

# ADOPTED RULES

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

## TITLE 1. ADMINISTRATION

### PART 5. TEXAS FACILITIES COMMISSION

#### CHAPTER 126. SURPLUS AND SALVAGE PROPERTY PROGRAMS

##### SUBCHAPTER A. STATE SURPLUS AND SALVAGE PROPERTY

###### 1 TAC §§126.1, 126.4, 126.5

###### Introduction and Background.

The Texas Facilities Commission ("TFC") adopts amendments to §§126.1, 126.4, and 126.5 of Title 1, Part 5, Chapter 126 of the Texas Administrative Code, with changes to the proposed text as published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2639).

During its rule review, published in the December 11, 2015, issue of the *Texas Register* (40 TexReg 8915), the Texas Facilities Commission ("Commission" or "TFC") reviewed and considered Texas Administrative Code, Title 1, Chapter 126 for reoption, revision, or repeal in accordance with the Texas Government Code §2001.039 (West 2008). The Commission determined that Texas Administrative Code, Title 1, §§126.1 - 126.5 were still necessary as these rules were promulgated to direct the transfer, sale, auction, or other disposition of State of Texas surplus and salvage property either by the state agency that owns the subject property or by the Commission, on behalf of the State of Texas under Texas Government Code, Chapter 2175. Revisions to these rules, however, were required to ensure consistency with governing statutes and to correct typographical errors. Accordingly, the Commission proposed amendments to Chapter 126. Notice of the proposed amendments was published in the April 15, 2016, issue of the *Texas Register* (41 TexReg 2639).

###### Justification for the Rule.

Proposed revisions to existing rules are required to reflect the agency's name change, to ensure consistency with governing statutes, and to correct typographical errors. Section 126.1 defines terms used in the subchapter addressing state surplus and salvage property. The adopted amendment will add definitions that will address changes made to §2175.1825 and §2175.241 of the Texas Government Code. Section 126.4 establishes rules for the direct transfer, priority, reporting and other disposition of surplus and salvage property. The adopted amendment is required to conform to changes made to §2175.184 and §2175.541 of the Texas Government Code. Section 126.5 addresses disposition of surplus and salvage property to the public. The adopted amendment is required to address changes to §2174.190 and

§2175.241 of the Texas Government Code. Due to comments received by another state agency, the Commission is adopting the amendments to Chapter 126 with changes.

###### Comments.

The 30-day comment period ended on May 16, 2016. During the 30-day comment period, the Commission received written comments from the Texas Department of Transportation ("TXDOT"). Summary of the comments and the Commission's response follow:

Proposed amendment to §126.1, adding definition of "Surplus Advertising Period": proposed definition conflicts with statute.

Commission response: Deleted the proposed definition from the adopted rules.

Proposed amendment to §126.4, adding language regarding direct transfer fees: TXDOT requested further clarification concerning the direct transfer fee. Specifically, TXDOT seeks clarification on whether the direct transfer fee is the price established for the property or is intended to be a fee in addition to the established price and which agency, the Commission or the selling state agency, receives the proposed fee.

Commission response: Deleted the proposed language from the adopted rules. TFC added language that will make §126.4(a)(2) conform with statutory changes by changing the posting from the State Comptroller's website to TFC's website.

Proposed amendment to §126.5, adding subsection (c): TXDOT requests clarification as to whether the fee to TFC would be charged only for donations made by TFC under subsection (c)(1), or whether the fee would also be charged to donations made by state agencies under subsection (c)(2).

Commission response: The Government Code gives TFC the authority to charge a fee. While TFC anticipates in most situations where TFC has minimal involvement, no fee would be collected on behalf of TFC. In the event that TFC encounters a situation where more costs are incurred with the transaction, TFC reserves the right to collect the fee.

Proposed amendment to §126.5, adding subsection (d): TXDOT requests that the terms "Small Value Items" and "Capital Assets" be defined and requests clarification as to the Commission's authority to withhold 12 percent from the proceeds of a sale or transfer.

Commission response: Added clarifying language as to the definition of "Small Value Items", as well as clarifying language that TFC seeks to recover costs, and deleted the language related to "Capital Assets" and withholding 12 percent.

Statutory Authority.

The amended rules are adopted under Texas Government Code §§2175.1825(a), 2175.184(a), 2175.190(c), and 2175. 241(a), (b), (c), and (d) (West 2008 & Supp. 2015).

Cross Reference to Statute.

The statutory provisions affected by the adopted rules are those set forth in Chapter 2175 of the Texas Government Code.

§126.1. *Definitions.*

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

(1) Certificate of Acquisition--A form prescribed by the Commission that verifies the qualifications of an approved assistance organization or political subdivision as an entity entitled to receive state surplus or salvage property.

(2) Commission--The Texas Facilities Commission.

(3) Local Governmental Entity--Each local government entity of the state, including counties, municipalities, and special purpose districts such as school districts, districts for fire and emergency services, including volunteer fire departments, utility and water districts, and health districts.

(4) Political subdivision--Each political subdivision of the state, including counties, municipalities, public school districts, volunteer fire departments.

(5) State agency--

(A) a department, commission, board, office, or other agency in the executive branch of state government created by the state constitution or a state statute;

(B) the supreme court, the court of criminal appeals, a court of appeals, or the Texas Judicial Council; and

(C) the Civil Air Patrol, Texas Wing.

§126.4. *Direct Transfer, Priority, Reporting, and Other Disposition.*

(a) Priority of claim.

(1) The first state agency, political subdivision or assistance organization that agrees to the established price before the expiration of ten (10) business days shall be entitled to the property; provided, however, a state agency shall have first priority over all other entities.

(2) In the event two competing and equivalent requests are received from parties of equal standing, the Commission shall award the property in the best interests of the state. Two or more requests shall be considered "competing and equivalent" for purposes of this section if each meets the established price on the same business day and within the ten (10) business day period following posting on the Commission's website.

(b) Reporting requirements. When a transfer of property is made to a political subdivision or assistance organization, the state agency disposing of the property must ensure the completion of a "Certificate of Acquisition" form. In completing the Certificate of Acquisition, the political subdivision or assistance organization certifies its continued qualification as an entity entitled to receive state surplus or salvage property, acknowledges receipt of property, and certifies that the property will be used for the purpose expressed by the organization at the time of application. The completed "Certificate of Acquisition" is to be retained by the state agency and a copy should be sent to the Commission within 5 business days of transfer. After the transfer, the state agency disposing of the property must document the proceeds from sale into the Comptroller's State Property Accounting System.

§126.5. *Disposition of Surplus and Salvage Property to the Public by Competitive Bidding, Auction, or Direct Sale.*

(a) Method of Sale. The Commission will consider the following criteria when determining the method of sale for surplus and salvage property:

- (1) geographic location;
- (2) cost of transportation if applicable;
- (3) sales history for similar property;
- (4) type of property; and
- (5) condition of property.

(b) Disposition by direct sale to the public.

(1) Location and method of direct sales. Direct sales operations may be conducted at designated state facilities or warehouses approved by the Commission or by live or Internet auction.

(A) Access. The general public, political subdivision, and assistance organizations will have equal access.

(B) Payment. A purchaser under this section must pay for the surplus or salvage property by an approved method of payment at the time of sale and prior to obtaining possession or actual title to the property.

(C) Live auctions. Surplus or salvage property sold through the live auction method shall be accompanied by an auctioneer's paid receipt. The auctioneer's paid receipt will serve as the authorization of the Commission that the purchaser has in good faith complied with the conditions of the sale.

(D) Internet auctions. The Commission may contract with one or more commercial Internet auction sites for sale of state surplus or salvage property. Property on the Internet auction site shall be posted for at least ten (10) calendar days.

(2) Transfer of property. When a purchaser or successful bidder has paid the full amount due for the purchase of surplus or salvage property, the Commission or its designee shall notify both the successful bidder and the state agency holding the title of the surplus or salvage property and authorize the transfer of possession. In the case of vehicles or other items which require title transfer, it shall be the responsibility of the state agency holding title to complete the transfer of title to the purchaser or successful bidder.

(3) Forfeiture. In the event a purchaser or successful bidder pays for the property, but fails to remove the property within the time specified, the purchaser or successful bidder forfeits his rights to the property and any monies tendered, and ownership of the property reverts to the state.

(c) Direct Donations to Assistance Organizations and Local Governmental Entities.

(1) If the Commission determines that disposition by public sale is not in the State's best interest then the Commission may destroy the property as worthless salvage or donate it to an assistance organization or local government entity.

(2) A State agency may also make similar donations if the agency first notifies the Commission and provides sufficient information for the Commission to determine the donation is in the State's best interest. The State agency is responsible for documenting the donation and any proceeds in the Comptroller's State Property Accounting System.

(3) The Commission may charge the recipient a fee (not to exceed 10% of the item's market value) to cover the costs of the donation.

(d) Returns on Small Value Items--For the purpose of this section, Small Value Items are non-capitalized items in the Comptroller's State Property Accounting System. The Commission may not provide participating State agencies with monetary returns on the transfer or sale of that agency's small value items. However, the Commission will allow the State agency to receive a return in the form of transfers of similar items at zero or reduced cost.

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

Filed with the Office of the Secretary of State on September 9, 2016.

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For further information, please call: (512) 475-2400



## PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

### CHAPTER 354. MEDICAID HEALTH SERVICES

#### SUBCHAPTER A. PURCHASED HEALTH SERVICES

#### DIVISION 3. MEDICAID HOME HEALTH SERVICES

##### 1 TAC §354.1039

The Texas Health and Human Service Commission (HHSC) adopts an amendment to §354.1039, concerning Home Health Services Benefits and Limitations, with changes to the proposed text as published in the June 17, 2016, issue of the *Texas Register* (41 TexReg 4372). The text of the rule will be republished.

##### BACKGROUND AND JUSTIFICATION

Section 354.1039 required that a prior authorization request for repairs of durable medical equipment (DME) or appliances include a statement or medical information from the attending physician substantiating that the medical appliance or equipment continues to serve a specific medical purpose and an itemized estimated cost list of the repairs. The requirement for a statement from the attending physician was administratively burdensome on DME providers requesting prior authorization for the repair of a DME or appliance. In addition, it is not required by federal law. Therefore, HHSC amended the rule to remove this requirement.

##### COMMENTS

The 30-day comment period ended July 18, 2016. During this period, HHSC received comments regarding the amended rule

from the Coalition for Nurses in Advanced Practice. A summary of the comments relating to the rule and HHSC's responses follows.

Comment: The commenter supports dropping the requirement for a physician statement before repairing durable medical equipment or appliances.

Response: HHSC appreciates the comment.

Comment: The commenter requests that HHSC revise subsections (a)(7)(A) and (a)(8)(A) of the proposed rule to include nurse practitioners, clinical nurse specialists, certified nurse-midwives, and physician assistants as medical practitioners who may sign an order for diabetic equipment and supplies. The commenter states that this would be consistent with Texas law, citing Texas Government Code §531.099, which requires HHSC to align Medicaid diabetic equipment and supplies written order procedures with Medicare procedures. The commenter also states that this would be consistent with federal law, citing 42 C.F.R. §440.70.

Response: HHSC declines to amend the proposed rule as the commenter suggests. Contrary to the commenter's assertion, 42 C.F.R. §440.70(a)(2) requires that an order for home health services, which includes medical supplies, equipment, and appliances (see 42 C.F.R. §440.70(b)(3)), be the order of a physician. Moreover, although the federal Centers for Medicare and Medicaid Services (CMS) recently amended §440.70, it did not amend the physician order requirement. See 81 Fed. Reg. 5530 (2016). Finally, CMS has not granted approval of a waiver to this federal requirement. See Tex. H.B. 1487, 81st Leg., R.S., §3.

Comment: The commenter requests that HHSC revise subsection (b)(1)(A) and add a new subsection (b)(1)(C) to allow a nurse practitioner, clinical nurse, specialist, or physician assistant to perform a face-to-face encounter within 30 days prior to starting home health services. This is consistent, the commenter states, with 42 C.F.R. §440.70(f) and (g).

Response: HHSC agrees and has revised the rule for adoption as the commenter suggests.

##### STATUTORY AUTHORITY

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

##### §354.1039. Home Health Services Benefits and Limitations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) Medical supplies must be:

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

(ii) supplied:

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

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

(iii) prior authorized unless otherwise specified by HHSC.

(B) Items which are not listed in subparagraph (C) of this paragraph may be medically necessary for the treatment or therapy of qualified recipients. If a prior authorization request is received

for these items, consideration will be given to the request. Approval for reasonable amounts of the requested items may be given if circumstances justify the exception and the need is documented.

(C) Covered items include:

(i) colostomy and ileostomy care supplies;

(ii) urinary catheters, appliances and related supplies;

(iii) pressure pads including elbow and heel protectors;

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

(v) crutch and cane tips;

(vi) irrigation sets;

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

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

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

(x) dressing supplies;

(xi) thermometers;

(xii) suction catheters;

(xiii) oxygen and related respiratory care supplies;

or

(xiv) feeding related supplies.

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

(A) DME must:

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

(ii) be prior authorized unless otherwise specified by HHSC;

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

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

(v) be provided through an:

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

(II) enrolled DME supplier under a written, signed, and dated physician's prescription.

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

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

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

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

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

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

(I) A request for repair of durable medical equipment or appliances must include an itemized estimated cost list of the repairs. Rental equipment may be provided to replace purchased medical equipment or appliances for the period of time it will take to make necessary repairs to purchased medical equipment or appliances.

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

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

(C) Covered medical appliances and equipment (rental, purchase, or repairs) include:

(i) manual or powered wheelchairs;

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

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

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

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

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

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

(vi) bed side rails and bed trays;

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

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

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

(x) respiratory or oxygen related equipment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) Diabetic supplies and related testing equipment must be prescribed by a physician.

(B) Prior authorization is required unless otherwise specified by HHSC.

(b) Home health service limitations include the following.

(1) Patient supervision.

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

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

(C) If the face-to-face encounter is performed by a nurse practitioner, clinical nurse specialist, or physician assistant, the practitioner must communicate the clinical findings of that encounter to the ordering physician, and the physician ordering the services must:

(i) record the date of the face-to-face encounter and the practitioner who conducted the encounter;

(ii) affirm that the face-to-face encounter is related to the primary reason the patient requires home health services and that the encounter occurred within 30 days prior to the start of home health services; and

(iii) include the clinical findings of the encounter in the patient's medical record.

(2) Time limited prior authorizations.

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

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

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

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

(I) full name, age, and address;

(II) Medical Assistance Program Identification number;

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

(IV) Medicare number;

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

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

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

(v) a composition of the family/caregiver;

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

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

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

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

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

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

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

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

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

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

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

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

(2) the home health services provider is responsible for documenting the amount, duration, and scope of services in the recipient's plan of care, the equipment/supply order request, and the client record based on the physician's orders. This information is subject to retrospective review; and

(3) HHSC may establish random and targeted utilization review processes to ensure the appropriate utilization of home health benefits and to monitor the cost effectiveness of home health services.

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

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

TRD-201604737

Karen Ray

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Texas Health and Human Services Commission

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



## TITLE 4. AGRICULTURE

# PART 1. TEXAS DEPARTMENT OF AGRICULTURE

## CHAPTER 7. PESTICIDES

### SUBCHAPTER H. STRUCTURAL PEST CONTROL SERVICE

#### DIVISION 1. GENERAL PROVISIONS

##### 4 TAC §7.115

The Texas Department of Agriculture (the Department) adopts new Texas Administrative Code (TAC), Title 4, Part 1, Chapter 7, Subchapter H, Division 1, §7.115, Structural Pest Control Enforcement, relating to penalties for violations of Subchapter H. The new rule is adopted without changes to the proposal published in the July 29, 2016, issue of the *Texas Register* (41 TexReg 5493). The penalties set forth in the attachment to §7.115, the Penalty Matrix (Matrix), are created to deter conduct detrimental to public health and safety, the environment, and consumer confidence and to prevent unfair competition by noncompliant businesses.

No comments were received during the comment period.

The new rule is adopted under Chapter 12 of the Texas Agriculture Code, which authorizes the Department to prescribe and assess administrative penalties to enforce structural pest control laws and regulations, and Chapter 1951 of the Occupations Code, which authorizes the Department to regulate certain structural pest control activities in this state.

The adoption is made under Chapter 12 of the Texas Agriculture Code and Chapter 1951 of the Occupations Code.

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

Filed with the Office of the Secretary of State on September 7, 2016.

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## CHAPTER 30. COMMUNITY DEVELOPMENT

### SUBCHAPTER A. TEXAS COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM

#### DIVISION 3. ADMINISTRATION OF PROGRAM FUNDS

##### 4 TAC §§30.50, 30.55, 30.58

The Texas Department of Agriculture (Department) adopts amendments to Title 4, Chapter 30, Subchapter A, Division 3, §§30.50, 30.55, and 30.58, relating to the Texas Community Development Block Grant (CDBG) Program. The amendments are adopted without changes to the proposal published in the

July 15, 2016, edition of the *Texas Register* (41 TexReg 5129). The amendments to the CDBG programs permit flexibility in the application and eligibility process, and enable maximum benefit to those communities in need.

The Department received one comment from GrantWorks, Inc., recommending a scoring change which would require applicants to prioritize their Colonia Construction Fund applications in order to ensure funds are not concentrated in a few counties. The Department recognizes the importance of an equitable distribution of grants through the overall CDBG program. The primary goal of the colonia set aside is to assist communities with the greatest need; however, the Department may consider including the recommendation in the scoring criteria in the future.

The amendments are adopted under Texas Government Code §487.051, which provides the Department the authority to administer the state's CDBG non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

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

Filed with the Office of the Secretary of State on September 6, 2016.

TRD-201604639

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Effective date: September 26, 2016

Proposal publication date: July 15, 2016

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## PART 12. TEXAS A&M FOREST SERVICE

### CHAPTER 216. RURAL VOLUNTEER FIRE DEPARTMENT ASSISTANCE PROGRAM

#### 4 TAC §§216.2, 216.3, 216.6

Texas A&M Forest Service (the agency) adopts amendments to 4 TAC §§216.2, 216.3 and 216.6, concerning the Rural Volunteer Fire Department Assistance Program. The amendments are adopted without changes to the proposed text as published in the August 12, 2016, issue of the *Texas Register* (41 TexReg 5858).

The adopted amendments comply with the requirements of Texas Government Code, §614.106, which requires the agency director adopt rules for the administration of the Rural Volunteer Fire Department Assistance Program to assist volunteer fire departments in paying for equipment, training of personnel, including determining reasonable criteria for the distribution of money from the volunteer fire department assistance fund. The amendments are non-substantive in nature and change the definition of a fire department from recognized to chartered.

The agency received no written comments regarding the adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code §614.102 and §614.106, which authorize the agency director to adopt rules considered necessary for the administration of the program.

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

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

TRD-201604752

Robby DeWitt

Associate Director for Finance and Administration

Texas A&M Forest Service

Effective date: October 2, 2016

Proposal publication date: August 12, 2016

For further information, please call: (979) 458-7341



## TITLE 16. ECONOMIC REGULATION

### PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

#### CHAPTER 60. PROCEDURAL RULES OF THE COMMISSION AND THE DEPARTMENT SUBCHAPTER B. POWERS AND RESPONSIBILITIES

##### 16 TAC §60.24

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to an existing rule at 16 Texas Administrative Code (TAC), Chapter 60, Subchapter B, §60.24, regarding the Procedural Rules of the Commission and the Department, with changes to the proposed text as published in the June 3, 2016, issue of the *Texas Register* (41 TexReg 3969). The rules will be republished.

Senate Bill 202, 84th Legislature, Regular Session (2015), transferred seven programs from the Texas Department of State Health Services to the Department to include, Athletic Trainers, Dietitians, Hearing Instrument Fitters and Dispensers, Licensed Dyslexia Therapists and Practitioners, Midwives, Orthotists and Prosthetists and Speech-Language Pathologists and Audiologists. In addition, House Bill 3315, 84th Legislature, Regular Session (2015), changed the Medical Advisory Committee to the Combative Sports Advisory Board. The adopted amendments primarily updates the list of Advisory Boards to include the additional advisory boards added from program transfers. The adopted amendments are necessary to comply with Texas Government Code, §2110.008.

The adopted amendments to §60.24 add the Advisory Board of Athletic Trainers, Dietitians Advisory Board, Dyslexia Therapists and Practitioners Advisory Committee, Hearing Instrument Fitters and Dispensers Advisory Board, Midwives Advisory Board, Orthotists and Prosthetists Advisory Board and Speech-Language Pathologists and Audiologists Advisory Board with

respective abolishment dates. Editorial changes are also made to renumber the section accordingly.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the June 3, 2016, issue of the *Texas Register* (41 TexReg 3969). The deadline for public comments was July 5, 2016. The Department received a comment from one interested party on the proposed rules during the 30-day public comment period.

Comment--The commenter asked what happens when the Advisory Board of Athletic Trainers is abolished.

*Department Response*--The Department is required to update the abolishment dates of the advisory boards to comply with Texas Government Code, §2110.008. If the abolishment date approaches and the Department still has statutory authority over the program and the advisory board the date will be extended. The Department did not make any changes to the rules based on this comment.

The amendment is adopted under Texas Occupations Code, Chapter 51, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

In addition, the following statutes establishing advisory boards/committees/councils are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Health and Safety Code, Chapters 754 (Elevators, Escalators, and Related Equipment) and 755 (Boilers); Government Code, Chapter 469 (Elimination of Architectural Barriers); and Texas Occupations Code Chapters 203 (Midwives), 401 (Speech-Language Pathologists and Audiologists), 402 (Hearing Instrument Fitters and Dispensers), 403 (Licensed Dyslexia Practitioners and Licensed Dyslexia Therapists), 451 (Athletic Trainers), 605 (Orthotists and Prosthetists), 701 (Dietitians), 802 (Dog or Cat Breeders), 1151 (Property Tax Professionals), 1152 (Property Tax Consultants), 1302 (Air Conditioning and Refrigeration Contractors), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetologists), 1603 (Regulation of Barbering and Cosmetology), 1703 (Polygraph Examiners), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Vehicle Towing and Booting), and 2309 (Used Automotive Parts Recyclers). No other statutes, articles, or codes are affected by the proposal.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the proposal.

##### §60.24. *Advisory Boards.*

(a) Unless otherwise provided by law, the presiding officer of the commission, with the commission's approval, shall appoint the members of each advisory board.

(b) The purpose, duties, manner of reporting, and membership requirements of each advisory board are detailed in the statutes and rules of the specific program regulated by the department.

(c) In accordance with Texas Government Code, §2110.008, the commission establishes the following periods during which the advisory boards listed will continue in existence. The automatic abolishment date of each advisory board will be the date listed for that board unless the commission subsequently establishes a different date:

- (1) Advisory Board of Athletic Trainers--09/01/2024;
- (2) Advisory Board on Barbering--09/01/2024;
- (3) Advisory Board on Cosmetology--09/01/2024;
- (4) Architectural Barriers Advisory Committee--09/01/2024;
- (5) Air Conditioning and Refrigeration Contractors Advisory Board--09/01/2024;
- (6) Auctioneer Education Advisory Board--09/01/2024;
- (7) Board of Boiler Rules--09/01/2024;
- (8) Combative Sports Advisory Board--09/01/2024;
- (9) Dietitians Advisory Board--09/01/2024;
- (10) Dyslexia Therapists and Practitioners Advisory Committee--09/01/2024;
- (11) Electrical Safety and Licensing Advisory Board--09/01/2024;
- (12) Elevator Advisory Board--09/01/2024;
- (13) Hearing Instrument Fitters and Dispensers Advisory Board--09/01/2024;
- (14) Licensed Breeders Advisory Committee--09/01/2024;
- (15) Midwives Advisory Board--09/01/2024;
- (16) Orthotists and Prosthetists Advisory Board--09/01/2024;
- (17) Polygraph Advisory Committee--09/01/2024;
- (18) Property Tax Consultants Advisory Council--09/01/2024;
- (19) Speech Language Pathologists and Audiologists Advisory Board--09/01/2024;
- (20) Texas Tax Professional Advisory Committee--09/01/2024;
- (21) Towing, Storage, and Booting Advisory Board--09/01/2024;
- (22) Used Automotive Parts Recycling Advisory Board--09/01/2024;
- (23) Vehicle Protection Product Warrantor Advisory Board--09/01/2024;
- (24) Water Well Drillers Advisory Council--09/01/2024; and
- (25) Weather Modification Advisory Committee--09/01/2024.

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

Filed with the Office of the Secretary of State on September 2, 2016.

TRD-201604623

Brian E. Francis  
 Executive Director  
 Texas Department of Licensing and Regulation  
 Effective date: October 1, 2016  
 Proposal publication date: June 3, 2016  
 For further information, please call: (512) 463-8179

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## TITLE 19. EDUCATION

### PART 2. TEXAS EDUCATION AGENCY

#### CHAPTER 62. COMMISSIONER'S RULES CONCERNING THE EQUALIZED WEALTH LEVEL

##### 19 TAC §62.1071

*(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 §62.1071 is not included in the print version of the Texas Register. The figure is available in the html version of the September 23, 2014, issue of the Texas Register online.)*

The Texas Education Agency (TEA) adopts an amendment to §62.1071, concerning the equalized wealth level. The amendment is adopted with changes to the proposed text as published in the June 24, 2016, issue of the *Texas Register* (41 TexReg 4579). The section establishes provisions relating to wealth equalization requirements. The amendment adopts as a part of the Texas Administrative Code (TAC) the *Manual for Districts Subject to Wealth Equalization 2016-2017 School Year*. The manual contains the processes and procedures that the TEA uses in the administration of the provisions of the Texas Education Code (TEC), Chapter 41, and the fiscal, procedural, and administrative requirements that school districts subject to the TEC, Chapter 41, must meet.

**REASONED JUSTIFICATION.** The TEA has adopted the procedures contained in each yearly manual for districts subject to wealth equalization as part of the TAC since 2011. The earlier version of 19 TAC §62.1071, Administration of Wealth Equalization, adopted effective June 11, 1998, and subsequently amended several times, was repealed effective May 9, 2011, and replaced with the wealth equalization manual to remove outdated and obsolete provisions from rule. The intent is to annually update 19 TAC §62.1071 to refer to the most recently published manual. Manuals adopted for previous school years will remain in effect with respect to those school years.

The amendment to 19 TAC §62.1071, Manual for Districts Subject to Wealth Equalization, adopts in rule the official TEA publication *Manual for Districts Subject to Wealth Equalization 2016-2017 School Year* as Figure: 19 TAC §62.1071(a).

Each school year's manual for districts subject to wealth equalization explains how districts subject to wealth equalization are identified; the fiscal, procedural, and administrative requirements those districts must meet; and the consequences for not meeting requirements. The manual also provides information on using the online Foundation School Program (FSP) System to fulfill certain requirements.

Three significant changes to the *Manual for Districts Subject to Wealth Equalization 2016-2017 School Year* from the *Manual for*

Districts Subject to Wealth Equalization 2015-2016 School Year are as follows.

#### Election Dates

The Chapter 41 Option 3 and Option 4 election dates have been moved to the District Intent/Choice Selection form in the Chapter 41 subsystem of the online FSP System.

#### Chapter 41 Intent Letter

The Chapter 41 Intent Letter is no longer mailed to districts. The letter authorizing districts to proceed with adopting a tax rate is located in a link at the bottom of the District Intent/Choice Selection form in the Chapter 41 subsystem of the online FSP System.

#### Changes to deadlines noted throughout

The language corresponding to passage of Senate Bill (SB) 1, 84th Texas Legislature, 2015, has been removed because transitional provisions from SB 1 expire September 1, 2016, and will not apply to the 2016-2017 school year.

At adoption, changes were made to the manual. The dates included on page 32 under the "First Evaluation" section were updated to align with the dates in the "Chapter 41 Calendar for School Year 2016-2017" on pages 11-15. Although the calendar dates were accurate at proposal, the dates on page 32 were inadvertently not updated to correspond.

**SUMMARY OF COMMENTS AND AGENCY RESPONSES.** The public comment period on the proposal began June 24, 2016, and ended July 25, 2016. No public comments were received.

**STATUTORY AUTHORITY.** The amendment is adopted under the Texas Education Code (TEC), §41.006, which authorizes the commissioner of education to adopt rules necessary for the implementation of the TEC, Chapter 41.

**CROSS REFERENCE TO STATUTE.** The amendment implements the TEC, §41.006.

#### §62.1071. *Manual for Districts Subject to Wealth Equalization.*

(a) The processes and procedures that the Texas Education Agency (TEA) uses in the administration of the provisions of the Texas Education Code (TEC), Chapter 41, and the fiscal, procedural, and administrative requirements that school districts subject to the TEC, Chapter 41, must meet are described in the official TEA publication *Manual for Districts Subject to Wealth Equalization 2016-2017 School Year*; provided in this subsection.  
Figure: 19 TAC §62.1071(a)

(b) The specific processes, procedures, and requirements used in the manual for districts subject to wealth equalization are established annually by the commissioner of education and communicated to all school districts.

(c) School district actions and inactions in previous school years and data from those school years will continue to be subject to the annual manual for districts subject to wealth equalization with respect to those years.

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

Filed with the Office of the Secretary of State on September 2, 2016.

TRD-201604624

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: September 22, 2016

Proposal publication date: June 24, 2016

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



## CHAPTER 102. EDUCATIONAL PROGRAMS SUBCHAPTER EE. COMMISSIONER'S RULES CONCERNING PILOT PROGRAMS

### 19 TAC §102.1058

The Texas Education Agency adopts new §102.1058, concerning the reading excellence team pilot program. The new section is adopted without changes to the proposed text as published in the July 29, 2016 issue of the *Texas Register* (41 TexReg 5494) and will not be republished. The adopted new section implements the requirements of the Texas Education Code (TEC), §28.0061, as added by Senate Bill (SB) 935, 84th Texas Legislature, Regular Session, 2015.

**REASONED JUSTIFICATION.** SB 935, 84th Texas Legislature, Regular Session, 2015, added the TEC, §28.0061, to require the commissioner of education to establish and administer a reading excellence team pilot program. The pilot program establishes reading excellence teams composed of reading instruction specialists who would provide assistance to eligible school districts upon request. A school district is eligible to participate in the reading excellence team pilot program if the district has low student performance, as determined by the commissioner, on required reading diagnosis assessments for kindergarten, Grade 1, and Grade 2 or on the Grade 3 State of Texas Assessments of Academic Readiness (STAAR®) reading assessment.

Adopted new 19 TAC §102.1058, Reading Excellence Team Pilot Program, implements the TEC, §28.0061, by establishing qualifications and criteria for selecting reading instruction specialists for reading excellence teams. It also requires that reading instruction specialists have significant expertise in reading instruction; experience in providing instruction related to the curriculum in 19 TAC Chapter 110, Texas Essential Knowledge and Skills for English Language Arts and Reading; and knowledge of developmentally appropriate and research-based strategies for students. The adopted new rule requires selected education service centers to prioritize school districts and open-enrollment charter schools that apply based on low performance on statutorily defined kindergarten-Grade 3 assessments for receipt of reading excellence teams.

**SUMMARY OF COMMENTS AND AGENCY RESPONSES.** The public comment period on the proposal began July 29, 2016, and ended August 29, 2016. No public comments were received.

**STATUTORY AUTHORITY.** The new section is adopted under the Texas Education Code (TEC), §28.0061, as added by Senate Bill 935, 84th Texas Legislature, Regular Session, 2015, which requires the commissioner of education to adopt rules to administer the reading excellence team pilot program, including establishing qualifications and criteria for selecting reading instruction specialists for a reading excellence team; and the TEC, §12.104(d), which authorizes the commissioner to permit

open-enrollment charter schools access to state programs available to school districts if the open-enrollment charter schools comply with the requirements of the programs.

CROSS REFERENCE TO STATUTE. The new section implements the Texas Education Code, §28.0061, as added by Senate Bill 935, 84th Texas Legislature, Regular Session, 2015, and §12.104(d).

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

Filed with the Office of the Secretary of State on September 6, 2016.

TRD-201604631

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: September 26, 2016

Proposal publication date: July 29, 2016

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



## TITLE 22. EXAMINING BOARDS

### PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

#### CHAPTER 72. APPLICATIONS AND APPLICANTS

##### 22 TAC §72.6

The Texas Board of Chiropractic Examiners (Board) adopts amendments to Chapter 72, §72.6, concerning Time, Place and Scope of Application, without changes to the proposed text as published in the June 24, 2016, issue of the *Texas Register* (41 TexReg 4585). The amended text will not be republished.

The amended rule will assist the Board in serving the public, stakeholders and licensees. The amendment will reflect current examination practices and bring the rule into compliance with statutory guidelines contained within Subchapter G. License Requirements of the Chiropractic Act, and recognize the transition to an online jurisprudence examination.

This rule was proposed for publication at the Board's meeting on May 17, 2016. The proposed language was published on the Rules Committee and the Board agenda. Comment on the proposal was sought during the Rules Committee and the Board meetings prior to this publication in the *Texas Register*.

No comments were received regarding this amendment.

This amended rule is adopted under Texas Occupations Code §201.152, relating to rules and Subchapter G of the Chiropractic Act, License Requirements. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic to protect the public health and safety. Subchapter G provides the framework to authorize the Board to grant chiropractic licenses.

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

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

Filed with the Office of the Secretary of State on September 7, 2016.

TRD-201604681

Courtney Ebeier

General Counsel

Texas Board of Chiropractic Examiners

Effective date: November 1, 2016

Proposal publication date: June 24, 2016

For further information, please call: (512) 305-6715



#### CHAPTER 74. CHIROPRACTIC RADIOLOGIC TECHNOLOGISTS

##### 22 TAC §74.1

The Texas Board of Chiropractic Examiners (Board) adopts amendments to Chapter 74, §74.1, concerning Chiropractic Radiologic Technologists, without changes to the proposed text as published in the June 24, 2016, issue of the *Texas Register* (41 TexReg 4586). The amended text will not be republished.

This section established requirements and procedures related the rules of chiropractic practice.

The amendment is made as part of the Board's review of Chapter 74 to fulfill its ongoing duty to conduct agency rule review.

This rule was proposed for publication at the Board's meeting on May 17, 2016. The proposed language was published on the Rules Committee and the Board agenda. Comment on the proposal was sought during the Rules Committee and the Board meetings prior to this publication in the Register.

No comments were received regarding this amendment.

This amendment is adopted under Texas Occupations Code §201.152, which authorizes the Board to adopt rules necessary to regulate the practice of chiropractic to protect the public health and safety.

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

Filed with the Office of the Secretary of State on September 7, 2016.

TRD-201604682

Courtney Ebeier

General Counsel

Texas Board of Chiropractic Examiners

Effective date: November 1, 2016

Proposal publication date: June 24, 2016

For further information, please call: (512) 305-6715



##### 22 TAC §74.2

The Texas Board of Chiropractic Examiners (Board) adopts amendments to Chapter 74, §74.2, concerning Registration of

Chiropractic Radiologic Technologists, without changes to the proposed text as published in the June 24, 2016, issue of the *Texas Register* (41 TexReg 4586) and will not be republished.

This section established requirements and procedures relating to the rules of chiropractic practice.

The amendment is made as part of the Board's review of Chapter 74 to fulfill its ongoing duty to conduct agency rule review.

This rule was proposed for publication at the Board's meeting on May 17, 2016. The proposed language was published on the Rules Committee and the Board agenda. Comment on the proposal was sought during the Rules Committee and the Board meetings prior to this publication in the Register.

No comments were received regarding this amendment.

This amendment is adopted under Texas Occupations Code §201.152, which authorizes the Board to adopt rules necessary to regulate the practice of chiropractic to protect the public health and safety.

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

Filed with the Office of the Secretary of State on September 7, 2016.

TRD-201604683

Courtney Ebeier  
General Counsel

Texas Board of Chiropractic Examiners

Effective date: November 1, 2016

Proposal publication date: June 24, 2016

For further information, please call: (512) 305-6715



## CHAPTER 78. RULES OF PRACTICE

### 22 TAC §78.6

The Texas Board of Chiropractic Examiners (Board) adopts amended Chapter 78, §78.6, concerning Required Fees and Charges, without changes to the proposed text as published in the June 24, 2016, issue of the *Texas Register* (41 TexReg 4588) and will not be republished.

The amendment is made to update the rule to reflect and ratify the Board's current Schedule of Fees regarding its jurisprudence examination and applicants that are being evaluated for licensure. It also acknowledges that a licensee may take a jurisprudence study course and receive 3 hours of CE. Finally, it contains an additional compliance tool for use by the Enforcement Committee.

This rule was proposed for publication at the Board's meeting on May 17, 2016. The proposed language was published on the Rules Committee and the Board agenda. Comment on the proposal was sought during the Rules Committee and the Board meetings prior to this publication in the Register.

No comments were received regarding this amendment.

This amendment is made under Texas Occupations Code §201.152, relating to rules. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic to protect the public health and safety.

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

Filed with the Office of the Secretary of State on September 7, 2016.

TRD-201604684

Courtney Ebeier  
General Counsel

Texas Board of Chiropractic Examiners

Effective date: November 1, 2016

Proposal publication date: June 24, 2016

For further information, please call: (512) 305-6715



## PART 9. TEXAS MEDICAL BOARD

### CHAPTER 185. PHYSICIAN ASSISTANTS

#### 22 TAC §§185.2, 185.4, 185.6, 185.7

The Texas Medical Board (Board) adopts amendments to §185.2, concerning Definitions, §185.4 concerning Procedural Rules for Licensure Applicants, §185.6, concerning Annual Renewal of License, and §185.7, concerning Temporary License. The amendments are adopted without changes to the proposed text as published in the May 13, 2016, issue of the *Texas Register* (41 TexReg 3419) and will not be republished.

The amendments to §185.2 add definitions for "Active Duty" and "Armed Forces of the United States" and amend definitions for "Military service member", "Military spouse" and "military veteran." These amendments are in accordance with the passage of SB 1307 (84th Regular Session) which amended Chapter 55 of the Texas Occupations Code.

The amendment to §185.4 expands subsection (f), Alternative Licensing Procedure, to include military service members and military veterans. The amendment also includes language allowing the executive director to waive any prerequisite to obtaining a license for an applicant described in the subsection, after reviewing the applicant's credentials. These amendments are in accordance with the passage of SB 1307 (84th Regular Session) which amended Chapter 55 of the Texas Occupations Code.

The amendment to §185.6 adds new subsection (b)(9) providing that a surgical assistant who is a military service member may request an extension of time, not to exceed two years, to complete any continuing education requirements. The amendment also adds new subsection (j) providing that military service members who hold a license to practice in Texas are entitled to two years of additional time to complete any other requirement related to the renewal of the military service member's license. This amendment is in accordance with the passage of SB 1307 (84th Regular Session) which amended Chapter 55 of the Texas Occupations Code.

The amendment to §185.7 changes an incorrect citation, §185.4(d), to the correct citation, §185.4(c)

No comments were received regarding adoption of the rules.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §204.101, which provides authority for the Board to adopt rules and bylaws as necessary to: gov-

ern its own proceedings; perform its duties; enforce this subtitle; and establish rules related to licensure.

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

Filed with the Office of the Secretary of State on September 6, 2016.

TRD-201604625

Mari Robinson, J.D.

Executive Director

Texas Medical Board

Effective date: September 26, 2016

Proposal publication date: May 13, 2016

For further information, please call: (512) 305-7016



## 22 TAC §185.8

The Texas Medical Board (Board) adopts an amendment to §185.8, concerning Inactive License, without changes to the proposed text as published in the April 1, 2016, issue of the *Texas Register* (41 TexReg 2385). The amended text will not be republished.

The amendment adds new language in subsection (d) providing that a licensee attempting to return from inactive to active status must complete a fingerprint card and return the card to the board as part of the application, as well as submitting, or having submitted on the applicant's behalf, a report from the National Practitioner Data Bank/Health Integrity and Protection Data Bank (NPDB-HIPDB).

No comments were received regarding adoption of the rule.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §204.101, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; enforce this subtitle; and establish rules related to licensure.

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

Filed with the Office of the Secretary of State on September 6, 2016.

TRD-201604626

Mari Robinson, J.D.

Executive Director

Texas Medical Board

Effective date: September 26, 2016

Proposal publication date: April 1, 2016

For further information, please call: (512) 305-7016



## CHAPTER 199. PUBLIC INFORMATION

### 22 TAC §199.6

The Texas Medical Board (Board) adopts new §199.6, concerning Enhanced Contract or Performance Monitoring, without changes to the proposed text as published in the July 1, 2016,

issue of the *Texas Register* (41 TexReg 4767). The new rule will not be republished.

New §199.6 delineates the criteria and requirements for the agency's identification of and monitoring of certain contracts. This new section is added in accordance with the passage of SB 20 (85th Regular Session) which amended Chapter 2261 of the Texas Government Code.

No comments were received regarding adoption of the rule.

The new section is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

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

Filed with the Office of the Secretary of State on September 6, 2016.

TRD-201604627

Mari Robinson, J.D.

Executive Director

Texas Medical Board

Effective date: September 26, 2016

Proposal publication date: July 1, 2016

For further information, please call: (512) 305-7016



## CHAPTER 200. STANDARDS FOR PHYSICIANS PRACTICING COMPLEMENTARY AND ALTERNATIVE MEDICINE

### 22 TAC §200.3

The Texas Medical Board (Board) adopts an amendment to §200.3, concerning Practice Guidelines for the Provision of Complementary and Alternative Medicine, without changes to the proposed text as published in the July 1, 2016, issue of the *Texas Register* (41 TexReg 4767) and will not be republished.

The amendment corrects an incorrect reference to the "board of medical examiners."

No comments were received regarding adoption of the rule.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

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

Filed with the Office of the Secretary of State on September 6, 2016.

TRD-201604628

Mari Robinson, J.D.  
Executive Director  
Texas Medical Board  
Effective date: September 26, 2016  
Proposal publication date: July 1, 2016  
For further information, please call: (512) 305-7016

## PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

### CHAPTER 463. APPLICATIONS AND EXAMINATIONS

#### 22 TAC §463.10

The Texas State Board of Examiners of Psychologists adopts an amendment to §463.10, concerning Provisionally Licensed Psychologists, without changes to the proposed text as published in the July 1, 2016, issue of the *Texas Register* (41 TexReg 4769). The amended rule will not be republished.

The amendment is being adopted to ensure the protection and safety of the public.

The amendment as adopted is necessary due to unforeseen limitations with the Board's shared database system. More specifically, the Board's database system will not allow licensing staff to place the transcript requirement at issue in this rule change, in the initial application module for some applicants and the approved application module for others. The transcript requirement must appear in the same application module for all applicants, otherwise staff will be unable to track the 90 day deadline required by Board rule §463.2.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

Filed with the Office of the Secretary of State on September 6, 2016.

TRD-201604636  
Darrel D. Spinks  
Executive Director  
Texas State Board of Examiners of Psychologists  
Effective date: September 26, 2016  
Proposal publication date: July 1, 2016  
For further information, please call: (512) 305-7700



### CHAPTER 465. RULES OF PRACTICE

#### 22 TAC §465.2

The Texas State Board of Examiners of Psychologists adopts amendment to §465.2, concerning Supervision, without changes

to the proposed text as published in the July 1, 2016, issue of the *Texas Register* (41 TexReg 4770). The amended text will not be republished.

The amendment is being adopted to ensure the protection and safety of the public.

The amendment as adopted will ensure that the Board's standards for the supervision of LSSP interns and trainees comport with both federal law and nationally recognized standards of practice as required by Tex. Occ. Code Ann. §501.260(c).

No comments were received regarding the adoption of the amendment.

The amendment is adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

Filed with the Office of the Secretary of State on September 6, 2016.

TRD-201604637  
Darrel D. Spinks  
Executive Director  
Texas State Board of Examiners of Psychologists  
Effective date: September 26, 2016  
Proposal publication date: July 1, 2016  
For further information, please call: (512) 305-7700



#### 22 TAC §465.11

The Texas State Board of Examiners of Psychologists adopts amendment to §465.11, concerning Informed Consent/Describing Psychological Services, with changes to the proposed text as published in the July 8, 2016, issue of the *Texas Register* (41 TexReg 4946). The amended text will be republished.

The amendment is being adopted to ensure the protection and safety of the public.

The amendment as adopted will clarify the duty to obtain informed consent in an inpatient setting, and reduce the regulatory burden by eliminating any requirement for duplicative informed consent when a patient has already given a general consent. The adopted change will also reduce confusion by referencing the rule governing informed consent in the public schools.

No comments were received regarding the adoption of the amendment.

The amendment is adopted under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

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

(a) Except in an inpatient setting where a general consent has been signed, licensees must obtain and document in writing informed

consent concerning all services they intend to provide to the patient, client or other recipient(s) of the psychological services prior to initiating the services, using language that is reasonably understandable to the recipients unless consent is precluded by applicable federal or state law.

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

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

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

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

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

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

(h) When informed consent is precluded by law, the licensee describes the nature and purpose of all services, as well as the confidentiality of the services and all applicable limits thereto, that he or she intends to provide to the patient, client, or other recipient(s) of the psychological services prior to initiating the services using language that is reasonably understandable to the recipient(s).

(i) Informed consent for school psychological services is governed by Board rule §465.38.

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

Filed with the Office of the Secretary of State on September 6, 2016.

TRD-201604638

Darrel D. Spinks

Executive Director

Texas State Board of Examiners of Psychologists

Effective date: September 26, 2016

Proposal publication date: July 8, 2016

For further information, please call: (512) 305-7700

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**TITLE 25. HEALTH SERVICES**

**PART 1. DEPARTMENT OF STATE  
HEALTH SERVICES**

**CHAPTER 1. MISCELLANEOUS PROVISIONS  
SUBCHAPTER D. STATE EMPLOYEE  
HEALTH FITNESS AND EDUCATION  
PROGRAMS**

**25 TAC §1.61**

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §1.61, concerning the Worksite Wellness Advisory Board as published in the May 20, 2016 issue of the *Texas Register* (41 TexReg 3615) without changes to the proposed text and, therefore, the section will not be republished.

**BACKGROUND AND PURPOSE**

The purpose of the repeal is to implement Government Code, Chapter 664, amended by Senate Bill (SB) 277, 84th Legislature, Regular Session, 2015, which abolished the board.

The board was created by the Legislature in 2007 to advise the department, executive commissioner, and statewide wellness coordinator on worksite wellness issues, including funding and resource development for worksite wellness programs; identifying food service vendors that successfully market healthy foods; best practices for worksite wellness used by the private sector; and worksite wellness features and architecture for new state buildings based on features and architecture used by the private sector.

The board was one of several advisory committees recommended for abolishment by the Sunset Advisory Commission in 2014. Subsequent to the repeal of the statutory requirements for this and other committees, the commission conducted a comprehensive analysis and sought stakeholder input on the continuation of the advisory committees abolished in statute to determine if there was a need to recreate any of the committees in rule. No comments were received regarding the discontinuation of the board. The department will continue to obtain input on worksite wellness issues through ongoing interactions with staff of state agencies and stakeholder groups.

**SECTION-BY-SECTION SUMMARY**

Section 1.61 is being repealed because this rule is no longer necessary. SB 277 amended Government Code, Chapter 664, by abolishing the board.

## COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rule during the comment period.

## LEGAL CERTIFICATION

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

## STATUTORY AUTHORITY

The repeal is authorized by Government Code, Chapter 664, which has been amended to remove reference to rules concerning the Worksite Wellness Advisory Board; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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

Filed with the Office of the Secretary of State on September 7, 2016.

TRD-201604671

Lisa Hernandez  
General Counsel

Department of State Health Services

Effective date: September 27, 2016

Proposal publication date: May 20, 2016

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



## CHAPTER 102. DISTRIBUTION OF TOBACCO SETTLEMENT PROCEEDS TO POLITICAL SUBDIVISIONS

### 25 TAC §102.3

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §102.3, concerning the distribution of tobacco settlement proceeds to political subdivisions without changes to the proposed text as published in the June 17, 2016 issue of the *Texas Register* (41 TexReg 4381) and, therefore, the rule will not be republished.

## BACKGROUND AND PURPOSE

The rule amendments provide updated language and offer clarification to enhance the understanding of the program rules for the distribution of tobacco settlement proceeds to political subdivisions. The rules are still needed due to the continued responsibilities for implementing the Health and Safety Code, §§12.131 - 12.139, and the responsibilities of the department under the "Agreement Regarding Disposition of Tobacco Settlement Proceeds" filed on July 24, 1998, in United States District Court, Eastern District of Texas, in the case styled *The State of Texas v. The American Tobacco Co., et al.*, No. 5-96CV-91.

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

## SECTION-BY-SECTION SUMMARY

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

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

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

The amendment to §102.3(b)(2)(F) adds "time spent transporting inmates" as an example of a court procedure that may not be counted.

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

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

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

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

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

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

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

## COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period. There were no changes to the proposed text of the rule amendments.

## LEGAL CERTIFICATION

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

## STATUTORY AUTHORITY

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

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

Filed with the Office of the Secretary of State on September 7, 2016.

TRD-201604686

Lisa Hernandez

General Counsel

Department of State Health Services

Effective date: September 27, 2016

Proposal publication date: June 17, 2016

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



## TITLE 30. ENVIRONMENTAL QUALITY

### PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

#### CHAPTER 30. OCCUPATIONAL LICENSES AND REGISTRATIONS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§30.3, 30.7, 30.10, 30.18, 30.20, 30.24, 30.26, 30.30, 30.81, 30.117, 30.120, 30.122, 30.231, 30.240, 30.279, 30.307, 30.331, 30.340, 30.390, 30.506, and 30.507; repeals §30.247; and repeals and simultaneously adopts new §30.28.

The amendment to §30.7 is adopted *with change* to the proposed text as published in the April 22, 2016, issue of the *Texas Register* (41 TexReg 2827) and will be republished. Sections 30.3, 30.10, 30.18, 30.20, 30.24, 30.26, 30.28, 30.30, 30.81, 30.117, 30.120, 30.122, 30.231, 30.240, 30.279, 30.307, 30.331, 30.340, 30.390, 30.506, and 30.507; and the repeals of §30.28 and §30.247 are adopted *without changes* and, therefore, will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This adopted rulemaking implement requirements in Senate Bills (SB) 807 and 1307 from the 84th Texas Legislature, 2015. These bills impact Chapter 30, Subchapter A, Administration of Occupational Licenses and Registrations.

The adopted rules enable the commission to: waive licensing and examination fees for military service members, military veterans, or military spouses, as required by Texas Occupations Code, Chapter 55, as amended by SB 807; and extend renewal

deadlines for military service as required by Texas Occupations Code, Chapter 55, amended by SB 1307.

Additionally, the adopted rules: remove redundant citations; identify approved training delivery methods; increase examination security; add relevant statutory citations; remove historical dates which no longer pertain to occupational licenses due to agency rule changes; remove citations which no longer pertain to occupational licenses due to historical legislative statutory changes; and improve readability of rules by removing redundant wording and making non-substantive changes to grammar, punctuation, and organization.

The adopted rules also repeal and simultaneously adopt new §30.28 to reorganize the section to improve readability by the public. Adopted new §30.28 will generalize training provider requirements to apply to all delivery methods.

#### Section by Section Discussion

In addition to the adopted amendments associated with this rulemaking, various stylistic, non-substantive changes have been made to update rule language to current *Texas Register* style and format requirements. Such changes included appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally not specifically discussed in this preamble.

#### §30.3, Purpose and Applicability

The adopted amendment to §30.3, updates subsection (b)(11) to match the title of Chapter 30, Subchapter L, Visible Emissions Evaluator Training and Certification.

#### §30.7, Definitions

The adopted amendment to §30.7, reorders definitions for alphabetical correctness. The adopted amendment adds a definition for *approved application* and *association*. The adopted rule clarifies training delivery methods and providers and identifies entities that may be approved for differing delivery methods. The adopted amendment adds or modifies definitions to clarify what the commission considers a *high school diploma* and *home school diploma*. The adopted amendment also updates additional definitions in the section to improve understanding.

Based on a comment received, the definition for *association* in adopted §30.7(8) is amended to include all nonprofit trade associations whose members are required to employ or contract with individuals who hold licenses issued by the commission.

#### §30.10, Administration

The adopted amendment to §30.10, clarifies the responsibilities of the executive director by including changes made in §30.7, Definitions.

#### §30.18, Applications for an Initial License

The adopted amendment to §30.18, adds language to allow the executive director discretion when considering an applicant's diploma from a non-accredited high school.

#### §30.20, Examinations

The adopted amendment to §30.20, includes language about the role and responsibility of examination proctors and examinees. The adopted rule also includes language for increased examination security requirements and provides details regarding the consequences for violation of exam security requirements.

#### §30.24, License and Registration Applications for Renewal

The adopted amendment to §30.24, clarifies language for renewal notification responsibilities. The adopted rule includes language from §30.7, Definitions. The adopted rule incorporates language from SB 1307 for the extended renewal time for military service members.

*§30.26, Recognition of Licenses from Out-of-State; Licenses for Military Service Members, Military Veterans, or Military Spouses*

The adopted amendment to §30.26, changes the section title to reflect changes made by SB 1307. The adopted rule incorporates language from SB 1307 for the qualifications of military service members, military veterans, and military spouses. The adopted rule adds language clarifying the limitations of reciprocity.

*§30.28, Approval of Training*

The adopted rulemaking repeals and simultaneously adopts new §30.28, to reorganize the section to improve readability and flow. The preexisting rule did not allow for incorporation of emerging technologies to deliver training. The new rule generalizes training provider requirements so the requirements apply to all delivery methods.

Adopted new §30.28(a), former §30.28(a), removes the 45- and 120-day application review notification deadlines from the former rule and place them into internal guidance. The removal of the review notification deadlines from rule will not affect the commission's response times on these reviews and will continue to ensure staff can review training applications completely and accurately.

Adopted new §30.28(b) identifies specific training delivery methods approved by the executive director. The adopted subsection incorporates the training methods in former §30.28(b).

Adopted new §30.28(c), part of former §30.28(b), allows the executive director to award training credit for successful completion of approved training used to obtain or renew a license.

Adopted new §30.28(d), former §30.28(c), allows the executive director to determine the number of hours of training credit for approval. The adopted subsection clarifies the methodology used to determine hours from the former section.

Adopted new §30.28(e), former §30.28(d), identifies the requirements for training provider applications. The adopted subsection improves the readability of the previous language. Adopted §30.28(e)(6) also specifies documentation required for copyrighted material as listed in former §30.28(v). Adopted §30.28(e)(7) additionally includes the application deadline from former §30.28(y).

Adopted new §30.28(f) adds the executive director's definition of applicant.

Adopted new §30.28(g), former Figure: 30 TAC §30.28(y)(6), identifies the fee schedule calculations for training applications.

Adopted new §30.28(h), former §30.28(l), identifies the requirements training providers must meet to be approved or renewed. The adopted subsection makes no substantive changes to the former language.

Adopted new §30.28(i), former §30.28(j), requires that training not be advertised as approved until a notice of approval is received from the executive director. The adopted subsection makes no substantive changes to the former language.

Adopted new §30.28(j), former §30.28(m)(1), prohibits training in a place of business directly related to the occupational license. The adopted subsection makes no substantive change to the former language.

Adopted new §30.28(k), former §30.28(e), allows approved training to be offered without notification to the executive director. The adopted subsection makes no substantive changes to the former language.

Adopted new §30.28(l), former §30.28(f), allows training to be considered approved until the content changes or the executive director notifies the training provider of required changes. The adopted subsection makes no substantive change to the former language.

Adopted new §30.28(m), former §30.28(g), requires the executive director's approval when training providers change delivery methods. The adopted subsection makes no substantive changes to the former language.

Adopted new §30.28(n), former §30.28(x), identifies the executive director's authority over training providers. The adopted subsection makes no substantive change to the former language. The adopted §30.28(n)(2) includes language from former §30.28(y)(3) that grants the executive director authority to conduct an administrative review over applications and a technical review for rule compliance. The adopted §30.28(n)(4) includes the update requirement from former §30.28(h).

Adopted new §30.28(o), former §30.28(x)(3), identifies the reasons the executive director may recall, rescind, suspend, or deny approval for training. The adopted subsection makes no substantive changes to the former language.

Adopted new §30.28(p) identifies the types of training that will not be approved or allowed credit.

Adopted new §30.28(q), former §30.28(i) and (q), identifies the obligations training providers have to the agency and to the students. The adopted subsection includes a requirement to ensure the agency has the most current electronic copy of a provider's training materials.

Adopted new §30.28(r), former §30.28(t), requires that training material be presented in the original manner and be relevant to the critical job tasks for the occupational license. The adopted subsection makes no substantive changes to the former language.

Adopted new §30.28(s), former §30.28(u), requires training providers utilizing public information modify the material to be applicable to the target audience and delivery methods. The adopted subsection makes no substantive changes to the former language.

*§30.30, Terms and Fees for Licenses and Registration*

The adopted amendment to §30.30 incorporates language from SB 807 to waive the initial application fee for military service members, military veterans, and military spouses.

*§30.81, Purpose and Applicability*

The adopted amendment to §30.81 removes citations which no longer pertain to occupational licenses due to historical legislative statutory changes.

*Subchapter D: Landscape Irrigators, Irrigation Technicians, and Irrigation Inspectors*

The adopted amendment changes the title of Subchapter D to reflect historical rule changes.

*§30.117, Definitions*

The adopted amendment to §30.117 removes and modifies historical definitions that pertain to occupational licenses due to agency rule changes.

*§30.120, Qualifications for Initial License*

The adopted amendment to §30.120 removes historical terms which no longer pertain to occupational licenses due to agency rule changes.

*§30.122, Qualifications for License Renewal*

The adopted amendment to §30.122 removes historical terms which no longer pertain to occupational licenses due to agency rule changes.

*§30.231, Purpose and Applicability*

The adopt amendment to §30.231 removes historical terms which no longer pertain to occupational licenses and registrations due to agency rule changes.

*§30.240, Qualifications for Initial License*

The adopted amendment to §30.240 removes historical terms and dates which no longer pertain to occupational licenses due to agency rule changes.

*§30.247, Registration of Maintenance Providers*

The adopted repeal of §30.247 repeals a historical rule that was valid from September 11, 2008, to April 30, 2009, due to legislative changes from House Bill 2482, 80th Texas Legislature, 2007.

*§30.279, Exemptions*

The adopted amendment to §30.279 removes and modifies citations which pertain to occupational licenses and registrations due to historical legislative statutory changes.

*§30.307, Definitions*

The adopted amendment to §30.307 removes and modifies citations which pertain to occupational licenses and registrations due to historical legislative statutory changes.

*§30.331, Purpose and Applicability*

The adopted amendment to §30.331 adds a new citation that resulted from a recent applicable rule change. The adopted section also removes historical dates which no longer pertain to occupational licenses and registrations due to agency rule changes.

*§30.340, Qualifications for Initial License*

The adopted amendment to §30.340 clarifies that an examination is required to receive the license. The adopted amendment makes references to college degrees consistent with other rules. The adopted amendment removes historical dates which no longer pertain to occupational licenses due to agency rule changes. The adopted amendment clarifies the amount of education and training that may be substituted for the required experience. The adopted amendment clarifies the courses required for licensure.

*§30.390, Qualifications for Initial License*

The adopted amendment to §30.390 clarifies that an examination is required to receive the license. The adopted rule clarifies the course and hours required for licensure. The adopted rule makes references to college degrees consistent with other rules. The adopted rule clarifies the experience requirements for licensure. The adopted rule clarifies the amount of education and training that may be substituted for the required experience.

*§30.506, Visible Emission Evaluator Training Requirements*

The adopted amendment to §30.506 adds a requirement for the number of proctors per student. This requirement was originally in §30.507 and moved to §30.506 to clarify that the requirement applies to training providers.

*§30.507, Field Training and Testing Requirements*

The adopted amendment to §30.507 removes a proctor requirement that is better suited to §30.506. The adopted amendment also updates a requirement to the field testing certification to be consistent with other certification requirements found in rule.

*Final Regulatory Impact Determination*

The commission reviewed this rulemaking action in light of the regulatory analysis requirements of the Administrative Procedure Act, Texas Government Code, §2001.001 *et seq*, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3). Texas Government Code, §2001.0225, applies only to rules that are specifically intended 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 intent of the adopted rulemaking is to implement requirements in SBs 807 and 1307 from the 84th Texas Legislature, 2015. Protection of human health and the environment may be a by-product of the adopted rules, but it is not the specific intent of this rulemaking. Furthermore, the adopted rulemaking will enable the commission to: extend renewal deadlines for military service as required by Texas Occupations Code, Chapter 55, Licensing of Military Service Members, Military Veterans, and Military Spouses, amended by SB 1307; and waive licensing and examination fees for military service members, military veterans, or military spouses, as required by Texas Occupations Code, Chapter 55, as amended by SB 807. This rulemaking will not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Thus, the adopted rulemaking does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225(g)(3) and does not require a full regulatory impact analysis.

Furthermore, the adopted rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) is adopted solely

under the general powers of the agency instead of under a specific state law.

There are no federal standards regulating occupational licensing. This rulemaking does not exceed state law requirements, and state law authorizes their implementation, not federal law. There are no delegation agreements or contracts between the State of Texas and an agency or representative of the federal government to implement a state and federal program regarding occupational licensing. Finally, this rulemaking is being adopted under specific state laws, in addition to the general powers of the agency.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination during the public comment period.

#### Takings Impact Assessment

The commission evaluated this adopted rulemaking and performed an analysis of whether this adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The purpose of this adopted rulemaking is to implement requirements in SBs 807 and 1307 from the 84th Texas Legislature, 2015. Promulgation and enforcement of this adopted rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, the adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. This rulemaking does not constitute a statutory or constitutional taking because this adopted rulemaking only implements statutory requirements and updates and clarifies the former rules and does not affect a landowner's rights in real property.

#### Consistency with the Coastal Management Program

The commission reviewed the adopted rulemaking and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor does the rulemaking affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rulemaking is not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the consistency with the CMP during the public comment period.

#### Public Comment

The commission held a public hearing on May 17, 2016. The comment period closed on May 23, 2016. The commission did not receive comments at the public hearing. The commission received written comments from the Texas Rural Water Association (TRWA).

#### Response to Comments

##### *Comment*

TRWA requested the definition of "association" in §30.7(8) be amended to broaden the term's applicability to cover all nonprofit trade associations representing retail public utilities. TRWA suggested the definition should include "or whose members are re-

tail public utilities that are required to employ or contract with individuals who hold licenses issued by the commission."

##### *Response*

The commission agrees with the comment and has made changes to the definition. The commission is not trying to exclude any currently recognized association, but rather the commission is trying to allow associations whose members might not hold commission issued licenses themselves but who are required to employ or contract with licensed individuals to be training providers.

##### *Comment*

TRWA supports the changes for the military fee waiver in §30.30(c) and recommends the commission streamline the process.

##### *Response*

After SB 807 passed, a waiver process was developed to incorporate the statutory requirements for military fee waivers. No changes were made in response to this comment.

## SUBCHAPTER A. ADMINISTRATION OF OCCUPATIONAL LICENSES AND REGISTRATIONS

### **30 TAC §§30.3, 30.7, 30.10, 30.18, 30.20, 30.24, 30.26, 30.28, 30.30**

#### Statutory Authority

These amendments and new section are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. These amendments and new section are also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37, "Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37; TWC, §37.005, which authorizes the commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs

necessary to qualify for or renew a license; TWC, §37.009, which authorizes the commission to establish and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC, Chapter 37; and TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37. These amendments and the new section are also adopted under Texas Occupations Code, §55.001, which establishes the definitions of active duty, armed forces of the United States, license, military service member, military spouse, military veteran, and state agency; Texas Occupations Code, §55.002, which requires the commission to adopt rules to exempt an individual who holds a license issued by the commission from any increased fee or other penalty for failing to renew the license in a timely manner if the individual establishes that the individual failed to renew the license in a timely manner because the individual was serving as a military service member; Texas Occupations Code, §55.003, which requires the commission to extend for two years license renewal deadlines for military service members who hold a license; Texas Occupations Code, §55.004, which requires the commission to adopt alternative licensing rules for military service members, military veterans, or military spouses who hold a license issued by another jurisdiction that has substantially equivalent requirements for the license in this state; Texas Occupations Code, §55.005, which requires the commission to provide an expedited license procedure for military service members, military veterans, and military spouses; Texas Occupations Code, §55.006, which requires the commission to provide expedited license renewal to military service members, military veterans, or military spouses; Texas Occupations Code, §55.008, which requires the commission to credit verified military service, training, or education that is relevant to the occupation toward apprenticeship requirements for a license if an apprenticeship is required; and Texas Occupations Code, §55.009, which requires the commission to waive license application and examination fees for certain military service members, military veterans, and military spouses and to prominently post a notice on the home page of the commission's website describing the provisions of Texas Occupations Code, Chapter 55, that are available to military service members, military veterans, and military spouses.

These amendments and new section implement TWC, §§5.013, 5.102, 5.103, and 37.001 - 37.015; Texas Occupations Code, §§55.001 - 55.006, 55.008, and 55.009; and Senate Bills 807 and 1307.

#### *§30.7. Definitions.*

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

- (1) **Aerobic treatment system owner**--Persons that in their individual capacities own a single-family dwelling that is serviced by an on-site sewage disposal system using aerobic treatment.
- (2) **Approved application**--An application submitted to the Occupational Licensing Section that contains all the information the executive director has deemed necessary to be accurately processed and that the executive director has determined to be approved.
- (3) **Approved classroom training providers**--Entities that have been approved by the executive director to provide classroom training after demonstration of hands-on subject matter expertise, knowledge of and experience with educational principles, and effective instructional designs.
- (4) **Approved conference and webinar training providers**--Governmental entities or their designated agents, associations, or colleges as listed by accrediting agencies that are recognized by the United States Department of Education and that have been approved by the executive director to provide conference and webinar training.
- (5) **Approved distance training providers**--Governmental entities or their designated agents, associations, or colleges as listed by accrediting agencies that are recognized by the United States Department of Education and that have been approved by the executive director to provide distance training after demonstrating comparable subject matter expertise, knowledge of and experience with educational principles, and effective instructional designs.
- (6) **Approved training**--Training which provides the knowledge and skills necessary to perform occupational job tasks and is used for obtaining or renewing a license as determined by the executive director.
- (7) **Approved training delivery method**--Methods approved by the executive director that currently include instructor-led classroom training, conferences, seminars, workshops, training at association meetings, distance training, or technology-based training.
- (8) **Association**--The term association as used in the context of this chapter is an industry-related non-profit association whose members hold licenses issued by the commission or whose members are required to employ or contract with individuals who hold licenses issued by the commission.
- (9) **Conference**--The term conference as used in the context of this chapter includes conferences, seminars, workshops, symposiums, expos, and any other such training venues.
- (10) **Continuing education**--Job-related training credit approved by the executive director used for renewal of licenses.
- (11) **Correspondence training**--The term correspondence training as used in the context of this chapter is distance training that can either be paper-based and conducted through a postal system, electronic-based and conducted through a website, or a blend of these delivery systems.
- (12) **Distance training**--The acquisition of knowledge that occurs through various technologies with a separation of place and/or time between the instructor(s) or learning resources and the learner.
- (13) **Distributor**--Any person or nongovernmental organization that sells a product primarily to individuals maintaining occupational licenses administered by the agency.
- (14) **High school diploma**--An earned high school diploma from a United States high school, an accredited secondary school equivalent to that of United States high school, or a passing score on the general education development (GED) test that indicates a high school graduation level.

(15) Home school diploma--An earned diploma from a student who predominately receives instruction in a general elementary or secondary education program that is provided by the parent, or by a person in parental authority, in or through the child's home.

(16) License--An occupational license issued by the commission to a person authorizing the person to engage in an activity covered by this chapter.

(17) Maintenance provider--A person that, for compensation, provides service or maintenance for one or more on-site sewage disposal systems using aerobic treatment.

(18) Manufacturer--For the purpose of this subchapter any person, company, or nongovernmental organization that produces a product for sale primarily to individuals who maintain occupational licenses that are administered by the agency.

(19) Person--As defined in §3.2 of this title (relating to Definitions).

(20) Qualified instructor--An individual who has instructional experience, work-related experience, and subject matter expertise that enables the individual to communicate course information in a relevant, informed manner and to answer students' questions.

(21) Registration--An occupational registration issued by the commission to a person authorizing the person to engage in an activity covered by this chapter.

(22) Service provider--Any person, company, or nongovernmental organization that provides a service for its own profit to individuals who maintain occupational licenses that are administered by the agency.

(23) Subject matter expert--A person having a minimum of three years of work-related experience and expert knowledge in a particular content area or areas as relates to training.

(24) Technology-based training--The term technology-based training as used in the context of this chapter includes training offered through computer equipment or through a website (also known as on-line training or e-learning).

(25) Training credit--Hours awarded by the executive director for successful completion of approved training.

(26) Training provider--An administrative entity or individual responsible for obtaining approval of training, providing acceptable delivery of approved training, ensuring that qualified instructors or subject matter experts are utilized in the delivery, support, and development of training and monitoring, recording and reporting attendance accurately and promptly as required by the executive director.

(27) Webinar--Interactive training delivered live via the Internet as a combination of conference training and distance training where the learner is separated by place from the learning source.

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

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### 30 TAC §30.28

#### Statutory Authority

This repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. This repeal is also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37, "Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37; TWC, §37.005, which authorizes the commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs necessary to qualify for or renew a license; TWC, §37.009, which authorizes the commission to establish and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC,

Chapter 37; and TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37.

This repeal implements TWC, §§5.013, 5.102, 5.103, and 37.001 - 37.015.

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

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## SUBCHAPTER C. CUSTOMER SERVICE INSPECTORS

### 30 TAC §30.81

#### Statutory Authority

This amendment is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. This amendment is also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37, "Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37; TWC, §37.005, which authorizes the commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs necessary to qualify for or renew a license; TWC, §37.009, which authorizes the commission to establish

and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC, Chapter 37; TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37; and THSC, §341.034, which requires persons who perform duties relating to public water supplies to hold a license or registration issued by the commission under TWC, Chapter 37.

This amendment implements TWC, §§5.013, 5.102, 5.103, and 37.001 - 37.015; and THSC, §341.034.

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

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## SUBCHAPTER D. LANDSCAPE IRRIGATORS, IRRIGATION TECHNICIANS, AND IRRIGATION INSPECTORS

### 30 TAC §§30.117, 30.120, 30.122

#### Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. These amendments also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37, "Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish

classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37; TWC, §37.005, which authorizes the commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs necessary to qualify for or renew a license; TWC, §37.009, which authorizes the commission to establish and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC, Chapter 37; TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37; Texas Occupations Code, §1903.053, which requires the commission to adopt by rule and enforce standards governing the responsibilities of licensed irrigators; and Texas Occupations Code, §1903.251, which requires a person to hold a license issued by the commission under TWC, Chapter 37, if the person engages in certain activities related to landscape irrigation.

These amendments implement TWC, §§5.013, 5.102, 5.103, and 37.001 - 37.015; and Texas Occupations Code, §1903.053 and §1903.251.

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

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## SUBCHAPTER G. ON-SITE SEWAGE FACILITIES INSTALLERS, APPRENTICES, DESIGNATED REPRESENTATIVES, MAINTENANCE PROVIDERS, MAINTENANCE TECHNICIANS, AND SITE EVALUATORS

### 30 TAC §30.231, §30.240

#### Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. These amendments are also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37, "Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37; TWC, §37.005, which authorizes the commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs necessary to qualify for or renew a license; TWC, §37.009, which authorizes the commission to establish and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational

licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC, Chapter 37; and TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37. These amendments are adopted under THSC, §366.011, which establishes that the commission has general authority over the location, design, construction, installation, and proper functioning of on-site sewage disposal systems; and THSC, §366.012, which authorizes the commission to adopt rules governing the installation of on-site sewage disposal systems.

These amendments implement TWC, §§5.013, 5.102, 5.103, and 37.001 - 37.015; and THSC, §366.011 and §366.012.

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

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### **30 TAC §30.247**

#### **Statutory Authority**

This repeal is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. This repeal is also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37, "Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37;

TWC, §37.005, which authorizes the commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs necessary to qualify for or renew a license; TWC, §37.009, which authorizes the commission to establish and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC, Chapter 37; and TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37. This repeal is also adopted under THSC, §366.011, which establishes that the commission has general authority over the location, design, construction, installation, and proper functioning of on-site sewage disposal systems; and THSC, §366.012, which authorizes the commission to adopt rules governing the installation of on-site sewage disposal systems.

This repeal implements TWC, §§5.013, 5.102, 5.103, and 37.001 - 37.015; and THSC, §366.011 and §366.012.

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

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## **SUBCHAPTER H. WATER TREATMENT SPECIALISTS**

### **30 TAC §30.279**

#### **Statutory Authority**

This amendment is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the com-

mission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. This amendment is also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37, "Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37; TWC, §37.005, which authorizes the commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs necessary to qualify for or renew a license; TWC, §37.009, which authorizes the commission to establish and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC, Chapter 37; and TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37. This amendment is adopted under Texas Occupations Code, §1904.051, which requires the commission to establish a program to certify persons qualified to install, exchange, service, and repair residential, commercial, or industrial water treatment equipment and appliances; Texas Occupations Code, §1904.052, which requires a person to obtain a certificate from the commission before engaging in water treatment; Texas Occupations Code, §1904.053, which establishes that the commission is authorized to take applications for certification into the water treatment specialist program; and Texas Occupations Code, §1904.054, which authorizes the commission to issue certificates stating

that a person is qualified to install, exchange, service, and repair residential, commercial, or industrial water treatment facilities.

This amendment implements TWC, §§5.013, 5.102, 5.103, and 37.001 - 37.015; and Texas Occupations Code, §§1904.051 - 1904.054.

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

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## SUBCHAPTER I. UNDERGROUND STORAGE TANK ON-SITE SUPERVISOR LICENSING AND CONTRACTOR REGISTRATION

### 30 TAC §30.307

#### Statutory Authority

This amendment is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. This amendment is also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37, "Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37; TWC, §37.005, which authorizes the commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs necessary to qualify for or renew a license;

TWC, §37.009, which authorizes the commission to establish and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC, Chapter 37; TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37; TWC, §26.345, which requires the commission to administer TWC, Chapter 26, Subchapter I, concerning Underground and Aboveground Storage Tanks; TWC, §26.364, which authorizes the commission to implement a program under TWC, Chapter 37, to register persons who contract to perform corrective action under TWC, Chapter 26, Subchapter I; TWC, §26.365, which authorizes the commission to register geoscientists into the corrective action program; and TWC, §26.366, which authorizes the commission to implement a program to license persons who supervise a corrective action under TWC, Chapter 26, Subchapter I.

This amendment implements TWC, §§5.013, 5.102, 5.103, 26.345, 26.364 - 26.366, and 37.001 - 37.015.

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

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## SUBCHAPTER J. WASTEWATER OPERATORS AND OPERATIONS COMPANIES

### 30 TAC §30.331, §30.340

#### Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. These amendments are also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37,

"Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37; TWC, §37.005, which authorizes the commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs necessary to qualify for or renew a license; TWC, §37.009, which authorizes the commission to establish and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC, Chapter 37; and TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37. These amendments are also adopted under TWC, §26.0301, which authorizes the commission to issue licenses and registrations for wastewater treatment plant operators and sewage treatment or collection facility services under contract.

These amendments implement TWC, §§5.013, 5.102, 5.103, 26.0301, and 37.001 - 37.015.

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

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## SUBCHAPTER K. PUBLIC WATER SYSTEM OPERATORS AND OPERATIONS COMPANIES

### 30 TAC §30.390

#### Statutory Authority

This amendment is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. This amendment is also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37, "Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37; TWC, §37.005, which authorizes the commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs necessary to qualify for or renew a license; TWC, §37.009, which authorizes the commission to establish and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and

commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC, Chapter 37; and TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37. This amendment is also adopted under THSC, §341.033, which requires persons who furnish drinking water to the public for a charge to hold a license issued by the commission under TWC, Chapter 37; and THSC, §341.034, which requires persons who operate a public water supply on a contract basis to hold a registration issued by the commission under TWC, Chapter 37.

This amendment implements TWC, §§5.013, 5.102, 5.103, and 37.001 - 37.015; and THSC, §341.033 and §341.034.

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

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## SUBCHAPTER L. VISIBLE EMISSIONS EVALUATOR TRAINING AND CERTIFICATION

### 30 TAC §30.506, §30.507

#### Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the general powers of the commission; and TWC, §5.103, which authorizes the Texas Commission on Environmental Quality (commission) to make rules. These amendments are also adopted under TWC, §37.001, which establishes that in TWC, Chapter 37, "Commission" means the Texas Natural Resource Conservation Commission, predecessor to the commission; TWC, §37.002, which authorizes the commission to adopt any rules necessary to: establish occupational licenses and registrations prescribed by TWC, §§26.0301, 26.3573, 26.452, and 26.456; Texas Health and Safety Code (THSC), §§341.033, 341.034, 361.027, and 366.071; and Texas Occupations Code, §1903.251; establish classes and terms of occupational licenses and registrations; and administer the provisions of TWC, Chapter 37, and other laws governing occupational licenses and registrations under the commission's jurisdiction; TWC, §37.003, which establishes that a person may not engage in a business, occupation, or profession described by TWC, §§26.0301, 26.3573, 26.452, and 26.456; THSC, §§341.033, 341.034, 361.027, and 366.071; or Texas Occupations Code, §1903.251, unless the person holds the appropriate license or registration issued by the commission; TWC, §37.004, which authorizes the commission to establish qualifications for each license and registration issued under TWC, Chapter 37; TWC, §37.005, which authorizes the

commission to establish requirements and uniform procedures for issuing licenses and registrations under TWC, Chapter 37; TWC, §37.006, which authorizes the commission to establish requirements and uniform procedures for renewing licenses and registrations; TWC, §37.007, which authorizes the commission to prescribe the content of licensing examinations; TWC, §37.008, which provides the commission authority to approve training programs necessary to qualify for or renew a license; TWC, §37.009, which authorizes the commission to establish and collect fees to cover the cost of administering and enforcing TWC, Chapter 37, and licenses and registrations issued under TWC, Chapter 37; TWC, §37.010, which grants the commission authority to make rules regarding false, misleading, or deceptive practices by licensees and registrants; TWC, §37.011, which authorizes the commission to prepare and make available to the public information describing the procedures by which a person may submit licensing and registration complaints to the commission; TWC, §37.012, which authorizes the commission to require a person to provide information about other occupational licenses and registrations held by the person; TWC, §37.013, which provides that a license or registration holder must engage in the business, occupation, or profession governed by the license or registration according to applicable laws and commission rules and orders; TWC, §37.014, which requires the commission to maintain and make available to the public an official roster of persons who hold licenses and registrations issued under TWC, Chapter 37; and TWC, §37.015, which authorizes the commission to contract with persons to provide services required by TWC, Chapter 37.

These amendments implement TWC, §§5.013, 5.102, 5.103 and 37.001 - 37.015.

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

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## **TITLE 31. NATURAL RESOURCES AND CONSERVATION**

### **PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT**

#### **CHAPTER 65. WILDLIFE**

#### **SUBCHAPTER B. DISEASE DETECTION AND RESPONSE**

#### **DIVISION 1. CHRONIC WASTING DISEASE (CWD)**

In a duly noticed meeting on August 25, 2016, the Texas Parks and Wildlife Commission adopted the repeal of §65.83 and §65.88, amendments to §§65.80 - 65.82, 65.84, 65.85, and new §65.88 and §65.89, concerning Chronic Wasting Disease. Section 65.82 is adopted with changes to the proposed text as published in the July 22, 2016, issue of the *Texas Register* (41 TexReg 5391). The repeals, amendments to §§65.80, 65.81, 65.84, 65.85, and new §65.88 and §65.89 are adopted without change and will not be republished.

The change to §65.82, concerning Surveillance Zones; Restrictions, makes nonsubstantive changes to paragraph (2)(B)(i)(II)(a-) - (b-) to maintain grammatical parallelism.

On July 10, 2012, the department confirmed the first known cases of Texas wildlife infected with Chronic Wasting Disease (CWD) in two free-ranging mule deer in the Hueco Mountains of far west Texas. With that discovery, Texas joined 20 other states and two Canadian provinces where CWD has been detected in free-ranging or captive environments. In response, the department adopted §§65.80 - 65.88 (37 TexReg 10231), effective January 2, 2013, to establish zones in which the unnatural movement of deer is more restricted, and to implement mandatory check stations in certain areas in order to determine the prevalence and geographic extent of the disease.

On June 30, 2015, the department received confirmation that a two-year-old white-tailed deer held in a deer breeding facility in Medina County had tested positive for CWD, which was followed by positive test results for white-tailed deer in three additional deer breeding facilities. In addition, a hunter-harvested free-ranging mule deer in Hartley County in the Texas Panhandle tested positive for CWD in the past year. In response, the department first adopted emergency rules (40 TexReg 5566) to respond immediately to the threat, then developed interim rules (41 TexReg 815) intended to function through the 2015 - 2016 hunting season until permanent rules could be implemented. Working closely with the Texas Animal Health Commission (TAHC), the regulated community, and key stakeholders, and with the assistance of the Center for Public Policy Dispute Resolution of the University of Texas School of Law, the department developed a rule package to implement a comprehensive CWD management strategy associated with permitted deer management practices involving the unnatural movement of live deer (41 TexReg 815). Those rules were approved for adoption by the Parks and Wildlife Commission, with changes, on June 20, 2016 (referred to herein as "comprehensive CWD management rules"), and became effective on August 15, 2016 (41 TexReg 5726).

The repeal, amendments, and new section adopted in this rule-making are necessary to harmonize the rules in Chapter 65, Subchapter B, Division 1 with the rules in Chapter 65, Subchapter B, Division 2, which implement the comprehensive CWD management strategy and to modify the types and geographical extent of the zones in which the unnatural movement of deer and the movement of deer carcasses are restricted.

The rules as adopted are a result of cooperation between the department, TAHC, and the department's CWD Task Force, comprised of wildlife-health professionals and cervid producers and are intended to protect susceptible species of exotic and native wildlife from CWD.

CWD is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, elk, red deer, moose, reindeer, sika, and their hybrids (susceptible species). It is classified as a TSE (transmissible spongiform

encephalopathy), a family of diseases that includes scrapie (found in sheep), bovine spongiform encephalopathy (BSE, found in cattle), and variant Creutzfeldt-Jakob Disease (vCJD) in humans.

Much remains unknown about CWD. The peculiarities of its transmission (how it is passed from animal to animal), infection rate (the frequency of occurrence through time or other comparative standard), incubation period (the time from exposure to clinical manifestation), and potential for transmission to other species are still being investigated. There is no scientific evidence to indicate that CWD is transmissible to humans. What is known is that CWD is invariably fatal to cervids, and is transmitted both directly (through deer-to-deer contact) and indirectly (through environmental contamination). Moreover, a high prevalence of the disease correlates with deer population decline in at least one free-ranging population, and human dimensions research suggests that hunters will avoid areas of high CWD prevalence. Additionally, the apparent persistence of CWD in contaminated environments represents a significant obstacle to eradication of CWD from either farmed or free-ranging cervid populations. The potential implications of CWD for Texas and its annual, multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies could be significant, unless it is contained and controlled.

The department has been concerned for over a decade about the possible emergence of CWD in free-ranging and captive deer populations in Texas. Since 2002, more than 40,000 "not detected" CWD test results have been obtained from free-ranging (i.e., not breeder) deer in Texas, and deer breeders have submitted approximately 20,000 "not detected" test results as well. The intent of the proposed rules is to reduce the probability of CWD being spread from areas and deer breeding facilities where it might exist and to increase the probability of detecting and confining CWD to areas where it does exist.

Under Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1, the department regulates the possession of white-tailed deer and mule deer for various purposes. Subchapter C governs permits for scientific research, zoological collection, rehabilitation, and educational display of protected wildlife, which includes deer. Subchapter E governs Triple T activities (trap, transport, and transplant), in which game animals or game birds are captured and relocated to adjust populations. Subchapter E also governs Urban White-tailed Deer Removal Permits and Permits to Trap, Transport, and Process Surplus White-tailed Deer (TTP). (Unless otherwise stated, the permits issued under authority of Subchapter E are collectively referred to herein as "Triple T" permits.) Subchapter L governs deer breeder permit activities, which include, among other things, possession of captive-raised deer within a facility for breeding purposes and release of such deer. Subchapters R and R-1 govern Deer Management Permit (DMP) activities for white-tailed deer and mule deer, respectively, in which free-ranging deer may be captured and temporarily retained for breeding purposes. The department notes that although DMPs for mule deer were authorized by the legislature in 2011, no DMPs for mule deer have been issued because the department has deferred promulgation of regulations pending acquisition of requisite data to develop biologically defensible rules and address disease threats, including CWD.

Triple T, deer breeder permits, and DMP all authorize release of deer under certain circumstances. Additionally, the permits governed by Parks and Wildlife Code, Chapter 43, Subchapter C, can also include permit conditions for release.

From an epidemiological point of view, the higher the density of susceptible organisms, the more likely disease transmission is to occur, if it exists in a population. Obviously, deer kept in circumstances (facilities, pens, trailers, etc.) in which densities are many times higher than what occurs naturally are more likely to both manifest and spread communicable diseases at a higher rate or in greater numbers than would occur in a free-ranging populations. Therefore, the proposed rules are designed and intended to provide reasonable assurance that once CWD is detected it is quickly isolated and not spread as a result of increased concentration of deer, the movement of live deer under permits issued by the department, or the movement of carcasses of harvested deer.

The repeal of §65.83, concerning Buffer Zones, is necessary because buffer zones are being eliminated. Prior to this rulemaking, the rules imposed a three-tiered cordon approach to address the possibility of CWD being spread via unnatural deer movements (deer breeder, Triple T, and DMP activities often involve the physical translocation of animals at distances that are far beyond what is possible by free-ranging animals): Containment Zones (the area immediately surrounding the location where a CWD-positive animal has been found); High-Risk Zones (the area surrounding or adjoining the Containment Zone); and Buffer Zones (an area surrounding or adjoining the High-Risk Zone). The unnatural movement of deer is most rigorously regulated in Containment Zones and becomes successively less rigorously regulated as distance from where the disease was discovered increases. The comprehensive CWD management rules (Chapter 65, Subchapter B, Division 2) previously referenced in this preamble impose increased CWD-testing requirements for breeder deer, Triple T trap sites, and DMP sites where breeder deer are introduced on a statewide basis, which makes the concept of the buffer zone superfluous.

The amendment to §65.80, concerning Definitions, would eliminate the definition for "buffer zone" for the reasons discussed in the repeal of §65.83. The amendment also eliminates the term "High-Risk Zone" and replaces it with "Surveillance Zone," and removes the language defining such zones as "surrounding or being adjacent to" a Containment Zone (CZ). The department has determined that the term "high-risk" could inadvertently and unnecessarily stigmatize an area, so a term that more accurately describes the function of the zone has been selected. Additionally, for reasons discussed in the proposed amendment to §65.82, concerning Surveillance Zones; Restrictions, the amendment eliminates the phrase "adjacent to or surrounding a CZ" from the definition. The amendment also alters the definition of "susceptible species" to clarify that the term includes parts of animals and is not restricted to a whole animal.

The amendment to §65.81, concerning Containment Zones; Restrictions, redefines the boundaries of the CZ currently in effect in far west Texas and creates a new CZ in the Texas Panhandle to address the discovery of CWD in Hartley County. The CZ in far west Texas is being reduced in geographical extent in Culberson, El Paso, and Hudspeth counties. The contraction of the CZ in those counties is possible because the department's surveillance efforts indicate that CWD has not likely spread beyond the Hueco Mountains. Several factors (e.g., cervid population parameters, cervid behavior and life history, historical surveillance intensity, clear boundaries, etc.) are considered when determining the appropriate extent of a CZ or SZ; for example, when CWD was detected just across the New Mexico border in 2012, there was more than a strong possibility that infected mule deer were

present in Texas, since the movement of desert mule deer can be as much as 25-30 linear miles.

The amendment to §65.81 alters the provisions of paragraph (2)(C) by adding language to allow the recapture of deer that have escaped from a deer breeding facility within a CZ if specifically authorized under a hold order or herd plan issued by TAHC. The department has determined that escaped breeder deer may be epidemiologically significant in some instances and that recapture should be permitted if authorized by TAHC.

Under current §65.81(2)(A), the movement of deer into, out of, or within a CZ is prohibited, except for department-authorized research. The amendment to §65.81 adds new paragraph (2)(D) to allow TC 1 deer breeding facilities within a CZ to release breeder deer to immediately adjoining acreage (provided the release site and the breeding facility share the same ownership and the release site is high-fenced as required by the comprehensive CWD rules alluded to previously in this preamble). Because TC 1 breeding facilities (more thoroughly described in the comprehensive CWD management rules) represent the lowest risk of spreading CWD, the department considers the release of such breeder deer to adjoining acreage under the same ownership to present a low risk with regard to disease transmission, but all other movement of breeder deer would continue to be prohibited.

The amendment to §65.81 also changes the term "deer breeder facility" to "deer breeding facility" for purposes of consistency.

The amendment to §65.82, concerning High-Risk Zones; Restrictions, changes the title of the section to Surveillance Zones; Restrictions, as previously noted in this preamble, shrinks the geographical extent of the zone in far west Texas, creates two new zones (one to address the additional CWD discovery in the Texas Panhandle and one to address the discovery of CWD in deer breeding facilities in Medina County), and allows the unnatural movement of deer within a SZ under certain circumstances. A Surveillance Zone (SZ) is a geographic area within which the department has determined, using the best available science and data, that the presence of CWD could reasonably be expected. With respect to new paragraph (1)(C), the department is creating a Surveillance Zone in portions of Bandera, Medina, and Uvalde counties, but not a CZ. The reason for not creating a CZ is two-fold. First, the CWD discovery in this part of the state occurred in breeder deer and deer breeding facilities, which are required by law to be designed and built to both prevent the free movement of deer and contact with free-ranging deer, which coincidentally is imperative for the control and management of CWD. Second, the facilities where CWD was discovered are operating under TAHC herd plans, which restrict deer movement and require CWD testing at a level equal to or greater than that required in a CZ.

Under the previous provisions of §65.82, the unnatural movement of deer was restricted to breeder deer being transferred to or from a deer breeding facility that had achieved "Certified" status in the TAHC Herd Certification Program (i.e., "Level 'C' status as defined by 4 TAC §40.3). With the adoption of the comprehensive CWD management rules alluded to earlier in this preamble, the testing, TAHC herd status, and herd inventory requirements of previous §65.82 with respect to breeder deer are no longer necessary in §65.82; however, because the comprehensive CWD management rules create a classification system that identifies breeding facilities and prospective DMP and Triple T trap sites that are epidemiologically determined to present limited risk of CWD transfer, the amendment adds new subpara-

graphs (B) - (D) to paragraph (2) to address that fact and prescribes the criteria under which those activities would be allowed.

New §65.82(2)(B) addresses deer breeding facilities and provides that except as provided by the provisions of Division 2 of Subchapter B (the comprehensive CWD management rules), TC 1 breeding facilities within a SZ may transfer, receive, or liberate breeder deer within or beyond the SZ, because they represent a low risk of CWD. Similarly, the amendment allows TC 2 breeding facilities to receive deer from any deer breeder in the state authorized to transfer deer and to transfer, receive, or liberate deer within the SZ, but not beyond the SZ. TC 2 breeding facilities are those facilities that while not deemed to present the greatest risk, at the same time cannot provide sufficient epidemiological data to achieve TC 1 status; therefore, because breeder deer transferred from breeding facility to breeding facility are always within a high-fenced area, which the comprehensive CWD management rules also require for release sites, these activities can be allowed within the SZ without increasing the chance of spreading CWD beyond the SZ in the event the disease does occur within the SZ. The amendment to §65.82 also adds new subparagraph (B)(ii) to allow the recapture of deer that have escaped from a deer breeding facility within a SZ if specifically authorized under a hold order or herd plan issued by TAHC. As stated previously in this preamble, the department has determined that escaped breeder deer may be epidemiologically significant in some instances and that recapture should be permitted only if authorized by TAHC.

New §65.82(2)(C) addresses the movement of deer pursuant to Triple T permits and provides for the approval of Triple T releases in a SZ, but prohibits trapping for Triple T purposes within a SZ. From an epidemiological standpoint, the release of deer within a SZ does not present a significant risk of spreading or accelerating the spread of CWD, and in any case, the department will not approve a release that would result in deer densities greater than the habitat conditions and deer populations at the release site can sustain, which would be the major concern in evaluating disease propagation potential. Conversely, the trapping of deer from within a SZ, because the source population's disease potential is unknown, represents an unacceptable risk of disease propagation in the absence of adequate sampling data to provide sufficient confidence that CWD does not exist within that area.

New §65.82(2)(D) addresses the movement of deer pursuant to a DMP and provides for the issuance of DMPs in SZs with the proviso that any breeder deer introduced to a DMP must be released to the designated release site and cannot be returned to a deer breeding facility. A DMP authorizes the trapping and temporary detention of free-ranging deer at the trap site for breeding purposes. Breeder deer may be introduced to a DMP pen as well, but since the epidemiological status of free-ranging deer within high-fenced enclosures is unknown, it is problematic to allow breeder deer exposed to such deer to be returned to a breeding facility.

The amendment to §65.84, concerning Powers and Duties of the Executive Director, alters the terminology used in the section in order to conform the terminology with the changes proposed elsewhere in this rulemaking.

The amendment to §65.85, concerning Mandatory Check Stations, makes nonsubstantive changes to terminology to comport the section with amendments made to other sections.

New §65.88, concerning Deer Carcass Movement Restrictions, sets forth the conditions under which certain parts of a suscep-

tible species harvested within a CZ or SZ may be lawfully transported from the CZ or SZ where the harvest occurred.

New §65.88(a) prohibits the possession or transport of certain parts of a susceptible species (white-tailed deer or mule deer) taken in a state, province, or other place outside Texas where CWD has been detected in free-ranging or captive herds. CWD prions are known to be present in tissues of infected animals, especially brain, spinal cord and viscera; thus, carcasses with these tissues entering Texas from other states and countries where CWD has been confirmed represent a source of environmental contamination and a potential infection pathway to free-ranging and farmed deer in Texas. For the same reason, new subsection (a)(2) would prohibit the transport of any part of a susceptible species from within a CZ or SZ, except in compliance with the new section.

New §65.88(b) establishes exceptions to subsection (a), consisting of various types of processing that must take place in order to lawfully transport susceptible species from the place of harvest. The exceptions consist of meat that has been cut up and packaged (boned or filleted); a carcass that has been reduced to quarters with no brain or spinal tissue present; a cleaned hide (skull and soft tissue must not be attached or present); whole skull (or skull plate) with antlers attached, provided the skull or skull plate has been completely cleaned of all soft tissue; finished taxidermy products; cleaned teeth; or tissue prepared and packaged for delivery to and use by a diagnostic or research laboratory. In general, these types of processing reflect the removal of the types of tissues in which CWD prions are known to concentrate.

New §65.88(c) provides that the exceptions created by subsection (b) apply if the susceptible species is processed within the CZ or SZ where it was harvested. In order to minimize the potential that brain or spinal tissue potentially infected with CWD could be transported beyond a CZ or SZ and present a risk of environmental contamination, the processing of the susceptible species must occur within the CZ or SZ where the animal is killed.

New §65.88(d) allows a susceptible species harvested in a CZ or SZ and processed in accordance with the provisions of subsections (b) and (c) to be transported from the CZ or SZ, provided it is accompanied by a department-issued check-station receipt, which must remain with the susceptible species until it reaches a final destination. At the current time, the only mandatory check stations in Texas are located in the one CZ that has been established in west Texas; however, additional mandatory check stations will be designated in the northwest Panhandle. Therefore, the provision allows the transport of susceptible species only if the required processing has occurred and the head has been presented at a check station.

New §65.88(e) allows susceptible species harvested from a CZ or SZ, other state, Canadian province, or other place outside of Texas to be transported to a taxidermist for taxidermy purposes; however, in order to minimize the potential for environmental contamination, all brain material, soft tissue, spinal column and any unused portions of the head is required to be disposed of in a landfill permitted by the Texas Commission on Environmental Quality (TCEQ). The new subsection does not exempt hunters within a CZ or SZ from the requirement, except as specifically authorized by the department, from the requirement to submit the head of a susceptible species harvested within a CZ or SZ to a check station for tissue collection.

New §65.88(f) exempts deer harvested in Surveillance Zone 3 from the mandatory check station and documentation requirements of the section. The department was approached by concerned county officials and landowners in Medina County who committed to organizing a volunteer hunter and landowner effort to provide the department with a sufficient number of valid "not detected" CWD test results, which would allow the department to make an epidemiologically sound determination about the prevalence (if any) of CWD within Surveillance Zone 3.

New §65.89, concerning Penalties, contains the statutory penalties for violations of the proposed new rules for ease of reference.

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The department received 34 comments opposing adoption of the rules as proposed. Of those 34 comments, 21 expressed a reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow. The department notes that because many individual comments contained multiple statements, and multiple individuals made similar comments, the number of responses does not equal the total number of comments.

#### Impacts to Deer Breeders

One commenter opposed adoption and stated that breeding facilities in a zone that achieve TC 1 or TC 2 status should be allowed to move deer outside the zone. The department disagrees with the comment and responds that with respect to a CZ, the rules do not allow the unnatural movement of deer in or out of the CZ, which is necessary because a CZ is the area where CWD has been discovered and detection of CWD elsewhere in the CZ is probable and could be spread, especially via unnatural deer movements. With respect to an SZ, the rules in fact do allow TC 1 breeding facilities to move deer into and out of the SZ, but prohibit TC 2 facilities from moving deer outside of the SZ, which is necessary because TC 2 facilities are facilities that cannot provide sufficient epidemiological proof that CWD is not present within the facility. The department believes that only those facilities that can furnish such proof should be allowed to move deer out of an area that, because of the reasonable expectation that CWD is present, has been designated a SZ. No changes were made as a result of the comment.

One commenter opposed adoption and stated that deer breeding facilities should be shut down and that all points of entry into Texas should be monitored by the department to check for CWD. The department disagrees with the comment and responds that from a disease-management perspective, while the unnatural movement of deer creates an additional risk that must be addressed, the rules as adopted, in combination with the Comprehensive CWD Management rules at Chapter 65, Subchapter B, Division 2 provide safeguards to increase the probability CWD will be detected where it exists and reduce the likelihood CWD will be spread to areas where it does not currently exist without prohibiting all movement of deer. The department also responds that fiscal and workforce realities make the monitoring of all points of entry into the state impossible to achieve. The department further responds that deer breeding is authorized by Parks and Wildlife Code, §43.352(a). No changes were made as a result of the comment.

One commenter opposed adoption and stated that there should be a moratorium on all cervid movement in Texas and 100 percent testing of cervids for 16 years. The department disagrees with the comment and responds that while the unnatural movement of deer creates an additional risk that must be addressed, and while additional testing is beneficial, the rules as adopted are intended to contain CWD where it is discovered; the department's rules at Chapter 65, Subchapter B, Division 2 address testing protocols for deer movement and are not part of this rule-making. No changes were made as a result of the comment.

One commenter opposed adoption and stated that all deer breeding and unnatural movements should be prohibited for at least three years. The department disagrees with the comment

and responds that from a disease-management perspective while the unnatural movement of deer creates an additional risk that must be addressed, the rules as adopted, in combination with the Comprehensive CWD Management rules at Chapter 65, Subchapter B, Division 2 provide safeguards to increase the probability CWD will be detected where it exists and reduce the likelihood CWD will be spread to areas where it does not currently exist without prohibiting all movement of deer. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are unjustified and unwarranted burdens placed on completely unconnected facilities through movement restrictions of live deer authorized under TPWD permits from properties within the proposed zones. The commenter stated that because the rules prohibit a TC 2 deer breeder facility located inside the zone from moving deer outside the zone, the department has implemented an unnecessary and unjust quarantine without cause. The department disagrees with the comment and responds that the rules are warranted and completely justified in light of the threat posed by CWD to free-ranging and captive cervid populations. The rules prevent a TC 2 breeding facility from moving deer outside of a SZ because although a TC 2 breeding facility's CWD testing performance, in conjunction with testing of liberated breeder deer that are ultimately harvested by hunters, is adequate for other parts of the state, this level of testing is insufficient to allow transfer of breeder deer from deer breeding facilities located within a geographic area where the presence of CWD could reasonably be expected. This fact makes it absolutely necessary and completely defensible, from a risk-management standpoint, to prohibit movement from TC 2 facilities within a SZ to points outside the SZ. The department also notes that Chapter 65, Subchapter B, Division 2 provides a pathway for any TC 2 breeding facility to attain TC 1 status, thereby becoming able to move deer anywhere within or beyond a SZ. No changes were made as a result of the comment.

One commenter opposed adoption and stated that "many" TC 2 facilities have been wholly compliant with four different sets of rules and will be negatively impacted by an "artificially created and unjustified CWD zone" and that such facilities should be allowed to move deer outside a SZ. The department agrees with the portion of the comment concerning the compliance of many TC 2 breeding facilities. The department disagrees that there have been four different sets of rules governing deer breeders in CWD zones or that the effect of the rules on deer breeders is the result of carelessness or recklessness on the part of the department. On the contrary, the department has been extraordinarily inclusive in the development of all regulations that might affect deer breeders. The department also disagrees, for reasons stated numerous times elsewhere in this preamble, that TC 2 breeding facilities within a SZ should be allowed to move deer outside the SZ. No changes were made as a result of the comment. The department also disagrees with the comment regarding "artificially created and unjustified CWD zones" and responds that the delineation of the zones imposed by the rules is based on the location where CWD-positive deer have been detected, the biology of white-tailed and mule deer, the nature and characteristics of CWD, and the need for easily recognizable boundaries for hunters and other deer managers to identify.

Four commenters opposed adoption and stated that the only breeding facilities that should be prevented from moving deer are those facilities that are directly connected to index facilities, a disease management approach has been largely effective in finding CWD throughout the state. The commenters also stated

that the epidemiological trace-in and trace-out model utilized by the Texas Animal Health Commission should be the only tool for restricting movement of compliant breeding facilities. The department disagrees with the comments and responds that *any* connection to an index facility, in the absence of statistically valid test results indicating that CWD is not present, is a potential pathway for disease transmission. The assertion that a disease-management approach limited only to deer received directly from an index facility has ever been employed in this state is false. The department also notes that rules regarding unnatural movement of deer *are* predicated on connectivity to index facilities (the same data used by TAHC) and the ability of any given facility to provide statistical confidence that CWD is not present in the facility. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that the rules determine winners and losers in the Texas deer industry. The department disagrees with the comments and responds that the rules as adopted are not for the purpose of creating "winners and losers" but are based on epidemiological risk. The department acknowledges that some areas and facilities pose a great risk and are thus subject to additional requirements. No changes were made as a result of the comments.

#### Economic Impacts

Three commenters opposed adoption and stated that rules constituted a severe and unprecedented restriction on commerce. The department disagrees with the comment and responds that the rules as adopted are not for the purpose of regulating commercial activity. As noted in the proposal preamble, the department acknowledges that the rules may have an economic impact on persons required to comply. The department also disagrees that the rules are unprecedented, as they were originally promulgated in 2013 and are being amended by this rulemaking. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that the rules create "commercial restraints to ranches in the designated CWD zones based on geographical proximity to a CWD positive, not actually direct connection to the index facilities, which is subjective." The department disagrees with the comment and responds that the rules as adopted are not for the purpose of regulating commercial activity. As noted in the proposal preamble, the department acknowledges that the rules may have an economic impact on persons required to comply. The department also notes that as a matter of epidemiology, deer populations in proximal contact with other deer populations containing a diseased animal are at an increased risk of being exposed to disease; therefore, all populations (both captive and free-ranging) that potentially could come into contact with a diseased deer or environmental contamination as a result of normal natural deer movement are at higher risk. On that basis the rules prohibit TC 2 breeding facilities from moving deer beyond the SZ where the facility is located. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will cause economic hardship. The department disagrees with the comment and responds that if the comment is referring to marketplace behavior associated with unnatural deer movement within a CZ or SZ, it is difficult, if not impossible, to accurately separate and distinguish marketplace behavior that is the result of the rules from marketplace behavior that is the result of the discovery of CWD. As noted previously, human dimensions research indicating that hunters will avoid areas of high CWD prevalence is cause for concern as well. Rather than create

an economic hardship, the rules as adopted, by enhancing detection and containment of CWD, are necessary to protect the state's multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules increase the cost of doing business and then add yet another burden to deer breeders in an attempt to put them out of business. The department disagrees that the rules are intended to be punitive or otherwise harm deer breeders. The department also disagrees that the rules impose any provision that increases the cost of doing business for deer breeders. The rules as adopted are intended solely to contain CWD where it is discovered and prevent the spread of CWD to areas in which it does not currently exist. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will cause financial devastation for deer breeders. The department disagrees with the comment and responds that in the cases in which a breeding facility is located within a CZ (and therefore prohibited from moving deer into or outside of the CZ) or is a TC 2 breeding facility within a SZ (prohibited from moving deer outside the SZ) there could be a financial impact; however, all breeding facilities may upgrade to TC 1 status through increased CWD testing and TC 1 breeding facilities located within a CZ may release deer to a contiguous release site where hunts could be sold. Moreover, the geographical extent of the CZs and surrounding SZs may be reduced in the future if warranted based on the department's CWD surveillance efforts. TC 1 breeding facility located within a SZ may receive or transfer breeder to any breeding facility not located within a CZ and may release breeder deer on any approved release sites in this state not located within a CZ. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that the rules will have an extreme negative impact on real estate values because the designation of CWD zones will create a stigma, which is both unwarranted and unnecessary. The commenters also stated that a ranch in Medina County would effectively be worth less this year than last year under the rules, simply due to the unprecedented and ad-hoc response by the department. While the department agrees that the demand for properties in areas where CWD has been discovered is likely to be less than the demand in the same area had CWD not been discovered, the presence of reasonable, efficacious, science-based rules that help to identify and exclude uninfected populations as well as prevent the spread of CWD is likely to provide some assurance to prospective buyers and sellers that a given property does not harbor CWD. The department also notes that as explained previously in this preamble, the rules are neither unwarranted nor unprecedented, although because they are intended for a specific purpose they are ad hoc by definition. No changes were made as a result of the comments.

#### Perceived Emergency

One commenter opposed adoption and stated that the department is treating CWD as if it were an emergency when it is not because Texas has too many deer and CWD will never cause a decline in the population of wild deer. The department disagrees with the comments and responds that if the commenter intends to suggest that the rules are unnecessary, the department disagrees and notes that CWD is a communicable, fatal disease that has the potential to profoundly alter the dynamics of deer hunting and deer management in Texas. Because there is no question that CWD exists in captive and free-ranging cervid pop-

ulations in Texas and has been spread by the movement of captive cervids in Texas, there continues to be an immediate danger to Texas deer populations that warrants regulatory action by the department. The department further responds that in some states where CWD has been allowed to proliferate and spread, significant population declines have occurred. The department also notes that the rules are not being adopted pursuant to emergency rulemaking authority. No changes were made as a result of the comment.

#### Constitutional and Landowner Rights

One commenter opposed adoption and stated that the rules are a violation of the constitutional rights of landowners and businessmen. The department disagrees with the comment and responds that the rules as adopted do not impact any constitutionally protected right of landowners or businessmen, but regulate the possession and movement of species that the department is required to protect and regulate. The rules, as adopted are the minimum necessary to allow the department to determine the extent and combat the spread of CWD. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules infringe on private property rights. The department disagrees with the comment and responds that the rules as adopted do not affect the private property rights of any individual landowner. No changes were made as a result of the comment.

#### Science

One commenter opposed adoption and stated that the rules are nonsensical and out of proportion to the threat that CWD actually poses. The department disagrees with the comment and responds that in most states where CWD has been detected in free-ranging deer, if not contained, its prevalence has increased over time, and in some cases is exerting measurable negative impacts on deer populations and hunting behaviors. The long-term results of CWD are pernicious, because prions (the infectious agent) remain viable in the environment long after a host organism has died, which potentially exposes new animals to the infectious agent even after the infected animal has expired. In addition, human dimensions research indicating that hunters will avoid areas of high CWD prevalence is cause for concern as well. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD has not killed a single deer in Texas. The department disagrees with the commenter and responds that although the deer in Texas that tested positive for CWD died from a cause other than CWD, the science evidence clearly establishes that CWD is a fatal disease and does result in mortalities. In addition, it should also be noted that CWD is an additional mortality factor in deer populations; data indicate that mortality rates can surpass fawn recruitment in local populations with high CWD prevalence. Studies have found that CWD-positive deer were much more likely to die as compared to their uninfected counterparts. (See, e.g., Edmunds 2013). While CWD-positive deer in the studies that did survive to the clinical stages of the disease did eventually succumb to CWD, preclinical CWD-positive animals were also shown to be more vulnerable to other mortality factors such as predation, hunter harvest, and vehicle collisions. This additive mortality can result in declining population trends. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department has no science to back up its belief. The department disagrees with the comment and responds that the delineation of

the zones imposed by the rules and the movement restrictions for live and dead deer are based on the biology of white-tailed and mule deer, the nature and characteristics of CWD, and the undisputable fact that unnatural deer movement is a very effective method for spreading infectious disease. No changes were made as a result of the comment.

#### Governmental Overreach/Authority

Two commenters opposed adoption and stated that the rules were an overreach. The department disagrees with the comment and responds that the rules as adopted are a scientifically valid, epidemiologically efficacious response to the discovery of CWD in both free-ranging and captive cervid populations in the immediate locations where the discoveries occurred. In addition, the rules' requirements are based on the risk of exposure to and spread of CWD and the need for surveillance as part of the department's effort to ensure that the rules were not, in fact, broader than necessary. No changes were made as a result of the comment. One commenter opposed adoption and stated that anyone at the department is not qualified to "make law on CWD." The department disagrees with the comment and responds that the department possesses the statutory authority to regulate the possession of native cervids and has relied upon the expertise of numerous specialists and experts to develop an effective regulatory response to the emergence of CWD in Texas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department has overstepped its boundaries. The department disagrees with the comment and responds that under the Parks and Wildlife Code, the department has the statutory authority to regulate the possession and take of native cervids. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department does not own the deer. The department agrees with the comment and responds that under Parks and Wildlife Code, Chapter 1, all white-tailed and mule deer in the state of Texas are the property of the people of the state of Texas. No changes were made as a result of the comments.

#### Carcass Movement Restrictions

One commenter opposed adoption and stated that the rules should allow for the movement of venison from Surveillance Zones to major cities for processing, the movement of skulls to taxidermists, and prohibit the take of predators in order to allow diseased deer to be eliminated by nature. The department agrees with a portion of the comment and responds that the rules in fact do allow for the movement of venison from Surveillance Zones to major cities for processing and the movement of skulls to taxidermists. The department disagrees that it is necessary to prohibit the take of predators within a CZ or SZ, simply because the suppressive effects of predation on CWD transmission are believed to be negligible, particularly where host populations exist at low densities, such as in far west Texas and the Panhandle. No changes were made as a result of the comment.

#### Testing of Hunter-Harvested Deer

Four commenters opposed adoption and stated that mandatory testing in SZs and CZs, creates logistical problems in remote areas and that the department should establish additional check stations. The department agrees with the comments and responds that although the establishment of specific check stations is not set forth in the rules, the department intends to establish

a sufficient number of check stations so as not to inconvenience hunters and landowners, especially during peak hunting times in those areas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are onerous to hunters and should allow the storage of harvested deer until a convenient time for testing. The department disagrees that the rules are onerous and responds that because of the threat that CWD poses it is imperative to obtain a sufficient number of valid samples as quickly as possible for testing. The department believes that it is reasonable to require harvested deer to be presented at a check station within 24 hours of take in most cases. However, the department will allow some deer to be brought to check stations exceeding the 24-hour requirement with authorization by department personnel. As noted in response to other comments, the department is committed to working with landowners to enhance convenience to the extent possible, including the establishment of additional check stations during peak hunting times. No changes were made as a result of the comment.

One commenter opposed adoption and stated that landowners should be able to call the department so that department representatives could take samples at the location where deer have been taken. The department agrees with the comment and responds that although fiscal and workforce constraints make it impossible for the department to collect samples on an on-call basis for all hunter-harvested deer, the department will attempt to accommodate such requests when possible. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should train landowners and land managers to take samples. The department agrees with the comment and responds that the department and TAHC are training non-governmental representatives to become certified sample collectors. No changes were made as a result of the comment.

One commenter opposed adoption and stated that testing for the first year should be voluntary in SZs and CZs, allowing landowners to understand the process. The department disagrees with the comment and responds that the rules allow the department, when circumstances warrant, to designate mandatory check stations in CZs and SZs. In those instances where mandatory check stations are designated, it is because the department has determined that CWD is or might be present; thus, it becomes imperative to collect as many samples as possible as quickly as possible to determine the absence, presence, and prevalence of the disease in order to inform further disease management actions. However, the department is committed to assisting landowners in understanding the process via various informational tools, including public meetings, literature, and information on the department's website. No changes were made as a result of the comment.

One commenter opposed adoption and stated that testing should be mandatory but landowners should receive a written statement from all government agencies involved stating that no action would be taken against any low fenced area where a positive CWD test occurred in the 2016/2017 hunting season. The department disagrees with the comment and responds that future actions that may or may not be taken by the department in response to the discovery of CWD would be addressed on a case-by-case basis according to the circumstances and the dictates of epidemiological science. However, the department will continue to make information available to landowners and the public via the department's web site ([www.tpwd.texas.gov](http://www.tpwd.texas.gov)), in-

cluding Frequently Asked Questions to address this and other concerns posed by hunters and landowners. No changes were made as a result of the comment.

#### Miscellaneous

One commenter opposed adoption and stated that CWD isn't a problem but the rules will cause a decline in license sales and hunting opportunity. The department disagrees with the comment and responds that because the rules affect an exceedingly small portion of the state, much of which is located in remote areas, there is no reason to expect that measurable impacts to either license sales or hunting opportunity will occur. The department further notes that the rules are designed to contain CWD where it is discovered, which is intended to protect the wildlife populations that license revenue and hunting opportunity are dependent upon. Significant revenue loss and economic harm could result if CWD is not contained and managed. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the zones are artificially mandated. If the commenter means that the rules are not valid or were not validly promulgated, the department disagrees with the comment and responds that the rules were promulgated in compliance with all applicable statutes. If the commenter means that the rules are arbitrary, the department again disagrees and responds that the rules as adopted are a scientifically valid, epidemiologically efficacious response to the discovery of CWD in both free-ranging and captive cervid populations in the immediate locations where the discoveries occurred. If the commenter is referring to the geographic extent of the zones, the department notes that the zones, which for purposes of compliance and enforcement must have boundaries that are easily identified and understood, were narrowly drawn based on the location where CWD-positive deer were reported, the biology and normal range of white-tailed and mule deer, and the nature and characteristics of CWD. It should also be noted, that the rules as adopted actually shrinks the geographical extent of the CZ in far west Texas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are complicated and hard to understand. The department disagrees with the comment and responds that the rules establish geographical zones and clearly delineate what activities may and may not take place within those zones, as well as clearly specifying the circumstance under which susceptible species may be transported. To the greatest extent possible, the rules, as adopted, avoid complexity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the penalties for violation should be increased. The department disagrees with the comment and responds that the penalties for violations of the rules are established by statute and cannot be increased by the commission. No changes were made as a result of the comment.

One commenter opposed adoption and stated that all deer should be tested for CWD. While the department agrees that additional testing is beneficial, the department disagrees with the comment and responds that the testing of all deer is impossible; however, the rules do allow the department to require all deer harvested in a CZ or SZ to be presented at a check station for testing. No changes were made as a result of the comment.

One commenter opposed adoption and stated that there has to be a better way to communicate the rules. The department neither agrees nor disagrees with the comment and responds that

the department has made, is making, and will continue to make every effort to make the public aware of department efforts to detect and contain CWD. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that the rules do not articulate what will happen if a positive result for CWD occurs within a CZ or SZ. The department agrees with the comment and responds that the rules are a mechanism for responding to the detection of CWD; they provide for the creation of geographical zones and provide for various actions that may be taken within those zones, but do not address future actions that may or may not be taken by the department in response to the discovery of CWD, which the department by design intends to address on a case-by-case basis according to the circumstances and the dictates of epidemiological science. However, the department will continue to make information available to landowners and the public via literature and the department's web site ([www.tpwd.texas.gov](http://www.tpwd.texas.gov)), including Frequently Asked Questions to address this and other concerns posed by hunters and landowners. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that any restrictions or testing requirements of deer inside an 8-foot fence should be the same as the deer outside any fence. The department disagrees that the comment is germane to the rules being adopted, as the only testing requirements imposed by the rules are on deer that are harvested by hunters in a CZ or SZ in which mandatory check stations have been established. No changes were made as a result of the comments.

#### **31 TAC §§65.80 - 65.82, 65.84, 65.85, 65.88, 65.89**

The amendments and new rules are adopted under the authority of Parks and Wildlife Code, Chapter 43, Subchapter C, which requires the commission to adopt rules to govern the collecting, holding, possession, propagation, release, display, or transport of protected wildlife for scientific research, educational display, zoological collection, or rehabilitation; Subchapter E, which requires the commission to adopt rules for the trapping, transporting, and transplanting of game animals and game birds, urban white-tailed deer removal, and trapping and transporting surplus white-tailed deer; Subchapter L, which authorizes the commission to make regulations governing the possession of breeder deer held under the authority of the subchapter; Subchapter R, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that white-tailed deer may be temporarily detained in an enclosure; Subchapter R-1, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that mule deer may be temporarily detained in an enclosure (although as noted previously, the department has not yet established the DMP program for mule deer authorized by Subchapter R-1); and §61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

#### *§65.82. Surveillance Zones; Restrictions.*

The areas described in paragraph (1) of this section are SZs.

##### (1) Surveillance Zones.

(A) Surveillance Zone 1: That portion of the state lying within a line beginning where U.S. 285 enters from the State of New Mexico in Reeves County; thence southeast along U.S. 285 to R.M. 652; thence west along R.M. 652 to Rustler Springs Rd./FM 3541 in Culberson County; thence south along Rustler Springs Rd./F.M. 3541

to F.M. 2185; thence south along F.M. 2185 to Nevel Road; thence west along Nevel Road to County Road 501; thence south along County Road 501 to Weatherby Road; thence south along Weatherby Road to F.M. 2185; thence southwest along to F.M. 2185 to S.H. 54; thence south on S.H. 54 to U.S. 90; thence south along U.S. 90 to the Culberson County line; thence southwest along the Culberson County line to the Rio Grande River in Hudspeth County; thence north along the Rio Grande to F.M. 1088; thence northeast along F.M. 1088 to S.H. 20; thence southeast along S.H. 20 to I.H. 10; thence southeast along I.H. 10 to F.M. 1111; thence north on F.M. 1111 to U.S. 62/180; thence east and north along U.S. 62/180 to the New Mexico state line in Culberson County.

(B) Surveillance Zone 2. That portion of the state lying within a line beginning at the New Mexico state line where U.S. 60 enters Texas; thence northeast along U.S. 60 to U.S. 87 in Randall County; thence north along U.S. 87 to I.H. 27; thence north along U.S. 87/I.H. 27 to U.S. 287 in Moore County; thence north along US 287 to the Oklahoma state line.

(C) Surveillance Zone 3. That portion of the state lying within a line beginning at U. S. 90 in Hondo in Medina County; thence west along U.S. Highway 90 to F.M. 187 in Uvalde County; thence north along F.M. 187 to F. M. 470 in Bandera County; thence east along F.M. 470 to Tarpley in Bandera County; thence south along F.M. 462 to U.S. 90 in Hondo.

(D) Existing SZs may be modified and additional SZs may be designated as necessary by the executive director as provided in §65.84 of this title (relating to Powers and Duties of the Executive Director).

(2) Restrictions.

(A) Except as provided in §65.87 of this title (relating to Exception) and subparagraph (B) of this paragraph, no person within a SZ may conduct, authorize or cause any activity involving the movement of a susceptible species, into, out of, or within a SZ under a permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter C, E, L, R, or R-1. Such prohibited activity, includes, but is not limited to transportation, introduction, removal, authorizing the transportation, introduction or removal, or causing the transportation, introduction or removal of a live susceptible species into, out of, or within a SZ.

(B) Breeder Deer.

(i) Except as provided in Division 2 of this subchapter, a breeding facility that is within a SZ and designated as a:

(I) TC 1 breeding facility may:

(-a-) transfer to or receive breeder deer from any other deer breeding facility in this state; and

(-b-) transfer breeder deer in this state for purposes of liberation, including to release sites within the SZ.

(II) TC 2 breeding facility:

(-a-) may receive deer from any facility in the state that is authorized to transfer deer;

(-b-) may transfer deer to a breeding facility or release site that is within the same SZ; and

(-c-) is prohibited from transferring deer to any facility outside of the SZ.

(ii) Deer that escape from a breeding facility within a SZ may not be recaptured unless specifically authorized under a hold order or herd plan issued by the Texas Animal Health Commission.

(C) Permits to Transplant Game Animals and Game Birds (Triple T permit). The department may authorize the release of

susceptible species in a SZ under the provisions of a Triple T permit issued by the department under the authority of Parks and Wildlife Code, Chapter 43, Subchapter E and the provisions of Subchapter C of this chapter, but the department will not authorize the trapping of deer within a SZ for purposes of a Triple T permit.

(D) Deer Management Permit (DMP). The department may issue a DMP for a facility in a SZ; however, any breeder deer introduced to a DMP facility must be released and may not be transferred to any deer breeding facility.

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

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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



**31 TAC §65.83, §65.88**

The repeals are adopted under the authority of Parks and Wildlife Code, Chapter 43, Subchapter C, which requires the commission to adopt rules to govern the collecting, holding, possession, propagation, release, display, or transport of protected wildlife for scientific research, educational display, zoological collection, or rehabilitation; Subchapter E, which requires the commission to adopt rules for the trapping, transporting, and transplanting of game animals and game birds, urban white-tailed deer removal, and trapping and transporting surplus white-tailed deer; Subchapter L, which authorizes the commission to make regulations governing the possession of breeder deer held under the authority of the subchapter; Subchapter R, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that white-tailed deer may be temporarily detained in an enclosure; Subchapter R-1, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that mule deer may be temporarily detained in an enclosure (although as noted previously, the department has not yet established the DMP program for mule deer authorized by Subchapter R-1); and §61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

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

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## TITLE 37. PUBLIC SAFETY AND CORRECTIONS

### PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

#### CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

##### SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY

###### 37 TAC §4.12

The Texas Department of Public Safety (the department) adopts amendments to §4.12, concerning Exemptions and Exceptions. This section is adopted without changes to the proposed text as published in the August 5, 2016 issue of the *Texas Register* (41 TexReg 5709) and will not be republished.

These amendments are necessary to ensure this section is consistent with interstate hours of service rules promulgated under federal statute in 49 CFR Part 395.

No comments were received regarding the adoption of these amendments.

The amendment is adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

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

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General Counsel  
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## TITLE 40. SOCIAL SERVICES AND ASSISTANCE

## PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

### CHAPTER 9. INTELLECTUAL DISABILITY SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

#### SUBCHAPTER E. INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH AN INTELLECTUAL DISABILITY OR RELATED CONDITIONS (ICF/IID) PROGRAM--CONTRACTING DIVISION 4. PROVIDER SERVICE REQUIREMENTS

##### 40 TAC §9.230

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), new §9.230, in Subchapter E, Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICF/IID) Program--Contracting, Chapter 9, Intellectual Disability Services--Medicaid State Operating Agency Responsibilities. The section is adopted without changes to the proposed text as published in the July 8, 2016, issue of the *Texas Register* (41 TexReg 4998), and will not be republished.

The new section is adopted to implement recommendations in the Sunset Advisory Commission's July 2015 report regarding "day habilitation facilities" in the ICF/IID Program. Specifically, the Sunset Advisory Commission recommended that an ICF/IID program provider, to help ensure the safety of individuals enrolled in the ICF/IID Program, include in a contract with a day habilitation facility requirements to conduct background checks on employees and volunteers, to have an emergency response plan, to conduct fire drills, to post abuse hotline information, and to follow an individual's service plan. The adopted rule states that it does not apply to an ICF/IID program provider that operates a campus-based facility, which means it does not apply to a state supported living center or the ICF/IID component of the Rio Grande State Center. In addition, the adopted rule defines and uses the term "day habilitation center" instead of "day habilitation facility" because that is the term currently used by ICF/IID program providers for these settings.

The adopted rule also requires an ICF/IID program provider that directly operates a day habilitation center to conduct fire drills, post abuse hotline information, and have an emergency preparedness and response plan. An ICF/IID program provider is required by other rules to conduct background checks on its own employees and to provide active treatment in accordance with an individual's individual program plan, so those requirements are not included in the adopted rule.

DADS received written comments from The Arc of Texas and Disability Rights Texas. A summary of the comments and the responses follows.

Comment: A commenter is concerned that the posted notice required in §9.230(c)(2) may not be accessible to all individuals, including an individual who is blind or needs visual supports to read, an individual whose first language is not English, and an individual who can read the posted notice but may not understand

the meaning of abuse, neglect, and exploitation and how to report it. The commenter suggested that these rules encourage day habilitation providers to ensure that individuals they serve know when the notices are posted; understand what the postings say; and are educated about abuse, neglect, and exploitation, and how to file a complaint.

Response: Code of Federal Regulations (CFR), Title 42, §483.420(a)(1) requires an ICF/IID program provider to inform each individual or legally authorized representative of the individual's rights, including the right to be free from abuse, neglect, and exploitation. Code of Federal Regulations, Title 42, §483.420(a)(3) requires an ICF/IID to allow and encourage individuals to exercise their rights, including the right to file complaints. Therefore, an individual should be informed of the information by the individual's program provider. No changes were made in response to the comment.

Comment: A commenter requested that day habilitation providers and their employees be required to receive training on the reporting of abuse, neglect, and exploitation, and that such training be documented.

Response: Code of Federal Regulations, Title 42, §483.410(d)(2)(ii) requires an ICF/IID program provider to assure that services provided under agreement with an outside source meet the federal ICF/IID standards. If DADS determines that staff at a day habilitation center do not know how to report abuse, neglect, and exploitation, DADS would cite the program provider under 42 CFR §483.410(d)(3) for not ensuring outside services meet the needs of each individual, including the individual's need to be free from abuse, neglect, and exploitation. No changes were made in response to the comment.

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

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Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

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For further information, please call: (361) 334-6105

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## CHAPTER 15. LICENSING STANDARDS FOR PRESCRIBED PEDIATRIC EXTENDED CARE CENTERS

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§15.1, 15.5, 15.501, 15.1101, and 15.1302; and new §15.123, in Chapter 15, Licensing Standards for Prescribed Pediatric Extended Care Centers, without changes to the proposed text as published in the July 8, 2016, issue of the *Texas Register* (41 TexReg 5001).

The amendments and new section are adopted to implement House Bill (H.B.) 2340, 84th Legislature, Regular Session, 2015, which amended Texas Health and Safety Code (THSC), Chapter 248A, governing prescribed pediatric extended care centers (PPECCs). The adoption allows an applicant for a license to operate a PPECC to obtain a temporary license. DADS grants a temporary license if an applicant meets the requirements of a Life Safety Code inspection and DADS approves the applicant's written policies and procedures. With a temporary license, a PPECC may admit up to six minors before requesting an initial on-site health inspection. A temporary license expires 90 days after the date the license is granted unless DADS grants a one-time 90-day extension. The adoption also implements amendments made by H.B. 2340 to THSC §248A.051, clarifying that an applicant for a PPECC license may not provide services until DADS issues a license, and THSC §248A.151, providing that a parent is not required to accompany a minor during the provision of services or during transportation of a minor to and from the PPECC. The adoption also adds a definition of "license" and corrects a statutory reference related to the investigation of abuse, neglect, and exploitation in a PPECC.

DADS received no comments regarding adoption of the amendments and new section.

### SUBCHAPTER A. PURPOSE, SCOPE, LIMITATIONS, COMPLIANCE, AND DEFINITIONS

#### 40 TAC §15.1, §15.5

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §248A.101, which provides that the HHSC executive commissioner shall adopt rules that are necessary to implement the chapter and to establish minimum standards for prescribed pediatric extended care centers.

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

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## SUBCHAPTER B. LICENSING APPLICATION, MAINTENANCE, AND FEES

### 40 TAC §15.123

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §248A.101, which provides that the HHSC executive commissioner shall adopt rules that are necessary to implement the chapter and to establish minimum standards for prescribed pediatric extended care centers.

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

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## SUBCHAPTER C. GENERAL PROVISIONS DIVISION 4. GENERAL SERVICES

### 40 TAC §15.501

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §248A.101, which provides that the HHSC executive commissioner shall adopt rules that are necessary to implement the chapter and to establish minimum standards for prescribed pediatric extended care centers.

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

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## SUBCHAPTER D. TRANSPORTATION

### 40 TAC §15.1101

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §248A.101, which provides that the HHSC executive commissioner shall adopt rules that are necessary to implement the chapter and to establish minimum standards for prescribed pediatric extended care centers.

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

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## SUBCHAPTER F. INSPECTIONS AND VISITS 40 TAC §15.1302

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §248A.101, which provides that the HHSC executive commissioner shall adopt rules that are necessary to implement the chapter and to establish minimum standards for prescribed pediatric extended care centers.

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

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## CHAPTER 18. NURSING FACILITY ADMINISTRATORS

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), amendments to §18.2 and §18.35, and new §18.42, in Chapter 18, Nursing Facility Administrators, without changes to the proposed text as published in the July 8, 2016, issue of the *Texas Register* (41 TexReg 5009).

The amendments and new section are adopted to implement Senate Bill (S.B.) 807 and S.B. 1307, 84th Legislature, Regular Session, 2015, which amended Texas Occupations Code, Chapter 55, Licensing of Military Service Members, Military Veterans, and Military Spouses. The adoption addresses several areas that relate to licensure of military service members, military veterans, and military spouses. First, the adoption describes the process that a license applicant who is a military service member or a military veteran must follow to request a waiver of the application and initial license fees. Second, the adoption describes the process that a license applicant or a nursing facility administrator who is a military service member, a military veteran, or a military spouse, and who holds a license in good standing in another jurisdiction must follow to request a waiver of the application and initial license fees. Third, the adoption describes the process that a nursing facility administrator who is a military service member must follow to request two additional years to complete license renewal requirements. Fourth, the adoption describes the process that a license applicant must follow to request credit based on military service, training, or education toward the internship requirements for an administrator-in-training. Finally, the adoption describes the process a former administrator who is a military service member, a military veteran, or a military spouse must follow to request renewal of an expired license. The adoption adds definitions related to the military provisions and replaces several defined terms with acronyms. The adoption also deletes a provision related to a military member having additional time to meet continuing education requirements for license renewal because the information is included in new §18.42.

DADS received no comments regarding adoption of the amendments and new section.

### SUBCHAPTER A. GENERAL INFORMATION

#### 40 TAC §18.2

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Health and Safety Code, Chapter 242, which authorizes the executive commissioner to adopt rules regarding the licensing of nursing facility

administrators; Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; and Texas Occupations Code, Chapter 55, which requires a state agency to adopt rules related to licensure of military service members, military veterans, and military spouses.

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

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## SUBCHAPTER C. LICENSES

#### 40 TAC §18.35, §18.42

The amendment and new section are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Health and Safety Code, Chapter 242, which authorizes the executive commissioner to adopt rules regarding the licensing of nursing facility administrators; Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; and Texas Occupations Code, Chapter 55, which requires a state agency to adopt rules related to licensure of military service members, military veterans, and military spouses.

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

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General Counsel  
Department of Aging and Disability Services  
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For further information, please call: (512) 438-4836



## CHAPTER 49. CONTRACTING FOR COMMUNITY SERVICES

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §49.102, in Subchapter A, Application and Definitions; and §49.205, in Subchapter B, Contractor Enrollment; and new §49.313, in Subchapter C, Requirements of a Contractor, in Chapter 49, Contracting for Community Services. The amendment to §49.205 is adopted with changes to the proposed text published in the July 8, 2016, issue of the *Texas Register* (41 TexReg 5015). The amendment to §49.102 and new §49.313 are adopted without changes to the proposed text.

The adoption implements recommendations in the Sunset Advisory Commission's July 2015 report regarding "day habilitation facilities" in the Home and Community-based Services (HCS) Program, Texas Home Living (TxHmL) Program, Deaf-Blind with Multiple Disabilities (DBMD) Program, and Community Living Assistance and Support Services (CLASS) Program. Specifically, the Sunset Advisory Commission recommended that an HCS, TxHmL, DBMD, or CLASS provider, to help ensure the safety of individuals enrolled in those programs, include in a contract with a day habilitation facility requirements to conduct background checks on employees and volunteers, have an emergency response plan, conduct fire drills, post abuse hotline information, and follow an individual's service plan. The adoption does not use the term "day habilitation facility," but instead refers to a contractor or subcontractor that provides day habilitation in the HCS Program, the TxHmL Program, or the DBMD Program, or that provides prevocational services in the CLASS Program.

The adoption also requires a contractor of HCS, TxHmL, DBMD, or CLASS Program services that directly provides day habilitation or prevocational services to have an emergency response plan, conduct fire drills, and post abuse hotline information. These requirements ensure consistency with the requirements of subcontractors.

The adoption also implements Senate Bill (S.B.) 1999, 84th Texas Legislature, Regular Session, 2015, which amended the Texas Human Resources Code, Chapter 103, to change "adult day care" to "day activity and health services." Also, in accordance with DADS current policy and S.B. 202, 84th Texas Legislature, Regular Session, 2015, which repealed Texas Health and Safety Code, Chapter 781 regarding personal emergency response systems, the adoption deletes the requirement for a contractor that provides Title XX emergency response services to have a license as a personal emergency response system provider issued by the Department of State Health Services or a license as an alarm systems company issued by the Texas Private Security Board.

Changes were made in §49.205(a)(15) to use "DAHS," the acronym for "day activity and health services," and to correct the title of Chapter 98.

DADS received written comments from The Arc of Texas and Disability Rights Texas. A summary of the comments and the responses follows.

Comment: A commenter is concerned that the posted notice required in §49.313(a)(1)(B) and (b)(3), may not be accessible to all individuals, including an individual who is blind or needs visual supports to read, an individual whose first language is not English, and an individual who can read the posted notice but may not understand the meaning of abuse, neglect, and exploitation and how to report it. The commenter suggested that these rules encourage day habilitation and prevocational providers to

ensure that individuals they serve know when the notices are posted; understand what the postings say; and are educated about abuse, neglect, and exploitation, and how to file a complaint.

Response: Section 49.310(4) requires a contractor that has a contract for the HCS Program, the TxHmL Program, the CLASS Program, or the DBMD Program to ensure that an individual and legally authorized representative are informed, orally and in writing, of how to report an allegation of abuse, neglect, or exploitation before or at the time the individual begins receiving program services from the contractor and at least once every 12 months thereafter. Section 49.308 requires a contractor to ensure that subcontractors comply with the requirements in Chapter 49. No changes were made in response to the comment.

Comment: A commenter requested that day habilitation providers and their employees be required to receive training on the reporting of abuse, neglect, and exploitation, and that such training be documented.

Response: Section 49.310(3) requires a contractor to ensure its employees, subcontractors, and volunteers are knowledgeable of requirements regarding abuse, neglect, or exploitation. Section 49.305(f)(5) requires a contractor to develop and maintain records regarding training of an employee, subcontractor or volunteer required by the rules and §49.308 requires a contractor to ensure that subcontractors comply with the requirements in Chapter 49. No changes were made in response to the comment.

## SUBCHAPTER A. APPLICATION AND DEFINITIONS

### 40 TAC §49.102

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

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## SUBCHAPTER B. CONTRACTOR ENROLLMENT

### 40 TAC §49.205

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

*§49.205. License, Certification, Accreditation, and Other Requirements.*

(a) To be a contractor, an applicant must have a license, certification, accreditation, or other document as follows:

(1) CLASS-CFS and CLASS-SFS require:

(A) a permit to operate a child-placing agency issued by DFPS in accordance with Chapter 745 of this title (relating to Licensing); or

(B) a HCSSA license issued by DADS in accordance with Chapter 97 of this title (relating to Licensing Standards for Home and Community Support Services Agencies) with:

(i) the licensed home health services (LHHS) category; or

(ii) the licensed and certified home health services (L&CHHS) category;

(2) CLASS-DSA requires a HCSSA license issued by DADS in accordance with Chapter 97 of this title with:

(A) the LHHS category; or

(B) the L&CHHS category;

(3) DBMD requires:

(A) a HCSSA license issued by DADS in accordance with Chapter 97 of this title with:

(i) the LHHS category; or

(ii) the L&CHHS category; and

(B) for a contractor that provides residential services to four to six individuals, an assisted living facility license Type A or Type B issued by DADS in accordance with Chapter 92 of this title (relating to Licensing Standards for Assisted Living Facilities);

(4) MDCP-AA requires, for a contractor that provides vehicle modification services, a copy of a current contractual agreement with the Department of Assistive and Rehabilitative Services (DARS) to provide vehicle modification services;

(5) MDCP-HCSSA requires a HCSSA license issued by DADS in accordance with Chapter 97 of this title with:

(A) the personal assistance services (PAS) category;

(B) the LHHS category; or

(C) the L&CHHS category;

(6) MDCP-OHR-camp requires written accreditation by the American Camping Association for providing summer camp services;

(7) MDCP-OHR-special care facility requires a special care facility license issued by the Department of State Health Services (DSHS) in accordance with 25 TAC Chapter 125 (relating to Special Care Facilities);

(8) MDCP-OHR-child care facility requires a child-care center license issued by DFPS in accordance with Chapter 745 of this title;

(9) MDCP-OHR-NF requires a nursing facility license issued by DADS in accordance with Chapter 19 of this title (relating to Nursing Facility Requirements for Licensure and Medicaid Certification);

(10) MDCP-OHR-hospital requires a hospital license issued by DSHS in accordance with 25 TAC Chapter 133 (relating to Hospital Licensing);

(11) MDCP-OHR-host family requires a foster family home license issued by DFPS in accordance with Chapter 745 of this title or verification as a child-placing agency foster family home issued by a child placing agency in accordance with Chapter 749 of this title (relating to Minimum Standards for Child-Placing Agencies);

(12) TAS requires:

(A) written documentation from DARS or the Rehabilitation Services Administration that the applicant is a center for independent living, as defined by 29 United States Code §796a;

(B) a contract other than the TAS contract; or

(C) written designation by DADS as an area agency on aging;

(13) Medicaid hospice requires:

(A) a HCSSA license for hospice issued by DADS in accordance with Chapter 97 of this title; and

(B) a written notification from the Centers for Medicare and Medicaid Services that the applicant is certified to participate as a hospice agency in the Medicare Program;

(14) PHC/CAS, and FC require a HCSSA license issued by DADS in accordance with Chapter 97 of this title with:

(A) the LHHS category;

(B) the L&CHHS category; or

(C) the PAS category;

(15) DAHS requires a DAHS facility license issued by DADS in accordance with Chapter 98 of this title (relating to Day Activity and Health Services);

(16) Title XX AFC requires for an AFC facility serving four to eight individuals, an assisted living facility license Type A or Type B issued by DADS in accordance with Chapter 92 of this title; and

(17) Title XX RC requires an assisted living facility license Type A or Type B issued by DADS in accordance with Chapter 92 of this title.

(b) The license, certification, accreditation, or other document required by subsection (a) of this section must be valid in the service or catchment area:

- (1) in which the applicant is seeking to provide services; or
- (2) covered under the contractor's contract.

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

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## SUBCHAPTER C. REQUIREMENTS OF A CONTRACTOR

### 40 TAC §49.313

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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## CHAPTER 94. NURSE AIDES

### 40 TAC §§94.2, 94.11, 94.13

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), amendments to §94.2 and §94.11; and new §94.13, in Chapter 94, Nurse Aides, without changes to the proposed text as published in the July 8, 2016, issue of the *Texas Register* (41 TexReg 5021). The rules will not be republished.

The amendments and new section are adopted to implement Senate Bill (S.B.) 807 and S.B. 1307, 84th Legislature, Regular Session, 2015, which amended Texas Occupations Code, Chapter 55, Licensing of Military Service Members, Military Veterans, and Military Spouses. The adoption describes the process a nurse aide who is a military service member must follow to request an additional two years to complete in-service education requirements to maintain a listing on the nurse aide registry (NAR). The adoption also describes the process a former nurse aide who is a military service member, a military veteran, or a military spouse must follow to request that the status of a listing on the NAR be changed from expired to active during the five years after expiration.

The adoption adds definitions related to the military provisions and replaces several defined terms with acronyms. The adoption also deletes a provision allowing a military spouse to be listed on the NAR with active status for up to five years after the listing expires under certain circumstances because the information is included in new §94.13.

DADS received no comments regarding adoption of the amendments and new section.

The amendments and new section are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; Texas Health and Safety Code, Chapter 250, which requires DADS to maintain a Nurse Aide Registry; and Texas Occupations Code, Chapter 55, which requires a state agency to adopt rules related to licensure of military service members, military veterans, and military spouses.

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

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## CHAPTER 95. MEDICATION AIDES-- PROGRAM REQUIREMENTS

**40 TAC §§95.101, 95.103, 95.105, 95.107, 95.109, 95.113, 95.115, 95.117, 95.119, 95.121, 95.123, 95.125, 95.127 - 95.129**

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§95.101, 95.103, 95.105, 95.107, 95.109, 95.113, 95.115, 95.117, 95.119, 95.121, 95.123, 95.125, 95.127, and 95.128; and new §95.129, in Chapter 95, Medication Aides--Program Requirements. The amendments to §§95.105, 95.125, and 95.128, and new §95.129 are adopted with changes to the proposed text as published in the July 15, 2016, issue of the *Texas Register* (41 TexReg 5142). The amendments to §§95.101, 95.103, 95.107, 95.109, 95.113, 95.115, 95.117, 95.119, 95.121, 95.123, and 95.127 are adopted without changes to the proposed text.

The adopted rules provide that DADS does not issue or renew a permit if a medication aide applicant or a medication aide is listed as unemployable on the Employee Misconduct Registry (EMR), listed as revoked on the Nurse Aide Registry (NAR), or has been convicted of certain offenses. The adopted rules specify criteria used to determine if a renewal application is late and allow DADS to use an applicant's email address of record as contact information. Certain practices, currently described as exceptions to prohibited practices, are listed as permissible practices. The adoption clarifies that any practice not listed in the rule is prohibited. Throughout the chapter, the adopted amendments change the term "permit holder" to "medication aide" to be consistent and to use a defined term.

The adopted amendments and new section also implement Senate Bill (S.B.) 807 and S.B. 1307, 84th Legislature, Regular Session, 2015, which amended Texas Occupations Code, Chapter 55, Licensing of Military Service Members, Military Veterans, and Military Spouses. The adopted amendments add definitions of terms related to these provisions and the new section addresses several areas that relate to issuing medication aide permits to military service members, military veterans, and military spouses.

Throughout the chapter, grammatical and editorial changes were made for clarity and consistency, and to correct formatting structure.

DADS received no comments regarding adoption of the amendments and new section.

The agency added a provision to §95.125(e)(2) that allows an applicant for a corrections medication aide permit to provide the written results of a general educational development (GED) test, instead of a high school diploma or transcript. The agency also added new paragraphs to §95.125(e) and §95.128(i) stating that DADS verifies the accreditation of the high school that issued a diploma or transcript, or the testing service or program that certified a GED test of an applicant for a corrections medication aide permit or a home health medication aide permit. Further, if DADS is unable to verify the accreditation of the school, service, or program, DADS may require the applicant to submit additional documentation to verify the accreditation status. These additions, which apply to corrections medication aides and home health medication aides, are consistent with existing rules that govern other medication aides.

A minor editorial change was made to the text of §95.105 to correct a spelling error, and to §95.129 to correct a reference to another section in Chapter 95.

The amendments and new section are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Health and Safety Code, §142.023, which authorizes the HHSC executive commissioner to establish standards for home health medication aides, and §242.608, which authorizes the HHSC executive commissioner to adopt rules regulating medication aides in nursing facilities; Texas Human Resources Code, §161.083, which authorizes the executive commissioner to establish minimum standards and requirements for the issuance of corrections medication aide permits; and Texas Occupations Code, Chapter 55, which requires a state agency to adopt rules related to licensure of military service members, military veterans, and military spouses.

*§95.105. Allowable and Prohibited Practices of a Medication Aide.*

(a) A medication aide under Texas Health and Safety Code, Chapter 242, Subchapter N, may:

(1) observe and report to the facility's charge licensed nurse reactions and side effects to medication shown by a resident;

(2) take and record vital signs before the administration of medication that could affect or change the vital signs;

(3) administer regularly prescribed medication to a resident if the medication aide:

(A) is trained to administer the medication;

(B) personally prepares the medication or sets up the medication to be administered from a unit dose pack; and

(C) documents the administration of the medication in the resident's clinical record;

(4) administer oxygen per nasal cannula or a non-sealing mask only in an emergency, after which the medication aide must verbally notify the licensed nurse on duty or on call and appropriately document the action and notification;

(5) apply specifically ordered ophthalmic, otic, nasal, vaginal, and rectal medication;

(6) administer previously ordered PRN medication, if:

(A) the facility's licensed nurse on duty or on call authorizes the medication;

(B) the medication aide documents in the resident's records the symptoms indicating the need for the medication and the time the symptoms occurred;

(C) the medication aide documents in the resident's records that the facility's licensed nurse was contacted, symptoms were described, and the licensed nurse granted permission to administer the medication, including the time of contact;

(D) the medication aide obtains authorization to administer the medication from the facility's licensed nurse on duty or on call each time the symptoms occur; and

(E) the medication aide ensures that the resident's record is co-signed by the licensed nurse who gave authorization by the end of the nurse's shift or, if the nurse was on call, by the end of the nurse's next shift;

(7) measure a prescribed amount of a liquid medication to be administered to a resident;

(8) break a tablet to be administered to a resident, if:

(A) the resident's medication card or its equivalent accurately documents how the tablet must be broken before administration; and

(B) the licensed nurse on duty or on call has calculated the dosage;

(9) crush medication, if the medication aide:

(A) obtains authorization to crush the medication from the licensed nurse on duty or on call; and

(B) documents the authorization on the resident's medication card or its equivalent; and

(10) electronically order a refill of medication from a pharmacy, if the refill request is signed by the licensed nurse on duty or on call.

(b) A medication aide under Texas Health and Safety Code, Chapter 242, Subchapter N, may not:

(1) administer medication by the injection route including:

(A) intramuscular route;

(B) intravenous route;

(C) subcutaneous route;

(D) intradermal route; and

(E) hypodermoclysis route;

(2) administer medication used for intermittent positive pressure breathing treatments or any form of medication inhalation treatments;

(3) administer previously ordered PRN medication, except in accordance with subsection (a)(6) of this section;

(4) administer medication that, according to the resident's clinical records, has not been previously administered to the resident;

(5) calculate a resident's medication doses for administration;

(6) crush medication, except in accordance with subsection (a)(9) of this section;

(7) administer medications or feedings by way of a tube inserted in a cavity of the body;

(8) receive or assume responsibility for reducing to writing a verbal or telephone order from a healthcare professional;

(9) order a resident's medications from a pharmacy, except in accordance with subsection (a)(10) of this section;

(10) apply topical medications that involve the treatment of skin that is broken or blistered or when a specified aseptic technique is ordered by the attending physician;

(11) steal, divert, or otherwise misuse medication;

(12) violate any provision of the Texas Health and Safety Code or this chapter;

(13) fraudulently procure or attempt to procure a permit;

(14) neglect to administer appropriate medications, as prescribed, in a responsible manner; or

(15) administer medications if the person is unable to do so with reasonable skill and safety to residents by reason of drunkenness or excessive use of drugs, narcotics, chemicals, or any other type of material.

(c) If a practice is not described in subsection (a) of this section the practice is prohibited for a medication aide under Texas Health and Safety Code, Chapter 242, Subchapter N.

§95.125. *Requirements for Corrections Medication Aides.*

(a) Purpose. The purpose of this section is to provide the qualifications, conduct, and practice activities of a medication aide employed in a correctional facility or employed by a medical services contractor for a correctional facility.

(b) Supervision and applicable law and rules. A medication aide must function under the direct supervision of a licensed nurse on duty or on call by the correctional facility using the medication aide. A medication aide must:

(1) function in accordance with applicable law and rules relating to administration of medication and operation of a correctional facility; and

(2) comply with TDCJ rules applicable to personnel used in a correctional institution.

(c) Allowable and prohibited practices of a medication aide.

(1) A medication aide may:

(A) observe and report to the correctional facility's charge nurse reactions and side effects to medication shown by an inmate;

(B) take and record vital signs before the administration of medication which could affect or change the vital signs;

(C) administer regularly prescribed medication to an inmate if the medication aide:

(i) is trained to administer the medication;

(ii) personally prepares the medication or sets up the medication to be administered; and

(iii) documents the administration of the medication in the inmate's clinical record;

(D) administer oxygen per nasal cannula or a non-sealing mask only in an emergency, after which the medication aide must verbally notify the licensed nurse on duty or on call and appropriately document the action and notification;

(E) apply specifically ordered ophthalmic, otic, nasal, vaginal, and rectal medication;

(F) administer previously ordered PRN medication. A medication aide must document in the inmate's records, symptoms indicating the need for the medication, and the time the symptoms occurred;

(G) administer the initial dose of a medication;

(H) order an inmate's medications from the correctional institution's pharmacy;

(I) measure a prescribed amount of a liquid medication to be administered;

(J) break a tablet for administration to an inmate if:

(i) the licensed nurse on duty or on call has calculated the dosage; and

(ii) the inmate's medication card or its equivalent accurately documents how the tablet must be altered before administration; and

(K) crush medication if:

(i) authorization is obtained from the licensed nurse on duty or on call; and

(ii) the authorization is documented on the inmate's medication card or its equivalent.

(2) A medication aide may not:

(A) administer medication by the injection route including:

(i) intramuscular;

(ii) intravenous;

(iii) subcutaneous;

(iv) intradermal; and

(v) hypodermoclysis;

(B) administer medication used for intermittent positive pressure breathing treatments or any form of medication inhalation treatments;

(C) calculate an inmate's medication dose for administration;

(D) crush medication, except in accordance with subsection (c)(1)(K) of this section;

(E) administer medications or feedings by way of a tube inserted in a cavity of the body;

(F) receive or assume responsibility for reducing to writing a verbal or telephone order from a physician, dentist, or podiatrist;

(G) apply topical medications that involve the treatment of skin that is broken or blistered or when a specified aseptic technique is ordered by the attending licensed practitioner;

(H) steal, divert, or otherwise misuse medications;

(I) violate any provision of Texas Human Resources Code, §161.083, or this chapter;

(J) fraudulently procure or attempt to procure a permit;

(K) neglect to administer appropriate medications, as prescribed, in a responsible manner; or

(L) administer medications if the person is unable to do so with reasonable skill and safety to residents by reason of drunkenness or excessive use of drugs, narcotics, chemicals, or any other type of material.

(d) Background and education requirements. Before applying for a corrections medication aide permit under Texas Human Resources Code, §161.083, an applicant must be:

(1) able to read, write, speak, and understand English;

(2) at least 18 years of age;

(3) free of communicable diseases and in suitable physical and emotional health to safely administer medications;

(4) a graduate of a high school or successfully passed a general educational development test; and

(5) employed in a correctional facility or by a medical service contractor for a correctional facility on the first day of an applicant's medication aide training program.

(e) Application. An applicant for a corrections medication aide permit under Texas Human Resources Code, §161.083 must submit an official Corrections Medication Aide application form to DADS.

(1) An applicant must submit the general statement enrollment form that contains:

(A) specific information regarding personal data, certain misdemeanor and felony convictions, work experience, education, and training;

(B) a statement that all the requirements in subsection (d) of this section were met before the start of the program;

(C) a statement that the applicant understands that application fees submitted in the permit process are nonrefundable;

(D) a statement that the applicant understands material submitted in the application process are nonreturnable;

(E) a statement that the applicant understands that it is a misdemeanor to falsify any information submitted to DADS; and

(F) the applicant's dated and notarized signature.

(2) An applicant must submit a certified copy or a photocopy that has been notarized as a true and exact copy of an unaltered original of the applicant's high school graduation diploma or transcript, or the written results of a general educational development (GED) test.

(3) DADS verifies the accreditation of the high school that issued the diploma or transcript, or the testing service or program that certified the GED test required by paragraph (2) of this subsection. If DADS is unable to verify the accreditation status of the school, testing service, or program, and DADS requests additional documentation from the applicant to verify the accreditation status, the applicant must provide the documentation to DADS.

(4) DADS considers a corrections medication aide permit application as officially submitted when DADS receives the permit application.

(5) DADS sends a notice listing the additional materials required to an applicant who does not complete the application. An application not completed by the day of the TDCJ final exam is void.

(6) DADS sends notice of application approval or deficiency in accordance with §95.127 of this chapter (relating to Application Processing).

(f) Fees. An applicant must pay application and permit renewal fees for a corrections medication aide permit by cashier's check or money order made payable to the Department of Aging and Disability Services. All fees are nonrefundable, except as provided by Texas Government Code, Chapter 2005. The fee schedule is as follows:

(1) permit application fee--\$15;

(2) renewal fee--\$15;

(3) late renewal fees for permit renewals made after the permit expires:

(A) \$22.50 for an expired permit renewed from one to 90 days after expiration;

(B) \$30 for an expired permit renewed from 91 days to one year after expiration; and

(4) permit replacement fee--\$5.

(g) Examination procedures. TDCJ gives a written examination to each applicant at a site determined by TDCJ. An applicant with a disability, including an applicant with dyslexia as defined in Texas Ed-

ucation Code, §51.970 (relating to Instructional Material for Blind and Visually Impaired Students and Students with Dyslexia), may request a reasonable accommodation for the examination under the Americans with Disabilities Act.

(1) The applicant must meet the requirements of the TDCJ training program described in §95.119(d) of this chapter (relating to Training Program Requirements) before taking the written examination.

(2) The applicant must be tested on the subjects taught in the TDCJ training program curriculum and correctional facility clinical experience. The examination must test an applicant's knowledge of accurate and safe drug therapy administered to a correctional facility inmate.

(3) TDCJ administers the examination and determines the passing grade.

(4) TDCJ must inform DADS, on the DADS class roster form, of the final exam results for each applicant within 15 days after completion of the exam.

(5) An applicant who is unable to attend the applicant's scheduled examination due to unforeseen circumstances must contact TDCJ to reschedule.

(6) If an applicant fails the examination, TDCJ notifies DADS and the applicant in writing of the failure to pass the examination. The applicant may take one subsequent examination without having to re-enroll in the training program described in §95.119 of this chapter.

(7) An applicant whose application for a permit is denied under §95.113 of this chapter (relating to Determination of Eligibility) is ineligible to take the examination.

(h) Determination of eligibility. DADS determines eligibility for a corrections medication aide permit applicant according to §95.113 of this chapter and subsections (d), (e), (f), and (g) of this section.

(i) Renewal. A permit must be renewed in accordance with §95.115 of this chapter (relating to Permit Renewal).

(j) Changes. Medication aides must report changes in accordance with §95.117 of this chapter (relating to Changes).

(k) Violations, complaints, and disciplinary actions.

(1) Complaints. Any person may complain to DADS alleging that a person or program has violated Texas Human Resources Code, §161.083, or this chapter. DADS handles complaints in the manner set forth in §95.123 of this chapter (relating to Violations, Complaints, and Disciplinary Actions).

(2) Investigations of abuse and neglect complaints. Allegations of abuse and neglect of inmates by corrections medication aides are investigated by the TDCJ Office of Inspector General. After an investigation, the TDCJ Office of Inspector General issues a report to DADS with findings of abuse or neglect against the corrections medication aide. After reviewing the report and findings, DADS determines whether to initiate a formal proceeding to revoke, suspend, or refuse to renew a corrections medication aide permit. If DADS determines a formal proceeding to revoke, suspend, or refuse to renew a corrections medication aide permit should be initiated, §95.123(c) and (d) of this chapter apply. If DADS determines that no formal proceeding to revoke, suspend, or refuse to renew a corrections medication aide permit should be initiated, DADS dismisses the complaint against the corrections medication aide and gives written notice of the dismissal to the corrections medication aide.

(l) Section 95.121 of this chapter (relating to Permitting of Persons with Criminal Backgrounds) applies to corrections medication aides under this chapter.

§95.128. *Home Health Medication Aides.*

(a) General.

(1) A person may not administer medication to a client unless the person:

(A) holds a current license under state law that authorizes the licensee to administer medication;

(B) holds a current permit issued under this section and acts under the delegated authority of an RN to administer medication;

(C) administers a medication to a client in accordance with rules of the BON that permit delegation of the administration of medication to a person not holding a permit under this section; or

(D) administers noninjectable medication under circumstances authorized by the memorandum of understanding between the BON and DADS.

(2) A HCSSA that provides licensed and certified home health services, licensed home health services, hospice services, or personal assistance services may use a home health medication aide. If there is a direct conflict between the requirements of this chapter and federal regulations, the requirements that are more stringent apply to the licensed and certified HCSSA.

(3) Exemptions are as follows.

(A) A person may administer medication to a client without the license or permit as required in paragraph (1) of this subsection if the person is:

(i) a graduate nurse holding a temporary permit issued by the BON;

(ii) a student enrolled in an accredited school of nursing or program for the education of RNs who is administering medications as part of the student's clinical experience;

(iii) a graduate vocational nurse holding a temporary permit issued by the BON;

(iv) a student enrolled in an accredited school of vocational nursing or program for the education of vocational nurses who is administering medications as part of the student's clinical experience; or

(v) a trainee in a medication aide training program approved by DADS under this chapter who is administering medications as part of the trainee's clinical experience.

(B) Supervision of an exempt person described in subparagraph (A) of this paragraph is as follows.

(i) A person described in:

(I) subparagraph (A)(i) of this paragraph shall be supervised by an RN;

(II) subparagraph (A)(ii) or (iv) of this paragraph shall be supervised by the student's instructor; or

(III) subparagraph (A)(iii) of this paragraph shall be supervised by an RN or licensed vocational nurse.

(ii) Supervision must be on-site.

(C) An exempt person described in this subsection may not be used in a supervisory or charge position.

(b) Required actions.

(1) If a HCSSA provides home health medication aide services the HCSSA must employ a home health medication aide to provide the home health medication aide services. The HCSSA must employ or contract with an RN to perform the initial health assessment, prepare the client care plan, establish the medication list, medication administration record, and medication aide assignment sheet, and supervise the home health medication aide. The RN must be available to supervise the home health medication aide when home health medication aide services are provided.

(2) The clinical records of a client using a home health medication aide must include a statement signed by the client or family acknowledging receipt of the list of permitted and prohibited acts of a home health medication aide.

(3) The RN must be knowledgeable of DADS rules governing home health medication aides and must ensure that the home health medication aide is in compliance with the Texas Health and Safety Code, Chapter 142, Subchapter B.

(4) A home health medication aide must:

(A) function under the supervision of an RN;

(B) comply with applicable law and this chapter relating to administration of medication and operation of the HCSSA;

(C) comply with DADS rules applicable to personnel used in a HCSSA; and

(D) comply with this section and §97.701 of this title (relating to Home Health Aides) if the person will be used as a home health aide and a home health medication aide.

(5) The RN must make a supervisory visit while the medication aide is in the client's residence in accordance with §97.298 of this title (relating to Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel and Tasks Not Requiring Delegation).

(c) Permitted actions. A home health medication aide is permitted to:

(1) observe and report to the HCSSA RN and document in the clinical record any reactions and side effects to medication shown by a client;

(2) take and record vital signs of a client before administering medication that could affect or change the vital signs;

(3) administer regularly prescribed medication to a client if the medication aide:

(A) is trained to administer the medication;

(B) personally prepares the medication or sets up the medication to be administered; and

(C) documents the administration of the medication in the client's clinical record;

(4) administer oxygen per nasal cannula or a non-sealing face mask only in an emergency, after which the medication aide must verbally notify the supervising RN and appropriately document the action and notification;

(5) apply specifically ordered ophthalmic, otic, nasal, vaginal, topical, and rectal medication unless prohibited by subsection (d)(10) of this section;

(6) administer medications only from the manufacturer's original container or the original container in which the medication had

been dispensed and labeled by the pharmacy with all information mandated by the Texas State Board of Pharmacy; and

(7) administer previously ordered PRN medication if:

(A) the HCSSA's RN authorizes the medication;

(B) the medication aide documents in the client's clinical notes the symptoms indicating the need for medication and the time the symptoms occurred;

(C) the medication aide documents in the client's clinical notes that the HCSSA's RN was contacted, symptoms were described, and the HCSSA's RN granted permission to administer the medication, including the time of contact;

(D) the medication aide obtains authorization to administer the medication each time the symptoms occur; and

(E) the medication aide ensures that the client's clinical record is co-signed by the RN who gave permission within seven days after the notes are incorporated into the clinical record;

(8) measure a prescribed amount of a liquid medication to be administered;

(9) break a tablet for administration to a client if:

(A) the client's medication administration record accurately documents how the tablet must be altered before administration; and

(B) the licensed nurse on duty or on call has calculated the dosage;

(10) crush medication, if:

(A) authorization has been given in the original physician's order or the medication aide obtains authorization from the HCSSA's RN; and

(B) the medication aide documents the authorization on the client's medication administration record.

(d) Prohibited actions. A home health medication aide must not:

(1) administer a medication by any injectable route, including:

(A) intramuscular route;

(B) intravenous route;

(C) subcutaneous route;

(D) intradermal route; and

(E) hypodermoclysis route;

(2) administer medication used for intermittent positive pressure breathing treatment or any form of medication inhalation treatments;

(3) administer previously ordered PRN medication except in accordance with subsection (c)(7) of this section;

(4) administer medication that, according to the client's clinical records, has not been previously administered to the client;

(5) calculate a client's medication doses for administration;

(6) crush medication, except in accordance with subsection (c)(10) of this section;

(7) administer medications or feedings by way of a tube inserted in a cavity of the body except as specified §97.404(h) of this title;

(8) receive or assume responsibility for reducing to writing a verbal or telephone order from a physician, dentist, podiatrist or advanced practice nurse;

(9) order a client's medication from a pharmacy;

(10) apply topical medications that involve the treatment of skin that is broken or blistered when a specified aseptic technique is ordered by the attending physician;

(11) administer medications from any container other than the manufacturer's original container or the original container in which the medication had been dispensed and labeled by the pharmacy with all information mandated by the Texas State Board of Pharmacy;

(12) steal, divert, or otherwise misuse medications;

(13) violate any provision of the statute or of this chapter;

(14) fraudulently procure or attempt to procure a permit;

(15) neglect to administer appropriate medications, as prescribed, in a responsible manner; or

(16) administer medications if the person is unable to do so with reasonable skill and safety to clients by reasons of drunkenness, inappropriate use of drugs, narcotics, chemicals, or any other type of material.

(e) Applicant qualifications. Each applicant for a permit issued under Texas Health and Safety Code, Chapter 142, Subchapter B must complete a training program. Before enrolling in a training program and applying for a permit under this section, all applicants:

(1) must be able to read, write, speak, and understand English;

(2) must be at least 18 years of age;

(3) must be free of communicable diseases and in suitable physical and emotional health to safely administer medications;

(4) must be a graduate of an accredited high school or have proof of successfully passing a general educational development test;

(5) must have satisfactorily completed a home health aide training and competency evaluation program or a competency evaluation program under §97.701 of this title;

(6) must not have been convicted of a criminal offense listed in Texas Health and Safety Code, §250.006(a), or convicted of a criminal offense listed in Texas Health and Safety Code, §250.006(b) within five years before the date DADS receives a permit application;

(7) must not be listed as unemployable on the EMR; and

(8) must not be listed with a revoked or suspended status on the NAR.

(f) Nursing graduates. A person who is a graduate of an accredited school of nursing and who does not hold a license to practice professional or vocational nursing meets the training requirements for issuance of a permit under this section if the date of graduation from the nursing school was no earlier than January 1 of the year immediately preceding the year of application for a permit under this section.

(1) The applicant must submit a DADS application form to DADS. The applicant must meet the requirements of subsection (e)(1) - (6) of this section.

(2) The application must be accompanied by the combined permit application and examination fee.

(3) The applicant must include an official transcript documenting graduation from an accredited school of nursing.

(4) DADS acknowledges receipt of the application by sending the applicant a copy of this chapter and DADS open book examination.

(5) The applicant must complete the open book examination and return it to DADS by the date given in the examination notice.

(6) The applicant must complete DADS written examination. DADS determines the site of the examination. DADS denies the application of an applicant failing to schedule and take the examination by the date given in the examination notice.

(7) An open book or written examination may not be re-taken if the applicant fails.

(8) Upon successful completion of the two examinations, DADS evaluates all application documents submitted by the applicant.

(9) DADS notifies the applicant in writing of the examination results.

(g) Nursing students. A person who is attending or has attended an accredited school of nursing and who does not hold a license to practice professional or vocational nursing meets the training requirements for issuance of a permit under this section if the person:

(1) attended the nursing school no earlier than January 1 of the year immediately preceding the year of application for a permit under this section;

(2) successfully completed courses at the nursing school that cover DADS curriculum for a home health medication aide training program;

(3) submits a statement with the person's application for a permit under this section, that is signed by the nursing school's administrator or other authorized individual who is responsible for determining that the courses that he or she certifies cover DADS curriculum and certifies that the person completed the courses specified under paragraph (2) of this subsection; and

(4) complies with subsection (f)(1) - (2) and (4) - (9) of this section.

(h) Reciprocity. A person who holds a valid license, registration, certificate, or permit as a home health medication aide issued by another state whose minimum standards or requirements are substantially equivalent to or exceed the requirements of this section in effect at the time of application may request a waiver of the training program requirement as follows:

(1) The applicant must submit a DADS application form to DADS. The applicant must meet the requirements of subsection (e)(1) - (4) of this section.

(2) The application must be accompanied by the combined permit application and exam fee.

(3) The application must include a current copy of the rules of the other state governing its licensing and regulation of home health medication aides, a copy of the legal authority, including the law, act, code, or section, for the state's licensing program, and a certified copy of the license or certificate by which the reciprocal permit is requested.

(4) DADS acknowledges receipt of the application by sending the applicant a copy of this chapter and of DADS open book examination.

(5) DADS may contact the issuing agency to verify the applicant's status with the agency.

(6) The applicant must complete DADS open book examination and return it to DADS by the date given in the examination notice.

(7) The applicant must complete DADS written examination. The site of the examination is determined by DADS. DADS denies the application of an applicant failing to schedule and take the examination by the date given in the examination notice.

(8) An open book or written examination may not be retaken if the applicant fails.

(9) Upon successful completion of the two examinations, DADS evaluates all application documents submitted by the applicant.

(10) DADS notifies the applicant in writing of the examination results.

(i) Application by trainees. An applicant under subsection (e) of this section must submit to DADS, no later than 30 days after enrollment in a training program, an application, including all required information and documentation on DADS forms.

(1) DADS considers an application as officially submitted when DADS receives the nonrefundable combined permit application and examination fee payable to the Department of Aging and Disability Services. The fee required by subsection (n) of this section must accompany the application form.

(2) The general statement enrollment form must contain the following application material that is required of all applicants:

(A) specific information regarding personal data, certain misdemeanor and felony convictions, work experience, education, and training;

(B) a statement that all of the requirements in subsection (e) of this section were met before the start of the program;

(C) a statement that the applicant understands that the application fee submitted in the permit process is nonrefundable;

(D) a statement that the applicant understands that materials submitted in the application process are not returnable;

(E) a statement that the applicant understands that it is a misdemeanor to falsify any information submitted to DADS; and

(F) the applicant's signature that has been dated and notarized.

(3) The applicant must submit a certified copy or notarized photocopy of an unaltered original of the applicant's high school graduation diploma or transcript, or an equivalent document demonstrating that the applicant successfully passed a general educational development (GED) test, unless the applicant is applying under subsection (f) of this section.

(4) DADS verifies the accreditation of the high school that issued the diploma or transcript, or the testing service or program that certified the GED test required by paragraph (3) of this subsection. If DADS is unable to verify the accreditation status of the school, testing service, or program, and DADS requests additional documentation from the applicant to verify the accreditation status, the applicant must provide the documentation to DADS.

(5) DADS sends a notice listing the additional materials required to an applicant who does not complete the application. An application not completed within 30 days after the date of the notice will be void.

(6) DADS sends notice of application acceptance, disapproval, or deficiency in accordance with subsection (q) of this section.

(j) Examination. DADS gives a written examination to each applicant at a site DADS determines.

(1) No final examination may be given to an applicant until the applicant has met the requirements of subsections (e) and (i) of this section, and if applicable, subsections (f), (g), or (h) of this section.

(2) An applicant with a disability, including an applicant with dyslexia as defined in Texas Education Code §51.970 (relating to Instructional Material for Blind and Visually Impaired Students and Students with Dyslexia), may request a reasonable accommodation for the examination under the Americans with Disabilities Act.

(3) The applicant must be tested on the subjects taught in the training program curricula and clinical experience. The examination covers an applicant's knowledge of accurate and safe drug therapy to clients.

(4) A training program must notify DADS at least four weeks before its requested examination date.

(5) DADS determines the passing grade on the examination.

(6) DADS notifies in writing an applicant who fails the examination.

(A) DADS may give an applicant under subsection (e) of this section one subsequent examination, without additional payment of a fee, upon the applicant's written request to DADS.

(B) A subsequent examination must be completed by the date given on the failure notification. DADS determines the site of the examination.

(C) Another examination will not be permitted if the student fails the subsequent examination unless the student enrolls and successfully completes another training program.

(7) An applicant who is unable to attend the applicant's scheduled examination due to unforeseen circumstances may be given an examination at another time without payment of an additional fee upon the applicant's written request to DADS. The examination must be completed within 45 days from the date of the originally scheduled examination. DADS determines the site for the rescheduled examination.

(8) An applicant whose application for a permit will be disapproved under subsection (k) of this section is ineligible to take the examination.

(k) Determination of eligibility. DADS approves or disapproves all applications. DADS sends notices of application approval, disapproval, or deficiency in accordance with subsection (q) of this section.

(1) DADS denies an application for a permit if the person has:

(A) not met the requirements of subsections (e) - (i) of this section, if applicable;

(B) failed to pass the examination prescribed by DADS as set out in subsection (j) of this section;

(C) failed to or refused to properly complete or submit any application form, endorsement, or fee, or deliberately presented false information on any form or document required by DADS;

(D) violated or conspired to violate the Texas Health and Safety Code, Chapter 142, Subchapter B, or any provision of this chapter; or

(E) been convicted of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a medication aide as set out in subsection (r) of this section.

(2) If, after review, DADS determines that the application should not be approved, DADS gives the applicant written notice of the reason for the proposed decision and of the opportunity for a formal hearing in accordance with subsection (r) of this section.

(1) Medication aide. Home health medication aides must comply with the following permit renewal requirements.

(1) When issued, a permit is valid for one year.

(2) A medication aide must renew the permit annually.

(3) The renewal date of a permit is the last day of the current permit.

(4) Each medication aide is responsible for renewing the permit before the expiration date. Failure to receive notification from DADS before the expiration date of the permit does not excuse the medication aide's failure to file for timely renewal.

(5) A medication aide must complete a seven hour continuing education program approved by DADS before expiration of the permit in order to renew the permit. Continuing education hours are not required for the first renewal. After a permit is renewed for the first time, the medication aide must earn approved continuing education hours to have the permit renewed again.

(6) DADS denies renewal of the permit of a medication aide who is in violation of the Texas Health and Safety Code, Chapter 142, Subchapter B, or this chapter at the time of application for renewal.

(7) DADS denies renewal of the permit of a medication aide who has been convicted of a criminal offense listed in Texas Health and Safety Code, §250.006(a), or convicted of a criminal offense listed in Texas Health and Safety Code, §250.006(b) within five years before the date DADS receives the renewal application.

(8) DADS denies renewal of the permit of a medication aide who is listed as unemployable on the EMR.

(9) Home health medication aide permit renewal procedures are as follows.

(A) At least 30 days before the expiration date of a permit, DADS sends to the medication aide at the address in DADS records notice of the expiration date of the permit and the amount of the renewal fee due and a renewal form that the medication aide must complete and return with the required renewal fee.

(B) The renewal form must include the preferred mailing address of the medication aide and information on certain misdemeanor and felony convictions. It must be signed by the medication aide.

(C) DADS issues a renewal permit to a medication aide who has met all requirements for renewal.

(D) DADS does not renew a permit if the medication aide does not complete the required seven-hour continuing education requirement. Successful completion is determined by the student's instructor. An individual who does not meet the continuing education requirement must complete a new program, application, and examination in accordance with the requirements of this section.

(E) DADS does not renew a permit if renewal is prohibited by the Texas Education Code, §57.491, concerning defaults on guaranteed student loans.

(F) If a medication aide fails to timely renew his or her permit because the medication aide is or was on active duty with the armed forces of the United States of America serving outside the State of Texas, the medication aide may renew the permit pursuant to this subparagraph.

(i) Renewal of the permit may be requested by the medication aide, the medication aide's spouse, or an individual having power of attorney from the medication aide. The renewal form must include a current address and telephone number for the individual requesting the renewal.

(ii) Renewal may be requested before or after the expiration of the permit.

(iii) A copy of the official orders or other official military documentation showing that the medication aide is or was on active military duty serving outside the State of Texas must be filed with DADS along with the renewal form.

(iv) A copy of the power of attorney from the medication aide must be filed with DADS along with the renewal form if the individual having the power of attorney executes any of the documents required in this subparagraph.

(v) A medication aide renewing under this subparagraph must pay the applicable renewal fee.

(vi) A medication aide is not authorized to act as a home health medication aide after the expiration of the permit unless and until the medication aide actually renews the permit.

(vii) A medication aide renewing under this subparagraph is not required to submit any continuing education hours.

(10) A person whose permit has expired for not more than two years may renew the permit by submitting to DADS:

(A) the permit renewal form;

(B) all accrued renewal fees;

(C) proof of having earned, during the expired period, seven hours in an approved continuing education program for each year or part of a year that the permit has been expired; and

(D) proof of having earned, before expiration of the permit, seven hours in an approved continuing education program as required in paragraph (5) of this subsection.

(11) A permit that is not renewed during the two years after expiration may not be renewed.

(12) DADS issues notices of permit renewal approval, disapproval, or deficiency must be in accordance with subsection (q) of this section.

(m) Changes.

(1) A medication aide must notify DADS within 30 days after changing his or her address or name.

(2) DADS replaces a lost, damaged, or destroyed permit upon receipt of a completed duplicate permit request form and permit replacement fee.

(n) Fees.

(1) The schedule of fees is:

(A) combined permit application and examination fee--\$25;

(B) renewal fee--\$15; and

(C) permit replacement fee--\$5.00.

(2) All fees are nonrefundable.

(3) An applicant or home health medication aide must pay the required fee by cashier's check or money order made payable to the Department of Aging and Disability Services. All fees are nonrefundable, except as provided by Texas Government Code, Chapter 2005.

(o) Training program requirements.

(1) An educational institution accredited by the Texas Workforce Commission or Texas Higher Education Coordinating Board that desires to offer a training program must file an application for approval on a DADS form. Programs sponsored by state agencies for the training and preparation of its own employees are exempt from the accreditation requirement. An approved institution may offer the training program and a continuing education program.

(A) All signatures on DADS forms and supporting documentation must be originals.

(B) The application includes:

(i) the anticipated dates of the program;

(ii) the location(s) of the classroom course(s);

(iii) the name of the coordinator of the program;

(iv) a list that includes the address and telephone number of each instructor and any other person responsible for the conduct of the program; and

(v) an outline of the program content and curriculum if the curriculum covers more than DADS established curricula.

(C) DADS may conduct an inspection of the classroom site.

(D) DADS sends notice of approval or proposed disapproval of the application to the program within 30 days of the receipt of a complete application. If the application is proposed to be disapproved due to noncompliance with the requirements of the Texas Health and Safety Code, Chapter 142, Subchapter B, or of this chapter, the reasons for disapproval are given in the notice.

(E) An applicant may request a hearing on a proposed disapproval in writing within ten days of receipt of the notice of the proposed disapproval. The hearing must be in accordance with subsection (r) of this section and the Administrative Procedure Act, Texas Government Code, Chapter 2001. If no request is made, the applicant is deemed to have waived the opportunity for a hearing, and the proposed action may be taken.

(2) The program includes, but is not limited to, the following instruction and training:

(A) procedures for preparation and administration of medications;

(B) responsibility, control, accountability, storage, and safeguarding of medications;

(C) use of reference material;

(D) documentation of medications in the client's clinical records, including PRN medications;

(E) minimum licensing standards for agencies covering pharmaceutical service, nursing service, and clinical records;

(F) federal and state certification standards for participation under the Social Security Act, Title XVIII (Medicare), pertaining to pharmaceutical service, nursing service, and clinical records;

(G) lines of authority in the agency, including agency personnel who are immediate supervisors;

(H) responsibilities and liabilities associated with the administration and safeguarding of medications;

(I) allowable and prohibited practices of a medication aide in the administration of medication;

(J) drug reactions and side effects of medications commonly administered to home health clients;

(K) instruction on universal precautions; and

(L) the provisions of this chapter.

(3) The program consists of 140 hours in the following order: 100 hours of classroom instruction and training, 20 hours of return skills demonstration laboratory, ten hours of clinical experience including clinical observation and skills demonstration under the supervision of an RN in an agency, and ten more hours in the return skills demonstration laboratory. A classroom or laboratory hour is 50 minutes of actual classroom or laboratory time.

(A) Class time will not exceed four hours in a 24-hour period.

(B) The completion date of the program must be a minimum of 60 days and a maximum of 180 days from the starting date of the program.

(C) Each program must follow the curricula established by DADS.

(4) At least seven days before the commencement of each program, the coordinator must notify DADS in writing of the starting date, the ending date, the daily hours of the program, and the projected number of students.

(5) A change in any information presented by the program in an approved application including, but not limited to, location, instructorship, and content must be approved by DADS before the program's effective date of the change.

(6) The program instructors of the classroom hours must be an RN and registered pharmacist.

(A) The nurse instructor must have a minimum of two years of full-time experience in caring for the elderly, chronically ill, or pediatric clients or been employed full time for a minimum of two years as an RN with a home and community support services agency. An instructor in a school of nursing may request a waiver of the experience requirement.

(B) The pharmacist instructor must have a minimum of one year of experience and be currently employed as a practicing pharmacist.

(7) The coordinator must provide clearly defined and written policies regarding each student's clinical experience to the student, the administrator, and the supervising nurse of the agency used for the clinical experience.

(A) The clinical experience must be counted only when the student is observing or involved in functions involving medication administration and under the direct, contact supervision of an RN.

(B) The coordinator is responsible for final evaluation of the student's clinical experience.

(8) Upon successful completion of the program, each program issues to each student a certificate of completion, including the program's name, the student's name, the date of completion, and the signature of the program coordinator.

(9) Within 15 days after completion of the course, each program must inform DADS on the DADS class roster form of the satisfactory completion for each student.

(p) Continuing education. The continuing education training program is as follows.

(1) The program must consist of at least seven clock hours of classroom instruction.

(2) The instructor must meet the requirements in subsection (o)(6) of this section.

(3) Each program must follow the curricula established by DADS.

(4) Within 15 days after completion of the course, each program must inform DADS on the DADS class roster form of the name of each medication aide who has completed the course.

(q) Processing procedures. DADS complies with the following procedures in processing applications of home health medication aide permits and renewal of permits.

(1) The following periods of time apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. A written notice stating that the application has been approved may be sent in lieu of the notice of acceptance of a complete application. The time periods are:

(A) letter of acceptance of an application for a home health medication aide permit--14 days; and

(B) letter of application or renewal deficiency--14 days.

(2) The following periods of time shall apply from the receipt of the last item necessary to complete the application until the date of issuance of written notice approving or denying the application. The time periods for denial include notification of proposed decision and of the opportunity, if required, to show compliance with the law and of the opportunity for a formal hearing. An application is not considered complete until the required documentation and fee have been submitted by the applicant. The time periods are as follows:

(A) the issuance of an initial permit--90 days;

(B) the letter of denial for a permit--90 days; and

(C) the issuance of a renewal permit--20 days.

(3) In the event an application is not processed in the time period stated in paragraphs (1) and (2) of this subsection, the applicant has the right to request reimbursement of all fees paid in that particular application process. Request for reimbursement is made to the Home Health Medication Aide Permit Program. If the director of the Home Health Medication Aide Permit Program does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the request will be denied.

(4) Good cause for exceeding the time period exists if the number of applications for initial home health medication aide permits and renewal permits exceeds by 15 percent or more the number of applications processed in the same calendar quarter of the preceding year;

another public or private entity relied upon by DADS in the application process caused the delay; or any other condition exists giving DADS good cause for exceeding the time period.

(5) If a request for reimbursement under paragraph (3) of this subsection is denied by the director of the Home Health Medication Aide Permit Program, the applicant may appeal to the DADS commissioner for a timely resolution of any dispute arising from a violation of the time periods. The applicant must give written notice to the DADS commissioner that the applicant requests full reimbursement of all fees paid because the application was not processed within the applicable time period. The applicant must mail the reimbursement request to Texas Department of Aging and Disability Services, John H. Winters Human Services Complex, 701 W. 51st St., P.O. Box 149030, Austin, Texas 78714-9030. The director of the Home Health Medication Aide Permit Program must submit a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time period to the DADS commissioner. The DADS commissioner provides written notice of the commissioner's decision to the applicant and the director of the Home Health Medication Aide Permit Program. An appeal is decided in the applicant's favor if the applicable time period was exceeded and good cause was not established. If the appeal is decided in favor of the applicant, DADS reimburses, in full, all fees paid in that particular application process.

(r) Denial, suspension, or revocation.

(1) DADS may deny, suspend, emergency suspend, or revoke a permit or program approval if the medication aide or program fails to comply with any provision of the Texas Health and Safety Code, Chapter 142, Subchapter B, or this chapter.

(2) DADS may also take action under paragraph (1) of this subsection for fraud, misrepresentation, or concealment of material fact on any documents required to be submitted to DADS or required to be maintained or complied by the medication aide or program pursuant to this chapter.

(3) DADS may suspend or revoke an existing permit or program approval or disqualify a person from receiving a permit or program approval because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a home health medication aide or training program. In determining whether a conviction directly relates, DADS considers the elements set forth in Texas Occupations Code §55.022 and §55.023.

(4) If DADS proposes to deny, suspend, or revoke a home health medication aide permit or to rescind a home health medication aide program approval, DADS notifies the medication aide or home health medication aide program by certified mail, return receipt requested, of the reasons for the proposed action and offers the medication aide or home health medication aide program an opportunity for a hearing.

(A) The medication aide or home health medication aide program must request a hearing within 15 days after receipt of the notice. Receipt of notice is presumed to occur on the tenth day after the notice is mailed to the last address known to DADS unless another date is reflected on a United States Postal Service return receipt.

(B) The request must be in writing and submitted to the Department of Aging and Disability Services, Medication Aide Program, Mail Code E-416, P.O. Box 149030, Austin, Texas 78714-9030.

(C) If the medication aide or home health medication aide program does not request a hearing, in writing, 15 days after receipt of the notice, the medication aide or home health medication aide program is deemed to have waived the opportunity for a hearing and the proposed action is taken.

(5) DADS may suspend a permit to be effective immediately when the health and safety of persons are threatened. DADS notifies the medication aide of the emergency action by certified mail, return receipt requested, or personal delivery of the notice and of the effective date of the suspension and the opportunity for the medication aide to request a hearing.

(6) All hearings are governed by to Texas Government Code, Chapter 2001, and Texas Administrative Code, Title 1, §§357.481 - 357.490.

(7) If the medication aide or program fails to appear or be represented at the scheduled hearing, the medication aide or program has waived the right to a hearing and the proposed action is taken.

(8) If DADS suspends a home health medication aide permit, the suspension remains in effect until DADS determines that the reason for suspension no longer exists, revokes the permit, or determines not to renew the permit. DADS investigates before making a determination.

(A) During the time of suspension, the suspended medication aide must return the permit to DADS.

(B) If a suspension overlaps a renewal date, the suspended medication aide may comply with the renewal procedures in this chapter; however, DADS does not renew the permit until DADS determines that the reason for suspension no longer exists.

(9) If DADS revokes or does not renew a permit, a person may reapply for a permit by complying with the requirements and procedures in this chapter at the time of reapplication.

(A) DADS may refuse to issue a permit if the reason for revocation or nonrenewal continues to exist.

(B) When a permit is revoked or not renewed, a medication aide must immediately return the permit to DADS.

*§95.129. Alternate Licensing Requirements for Military Service.*

(a) Fee waiver based on military experience.

(1) DADS waives the combined permit application and examination fee described in §95.109(c)(1)(A) of this chapter (relating to Application Procedures) and §95.128(n)(1)(A) of this chapter (relating to Home Health Medication Aides) and the permit application fee described in §95.125(f)(1) of this chapter (relating to Requirements for Corrections Medication Aides) for an applicant if DADS receives and approves a request for a waiver of fees from the applicant in accordance with this subsection.

(2) To request a waiver of fees under this subsection, an applicant must submit a written request for a waiver with the applicant's application for a permit submitted to DADS in accordance with this section. The applicant must include with the request:

(A) documentation of the applicant's status as a military service member or military veteran that is acceptable to DADS; and

(B) documentation of the type and dates of the service, training, and education the applicant received and an explanation as to why the applicant's military service, training or education substantially meets all of the requirements for a permit under this chapter.

(3) Documentation of military status that is acceptable to DADS includes:

(A) for status as a military service member, a copy of a current military service order issued to the applicant by the armed forces of the United States, the State of Texas, or another state; and

(B) for status as a military veteran, a copy of a military service discharge order issued to the applicant by the armed forces of the United States, the State of Texas, or another state.

(4) If DADS requests additional documentation, the applicant must submit the requested documentation.

(5) DADS approves a request for a waiver of fees submitted in accordance with this subsection if DADS determines that the applicant is a military service member or a military veteran and the applicant's military service, training, or education substantially meets all of the requirements for licensure under this chapter.

(b) Fee waiver based on reciprocity.

(1) DADS waives the combined permit application and examination fee described in §95.109(c)(1)(A) of this chapter and §95.128(n)(1)(A) of this chapter and the permit application fee described in §95.125(f)(1) of this chapter for an applicant if DADS receives and approves a request for a waiver of fees from the applicant in accordance with this subsection.

(2) To request a waiver of the fee under this subsection, an applicant must include a written request for a waiver of the fee with the applicant's application that is submitted to DADS in accordance with §95.128(h) of this chapter. The applicant must include with the request documentation of the applicant's status as a military service member, military veteran, or military spouse that is acceptable to DADS.

(3) Documentation of military status that is acceptable to DADS includes:

(A) for status as a military service member, a copy of a current military service order issued to the applicant by the armed forces of the United States, the State of Texas, or another state;

(B) for status as a military veteran, a copy of a military service discharge order issued to the applicant by the armed forces of the United States, the State of Texas, or another state; and

(C) for status as a military spouse:

(i) a copy of a marriage certificate issued to the applicant by a state of the United States or a foreign government; and

(ii) a copy of a current military service order issued to the applicant's spouse by the armed forces of the United States, the State of Texas, or another state.

(4) If DADS requests additional documentation, the applicant must submit the requested documentation.

(5) DADS approves a request for a waiver of the fee submitted in accordance with this subsection if DADS determines that:

(A) the applicant holds a license, registration, certificate, or permit as a medication aide in good standing in another jurisdiction with licensing requirements substantially equivalent to or that exceed the requirements for a permit under this chapter; and

(B) the applicant is a military service member, a military veteran, or a military spouse.

(c) Additional time for permit renewal.

(1) DADS gives a medication aide an additional two years to complete the permit renewal requirements described in §95.115 of this chapter (relating to Permit Renewal), if DADS receives and approves a request for additional time to complete the permit renewal requirements from a medication aide in accordance with this subsection.

(2) To request additional time to complete permit renewal requirements, a medication aide must submit a written request for addi-

tional time to DADS before the expiration date of the medication aide's permit. The medication aide must include with the request documentation of the medication aide's status as a military service member that is acceptable to DADS. Documentation as a military service member that is acceptable to DADS includes a copy of a current military service order issued to the medication aide by the armed forces of the United States, the State of Texas, or another state.

(3) If DADS requests additional documentation, the medication aide must submit the requested documentation.

(4) DADS approves a request for two additional years to complete permit renewal requirements submitted in accordance with this subsection if DADS determines that the medication aide is a military service member, except DADS does not approve a request if DADS granted the medication aide a previous extension and the medication aide has not completed the permit renewal requirements during the two-year extension period.

(5) If a medication aide does not submit the written request described by paragraph (2) of this subsection before the expiration date of the medication aide's permit, DADS will consider a request after the expiration date of the permit if the medication aide establishes to the satisfaction of DADS that the request was not submitted before the expiration date of the medication aide's permit because the medication aide was serving as a military service member at the time the request was due.

(d) Renewal of expired permit.

(1) DADS renews an expired permit if DADS receives and approves a request for renewal from a former medication aide in accordance with this subsection.

(2) To request renewal of an expired permit, a former medication aide must submit a written request with a permit renewal application within five years after the former medication aide's permit expired. The former medication aide must include with the request documentation of the former medication aide's status as a military service member, military veteran, or military spouse that is acceptable to DADS.

(3) Documentation of military status that is acceptable to DADS includes:

(A) for status as a military service member, a copy of a current military service order issued to the former medication aide by the armed forces of the United States, the State of Texas, or another state;

(B) for status as a military veteran, a copy of a military service discharge order issued to the former medication aide by the armed forces of the United States, the State of Texas, or another state; and

(C) for status as a military spouse:

(i) a copy of a marriage certificate issued to the former medication aide by a state of the United States or a foreign government; and

(ii) a copy of a current military service order issued to the former medication aide's spouse by the armed forces of the United States, the State of Texas, or another state.

(4) If DADS requests additional documentation, the former medication aide must submit the requested documentation.

(5) DADS approves a request for renewal of an expired permit submitted in accordance with this subsection if DADS determines that:

(A) the former medication aide is a military service member, military veteran, or military spouse;

(B) the former medication aide has not committed an offense listed in Texas Health and Safety Code §250.006(a) and has not committed an offense listed in Texas Health and Safety Code §250.006(b) during the five years before the date the former medication aide submitted the initial permit application;

(C) the former medication aide is not listed on the EMR; and

(D) the former medication aide is not listed on the NAR.

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

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For further information, please call: (512) 438-4836



## PART 20. TEXAS WORKFORCE COMMISSION

### CHAPTER 809. CHILD CARE SERVICES

The Texas Workforce Commission (Commission) adopts amendments to the following sections of Chapter 809, relating to Child Care Services, *without* changes, as published in the June 17, 2016, issue of the *Texas Register* (41 TexReg 4394):

Subchapter B. General Management, §§809.13, 809.15 - 809.17

Subchapter C. Eligibility for Child Care Services, §§809.42 - 44, 809.46, 809.48, 809.49, 809.53

Subchapter D. Parent Rights and Responsibilities, §§809.72, 809.74, 809.75

Subchapter E. Requirements to Provide Child Care, §809.95

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

The Texas Workforce Commission (Commission) adopts amendments to the following sections of Chapter 809, relating to Child Care Services, *with* changes, as published in the June 17, 2016, issue of the *Texas Register* (41 TexReg 4394):

Subchapter A. General Provisions, §809.2

Subchapter B. General Management, §809.19, §809.20

Subchapter C. Eligibility for Child Care Services, §§809.41, 809.45, 809.47, 809.50, 809.51, 809.54

Subchapter D. Parent Rights and Responsibilities, §§809.71, 809.73, 809.78

Subchapter E. Requirements to Provide Child Care, §§809.91 - 809.94

Subchapter F. Fraud Fact-Finding and Improper Payments, §§809.111, 809.112, 809.117

The Commission adopts the following new section to Chapter 809, relating to Child Care Services, *without* changes, as published in the June 17, 2016, issue of the *Texas Register* (41 TexReg 4394):

Subchapter C. Eligibility for Child Care Services, §809.52

The Commission adopts the repeal of the following sections of Chapter 809, relating to Child Care Services, *without* changes, as published in the June 17, 2016, issue of the *Texas Register* (41 TexReg 4394):

Subchapter C. Eligibility for Child Care Services, §809.55

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

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

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

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

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

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

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

#### *Twelve-Month Eligibility Period*

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

CCDBG Act §658E(c)(2)(N)(i) and (ii) require states to demonstrate in the CCDF State Plan that after initial eligibility, each

child who receives assistance will be considered to meet all eligibility requirements for such assistance and will receive such assistance for not fewer than 12 months before the state or designated local entity redetermines the eligibility of the child. The 12-month eligibility period applies regardless of changes in income--as long as income does not exceed the federal threshold of 85 percent of the state median income (SMI)--or temporary changes in participation in work, training, or educational activities.

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

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

#### *Parent Share of Cost during the 12-Month Eligibility Period*

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

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

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

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

#### *Income Calculation to Consider Irregular Income Fluctuations*

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

#### *Graduated Phaseout of Eligibility*

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

#### *Priority and Eligibility for Children Experiencing Homelessness*

CCDBG Act §650E(3)(B)(i) and NPRM §98.46(a)(3) and §98.51 require states to give priority for services to children experiencing homelessness. NPRM §98.2 defines a "child experiencing

homelessness" as a child meeting the definition of homelessness under the McKinney-Vento Homelessness Act of 1987 (McKinney-Vento Act).

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

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

#### *Attendance and Provider Reimbursements*

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

- align with generally accepted payment practices for children who do not receive CCDF funds; and
- support the fixed costs of providing child care services by delinking provider payments from a child's occasional absences.

#### *Consumer Education Information*

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

- availability of the full diversity of child care services;
- quality of providers;
- state processes for licensing, conducting background checks, and monitoring child care providers;
- other programs for which families that receive child care services may be eligible;
- research and best practices concerning children's development; and
- state policies regarding social-emotional behavioral health of children.

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

- licensing compliance information for the provider selected by the parent;
- how to submit a complaint regarding a child care provider;
- how to contact community resources that assist parents in locating quality child care; and
- how CCDF subsidies are designed to promote equal access to the full range of child care providers.

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

- the Medicaid Early and Periodic Screening, Diagnosis, and Treatment program; and
- the Early Childhood Intervention (ECI) and Preschool Program for Children with Disabilities developmental screening services.

## PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

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

### SUBCHAPTER A. GENERAL PROVISIONS

The Commission adopts the following amendments to Subchapter A:

#### §809.2. Definitions

##### *Attending a Job Training or Educational Program*

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

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

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

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

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

##### *A Child Experiencing Homelessness*

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

### *Child with Disabilities*

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

### *Family*

The definition of a "family" is amended to mirror the Workforce Innovation and Opportunity Act (WIOA) definition of a family. The intent of this change is to clarify, consistent with current practice for both the child care and WIOA programs, that the individuals in a family are "living in a single household." Additionally, consistent with WIOA, the definition of married individuals includes "common-law" marriages. Consistent with the WIOA program guidelines, written attestation must be obtained from both parties affirming the common-law marriage.

### *Improper Payments*

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

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

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

### *Regulated Child Care Provider*

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

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

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

### *Working*

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

Comment:

One commenter strongly supported the requirement that the parent demonstrate successful progress toward completion of an education program only be applied at the 12-month redetermination date.

Response:

The Commission appreciates the comment.

Comment:

Commenters requested that the requirement for the parent to be making progress toward successful completion of the education program be applied at initial eligibility if the parent is already enrolled in an education or job training program.

Response:

Past performance in an education or training program should not be considered in initial eligibility for child care. The parent's progress toward completion of the program should only be based on the performance while the parent is receiving child care, as the lack of stable child care may have been a contributing factor to the parent's inability to work toward successful completion of the education or training activity.

Comment:

Commenters requested that the criteria for determining if a parent is making progress toward successful completion of an education and/or training program be consistent across the state. The commenters stated that allowing various standards in the state leads to confusion when a parent moves from one local workforce development area (workforce area) to another. One commenter stated that there should not be more than one way to define the completion of a college course (i.e., grade point average) and that individual Boards should not have differing criteria to determine the extent of progress. Parents deserve to have equal access to child care assistance regardless of where they live or attend school.

Response:

The Commission understands the concerns; however, the Commission believes that this standard should remain a local decision based on local needs and factors specific to education and training programs in the workforce area. Local Workforce Development Boards (Boards) are in the best position, based on their knowledge of and experience with local training and education programs, to make policies regarding the criteria for determining whether the parent is making progress toward successful completion of the program.

Comment:

Commenters requested that if a parent is officially enrolled in the training or education program and meeting the program's attendance requirements, that should be sufficient documentation for a Board to determine that the parent is making progress toward program completion.

Response:

Boards have the flexibility within the rule to determine that being enrolled in and meeting attendance standards of the program would meet the Board standard for making progress toward completion of the program.

Comment:

A commenter requested clarification as to whether the parent would be eligible for the three-month continued care (described

in §809.51) once the Board determines that the minimum threshold for making progress has not been met.

Response:

The requirement that the parent is making successful progress toward completion of the program is only applied at the 12-month eligibility redetermination. If the parent is determined as not meeting this requirement at redetermination, then the parent is not eligible for care for the next eligibility period (unless the parent meets other eligibility requirements regarding participation in work activities). The three-month period of continued care does not apply to parents who do not meet the eligibility requirements at the 12-month eligibility redetermination.

Comment:

One commenter supported the change to the definition of a "child with disabilities" to include the language change from "incapable of performing" to "substantially limits." The commenter also supported expanding the definition to include children who may not have a formal diagnosis but are "regarded to have a disability," as there are many reasons why a child may not have a formal diagnosis (e.g., the family does not have access to regular medical care) but would certainly benefit from additional support services.

Response:

The Commission appreciates the comment.

Comment:

One commenter requested that acceptable forms of documentation to verify impairments listed in the definition of a child with disabilities (if required) be specified in the Child Care Services Guide.

Response:

The definition is based on §504 of the Rehabilitation Act of 1973. The Agency will review documentation related to this Act and update the Child Care Services Guide accordingly.

Comment:

Commenters requested that the definition of a "family" align more closely with the WIOA definition, specifically to include the statement that the individuals are "living in a single household," as this would clarify the current practice in child care and match the WIOA definition. Another commenter stated that aligning the definitions would increase opportunities to streamline Board eligibility determination processes.

Response:

The Commission agrees and has modified the definition of a "family" to mirror, but not replicate, the definition of a family in WIOA. Consistent with the current child care practice of including all household dependents in the family, the amended rule language modifies the WIOA definition to include all household dependents, not just the children, in the definition of a family.

Comment:

Several commenters requested clarification regarding the inclusion of payments "for services not received" in the definition of "improper payments." The commenters stated that this appears to be in conflict with §809.93(b), which states that providers are reimbursed on authorized enrollment, not attendance. The commenters stated that "services not delivered" may be read

to include payments for absences, which is required under §809.93(b).

Response:

Payment for enrollment is a requirement in the rule, and payment for absences is allowed as long as the child remains enrolled under a valid authorization for care. The Commission clarifies that the term "services not received" in the definition of "improper payments" is intended to cover instances in which payment is made to a provider without a valid authorization and care was not provided. Further, the definition of improper payment is also intended to apply to quality improvement activities. It would be considered an improper payment if payment is made for a quality activity, such as professional development or equipment, and the services or equipment were not delivered.

Comment:

One commenter supported the new definition of "child experiencing homelessness."

Response:

The Commission appreciates the comment.

Comment:

Several commenters requested that the rule language for a "child experiencing homelessness" include the statutory language from the McKinney-Vento Act for the definition of a child experiencing homelessness. The commenters stated that this would ensure consistent implementation of the definition. One commenter also requested that acceptable forms of documentation to verify compliance with the definition should be included in the Child Care Services Guide.

Response:

The Child Care Services Guide will provide a link to the pertinent section of the McKinney-Vento Act, but actual language from that statute will not be included in rule. Doing so would require keeping the Texas Administrative Code (TAC) updated with any changes to the McKinney-Vento Act. Providing a link to the most current citation will ensure that the most current definition is used.

Additional guidance regarding the definition of homelessness and determining eligibility for children experiencing homelessness will be provided in the Child Care Services Guide.

Comment:

One commenter strongly supported the removal of youth day camp providers from the definition of a "regulated child care provider," and, therefore, being ineligible to serve subsidized children. The commenter commends the state on providing additional support and an extended timeline for these providers to become licensed through DFPS.

The commenter stated that ensuring the safety of all children, regardless of age and placement, by requiring an FBI fingerprint criminal background check for youth day camp staff is a responsible state policy. The commenter urges the Commission to consider extending FBI fingerprint criminal background checks to all child care providers, regardless of whether they serve subsidized children.

Response:

The Commission appreciates the comment. The Commission also notes that the CCDBG Act of 2014 requires FBI fingerprint

background checks for all licensed, regulated, or registered child care providers (excluding eligible relatives), not just providers serving subsidized children.

Comment:

One commenter recommended adding definitions for both "temporary" and "nontemporary" regarding parent status changes in work, training, and education activities.

Response:

The Commission declines to make this change. Temporary changes are listed in §809.51(a)(2) and conform to the requirements in the proposed CCDF regulations. Nontemporary changes are clarified in §809.51(b) to be "a loss of work or cessation of attendance at a job training or educational program *that does not constitute a temporary change* in accordance with §809.51(a)(2)." If the status change is not a temporary change listed in §809.51(a)(2), then it would be considered a nontemporary change.

Comment:

One commenter recommended adding a definition for a "job training program," which is part of the eligibility criteria defined in §809.41(a)(3)(B), but is not defined, while the other two criteria--educational programs and working--are defined.

Response:

The Commission points out that "job training program" is defined in §809.2(12).

## SUBCHAPTER B. GENERAL MANAGEMENT

The Commission adopts the following amendments to Subchapter B:

### §809.13. Board Policies for Child Care Services

Section 809.13 is amended to remove the requirement in subsection (c) for Boards to submit policy modifications, amendments, or new policies to the Commission within two weeks of adopting the policy. This section retains the requirement that Boards submit Board policies to the Commission upon request. The additional requirement to submit changes to policies within a specific time frame is redundant. The Commission makes this change to reduce administrative burden on both Board and Agency staff. Section 809.13 is amended to remove multiple Board policy requirements that no longer apply under the CCDBG Act.

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

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

Section 809.13 is amended to remove the requirement that Boards establish policies for attendance standards in order to be consistent with CCDBG Act §658E(c)(2)(S), which requires

that provider reimbursement policies support the fixed costs of providing child care services by delinking provider payments from a child's occasional absences. Attendance standards are established in amended §809.78, and reimbursement policies based on enrollments are established in §809.93.

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

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

Comment:

One commenter recommended that all of the required Board policies for child care services be removed from the rules and that the Agency standardize all child care rules and provide clear intent and implementation direction. In order to ensure equitable services be available to all parents, regardless of where the parent resides within the state of Texas, the commenter stated that the rules must be standardized and applied consistently across all Board areas.

Response:

The Commission declines this recommendation. The Chapter 809 Child Care Services rules provide for Agency oversight of the program in order to comply with federal and state laws and regulations and to ensure that the rules are applied consistently throughout the state. However, state statute requires that child care services be administered by Boards and requires that the Agency provide Boards with flexibility in administering workforce programs, including child care.

Comment:

One commenter strongly recommended that the Commission retain the requirement that Boards submit policy modifications, amendments, or new policies to the Agency within two weeks of adopting the policy.

The commenter contended that receiving notice of policy modifications after their adoption effectively removes all authority from the Agency to establish consistent standards. Removing a timeline for providing Board policies means that the state may be completely unaware of requirements for regulated child care providers for an extended period of time, including new policies that may be contradictory to federal or state law. Relying on the initiative of an individual Board to report changes or waiting for Agency staff to proactively ask about new policies is an unreliable system for compliance. Contrary to the Commission's interpretation, requiring a two-week standing deadline is not redundant to offering information only upon request.

While the commenter acknowledged there is an administrative responsibility that may be challenging, the risk of allowing inappropriate or possibly noncompliant policies to be implemented on a local level is much greater.

Response:

The Commission disagrees that receiving notification of policy changes after their adoption removes all authority from the Agency to establish consistent standards.

The Agency and the Agency's Child Care Technical Assistance staff review all Board policies prior to conducting technical assistance site visits. Additionally, the Agency's Subrecipient Monitoring department also reviews Board policies prior to monitoring visits. Agency staff participates in Board meetings, is aware of changes to Board policies as they occur, and responds appropriately and timely if the policies do not comply with Agency rules and policies. These routine activities are sufficient to meet the Agency's oversight responsibilities.

#### §809.15. Promoting Consumer Education

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

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

#### *Information on Resources for Developmental Screening*

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

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

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

Information on developmental screenings must also include a description of how a family or eligible child care provider can use available resources and services to obtain developmental screenings for children receiving assistance who may be at risk for cognitive or other developmental delays, which may include social, emotional, physical, or linguistic delays.

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

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

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

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

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

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

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

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

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

#### *Consumer Education*

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

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

--quality of providers;

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

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

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

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

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

--providing licensing compliance information;

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

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

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

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

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

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

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

All consumer education required by the final CCDF regulations is available on the Texas Child Care Solutions website at [www.texaschildcaresolutions.org](http://www.texaschildcaresolutions.org).

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

Comment:

Commenters requested additional information on how referrals for developmental screenings will be made and if a referral

to 2-1-1 Texas would be sufficient. One commenter inquired whether the Agency will be providing the Boards with information on existing resources and services available within the workforce area for developmental screenings.

Response:

The Commission clarifies that there is no requirement that a referral for developmental screening is made. The rule language only requires that information be included in consumer education materials regarding resources and services for conducting developmental screenings, and providing referrals is included in consumer education materials. The information provided to parents will state how the parent can connect with the resources.

The Agency will provide information to Boards in the Child Care Services Guide on procedures for providing information to parents regarding screenings, including links to state websites and the option to provide printed materials. Additional information specific to resources in the workforce area should be provided by the Board.

#### §809.16. Quality Improvement Activities

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

#### §809.17. Leveraging Local Resources

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

Comment:

One commenter requested additional information on the expectations of how the public entity shall verify that children meet eligibility requirements.

Response:

The Commission notes that there are no changes to the rule provisions. Guidance regarding the requirements for local match is provided in Section C-202-a of the Child Care Services Guide.

#### §809.19. Assessing the Parent Share of Cost

##### *Parent Share of Cost during the 12-Month Eligibility Period*

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

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

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

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

--Initial eligibility determination;

--12-month eligibility redetermination;

--The addition of a child in care;

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

--Upon resumption of work, job training, or education activities following temporary changes described in §809.51(a)(2) and during the three-month continuation of care period described in §809.51(c).

In order to ensure compliance with the requirement in the NPRM that prohibits states from increasing the parent share of cost during the 12-month eligibility period, regardless of increases in the family income, the Commission adds §809.19(a)(1)(D), requiring Boards to ensure that the parent share of cost amount does not increase above the amount assessed at initial eligibility or at the 12-month eligibility redetermination, except upon the addition of a child in care as described in §809.19(a)(1)(C)(iii).

Additionally, the Commission amends §809.19(a)(2)(A) - (B) to clarify that parents participating in Choices or Supplemental Nutrition and Assistance Program Employment and Training (SNAP E&T), as well as a parent in Choices child care at §809.45 or SNAP E&T child care at §809.47, are exempt from the parent share of cost for the 12-month eligibility period.

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

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

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

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

--the family's size and income; and

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

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

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

parent share of cost is reduced any time the parent reports a change in income, family size, or number of children in care that would result in a reduced parent share of cost.

The Commission further notes that amended §809.73 requires that parents report such changes within 14 calendar days of the change. Changes in the parent share of cost should be made at the beginning of the month following the reported change. If the parent does not report the change within that time period, the Board is not required to make the change retroactive from the actual date of the reduction.

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

#### *Exemptions for Parents of Children Experiencing Homelessness*

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

Section 809.19(a)(2) is amended to require that parents of a child receiving child care for children experiencing homelessness described in §809.52 be exempt from the parent share of cost.

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

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

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

Consistent with NPRM §98.30(h) and to encourage parents to select a TRS-certified provider, and, thus, encourage greater provider participation in the TRS program, the Commission adds §809.19(g) to allow Boards to reduce the assessed parent share of cost amount based on the parent's selection of a TRS-certified provider.

If a Board elects to have such a policy, the policy must ensure that the parent continues to receive the reduction if:

--the TRS provider loses TRS certification; or

--the parent moves or changes employment within the workforce area and no TRS-certified providers are available to meet the needs of the parent's changed circumstances.

However, the policy must also ensure that the parent no longer receives the reduction if the parent voluntarily transfers the child from a TRS-certified provider to a non-TRS-certified provider.

Comment:

Several commenters requested clarification regarding the requirements surrounding reductions in the assessed parent share of cost amount.

Several Boards requested that the reduction of the parent share of cost during a three-month continuation of care period after the nontemporary employment loss be considered a temporary reduction and the parent share of cost be reassessed if the parent resumes activities during the three-month period.

Similarly, several Boards requested to reassess a parent share of cost when the parent resumes activities following a temporary loss of employment. This is not stated in the proposed rule change. Without the ability to reassess the parent share of cost upon gaining new employment or resuming the parent share of cost originally established, the parent share of cost would remain at the reduced amount through the remainder of the eligibility period.

Response:

The Commission has added clarification language at §809.19(a)(1)(C)(v) to allow for a reassessment of the parent share of cost upon the resumption of work, job training, or education activities following temporary changes described in §809.51(a)(2) and following nontemporary changes described in §809.51(c).

However, in order to ensure compliance with the requirement in NPRM that prohibits states from increasing the parent share of cost during the 12-month eligibility period, regardless of increases in the family income, the Commission adds §809.19(a)(1)(D) requiring Boards to ensure that the parent share of cost amount does not increase above the amount assessed at initial eligibility or at the 12-month eligibility redetermination, except upon the addition of a new child in care.

Comment:

Several commenters requested clarification regarding whether or not reductions made for extenuating circumstances are required to be permanent for the remainder of the eligibility period. The commenters recommended that reductions in parent share of cost due to extenuating circumstances in §809.19(d) be temporary and that the parent share of cost return to its previous rate once the extenuating circumstances no longer exist.

Response:

The Commission agrees and has modified the language in §809.19(d) to clarify that the reductions due to extenuating circumstances are temporary and that following the temporary reduction, the parent share of cost amount immediately prior to the temporary reduction shall be reinstated.

Comment:

One commenter suggested that the language in §809.19(a)(1)(C)(iii) regarding the amount added to the parent share of cost upon the addition of a child in care should read "an additional amount for the family" instead of an additional amount "for the child."

Response:

The Commission has modified the language in §809.19(a)(1)(C)(iii) to streamline the rules by stating that the reassessment is done upon the addition of a child in care.

Comment:

Several commenters requested clarification on the parent share of cost reduction based on the parent's selection of a TRS-certified provider. In light of the requirement that the assessed parent share of cost amount cannot increase during the eligibility period, the commenters asked if the reduction would continue if the parent transfers to a non-TRS-certified provider.

Response:

The Commission appreciates the comment and has made changes to the proposed rule language to add §809.19(g) to clarify the requirements for TRS parent share of cost reduction.

The Commission has removed the proposed language that the selection of a TRS provider is a factor in the parent share of cost assessment. Instead, the rule language in §809.19(g) is intended to clarify that the selection of a TRS provider would be, at the Board's option, a reduction of the amount of the parent share of cost assessed in §809.19(a)(1).

The parent would continue to receive the applicable TRS reduction through the end of the eligibility period, if during the 12-month period, the TRS provider selected by the parent loses TRS certification, or the parent moves or changes employment and no TRS providers are available to meet the needs of the parent's changed circumstance.

However, if the parent voluntarily transfers the child from a quality provider to a non-quality provider, then the parent would no longer be eligible for the TRS reduction.

Comment:

As will be discussed in §809.45, regarding Choices child care, and §809.47, regarding SNAP E&T child care, several commenters requested clarification regarding the parent share of cost exemption for parents participating in Choices and SNAP E&T. Commenters suggested ending the exemption from the parent share of cost once the parent stops participating in Choices or SNAP E&T.

Additionally, several commenters requested that the parent share of cost exemption for parents of children experiencing homelessness should end and a parent share of cost be assessed if the parent becomes employed or is otherwise eligible for At-Risk child care, following the initial three-month eligibility period for homeless children.

Response:

Consistent with the NPRM requirement §98.21(a)(3) that prohibits states from increasing the parent share of cost during the 12-month eligibility period, regardless of increases in the family income, the exemption from the parent share of cost for parents in Choices child care at §809.45 and SNAP E&T child care at §809.47 must continue during the 12-month eligibility period.

Accordingly, the Commission has modified §809.19(a)(2)(A) - (B) to clarify that parents participating in Choices or SNAP E&T, as well as parents in Choices child care at §809.45 or SNAP E&T child care at §809.47, are exempt from the parent share of cost. This change clarifies that the parent share of cost exemption is retained throughout the eligibility period, even if the parent's participation in these programs changes.

Similarly, the Commission has also modified §809.19(a)(2)(C) to state that parents with children receiving child care for children experiencing homelessness, as described in §809.52, are exempt from the parent share of cost. This change clarifies that

the parent share of cost exemption is retained throughout the eligibility period, even if the child's homelessness status changes.

Comment:

One commenter strongly supported the option for Boards to consider the parent selection of a TRS-certified provider in assessing the parent share of cost. Reducing the parent share of cost, along with increasing the provider's payment rate for selection and participation in the TRS program, are effective strategies to encourage parents to select a TRS-certified provider and to encourage greater provider participation in the TRS program. The commenter encouraged the Commission to consider extending this as a requirement for all Boards. The commenter also strongly urged the Commission to ensure Boards secure funding to set their TRS-certified provider reimbursement rate bonus at a level that accommodates any reduction in the parent share of cost without reducing eligibility or creating a waiting list.

Response:

The Commission appreciates the support. However, the Commission declines to require this of all Boards. The decision to include the TRS parent share of cost reduction should remain a local decision as determined by the Board--taking into consideration the need for such an incentive and the availability of funds at the local level.

Comment:

One commenter recommended that the Commission clarify in the rule language that the Board's consideration of parent selection of a TRS-certified provider result in the reduction of the parent share of cost, as intended by the Commission's rule explanation of NPRM §98.30(h). The current proposed rule language leaves the interpretation of "consider" too vague.

Response:

The Commission appreciates the comment and, as explained previously, the Commission has modified the language and added §809.19(g) to clarify that this is a reduction in the assessed parent share of cost, at the Board's discretion.

Comment:

One commenter disagreed that the selection of a TRS-certified provider as a consideration in the parent share of cost assessment will encourage providers to participate in the TRS program. Providers are required to collect the parent share of cost at the beginning of the month, and reducing the amount collected at the beginning of the month will not encourage providers to become TRS-certified. The commenter recommended that if the parent share of cost is reduced for selecting a TRS provider, then the TRS provider should be reimbursed at the beginning of the month based on the enrollment authorization.

Response:

The Commission's intent is for Boards, at their option, to provide incentives for parents to choose a TRS-certified provider, and, as a result, encourage more providers to become TRS certified in order for the parent to take advantage of this incentive.

The Commission understands the payment issue described by the commenter and notes that amendments to §809.93 change reimbursements from being based on daily attendance to being based on authorized monthly enrollments. The Commission declines to provide reimbursements prior to the delivery of services under that authorization to account for instances in which the authorization may change during the week or month. This is also

consistent with the general principle that reimbursements using public funds occurs following the delivery of services.

Comment:

One commenter requested that the Commission allow Boards to waive the parent share of cost for families at or below 100 percent of the federal poverty guidelines, as allowed under the CCDF regulations. This would align with income limits for Early Head Start and Head Start and would help Boards coordinate with local partners in providing "wraparound care" for families.

Response:

Pursuant to §809.19(e), the Commission has waived the parent share of cost only to parents in an exempted group in §809.19(a)(2). However, the requirement that the parent share of cost be a sliding fee scale based on income and family size is intended to result in the parent share of cost amount starting at a low amount for families with very low incomes and gradually increase as the family moves to higher income ranges for the same family size. Families at or below 100 percent of poverty would have a lower parent share of cost than families at higher income ranges. Additionally, pursuant to §809.19(f), families whose income is calculated to be zero shall have a zero parent share of cost.

Comment:

One commenter did not agree with prohibiting increases in parent share of cost if a parent or family experiences an income increase during the eligibility period.

Response:

The Commission notes that the rule reflects requirements in the NPRM. The intent of the rule is described in the preamble to the NPRM as follows:

The limitation on raising copayments, by protecting the child's benefit level for the minimum 12-month eligibility period, is consistent with the statutory requirement that once deemed eligible, a child shall 'receive such assistance for not less than 12 months.' Raising copayments earlier than the 12-month period could potentially destabilize the child's access to assistance and has the unintended consequence of forcing working parents to choose between advancing in the workplace and child care assistance.

Comment:

Several commenters requested clarification regarding current Board policies that allow for reductions in the parent share of cost based on factors other than the selection of a TRS-certified provider. Specifically, the commenters inquired whether the Boards are allowed to reduce the assessed parent share of cost based on the level of care authorized (e.g., part-day or part-week).

Response:

Pursuant to §809.19(a)(1)(B), the amount of the parent share of cost, including any reduction pursuant to §809.19(a)(1)(C)(iv), due to changes during the eligibility period, is determined by a sliding fee scale based on the family's size and gross monthly income and may also take into consideration the number of children in care. Those are the only factors allowed to determine the amount of the parent share of cost.

Reductions to that assessed amount are only allowed if the reduction is:

--temporary due to extenuating circumstances (§809.19(d)); or  
--based on the selection of a TRS-certified provider (§809.19(g)).

NPRM §98.45(k)(2) prohibits the parent share of cost from being based on the cost of care or the subsidy amount. Basing the parent share of cost on the level of services would be considered as basing the parent share of cost on the cost of care or the subsidy amount.

Reductions for "part-day" and "part-week" care do not meet the intent of the NPRM or §809.19(d) (regarding reductions due to extenuating circumstances), as these reductions are based on the level of services, and not based on family income, family size, number of children in care, temporary extenuating circumstances, or the selection of a TRS provider, as required in the rule. Therefore, these reductions are not allowable.

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

The Commission acknowledges that this type of reduction was allowed previously; however, upon review of the rules that have been in place, these reductions do not conform to the requirements in the NPRM.

Comment:

Many commenters expressed concerns regarding parents who may fail to pay the parent share of cost as terminating care because the failure to pay the parent share of cost is no longer allowed during the eligibility period. Commenters inquired if Boards may continue to have a policy that limits transfers to another provider if the parent owes a parent share of cost at the current provider. The commenters expressed concerns that parents should be held responsible during the eligibility period for failure to pay the parent share of cost.

Commenters expressed concerns that the only option to enforce the parent share of cost would be to require Boards to have a policy that reimburses the provider, and the parent would not be allowed back into care at the 12-month eligibility redetermination until the amount is repaid.

One Board requested consideration to use a suspension process when parents do not pay their assigned parent share of cost, similar to the suspensions allowed for excessive absences. The Board does not want to pay the parent share of cost to the provider when the parent does not pay, as the Board believes this will be setting a negative precedent. The Board specifically requested to be allowed to withhold a transfer or suspend care until the parent has paid the parent share of cost to the provider in full.

Response:

Boards may prohibit transfers or allow a certain number of transfers if a parent is not current on the parent share of cost, as long as it does not have the effect of terminating care during the 12-month period. A Board cannot terminate care during the eligibility period for a parent's failure to pay the parent share of cost.

Providers should report timely for failure to pay the parent share of cost, and Board child care contractors should work with parents to determine why the payments are not being made and

possibly temporarily reduce the parent share of cost if necessary.

Pursuant to §809.13(c)(3), at their option, Boards may choose to have a policy to reimburse the provider when a parent fails to pay the parent share of cost. Where the Board has such a policy, pursuant to §809.117(d)(3), the Board must recoup the costs at the next eligible determination. Where a parent fails to fully repay the cost, the parent is not eligible until the repayment is made, pursuant to §809.117(e).

To ensure continuity of care for children and to assist working parents with child care, suspensions should only occur in instances in which the parent determines that care is not needed for a temporary amount of time (such as temporary interruptions in activities, or other reasons as determined by the parent that may affect the child's continued attendance). However, failure to pay the parent share of cost is not a reason for the child care contractor to suspend care, as it is not a factor in demonstrating that care is not needed for a temporary amount of time.

As explained in §809.51, regarding care during interruptions in activities, the preamble to the NPRM notes that, consistent with §658E(c)(2)(N)(i) of the CCDBG Act, "during the minimum 12-month eligibility period Lead Agencies also may not end or suspend child care authorization or provider payments due to a temporary change in a parent's work, training, or education status." Consistent with this guidance, a Board or a Board child care contractor cannot suspend a child's care for the parent's failure to pay the parent share of cost.

Comment:

One commenter inquired if a provider is allowed to end enrollment at the provider's facility if a parent fails to pay the parent share of cost and if those practices are in the provider's established policies.

Response:

Yes, a provider may discontinue care at the provider's facility, consistent with established policies related to parents who do not pay for the services provided. However, this must not result in the contractor's termination of the child's eligibility for the subsidy during the 12-month eligibility period.

Comment:

One commenter inquired if a new redetermination is conducted and a new parent share of cost assessed if the parents get married, have a baby, or add a sibling to care.

Response:

Pursuant to §809.42, family eligibility can only be redetermined at the 12-month eligibility period. Changes in family composition or the addition of a child in care are not factors in eligibility redetermination. If the changes result in a change in family size that would result in a reduced parent share of cost, then such reduction must be made. However, the parent share of cost cannot be increased based on the increase in income during the 12-month period. The addition of a new baby or sibling to care would constitute a change to the number of children to which the parent share of cost is applied. Additional guidance on how to apply the parent share of cost for changes in family size amount added for the child will be provided in the Child Care Services Guide.

Comment:

One commenter requested clarification regarding the phrase in the preamble that the parent share of cost may be based on "other factors as appropriate."

Response:

This is CCDF regulatory language quoted in the preamble. In Chapter 809 rules, "other factors as appropriate" are set out in §809.19(a)(1)(B) regarding the number of children in care.

Comment:

One commenter inquired if parents with currently enrolled children will be able to request their parent share of cost to be reduced due to new exclusions of income sources in §809.44. The commenter suggested parents must wait until January 1, 2017, to request a parent share of cost to be reevaluated or until significant status change occurs or the case comes up for review. This will assist Board contractor staff in managing workload. Otherwise, there will be a significant need for overtime in order for all these cases to be processed timely due to the majority of parents who receive some other income besides income received from work.

Response:

The income calculation in §809.44 is used to determine family income at the following points:

--Initial eligibility determination;

--12-month redetermination; and

--When a parent reports a change in income that would result in a lower parent share of cost or result in the family exceeding 85 percent of SMI.

Beginning on October 1, 2016, the new income calculation methodology for continued eligibility and the parent share of cost assessment will be used at the family's scheduled redetermination. Upon the effective date of the rules, parents with children currently enrolled in care may report a change in family income or family size that could result in a reduction of the parent share of cost, and the parent share of cost will be calculated under the new income calculation guidelines. At their discretion, Boards may determine whether to consider a reevaluation of family income or family size as a redetermination. If Boards choose to do so, the requirements of §809.42 apply.

Comment:

One commenter pointed out that the reference to §809.54(c)(1) in the proposed §809.19(a)(2)(D) is incorrect.

Response:

The Commission appreciates the comment and agrees. This was an error in the proposed rules. The reference should be to §809.54(c), as paragraph (1) has been removed from the final rules.

#### §809.20. Maximum Provider Reimbursement Rates

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

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

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

Comment:

One commenter pointed out that the reference to §809.93(e) in the proposed §809.20(a) is incorrect.

Response:

The Commission appreciates the comment and agrees. This was an error in the proposed rules. The reference should be to §809.93(f), and this has been corrected in the final rules.

#### SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES

The Commission adopts the following amendments to Subchapter C:

##### §809.41. A Child's General Eligibility for Child Care Services

CCDBG Act §658E(c)(2)(N)(i) requires that each child who receives CCDF assistance be considered to meet all eligibility requirements and receive assistance for not less than 12 months before eligibility redetermination. NPRM §98.20 clarifies that general eligibility requirements are applicable "at the time of eligibility determination or redetermination."

Consistent with CCDBG Act §658E(c)(2)(N)(i) and NPRM §98.20, §809.41 is amended to add language clarifying that a child's general eligibility requirements--i.e., child's age, citizenship status, and residency, and the family's income, work status, and attendance in a job training or educational activity--are applied at the time of eligibility determination or redetermination. Changes to the child's age or residency, the family's income, participation in work, job training, or education activities that occur during the 12-month eligibility period and affect the child's continued care and eligibility are covered in §809.42.

The CCDBG Act revised the definition of eligibility at §658P(4)(B) so that, in addition to being at or below 85 percent of SMI for a family of the same size, the "family assets do not exceed \$1,000,000 (as certified by a member of such family)." This requirement is included in NPRM §98.20(a)(2)(ii).

Section 809.41(a)(3)(A) is amended to include this requirement and clarify that a family member must certify that the family assets do not exceed the \$1,000,000 threshold. This certification will be based on the parent's self-attestation and will be included in the application for services. Boards are not required to verify this certification; however, if it is discovered that the family may exceed the \$1 million asset threshold, the parent may be subject to fraud fact-finding procedures, as described in Subchapter F. Additional guidance will be provided in the Child Care Services Guide.

As mentioned previously, CCDBG Act §650E(3)(B)(i) and NPRM §98.46(a)(3) and §98.51 require states to give priority for services to children experiencing homelessness. The NPRM preamble clarifies that Lead Agencies have flexibility as to how they offer priority to this population.

Consistent with this requirement, §809.41(a)(2)(A) is amended to include language that families meeting the definition of experiencing homelessness in §809.2 are considered as having income that does not exceed 85 percent of SMI. Therefore, Boards are not required to conduct income eligibility determinations for families with a child experiencing homelessness.

Section 809.41 is amended to remove subsection (d) related to job search limitations. Continued child care for job search is described in §809.51.

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

NPRM §98.21(b) provides two options for states to use for the CCDBG Act's graduated phaseout requirement. The phaseout can be accomplished either by:

--establishing a second tier of eligibility at 85 percent of SMI if the parents, at the time of redetermination, are working or attending a job training or educational program, even if their income exceeds the initial income limit; or

--using the approach specified above, but only for a limited period of not less than an additional 12 months.

Section 809.41 is amended to add language requiring that Boards that establish initial family income eligibility at a level less than 85 percent of the SMI must ensure that the family remains eligible for care after passing the Board's initial income eligibility limit, up to 85 percent of SMI.

This language is consistent with NPRM §98.21(b)(1)(i), which provides the option to require that the family remain income-eligible for care after passing the initial income eligibility limit, including at the family's scheduled 12-month eligibility redetermination, as long as the family income does not exceed 85 percent of SMI.

In determining whether the family exceeds 85 percent of SMI, the Board shall use income calculation methodology and guidance that take into consideration fluctuations of income pursuant to §809.44(a).

The Commission notes that Boards are not required to establish initial family income eligibility at a level less than 85 percent of the SMI. The graduated phaseout requirements only apply to Boards that have established income eligibility thresholds pursuant to §809.41(a) that are less than 85 percent of the SMI. Boards are reminded that the establishment of income eligibility thresholds must be done in accordance with requirements for Board approving policies in an Open Meeting.

Comment:

Two commenters inquired if there is a federal requirement that WIOA-funded child care follow requirements in the CCDBG Act and the NPRM. The comments stated that Boards should be allowed to use WIOA funds for child care services without requiring the 12-month eligibility if the WIOA customer ends WIOA participation.

Response:

The Commission appreciates the comment and has amended §809.41 to add paragraph (f) to state that Subchapter C applies only to child care services using CCDF allocated by the Agency pursuant to its allocation rules at Chapter 800 General Administration rule §800.58, and local public transferred funds and local private donated funds described in §809.17.

Comment:

One commenter requested clarification regarding the provision in §809.41(c) related to time limits for child care if the parent is enrolled in an associate's degree program that will prepare the parent for a job in a high-growth, high-demand occupation as determined by the Board. The commenter suggested that this language be changed to read a "postsecondary degree program" and not specify the degree, as there is no Agency definition for what constitutes a high-growth, high-demand occupation. Additionally, the commenter asked what happens to eligibility if a parent is meeting eligibility requirements in one workforce area with his or her enrollment in an educational program but moves to another area and no longer meets eligibility due to a program/occupation not being on the new Board's list, since high-growth, high-demand occupation lists can vary significantly across the state. The commenter also requested clarification to confirm that students' career fields no longer will need to be attached to a targeted or demand occupation list.

Response:

The Commission declines to make the requested changes. To clarify, there is no requirement in Chapter 809 that a student's career field must be attached to a target or demand occupation in order to be eligible for child care services. However, a Board may choose to have a local policy that places this restriction as a condition of eligibility pursuant to §809.41(b) and §809.41(c), which require four years of eligibility if the parent is enrolled in such a degree program.

Section 809.41(b) allows Boards to establish policies for the provision of child care, including time limits, for the provision of child care services while the parent is attending an educational program. Section 809.41(c) requires that the time limits must ensure child care for four years if the parent is enrolled in a high-growth, high-demand occupation as determined by the Board. However, the provisions in §809.41(b) - (c) do not require parents to be in such a program leading to a high-growth, high-demand, or targeted occupation, absent a local policy placing this restriction.

Regarding the issue of a parent with an enrolled child moving to a workforce area that has a different educational requirement for eligibility, the educational eligibility requirement of the new Board can only be applied at the parent's scheduled 12-month redetermination.

§809.42. Eligibility Verification, Determination, and Redetermination

Section 809.42 is amended to include rule provisions related to eligibility verification, determination, and redetermination consistent with the CCDBG Act.

Section 809.42(a) is amended to emphasize that a Board shall ensure that all eligibility requirements for child care are verified prior to authorizing care. Due to the requirement in CCDBG Act §658E(c)(2)(N)(i) that each child who receives CCDF assistance will be considered to meet all eligibility requirements and will receive assistance for not less than 12 months before the eligibility is redetermined, it is critical that eligibility is properly and accurately verified prior to authorizing care.

Consistent with CCDBG Act §658E(c)(2)(N)(i) and NPRM §98.21, amended §809.42(b) requires that Boards ensure that eligibility for child care services shall be redetermined no sooner than 12 months following the initial determination or most recent redetermination.

Comment:

Several commenters strongly supported the establishment of a 12-month eligibility period. One commenter stated that this supports continuity of care for children while allowing for wage growth for families on a path toward economic stability.

Response:

The Commission appreciates the comment.

Comment:

One commenter expressed concern that the 12-month eligibility period in §809.42 will result in fewer children receiving child care services in Texas and across the nation unless there is additional funding for the child care portion of services. The result will be an increase in an already long waiting list for services. The commenter understands that this eligibility period is a requirement of the CCDBG Act; however, there may be unintended consequences that affect the ability to realistically move people back into the workforce.

Response:

The Agency agrees that the changes are required due to the changes in the CCDBG Act, and the Agency provided comments to the U.S. Department of Health and Human Services Administration for Children and Families (ACF) on the potential impact to the number of children in care. The Agency will very closely monitor the impact of the 12-month eligibility period on the number of children served and associated costs and any other unintended consequences.

Comment:

One commenter stated that leaving the recertification requirement open ended to occur not before 12 months, and not defining an absolute requirement for Board or contractor actions within a certain time period, Boards and contractors could be left open to an arbitrary assignment of improper payment based on failure to conduct due diligence.

Response:

The CCDBG Act and the NPRM clearly state that once a child is determined eligible, the child is assumed to be meeting the eligibility requirements for the 12-month eligibility period. Additionally, the NPRM clarifies that payments made during the eligibility period shall not be considered as improper payments due to a change in the family's circumstances. Agency rules further state that recoupments from the parents should only occur for instances in which eligibility was determined on information fraudulently reported or misreported.

With these guidelines in mind, it is important that the Board ensures that contractors continue to conduct due diligence for determining eligibility at the beginning of the eligibility period.

Additionally, the Agency will work with the Boards to develop data analysis tools and reports to assist Boards in identifying potential changes in a parent's ongoing eligibility during the 12-month period.

Comment:

Many commenters requested clarification regarding the language that eligibility for child care services shall be redetermined "no sooner than 12 months following the initial determination or most recent redetermination." Commenters stated that the language is unclear if eligibility redetermination needs to occur during the 12th month of care or the 13th month of care. One commenter acknowledged that this language matches the

language used in the NPRM, however, recommended clarifying that the redetermination process occurs prior to the end of the 12th month with an effective redetermination date after the 12th month. Two commenters recommended that the contractors be allowed to initiate the eligibility redetermination process prior to the end of the 12th month of eligibility, with any changes effective the day following the end of the 12th month of eligibility.

Response:

The rule language is identical to the language in the proposed CCDF regulations and CCDBG Act. The Commission agrees that the process for redetermining eligibility should begin prior to the end of the 12-month period and the actual redetermination decision should be made prior to the end of the 12-month eligibility period. However, if the parent is determined ineligible prior to the end of the eligibility period, then care shall continue through the end of the 12-month eligibility period. The time frame for beginning the redetermination process is determined by the Board. However, the time frame and deadlines for parents should ensure that sufficient time is allowed for parents to complete the eligibility process, and allow for the required 15-day notification of termination prior to the end of the current eligibility period (if the parent is determined ineligible).

The Commission also notes that CCDBG Act §658E(c)(2)(N)(ii) requires states to certify that parents ". . . are not required to unduly disrupt their employment in order to comply with the State's or designated local entity's requirements for redetermination."

Additional operational guidance regarding the redetermination process will be provided in the Child Care Services Guide.

#### §809.43. Priority for Child Care Services

Consistent with CCDBG Act §650E(3)(B)(i) and NPRM §98.46(a)(3) and §98.51, which require states to give priority for services to children experiencing homelessness, the Commission amends §809.43 to add children experiencing homelessness as a second priority group served, subject to the availability of funds. This priority group will follow the three priority groups in state statute--children in protective services, children of a qualified veteran or spouse, and children of foster youth.

Comment:

One commenter pointed out that the Sunset Review directs the Agency to study potential methods of providing incentives for parents participating in the child care subsidy program to choose providers with a TRS quality designation and include the results in its 2017 report to the legislature. The commenter recommended incentivizing parents to choose quality-rated programs by placing them on a priority wait list and when space is available at one of these programs, parents may choose a program with the commitment to keep their child in that program for at least six months. Program types would include TRS quality-rated programs and programs participating in the Early Head Start--Child Care Partnership grant.

Response:

The Commission thanks for the commenter for the suggestion. The Agency will take this under consideration as part of the study on providing incentives to parents to choose quality care.

Comment:

One Board recommended adding language to clarify that priority as defined in this section is applicable at initial enrollment.

Otherwise, the language regarding service being subject to the availability of funds for the second priority group appears to contradict the 12-month eligibility period. The commenter inquired if "subject to the availability of funds" gives Boards the authority to terminate services for families in the second priority group during the 12-month eligibility period if funding is not available.

Response:

The Commission clarifies that the CCDBG Act requires that care shall continue through the 12-month eligibility period unless the family has a permanent end of employment, job training, or education participation of three months. Additionally, Continuity of Care rules at §809.54(b) state, "Nothing in this chapter shall be interpreted in a manner as to result in a child being removed from care." Boards should closely monitor funding levels prior to opening enrollment to new initial eligibility determinations. Additionally, the Agency will work with the Boards to develop data analysis tools and reports to assist Boards in projecting enrollments and managing funds in order to ensure that care for enrolled children is not discontinued due to the unavailability of child care funds.

Comment:

The Board recommends that §809.43(a)(2) be reworded to read, "The second priority group is served subject to the availability of funds and includes, in the following order of priority..." in order to ensure clarity of the intent that the priority groups outlined in the second priority group Item 2 be served in the order listed in the rule.

Response:

The Commission declines to make the change in rule language; however, the Child Care Services Guide will clarify the order of the priority group.

Comment:

One commenter requested that The Workforce Information system of Texas (TWIST) be changed to track local priorities.

Response:

The Agency will review the feasibility of making this change in TWIST.

#### §809.44. Calculating Family Income

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

Section 809.44(a) is amended to reflect these new requirements. The rule language requires that Boards ensure family income is calculated in accordance with Commission guidelines. Consistent with the CCDBG Act, rule language also requires that Commission guidelines:

--take into account irregular fluctuations in earnings; and

--ensure that temporary increases in income, including temporary increases that result in monthly income exceeding 85 percent SMI, do not affect eligibility or parent share of cost.

A standard and uniform methodology applied consistently across all 28 workforce areas is important to ensure that the state is meeting the requirements of the CCDBG Act regarding fluctuations of income. Moreover, statewide consistency is important because child care is also required to continue if a parent moves to another workforce area.

The Commission will be developing guidelines to align income calculation methodology with federal program guidance regarding fluctuations in earnings. The guidance will include, but not be limited to, the following:

- Income documentation requirements at initial eligibility that may differ from requirements at redetermination;
- Documentation requirements for gaps in income;
- Calculation of bonuses received during the 12-month eligibility period;
- The methodology and documentation used to determine family income for changes reported during the 12-month eligibility period; and
- The methodology and documentation used to determine family income for parents who resume work, training, or education during the three-month period of nontemporary cessation of activities.

Section 809.44(b) is amended to provide an updated itemized list of income sources that are specifically excluded from determining family income. This list includes income sources that are specifically excluded by various federal laws or regulations in determining eligibility for public assistance programs, including CCDF, as well as income sources that are excluded by the WIOA adult program.

The specific exclusions are:

- Medicare, Medicaid, SNAP benefits, school meals, and housing assistance;
- Monthly monetary allowances provided to or for children of Vietnam veterans born with certain birth defects;
- Needs-based educational scholarships, grants, and loans, including financial assistance under Title IV of the Higher Education Act--Pell Grants, Federal Supplemental Educational Opportunity grants, Federal Work Study Program, PLUS, Stafford loans, and Perkins loans;
- Individual Development Account (IDA) withdrawals for the purchase of a home, medical expenses, or educational expenses;
- Onetime cash payments, including tax refunds, Earned Income Tax Credit (EITC) and Advanced EITC, onetime insurance payments, gifts, and lump sum inheritances;
- VISTA and AmeriCorps living allowances and stipends;
- Noncash or in-kind benefits such as employer-paid fringe benefits, food, or housing received in lieu of wages;
- Foster care payments and adoption assistance;
- Special military pay or allowances, including subsistence allowances, housing allowances, family separation allowances, or special allowances for duty subject to hostile fire or imminent danger;
- Income from a child in the household between 14 and 19 years of age who is attending school;

--Early withdrawals from qualified retirement accounts specified as hardship withdrawals as classified by the Internal Revenue Service (IRS);

--Unemployment compensation;

--Child support payments;

--Cash assistance payments, including Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Refugee Cash Assistance, general assistance, emergency assistance, and general relief;

--Onetime income received in lieu of TANF cash assistance;

--Income earned by a veteran while on active military duty and certain other veterans' benefits, such as compensation for service-connected death, vocational rehabilitation, and education assistance;

--Regular payments from Social Security, such as Old-Age, and Survivors Insurance Trust Fund;

--Lump sum payments received as assets in the sale of a house, in which the assets are to be reinvested in the purchase of a new home (consistent with IRS guidance);

--Payments received as the result of an automobile accident insurance settlement that are being applied to the repair or replacement of an automobile; and

--Any income sources specifically excluded by federal law or regulation.

The Commission understands that the new income calculation methodology and income exemptions may equate to lower parent share of cost assessments, thereby increasing the cost of care and reducing the number of children the Board may be able to serve. The Agency will continue to analyze Board costs, including parent share of cost, as part of the Agency's performance target methodology.

New §809.44(c) states that income that is not listed in §809.44(b) as excluded from income is included as income.

Comment:

One commenter supported a standard and uniform methodology that is applied consistently across all 28 Boards.

One commenter supported the amendment to require Boards to calculate family income by taking into account irregular fluctuations in earnings and to ensure that temporary increases in income do not affect eligibility or parent share of cost. The commenter commends the Commission on its recognition of and commitment to creating a standard and uniform methodology applied consistently across all 28 workforce areas in order to best meet the requirements of the CCDBG Act.

One commenter supported the Commission's amendment identifying income sources excluded from the calculation of family income, especially the exclusion of income earned by a veteran while on active military duty. The commenter has firsthand experience with the challenges military parents face and commends the state on recognizing the unique needs of military families. One commenter strongly supported the exclusion of child support payment, SSI, Social Security, and unemployment insurance (UI).

Response:

The Commission appreciates the comments.

Comment:

One commenter requested clarification regarding the exclusion of income earned by a veteran while on active military duty. The commenter requested confirmation that this means regular base pay of parents in the military is excluded and wondered whether special pay would continue to be excluded.

Response:

It is not the intent of the Commission that base pay of parents in the military be excluded as income. The rule language exempts income earned by a current veteran (a veteran at the time of eligibility determination or redetermination) during the time the individual was serving on active duty. It is also intended to exempt income earned by a current veteran who may have been called back on active duty. The base pay of parents on active military duty, however, is considered income. Further, special military pay would continue to be excluded, pursuant to §809.44(b)(9).

Comment:

One commenter requested clarification regarding the inclusion or exclusion of workers' compensation and alimony. The commenter suggested that workers' compensation, SSI, Social Security Disability Insurance (SSDI), UI, and alimony be included as income, as all of these sources are taxable.

Response:

The Commission clarifies that workers' compensation, SSDI, and alimony are not specifically excluded, and therefore, are included as income. However, the other payments (SSI and UI) are excluded from income, consistent with WIOA.

Comment:

One commenter requested clarification regarding payments from SSDI. The commenter noted that regular payments from Social Security (such as Old-Age and Survivors Insurance Trust Fund) are listed as excluded income; however, SSDI is not listed as being excluded. SSDI is very similar to regular payments from Social Security.

Response:

The Commission notes that recent guidance from the U.S. Department of Labor specifically requires that SSDI not be excluded from income for WIOA. Consistent with WIOA, SSDI is not listed as being excluded, and therefore, is included as income for child care eligibility and the parent share of cost assessment.

Comment:

Many commenters stated that a list of income that is excluded is difficult for frontline staff to operationalize, and, likewise, will be difficult for families to understand as well. The commenters recommended that the rules for calculating income include both an inclusion list as well as an exclusion list.

Response:

The income calculation guidelines in the Child Care Services Guide will clarify this issue. Similar to WIOA, it is expected that the parent will report all family income. When calculating income, the contractor should review the income reported and exclude from the calculation the sources that are excluded in rule. The Agency will work with Boards to provide ongoing technical assistance regarding this issue.

Comment:

Two commenters requested that the calculation methodology be made available for public comment prior to implementation.

Response:

The Agency is working with Boards to develop the income calculation methodology. The income calculation methodology will be available in the Child Care Services Guide, which is available to the public. The Agency welcomes input from the public on these operational guidelines.

Comment:

One commenter expressed appreciation for the efforts by the Agency to establish a standard and uniform methodology for calculating family income, but wishes to stress that it is imperative that this guidance be provided no later than September 1, 2016, in order for staff to employ the methodology when determining eligibility for customers whose eligibility redetermination is due at the beginning of October 2016.

In addition to establishing such a methodology, the Board would also recommend that the Agency provide forms and/or checklists that might be helpful in ensuring that the process is being followed accurately, and that all required documentation for calculating income has been ascertained.

Response:

The Agency will make the methodology, guidance, and technical assistance available at the earliest date possible upon the adoption of the final rules.

Comment:

In order to meet the requirement that the methodology take into consideration fluctuations of income, one commenter recommended that bonuses and incentive payments be excluded from income, as these sources fluctuate greatly. Additionally, as bonuses are considered to be a reward for high-performing employees, including these irregular amounts as countable income is believed to be contrary to the intent of the CCDBG Act of 2014.

Response:

The Commission appreciates the comments. The Commission's Chapter 809 rules include bonuses as part of the family income because the bonus may be a significant and stable source of family income. However, the calculation methodology will be designed to appropriately account for fluctuations in bonus amounts.

Comment:

One commenter recommended that the income calculation not follow the WIOA methodology requesting proof of income for the last six months, as this creates a barrier for most parents. Including income from a previous employment worked during the prior six months, but which has now ended, does not accurately reflect future wages. The commenter suggested three months of income as a more appropriate methodology. The commenter suggested that the methodology provide for multiple options for parents to report and document income, including the use of the year-to-date amounts and the most recent tax returns.

Response:

The Commission appreciates the comments and will take these suggestions into consideration in the income calculation methodology.

Comment:

Several commenters requested clarification on specific elements of the income calculation methodology, including:

- gaps in income;
- payments on commission-only;
- cash-only income;
- self-employment income;
- temporary increases that may be over 85 percent of SMI; and
- the methodology for calculating monthly income for individuals who are paid twice a month.

Response:

The Commission appreciates the comments. The income methodology will provide guidance on how these payments will be calculated.

#### §809.45. Choices Child Care

Section 809.45(b) is amended to clarify that for a parent receiving Choices child care who ceases participation in the Choices program during the 12-month eligibility period, Boards must ensure that Choices child care continues:

- for the three-month period pursuant to §809.51(b); and
- for the remainder of the eligibility period, if the parent resumes participation in Choices or begins participation in work or attendance in a job training or education program during the three-month period described in §809.51(c).

Comment:

One Board supported the Commission's efforts to stabilize child care for at-risk and vulnerable children whose parents are in the Choices, TANF Applicant, SNAP E&T, and child protective services child care programs. The commenter noted the September 2012 jointly funded brief by ACF's Office of Child Care and Office of Head Start Convened by the National Center on Child Care Professional Development Systems and Workforce Initiatives concluded that "Research has shown that babies who experience multiple disruptions in their early child care are more likely to show aggression and be less outgoing in the preschool years. Further, children's relationships with adult caregivers are vital for shaping the brain, early childhood development, and the foundations of school readiness."

Additionally, the commenter stated that the irrational and harmful practice of disrupting the care and education of young children whose parents are enrolled in these programs should end. The churning on and off of CCDF as parents lose assistance and later return fails to support CCDF's intentions to stabilize families, increase the quality of care for children, and support the child care industry.

Response:

The Commission appreciates the comment.

Comment:

Many Boards requested that the Commission consider the negative impact on Choices performance that can occur if Boards are required to provide child care for three months after a Choices participant ceases participation in the Choices program.

It is recommended that child care ceases when a Choices participant stops participating in the Choices program as required.

Customers participating in Choices may receive assistance with child care expenses. Eligibility is determined monthly. Unlike other customers who receive assistance with child care expenses when eligibility is determined for a 12-month period, Choices eligibility is a month-to-month issue. The Boards would support a rule that limits assistance with child care expenses to:

- (a) continued meeting participation requirements; and/or
- (b) continued receipt of TANF benefits.

Just as eligibility is redetermined on a 12-month basis, Choices eligibility is determined monthly. If the customer does not meet the criteria for continued eligibility for Choices, then we should take action to stop the assistance with child care expenses.

Response:

The Commission emphasizes that ending child care prior to three-month continuation of care period is expressly disallowed under the CCDBG Act and the proposed CCDF regulations.

The Agency will closely monitor the impact of the changes to cost and performance.

Comment:

Many commenters requested clarification regarding which funding source should be used during the three-month continuation of when the Choices parent stops participating in Choices.

Response:

The Commission appreciates the comments and has modified §809.45(b)(1) and (2) to clarify that the continued care will be funded as Choices child care.

Once initially determined eligible for Choices child care, the parent is eligible to receive Choices child care throughout the entire 12-month eligibility period. However, if the parent stops participating in Choices, then Choices child care will continue during the required three-month continuation of care period. Choices child care will cease at the end of the 12-month eligibility period or after three months of nonparticipation in either Choices or other work, education, or training activities.

Comment:

Many commenters recommended that the current practice of determining eligibility for income-eligible child care services, complete with the assignment of a parent share of cost, be continued once a Choices participant is no longer participating in Choices.

Response:

As stated previously, once determined eligible for Choices child care, Choices child care will continue through the 12-month period as long as the parent is participating in Choices or work, training, or education activities. Also, as stated in the discussion on the parent share of cost in §809.19, parents participating in Choices are exempt from the parent share of cost at initial eligibility and the amount cannot increase during the 12-month eligibility period, as this would be contrary to the intent of the CCDBG Act and the NPRM.

Comment:

Several commenters asked whether the parent is placed in a job search for the three months and what documentation is required during the three months.

Response:

The Commission clarifies that there is no requirement to document that the parent is engaged in job search or other activities during the three-month continuation of care. The preamble to the NPRM also states, "In fact, we strongly discourage such policies, as they would be an additional burden on families and be inconsistent with the purposes of CCDF and this proposed rule."

Comment:

Several commenters inquired if there had been any consideration given to the fact that continued care under the CCDBG Act might have a negative impact on Choices and SNAP E&T workforce performance. The commenters inquired if TWC will readjust each Board's target number of units due to the higher cost associated with Choices child care.

Response:

The Agency will monitor any impact to Choices performance and Boards' child care performance targets.

Comment:

One commenter inquired whether an individual owes recoupment from suspected fraud and whether they still receive three months once Choices ends.

Response:

For prospective fraud determinations, we refer the commenter to the discussion on suspected fraud and fraud determinations in Subchapter F.

As stated previously, once determined eligible for Choices child care, Choices child care will continue through the 12-month period as long as the parent is participating in Choices or work, training, or education activities. This would include parents who owe recoupments.

Section 809.117(e) states that a parent subject to repayment for a fraud determination shall be prohibited from future eligibility until the repayment is made "provided that the prohibition does not result in a Choices or SNAP E&T participant becoming ineligible for child care." Future eligibility is considered to be at the parent's 12-month redetermination or the next time the parent applies for child care services. If a parent owes recoupments, but is eligible for Choices child care or SNAP E&T child care at initial eligibility due to participation in those activities, then care must be authorized. However, if the parent is no longer participating in either of these programs at redetermination or the next time the parent applies, then the parent is not eligible for care until the debt is repaid.

Comment:

One commenter asked when a Choices customer becomes Transitional before the 12-month eligibility period ends, does this mean he or she will not be assessed a parent share of cost until the next eligibility period or will the eligibility characteristic remain the same until the next recertification period?

Response:

The Choices eligibility period will last the full 12 months (unless the parent ceases to participate in Choices or other work, training, or education activity for three months). At the parent's 12-month redetermination, the parent will be redetermined based on Transitional child care eligibility requirements in §809.48 or At-Risk Child Care eligibility requirements in §809.50.

Comment:

Several commenters inquired if TWIST will be updated to allow a *Child Care Program Detail* with the Choices eligibility characteristic while a *Choices Program Detail* is closed? This will be required if a Choices child care customer ceases participation in the Choices program as their *Choices Program Detail* will be closed as a result; however, Boards will still be required to continue child care for the three-month period.

Response:

TWIST does not require an open *Choices Program Detail* in order to open a *Choices Child Care Program Detail*.

§809.46. Temporary Assistance for Needy Families Applicant Child Care

Section 809.46 is amended to remove provisions that:

--duplicate the 12-month eligibility period specified in §809.42; or

--would end care prior to the end of the 12-month eligibility period.

§809.47. Supplemental Nutrition Assistance Program Employment and Training Child Care

Section 809.47 is amended to remove language stating that SNAP Employment and Training (SNAP E&T) care continues as long as the case remains open.

Section 809.47(b) is added to clarify that for a parent receiving SNAP E&T child care who ceases participation in the E&T program during the 12-month eligibility period, Boards must ensure that:

--child care continues for the three-month period pursuant to §809.51; and

--the provisions of §809.51 shall apply if the parent resumes participation in the E&T program or begins participation in work or attendance in a job training or education program during the three-month period.

Comment:

Many commenters requested clarification regarding which funding source should be used during the three-month continuation of when the SNAP E&T parent stops participating in SNAP E&T.

Response:

The Commission appreciates the comments and, consistent with Choices child care in §809.45, has modified §809.47(b)(1) and (2) to clarify that the continued care will be considered as SNAP E&T child care.

Once initially determined eligible for SNAP E&T child care, the parent is eligible to receive SNAP E&T child care throughout the entire 12-month eligibility period. However, if the parent stops participating in E&T, then SNAP E&T child care will continue during the required three-month continuation of care period. SNAP E&T child care will cease at the end of the 12-month eligibility period or after three months of nonparticipation in either SNAP E&T or other work, education, or training activities.

Comment:

Many commenters recommended that the current practice of determining eligibility for income-eligible child care services, complete with the assignment of a parent share of cost, be continued once a SNAP E&T participant is no longer participating in SNAP E&T.

Response:

As stated previously, once determined eligible for SNAP E&T child care, SNAP E&T child care will continue through the 12-month period as long as the parent is participating in SNAP E&T or work, training, or education activities. Also, as stated in the discussion on the parent share of cost in §809.19, parents participating in SNAP E&T are exempt from the parent share of cost at initial eligibility and the amount cannot increase during the 12-month eligibility period as this would be contrary to the intent of the CCDBG Act and the NPRM.

#### §809.48. Transitional Child Care

Section 809.48 is amended to remove provisions that would end care prior to the end of the 12-month eligibility period.

Comment:

One commenter requested confirmation that the only change to this section was to remove those individuals who were not employed when TANF expired from eligibility for Transitional child care. The commenter stated that the current practice is to have the parent come in and determine eligibility for transitional care, and asked if this would still be the process.

Response:

The only changes to the section involved removing the provisions that would end care prior to the end of the 12-month eligibility period for Transitional child care. Once Choices child care ends at the end of the 12-month eligibility period, the family would be redetermined for eligibility as Transitional, if the conditions of §809.48 are met, or At-Risk, if the conditions of §809.50 are met.

#### §809.49. Child Care for Children Receiving or Needing Protective Services

Section 809.49 is amended to clarify that child care discontinued by DFPS prior to the end of the 12-month eligibility period shall be subject to the Continuity of Care provisions in §809.54(c) regarding continued care for closed DFPS Child Protective Services (CPS) cases.

Section 809.49 is also amended to clarify that the requirements of §809.91(f)(1) do not apply to foster parents whose care is authorized by DFPS. The language clarifies that requests made by DFPS for specific eligible providers are enforced for children in protective services, including children of foster parents when the foster parent is the owner, director, assistant director, or other individual with an ownership interest in the provider.

A technical change to §809.49(a)(2) is made to clarify that DFPS may authorize care for a child under the age of 19.

Comment:

The Commission received many comments regarding the continuation of care through the end of the 12-month eligibility period for closed DFPS CPS cases as required in §809.54(c) and §809.49(a)(3). Commenters submitted that this provision would strain Board funding and would lead to many low-income customers not receiving care. One commenter suggested that the Commission make an exception to the continuity of care provision for DFPS customers. One commenter asked if there would be a minimum amount of time that the child will be required to be funded by DFPS before DFPS discontinues funding and the child is served using Board funds.

Response:

As mentioned regarding continued care for Choices and SNAP E&T, discontinuing care prior to the end of the 12-month period is not allowed under the CCDBG Act or the proposed CCDF regulations. The preamble to the CCDF regulations states:

Based on feedback from the States and various stakeholders, ACF has already considered possible exceptions to the minimum 12-month eligibility period for certain populations, such as children in families receiving TANF and children in protective services, but has decided that such special considerations would be in conflict with the CCDBG Act, which clearly provides 12-month eligibility for all children.

The Agency will closely monitor the impact of the changes to cost and performance.

Comment:

Several commenters requested clarification as to whether the eligibility requirements outlined in §809.41 apply to families receiving protective services child care once DFPS funding has ended. The commenters are aware that many parents receiving DFPS CPS funding for child care are not eligible under §809.41 because they are not meeting work, training, or educational requirements or they are earning over 85 percent of SMI. The commenters stated that families not meeting the eligibility requirements in §809.41 would need to be terminated once DFPS eligibility expires.

One commenter suggested that once CPS funding ends, children are allowed to be placed in CCDF funding for three months. At the end of the three months, the Board contractor would determine if parents are meeting eligibility requirements. If the family is no longer eligible, the care should end.

Response:

As stated in §809.41(a), the eligibility requirements in that section do not apply to children authorized for care by DFPS under §809.49. The CCDBG Act and the NPRM require that during the period of time between redetermination, if the child met all of the requirements for eligibility on the date of the most recent eligibility determination or redetermination, the child shall be considered to be eligible and will receive services for the 12-month eligibility period.

DFPS determines that the child meets eligibility requirements for CPS child care pursuant to §98.20(a)(3)(ii) of the CCDF regulations, which allows for children in protective services to be eligible for care if the parent or caretaker is not working or if family income is over 85 percent of SMI.

Once DFPS makes that determination, pursuant to the CCDBG Act, the child is considered eligible for the 12 months. Once DFPS closes the child protective case, then DFPS-funded care will end and Agency-funded care will begin through the remainder of the eligibility period.

Comment:

Many commenters inquired if former DFPS children will be made a required priority group or will be subject to the availability of funds. Many commenters recommended that former CPS be included as a second priority group, subject to the availability of funds.

Response:

Once DFPS authorizes care for a child in protective services, the Boards must provide child care services to that child. As mentioned previously, care must continue through the end of the

12-month eligibility period. At the end of the 12-month eligibility period, the child's eligibility will be redetermined for continued care under any eligibility type in Subchapter C.

The Agency acknowledges that CPS cases must be served and not be subject to the availability of funds. The Agency will closely monitor the impact of the changes to cost and performance.

Comment:

Several commenters requested clarification on when the 12-month eligibility begins for DFPS cases. The commenter inquired if the 12-month period begins when DFPS case opened the authorization or when DFPS case is closed.

Response:

The 12-month eligibility period begins when DFPS first authorizes the care.

Comment:

Several commenters requested information on the process for continuing care for former CPS cases. One commenter asked if the DFPS cases will be closed and referred to the Board contractor as "Former DFPS," or will the child be considered as at-risk. Another commenter requested clarification on what information will be requested or required from the parent or guardian.

Response:

The DFPS program detail will be closed and a new "Former DFPS" program detail will be opened with an end date that is 12 months from the start of initial DFPS authorization. The Agency will work with DFPS to ensure that information necessary for the Board to continue care is provided to the Board. Additional information on the process for continuing the care will be addressed in the Child Care Services Guide.

#### §809.50. At-Risk Child Care

Section 809.50 is amended to clarify that eligibility requirements for At-Risk child care are applied at initial determination and at the 12-month eligibility redetermination, pursuant to §809.41 and §809.42.

Comment:

One commenter stated that with the rule that services must continue when there is a change in residency within the state, the allowance for the Board to set a higher number of hours per week may be difficult for parents at the point of redetermination. If the parent moves from a Board area that uses the 25 hours per week rule and is eligible and then moves into another Board area that requires a higher number of hours for each parent, the child would remain in care for the remainder of the 12 months, but at the point of redetermination, the parent would then have to meet the current Board's higher rule. The commenter recommended to remove the allowance of the Board to set a higher number of hours per week in order to ensure consistent eligibility across the state.

Response:

The Commission declines to make this change and will continue to allow Boards the local flexibility to have higher minimum work hours than the minimum Agency requirement. This is a local decision based on local needs and local factors as determined by the Board.

Comment:

One commenter pointed out that the proposed rules at §809.50(a)(1) made a reference to §809.41(a)(2)(A) instead of (a)(3)(A) in regards to income limits established by the Board.

Response:

The Commission appreciates the comment and has made the correction on the final rules.

#### §809.51. Child Care during Interruptions in Work, Education, or Job Training

Section 809.51 is amended to include CCDBG Act and NPRM requirements regarding the provision of child care during interruptions in work, education, or job training. The section contains the rules related to both temporary interruptions and permanent cessation of activities during the 12-month eligibility period.

Section 809.51(a) is amended to include the CCDBG Act requirement that if a child met all of the applicable eligibility requirements for any child care service in Subchapter C on the date of the most recent eligibility determination or redetermination, the child shall be considered to be eligible and will receive services during the 12-month eligibility period, regardless of any:

--change in family income, if that family income does not exceed 85 percent of SMI for a family of the same size; or

--temporary change in the ongoing status of the child's parent as working or attending a job training or education program.

Consistent with language in the NPRM, a temporary change shall include, at a minimum, any:

--time-limited absence from work for an employed parent for periods of family leave (including parental leave) or sick leave;

--interruption in work for a seasonal worker who is not working between regular industry work seasons;

--student holiday or breaks within a semester, between the fall and spring semesters, or between the spring and fall semesters, for a parent participating in training or education;

--reduction in work, training, or education hours, as long as the parent is still working or attending a training or education program;

--other cessation of work or attendance in a training or education program that does not exceed three months;

--change in age, including turning 13 years old or a child with disabilities turning 19 years old during the eligibility period; and

--change in residency within the state.

Section 809.51(b) is amended to require that during the period of time between eligibility redeterminations, a Board shall discontinue child care services due to a parent's loss of work or cessation of attendance at a job training or educational program that does not constitute a temporary change in accordance with paragraph (b)(2) of this subsection. However, Boards must ensure that care continues at the same level for a period of not less than three months after such loss of work or cessation of attendance at a job training or educational program.

Section 809.42(c) is amended to state that if a parent resumes work or attendance at a job training or education program at any level and at any time during the three months, Boards shall ensure that:

--care will continue to the end of the 12-month eligibility period at the same or greater level, depending upon any increase in the activity hours of the parent; and

--the parent share of cost will not be increased during the remainder of the 12-month eligibility period, including for parents who are exempt from the parent share of cost pursuant to §809.19.

This is consistent with NPRM §98.21(a)(3), which prohibits states from increasing the parent share of cost during the 12-month eligibility period, regardless of increases in the family income.

The rule language also clarifies that the Board child care contractor shall verify only:

--that the family income does not exceed 85 percent SMI; and

--the resumption of work or attendance at a job training or education program.

Section 809.51(d) is amended to state that the Board may suspend child care services during interruptions in the parent's work, job training, or education only with the concurrence of the parent.

#### *School Holidays and Breaks*

The Commission clarifies that student holidays such as spring break and breaks between the fall and spring semesters, or between the spring and fall semesters (including the summer break), are considered temporary changes, and care shall continue during those breaks. However, breaks of the full fall or the full spring semesters are considered nontemporary, and care ends if the parent does not resume attendance at an education or job training program, or does not participate in work within three months from the end of the previous enrollment.

#### *Reductions in Work, Training, or Education for Dual-Parent Families*

The Commission clarifies that in a dual-parent family, if both parents have a nontemporary loss of job (or end of training/education activities), then the family would be subject to the three-month job search period prior to termination. However, if one parent experiences a nontemporary change, then this would be considered a reduction in the dual-parent 50-hour participation requirements. Under the CCDBG Act, a reduction in work is not considered a permanent loss of job and is not subject to discontinuation of the child's care. Care would continue through the 12-month period without requiring care to end if one parent does not resume activities within three months. The child is still residing with at least one parent who is working and is still eligible under the CCDBG Act.

#### *Continued Care for Children over the Age of 13 or the Age of 19 for a Child with Disabilities*

The Commission notes that the DFPS Child Care Licensing allows children under the age of 14 (and under the age of 19 for children with disabilities) to receive care at a regulated facility. However, the Commission is aware that some child care facilities do not serve children over the age of 13 or 19 (for a child with disabilities). In such a case, the Board must ensure that eligibility does not end and work with parents and provider to continue care at a different provider selected by the parent until the end of the child's eligibility period, unless the parent voluntarily withdraws from child care services.

#### *Continued Care for Children and Families Relocating to Another Workforce Area*

Under the CCDBG Act, a change in the child's residence is not grounds for ending care in the state, regardless of the enrollment status of the workforce area to which the parent moved. The Commission understands that a Board at full enrollment would be required to enroll and fund children even if the Board enrollment of new children is closed at the time. The movement of children both into and out of workforce areas is anticipated to be balanced throughout the year. However, the Agency will track this movement and the fiscal impact on Boards to determine if funding amounts should be adjusted accordingly.

Additional policies, procedures, and documenting requirements regarding continuation of care for children and families who relocate to another workforce area will be provided through updates to the Child Care Services Guide.

The Commission clarifies that the Board that determined eligibility at the beginning of the 12-month period is responsible for any subsequent finding of improper eligibility determinations. However, the Board in the workforce area in which the family relocates is responsible for verifying that the move did not result in a nontemporary loss of work, training, or education, and the family is not over 85 percent of the SMI.

The Commission clarifies that if the move to a different workforce area does not result in a change of provider (i.e., the child remains at the originating workforce area provider), then care would continue at that provider under the originating Board's agreement, rates, and funding through the remainder of the authorization for care and the end of the 12-month eligibility period. However, if the move to a different workforce area results in or is accompanied by a change in provider, then the receiving Board will establish and fund the authorization.

The Commission also clarifies that if a parent is participating in the three-month period of continued care and relocates to a different workforce area without resuming activities, then the parent would not receive a new three-month period, but is entitled to continue the three-month period that began in the previous workforce area.

#### *Other Cessation of Work, Training, or Education Activities*

The Commission recognizes that there are situations, such as parent incarcerations or other circumstances, that may not be clearly defined in the rules. The Commission will work with Boards to provide guidance on these situations. As a general rule, if the separation from activities is of a length that would allow the parent to continue participation within three months, then care would continue through the remainder of the 12-month eligibility period. If, however, the separation is expected to last over three months, then care would be discontinued three months after the cessation of work, training, or education.

#### *Number of Three-Month Periods in a 12-Month Eligibility Period*

The CCDBG Act requires that care continue for at least 12 months following the initial eligibility determination. Neither the CCDBG Act nor the NPRM allows states to put limits on the number of three-month periods of continued care that a parent may have during the 12-month eligibility period. Parents will be allowed a three-month period of continued care for each nontemporary cessation of activities within the 12-month eligibility period.

#### *Parent Share of Cost during the Three-Month Period of Continued Care*

As required in §809.19(a)(1)(c), the parent share of cost is reassessed if a parent reports a change in income that would result in a reduced parent share of cost. Accordingly, the parent share of cost should be reassessed during the three-month period due to the resulting reduction of family income. As mentioned in the discussion on calculating family income in §809.44, the Commission will provide guidance on the methodology used to calculate income during this period in order to take into consideration fluctuation in income. During this period, Boards may also reduce the parent share of cost based on the Board policies for reductions due to extenuating circumstances pursuant to §809.19(d).

#### *Increases in the Level of Care following the Three-Month Period of Continued Care*

Section 809.51(c) requires care to continue to the end of the 12-month eligibility period at the same or greater level, depending on any increase in the activity hours of the parent. The Commission expects that the parent should provide documentation to verify that such an increase is warranted.

#### *Suspensions of Child Care during the 12-month Eligibility Period*

The preamble to the NPRM notes that, consistent with §658E(c)(2)(N)(i) of the CCDBG Act, "during the minimum 12-month eligibility period Lead Agencies also may not end or suspend child care authorization or provider payments due to a temporary change in a parent's work, training, or education status." However, the preamble also notes that "despite the language that the child 'will receive such assistance,' the receipt of such services remains at the option of the family." The law does not require the family to continue receiving services, nor would it force the family to remain with a provider if the family no longer chooses to receive such services.

Therefore, the amended Commission rules require that any suspensions of care during the 12-month eligibility period shall only be upon concurrence from the parent. This provision is included in §809.51 regarding optional suspensions of care during interruptions in work, job training, or education. As will be discussed in §809.78 regarding attendance standards, the requirement that care can only be suspended at the concurrence of the parent is also included for suspensions of care under §809.78.

#### *Implementation of the 12-Month Eligibility Period*

The Commission clarifies that eligibility determinations under the new rules will go into effect at the family's first scheduled re-determination (under the Board's previous determination period) following October 1, 2016.

#### Comment:

Several commenters supported the requirements regarding continuation of care during interruptions of work, training, or education activities. One commenter strongly supported the proposed amendments stating that it will make it easier for parents to maintain employment or complete education programs, and supports both family financial stability and the relationship between children and their caregivers.

Another commenter supported the continuation of child care for the 12-month eligibility period if one parent in a dual-parent household experiences a permanent loss of job or end of training or education activities. The commenter supports efforts to decrease the churning on and off of subsidized care as parents lose assistance then later return. The commenter is aware of the harm this can cause children and understands that it

runs counter to the CCDF's purpose to stabilize the care and education of low-income children.

Another commenter supported the changes to ensure the continuity of care and putting the welfare of the child first.

#### Response:

The Commission appreciates the comments.

#### Comment:

One commenter noted that some summer breaks slightly exceed the three-month period cited in the rule language as a temporary break. The commenter requested clarification as to whether summer breaks are included as a temporary break or a nontemporary break.

#### Response:

The Commission appreciates the comment and agrees that summer breaks should be considered as temporary breaks in education. The rule has been modified to state that breaks between the fall and spring semesters, or between the spring and fall semesters, are considered temporary changes. This would include summer breaks as meeting the standard in §809.51(a)(2)(C) as a temporary break in education.

#### Comment:

One commenter noted that parent-requested suspensions are not mentioned in the new rules. The commenter inquired if parents will continue to be allowed to suspend care during temporary breaks in work or training periods. The commenter noted that some parents prefer to have their children at home with them on breaks and not pay the parent share of cost while on the breaks, including suspensions for court-ordered visitations.

#### Response:

The Commission appreciates the comment and, as discussed previously, has added a provision in §809.51(d) that parents may suspend care during interruptions in work, training, or education. The rule requires that the suspension must be at the concurrence of the parent.

#### Comment:

One commenter inquired if a child with disabilities turns 19 during the 12-month eligibility period, does the child remain in care until the end of the eligibility period or would the child's care end from care the day before their 19th birthday.

#### Response:

The Commission appreciates the comment and has modified the rule to include that eligibility for children with disabilities continues through the end of the 12-month eligibility period if the child turns 19 during the eligibility period.

#### Comment:

Many commenters disagreed with the provision that allows for one parent in a dual-parent family to experience a permanent loss of a job and for the change to be considered a reduction in work. Commenters submitted that allowing such families to continue to receive care effectively held single-parent families to a higher participation standard than two-parent families.

#### Response:

The CCDBG Act and the CCDF regulations do not specifically address this issue of single or dual-parent families.

In the Act and the regulations, a child's eligibility requirement is to reside with "a parent or parents who are working or attending a job training or educational program" (CCDBG Act 658P(4)(C)(i); NPRM §98.20(a)(3)(i)). The language is unchanged in the reauthorization and proposed regulations.

Both the Act (658E(c)(2)(N)) and the NPRM (§98.21) require that the child remain eligible between eligibility periods regardless of a temporary change in "the parent's" (singular) status. Both use the singular "parent" regarding the *state option* to end care if a "parent" has a nontemporary cessation of activities. Because this is a state option, there is no requirement in the Act or the regulations that the state must end care if one parent in a dual-parent family has a permanent cessation of activities.

In fact, the preamble states that the default is to continue care for 12 months in order to ensure that the goal of continuity of care is maintained and child care is available to assist the parent if he or she regains employment.

Therefore, in order to comply with the intent of the CCDBG Act that child care continue for 12 months, both parents must have a permanent cessation of activities in order to end care after the three-month continuation of care period. This would ensure that the goal of continuity of care for the child is maintained and ensure that child care is continued while one parent is working while the other parent reenters the workforce.

Comment:

One commenter asked if §809.51(a)(2)(D) means that the parent can be working less than 25 hours and if this would be considered temporary.

Response:

The minimum activity requirement of 25 hours per week (50 hours for a dual-parent family) is a state requirement. NPRM §98.21(a)(1)(ii)(D) includes reduction in hours, as long as the parent is working or in training or education, as a temporary status change, and the child will remain eligible for care through the 12-month eligibility period.

Comment:

One commenter requested clarification on how Boards "must ensure" eligibility continues at a different provider when a child turns 13. Boards do not have any control over providers or their policies regarding the age of the youth they serve.

Response:

The Commission understands that providers may discontinue a child's care when the child turns 13, pursuant to the provider policy. However, Boards must ensure that the eligibility is not ended. The Board must ensure that the child remains eligible during the eligibility period. Boards are strongly encouraged to assist parents in locating providers that care for 13-year-old children and should make a diligent effort to find and encourage local providers to care for children through the age of 13.

As provided in §809.51(d), parents may decide to have care suspended pending the choice of an acceptable provider.

Comment:

One commenter inquired if the three-month continuation of care is three calendar months or 90 calendar days. The commenter preferred to establish three calendar months as the benchmark. The commenter also requested this clarification regarding the

three-month initial eligibility for children experiencing homelessness.

Response:

The Commission clarifies that the requirement is for three months, not 90 days. Therefore, the standard will be to use three calendar months.

Comment:

Many commenters requested clarification and guidance on specific scenarios that may occur during the 12-month eligibility period related to continuing care or ending care after the three-month period. The commenters also requested clarification on the process, documentation requirements, and handling provider payments when a child in care moves from one workforce area to another. One commenter requested that guidance be provided in the Child Care Services Guide.

Response:

The Commission appreciates the comments and will review each scenario and provide guidance in the Child Care Services Guide.

Comment:

One commenter inquired if care continues for the year of eligibility if a parent moves out of state after the child is determined eligible for care.

Response:

Agency child care funds cannot be used for customers who do not reside in Texas.

#### §809.52. Child Care for Children Experiencing Homelessness

New §809.52 is added to include initial eligibility for children experiencing homelessness. CCDBG Act §658E(c)(3) requires that state procedures permit enrollment (after an initial eligibility determination) of children experiencing homelessness while required documentation is obtained.

Consistent with this requirement, §809.52(a) requires that for a child experiencing homelessness, a Board shall ensure that the child is initially enrolled for a period not to exceed three months.

Section 809.52(b)(1) states that if, during the three-month enrollment period, the parent of a child experiencing homelessness is unable to provide documentation verifying that the child meets the age and citizenship status requirements under §809.41(a)(1) - (2), then care shall be discontinued following the three-month enrollment period. Consistent with NPRM §98.51, payments of child care services for this three-month period are not considered improper payments.

Section 809.52(b)(2) states that if, during the three-month enrollment period, a parent provides documentation verifying eligibility under §809.41(a) (regarding the child's age and citizenship status, and the parent's participation in work, job training, or education activities) then care shall continue through the end of the 12-month initial eligibility period (inclusive of the three-month initial enrollment period).

For parents of children experiencing homelessness, parent self-attestation of the eligibility requirements under §809.41(a)(1) - (2) will be allowed for the first three months for all eligibility requirements, as long as the family meets the definition of homelessness. This can be verified through another entity such as a school district or housing authority, or by the Board contractor.

The Agency will work with Boards to provide guidance on determining initial and continuing eligibility for homeless families.

The Commission clarifies that parents of children experiencing homelessness must have appeal rights pursuant to §809.74.

Comment:

One commenter requested clarification as to whether or not initial eligibility includes verifying employment, training, and education activities for family members, and, if so, if verification documentation must be presented at that time or if self-attestation is adequate. The commenter understands that documentation related to age and citizenship does not have to be presented at initial eligibility but must be presented within three months for care to continue. The Board appreciates the Agency's stated commitment to providing guidance on determining initial and continuing eligibility for homeless families, and requests that this guidance be included in the Child Care Services Guide.

Response:

The Commission clarifies that initial eligibility for homeless children does not include the parent's participation in work, training, or education. However, verification of these requirements must be conducted in order for care to continue after the initial eligibility period.

Comment:

One commenter requested clarification regarding acceptable documentation to verify homelessness. For example, is self-attestation acceptable only at initial eligibility determination and is the initial certification period only for three months, with a zero parent share of cost assessed? Then, at the end of the three-month certification, must all required eligibility documents be provided in order to continue care through the remainder of the 12-month period? At that point, is the parent share of cost assessed based on the sliding fee scale?

Response:

The Commission clarifies that self-attestation is acceptable to verify homelessness at initial eligibility. All required documentation to verify eligibility under §809.41 is required at three months. Pursuant to §809.19(a)(2), parents of homeless children are exempt from the parent share of cost for the entire 12-month eligibility period.

#### §809.53. Child Care for Children Served by Special Projects

Section 809.53 is amended to clarify that the provisions related to child care for children serviced by special projects are only for special projects funded through non-CCDF sources.

Comment:

Two commenters inquired if there is a federal requirement that WIOA-funded Child Care follow requirements in the CCDBG Act and the NPRM. The comments stated that Boards should be allowed to use WIOA funds for child care services without requiring the 12-month eligibility if the WIOA customer ends WIOA participation.

Response:

The Commission appreciates the comment and has amended §809.41 to add paragraph (f) to state that Subchapter C applies only to child care services using funds allocated by TWC pursuant to its allocation rules at §800.58, and local public transferred funds and local private donated funds described in §809.17.

#### §809.54. Continuity of Care

Section 809.54 is amended to clarify that for enrolled children, including children whose eligibility for Transitional child care has expired, care continues through the end of the applicable eligibility periods described in §809.42.

Rule language also clarifies that enrolled children of military parents in military deployment remain eligible for continued care, including parents in military deployment at the end of the 12-month eligibility redetermination period.

Section 809.54 also removes the temporary placement of a child if space is available due to another child's absence due to custody arrangements, as temporary placements are contrary to the CCDBG Act's 12-month eligibility requirements.

Comment:

Regarding §809.54(c), many commenters submitted identical or similar comments in §809.49 regarding continued care for closed DFPS Child Protective Services.

Response:

Responses to comments submitted in §809.54(c) are addressed in the discussion in §809.49.

Comment:

Many commenters requested clarification regarding the allowability of two providers being reimbursed for the same period when parents have joint custody and the child is cared for by two different providers every other week.

Response:

Section 809.93(b) requires that providers be reimbursed based on the child's monthly enrollment authorization, excluding periods of suspensions. Section 809.78(c) requires that absences due to court-ordered visitation are not included in the child's total absences for meeting attendance standards.

The monthly child care enrollments for joint-custody arrangements such as the one described in the comment should be consistent with the court order. If the court-ordered joint custody arrangement calls for a change in child care arrangements every other week, then the monthly enrollment must reflect that and the provider be reimbursed according to the monthly authorization.

Comment:

One commenter expressed appreciation for removing the temporary placement of a child in a slot made open during another child's court-ordered custody arrangements.

Response:

The Commission appreciates the comment.

Comment:

One commenter requested clarification regarding filling a slot temporarily for a child on court-ordered visitation since temporarily filling a slot is no longer allowed due to the 12-month eligibility period once a child is determined eligible for care. However, the commenter stated that the Board must ensure that a child can return to the same provider pursuant to §809.54(e). The commenter asked how the Board would pay for that child's enrollment during the time the child is away on court-ordered visitation. The commenter is concerned that the provider will not want to hold the spot unless the Board reimburses the provider. The commenter asked if the provider charges the client to hold the spot.

Another commenter requested guidance if child care during custody arrangements would be considered a suspension of care.

Response:

The Commission clarifies that §809.54(e) does not require that the child return to the same provider following a court-ordered visitation. The rule requires that the child return to care "at the same provider or a different provider if agreed to by the parent in advance of the leave." The enrollment during the court-ordered arrangement should continue during the court-ordered visitation. However, the parent will still be responsible for paying the parent share of cost for care during the court-ordered visitation. If the parent decides to suspend the authorization and not pay the parent share of cost, then the provider is not allowed to hold the spot open, as holding spots open without an enrollment authorization is not allowed under §809.93(g). The Commission clarifies that the suspension of care must be at the option of the parent.

Comment:

One commenter pointed out that the reference in §809.54(b) to §809.75(b) regarding care during appeals was removed.

Response:

The Commission appreciates the comment and has made the correction to the reference in the final rule at §809.48.

#### §809.55. Mandatory Waiting Period for Reapplication

Section 809.55, regarding a mandatory waiting period for reapplication if care is terminated for certain reasons, is repealed because the listed termination reasons for ending care are no longer applicable.

The Commission did not receive comments on the repeal of this section.

### SUBCHAPTER D. PARENT RIGHTS AND RESPONSIBILITIES

The Commission adopts the following amendments to Subchapter D:

#### §809.71. Parent Rights

Section 809.71 is amended to clarify that the 20-day eligibility notification following receipt of eligibility documentation from the parent is applicable only at the initial eligibility determination.

Section 809.71(9) is amended to remove the exceptions to the 15-day notification of termination for instances in which care is to end immediately due to a parent no longer participating in Choices or SNAP E&T or due to a child being absent five consecutive days, as these are no longer eligible reasons to terminate care during the 12-month eligibility period.

Regarding the 15-day termination notice, the Commission clarifies that for parents with a nontemporary cessation of activities, at a minimum, notification must be provided at least 15 calendar days prior to the end of the three-month period of continued care. However, Boards should also clearly notify or provide clear instructions to parents at the beginning of the three-month period that care will end if the parent does not resume participation at any level within three months.

Section 809.71 is amended to remove the 30-day notification due to terminations to make room for a priority group member, as this is no longer an allowable reason to terminate care during the 12-month period.

Section 809.71 is also amended to remove the requirement that parents be informed of the Board's attendance policies. No-

tification of the attendance standards are located in amended §809.78.

Comment:

Two commenters disagreed that the 20-day notification of eligibility be applied at both the initial eligibility determination and the eligibility redetermination, as required in the proposed rules. The commenters stated that the notification within 20 days upon receipt of all necessary documentation is pertinent for initial determination. However, redeterminations must be completed with sufficient time in order to meet the 15-day termination notification prior to end of the 12-month period. Therefore, the same allowance to receive all necessary documentation and then determine and notify within 20 days is not applicable.

Since the child is already receiving care, and if the intent is not to have an interruption in services, the commenters recommend that the required documentation be received at least 30 days in advance of the end of the eligibility period, which will allow for processing time, and in the event the parent is not eligible for services to continue, the termination of services could be realized and care would not continue past the 12-month end date.

Response:

The Commission agrees with the commenters and has modified the rules to establish the 20-day notification of eligibility or denial only for initial eligibility determinations. The Commission also agrees with the commenters and clarifies that if the family is determined to not be eligible for care at the eligibility redetermination, then the family must be notified of termination at least 15-days before the end of the current 12-month eligibility period.

The Commission believes that the timeline for parent submission of documentation is at a Board's discretion. However, a Board must ensure that the deadline for submitting redetermination documentation provides sufficient time for a Board child care contractor to accurately redetermine eligibility and to ensure that the Board child care contractor provide the 15-day notification of termination prior to the end of the 12-month eligibility period, if it is determined that the family is not eligible for care.

Comment:

Several commenters recommended that the 20-day notification of the eligibility determination be extended to allow for quality assurance. Since significant resources are being committed due to the 12-month eligibility period, the commenters stated that it is critical that accuracy is maintained and recommended additional time be allowed for review of case processing.

Response:

The Commission declines to extend the 20-day requirement for initial eligibility determinations. The Commission agrees that accuracy and quality assurance is vital, especially with the 12-month eligibility period; however, this quality assurance should be conducted within 20 days in order to ensure that parents who need child care do not have a delay in services.

Comment:

Many commenters requested clarification as to whether the 15-day notification of termination is provided during the period of care or at the end of the care. Several commenters recommended that the clarification provided in the preamble that the notification of termination notice be provided at least 15 days prior to the end of the three-month period of continued care be adopted in all instances in which this notification is required

to be sent. To send the notification on the termination date requires the Board to pay for an additional 15 days of care and adds to the increased cost of care.

Response:

The Commission clarifies that the 15-day notification is required at least 15 days prior to ending care at the end of the eligibility period, if the parent is determined not to be eligible, or at the end of the three-month continuation of care period, if the parent has not resumed activities, and emphasizes that the 12-month eligibility period cannot be extended to allow for the 15-day notice of termination.

Comment:

Two commenters recommended that proposed language stating the customer has the right to receive written notification at least 15 days before termination of child care services be changed to say the customer has the right to be sent written notification at least 15 days before termination of child care services. The commenter questions how the Board or contractor would determine the customer received the written notification.

Response:

The Commission declines to make changes to this rule. This is a long-standing requirement with which Boards and Board contractors should be familiar. It is correct that there is no guarantee that the parent would actually receive the notification, particularly if the parent moves and did not notify the Board. However, the intent of the language is that the Board's contractor must send the notification to ensure, under normal circumstances, that the parent would receive the notification at least 15 days of termination.

Comment:

One commenter inquired if, during the redetermination process, the family income exceeds 85 percent of SMI, does the customer still have 15 days from the day the parent is notified of the termination of child care services.

Response:

The Commission clarifies that the parent must receive a notification at least 15 days prior to terminating care at the end of the 12-month eligibility period, including for cases determined ineligible due to family income exceeding 85 percent of SMI.

#### §809.72. Parent Eligibility Documentation Requirements

Section 809.72(a) is amended to clarify that child care cannot be determined or redetermined and care cannot be authorized until parents provide to the Board's child care contractor all the information necessary to determine eligibility.

Section 809.72(b) is amended to clarify that a parent's failure to submit required documentation shall result in initial denial of child care service or the termination of services at the 12-month redetermination period.

As mentioned in §809.42(a), due to the requirement in CCDBG Act §658E(c)(2)(N)(i) that each child who receives CCDF-funded child care will be considered to meet all eligibility requirements and will receive assistance for not less than 12 months before the eligibility is redetermined, it is critical that all eligibility documentation submitted is properly and accurately verified prior to authorizing care. As described in §809.42(c), an exception to this requirement exists for a child experiencing homelessness.

#### §809.73. Parent Reporting Requirements

CCDBG Act §658E(c)(2)(N)(ii) and NPRM §98.21(e)(2) state that any requirement for parents to provide notification of changes in circumstances shall not constitute an undue burden on families. Any such requirements shall:

--limit notification requirements to changes that impact a family's eligibility (e.g., only if income exceeds 85 percent of SMI, or there is a nontemporary change in the status of the child's parent as working or attending a job training or educational program) or changes that impact the Lead Agency's ability to contact the family or pay providers;

--not require an office visit to fulfill notification requirements; and

--offer a range of notification options (e.g., phone, e-mail, online forms, extended submission hours) to accommodate the needs of working parents.

Further NPRM language states that Lead Agencies must allow families the option to voluntarily report changes on an ongoing basis:

--Lead Agencies are required to act on the information provided by the family if it would reduce the family's copayment or increase the family's subsidy.

--Lead Agencies are prohibited from acting on information that would reduce the family's subsidy unless the information provided indicates that the family's income exceeds 85 percent of SMI for a family of the same size, taking into account irregular income fluctuations, or, at the option of the Lead Agency, if the family has experienced a nontemporary change in work, training, or educational status.

Section 809.73 related to parent reporting requirements is amended consistent with this guidance.

Section 809.73(a) is amended to require Boards to ensure that during the 12-month eligibility period, parents are only required to report items that impact a family's eligibility or that enable the Board or Board contractor to contact the family or pay the provider.

This is further clarified in §809.73(b), which is amended to state that parents shall report to the child care contractor, within 14 calendar days of the occurrence, the following:

--Changes in family income or family size that would cause the family to exceed 85 percent of SMI for a family of the same size;

--Changes in work or attendance at a job training or educational program not considered to be temporary changes, as described in §809.51; and

--Any change in family residence, primary phone number, or e-mail (if available).

The amendment extends the number of days to report from the current 10 calendar days to 14 calendar days. This will allow additional time for parents to report changes while also allowing sufficient time for Boards to make any requested changes in the parent share of cost or for other authorization changes to become effective, as well as sufficient time to adjust the parent's eligibility (if the reported change caused the family to exceed 85 percent SMI or constitutes a nontemporary change in activity status).

Because the CCDBG Act limits termination of eligibility for care to the parent's permanent cessation of work, training, or education activities, or the family exceeding 85 percent of SMI (taking into consideration fluctuations of income), §809.73 is also

amended to remove the provision that care may be terminated and costs may be recovered due to a parent failure to report a change in §809.73(b). However, the provision that failure to report a change may result in fact-finding for suspected fraud as described in Subchapter F is retained.

Section 809.73 is also amended to require Boards to allow parents to report, and require the child care contractor to take appropriate action, regarding changes in:

--income and family size, which may result in a reduction in the parent share of cost pursuant to §809.19; and

--work, job training, or education program participation that may result in an increase in the level of child care services.

The CCDBG Act requires that reporting requirements during the 12-month period do not constitute an undue burden on working parents, and the NPRM clarifies that the reporting requirements must only be on information that affects eligibility or the ability to contact the parent and pay the provider. Therefore, the Commission emphasizes that Boards must not require parents to report any changes during the 12-month period other than those specified in amended §809.73(a) - (b).

The Agency will work with Boards to provide technical assistance on establishing clear and family-friendly information for parents on when they are required to report income and family changes.

Additionally, the Agency will work with Boards to provide reports and tools, including tools associated with wage records and a child's attendance tracking, to assist Boards in identifying parents and families that:

--may have changes in income or family size that may have resulted in the family income exceeding 85 percent of the SMI; or

--may have experienced a nontemporary change in work, training, or education activities.

#### *Implementation of the Reporting Requirements*

The Commission clarifies that parents with children enrolled prior to the effective date of the rule amendments may be notified of the new parent reporting requirements at the parent's next scheduled redetermination. However, the standards for assessing any reported changes to the parent's eligibility as well as changes in the consequences for failure to report will be effective on the effective date of the amended rules. Therefore, the Board must ensure that if a parent fails to report a change that was required under the former rules, care shall not be terminated and recoupment is not required for this failure to report, subject to the requirements in Subchapter F regarding recoupments.

#### *Comment:*

Several commenters stated that the 14 calendar days to report changes seems irrelevant. While a reporting requirement is needed, since care will continue during the 12-month eligibility period, a time frame is not necessary. At whatever point the parent reports, fact-finding would have to occur to determine the start date of the change to determine eligibility. There is no adverse action that can occur if the parent does not report within 14 days.

One commenter recommended that the reporting requirement remain but remove the 14 days. The commenter also recommended that "parent shall" language be removed since there is no action (i.e., termination of services) that can be the result if the parent does not report.

#### *Response:*

The 14-day reporting requirement is to place the parent on notice that any changes that affect eligibility or that enable the Board or Board contractor to contact the family or pay the provider must be reported as soon as possible in order to allow appropriate time for the contractor to review and verify the documentation and to determine the appropriate action to take. If it is discovered, either upon eligibility redetermination or during the 12-month eligibility period, that a change affecting eligibility was not reported timely, then that failure to report may be grounds for fact-finding for suspected fraud.

#### *Comment:*

Several commenters suggested that parents report all changes and allow the contractor to determine whether or not that change impacts the family's eligibility. The commenters stated that it is easier for parents to remember to report all changes rather than tasking them with making the determination themselves as to whether a change may affect their eligibility. If the change reported does not constitute a change that impacts eligibility, no action will be taken by contractor staff. Encouraging parents to report all changes lowers their risk of receiving services for which they are not eligible. It could also impact the family positively because if they report a change that does not impact eligibility, it could still potentially reduce their parent share of cost or increase their level of subsidy. Since the preamble indicates that parents are required to report one type of change, and are encouraged to voluntarily report all other changes, it would benefit both the parent and contractor staff if given the flexibility to continue to ask (not require) parents to report all changes to the contractor.

#### *Response:*

The Commission declines to require that parents report all changes. The CCDBG Act states that any requirements for parents to provide notification of changes shall not constitute an undue burden on families. The Commission agrees that parents need clear instructions and guidelines on what information would rise to the level of a required report.

The Agency will work with Boards to provide clear income and family size levels that, if surpassed, would be over the 85 percent of the SMI eligibility requirement. Clear guidance should also be provided to parents regarding actions that would constitute a temporary change and not need to be reported. The Child Care Services Guide will include guidance for helping parents understand what is considered a temporary change.

#### *Comment:*

One commenter requested that Boards be allowed to sanction parents for any status changes that would affect eligibility that is not reported, such as changes in income, household size, and address.

#### *Response:*

The Commission notes that pursuant to §809.112, certain parental actions may be grounds for suspected fraud and cause for Boards to conduct fraud fact-finding or the Agency to initiate a fraud investigation. This will be discussed in greater detail in Subchapter F, Fraud Fact-Finding and Improper Payments.

#### *Comment:*

Two commenters asked if the various exception reports from Agency (UI Early Warning, Work & Training, Identity Mismatch, and Income Exceptions) will still be necessary.

One commenter also requested Board flexibility in continuing to contact parents when information available to the contractor (via TIERS, UI, or exception reports provided by the Agency) may indicate that the parent is facing an eligibility issue (such as loss of employment, a second job that puts them over the 85 percent of SMI guidelines, or has had a change in work, training, or education status).

Response:

The Commission agrees that these reports will continue to be very important tools that Boards should use to identify potential changes to the parent's work or income status that may have occurred during the 12-month eligibility period.

Additionally, the Commission agrees that parents must be contacted when information becomes available that may indicate that a family is no longer eligible. In fact, the Commission notes that the exception reports and data analysis tools should not be the sole source used to determine whether the parent has, in fact, experienced a change in income or a change in work, training, or education participation. The parent must be contacted and given the opportunity to explain the exception and submit documentation, if necessary, to demonstrate that the change did not result in the family exceeding 85 percent of SMI or did not result in a permanent cessation of work, training, or education activities.

Comment:

Several commenters inquired if the contractor receives information from a source other than the parent regarding potential eligibility issues, will the contractor be allowed to contact the parent to request additional information. Additionally, one commenter asked what consequences are allowed to be imposed for not responding to the inquiry within a set number of days.

Response:

The activities described in the comment are allowable. However, care cannot be terminated based solely on the reports or the parent's failure to respond to the request for information. The CCDBG Act and the NPRM state that once the child is determined eligible, the child is assumed to be eligible for the 12-month period.

If a parent does not respond to requests for information, then a Board may need to address this at either the 12-month redetermination or as part of a potential fraud fact-finding, or both. Additional guidance will be provided in the Child Care Services Guide.

Comment:

One commenter requested guidance on situations in which an individual on a temporary summer semester break intends to go back to school after the break, but then does not go back to school. Do they receive three months of continued care from the time school let out or from the time they decided not to go back to school? The commenter also asked what happens if a temporary break turns into a permanent end and is not reported.

Response:

The Commission has clarified in rule that a break between the spring and fall semesters would constitute a temporary break in activities. The three months of continued care would start from the date that the temporary break due to the summer semester change became a permanent change. In this example, the summer break is considered a temporary change, but the failure to

return to school following this period would be the permanent change and child care would continue only for three months following the permanent change, namely, the failure to return to school. If the parent does not report the permanent change in status and this is discovered at eligibility redetermination, then the failure to report is grounds for fraud fact-finding.

Comment:

Several commenters inquired if it is the continued expectation that parents enrolled in a training institution be monitored by each semester, as they are now. The preamble noted that the enrollment information should be obtained from the training or education institution, *instead of requiring the parent to submit this documentation*. The commenters indicated that most training institutions in their area will not produce this type of enrollment information for their students.

The commenters noted that the preamble states that "Boards may develop procedures for confirming continued enrollment and attendance *during* the 12-month eligibility period...." The commenters requested clarification of the intent behind verifying this information when temporary changes do not impact the required 12-month eligibility period.

The commenters requested clarification on the statement that Boards may request that educational institutions and training providers confirm enrollment and resumption of training classes. Are Boards limited to collecting this information directly from educational institutions or may the information be requested from parents? Educational institutions are unlikely to release such information directly to Boards.

This issue is causing some confusion, as it would seem that if parents do not report a nontemporary cessation of education or training activities, and if they are not monitored by semester, the possibility of fraud review may increase. However, this seems to go against the 12-month eligibility determination philosophy.

Response:

Section 809.73 requires parents to report a nontemporary (permanent) change in the education status during the 12-month period. Section 809.51(a)(2)(C) has been amended to clarify that student holidays or breaks within a semester or between the fall and spring semesters, or between the spring and fall semesters, are temporary and do not need to be reported.

However, for parents solely in education activities, parents must report breaks in these education activities that are longer than the breaks described in §809.51(a)(2)(C) (e.g., breaks between the fall and summer semester or breaks that include two full semesters). Therefore, Boards may develop procedures for confirming during the 12-month eligibility period, including requesting that education institutions and training providers confirm enrollment at each semester and the resumption of training classes in order to determine that the parent has not had a nontemporary cessation of education or training activities. The Commission understands that educational institutions may not be able to provide such information. However, this is an allowable Board procedure.

Also, the resumption of enrollment after the nontemporary break between semesters does not need to be reported by the parent for continuation of care through the end of the 12-month period. The resumption of enrollment is only required at the 12-month redetermination period.

§809.74. Parent Appeal Rights

Section 809.74 is amended to clarify that parents may appeal the amount of any recoupment determined pursuant to Subchapter F of this chapter.

#### §809.75. Child Care during Appeal

Section 809.75 is amended to remove the provisions for not continuing care during a parent appeal as the reasons for terminating care provided in this section no longer apply.

Comment:

One commenter stated that his experience shows that parents who are ineligible choose to continue care regardless of the possibility of having to pay for child care. Commenters request that if a hearing officer affirms a determination of ineligibility that there be no recoupment owed by the parent.

Response:

The Commission declines to change the rule regarding repayment of child care provided during the appeal if the decision that the parent was ineligible for care is affirmed upon appeal. An affirmation of termination of care is a verification that the parent was not eligible to continue to receive services. The rule language at §809.71(13) also requires that parents be informed of the appeal rights, including that the cost of care during the appeal is subject to recovery. Failure to attempt recovery of payments for services for which the person was not eligible is not allowed.

Comment:

One commenter stated that the modified rule language implies that child care during an appeal is required and does not have to be requested by the parent. If the parent does request child care during an appeal, is it automatically approved? If the local review of the appeal process upholds the termination and the parent received child care during an appeal, how can we seek recoupment of these funds if the parent did not request child care during an appeal?

Response:

The Commission clarifies that the rule language has not changed regarding child care continuing during appeal. The language does not require that child care continue only if requested by the parent. The rule retains the statement that the cost of providing services during the appeal is subject to recovery if the decision is rendered against the parent. Rule language at §809.71(13) also requires that parents be informed of the appeal rights, including that the cost of care during the appeal is subject to recovery. Boards must inform parents of this and allow the parent the option of not continuing care during the appeal. If the parent agrees that child care should continue, then the rules require that care continue during the appeal.

Comment:

One commenter inquired if the Board can set local policy that states customers must pay this amount in full before they can apply to receive services again.

Response:

The Commission agrees and notes that §809.117, regarding recovery of improper payments, includes the requirement that payments made during the appeal in which the appeal is rendered against the parent are subject to full recovery in order for the parent to be eligible for future child care.

#### §809.76. Parent Responsibility Agreement

As stated previously, CCDBG Act §658E(c)(2)(N) states that each child who receives assistance will be considered to meet all eligibility requirements for such assistance and will receive such assistance for not less than 12 months before the state redetermines eligibility.

NPRM §98.20(b)(4) clarifies that the state may establish additional eligibility conditions, regarding the child's age, citizenship, residing in a family with an income that does not exceed 85 percent SMI, and residing with parents who are working or in job training or education, as long as the additional requirements do not impact eligibility other than at the time of eligibility determination or redetermination. Additionally, CCDBG Act §658E(c)(2)(N)(ii) and NPRM §98.21(d) require that Lead Agency eligibility redetermination requirements do not unduly disrupt parent work, training, or education activities.

The PRA in §809.76 requires that the parent shall:

--pursue child support by:

--cooperating with the Office of the Attorney General (OAG), if necessary, to establish paternity and to enforce child support on an ongoing basis by either:

--providing documentation that the parent has an open case with OAG and is cooperating with OAG; or

--opening a child support case with OAG and providing documentation that the parent is cooperating with OAG; or

--providing documentation that the parent has an arrangement with the absent parent for child support and is receiving child support on an ongoing basis;

--not use, sell, or possess marijuana or other controlled substances; and

--ensure that each family member younger than 18 years of age attend school regularly (unless exempt under state law).

Current §809.76(c) requires that the parent demonstrate compliance with these provisions within three months of initial eligibility. If the parent does not demonstrate compliance within three months, child care is required to end. Some Boards require parents to demonstrate compliance with the PRA at the time of initial eligibility.

Boards have reported that parents meet PRA requirements by opening an OAG case at initial determination, closing the case immediately following initial determination, and then reopening the case immediately prior to redetermination. This increases OAG's workload and requires Boards and Board contractors to track parent compliance with the PRA-without meeting the PRA's intent.

Therefore, §809.76 regarding the PRA is repealed, as the requirements of the provisions of the PRA:

--cannot be applied or enforced during the 12-month eligibility period;

--cause delays in determining eligibility; and

--cause errors in calculating income due to inconsistent receipt of child support.

Comment:

Several commenters expressed appreciation to the Commission for the Commission's willingness to review and accept the request to remove the PRA as a requirement for child care eligibility.

Response:

The Commission appreciates the comment.

Comment:

One commenter, although appreciative of the removal of the PRA, inquired if the Commission will take into consideration the impact of removal of PRA on performance since the removal of the PRA affects parent income, which could affect parent share of cost and the final amount the Board pays.

Response:

The Agency will monitor any impact to child care performance targets.

§809.77. Exemptions from the Parent Responsibility Agreement  
Section 809.77 related to exemptions from the PRA is repealed.

§809.78. Attendance Standards and Reporting Requirements  
CCDBG Act §658E(c)(2)(S) and NPRM §98.45(m) require implementation of provider payment practices that:

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

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

NPRM §98.45(m)(2) included four options that states may consider to meet the statutory requirement to support the fixed costs of providing child care by delinking payments from a child's occasional absence. The options include:

--paying providers based on a child's enrollment, rather than attendance;

--providing full payment to providers as long as a child attends for at least 85 percent of the authorized time;

--providing full payment to providers as long as a child is absent for five or fewer days in a four-week period; and

--requiring states that do not choose one of these three approaches to describe their approach in the State Plan, including how the approach is not weaker than one of the three listed above.

Currently, Chapter 809 requires Boards to establish a policy on attendance standards and procedures regarding reimbursement to providers for absence days. Chapter 809 requires Boards to terminate services if a child exceeds the Board-allowed number of paid absences during a year. If care is terminated due to excessive absences, then the parent must wait 30 days before reapplying for services.

Neither the CCDBG Act nor the NPRM grants states the authority to terminate care due to a child not meeting the state's attendance standards.

As described in §809.93, consistent with the requirements in the CCDBG Act and the NPRM, the Commission amends §809.93 to state that providers shall be reimbursed based on the child's enrollment, rather than daily attendance.

The Commission must ensure that authorizations for reimbursement based on enrollments do not result in underutilization of services, and must reduce the potential for waste, fraud, or abuse of public child care funds. The Commission establishes statewide attendance standards designed to encourage parents to fully use child care services. The rules also require that

12-month attendance standards must be met in order for the child to continue to be eligible at the 12-month recertification.

Section 809.78(a)(1) is amended to require that parents shall be notified that the eligible child shall attend on a regular basis consistent with the child's authorization for enrollment. Failure to meet monthly attendance standards may:

--result in suspension of care, at the concurrence of the parent; and

--be grounds for determining that a change in the parent's participation in work, job training, or an education program has occurred and care may be terminated pursuant to the requirements in §809.51(b).

Section 809.78(a)(2) establishes allowable attendance standards as fewer than:

--five consecutive absences during the month; or

--ten total absences during the month.

Section 809.78(a)(3) requires parents to be notified that if a child exceeds 65 total absences during the most recent 12-month period, then the child is not eligible for continued care at the 12-month eligibility redetermination period and shall not be eligible for a minimum of 12 months.

Section 809.78(a)(4) includes in the parent notification that child care providers may end a child's enrollment with the provider if the child does not meet the provider's established attendance policy. As will be discussed in Subchapter E, regarding provider reimbursement based on enrollment, a child's eligibility cannot end based on the number of absences. However, parents must be notified that a provider is allowed to discontinue enrollment of the child at the provider facility if the child does not meet attendance standards established by the provider.

Section 809.78(a) is also amended to remove the provisions that child care services may be terminated for absences or misuse of attendance automation policies. However, the rules at §809.78(a)(9) state that the parent or secondary cardholders giving the attendance card or personal identification number (PIN) to another person, including the provider, is grounds for a potential fraud determination pursuant to Subchapter F of this chapter.

Section 809.78(c) is added to state that Boards shall ensure that absences due to a child's documented chronic illness or disability or court-ordered visitation are not included in the number of absences in paragraphs (2) and (3) (related to monthly and the 12-month attendance standards).

Section 809.78(d) is added to state that when a child's enrollment has been ended by a provider in §809.78(d)(4), Boards shall work with the parent to place the otherwise eligible child in another eligible provider.

The Commission acknowledges that the rule amendments related to enrollments and absences will require substantial modifications to existing Board policies and procedures as well as changes to the Agency's information and attendance automation systems. The Agency will work with Boards regarding these changes and to develop necessary reports to assist Boards, parents, and providers in tracking attendance.

Comment:

Several commenters agreed that the goal of preventing potential waste, fraud, or abuse was to ensure that the child care authorizations are being used. The commenters also understood that

the CCDBG Act and the NPRM absences are not listed as an allowable termination of care reason during the 12-month eligibility period. Several commenters supported the development of statewide attendance standards designed to encourage parents to fully use child care services. One commenter stated that encouraging parents to maintain regular attendance for their child in a high-quality early education program results in stronger outcomes for children and families. The commenter was pleased to see that the Commission has considered multiple opportunities to quantify absences, and interpreted this as a commitment to supporting the development of the whole family and their needs outside of child care.

Response:

The Commission appreciates the comment.

Comment:

Many commenters expressed concerns regarding the lack of enforcement of attendance standards. The commenters stated that the enforcement mechanisms (suspension, determining a change in parents' activity participation) are not efficient or effective to enforce compliance with attendance reporting requirements or attendance standards.

One commenter pointed out that the Agency commented to ACF that attendance should be considered an eligibility requirement. While TWC provided comment to ACF requesting the consideration of termination of services due to excessive absences, without being able to end services, the additional 10 in a month or 41 in a year are not needed.

Many commenters requested that Boards be allowed to set local policy for redeterminations that consider whether or not attendance standards were met during the previous eligibility period.

Response:

The Commission understands the commenters' concerns. As one of the commenters pointed out, the Commission provided comments to the NPRM recommending that the regulations to allow states the flexibility to end services during the 12-month eligibility period for children and families that do not meet state attendance standards. However, pending the final rules, there is no statement in the CCDBG Act or the NPRM that expressly gives states this flexibility.

Regarding the recommendation that Boards be allowed to set local policy for redeterminations that consider whether or not attendance standards were met during the previous eligibility period, the Commission agrees that a child's attendance during the previous eligibility period should be taken into consideration at eligibility redetermination. However, the Commission does not agree that this should be established by Board policy. The Commission believes it is important to have statewide attendance standards in order to ensure that families and providers are treated consistently across the state regarding payments for absences and consequences for failure to meet attendance standards and reporting requirements.

Therefore, the Commission modified the proposed rules at §809.98(a)(3) to require that parents be notified that if a child is absent more than 65 days during the 12-month eligibility period, then the child is not eligible for continued care at the 12-month eligibility redetermination period and shall not be eligible for a minimum of 12 months.

The 65 total absences number is based on 75 percent attendance during a typical 12-month eligibility period of 260 autho-

rized days. However, the Commission clarifies that the attendance standard is not 75 percent of any individual authorized enrollment. The attendance standard is fewer than 65 absences on any authorizations, including authorizations in which care may be for more than five days a week based on a parent's flexible work schedule or fewer than five days a week based on the parent's needs.

The 65-day attendance standard should not be confused with a provider's own attendance policies. As stated previously, individual provider attendance standards are at the discretion of the provider's operational policies. A provider could end enrollment for a child that does not meet the provider's attendance standards. However, if a provider ends the care due to violations of the provider attendance standards, the child care contractor must work with the parent to place the otherwise eligible child in another eligible provider. The Commission has added §809.78(d) to emphasize this point.

Comment:

Several commenters inquired if absences due to extenuating circumstances such as illness or absences due to court-ordered visitations would be included in the absence totals for the attendance standards. One commenter provided specific suggestions regarding the circumstances in which these absences would or would not be counted, including partially counting particular absences over the course of a particular period.

Response:

In order to ensure that the attendance standards are consistently applied and enforced, the Commission believes that the treatment of these types of absences should be included in Commission rules. Therefore, the Commission has added §809.78(c) to state that Boards shall ensure that absences due to a child's documented chronic illness or disability or court-ordered visitation are not included in the number of absences in §809.78(a)(2) - (3).

Comment:

Many commenters requested clarification regarding the use of suspensions during the 12-month authorization period as a method for enforcing attendance standards and requested guidance on how to implement suspensions. Several commenters requested that Boards be given local flexibility to define how the suspension process works in the workforce area since the proposed rules do not address this issue.

Response:

As noted earlier in the section entitled "Suspensions of Child Care during the 12-month Eligibility Period," the preamble to the NPRM notes that, consistent with §658E(c)(2)(N)(i) of the CCDBG Act, once determined eligible, the child "will receive such assistance" for the 12-month eligibility period, and "during the minimum 12-month eligibility period Lead Agencies also may not end or suspend child care authorization or provider payments due to a temporary change in a parent's work, training, or education status."

However, the preamble also notes that "despite the language that the child 'will receive such assistance,' the receipt of such services remains at the option of the family." The law does not require the family to continue receiving services nor would it force the family to remain with a provider if the family no longer chooses to receive such services.

Consistent with this guidance, the Commission modifies §809.78(a)(1) to require that the parent must concur with the suspension. The Board cannot suspend care without the agreement and concurrence of the parent. Suspension of care without the request or concurrence from the parent is not allowed during the 12-month eligibility period under the guidance provided by the NPRM.

Board child care contractors are encouraged to contact parents to determine the reason for the absences, including if the absences are due to a change in activity status.

Contractors should work with the parent, including sending letters to the parents, to encourage attendance, recommend potential suspensions or reduction in the authorization and remind the parent of potential consequences, including termination of care at the 12-month redetermination period with the child not being eligible for care for future child care services for 12 months. Boards and contractors are reminded that suspensions or reductions in the authorizations can only occur with the concurrence of the parent. This will also be clarified in the Child Care Services Guide.

Comment:

Several Boards pointed out that some Boards are not currently reimbursing providers for the parent's failure to report attendance and asked if these Boards would now be required to pay for the non-reported attendance.

Response:

As discussed in §809.93, provider reimbursement will be based on the child's monthly authorized enrollment, excluding periods of suspensions. Providers will be reimbursed for all authorized days, including absences and days in which the parent did not report attendance. Boards currently not reimbursing providers for non-reported attendance days must start reimbursing the providers under the new rules.

Comment:

Several commenters inquired if the parent's failure to report attendance using the child care attendance automation (CCAA) system would be counted as an absence. One commenter noted that often the five-day and 10-day consecutive absences are the result of the unavailability of the CCAA attendance card, as either the card has not been received by the parent or the card needs to be replaced.

Many commenters noted that the language in §809.78(a)(10) includes language that the failure to report attendance or the denial of the attendance report by the automated system "may" result in an absence counted toward the attendance standards. The commenters requested that Boards have the local flexibility to develop policy for how this will be counted; and, if so, that the guidance should be either added to the rule language or included in the Child Care Services Guide.

One commenter requested that if the intent is to include non-reported days as an absence, then language should be added to the rule stating that "absences and non-reported attendance" are counted as absences.

Response:

The Commission appreciates the comments, but declines to include rule language specifying that all non-reported attendance should be counted as an absence. As one commenter noted,

the non-reported attendance could be the result of the inability to record attendance due to issues with the attendance card.

However, the Commission agrees that the procedures for including or excluding non-reported attendance as an absence should be included in the Child Care Services Guide. Currently, such guidance to Boards is provided in §E-804: "Board Absence Policies for Parent Failure to Report Attendance" of the Child Care Services Guide. The guidance requires Boards to ensure that the decision to include the non-reported day must take into consideration situations that are beyond the control of the parent. The guidance in the revised Child Care Services Guide will be consistent with this requirement.

Providers will also continue to be able to report attendance that the parent was unable to report due to the CCAA system.

The Commission will make modifications to §E-804 to reflect the new rules for Boards to ensure that their procedures for including non-reported days as an absence comply with the Child Care Services Guide.

Comment:

One commenter requested information regarding the methodology used for determining these allowable attendance standards, as the commenter believed the proposed 41 absences in a 12-month period seem excessive. The commenter stated that no employer would accept an employee being absent for 41 days. The commenter stated that this 12-month period absence limit seems too generous and wasteful of taxpayer funds, especially when other families will be on the child care services waiting list for services.

Response:

The proposed rule language allows for a total of 40 absences in 12-months. This equated to 85 percent attendance of the standard 260 annual child care days, which is approximately three days a month and is listed in the NPRM as the minimal acceptable annual attendance standard for providers to receive full payment.

Because the Commission has made a change as an enforcement mechanism of the attendance standards, the Commission believes it is necessary to increase the annual amount from 40 to 65 absences in a 12-month period. This is approximately five absences a month. Although this may not be an acceptable standard for adults in the workplace, the Commission believes that five absences over the course of a month is appropriate for children in a child care setting, particularly if the child's continued eligibility at the 12-month redetermination period is at stake if the annual amount is exceeded.

The Commission notes that rules specifically exclude absences due to a child's documented chronic illness and disability, but do not exclude all absences due to illnesses. Young children experience a higher rate of non-chronic illnesses, particularly during their early years, and the Commission believes it is important to account for the absences in the absence count, but allow for a reasonable threshold as to not jeopardize continued eligibility.

Additionally, the annual absence requirement takes into consideration authorizations in which care may be for more than five days a week based on a parent's flexible work schedule. The Commission recognizes that many parents have work schedules that may be seven days one week, three days another week, and four days in other weeks, and that these schedules are not established on a routine basis. The monthly authorization must

reflect this variation and the provider must make the space available to the child. Some absences on many of those authorized, but non-working days, are to be expected and the 65 total absences during the year account for these variations.

Comment:

Several commenters requested clarification as to whether care is to be terminated if the child does not meet the attendance standards in the rules. One commenter stated that if care cannot be terminated during the eligibility period, and the absences are only to alert the contractor to check into the parent's status, then this would appear to be a burden. Another commenter asked how absence letters will work with these changes.

Response:

The Commission emphasizes that the CCDBG Act and the NPRM do not allow for care to be terminated during the 12-month period for absences. Contractors should work with the parent, including sending letters to the parents, to encourage attendance, recommend potential suspensions or reduction in the authorization, and remind the parent of potential consequences, including termination of care at the 12-month redetermination period with the child not being eligible for care for future child care services for 12 months. Boards and contractors are reminded that suspensions or reductions in the authorizations can only occur with the concurrence of the parent. This will also be clarified in the Child Care Services Guide.

Comment:

Several commenters requested clarification regarding the rule language stating the parents must be notified that providers may end the child's enrollment with the provider if the child does not meet the provider's established policy regarding attendance. Several commenters inquired if the Board contractor is required to review all the provider attendance policies to ensure the provider is in compliance with this language.

One commenter asked if parents would be able to request a transfer if a provider ends child's enrollment due to absences.

Response:

The Board's child care contractor will not be responsible for maintaining copies of providers' attendance policies. If a provider policy is to require adherence to attendance standards, then the Board cannot require the provider to keep the child enrolled. It is not expected that Boards monitor provider policies to ensure the policies are equitably enforced. This notification to the parent is intended to ensure that, even though the child's eligibility cannot end due to absences, the parent must be notified that absences may result in the provider ending care if the child is not attending in accordance with the provider's attendance standards.

Parents will be able to transfer, and Boards should work with parents in finding placements for the child. Boards should also work with the parent to determine the cause of the absences and recommend strategies to reduce absences.

Comment:

One commenter was appreciative of the statement in rule that providers may end care at the provider facility if absences exceed the provider policy.

Response:

The Commission appreciates the comment.

Comment:

One commenter requested clarification as to whether the attendance standards are based on one calendar month or 30 calendar days.

Response:

The time period specifies a month, not 30 days. This is to align with the monthly authorization.

Comment:

A commenter asked how Boards that pay providers weekly or biweekly should calculate the required attendance for payment to the providers. Rule states that providers are reimbursed on enrollment; however, there is also an attendance requirement for the family to meet. Please clarify whether these are two separate items and whether parents not meeting attendance requirements would not affect full enrollment payment to providers.

Another commenter asked how the absences affect payments. It appears that the Agency is considering funding based solely on enrollment, but an absence policy based on a percentage of the enrollment may have a financial impact on providers.

Response:

The Commission clarifies that payments on enrollments and the attendance standards are two separate issues. Payments to providers will be based on authorized enrollment, not daily attendance. Attendance tracking will help ensure that services are being used by alerting contractor staff to provide additional case management in situations in which a child is not regularly attending. Further, the annual attendance standard is taken into consideration at the eligibility redetermination.

Comment:

Many commenters questioned the continued use of CCAA. The commenters stated that to be fully consistent with CCDBG changes, it is recommended that the Commission eliminate any attendance standards, and that the \$3 million currently budgeted for CCAA be reallocated to direct care and quality. Since providers are already required to track attendance as part of DFPS minimum standards, CCAA is a duplication. Furthermore, since using CCAA cannot be enforced during the 12-month eligibility period, it should be removed, like the PRA requirements. The change from paying providers based on authorized enrollment rather than attendance also supports the recommendation to stop using the CCAA system.

The commenters cited the policy brief on Attendance Policies and Systems authored by ACF Office of Child Care, which states, "Time and attendance systems should support program payment policies and goals, not drive them. IT systems should be flexible and cost-effective to maintain, and not act as impediments to change." The commenters stated that the CCAA system is neither flexible nor cost-effective. The commenters stated that there are other, more cost-effective attendance tracking systems available.

One commenter suggested that there may be a way to collaborate with Child Care Licensing at both the local and state levels to create a more robust provider fraud prevention program. The commenter pointed out that the entire public school system bases certain allocations on attendance, but the school administration is responsible for reporting 100 percent of its attendance, not parents.

Another commenter stated that child care centers located on military bases are having difficulty meeting the requirement for CCAA since the military will not allow a point-of-service machine to be connected to their system for security reasons.

Response:

Tracking and reporting attendance will continue to be important parts of child care services, and CCAA will continue to be used for this purpose. Particularly during the 12-month eligibility period, it is very important for the Agency, Boards, and contractors to be aware of changes and trends in a child's attendance in order to contact the parent to determine why absences are occurring and if, with the concurrence of the parent, changes need to be made in the monthly authorization in order to reduce the number of absences for authorized days.

Timely attendance reporting and tracking is also an important tool in identifying potential nontemporary changes in the parent work, training, and education status.

However, the Commission will work with Boards to gather input on any future recommended changes to the automated attendance system resulting from the changes in the rules.

#### SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

The Commission adopts the following amendments to Subchapter E:

##### §809.91. Minimum Requirements for Providers

CCDBG Act §658E(c)(2)(K) requires annual unannounced inspections of all CCDF providers for compliance with health, safety, and fire standards. Relative providers are exempt from this requirement. By state statute, listed family homes are not inspected by DFPS child care licensing (unless there is a report of abuse or neglect at the facility). Therefore, under the CCDBG Act, nonrelative listed family homes are not eligible to provide CCDF services. Therefore, the Commission amends §809.91(a)(3) and (b) to remove requirements for Boards choosing to allow nonrelative listed homes as eligible child care providers as these providers are no longer eligible to care for CCDF-subsidized children.

Section 809.91(f) is amended to clarify that foster parents who are also directors, assistant directors, or have an ownership in the child care center, may receive reimbursement if authorized by DFPS.

Comment:

One commenter strongly supported the amendment to remove nonrelative listed homes as eligible to care for CCDF-subsidized children. All of Texas' children deserve access to child care options that meet the standards of health and safety as confirmed through annual, unannounced site inspections. The commenter commended the state on recognizing the critical importance of DFPS licensing standards and monitoring. DFPS child care licensing establishes minimum standards and monitoring processes that ensure the health and safety of children in care. Investment of state and federal funds should be made in safe, quality early childhood programs that deliver educational outcomes.

Response:

The Commission appreciates the comment. The Commission also notes that the final rules have been modified from the proposed rules to include removing §809.91(a)(3), which gave

Boards the option to allow nonrelative listed family homes. This provision was inadvertently retained in the proposed rules.

##### §809.92. Provider Responsibilities and Reporting Requirements

Section 809.92(b) is amended to remove the specific attendance reporting requirements for providers to:

--document and maintain a list of each child's attendance and submit the list upon request;

--inform the Board when an enrolled child is absent; and

--inform the Board that a child has not attended the first three days of scheduled care.

The implementation of the child care attendance automation system eliminates the need for providers to report this attendance to the Board. However, the Commission notes that removing the requirement from Chapter 809 that providers document and maintain a list of each child's attendance does not remove the DFPS child care licensing requirement for providers to maintain a daily sign-in sheet for all children enrolled at the facility.

Comment:

One commenter noted that the requirement to maintain attendance records is removed in the proposed rules. However, the commenter stated that the contractor uses the sign-in sheets required by Child Care Licensing as evidence in potential fraud cases and would like to continue to request the sign-in sheets that are required by Child Care Licensing.

Response:

The Commission clarifies that Boards may continue to request these sign-in sheets from providers as part of fraud fact-finding.

Comment:

One commenter requested clarification on the purpose of the requirement that providers report when the parent fails to pay the parent share of cost since Boards are not allowed to impose consequences to parents failing to comply. The only reason for providers, that we can see, is if Boards are required to pay the parent share of cost when parents fail to do so.

Response:

A Board may have a policy that prohibits transfers if a parent is not current on their parent share of cost (as long as this policy does not have the effect of terminating a child's care). A Board may also have a policy that reimburses the provider if the parent fails to pay the parent share of cost. Both of these policies depend on the provider's timely reporting to the child care contractor that the parent is not current on the parent share of cost pursuant to §809.93(b)(3).

The requirement that providers report this information to the contractor will be vital to ensuring that appropriate actions are taken with the parent, including potential temporary reductions in the parent share of cost. Boards will be able to better anticipate costs associated with "making the provider whole," and the contractor will be alerted to families that require outreach and case management.

The Child Care Services Guide will provide guidance on working with parents who are not paying their parent share of cost.

Comment:

While not stated in rule, there is a common understanding among the Board child care network representatives that the provider

may end services with the parent if the parent does not pay the parent share of cost. This is not based on proposed rule. Should it actually be considered, the environment of "provider hopping" will occur. The parent will not pay provider A. Provider A ends the services. Parent transfers to provider B, and it starts again.

The Agency provided comment to ACF that allows for termination of services for nonpayment of parent share of cost. That request is fully supported. The termination of services for nonpayment of parent share of cost, if allowed, is the best solution to support the providers and to support the parent. If the provider reports the nonpayment of parent share of cost appropriately, then the parent share of cost could be paid to the provider. The parent would then have services terminated or would pay the parent share of cost to the Board to have services continued.

If it remains that services cannot be terminated due to nonpayment of parent share of cost, then recommend that the rule remain as it is that the provider must report and the child care contractor works with the parent to pay the parent share of cost to the provider before any consideration of a transfer is given.

Response:

Pursuant to the NPRM, a child's care may not be terminated within the 12-month eligibility period for any reason other than income exceeding 85 percent of SMI for a family of the same size, or a permanent cessation of work, training, or education has occurred and three months of continuing care have been provided to allow the parent to resume the work, training, or education activity.

A Board may establish a policy prohibiting transfers when a parent has failed to pay his or her share of cost, as long as the policy does not have the effect of terminating care during the 12-month eligibility period.

Boards may enact policies to pay providers when parents fail to pay their share of cost. The Child Care Services Guide will provide guidance for contractor staff regarding parents who may qualify for a temporary reduction in their parent share of cost.

Comment:

One commenter noted that the Agency commented to ACF disagreement that states or local areas cannot allow providers to charge parents above the copay for provider mandatory fees, preferring that the decision should be based on local needs and provider base. Yet, the Agency issued Workforce Development (WD) Letter 33-13 implementing a methodology on calculating a provider's published rates, stating that the intent is to ensure that provider's published daily rates are consistently calculated across the state. The calculation includes enrollment fees, supply fees, and activity fees. If indeed there are additional mandatory fees, then all mandatory fees should be included in the standardized method of calculating daily rate. This would negate Agency disagreement that states or local areas cannot allow providers to charge parents above the co-pay for provider mandatory fees.

Response:

The calculation in the referenced WD Letter concerns the methodology for calculating an individual provider's published rate, which does require the inclusion of provider mandatory fees. However, this is not the same as the Board maximum rate. Board maximum rates may be higher or lower than an individual provider's published rate. If the Board maximum rate is lower than the provider's published rate, then the current rules retain

the provision that a Board may prohibit providers from charging parents the difference between the lower Board maximum rate and the higher provider published rate. However, this should be a local decision.

#### §809.93. Provider Reimbursement

As explained in §809.78 regarding a child's attendance standards, CCDBG Act §658E(c)(2)(S) and NPRM §98.45(m) require implementation of provider payment practices that:

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

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

NPRM §98.45(m)(2) included four options that states may consider to meet the statutory requirement to support the fixed costs of providing child care by delinking payments from a child's occasional absence. The options include:

--paying providers based on a child's enrollment, rather than attendance;

--providing full payment to providers as long as a child attends for at least 85 percent of the authorized time;

--providing full payment to providers as long as a child is absent for five or fewer days in a four-week period; and

--requiring states that do not choose one of these three approaches to describe their approach in the State Plan, including how the approach is not weaker than one of the three listed above.

Currently, Chapter 809 requires Boards to establish a policy on attendance standards and procedures regarding reimbursement to providers for absence days. Chapter 809 requires Boards to terminate services if a child exceeds the Board-allowed number of paid absences during a year. If care is terminated due to excessive absences, then the parent must wait 30 days before reapplying for services.

Neither the CCDBG Act nor the NPRM grants states the authority to terminate care due to a child not meeting the state's attendance standards.

To ensure statewide consistency for families and statewide compliance to the requirements in CCDBG Act §658E(c)(2)(S) and NPRM §98.45(m), §809.93 is amended to implement a statewide policy that reimburses regulated providers based on the child's enrollment, rather than daily attendance. The rule language at §809.93(b) states that a Board or its contractor shall reimburse a regulated provider based on a child's monthly enrollment, excluding periods of suspension (at the concurrence of the parent).

Additionally, the Commission reletters §809.93(g) to §809.93(f) and amends the language to remove references to reimbursements based on the unit of services delivered. The amended language states that the monthly enrollment authorization is based on the unit of service authorized (either as an authorized part-day unit or an authorized full-day unit).

The rules retain the requirement that relative child care providers are not reimbursed for days on which the child is absent. The Commission retains this provision based on the contention that unregulated relative providers do not have the same fixed costs as regulated providers do in order to meet regulatory standards.

Comment:

One commenter noted that §809.93(b) states that providers will be reimbursed based on "monthly enrollment." However, §809.93(f) states that "reimbursement for child care is based on the unit of service delivered," which is then defined on a daily basis. Monthly enrollment implies that providers are paid their monthly rate for the entire month; "unit of service delivered" defined on a daily basis implies that providers are reimbursed a daily amount (current practice), whether based on enrollment or attendance. The commenter recommended that §809.93 should be modified to be clear on which basis providers are reimbursed.

Response:

The Commission appreciates the comment and has modified the language in §809.93(f) accordingly.

Comment:

One commenter strongly supported the rule change to reimburse a regulated provider based on a child's monthly enrollment authorization. As the Commission noted, CCDBG Act §658E(c)(2)(S) and NPRM §98.45(m) require implementation of provider payment practices that align with generally accepted payment practices for children who do not receive CCDF funds and support the fixed costs of providing child care services by delinking provider payments from a child's occasional absences. This change will bring Texas into the forefront of states that are committed to ensuring equal access for children receiving subsidy.

The commenter would like to offer support, input, and feedback on any rules or guidelines needed to fully implement this payment structure. As this is a major change to existing practice that will greatly support currently participating providers and encourage new providers to participate in CCDF, the commenter also supports the Agency in any request for additional funding to comply with this requirement.

Response:

The Commission appreciates the comment.

Comment:

One commenter stated that with the 12-month eligibility period and care being paid based upon authorization, not on attendance, that greater consideration must be given to paying the early care and education providers at the beginning of each month based upon authorized days in the month. This would align the child care services with the early care and education industry. It would encourage more providers to participate, as the funds would be paid at the beginning of each month. This may also encourage providers to expand their infant and toddler capacity and to provide care during nontraditional hours because they would have the funds at the beginning of each month. They would be incentivized to work with the parents and the children to deliver stable, consistent, quality care in order to maintain the children in care and the payment upfront.

Response:

The Commission declines to make this change. It is a matter of generally accepted practice that public funds be expended after the authorized services are delivered in order to ensure greater integrity of the public funds and to minimize the amount that may be required to be recovered if spent improperly. Additionally, the authorization may change during the month due to the parent requesting an increase in services from part-time to full-time, a requested parent suspension of care, or the family's eligibility pe-

riod ending during the month and the family is not redetermined as eligible. The payments made prior to these changes would need to be recovered.

Comment:

One commenter recommended that the Commission add language to support child care providers in managing fixed costs to include that "A Board or its child care contractor shall reimburse a regulated provider based on a child's monthly enrollment authorization, regardless of whether eligibility changes during the month." This change is especially impactful since daily attendance is no longer reported and many fixed costs recur monthly, such as rent.

Response:

The Commission declines to make this change. If the family eligibility changes during the month and the family is no longer eligible, then the authorization must end and the provider cannot be reimbursed.

Comment:

One commenter noted that this section requires Boards to ensure that providers are not paid for holding spaces open and requested clarification on the difference between paying to hold spaces open and paying for authorized enrollment when a child is not attending.

Response:

The Commission clarifies that paying a provider without an authorized enrollment would be considered paying a provider for holding a space open.

With an enrollment authorization, the Board is not paying for an open slot because the enrolled child fills the slot.

Comment:

Several commenters stated that this section prohibits child care services from ending because of attendance, but proposes to only pay providers 85 percent of the rate if the children do not meet the standards of attendance. The commenters stated that this would not allow provider to cover its fixed costs. The commenters highly object to that burden being placed on providers. And in many cases already, the provider is not being paid the published rate, but is being paid below that.

Response:

The Commission clarifies that the amended rule requires that payment be based upon authorized enrollment, not daily attendance. The Commission anticipates that, consistent with the requirement in the CCDBG Act, this will assist providers in meeting the fixed costs of providing care. The rules do not limit the payments to 85 percent of the rate if the children do not meet attendance standards.

§809.94. Providers Placed on Corrective or Adverse Action by the Texas Department of Family and Protective Services

Section 809.94(c) is amended to remove language stating that a parent receiving notification of a provider's corrective action may choose to continue care with the provider if the parent signs the notification acknowledging that the parent is aware of the provider status. The effect of this language is to end the child's care unless the parent signs the notification and acknowledges that the parent chooses to continue care at the facility. Under the CCDBG Act, care cannot end during the 12-month period for a

parent's failure to return the acknowledgement to continue care at the facility.

Therefore, §809.94(c) is amended to state that the parent may transfer the child to another provider without being subject to the Board's transfer policies if the parent requests the transfer within 14 calendar days of receiving the notification.

Comment:

One commenter pointed out that the parent must request the transfer within 14 business days of receiving the notification. The commenter stated that 14 business days is too long for the parent to pick another provider to transfer their children. It would be most beneficial if this rule were changed to 14 calendar days, which would align with the new parent reporting requirement.

Response:

This is an oversight in the proposed rules. The language should be 14 calendar days to align with the parent reporting requirements.

Comment:

One commenter expressed concern about removing the requirement that a parent must sign an acknowledgement that the parent is aware of the provider's licensing status. If something subsequently were to happen to the parent's child, then the Board would have no documentation to support the fact that the parent was informed of the provider status and chose to keep their child at the facility anyway.

One commenter asked if the case remains open if the contractor does not hear anything back from the parent after sending notice to the parent.

One commenter asked if a parent chooses to keep a child at a provider that is on corrective action would this be considered a voluntary withdrawal from child care services.

Response:

The Commission clarifies that care cannot be terminated due to the parent not returning the acknowledgement that the provider is on corrective action. The contractor should retain a copy of the notification sent to the parent, either on hard copy or electronic format, in order to document that the contractor provided notification to the parent.

Additionally, parents may choose to continue care in a provider that is on corrective action as corrective action does not disqualify a provider from serving subsidized children.

#### §809.95. Provider Automated Attendance Agreement

Section 809.95 is amended to clarify that provider misuse of attendance reporting and violation of the requirements in this section are grounds for fraud determination pursuant to Subchapter F of this chapter.

Comment:

One commenter strongly recommended the Commission clarify the reporting requirement for providers, specifically with regards to "authorized days," and how that differs from attendance, which providers will no longer be required to report.

Response:

The Commission clarifies that the authorized days consist of the number of days, the days of the week, and the level of care (part-day or full-day) that will determine the monthly authoriza-

tion. The attendance associated with the authorized enrollment will be reported by the parent through the automated attendance. Although the providers are no longer required to report individual attendance days in order to be reimbursed, providers are required to notify the contractor if the authorized days in the automated system are different than the authorization received by the provider and the parent, in order to ensure that the proper number of days for reimbursement is correct.

Comment:

Since payment for services will be based on authorized days and not on attendance, the rules associated with CCAA usage seem overly harsh and in most cases not necessary. The CCAA system will primarily be used for tracking absence and non-records of attendance as a tool for the child care contractor to determine which parents need to be contacted.

Response:

CCAA will be used to track absences to determine if parents should be contacted in regards to attendance. However, the attendance system will also be used to verify that the child's authorized enrollment is being used for continued provider payments. Instances in which the parent removed the child from the provider without informing the child care contractor, yet the child's attendance is still being recorded through automated attendance and the provider continues to receive payments on the enrollment, will be grounds for determination of fraud fact-finding.

#### SUBCHAPTER F. FRAUD FACT-FINDING AND IMPROPER PAYMENTS

The Commission adopts the following amendments to Subchapter F:

##### §809.111. General Fraud Fact-Finding Procedures

Under *Program Integrity* on page 80488, the NPRM preamble provided the following clarification regarding the Administration for Children and Families' (ACF) intent regarding fraud and recoupments:

ACF would like to clarify that there is no Federal requirement for Lead Agencies to recoup CCDF overpayments, except in instances of fraud. We also strongly discourage such policies as they may impose a financial burden on low-income families that is counter to CCDF's long-term goal of promoting family economic stability. The Act affirmatively states an eligible child "will be considered to meet all eligibility requirements" for a minimum of 12 months regardless of increases in income (as long as income remains at or below 85 percent of SMI) or temporary changes in parental employment or participation in education and training. Therefore, there are very limited circumstances in which a child would not be considered eligible after an initial eligibility determination.

When implementing their CCDF programs, Lead Agencies must balance ensuring compliance with eligibility requirements with other considerations, including administrative feasibility, program integrity, promoting continuity of care for children, and aligning child care with Head Start, Early Head Start, and other early childhood programs. These proposed changes are intended to remove any uncertainty regarding applicability of Federal eligibility requirements for CCDF and the threat of potential penalties or disallowances that otherwise may inhibit Lead Agencies ability to balance these priorities in a way that best meets the needs of children.

Existing regulations at §98.60 indicate that Lead Agencies shall recover child care payments that are the result of fraud from the responsible party. While ACF does not define the term fraud and leaves flexibility to Lead Agencies, fraud in this context typically involves knowing and willful misrepresentation of information to receive a benefit. We urge Lead Agencies to carefully consider what constitutes fraud, particularly in the case of individual families.

In accordance with this guidance, §809.111 is amended to provide a definition of fraud in relation to child care services. The amended rule states that a person commits fraud if, to obtain or increase a benefit or other payment, either for the person or another person, the person:

--makes a false statement or representation, knowing it to be false; or

--knowingly fails to disclose a material fact.

This definition is consistent with the definition of fraudulently obtaining benefits under Texas Labor Code §214.001.

#### §809.112. Suspected Fraud

Section 809.112 is amended to clarify specific parental actions that may be grounds for suspected fraud and cause the Board to conduct fact-finding or the Commission to initiate a fraud investigation. These actions include:

--not reporting or falsely reporting at initial eligibility or at eligibility redetermination:

--household composition, or income sources or amounts that would have resulted in ineligibility or a higher parent share of cost; or

--work, training, or education hours that would have resulted in ineligibility; or

--not reporting during the 12-month eligibility period:

--changes in income or household composition that would cause the family income to exceed 85 percent of SMI (taking into consideration fluctuations of income);

--a permanent loss of job or cessation of training or education that exceeds three months; or

--improper or inaccurate reporting of attendance.

Comment:

One commenter suggested that the "90-day" reference in §809.112(b)(2) regarding a permanent loss of job be changed to "three months" to align with the language in §809.51(a)(2)(E) regarding other temporary cessations of activities.

Response:

The Commission agrees and for consistency has modified the language as suggested.

Comment:

One commenter pointed out that the last two actions considered as grounds for suspected fraud in §809.112(b)(2) should be separated by an "or," not "and." Using the word "and" implies that both instances have to be true to suspect fraud.

Response:

The Commission agrees and has modified the language as suggested.

Comment:

One commenter requested that the rules clarify what actions should be taken at redetermination if the contractor needs to process fact-finding for suspected fraud due to the parent failure to report changes.

Response:

Section 809.112 specifies parent actions that would be grounds for suspected fraud, which includes not reporting or falsely reporting family size or income that would result in the family being over 85 percent of SMI for a family of the same size. Section 809.112 also includes failure to report a permanent change in work, education, or training.

The Agency is developing procedures regarding fact-finding actions to determine fraud and provide guidance through a WD Letter or in the Child Care Services Guide.

Comment:

One commenter recommended the household composition be defined based upon marriage certificates, public records, legal and financial records, and client admittance.

Response:

The definition of a family in §809.2 has been changed to include marriage, including common-law marriage.

Comment:

One commenter stated that further fact-finding may be initiated if the parent entered a legal union of matrimony during the 12-month eligibility period and fails to disclose a change in household composition at eligibility redetermination.

Response:

If the marriage increased the family size, then this would be considered a change of family size that must be reported. If two unmarried parents reported as residing together at eligibility, then both parents would be included in the family size. The couples getting married during the 12-month eligibility period would not change the family size. However, if the marriage increased the family size and income, then that must be reported and would be subject to fraud fact-finding.

Comment:

One commenter recommended that if a parent does not report a change in income or household composition that causes the family income to exceed 85 percent of SMI, this failure to report should not be considered grounds for fraud, as the family may not be aware of the SMI guidelines. It is the parent's responsibility to ensure such changes are reported at initial eligibility and eligibility redeterminations.

Response:

The Commission understands the concern that a parent may not be fully versed in the specific income calculation used to determine eligibility or if a change in activity status constitutes a non-temporary change. The Agency will work with Boards to provide clear information to parents regarding the family size and income amounts that must be reported if exceeded, and to provide clear guidance on changes that are considered temporary changes.

Comment:

One commenter requested clarification on what constitutes improper reporting of attendance described in §809.112(b)(2)(C).

Response:

Improper reporting of attendance includes misuse of the attendance automation system and reporting of attendance that did not occur.

#### §809.113. Action to Prevent or Correct Suspected Fraud

Section 809.113 is amended to remove the provision that a child care contractor may take certain actions if a provider or parent has committed fraud. Although a Board's child care contractor is expected to take these actions, the language implied that the contractor determines which action to take without the involvement of the Board or the Commission.

Amended language in §809.113 clarifies that actions taken against a provider or parent shall be consistent with and pursuant to Commission policy.

Further, §809.113 is amended to include the following options:

--A provider may be prohibited from future eligibility to provide Commission-funded child care services; and

--A parent's eligibility may be terminated during the 12-month eligibility period if eligibility was determined using fraudulent information provided by the parent.

Comment:

One commenter requested clarification on §809.113(b)(4) regarding termination of a parent's care during the 12-month eligibility period, if eligibility was determined using fraudulent information provided by the parent. The commenters asked if this would require the appeal or fraud review to take place first before terminating the parent's care. Would fraud have to be confirmed first before terminating the parent's care or can the parent be terminated for suspected fraud?

Another commenter asked if a parent is found to have committed fraud, is the Board required to give 15 days' notice of termination or is the care terminated immediately.

Response:

The language in §809.113(b) states that the actions are based on a finding of fraud. A finding of fraud would be a fraud determination. The required 15-day notification must be provided, and the parent must be allowed to appeal the decision as required in §809.74.

Comment:

One commenter recommended that to achieve the explanation in the preamble, it is recommended that the revision be, "The Commission, Board, or Board's child care contractor (with Board approval)..."

Another commenter recommended that the wording in §809.113 (a) and (b) be modified to read, "the Commission, Board, or Board's child care contractor at the direction of the Board..." in recognition of the fact that the contractor is expected to take these actions while addressing the concern that they should not be taken without the involvement of the Board or the Commission.

Response:

The Commission declines to make this change. The intent of the rule language in §809.113 is to list actions that may be taken against a provider or parent for a finding of fraud. The decision on the actions taken is the responsibility of the Board, not the Board contractor. The contractor may present the results of the

fact-finding to the Board and recommend that the Board determine that fraud occurred. The Commission understands that the contractor will ultimately implement the action as determined by the Board regarding a finding of fraud, but the intent of the language is to establish that the Commission or the Board, not the contractor, will take action regarding fraud determinations.

Comment:

One commenter requested clarification on what is considered fraud and provided specific scenarios and inquired if those scenarios would be considered fraud and the funds subject to recovery.

Response:

The Agency will develop guidelines and criteria for fraud determinations. RID will continue to provide training to Boards and Board contractors on fact-finding.

#### §809.115. Corrective Adverse Actions

Section 809.115 is amended to remove §809.115(b)(4) to remove termination of child care services as a possible corrective action for parents' noncompliance with this chapter.

Comment:

One commenter requested that a list of corrective actions for parents be provided as was done for providers in §809.115(b). One commenter asked if giving a CCAA card or PIN to a provider are the only parent actions for which Boards may take corrective actions against parents.

Response:

The actions taken against a parent are included in §809.117(d) and involve recovery of improper payments for instances:

-- involving fraud;

-- in which the parent has received child care services while awaiting an appeal and the determination is affirmed by the hearing officer; and

-- in which the parent fails to pay the parent share of cost and the Board's policy is to pay the provider.

Comment:

One commenter requested clarification on whether or not Boards have local flexibility to impose sanctions on parents for other reasons at the discretion of the Board.

Response:

Boards may only take corrective action as allowed under Subchapter F. Any termination of care within the 12 months must be in compliance with this subchapter.

Comment:

One commenter stated that the corrective actions for the CCAA card seem overly harsh and in most cases not necessary. The CCAA system will primarily be used for tracking absence and non-records of attendance as a tool for the child care services contractor to determine which parents need to be contacted. There are no corrective actions that can be taken against the parent for non-usage if the parent is and remains eligible for services.

Response:

In this subchapter, the definition of "fraud" includes knowingly making a false statement or declaration in order to obtain or in-

crease payments either for the person or another person. Knowingly making false attendance reporting in order to bypass the attendance standards with the goal of continuing care at the next eligibility redetermination could be considered grounds for a finding of fraud.

#### §809.116. Recovery of Improper Payments

Section 809.116 is repealed and combined with §809.117.

#### §809.117. Recovery of Improper Payments to a Provider or Parent

Section 809.117 is amended to clarify the circumstances in which parents are required to repay improper payments. The language clarifies that a parent shall repay improper payments only in the following circumstances:

--Instances involving fraud;

--Instances in which the parent has received child care services awaiting an appeal and the determination is affirmed by the hearing officer; or

--Instances in which the parent fails to pay the parent share of cost and the Board's policy is to pay the provider for the parent's failure to pay the parent share of cost.

Section 809.117 is amended to prohibit a parent subject to the repayment provisions above from future child care eligibility until the repayment amount is recovered, provided that the prohibition does not result in a Choices or SNAP E&T participant becoming ineligible for child care.

A technical amendment to §809.117(e) is made to change the word "prepayment" to "repayment."

Comment:

One commenter asked if upon finding an eligibility error that resulted in the customer receiving services for which they were not eligible, whether contractors will be able to discontinue services or is the customer still entitled to receive a full 12 months of services. Additionally, the commenter asked who would be responsible for paying back the improper payment.

Response:

The actions taken and any possible recoupments will be included in Agency guidelines regarding fraud determinations and recoupments that are currently under development.

Comment:

One commenter stated that to align with the proposed change to not recoup overpayments from parents due to not timely reporting changes, it is recommended that contractors not be assessed disallowed costs from overpayments due to unintended errors.

The commenter stated that this is particularly true during this transition period of enacting major changes, including 12-month certifications, and enhanced quality assurance will need to be developed. To allow time for training and review processes to be fully implemented, it is recommended that contractors be exempt from disallowed cost charges so resources can be devoted to areas that benefit families. These include training staff on new rules that better adhere to the interests of the children and internally monitoring cases to ensure new rules are being administered accurately. Uniform statewide training is also recommended, given the significant changes being proposed to Chapter 809.

Response:

The Agency will provide training on the new requirements and new processes and will provide technical assistance to Boards and contractors on the new requirements. However, the Agency cannot exempt contractors from disallowed costs, even during the implementation period. Any findings of disallowed costs due to contractor error will be handled in accordance with Agency policy.

Comment:

One commenter noted that §809.117(d)(2) states that improper payments should be repaid in "instances in which the parent has received child care services awaiting an appeal and the determination is affirmed by the hearing officer." One commenter asked if this refers to the first step of the appeal process--the local review--or the second step of the appeal process--the Board level hearing--or both.

Are parents required to repay the cost of child care during an appeal if the termination is upheld even with the first level of appeal as they do now?

Response:

The repayment amount will be based on the final appeal determination.

Comment:

Several commenters asked if the Board's current process of using repayment schedules (payments received over a period of time) and allowing parents to remain in care as long as they are paying on their repayment schedules will still be allowed.

The current proposed rule does not allow for parents who are complying with their recoupment payment plan to be eligible to receive services. Under the current proposed rule, if a Choices or SNAP E&T participant receives services and then becomes eligible for At-Risk child care services, the parent would have to be denied under current proposed rule because the recoupment amount has not been paid in full.

One commenter recommended to allow for eligibility for services if a parent is complying with recoupment payments.

One commenter asked for clarification if the language in §809.117(e) means the repayment must be paid in full prior to determination of eligibility.

Response:

Full payment must be made in order for the parent to be eligible for future child care at the eligibility redetermination or at the next time the parent applies for care. This is necessary due to the 12-month eligibility period and the requirement that care cannot be terminated during the eligibility period. There is a possibility that a parent may make one payment at the beginning the repayment plan in order to be determined eligible, then not make a payment for the remainder of the eligibility period.

Comment:

One commenter inquired as to whether Boards have local flexibility on how to handle recoupments owed under current rules. If Boards do not have flexibility, the commenter requested guidance on how to handle current recoupments effective October 1, 2016.

Response:

As stated previously in the discussion in §809.111 regarding general fraud fact-finding procedures, there is no federal requirement for Lead Agencies to recoup CCDF overpayments, except in instances of fraud. However, the Commission is obligated to ensure that child care funds are effectively and efficiently targeted toward eligible low-income families. As noted in the NPRM preamble, when implementing CCDF program, Lead Agencies must balance ensuring compliance with eligibility requirements with other considerations, including administrative feasibility and program integrity. The Commission has long had a strong focus on program integrity and a significant Rapid Process Improvement review is underway to streamline and standardize Boards' fraud fact-finding investigations and adverse action determination procedures. As Agency and Board procedures become more clear and efficient, recoupment efforts will become more focused on fraud detection.

To ensure that recoupment of amounts owed prior to the effective date of these rules are consistent with the revised Agency and Board fraud-related standards moving forward, the Commission proposes to limit consideration during eligibility determination and redetermination of prior recoupments solely to debts from court-ordered restitution. Therefore, amounts owed other than those that are court-ordered restitution cannot be considered during eligibility redetermination.

#### GENERAL COMMENTS

##### Comment:

The Commission received many comments from Boards as well as from the Board Child Care Network in support of the changes to ensure continuity of care. However, the commenters were also concerned that many of the changes resulting from the CCDBG reauthorization will make it even more difficult for Boards to accurately forecast expenditures in the first couple of years, such as reductions in parent share of cost, transfers between workforce areas, and the requirement to fund all former DFPS children with CCDF funds for the remainder of the eligibility period. Since DFPS families do not have a parent share of cost, it will be more expensive to serve these families compared to At-Risk families. Additionally, potential changes in the methodology for calculating income are likely to reduce parent shares of cost resulting in higher Board costs. Over half of the Boards currently do not reimburse providers for non-attendance days and the change to reimbursing providers based on authorized enrollment will further increase the amount of funds needed to provide care for these Boards. These factors, along with higher utilization rates, will present new challenges to Boards in managing funds. These factors may necessitate the need of Boards to terminate services rather than exceed their child care allocations.

One Board recommended that the Agency develop specialized technical assistance in this area and that adequate resources be made available to develop and run specialized or canned reports.

The child care network and several Boards recommended that the ability of Boards to end services in order to stay within budget be added to the Chapter 809 rules.

##### Response:

The Commission appreciates the comments and understands the concerns mentioned. The Agency will closely monitor the impact of the changes to cost and.

The Commission will also provide technical assistance and specialized data analysis as requested to Boards on an individual and group basis in order to develop strategies and identify best practices during the implementation of the rules.

Regarding the recommendation to end services in order to stay within budget, CCDBG Act 658E(c)(2)(N) states that the child will receive assistance for not less than 12 months "before the State or designated local entity redetermines the eligibility of the child under this subchapter." Additionally, the Act further states that there are procedures in place ". . . to ensure that working parents (especially parents in families receiving assistance under [TANF] are not required to unduly disrupt their employment in order to comply with the State's or designated local entity's requirement for redetermination of eligibility for assistance in accordance with this subchapter."

The CCDBG Act promotes continuity of services and does not provide for dropping an otherwise eligible child for continued care at redetermination.

The Agency's child care rules reflect this intent. Section 809.54(b) states that "nothing in this chapter shall be interpreted in a manner as to result in a child being removed from care." Additionally, §809.50 regarding At-Risk child care specifically states that a parent is eligible under this section "at eligibility determination *and* at eligibility redetermination," if the child and the family meet the eligibility requirements.

##### Comment:

One Board commented that it supports the concept of continuity of care; however, as the Agency has acknowledged in the preamble to §809.44 related to calculating family income, these changes, as well as changes to other rules (in particular, those related to assignment of parent share of cost and serving populations not required to pay parent share of cost), may result in increased costs of care and reduce the number of children the Board may be able to serve.

The Board is grateful to see that the Agency plans to perform ongoing analyses of these and other factors that may affect performance and be open to making adjustments accordingly, especially since remedies once available to Boards for managing over expenditures (such as termination policies) are no longer allowable and are, therefore, unavailable as an option for mitigating risk.

##### Response:

The Commission appreciates the comment.

##### Comment:

Commenters expressed concern about the deadline to implement the reauthorization and new state rules on October 1, 2016. The amended rules and the income calculation redesign constitute major operational changes that will require changes to processes, systems, customer and provider communications, and finally training for staff. In the meantime, customers needing to be recertified receive notices 20-45 days in advance, depending on the region. In some cases this is well before final rules are even adopted. In order to ensure clear communication to customers and ensure that the rules are implemented appropriately, we would request that the rules be phased in starting on October 1, 2016, and that time be allowed to implement the changes required.

##### Response:

The Commission understands the concern and is planning to provide training webinars in September in preparation for the October 1, 2016, rule implementation. Training and technical assistance will also be provided throughout the 2017 Board contract year. Additionally, the Agency has issued guidance to Boards that the rules in effect prior to the effective date of these amendments allow Boards to establish their own eligibility periods. Therefore, Boards may extend the eligibility periods of children in care prior to the effective date of these rules in order to ensure minimum disruption to service delivery and to allow time for Board and Board contractors to receive training on the new rules and to modify processes and procedures.

Comment:

One commenter was "overwhelmingly excited" to see the changes coming and cannot wait until October 1, 2016. The commenter has used child care services for several years and thinks it is a great program.

Response:

The Commission appreciates the comment.

Comment:

Several commenters noted that scattered throughout the document are limitations or time frames when parents can report changes, request a transfer after the provider is placed on corrective action by DFPS, etc. However, these date limitations do not appear to be consistent and make the rules more challenging than necessary. Additionally, sometimes the term "calendar days" is used, while other times, the term "business days" is used. Using "calendar days" is our preferred method. Consistency with limitations and time frames among all of the sections of the proposed rules would be appreciated (if allowable).

Response:

The Commission appreciates the comment. Generally, the time frames in the rules are "calendar" days, and the rules will be modified to make this clarification, where applicable. However, to account for the weekend and to allow the greatest amount of time possible, deadlines of five days or fewer will remain "business days."

Comment:

One commenter appreciated the opportunity to provide comment on proposed rule changes. The commenter believes that 30 days is insufficient time to thoroughly review each proposed rule and suggests rules that address the intent and implementation of the Reauthorization Act of 2014. These 30 days have been the first opportunity for the public to provide comments. Given the sweeping changes that the Act allows, the commenter respectfully requests that the Commission and/or Boards host forums to receive input from parents, providers, private and public entities, and early care and education associations. Guidelines may have to be issued in order to comply with an October 1, 2016, implementation date but after that, host public forums--gather the input from the public on how they see the future implementation of the CCDF rules in Texas.

Response:

The Commission appreciates the comment and thanks the commenter for reviewing the proposed rules and providing input. The Commission encourages input from all stakeholders regarding the Child Care Services program.

Comment:

One provider submitted that the provider has always been willing to be paid less for the sake of these families and children and over the years have seen families use the system and then get out of it, making room for others and being successful.

The provider reported seeing much abuse by parents who fail to record attendance, fail to turn in their paperwork and are then removed from the system, but get back on and the cycle continues. The commenter believes there should be some accountability for the parent to do what is required, and the penalty should not be placed on the provider who is already not being compensated at the rate they are charging. If an open child support case is no longer required, allowing parents to neglect the cost and care of their child, then the burden falls on the taxpayer.

The provider is supporting the current workforce by providing care for young children as well as educating the young children in care to become the workforce of tomorrow.

The commenter stated that parents should be required to attend education classes, parenting classes, budgeting classes, and self-improvement classes, if they are allowed to remain in the system. The provider is required to train staff and follow all the rules in order to care for children. Parents should have to do the same.

The commenter also stated that parents complain about having to pay their copay amounts. Many have an entitlement mentality. The commenter stated the understanding that many Child Care Services customers have little education or life skills, but wondered when the cycle will be broken if we continue to enable parents to remain in the cycle their parents were in.

There should be a limit of how long parents are allowed to stay in the system. If parents knew they would never receive funds after a certain amount of time, perhaps they would be more diligent in becoming self-sufficient.

Response:

The Commission appreciates the comments and appreciates the challenges faced by providers. The Commission has implemented several initiatives to assist child care providers with funding and professional development to improve the quality of child care services.

Additionally, the Agency strives to support the fixed costs of providing subsidized child care services by paying providers on enrollment rather than daily attendance.

The Commission appreciates the commenter's support for the current workforce and helping to develop and educate the future workforce. The 12-month eligibility period and the emphasis on continuity of care will assist children in obtaining stable and consistent care and early education opportunities. The consistent and stable care will also assist parents in obtaining and maintaining consistent and stable employment to lead to self-sufficiency.

COMMENTS WERE RECEIVED FROM:

Rachel Garcia, Senior Operations Manager, Lower Rio Grande Valley

Sharon Felderhoff, Workforce Texoma Board of Directors

Julie Craig, Child Care Contracts Manager, Texoma

Marsha Lindsey, Deputy Director/EO Officer, Workforce Solutions Texoma

Dr. Jeremy P. McMillen, President, Grayson College

Angela Magers, Director, Montessori Academy of North Texas  
 Kelly Langley  
 Tammy Flores  
 Debra English  
 Shannon Richter, Contract Manager, Workforce Solutions Rural Capital Area  
 Kelley Fontenot, Child Care Manager, North Central Texas Council of Governments, Workforce Solutions for North Central Texas  
 Shari Anderson, VP Child Care Assistance, ChildCareGroup  
 Shawn Garrison, Child Care Policy Analyst, Workforce Solutions Alamo  
 Rita Morris, Director of Child Care Management Services, Child Care Associates (Tarrant County)  
 Pam McPeak, Owner and Executive Director, Little People's Learning Center  
 Sandy Balk  
 Kerry Echard  
 Workforce Solutions Concho Valley  
 Workforce Solutions of West Central Texas  
 City of San Antonio, Workforce Solutions Alamo's child care contractor  
 Kathy Talbert, Owner/Director, Little Cougar, Inc.  
 September Jones, Government Relations Manager, KinderCare Education, LLC  
 Sharron Benson Powell, Houston-Galveston Area Council, Workforce Solutions Gulf Coast  
 Janet Bono, Workforce Services Program Administrator, Workforce Solutions Borderplex  
 YWCA El Paso  
 Workforce Solutions Northeast Texas  
 Rosa Hernandez, Workforce Solutions South Plains  
 Elaine Clark, Child Care Programs Manager, Workforce Solutions Capital Area  
 Julie Talbert, Manager of Child Care & Public Transportation, Workforce Solutions for the Heart of Texas  
 Marvin Albright, Nomah Albright, Alison Albright, Imelda Davila-Leon, Marissa Hudler, and Todd Hudler  
 Neil Hanson, Senior Director of Public Sector Solutions, Neighborhood Centers Inc.

## SUBCHAPTER A. GENERAL PROVISIONS

### 40 TAC §809.2

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rule affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

#### §809.2. Definitions.

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

(1) Attending a job training or educational program--An individual is attending a job training or educational program if the individual:

- (A) is considered by the program to be officially enrolled;
- (B) meets all attendance requirements established by the program; and
- (C) is making progress toward successful completion of the program as determined by the Board upon eligibility redetermination as described in §809.42(b).

(2) Child--An individual who meets the general eligibility requirements contained in this chapter for receiving child care services.

(3) Child care contractor--The entity or entities under contract with the Board to manage child care services. This includes contractors involved in determining eligibility for child care services, contractors involved in the billing and reimbursement process related to child care subsidies, as well as contractors involved in the funding of quality improvement activities as described in §809.16.

(4) Child care services--Child care subsidies and quality improvement activities funded by the Commission.

(5) Child care subsidies--Commission-funded child care reimbursements to an eligible child care provider for the direct care of an eligible child.

(6) Child experiencing homelessness--A child who is homeless as defined in the McKinney-Vento Act (42 U.S.C. 11434(a)), Subtitle VII-B, §725.

(7) Child with disabilities--A child who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Major life activities include, but are not limited to, caring for oneself; performing manual tasks; walking; hearing; seeing, speaking, or breathing; learning; and working.

(8) Educational program--A program that leads to:

- (A) a high school diploma;
- (B) a General Educational Development (GED) credential; or
- (C) a postsecondary degree from an institution of higher education.

(9) Family--Two or more individuals related by blood, marriage, or decree of court, who are living in a single residence and are included in one or more of the following categories:

- (A) Two individuals, married--including by common-law, and household dependents; or
- (B) A parent and household dependents.

(10) Household dependent--An individual living in the household who is one of the following:

- (A) An adult considered as a dependent of the parent for income tax purposes;

(B) A child of a teen parent; or

(C) A child or other minor living in the household who is the responsibility of the parent.

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

- (A) to an ineligible recipient;
- (B) for an ineligible service;
- (C) for any duplicate payment; and
- (D) for services not received.

(12) Job training program--A program that provides training or instruction leading to:

- (A) basic literacy;
- (B) English proficiency;
- (C) an occupational or professional certification or license; or
- (D) the acquisition of technical skills, knowledge, and abilities specific to an occupation.

(13) Listed family home--A family home, other than the eligible child's own residence, that is listed, but not licensed or registered with, the Texas Department of Family and Protective Services (DFPS) pursuant to Texas Human Resources Code §42.052(c).

(14) Military deployment--The temporary duty assignment away from the permanent military installation or place of residence for reserve components of the single military parent or the dual military parents. This includes deployed parents in the regular military, military reserves, or National Guard.

(15) Parent--An individual who is responsible for the care and supervision of a child and is identified as the child's natural parent, adoptive parent, stepparent, legal guardian, or person standing in loco parentis (as determined in accordance with Commission policies and procedures). Unless otherwise indicated, the term applies to a single parent or both parents.

(16) Protective services--Services provided when:

- (A) a child is at risk of abuse or neglect in the immediate or short-term future and the child's family cannot or will not protect the child without DFPS Child Protective Services (CPS) intervention;
- (B) a child is in the managing conservatorship of DFPS and residing with a relative or a foster parent; or
- (C) a child has been provided with protective services by DFPS within the prior six months and requires services to ensure the stability of the family.

(17) Provider--A provider is defined as:

- (A) a regulated child care provider as defined in §809.2(18);
- (B) a relative child care provider as defined in §809.2(19); or
- (C) a listed family home as defined in §809.2(13), subject to the requirements in §809.91(b).

(18) Regulated child care provider--A provider caring for an eligible child in a location other than the eligible child's own residence that is:

- (A) licensed by DFPS;
- (B) registered with DFPS; or
- (C) operated and monitored by the United States military services.

(19) Relative child care provider--An individual who is at least 18 years of age, and is, by marriage, blood relationship, or court decree, one of the following:

- (A) The child's grandparent;
- (B) The child's great-grandparent;
- (C) The child's aunt;
- (D) The child's uncle; or
- (E) The child's sibling (if the sibling does not reside in the same household as the eligible child).

(20) Residing with--Unless otherwise stipulated in this chapter, a child is considered to be residing with the parent when the child is living with and physically present with the parent during the time period for which child care services are being requested or received.

(21) Teen parent--A teen parent (teen) is an individual 18 years of age or younger, or 19 years of age and attending high school or the equivalent, who has a child.

(22) Texas Rising Star program--A voluntary, quality-based rating system of child care providers participating in Commission-subsidized child care.

(23) Texas Rising Star Provider--A provider certified as meeting the TRS program standards. TRS providers are certified as one of the following:

- (A) 2-Star Program Provider;
- (B) 3-Star Program Provider; or
- (C) 4-Star Program Provider.

(24) Working--Working is defined as:

- (A) activities for which one receives monetary compensation such as a salary, wages, tips, and commissions; or
- (B) participation in Choices or Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T) activities.

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

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## SUBCHAPTER B. GENERAL MANAGEMENT

### 40 TAC §§809.13, 809.15 - 809.17, 809.19, 809.20

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

#### §809.19. *Assessing the Parent Share of Cost.*

(a) For child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, General Administration, Subchapter B, Allocation and Funding, and specifically, §800.58, Child Care), including local public transferred funds and local private donated funds, as provided in §809.17, the following shall apply.

(1) A Board shall set a parent share of cost policy that assesses the parent share of cost in a manner that results in the parent share of cost:

(A) being assessed to all parents, except in instances when an exemption under paragraph (2) of this subsection applies;

(B) being an amount determined by a sliding fee scale based on the family's size and gross monthly income, and also may consider the number of children in care.

(C) being assessed only at the following times:

(i) initial eligibility determination;

(ii) 12-month eligibility redetermination;

(iii) upon the addition of a child in care;

(iv) upon a parent's report of a change in income, family size, or number of children in care that would result in a reduced parent share of cost assessment; and

(v) upon resumption of work, job training, or education activities following temporary changes described in §809.51(a)(2) and upon resumption of work, job training, or education activities during the three-month continuation of care period described in §809.51(c); and

(D) not increasing above the amount assessed at initial eligibility determination or at the 12-month eligibility redetermination based on the factor in subparagraph (B) of this paragraph, except upon the addition of a child in care as described in subsection (a)(1)(C)(iii) of this section.

(2) Parents who are one or more of the following are exempt from paying the parent share of cost:

(A) Parents who are participating in Choices or who are in Choices child care described in §809.45;

(B) Parents who are participating in SNAP E&T services or who are in SNAP E&T child care described in §809.47;

(C) Parents of a child receiving Child Care for Children Experiencing Homelessness as described in §809.52; or

(D) Parents who have children who are receiving protective services child care pursuant to §809.49 and §809.54(c), unless DFPS assesses the parent share of cost.

(3) Teen parents who are not covered under exemptions listed in paragraph (2) of this subsection shall be assessed a parent share of cost. The teen parent's share of cost is based solely on the teen parent's income and size of the teen's family as defined in §809.2.

(b) For child care services funded from sources other than those specified in subsection (a) of this section, a Board shall set a parent share of cost policy based on a sliding fee scale. The sliding fee scale may be the same as or different from the provisions contained in subsection (a) of this section.

(c) A Board shall establish a policy regarding reimbursement of providers when parents fail to pay the parent share of cost.

(d) The Board or its child care contractor may review the assessed parent share of cost for a possible temporary reduction if there are extenuating circumstances that jeopardize a family's self-sufficiency. The Board or its child care contractor may temporarily reduce the assessed parent share of cost if warranted by these circumstances. Following the temporary reduction, the parent share of cost amount immediately prior to the reduction shall be reinstated.

(e) If the parent is not covered by an exemption as specified in subsection (a)(2) of this section, then the Board or its child care contractor shall not waive the assessed parent share of cost under any circumstances.

(f) If the parent share of cost, based on family income and family size, is calculated to be zero, then the Board or its child care contractor shall not charge the parent a minimum share of cost amount.

(g) A Board may establish a policy to reduce the parent share of cost amount assessed pursuant to subsection (a)(1)(B) of this section upon the parent's selection of a TRS-certified provider. Such Board policy shall ensure:

(1) that the parent continue to receive the reduction if:

(A) the TRS provider loses TRS certification; or

(B) the parent moves or changes employment within the workforce area and no TRS-certified providers are available to meet the needs of the parent's changed circumstances; and

(2) that the parent no longer receives the reduction if the parent voluntarily transfers the child from a TRS-certified provider to a non-TRS-certified provider.

#### §809.20. *Maximum Provider Reimbursement Rates.*

(a) Based on local factors, including a market rate survey provided by the Commission, a Board shall establish maximum reimbursement rates for child care subsidies to ensure that the rates provide equal access to child care in the local market and in a manner consistent with state and federal statutes and regulations governing child care. At a minimum, Boards shall establish reimbursement rates for full-day and part-day units of service, as described in §809.93(f), for the following:

(1) Provider types:

(A) Licensed child care centers, including before- or after-school programs and school-age programs, as defined by DFPS;

(B) Licensed child care homes as defined by DFPS;

(C) Registered child care homes as defined by DFPS;

and

(D) Relative child care providers as defined in §809.2.

(2) Age groups in each provider type:

(A) Infants age 0 to 17 months;

(B) Toddlers age 18 to 35 months;

(C) Preschool age children from 36 to 71 months; and

(D) School age children 72 months and over.

(b) A Board shall establish enhanced reimbursement rates:

(1) for all age groups at TRS provider facilities;

and

(2) only for preschool-age children at child care providers that participate in integrated school readiness models pursuant to Texas Education Code §29.160.

(c) The minimum enhanced reimbursement rates established under subsection (b) of this section shall be greater than the maximum rate established for providers not meeting the requirements of subsection (b) of this section for the same category of care up to, but not to exceed, the provider's published rate. The maximum rate must be at least:

(1) 5 percent greater for a:

(A) 2-Star Program Provider; or

(B) child care provider meeting the requirements of subsection (b)(2) of this section;

(2) 7 percent greater for a 3-Star Program Provider; and

(3) 9 percent greater for a 4-Star Program Provider.

(d) Boards may establish a higher enhanced reimbursement rate than those specified in subsection (c) of this section for TRS providers, as long as there is a minimum 2 percentage point difference between each star level.

(e) A Board or its child care contractor shall ensure that providers that are reimbursed for additional staff or equipment needed to assist in the care of a child with disabilities are paid a rate up to 190 percent of the provider's reimbursement rate for a child of that same age. The higher rate shall take into consideration the estimated cost of the additional staff or equipment needed by a child with disabilities. The Board shall ensure that a professional, who is familiar with assessing the needs of children with disabilities, certifies the need for the higher reimbursement rate described in this subsection.

(f) The Board shall determine whether to reimburse providers that offer transportation as long as the combined total of the provider's published rate, plus the transportation rate, is subject to the maximum reimbursement rate established in subsection (a) of this section.

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## SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES

### 40 TAC §§809.41 - 809.54

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.41. *A Child's General Eligibility for Child Care Services.*

(a) Except for a child receiving or needing protective services as described in §809.49, for a child to be eligible to receive child care services, at the time of eligibility determination or redetermination, a Board shall ensure that the child:

(1) meets one of the following age requirements:

(A) be under 13 years of age; or

(B) at the option of the Board, be a child with disabilities under 19 years of age;

(2) is a U.S. citizen or legal immigrant as determined under applicable federal laws, regulations, and guidelines; and

(3) resides with:

(A) a family within the Board's workforce area:

(i) whose income does not exceed the income limit established by the Board, which income limit must not exceed 85 percent of the state median income (SMI) for a family of the same size; and

(ii) whose assets do not exceed \$1,000,000 as certified by a family member; or

(iii) that meets the definition of experiencing homelessness as defined in §809.2.

(B) parents who require child care in order to work or attend a job training or educational program; or

(C) a person standing in loco parentis for the child while the child's parent is on military deployment and the deployed military parent's income does not exceed the limits set forth in subparagraph (A) of this paragraph.

(b) Notwithstanding the requirements set forth in subsection (c) of this section, a Board shall establish policies, including time limits, for the provision of child care services while the parent is attending an educational program.

(c) Time limits pursuant to subsection (b) of this section shall ensure the provision of child care services for four years, if the eligible child's parent is enrolled in an associate's degree program that will prepare the parent for a job in a high-growth, high-demand occupation as determined by the Board.

(d) A Board may establish a policy to allow parents attending a program that leads to a postsecondary degree from an institution of higher education to be exempt from residing with the child as defined in §809.2.

(e) Boards that establish initial family income eligibility at a level less than 85 percent of SMI must ensure that the family remains income-eligible for care after passing the Board's initial income eligibility limit.

(f) Unless otherwise specified, this subchapter applies only to child care services using funds allocated pursuant to §800.58 of this title, including local public transferred funds and local private donated funds described in §809.17.

§809.45. *Choices Child Care.*

(a) A parent is eligible for Choices child care if the parent is participating in the Choices program as stipulated in Chapter 811 of this title.

(b) For a parent receiving Choices child care who ceases participation in the Choices program during the 12-month eligibility period, Boards must ensure that Choices child care continues:

(1) for the three-month period pursuant to §809.51(b); and

(2) for the remainder of the eligibility period, if the parent resumes participation in Choices or begins participation in work or attendance in a job training or education program during the three-month period described in §809.51(c).

§809.47. *Supplemental Nutrition Assistance Program Employment and Training Child Care.*

(a) A parent is eligible to receive SNAP E&T child care services if the parent is participating in SNAP E&T services, in accordance with the provisions of 7 CFR Part 273.

(b) For a parent receiving SNAP E&T child care services who ceases participation in the E&T program during the 12-month eligibility period, Boards must ensure that SNAP E&T child care continues:

(1) for the three-month period pursuant to §809.51(b); and

(2) for the remainder of the eligibility period, if the parent resumes participation in the SNAP E&T program or begins participation in work or attendance in a job training or education program during the three-month period described in §809.51(c).

§809.50. *At-Risk Child Care.*

(a) A parent is eligible for child care services under this section if at initial eligibility determination and at eligibility redetermination as described in §809.42:

(1) the family income does not exceed the income limit established by the Board pursuant to §809.41(a)(3)(A); and

(2) child care is required for the parent to work or attend a job training or educational program for a combination of at least an average of 25 hours per week for a single-parent family or 50 hours per week for a two-parent family, or a higher number of hours per week as established by the Board.

(b) A Board may allow a reduction to the work, education, or job training activity requirements in subsection (a)(2) of this section if a parent's documented medical disability or need to care for a physically or mentally disabled family member prevents the parent from participating in these activities for the required hours per week.

(c) For purposes of meeting the education requirements stipulated in subsection (a)(2) of this section, the following shall apply:

(1) each credit hour of postsecondary education counts as three hours of education activity per week;

(2) each credit hour of a condensed postsecondary education course counts as six education activity hours per week; and

(3) teen parents attending high school or the equivalent shall be considered as meeting the education requirements in subsection (a)(2) of this section.

(d) When calculating income eligibility for a child with disabilities, a Board shall deduct the cost of the child's ongoing medical expenses from the family income.

(e) Boards may establish a higher income eligibility limit for teen parents than the eligibility limit established pursuant to §809.41(a)(3)(A) provided that the higher income limit does not exceed 85 percent of the state median income for a family of the same size.

(f) A teen parent's family income is based solely on the teen parent's income and size of the teen's family as defined in §809.2(9).

(g) Boards may establish a higher income eligibility limit for families with a child who is enrolled in Head Start, Early Head Start, or public pre-K provided that the higher income limit does not exceed 85 percent of the state median income for a family of the same size.

§809.51. *Child Care during Interruptions in Work, Education, or Job Training.*

(a) Except for a child experiencing homelessness, as described in §809.52, if the child met all of the applicable eligibility requirements for child care services in this subchapter on the date of the most recent eligibility determination or redetermination, the child shall be considered to be eligible and will receive services during the 12-month eligibility period described in §809.42, regardless of any:

(1) change in family income, if that family income does not exceed 85 percent of SMI for a family of the same size; or

(2) temporary change in the ongoing status of the child's parent as working or attending a job training or education program. A temporary change shall include, at a minimum, any:

(A) time-limited absence from work for an employed parent for periods of family leave (including parental leave) or sick leave;

(B) interruption in work for a seasonal worker who is not working between regular industry work seasons;

(C) student holiday or breaks within a semester, between the fall and spring semesters, or between the spring and fall semesters, for a parent participating in training or education;

(D) reduction in work, training, or education hours, as long as the parent is still working or attending a training or education program;

(E) other cessation of work or attendance in a training or education program that does not exceed three months;

(F) change in age, including turning 13 years old or a child with disabilities turning 19 years old during the eligibility period; and

(G) change in residency within the state.

(b) During the period of time between eligibility redeterminations, a Board shall discontinue child care services due to a parent's loss of work or cessation of attendance at a job training or educational program that does not constitute a temporary change in accordance with subsection (a)(2) of this section. However, Boards must ensure that care continues at the same level for a period of not less than three months after such loss of work or cessation of attendance at a job training or educational program.

(c) If a parent resumes work or attendance at a job training or education program at any level and at any time during the period described in subsection (b) of this section, then the Board shall ensure that:

(1) care will continue to the end of the 12-month eligibility period at the same or greater level, depending upon any increase in the activity hours of the parent;

(2) the parent share of cost will not be increased during the remainder of the 12-month eligibility period, including for parents who are exempt from the parent share of cost pursuant to §809.19; and

(3) the Board's child care contractor verifies only:

(A) that the family income does not exceed 85 percent of SMI; and

(B) the resumption of work or attendance at a job training or education program.

(d) The Board may suspend child care services during interruptions in the parent's work, job training, or education status only at the concurrence of the parent.

*§809.54. Continuity of Care.*

(a) Enrolled children, including children whose eligibility for Transitional child care has expired, shall receive child care through the end of the applicable eligibility periods described in §809.42.

(b) Except as provided by §809.75 relating to child care during appeal, nothing in this chapter shall be interpreted in a manner as to result in a child being removed from care.

(c) In closed DFPS CPS cases (DFPS cases) where child care is no longer funded by DFPS, child care shall continue through the end of the applicable eligibility periods described in §809.42 using funds allocated to the Board by the Commission.

(d) A Board shall ensure that no enrolled children of military parents in military deployment have a disruption of child care services or eligibility during military deployment, including parents in military deployment at the end of the 12-month eligibility redetermination period.

(e) A Board shall ensure that a child who is required by a court-ordered custody or visitation arrangement to leave a provider's care is permitted to continue receiving child care by the same provider, or another provider if agreed to by the parent in advance of the leave, upon return from the court-ordered custody or visitation arrangement.

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**40 TAC §809.55**

The repeal is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities,

and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted repeal affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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**SUBCHAPTER D. PARENT RIGHTS AND RESPONSIBILITIES**

**40 TAC §§809.71 - 809.75**

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

*§809.71. Parent Rights.*

A Board shall ensure that the Board's child care contractor informs the parent in writing that the parent has the right to:

(1) choose the type of child care provider that best suits their needs and to be informed of all child care options available to them as included in the consumer education information described in §809.15;

(2) visit available child care providers before making their choice of a child care option;

(3) receive assistance in choosing initial or additional child care referrals including information about the Board's policies regarding transferring children from one provider to another;

(4) be informed of the Commission rules and Board policies related to providers charging parents the difference between the Board's reimbursement and the provider's published rate as described in §809.92(c) - (d);

(5) be represented when applying for child care services;

(6) be notified of their eligibility to receive child care services within 20 calendar days from the day the Board's child care contractor receives all necessary documentation required to initially determine eligibility for child care;

(7) receive child care services regardless of race, color, national origin, age, sex, disability, political beliefs, or religion;

(8) have the Board and the Board's child care contractor treat information used to determine eligibility for child care services as confidential;

(9) receive written notification at least 15 calendar days before termination of child care services;

(10) reject an offer of child care services or voluntarily withdraw their child from child care, unless the child is in protective services;

(11) be informed of the possible consequences of rejecting or ending the child care that is offered;

(12) be informed of the eligibility documentation and reporting requirements described in §809.72 and §809.73;

(13) be informed of the parent appeal rights described in §809.74; and

(14) be informed of required background and criminal history checks for relative child care providers through the listing process with DFPS, as described in §809.91(e), before the parent or guardian selects the relative child care provider.

*§809.73. Parent Reporting Requirements.*

(a) Boards shall ensure that during the 12-month eligibility period, parents are only required to report items that impact a family's eligibility or that enable the Board or Board contractor to contact the family or pay the provider.

(b) Pursuant to subsection (a) of this section, parents shall report to the child care contractor, within 14 calendar days of the occurrence, the following:

(1) Changes in family income or family size that would cause the family to exceed 85 percent of SMI for a family of the same size;

(2) Changes in work or attendance at a job training or educational program not considered to be temporary changes, as described in §809.51; and

(3) Any change in family residence, primary phone number, or e-mail (if available).

(c) Failure to report changes described in subsection (a) of this section may result in fact-finding for suspected fraud as described in Subchapter F of this chapter.

(d) A Board shall allow parents to report and the child care contractor shall take appropriate action regarding changes in:

(1) income and family size, which may result in a reduction in the parent share of cost pursuant to §809.19; and

(2) work, job training, or education program participation that may result in an increase in the level of child care services.

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**40 TAC §809.76, §809.77**

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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**40 TAC §809.78**

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

*§809.78. Attendance Standards and Reporting Requirements.*

(a) A Board shall ensure that parents are notified of the following:

(1) Parents shall ensure that the eligible child attends on a regular basis consistent with the child's authorization for enrollment. Failure to meet monthly attendance standards described in paragraph (2) of this subsection may:

(A) result in suspension of care, at the concurrence of the parent; or

(B) be grounds for determining that a change in the parent's participation in work, job training, or an education program has occurred and care may be terminated pursuant to the requirements in §809.51(b).

(2) Meeting attendance standards for child care services consists of fewer than:

- (A) five consecutive absences during the month;
- (B) ten total absences during the month.

(3) If a child exceeds 65 total absences during the most recent eligibility period, then the child is not eligible for care at the next eligibility determination and shall not be eligible for care for 12 months from the end of the most recent eligibility period.

(4) Notwithstanding paragraph (3) of this subsection, child care providers may end a child's enrollment with the provider if the child does not meet the provider's established policy regarding attendance.

(5) Parents shall use the attendance card to report daily attendance and absences.

(6) Parents shall not designate anyone under age 16 as a secondary cardholder, unless the individual is a child's parent.

(7) Parents shall not designate the owner, assistant director, or director of the child care facility as a secondary cardholder.

(8) Parents shall:

(A) ensure the attendance card is not misused by secondary cardholders;

(B) inform secondary cardholders of the responsibilities for using the attendance card;

(C) ensure that secondary cardholders comply with these responsibilities; and

(D) ensure the protection of attendance cards issued to them or secondary cardholders.

(9) The parent or secondary cardholders giving the attendance card or the personal identification number (PIN) to another person, including the child care provider, is grounds for a potential fraud determination pursuant to Subchapter F of this chapter.

(10) Parents shall report to the child care contractor instances in which a parent's attempt to record attendance in the child care automated attendance system is denied or rejected and cannot be corrected at the provider site. Failure to report such instances may result in an absence counted toward the attendance standards described in paragraphs (2) and (3) of this subsection.

(b) Boards shall ensure that parents sign a written acknowledgment indicating their understanding of the attendance standards and reporting requirements at each of the following stages:

(1) initial eligibility determination; and

(2) each eligibility redetermination, as required in §809.42(b).

(c) Boards shall ensure that absences due to a child's documented chronic illness or disability or court-ordered visitation are not counted in the number of absences in subsection (a)(2) and (3) of this section.

(d) Where a child's enrollment has been ended by a provider in subsection (a)(4) of this section, Boards shall work with the parent to place the otherwise eligible child with another eligible provider.

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## SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

### 40 TAC §§809.91 - 809.95

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

#### *§809.91. Minimum Requirements for Providers.*

(a) A Board shall ensure that child care subsidies are paid only to:

(1) regulated child care providers as described in §809.2;

(2) relative child care providers as described in §809.2, subject to the requirements in subsection (e) of this section; or

(3) at the Board's option, child care providers licensed in a neighboring state, subject to the following requirements:

(A) Boards shall ensure that the Board's child care contractor reviews the licensing status of the out-of-state provider every month, at a minimum, to confirm the provider is meeting the minimum licensing standards of the state;

(B) Boards shall ensure that the out-of-state provider meets the requirements of the neighboring state to serve CCDF-subsidized children; and

(C) The provider shall agree to comply with the requirements of this chapter and all Board policies and Board child care contractor procedures.

(b) A Board shall not prohibit a relative child care provider who is listed with DFPS and who meets the minimum requirements of this section from being an eligible relative child care provider.

(c) Except as provided by the criteria for TRS Provider certification, a Board or the Board's child care contractor shall not place requirements on regulated providers that:

(1) exceed the state licensing requirements stipulated in Texas Human Resources Code, Chapter 42; or

(2) have the effect of monitoring the provider for compliance with state licensing requirements stipulated in Texas Human Resources Code, Chapter 42.

(d) When a Board or the Board's child care contractor, in the course of fulfilling its responsibilities, gains knowledge of any pos-

sible violation regarding regulatory standards, the Board or its child care contractor shall report the information to the appropriate regulatory agency.

(e) For relative child care providers to be eligible for reimbursement for Commission-funded child care services, the following applies:

(1) Relative child care providers shall list with DFPS; however, pursuant to 45 CFR §98.41(e), relative child care providers listed with DFPS shall be exempt from the health and safety requirements of 45 CFR §98.41(a).

(2) A Board shall allow relative child care providers to care for a child in the child's home (in-home child care) only for the following:

(A) A child with disabilities as defined in §809.2, and his or her siblings;

(B) A child under 18 months of age, and his or her siblings;

(C) A child of a teen parent; and

(D) When the parent's work schedule requires evening, overnight, or weekend child care in which taking the child outside of the child's home would be disruptive to the child.

(3) A Board may allow relative in-home child care for circumstances in which the Board's child care contractor determines and documents that other child care provider arrangements are not available in the community.

(f) Boards shall ensure that subsidies are not paid for a child at the following child care providers:

(1) Except for foster parents authorized by DFPS pursuant to §809.49, licensed child care centers, including before- or after-school programs and school-age programs, in which the parent or his or her spouse, including the child's parent or stepparent, is the director or assistant director, or has an ownership interest; or

(2) Licensed, registered, or listed child care homes where the parent also works during the hours his or her child is in care.

#### §809.92. *Provider Responsibilities and Reporting Requirements.*

(a) A Board shall ensure that providers are given written notice of and agree to their responsibilities, reporting requirements, and requirements for reimbursement under this subchapter prior to enrolling a child.

(b) Providers shall:

(1) be responsible for collecting the parent share of cost as assessed under §809.19 before child care services are delivered;

(2) be responsible for collecting other child care funds received by the parent as described in §809.21(a)(2);

(3) report to the Board or the Board's child care contractor instances in which the parent fails to pay the parent share of cost; and

(4) follow attendance reporting and tracking procedures required by the Commission under §809.95, the Board, or, if applicable, the Board's child care contractor.

(c) Providers shall not charge the difference between the provider's published rate and the amount of the Board's reimbursement rate as determined under §809.21 to parents:

(1) who are exempt from the parent share of cost assessment under §809.19(a)(2); or

(2) whose parent share of cost is calculated to be zero pursuant to §809.19(f).

(d) A Board may develop a policy that prohibits providers from charging the difference between the provider's published rate and the amount of the Board's reimbursement rate (including the assessed parent share of cost) to all parents eligible for child care services.

(e) Providers shall not deny a child care referral based on the parent's income status, receipt of public assistance, or the child's protective service status.

(f) Providers shall not charge fees to a parent receiving child care subsidies that are not charged to a parent who is not receiving subsidies.

#### §809.93. *Provider Reimbursement.*

(a) A Board shall ensure that reimbursement for child care is paid only to the provider.

(b) A Board or its child care contractor shall reimburse a regulated provider based on a child's monthly enrollment authorization, excluding periods of suspension at the concurrence of the parent as described in §809.51(d) and §809.78(a).

(c) A Board shall ensure that a relative child care provider is not reimbursed for days on which the child is absent.

(d) A relative child care provider shall not be reimbursed for more children than permitted by the DFPS minimum regulatory standards for Registered Child Care Homes. A Board may permit more children to be cared for by a relative child care provider on a case-by-case basis as determined by the Board.

(e) A Board shall not reimburse providers that are debarred from other state or federal programs unless and until the debarment is removed.

(f) Unless otherwise determined by the Board and approved by the Commission for automated reporting purposes, the monthly enrollment authorization described in subsection (b) of this section is based on the unit of service authorized, as follows:

(1) A full-day unit of service is 6 to 12 hours of care provided within a 24-hour period; and

(2) A part-day unit of service is fewer than 6 hours of care provided within a 24-hour period.

(g) A Board or its child care contractor shall ensure that providers are not paid for holding spaces open.

(h) A Board or the Board's child care contractor shall not pay providers:

(1) less, when a child enrolled full time occasionally attends for a part day; or

(2) more, when a child enrolled part time occasionally attends for a full day.

(i) The Board or its child care contractor shall not reimburse a provider retroactively for new Board maximum reimbursement rates or new provider published rates.

(j) A Board or its child care contractor shall ensure that the parent's travel time to and from the child care facility and the parent's work, school, or job training site is included in determining whether to authorize reimbursement for full-day or part-day care under subsection (f) of this section.

#### §809.94. *Providers Placed on Corrective or Adverse Action by the Texas Department of Family and Protective Services.*

(a) For a provider placed on evaluation corrective action (evaluation status) by DFPS, Boards shall ensure that:

(1) parents with children enrolled in Commission-funded child care are notified in writing of the provider's evaluation status no later than five business days after receiving notification from the Agency of DFPS' decision to place the provider on evaluation status; and

(2) parents choosing to enroll children in Commission-funded child care with the provider are notified in writing of the provider's evaluation status prior to enrolling the children with the provider.

(b) For a provider placed on probation corrective action (probationary status) by DFPS, Boards shall ensure that:

(1) parents with children in Commission-funded child care are notified in writing of the provider's probationary status no later than five business days after receiving notification from the Agency of DFPS' decision to place the provider on probationary status; and

(2) no new referrals are made to the provider while on probationary status.

(c) A parent receiving notification of a provider's evaluation or probationary status with DFPS pursuant to subsections (a) and (b) of this section may transfer the child to another eligible provider without being subject to the Board transfer policies described in §809.71(3) if the parent requests the transfer within 14 calendar days of receiving such notification.

(d) For a provider placed on evaluation or probationary status by DFPS, Boards shall ensure that the provider is not reimbursed at the Boards' enhanced reimbursement rates described in §809.20 while on evaluation or probationary status.

(e) For a provider against whom DFPS is taking adverse action, Boards shall ensure that:

(1) parents with children enrolled in Commission-funded child care are notified no later than two business days after receiving notification from the Agency that DFPS intends to take adverse action against the provider;

(2) children enrolled in Commission-funded child care with the provider are transferred to another eligible provider no later than five business days after receiving notification from the Agency that DFPS intends to take adverse action against the provider; and

(3) no new referrals for Commission-funded child care are made to the provider while DFPS is taking adverse action.

(f) For adverse actions in which DFPS has determined that the provider poses an immediate risk to the health or safety of children and cannot operate pending appeal of the adverse action, but for which there is a valid court order that overturns DFPS' determination and allows the provider to operate pending administrative review or appeal, Boards shall take action consistent with subsection (e) of this section.

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

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SUBCHAPTER F. FRAUD FACT-FINDING  
AND IMPROPER PAYMENTS

**40 TAC §§809.111 - 809.113, 809.115**

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

*§809.111. General Fraud Fact-Finding Procedures.*

(a) This subchapter establishes authority for a Board to develop procedures for the prevention of fraud by a parent, provider, or any other person in a position to commit fraud consistent with fraud prevention provisions in the Agency-Board Agreement.

(b) In this subchapter, a person commits fraud if, to obtain or increase a benefit or other payment, either for the person or another person, the person:

(1) makes a false statement or representation, knowing it to be false; or

(2) knowingly fails to disclose a material fact.

(c) A Board shall ensure that procedures for researching and fact-finding for possible fraud are developed and implemented to deter and detect suspected fraud for child care services in the workforce area.

(d) These procedures shall include provisions that suspected fraud is reported to the Commission in accordance with Commission policies and procedures.

(e) Upon review of suspected fraud reports, the Commission may either accept the case for investigation and action at the state level, or return the case to the Board or its child care contractor for action including, but not limited to, the following:

(1) further fact-finding; or

(2) other corrective action as provided in this chapter or as may be appropriate.

(f) The Board shall ensure that a final fact-finding report is submitted to the Commission after a case is returned to the Board or its child care contractor and all feasible avenues of fact-finding and corrective actions have been exhausted.

*§809.112. Suspected Fraud.*

(a) A parent, provider, or any other person in a position to commit fraud may be suspected of fraud if the person presents or causes to be presented to the Board or its child care contractor one or more of the following items:

(1) A request for reimbursement in excess of the amount charged by the provider for the child care; or

(2) A claim for child care services if evidence indicates that the person may have:

(A) known, or should have known, that child care services were not provided as claimed;

(B) known, or should have known, that information provided is false or fraudulent;

(C) received child care services during a period in which the parent or child was not eligible for services;

(D) known, or should have known, that child care subsidies were provided to a person not eligible to be a provider; or

(E) otherwise indicated that the person knew or should have known that the actions were in violation of this chapter or state or federal statute or regulations relating to child care services.

(b) The following parental actions may be grounds for suspected fraud and cause for Boards to conduct fraud fact-finding or the Commission to initiate a fraud investigation:

(1) Not reporting or falsely reporting at initial eligibility or at eligibility redetermination:

(A) household composition, or income sources or amounts that would have resulted in ineligibility or a higher parent share of cost; or

(B) work, training, or education hours that would have resulted in ineligibility; or

(2) Not reporting during the 12-month eligibility period:

(A) changes in income or household composition that would cause the family income to exceed 85 percent of SMI (taking into consideration fluctuations of income); or

(B) a permanent loss of job or cessation of training or education that exceeds three months; or

(C) improper or inaccurate reporting of attendance.

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

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#### 40 TAC §809.116

The repeal is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted repeal affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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#### 40 TAC §809.117

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rule affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

*§809.117. Recovery of Improper Payments to a Provider or Parent.*

(a) A Board shall attempt recovery of all improper payments as defined in §809.2.

(b) Recovery of improper payments shall be managed in accordance with Commission policies and procedures.

(c) The provider shall repay improper payments for child care services received in the following circumstances:

(1) Instances involving fraud;

(2) Instances in which the provider did not meet the provider eligibility requirements in this chapter;

(3) Instances in which the provider was paid for the child care services from another source;

(4) Instances in which the provider did not deliver the child care services;

(5) Instances in which referred children have been moved from one facility to another without authorization from the child care contractor; and

(6) Other instances when repayment is deemed an appropriate action.

(d) A parent shall repay improper payments for child care only in the following circumstances:

(1) Instances involving fraud as defined in this subchapter;

(2) Instances in which the parent has received child care services while awaiting an appeal and the determination is affirmed by the hearing officer; or

(3) Instances in which the parent fails to pay the parent share of cost and the Board's policy is to pay the provider for the parent's failure to pay the parent share of cost.

(e) A Board shall ensure that a parent subject to the repayment provisions in subsection (d) of this section shall prohibit future child care eligibility until the repayment amount is recovered, provided that the prohibition does not result in a Choices or SNAP E&T participant becoming ineligible for child care.

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