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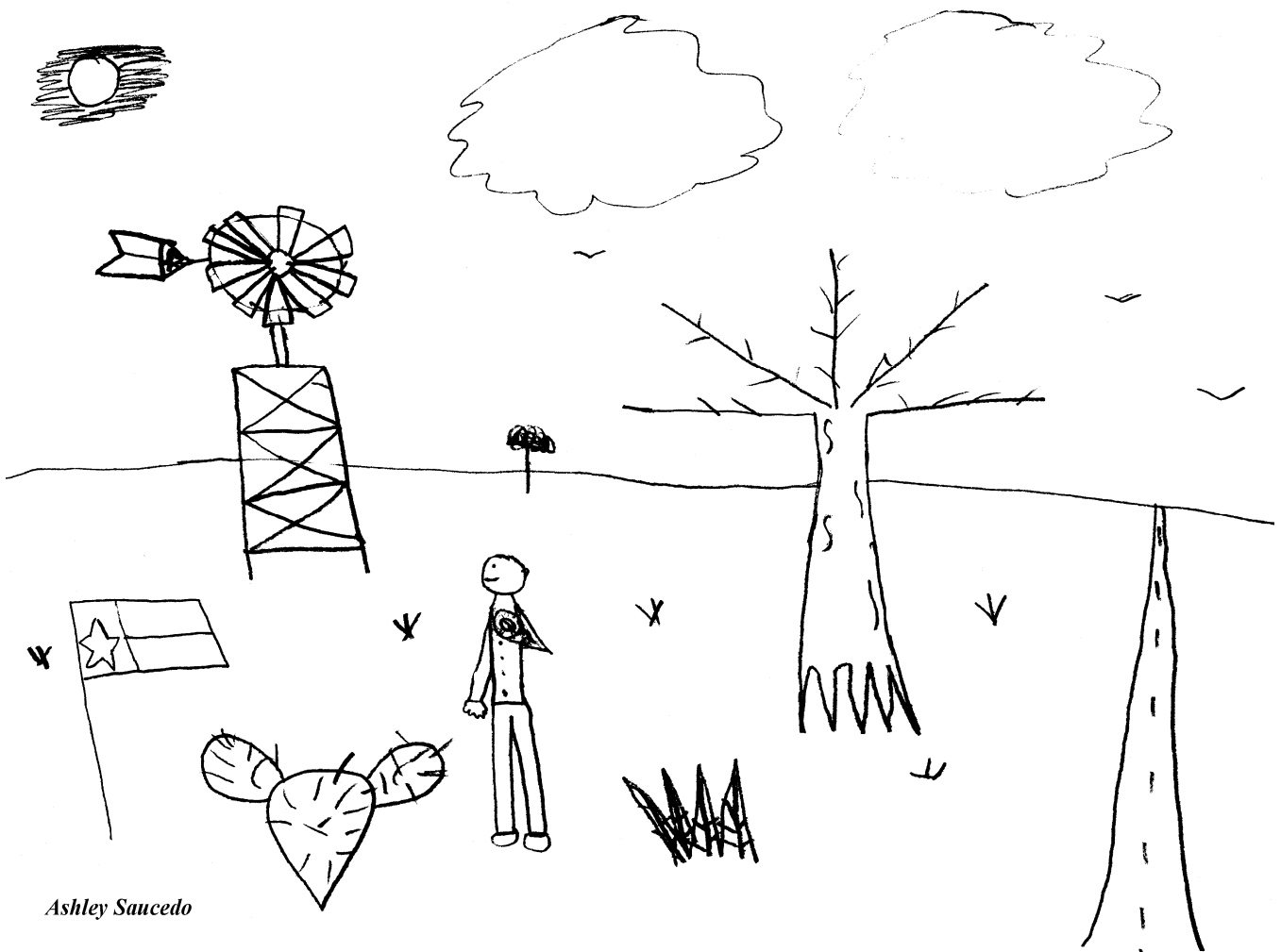
# TEXAS REGISTER

Volume 43 Number 25

June 22, 2018

Pages 3947 - 4262

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Ashley Saucedo

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

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# THE ATTORNEY GENERAL

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The *Texas Register* publishes summaries of the following:  
Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from  
the Attorney General's Internet site <http://www.oag.state.tx.us>.

Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: <http://www.oag.state.tx.us/opinopen/opinhome.shtml>.)

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Requests for Opinions

**RQ-0236-KP**

**Requestor:**

The Honorable Timothy J. Mason  
Andrews County/District Attorney  
121 North West Avenue A  
Andrews, Texas 79714

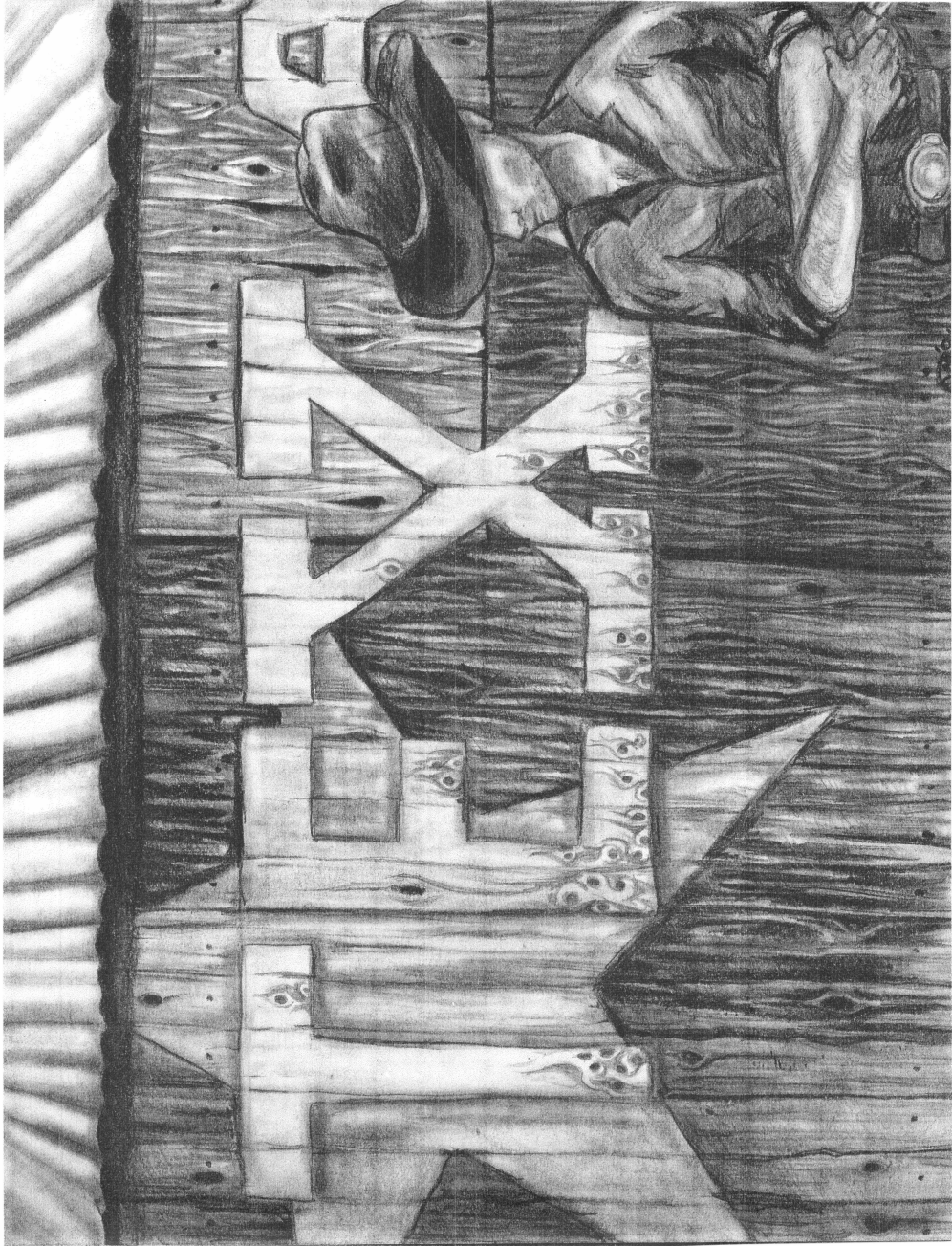
Re: Authority of a county commissioners court over disbursing funds  
received from a compact waste disposal facility under Health and  
Safety Code section 402.244 (RQ-0236-KP)

**Briefs requested by July 6, 2018**

*For further information, please access the website at [www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov) or call the Opinion Committee at (512) 463-2110.*

TRD-201802589  
Amanda Crawford  
General Counsel  
Office of the Attorney General  
Filed: June 12, 2018







# TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39. Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

## Advisory Opinion Requests

Whether a candidate may use political contributions to pay for child-care expenses incurred during a campaign (**AOR-627**).

The Texas Ethics Commission is authorized by section 571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; (9) Chapter 39, Penal Code; (10) Section 2152.064, Government Code; and (11) Section 2155.003, Government Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-201802605  
Seana Willing  
Executive Director  
Texas Ethics Commission  
Filed: June 12, 2018



Whether section 572.069 of the Government Code would prohibit a former employee of a state agency from accepting employment from a person to which the state agency had awarded a contract. (**AOR-628**).

The Texas Ethics Commission is authorized by section 571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; (9) Chapter 39, Penal Code; (10) Section 2152.064, Government Code; and (11) Section 2155.003, Government Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-201802606  
Seana Willing  
Executive Director  
Texas Ethics Commission  
Filed: June 12, 2018



## Advisory Opinion Requests - Self Proposed

Whether a judge or a candidate for judicial office may use public resources for campaign purposes, and whether an associate judge may wear judicial robes and use the title "associate judge" in political advertising. (**SP-14**)

The Texas Ethics Commission is authorized by section 571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; (9) Chapter 39, Penal Code; (10) Section 2152.064, Government Code; and (11) Section 2155.003, Government Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-201802604  
Seana Willing  
Executive Director  
Texas Ethics Commission  
Filed: June 12, 2018



TEXAS



Welcome  
to  
Texas. 🇺🇸

Leslie Gallegos  
7th Grade

# PROPOSED RULES

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

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

## TITLE 1. ADMINISTRATION

### PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

#### CHAPTER 351. COORDINATED PLANNING AND DELIVERY OF HEALTH AND HUMAN SERVICES

The Health and Human Services Commission (HHSC) proposes to repeal Texas Administrative Code (TAC) Title 1, Part 15, Chapter 351, Coordinated Planning and Delivery of Health and Human Services, Subchapter A, General Provisions, §351.9, concerning Public Complaints. HHSC also proposes the repeal of Title 1, Part 15, Chapter 351, Coordinated Planning and Delivery of Health and Human Services, Subchapter B, Advisory Committees, Division 2, Ombudsman for Children and Youth in Foster Care, including all of the rules therein.

##### BACKGROUND AND PURPOSE

The purpose of the repeal of §351.9 is to remove outdated information regarding the Office of the Ombudsman and to provide new rules for further expansion and clarification based on OO's legislative authority and jurisdiction. Since adoption of the rule, the Office of the Ombudsman was reauthorized by Senate Bill 200 (84th Legislature, Regular Session, 2015).

The purpose of the repeal of Subchapter B, Division 2, is to relocate and amend the rules to reflect passage of House Bill 5 (85th Legislature, Regular Session, 2017). The new rules relating to OO are being proposed for TAC Title 26, Health and Human Services, Part 1, Health and Human Services Commission, new Chapter 87, Ombudsman Services, Subchapters A, B, C, and D, in this issue of the *Texas Register*.

##### SECTION-BY-SECTION SUMMARY

The proposed repeal of 1 TAC §351.9 deletes the rule as no longer necessary, because the content of the rule will be included in new 26 TAC Chapter 87, Ombudsman Services, published as proposed in this issue of the *Texas Register*.

The proposed repeal of 1 TAC Chapter 351, Subchapter B, Division 2, repeals the rules so that the rules can be proposed in new 26 TAC Chapter 87, Subchapter C, published as proposed in this issue of the *Texas Register*.

##### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the sections will be repealed, there will be no implications to costs and revenues of state or local governments as a result of the repeals.

##### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections will be repealed:

- (1) the repealed rules will not create or eliminate a government program;
- (2) the repealed rules will not affect the number of employee positions;
- (3) the repealed rules will not require an increase or decrease in future legislative appropriations;
- (4) the repealed rules will not affect fees paid to the agency;
- (5) the repealed rules will not create a new regulation;
- (6) the repealed rules will not repeal an existing regulation;
- (7) the repealed rules will not change the number of individuals subject to the rule; and
- (8) the repealed rules will not affect the state's economy.

##### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal, Deputy Executive Commissioner for Financial Services, has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of repealing the rules. The only entity affected by the repeal is HHSC and there is no cost for the public or consumers to access Ombudsman services and no requirement for any other entity to alter current business practices.

##### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as repealed.

There is no anticipated negative impact on local employment.

##### COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule is necessary to protect the health, safety, and welfare of the residents of Texas.

##### PUBLIC BENEFIT

Joel Schwartz, Director of the Office of the Ombudsman, has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections will be a more complete understanding of the HHS consumer complaint process and the role of the HHS Office of the Ombudsman.

##### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to [HHSRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHSRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. When e-mailing comments, please indicate "Comments on Proposed Rule 18R024" in the subject line.

### SUBCHAPTER A. GENERAL PROVISIONS

#### 1 TAC §351.9

##### STATUTORY AUTHORITY

The repeal is authorized by Government Code §531.0171, Office of Ombudsman, which establishes the HHS Executive Commissioner's (EC) authority and responsibility over the HHS Ombudsman functions; Government Code Chapter 531, Subchapter Y, as enacted by Senate Bill 830 (84th Legislature, Regular Session, 2015), which establishes HHS OO FCO responsibility to develop and implement statewide procedures regarding, among other areas, complaints involving children and youth in the conservatorship of DFPS; and Government Code §531.0055, General Responsibility for Health and Human Services System, which provides that the HHS EC shall adopt rules for the operation and provision of services by the health and human services agencies.

The proposed repeals implement Texas Government Code, Chapter 531.

##### §351.9. *Public Complaints.*

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

Filed with the Office of the Secretary of State on June 5, 2018.

TRD-201802433

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Earliest Possible date of adoption: July 22, 2018

For further information, please call: (512) 706-7120



### SUBCHAPTER B. ADVISORY COMMITTEES DIVISION 2. OMBUDSMAN FOR CHILDREN AND YOUTH IN FOSTER CARE

#### 1 TAC §§351.861, 351.863, 351.865, 351.867, 351.869, 351.871, 351.873, 351.875, 351.877, 351.879, 351.881, 351.883

##### STATUTORY AUTHORITY

The repeals are authorized by Government Code §531.0171, Office of Ombudsman, which establishes the HHS Executive

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The proposed repeals implement Texas Government Code, Chapter 531.

##### §351.861. *Definitions.*

##### §351.863. *Creation of Program and Population Served.*

##### §351.865. *Contact Information.*

##### §351.867. *Confidentiality.*

##### §351.869. *Data and Reports.*

##### §351.871. *Contacts Outside FCO Scope and Referral to Other Offices.*

##### §351.873. *Telephone Communications.*

##### §351.875. *Allegations of Abuse or Neglect.*

##### §351.877. *Research Using DFPS Systems and Policies.*

##### §351.879. *Follow-up Communication with Youth.*

##### §351.881. *Substantiating and Closing Cases.*

##### §351.883. *Retaliation.*

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

Filed with the Office of the Secretary of State on June 5, 2018.

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Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 706-7120



### CHAPTER 354. MEDICAID HEALTH SERVICES SUBCHAPTER A. PURCHASED HEALTH SERVICES

#### DIVISION 15. HEARING AID SERVICES

##### 1 TAC §354.1231, §354.1233

The Texas Health and Human Services Commission (HHSC) proposes amendments to §354.1231, concerning Benefits and Limitations; and §354.1233, concerning Requirements for Hearing Aid Services.

##### BACKGROUND AND JUSTIFICATION

The proposed rule amendments permit nurse practitioners and physician assistants under physician delegation to perform client examinations to determine medical necessity for a hearing aid. The proposed rule amendments also specify that nurse practitioners and physician assistants under physician delegation that perform client examinations may recommend a client for a hearing aid evaluation performed by a physician or an audiologist. A

hearing examination is a preliminary step to investigating hearing loss and to determine the medical necessity for a hearing aid, in which a client's hearing is checked to see if further evaluation is required by a physician or audiologist. Currently, a hearing examination may only be conducted by a Medicaid-enrolled provider licensed to perform these services. The hearing aid evaluation is a subsequent, in-depth procedure by a physician or audiologist to determine the type, scope, and severity of hearing loss. The rule amendments reinforce a physician's ability to delegate tasks to nurse practitioners and physician assistants, as specified by Texas Medical Board and Texas Board of Nursing administrative rules.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment of §354.1231 allows nurse practitioners and physician assistants under physician delegation to perform client examinations to determine medical necessity for a hearing aid. Other nonsubstantive language changes are also proposed.

The proposed amendment of §354.1233 specifies that physicians may receive reimbursement when a nurse practitioner or a physician assistant under delegation performs the client examination to determine medical necessity for a hearing aid. The proposed amendments allow nurse practitioners or physician assistants under physician delegation to recommend clients for a hearing aid evaluation based on the results of the examination. Hearing aid evaluations are performed by a physician or an audiologist. Other nonsubstantive language changes are also proposed.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to the agency;
- (5) the proposed rules will not create a new rule;
- (6) the proposed rules will not expand, limit, or repeal an existing rule;
- (7) the proposed rules will not change the number of individuals subject to the rule; and
- (8) HHSC has insufficient information to determine the proposed rules' effect on the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Ms. Rymal has also determined that there will be no adverse impact on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. Nurse

practitioners and physician assistants are currently reimbursed at 92% of the rate paid to physicians and audiologists. Because the rule changes do not alter existing reimbursements, HHSC does not anticipate an adverse economic impact to small businesses, micro-businesses, or rural communities from adoption and implementation of the rules.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the section(s) as proposed.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons.

#### PUBLIC BENEFIT

Stephanie Muth, State Medicaid Director, has determined that for each year of the first five years the amended rules are in effect, the public will benefit from the adoption of the rules. The anticipated public benefit is alignment of Medicaid hearing aid services requirements with existing nurse practitioner and physician assistant scope of practice requirements.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Questions about the content of this proposal may be directed to Jasmin Patel at (512) 730-7429 in the HHSC Office of Medicaid/CHIP Policy.

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to [HHRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 1R030" in the subject line.

#### STATUTORY AUTHORITY

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

The proposed amendments implement Texas Human Resources Code, Chapter 32, and Texas Government Code, Chapter 531.

§354.1231. *Benefits and Limitations.*

(a) Benefits. Reimbursement for hearing aid services available through the Texas Medical Assistance (Medicaid) Program shall

be provided in accordance with federal regulations found at 42 CFR Chapter IV, Subchapter C, Medical Assistance Programs, and the provisions and procedures found elsewhere in this chapter. The following hearing aid services shall be reimbursed through the Texas Medicaid Program:

(1) physician, or nurse practitioner or physician assistant under physician delegation, [~~Physician~~] examination to determine the medical necessity for a hearing aid;

(2) hearing [~~Hearing~~] aid evaluations;

(3) hearing [~~Hearing~~] aids (monaural or binaural) and hearing aid repairs;

(4) replacement [~~Replacement~~] batteries and related hearing aid supplies;

(5) initial [~~Initial~~] fitting, dispensing, and post-fitting check of the hearing aid(s); and

(6) first [~~First~~] and second revisits to assess the recipient's adaptation to the hearing aid(s) and the functioning of the instrument(s).

(b) Limitations and exclusions. All authorized hearing aid providers, as described in §354.1233 of this division [~~Division~~] (relating to Requirements for Hearing Aid Services), must comply with the following conditions and limitations established by the Texas Health and Human Services Commission (HHSC) [~~(Commission)~~] or its designee.

(1) Hearing aid services are available to persons who are eligible for Medicaid services.

(2) An individual using a hearing aid before becoming eligible for Medicaid benefits may have a hearing aid evaluation conducted by an approved hearing aid services provider after becoming eligible for Medicaid. Medicaid reimbursement for a new hearing aid shall be denied if the provider concludes, based upon the evaluation findings, that the recipient's present hearing aid adequately compensates for the degree of hearing loss.

(3) Providers may not submit a hearing aid evaluation claim to HHSC [~~the Commission or its designee~~] unless the Medicaid recipient meets the eligibility criteria in §354.1233(c) [~~§354.1233, Requirements for Hearing Aid Services~~].

(4) Repairs are limited to one per year per hearing aid. Additional repairs require prior authorization.

(5) Replacement of a hearing [~~an~~] aid may be considered when loss or irreparable damage has occurred. Replacement of a hearing aid requires prior authorization. Replacement will not be authorized in situations where the equipment has been abused or neglected.

(6) Hearing aids may be replaced once every five years.

(7) Hearing aid services do not include auditory training, speechreading, or other types of rehabilitative services.

(8) Hearing aids are limited to eligible recipients who meet medical necessity criteria as defined by HHSC or its designee, which includes an air conduction puretone average (500 Hz, 1000 Hz, 2000 Hz) in the better ear of 35 dB hearing loss (HL) or greater.

(9) Recipients under the age of 21 meet the criteria for binaural aids if they meet the conditions for a monaural hearing aid and have at least a 35 dB hearing loss in both ears.

(10) Recipients under the age of 21 that do not meet the criteria listed in this section may submit a request for authorization through the Texas Health Steps Comprehensive Care Program (THSteps-CCP).

(11) Coverage for recipients age 21 and older who meet the medical criteria as defined by HHSC or its designee and have hearing loss in both ears is limited to one hearing aid.

(12) Coverage is not available for recipients age 21 and older who have hearing loss in only one ear.

§354.1233. *Requirements for Hearing Aid Services.*

(a) Hearing aid services. Providers of hearing aid services must comply with:

(1) all applicable federal and state laws and regulations; [; and]

(2) recognized professional standards; [; and]

(3) the provisions [~~eted~~] in Division 1[;] of this subchapter (relating to [;] Medicaid Procedures for Providers); [; and]

(4) the provisions in Division 11 of this subchapter (relating to [;] General Administration); [; ~~in addition to~~]

(5) the conditions, specifications, and limitations established by the Texas Health and Human Services Commission (HHSC); [~~(Commission) or its designee,~~] and

(6) applicable requirements of their licensing authority.

(b) Reimbursement.

(1) Physicians. Physicians shall be reimbursed for all services covered by the Texas Medicaid Program, including examinations and hearing evaluations. Physicians may delegate examinations to nurse practitioners or physician assistants.

(2) Audiologists. Audiologists shall be reimbursed for hearing aid evaluations and for the fitting and dispensing of hearing aids.

(3) Fitters and dispensers. Hearing aid fitters and dispensers shall be reimbursed for the fitting and dispensing of hearing aids.

(c) [~~(b)~~] Hearing aid evaluations. Hearing aid evaluations must be recommended by a physician, or a nurse practitioner or physician assistant under physician delegation, based upon examination of the recipient. Reimbursement for hearing aid evaluations will be made only to physicians or licensed audiologists. The recipient must have a medical necessity for a hearing aid as stated in §354.1231 of this division (relating to [;] Benefits and Limitations). The recipient must not have any medical contraindications to the ability to use or wear a hearing aid.

(1) A physician, nurse practitioner, or physician assistant who recommends a hearing aid evaluation must be licensed in the state where and when the examination is conducted.

(2) The physician, nurse practitioner, or physician assistant must indicate on the Physician Examination Report form if the recipient needs a hearing aid evaluation based on the examination of the recipient. Medicaid reimbursement for a hearing aid evaluation shall be based on the physician's, nurse practitioner's, or physician assistant's recommendation that the hearing aid evaluation is [~~medically~~] necessary.

(3) Providers must administer hearing aid evaluations using appropriate procedures as specified within their scope of practice and recognized professional standards.

(4) Reimbursement for home visit hearing aid evaluations shall be made if the recipient's physician has documented that the recipient's medical condition prohibits traveling to the provider's place of business.

(5) Providers of hearing aid evaluations must have a report in the recipient's record. Providers must include in the report hearing aid evaluation test data.

(6) Hearing aid evaluations performed by fitters and dispensers are not reimbursable. If a fitter or dispenser performs a hearing evaluation on a recipient, the recipient shall not be billed for the hearing evaluation.

(d) [(e)] Hearing aids. Providers must offer each recipient eligible for a hearing aid a new instrument that meets the recipient's hearing need.

(1) Warranty. Providers must ensure that each hearing aid purchased through the Texas Medicaid Program is a new and current model that meets the performance specifications of the manufacturer and the hearing needs of the recipient. Providers must also ensure that each hearing aid is covered by at least a standard 12-month manufacturer's warranty, effective from the dispensing date.

(2) Required package. Providers must dispense each hearing aid purchased through the Texas Medicaid Program with all necessary tubing, cords, connectors, and a one-month supply of batteries. The instructions for care and use of the hearing aid must be included with the hearing aid package.

(3) Thirty-day trial period. Providers must allow each eligible recipient thirty days to determine if the recipient is satisfied with a hearing aid purchased through the Texas Medicaid Program. The trial period consists of thirty consecutive days from the dispensing date. Providers must inform recipients of the trial period and present the beginning and ending date of the trial period to the recipient in writing.

(A) During the trial period, providers may dispense additional hearing aids, as medically necessary, until the recipient is satisfied with the result of the hearing aid or the provider determines that the recipient cannot benefit from the dispensing of an additional hearing aid. A new trial period begins with the dispensing date of each hearing aid.

(B) Providers may charge a rental fee for hearing aids returned during the trial period.

(i) If a rental fee is charged, providers must assess the rental fee according to the rules and regulations established by the Texas Department of Licensing and Regulation [State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments and the State Board of Examiners for Speech-Language Pathology and Audiology].

(ii) The maximum rental fee for eligible Medicaid recipients shall be \$2 per day. This fee shall not be a covered benefit of the Texas Medicaid Program. Recipients shall be responsible for paying any rental fee assessed them for instruments returned during the 30-day period. Providers must keep in the recipient's file the signed certification acknowledging responsibility to pay hearing aid rental fees.

(iii) Providers must comply with all procedures and directions of the Texas Medicaid Program regarding forms and certifications required during the 30-day trial period. Providers must allow thirty days to elapse from the hearing aid dispensing date before completing a "30-day trial period certification statement." The certification statement must be maintained by the provider in the recipient's file.

(4) Post-fitting checks. The fitter and dispenser must perform a post-fitting check of the hearing aid within five weeks of the initial fitting. The post-fitting check is part of the dispensing procedure and is not reimbursed separately.

(5) First revisit. The first revisit shall include a hearing aid check. Providers must make counseling available as needed within six months of the post-fitting check.

(6) Second revisit. The purpose of the second revisit is to make any necessary adjustments to the hearing aid. Provider must conduct a second revisit as needed.

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

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Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 730-7429



## TITLE 19. EDUCATION

### PART 2. TEXAS EDUCATION AGENCY

#### CHAPTER 61. SCHOOL DISTRICTS

#### SUBCHAPTER AA. COMMISSIONER'S

#### RULES ON SCHOOL FINANCE

##### 19 TAC §61.1017

The Texas Education Agency (TEA) proposes new §61.1017, concerning commissioner's rules on school finance. The proposed new rule would provide for an alternative compensatory education allotment calculation for certain school districts and open-enrollment charter schools located in counties declared a natural disaster as a result of Hurricane Harvey.

Texas Education Code (TEC), §42.152(a), specifies that a school district is entitled to an annual compensatory education allotment that is determined using counts of students who are educationally disadvantaged or who do not have a disability and reside in a residential treatment facility not located where the student's parent or legal guardian resides. TEC, §42.152(b), specifies that the number of educationally disadvantaged students is determined by averaging the best six months' numbers of students eligible for enrollment in the National School Lunch Program (NSLP) of free or reduced priced lunches the preceding school year or in a manner provided by commissioner rule.

Proposed new §61.1017 would exercise the commissioner's authority under TEC, §42.152(b)(2), to specify how educationally disadvantaged students are determined for the purpose of the compensatory education allotment. The proposed new rule would equalize compensatory education funding for all school districts and open-enrollment charter schools located in counties declared a natural disaster as a result of Hurricane Harvey.

Specifically, the proposed new rule would allow school districts and open-enrollment charter schools located in counties declared a natural disaster that did not receive a waiver related to provisions of the NSLP and School Breakfast Program offered by the Texas Department of Agriculture (TDA) to use total student enrollment as reported during the 2017-2018 Fall Texas Student Data System Public Education Information

Management System (TSDS PEIMS) Snapshot in place of the number of students reported as eligible for enrollment in free or reduced-price lunches for the month of September 2017 when computing the best six-month average under TEC, §42.152(b)(1), for the 2017-2018 school year. Absent this proposed new rule, school districts and open-enrollment charter schools that did not receive the TDA waiver for the school lunch program would not be able to receive additional compensatory education funding even though their students were likely educationally disadvantaged due to the impacts of Hurricane Harvey.

The proposed new section would have no procedural and reporting implications. School districts and open-enrollment charter schools would continue to follow current reporting requirements.

The proposed new section would have no locally maintained paperwork requirements. School districts and open-enrollment charter schools would continue to maintain existing local records.

**FISCAL NOTE.** Leo Lopez, associate commissioner for school finance / chief school finance officer, has determined that for the first five-year period the proposed new section is in effect, there will be fiscal implications for state and local government as a result of enforcing or administering the new section. School districts and open-enrollment charter schools located in counties declared a natural disaster that do not have a TDA waiver will receive an additional \$11 million in compensatory education funding. The funding will cost the state \$11 million from the Foundation School Program.

There is no effect on local economy for the first five years that the proposed new section is in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022. The proposed new section does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

**GOVERNMENT GROWTH IMPACT.** TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not expand, limit, or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

**PUBLIC BENEFIT/COST NOTE.** Mr. Lopez has determined that for each year of the first five years the proposed new section is in effect, the public benefit anticipated as a result of enforcing the proposed new section would be providing school districts and open-enrollment charter schools located in counties declared a natural disaster without a TDA waiver approximately \$11 million in additional compensatory education funding to serve students at risk of dropping out of school. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.** There is no direct adverse economic impact for small businesses, microbusinesses,

and rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

**REQUEST FOR PUBLIC COMMENT.** The public comment period on the proposal begins June 22, 2018, and ends July 23, 2018. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About\\_TEA/Laws\\_and\\_Rules/Commissioner\\_Rules\\_\(TAC\)/Proposed\\_Commissioner\\_of\\_Education\\_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/). Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. A public hearing on the proposed new rule will be held at 9:00 a.m. on July 9, 2018, in Room 1-104, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Anyone wishing to testify at the hearing must sign in between 8:15 a.m. and 9:00 a.m. on the day of the hearing. The hearing will conclude once all who have signed in have been given the opportunity to comment. Questions about the hearing should be directed to Nora Rainey, State Funding, (512) 463-7298.

**STATUTORY AUTHORITY.** The new section is proposed under Texas Education Code, §42.152(a)(2), which allows the commissioner to adopt rules for the administration of TEC, §42.152, including the calculation of the number of educationally disadvantaged students.

**CROSS REFERENCE TO STATUTE.** The new section implements Texas Education Code, §42.152.

§61.1017. *Alternative Compensatory Education Allotment Calculation.*

(a) This section applies to a school district or open-enrollment charter school that:

(1) is located in a county declared a natural disaster by the president during the 2017-2018 school year;

(2) received an adjustment to average daily attendance under Texas Education Code (TEC), §42.005(d), for the 2017-2018 school year; and

(3) did not receive a waiver related to provisions of the National School Lunch and School Breakfast programs offered by the Texas Department of Agriculture and approved by the U.S. Department of Agriculture on August 29, 2017.

(b) For a school district or open-enrollment charter school that meets the requirements of subsection (a) of this section, the Texas Education Agency will substitute that entity's total student enrollment as reported during the 2017-2018 Fall Texas Student Data System Public Education Information Management System (TSDS PEIMS) Snapshot in place of the number of students reported as eligible for enrollment in free or reduced-price lunches for the month of September 2017 when computing the best six-month average under TEC, §42.152(b)(1), for the 2017-2018 school year.

(c) Subsection (b) of this section only takes effect if an entity's total student enrollment as reported in the 2017-2018 Fall TSDS PEIMS Snapshot is larger than the number of students reported as eligible for free or reduced-price lunches for the month of September 2017.

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

Filed with the Office of the Secretary of State on June 11, 2018.  
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## PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

### CHAPTER 228. REQUIREMENTS FOR EDUCATOR PREPARATION PROGRAMS

#### 19 TAC §§228.1, 228.2, 228.30, 228.35

The State Board for Educator Certification (SBEC) proposes an amendment to §§228.1, 228.2, 228.30, and 228.35, concerning requirements for educator preparation programs. The proposed amendments would implement the statutory requirements of Senate Bills (SBs) 7 and 1839 and House Bills (HBs) 2039, 3349, and 1963, 85th Texas Legislature, Regular Session, 2017. The proposed amendments would also implement changes based on stakeholder input and the Texas Education Agency (TEA) staff recommendations.

The SBEC rules in 19 Texas Administrative Code (TAC) Chapter 228, Requirements for Educator Preparation Programs (EPPs), provide for rules that establish requirements for educator preparation programs.

The following is a description of the proposed amendments.

#### §228.1. *General Provisions.*

A proposed new subsection (d) would allow the TEA to extend rule deadlines when rules in this chapter cannot be complied with because of a disaster that results in the governor declaring a state of disaster. This amendment would allow the TEA to extend deadlines in this chapter for up to 90 days to accommodate persons in the disaster areas identified by the governor's declaration.

#### §228.2. *Definitions.*

The definition of *cooperating teacher* in §228.2(12) would be amended to add the phrase, "including training in how to coach and mentor teacher candidates," to the criteria of the cooperating teacher training. This amendment would require cooperating teachers to be trained on how to coach and mentor teacher candidates, so they could adequately guide and support the candidates throughout their clinical teaching experiences.

The definition of *field supervisor* in §228.2(16) would be amended to clarify that a field supervisor who has certification as a principal and experience as a campus-level administrator may also supervise classroom teacher, master teacher, and reading specialist candidates; and a field supervisor who has certification as a superintendent and experience as a district-level administrator may also supervise principal candidates. This amendment would provide flexibility for EPPs in determining the field supervisor and would support teacher candidates being supervised by a field supervisor who has experience as a classroom teacher. A technical edit is also recommended to update in rule relevant cross references.

The definition of *internship* in §228.2(21) would be amended to move the criteria for a successful internship into the appro-

appropriate preparation program coursework and training in subsection §228.35(f)(2)(B)(vii). This amendment would provide consistency among the requirements for internships, clinical teaching, and practicums.

The definition of *mentor* in §228.2(23) would be amended to add the phrase, "including training in how to coach and mentor teacher candidates," to the criteria of the site supervisor training. This amendment would require site supervisors to be trained on how to coach and mentor teacher candidates, so they could adequately guide and support the candidates throughout their internship experiences.

The definition of *site supervisor* in §228.2(30) would be amended to add the phrase, "including training in how to coach and mentor candidates," to the criteria of the site supervisor training. This amendment would require site supervisors to be trained on how to coach and mentor candidates, so they could adequately guide and support the candidates throughout their internship experiences.

#### §228.30. *Educator Preparation Curriculum.*

Language would be amended in §228.30(c)(3) to clarify curriculum requirements for instruction regarding mental health, substance abuse, and youth suicide. The TEC, §21.044(c-1), requires EPPs to select training from a list of recommended best practice-based programs and research-based practices. This amendment would clarify that an EPP that acquires training from a provider on the list may use that training on its own if it implements the training as required by the provider.

Language would be amended in §228.30(c)(7) to incorporate the requirements of the TEC, §21.044(g)(6), as amended by SB 7, 85th Texas Legislature, Regular Session, 2017. The language being proposed would require the curriculum for all certification classes to include instruction regarding appropriate relationships, boundaries, and communications between educators and students.

Language would be amended in §228.30(c)(8) to incorporate the requirements of the TEC, §21.044, as amended by SB 1839, 85th Texas Legislature, Regular Session, 2017. The language being proposed would require the curriculum for all certification classes to include instruction in digital learning. The EPP would need to assess each candidate with a digital literacy evaluation followed by a prescribed digital learning curriculum that must include resources to address any deficiencies identified by the digital literacy evaluation. The instruction must be aligned with the International Society for Technology in Education's (ISTE) standards and provide effective, evidence-based strategies to determine a person's degree of digital literacy. The current ISTE standards for educators and administrators are published on its website at <https://www.iste.org/standards>.

Language would be amended in §228.30(d)(4) and §228.30(e) to remove the domains of the Teacher and Administrator Standards. Because these domains are identified in Commissioner of Education rules, Chapter 149, Subchapters AA and BB, this amendment would reduce the amount of redundancy in the rules.

Proposed new §228.30(f) would incorporate the requirements of the TEC, §21.0489, as amended by SB 1839 and HB 2039, 85th Texas Legislature, Regular Session, 2017. The subsection would identify the standards that an EPP must include in its Early Childhood: Prekindergarten-Grade 3 curriculum for candidates who hold a valid standard, provisional, or one-year classroom teacher certificate that has been issued by the SBEC

and allows them to teach all subjects in grades prekindergarten, kindergarten, first, second, or third. The curriculum must include the Child Development provision of the Early Childhood-Grade 3 Content Standards, the Early Childhood-Grade 3 Pedagogy and Professional Responsibilities Standards, and the Science of Teaching Reading Standards. This amendment would implement the statutory requirements of the TEC, §21.0489.

*§228.35. Preparation Program Coursework and/or Training.*

Language would be amended in §228.35(a)(6) to broaden the options from which EPPs may select to ensure coursework and training that is offered online is of a high quality. This amendment would include the certification options that are provided by the Distance Education Accreditation Commission. This amendment would provide EPPs that do not offer all their coursework and training online additional cost-effective options for quality assurance.

Proposed new §228.35(c) would incorporate the abbreviated program requirements of the TEC, §21.0442(c), as amended by HB 3349, 85th Texas Legislature, Regular Session, 2017. The language being proposed would require an EPP to provide a minimum of 200 clock-hours of coursework and/or training for a candidate seeking initial certification in the classroom teacher certification class in Trade and Industrial Workforce Training. The coursework and/or training requirement is 100 hours less than the minimum for all other initial classroom teacher certificates because the statute calls for an abbreviated educator preparation program for Trade and Industrial Workforce Training and because this certificate is only available to individuals with prior wage-earning experience in an occupation they will be teaching. New subsection (c)(1) would require a candidate to complete the following prior to clinical teaching or internship: a minimum of 30 clock-hours of field-based experience as prescribed in subsection (b)(1) and 80 clock-hours of coursework/training as prescribed in subsection (c)(1)(B). The 30 clock-hours of field-based experience is consistent with the required hours of field-based experience for all certificates and ensures that an individual has a baseline of experience in a classroom prior to assuming a position as the teacher of record. Additionally, the 80 clock-hours of coursework and training provides for basic training in essential topics while upholding the requirement for an abbreviated certificate. New subsection (c)(2) would require a candidate to complete a minimum of 90 additional clock-hours in the curriculum prescribed in §228.30(a)-(d) prior to completion of the program. The 90 additional clock-hours are necessary to ensure adequate training in the topics the TEC, §21.044, requires. The curriculum would include: the Pedagogy and Professional Responsibilities for Trade and Industrial Education (Grades 6-12) educator standards; the Educators' Code of Ethics; instruction in the detection and education of students with dyslexia; instruction regarding mental health, substance abuse, and youth suicide; the importance of setting high expectations for students and building strong classroom management skills; the framework for teacher and principal evaluation; appropriate relationships, boundaries, and communication between educators and students; instruction in digital learning; the relevant Texas Essential Knowledge and Skills; and reading instruction.

This amendment would implement the statutory requirements of the TEC, §21.0442(c), and will provide consistency among EPPs.

Based on stakeholder feedback, the provisions in §228.35(c) would be expanded to include initial certification in the class-

room teacher certification class in Marketing: Grades 6-12 and Health Science: Grades 6-12. These certificates are similar to the Trade and Industrial Workforce Training certificate in that they also require experience and preparation in a skill area. This would provide an abbreviated route to certification for these areas. Remaining subsections would be relettered accordingly.

Language would be amended in §228.35(f)(1)(C) to incorporate the requirements of the TEC, §21.051(b-1), as amended by SB 1839, 85th Texas Legislature, Regular Session, 2017. The language being proposed would allow a teacher candidate to satisfy up to 15 clock-hours of field-based experience by serving as a long-term substitute. A long-term substitute would be defined as an individual who has been hired by a public or private school accredited or approved by the TEA to work more than 30 consecutive days in an assignment as a classroom teacher. Long-term substitute experience may occur after the candidate's admission to an EPP or during the two years before the date the candidate is admitted to the EPP. The candidate's experience in instructional or educational activities during the long-term substitute experience must be documented by the EPP. This change would implement the provisions of the TEC, §21.051(b-1), and would provide consistency among EPPs.

Language would be amended in §228.35(f)(2)(A)(i)(I) to increase the minimum required days for a 14-week clinical teaching assignment from 65 days to 70 full days, and in subsection (f)(2)(A)(i)(II) to increase the minimum required days for a 28-week clinical teaching assignment from 130 to 140 half days. These changes would reflect the actual number of days and half-days in a five-day week. Current rule allows fewer days to provide flexibility for an exception for maternity leave, military leave, or illness. These changes would provide clarity of the expected days required and then allow for an exception due to these circumstances, as reflected in subsection (f)(2)(A)(iv). These amendments would still allow for flexibility for and consistency among EPPs.

Language would be added as new §228.35(f)(2)(A)(ii) to clarify that a full-day clinical teaching assignment must be an average of four hours per day in the subject and grade level of the certification category being sought. This average would include intermissions and recesses but not conference periods and duty-free lunch periods. This amendment would allow more assignments to qualify as full-day clinical teaching assignments and provide more consistency between clinical teaching and internship assignments.

Language would be added as new §228.35(f)(2)(A)(iii) to specify criteria for a successful clinical teaching assignment. A successful assignment would include that the candidate demonstrates proficiency in each of the educator standards for the assignment. Based on stakeholder feedback, if either the field supervisor or cooperating teacher do not recommend the candidate for a standard certificate, the documentation supporting that recommendation would be provided to the candidate for review by all parties. This would provide clarification of the recommendation to all parties and provide consistency among the requirements for all certificates.

Language would be amended in new §228.35(f)(2)(A)(iv) to permit a full day clinical teaching assignment to be up to five days fewer than the minimum of 70 days and a half day clinical teaching assignment to be up to ten days fewer than the minimum of 140 days. The grounds for permitting fewer than the minimum number of days would be maternity leave, military leave, and ill-

ness. This amendment would provide flexibility for candidates and EPPs to complete clinical teaching experiences.

Language would be amended in §228.35(f)(2)(B)(i) to clarify that an internship may be up to 30 school days fewer than the minimum of 180 days if the candidate is hired by the school or district after the first day of school. This amendment would ensure that candidates are only eligible for the shortened internship if they are hired after the first day of school.

Language would be amended in §228.35(f)(2)(B)(ii) to clarify that the beginning date of an internship for the purpose of field supervision would be the first day of instruction with students. Because the requirement for an internship is 180 days, interns may need to participate in professional development before and after the first and last instructional day to meet the requirements of an internship. Because the purpose of field supervision is to provide support to candidates based on observed instructional practices, field supervision does not need to begin until candidates are providing instruction to students.

Language would be amended in §228.35(f)(2)(B)(iii) to include intermissions and recesses into the average of four hours a day an individual must teach for an internship. Intermissions and recesses are included in the statutory definition of school day and the educational activities that beginning teachers are expected to perform during intermissions and recesses are included in the classroom teacher educator standards. This change would also clarify that conference periods and duty-free lunch periods are not included. This amendment would allow more assignments to qualify as internships. A technical edit is also recommended to update in rule relevant cross references.

Language would be amended in §228.35(f)(2)(B)(vi)(II)-(IV) to provide candidates and EPPs with more time to provide the required notices related to inactivation of intern and probationary certificates. The time required for candidates to provide an EPP a notice of resignation, non-renewal, or termination of employment or withdrawal from the EPP would increase from one business day to seven calendar days. The time required for EPPs to provide candidates with a notice of inactivation of intern or probationary certificates due to resignation, non-renewal, or termination of employment or withdrawal from the EPP would increase from one business day to seven calendar days. This amendment would provide candidates and EPPs with more flexibility in providing required notices. Technical edits are also recommended to update in rule relevant cross references.

Language would be amended in new §228.35(f)(2)(B)(vi)(V) to add notification requirements for EPPs when an internship assignment does not meet requirements. An EPP would need to provide a candidate with notice within seven calendar days of knowing that an EPP assignment does not meet requirements. The notice would inform the candidate that the employer would be notified, and the intern or probationary certificate would be inactivated within 30 calendar days. Within one business day of notifying the candidate, an EPP would need to provide similar notice to the employer. Within one business day of notifying the employer, the EPP would need to provide similar notice to the TEA. This amendment would provide consistency among EPPs in providing required notices that result in the inactivation of certificates. This timeline is consistent with other notification requirements related to the inactivation of certificates and is necessary to ensure that programs provide prompt notification to candidates, employers, and the TEA to prevent a candidate from continuing in an inappropriate assignment.

Language would be amended in new §228.35(f)(2)(B)(vii) to move language from §228.2(21) that describes the criteria for a successful internship. Based on stakeholder feedback, if either the field supervisor or campus supervisor do not recommend the candidate for a standard certificate, the EPP would be required to provide the documentation supporting that recommendation to the candidate for review by all parties. This would provide clarification of the recommendation to all parties and provide consistency among the requirements for all certificates.

Language would be amended in new §228.35(f)(2)(B)(viii) to incorporate the provisions of the TEC, §21.0491(c)(2), as amended by HB 3349, 85th Texas Legislature, Regular Session, 2017. The proposed language would authorize a candidate seeking a Trade and Industrial Workforce Training certificate to complete an internship at an accredited institution of higher education if the candidate teaches not less than an average of four hours each day, including intermissions and recesses, in a dual credit career and technical instructional setting. Permitting an internship in this setting allows candidates to fulfill the employment eligibility requirement found in the TEC, §21.0491(c)(2)(B), at an institution of higher education. A dual credit career and technical instructional setting would be defined by Part 1, Chapter 4, Subchapter D of this title (relating to Dual Credit Partnerships Between Secondary Schools and Public Schools). This amendment would implement the statutory requirements of the TEC, §21.0491(c)(2), and will provide consistency among EPPs.

Language would be amended in new §228.35(f)(3) to add requirements for the review, approval, and revocation of clinical teaching exception requests. The review and approval requirements being added are the review and approval procedures that the TEA and the SBEC have used for requests that have already been approved. The revocation requirements being added would address how approval of an exception is revoked if an EPP does not meet the conditions of the exception that was approved by the SBEC. This amendment would clarify the process by which clinical teaching exception requests are reviewed, approved, and revoked. This amendment is necessary because the current rules do not provide for a clear process for revoking a clinical teaching exception for a program that does not meet the conditions of the exception. The September 15 deadline tracks the deadline for programs to report data.

Language would be amended in §228.35(f)(4) to add language clarifying that "candidates" as used in this subsection refers to candidates participating in an internship or clinical teaching assignment. This amendment would provide consistency among clinical teaching and internship assignments.

Based on stakeholder feedback, language would be amended in §228.35(f)(8)(D), regarding practicum experiences, to specify that if either the field supervisor or site supervisor do not recommend the candidate for a standard certificate, the documentation supporting that recommendation be provided to the candidate for review by all parties. This would provide clarification of the recommendation to all parties and provide consistency among the requirements for all certificates.

Language would be amended in §228.35(h)(8) to define the observation requirements for a full-day clinical teaching assignment that exceeds 14 weeks and extends beyond one semester. A field supervisor from an EPP would need to provide at least two formal observations during the first half of the assignment and two formal observations during the second half of the assignment. This change would ensure that candidates receive

necessary support and feedback throughout the clinical teaching assignment as a means to foster continuous improvement and would provide consistency among EPPs. Technical edits are also recommended to update in rule relevant cross references.

Language would be amended in §228.35(i)(2) to incorporate the requirements of the TEC, §21.044(f-1), as amended by SBs 1839 and 1963, 85th Texas Legislature, Regular Session, 2017. The proposed language would remove the requirement that at least one formal observation by a field supervisor be onsite and face-to-face for a candidate seeking a principal, superintendent, school counselor, school librarian, educational diagnostician, reading specialist, or master teacher certificate. This change would implement the statutory requirements of the TEC, §21.044(f-1). Remaining subsections would be renumbered accordingly.

Language would be amended in §228.35(i)(3) to clarify that a minimum of three observations are required during a practicum, regardless of the type of certificate that is held by a candidate. Because a practicum can be completed while a candidate seeking an advanced certificate is employed under an intern, probationary, or standard certificate, this clarification is needed because the number of observations for a teacher candidate participating in an internship differs according to the type of certificate the candidate holds. This change would clarify the requirements for candidates seeking an advanced certificate.

Proposed new §228.35(j) would incorporate the requirements of the TEC, §21.0489, as amended by SB 1839 and HB 2039, 85th Texas Legislature, Regular Session, 2017. New §228.35(j)(1) would identify the concepts and themes that coursework and/or training must include. New §228.35(j)(2) would require an EPP to provide a minimum of 150 clock-hours of coursework and/or training for candidates seeking an Early Childhood: Prekindergarten-Grade 3 certificate who hold a valid standard, provisional, or one-year classroom teacher certificate that has been issued by the SBEC and would allow them to teach all subjects in grades prekindergarten, kindergarten, first, second, or third. Teachers already certified in these areas have already demonstrated their content proficiency based on the passing of their prior content tests. Additionally, their time in the classroom serves the same purposes of field-based experience and clinical teaching. This allows the number of hours to be reduced. New §228.35(j)(3) would require an EPP to provide a candidate who holds any other classroom teacher certificate the same coursework and training that the EPP would provide for a candidate who is seeking an initial certificate in Early Childhood: Prekindergarten-Grade 3. Due to the specialized nature of early childhood, content knowledge, content pedagogy, and pedagogy practices from outside of the early childhood grade-bands cannot be directly applied to this setting. These changes would implement the statutory requirements of the TEC, §21.0489, and would provide consistency among programs.

Proposed new §228.35(k) would define the coursework and/or training requirements for the Teacher of Students with Visual Impairments (TVI) Supplemental: Early Childhood-Grade 12 certificate. The two EPPs actively certifying candidates for the TVI certificate meet the requirements of the proposed new subsection.

New §228.35(k)(1) would require a minimum of 300 hours of coursework and/or training related to the educator standards for that certificate adopted by the SBEC. The TEC, §21.0485, requires an individual to complete coursework in an EPP to be eligible for this certificate. This proposed minimum is the min-

imum amount of coursework and/or training hours that the two programs that actively offer this certificate provide. This subsection would provide clarity for individuals and ensure rigor due to the uniqueness of the TVI certificate.

New §228.35(k)(2) would require an EPP to provide a candidate a clinical experience of at least 350 clock-hours in a supervised school assignment. The TEC, §21.0485, requires an individual to complete coursework in an EPP to be eligible for this certificate. This proposed minimum is the minimum amount of coursework and/or training hours that the two programs that actively offer this certificate provide. The assignment needs to take place in a public school accredited by the TEA or other school approved by the TEA for this purpose. Other schools would include private schools accredited by the Texas Private School Accreditation Commission, all Department of Defense Education Activity schools, and schools that meet the approval standards described in 19 TAC §228.35(e)(7)(C) and (D). A clinical experience is successful when a field supervisor from the EPP recommends that the candidate should be recommended for a TVI supplemental certificate. New §228.35(k)(2)(A) would clarify that the EPP will provide guidance, assistance, and support for the candidate by assigning a cooperating teacher. If a cooperating teacher is not assigned to the candidate, the EPP must provide guidance, assistance, and support through individual or group consultation. The new subsection also requires that the EPP is responsible for providing training to cooperating teachers and/or consultation providers. New §228.35(k)(2)(B) would require that the EPP assign a TVI mentor to the TVI candidate during the clinical experience. The Texas School for the Blind and Visually Impaired Statewide Mentor Program is responsible for providing training for TVI mentors. New §228.35(k)(2)(C) would require the EPP assign a field supervisor who has completed TEA-approved field supervisor training to provide ongoing support for the TVI candidate. The new subsection would require initial contact by the field supervisor to the TVI candidate be made within the first quarter of the assignment, that each observation must include a pre- and post-conference with written feedback, and that informal observations and coaching be provided by the field supervisor as appropriate. New §228.35(k)(2)(C)(i) would require formal observations be at least 135 minutes in duration in total throughout the clinical experience. New §228.35(k)(2)(C)(ii) would clarify that if a formal observation is not conducted on the candidate's site in a face-to-face setting, it may be provided by use of electronic transmission or other video or technology-based method and must include a pre- and post-conference. New §228.35(k)(2)(C)(iii) requires the EPP to provide a minimum of three formal observations during the clinical experience. The TEC, §21.0485, requires an individual to satisfy any other requirements prescribed by the SBEC to be eligible for this certificate. This proposed minimum describes the level of support that the two programs that actively offer this certificate provide and is necessary to ensure sufficient levels of support for the specialized nature of this certificate. This change would reflect the requirements of the EPPs that currently offer training for this certificate and would also provide consistency among EPPs that may offer the certification in the future.

Proposed new §228.35(l) would create provisions for individuals employed as certified educational aides to complete an educator preparation program. New subsection (l)(1) would create a clinical teaching option for candidates who are employed as a certified educational aide to satisfy their clinical teaching assignment requirements through their instructional duties under the supervision of a certified educator. New subsection (l)(1)(A)

would allow for the assignment requirements of 490 hours to be satisfied through their instructional duties. The requirement for 490 hours is equivalent to the 14-week requirement for other individuals completing clinical teaching, but it allows an individual to complete the assignment more flexibly while working as a certified educational aide. This change creates flexibility to allow school districts and charter schools to "grow their own" educational aides into certified teachers and to diversify the pool of new teachers while ensuring sufficient time within the clinical teaching assignment to demonstrate proficiency in each of the educator standards for the assignment.

Proposed new subsection §228.35(l)(1)(B) would permit an educational aide clinical teaching assignment to be up to 35 hours fewer than the minimum of 490 hours. The grounds for permitting fewer than the minimum number of hours would be maternity leave, military leave, and illness. This amendment would provide flexibility for candidates and EPPs to complete clinical teaching experiences.

Proposed new subsection §228.35(l)(1)(C) would add criteria for a successful clinical teaching assignment. A successful assignment would include that the candidate demonstrates proficiency in each of the educator standards for the assignment. Based on stakeholder feedback, if either the field supervisor or cooperating teacher do not recommend the candidate for a standard certificate, the documentation supporting that recommendation would be provided to the candidate for review by all parties. This would provide clarification of the recommendation to all parties and provide consistency among the requirements for all certificates.

Proposed new subsection §228.35(l)(2) would specify the coursework and/or training requirements and define the observation requirements for a 490-hour clinical teaching option for candidates who are employed as a certified educational aide. A field supervisor from an EPP would need to provide at least one formal observation during the first third of the assignment, one formal observation during the second third of the assignment, and one formal observation during the final third of the assignment. This change would ensure that candidates receive necessary support and feedback throughout the clinical teaching assignment as a means to foster continuous improvement and would provide consistency among EPPs.

Technical edits were also made to 19 TAC Chapter 228 to conform to style and formatting requirements.

The proposed amendments would have no additional procedural and reporting implications. The proposed amendments would have no additional locally maintained paperwork requirements.

**FISCAL NOTE.** Ryan Franklin, associate commissioner for educator leadership and quality, has determined that for the first five-year period the amendments are in effect, there will be no additional fiscal implications for state and local governments and there are no additional costs to entities required to comply with the proposed amendments. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code, §2001.022. The proposed amendments do not impose a cost on regulated persons, another state agency, a special district, or local government and, therefore, is not subject to TGC, §2001.0045.

**PUBLIC BENEFIT/COST NOTE.** Mr. Franklin has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the

amendment will be clear guidance for EPPs on requirements for providing preparation to individuals seeking certification as an educator. Beyond that which the underlying legislation requires, the proposed amendments do not impose a cost on persons required to comply with the rules.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.** There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in TGC, §2006.002, is required.

**GOVERNMENT GROWTH IMPACT:** The TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking for the first five years the proposed rulemaking would be in effect. The TEA staff has determined that, although the proposed rulemaking could potentially have a government growth impact by creating a new regulation, that impact is created by the statutory requirement and not the agency regulation. The TEA staff has also determined that the proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not expand, limit, or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

**REQUEST FOR PUBLIC COMMENT.** The public comment period on the proposal begins June 22, 2018, and ends July 23, 2018. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About\\_TEA/Laws\\_and\\_Rules/SBEC\\_Rules\\_\(TAC\)/Proposed\\_State\\_Board\\_for\\_Educator\\_Certification\\_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/). The SBEC will take registered oral and written comments on the proposed amendments at the August 3, 2018 meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Mr. Ryan Franklin, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on June 22, 2018.

**STATUTORY AUTHORITY.** The amendments are proposed under the Texas Education Code (TEC), §21.031, which authorizes the State Board for Educator Certification (SBEC) to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators, and states that in proposing rules under the TEC, Chapter 21, Subchapter B, the SBEC shall ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state; TEC, §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; TEC, §21.044, as amended by Senate Bills (SBs) 7, 1839, and 1963, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to propose rules establishing training requirements a person must accomplish to obtain a cer-

tificate, enter an internship, or enter an induction-year program; TEC, §21.0442(c), as added by House Bill (HB) 3349, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to ensure that an educator preparation program (EPP) requires at least 80 hours of instruction for a candidate seeking a Trade and Industrial Workforce Training certificate; TEC, §21.0443, which requires the SBEC to establish rules for the approval and renewal of EPPs; TEC, §21.0453, which states that the SBEC may propose rules as necessary to ensure that all EPPs provide the SBEC with accurate information; TEC, §21.0454, which requires the SBEC to develop a set of risk factors to assess the overall risk level of each EPP and use the set of risk factors to guide the TEA in conducting monitoring, inspections, and evaluations of EPPs; TEC, §21.0455, which requires the SBEC to propose rules necessary to establish a process for complaints to be directed against an EPP; TEC, §21.046(b), which states that the qualifications for certification as a principal must be sufficiently flexible so that an outstanding teacher may qualify by substituting approved experience and professional training for part of the educational requirements; TEC, §21.0485, which states the issuance requirements for certification to teach students with visual impairments; TEC, §21.0487(c), which states that because an effective principal is essential to school improvement, the SBEC shall ensure that each candidate for certification as a principal is of the highest caliber and that multi-level screening processes, validated comprehensive assessment programs, and flexible internships with successful mentors exist to determine whether a candidate for certification as a principal possesses the essential knowledge, skills, and leadership capabilities necessary for success; TEC, §21.0489(c), as added by SB 1839 and HB 2039, 85th Texas Legislature, Regular Session, 2017, which states the eligibility for an Early Childhood: Prekindergarten-Grade 3 certificate; TEC, §21.049(a), which authorizes the SBEC to adopt rules providing for educator certification programs as an alternative to traditional EPPs; TEC, §21.0491, as added by HB 3349, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to create a probationary and standard trade and industrial workforce training certificate; TEC, §21.050(b), which states that the SBEC may not require more than 18 semester credit hours of education courses at the baccalaureate level for the granting of a teaching certificate; TEC, §21.050(c), which states that a person who receives a bachelor's degree required for a teaching certificate on the basis of higher education coursework completed while receiving an exemption from tuition and fees under the TEC, §54.363, may not be required to participate in any field experience or internship consisting of student teaching to receive a teaching certificate; TEC, §21.051, as amended by SB 1839, 85th Texas Legislature, Regular Session, 2017, which provides a requirement that before a school may employ a certification candidate as a teacher of record, the candidate must have completed at least 15 hours of field-based experience in which the candidate was actively engaged at an approved school in instructional or educational activities under supervision; Texas Occupations Code, §55.007, which provides that verified military service, training, and education be credited toward licensing requirements.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, (TEC), §§21.031; 21.041(b)(1); 21.044, as amended by Senate Bills (SBs) 7, 1839, and 1963, 85th Texas Legislature, Regular Session, 2017; 21.0442(c), as added by House Bill (HB) 3349, 85th Texas Legislature, Regular Session, 2017; 21.0443; 21.0453; 21.0454; 21.0455; 21.046(b); 21.0485; 21.0487(c); 21.0489(c),

as added by SB 1839 and HB 2039, 85th Texas Legislature, Regular Session, 2017; 21.049(a); 21.0491, as added by HB 3349, 85th Texas Legislature, Regular Session, 2017; 21.050(b) and (c); 21.051, as amended by SB 1839, 85th Texas Legislature, Regular Session, 2017; and the Texas Occupations Code, §55.007.

#### §228.1. *General Provisions.*

(a) To ensure the highest level of educator preparation and practice, the State Board for Educator Certification (SBEC) recognizes that the preparation of educators must be the joint responsibility of educator preparation programs (EPPs) and the Early Childhood-Grade 12 public and private schools of Texas. Collaboration in the development, delivery, and evaluation of educator preparation is required.

(b) Consistent with the Texas Education Code, §21.049, the SBEC's rules governing educator preparation are designed to promote flexibility and creativity in the design of EPPs to accommodate the unique characteristics and needs of different regions of the state as well as the diverse population of potential educators.

(c) All EPPs are subject to the same standards of accountability, as required under Chapter 229 of this title (relating to Accountability System for Educator Preparation Programs).

(d) If the governor declares a state of disaster consistent with the Texas Government Code, §418.014, Texas Education Agency staff may extend deadlines in this chapter for up to 90 days and decrease clinical teaching, internship, and practicum assignment minimums by up to 20 percent as necessary to accommodate persons in the affected disaster areas.

#### §228.2. *Definitions.*

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

(1) Academic year--If not referring to the academic year of a particular public, private, or charter school or institution of higher education, September 1 through August 31.

(2) Accredited institution of higher education--An institution of higher education that, at the time it conferred the degree, was accredited or otherwise approved by an accrediting organization recognized by the Texas Higher Education Coordinating Board.

(3) Alternative certification program--An approved educator preparation program, delivered by entities described in §228.20(a) of this title (relating to Governance of Educator Preparation Programs), specifically designed as an alternative to a traditional undergraduate certification program, for individuals already holding at least a bachelor's degree from an accredited institution of higher education.

(4) Benchmarks--A record similar to a transcript for each candidate enrolled in an educator preparation program documenting the completion of admission, program, certification, and other requirements.

(5) Candidate--An individual who has been formally or contingently admitted into an educator preparation program; also referred to as an enrollee or participant.

(6) Certification category--A certificate type within a certification class; also known as certification field.

(7) Certification class--A certificate, as described in §230.33 of this title (relating to Classes of Certificates), that has defined characteristics; also known as certification field.

(8) Classroom teacher--An educator who is employed by a school or district and who, not less than an average of four hours each

day, teaches in an academic instructional setting or a career and technical instructional setting. This term does not include an educational aide or a full-time administrator.

(9) Clinical teaching--A supervised educator assignment through an educator preparation program at a public school accredited by the Texas Education Agency (TEA) or other school approved by the TEA for this purpose that may lead to completion of a standard certificate; also referred to as student teaching.

(10) Clock-hours--The actual number of hours of coursework or training provided; for purposes of calculating the training and coursework required by this chapter, one semester credit hour at an accredited institution of higher education is equivalent to 15 clock-hours. Clock-hours of field-based experiences, clinical teaching, internship, and practicum are actual hours spent in the required educational activities and experiences.

(11) Contingency admission--Admission as described in §227.15 of this title (relating to Contingency Admission).

(12) Cooperating teacher--For a clinical teacher candidate, an educator who is collaboratively assigned by the educator preparation program (EPP) and campus administrator; who has at least three years of teaching experience; who is an accomplished educator as shown by student learning; who has completed cooperating teacher training, including training in how to coach and mentor teacher candidates, by the EPP within three weeks of being assigned to a clinical teacher; who is currently certified in the certification category for the clinical teaching assignment for which the clinical teacher candidate is seeking certification; who guides, assists, and supports the candidate during the candidate's clinical teaching in areas such as planning, classroom management, instruction, assessment, working with parents, obtaining materials, district policies; and who reports the candidate's progress to that candidate's field supervisor.

(13) Educator preparation program--An entity that must be approved by the State Board for Educator Certification to recommend candidates in one or more educator certification classes.

(14) Entity--The legal entity that is approved to deliver an educator preparation program.

(15) Field-based experiences--Introductory experiences for a classroom teacher certification candidate involving, at the minimum, reflective observation of Early Childhood-Grade 12 students, teachers, and faculty/staff members engaging in educational activities in a school setting.

(16) Field supervisor--A currently certified educator, hired by the educator preparation program, who preferably has advanced credentials, to observe candidates, monitor their performance, and provide constructive feedback to improve their effectiveness as educators. A field supervisor shall have at least three years of experience and current certification in the class in which supervision is provided. A field supervisor shall be an accomplished educator as shown by student learning. A field supervisor with experience as a campus-level administrator [~~principal~~] and who holds a current certificate that is appropriate for a principal assignment may also supervise [~~principal~~] classroom teacher, master teacher, and reading specialist candidates. A field supervisor with experience as a district-level administrator [~~superintendent~~] and who holds a current certificate that is appropriate for a superintendent assignment may also supervise [~~superintendent~~] principal [, ~~classroom teacher, master teacher, and reading specialist~~] candidates. If an individual is not currently certified, an individual must hold at least a master's degree in the academic area or field related to the certification class for which supervision is being provided and comply with the same number, content, and type of continuing professional educa-

tion requirements described in §232.11 of this title (relating to Number and Content of Required Continuing Professional Education Hours), §232.13 of this title (relating to Number of Required Continuing Professional Education Hours by Classes of Certificates), and §232.15 of this title (relating to Types of Acceptable Continuing Professional Education Activities). A field supervisor shall not be employed by the same school where the candidate being supervised is completing his or her clinical teaching, internship, or practicum. A mentor, cooperating teacher, or site supervisor, assigned as required by §228.35(g) [~~§228.35(e)~~] of this title (relating to Preparation Program Coursework and/or Training), may not also serve as a candidate's field supervisor.

(17) Formal admission--Admission as described in §227.17 of this title (relating to Formal Admission).

(18) Head Start Program--The federal program established under the Head Start Act (42 United States Code, §9801 et seq.) and its subsequent amendments.

(19) Initial certification--The first Texas certificate in a class of certificate issued to an individual based on participation in an approved educator preparation program.

(20) Intern certificate--A type of certificate as specified in §230.36 of this title (relating to Intern Certificates) that is issued to a candidate who has pass all required content certification examinations and is completing initial requirements for certification through an approved educator preparation program.

(21) Internship--A paid supervised classroom teacher assignment for one full school year at a public school accredited by the Texas Education Agency (TEA) or other school approved by the TEA for this purpose that may lead to completion of a standard certificate. [~~An internship is successful when the field supervisor and supervising campus administrator recommend to the EPP that the candidate should be recommended for a standard certificate.~~]

(22) Late hire--An individual who has not been accepted into an educator preparation program before the 45th day before the first day of instruction and who is hired for a teaching assignment by a school after the 45th day before the first day of instruction or after the school's academic year has begun.

(23) Mentor--For an internship candidate, an educator who is collaboratively assigned by the campus administrator and the educator preparation program (EPP); who has at least three years of teaching experience; who is an accomplished educator as shown by student learning; who has completed mentor training, including training in how to coach and mentor teacher candidates, by an EPP within three weeks of being assigned to the intern; who is currently certified in the certification category in which the internship candidate is seeking certification; who guides, assists, and supports the candidate during the internship in areas such as planning, classroom management, instruction, assessment, working with parents, obtaining materials, district policies; and who reports the candidate's progress to that candidate's field supervisor.

(24) Pedagogy--The art and science of teaching, incorporating instructional methods that are developed from scientifically-based research.

(25) Post-baccalaureate program--An educator preparation program, delivered by an accredited institution of higher education and approved by the State Board for Educator Certification to recommend candidates for certification, that is designed for individuals who already hold at least a bachelor's degree and are seeking an additional degree.

(26) Practicum--A supervised educator assignment at a public school accredited by the Texas Education Agency (TEA) or other school approved by the TEA for this purpose that is in a school

setting in the particular class for which a certificate in a class other than classroom teacher is sought.

(27) Probationary certificate--A type of certificate as specified in §230.37 of this title (relating to Probationary Certificates) that is issued to a candidate who has passed all required certification examinations and is completing requirements for certification through an approved educator preparation program.

(28) School day--If not referring to the school day of a particular public or private school, a school day shall be at least seven hours (420 minutes) each day, including intermissions and recesses.

(29) School year--If not referring to the school year of a particular public or private school, a school year shall provide at least 180 days (75,600 minutes) of instruction for students.

(30) Site supervisor--For a practicum candidate, an educator who has at least three years of experience in the aspect(s) of the certification class being pursued by the candidate; who is collaboratively assigned by the campus or district administrator and the educator preparation program (EPP); who is currently certified in the certification class in which the practicum candidate is seeking certification; who has completed training by the EPP, including training in how to coach and mentor candidates, within three weeks of being assigned to a practicum candidate; who is an accomplished educator as shown by student learning; who guides, assists, and supports the candidate during the practicum; and who reports the candidate's progress to the candidate's field supervisor.

(31) Texas Education Agency staff--Staff of the Texas Education Agency assigned by the commissioner of education to perform the State Board for Educator Certification's administrative functions and services.

(32) Texas Essential Knowledge and Skills (TEKS)--The kindergarten-Grade 12 state curriculum in Texas adopted by the State Board of Education and used as the foundation of all state certification examinations.

§228.30. *Educator Preparation Curriculum.*

(a) The educator standards adopted by the State Board for Educator Certification [(SBEC)] shall be the curricular basis for all educator preparation and, for each certificate, address the relevant Texas Essential Knowledge and Skills (TEKS).

(b) The curriculum for each educator preparation program shall rely on scientifically-based research to ensure educator effectiveness.

(c) The following subject matter shall be included in the curriculum for candidates seeking initial certification in any certification class:

(1) the code of ethics and standard practices for Texas educators, pursuant to Chapter 247 of this title (relating to Educators' Code of Ethics), which include:

- (A) professional ethical conduct, practices, and performance;
- (B) ethical conduct toward professional colleagues; and
- (C) ethical conduct toward students;

(2) instruction in detection and education of students with dyslexia, as indicated in the Texas Education Code (TEC), §21.044(b);

(3) instruction regarding mental health, substance abuse, and youth suicide, as indicated in the TEC, §21.044(c-1). Instruction acquired from the list of recommended best practice-based programs

or research-based practices shall be implemented as required by the provider of the best practice-based program or research-based practice;

(4) the skills that educators are required to possess, the responsibilities that educators are required to accept, and the high expectations for students in this state;

(5) the importance of building strong classroom management skills; ~~and~~

(6) the framework in this state for teacher and principal evaluation; ~~and~~

(7) appropriate relationships, boundaries, and communications between educators and students; and

(8) instruction in digital learning, including a digital literacy evaluation followed by a prescribed digital learning curriculum. The instruction required must:

(A) be aligned with the latest version of the International Society for Technology in Education's (ISTE) standards as appears on the ISTE website;

(B) provide effective, evidence-based strategies to determine a person's degree of digital literacy; and

(C) include resources to address any deficiencies identified by the digital literacy evaluation.

(d) The following subject matter shall be included in the curriculum for candidates seeking initial certification in the classroom teacher certification class:

(1) the relevant TEKS, including the English Language Proficiency Standards;

(2) reading instruction, including instruction that improves students' content-area literacy;

(3) for certificates that include early childhood and prekindergarten, the Prekindergarten Guidelines; and

(4) the skills and competencies captured in the Texas teacher standards in Chapter 149, Subchapter AA, of this title (relating to Teacher Standards), ~~which include:~~

- ~~{(A) instructional planning and delivery;}~~
- ~~{(B) knowledge of students and student learning;}~~
- ~~{(C) content knowledge and expertise;}~~
- ~~{(D) learning environment;}~~
- ~~{(E) data-driven practice; and}~~
- ~~{(F) professional practices and responsibilities.}~~

(e) For candidates seeking certification in the principal certification class, the curriculum shall include the skills and competencies captured in the Texas administrator standards, as indicated in Chapter 149, Subchapter BB, of this title (relating to Administrator Standards), ~~which include:~~

- ~~{(1) instructional leadership;}~~
- ~~{(2) human capital;}~~
- ~~{(3) executive leadership;}~~
- ~~{(4) school culture; and}~~
- ~~{(5) strategic operations.}~~



(f) The following educator content standards from Chapter 235 of this title (relating to Classroom Teacher Certification Standards) shall be included in the curriculum for candidates who hold a valid standard, provisional, or one-year classroom teacher certificate specified in §230.31 of this title (relating to Types of Certificates) in a certificate category that allows the candidates who are seeking the Early Childhood: Prekindergarten-Grade 3 certificate to teach all subjects in Prekindergarten, Kindergarten, Grade 1, Grade 2, or Grade 3:

(1) Child Development provisions of the Early Childhood: Prekindergarten-Grade 3 Content Standards;

(2) Early Childhood-Grade 3 Pedagogy and Professional Responsibilities Standards; and

(3) Science of Teaching Reading Standards.

§228.35. *Preparation Program Coursework and/or Training.*

(a) Coursework and/or training for candidates seeking initial certification in any certification class.

(1) An educator preparation program (EPP) shall provide coursework and/or training to adequately prepare candidates for educator certification and ensure the educator is effective in the classroom.

(2) Coursework and/or training shall be sustained, rigorous, intensive, interactive, candidate-focused, and performance-based.

(3) All coursework and/or training shall be completed prior to EPP completion and standard certification.

(4) With appropriate documentation such as certificate of attendance, sign-in sheet, or other written school district verification, 50 clock-hours of training may be provided by a school district and/or campus that is an approved Texas Education Agency (TEA) [TEA] continuing professional education provider to a candidate who is considered a late hire. The training provided by the school district and/or campus must meet the criteria described in the Texas Education Code (TEC), §21.451 (Staff Development Requirements) and must be directly related to the certificate being sought.

(5) Each EPP must develop and implement specific criteria and procedures that allow:

(A) military service member or military veteran candidates to credit verified military service, training, or education toward the training, education, work experience, or related requirements (other than certification examinations) for educator certification requirements, provided that the military service, training, or education is directly related to the certificate being sought; and

(B) candidates who are not military service members or military veterans to substitute prior or ongoing service, training, or education, provided that the experience, education, or training is not also counted as a part of the internship, clinical teaching, or practicum requirements, was provided by an approved EPP or an accredited institution of higher education within the past five years, and is directly related to the certificate being sought.

(6) Coursework and training that is offered online must meet, or the EPP must be making progress toward meeting, criteria set for accreditation, quality assurance, and/or compliance with one or more of the following:

(A) Accreditation or Certification by the Distance Education Accrediting Commission;

(B) Program Design and Teaching Support Certification by Quality Matters;

(C) Part 1, Chapter 4, Subchapter P, of this title (relating to Approval of Distance Education Courses and Programs for Public Institutions); or

(D) Part 1, Chapter 7 of this title (relating to Degree Granting Colleges and Universities Other than Texas Public Institutions).

(b) Coursework and/or training for candidates seeking initial certification in the classroom teacher certification class. An EPP shall provide each candidate with a minimum of 300 clock-hours of coursework and/or training. Unless a candidate qualifies as a late hire, a candidate shall complete the following prior to any clinical teaching or internship:

(1) a minimum of 30 clock-hours of field-based experience. Up to 15 clock-hours of this field-based experience may be provided by use of electronic transmission or other video or technology-based method; and

(2) 150 clock-hours of coursework and/or training that allows candidates to demonstrate proficiency in:

(A) designing clear, well-organized, sequential, engaging, and flexible lessons that reflect best practice, align with standards and related content, are appropriate for diverse learners and encourage higher-order thinking, persistence, and achievement;

(B) formally and informally collecting, analyzing, and using student progress data to inform instruction and make needed lesson adjustments;

(C) ensuring high levels of learning, social-emotional development, and achievement for all students through knowledge of students, proven practices, and differentiated instruction;

(D) clearly and accurately communicating to support persistence, deeper learning, and effective effort;

(E) organizing a safe, accessible, and efficient classroom;

(F) establishing, communicating, and maintaining clear expectations for student behavior;

(G) leading a mutually respectful and collaborative class of actively engaged learners;

(H) meeting expectations for attendance, professional appearance, decorum, procedural, ethical, legal, and statutory responsibilities;

(I) reflect on his or her practice; and

(J) effectively communicating with students, families, colleagues, and community members.

(c) Coursework and training for candidates seeking initial certification in the classroom teacher certification class in Trade and Industrial Workforce Training, Marketing: Grades 6-12, or Health Science: Grades 6-12. An EPP shall provide a minimum of 200 clock-hours of coursework and/or training for a candidate seeking a Trade and Industrial Workforce Training certificate as specified in §233.14(b), (c), and (e) of this title (relating to Career and Technical Education (Certificates requiring experience and preparation in a skill area)).

(1) A candidate shall complete the following prior to any clinical teaching or internship:

(A) the field-based experience described in subsection (b)(1) of this section; and

(B) 80 clock-hours of coursework and/or training described in subsection (b)(2) of this section and the educator standards related to those fields.

(2) Prior to completion of the program, a candidate shall complete 90 clock-hours of coursework and/or training described in §228.30(a)-(d) of this title (relating to Educator Preparation Curriculum). The additional coursework and/or training may be provided by a school district, a campus, an EPP, or another entity that is an approved TEA continuing professional education provider. Appropriate documentation such as certificate of attendance, sign-in sheet, or other written verification must be validated by the candidate's EPP.

(d) [(e)] Coursework and/or training for candidates seeking initial certification in a certification class other than classroom teacher. An EPP shall provide coursework and/or training to ensure that the educator is effective in the assignment. An EPP shall provide a candidate with a minimum of 200 clock-hours of coursework and/or training that is directly aligned to the educator standards for the applicable certification class.

(e) [(4)] Late hire provisions. A late hire for a school district teaching position may begin employment under an intern or probationary certificate before completing the pre-internship requirements of subsection (b) of this section, but shall complete these requirements within 90 school days of assignment.

(f) [(e)] Educator preparation program delivery. An EPP shall provide evidence of ongoing and relevant field-based experiences throughout the EPP in a variety of educational settings with diverse student populations, including observation, modeling, and demonstration of effective practices to improve student learning.

(1) For initial certification in the classroom teacher certification class, each EPP shall provide field-based experiences, as defined in §228.2 of this title (relating to Definitions), for a minimum of 30 clock-hours. The field-based experiences must be completed prior to assignment in an internship or clinical teaching.

(A) Field-based experiences must include 15 clock-hours in which the candidate, under the direction of the EPP, is actively engaged in instructional or educational activities that include:

- (i) authentic school settings in a public school accredited by the TEA [Texas Education Agency (TEA)] or other school approved by the TEA for this purpose;
- (ii) instruction by content certified teachers;
- (iii) actual students in classrooms/instructional settings with identity-proof provisions;
- (iv) content or grade-level specific classrooms/instructional settings; and
- (v) written reflection of the observation.

(B) Up to 15 clock-hours of field-based experience may be provided by use of electronic transmission or other video or technology-based method. Field-based experience provided by use of electronic transmission or other video or technology-based method must include:

- (i) direction of the EPP;
- (ii) authentic school settings in an accredited public or private school;
- (iii) instruction by content certified teachers;
- (iv) actual students in classrooms/instructional settings with identity-proof provisions;

(v) content or grade-level specific classrooms/instructional settings; and

(vi) written reflection of the observation.

(C) Up to 15 clock-hours of field-based experience may be satisfied by serving as a long-term substitute. A long-term substitute is an individual who has been hired by a school or district to work at least 30 consecutive days in an assignment as a classroom teacher. Experience may occur after the candidate's admission to an EPP or during the two years before the date the candidate is admitted to the EPP. The candidate's experience in instructional or educational activities must be documented by the EPP and must be obtained at a public or private school accredited or approved for the purpose by the TEA.

(2) For initial certification in the classroom teacher certification class, each EPP shall also provide at least one of the following.[:]

(A) Clinical Teaching.

(i) Clinical teaching must meet one of the following requirements:

(I) [(A)] [clinical teaching for] a minimum of 14 weeks (no fewer [less] than 70 [65] full days), with a full day being 100% of the school day; or

(II) [(B)] [clinical teaching for] a minimum of 28 weeks (no fewer [less] than 140 [130] half days), with a half day being 50% of the school day.[: ø]

(ii) A clinical teaching assignment as described in clause (i)(I) of this subparagraph shall not be less than an average of four hours each day in the subject area and grade level of certification sought. The average includes intermissions and recesses but does not include conference and duty-free lunch periods.

(iii) Clinical teaching is successful when the candidate demonstrates proficiency in each of the educator standards for the assignment and the field supervisor and cooperating teacher recommend to the EPP that the candidate should be recommended for a standard certificate. If either the field supervisor or cooperating teacher do not recommend that the candidate should be recommended for a standard certificate, the person who does not recommend the candidate must provide documentation supporting the lack of recommendation to the candidate and either the field supervisor or cooperating teacher.

(iv) An EPP may permit a full day clinical teaching assignment up to 5 full days fewer than the minimum and a half day clinical teaching assignment up to 10 half days fewer than the minimum if due to maternity leave, military leave, or illness.

(B) [(C)] Internship. An internship must be for a minimum of one full school year for the classroom teacher assignment or assignments that match the certification category or categories for which the candidate is prepared by the EPP.

(i) An EPP may permit an internship of up to 30 school days fewer [less] than the minimum if due to maternity leave, military leave, illness, or if the late hire date is after the first day of the school year.

(ii) The beginning date for an internship for the purpose of field supervision is the first day of instruction with students in the school or district in which the internship takes place.

(iii) An internship assignment shall not be less than an average of four hours each day in the subject area and grade level of certification sought. The average includes intermissions and recesses but does not include conference and duty-free lunch periods. An EPP

may permit an additional internship assignment of less than an average of four hours each day if:

(I) the primary assignment is not less than an average of four hours each day in the subject area and grade level of certification sought;

(II) the EPP is approved to offer preparation in the certification category required for the additional assignment;

(III) the EPP provides ongoing support for each assignment as prescribed in subsection (h) [(g)] of this section;

(IV) the EPP provides coursework and training for each assignment to adequately prepare the candidate to be effective in the classroom; and

(V) the employing school or district notifies the candidate and the EPP in writing that an assignment of less than four hours will be required.

(iv) A candidate must hold an intern or probationary certificate while participating in an internship. A candidate must meet the requirements and conditions, including the subject matter knowledge requirement, prescribed in §230.36 of this title (relating to Intern Certificates) and §230.37 of this title (relating to Probationary Certificates) to be eligible for an intern or probationary certificate.

(v) An EPP may recommend an additional internship if:

(I) the EPP certifies that the first internship was not successful, the EPP has developed a plan to address any deficiencies identified by the candidate and the candidate's field supervisor, and the EPP implements the plan during the additional internship; or

(II) the EPP certifies that the first internship was successful and that the candidate is making satisfactory progress toward completing the EPP before the end of the additional internship.

(vi) An EPP must provide ongoing support to a candidate as described in subsection (h) [(g)] of this section for the full term of the initial and any additional internship, unless, prior to the expiration of that term:

(I) a standard certificate is issued to the candidate during any additional internship under a probationary certificate;

(II) the candidate resigns, is non-renewed, or is terminated by the school or district. A candidate must provide the EPP the official notice of resignation or termination within seven calendar days [one business day] after receipt of the notice from the employing school or district. Within seven calendar days [one business day] after receipt of the official notice of resignation or termination, an EPP must notify a candidate in writing that the EPP will provide TEA with notice about the resignation or termination and that the intern or probationary certificate will be inactivated by the TEA 30 calendar days from the effective date of the resignation or termination. Within one business day after providing the notice to a candidate, an EPP must email the TEA a copy of the notice to the candidate and a copy of the official notice of the resignation or termination;

(III) the candidate is discharged or is released from the EPP. An EPP must notify a candidate in writing that the candidate is being discharged or released, that the EPP will provide the employing school or district with notice of the discharge or release, that the EPP will provide TEA with notice about the discharge or release [resignation or termination], and that the intern or probationary certificate will be inactivated by the TEA 30 calendar days from the effective date of the discharge or release. Within one business day after providing a candidate with notice of discharge or release, an EPP

must provide written notification to the employing school or district of the withdrawal, discharge, or release. Within one business day of providing notice to the employing school or district, an EPP must email the TEA a copy of the notice of discharge or release and a copy of the notice to the employing school or district; [or]

(IV) the candidate withdraws from the EPP. A candidate must notify the EPP in writing that the candidate is withdrawing from the EPP. Within seven calendar days [one business day] after receipt of the withdrawal notice, an EPP must notify a candidate in writing that the EPP will provide the employing school or district with notice of the withdrawal, that the EPP will provide TEA with notice about the withdrawal, and that the intern or probationary certificate will be inactivated by the TEA 30 calendar days from the effective date of the withdrawal. Within one business day after providing a candidate with notice of discharge or release, an EPP must provide written notification to the employing school or district of the withdrawal, discharge, or release. Within one business day of providing notice to the employing school or district, an EPP must email the TEA a copy of the notice of withdrawal and a copy of the notice to the employing school or district; or[-]

(V) the internship assignment does not meet the requirements described in this subparagraph. Within seven calendar days of knowing that an internship assignment does not meet requirements, an EPP must notify a candidate in writing: that the internship assignment does not meet the requirements; that the EPP will provide the employing school or district with notice; that the EPP will provide the TEA with notice; and that the intern or probationary certificate will be inactivated by the TEA 30 calendar days from the effective date the notice to the candidate was sent by the EPP. Within one business day after providing a candidate with notice, an EPP must provide written notification to the employing school or district that the internship assignment does not meet requirements and that the TEA will inactivate the certificate. Within one business day of providing notice to the employing school or district, an EPP must email the TEA a copy of the notice to the candidate and a copy of the notice to the employing school or district.

(vii) An internship is successful when the candidate demonstrates proficiency in each of the educator standards for the assignment and the field supervisor and campus supervisor recommend to the EPP that the candidate should be recommended for a standard certificate. If either the field supervisor or campus supervisor do not recommend that the candidate should be recommended for a standard certificate, the person who does not recommend the candidate must provide documentation supporting the lack of recommendation to the candidate and either the field supervisor or campus supervisor.

(viii) An internship for a Trade and Industrial Workforce Training certificate may be at an accredited institution of higher education if the candidate teaches not less than an average of four hours each day, including intermissions and recesses, in a dual credit career and technical instructional setting as defined by Part 1, Chapter 4, Subchapter D of this title (relating to Dual Credit Partnerships Between Secondary Schools and Public Schools).

(3) [(D)] An EPP may request an exception to the clinical teaching option described in this subsection.

(A) Submission of Exception Request. The request for an [An] exception must include an alternate requirement that will adequately prepare candidates for educator certification and ensure the educator is effective in the classroom. The request for an exception must be submitted in a form developed by the TEA staff that [which] shall include:

(i) the rationale and support for the alternate clinical teaching option;

(ii) a full description and methodology of the alternate clinical teaching option;

(iii) a description of the controls to maintain the delivery of equivalent, quality education; and

(iv) a description of the ongoing monitoring and evaluation process to ensure that EPP objectives are met.

(B) Review, Approval, and Revocation of Exception Request.

(i) ~~[(E)]~~ Exception requests will be reviewed by TEA staff, and the TEA staff shall recommend to the State Board for Educator Certification (SBEC) whether the exception should be approved. The SBEC may:

(I) approve the request;

(II) approve the request with conditions;

(III) deny approval of the request; or

(IV) defer action on the request pending receipt of further information.

(ii) If the SBEC approves the request with conditions, the EPP must meet the conditions specified in the request. If the EPP does not meet the conditions, the approval is revoked.

(iii) If the SBEC approves the request, the EPP must submit a written report of outcomes resulting from the clinical teaching exception to the TEA by September 15 of each academic year. If the EPP does not timely submit the report, the approval is revoked.

(iv) If the SBEC does approve the exception or an approval is revoked, an EPP must wait at least six months from the date of the denial or revocation before submitting a new request.

(4) ~~[(F)]~~ Candidates participating in an internship or a clinical teaching assignment need to experience a full range of professional responsibilities that shall include the start of the school year. The start of the school year is defined as the first 15 instructional days of the school year. If these experiences cannot be provided through clinical teaching or an internship, they must be provided through field-based experiences.

(5) ~~[(3)]~~ An internship or clinical teaching experience for certificates that include early childhood may be completed at a Head Start Program with the following stipulations:

(A) a certified teacher is available as a trained mentor;

(B) the Head Start program is affiliated with the federal Head Start program and approved by the TEA;

(C) the Head Start program teaches three- and four-year-old students; and

(D) the state's prekindergarten curriculum guidelines are being implemented.

(6) ~~[(4)]~~ An internship or clinical teaching experience must take place in an actual school setting rather than a distance learning lab or virtual school setting.

(7) ~~[(5)]~~ An internship or clinical teaching experience shall not take place in a setting where the candidate:

(A) has an administrative role over the mentor or cooperating teacher; or

(B) is related to the field supervisor, mentor, or cooperating teacher by blood (consanguinity) within the third degree or by marriage (affinity) within the second degree.

(8) ~~[(6)]~~ For certification in a class other than classroom teacher, each EPP shall provide a practicum for a minimum of 160 clock-hours whereby a candidate must demonstrate proficiency in each of the educator standards for the certificate class being sought.

(A) A practicum experience must take place in an actual school setting rather than a distance learning lab or virtual school setting.

(B) A practicum shall not take place in a setting where the candidate:

(i) has an administrative role over the site supervisor; or

(ii) is related to the field supervisor or site supervisor by blood (consanguinity) within the third degree or by marriage (affinity) within the second degree.

(C) An intern or probationary certificate may be issued to a candidate for a certification class other than classroom teacher who meets the requirements and conditions, including the subject matter knowledge requirement, prescribed in §230.37 of this title.

(i) A candidate for an intern or probationary certificate in a certification class other than classroom teacher must meet all requirements established by the recommending EPP, which shall be based on the qualifications and requirements for the class of certification sought and the duties to be performed by the holder of a probationary certificate in that class.

(ii) An EPP may recommend an additional practicum under a probationary certificate if:

(I) the EPP certifies that the first practicum was not successful, the EPP has developed a plan to address any deficiencies identified by the candidate and the candidate's field supervisor, and the EPP implements the plan during the additional practicum; or

(II) the EPP certifies that the first practicum was successful and that the candidate is making satisfactory progress toward completing the EPP before the end of the additional practicum.

(D) A practicum is successful when the field supervisor and the site supervisor recommend to the EPP that the candidate should be recommended for a standard certificate. If either the field supervisor or site supervisor does not recommend that the candidate should be recommended for a standard certificate, the person who does not recommend the candidate must provide documentation supporting the lack of recommendation to the candidate and either the field supervisor or site supervisor.

(9) ~~[(7)]~~ Subject to all the requirements of this section, the TEA may approve a school that is not a public school accredited by the TEA as a site for field-based experience, internship, clinical teaching, and/or practicum.

(A) All Department of Defense Education Activity (DoDEA) schools, wherever located, and all schools accredited by the Texas Private School Accreditation Commission (TEPSAC) are approved by the TEA for purposes of field-based experience, internship, clinical teaching, and/or practicum.

(B) An EPP may file an application with the TEA for approval, subject to periodic review, of a public school, a private school, or a school system located within any state or territory of the United States, as a site for field-based experience. The application

shall be in a form developed by the TEA staff and shall include, at a minimum, evidence showing that the instructional standards of the school or school system align with those of the applicable Texas Essential Knowledge and Skills (TEKS) and SBEC certification standards.

(C) An EPP may file an application with the TEA for approval, subject to periodic review, of a public or private school located within any state or territory of the United States, as a site for an internship, clinical teaching, and/or practicum required by this chapter. The application shall be in a form developed by the TEA staff and shall include, at a minimum:

- (i) the accreditation(s) held by the school;
- (ii) a crosswalk comparison of the alignment of the instructional standards of the school with those of the applicable TEKS and SBEC certification standards;
- (iii) the certification, credentials, and training of the field supervisor(s) who will supervise candidates in the school; and
- (iv) the measures that will be taken by the EPP to ensure that the candidate's experience will be equivalent to that of a candidate in a Texas public school accredited by the TEA.

(D) An EPP may file an application with the TEA for approval, subject to periodic review, of a public or private school located outside the United States, as a site for clinical teaching, internship, or practicum required by this chapter. The application shall be in a form developed by the TEA staff and shall include, at a minimum, the same elements required in subparagraph (C) of this paragraph for schools located within any state or territory of the United States, with the addition of a description of the on-site program personnel and program support that will be provided and a description of the school's recognition by the U.S. State Department Office of Overseas Schools.

(g) [(f)] Mentors, cooperating teachers, and site supervisors. In order to support a new educator and to increase educator retention, an EPP shall collaborate with the campus or district administrator to assign each candidate a mentor during the candidate's internship, assign a cooperating teacher during the candidate's clinical teaching experience, or assign a site supervisor during the candidate's practicum. If an individual who meets the certification category and/or experience criteria for a cooperating teacher, mentor, or site supervisor is not available, the EPP and campus or district administrator shall assign an individual who most closely meets the criteria and document the reason for selecting an individual that does not meet the criteria. The EPP is responsible for providing mentor, cooperating teacher, and/or site supervisor training that relies on scientifically-based research, but the program may allow the training to be provided by a school, district, or regional education service center if properly documented.

(h) [(g)] Ongoing educator preparation program support for initial certification of teachers. Supervision of each candidate shall be conducted with the structured guidance and regular ongoing support of an experienced educator who has been trained as a field supervisor. Supervision provided on or after September 1, 2017, must be provided by a field supervisor who has completed TEA-approved observation training. The initial contact, which may be made by telephone, email, or other electronic communication, with the assigned candidate must occur within the first three weeks of assignment. For each formal observation, the field supervisor shall participate in an individualized pre-observation conference with the candidate, document educational practices observed; provide written feedback through an individualized, synchronous, and interactive post-observation conference with the candidate; and provide a copy of the written feedback to the candidate's cooperating teacher or mentor. Neither the pre-observation con-

ference nor the post-observation conference need to be onsite. For candidates participating in an internship, the field supervisor shall provide a copy of the written feedback to the candidate's supervising campus administrator. Formal observations by the field supervisor conducted through collaboration with school or district personnel can be used to meet the requirements of this subsection. Informal observations and coaching shall be provided by the field supervisor as appropriate. In a clinical teaching experience, the field supervisor shall collaborate with the candidate and cooperating teacher throughout the clinical teaching experience. For an internship, the field supervisor shall collaborate with the candidate, mentor, and supervising campus administrator throughout the internship.

(1) Each formal observation must be at least 45 minutes in duration, must be conducted by the field supervisor, and must be on the candidate's site in a face-to-face setting.

(2) An EPP must provide the first formal observation within the first third of all clinical teaching assignments and the first six weeks of all internship assignments.

(3) For an internship under an intern certificate or an additional internship described in subsection (f)(2)(B)(v)(I) [(e)(2)(C)(v)(I)] of this section, an EPP must provide a minimum of three formal observations during the first half of the internship and a minimum of two formal observations during the last half of the internship.

(4) For a first-year internship under a probationary certificate or an additional internship described in subsection (f)(2)(B)(v)(II) [(e)(2)(C)(v)(II)] of this section, an EPP must provide a minimum of one formal observation during the first third of the assignment, a minimum of one formal observation during the second third of the assignment, and a minimum of one formal observation during the last third of the assignment.

(5) If an internship under an intern certificate or an additional internship described in subsection (f)(2)(B)(v)(I) [(e)(2)(C)(v)(I)] of this section involves certification in more than one certification category that cannot be taught concurrently during the same period of the school day, an EPP must provide a minimum of three observations in each assignment. For each assignment, the EPP must provide at least two formal observations during the first half of the internship and one formal observation during the second half of the internship.

(6) For a first-year internship under a probationary certificate or an additional internship described in subsection (f)(2)(B)(v)(II) [(e)(2)(C)(v)(II)] of this section that involves certification in more than one certification category that cannot be taught concurrently during the same period of the school day, an EPP must provide a minimum of one formal observation in each of the assignments during the first half of the assignment and a minimum of one formal observation in each assignment during the second half of the assignment.

(7) For a 14-week, full-day clinical teaching assignment, an EPP must provide a minimum of one formal observation during the first third of the assignment, a minimum of one formal observation during the second third of the assignment, and a minimum of one formal observation during the last third of the assignment. For an all-level clinical teaching assignment in more than one location, a minimum of two formal observations must be provided during the first half of the assignment and a minimum of one formal observation must be provided during the second half of the assignment.

(8) For a 28-week, half-day clinical teaching assignment or a full-day clinical teaching assignment that exceeds 14 weeks and extends beyond one semester, an EPP must provide a minimum of two

formal observations during the first half of the assignment and a minimum of two formal observations during the last half of the assignment.

(i) ~~[(h)]~~ Ongoing educator preparation program support for certification in a certification class other than classroom teacher. Supervision of each candidate shall be conducted with the structured guidance and regular ongoing support of an experienced educator who has been trained as a field supervisor. Supervision provided on or after September 1, 2017, must be provided by a field supervisor who has completed TEA-approved observation training. The initial contact, which may be made by telephone, email, or other electronic communication, with the assigned candidate must occur within the first quarter of the assignment. For each formal observation, the field supervisor shall participate in an individualized pre-observation conference with the candidate; document educational practices observed; provide written feedback through an individualized, synchronous, and interactive post-observation conference with the candidate; and provide a copy of the written feedback to the candidate's site supervisor. Neither the pre-observation conference nor the post-observation conference need to be onsite. Formal observations conducted through collaboration with school or district personnel can be used to meet the requirements of this subsection. Informal observations and coaching shall be provided by the field supervisor as appropriate. The field supervisor shall collaborate with the candidate and site supervisor throughout the practicum experience.

(1) Formal observations must be at least 135 minutes in duration in total throughout the practicum and must be conducted by the field supervisor.

~~[(2) At least one of the formal observations must be on the candidate's site in a face-to-face setting.]~~

(2) ~~[(3)]~~ If a formal observation is not conducted on the candidate's site in a face-to-face setting, the formal observation may be provided by use of electronic transmission or other video or technology-based method. A formal observation that is not conducted on the candidates' site in a face-to-face setting must include a pre- and post-conference.

(3) ~~[(4)]~~ Regardless of the type of certificate held by a candidate during a practicum, an ~~[A#]~~ EPP must provide a minimum of one formal observation within the first third of the practicum, one formal observation within the second third of the practicum, and one formal observation within the final third of the practicum.

(j) Coursework and/or training for candidates seeking Early Childhood: Prekindergarten-Grade 3 certification.

(1) In support of the educator standards that are the curricular basis of the Early Childhood: Prekindergarten-Grade 3 certificate, an EPP shall integrate the following concepts and themes throughout the coursework and training:

(A) using planning and teaching practices that support student learning in early childhood, including:

(i) demonstrating knowledge and skills to support child development (birth-age eight) in the following areas:

(I) brain development;

(II) physical development;

(III) social-emotional learning; and

(IV) cultural development;

(ii) demonstrating knowledge and skills of effective, research supported, developmentally appropriate instructional

approaches to support young students' learning, including, but not limited to:

(I) intentional instruction with clear learning goals;

(II) project-based learning;

(III) child-directed inquiry;

(IV) learning through play; and

(V) integration of knowledge across content areas;

(iii) demonstrating knowledge and skills in implementing instruction tailored to the variability in learners' needs, including, but not limited to, small group instruction;

(iv) demonstrating knowledge and skills in early literacy development and pedagogy, including:

(I) demonstrating effective ways to support language development, particularly oral language development, including, but not limited to, growth in academic vocabulary, comprehension, and inferencing abilities; and

(II) demonstrating effective ways to support early literacy development, including letter knowledge, phonological awareness, early writing, and decoding;

(v) demonstrating knowledge and skills in early mathematics and science development and pedagogy;

(vi) demonstrating knowledge and skills in developing and implementing pedagogical approaches for students who are English learners and/or bilingual; and

(vii) demonstrating knowledge and skills in developing and implementing pedagogical approaches for students who have or are at risk for developmental delays and disabilities;

(B) assessing the success of instruction and student learning through developmentally appropriate assessment, including:

(i) demonstrating knowledge of multiple forms of assessment, the information that each form of assessment can provide about a student's learning and development, and how to conceive, construct, and/or select an assessment aligned to standards that can demonstrate student learning to stakeholders;

(ii) demonstrating knowledge in how to use assessments to inform instruction to support student growth; and

(iii) demonstrating knowledge and application of children's developmental continuum in the analysis of assessment results utilizing a variety of assessment types to gain a full understanding of students' current development and assets;

(C) creating developmentally appropriate learning environments, including:

(i) demonstrating knowledge and skills in supporting learners' development of self-regulation and executive function (e.g., behavior, attention, goal setting, cooperation);

(ii) demonstrating knowledge and skills in designing, organizing, and facilitating spaces for learning, particularly small group learning, in both indoor and outdoor contexts; and

(iii) demonstrating knowledge and skills in developing learning environments that support English learners' development, including structures to support language development and communication;

(D) working with families, students, and the community through:

(i) teacher agency and teacher leadership;

(ii) research-based family engagement practices;

(iii) understanding the capabilities of students through parent and community input; and

(iv) the development and modeling of responsive relationships with children; and

(E) using a diversity and equity framework, such as:

(i) demonstrating knowledge and skills in creating early learning communities that capitalize on the cultural knowledge and strengths children bring to the classroom;

(ii) demonstrating knowledge and skills in creating an early learning environment that reflects the communities in which they work; and

(iii) demonstrating knowledge and skills in how to access the knowledge children and families bring to school.

(2) An EPP shall provide each candidate who holds a valid standard, provisional, or one-year classroom teacher certificate specified in §230.31 of this title (relating to Types of Certificates) in a certificate category that allows the applicant to teach all subjects in Prekindergarten, Kindergarten, Grade 1, Grade 2, or Grade 3 with a minimum of 150 clock-hours of coursework and/or training that is directly aligned to the educator standards as specified in Chapter 235, Subchapter B, Division 1, of this title (relating to Early Childhood: Prekindergarten-Grade 3) and that is based on the concepts and themes specified in subsection (j)(1) of this section. A clinical teaching, internship, or practicum assignment is not required for completion of program requirements.

(3) An EPP shall provide each candidate who holds a valid standard, provisional, or one year classroom teacher certificate specified in §230.31 of this title in a certificate category that does not allow the candidate to teach all subjects in Prekindergarten, Kindergarten, Grade 1, Grade 2, or Grade 3 coursework and/or training as specified in subsections (a) and (b) of this section that is directly aligned to the educator standards as specified in Chapter 235, Subchapter B, Division 1, of this title and that is based on the concepts and themes specified in subsection (j)(1) of this section, a clinical experience as specified in subsection (f)(2) of this section, a mentor or cooperating teacher as specified in subsection (g) of this section, and ongoing support as specified in subsection (h) of this section.

(k) Coursework and/or training for candidates seeking a Teacher of Students with Visual Impairments (TVI) Supplemental: Early Childhood-Grade 12 certification.

(1) An EPP must provide a minimum of 300 hours of coursework and/or training related to the educator standards for that certificate adopted by the SBEC.

(2) An EPP shall provide a clinical experience of at least 350 clock-hours in a supervised educator assignment in a public school accredited by the TEA or other school approved by the TEA for this purpose. A TVI certification candidate must demonstrate proficiency in each of the educator standards for the certificate being sought during the clinical experience. A clinical experience is successful when the field supervisor recommends to the EPP that the TVI certification candidate should be recommended for a TVI supplemental certification.

(A) An EPP will provide guidance, assistance, and support for the TVI certification candidate by assigning a cooperating teacher and/or providing individual or group consultation. The EPP

is responsible for providing training to cooperating teachers and/or consultation providers.

(B) An EPP will collaborate with the program coordinator for the Texas School for the Blind and Visually Impaired Statewide Mentor Program to assign a TVI mentor for the TVI certification candidate. The Texas School for the Blind and Visually Impaired Statewide Mentor Program is responsible for providing training for all TVI mentors.

(C) An EPP will provide ongoing support for the TVI certification candidate. Supervision of each candidate shall be conducted with the structured guidance and regular ongoing support of an experienced educator who has been trained as a field supervisor. Supervision must be provided by a field supervisor who has completed TEA-approved observation training. The initial contact, which may be made by telephone, email, or other electronic communication, with the assigned candidate must occur within the first quarter of the assignment. For each formal observation, the field supervisor shall participate in an individualized pre-observation conference with the candidate; document educational practices observed; and provide written feedback through an individualized, synchronous, and interactive post-observation conference with the candidate. Neither the pre-observation conference nor the post-observation conference need to be onsite. Formal observations conducted through collaboration with school or district personnel can be used to meet the requirements of this subsection. Informal observations and coaching shall be provided by the field supervisor as appropriate.

(i) Formal observations must be at least 135 minutes in duration in total throughout the clinical experience and must be conducted by the field supervisor.

(ii) If a formal observation is not conducted on the candidate's site in a face-to-face setting, the formal observation may be provided by use of electronic transmission or other video or technology-based method. A formal observation that is not conducted on the candidates' site in a face-to-face setting must include a pre- and post-conference.

(iii) An EPP must provide a minimum of one formal observation within the first third of the clinical experience, one formal observation within the second third of the clinical experience, and one formal observation within the final third of the clinical experience.

(l) Candidates employed as certified educational aides.

(1) Clinical Teaching Assignment. Candidates employed as certified educational aides may satisfy their clinical teaching assignment requirements through their instructional duties.

(A) If an EPP permits candidates employed as certified educational aides, as defined by Chapter 230, Subchapter E, of this title (relating to Educational Aide Certificate), to satisfy the clinical teaching assignment requirements through their instructional duties, the clinical teaching assignment must be for a minimum of 490 hours (14-week equivalent).

(B) An EPP may permit an educational aide employed in a clinical teaching to be excused from up to 35 of the required hours due to maternity leave, military leave, or illness.

(C) Clinical teaching is successful when the candidate demonstrates proficiency in each of the educator standards for the assignment and the field supervisor and cooperating teacher recommend to the EPP that the candidate should be recommended for a standard certificate. If either the field supervisor or cooperating teacher do not recommend that the candidate should be recommended for a standard certificate, the person who does not recommend the candidate must

provide documentation supporting the lack of recommendation to the candidate and either the field supervisor or cooperating teacher.

(2) Coursework and Training. An EPP must provide coursework and/or training as specified in subsections (a) and (b) of this section, a clinical experience as specified in subsection (f) of this section, a cooperating teacher as specified in subsection (g) of this section, and ongoing support as specified in subsection (h) of this section. An EPP must provide a minimum of one formal observation during the first third of the assignment, a minimum of one formal observation during the second third of the assignment, and a minimum of one formal observation during the last third of the assignment.

(m) [(+)] Exemptions.

(1) Under the TEC, §21.050(c), a candidate who receives a bachelor's degree required for a teaching certificate on the basis of higher education coursework completed while receiving an exemption from tuition and fees under the TEC, §54.363, is exempt from the requirements of this chapter relating to field-based experience, internship, or clinical teaching.

(2) Under the TEC, §21.0487(c)(2)(B), a candidate's employment by a school or district as a Junior Reserve Officer Training Corps instructor before the person was enrolled in an EPP or while the person is enrolled in an EPP is exempt from any clinical teaching, internship, or field-based experience program requirement.

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

Filed with the Office of the Secretary of State on June 11, 2018.

TRD-201802569

Cristina De La Fuente-Valadez

Director, Rulemaking

State Board for Educator Certification

Earliest possible date of adoption: July 22, 2018

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



## CHAPTER 233. CATEGORIES OF CLASSROOM TEACHING CERTIFICATES

### 19 TAC §§233.1 - 233.15, 233.17

The State Board for Educator Certification (SBEC) proposes amendments to §§233.1 - 233.15 and 233.17 concerning categories of classroom teaching certificates. The proposed amendments would implement changes resulting from the 85th Texas Legislature, Regular Session, 2017, to establish new certificates for Early Childhood: Prekindergarten-Grade 3 and Trade and Industrial Workforce Training: Grades 6-12; would specify procedures for an interested party to request an additional foreign language certificate; and would identify any additional requirements to obtain certification and/or be eligible to teach specific courses. The proposed amendments would also reflect technical changes that would provide clarification for consistent application of these rules, would remove duplicative language specifying assignments into which certificate holders are eligible to be placed, and would establish consistent information related to the classroom certificates issued by the SBEC.

The Texas Education Code (TEC), §21.041(b)(2), authorizes the SBEC to adopt rules that specify the classes of educator certificates to be issued, including emergency certificates. The SBEC

rules in 19 Texas Administrative Code (TAC) Chapter 233 establish the general categories of classroom teaching certificates, identify specific grade levels and subject areas of classroom certificates, and where appropriate, state the general area(s) of assignments that may be taught by the holder of each certificate.

The proposed amendments would remove assignment-specific text from most sections of the rule as this information is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments. Information relevant to either legislative mandates, training requirements, or other qualifications necessary for issuance of a specific certificate prior to placement into the assignment would be maintained. Following is a description of the proposed amendments.

#### §233.1. *General Authority*

Language would be amended in subsection (e) to reference §230.21, Educator Assessment, to clarify and establish a single, specific list of examinations that must be successfully completed prior to issuance of an initial standard classroom teaching certificate. Language in subsection (f) would be deleted as it is duplicative of the test requirements referenced in subsection (e).

A proposed new subsection (f) would allow staff to extend rule deadlines when rules in this chapter cannot be complied with because of a disaster that results in the governor declaring a state of disaster. This amendment would allow Texas Education Agency (TEA) staff to extend deadlines in this chapter for up to 90 days to accommodate persons in the disaster areas identified by the governor's declaration.

Language in subsection (h) would be amended to add the text, "where applicable," to clarify that only certain certificates have general assignment descriptions that make them subject to legislative mandates, federal requirements, or other training or guidelines specific to issuance of the certificate.

#### §233.2. *Core Subjects; Generalist*

Language would be amended in the heading to add "Early Childhood" and delete "Generalist" since those certificates will no longer be issued at the completion of this rulemaking process. This proposed amendment does not change the eligibility status for classroom assignments for individuals issued a Generalist certificate through the provisions of this chapter. Proposed new subsection (a) would add the Early Childhood: Prekindergarten-Grade 3 Certificate to implement SB 1839 and HB 2039, 85th Texas Legislature, Regular Session, 2017.

The Core Subjects: Early Childhood-Grade 6 and Core Subjects: Grades 4-8 certificate references previously listed in subsections (a) and (b) would be relettered to subsections (b) and (c).

Current subsections (c) and (d) would be deleted since the certificates for Generalist: Early Childhood-Grade 6 and Generalist: Grades 4-8 were issued for the last time in fall 2017.

#### §233.3. *English Language Arts and Reading; Social Studies*

Language in subsections (a) - (h) that specifies what the certificate holder can teach would be deleted as this information is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments. Current subsection (g) would be deleted since the Journalism: Grades 8-12 certificate was issued for the last time in 2016. Remaining subsections would be relettered accordingly.

#### §233.4. *Mathematics; Science*



Language in subsections (b) - (j) that specifies what the certificate holder can teach would be deleted as this information is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments. Current subsections (h) and (j) would be deleted since the certificates for Physics/Mathematics: Grades 8-12 and Mathematics/Physical Science/Engineering: Grades 8-12 were issued for the last time in 2016. Remaining subsections would be relettered accordingly.

#### *§233.5. Technology Applications and Computer Science*

Language in subsections (a) - (c) that specifies what the certificate holder can teach would be deleted as this information is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments.

#### *§233.6. Bilingual Education*

Current subsections (a) and (b) would be deleted since the certificates for Bilingual Generalist: Early Childhood-Grade 6 and Bilingual Generalist: Grades 4-8 were issued for the last time in fall 2017. Remaining subsections would be relettered accordingly.

#### *§233.7. English as a Second Language*

Current subsections (a) and (b) would be deleted since the certificates for English as a Second Language Generalist: Early Childhood-Grade 6 and English as a Second Language Generalist: Grades 4-8 were issued for the last time in fall 2017. Remaining subsections would be relettered accordingly.

#### *§233.8. Special Education*

Language in subsection (a) specific to qualifications for assignment as a special education teacher would be deleted as this information is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments.

#### *§233.9. Gifted and Talented*

Language that specifies what the certificate holder can teach would be deleted as this information is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments.

#### *§233.10. Fine Arts*

Language in subsections (a), (b), and (e) that specifies what the certificate holder can teach would be deleted as this information is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments.

#### *§233.11. Health*

Language that specifies what the certificate holder can teach would be deleted as this information is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments.

#### *§233.12. Physical Education*

Language that specifies what the certificate holder can teach would be deleted as this information is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments.

#### *§233.13. Career and Technical Education (Certificates not requiring experience and preparation in a skill area)*

Language in subsections (a) - (f) that specifies what the certificate holder can teach would be deleted as this information

is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments. Current subsections (e) and (g) would be deleted since the certificates for Agricultural Science and Technology: Grades 6-12 and Business Education: Grades 6-12 were issued for the last time in fall 2017.

Current subsection (i) that references the certificate for Science, Technology, Engineering, and Mathematics (STEM): Grades 6-12 certificate would be deleted as there are currently no approved educator preparation programs (EPPs) to prepare candidates, no adopted educator standards to guide the foundation of educator preparation or test development, and no examination available to assess an individual's preparedness and readiness for issuance of a certificate in this subject area. There are other classroom certificates already available for issuance under provisions of this chapter that qualify an individual to be placed in an assignment to teach STEM courses as specified in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments. Remaining subsections would be relettered accordingly.

#### *§233.14. Career and Technical Education (Certificates requiring experience and preparation in a skill area)*

Current subsections (b) and (d) would be deleted since the certificates for Marketing Education: Grades 8-12 and Health Science Technology Education: Grades 8-12 were issued for the last time in fall 2017. Remaining subsections would be relettered accordingly.

If proposed changes to 19 TAC Chapter 233 are adopted by the SBEC, subject to State Board of Education review, TEA staff anticipates future rulemaking specific to 19 TAC Chapter 231, Requirements for Public School Personnel Assignments, to align with applicable changes made in this chapter. This action would be necessary to maintain clear communication with the public regarding the current list of classroom certificates issued as it relates to teaching assignments specified in 19 TAC Chapter 231.

Proposed new subsection (e) would add the Trade and Industrial Workforce Training Certificate: Grades 6-12, mandated in HB 3349, 85th Texas Legislature, Regular Session, 2017. The proposed new subsection would align with legislation as it relates to the minimal educational requirement, the recency and duration of experience, and licensure for a specific trade. The proposed new subsection would also support agency-wide and statewide efforts to open pathways into career and technical areas for candidates with knowledge, skills, experience, and licensure to be successful in this area of certification. Eligibility and coursework requirements for individuals interested in pursuing this area of certification currently are addressed in 19 TAC Chapter 227, Provisions for Educator Preparation Candidates, and 19 TAC Chapter 228, Requirements for Educator Preparation Programs.

#### *§233.15. Languages Other Than English*

Proposed new subsection (a) would provide introductory text specific to certificates for languages other than English (LOTE) issued by the SBEC. Current subsections (a) - (p) that identify each foreign language certificate area relating to subsection (a) would be renumbered as paragraphs (1) - (16), and language specifying what the certificate holder can teach would be deleted as this information is duplicative and already resides in 19 TAC Chapter 231, Requirements for Public School Personnel Assignments.

TEA staff recognizes that as districts attempt to be responsive to the needs and interests of their multicultural communities, as well as continue to prepare their students for the increasing globalization of our economy, there is a need to add additional language choices for students. For example, at the October 2017 SBEC meeting, the SBEC received public testimony related to the languages of Tamil and Esperanto.

To address these district needs, there are existing provisions in 19 TAC §231.97, Innovative Course, and 19 TAC §231.99, Local Credit Course, that allow school districts flexibility to assign individuals to teach a foreign language course for which a certification does not exist; however, the course offering will not count for the foreign language graduation requirement. An assignment for an innovative course is allowed with a valid certificate that matches the grade level of the assignment determined by TEA. An assignment where local credit is given is allowed with a valid certificate that matches the grade level of the assignment or appropriate qualifications as determined by the school district. Districts that are interested in offering a foreign language course for which there is no educator certification and that do want it to count for the foreign language graduation requirement, can identify a language proficiency examination in that foreign language and provide for credit by examination.

Because districts are required to ensure that instructors are appropriately certified to teach any Texas Essential Knowledge and Skills-based course, some school districts have eliminated LOTE courses because SBEC does not issue a certificate for some languages. Beyond existing options for districts to offer LOTE courses for which there are no SBEC certificates, proposed new subsection (b) would establish procedures to allow an interested person to submit a request for an additional LOTE certificate utilizing the provisions in 19 TAC §250.20, Petition for Adoption of Rules or Rule Changes, to petition the SBEC for rulemaking. Proposed new subsection (b)(1) would require the petitioner to clarify the desired certificate and confirm the number of students designated to receive instruction in the language other than English; proposed new subsection (b)(2) would require the petitioner to clarify the number of individuals interested in adding certification in the new language; and proposed new subsection (b)(3) would require the petitioner to describe the rationale and student benefit for the additional LOTE certificate. These requirements will allow TEA staff to determine the extent of the need for the additional foreign language and will inform staff's recommendation to the SBEC. Also, having in rule the specific process necessary for the SBEC to consider a request for a new LOTE certification would provide clarification and guidance to interested school districts and individuals.

#### *§233.17. Junior Reserve Officer Training Corps.*

Language would be amended in paragraph (4) to replace the specific test name reference, pedagogy and professional responsibilities, with more general wording that confirms the appropriate examination must still be passed for issuance of the certificate. This change mirrors other technical edits in this chapter to verify that information about required examinations for issuance of licensure is retained and updated in the figure adopted in rule in 19 TAC §230.21(e), Educator Assessment.

The proposed amendments would have no additional procedural and reporting implications. The proposed amendments would have no additional locally maintained paperwork requirements.

**FISCAL NOTE.** Ryan Franklin, associate commissioner for educator leadership and quality, has determined that for the first

five-year period the amendments are in effect, there will be no additional fiscal implications for state and local governments and there are no additional costs to entities required to comply with the proposed amendments. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code (TGC), §2001.022. The proposed amendments do not impose a cost on regulated persons, another state agency, a special district, or local government and, therefore, are not subject to TGC, §2001.0045.

**PUBLIC BENEFIT/COST NOTE.** Mr. Franklin has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendment would be the continued issuance of classroom teaching certificates to eligible individuals. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.** There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in TGC, §2006.002, is required.

**GOVERNMENT GROWTH IMPACT:** The TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not expand, limit, or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

**REQUEST FOR PUBLIC COMMENT.** The public comment period on the proposal begins June 22, 2018 and ends July 23, 2018. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About\\_TEA/Laws\\_and\\_Rules/SBEC\\_Rules\\_\(TAC\)/Proposed\\_State\\_Board\\_for\\_Educator\\_Certification\\_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/). The State Board for Educator Certification (SBEC) will take registered oral and written comments on the proposed amendments at the August 3, 2018 meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Mr. Ryan Franklin, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on June 22, 2018.

**STATUTORY AUTHORITY.** The amendments are proposed under the Texas Education Code (TEC), §21.003(a), which states that a person may not be employed as a teacher, teacher intern or teacher trainee, librarian, educational aide, administrator, educational diagnostician, or school counselor by a school district unless the person holds an appropriate certificate or permit issued as provided by the TEC, Chapter 21, Subchapter B; TEC, §21.031, which authorizes the State Board for Educator

Certification (SBEC) to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators, and states that in proposing rules under the TEC, Chapter 21, Subchapter B, the SBEC shall ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state; TEC, §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; TEC, §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; TEC, §21.041(b)(3), which requires the SBEC to propose rules that specify the period for which each class of educator certificate is valid; TEC, §21.041(b)(4), which requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; TEC, §21.041(b)(6), which requires the SBEC to propose rules that provide for special or restricted certification of educators, including certification of instructors of American Sign Language; TEC, §21.044(e), which provides the requirements that SBEC rules must specify for a person to obtain a certificate to teach a health science technology education course; TEC, §21.044(f), which provides that SBEC rules for obtaining a certificate to teach a health science technology education course shall not specify that a person must have a bachelor's degree or establish any other credential or teaching experience requirements that exceed the requirements under TEC, §21.044(e); TEC, §21.0442, as added by HB 3349, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to create an abbreviated educator preparation program for trade and industrial workforce training; TEC, §21.048(a), which requires the SBEC to propose rules prescribing comprehensive examinations for each class of certificate issued by the SBEC. TEC, §21.048(a), also specifies that the commissioner of education shall determine the satisfactory level of performance required for each certification examination and require a satisfactory level of examination performance in each core subject covered by the generalist certification examination; TEC, §21.0489, as added by Senate Bill 1839 and House Bill (HB) 2039, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to create a prekindergarten-Grade 3 certificate; and TEC, §21.0491, as added by HB 3349, 85th Texas Legislature, Regular Session, 2017, which requires the SBEC to create a probationary and standard trade and industrial workforce training certificate.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, (TEC), §§21.003(a); 21.031; 21.041(b)(1) - (4) and (6); 21.044(e) and (f); 21.048(a); 21.0442 and 21.0491, as added by House Bill (HB) 3349, 85th Texas Legislature, Regular Session, 2017; and 21.0489, as added by Senate Bill (SB) 1839 and HB 2039, 85th Texas Legislature, Regular Session, 2017.

§233.1. *General Authority.*

(a) In this chapter, the State Board for Educator Certification (SBEC) establishes separate certificate categories within the certificate class for the classroom teacher established under §230.33 of this title (relating to Classes of Certificates).

(b) For purposes of authorizing a person to be employed by a school district under the Texas Education Code, §21.003(a), a certificate category identifies:

- (1) the content area or the special student population the holder may teach;
- (2) the grade levels the holder may teach; and
- (3) the earliest date the certificate may be issued.

(c) Unless provided otherwise in this title, the content area and grade level of a certificate category as well as the standards underlying the certification examination for each category are aligned with the Texas Essential Knowledge and Skills curriculum adopted by the State Board of Education.

(d) A category includes both a standard certificate and the related emergency or temporary credential. A category may comprise a standard base certificate or a supplemental certificate. A supplemental certificate may be issued only to a person who already holds the appropriate standard base certificate.

(e) A person must satisfy all applicable requirements and conditions under this title and other law to be issued a certificate in a category. A person seeking an initial standard certification must pass the appropriate examination(s) as prescribed in §230.21 of this title (relating to Educator Assessment) [grade level of pedagogy and professional responsibility certification examination; the appropriate content subject examination(s); and, as applicable, the appropriate oral or communication proficiency examination in the target language for the certification sought as established by the SBEC]. A person completing requirements for a standard certificate using a score on an examination that has been eliminated must apply and pay for the certification not later than one year from the last test administration of the deleted examination. Exceptions may be granted for a period of two years after the elimination of the examination for catastrophic illness of the educator or an immediate family member or military service of the applicant.

(f) If the governor declares a state of disaster consistent with the Texas Government Code, §418.014, Texas Education Agency staff may extend deadlines in this chapter for up to 90 days as necessary to accommodate persons in the affected disaster areas.

~~[(f) A person seeking a languages other than English certificate valid for Early Childhood-Grade 12 specified in §233.15 of this title (relating to Languages Other Than English) must successfully complete an approved oral or communication proficiency examination in the target language in addition to the appropriate grade level of pedagogy and professional responsibility and content subject examinations as specified in subsection (e) of this section.]~~

(g) A holder of a certificate valid for Grades 4-8 may teach technology applications in Grades 4-8 if integrated within an academic course or through interdisciplinary methodology in those subjects that the individual is certified to teach. The school district is responsible for ensuring that the educator has the appropriate technology applications knowledge and skills to teach the course(s) to which he or she is assigned. If Technology Applications is taught as a separate course, the educator shall be required to hold an appropriate technology applications certificate as specified in §233.5 of this title (relating to Technology Applications and Computer Science).

(h) The general assignment descriptions in this chapter, where applicable, are subject to the specific provisions for the assignment of a holder of a certificate in Chapter 231 of this title (relating to Requirements for Public School Personnel Assignments), and in the event of any conflict with this chapter, Chapter 231 of this title shall prevail.

§233.2. *Early Childhood; Core Subjects; [Generalist]*

(a) Early Childhood: Prekindergarten-Grade 3. The Early Childhood: Prekindergarten-Grade 3 certificate may be issued no earlier than January 1, 2020.

(b) [(a)] Core Subjects: Early Childhood-Grade 6. The Core Subjects: Early Childhood-Grade 6 certificate may be issued no earlier than January 1, 2015. [The holder of the Core Subjects: Early Childhood-Grade 6 certificate may teach the following content areas in a prekindergarten program, in kindergarten, and in Grades 1-6:]

- [(1) Art;]
- [(2) Health;]
- [(3) Music;]
- [(4) Physical Education;]
- [(5) English Language Arts and Reading;]
- [(6) Mathematics;]
- [(7) Science;]
- [(8) Social Studies;]
- [(9) Technology Applications; and]
- [(10) Theater.]

(c) [(b)] Core Subjects: Grades 4-8. The Core Subjects: Grades 4-8 certificate may be issued no earlier than January 1, 2015. [The holder of the Core Subjects: Grades 4-8 certificate may teach the following content areas in Grades 4-8:]

- [(1) English Language Arts and Reading;]
- [(2) Mathematics;]
- [(3) Science; and]
- [(4) Social Studies.]

[(e) Generalist: Early Childhood-Grade 6. The Generalist: Early Childhood-Grade 6 certificate may be issued no earlier than September 1, 2008. A candidate must meet the requirements for a Generalist: Early Childhood-Grade 6 certificate by August 31, 2017. All applications must be complete and received by the Texas Education Agency (TEA) by October 30, 2017. The holder of the Generalist: Early Childhood-Grade 6 certificate may teach the following content areas in a prekindergarten program, in kindergarten, and in Grades 1-6:]

- [(1) Art;]
- [(2) Health;]
- [(3) Music;]
- [(4) Physical Education;]
- [(5) English Language Arts and Reading;]
- [(6) Mathematics;]
- [(7) Science;]
- [(8) Social Studies;]
- [(9) Technology Applications; and]
- [(10) Theater.]

[(d) Generalist: Grades 4-8. The Generalist: Grades 4-8 certificate may be issued no earlier than September 1, 2002. A candidate must meet the requirements for a Generalist: Grades 4-8 certificate by August 31, 2017. All applications must be complete and received by the TEA by October 30, 2017. The holder of the Generalist: Grades 4-8 certificate may teach the following content areas in Grades 4-8:]

- [(1) English Language Arts and Reading;]
- [(2) Mathematics;]

[(3) Science; and]

[(4) Social Studies.]

§233.3. *English Language Arts and Reading; Social Studies.*

(a) English Language Arts and Reading: Grades 4-8. The English Language Arts and Reading: Grades 4-8 certificate may be issued no earlier than September 1, 2002. [The holder of the English Language Arts and Reading: Grades 4-8 certificate may teach English language arts and reading in Grades 4-8.]

(b) Social Studies: Grades 4-8. The Social Studies: Grades 4-8 certificate may be issued no earlier than September 1, 2002. [The holder of the Social Studies: Grades 4-8 certificate may teach social studies in Grades 4-8.]

(c) English Language Arts and Reading/Social Studies: Grades 4-8. The English Language Arts and Reading/Social Studies: Grades 4-8 certificate may be issued no earlier than September 1, 2002. [The holder of the English Language Arts and Reading/Social Studies: Grades 4-8 certificate may teach English language arts and reading, and social studies in Grades 4-8.]

(d) English Language Arts and Reading: Grades 7-12. The English Language Arts and Reading: Grades 7-12 certificate may be issued no earlier than September 1, 2013. [The holder of the English Language Arts and Reading: Grades 7-12 certificate may teach English language arts and reading in Grades 7 and 8 and all English language arts and reading courses in Grades 9-12, excluding journalism and speech courses.]

(e) Social Studies: Grades 7-12. The Social Studies: Grades 7-12 certificate may be issued no earlier than September 1, 2013. [The holder of the Social Studies: Grades 7-12 certificate may teach social studies in Grades 7 and 8 and all social studies and economics courses in Grades 9-12.]

(f) History: Grades 7-12. The History: Grades 7-12 certificate may be issued no earlier than September 1, 2013. [The holder of the History: Grades 7-12 certificate may teach social studies in Grades 7 and 8 and all history courses in Grades 9-12.]

[(g) Journalism: Grades 8-12. The Journalism: Grades 8-12 certificate may be issued no earlier than September 1, 2005. The holder of the Journalism: Grades 8-12 certificate is eligible to teach all journalism courses in Grades 8-12. A candidate must meet the requirements for a Journalism: Grades 8-12 certificate by August 31, 2016. All applications must be complete and received by the TEA by October 30, 2016.]

[(h) Journalism: Grades 7-12. The Journalism: Grades 7-12 certificate may be issued no earlier than September 1, 2013. [The holder of the Journalism: Grades 7-12 certificate is eligible to teach all journalism courses in Grades 7-12.]

[(i) Speech: Grades 7-12. The Speech: Grades 7-12 certificate may be issued no earlier than November 1, 2010. [The holder of the Speech: Grades 7-12 certificate is eligible to teach all speech courses in Grades 7-12.]

§233.4. *Mathematics; Science.*

(a) Mathematics: Grades 4-8. The Mathematics: Grades 4-8 certificate may be issued no earlier than September 1, 2002. [The holder of the Mathematics: Grades 4-8 certificate may teach mathematics in Grades 4-8, including Algebra I for high school credit.]

(b) Science: Grades 4-8. The Science: Grades 4-8 certificate may be issued no earlier than September 1, 2002. [The holder of the Science: Grades 4-8 certificate may teach science in Grades 4-8.]

(c) Mathematics/Science: Grades 4-8. The Mathematics/Science: Grades 4-8 certificate may be issued no earlier than September 1, 2002. [The holder of the Mathematics/Science: Grades 4-8 certificate may teach mathematics and science in Grades 4-8.]

(d) Mathematics: Grades 7-12. The Mathematics: Grades 7-12 certificate may be issued no earlier than September 1, 2013. [The holder of the Mathematics: Grades 7-12 certificate may teach mathematics in Grades 7 and 8 and all mathematics courses in Grades 9-12.]

(e) Science: Grades 7-12. The Science: Grades 7-12 certificate may be issued no earlier than September 1, 2013. [The holder of the Science: Grades 7-12 certificate may teach science in Grades 7 and 8 and all science courses in Grades 9-12.]

(f) Life Science: Grades 7-12. The Life Science: Grades 7-12 certificate may be issued no earlier than September 1, 2013. [The holder of the Life Science: Grades 7-12 certificate may teach science in Grades 7 and 8 and all biology, environmental systems, environmental science, and aquatic science courses in Grades 9-12.]

(g) Physical Science: Grades 6-12. The Physical Science: Grades 6-12 certificate may be issued no earlier than September 1, 2013. [The holder of the Physical Science: Grades 6-12 certificate is eligible to teach science in Grades 6-8 and all physics and chemistry courses, including Integrated Physics and Chemistry, in Grades 9-12.]

[(h) Physics/Mathematics: Grades 8-12. The Physics/Mathematics: Grades 8-12 certificate may be issued no earlier than September 1, 2004. The holder of the Physics/Mathematics: Grades 8-12 certificate is eligible to teach mathematics in Grade 8 and all mathematics courses in Grades 9-12. The holder may also teach science in Grade 8 and all physics courses in Grades 9-12. A candidate must meet the requirements for a Physics/Mathematics: Grades 8-12 certificate by August 31, 2016. All applications must be complete and received by the TEA by October 30, 2016.]

[(h) [(i)] Physics/Mathematics: Grades 7-12. The Physics/Mathematics: Grades 7-12 certificate may be issued no earlier than September 1, 2014. [The holder of the Physics/Mathematics: Grades 7-12 certificate is eligible to teach mathematics in Grades 7 and 8 and all mathematics courses in Grades 9-12. The holder may also teach science in Grades 7 and 8 and all physics courses in Grades 9-12.]

[(i) Mathematics/Physical Science/Engineering: Grades 8-12. The Mathematics/Physical Science/Engineering: Grades 8-12 certificate may be issued no earlier than September 1, 2005. The holder of the Mathematics/Physical Science/Engineering: Grades 8-12 certificate is eligible to teach mathematics in Grade 8 and all mathematics courses in Grades 9-12. The holder is also eligible to teach science in Grade 8 and all physics and chemistry courses, including Integrated Physics and Chemistry, in Grades 9-12. A candidate must meet the requirements for a Mathematics/Physical Science/Engineering: Grades 8-12 certificate by August 31, 2016. All applications must be complete and received by the TEA by October 30, 2016.]

(i) [(k)] Mathematics/Physical Science/Engineering: Grades 6-12. The Mathematics/Physical Science/Engineering: Grades 6-12 certificate may be issued no earlier than September 1, 2014. [The holder of the Mathematics/Physical Science/Engineering: Grades 6-12 certificate is eligible to teach mathematics in Grades 6-8 and all mathematics courses in Grades 9-12. The holder is also eligible to teach science in Grades 6-8 and all physics and chemistry courses, including Integrated Physics and Chemistry, in Grades 9-12.]

(j) [(h)] Chemistry: Grades 7-12. The Chemistry: Grades 7-12 certificate may be issued no earlier than September 1, 2013. [The holder of the Chemistry: Grades 7-12 certificate is eligible to teach science in Grades 7 and 8 and all chemistry courses in Grades 9-12.]

#### §233.5. *Technology Applications and Computer Science.*

(a) Technology Applications: Grades 8-12. The Technology Applications: Grades 8-12 certificate may be issued no earlier than June 1, 2001. [The holder of the Technology Applications: Grades 8-12 certificate may teach Technology Applications in Grade 8 and the following technology applications courses in Grades 9-12: desktop publishing, digital graphics/animation, multimedia, video technology, web mastering, and independent study in technology applications.] A candidate must meet the requirements for a Technology Applications: Grades 8-12 certificate by August 31, 2018. All applications must be complete and received by the Texas Education Agency by October 30, 2018.

(b) Technology Applications: Early Childhood-Grade 12. The Technology Applications: Early Childhood-Grade 12 certificate may be issued no earlier than September 1, 2002. [The holder of the Technology Applications: Early Childhood-Grade 12 certificate may teach the technology applications curriculum in prekindergarten, kindergarten, and Grades 1-12, with the exception of Computer Science I and II.]

(c) Computer Science: Grades 8-12. The Computer Science: Grades 8-12 certificate may be issued no earlier than June 1, 2001. [The holder of the Computer Science: Grades 8-12 certificate may teach Computer Science I, II, and III in Grades 8-12 and the following courses in Grades 9-12: Digital Forensics, Robotics Programming and Design, Fundamentals of Computer Science, Advanced Placement Computer Science Principles, Game Programming and Design, and Mobile Application Development.]

#### §233.6. *Bilingual Education.*

[(a) Bilingual Generalist: Early Childhood-Grade 6. The Bilingual Generalist: Early Childhood-Grade 6 certificate may be issued no earlier than September 1, 2008. The holder of the Bilingual Generalist: Early Childhood-Grade 6 certificate may teach in a bilingual prekindergarten program, a bilingual kindergarten program, and a bilingual program in Grades 1-6. The holder of the Bilingual Generalist: Early Childhood-Grade 6 certificate may teach the same content areas, in either a bilingual or general education program, as the holder of the Generalist: Early Childhood-Grade 6 certificate may teach under §233.2(a) of this title (relating to Generalist). The holder of the Bilingual Generalist: Early Childhood-Grade 6 certificate may also teach in an English as a second language program in Early Childhood-Grade 6. A candidate must meet the requirements for a Bilingual Generalist: Early Childhood-Grade 6 certificate by August 31, 2017. All applications must be complete and received by the Texas Education Agency (TEA) by October 30, 2017.]

[(b) Bilingual Generalist: Grades 4-8. The Bilingual Generalist: Grades 4-8 certificate may be issued no earlier than September 1, 2002. The holder of the Bilingual Generalist: Grades 4-8 certificate may teach in a bilingual program in Grades 4-8. The holder of the Bilingual Generalist: Grades 4-8 certificate may teach the same content areas, in either a bilingual or a general education program, as the holder of the Generalist: Grades 4-8 certificate may teach under §233.2(b) of this title. The holder of the Bilingual Generalist: Grades 4-8 certificate may also teach in an English as a second language program in Grades 4-8. A candidate must meet the requirements for a Bilingual Generalist: Grades 4-8 certificate by August 31, 2017. All applications must be complete and received by the TEA by October 30, 2017.]

(a) [(e)] Bilingual Education Supplemental. The Bilingual Education Supplemental certificate may be issued no earlier than September 1, 2009. [The holder of the Bilingual Education Supplemental certificate may teach in a bilingual program at the same grade levels and in the content area(s) of the holder's base certificate. The holder of the Bilingual Education Supplemental certificate may also teach in an English as a second language program at the same grade levels and in the content area(s) of the holder's base certificate.]

(b) [(d)] The State Board for Educator Certification shall determine the target languages for bilingual education certificates based on the student population in the Texas public schools.

§233.7. *English as a Second Language.*

[(a)] English as a Second Language Generalist: Early Childhood-Grade 6. The English as a Second Language Generalist: Early Childhood-Grade 6 certificate may be issued no earlier than September 1, 2008. The holder of the English as a Second Language Generalist: Early Childhood-Grade 6 certificate may teach in an English as a second language program in prekindergarten-Grade 6. The holder of an English as a Second Language Generalist: Early Childhood-Grade 6 certificate may also teach the component of a dual language immersion/one-way or two-way bilingual education program model that is provided in English for prekindergarten-Grade 6. The holder of the English as a Second Language Generalist: Early Childhood-Grade 6 certificate may teach the same content areas, in either an English as a second language or a general education program, as the holder of the Generalist: Early Childhood-Grade 6 certificate may teach under §233.2(a) of this title (relating to Generalist). A candidate must meet the requirements for an English as Second Language Generalist: Early Childhood-Grade 6 certificate by August 31, 2017. All applications must be complete and received by the Texas Education Agency (TEA) by October 30, 2017.]

[(b)] English as a Second Language Generalist: Grades 4-8. The English as a Second Language Generalist: Grades 4-8 certificate may be issued no earlier than September 1, 2003. The holder of the English as a Second Language Generalist: Grades 4-8 certificate may teach in an English as a second language program in Grades 4-8. The holder of an English as a Second Language Generalist: Grades 4-8 certificate may also teach the component of a dual language immersion/one-way or two-way bilingual education program model that is provided in English for Grades 4-6 only. The holder of the English as a Second Language Generalist: Grades 4-8 certificate may teach the same content areas, in either an English as a second language or a general education program, as the holder of the Generalist: Grades 4-8 certificate may teach under §233.2(b) of this title. A candidate must meet the requirements for an English as a Second Language Generalist: Grades 4-8 certificate by August 31, 2017. All applications must be complete and received by the TEA by October 30, 2017.]

[(e)] English as a Second Language Supplemental. The English as a Second Language Supplemental certificate may be issued no earlier than September 1, 2003. [The holder of the English as a Second Language Supplemental certificate may teach in an English as a second language program at the same grade levels and in the same content area(s) of the holder's base certificate. The holder of an English as a Second Language Supplemental certificate may also teach the component of a dual language immersion/one-way or two-way bilingual program model that is provided in English for prekindergarten-Grade 6.]

§233.8. *Special Education.*

(a) Special Education: Early Childhood-Grade 12. The Special Education: Early Childhood-Grade 12 certificate may be issued no earlier than September 1, 2003. [The holder of the Special Education: Early Childhood-Grade 12 certificate may teach at any level of a basic special education instructional program serving eligible students

3-21 years of age, unless otherwise specified in §89.1131 of this title (relating to Qualifications of Special Education, Related Service, and Paraprofessional Personnel). If an individual is providing content instruction in a special education classroom setting, a valid certificate that matches the subject and grade level of the assignment is also required, or the individual must demonstrate competency through the state's 2010 and 2011 high objective uniform State standard of evaluation for elementary and secondary special education teachers.]

(b) Special Education Supplemental. The Special Education Supplemental certificate may be issued no earlier than September 1, 2003. [The holder of the Special Education Supplemental certificate may teach in a special education instructional program serving eligible students at the same grade levels and in the content area(s) of the holder's base certificate, unless otherwise specified in §89.1131 of this title.]

(c) Teacher of the Deaf and Hard of Hearing: Early Childhood-Grade 12. The Teacher of the Deaf and Hard of Hearing: Early Childhood-Grade 12 certificate may be issued no earlier than September 1, 2005. [The holder of the Teacher of the Deaf and Hard of Hearing: Early Childhood-Grade 12 certificate is eligible to teach at any level in a special education instructional program serving eligible students, unless otherwise specified in §89.1131 of this title.]

(d) Teacher of Students with Visual Impairments Supplemental: Early Childhood-Grade 12. The Teacher of Students with Visual Impairments Supplemental: Early Childhood-Grade 12 certificate may be issued no earlier than September 1, 2005. [The holder of the Teacher of Students with Visual Impairments Supplemental: Early Childhood-Grade 12 certificate is eligible to teach at any level in a special education instructional program serving eligible students, unless otherwise specified in §89.1131 of this title.]

§233.9. *Gifted and Talented.*

Gifted and Talented Supplemental. The Gifted and Talented Supplemental certificate may be issued no earlier than September 1, 2004. [The holder of the Gifted and Talented Supplemental certificate may teach students in a gifted and talented program at the same grade levels and in the same content area(s) of the holder's base certificate.]

§233.10. *Fine Arts.*

(a) Music: Early Childhood-Grade 12. The Music: Early Childhood-Grade 12 certificate may be issued no earlier than September 1, 2004. [The holder of the Music: Early Childhood-Grade 12 certificate is eligible to teach music in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(b) Art: Early Childhood-Grade 12. The Art: Early Childhood-Grade 12 certificate may be issued no earlier than September 1, 2005. [The holder of the Art: Early Childhood-Grade 12 certificate is eligible to teach art in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(c) Theatre: Early Childhood-Grade 12. The Theatre: Early Childhood-Grade 12 certificate may be issued no earlier than September 1, 2005. [The holder of the Theatre: Early Childhood-Grade 12 certificate is eligible to teach theatre in a prekindergarten program, in kindergarten, and in Grades 1-12. The holder of the Theatre: Early Childhood-Grade 12 certificate is also eligible to teach Musical Theatre, Grades 9-12.]

(d) Dance: Grades 8-12. The Dance: Grades 8-12 certificate may be issued no earlier than September 1, 2005. The holder of the Dance: Grades 8-12 certificate is eligible to teach all dance courses in Grades 8-12. [The holder of the Dance: Grades 8-12 certificate is also eligible to teach Dance, Middle School 1-3 courses for Grades 6-8.] A candidate must meet the requirements for a Dance: Grades 8-12

certificate by August 31, 2018. All applications must be complete and received by the Texas Education Agency by October 30, 2018.

(e) Dance: Grades 6-12. The Dance: Grades 6-12 certificate may be issued no earlier than March 1, 2017. [The holder of the Dance: Grades 6-12 certificate is eligible to teach all dance courses in Grades 6-12.]

§233.11. *Health.*

Health: Early Childhood-Grade 12. The Health: Early Childhood-Grade 12 certificate may be issued no earlier than September 1, 2004. [The holder of the Health: Early Childhood-Grade 12 certificate may teach health in a prekindergarten program, in kindergarten, and in Grades 1-12.]

§233.12. *Physical Education.*

Physical Education: Early Childhood-Grade 12. The Physical Education: Early Childhood-Grade 12 certificate may be issued no earlier than September 1, 2004. [The holder of the Physical Education: Early Childhood-Grade 12 certificate may teach physical education in a prekindergarten program, in kindergarten, and in Grades 1-12.]

§233.13. *Career and Technical Education (Certificates not requiring experience and preparation in a skill area).*

(a) Technology Education: Grades 6-12. The Technology Education: Grades 6-12 certificate may be issued no earlier than September 1, 2004. [The holder of the Technology Education: Grades 6-12 certificate may teach all technology education courses in Grades 6-12.]

(b) Family and Consumer Sciences, Composite: Grades 6-12. The Family and Consumer Sciences, Composite: Grades 6-12 certificate may be issued no earlier than September 1, 2004. [The holder of the Family and Consumer Sciences, Composite: Grades 6-12 certificate may teach all family and consumer sciences courses in Grades 6-12.]

(c) Human Development and Family Studies: Grades 8-12. The Human Development and Family Studies: Grades 8-12 certificate may be issued no earlier than September 1, 2004. [The holder of the Human Development and Family Studies: Grades 8-12 certificate may teach the specific courses in Grades 8-12 listed in Chapter 231 of this title (relating to Requirements for Public School Personnel Assignments).]

(d) Hospitality, Nutrition, and Food Sciences: Grades 8-12. The Hospitality, Nutrition, and Food Sciences: Grades 8-12 certificate may be issued no earlier than September 1, 2004. [The holder of the Hospitality, Nutrition, and Food Sciences: Grades 8-12 certificate may teach the specific courses in Grades 8-12 listed in Chapter 231 of this title.]

[(e) Agricultural Science and Technology: Grades 6-12. The Agricultural Science and Technology: Grades 6-12 certificate may be issued no earlier than September 1, 2005. The holder of the Agricultural Science and Technology: Grades 6-12 certificate is eligible to teach all agricultural science and technology courses in Grades 6-12. A candidate must meet the requirements for an Agricultural Science and Technology: Grades 6-12 certificate by August 31, 2017. All applications must be complete and received by the Texas Education Agency (TEA) by October 30, 2017.]

(e) [(f)] Agriculture, Food, and Natural Resources: Grades 6-12. The Agriculture, Food, and Natural Resources: Grades 6-12 certificate may be issued no earlier than September 1, 2014. [The holder of the Agriculture, Food, and Natural Resources: Grades 6-12 certificate is eligible to teach all agricultural science and technology courses in Grades 6-12.]

[(g) Business Education: Grades 6-12. The Business Education: Grades 6-12 certificate may be issued no earlier than November 8, 2006. The holder of the Business Education: Grades 6-12 certificate may teach all business education courses in Grades 6-12, excluding economics courses. A candidate must meet the requirements for a Business Education: Grades 6-12 certificate by August 31, 2017. All applications must be complete and received by the TEA by October 30, 2017.]

(f) [(h)] Business and Finance: Grades 6-12. The Business and Finance: Grades 6-12 certificate may be issued no earlier than September 1, 2014. [The holder of the Business and Finance: Grades 6-12 certificate may teach all business and finance courses in Grades 6-12.]

[(i) Science, Technology, Engineering, and Mathematics: Grades 6-12. The Science, Technology, Engineering, and Mathematics: Grades 6-12 certificate may be issued no earlier than September 1, 2014. The holder of the Science, Technology, Engineering, and Mathematics: Grades 6-12 certificate may teach all science, technology, engineering, and mathematics cluster courses in Grades 6-12.]

§233.14. *Career and Technical Education (Certificates requiring experience and preparation in a skill area).*

(a) All individuals seeking a career and technical education certificate specified in this section must have the required number of years of qualified work experience and preparation in a skill area approved in accordance with the provisions of subsection (f) [(h)] of this section prior to issuance of the certificate and assignment in a Texas school.

[(b) Marketing Education: Grades 8-12. The Marketing Education: Grades 8-12 certificate may be issued no earlier than September 1, 2005. A candidate must meet the requirements for a Marketing Education: Grades 8-12 certificate by August 31, 2017. All applications must be complete and received by the Texas Education Agency (TEA) by October 30, 2017. The holder of the Marketing Education: Grades 8-12 certificate is eligible to teach all marketing education courses in Grades 8-12. A candidate for the Marketing Education: Grades 8-12 certificate must:]

[(1) hold a bachelor's degree from an accredited institution of higher education that at the time was accredited or otherwise approved by an accrediting organization recognized by the Texas Higher Education Coordinating Board (THECB); and]

[(2) have two years of full-time wage-earning experience in a marketing occupation as specified in subsection (h) of this section.]

(b) [(e)] Marketing: Grades 6-12. The Marketing: Grades 6-12 certificate may be issued no earlier than September 1, 2014. [The holder of the Marketing: Grades 6-12 certificate is eligible to teach all marketing courses in Grades 6-12.] A candidate for the Marketing: Grades 6-12 certificate must:

(1) hold a bachelor's degree from an accredited institution of higher education that at the time was accredited or otherwise approved by an accrediting organization recognized by the THECB; and

(2) have two years of full-time wage-earning experience in a marketing occupation as specified in subsection (h) of this section.

[(d) Health Science Technology Education: Grades 8-12. A standard Health Science Technology Education: Grades 8-12 certificate shall be based on experience and academic preparation in the skill area. A candidate must meet the requirements for a standard Health Science Technology Education: Grades 8-12 certificate by August 31, 2017. All applications must be complete and received by the TEA by October 30, 2017.]

[(1) The standard Health Science Technology Education: Grades 8-12 certificate shall require the following:]

[(A) an associate or more advanced degree from an accredited institution of higher education that at the time was accredited or otherwise approved by an accrediting organization recognized by the THECB;]

[(B) current licensure, certification, or registration by a nationally recognized accrediting agency as a health professions practitioner; and]

[(C) approval, by the certification officer of an approved educator preparation program (EPP), of two years of wage-earning experience using the licensure requirement described in subparagraph (B) of this paragraph.]

[(2) The standard Health Science Technology Education: Grades 8-12 certificate curricula shall be based on the standards approved by the State Board for Educator Certification. A candidate for this certificate must pass the appropriate certification examinations.]

[(c) [(e)] Health Science: Grades 6-12 certificate. The standard Health Science: Grades 6-12 certificate may be issued no earlier than September 1, 2014. A standard Health Science: Grades 6-12 certificate shall be based on experience and academic preparation in the skill area and require the following:]

[(1) The standard Health Science: Grades 6-12 certificate shall require the following:]

[(1) [(A)] an associate or more advanced degree from an accredited institution of higher education that at the time was accredited or otherwise approved by an accrediting organization recognized by the THECB;

[(2) [(B)] current licensure, certification, or registration by a nationally recognized accrediting agency as a health professions practitioner; and

[(3) [(C)] approval, by the certification officer of an approved EPP, of two years of full-time wage-earning experience using the licensure requirement described in paragraph (2) [subparagraph (B)] of this subsection [ paragraph].

[(2) The standard Health Science: Grades 6-12 certificate curricula shall be based on the standards approved by the State Board for Educator Certification. A candidate for this certificate must pass the appropriate certification examinations.]

[(f) Trade and Industrial Education: Grades 8-12 certificate. A standard Trade and Industrial Education: Grades 8-12 certificate shall be based on academic preparation and experience in the skill areas to be taught and completion of specified pedagogy and professional responsibilities training.]

[(1) The standard Trade and Industrial Education: Grades 8-12 certificate shall require the following academic preparation and wage-earning experience.]

[(A) Option I. An individual must:]

[(i) hold a bachelor's degree from an accredited institution of higher education that at the time was accredited or otherwise approved by an accrediting organization recognized by the THECB; and]

[(ii) have two years of full-time wage-earning experience within the past ten years in one or more approved occupations for which instruction is offered. The experience must be approved by the certification officer of an EPP approved to prepare teachers for

the Trade and Industrial Education: Grades 8-12 certificate. Up to 18 months of the wage-earning experience can be met through a formal documented internship.]

[(B) Option II. An individual must:]

[(i) hold an associate degree from an accredited institution of higher education that at the time was accredited or otherwise approved by an accrediting organization recognized by the THECB; and]

[(ii) have two years of full-time wage-earning experience within the past ten years in one or more approved occupations for which instruction is offered. The experience must be approved by the certification officer of an EPP approved to prepare teachers for the Trade and Industrial Education: Grades 8-12 certificate.]

[(C) Option III. An individual must:]

[(i) hold a high school diploma or the equivalent; and]

[(ii) have five years of full-time wage-earning experience within the past eight years in one or more approved occupations for which instruction is offered. The experience must be approved by the certification officer of an EPP approved to prepare teachers for the Trade and Industrial Education: Grades 8-12 certificate.]

[(2) The standard Trade and Industrial Education: Grades 8-12 certificate shall require current licensure, certification, or registration by a nationally recognized accrediting agency based on a recognized test or measurement. If the licensure, certification, or registration is not based on a recognized test or measurement, then passing the appropriate National Occupational Competency Testing Institute (NOCTI) assessment is required. A cosmetology teacher must hold a current cosmetology instructor license issued by the Texas Department of Licensing and Regulation.]

[(3) An individual must complete one year of creditable classroom teaching experience, as defined in Chapter 153, Subchapter CC, of this title (relating to Commissioner's Rules on Creditable Years of Service), on an emergency permit or probationary certificate in the specific area of trade and industrial education.]

[(4) The holder of a standard or provisional Trade and Industrial Education: Grades 8-12 certificate or Vocational Trades and Industry certificate may be approved for additional trade and industrial education assignments provided he or she meets the required number of years of wage-earning experience as indicated in this subsection. Work experience must be approved according to the provisions of this subsection. The EPP must submit a statement of qualifications to the Texas Education Agency (TEA) within 60 calendar days of approval.]

[(d) [(g)] Trade and Industrial Education: Grades 6-12 certificate. The certificate may be issued no earlier than September 1, 2014. A standard Trade and Industrial Education: Grades 6-12 certificate shall be based on academic preparation and experience in the skill areas to be taught and completion of specified pedagogy and professional responsibilities training.

[(1) The standard Trade and Industrial Education: Grades 6-12 certificate shall require the following academic preparation and wage-earning experience.

[(A) Option I. An individual must:

[(i) hold a bachelor's degree from an accredited institution of higher education that at the time was accredited or otherwise approved by an accrediting organization recognized by the THECB; and



(ii) have two years of full-time wage-earning experience within the past ten years in one or more approved occupations for which instruction is offered. The experience must be approved by the certification officer of an EPP approved to prepare teachers for the Trade and Industrial Education: Grades 6-12 certificate. Up to 18 months of the wage-earning experience can be met through a formal documented internship.

(B) Option II. An individual must:

(i) hold an associate degree from an accredited institution of higher education that at the time was accredited or otherwise approved by an accrediting organization recognized by the THECB; and

(ii) have two years of full-time wage-earning experience within the past ten years in one or more approved occupations for which instruction is offered. The experience must be approved by the certification officer of an EPP approved to prepare teachers for the Trade and Industrial Education: Grades 6-12 certificate.

(C) Option III. An individual must:

(i) hold a high school diploma or the equivalent; and

(ii) have five years of full-time wage-earning experience within the past ten years in one or more approved occupations for which instruction is offered. The experience must be approved by the certification officer of an EPP approved to prepare teachers for the Trade and Industrial Education: Grades 6-12 certificate.

(2) The standard Trade and Industrial Education: Grades 6-12 certificate shall require current licensure, certification, or registration by a nationally recognized accrediting agency based on a recognized test or measurement. If the licensure, certification, or registration is not based on a recognized test or measurement, then passing the appropriate NOCTI assessment is required. A cosmetology teacher must hold a current cosmetology instructor license issued by the Texas Department of Licensing and Regulation.

(3) An individual must complete one year of creditable classroom teaching experience, as defined in Chapter 153, Subchapter CC, of this title, on an emergency permit or probationary certificate in the specific area of trade and industrial education.

(4) The holder of a standard or provisional Trade and Industrial Education: Grades 6-12 certificate or Vocational Trades and Industry certificate may be approved for additional trade and industrial education assignments provided he or she meets the required number of years of wage-earning experience as indicated in this subsection. Work experience must be approved according to the provisions of this subsection. The EPP must submit a statement of qualifications to the TEA within 60 calendar days of approval.

(e) Trade and Industrial Workforce Training: Grades 6-12 certificate. The certificate may be issued no earlier than September 1, 2018. A standard Trade and Industrial Workforce Training: Grades 6-12 certificate shall be based on academic preparation and experience in the skill areas to be taught and completion of specified pedagogy and professional responsibilities training.

(1) The standard Trade and Industrial Workforce Training: Grades 6-12 certificate shall require all of the following academic preparation and wage-earning experience.

(A) An individual must have been issued a high school diploma or its equivalent or a postsecondary credential, certificate or degree.

(B) An individual must have seven years of full-time wage-earning experience within the preceding 10 years in an approved

occupation for which instruction is offered, and have not been the subject of a complaint filed with a licensing entity or other agency that regulates the occupation of the person, other than a complaint that was determined baseless or unfounded by that entity or agency.

(C) An individual must hold with respect to that occupation a current license, certificate, or registration, as applicable, issued by a nationally recognized accrediting agency based on a recognized test or measurement.

(2) The standard Trade and Industrial Workforce Training: Grades 6-12 certificate shall require current licensure, certification, or registration by a nationally recognized accrediting agency based on a recognized test or measurement.

(f) ~~[(h)]~~ Career and technical education certificates. Approval of career and technical education certificates in this section shall be based on prior experience and preparation in a skill area.

(1) Prospective career and technical education teachers shall submit a statement of qualifications detailing prior experience and skill area preparation to the EPP approved to prepare teachers for the career and technical education certificate sought. The certification officer of the EPP shall review the applicant's statement of qualifications to determine whether the applicant meets the appropriate approval criteria specified in this subsection. In the case of an educator who otherwise qualifies for certification by examination in [~~Marketing Education: Grades 8-12;~~] Marketing: Grades 6-12, [~~Health Science Technology Education: Grades 8-12;~~] Health Science: Grades 6-12, or Trade and Industrial Education: Grades 6-12, the review and approval of required work experience may be performed by a certified school administrator.

(2) Under this subsection, 12 months of wage-earning experience consisting of at least 40 hours per week shall equal one year of full-time experience. Wage-earning experience consisting of less than 40 hours, but at least 20 hours per week, shall be calculated at a 50% rate in determining years of full-time experience. Wage-earning experience consisting of less than 20 hours per week shall not be considered acceptable in determining full-time experience.

(3) Postsecondary and proprietary school teaching experience in the specific occupational area for which the candidate is seeking certification may be counted on a year-for-year basis in lieu of on-the-job experience. Proprietary schools must be accredited or otherwise approved by the Texas Workforce Commission. Recency of experience requirements must be met, as well as current licensure, certification, or registration by a state or nationally recognized accrediting agency.

§233.15. *Languages Other Than English.*

(a) The State Board for Educator Certification (SBEC) shall issue languages other than English (LOTE) certificates in the following areas:

(1) ~~[(a)]~~ American Sign Language: Early Childhood-Grade 12. The American Sign Language: Early Childhood-Grade 12 certificate may be issued no earlier than September 1, 2005. [~~The holder of the American Sign Language: Early Childhood-Grade 12 certificate is eligible to teach American Sign Language in a prekindergarten program, in kindergarten, and in Grades 1-12.~~]

(2) ~~[(b)]~~ Arabic: Early Childhood-Grade 12. The Arabic: Early Childhood-Grade 12 certificate may be issued no earlier than October 15, 2007. [~~The holder of the Arabic: Early Childhood-Grade 12 certificate is eligible to teach Arabic in a prekindergarten program, in kindergarten, and in Grades 1-12.~~]

(3) [(e)] Chinese: Early Childhood-Grade 12. The Chinese: Early Childhood-Grade 12 certificate may be issued no earlier than October 15, 2007. [The holder of the Chinese: Early Childhood-Grade 12 certificate is eligible to teach Chinese in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(4) [(d)] French: Early Childhood-Grade 12. The French: Early Childhood-Grade 12 certificate may be issued no earlier than November 1, 2009. [The holder of the French: Early Childhood-Grade 12 certificate is eligible to teach French in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(5) [(e)] German: Early Childhood-Grade 12. The German: Early Childhood-Grade 12 certificate may be issued no earlier than November 1, 2009. [The holder of the German: Early Childhood-Grade 12 certificate is eligible to teach German in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(6) [(f)] Hindi: Early Childhood-Grade 12. The Hindi: Early Childhood-Grade 12 certificate may be issued no earlier than November 1, 2010. [The holder of the Hindi: Early Childhood-Grade 12 certificate is eligible to teach Hindi in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(7) [(g)] Italian: Early Childhood-Grade 12. The Italian: Early Childhood-Grade 12 certificate may be issued no earlier than November 1, 2010. [The holder of the Italian: Early Childhood-Grade 12 certificate is eligible to teach Italian in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(8) [(h)] Japanese: Early Childhood-Grade 12. The Japanese: Early Childhood-Grade 12 certificate may be issued no earlier than October 15, 2007. [The holder of the Japanese: Early Childhood-Grade 12 certificate is eligible to teach Japanese in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(9) [(i)] Korean: Early Childhood-Grade 12. The Korean: Early Childhood-Grade 12 certificate may be issued no earlier than June 1, 2016. [The holder of the Korean: Early Childhood-Grade 12 certificate is eligible to teach Korean in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(10) [(j)] Latin: Early Childhood-Grade 12. The Latin: Early Childhood-Grade 12 certificate may be issued no earlier than January 1, 2010. [The holder of the Latin: Early Childhood-Grade 12 certificate is eligible to teach Latin in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(11) [(k)] Portuguese: Early Childhood-Grade 12. The Portuguese: Early Childhood-Grade 12 certificate may be issued no earlier than June 1, 2016. [The holder of the Portuguese: Early Childhood-Grade 12 certificate is eligible to teach Portuguese in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(12) [(l)] Russian: Early Childhood-Grade 12. The Russian: Early Childhood-Grade 12 certificate may be issued no earlier than October 15, 2007. [The holder of the Russian: Early Childhood-Grade 12 certificate is eligible to teach Russian in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(13) [(m)] Spanish: Early Childhood-Grade 12. The Spanish: Early Childhood-Grade 12 certificate may be issued no earlier than November 1, 2009. [The holder of the Spanish: Early Childhood-Grade 12 certificate is eligible to teach Spanish in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(14) [(n)] Turkish: Early Childhood-Grade 12. The Turkish: Early Childhood-Grade 12 certificate may be issued no earlier than November 1, 2010. [The holder of the Turkish: Early Childhood-Grade

12 certificate is eligible to teach Turkish in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(15) [(o)] Urdu: Early Childhood-Grade 12. The Urdu: Early Childhood-Grade 12 certificate may be issued no earlier than November 1, 2010. [The holder of the Urdu: Early Childhood-Grade 12 certificate is eligible to teach Urdu in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(16) [(p)] Vietnamese: Early Childhood-Grade 12. The Vietnamese: Early Childhood-Grade 12 certificate may be issued no earlier than October 15, 2007. [The holder of the Vietnamese: Early Childhood-Grade 12 certificate is eligible to teach Vietnamese in a prekindergarten program, in kindergarten, and in Grades 1-12.]

(b) An interested party may request an additional LOTE certificate using the petition process described in §250.20 of this title (relating to Petition for Adoption of Rules or Rule Changes) for SBEC consideration. The petitioner must provide:

(1) the desired LOTE certificate and confirmation of the number of students likely to receive instruction in the requested language;

(2) the number of individuals interested in adding a certification in the new language; and

(3) the rationale for the request and anticipated benefit to students.

§233.17. *Junior Reserve Officer Training Corps.*

Junior Reserve Officer Training Corps: Grades 6-12 certificate. The holder of the Junior Reserve Officer Training Corps: Grades 6-12 certificate is eligible to teach all junior reserve officer training courses in Grades 6-12. A candidate for the standard Junior Reserve Officer Training Corps: Grades 6-12 certificate must:

(1) hold a Junior Reserve Officer Training Corps instructor certificate issued by one of the military branches;

(2) complete an approved educator preparation program;

(3) hold a bachelor's degree from an accredited institution of higher education that at the time was accredited or otherwise approved by an accrediting organization recognized by the Texas Higher Education Coordinating Board; and

(4) pass the appropriate [obtain a passing performance on the pedagogy and professional responsibilities] certification examination.

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

Filed with the Office of the Secretary of State on June 11, 2018.

TRD-201802565

Cristina De La Fuente-Valadez

Director, Rulemaking

State Board for Educator Certification

Earliest possible date of adoption: July 22, 2018

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



## CHAPTER 247. EDUCATORS' CODE OF ETHICS

19 TAC §247.1, §247.2

The State Board for Educator Certification (SBEC) proposes amendments to §247.1 and §247.2, concerning the Educators' Code of Ethics. The proposed amendment to 19 Texas Administrative Code (TAC) §247.1 would add the definitions of "sexual harassment" and "under the influence of alcohol." The proposed amendment to 19 TAC §247.2 would make educators who act recklessly in diverting money for personal gain or misrepresenting the educator's employment history subject to discipline by the SBEC, would clarify language regarding an educator's illegal use of drugs, and would add a standard regarding educator-on-educator workplace sexual harassment. The proposed amendment to 19 TAC §247.2 would also strike Standard 1.14 (a prohibition on assisting an educator with getting a new job when the educator had an inappropriate relationship with a student or minor) with the intent to move that provision to 19 TAC §249.15.

The proposed amendment to §247.1(e)(17) would add a new definition for "sexual harassment," defining the term that is used later in the proposed new §247.2(2)(H) that makes it a violation of the Educators' Code of Ethics for an educator to intentionally or knowingly subject a colleague to sexual harassment. This provision is intended to address educator-on-educator sexual misconduct and is tailored to exclude concepts such as hostile work environment that can be better addressed by employment law actions than by educator disciplinary proceedings.

The proposed amendment to §247.1(e)(22) would define "under the influence of alcohol" for purposes of §247.2(1)(M), which makes educators subject to discipline when they are "under the influence of alcohol" at school or at school-related activities. The proposed definition would include any educator with a blood-alcohol content of .04% or higher because this is the blood alcohol level at which standard school district policy prohibits individuals from driving school buses and at which a commercial driver is considered to be driving while intoxicated under both state and federal law. The definition also would include any physical or mental symptoms to allow evidence of such symptoms to suffice to prove a violation of the Educators' Code of Ethics if evidence of the educator's blood-alcohol content is not available or admissible.

The proposed amendment to §247.2(1)(B) would change the level of intent required to prove that an educator violated the Educators' Code of Ethics by diverting money or property for personal gain from "knowingly" to "intentionally, knowingly, or recklessly." This would allow SBEC to discipline educators for misappropriation when the educator was reckless in book-keeping or in how the educator kept the money or property, as well as when the educator acted intentionally or knowingly to divert the money or property.

The proposed amendment to §247.2(1)(K) would change the level of intent required to prove that an educator violated the Educators' Code of Ethics by misrepresenting personal history when applying for employment to include educators who act recklessly. The change is intended to inspire educators to take extra care in the information they provide school districts and to allow SBEC to discipline educators who make such misrepresentations even when there is insufficient evidence that the educator acted knowingly or intentionally.

The proposed change to §247.2(1)(L) would revise the wording of the prohibition on educators illegally using, distributing, or abusing drugs to make it clearer and more enforceable. The changes are not intended to significantly alter the meaning of the provision.

The proposed amendment would strike §247.2(1)(N), which currently prohibits an educator from assisting another educator in getting a new job as an educator or any position in a school if the educator knows that the job-seeker engaged in sexual misconduct with a student or minor. This provision was initially adopted to implement the Every Student Succeeds Act (ESSA), 20 United States Code (USC), §7926. Texas Education Agency (TEA) received feedback from stakeholders who felt that 19 TAC Chapter 249 was a more appropriate location for educator disciplinary rules that reiterate or implement separate statutory authority and that the Educators' Code of Ethics should be reserved for ethical requirements that were not otherwise reflected in the law. To that end, the language of this provision is simultaneously being proposed for inclusion in 19 TAC §249.15, Disciplinary Action by State Board for Educator Certification in a separate issue. The proposed amendments would have no additional procedural and reporting implications. The proposed amendments would have no additional locally maintained paperwork requirements.

**FISCAL NOTE.** Ryan Franklin, associate commissioner for educator leadership and quality, has determined that for the first five-year period the amendments are in effect, there will be no additional fiscal implications for state and local governments and there are no additional costs to entities who are required to comply with the proposed amendments. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code (TGC), §2001.022. The proposed amendments do not impose a cost on regulated persons, another state agency, a special district, or local government and, therefore, is not subject to TGC, §2001.0045.

**PUBLIC BENEFIT/COST NOTE.** Mr. Franklin has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amendments would be to allow SBEC more effective and efficient enforcement of its Educators' Code of Ethics; to clarify the meaning of terms in the Educators' Code of Ethics; to clarify the purpose of the Educators' Code of Ethics; to protect educators from sexual harassment by other educators; and to further deter educators from misappropriating assets or misrepresenting themselves on job applications. The proposed amendments do not impose a cost on persons required to comply with the rules.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.** There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in TGC, §2006.002, is required.

**GOVERNMENT GROWTH IMPACT:** The TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would create a new regulation by making educators subject to discipline by the SBEC for the intentional or knowing sexual harassment of another educator. In addition, the proposed rulemaking would not expand, limit, or repeal an existing regulation, except by striking the provision that prohibits an educator from assisting another educator in getting a job if the job-seeker is known to have engaged in sexual misconduct with a minor, but that provision is proposed to be added to 19 TAC Chapter 249.

The proposed rulemaking would not create or eliminate a government program, would not require the creation of new employee positions or the elimination of existing employee posi-

tions, would not require an increase or decrease in future legislative appropriations to the agency, would not require an increase or decrease in fees paid to the agency, would not increase or decrease the number of individuals subject to its applicability, and would not positively or adversely affect the state's economy.

**REQUEST FOR PUBLIC COMMENT.** The public comment period on the proposal begins June 22, 2018, and ends July 23, 2018. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About\\_TEA/Laws\\_and\\_Rules/SBEC\\_Rules\\_\(TAC\)/Proposed\\_State\\_Board\\_for\\_Educator\\_Certification\\_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/). The SBEC will take registered oral and written comments on the proposed amendments at the August 3, 2018, meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Mr. Ryan Franklin, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on June 22, 2018.

**STATUTORY AUTHORITY.** The amendments are proposed under the Texas Education Code (TEC), §21.031(a), which charges the State Board for Educator Certification (SBEC) with regulating and overseeing all aspects of the certification, continuing education, and standards of conduct for public school educators; TEC, §21.041, which authorizes the SBEC to adopt rules as necessary to regulate educators, administer statutory requirements, and provide for educator disciplinary proceedings; and Every Student Succeeds Act, 20 United States Code, §7926, which requires state educational agencies to make rules forbidding an educator from aiding other school employees, contractors, or agents in getting jobs when the educator knows the job-seeker has committed sexual misconduct with a student or minor in violation of the law.

**CROSS REFERENCE TO STATUTE.** The amendments implement the Texas Education Code, (TEC), §21.031(a) and §21.041(a) and (b)(1), (7), and (8); and Every Student Succeeds Act (ESSA), 20 United States Code (USC), §7926.

*§247.1. Purpose and Scope; Definitions.*

(a) In compliance with the Texas Education Code, §21.041(b)(8), the State Board for Educator Certification (SBEC) adopts an Educators' Code of Ethics as set forth in §247.2 of this title (relating to Code of Ethics and Standard Practices for Texas Educators). The SBEC may amend the ethics code in the same manner as any other formal rule.

(b) The Texas educator shall comply with standard practices and ethical conduct toward students, professional colleagues, school officials, parents, and members of the community and shall safeguard academic freedom. The Texas educator, in maintaining the dignity of the profession, shall respect and obey the law, demonstrate personal integrity, and exemplify honesty and good moral character. The Texas educator, in exemplifying ethical relations with colleagues, shall extend just and equitable treatment to all members of the profession. The Texas educator, in accepting a position of public trust, shall measure success by the progress of each student toward realization of his or her potential as an effective citizen. The Texas educator, in fulfilling responsibilities in the community, shall cooperate with parents and others to improve the public schools of the community. This chapter shall apply to educators and candidates for certification.

(c) The SBEC is solely responsible for enforcing the Educators' Code of Ethics for purposes related to certification disciplinary proceedings. The Educators' Code of Ethics is enforced through the disciplinary procedure set forth in Chapter 249 of this title (relating to Disciplinary Proceedings, Sanctions, and Contested Cases) pursuant to the purposes stated therein.

(d) As provided in §249.5 of this title (relating to Purpose; Policy Governing Disciplinary Proceedings), the primary goals the SBEC seeks to achieve in educator disciplinary matters are:

(1) to protect the safety and welfare of Texas schoolchildren and school personnel;

(2) to ensure educators and applicants are morally fit and worthy to instruct or to supervise the youth of the state; and

(3) to fairly and efficiently resolve educator disciplinary proceedings at the least expense possible to the parties and the state.

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

(1) Abuse--Includes the following acts or omissions:

(A) mental or emotional injury to a student or minor that results in an observable and material impairment in the student's or minor's development, learning, or psychological functioning;

(B) causing or permitting a student or minor to be in a situation in which the student or minor sustains a mental or emotional injury that results in an observable and material impairment in the student's or minor's development, learning, or psychological functioning;

(C) physical injury that results in substantial harm to a student or minor, or the genuine threat of substantial harm from physical injury to the student or minor, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline; or

(D) sexual conduct harmful to a student's or minor's mental, emotional, or physical welfare.

(2) Applicant--A party seeking issuance, renewal, or reinstatement of a certificate from the Texas Education Agency staff or the State Board for Educator Certification.

(3) Code of Ethics--The Educators' Code of Ethics codified in this chapter.

(4) Complaint--A written statement submitted to the Texas Education Agency staff that contains essential facts alleging improper conduct by an educator, applicant, or examinee, the complainant's verifiable contact information, including full name, complete address, and phone number, which provides grounds for sanctions.

(5) Contested case--A proceeding under this chapter in which the legal rights, duties, and privileges related to a party's educator certificate are to be determined by the State Board for Educator Certification and/or the State Office of Administrative Hearings commencing when a petition is properly served under this chapter.

(6) Disciplinary proceedings--Any matter arising under this chapter or Chapter 249 of this title (relating to Disciplinary Proceedings, Sanctions, and Contested Cases) that results in a final order or finding issued by the Texas Education Agency staff, the State Office of Administrative Hearings, or the State Board for Educator Certification relating to the legal rights, duties, privileges, and status of a party's educator certificate.

(7) Educator--A person who is required to hold a certificate issued under the Texas Education Code, Chapter 21, Subchapter B.

(8) Endanger--Exposure of a student or minor to unjustified risk of injury or to injury that jeopardizes the physical health or safety of the student or minor without regard to whether there has been an actual injury to the student or minor.

(9) Good moral character--The virtues of a person as evidenced by patterns of personal, academic, and occupational behaviors that, in the judgment of the State Board for Educator Certification, indicate honesty, accountability, trustworthiness, reliability, and integrity. Lack of good moral character may be evidenced by the commission of crimes relating directly to the duties and responsibilities of the education profession as described in §249.16(b) of this title (relating to Eligibility of Persons with Criminal History for a Certificate under Texas Occupations Code, Chapter 53, and Texas Education Code, Chapter 21), or by the commission of acts involving moral turpitude, but conduct that evidences a lack of good moral character is not necessarily limited to such crimes or acts.

(10) Intentionally--An educator acts intentionally, or with intent, with respect to the nature of his or her conduct or to a result of his or her conduct when it is his or her conscious objective or desire to engage in the conduct or cause the result.

(11) Knowingly--An educator acts knowingly, or with knowledge, with respect to the nature of his or her conduct or to circumstances surrounding his or her conduct when he or she is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his or her conduct when he or she is aware that the conduct is reasonably certain to cause the result.

(12) Minor--A person under 18 years of age.

(13) Moral turpitude--Improper conduct, including, but not limited to, the following: dishonesty; fraud; deceit; theft; misrepresentation; deliberate violence; base, vile, or depraved acts that are intended to arouse or to gratify the sexual desire of the actor; drug or alcohol related offenses as described in §249.16(b) of this title (relating to Eligibility of Persons with Criminal History for a Certificate under Texas Occupations Code, Chapter 53, and Texas Education Code, Chapter 21); or acts constituting abuse or neglect under the Texas Family Code, §261.001.

(14) Neglect--The placing or leaving of a student or minor in a situation where the student or minor would be exposed to a substantial risk of physical or mental harm.

(15) Recklessly--An educator acts recklessly, or is reckless, with respect to circumstances surrounding his or her conduct or the results of his or her conduct when he or she is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or that the result will occur.

(16) Sanction--A disciplinary action by the State Board for Educator Certification, including a restriction, reprimand, suspension, revocation of a certificate, or a surrender in lieu of disciplinary action.

(17) Sexual harassment--Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.

(18) ~~[(17)]~~ State Board for Educator Certification--The State Board for Educator Certification acting through its voting members in a decision-making capacity.

(19) ~~[(18)]~~ State Board for Educator Certification member(s)--One or more of the members of the State Board for Educator

Certification, appointed and qualified under the Texas Education Code, §21.033.

~~[(19)]~~ Student--A person enrolled in a primary or secondary school, whether public, private, or charter, regardless of the person's age, or a person 18 years of age or younger who is eligible to be enrolled in a primary or secondary school, whether public, private, or charter.

~~[(20)]~~ Texas Education Agency staff--Staff of the Texas Education Agency assigned by the commissioner of education to perform the State Board for Educator Certification's administrative functions and services.

~~[(21)]~~ Under the influence of alcohol--A blood alcohol content of .04% or greater and/or lacking the normal use of mental or physical faculties by reason of the introduction of alcohol.

~~[(22)]~~ Worthy to instruct or to supervise the youth of this state--Presence of those moral, mental, and psychological qualities that are required to enable an educator to render the service essential to the accomplishment of the goals and mission of the State Board for Educator Certification policy and this chapter.

§247.2. *Code of Ethics and Standard Practices for Texas Educators.*  
Enforceable Standards.

(1) Professional Ethical Conduct, Practices and Performance.

(A) Standard 1.1. The educator shall not intentionally, knowingly, or recklessly engage in deceptive practices regarding official policies of the school district, educational institution, educator preparation program, the Texas Education Agency, or the State Board for Educator Certification (SBEC) and its certification process.

(B) Standard 1.2. The educator shall not intentionally, knowingly, or recklessly misappropriate, divert, or use monies, personnel, property, or equipment committed to his or her charge for personal gain or advantage.

(C) Standard 1.3. The educator shall not submit fraudulent requests for reimbursement, expenses, or pay.

(D) Standard 1.4. The educator shall not use institutional or professional privileges for personal or partisan advantage.

(E) Standard 1.5. The educator shall neither accept nor offer gratuities, gifts, or favors that impair professional judgment or that are used to obtain special advantage. This standard shall not restrict the acceptance of gifts or tokens offered and accepted openly from students, parents of students, or other persons or organizations in recognition or appreciation of service.

(F) Standard 1.6. The educator shall not falsify records, or direct or coerce others to do so.

(G) Standard 1.7. The educator shall comply with state regulations, written local school board policies, and other state and federal laws.

(H) Standard 1.8. The educator shall apply for, accept, offer, or assign a position or a responsibility on the basis of professional qualifications.

(I) Standard 1.9. The educator shall not make threats of violence against school district employees, school board members, students, or parents of students.

(J) Standard 1.10. The educator shall be of good moral character and be worthy to instruct or supervise the youth of this state.

(K) Standard 1.11. The educator shall not intentionally, ~~or~~ knowingly, or recklessly misrepresent his or her employment history, criminal history, and/or disciplinary record when applying for subsequent employment.

(L) Standard 1.12. The educator shall refrain from the illegal use, abuse, or distribution of controlled substances, prescription drugs, and toxic inhalants ~~[or distribution of controlled substances and/or abuse of prescription drugs and toxic inhalants]~~.

(M) Standard 1.13. The educator shall not be under the influence of alcohol or consume alcoholic beverages on school property or during school activities when students are present.

~~(N) Standard 1.14. The educator shall not assist another educator, school employee, contractor, or agent in obtaining a new job as an educator or in a school, apart from the routine transmission of administrative and personnel files, if the educator knows or has probable cause to believe that such person engaged in sexual misconduct regarding a minor or student in violation of the law.]~~

(2) Ethical Conduct Toward Professional Colleagues.

(A) Standard 2.1. The educator shall not reveal confidential health or personnel information concerning colleagues unless disclosure serves lawful professional purposes or is required by law.

(B) Standard 2.2. The educator shall not harm others by knowingly making false statements about a colleague or the school system.

(C) Standard 2.3. The educator shall adhere to written local school board policies and state and federal laws regarding the hiring, evaluation, and dismissal of personnel.

(D) Standard 2.4. The educator shall not interfere with a colleague's exercise of political, professional, or citizenship rights and responsibilities.

(E) Standard 2.5. The educator shall not discriminate against or coerce a colleague on the basis of race, color, religion, national origin, age, gender, disability, family status, or sexual orientation.

(F) Standard 2.6. The educator shall not use coercive means or promise of special treatment in order to influence professional decisions or colleagues.

(G) Standard 2.7. The educator shall not retaliate against any individual who has filed a complaint with the SBEC or who provides information for a disciplinary investigation or proceeding under this chapter.

(H) Standard 2.8. The educator shall not intentionally or knowingly subject a colleague to sexual harassment.

(3) Ethical Conduct Toward Students.

(A) Standard 3.1. The educator shall not reveal confidential information concerning students unless disclosure serves lawful professional purposes or is required by law.

(B) Standard 3.2. The educator shall not intentionally, knowingly, or recklessly treat a student or minor in a manner that adversely affects or endangers the learning, physical health, mental health, or safety of the student or minor.

(C) Standard 3.3. The educator shall not intentionally, knowingly, or recklessly misrepresent facts regarding a student.

(D) Standard 3.4. The educator shall not exclude a student from participation in a program, deny benefits to a student, or grant

an advantage to a student on the basis of race, color, gender, disability, national origin, religion, family status, or sexual orientation.

(E) Standard 3.5. The educator shall not intentionally, knowingly, or recklessly engage in physical mistreatment, neglect, or abuse of a student or minor.

(F) Standard 3.6. The educator shall not solicit or engage in sexual conduct or a romantic relationship with a student or minor.

(G) Standard 3.7. The educator shall not furnish alcohol or illegal/unauthorized drugs to any person under 21 years of age unless the educator is a parent or guardian of that child or knowingly allow any person under 21 years of age unless the educator is a parent or guardian of that child to consume alcohol or illegal/unauthorized drugs in the presence of the educator.

(H) Standard 3.8. The educator shall maintain appropriate professional educator-student relationships and boundaries based on a reasonably prudent educator standard.

(I) Standard 3.9. The educator shall refrain from inappropriate communication with a student or minor, including, but not limited to, electronic communication such as cell phone, text messaging, email, instant messaging, blogging, or other social network communication. Factors that may be considered in assessing whether the communication is inappropriate include, but are not limited to:

(i) the nature, purpose, timing, and amount of the communication;

(ii) the subject matter of the communication;

(iii) whether the communication was made openly, or the educator attempted to conceal the communication;

(iv) whether the communication could be reasonably interpreted as soliciting sexual contact or a romantic relationship;

(v) whether the communication was sexually explicit; and

(vi) whether the communication involved discussion(s) of the physical or sexual attractiveness or the sexual history, activities, preferences, or fantasies of either the educator or the student.

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

Filed with the Office of the Secretary of State on June 11, 2018.

TRD-201802566

Cristina De La Fuente-Valadez

Director, Rulemaking

State Board for Educator Certification

Earliest possible date of adoption: July 22, 2018

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



## CHAPTER 249. DISCIPLINARY PROCEEDINGS, SANCTIONS, AND CONTESTED CASES

The State Board for Educator Certification (SBEC) proposes amendments to §§249.3, 249.5, and 249.15, concerning disciplinary proceedings, sanctions, and contested cases. The proposed amendments would add language creating a legal

presumption based on educators' violations of written directives from school administrators regarding the educator's behavior toward a student to the definitions of "solicitation of a romantic relationship" and to both the definition and general principle of the term "unworthy to instruct or to supervise the youth of this state." The proposed amendments also would add the existing prohibition on assisting an educator with getting a new job when the educator had an inappropriate relationship with a student or minor to the list of satisfactory evidence on which the SBEC can take disciplinary action, intended to comply with both the Every Student Succeeds Act (ESSA), 20 United States Code (USC), §7926, and Texas Education Code (TEC), §21.009(e), and currently proposed to be stricken from 19 Texas Administrative Code (TAC) Chapter 247, Educators' Code of Ethics.

In many cases involving an educator's solicitation of a romantic relationship with a student, an educator's violation of educator-student relationship boundaries, or an educator's violence toward or inappropriate discipline of students, the evidence in the cases shows that the educator has violated a written directive from a supervising administrator regarding the educator's inappropriate behavior toward a student. This evidence is important because it shows that the educator was warned, that the behavior toward students was inappropriate, and that the educator was either unable or unwilling to stop the inappropriate behavior. The existence of such evidence shows that the educator did not make a one-time mistake, misestimation, or miscommunication, and thereby proves that the educator's conduct was serious and intentional. To ensure that the State Office of Administrative Hearings understands the importance of this sort of evidence and to make the disciplinary consequences of violating a written directive regarding behavior toward students more predictable for educators, the proposed amendments contain several provisions regarding such directives.

Section 249.3, Definitions, lists acts in paragraph (51)(A)-(K) that may constitute prima facie evidence of solicitation by an educator of a romantic relationship with a student. The proposed amendment to §249.3 would add to the list of acts, as a new subparagraph (J), the act of violating written directives from school administrators regarding the educator's behavior toward a student. The proposed amendment would reletter existing subparagraphs, respectively.

The proposed amendment to §249.3 would also add language in paragraph (60) to the definition of the term "unworthy to instruct or to supervise the youth of this state" that would create a rebuttable presumption that an educator who violates written directives from school administrators regarding the educator's behavior toward a student is unworthy to instruct or to supervise the youth of this state.

The proposed amendment to §249.5, Purpose; Policy Governing Disciplinary Proceedings, would add in subsection (b)(2)(E) the same rebuttable presumption to the general principle listed in subsection (b) to further explain the concept of "unworthy to instruct or supervise the youth of this state."

The proposed amendment to §249.15, Disciplinary Action by State Board for Educator Certification, would add a new paragraph (13) to include a provision that makes educators subject to discipline for helping another educator, school employee, or contractor obtain a new job when the educator knows that the job-seeker engaged in an inappropriate relationship with a student or minor. This provision currently exists in 19 TAC §247.2, Educators' Code of Ethics, where it was adopted to fulfill the requirements of the ESSA. Stakeholders subsequently suggested

that the Educators' Code of Ethics should only include ethical standards that are not required by any other statute, while 19 TAC Chapter 249 should house the disciplinary rules that implement other sources of statutory authority. To that end, the provision, §247.2(1)(N), is proposed to be stricken from Chapter 247 in this notice and added to this chapter, 249. The proposed language in §249.15(b)(13) would be amended to reflect the requirements of TEC, §21.009(e), which is similar to the ESSA but uses the term "inappropriate relationship" rather than "sexual misconduct." Subsequent paragraphs would be renumbered, respectively.

Technical edits were also made to comply with style and formatting requirements.

The proposed amendments would have no additional procedural and reporting implications. The proposed amendments would have no additional locally maintained paperwork requirements.

**FISCAL NOTE.** Ryan Franklin, associate commissioner for educator leadership and quality, has determined that for the first five-year period the proposed amendments are in effect, there will be no additional fiscal implications for state and local governments and there are no additional costs to entities required to comply with the proposed amendments. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code (TGC), §2001.022. The proposed amendments do not impose a cost on regulated persons, another state agency, a special district, or local government and, therefore, is not subject to TGC, §2001.0045.

**PUBLIC BENEFIT/COST NOTE.** Mr. Franklin has determined that, for each year of the first five years the proposed amendments are in effect, the public and student benefit anticipated as a result of enforcing the amendments would be to ensure that educators who violate written directives from school administrators regarding the educator's behavior toward students are disciplined more consistently and predictably by the SBEC, and that the Educators' Code of Ethics regains its role as an independent ethical code separate and apart from the disciplinary rules that implement separate statutory authority. The proposed amendments do not impose a cost on persons required to comply with the rules.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.** There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in TGC, §2006.002, is required.

**GOVERNMENT GROWTH IMPACT:** The TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not expand, limit, or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy. While the proposed rulemaking appears to add a regulation prohibiting educators from assisting other educators in getting jobs if the job-seeker is known to have engaged

in sexual misconduct with a minor, that provision already exists in 19 TAC Chapter 247 and is merely being moved to 19 TAC Chapter 249.

REQUEST FOR PUBLIC COMMENT. The public comment period on the proposal begins June 22, 2018, and ends July 23, 2018. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About\\_TEA/Laws\\_and\\_Rules/SBEC\\_Rules\\_\(TAC\)/Proposed\\_State\\_Board\\_for\\_Educator\\_Certification\\_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/). The SBEC will take registered oral and written comments on the proposed amendments at the August 3, 2018, meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Mr. Ryan Franklin, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on June 22, 2018.

## SUBCHAPTER A. GENERAL PROVISIONS

### 19 TAC §249.3, §249.5

STATUTORY AUTHORITY. The amendments are proposed under the Texas Education Code (TEC), §21.009, which states that the State Board for Educator Certification (SBEC) may revoke the certificate of an administrator if the board determines it is reasonable to believe that the administrator employed an applicant despite being aware that the applicant had been adjudicated for or convicted of having an inappropriate relationship with a student or minor; TEC, §21.031(a), which charges the SBEC with regulating and overseeing all aspects of the certification, continuing education, and standards of conduct for public school educators; TEC, §21.035, which states that Texas Education Agency (TEA) staff provides administrative functions and services for SBEC and gives State Board for Educator Certification (SBEC) the authority to delegate to either the commissioner of education or to TEA staff the authority to settle or otherwise informally dispose of contested cases involving educator certification; TEC, §21.041, which authorizes the SBEC to adopt rules as necessary to regulate educators, administer statutory requirements, and provide for educator disciplinary proceedings; TEC, §21.060, which sets out crimes that relate to the education profession and authorizes the SBEC to sanction or refuse to issue a certificate to any person who has been convicted of one of these offenses; Every Student Succeeds Act, 20 United States Code, §7926, which requires state educational agencies to make rules forbidding educators from aiding other school employees, contractors, or agents in getting jobs when the educator knows the job-seeker has committed sexual misconduct with a student or minor in violation of the law.

CROSS REFERENCE TO STATUTE. The amendments implement the Texas Education Code, (TEC), §§21.009, 21.031(a), 21.035, 21.041, and 21.060; and Every Student Succeeds Act, 20 United States Code, §7926.

#### §249.3. Definitions.

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

- (1) Abuse--Includes the following acts or omissions:

- (A) mental or emotional injury to a student or minor that results in an observable and material impairment in the student's or minor's development, learning, or psychological functioning;

- (B) causing or permitting a student or minor to be in a situation in which the student or minor sustains a mental or emotional injury that results in an observable and material impairment in the student's or minor's development, learning, or psychological functioning;

- (C) physical injury that results in substantial harm to a student or minor, or the genuine threat of substantial harm from physical injury to the student or minor, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline; or

- (D) sexual conduct harmful to a student's or minor's mental, emotional, or physical welfare.

- (2) Administrative denial--A decision or action by the Texas Education Agency staff, acting on behalf of the State Board for Educator Certification, to deny certification (including certification following revocation, cancellation, or surrender of a previously issued certificate), renewal of certification, or reinstatement of a previously suspended certificate based on the withholding or voiding of certification test scores; the invalidation of a certification test registration; evidence of a lack of good moral character; or evidence of improper conduct.

- (3) Administrative law judge--A person appointed by the chief judge of the State Office of Administrative Hearings under the Texas Government Code, Chapter 2003.

- (4) Answer--The responsive pleading filed in reply to factual and legal issues raised in a petition.

- (5) Applicant--A party seeking issuance, renewal, or reinstatement of a certificate from the Texas Education Agency staff or the State Board for Educator Certification.

- (6) Cancellation--The invalidation of an erroneously issued certificate.

- (7) Certificate--The whole or part of any educator credential, license, or permit issued under the Texas Education Code, Chapter 21, Subchapter B. The official certificate is the record of the certificate as maintained on the Texas Education Agency's website.

- (8) Certificate holder--A person who holds an educator certificate issued under the Texas Education Code, Chapter 21, Subchapter B.

- (9) Chair--The presiding officer of the State Board for Educator Certification, elected pursuant to the Texas Education Code, §21.036, or other person designated by the chair to act in his or her absence or inability to serve.

- (10) Chief judge--The chief administrative law judge of the State Office of Administrative Hearings.

- (11) Code of Ethics--The Educators' Code of Ethics codified in Chapter 247 of this title (relating to the Educators' Code of Ethics).

- (12) Complaint--A written statement submitted to the Texas Education Agency staff that contains essential facts alleging improper conduct by an educator, applicant, or examinee, the complainant's verifiable contact information, including full name, complete address, and phone number, which provides grounds for sanctions.

- (13) Contested case--A proceeding under this chapter in which the legal rights, duties, and privileges related to a party's educator certificate are to be determined by the State Board for Educator



Certification and/or the State Office of Administrative Hearings commencing when a petition is properly served under this chapter.

(14) Conviction--An adjudication of guilt for a criminal offense. The term does not include the imposition of deferred adjudication for which the judge has not proceeded to an adjudication of guilt.

(15) Deferred adjudication--The resolution of a criminal charge, based on a defendant's plea to the offense of guilty or nolo contendere, which results in the suspension of adjudication of the defendant's guilt and the imposition of conditions such as community supervision or restitution, and, upon successful completion of those conditions, the dismissal of the criminal case. In a contested case under this chapter, the defendant's acceptance of deferred adjudication in a criminal case may be considered as provided by the Texas Occupations Code, §53.021.

(16) Disciplinary proceedings--Any matter arising under this chapter or Chapter 247 of this title (relating to the Educators' Code of Ethics) that results in a final order or finding issued by the Texas Education Agency staff, the State Office of Administrative Hearings, or the State Board for Educator Certification relating to the legal rights, duties, privileges, and status of a party's educator certificate.

(17) Educator--A person who is required to hold a certificate issued under the Texas Education Code, Chapter 21, Subchapter B.

(18) Effective date--The date the decision or action taken by the State Board for Educator Certification or the Texas Education Agency staff becomes final under the appropriate legal authority.

(19) Endanger--Exposure of a student or minor to unjustified risk of injury or to injury that jeopardizes the physical health or safety of the student or minor without regard to whether there has been an actual injury to the student or minor.

(20) Examinee--A person who registers to take or who takes any examination required by the State Board for Educator Certification for admission to an educator preparation program or to obtain an educator certificate.

(21) Expired--No longer valid because a specific period or term of validity of a certificate has ended; an expired certificate is not subject to renewal or revalidation and a new certificate must be issued.

(22) Filing--Any written petition, answer, motion, response, other written instrument, or item appropriately filed under this chapter with the Texas Education Agency staff, the State Board for Educator Certification, or the State Office of Administrative Hearings.

(23) Good moral character--The virtues of a person as evidenced by patterns of personal, academic, and occupational behaviors that, in the judgment of the State Board for Educator Certification, indicate honesty, accountability, trustworthiness, reliability, and integrity. Lack of good moral character may be evidenced by the commission of crimes relating directly to the duties and responsibilities of the education profession as described in §249.16(b) of this title (relating to Eligibility of Persons with Criminal History for a Certificate under Texas Occupations Code, Chapter 53, and Texas Education Code, Chapter 21), or by the commission of acts involving moral turpitude, but conduct that evidences a lack of good moral character is not necessarily limited to such crimes or acts.

(24) Inactive--Lacking current effectiveness. An inactive certificate does not currently entitle the certificate holder to work as a professional educator in Texas public schools. An inactive certificate is distinguished from a certificate that is void or expired by the fact that it can be reactivated by satisfying the condition or conditions that caused it to be placed in inactive status (failure to renew, failure to sub-

mit fingerprint information, or payment of fees), subject to any other certification requirements applicable to active certificates.

(25) Inappropriate relationship--A violation of Texas Penal Code, §21.12(a); a sexual or romantic relationship with a student or minor; or solicitation of a sexual or romantic relationship with a student or minor.

(26) Informal conference--An informal meeting between the Texas Education Agency staff and an educator, applicant, or examinee; such a meeting may be used to give the person an opportunity to show compliance with all requirements of law for the granting or retention of a certificate or test score pursuant to Texas Government Code, §2001.054(c).

(27) Invalid--Rendered void; lacking legal or administrative efficacy.

(28) Law--The United States and Texas Constitutions, state and federal statutes, regulations, rules, relevant case law, and decisions and orders of the State Board for Educator Certification and the commissioner of education.

(29) Mail--Certified United States mail, return receipt requested, unless otherwise provided by this chapter.

(30) Majority--A majority of the voting members of the State Board for Educator Certification who are present and voting on the issue at the time the vote is recorded.

(31) Moral turpitude--Improper conduct, including, but not limited to, the following: dishonesty; fraud; deceit; theft; misrepresentation; deliberate violence; base, vile, or depraved acts that are intended to arouse or to gratify the sexual desire of the actor; drug or alcohol related offenses as described in §249.16(b) of this title (relating to Eligibility of Persons with Criminal History for a Certificate under Texas Occupations Code, Chapter 53, and Texas Education Code, Chapter 21); or acts constituting abuse or neglect under the Texas Family Code, §261.001.

(32) Neglect--The placing or leaving of a student or minor in a situation where the student or minor would be exposed to a substantial risk of physical or mental harm.

(33) Party--Each person named or admitted to participate in a contested case under this chapter.

(34) Permanent revocation--Revocation without the opportunity to reapply for a new certificate.

(35) Person--Any individual, representative, corporation, or other entity, including the following: an educator, applicant, or examinee; the Texas Education Agency staff; or the State Board for Educator Certification, the State Office of Administrative Hearings, or any other agency or instrumentality of federal, state, or local government.

(36) Petition--The written pleading served by the petitioner in a contested case under this chapter.

(37) Petitioner--The party seeking relief, requesting a contested case hearing under this chapter, and having the burden of proof by a preponderance of the evidence in any contested case hearing or proceeding under this chapter.

(38) Physical mistreatment--Any act of unreasonable or offensive touching that would be offensive to a reasonable person in a similar circumstance. It is an affirmative defense that any unreasonable or offensive touching was justified under the circumstances, using a reasonable person standard.

(39) Presiding officer--The chair or acting chair of the State Board for Educator Certification.

(40) Proposal for decision--A recommended decision issued by an administrative law judge in accordance with the Texas Government Code, §2001.062.

(41) Quorum--A majority of the 14 members appointed to and serving on the State Board for Educator Certification (SBEC) pursuant to the Texas Education Code, §21.033; eight SBEC members, including both voting and non-voting members, as specified in the SBEC Operating Policies and Procedures.

(42) Recklessly--An educator acts recklessly, or is reckless, with respect to circumstances surrounding his or her conduct or the results of his or her conduct when he or she is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or that the result will occur.

(43) Reinstatement--The restoration of a suspended certificate to valid status by the State Board for Educator Certification.

(44) Reported criminal history--Information concerning any formal criminal justice system charges and dispositions. The term includes, without limitation, arrests, detentions, indictments, criminal informations, convictions, deferred adjudications, and probations in any state or federal jurisdiction.

(45) Representative--A person representing an educator, applicant, or examinee in matters arising under this chapter; in a contested case proceeding before the State Office of Administrative Hearings (SOAH), an attorney licensed to practice law in the State of Texas or other person authorized as a party representative under SOAH rules.

(46) Reprimand--The State Board for Educator Certification's formal censuring of a certificate holder.

(A) An "inscribed reprimand" is a formal, published censure appearing on the face of the educator's virtual certificate.

(B) A "non-inscribed reprimand" is a formal, unpublished censure that does not appear on the face of the educator's virtual certificate.

(47) Respondent--The party who contests factual or legal issues or both raised in a petition; the party filing an answer in response to a petition.

(48) Restricted--The condition of an educator certificate that has had limitations or conditions on its use imposed by State Board for Educator Certification order.

(49) Revocation--A sanction imposed by the State Board for Educator Certification invalidating an educator's certificate.

(50) Sanction--A disciplinary action by the State Board for Educator Certification, including a restriction, reprimand, suspension, revocation of a certificate, or a surrender in lieu of disciplinary action.

(51) Solicitation of a romantic relationship--Deliberate or repeated acts that can be reasonably interpreted as the solicitation by an educator of a relationship with a student that is romantic in nature. A romantic relationship is often characterized by a strong emotional or sexual attachment and/or by patterns of exclusivity[,] but does not include appropriate educator-student relationships that arise out of legitimate contexts such as familial connections or longtime acquaintance. The following acts, considered in context, may constitute prima facie evidence of the solicitation by an educator of a romantic relationship with a student:

(A) behavior, gestures, expressions, or communications with a student that are unrelated to the educator's job duties and evidence a romantic intent or interest in the student, including

statements of love, affection, or attraction. Factors that may be considered in determining the romantic intent of such communications or behavior, include, without limitation:

- (i) the nature of the communications;
- (ii) the timing of the communications;
- (iii) the extent of the communications;
- (iv) whether the communications were made openly

or secretly;

(v) the extent that the educator attempts to conceal the communications;

(vi) if the educator claims to be counseling a student, the State Board for Educator Certification may consider whether the educator's job duties included counseling, whether the educator reported the subject of the counseling to the student's guardians or to the appropriate school personnel, or, in the case of alleged abuse or neglect, whether the educator reported the abuse or neglect to the appropriate authorities; and

(vii) any other evidence tending to show the context of the communications between educator and student;

(B) making inappropriate comments about a student's body, creating or transmitting sexually suggestive photographs or images, or encouraging the student to transmit sexually suggestive photographs or images;

(C) making sexually demeaning comments to a student;

(D) making comments about a student's potential sexual performance;

(E) requesting details of a student's sexual history;

(F) requesting a date, sexual contact, or any activity intended for the sexual gratification of the educator;

(G) engaging in conversations regarding the sexual problems, preferences, or fantasies of either party;

(H) inappropriate hugging, kissing, or excessive touching;

(I) providing the student with drugs or alcohol;

(J) violating written directives from school administrators regarding the educator's behavior toward a student;

(K) [~~F~~] suggestions that a romantic relationship is desired after the student graduates, including post-graduation plans for dating or marriage; and

(L) [~~K~~] any other acts tending to show that the educator solicited a romantic relationship with a student.

(52) State assessment testing violation--Conduct that violates the security or confidential integrity of any test or assessment required by the Texas Education Code, Chapter 39, Subchapter B, or conduct that is a departure from the test administration procedures established by the commissioner of education in Chapter 101 of this title (relating to Assessment). The term does not include benchmark tests or other locally required assessments.

(53) State Board for Educator Certification--The State Board for Educator Certification acting through its voting members in a decision-making capacity.

(54) State Board for Educator Certification member(s)--One or more of the members of the State Board for Educator

Certification, appointed and qualified under the Texas Education Code, §21.033.

(55) Student--A person enrolled in a primary or secondary school, whether public, private, or charter, regardless of the person's age, or a person 18 years of age or younger who is eligible to be enrolled in a primary or secondary school, whether public, private, or charter.

(56) Surrender--An educator's voluntary relinquishment of a particular certificate in lieu of disciplinary proceedings under this chapter resulting in an order of revocation of the certificate.

(57) Suspension--A sanction imposed by the State Board for Educator Certification (SBEC) temporarily invalidating a particular certificate until reinstated by the SBEC.

(58) Test administration rules or procedures--Rules and procedures governing professional examinations administered by the State Board for Educator Certification through the Texas Education Agency staff and a test contractor, including policies, regulations, and procedures set out in a test registration bulletin.

(59) Texas Education Agency staff--Staff of the Texas Education Agency assigned by the commissioner of education to perform the State Board for Educator Certification's administrative functions and services.

(60) Unworthy to instruct or to supervise the youth of this state--Absence of those moral, mental, and psychological qualities that are required to enable an educator to render the service essential to the accomplishment of the goals and mission of the State Board for Educator Certification policy and Chapter 247 of this title (relating to Educators' Code of Ethics). Unworthy to instruct serves as a basis for sanctions under §249.15(b)(2) of this title (relating to Disciplinary Action by State Board for Educator Certification) and for administrative denial under §249.12(b) of this title (relating to Administrative Denial; Appeal). A determination that a person is unworthy to instruct does not require a criminal conviction. It is a rebuttable presumption that an educator who violates written directives from school administrators regarding the educator's behavior toward a student is unworthy to instruct or to supervise the youth of this state.

(61) Virtual certificate--The official record of a person's certificate status as maintained on the Texas Education Agency's website.

#### §249.5. Purpose; Policy Governing Disciplinary Proceedings.

(a) Purpose. The purpose of this chapter is:

- (1) to protect the safety and welfare of Texas schoolchildren and school personnel;
- (2) to ensure educators and applicants are morally fit and worthy to instruct or to supervise the youth of the state;
- (3) to regulate and to enforce the standards of conduct of educators and applicants;
- (4) to provide for disciplinary proceedings in conformity with the Texas Government Code, Chapter 2001, and the rules of practice and procedure of the State Office of Administrative Hearings;
- (5) to enforce an educators' code of ethics;
- (6) to fairly and efficiently resolve disciplinary proceedings at the least expense possible to the parties and the state;
- (7) to promote the development of legal precedents through State Board for Educator Certification (SBEC) decisions to the end that disciplinary proceedings may be justly resolved; and

(8) to provide for regulation and general administration pursuant to the SBEC's enabling statutes.

(b) Policy governing disciplinary proceedings.

(1) A certified educator holds a unique position of public trust with almost unparalleled access to the hearts and minds of impressionable students. The conduct of an educator must be held to the highest standard. Because SBEC sanctions are imposed for reasons of public policy, and are not penal in nature, criminal procedural and punishment standards are not appropriate to educator disciplinary proceedings.

(2) The following general principles shall apply.

(A) Because the SBEC's primary duty is to safeguard the interests of Texas students, educator certification must be considered a privilege and not a right.

(B) The SBEC may pursue disciplinary proceedings and sanctions based on convictions of felonies and misdemeanors as provided by the Texas Education Code (TEC), §21.060; the Texas Occupations Code, Chapter 53; and this chapter.

(C) The SBEC may also pursue disciplinary proceedings and sanctions based on educator conduct that is proved by a preponderance of the evidence, and such proceedings and sanctions do not require a criminal conviction, deferred adjudication, community supervision, an indictment, or an arrest.

(D) An educator's good moral character, as defined in §249.3 of this title (relating to Definitions), constitutes the essence of the role model that the educator represents to students both inside and outside the classroom. Chapter 247 of this title (relating to Educators' Code of Ethics) and this chapter provide for educator disciplinary proceedings and provide a minimum standard for educator conduct. Conduct or conditions that may demonstrate that an educator or applicant lacks good moral character, is a negative role model to students, and does not possess the moral fitness necessary to be a certified educator include, but are not limited to:

- (i) active community supervision or criminal probation;
- (ii) conduct that indicates dishonesty or untruthfulness;
- (iii) habitual impairment through drugs or alcohol;
- (iv) abuse or neglect of students and minors, including the educator's own children; and
- (v) reckless endangerment of the safety of others.

(E) "Unworthy to instruct or to supervise the youth of this state," defined in §249.3 of this title, which serves as a basis for sanctions under §249.15(b)(2) of this title (relating to Disciplinary Action by State Board for Educator Certification), is a broad concept that is not limited to the specific criminal convictions that are described in the TEC, §21.058 and §21.060. The moral fitness of a person to instruct the youth of this state must be determined from an examination of all relevant conduct, is not limited to conduct that occurs while performing the duties of a professional educator, and is not limited to conduct that constitutes a criminal violation or results in a criminal conviction or to conduct that constitutes a violation of Chapter 247 of this title. It is a rebuttable presumption that an educator who violates written directives from school administrators regarding the educator's behavior toward a student is unworthy to instruct or to supervise the youth of this state.

(F) Educators have positions of authority, have extensive access to students when no other adults (or even other students,

in some cases) are present, and have access to confidential information that could provide a unique opportunity to exploit student vulnerabilities. Educators must clearly understand the boundaries of the educator-student relationship that they are trusted not to cross. Any violation of that trust, such as soliciting or engaging in a romantic or sexual relationship with any student or minor, is considered conduct that may result in permanent revocation of an educator's certificate.

(G) Administrators who hold Superintendent, Principal, or Mid-Management Administrator certificates issued by the SBEC have, as a result of their actual or potential positions of authority over both students and other educators, an even greater obligation to maintain good moral character than teachers and paraprofessionals. When an administrator's conduct demonstrates that the administrator lacks good moral character, is a negative role model to students, or does not possess the moral fitness necessary to be a certified educator as described in subparagraph (D) of this paragraph, the administrator may be subject to greater sanction than a teacher or paraprofessional would receive for the same conduct.

(H) Evidence of rehabilitation with regard to educator conduct that could result in sanction, denial of a certification application, or denial of an application for reinstatement of a certificate shall be recognized and considered. In addition, the following shall also be considered:

- (i) the nature and seriousness of prior conduct;
- (ii) the potential danger the conduct poses to the health and welfare of students;
- (iii) the effect of the prior conduct upon any victims of the conduct;
- (iv) whether sufficient time has passed, and sufficient evidence is presented to demonstrate that the educator or applicant has been rehabilitated from the prior conduct; and
- (v) the effect of the conduct upon the educator's good moral character and ability to be a proper role model for students.

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

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Cristina De La Fuente-Valadez

Director, Rulemaking

State Board for Educator Certification

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



## SUBCHAPTER B. ENFORCEMENT ACTIONS AND GUIDELINES

### 19 TAC §249.15

STATUTORY AUTHORITY. The amendment is proposed under the Texas Education Code (TEC), §21.009, which states that the State Board of Educator Certification (SBEC) may revoke the certificate of an administrator if the board determines it is reasonable to believe that the administrator employed an applicant despite being aware that the applicant had been adjudicated for or convicted of having an inappropriate relationship with a student

or minor; TEC, §21.031(a), which charges the SBEC with regulating and overseeing all aspects of the certification, continuing education, and standards of conduct for public school educators; TEC, §21.035, which states that Texas Education Agency (TEA) staff provides administrative functions and services for SBEC and gives SBEC the authority to delegate to either the commissioner of education or to TEA staff the authority to settle or otherwise informally dispose of contested cases involving educator certification; TEC, §21.041, which authorizes the SBEC to adopt rules as necessary to regulate educators, administer statutory requirements, and provide for educator disciplinary proceedings; TEC, §21.060, which sets out crimes that relate to the education profession and authorizes the SBEC to sanction or refuse to issue a certificate to any person who has been convicted of one of these offenses; Every Student Succeeds Act, 20 United States Code, §7926, which requires state educational agencies to make rules forbidding educators from aiding other school employees, contractors, or agents in getting jobs when the educator knows the job-seeker has committed sexual misconduct with a student or minor in violation of the law.

CROSS REFERENCE TO STATUTE. The amendment implements the Texas Education Code, (TEC), §§21.009, 21.031(a), 21.035, 21.041, and 21.060; and Every Student Succeeds Act, 20 United States Code §7926.

§249.15. *Disciplinary Action by State Board for Educator Certification.*

(a) Pursuant to this chapter, the State Board for Educator Certification (SBEC) may take any of the following actions:

- (1) place restrictions on the issuance, renewal, or holding of a certificate, either indefinitely or for a set term;
- (2) issue an inscribed or non-inscribed reprimand;
- (3) suspend a certificate for a set term or issue a probated suspension for a set term;
- (4) revoke or cancel, which includes accepting the surrender of, a certificate without opportunity for reapplication for a set term or permanently;

(5) impose any additional conditions or restrictions upon a certificate that the SBEC deems necessary to facilitate the rehabilitation and professional development of the educator or to protect students, parents of students, school personnel, or school officials; or

(6) impose an administrative penalty of \$500-\$10,000 on a superintendent or director who fails to file timely a report required under §249.14(d) of this title (relating to Complaint, Required Reporting, and Investigation; Investigative Notice; Filing of Petition) or on a principal who fails to timely notify a superintendent or director as required under §249.14(e) of this title under the circumstances and in the manner required by the Texas Education Code (TEC), §21.006.

(b) The SBEC may take any of the actions listed in subsection (a) of this section based on satisfactory evidence that:

- (1) the person has conducted school or education activities in violation of law;
- (2) the person is unworthy to instruct or to supervise the youth of this state;
- (3) the person has violated a provision of the Educators' Code of Ethics;
- (4) the person has failed to report or has hindered the reporting of child abuse pursuant to the Texas Family Code, §261.001,

or has failed to notify the SBEC or the school superintendent or director under the circumstances and in the manner required by the TEC, §21.006, and §249.14(d)-(f) of this title;

(5) the person has abandoned a contract in violation of the TEC, §§21.105(c), 21.160(c), or 21.210(c);

(6) the person has failed to cooperate with the Texas Education Agency (TEA) in an investigation;

(7) the person has failed to provide information required to be provided by §229.3 of this title (relating to Required Submissions of Information, Surveys, and Other Data);

(8) the person has violated the security or integrity of any assessment required by the TEC, Chapter 39, Subchapter B, as described in subsection (g) of this section or has committed an act that is a departure from the test administration procedures established by the commissioner of education in Chapter 101 of this title (relating to Assessment);

(9) the person has committed an act described in §249.14(h)(1) of this title, which constitutes sanctionable Priority 1 conduct, as follows:

(A) any conduct constituting a felony criminal offense;

(B) indecent exposure;

(C) public lewdness;

(D) child abuse and/or neglect;

(E) possession of a weapon on school property;

(F) drug offenses occurring on school property;

(G) sale to or making alcohol or other drugs available to a student or minor;

(H) sale, distribution, or display of harmful material to a student or minor;

(I) certificate fraud;

(J) state assessment testing violations;

(K) deadly conduct; or

(L) conduct that involves soliciting or engaging in sexual conduct or a romantic relationship with a student or minor;

(10) the person has committed an act that would constitute an offense (without regard to whether there has been a criminal conviction) that is considered to relate directly to the duties and responsibilities of the education profession, as described in §249.16(c) of this title (relating to Eligibility of Persons with Criminal History for a Certificate under Texas Occupations Code, Chapter 53, and Texas Education Code, Chapter 21). Such offenses indicate a threat to the health, safety, or welfare of a student or minor, parent of a student, fellow employee, or professional colleague; interfere with the orderly, efficient, or safe operation of a school district, campus, or activity; or indicate impaired ability or misrepresentation of qualifications to perform the functions of an educator and include, but are not limited to:

(A) offenses involving moral turpitude;

(B) offenses involving any form of sexual or physical abuse or neglect of a student or minor or other illegal conduct with a student or minor;

(C) offenses involving any felony possession or conspiracy to possess, or any misdemeanor or felony transfer, sale, distribution, or conspiracy to transfer, sell, or distribute any controlled substance defined in the Texas Health and Safety Code, Chapter 481;

(D) offenses involving school property or funds;

(E) offenses involving any attempt by fraudulent or unauthorized means to obtain or alter any certificate or permit that would entitle any person to hold or obtain a position as an educator;

(F) offenses occurring wholly or in part on school property or at a school-sponsored activity; or

(G) felony offenses involving driving while intoxicated (DWI);

(11) the person has intentionally failed to comply with the reporting, notification, and confidentiality requirements specified in the Texas Code of Criminal Procedure, §15.27(a), relating to student arrests, detentions, and juvenile referrals for certain offenses;

(12) the person has failed to discharge an employee or to refuse to hire an applicant when the person knew that the employee or applicant had been adjudicated for or convicted of having an inappropriate relationship with a minor in accordance with the TEC, §21.009(e), or knew or should have known through a criminal history record information review that the employee or applicant had been convicted of an offense in accordance with the TEC, §22.085;

(13) the person assisted another educator, school employee, contractor, or agent in obtaining a new job as an educator or in a school, apart from the routine transmission of administrative and personnel files, when the educator knew or had probable cause to believe that such person engaged in an inappropriate relationship with a minor or student;

(14) ~~[(13)]~~ the person is a superintendent of a school district or the chief operating officer of an open-enrollment charter school who falsely or inaccurately certified to the commissioner of education that the district or charter school had complied with the TEC, §22.085; or

(15) ~~[(14)]~~ the person has failed to comply with an order or decision of the SBEC.

(c) The TEA staff may commence a contested case to take any of the actions listed in subsection (a) of this section by serving a petition to the certificate holder in accordance with this chapter describing the SBEC's intent to issue a sanction and specifying the legal and factual reasons for the sanction. The certificate holder shall have 30 calendar days to file an answer as provided in §249.27 of this title (relating to Answer).

(d) Upon the failure of the certificate holder to file a written answer as required by this chapter, the TEA staff may file a request for the issuance of a default judgment from the SBEC imposing the proposed sanction in accordance with §249.35 of this title (relating to Disposition Prior to Hearing; Default).

(e) If the certificate holder files a timely answer as provided in this section, the case will be referred to the State Office of Administrative Hearings (SOAH) for hearing in accordance with the SOAH rules; the Texas Government Code, Chapter 2001; and this chapter.

(f) The provisions of this section are not exclusive and do not preclude consideration of other grounds or measures available by law to the SBEC or the TEA staff, including student loan default or child support arrears. The SBEC may request the Office of the Attorney General to pursue available civil, equitable, or other legal remedies to enforce an order or decision of the SBEC under this chapter.

(g) The statewide assessment program as defined by the TEC, Chapter 39, Subchapter B, is a secure testing program.

(1) Procedures for maintaining security shall be specified in the appropriate test administration materials.

(2) Secure test materials must be accounted for before, during, and after each test administration. Only authorized personnel may have access to secure test materials.

(3) The contents of each test booklet and answer document are confidential in accordance with the Texas Government Code, Chapter 551, and the Family Educational Rights and Privacy Act of 1974. Individual student performance results are confidential as specified under the TEC, §39.030(b).

(4) Violation of security or confidential integrity of any test required by the TEC, Chapter 39, Subchapter B, shall be prohibited. A person who engages in conduct prohibited by this section may be subject to sanction of credentials, including any of the sanctions provided by subsection (a) of this section.

(5) Charter school test administrators are not required to be certified; however, any irregularity in the administration of any test required by the TEC, Chapter 39, Subchapter B, would cause the charter itself to come under review by the commissioner of education for possible sanctions or revocation, as provided under the TEC, §12.115(a)(4).

(6) Conduct that violates the security and confidential integrity of a test is evidenced by any departure from the test administration procedures established by the commissioner of education. Conduct of this nature may include, but is not limited to, the following acts and omissions:

(A) viewing a test before, during, or after an assessment unless specifically authorized to do so;

(B) duplicating secure examination materials;

(C) disclosing the contents of any portion of a secure test;

(D) providing, suggesting, or indicating to an examinee a response or answer to a secure test item or prompt;

(E) changing or altering a response or answer of an examinee to a secure test item or prompt;

(F) aiding or assisting an examinee with a response or answer to a secure test item or prompt;

(G) fraudulently exempting or preventing a student from the administration of a required state assessment;

(H) encouraging or assisting an individual to engage in the conduct described in paragraphs (1)-(7) of this subsection; or

(I) failing to report to an appropriate authority that an individual has engaged in conduct outlined in paragraphs (1)-(8) of this subsection.

(7) Any irregularities in test security or confidential integrity may also result in the invalidation of student results.

(8) The superintendent and campus principal of each school district and chief administrative officer of each charter school and any private school administering the tests as allowed under the TEC, §39.033, shall develop procedures to ensure the security and confidential integrity of the tests specified in the TEC, Chapter 39, Subchapter B, and shall be responsible for notifying the TEA in writing of conduct that violates the security or confidential integrity of a test administered under the TEC, Chapter 39, Subchapter B. A person who fails to report such conduct as required by this subsection may be subject to any of the sanctions provided by subsection (a) of this section.

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

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Director, Rulemaking

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## CHAPTER 250. ADMINISTRATION

The State Board for Educator Certification (SBEC) proposes amendments to §250.1 and §250.20, concerning administration. The proposed amendments would implement changes resulting from the 84th Texas Legislature, Regular Session, 2015, to update the petition form for adoption of rules or rule changes to require the petitioner to indicate that the petitioner meets one of the four definitions of an *interested person* and would reflect a technical change that would update in rule relevant cross references to the state's Historically Underutilized Business (HUB) program.

Texas Government Code (TGC), §2161.003, requires state agencies to adopt the Comptroller of Public Accounts' rules under TGC, §2161.002, as the SBEC's own rules regarding the purchases of goods or services paid for with appropriated money. Section 250.1, Historically Underutilized Business (HUB) Program, states that the SBEC adopts the rules of the Comptroller of Public Accounts found in Title 34 concerning the HUB Program. The section numbers in 34 Texas Administrative Code (TAC) cross-referenced in §250.1 have been renumbered; therefore, a technical change is required to update relevant cross references in rule. The proposed amendment to §250.1 would replace the current cross references to §§20.11 - 20.22 and §§20.24 - 20.28, and update the rule with the correct, renumbered sections, §§20.281 - 20.298.

Section 250.20, Petition for Adoption of Rules or Rule Changes, provides the process for interested persons to petition the SBEC for changes to rules, in accordance with the TGC, §2001.021.

House Bill 763, 84th Texas Legislature, 2015, amended the TGC, §2001.021, to define the term *interested person* for the purposes of petitioning a rule change. The statute states that an *interested person* must be one of the following: (1) a resident of Texas; (2) a business entity located in Texas; (3) a governmental subdivision located in Texas; or (4) a public or private organization located in Texas that is not a state agency.

The proposed amendment to Figure: 19 TAC §250.20(a) would implement House Bill 763 to update the petition form in rule by adding the four definitions of an *interested person* and requiring the petitioner to indicate all applicable definitions.

The proposed amendments would have no additional procedural and reporting implications. The proposed amendments would have no additional locally maintained paperwork requirements.

FISCAL NOTE. Ryan Franklin, associate commissioner for educator leadership and quality, has determined that for the first five-year period the amendments are in effect, there will be no additional fiscal implications for state and local governments and

there are no additional costs to entities required to comply with the proposed amendments. There is no effect on local economy for the first five years that the proposed amendments are in effect; therefore, no local employment impact statement is required under Texas Government Code (TGC), §2001.022. The proposed amendments do not impose a cost on regulated persons, another state agency, a special district, or local government and, therefore, is not subject to TGC, §2001.0045.

**PUBLIC BENEFIT/COST NOTE.** Mr. Franklin has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments would be correctly citing cross references in rule and aligning the rule with statute by including the four definitions of *interested person* in the petition form. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES, MICROBUSINESSES, AND RURAL COMMUNITIES.** There is no direct adverse economic impact for small businesses, microbusinesses, and rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

**GOVERNMENT GROWTH IMPACT:** The TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not expand, limit, or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

**REQUEST FOR PUBLIC COMMENT.** The public comment period on the proposal begins June 22, 2018, and ends July 23, 2018. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About\\_TEA/Laws\\_and\\_Rules/SBEC\\_Rules\\_\(TAC\)/Proposed\\_State\\_Board\\_for\\_Educator\\_Certification\\_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/). The SBEC will take registered oral and written comments on the proposed amendments at the August 3, 2018, meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposed amendments submitted under the Administrative Procedure Act must be received by the Department of Educator Leadership and Quality, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Mr. Ryan Franklin, associate commissioner for educator leadership and quality, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on June 22, 2018.

## SUBCHAPTER A. PURCHASING

### 19 TAC §250.1

**STATUTORY AUTHORITY.** The amendment is proposed under the Texas Education Code (TEC), §21.035(b), which requires the Texas Education Agency (TEA) to provide the State Board for Educator Certification's (SBEC's) administrative functions and services; TEC, §21.040(6), which requires the SBEC to develop and implement policies that clearly define the respective

responsibilities of the SBEC and TEA staff; TEC, §21.041(a), which authorizes the SBEC to adopt rules as necessary to implement its procedures; and Texas Government Code, §2161.003, which requires the SBEC to adopt the Comptroller's rules under §2161.002, as the SBEC's own rules regarding the purchase of goods or services paid for with appropriated money.

**CROSS REFERENCE TO STATUTE.** The amendment implements the Texas Education Code §§21.035(b), 21.040(6), and 21.041(a), and Texas Government Code, §2161.003.

#### §250.1. *Historically Underutilized Business (HUB) Program.*

In accordance with the Texas Government Code, §2161.003, the State Board for Educator Certification adopts by reference the rules of the Comptroller of Public Accounts, found at Title 34 Texas Administrative Code, §§20.281 - 20.298 [~~§§20.11-20.22 and §§20.24-20.28~~], concerning the Historically Underutilized Business (HUB) Program.

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

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## SUBCHAPTER B. RULEMAKING PROCEDURES

### 19 TAC §250.20

**STATUTORY AUTHORITY.** The amendment is proposed under the Texas Education Code (TEC), 21.035(b), which requires the Texas Education Agency to provide the SBEC's administrative functions and services; TEC, §21.041(a), which authorizes the State Board for Educator Certification (SBEC) to adopt rules as necessary to implement its procedures; TEC, §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; Texas Government Code (TGC), §2001.021, which authorizes a state agency to prescribe by rule the form for a petition and the procedure for the submission, consideration, and disposition.

**CROSS REFERENCE TO STATUTE.** The amendment implements the Texas Education Code §21.035(b) and §21.041(a) and (b)(1), and Texas Government Code, §2001.021, as amended by House Bill 763, 84th Texas Legislature, 2015.

#### §250.20. *Petition for Adoption of Rules or Rule Changes.*

(a) Any interested person, as defined in Texas Government Code, §2001.021, may petition for the adoption, amendment, or repeal of a rule of the State Board for Educator Certification (SBEC) by filing a petition on a form provided in this subsection. The petition shall be signed and submitted to the designated Texas Education Agency (TEA) office. The TEA staff shall evaluate the merits of the proposal to determine whether to recommend that rulemaking proceedings be initiated or that the petition be denied.

Figure: 19 TAC §250.20(a)

[Figure: 19 TAC §250.20(a)]

(b) In accordance with the Texas Government Code, §2001.021, the TEA staff must respond to the petitioner within 60 calendar days of receipt of the petition.

(1) Where possible, the recommendation concerning the petition shall be placed on the SBEC agenda, and the SBEC shall act on the petition within the 60-calendar-day time limit.

(2) Where the time required to review the petition or the scheduling of SBEC meetings will not permit the SBEC to act on the petition within the required 60 calendar days, the TEA staff shall respond to the petitioner within the required 60 calendar days, notifying the petitioner of the date of the SBEC meeting at which the recommendation will be presented to the SBEC for action.

(c) The SBEC will review the petition and the recommendation and will either direct the TEA staff to begin the rulemaking process or deny the petition, giving reasons for the denial. The TEA staff will notify the petitioner of the SBEC's action related to the petition.

(d) Without limitation to the reasons for denial in this subsection, the SBEC may deny a petition on the following grounds:

(1) the SBEC does not have jurisdiction or authority to propose or to adopt the petitioned rule;

(2) the petitioned rule conflicts with a statute, court decision, another rule proposed or adopted by the SBEC, or other law;

(3) the SBEC determines that a different proceeding, procedure, or act more appropriately addresses the subject matter of the petition than initiating a rulemaking proceeding; or

(4) the petitioner is inappropriately using the opportunity to file a rulemaking petition under this section, as evidenced by filing a petition:

(A) before the fourth anniversary of the SBEC's having previously considered and rejected a similar rule on the same subject matter; or

(B) to amend a rule proposed or adopted by the SBEC that has not yet become effective.

(e) If the SBEC initiates rulemaking procedures in response to a petition, the rule text which the SBEC proposes may differ from the rule text proposed by the petitioner.

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

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## TITLE 22. EXAMINING BOARDS

### PART 5. STATE BOARD OF DENTAL EXAMINERS

#### CHAPTER 101. DENTAL LICENSURE

#### 22 TAC §101.11

The State Board of Dental Examiners (Board) proposes amended rule §101.11, concerning the temporary or permanent appointment of a custodian of records for a dentist's records. This amendment to the existing rule will require dentists to designate a custodian, and will provide for the Board to appoint a custodian if needed. This rule is being proposed to comply with the requirements of S.B. 313.

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

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the agency's compliance with legislative directives and the safety and security of patient records.

W. Boyd Bush, Jr. has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: the rule does not create or eliminate a government program; implementation of the proposed rule does not require the creation or elimination of employee positions; the implementation of the proposed rule does not require an increase or decrease in future appropriations; the proposed rule does not require an increase or decrease in fees paid to the agency; the proposed rule does not create a new regulation; the proposed rule expands an existing regulation; the proposed rule increases the number of individuals subject to it; the proposed rule does not adversely affect the state's economy.

Comments on the proposed new rule may be submitted to W. Boyd Bush, Jr., Ed.D., Executive Director, 333 Guadalupe, Suite 3-800, Austin, Texas 78701, by Fax to (512) 305-9364, or by email to [official\\_rules\\_comments@tsbde.texas.gov](mailto:official_rules_comments@tsbde.texas.gov) no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety, and Texas Occupations Code §258.0511(a-1) and (c), which authorize the Board to establish conditions under which the board may temporarily or permanently appoint a person as custodian of a dentist's billing or dental patient records, and rules regarding the designation and duties of a dental custodian of records.

This proposed rule implements Texas Occupations Code §258.0511(a-1) and (c).

*§101.11. Employment by Estate of Dentist or Person Acting for Mentally Incompetent Dentist.*

(a) Texas Occupations Code, Title 3, Subtitle D, does not prevent a person who is the administrator or executor of the estate of a dentist or a person who is legally authorized to act for a dentist adjudicated to be mentally incompetent from employing a licensed dentist to:

(1) carry on the deceased or mentally incompetent dentist's practice for a reasonable period, as determined by the Board; or



(2) conclude the affairs of the practice, including the sale of any assets.

(b) Texas Occupations Code, Title 3, Subtitle D, does not prevent a licensed dentist from working for a person described by subsection (a) of this section during the administration of the estate or the period of incompetency.

(c) For purposes [of subsection (a)(1)] of this section, "reasonable period" means a period of no more than twelve (12) months from the date of the dentist's death or the date the dentist is lawfully determined to be mentally incompetent, whichever is applicable.

(d) Upon initial licensure as a dentist, and at each renewal period, a licensed dentist shall designate a custodian of records who shall act as temporary or permanent custodian for the dentist in the event of death or incapacity. This custodian of records may be employed by the administrator or estate of the dentist in the event of death or mental or physical incapacitation of the dentist. The custodian of records may also be appointed as needed during an unexplained disappearance of the dentist, or the abandonment of the dentist's patients without reasonable cause. If a licensed dentist has designated a person who is not a licensed dentist as a custodian of records, that person may serve as the custodian for a reasonable period of time as defined in subsection (c) of this section, and must ensure safe transfer of the patient records to each patient or another licensed dentist as soon as reasonably practicable.

(e) Should the custodian of records designated in subsection (d) of this section be unable to serve as custodian of records, the Board shall review and attempt to appoint an available custodian of records in the immediate area of the dentist's practice who may serve as custodian. The Board shall prioritize the security of patient health information and access to dental records.

(f) A custodian of records designated or appointed under this rule shall not be held responsible for any violations of the Dental Practice Act or Board rules occurring before the custodian is in possession of the licensed dentist's patient records, or any violations attributable to the actions of the licensed dentist who previously held the patient records. Designation or appointment as a custodian of records under this rule does not create a dentist-patient relationship between the custodian and patients of the licensed dentist.

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

Filed with the Office of the Secretary of State on June 8, 2018.

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W. Boyd Bush, Jr.

Executive Director

State Board of Dental Examiners

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For further information, please call: (512) 475-0987



## CHAPTER 102. FEES

### 22 TAC §102.1

The State Board of Dental Examiners (Board) proposes an amendment to rule §102.1, concerning fees. This amendment will increase fees to account for the agency changing to biennial renewals for dental licensure, as well as providing funding for the Board's mandated changes enacted in S.B. 313. This amended rule incorporates requirements due to enactment of

SB 313 and changes to the General Appropriations Act in the eighty-fifth Texas Legislature Regular Session, 2017, relating to the continuation and functions of the Texas State Board of Dental Examiners, resulting in an appropriations increase of \$222,943 in fiscal year 2019. The mandated increases are effective on September 1, 2018, and are as follows:

DDS Biennial Renewal +\$150

DDS Biennial Renewal - Late 1 to 90 days +\$150

DDS Biennial Renewal - Late 91 to 365 days +\$150

DDS Faculty Biennial Renewal +\$97

DDS Faculty Biennial Renewal Late 1 to 90 days +\$97

DDS Faculty Biennial Renewal Late 91 to 365 days +97

DDS Nitrous Level 2-4 Permits +\$200

DDS Nitrous Renewals Permits Levels 2-4 Permits +\$50

DDS Conversion Fee-Faculty to Full Privilege +\$67

DDS Application to Reactive a Retired License +\$68

DDS Reinstatement of a Canceled Dental License +\$68

DDS Conversion Fee - Full Privilege to Faculty +\$67

DDS Conversion Fee-Temporary Licensure by Credentials to Full Privilege +\$72

DH Biennial Renewal +\$115

DH Biennial Renewal Late 1 to 90 days +\$115

DH Biennial Renewal Late 91 to 365 days +\$115

DH Faculty Biennial Renewal +\$115

DH Faculty Biennial Renewal Late 1 to 90 days +\$115

DH Faculty Biennial Renewal Late 91 to 365 days +\$115

DH Conversion Fee - Faculty to Full Privilege +\$7

DH Reinstatement of a Cancelled Dental Hygiene License +\$4

DH Conversion Fee - Full Privilege to Faculty +\$12

Annual Mobile Renewals +\$1

W. Boyd Bush, Jr., Ed.D., Executive Director, has determined that for the first five-year period the proposed rule is in effect, the fiscal implications for state government will be that the Board will collect an appropriate amount of fees to offset appropriations as a result of S.B. 313.

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the agency's compliance with legislative directives and the assurance that the Board collects appropriate funds to offset the appropriated funding for public safety and welfare programs through S.B. 313.

W. Boyd Bush, Jr. has determined that an economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule. Dental annual renewals, DDS faculty annual renewals, Dental hygienists annual renewals and dental hygienists faculty annual renewal fees are being doubled to account for biennial renewals adopted after the enactment of S.B. 313. DDS conversion fees faculty to full privilege, application to reactivate a retired license, reinstatement of a canceled dental license, full privilege to faculty and a conversion fee - temporary license by creden-

tials to full private are being changed to ensure all correct fees are being applied where necessary. These include a \$3-5 Texas Online fee, \$7 Peer Assistance fee, \$1-5 Patient Protection Fee, \$55 HB 3201 fee and \$1 NPDB fee. Dental hygienists conversion fee faculty to full privilege, reinstatement of a canceled dental hygiene license and conversion fee temporary licensure by credentials to full privilege are being changed to ensure all correct fees are applied where necessary. These include a \$3-4 Texas Online fee, \$2 Peer Assistance fee, \$1-5 Patient Protection Fee, and \$1 NPDB fee. The annual mobile renewal fee was adjusted to include a \$1 patient protection fee. DDS Nitrous permit levels 2-4 fees were raised from \$60 to \$260. This will potentially affect an average of 270 new permit requests. DDS nitrous renewals levels 2-4 fees were raised from \$10 to \$60. This will potentially affect an average of 3,400 permit holders. These fees incorporate changes to Article I, §18.33, of the General Appropriations Act, due to enactment of S.B. 313, eighty-fifth Texas Legislature Regular Session, 2017, relating to the continuation and functions of the Texas State Board of Dental Examiners, resulting in an increase of \$222,943 in fiscal year 2019. Increases mandated by the legislature are effective on September 1, 2018. These changes potentially effect up to 17,985 dentists, 14,054 dental hygienists, and 61 mobile units. Some of these practitioners work in small or micro-businesses, and some of these practitioners are located in rural areas of the state. The Board reviewed several possible methods of apportioning the necessary increase of fees across all license and permit holders, and after receiving stakeholder input and considering comments at public meetings, determined that the above distribution was the most equitable and appropriate solution. These fee changes are a direct result of direction provided by the Texas Legislature, and as such, must be adopted by the Board in some form.

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: the rule does not create or eliminate a government program; implementation of the proposed rule does not require the creation or elimination of employee positions; the implementation of the proposed rule does not require an increase or decrease in future appropriations; the proposed rule requires an increase in fees paid to the agency; the proposed rule does not create a new regulation; the proposed rule expands an existing regulation; the proposed rule does not increase the number of individuals subject to it; the proposed rule does not adversely affect the state's economy.

Comments on the proposed new rule may be submitted to W. Boyd Bush, Jr., Ed.D., Executive Director, 333 Guadalupe, Suite 3-800, Austin, Texas 78701, by Fax to (512) 305-9364, or by email to [official\\_rules\\_comments@tsbde.texas.gov](mailto:official_rules_comments@tsbde.texas.gov) no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety, and Texas Occupations Code §254.004, which authorizes the Board to collect sufficient fees to cover the cost of administering the Dental Practice Act.

This proposed rule does not affect any statutes. W. Boyd Bush, Jr., has determined that this rule is necessary to protect the health, safety, and welfare of the residents of Texas, and as such, Texas Government Code §2001.0045(c)(6) is applicable to this proposed rule.

#### §102.1. Fees.

Effective September 1, 2018, the Board has established the following reasonable and necessary fees for the administration of its function.

Figure: 22 TAC §102.1

[Figure: 22 TAC §102.1]

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

Filed with the Office of the Secretary of State on June 8, 2018.

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W. Boyd Bush, Jr.

Executive Director

State Board of Dental Examiners

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For further information, please call: (512) 475-0987



## CHAPTER 107. DENTAL BOARD PROCEDURES SUBCHAPTER A. PROCEDURES GOVERNING GRIEVANCES, HEARINGS, AND APPEALS

### 22 TAC §107.63

The State Board of Dental Examiners (Board) proposes amendments to §107.63, concerning the Board's procedure for scheduling and conducting informal settlement conferences. This amendment to the existing rule will clarify the scheduling procedures for informal settlement conferences, ensure that complaints are resolved in a timely manner, and clarify the Board's mediation process. This rule is being proposed through the authority granted in S.B. 313 directing the Board to promulgate rules related to the scheduling of informal settlement conferences.

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

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the agency's compliance with legislative directives and the protection of the public safety and welfare by the prompt and efficient resolution of complaints against the Board's licensees.

W. Boyd Bush, Jr. has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: the rule does not create or eliminate a government program; implementation of the proposed rule does not require the creation or elimination of employee positions; the implementation of the proposed rule does not require an increase or decrease in future appropriations; the proposed rule does not require an increase or decrease in fees paid to the agency; the proposed rule does not create a new regulation; the proposed

rule does not expand an existing regulation; the proposed rule does not increase the number of individuals subject to it; the proposed rule does not adversely affect the state's economy.

Comments on the proposed amendments may be submitted to W. Boyd Bush, Jr., Ed.D., Executive Director, 333 Guadalupe, Suite 3-800, Austin, Texas 78701, by Fax to (512) 305-9364, or by email to [official\\_rules\\_comments@tsbde.texas.gov](mailto:official_rules_comments@tsbde.texas.gov) no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety, and Texas Occupations Code §263.007(a), (b), (g), and (h), which authorize the Board to establish proceedings for informal settlement conferences, and procedures for scheduling and postponing the scheduling of informal settlement conferences.

No statutes are affected by this proposed rule.

*§107.63. Informal Disposition and Mediation [Alternative Dispute Resolution].*

(a) Policy. It is the Board's policy to encourage, where appropriate, the resolution and early settlement of contested disciplinary matters and internal disputes through informal and alternative dispute resolution procedures.

(b) Informal Disposition. [Pursuant to Texas Government Code, Chapter 2001 et seq., ultimate disposition of any complaint or matter pending before the Board may be made by stipulation, agreed settlement, or consent order.] Under Texas Occupations Code §263.0065, the Board may delegate the authority to dismiss or enter into agreed settlement for the resolution of certain complaints prior to an informal settlement conference. Texas Occupations Code §263.007 and §263.0073 authorize the Board to resolve complaints by [~~§263.0075, such a disposition may be reached through~~] review at an informal settlement conference.

(c) Scheduling of Informal Settlement Conference.

(1) Not later than the 180th day after the date the Board's official investigation of a complaint is commenced, the Board shall schedule an informal settlement conference unless good cause is shown by the Board for not scheduling the conference by that date. The following justifications represent good cause for Board staff to postpone scheduling an informal settlement conference:

(A) an expert reviewer's delinquency in reviewing and submitting a report to the Board under Texas Occupations Code §255.0067;

(B) a temporary suspension of the license holder's license under Texas Occupations Code §263.004;

(C) the filing of a contested case against the licensee with the State Office of Administrative Hearings to resolve the complaint;

(D) a pending contested case against the licensee with the State Office of Administrative Hearings where Board staff's requested sanction is license suspension or revocation;

(E) proposed resolution of the complaint through delegation pursuant to Texas Occupations Code §263.0065;

(F) a delay for a final judgment resulting from federal or state criminal charges filed against the licensee for conduct relevant to the complaint, if conviction for such charges would represent grounds

for license suspension or revocation under the Texas Occupations Code or Board rules;

(G) a request for delay from federal, state, or local law enforcement to allow investigation of potential criminal charges against the licensee for conduct relevant to the complaint, if conviction for such charges would represent grounds for license suspension or revocation under the Texas Occupations Code or Board rules;

(H) delay of the investigation due to Board staff's inability to locate the licensee or complainant, or licensee's inability or refusal to provide relevant records for the Board's investigation; or

(I) the existence of pending complaints from prior fiscal years which require resolution at an informal settlement conference.

(2) Requests to reschedule the informal settlement conference by a licensee must be in writing and shall be referred to the General Counsel for consideration. To avoid undue disruption of the informal settlement conference schedule, the following requirements shall be applied. A request by a licensee to reschedule an informal settlement conference must be in writing and may be granted only if the licensee provides satisfactory evidence of the following requirements:

(A) The request must be received by the agency within five business days after the licensee received notice of the date of the informal settlement conference, must provide details showing that the licensee has a conflicting event that was scheduled prior to receipt of notice of the informal settlement conference, and must show the licensee has made reasonable efforts to reschedule such event but a conflict cannot reasonably be avoided.

(B) A request received by the agency more than five business days after the licensee received notice of the date of the informal settlement conference must provide details showing that an extraordinary event or circumstance has arisen since receipt of the notice that will prevent the licensee from attending the informal settlement conference. The request must show that the request is made within five business days after the licensee first becomes aware of the event or circumstance. Unavailability of the licensee's counsel for the informal settlement conference date shall not be adequate to show an extraordinary event or circumstance if the unavailability is due to scheduling conflicts with counsel's other clients or matters not related to counsel's representation of the licensee.

(3) A request by a licensee to reschedule an informal settlement conference based on the failure of the agency to send timely notice before the date scheduled for the informal settlement conference shall be granted, provided that the request is received by the Board within five business days after the late notice is received by the licensee and the licensee provides sufficient proof that the notice was not timely delivered to the licensee's address of record on file with the Board.

(d) [~~e~~] Informal [~~Board~~] Settlement Conference.

(1) Two [~~One~~] or more members of the Board or the Dental Review Committee shall represent the full Board at the informal [~~Board~~] settlement conference, and at least one panelist must be a dentist. At least one member of the representative panel shall be present in person, but other members of the panel may appear via teleconference.

(A) Notwithstanding subsection (d)(1), an informal settlement conference may be conducted by one panelist if the license holder who is the subject of the complaint waives the requirement that at least two panelists conduct the conference. If the license holder waives that requirement, the panelist may be a dentist, a dental hygienist, or a member who represents the public. If the licensee attends the scheduled informal settlement conference and, after being informed of the requirements of Texas Occupations Code §263.0072, does not ob-

ject during the scheduled time of the conference to the lack of two panel members, the licensee shall have waived the requirement for purposes of that complaint's proceedings.

(B) Pursuant to Texas Occupations Code §263.0072(e), an informal settlement conference conducted under Texas Occupations Code §263.007 to show compliance with a Board order or remedial plan of the Board may be conducted by one panelist.

(2) The Board will provide the licensee notice in writing of the time, date, and place of the settlement conference not later than the 45th day before the date the conference is held. Such notification shall inform the licensee: of the specific allegations against the licensee and the information board staff intends to use at the informal settlement conference; that he or she may be represented by legal counsel; that the licensee may offer a rebuttal to the allegations, including the exhibits or the testimony of such witnesses as he or she may desire; that the Board will be represented by one or more of its members and by legal counsel; and that he or she may request that the matter be considered by the Board according to procedures described in Texas Occupations Code §263.007. The Board's rules or policies relating to the informal disposition of cases shall be enclosed with the notice of the settlement conference. Notice of the settlement conference, with enclosures, shall be sent by first class United States Mail or overnight courier to the address of record of the licensee on file with the Board or the licensee's attorney of record. An electronic copy of the notice and enclosures may be provided if the license holder or the license holder's representative consents to such electronic notice. A settlement conference may be rescheduled if Board staff does not provide adequate notice as required by this subsection. Delivery of the notice is presumed to have occurred three business days after the deposit of the notice with the United States Postal Service, one business day after deposit of the notice with an overnight courier, or immediately upon sending if the notice is provided electronically.

(3) The licensee must provide to Board staff his rebuttal not later than the 15th day before the date of the conference in order for that information to be considered at the conference.

(4) The settlement conference shall be informal and will not follow the procedure established in State Office of Administrative Hearing (SOAH) rules for contested cases. The settlement conference will be conducted by representatives [representative(s)] of the Board. The Board's representatives [representative] may call upon the Board's attorney at any time for assistance in conducting the settlement conference. The licensee, his or her attorney, representative(s) of the Board, and Board staff may question witnesses, make relevant statements, present affidavits or statements of persons not in attendance, and may present such other evidence as may be appropriate.

(5) The Board's representatives [representative(s)] may prohibit or limit access to the Board's investigative file by the licensee, his or her attorney, and the complainant and his or her representative.

(6) The Board's representatives [representative(s)] shall exclude from the settlement conference all persons except the patient or other witnesses; the licensee and his or her attorney; the complainant; Board members; and Board staff. Complainants and licensees shall not be present in the informal settlement conference at the same time unless both parties consent, and the Board's representatives may exclude parties at any time to ensure the conference proceeds efficiently and with appropriate decorum.

(7) At the conclusion of the settlement conference, the Board's representatives [representative(s)] shall make recommendations for resolution or correction of any alleged violations of the Dental Practice Act or of the Board rules. Such recommendations may include any disciplinary actions authorized by Texas Occupations Code

§263.002 or a remedial plan authorized by §263.0077 of the Dental Practice Act. The Board's representatives [representative(s)] may, on the basis that a violation of the Dental Practice Act or the Board's rules has not been established, dismiss the complaint [ease, or refer the ease to Board staff for further investigation]. Dismissal [Closure] of a complaint [ease] by the Board's representatives [representative(s)] shall be adopted after [given effect immediately without the necessity of] presentation to the full Board for an affirmative vote. A recommendation to dismiss [elose] a complaint [ease] requires no further action by the Respondent.

(8) Board staff shall draft a proposed settlement agreement or remedial plan reflecting the settlement recommendations, which the licensee shall either accept or reject. To accept the settlement recommendations, the licensee must sign the proposed agreed settlement order or remedial plan and return it to the Board. Inaction by the licensee shall constitute rejection. If the licensee rejects the proposed agreed settlement order or remedial plan, the matter shall be referred to SOAH for a contested case hearing.

(9) Following acceptance and execution of the proposed agreed settlement order or remedial plan by the licensee, said proposed order shall be submitted to the entire Board for approval.

(10) On request of the licensee, Board staff shall make a recording of the conference. The recording is part of the investigative file and may not be released to a third party. Board staff may charge the licensee a fee to cover the cost of recording the conference. Board staff shall provide a copy of the recording to the licensee on the licensee's request.

(e)[(d)] Use of Mediation [ADR] In Contested Disciplinary Matters.

(1) The [Board Secretary or the] Executive Director or General Counsel may refer a contested disciplinary matter to a mediation [an ADR] process to seek resolution or correction of any alleged violations of the Dental Practice Act or of the Board rules. Such mediation [ADR] processes may include [(A) any procedure or combination of procedures described by Chapter 154, Texas Civil Practice and Remedies Code; or (B)] any procedure described in the SOAH Rules of Procedure. Referral to mediation may occur prior to or simultaneous with a contested case filed at SOAH.

(2) Any agreement or recommendation resulting from the application of a mediation [an ADR] process to a contested disciplinary matter shall be documented in written form and signed by the licensee, and a representative of [legal counsel for] the Board and/or the Executive Director [or Board Secretary]. Such an agreement or recommendation may include any disciplinary actions authorized by Chapter 263 [§263.002] of the Dental Practice Act.

(3) If the mediation [ADR] process results in no agreement or recommendation, the matter shall be referred to SOAH for a contested case hearing.

(f) [(e)] Consideration by the Board.

(1) All proposed agreed settlement orders, remedial plans, agreements or other recommendations shall be reviewed by the full Board for approval.

(2) Upon an affirmative majority vote, the Board shall enter an order approving the proposed agreed settlement order, remedial plan, agreement, or recommendation. Said order shall bear the signature of the Presiding Officer and Board Secretary, or of the officer presiding at such meeting.

(3) If the Board does not approve a proposed settlement order, remedial plan, agreement, or recommendation, the licensee shall

be so informed. The matter shall be referred by the Board to the Board Secretary and Executive Director for consideration of appropriate action.

(g) [(#)] Restitution.

(1) Pursuant to Texas Occupations Code §263.0075, the Board may order a licensee to pay restitution to a patient as provided in a proposed agreed settlement order or other agreement or recommendation, instead of or in addition to any administrative penalty.

(2) The amount of restitution ordered may not exceed the amount the patient paid to the licensee for the service or services from which the complaint arose. The Board shall not require payment of other damages or make an estimation of harm in any order for restitution.

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

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W. Boyd Bush, Jr.

Executive Director

State Board of Dental Examiners

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For further information, please call: (512) 475-0987



## CHAPTER 110. SEDATION AND ANESTHESIA 22 TAC §110.9

The State Board of Dental Examiners (Board) proposes amended rule §110.9, concerning renewal requirements for sedation/anesthesia permit holders. This amended rule will require permit holders to renew permits biennially as opposed to annually, and will require permit holders to take the sedation/anesthesia jurisprudence assessment once every five years. This rule is being proposed to comply with the requirements of S.B. 313.

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

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the agency's compliance with legislative directives and protection of the safety and welfare of the Texas public by further education of permit holders as a result of the jurisprudence assessment requirements.

W. Boyd Bush, Jr. has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: the rule does not create or eliminate a government program; implementation of the proposed rule does not require the creation or elimination of employee positions; the implementation of the proposed rule does not require an increase or decrease in future appropriations; the proposed rule does not require an increase or decrease in fees paid to the agency; the

proposed rule does not create a new regulation; the proposed rule expands an existing regulation; the proposed rule does not increase the number of individuals subject to it; the proposed rule does not adversely affect the state's economy.

Comments on the proposed new rule may be submitted to W. Boyd Bush, Jr., Ed.D., Executive Director, 333 Guadalupe, Suite 3-800, Austin, Texas 78701, by Fax to (512) 305-9364, or by email to [official\\_rules\\_comments@tsbde.texas.gov](mailto:official_rules_comments@tsbde.texas.gov) no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety, and Texas Occupations Code §258.1552(b), which requires a permit holder to pass the online jurisprudence examination developed by the Board once every five years.

This proposed rule implements the requirements of Texas Occupations Code §258.1552.

### §110.9. Anesthesia Permit Renewal.

(a) The Board shall renew an anesthesia/sedation permit biennially [~~annually~~] if required fees are paid and the required emergency management training and continuing education requirements are satisfied. The Board shall not renew an anesthesia/sedation permit if, after notice and opportunity for hearing, the Board finds the permit holder has provided, or is likely to provide, anesthesia/sedation services in a manner that does not meet the minimum standard of care. If a hearing is held, the Board shall consider factors including patient complaints, morbidity, mortality, and anesthesia consultant recommendations.

(b) Fees. Biennial dental license renewal certificates shall include the biennial [~~annual~~] permit renewal, except as provided for in this section. The licensee shall be assessed a biennial [~~an annual~~] renewal fee in accordance with the fee schedule in Chapter 102 of this title.

#### (c) Continuing Education.

(1) In conjunction with the biennial [~~annual~~] renewal of a dental license, a dentist seeking to renew a minimal sedation, moderate sedation, or deep sedation/general anesthesia permit must submit proof of completion of the following hours of continuing education every two years on the administration of or medical emergencies associated with the permitted level of sedation:

(A) Level 1: Minimal Sedation - six (6) hours

(B) Levels 2 and 3: Moderate Sedation - eight (8) hours

(C) Level 4: Deep Sedation/General Anesthesia - twelve (12) hours

(2) The continuing education requirements under this section shall be in addition to any additional courses required for licensure. Advanced Cardiac Life Support (ACLS) course and Pediatric Advanced Life Support (PALS) course may not be used to fulfill the continuing education requirement for renewal of the permit under this section.

(3) Continuing education courses must meet the provider endorsement requirements of §104.2 of this title.

(d) Anesthesia Jurisprudence Examination. The Board shall develop and administer an online jurisprudence examination to determine a permit holder's knowledge of the Dental Practice Act, Board rules, and other applicable laws of this state relating to the adminis-

tration of anesthesia. A permit holder for nitrous oxide, level 1, level 2, level 3, or level 4 sedation/anesthesia must pass the online jurisprudence examination developed by the Board once every five years.

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

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W. Boyd Bush, Jr.

Executive Director

State Board of Dental Examiners

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## 22 TAC §110.16

The State Board of Dental Examiners (Board) proposes new rule §110.16, concerning Sedation/Anesthesia of High-Risk Patients. This new rule will require dentists to undergo additional didactic and clinical training prior to providing levels 2, 3, or 4 sedation/anesthesia to high-risk patients. This rule is being proposed to comply with the requirements of Senate Bill 313 (S.B. 313).

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

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the agency's compliance with legislative directives and increased public safety as a result of increased training requirements for dentists.

W. Boyd Bush, Jr. has also determined that an economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule. The Board has approximately 3,400 permit holders affected by this rule across the State of Texas. Many of these permit holders are considered small or micro-businesses in that they are independent practitioner-business owners employing fewer than 100 employees. Many of them practice in rural communities, defined as municipalities with fewer than 25,000 people. Small businesses, micro-businesses, and rural communities will almost certainly experience an adverse economic effect from this proposed rule. Informal comments presented at stakeholder and committee meetings estimate the cost of the new additional training program will be in the range of \$10,000 - 20,000. Permit holders will have to take at least 16 hours out of their schedule for the didactic training and obtaining the necessary clinical training may likely require even further time, travel, and expense. As for rural communities, it is an inevitable consequence of this regulation that there will be fewer providers of levels 2, 3, and 4 sedation/anesthesia for these patients throughout the State of Texas. There are already fewer of these providers in rural areas than in urban areas and presumably that gap will grow wider due to the costs associated with this regulation. A provider in a rural area who only performs these procedures a few times a year likely will not go through the additional training required to continue doing so. As a result, rural patients may have to seek out someone else who is qualified to perform the procedures, likely in a more urban setting that will require additional time and expense. As such, rural communities will likely experience an ad-

verse economic impact from this proposed regulation. That said, this rule is being proposed due to a legislative mandate in S.B. 313 (85th Legislature) that requires these practitioners to undergo "additional didactic and clinical training," as defined by the Board. The legislature has mandated further training to protect the health and safety of all Texans. The Board was charged with defining "additional training" and after many discussions about alternatives they arrived at the requirements that are being proposed. The proposed requirements could be higher or lower, but either way, the legislature has mandated "additional training" and any amount of "additional training" is going to have an adverse economic effect on small businesses and rural communities. It would not have been acceptable to the Board of the legislature to have proposed one standard for rural providers and another for urban providers. The Board believes the proposed rule strikes a good balance between protecting the public health and safety and keeping the new regulation economically feasible for those who wish to provide or receive this service.

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: the rule does not create or eliminate a government program; implementation of the proposed rule does not require the creation or elimination of employee positions; the implementation of the proposed rule does not require an increase or decrease in future appropriations; the proposed rule does not require an increase or decrease in fees paid to the agency; the proposed rule creates a new regulation; the proposed rule expands an existing regulation; the proposed rule increases the number of individuals subject to it; the proposed rule does not adversely affect the state's economy.

Comments on the proposed new rule may be submitted to W. Boyd Bush, Jr., Ed.D., Executive Director, 333 Guadalupe, Suite 3-800, Austin, Texas 78701, by Fax to (512) 305-9364, or by email to [official\\_rules\\_comments@tsbde.texas.gov](mailto:official_rules_comments@tsbde.texas.gov), no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety, and Texas Occupations Code §258.1554(b), which authorizes the Board to establish limitations on the administration of anesthesia by a permit holder to a pediatric or high-risk patient.

This proposed rule implements Texas Occupations Code §258.1554. W. Boyd Bush, Jr., has determined that this rule is necessary to protect the health, safety, and welfare of the residents of Texas, and as such, Texas Government Code §2001.0045(c)(6) is applicable to this proposed rule.

### §110.16. Sedation/Anesthesia of High-Risk Patients.

(a) For purposes of this rule, the following definitions apply:

(1) "High-risk patient" means a patient who has a level 3 or 4 classification according to the American Society of Anesthesiologists Physical Status Classification System (ASA).

(2) "Board-approved education program" means an in-person or online program provided by a recognized continuing education provider pursuant to Board rule 22 TAC §104.2 of this title (relating to Providers) and any subsequent amendments.

(b) For the purposes of this chapter, ASA classifications are defined as follows:

- (1) ASA I: a normal healthy patient.
- (2) ASA II: a patient with mild systemic disease.
- (3) ASA III: a patient with severe systemic disease.
- (4) ASA IV: a patient with severe systemic disease that is a constant threat to life.

(c) On or after September 1, 2019, a permit holder may not administer sedation/anesthesia under a level 2, level 3, or level 4 permit to a high-risk patient unless the permit holder has completed the requirements of paragraph (1) or (2) of this subsection. Permit holders must have:

(1) completed a university or hospital-based residency at least 12 months in length. All permit holders completing a university or hospital-based residency after September 1, 2019, must confirm that during the residency, the permit holder completed satisfactory management of sedation/anesthesia in at least ten (10) cases involving high-risk patients sedated/anesthetized at the highest level of permit held. At least five (5) of the cases must involve the hands-on administration of sedation/anesthesia as the primary provider. No more than five (5) cases may be observed. The ten (10) cases must involve either live patients and/or high-fidelity emergency sedation/anesthesia simulations;  
or

(2) completed a board-approved education program that includes a minimum of sixteen (16) hours of didactic training and instruction in sedation/anesthesia of high-risk patients. The entire board-approved education program, including all didactic and clinical requirements, must be completed within a two-year period of beginning the Board-approved program. Successful completion of the program must include passing an evaluation to demonstrate satisfactory completion of the course requirements. Didactic education must include:

(A) pre-anesthetic patient assessment/evaluation for medically compromised and geriatric patients;

(B) physical evaluation and medical history of high-risk patients, including obesity, pregnancy, and obstructive sleep apnea syndrome, cardiovascular disease, metabolic or genetic disorders, hematologic disorders, and other systemic diseases/conditions affecting sedation/anesthesia;

(C) high-risk patient anatomical and/or physiological differences;

(D) medical consultations;

(E) high-risk respiratory assessment, including airway anatomy, physiology, and management;

(F) informed consent by patient, parent, or guardian;

(G) sedation/anesthesia pharmacology;

(H) sedation/anesthesia management of patients identified with special health care needs;

(I) high-risk patient monitoring;

(J) peri-operative complications and emergencies;

(K) emergency management of high-risk patients, including high-risk anesthesia equipment and resuscitation supplies;

(L) sedation/anesthesia technique;

(M) sedation/anesthesia record keeping;

(N) patient recovery and discharge;

(O) appropriate patient selection; and

(P) permit holders shall have completed satisfactory management of sedation/anesthesia in at least ten (10) cases involving high-risk patients sedated/anesthetized at the highest level of permit held. At least five (5) of the cases must involve the hands-on administration of sedation/anesthesia as the primary provider. No more than five (5) cases may be observed. The ten (10) cases must involve either live patients and/or high-fidelity emergency sedation/anesthesia simulations. All of the cases must be performed and documented under the on-site instruction and direct supervision of a licensed dentist authorized to administer sedation/anesthesia to high-risk patients.

(d) A permit holder is authorized to administer sedation/anesthesia under a level 2, level 3, or level 4 permit to a high-risk patient if they have completed the requirements above and have requested and received authorization from the Board to administer sedation/anesthesia to high-risk patients. Board staff shall promulgate appropriate forms for permit holders qualifying under subsection (c)(1) and (c)(2) of section. The permit holder must attest to their advanced training satisfying the requirements of subsection (c)(1) or (c)(2) of this section, and will be required to produce proof of completion as part of a permit inspection or an investigation of a complaint involving sedation/anesthesia of a high-risk patient.

(e) The education hours described in subsection (c)(2) of this section can be applied towards the permit holder's continuing education requirement for maintaining a sedation/anesthesia permit.

(f) If qualifying under subsection (c)(2) of this section, the didactic and clinical training described in subsection (c)(2) of this section may not be fulfilled by the same didactic and clinical training used to fulfill the requirements for initial sedation/anesthesia permit issuance.

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

Filed with the Office of the Secretary of State on June 8, 2018.

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W. Boyd Bush, Jr.

Executive Director

State Board of Dental Examiners

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 475-0987



## 22 TAC §110.17

The State Board of Dental Examiners (Board) proposes new rule §110.17, concerning Sedation/Anesthesia of Pediatric Patients. This new rule will require dentists to undergo additional didactic and clinical training prior to providing levels 2, 3, or 4 sedation/anesthesia to pediatric patients. This rule is being proposed to comply with the requirements of S.B. 313.

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

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the agency's compliance with legislative directives and increased public safety as a result of increased training requirements for dentists.

W. Boyd Bush, Jr. has also determined that an economic impact statement and regulatory flexibility analysis for small businesses,

micro-businesses, and rural communities is necessary for this rule. The Board has approximately 3,400 permit holders affected by this rule across the State of Texas. Many of these permit holders are considered small or micro-businesses in that they are independent practitioner-business owners employing fewer than 100 employees. Many of them practice in rural communities, defined as municipalities with fewer than 25,000 people. Small businesses, micro-businesses, and rural communities will almost certainly experience an adverse economic effect from this proposed rule. Informal comments presented at stakeholder and committee meetings estimate the cost of the new additional training program will be in the range of \$10-20,000. Permit holders will have to take at least 16 hours out of their schedule for the didactic training and obtaining the necessary clinical training may likely require even further time, travel, and expense. As for rural communities, it is an inevitable consequence of this regulation that there will be fewer providers levels 2, 3, and 4 sedation/anesthesia for these patients throughout the State of Texas. There are already fewer of these providers in rural areas than in urban areas and presumably that gap will grow wider due to the costs associated with this regulation. A provider in a rural area who only performs these procedures a few times a year likely will not go through the additional training required to continue doing so. As a result, rural patients may have to seek out someone else who is qualified to perform the procedures, likely in a more urban setting that will require additional time and expense. As such, rural communities will likely experience an adverse economic impact from this proposed regulation. That said, this rule is being proposed due to a legislative mandate in Senate Bill 313 (85th Legislature) that requires these practitioners to undergo "additional didactic and clinical training," as defined by the Board. The legislature has mandated further training to protect the health and safety of all Texans. The Board was charged with defining "additional training" and after many discussions about alternatives they arrived at the requirements that are being proposed. The proposed requirements could be higher or lower, but either way, the legislature has mandated "additional training" and any amount of "additional training" is going to have an adverse economic effect on small businesses and rural communities. It would not have been acceptable to the Board or the legislature to have proposed one standard for rural providers and another for urban providers. The Board believes the proposed rule strikes a good balance between protecting the public health and safety and keeping the new regulation economically feasible for those who wish to provide or receive this service.

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: the rule does not create or eliminate a government program; implementation of the proposed rule does not require the creation or elimination of employee positions; the implementation of the proposed rule does not require an increase or decrease in future appropriations; the proposed rule does not require an increase or decrease in fees paid to the agency; the proposed rule creates a new regulation; the proposed rule expands an existing regulation; the proposed rule increases the number of individuals subject to it; the proposed rule does not adversely affect the state's economy.

Comments on the proposed new rule may be submitted to W. Boyd Bush, Jr., Ed.D., Executive Director, 333 Guadalupe, Suite 3-800, Austin, Texas 78701, by Fax to (512) 305-9364, or by email to [official\\_rules\\_comments@tsbde.texas.gov](mailto:official_rules_comments@tsbde.texas.gov) no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety, and Texas Occupations Code §258.1554(b), which authorizes the Board to establish limitations on the administration of anesthesia by a permit holder to a pediatric or high-risk patient.

This proposed rule implements Texas Occupations Code §258.1554. W. Boyd Bush, Jr., has determined that this rule is necessary to protect the health, safety, and welfare of the residents of Texas, and as such, Texas Government Code 2001.0045(c)(6) is applicable to this proposed rule.

§110.17. Sedation/Anesthesia of Pediatric Patients.

(a) For purposes of this rule, the following definitions apply:

(1) "Pediatric patient" means a patient younger than 13 years of age.

(2) "Board-approved education program" means an in-person or online program provided by a recognized continuing education provider pursuant to Board rule 22 Tex. Admin. Code §104.2 and any subsequent amendments.

(b) On or after September 1, 2019, a permit holder may not administer sedation/anesthesia under a level 2, level 3, or level 4 permit to a pediatric patient unless the permit holder has completed the requirements of paragraphs (1) or (2) of this subsection. Permit holders must have:

(1) completed a university or hospital-based residency at least 12 months in length. All permit holders completing a university or hospital-based residency after September 1, 2019, must confirm that during the residency, the permit holder completed satisfactory management of sedation/anesthesia in at least fifteen (15) cases involving pediatric patients sedated/anesthetized at the highest level of permit held. The cases must include at least three (3) live cases in which the permit holder is the primary sedation/anesthesia provider, no more than seven (7) cases observed on live patients, and no more than five (5) cases performed as part of a hands-on high-fidelity sedation simulation center or program; or

(2) completed a board-approved education program that includes a minimum of sixteen (16) hours of didactic training and instruction in sedation/anesthesia of pediatric patients. The entire board-approved education program, including all didactic and clinical requirements, must be completed within a two-year period of beginning the Board-approved program. Successful completion of the program must include passing an evaluation to demonstrate satisfactory completion of the course requirements. Didactic education must include:

(A) pre-anesthetic patient assessment/evaluation for medically compromised and geriatric patients;

(B) physical evaluation and medical history of pediatric patients, including obesity, limited neck mobility, micro/retrognathia, macroglossia, Mallampati score, and limited oral opening;

(C) pediatric anatomical and/or physiological differences;

(D) pediatric respiratory assessment, including airway anatomy, physiology, and management;

(E) informed consent by parent, guardian, or care-giver;

(F) sedation/anesthesia pharmacology;



- (G) sedation/anesthesia management of pediatric patients;
- (H) pediatric patient monitoring;
- (I) peri-operative complications and emergencies;
- (J) emergency management of pediatric patients, including pediatric anesthesia equipment and resuscitation supplies;
- (K) sedation/anesthesia technique;
- (L) sedation/anesthesia record keeping;
- (M) patient recovery and discharge;
- (N) pediatric case selection and reference behavior scale; and

(O) permit holders shall have completed satisfactory management of sedation/anesthesia in at least fifteen (15) cases involving pediatric patients sedated/anesthetized at the highest level of permit held. The cases must include at least three (3) live cases in which the permit holder is the primary sedation/anesthesia provider, no more than seven (7) cases observed on live patients, and no more than five (5) cases performed as part of a hands-on high-fidelity sedation simulation center or program. All of the cases must be performed and documented under the on-site instruction and direct supervision of a licensed dentist authorized to administer sedation/anesthesia to pediatric patients.

(c) A permit holder is authorized to administer sedation/anesthesia under a level 2, level 3, or level 4 permit to a pediatric patient if they have completed the requirements above and have requested and received authorization from the Board to administer sedation/anesthesia to pediatric patients. Board staff shall promulgate appropriate forms for permit holders qualifying under subsection (b)(1) and (b)(2) of this section. The permit holder must attest to their advanced training satisfying the requirements of subsection (b)(1) or (b)(2) of this section, and will be required to produce proof of completion as part of a permit inspection or an investigation of a complaint involving sedation/anesthesia of a pediatric patient.

(d) The education hours described in subsection (b)(2) of this section can be applied towards the permit holder's continuing education requirement for maintaining a sedation/anesthesia permit.

(e) If qualifying under subsection (b)(2) of this section, the didactic and clinical training described in subsection (b)(2) of this section may not be fulfilled by the same didactic and clinical training used to fulfill the requirements for initial sedation/anesthesia permit issuance.

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

Filed with the Office of the Secretary of State on June 8, 2018.

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W. Boyd Bush, Jr.

Executive Director

State Board of Dental Examiners

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 475-0987



**22 TAC §110.18**

The State Board of Dental Examiners (Board) proposes new rule §110.18, concerning the inspection of sedation/anesthesia providers. This new rule will require permit holders to undergo

compliance inspections within one year of receiving a level 2, 3, or 4 sedation/anesthesia permit, as well as an inspection for all other level 2, 3, or 4 permit holders by September 1, 2022. This rule is being proposed to comply with the requirements of S.B. 313 regarding the inspections of sedation/anesthesia providers.

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

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the agency's compliance with legislative directives and increased public safety as a result of the inspection and confirmation of compliance for permit holding dentists.

W. Boyd Bush, Jr. has also determined that an economic impact statement and regulatory flexibility analysis for small businesses and micro-businesses is necessary for this rule. The Board currently has approximately 3,400 permit holders affected by this rule across the State of Texas. Many of these permit holders are considered small or micro-businesses in that they are independent practitioner-business owners employing fewer than 100 employees. Small businesses and micro-businesses, will almost certainly experience an adverse economic effect from this proposed rule. Many permit holders operate in small or micro-business formats, as their offices are solo or small dental practices. Preparation for inspections and possible downtime during the inspection process may force these providers to sacrifice some income from patients that would have been scheduled during the inspection time. However, this rule is being proposed due to a legislative mandate in Senate Bill 313 (85th Legislature) that requires these practitioners to undergo inspections as necessary to enforce the requirements of the Dental Practice Act and Board rules. The legislature has mandated inspections to protect the health and safety of all Texans. The Board was charged with developing a policy for inspections and developing the training and policies necessary to implement the inspection program, and after many discussions about alternatives they arrived at the requirements that are being proposed. The Board believes the proposed rule strikes a good balance between protecting the public health and safety and avoiding onerous inspection requirements that would impact permit holders' ability to provide services to the public.

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: the rule does not create or eliminate a government program; implementation of the proposed rule does not require the creation or elimination of employee positions; the implementation of the proposed rule does not require an increase or decrease in future appropriations; the proposed rule does require an increase in fees paid to the agency; the proposed rule creates a new regulation; the proposed rule expands an existing regulation; the proposed rule increases the number of individuals subject to it; the proposed rule does not adversely affect the state's economy.

Comments on the proposed new rule may be submitted to W. Boyd Bush, Jr., Ed.D., Executive Director, 333 Guadalupe, Suite 3-800, Austin, Texas 78701, by Fax to (512) 305-9364, or by email to [official\\_rules\\_comments@tsbde.texas.gov](mailto:official_rules_comments@tsbde.texas.gov) no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety, and Texas Occupations Code §258.156, which authorizes the Board to establish an inspection program for all providers of level 2, 3 or 4 sedation/anesthesia permits.

This proposed rule implements requirements of S.B. 313 and Texas Occupations Code §258.156(b)-(h). W. Boyd Bush, Jr., has determined that this rule is necessary to protect the health, safety, and welfare of the residents of Texas, and as such, Texas Government Code §2001.0045(c)(6) is applicable to this proposed rule.

§110.18. Inspection of Sedation/Anesthesia Providers.

(a) The Board may conduct inspections to enforce Chapter 110 of the Board's rules, including inspections of a licensee, an office site, equipment, a facility, and any document required by Board rules. The inspections shall not identify violations outside the applicable sedation/anesthesia rules in effect for each permit level at the time of the inspection. The Board may employ Board staff or contract with another state agency or qualified person to conduct these inspections.

(b) Unless it would jeopardize an ongoing investigation, the Board shall provide at least ten business days' notice before conducting an on-site inspection under this section.

(c) Regardless of issue date, all level 2, 3 and 4 permit holders will be subject to at least one inspection prior to September 1, 2022. All level 2, 3, and 4 permit holders who received their initial permit after March 1, 2018, must be inspected within a year of receiving their permit.

(d) Compliance/Tier 1 inspections: The initial inspection will be a compliance inspection, in which a Board staff member will evaluate the permit holder's compliance with the Board's rules through completing a checklist and auditing one sedation/anesthesia record of the inspector's choosing that was completed prior to the date the Board notified the licensee of the inspection. The record shall be of treatment for the highest level of sedation/anesthesia permit held by the permit holder, and will apply the Board rules in effect at the time the patient was treated. The inspector shall be a member of Board staff and will receive training in recognizing the checklist requirements and in evaluating sedation/anesthesia records. If the inspection results in the identification of a violation of the Board's rules found in Chapter 110, the permit holder must immediately cease providing sedation/anesthesia services until satisfactory proof is provided to Board staff that the violation has been corrected. Board staff shall provide contact information for both an inspector and supervisor of the inspector so that the permit holder may provide proof of remediation as soon as possible. Any violation of this cease and desist requirement shall represent grounds for disciplinary action. A failure by Board staff to respond within two business days to permit holder's satisfactory proof of remediation shall represent an affirmative defense to disciplinary action. Additionally, the permit holder shall pay an amount of not more than five hundred dollars (\$500.00) as necessary to cover the expenses of additional review and inspection by Board staff as a result of any violations identified during the initial inspection. The inspection checklist can be previewed here: Figure: 22 TAC §110.18(d)

(e) Risk-based/Tier 2 inspections: A permit holder with a violation on a compliance/tier 1 inspection that is not remedied within thirty (30) days shall be referred to a risk-based inspection. Additionally, a Board member sitting on an informal settlement conference panel pursuant to Tex. Occ. Code §263.0072 may refer a permit holder to a risk-based inspection. The risk-based inspection will include the

same factors as a compliance inspection, as well as a competency evaluation consisting of an audit of five sedation/anesthesia records of the inspector's choosing. The records shall be of treatment records for the highest level of sedation/anesthesia permit held by the permit holder, and shall apply the Board rules in effect at the time the patient was treated. Review of the five sedation/anesthesia records shall be performed by members of the Board's dental review panel process pursuant to Tex. Occ. Code §255.0065 who currently hold the same or higher level of sedation/anesthesia permit. The dental review panel reviewer shall prepare a report and note any violations or concerns with the permit holder's competency, and the report shall be reviewed following the procedure described in Tex. Occ. Code §255.0067. Any violation found during the risk-based inspection may result in the filing of a complaint and complaint resolution pursuant to the Board's informal disposition process in 22 Texas Administrative Code §107.63. The Executive Committee of the Board may order the emergency temporary suspension of a permit if the risk-based inspection reveals evidence of a clear, imminent, or continuing threat to the health or well-being of the public.

(f) Inactive status: A permit holder may forego an inspection if they submit a notarized, Board-issued affidavit that they will not administer levels 2, 3, or 4 sedation/anesthesia until first notifying the Board in writing that they wish to resume those activities. A permit holder must complete a compliance/Tier 1 inspection prior to resuming the administration of sedation/anesthesia at the inactive permit level. The permit holder must comply with continuing education and any other permit requirements during this time. During the period of inactive status, a permit holder may not delegate any inactive-status level of sedation/anesthesia to a certified registered nurse anesthetist or any other dental or medical professional except a dentist with a permit issued by the Board for the procedure being performed or a physician anesthesiologist licensed by the Texas Medical Board. If the permit holder is later found to have administered or delegated the administration of level 2, 3, or 4 sedation/anesthesia while in inactive status, the Board shall pursue revocation of their dental license.

(g) Exempt-location status: The Board shall not inspect a level 2, 3, or 4 permit holder who provides those services exclusively in a state-licensed hospital or state-licensed ambulatory surgery center. The permit holder must attest to that fact with a notarized, Board-issued affidavit and may not provide those services at a non-exempt location until first notifying the Board in writing and successfully completing a compliance/Tier 1 inspection. During the period of exempt-location status, a permit holder may not delegate the administration of any level of sedation/anesthesia to a dental or medical professional outside a state-licensed hospital or state-licensed ambulatory surgery center. If they are later found to have administered or delegated the administration of level 2, 3, or 4 sedation/anesthesia in a non-exempt location, the Board shall pursue revocation of their dental license.

(h) Group practice inspections. The Board shall permit group practices to request an inspection of all permit holders in a single location during one inspection visit. Permit holders shall inform Board staff upon receiving notice of an inspection their wish to receive a combined group practice inspection, and Board staff shall accommodate this request as feasible while ensuring a group inspection shall not jeopardize an ongoing investigation. Board staff shall ensure that group practice inspection requests do not create unnecessary delays to the completion of the inspection process and may decline the request as needed to ensure timely completion of all scheduled inspections.

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

Filed with the Office of the Secretary of State on June 8, 2018.

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W. Boyd Bush, Jr.

Executive Director

State Board of Dental Examiners

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For further information, please call: (512) 475-0987



## CHAPTER 114. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL ASSISTANTS

### 22 TAC §114.12

The State Board of Dental Examiners (Board) proposes amended rule §114.12, concerning the continuing education requirements applicable to registered dental assistants. This amendment to the existing rule will clarify the continuing education requirements applicable to registered dental assistants and the requirements applicable to the courses. This rule is being proposed to comply with the requirements of S.B. 313.

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

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of this rule will be the agency's compliance with legislative directives, the clarification and streamlining of registered dental assistant continuing education, and the safety and welfare of the public by ensuring registered dental assistants complete high quality continuing education on a regular basis.

W. Boyd Bush, Jr. has determined that no economic impact statement and regulatory flexibility analysis for small businesses, micro-businesses, and rural communities is necessary for this rule.

W. Boyd Bush, Jr. has also determined that for the first five-year period the proposed rule is in effect, the following government growth effects apply: the rule does not create or eliminate a government program; implementation of the proposed rule does not require the creation or elimination of employee positions; the implementation of the proposed rule does not require an increase or decrease in future appropriations; the proposed rule does not require an increase or decrease in fees paid to the agency; the proposed rule does not create a new regulation; the proposed rule does not expand an existing regulation; the proposed rule does not increase the number of individuals subject to it; the proposed rule does not adversely affect the state's economy.

Comments on the proposed new rule may be submitted to W. Boyd Bush, Jr., Ed.D., Executive Director, 333 Guadalupe, Suite 3-800, Austin, Texas 78701, by Fax to (512) 305-9364, or by email to [official\\_rules\\_comments@tsbde.texas.gov](mailto:official_rules_comments@tsbde.texas.gov) no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety, and Texas Occupations Code §265.008,

which directs the Board to adopt rules establishing continuing education requirements for registered dental assistants.

This proposed rule implements Texas Occupations Code §265.008.

### §114.12. Continuing Education for Certificate Holders.

(a) To renew a certificate of registration issued under this chapter, a dental assistant must complete six (6) hours of continuing education each year in areas covering dental assistant duties.

~~[(b) A dental assistant holding two or more certificates authorized by this chapter is required to complete twelve (12) hours of continuing education each year to renew all of the certificates held by the assistant.]~~

(b) ~~[(e)]~~ A dental assistant may fulfill the continuing education requirement through board-approved self-study, interactive computer courses, or lecture courses. All continuing education must be offered by providers approved under 22 Texas Administrative Code §104.2.

~~[(d) Dental assistants shall select and participate in continuing education courses offered by or endorsed by:]~~

~~[(1) dental schools; dental hygiene schools; or dental assisting schools that have been accredited by the Commission on Dental Accreditation of the American Dental Association; or]~~

~~[(2) nationally recognized dental; dental hygiene or dental assisting organizations.]~~

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

Filed with the Office of the Secretary of State on June 8, 2018.

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W. Boyd Bush, Jr.

Executive Director

State Board of Dental Examiners

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 475-0987



## PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

### CHAPTER 850. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS SUBCHAPTER C. FEES

#### 22 TAC §850.82

The Texas Board of Professional Geoscientists (TBPG) proposes an amendment concerning the licensure and regulation of Professional Geoscientists in Texas. TBPG proposes an amendment to 22 TAC §850.82, concerning dishonored payment.

#### BACKGROUND AND PURPOSE

TBPG conducted its four-year rule review in 2018, and, as a result of the review process, now proposes a change to its rules for refinement and clarity.

#### SECTION SUMMARY

Proposed amendment to §850.82, makes use of the defined term "licensee," adding the word "licensee," and removing the terms, "license, certification or registration holder because a licensee is a defined term in §850.10. In §850.82, "licensee is defined as, "An individual holding a current Professional Geoscientist license, GIT certificate, or firm registration.

#### FISCAL NOTE

##### STATE AND LOCAL GOVERNMENT

Charles Horton, Executive Director of the Texas Board of Professional Geoscientists, has determined that for each fiscal year of the first five years the section is in effect there is no cost to the state and local governments as a result of enforcing or administering the section as proposed. There is no anticipated negative impact on state or local government. There are no estimated reductions in cost to the state and to local governments as a result of enforcing or administering the proposed section. There is no estimated loss or increase in revenue to the state or local governments as a result of enforcing or administering this section. This proposal has no foreseeable implications relating to cost or revenues of the state or local governments.

##### PUBLIC BENEFIT AND COST

Mr. Horton has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of enforcing or administering the section includes the consistent use of terms defined in the rules, which adds to the clarity of the amended rule. There will be no anticipated economic cost to individuals who are required to comply with the proposed section.

##### SMALL, MICRO-BUSINESS, LOCAL ECONOMY, AND RURAL COMMUNITIES ECONOMIC IMPACT ANALYSIS

Mr. Horton has determined that the proposed rule will not have an adverse effect on small businesses, micro-businesses, local economy, or rural communities. Consequently, neither an economic impact statement, a local employment impact statement, nor a regulatory flexibility analysis is required.

##### GOVERNMENT GROWTH IMPACT STATEMENT

During the first five years that the amendment would be in effect:

- (1) the proposed rules do not create or eliminate a government program;
- (2) implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions;
- (3) implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency;
- (4) the proposed rules do not require an increase or decrease in fees paid to the agency;
- (5) the proposed rules do not create a new regulation;
- (6) the proposed rules do not expand, limit, or repeal an existing regulation;
- (7) the proposed rules do not increase or decrease the number of individuals subject to the rules' applicability; and
- (8) the proposed rules do not positively or adversely affect this state's economy.

#### REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

Mr. Horton has determined that this proposal is not a "major environmental rule as defined by Government Code, §2001.0225. "Major environmental rule is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. Although Professional Geoscientists and Registered Geoscience Firms play a key role in environmental protection for the state of Texas, this proposal is not specifically intended to protect the environment nor reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Comments on the proposed amendment may be submitted in writing to Charles Horton, Executive Director, Texas Board of Professional Geoscientists, 333 Guadalupe Street, Tower I-530, Austin, Texas 78701 or by mail to P.O. Box 13225, Austin, Texas 78711 or by e-mail to [chorton@tbpge.texas.gov](mailto:chorton@tbpge.texas.gov). Please indicate "Comments on Proposed Amendment in the subject line of all e-mails submitted. Please submit comments within 30 days following publication of the proposal in the *Texas Register*.

#### STATUTORY AUTHORITY

This amendment is proposed under the Texas Geoscience Practice Act, Occupations Code §1002.151, which authorizes the Board to adopt and enforce all rules and regulations consistent with the Act as necessary for the performance of its duties, and the regulation of the practice of geoscience in this state; and Occupations Code §1002.154, which provides that Board shall enforce the Act.

It affects the Texas Geoscience Practice Act, Occupations Code §1002.151 and §1002.154.

##### *§850.82. Dishonored Payment.*

(a) If a payment drawn to the TBPG for an initial license, certification or registration or the renewal of a license, certification, or registration is dishonored by a payor, the TBPG shall take the following actions:

(1) Notify the applicant or licensee [~~license, certification or registration holder~~] of the issue and request resolution of the payment, plus the insufficient funds fee in §851.80 of this title within 30 days;

(2) Invalidate any new or renewed license, certification, or registration that was processed based on the payment that was dishonored, if the payment has not been resolved within 30 days of the sending or receipt of the notice, as applicable.

(b) any other payment to the TBPG is dishonored by a payor, the TBPG will take appropriate steps as determined by the Executive Director.

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

Filed with the Office of the Secretary of State on June 8, 2018.

TRD-201802548

Charles Horton

Executive Director

Texas Board of Professional Geoscientists

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 936-4405



## TITLE 25. HEALTH SERVICES

### PART 1. DEPARTMENT OF STATE HEALTH SERVICES

#### CHAPTER 13. HEALTH PLANNING AND RESOURCE DEVELOPMENT

##### SUBCHAPTER G. WORKPLACE VIOLENCE AGAINST NURSES PREVENTION

###### 25 TAC §§13.81 - 13.87

The Executive Commissioner of the Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes new Title 25, Part 1, Chapter 13, Subchapter G, Workplace Violence Against Nurses Prevention Grant Program, including new §13.81, concerning Purpose; §13.82, concerning Definitions; §13.83, concerning Grant Application Procedures; §13.84, concerning Program Funding and Award Amounts; §13.85, concerning Award Criteria and Selection for Funding; §13.86, concerning General Information; and §13.87, concerning Reporting.

###### BACKGROUND AND PURPOSE

The new subchapter and sections are necessary to implement Texas Health and Safety Code, §105.011, which authorizes HHSC to adopt rules for DSHS to administer a grant program aimed at reducing workplace violence against nurses. The purpose of these new rules is to describe the grant program as well as the eligibility, grant application procedures, award amounts, award criteria and selection criteria, general information, and reporting requirements as they relate to this grant program.

###### SECTION-BY-SECTION SUMMARY

Proposed new §13.81, concerning Purpose, identifies the purpose of the subchapter, which is to implement rules to establish the Workplace Violence Against Nurses Prevention Grant Program.

Proposed new §13.82, concerning Definitions, defines words and terms used in the subchapter.

Proposed new §13.83, concerning Grant Application Procedures, identifies the steps an applicant must complete to qualify for funding consideration.

Proposed new §13.84, concerning Program Funding and Award Amounts, identifies the source of the funding available to the program, states that award amounts are dependent on the availability of funding, and that the number and amount of awards will be specified in each Request for Application.

Proposed new §13.85, concerning Award Criteria and Selection for Funding, describes the review of applications and the requirements of a complete application.

Proposed new §13.86, concerning General Information, identifies the department's right to cancel or suspend grant solicitations and the requirement for applicants to sign a Notice of Grant Award before release of funds.

Proposed new §13.87, concerning Reporting, describes reporting requirements for the department and each grant recipient.

###### FISCAL NOTE

Donna Sheppard, DSHS Chief Financial Officer, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

###### GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the sections will be in effect:

- (1) the proposed rules will create a government program;
- (2) implementation of the proposed rules will not affect the number of employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to the agency;
- (5) the proposed rules will create new rules;
- (6) the proposed rules will not expand existing rules;
- (7) the proposed rules will not change the number of individuals subject to the rules; and
- (8) the proposed rules will not affect the state's economy.

###### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Donna Sheppard has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

The rules do not apply to small businesses, micro-businesses, or rural communities. The proposed new rules merely outline the requirements for establishing and administering a grant program.

###### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

There is no anticipated negative impact on local employment.

###### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons.

###### PUBLIC BENEFIT

Pamela Lauer, Texas Center for Nursing Workforce Studies, has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections will be the administration of the legislatively required grant program aimed at reducing workplace violence against nurses.

## TAKINGS IMPACT ASSESSMENT

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

## PUBLIC COMMENT

Questions about the content of this proposal may be directed to Pamela Lauer at (512) 776-6723 in the DSHS Center for Health Statistics.

Written comments on the proposal may be submitted to Pamela Lauer, Texas Center for Nursing Workforce Studies, Center for Health Statistics, Department of State Health Services, 1100 West 49th Street, Austin, TX 78756 or Mail Code 1898, P.O. Box 149347, Austin Texas 78714-9347; by fax to (512) 776-7344; or by email to [tcnws@dshs.texas.gov](mailto:tcnws@dshs.texas.gov). When faxing or emailing comments, please indicate "Comments on Proposed Rule 25R066" in the subject line.

Comments are accepted for 30 days following publication of the proposal in the *Texas Register*. If the last day to submit comments falls on a weekend or a holiday, comments must be post-marked, shipped, faxed, or emailed before midnight on the following business day to be accepted.

## STATUTORY AUTHORITY

The new sections are authorized by Texas Health and Safety Code, §105.011, which provides that DSHS shall provide administrative assistance to the nursing resource section in administering the grant program and that the Executive Commissioner shall adopt rules to implement the grant program, including rules governing the submission and approval of grant requests and establishing a reporting procedure for grant recipients. Texas Government Code, §531.0055 and Texas Health and Safety Code, §1001.075 authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

The new sections implement Texas Health and Safety Code, Chapters 105 and 1001; and Texas Government Code, Chapter 531.

### §13.81. Purpose.

(a) The purpose of this subchapter is to implement Texas Health and Safety Code, §105.011. The Workplace Violence Against Nurses Prevention Grant Program authorizes the Department of State Health Services to award grant payments to fund innovative approaches aimed at reducing verbal and physical violence against nurses in hospitals, freestanding emergency medical care facilities, nursing facilities, and home health agencies.

(b) Grant funds awarded under this subchapter may only be spent on a program intended to identify and implement efforts to reduce verbal and physical violence against nurses in hospitals, freestanding emergency medical care facilities, nursing facilities, and home health agencies.

### §13.82. Definitions.

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

(1) Administer--Includes the proposal, development, and implementation of a program, within the parameters of the Request for Applications.

(2) Department--The Texas Department of State Health Services.

(3) Health care facility--Includes any of the following, as defined in Texas Health and Safety Code, §105.001:

(A) "Freestanding emergency medical care facility" means a facility licensed under Texas Health and Safety Code, Chapter 254.

(B) "Home health agency" means a home and community support services agency licensed under Texas Health and Safety Code, Chapter 142.

(C) "Hospital" means a:

(i) general or special hospital licensed under Texas Health and Safety Code, Chapter 241;

(ii) private mental hospital licensed under Texas Health and Safety Code, Chapter 577; or

(iii) hospital that is maintained or operated by this state or an agency of this state.

(D) "Nursing facility" means an institution licensed under Texas Health and Safety Code, Chapter 242.

(4) Request for Applications (RFA)--A type of solicitation notice in which the department announces available grant funding, sets forth the guidelines governing the program, provides evaluation criteria for submitted applications, and provides instructions for eligible entities to submit applications for such funding. The guidelines governing the program may include a letter of intent, eligibility requirements, performance expectations, budget guidelines, reporting requirements, and other standards of accountability for this program.

(5) Workplace Violence Prevention Grant Program--A grant program under which the department awards grant payments to a health care facility to administer innovative programs designed to reduce verbal and physical violence against nurses in this state.

### §13.83. Grant Application Procedures.

To qualify for funding consideration, each eligible applicant must submit an application to department staff identified in the RFA. Each application must:

(1) be submitted electronically in a format specified in the RFA;

(2) adhere to the grant program requirements and the funding priorities contained in the RFA; and

(3) be submitted with proper authorization on or before the date and time specified by the department in the RFA.

### §13.84. Program Funding and Award Amounts.

The maximum amount of funding available to the program is dependent on the extent funding is available through fees collected under Texas Occupations Code, §301.155(c) for each biennium. Maximum and minimum award levels and maximum number of awards will be specified in each RFA.

### §13.85. Award Criteria and Selection for Funding.

(a) Applicants shall be selected for funding on a competitive basis.

(b) An application must meet the requirements of the RFA and be submitted with proper authorization on or before the day and time specified by the RFA to qualify for further consideration.

(c) A taskforce assigned by the Nursing Advisory Committee, defined by Texas Health and Safety Code, §104.0155, will review and

evaluate the proposals. Proposals will be scored by the taskforce and the taskforce will make recommendations to the department for grant awards.

(d) Each application shall:

(1) provide a detailed explanation of the applicant's workplace violence prevention program, including:

(A) a timeline for development and implementation;

(B) a description of the population identified to participate in the program;

(C) a detailed budget; and

(D) detailed information related to administration and support for the program;

(2) document how the workplace violence prevention program will achieve the goals of reducing verbal and physical violence against nurses in the applicant's health care facility; and

(3) propose performance metrics for measuring short-term and long-term outcomes of the program, including a measure of the change in the severity and frequency of verbal and physical violence against nurses.

(e) Priority for selection will be given to applicants that demonstrate an innovative approach to reducing verbal and physical violence against nurses that includes the following:

(1) evidence supporting the conceptual foundation of the proposed program;

(2) evidence of institutional commitment to reduce workplace violence against nurses;

(3) evidence of institutional support of the proposal, such as staff time, access to institutional resources, and/or funds; and

(4) description of a plan for long-term sustainability of the proposed program.

§13.86. General Information.

(a) Cancellation or Suspension of Grant Solicitations. The department has the right to cancel or suspend a grant solicitation or RFA for any reason.

(b) Notice of Grant Award (NOGA). Before release of funds, the successful applicants must sign a NOGA issued by department staff.

§13.87. Reporting.

(a) Each grant recipient shall provide reports to the department as required by the RFA. The reports must include descriptions of the following:

(1) activities funded through the grant;

(2) the change in the severity and frequency of verbal and physical violence against nurses;

(3) program performance based on stated performance metrics; and

(4) budget expenditures.

(b) At least annually, the Nursing Resource Section of the Health Professions Resource Center of the department shall publish a report describing the grants awarded under this subchapter, including the amount of the grants, the purpose of the grants, and the outcome reported by the grant recipient.

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

Filed with the Office of the Secretary of State on June 6, 2018.

TRD-201802446

Barbara L. Klein

General Counsel

Department of State Health Services

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 776-6723



## CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

### SUBCHAPTER R. ADVISORY COMMITTEES

#### 25 TAC §37.401

The Executive Commissioner of the Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes an amendment to §37.401, concerning Maternal Mortality and Morbidity Task Force (committee).

#### BACKGROUND AND PURPOSE

The changes to §§37.401(c), 37.401(e), 37.401(f), and 37.401(i) are necessary to comply with Senate Bill 17, 85th Legislature, First Called Session, 2017, which amended Health and Safety Code, Chapter 34 and expands the duties of the committee and increases the committee's composition. Senate Bill 17 also requires the committee meetings to be subject to the Open Meetings Act, Texas Government Code, Chapter 551, except when reviewing cases.

Changes to §37.401(f) and §37.401(l) are being made to remove duplicative language from the committee's bylaws and are based on program staff initiative.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §37.401(c) expands the committee's duties, instructs the committee to compare rates of pregnancy-related deaths based on the socioeconomic status of the mother, and directs the committee to consult with the Perinatal Advisory Council when making recommendations to help reduce the incidence of pregnancy-related deaths and severe maternal morbidity. This amendment was due to state legislation.

The proposed amendment to §37.401(e) extends the committee until September 1, 2023. This amendment was due to state legislation.

The proposed amendment to §37.401(f) increases the committee's composition to 17 by adding a nurse specializing in labor and delivery and a physician specializing in critical care. This amendment was due to state legislation.

The proposed amendment to §37.401(i) requires the committee meetings to be subject to the Open Meetings Act, Texas Government Code, Chapter 551, except when the committee conducts a closed meeting to review cases. The proposed amendment also requires the committee to allow for public comment during at least one public meeting each year, and directs the committee to present recommendations in open session and post public

notice for meetings conducted for the sole purpose of reviewing cases. This amendment was due to state legislation.

The proposed amendment to §37.401(l) removes duplicative procedure language that is in the committee's bylaws. This amendment was due to program staff's initiative to make procedural language clearer.

The proposed amendment to relettered §37.401(l) adds punctuation to statute citations for consistency throughout the rule.

#### FISCAL NOTE

Donna Sheppard, Chief Financial Officer, has determined that for each year of the first five years that the amended section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the section as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the section will be in effect:

- (1) the proposed rule will not create or eliminate a government program;
- (2) implementation of the proposed rule will not affect the number of employee positions;
- (3) implementation of the proposed rule will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rule will not affect fees paid to the agency;
- (5) the proposed rule will not create a new rule;
- (6) the proposed rule will expand an existing rule;
- (7) the proposed rule will not change the number of individuals subject to the rule; and
- (8) the proposed rule will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Donna Sheppard, Chief Financial Officer, has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rule does not apply to small or micro-businesses, or rural communities.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the section as proposed.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to this rule because the rule does not impose a cost on regulated persons; is necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule; and is necessary to protect the health, safety, and welfare of the residents of Texas.

#### PUBLIC BENEFIT

Dr. Manda Hall, Associate Commissioner, has determined that for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of enforcing the section will be greater expertise during case review and recommendation development, leading to improved health of women throughout the State of Texas.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Questions about the content of this proposal may be directed to Audrey Young at (512) 776-3069 in DSHS Community Health Improvement Division.

Written comments on the proposal may be submitted to Audrey Young, Maternal and Child Health Program Coordinator, P.O. Box 149347, Mail Code 1922, Austin, Texas 78751; or by e-mail to [Maternalhealth@dshs.texas.gov](mailto:Maternalhealth@dshs.texas.gov) or by fax to (512) 776-7658. When faxing or emailing comments, please indicate "Comments on Proposed Rule DSHS-18-R021" in the subject line.

Comments are accepted for 30 days following publication of the proposal in the *Texas Register*. If the last day to submit comments falls on a weekend or a holiday, comments must be post-marked, shipped, faxed or emailed before midnight on the following business day to be accepted.

#### STATUTORY AUTHORITY

The proposed rule is authorized by Texas Government Code, §531.012, which requires DSHS to adopt rules necessary to establish an Advisory Committee, and by Chapter 2110 in general; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

The rule affects Texas Government Code, Chapters 531 and 2110; and Texas Health and Safety Code, Chapters 34 and 1001.

*§37.401. Maternal Mortality and Morbidity Task Force.*

(a) The committee. The Maternal Mortality and Morbidity Task Force (committee) is appointed under and governed by this section. The committee is established under Texas Health and Safety Code, §§34.001 - 34.018.

(b) Purpose. The purpose of the committee is to study cases of pregnancy-related deaths and trends in severe maternal morbidity and to make recommendations to reduce the incidence of pregnancy-related deaths and severe maternal morbidity in Texas.

(c) Tasks. The committee:

(1) studies and reviews:

(A) cases of pregnancy-related deaths; ~~and~~

(B) trends, rates, or disparities in pregnancy-related deaths and ~~in~~ severe maternal morbidity; ~~and~~

(C) health conditions and factors that disproportionately affect the most at-risk populations as determined in the joint biennial report required under Texas Health and Safety Code, §34.015; and

(D) best practices and programs operating in other states that have reduced rates of pregnancy-related deaths;

(2) compares rates of pregnancy-related deaths based on the socioeconomic status of the mother;



(3) [(2)] determines the feasibility of the committee studying cases of severe maternal morbidity; and

(4) in consultation with the Perinatal Advisory Council, makes recommendations to help reduce the incidence of pregnancy-related deaths and severe maternal morbidity in this state.

{(3) makes recommendations to help reduce the incidence of pregnancy-related deaths and severe maternal morbidity in Texas.}

(d) Reports. No later than September 1 of each even-numbered year, the committee must submit a biennial written report to the Governor, Lieutenant Governor, Speaker of the House of Representatives, and appropriate committees of the Texas Legislature.

(1) The report must include:

(A) the findings of the committee related to their study and review of cases and trends in pregnancy-related deaths and severe maternal morbidity in this state; and

(B) any policy recommendations made to the HHSC Executive Commissioner to help reduce the incidence of pregnancy-related deaths and severe maternal morbidity.

(2) DSHS must disseminate the report to the state professional associations and organizations listed in Texas Health and Safety Code, §34.006(b).

(e) Sunset Provision. The committee is subject to Texas Government Code, Chapter 325, (Texas Sunset Act). Unless continued in existence as provided by that chapter, the committee is abolished and this section expires September 1, 2023 [~~September 1, 2019~~].

(f) Composition. [(+) ] The committee is composed of 17 [+5] members:

(1) [(A) ] fifteen [thirteen] members appointed by the DSHS Commissioner:

(A) [(+) ] four physicians specializing in obstetrics, at least one of whom is a maternal fetal medicine specialist;

(B) [(+)] one certified nurse-midwife;

(C) [(+)] one registered nurse;

(D) one nurse specializing in labor and delivery;

(E) [(+)] one physician specializing in family practice;

(F) [(+)] one physician specializing in psychiatry;

(G) [(+)] one physician specializing in pathology;

(H) [(+)] one epidemiologist, biostatistician, or researcher of pregnancy-related deaths;

(I) [(+)] one social worker or social service provider;

(J) [(+)] one community advocate in a relevant field; [and]

(K) [(+)] one medical examiner or coroner responsible for recording deaths; and

(L) one physician specializing in critical care;

(2) [(B) ] a representative of DSHS's family and community health programs; and

(3) [(C) ] the state epidemiologist for DSHS or the epidemiologist's designee.

(4) [(2) ] In appointing members to the committee, the DSHS Commissioner:

(A) includes members working in and representing communities that are diverse with regard to race, ethnicity, immigration status, and English proficiency;

(B) includes members from differing geographic regions in the state, including both rural and urban areas;

(C) endeavors to include members who are working in and representing communities that are affected by pregnancy-related deaths and severe maternal morbidity and by a lack of access to relevant perinatal and intrapartum care services; and

(D) ensures that the composition of the committee reflects the racial, ethnic, and linguistic diversity of Texas.

(g) Terms of office.

(1) Members are appointed for staggered six-year terms, with the terms of four or five members, as appropriate, expiring February 1st of each odd-numbered year.

(2) A committee member may serve more than one term.

(3) If a vacancy occurs, a person is appointed to serve the unexpired portion of that term.

(h) Officers. The DSHS Commissioner appoints from among the committee members a presiding officer.

(1) The presiding officer presides at all committee meetings at which he or she is in attendance, calls meetings in accordance with this section, appoints subcommittees of the committee as necessary, and causes proper reports to be made to the HHSC Executive Commissioner. The presiding officer may serve as an ex officio member of any subcommittee of the committee.

(2) The committee may reference its presiding officer by another term, such as chairperson.

(i) Meetings. The committee meets at least quarterly to conduct business, or at the call of the DSHS Commissioner.

(1) The committee meets at the call of the presiding officer.

(2) Meeting arrangements are made by DSHS staff.

(3) The committee is subject to [not a "governmental body" as defined in] the Open Meetings Act, Texas Government Code, Chapter 551, except when the committee conducts a closed meeting to review cases under Texas Health and Safety Code, §34.007. Meetings may be conducted in person, through teleconference call, or by means of other technology.

(4) A simple majority of the appointed committee members constitutes a quorum for the purpose of transacting official business.

(5) The committee is authorized to transact official business only when in a legally constituted meeting with a quorum present.

(6) The agenda for each committee meeting must include an opportunity for new business or for any member to address the committee on matters relating to committee business.

(7) The committee shall allow for public comment during at least one public meeting each year.

(8) The committee shall present in open session recommendations made under Texas Health and Safety Code, §34.005 to help reduce the incidence of pregnancy-related deaths and severe maternal morbidity in this state.

(9) The committee shall post public notice for meetings conducted for the sole purpose of reviewing cases for selection under Texas Health and Safety Code, §34.007.

(j) Attendance. Members must attend committee meetings as scheduled.

(1) A member must notify the presiding officer or appropriate DSHS staff if he or she is unable to attend a scheduled meeting.

(2) It is grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, is absent from more than half of the committee meetings during a calendar year, or is absent from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when grounds for removal of a member exists.

(k) Staff. Staff support for the committee is provided by DSHS staff.

~~[(t) Procedures.]~~

~~[(1) Any action taken by the committee must be approved by a majority vote of the members present once quorum is established.]~~

~~[(2) Each member has one vote.]~~

~~[(3) A member may not authorize another individual to represent the member by proxy.]~~

~~[(4) The committee must make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.]~~

~~[(5) Minutes of each committee meeting are taken by DSHS staff and approved by the committee at the next scheduled meeting.]~~

~~(l) [(m) Confidentiality.~~

~~(1) Any information pertaining to a pregnancy-related death or severe maternal morbidity is confidential.~~

~~(2) Confidential information that is acquired by DSHS and that includes identifying information of an individual or health care provider is confidential and may not be disclosed to any person.~~

~~(3) Information is not confidential under this section if the information is general information that cannot be connected with any specific individual, case, or health care provider.~~

~~(4) The committee may publish statistical studies and research reports based on information that is confidential under this section, provided that the information:~~

~~(A) is published in the aggregate;~~

~~(B) does not identify a patient or the patient's family;~~

~~(C) does not include any information that could be used to identify a patient or the patient's family; and~~

~~(D) does not identify a health care provider.~~

~~(5) The department will adopt and implement practices and procedures to ensure that information that is confidential under this section is not disclosed in violation of this section.~~

~~(6) In accordance with Texas Health and Safety Code, §34.009, information in the committee's possession is confidential and excepted from disclosure under the Public Information Act, Texas Government Code, Chapter 552.~~

(7) The committee and DSHS must comply with all state and federal laws and rules relating to the transmission of health information, including the Health Insurance Portability and Accountability Act of 1996 (Pub. L. No. 104-191) and rules adopted under that Act.

~~(m) [(n)] Statements by members.~~

~~(1) HHSC, DSHS, and the committee are not bound in any way by any statement, recommendation, or action on the part of any committee member, except when a statement or action is in pursuit of specific instructions from HHSC, DSHS, or the committee.~~

~~(2) The committee and its members may not participate in legislative activity in the name of HHSC, DSHS, or the committee except with approval through HHSC's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.~~

~~(3) A committee member must not accept or solicit any benefit that might reasonably tend to influence the member in the discharge of the member's official duties.~~

~~(4) A committee member must not disclose confidential information acquired through his or her committee membership.~~

~~(5) A committee member must not knowingly solicit, accept, or agree to accept any benefit for having exercised the member's official powers or duties in favor of another person.~~

~~(6) A committee member who has a personal or private interest in a matter pending before the committee must publicly disclose the fact in a committee meeting and may not vote or otherwise participate in the matter. The phrase "personal or private interest" means the committee member has a direct pecuniary interest in the matter but does not include the committee member's engagement in a profession, trade, or occupation when the member's interest is the same as all others similarly engaged in the profession, trade, or occupation.~~

~~(n) [(o)] Reimbursement for expenses.~~

~~(1) Members appointed to the committee are not entitled to compensation for service on the committee or reimbursement for travel or other expenses incurred by the member while conducting the business of the committee.~~

~~(2) In carrying out its duties, the committee may use technology, including teleconferencing or videoconferencing, to eliminate travel expenses.~~

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

Filed with the Office of the Secretary of State on June 6, 2018.

TRD-201802442

Barbara L. Klein

General Counsel

Department of State Health Services

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 776-3069



## CHAPTER 98. TEXAS HIV MEDICATION PROGRAM

### SUBCHAPTER C. TEXAS HIV MEDICATION PROGRAM

## DIVISION 1. GENERAL PROVISIONS

### 25 TAC §98.103

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (DSHS), proposes an amendment to §98.103, concerning Medication Coverage.

#### BACKGROUND AND PURPOSE

Texas Health and Safety Code, Chapter 85, established the Texas HIV Medication Program (THMP). The THMP provides medications for the treatment of HIV and its related complications to low-income Texans. Section 85.063 authorizes the executive commissioner to determine distribution procedures.

The purpose of the amendment is to increase a "30-day supply" of medication to a "90-day supply" of medication. The amendment would allow DSHS the flexibility to approve dispensing of up to a 90-day supply of medication(s) upon prescription by a treating physician. THMP uses federal and state funds to purchase and distribute life-saving HIV medications to eligible clients (e.g. low-income, uninsured, or underinsured). Federal funds for the program are provided to DSHS by the Health Resources and Services Administration, which allows the dispensing of a 90-day medication supply. The option of a 90-day refill would be beneficial to clients and pharmacies as well as more efficient for the THMP. The determination of whether a refill for 30 days or 90 days will be made by the prescribing physicians, not by the THMP. The option for a 90-day supply would not be a requirement, so there would be no detriment to program clients who did not want to receive this amount of medication or whose physicians choose not to provide 90-day prescriptions. This change is expected to support adherence to medication treatment of clients of the THMP. Treatment adherence is critical to maintain the health of persons living with HIV and to reduce HIV transmission by reducing or eliminating clients' viral load (amount of virus within the blood).

#### SECTION-BY-SECTION SUMMARY

Proposed amendment to §98.103(b) replaces the "30-day" supply with a "90-day" supply to allow the THMP to approve the dispensing of medication(s) for a 90-day time frame.

#### FISCAL NOTE

Donna Sheppard, Chief Financial Officer, has determined that for each year of the first five years that the section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the section as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the section will be in effect:

- (1) the proposed rule will not create or eliminate a government program;
- (2) implementation of the proposed rule will not affect the number of employee positions;
- (3) implementation of the proposed rule will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the proposed rule will not affect fees paid to the agency;
- (5) the proposed rule will not create a new rule;

(6) the proposed rule will expand an existing rule;

(7) the proposed rule will not change the number of individuals subject to the rule; and

(8) the proposed rule will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Ms. Sheppard has also determined that there will be no adverse economic effect on small businesses, micro-businesses or rural communities required to comply with the section as proposed. Small businesses or micro-businesses, or rural communities will not be required to change their business practices as a result of this rule.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to this rule because the rule is necessary to protect the health, safety, and welfare of the residents of Texas.

#### PUBLIC BENEFIT

Felipe Rocha, Director, TB/HIV/STD Section, has determined that for each year of the first five years that the section will be in effect, the public will benefit from adoption of the section as the THMP can continue to provide life-sustaining medications to Texans living with HIV. This change will benefit clients who experience challenges obtaining transportation to their pharmacy. It will also benefit the network of local cooperating pharmacies by reducing to some extent the number of refills they process.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Written comments on the proposal may be submitted to Shaina Johnson, Legislative Liaison, TB/HIV/STD Section, P.O. Box 149347, Mail Code 7909, Austin, Texas 78714-9347, by email to [HHRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHRulesCoordinationOffice@hhsc.state.tx.us) or by fax to (512) 206-5801. When faxing or emailing comments, please indicate "Comments on Proposed Rule 18R030" in the subject line.

To be considered, comments must be submitted no later than 30 days following publication of the proposal in the *Texas Register*. If the last day to submit comments falls on a weekend or a holiday, comments must be postmarked, shipped, faxed or emailed before midnight on the following business day to be considered.

#### STATUTORY AUTHORITY

The amendment is authorized by Texas Health and Safety Code, §85.003, which requires DSHS to act as lead agency and primary resource for AIDS and HIV policy; Texas Health and Safety Code, §85.016, which allows for the adoption of rules; Texas Health and Safety Code, §85.061, which establishes the THMP; Texas Health and Safety Code, §85.063, which requires the department to establish procedures and eligibility guidelines for the

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

The amendment affects Texas Health and Safety Code, Chapters 85 and 1001; and Texas Government Code, Chapter 531.

§98.103. *Medication Coverage.*

(a) The medications provided under the program, and the specific eligibility criteria for them shall be determined by the commissioner, considering the recommendations of the Texas HIV Medication Advisory Committee.

(b) The program will not approve the dispensing of medication(s) in excess of a 90-day [30-day] supply.

(c) A list of the approved medications and specific eligibility criteria for them may be obtained from the Department of State Health Services, HIV/STD Prevention and Care Branch, Texas HIV Medication Program, Attn: MSJA, Mail Code 1873, P.O. Box 149347, Austin, Texas 78714-3947 or on the program's website at: <http://www.dshs.state.tx.us/hivstd/meds/>.

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

Filed with the Office of the Secretary of State on June 6, 2018.

TRD-201802443

Barbara L. Klein

General Counsel

Department of State Health Services

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 206-5495



## CHAPTER 289. RADIATION CONTROL SUBCHAPTER F. LICENSE REGULATIONS

### 25 TAC §§289.251 - 289.253, 289.256, 289.257

*(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 figures in 25 TAC §§289.252, 289.253, 289.256, and 289.257, are not included in the print version of the Texas Register. The figures are available in the on-line version of the June 22, 2018, issue of the Texas Register.)*

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (DSHS), proposes amendments to §289.251, concerning Exemptions, General Licenses, and General License Acknowledgements; §289.252, concerning Licensing of Radioactive Material; §289.253, concerning Radiation Safety Requirements for Well Logging Service Operations and Tracer Studies; §289.256, concerning Medical and Veterinary Use of Radioactive Material; and §289.257, concerning Packaging and Transportation of Radioactive Material.

#### BACKGROUND AND PURPOSE

Amendments to §§289.251 - 289.253, 289.256, and 289.257 are necessary to comply with compatibility requirements of the

United States Nuclear Regulatory Commission (NRC), to which Texas is subject as an agreement state. The amendments update NRC information and are the results of the NRC's adoption of requirements for: exemptions for source material; exemptions for radioactive material other than source material; general and specific licenses; sealed source or device evaluation; expiration and termination of licenses and decommissioning of sites and separate buildings or outdoor areas; physical protection of category 1 and category 2 quantities of radioactive material; specific licenses for well logging; new definitions for contamination and special form radioactive material; criticality safety index; low specific activity material; exemptions for low-level radioactive material; exemptions from classification as fissile material; use of foreign-approved package; record keeping; quality assurance program and records; and radionuclide values and formulas.

Other amendments are made to §§289.251 - 289.253, 289.256, and 289.257 to clarify or include new or refined terminology and requirements for radiation safety officers; sealed source or device evaluation; isotope quantities; radiation survey instruments; authorized users; training for an authorized nuclear pharmacist; calibration dates; and reporting events.

In addition, amendments to §§289.251 - 289.253, 289.256, and 289.257 include changes which update, correct, improve, or clarify rule citation references; terminology; obsolete language; language consistency; units of measure; grammar; and minor typographical and formatting errors.

Government Code, §2001.039, requires that 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 289.251 - 289.253, 289.256, and 289.257, have been reviewed and DSHS has determined that the reasons for adopting these sections continue to exist because rules on this subject are needed to protect public health and safety, to fulfill DSHS's statutory responsibilities as the state's Radiation Control Agency, and to comply with NRC compatibility requirements.

#### SECTION-BY-SECTION SUMMARY

To maintain rules that are compatible with the NRC, the word "depleted" is removed from §289.251(d)(3)(E); the words "natural or" are added to §289.251(d)(3)(F); and the words "or transfer" are added to §289.251(e)(2)(C).

Language is added in §289.251(e)(3)(A)(i) to the exceptions for certain items containing radioactive material in order to be consistent with NRC rule language.

In §289.251(e)(3)(A)(i)(I)(-h-), the manufacture date for intact timepieces is corrected because, as an agreement state, Texas is subject to federal rule compatibility requirements.

Regarding self-luminous products, the element "radium-226" is removed from §289.251(e)(3)(B); and in §289.251(e)(3)(B)(ii), the word "shall" is replaced with the word "should" in order to be consistent with NRC rule language.

Rule references relating to general licenses for small quantities of source material are corrected in §289.251(f)(3)(A)(iv) to maintain rules that are compatible with the NRC.

Language is added and removed in §289.251(f)(4)(H) regarding the general license requirements for certain detecting, measuring, gauging, or controlling devices or certain devices for producing light or an ionized atmosphere to be consistent with NRC rule language.

To maintain rules that are compatible with the NRC, language regarding small radium sources is added to §289.251(f)(4)(K)(i)(V) and as new §289.251(f)(4)(K)(ii). The subsequent clause is renumbered.

New §289.251(g)(4) is added to general license acknowledgment requirements because, as an agreement state, Texas is subject to federal rule compatibility requirements.

Regarding the purpose of licensing of radioactive material, in §289.252(a) the words "manufacture" and "produce" and "manufactures" and "produces" are added in order to be consistent with NRC rule language.

In §289.252(c)(1) and (2) the words "conditions or" are added to be consistent with verbiage used within the section.

The words "life" and "property" are added in §289.252(e) to the general requirements for the issuance of specific licenses, because, as an agreement state, Texas is subject to federal rule compatibility requirements.

Language is revised in §289.252(e)(11) to clarify that applicants shall have a current registration with the Secretary of State in order to meet the general requirements for specific licenses.

New language in §289.252(f) requires that a radiation safety officer be available in a reasonable amount of time after being notified of an emergency situation or unsafe condition in addition to other requirements in order to be consistent with other rules throughout the chapter. The subsection is subsequently renumbered.

Wording has been deleted from §289.252(i) as only entities licensed by NRC are allowed to introduce radioactive material into products in exempt concentrations.

To maintain rules that are compatible with the NRC, the word "shall" is replaced with the word "may" in §289.252(v).

Rule references to "subsection (h)" and "§289.256(o)" are added in §289.252(v)(8)(B)(i), as they were previously omitted.

Language is added to §289.252(y)(4)(B) and as new §289.252(y)(5)(A) and (B) regarding decommissioning in order to be consistent with NRC rule language.

Recordkeeping language is added to §289.252(cc)(6)(C) based on requirements for compatibility with NRC regulations.

To maintain rules that are compatible with the NRC, a rule reference is added regarding reciprocal recognition of licenses in §289.252(ee)(2).

A requirement to complete a business information form is added as §289.252(ee)(2)(B)(vii) to be consistent with the requirements in other rules within the chapter.

Regarding decommissioning, new §289.252(gg)(7)(C)(iv) is added to be consistent with requirements in other rules within the chapter.

Due to NRC compatibility, a rule reference is corrected in §289.252(ii)(3)(B)(ii) regarding access authorization requirements.

Corrections to names, numbers, and addresses are made in §289.252(ii)(5)(C)(i) and (ii) to update information for the NRC as offices have been renamed and/or moved.

Rule references are corrected in §289.252(ii)(10)(D)(iv)(I) to include other clauses previously omitted and in §289.252(ii)(19) to

exclude a paragraph that was mistakenly included as part of the reference.

A correction to the NRC website is made in §289.252(ii)(21)(A)(i)(I) as the website has changed.

A column is added to Figure: 25 TAC §289.252(jj)(2) for values of 1012 as the values were previously omitted from the table even though they were referenced in rule text.

To maintain rules that are compatible with the NRC, the quantity value for Cesium-137 is corrected from "2000" to "3000" in Figure: 25 TAC §289.252(jj)(7). In addition, a dash is added to read "AG-110m"; the element "Sr-35" is corrected to read "S-35"; the element "Ti-144" is corrected to read "Ti-44", and the three asterisks in the "Mixed Radioactive Waste" row are removed and placed in the "Packaged Waste" row.

Other changes to §289.252 are made to correct grammatical, typographical, and punctuation errors; to correct rule reference errors; and to use language consistently within the section and/or chapter.

Rule reference citations are revised throughout §289.253 due to the renumbering of the subsections due to the addition of a new §289.253(d). The subsection is subsequently renumbered.

Due to the addition of §289.253(d), citation changes are made in §289.253(c)(9), (e)(1)(D), (e)(3), (g)(4), (i)(4), (j)(1), (k), (l), (o)(1) and (3), (p)(1)(A), (p)(4), (q), (r)(3), (s)(3)(H), (z)(2) and (3), (aa)(1) and (2), (bb)(6), (cc)(1) - (4), (dd)(6), (ee)(4)(S), and Figure: 25 TAC §289.253(ee)(5).

Based upon requirements for compatibility with NRC regulations, a new §289.253(d) has been added for specific licenses for well logging as the section had previously been omitted. The subsections are subsequently renumbered.

The words "capable of detecting beta and gamma radiation" are added to §289.253(i)(3) for clarification regarding radiation survey instruments.

The term "licensing state" has been removed throughout §289.253 because the Suggested State Regulations for Control of Radiation (SSRCR), as written by the Conference of Radiation Control Program Directors, Inc. (CRCPD), no longer uses the terminology. Revisions are reflected in §289.253(i)(3)(A), (j)(3), (o)(3) and (4), and (p)(1)(A).

The word "Voluntary" is added to §289.253(r)(1) to correctly reflect the name of the National Voluntary Laboratory Accreditation Program.

In §289.253(x) the rule reference is corrected as it currently references the wrong subsection.

Language is added to §289.253(dd)(5)(D)(ii) to be consistent with terminology used throughout the chapter; and the word "Texas" is added to §289.253(dd)(6)(B)(viii)(III) to be consistent with the diagram in Figure: 25 TAC §289.253(ee)(3).

Former Figure: 25 TAC §289.253(dd)(3) is replaced with Figure: 25 TAC §289.253(ee)(3) to correctly reflect the new subsection due to renumbering of the section.

Former Figure: 25 TAC §289.253(dd)(5) is replaced with Figure: 25 TAC §289.253(ee)(5) to reflect the new numbering of the subsections within §289.253 as they are located in the Rule Cross-Reference column of the table due to the renumbering of the section.

Other changes to §289.253 are made to correct grammar and punctuation errors; to correct language in order to be consistent throughout the section and chapter; and correctly use units of measurement.

Regarding the purpose of medical and veterinary use of radioactive material, in §289.256(a)(1) and (2) the words "manufacture" and "produce" and "manufactures" and "produces" are added in order to be consistent with NRC rule language.

The term "licensing state" has been removed throughout §289.256 because the Suggested State Regulations for Control of Radiation (SSRCR), as written by the Conference of Radiation Control Program Directors, Inc. (CRCPD), no longer uses the terminology. Revisions are reflected in §289.256(c)(3)(B)(i) and (iii); (c)(4)(B)(i) and (iii); (c)(5)(A)(ii)(I) and (III); (c)(5)(B)(iii)(I) and (III); (c)(25)(B)(i); (h)(1); (h)(1)(B)(ii)(I); (h)(2)(B); (h)(3); (j)(1); (j)(1)(B)(i); (k)(1); (l)(1)(A) and (B); (l)(2)(A) and (B); (l)(3)(A) and (B); (u)(1) and (3); (x)(2)(B)(i); (x)(3)(C)(i); (ff)(1)(A) and (B); (ff)(3); (gg)(1); (hh)(1)(A) and (B); (hh)(3); (jj)(1); (kk)(1)(A); (kk)(3); (nn)(1); (oo)(1); (pp)(1); (qq)(3); (zz)(1); (ccc)(1); (fff)(1), (2) and (3); (rrr)(2); and (ttt)(1).

Rule references are revised in §289.256(c)(5)(A)(i) and (c)(5)(B)(ii) to correctly reflect the appropriate subsections being referenced.

The agency webpage address is corrected throughout §289.256 to reflect an accurate website. Revisions are reflected in §289.256(h)(1), (j)(1), (k)(1), (gg)(1), (jj)(1), (nn)(1), (oo)(1), (pp)(1), (qq)(3), (zz)(1), (ccc)(1), and (ttt)(1).

In §289.256(k)(1)(A), the name of the pharmacy accreditation council is corrected to read "Accreditation Council for Pharmacy Education".

An additional rule reference is added to §289.256(k)(1)(C) as it was previously omitted.

To be consistent with requirements in other sections of this chapter, new §289.256(uuu)(4)(B) and (vvv)(4)(B) are added regarding reporting requirements.

Figure: 25 TAC §289.256(www) is replaced to reflect the correct rule cross reference for the dosage determinations of unsealed radioactive material for medical use from (x)(5) to (x)(6).

Other changes to §289.256 are made to correct language in order to be consistent throughout the section and/or chapter; to correct rule reference errors; and to utilize and correct verbiage and abbreviations for measurements; and to correct punctuation errors.

Definitions for "contamination" and "special form radioactive material" are added as §289.257(d)(11) and (42), respectively, because as an agreement state, Texas is subject to federal rule compatibility requirements. The subsection is subsequently renumbered.

The definition of "criticality safety index" is revised in §289.257(d)(13) in order to be consistent with NRC rule language.

Based upon requirements for compatibility with NRC regulations, the word "Tribe" is capitalized in the definition of "Indian Tribe" in §289.257(d)(24).

The definition of "low specific activity material" is revised in §289.257(d)(27) in order to be consistent with NRC rule language.

The words "which may be chemically separated" are added to the definition of "uranium" in §289.257(d)(50) in order to maintain rules that are compatible with the NRC.

Language is revised in §289.257(f)(1)(A) and (B) and a new subparagraph (C) is added relating to exemptions for low-level radioactive materials because, as an agreement state, Texas is subject to federal rule compatibility requirements.

To maintain rules that are compatible with the NRC, language is revised in §289.257(h)(4) regarding exemptions from classification as fissile material.

The name of the Spent Fuel Project Office is changed to the Division of Spent Fuel Storage and Transportation in §289.257(i)(1)(C)(iii) because the NRC office name has changed.

Based upon requirements for compatibility with NRC regulations, a rule reference is corrected in §289.257(i)(4)(A); terminology clarified in §289.257(i)(4)(C); and language is removed and added in §289.257(i)(4)(D)(ii) relating to use of foreign approved packages.

A new preliminary determination is added as §289.257(k)(4) in order to be consistent with NRC rule language.

Additional requirements for recordkeeping are added in §289.257(o) because, as an agreement state, Texas is subject to federal rule compatibility requirements. The subsection is subsequently renumbered.

An emergency number is added to §289.257(p) to be consistent with immediate reporting of events.

Information regarding where to locate a list of designees is updated in §289.257(q)(4)(C)(ii), to maintain rules that are compatible with the NRC.

New requirements relating to changes to the quality assurance program are added as new §289.257(u)(6) based upon compatibility requirements with NRC regulations.

To maintain rules that are compatible with the NRC, the quality assurance records subsection is revised in §289.257(aa).

Revisions are made in §289.257(ee)(1) and (2) relating to appendices for determination of  $A_1$  and  $A_2$  values in order to be consistent with NRC rule language.

Based upon requirements for compatibility with NRC regulations, the following figures are revised. Figure: 25 TAC §289.257(ee)(4)(A) is revised to correct the radionuclide "I" to read "i." Figure: 25 TAC §289.257(ee)(4)(B) is revised to correct the radionuclide "I" to read "i" and add the words "in normal form."

A new determination and formula are added as §289.257(ee)(4)(C) and a new Figure: 25 TAC §289.257(ee)(4)(C) is added because, as an agreement state, Texas is subject to federal rule compatibility requirements. Subsequent subparagraphs are renumbered.

Based upon requirements for compatibility with NRC regulations, the following revisions were made. In addition, the figures are renumbered due to the addition of new subparagraph (C). Figure: 25 TAC §289.257(ee)(4)(D) is revised to correct the radionuclide "I" to read "i" and change the word "nuclide" to "radionuclide." Figure: 25 TAC §289.257(ee)(4)(E) is revised to correct the radionuclide "I" to read "i" and change the word "nuclide" to "radionuclide." Figure: 25 TAC §289.257(ee)(4)(F) is revised to

correct the radionuclide "I" to read "i;" to add the figure(i) after [A] to read "[A](i);" and to correct the formula itself. Figure: 25 TAC §289.257(ee)(4)(G) is revised to correct the radionuclide "I" to read "i;" add the word "consignment;" replace the word "concentration" with the word "limit;" and correct the formula.

In order to be consistent with NRC rule language, a new determination when individual activities of some of the radionuclides are not known is added to §289.257(ee)(5).

Regarding the table for  $A_1$  and  $A_2$  values for radionuclides, Figure: 25 TAC §289.257(ee)(6), is revised to meet NRC compatibility as follows. A title is added. Footnote (h) is removed from the radionuclide Cf-252 and the  $A_1$  values in becquerels and curies are changed to  $1.0 \times 10^{-1}$  and 2.7, respectively. Footnote (c) is removed from the radionuclide Ir-192 and moved to the  $A_1$  values in becquerels and curies within the Ir-192 row. Radionuclide Kr-79 is added to the table with corresponding values. The element and atomic number, Krypton (36), are removed from radionuclide Kr-81.

Additional NRC compatibility changes to Figure: 25 TAC §289.257(ee)(6) include the following. Footnote (h) is removed from the radionuclide Mo-99. Footnote (a) adds the words "as listed in the following" and includes the new listing. Footnote (b) adds the word "see" before "subsection (ee)(1)" and removes "Section I" following "Determination of  $A_1$  and  $A_2$ ." Footnote (c) changes the word "quantity" to read "activity of Ir-192 in special form." Former footnote (h) is deleted. Former footnote (i) becomes the new (h).

To maintain rules that are compatible with the NRC, Figure: 25 TAC §289.257(ee)(7) is revised as follows: a title is added; radionuclide Kr-79 is added to the table with corresponding values; and the element and atomic number, Krypton (36), are removed from radionuclide Kr-81. In addition, the activity limit for exempt consignment in becquerels and curies for radionuclide Te-121m, is revised to read " $1.0 \times 10^6$ " and " $2.7 \times 10^{-5}$ ," respectively; and in Footnote (b) the following radionuclides are deleted: Ce-134, La-134; Rn-220, Po-216; and Th-226, Ra-222, Rn-218, Po-214. A "9" is also added to radionuclide Pb-20 to correctly read "Pb-209."

Regarding the table for general values for  $A_1$  and  $A_2$ , Figure: 25 TAC §289.257(ee)(8), the "contents" column is revised and a footnote (a) is added, because as an agreement state, Texas is subject to federal rule compatibility requirements.

In §289.257(ff)(3), information is added relating to obtaining NRC forms in order to be consistent with NRC rule language.

Other changes to §289.257 are made to correct language in order to be consistent throughout the section and chapter; to correctly use verbiage and abbreviations for measurements; and to correct rule reference errors.

#### FISCAL NOTE

Donna Sheppard, Chief Financial Officer, has determined that for each year of the first five years that the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing and administering the sections as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the sections will be in effect:

(1) the proposed rules will not create or eliminate a government program;

(2) implementation of the proposed rules will not affect the number of employee positions;

(3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;

(4) the proposed rules will not affect fees paid to the agency;

(5) the proposed rules will not create new rules;

(6) the proposed rules will not expand, limit, or repeal any existing rules;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Jon Huss, Associate Commissioner, Consumer Protection Division, has determined that there will be no adverse economic impact on small businesses, micro-businesses, or rural communities required to comply with the sections as proposed. Small businesses, micro-businesses, and rural communities will not be required to alter their business practices in order to comply with the sections.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rule amendments because the rules are necessary to protect the health, safety, and welfare of the residents of Texas.

#### PUBLIC BENEFIT

In addition, Mr. Huss also has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as the result of enforcing or administering these sections is to ensure continued enhanced protection of the public, patients, workers, and the environment from unnecessary exposure to radiation by ensuring that the rules are clear and specific.

#### REGULATORY ANALYSIS

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

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled after publication in the *Texas Register* and will be held at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas 78754. The meeting date will be posted on the Radiation Control website ([www.dshs.texas.gov/radiation](http://www.dshs.texas.gov/radiation)). Please contact Chuck Flynn at (512) 834-6655 or [Chuck.Flynn@dshs.texas.gov](mailto:Chuck.Flynn@dshs.texas.gov) if you have questions.

#### PUBLIC COMMENT

Written comments on the proposal may be submitted to Chuck Flynn, Radiation Unit Manager, Policy, Standards, and Quality Assurance Section, Consumer Protection Division, Texas Department of State Health Services, Mail Code 1987, P.O. Box 149347, Austin, Texas 78714-9347; (512) 834-6655; or by email to [CPDRuleComments@dshs.texas.gov](mailto:CPDRuleComments@dshs.texas.gov). Please indicate "Comments on Chapter 289 Proposed Rules" in the subject line.

To be considered, comments must be submitted no later than 30 days following publication of the proposal in the *Texas Register*. If the last day to submit comments falls on a weekend or a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be considered.

#### STATUTORY AUTHORITY

The amendments are authorized by Texas Health and Safety Code, Chapter 401, which provides for DSHS radiation control rules and regulatory program to be compatible with federal standards and regulation; §401.065, which permits Texas to enter an agreement with the federal government to perform functions relating to radiation control, in cooperation with the federal government, and Texas' status thereto as an agreement state, under which it is required to comply with NRC requirements for compatibility with its regulations; §401.051, which provides the required authority to adopt rules and guidelines relating to the control of sources of radiation; §401.052, which provides authority for rules that provide for transportation and routing of radioactive material and waste in Texas; §401.103, which provides authority for licensing and registration for transportation of sources of radiation; §401.104 which provides for rulemaking authority for general or specific licensing of radioactive material and devices or equipment using radioactive material; §401.224, which provides rulemaking authority relating to the packaging of radioactive waste; and Texas Government Code, §531.0055; and Texas Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001. The review of the rules implements Texas Government Code, §2001.039, regarding review of existing rules.

The amendments affect Texas Health and Safety Code, Chapters 401 and 1001; and Texas Government Code, Chapter 531.

§289.251. *Exemptions, General Licenses, and General License Acknowledgements.*

(a) - (c) (No change.)

(d) Exemptions for source material.

(1) - (2) (No change.)

(3) Any person is exempt from this section and §289.252 of this title to the extent that such person receives, possesses, uses, or transfers:

(A) - (D) (No change.)

(E) [~~depleted~~] uranium contained in counterweights installed in aircraft, rockets, projectiles, and missiles, or stored or handled in connection with installation or removal of such counterweights, provided that:

(i) - (iii) (No change.)

(F) natural or depleted uranium used as shielding constituting part of any shipping container, provided that:

(i) - (ii) (No change.)

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

(4) - (5) (No change.)

(e) Exemptions for radioactive material other than source material.

(1) (No change.)

(2) Exempt quantities.

(A) - (B) (No change.)

(C) This paragraph does not authorize the production, packaging, or repackaging or transfer of radioactive material for purposes of commercial distribution, or the incorporation of radioactive material into products intended for commercial distribution.

(D) - (F) (No change.)

(3) Exempt items.

(A) Certain items containing radioactive material.

(i) Except for persons who apply radioactive material to, or persons who incorporate radioactive material into the following products, or persons who initially transfer for sale or distribution the following products containing radioactive material, any person is exempt from this chapter if that person receives, possesses, uses, transfers, or acquires the following products:

(I) timepieces, hands, or dials containing not more than the following specified quantities of radioactive material and not exceeding the following specified levels of radiation:

(-a-) - (-g-) (No change.)

(-h-) 1  $\mu$ Ci (0.037 MBq) of radium-226 per timepiece in intact timepieces manufactured prior to November 30, 2007 [January 1, 1986];

(II) - (IX) (No change.)

(ii) - (iii) (No change.)

(B) Self-luminous products containing tritium, krypton-85, or promethium-147 [~~or radium-226~~].

(i) (No change.)

(ii) Any person who desires to manufacture, process, or produce, or initially transfer for sale or distribution self-luminous products containing tritium, krypton-85, or promethium-147 for use under clause (i) this subparagraph, should [~~shall~~] apply for:

(I) - (II) (No change.)

(iii) (No change.)

(C) - (D) (No change.)

(4) (No change.)

(f) General licenses. In addition to the requirements of this section, all general licenses, unless otherwise specified, are subject to the requirements of §289.201 of this title (relating to General Provisions for Radioactive Material), §289.202(w) and (xx) of this title,



§289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), and §289.257 of this title (relating to Packaging and Transportation of Radioactive Material).

(1) - (2) (No change.)

(3) General licenses for source material.

(A) General license for small quantities of source material.

(i) - (iii) (No change.)

(iv) Any person who receives, possesses, uses, or transfers source material in accordance with the general license granted in clause (i) of this subparagraph is exempt from the regulations in §§289.201, 289.202, and 289.203 [and §§289.205] of this title to the extent that such receipt, possession, use, and transfer are within the terms of this general license, except that such person shall comply with the regulations of §289.202(ff) and (ddd)(2)(A) of this title to the extent necessary to meet the requirements of clauses (ii)(II) and (iii) of this subparagraph. However, this exemption does not apply to any person who also holds a specific license issued under §289.252 of this title.

(v) (No change.)

(B) - (D) (No change.)

(4) General licenses for radioactive material other than source material.

(A) - (G) (No change.)

(H) General license for certain detecting, measuring, gauging, or controlling devices and certain devices for producing light or an ionized atmosphere.

(i) (No change.)

(ii) The general license in clause (i) of this subparagraph applies only to radioactive material contained in devices that have been manufactured or initially transferred and labeled in accordance with the specifications contained in:

(I) a specific license issued by the agency in accordance with §289.252(l) of this title; [ø]

(II) [iñ] a specific license issued by the NRC or any agreement state that authorizes distribution of devices to persons generally licensed by the NRC or any agreement state; or

(III) an equivalent specific license issued by a state with provisions comparable to §289.252(l) of this title.

(iii) (No change.)

(iv) Any person who receives, acquires, possesses, uses, or transfers radioactive material in a device in accordance with the general license in this subparagraph shall do the following:

(I) (No change.)

(II) assure that the device is tested for leakage of radioactive material and proper operation of the "on-off" mechanism and indicator, if any, at no longer than 6-month intervals or at such other intervals as specified in the label; however:

(-a-) (No change.)

(-b-) devices containing only tritium or not more than 100  $\mu\text{Ci}$  (3.7 MBq) of other beta and/or gamma emitting material or 10  $\mu\text{Ci}$  (0.37 MBq) of alpha emitting material and devices held in storage in the original shipping container prior to initial instal-

lation need not be tested for any purpose [~~]; provided that each source is tested for leakage within 6 months prior to being used or transferred];~~

(III) assure that the tests required by subclause (II) of this clause and other testing, installation [~~(removal of the manufacturer's lock and initial alignment of the radiation beam)], servicing, and removal from location of installation involving the radioactive materials, its shielding or containment, are performed:~~

(-a-) - (-c-) (No change.)

(IV) - (XIX) (No change.)

(I) - (J) (No change.)

(K) General license for certain items and self-luminous products containing radium-226.

(i) A general license is hereby issued to any person to acquire, receive, possess, use, or transfer radium-226 contained in the following products manufactured prior to November 30, 2007.

(I) - (IV) (No change.)

(V) Small radium sources containing no more than 1  $\mu\text{Ci}$  (0.037 MBq) of radium 226. For the purposes of this paragraph, "small radium sources" means discrete survey instrument check sources, sources contained in radiation measuring instruments, sources used in educational demonstrations (such as cloud chambers and spintariscopes), electron tubes, lightning rods, ionization sources, static eliminators, or as designated by the NRC.

(ii) Persons who acquire, receive, possess, use, or transfer byproduct material under the general license issued in clause (i) of this subparagraph are exempt from the provisions of §§289.201, 289.202, 289.203, and 289.252 of this title, to the extent that the receipt, possession, use, or transfer of byproduct material is within the terms of the general license; provided, however, that this exemption shall not be deemed to apply to any such person specifically licensed under §289.252 of this title.

(iii) [(iñ)] Any person who acquires, receives, possesses, uses, or transfers radioactive material in accordance with this subparagraph shall do the following.

(I) Provide to the agency within 30 days of any indication of possible damage to the product that could result in a loss of the radioactive material. The report should include a brief description of the event, and the remedial action taken.

(II) Not abandon products containing radium-226.

(-a-) The product, and any radioactive material from the product, may only be disposed of according to §289.202 of this title or as otherwise approved by the agency.

(-b-) The product, and any radioactive material from the product, may be transferred to a person authorized by a specific license to receive the radium-226 or as otherwise approved by the agency.

(III) The general license in this subparagraph does not authorize the manufacture, assembly, disassembly, repair, or import of products containing radium-226, except that timepieces may be disassembled and repaired provided that paint containing radium-226 is not applied or removed.

(IV) Not export products containing radium-226 except in accordance with or equivalent regulations of the NRC Title 10, CFR, §110.

(V) Dispose of products containing radium-226 at a disposal facility authorized to dispose of radioactive material in

accordance with any federal or state solid or hazardous waste law, including the Solid Waste Disposal Act, as authorized under the Energy Policy Act of 2005, by transfer to a person authorized to receive radium-226 by a specific license issued under this section, or under equivalent regulations of the NRC, or any agreement state.

(VI) Respond to written requests from the agency, the NRC, or any agreement state to provide information relating to the general license within 30 calendar days of the date of the request, or other time specified in the request. If the general licensee cannot provide the requested information within the allotted time, it shall, within that same time period, request a longer period to supply the information by providing the agency, the NRC, or any agreement state a written justification for the request.

(g) General license acknowledgements for radioactive material other than source material. In addition to the requirements of this section, all general license acknowledgement holders, unless otherwise specified, are subject to the requirements of §§289.201, 289.202(w) and (xx), 289.204, 289.205, and 289.257 of this title.

(1) (No change.)

(2) Persons generally licensed by the agency, the NRC, or any agreement state with respect to devices meeting the criteria in paragraph (1) of this subsection, are not subject to the requirements of paragraph (1) of this subsection if the devices are used in areas subject to agency jurisdiction for a period less than 180 days in any calendar year.

(3) (No change.)

(4) Each address for a location of use, as described under paragraph (1)(D) of this subsection, represents a separate general license and requires a separate registration and fee.

(h) - (l) (No change.)

§289.252. *Licensing of Radioactive Material.*

(a) Purpose. The intent of this section is as follows.

(1) (No change.)

(2) Unless otherwise exempted, no person shall manufacture, produce, receive, possess, use, transfer, own, or acquire radioactive material except as authorized by the following:

(A) - (B) (No change.)

(3) A person who manufactures, produces, receives, possesses, uses, transfers, owns, or acquires radioactive materials prior to receiving a license is subject to the requirements of this chapter.

(b) (No change.)

(c) Types of licenses. Licenses for radioactive materials are of two types: general and specific.

(1) General licenses provided in §289.251 and §289.259 of this title are effective without the filing of applications with the agency or the issuance of licensing documents to the particular persons, although the filing of an application for acknowledgement with the agency may be required for a particular general license. The general licensee is subject to any other applicable portions of this chapter and any conditions or limitations of the general license.

(2) Specific licenses require the submission of an application to the agency and the issuance of a licensing document by the agency. The licensee is subject to all applicable portions of this chapter as well as any conditions or limitations specified in the licensing document.

(d) (No change.)

(e) General requirements for the issuance of specific licenses. A license application will be approved if the agency determines that:

(1) the applicant and all personnel who will be handling the radioactive material are qualified by reason of training and experience to use the material in question for the purpose requested in accordance with this chapter in such a manner as to minimize danger to occupational and public health and safety, life, property, and the environment;

(2) the applicant's proposed equipment, facilities, and procedures are adequate to minimize danger to occupational and public health and safety, life, property, and the environment;

(3) - (10) (No change.)

(11) the applicant shall have a current registration with [is listed on] the Secretary of State [State's website as authorized] to conduct business in the state, unless the applicant is exempt. All applicants using an assumed name in their application shall file an assumed name certificate with the Secretary of State and/or the office of the county clerk as required under the Business and Commerce Code, Chapter 71.

(f) Radiation safety officer.

(1) - (2) (No change.)

(3) Every licensee shall establish in writing the authority, duties, and responsibilities of the RSO and ensure that the RSO is provided sufficient authority, organizational freedom, time, resources, and management prerogative to perform the [The] specific duties of the RSO which include, but are not limited to, the following:

(A) - (O) (No change.)

(4) The RSO shall ensure that the duties listed in paragraph (3)(A) - (O) of this subsection are performed.

(5) The RSO shall be on site periodically, commensurate with the scope of licensed activities, to satisfy the requirements of paragraphs (3) and (4) of this subsection.

(6) The RSO, or a Site RSO designated on the license, shall be capable of physically arriving at the licensee's authorized use site(s) within a reasonable time of being notified of an emergency situation or unsafe condition. A Site RSO shall meet the qualifications in paragraph (2) of this subsection.

(7) [~~4~~] Requirements for RSOs for specific licenses for broad scope authorization for research and development. In addition to the requirements in paragraphs (1) and (3) - (6) of this subsection, the RSO's qualifications for specific licenses for broad scope authorization for research and development shall include evidence of the following:

(A) a bachelor's degree in health physics, radiological health, physical science or a biological science with a physical science minor and 4 years of applied health physics experience in a program with radiation safety issues similar to those in the program to be managed;

(B) a master's degree in health physics or radiological health and 3 years of applied health physics experience in a program with radiation safety issues similar to those in the program to be managed;

(C) 2 years of applied health physics experience in a program with radiation safety issues similar to those in the program to be managed and one of the following:

(i) doctorate degree in health physics or radiological health;

(ii) comprehensive certification by the American Board of Health Physics;

(iii) certification by the American Board of Radiology in Nuclear Medical Physics;

(iv) certification by the American Board of Science in Nuclear Medicine in Radiation Protection; or

(v) certification by the American Board of Medical Physics in Medical Health Physics; or

(D) equivalent qualifications as approved by the agency.

(8) ~~[(5)]~~ The qualifications in paragraph ~~(7)(A) - (D)~~ ~~[(4)(A) - (D)]~~ do not apply to individuals who have been adequately trained and designated as RSOs on licenses issued prior to October 1, 2000.

(g) (No change.)

(h) Specific licenses for broad scope authorization for multiple quantities or types of radioactive material for use in research and development.

(1) In addition to the requirements in subsection (e) of this section, a specific license for multiple quantities or types of radioactive material for use in research and development, not to include the internal or external administration of radiation or radioactive material to humans, will be issued if the agency approves the following documentation submitted by the applicant:

(A) (No change.)

(B) of a full-time RSO meeting the requirements of subsection ~~(f)(7)~~ ~~[(4)(4)]~~ of this section;

(C) (No change.)

(2) - (3) (No change.)

(i) Specific licenses for introduction of radioactive material into products in exempt concentrations.

~~[(1)]~~ In addition to the requirements in subsection (e) of this section, a specific license authorizing the introduction of radioactive material into a product or material in the possession of the licensee or another to be transferred to persons exempt from this chapter in accordance with §289.251(e)(1)(A) of this title will be issued if the agency approves the following information submitted by the applicant:

~~[(A)]~~ a description of the product or material into which the radioactive material will be introduced;

~~[(B)]~~ intended use of the radioactive material and the product or material into which it is introduced;

~~[(C)]~~ method of introduction;

~~[(D)]~~ initial concentration of the radioactive material in the product or material;

~~[(E)]~~ control methods to assure that no more than the specified concentration is introduced into the product or material;

~~[(F)]~~ estimated time interval between introduction and transfer of the product or material;

~~[(G)]~~ estimated concentration of the radioactive material in the product or material at the time of transfer; and

~~[(H)]~~ procedures for disposition of unwanted or unused radioactive material.

~~[(2)]~~ The applicant shall provide reasonable assurance that:

~~[(A)]~~ the concentrations of radioactive material at the time of transfer will not exceed the concentrations in §289.251(m)(1) of this title;

~~[(B)]~~ reconcentration of the radioactive material in concentrations exceeding those in §289.251(m)(1) of this title will not occur;

~~[(C)]~~ the use of lower concentrations is not feasible; and

~~[(D)]~~ the product or material is not to be incorporated in any food, beverage, cosmetic, drug, or other commodity or product designed for ingestion or inhalation by, or application to, a human.

~~[(3)]~~ Each person licensed in accordance with this subsection shall file an annual report with the agency and shall identify the type and quantity of each product or material into which radioactive material has been introduced during the reporting period. The report shall cover the year ending June 30, shall be filed within 30 days thereafter, and shall include the following:

~~[(A)]~~ name and address of the person who owned or possessed the product or material when the radioactive material was introduced;

~~[(B)]~~ the type and quantity of radionuclide introduced into each such product or material; and

~~[(C)]~~ the initial concentrations of the radionuclide in the product or material at time of transfer of the radioactive material by the licensee.

~~[(4)]~~ If no transfers of radioactive material have been made in accordance with this subsection during the reporting period, the report shall so indicate.

~~[(5)]~~ No person may introduce radioactive material into a product or material knowing or having reason to believe that it will be transferred to persons exempt in accordance with §289.251 of this title except as specified with a license issued by the NRC.

(j) - (u) (No change.)

(v) Sealed source or device evaluation.

(1) Any manufacturer or initial distributor of a sealed source or device containing a sealed source ~~may~~ ~~[shall]~~ submit a request to the agency for evaluation of radiation safety information about its product and for its registration.

(2) - (7) (No change.)

(8) Authority to manufacture or initially distribute a sealed source or device to specific licensees shall be provided in the license without the issuance of a SS & D certificate of registration in the following cases:

(A) (No change.)

(B) the intended recipients are qualified by training and experience and have sufficient facilities and equipment to safely use and handle the requested quantity of radioactive material in any form in the case of unregistered sources or, for registered sealed sources contained in unregistered devices, are qualified by training and experience and have sufficient facilities and equipment to safely use and handle the requested quantity of radioactive material in unshielded form, as specified in their licenses; and

(i) the intended recipients are licensed in accordance with subsection (h) of this section, §289.256(o) of this title, or equivalent regulations of the NRC or any agreement state; or

(ii) - (iii) (No change.)

(9) - (10) (No change.)

(w) (No change.)

(x) Specific terms and conditions of licenses.

(1) - (6) (No change.)

(7) The notification in paragraph (6) [(5)] of this subsection shall include:

(A) - (B) (No change.)

(8) - (11) (No change.)

(y) Expiration and termination of licenses and decommissioning of sites and separate buildings or outdoor areas.

(1) - (3) (No change.)

(4) Within 60 days of the occurrence of any of the following, each licensee shall provide notification to the agency in writing and either begin decommissioning a site, or any separate building or outdoor area that contains residual radioactivity, so that the building and/or outdoor area is suitable for release in accordance with §289.202(see) of this title, or submit within 12 months of notification a decommissioning plan, if required by paragraph (7) of this subsection, and begin decommissioning upon approval of that plan if:

(A) (No change.)

(B) the licensee has decided to permanently cease principal activities, as defined in §289.201(b) of this title, at the entire site or in any separate building or outdoor area that contains residual radioactivity such that the building or outdoor area is unsuitable for release in accordance with agency requirements;

(C) - (D) (No change.)

(5) Coincident with the notification required by paragraph (4) of this subsection, the licensee shall maintain in effect all decommissioning financial assurances established by the licensee in accordance with subsection (gg) of this section in conjunction with a license issuance or renewal or as required by this section. The amount of the financial assurance shall be increased, or may be decreased, as appropriate, with agency approval, to cover the detailed cost estimate for decommissioning established in accordance with paragraph (10)(E) of this subsection.

(A) Any licensee who has not provided financial assurance to cover the detailed cost estimate submitted with the decommissioning plan shall do so in accordance with subsection (gg) of this section.

(B) Following approval of the decommissioning plan, a licensee may reduce the amount of the financial assurance as decommissioning proceeds and radiological contamination is reduced at the site, with the approval of the agency.

(6) - (16) (No change.)

(17) Each licensee shall submit to the agency all records required by §289.202(nn)(3) [§289.202(nn)(2)] of this title before the license is terminated.

(z) (No change.)

(aa) Amendment of licenses at request of licensee.

(1) (No change.)

(2) Requests for amendments to delete a subsite from a license shall be filed in accordance with subsections (d)(1) and (2) and (y)(13) [(y)(3)] and (15) of this section.

(bb) (No change.)

(cc) Transfer of material.

(dd) (No change.)

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

(6) Requirements for transfer of small quantities of source material.

(A) (No change.)

(B) Quality control, labeling, safety instructions, and records and reports. Each person licensed under subparagraph (A) of this paragraph shall:

(i) - (iii) (No change.)

(iv) report transfers as follows:

(I) - (II) (No change.)

(III) The following are to be submitted to the agency by January 31 of each year:

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

(-c-) if no transfers have been made to general licensees in a particular agreement state during the reporting period, this information shall be reported to the responsible agreement state upon request of that agency. [; and]

(C) [(\*)] Records.

(i) The licensee shall maintain all information that supports the reports required by this paragraph [subparagraph] concerning each transfer to a general licensee for inspection by the agency in accordance with subsection (mm) of this section.

(ii) The licensee who transferred the material shall retain each record of transfer of radioactive material until the agency terminates each license that authorizes the activity that is subject to the recordkeeping requirement.

(ee) Reciprocal recognition of licenses.

(2) In addition to the provisions of paragraph (1) of this subsection, any person who holds a specific license issued by the NRC or any agreement state authorizing the holder to manufacture, transfer, install, or service the device described in §289.251(f)(4)(H) of this title or in Title 10, CFR, §150.20, within areas subject to the jurisdiction of the licensing body, is granted a general license to install, transfer, demonstrate, or service the device in the State of Texas provided that:

(B) the out-of-state licensee notifies the agency in writing at least three working days prior to engaging in such activity. If, for a specific case, the three-working-day period would impose an undue hardship on the out-of-state licensee, the licensee may, upon application to the agency, obtain permission to proceed sooner. The agency may waive the requirement for filing additional written notifications during the remainder of the calendar year following the receipt of the initial notification from a person engaging in activities in accordance with the general license provided in this subsection. Such notification shall include:

(i) - (iv) (No change.)

(v) a copy of the licensee's operating, safety, and emergency procedures; [and]

(vi) a fee as specified in §289.204 of this title; and

(vii) a copy of the completed RC Form 252-1 (Business Information Form);

(C) - (D) (No change.)

- (3) (No change.)
- (ff) (No change.)
- (gg) Financial assurance and record keeping for decommissioning.

(1) - (2) (No change.)

(3) The required amount of financial assurance for decommissioning is determined by the quantity of material authorized by the license and is determined as follows:

(A) - (B) (No change.)

(C) \$113,000 for quantities of material greater than  $10^{10}$  [4040] but less than or equal to  $10^{12}$  [4042] times the applicable quantities in subsection (jj)(2) of this section in sealed sources or plated foils. (For a combination of radionuclides, if R, as defined in paragraph (1) of this subsection, divided by  $10^{10}$  [4040] is greater than 1, but R divided by  $10^{12}$  [4042] is less than or equal to 1); or

(D) (No change.)

(4) - (6) (No change.)

(7) Each person licensed in accordance with this section shall make, maintain, and retain records of information important to the safe and effective decommissioning of the facility in an identified location for inspection by the agency in accordance with §289.252(mm) of this section. If records of relevant information are kept for other purposes, reference to these records and their locations may be used. Information the agency considers important to decommissioning consists of the following:

(A) - (B) (No change.)

(C) except for areas containing only sealed sources (provided the sealed sources have not leaked or no contamination remains after any leak) or byproduct materials having only half-lives of less than 65 days, a list contained in a single document and updated every two years, of the following:

(i) (No change.)

(ii) all areas outside of restricted areas that require documentation under subparagraph (A) of this paragraph; ~~and~~

(iii) all areas outside of restricted areas where current and previous wastes have been buried as documented in accordance with; and

(iv) all areas outside of restricted areas that contain material such that, if the license expired, the licensee would be required to either decontaminate the area to meet the criteria for decommissioning in subsection (gg) of this section, or meet the requirements for approval of disposal under §289.202(ff) - (kk) of this title; and

(D) (No change.)

(8) (No change.)

(hh) (No change.)(ii) Physical protection of category 1 and category 2 quantities of radioactive material.

(1) - (2) (No change.)

(3) Access authorization program requirements.

(A) (No change.)

(B) Reviewing officials.

(i) (No change.)

(ii) Each licensee shall name one or more individuals to be reviewing officials. After completing the background investigation on the reviewing official, the licensee shall provide under oath or affirmation, a certification that the reviewing official is deemed trustworthy and reliable by the licensee. The fingerprints of the named reviewing official must be taken by a law enforcement agency, federal or state agencies that provide fingerprinting services to the public, or commercial fingerprinting services authorized by a state to take fingerprints. The licensee shall recertify that the reviewing official is deemed trustworthy and reliable every 10 years in accordance with Title 10, CFR, §37.25(c) [paragraph (4)(B) of this subsection].

(iii) - (v) (No change.)

(C) - (H) (No change.)

(4) (No change.)

(5) Requirements for criminal history records checks of individuals granted unescorted access to category 1 or category 2 quantities of radioactive material.

(A) - (B) (No change.)

(C) Procedures for processing of fingerprint checks.

(i) For the purpose of complying with paragraphs (2) - (4), this paragraph, and paragraphs (6) - (8) of this subsection, licensees shall use an appropriate method listed in Title 10, CFR, §37.7, to submit to the U.S. Nuclear Regulatory Commission, Director, Division of Facilities and Security, 11545 Rockville Pike, ATTN: Criminal History Program/Mail Stop T-03B46M [FWB-05 B32M], Rockville, Maryland 20852-2738, one completed, legible standard fingerprint card (Form FD-258, ORIMDNRCOOOZ), electronic fingerprint scan or, where practicable, other fingerprint record for each individual requiring unescorted access to category 1 or category 2 quantities of radioactive material. Copies of these forms may be obtained by writing the Office of the Chief Information Officer [Office of Information Services], U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, by calling (630) 829-9565, or by email to FORMS.Resource@nrc.gov. Guidance on submitting electronic fingerprints can be found at <http://www.nrc.gov/site-help/e-submittals.html>.

(ii) Fees for the processing of fingerprint checks are due upon application. Licensees shall submit payment with the application for the processing of fingerprints through corporate check, certified check, cashier's check, money order, or electronic payment, made payable to "U.S. NRC." (For guidance on making electronic payments, contact the Security Branch, Division of Facilities and Security at (301) 415-7513 [(301) 492-3531].) Combined payment for multiple applications is acceptable. The NRC publishes the amount of the fingerprint check application fee on the NRC's public website. (To find the current fee amount, go to the Electronic Submittals page at <http://www.nrc.gov/site-help/e-submittals.html> and see the link for the Criminal History Program under Electronic Submission Systems.)

(iii) (No change.)

(6) - (7) (No change.)

(8) Access authorization program review.

(A) Each licensee shall be responsible for the continuing effectiveness of the access authorization program. Each licensee shall ensure that access authorization programs are reviewed to confirm compliance with the requirements of paragraphs (2) - (7) and this paragraph of this subsection and that comprehensive actions are taken to correct any noncompliance that is identified. The review program shall evaluate all program ~~shall~~ performance objectives and require-

ments. Each licensee shall review the access program content and implementation at least every 12 months.

(B) - (C) (No change.)

(9) (No change.)

(A) - (C) (No change.)

(A) - (C) (No change.)

(D) Protection of information.

(i) - (iii) (No change.)

(iv) Licensees need not subject the following individuals to the background investigation elements for protection of information:

(I) the categories of individuals listed in paragraph (6)(A)(i) - (xiii) of this subsection; or

(II) (No change.)

(v) - (viii) (No change.)

(11) - (18) (No change.)

(19) Applicability of physical protection of category 1 and category 2 quantities of radioactive material during transit. The shipping licensee shall be responsible for meeting the requirements of paragraph (18), this paragraph, and paragraphs (20) - (23) of this subsection unless the receiving licensee has agreed in writing to arrange for the in-transit physical protection required under ~~paragraph (18);~~ this paragraph, and paragraphs (20) - (23) of this subsection.

(20) (No change.)

(21) Advance notification of shipment of category 1 quantities of radioactive material. As specified in subparagraphs (A) and (B) of this paragraph, for shipments initially made by an agreement state licensee, each licensee shall provide advance notification to the Texas Department of Public Safety and the governor of the State of Texas [a state], or the governor's designee, of the shipment of licensed material in a category 1 quantity, through or across the boundary of the state, before the transport, or delivery to a carrier for transport of the licensed material outside the confines of the licensee's facility or other place of use or storage.

(A) Procedures for submitting advance notification.

(i) The notification must be made to the Texas Department of Public Safety and to the office of each appropriate governor or governor's designee.

(I) The contact information, including telephone and mailing addresses, of governors and governors' designees, is available on the NRC's Web site at <https://scp.nrc.gov/special/designee.pdf> [<http://nrc-stp.ornl.gov/special/designee.pdf>]. A list of agreement state advance notification contact information is also available upon request from the Director, Division of Material Safety, State, Tribal, and Rule-making Programs, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

(II) (No change.)

(B) - (F) (No change.)

(22) - (25) (No change.)

(jj) Appendices.

(1) (No change.)

(2) Isotope quantities (for use in subsection (gg) of this section).

Figure: 25 TAC §289.252(jj)(2)  
[Figure: 25 TAC §289.252(jj)(2)]

(3) - (6) (No change.)

(7) Quantities of radioactive materials requiring consideration of the need for an emergency plan for responding to a release. The following table contains quantities of radioactive materials requiring consideration of the need for an emergency plan for responding to a release.

Figure: 25 TAC §289.252(jj)(7)  
[Figure: 25 TAC §289.252(jj)(7)]

(8) - (9) (No change.)

(kk) - (mm) (No change.)

§289.253. *Radiation Safety Requirements for Well Logging Service Operations and Tracer Studies.*

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

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

(1) - (3) (No change.)

(4) Logging assistant (equipment operator)--Any individual who, under the personal supervision of a logging supervisor, handles sealed sources or tracers that are not in logging tools or shipping containers or who performs surveys required by subsection (bb) [(aa)] of this section.

(5) - (8) (No change.)

(9) Radiation safety officer--An individual named by the licensee or registrant and listed on the license or certificate of registration who has a knowledge of, responsibility for, and authority to enforce appropriate radiation protection rules, standards, and practices on behalf of the licensee and/or registrant, and who meets the requirements of subsection (s) [(+)] of this section.

(10) - (24) (No change.)

(d) Specific licenses for well logging.

(1) The applicant shall satisfy the general requirements specified in this subsection and in §289.252(e) of this title.

(2) The applicant shall develop a program for training logging supervisors and logging assistants and submit to the agency a description of this program which specifies the:

(A) initial training;

(B) on-the-job training;

(C) annual safety reviews provided by the licensee;

(D) means the applicant will use to demonstrate the logging supervisor's knowledge and understanding of and ability to comply with the agency's regulations and licensing requirements and the applicant's operating and emergency procedures; and

(E) means the applicant will use to demonstrate the logging assistant's knowledge and understanding of and ability to comply with the applicant's operating and emergency procedures.

(3) The applicant shall submit to the agency written operating and emergency procedures as described in subsection (ee)(4) of this section.

(4) The applicant shall establish and submit to the agency its program for annual inspections of the job performance of each logging supervisor to ensure that the agency's regulations, license require-

ments, and the applicant's operating and emergency procedures are followed. Inspection records must be retained for 3 years after each annual internal inspection.

(5) The applicant shall submit a description of its overall organizational structure as it applies to the radiation safety responsibilities in well logging, including specified delegations of authority and responsibility.

(6) If an applicant wants to perform leak testing of sealed sources, the applicant shall identify the manufacturers and the model numbers of the leak test kits to be used. If the applicant wants to analyze its own wipe samples, the applicant shall establish procedures to be followed and submit a description of these procedures to the agency. The description must include the:

(A) instruments to be used;

(B) methods of performing the analysis; and

(C) pertinent experience of the person who will analyze the wipe samples.

(e) ~~[(d)]~~ Prohibitions.

(1) No licensee shall perform well logging service operations with a sealed source(s) in any well or wellbore unless, prior to commencement of the operation, the licensee has a written agreement with the well operator, well owner, drilling contractor, or land owner that specifies who will be responsible for ensuring the following requirements are met:

(A) a reasonable effort at recovery will be made in the event a sealed source is lost or lodged downhole;

(B) a person shall not attempt to recover a sealed source in a manner that, in the licensee's opinion, could result in a source rupture;

(C) in the event the environment, any equipment, or personnel are contaminated with radioactive material, decontamination to levels specified in §289.202(f), (n), and (eee) of this title shall be performed; and

(D) the requirements of subsection ~~(dd)(4)~~ ~~[(ee)(4)]~~ of this section shall be met in the event a decision is made to abandon the sealed source downhole.

(2) No licensee shall perform tracer study operations with a substance tagged with radioactive material in any well or wellbore unless, prior to commencement of the operation, the licensee has a written agreement with the well operator, well owner, drilling contractor or land owner, and the service company to which the licensee's equipment is connected, as applicable, that specifies who will be responsible for ensuring the following requirements are met:

(A) in the event the service company's personnel or equipment are contaminated with radioactive material, they shall be decontaminated in accordance with §289.202(n) or (ddd) of this title before release from the job site or release for unrestricted use, respectively;

(B) in the event the well head or job site is contaminated with radioactive material, it shall be decontaminated in accordance with §289.202(ddd) of this title; and

(C) in the event radioactive material is to be reversed from the well or the well screens out, the licensee shall have established procedures and equipment or facilities to do the following:

(i) reverse material into a preconstructed steel or lined pit that is specifically established in the event of a screen out; or

(ii) reverse material into suitable transport container(s) in the event of a screen out.

(3) The licensee shall maintain, in accordance with subsection ~~(ee)(5)~~ ~~[(dd)(5)]~~ of this section, a copy of the written agreement specified in paragraph (1) or (2) of this subsection.

(f) ~~[(e)]~~ Limits on levels of radiation. Sources of radiation shall be used, stored, and transported in such a manner that the requirements of §289.202 of this title, §289.231 of this title, and §289.257 of this title, as applicable, are met.

(g) ~~[(f)]~~ Storage precautions.

(1) Each source of radiation, except accelerators, shall be provided with a storage and/or transport container. Each container shall have a lock (or tamper seal for calibration sources) to prevent unauthorized removal of, or exposure to, the source of radiation.

(2) Each area or room in which sources of radiation are stored shall be posted in accordance with §289.202(aa)(5) or §289.231(x) of this title, as applicable.

(3) Sources of radiation, except accelerators, shall be stored downhole or in a bunker in order to minimize the danger from explosion and/or fire.

(4) Sources of radiation may not be stored in residential locations. This section does not apply to storage of radioactive material in a vehicle in transit for use at temporary job sites, if the licensee complies with subsection ~~(bb)(2)~~ ~~[(aa)(2)]~~ of this section.

(5) Sources of radiation in storage shall be secured to prevent tampering, or removal by unauthorized individuals.

(h) ~~[(g)]~~ Transport precautions. Transport containers shall be locked and physically secured to the transporting vehicle to prevent shifting during transport, accidental loss, tampering, or unauthorized removal.

(i) ~~[(h)]~~ Radiation survey instruments.

(1) The licensee or registrant shall maintain a sufficient number of calibrated and operable radiation survey instruments at each location where sources of radiation are stored or used to make physical radiation surveys as required by this section and by §289.202(p) or §289.231(s), of this title, as applicable. Instrumentation shall be capable of measuring 0.1 milliroentgen per hour (mR/hr) (1 microsievert per hour (µSv/hr)) through at least 50 mR/hr (500 µSv/hr). (Instrumentation capable of measuring 0.1 mR/hr (1 µSv/hr) through 50 mR/hr (500 µSv/hr) may not be sufficient to determine compliance with DOT requirements.)

(2) A licensee using tracer material shall have available at each additional authorized use/storage location and temporary job site additional calibrated and operable radiation survey instruments sensitive enough to detect the radioactive surface contamination limits specified in §289.202(eee) of this title.

(3) Each radiation survey instrument capable of detecting beta and gamma radiation shall be calibrated:

(A) by a person specifically licensed or registered by the agency, another agreement state ~~[or licensing state]~~ or the United States Nuclear Regulatory Commission (NRC) to perform such service;

(B) at intervals not to exceed six months and after each survey instrument repair;

(C) for the types of radiation used and at energies appropriate for use; and

(D) at an accuracy within  $\pm 20\%$  of the true radiation level at each calibration point.

(4) The licensee or registrant shall maintain calibration records in accordance with subsection ~~(ee)(5)~~ [(dd)(5)] of this section.

(j) ~~[(h)]~~ Leak testing of sealed sources.

(1) Testing and record keeping. Sealed sources shall be tested for leakage and contamination in accordance with this section and §289.201(g) of this title. The licensee shall maintain records of leak tests in accordance with subsection ~~(ee)(5)~~ [(dd)(5)] of this section.

(2) Each energy compensation source that is not exempt from testing in accordance with §289.201(g)(2) of this title shall be tested at intervals not to exceed three years. In the absence of a certificate from a transferor that a test has been made within the three years before the transfer, the energy compensation source may not be used until tested in accordance with §289.201(g) of this title.

(3) If a sealed source is found to be leaking in accordance with §289.201(g) of this title, the licensee shall check the equipment associated with the leaking source for radioactive contamination and, if contaminated, have it decontaminated or disposed of by persons specifically authorized by the agency, the NRC, or an agreement state, ~~[or a licensing state,]~~ to perform such services.

(k) ~~[(j)]~~ Quarterly inventory. Each licensee or registrant shall conduct a physical inventory to account for all sources of radiation received or possessed at intervals not to exceed three months. The licensee or registrant shall make and maintain records of inventories in accordance with subsection ~~(ee)(5)~~ [(dd)(5)] of this section and shall include the following:

- (1) the quantities and kinds of sources of radiation;
- (2) the location where sources of radiation are assigned;
- (3) a unique identification of each source of radiation;
- (4) the date of the inventory; and
- (5) the name of the individual conducting the inventory.

(l) ~~[(k)]~~ Utilization records. Utilization records shall be maintained by each licensee or registrant in accordance with subsection ~~(ee)(5)~~ [(dd)(5)] of this section and shall include the following information for each source of radiation:

(1) identification of each source of radiation to include:

(A) the make and model number and/or serial number (or if absent, a description) of each sealed source used; or

(B) the radionuclide and activity of tracer materials and radioactive markers used at a particular well site and the disposition of any unused tracer materials.

(2) the identity of the logging supervisor or individual who is responsible for receiving sources of radiation, to whom assigned; and

(3) the locations where used and dates of use.

(m) ~~[(h)]~~ Design and performance criteria for sealed sources used in well logging operations.

(1) Each sealed source used in well logging applications shall meet the following minimum criteria.

(A) The sealed source is of doubly encapsulated construction.

(B) The sealed source contains radioactive material with a chemical/physical form as insoluble and nondispersible as practicable.

(C) The sealed source meets one of the following requirements:

(i) for a sealed source manufactured on or before July 14, 1989, the requirements from the United States of America Standards Institute (USASI) N5.10-1968, "Classification of Sealed Radioactive Sources," or the requirements in clause (ii) or (iii) of this subparagraph;

(ii) for a sealed source manufactured after July 14, 1989, the oil-well logging requirements from the American National Standards Institute/Health Physics Society (ANSI/HPS) N43.6-1997, "Sealed Radioactive Sources-Classification;" or

(iii) for a sealed source manufactured after July 14, 1989, the sealed source's prototype has been tested and found to maintain its integrity after each of the following tests:

(I) Temperature. The test source shall be held at  $-40$  degrees Celsius for 20 minutes, 600 degrees Celsius for one hour, and then be subjected to a thermal shock test with a temperature drop from 600 degrees Celsius to 20 degrees Celsius within 15 seconds.

(II) Impact. A 5 kilogram (kg) steel hammer, 2.5 centimeters (cm) in diameter, shall be dropped from a height of 1 meter (m) onto the test source.

(III) Vibration. The test source shall be subjected to a vibration from 25 Hertz (Hz) to 500 Hz with a peak amplitude of five times the acceleration of gravity for 30 minutes.

(IV) Puncture. A 1 gram (gm) hammer and pin, 0.3 cm pin diameter, shall be dropped from a height of 1 m onto the test source.

(V) Pressure. The test source shall be subjected to an external pressure of 24,600 pounds per square inch absolute (1.695 x 10<sup>7</sup> pascals) without leakage.

(2) The requirements in paragraph (1) of this subsection do not apply to sealed sources that contain radioactive material in gaseous form.

(3) The requirements in this subsection do not apply to energy compensation sources.

(n) ~~[(m)]~~ Labeling.

(1) Each source, source holder, or logging tool containing radioactive material in other than an exempt quantity, shall bear a durable, legible, and clearly visible marking or label that has, as a minimum, the standard radiation caution symbol with no color requirement, and the wording DANGER (or CAUTION), RADIOACTIVE-DO NOT HANDLE, NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY).

(2) The labeling specified in paragraph (1) of this subsection shall be on the smallest component, source, source holder, or logging tool[-] that is transported as a separate piece of equipment.

(3) Each transport container shall have permanently attached to it a durable, legible, and clearly visible label that has, as a minimum, the standard radiation caution symbol and the wording DANGER (or CAUTION), RADIOACTIVE, NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY).

(4) Each transport container shall have attached to it a durable, legible, and clearly visible label(s) that has, as a minimum, the licensee's name, address, and telephone number, the radionuclide, its activity, and assay date.

(o) ~~[(n)]~~ Inspection and maintenance.



(1) Each licensee or registrant shall conduct, at intervals not to exceed six months, a program of visual inspection and maintenance of source holders (or sealed source, if there is no source holder), logging tools, source handling tools, storage containers, transport containers, and injection tools to assure proper labeling and physical condition. The inspection program may be performed concurrently with routine leak testing of sealed sources. Records of inspection and maintenance shall be made and maintained by the licensee or registrant in accordance with subsection ~~(ee)(5)~~ [(dd)(5)] of this section.

(2) If any inspection conducted in accordance with paragraph (1) of this subsection reveals damage to labeling or components critical to radiation safety, the device shall be removed from service at the time the damage is discovered and until repairs have been made.

(3) Any operation, such as drilling, cutting, or chiseling on a source holder containing a sealed source, shall be performed on the source holder only by persons specifically licensed to do so by the agency, another agreement [or licensing] state, or the NRC. The provisions of this paragraph do not apply to logging tool recovery (fishing) operations conducted in accordance with the provisions of subsection ~~(dd)(4)~~ [(ee)(4)] of this section.

(4) The repair, opening, or modification of any sealed source shall be performed only by persons specifically licensed to do so by the agency, another agreement or licensing state, or the NRC.

~~(p)~~ [(o)] Training requirements.

(1) No licensee or registrant shall permit any individual to act as a logging supervisor until such individual has met the following requirements:

(A) successfully completed an agency-accepted course or a course recognized by another agreement [or licensing] state, or the NRC, including at least 24 hours of formal training in the subjects outlined in subsection ~~(ee)(1)~~ [(dd)(1)] of this section;

(B) received copies of and instruction in the following:

(i) the requirements contained in this section and the applicable subsections of §§289.201, 289.202, 289.203, and 289.231 of this title or their equivalent;

(ii) the conditions of the appropriate license or certificate of registration; and

(iii) the licensee's or registrant's operating, safety, and emergency procedures;

(C) demonstrated understanding of the requirements in subparagraphs (A) and (B) of this paragraph by successfully completing a written examination administered by the licensee or registrant;

(D) completed two months of on-the-job training under the supervision of a logging supervisor; and

(E) demonstrated through a field evaluation, competence in the use of sources of radiation, related handling tools, and the type of radiation survey instruments that will be used in the job assignment.

(2) No licensee or registrant shall permit any individual to act as a logging assistant until such individual has met the following requirements:

(A) received copies of and instruction in the applicable subsections of §§289.201, 289.202, 289.203, and 289.231 of this title or their equivalent, and the licensee's or registrant's operating, safety, and emergency procedures;

(B) demonstrated understanding of the requirements in subparagraph (A) of this paragraph by successfully completing a written examination administered by the licensee or registrant; and

(C) demonstrated competence to use, under the personal supervision of the logging supervisor, the sources of radiation, related handling tools, and radiation survey instruments that will be used in the job assignment.

(3) The licensee or registrant shall provide an annual radiation safety review for logging supervisors and logging assistants.

(4) Each licensee or registrant shall maintain records that document that the requirements of paragraphs (1) - (3) of this subsection are met. Such records shall be maintained in accordance with subsection ~~(ee)(5)~~ [(dd)(5)] of this section.

~~(q)~~ [(p)] Operating, safety, and emergency procedures. The licensee or registrant shall maintain written operating, safety, and emergency procedures that include descriptions of and directions in at least the items listed in subsection ~~(ee)(4)~~ [(dd)(4)] of this section.

~~(r)~~ [(q)] Personnel monitoring.

(1) In addition to the requirements of §289.202(p)(4) and (q) of this title or §289.231(n) and (s)(3) of this title, as applicable, no licensee or registrant shall permit any individual to act as a logging supervisor or logging assistant unless that individual wears an individual monitoring device that is processed and evaluated by an accredited National Voluntary Laboratory Accreditation Program (NVLAP) processor, at all times during well logging service operations and/or tracer studies utilizing sources of radiation. Each individual monitoring device shall be assigned to and worn by only one individual. Film badges shall be replaced at least monthly. Other individual monitoring devices shall be replaced at least quarterly. After replacement, each individual monitoring device shall be returned to the supplier for processing within 14 calendar days or as soon as practicable. In circumstances that make it impossible to return each individual monitoring device to the supplier for processing within 14 calendar days, such circumstances shall be documented and available for review by the agency.

(2) When necessary in order to aid in determining the extent of an individual's exposure to concentrations of radioactive material, the agency may require a licensee or registrant to make available to the individual appropriate bioassay services and to furnish a copy of the reports of such services to the agency.

(3) Personnel monitoring records shall be maintained by the licensee or registrant in accordance with subsection ~~(ee)(5)~~ [(dd)(5)] of this section.

~~(s)~~ [(r)] Radiation safety officer.

(1) A radiation safety officer (RSO) shall be designated for every license and certificate of registration issued by the agency.

(2) The RSO's documented qualifications shall include:

(A) possession of a high school diploma or a certificate of high school equivalency based on the GED test;

(B) completion of the training and testing requirements of subsection (o)(1) of this section; and

(C) two years of experience as a logging supervisor to include knowledge of well logging service operations and tracer studies.

(3) The duties of the RSO include, but are not limited to, the following:

(A) establishing and overseeing operating, safety, and emergency, and as low as reasonably achievable (ALARA) procedures, and to review them regularly to ensure that the procedures are current and conform with this chapter;

(B) overseeing and approving all phases of the training program for well logging service operations and/or tracer studies personnel so that appropriate and effective radiation protection practices are taught;

(C) ensuring that required radiation surveys and leak tests are performed and documented in accordance with this chapter, including any corrective measures when levels of radiation exceed established limits;

(D) ensuring that personnel monitoring is used properly by occupationally-exposed personnel, that records are kept of the monitoring results, and that timely notifications are made as required by §289.203 of this title;

(E) investigating and reporting to the agency each known or suspected case of radiation exposure to an individual or radiation level detected in excess of limits established by this chapter and each theft or loss of source(s) of radiation, to determine the cause, and to take steps to prevent its recurrence;

(F) having a thorough knowledge of management policies and administrative procedures of the licensee or registrant;

(G) assuming control and having the authority to institute corrective actions including shutdown of operations when necessary in emergency situations or unsafe conditions;

(H) maintaining records as required by this chapter (see subsection (ee)(5) [~~(d)(5)~~] of this section);

(I) ensuring the proper storing, labeling, transport, and use of sources of radiation, storage, and/or transport containers;

(J) ensuring that inventories are performed in accordance with subsection (k) [(j)] of this section;

(K) ensuring that personnel are complying with this chapter, the conditions of the license or the registration, and the operating, safety, and emergency procedures of the licensee or registrant; and

(L) serving as the primary contact with the agency.

(t) [(s)] Security.

(1) A logging supervisor must be physically present at a temporary jobsite whenever radioactive material is being handled or is not stored and locked in a vehicle or storage place. The logging supervisor may leave the jobsite in order to obtain assistance if a sealed source becomes lodged in a well.

(2) During well logging, except when sealed sources are below ground or in shipping or storage containers, the logging supervisor or other individual designated by the logging supervisor shall maintain direct surveillance of the operation to prevent unauthorized entry into a restricted area, as defined in §289.201(b) of this title, or §289.231(c) of this title, as applicable.

(u) [(t)] Handling tools. The licensee shall provide and require the use of tools that will assure remote handling of sealed sources other than low activity calibration sources.

(v) [(u)] Tracer studies.

(1) Appropriate protective clothing and equipment shall be used by all personnel handling radioactive tracer material. Precautions shall be taken to avoid ingestion or inhalation of radioactive material

and to avoid contamination of field stations, temporary job sites, vehicles, associated equipment, and clothing.

(2) No licensee shall permit the injection of radioactive material into usable quality groundwater (3,000 parts per million (ppm) total dissolved solids or less) without prior written authorization from the agency.

(3) The well operator shall contact the licensee when a decision is made to reverse the radioactive tracer material out of a well. The licensee shall be on site and present at the well when radioactive tracer material is reversed out of a well.

(w) [(v)] Particle accelerators. No licensee or registrant shall permit above-ground testing of particle accelerators that results in the production of radiation except in areas or facilities controlled or shielded to meet the requirements of §289.202(f) or (n) of this title, or §289.231(m) or (o) of this title, as applicable.

(x) [(w)] Radioactive markers. The licensee may use radioactive markers in wells only if the individual markers contain quantities of radioactive material not exceeding the quantities specified in §289.251(1)(2) [~~§289.251(m)(2)~~] of this title. The use of markers is subject only to the provisions of this subsection and subsection (k) [(j)] of this section.

(y) [(x)] Uranium sinker bars. The licensee may use a depleted uranium sinker bar in well logging service operations only if it is legibly impressed with the wording "DANGER (or CAUTION), RADIOACTIVE-DEPLETED URANIUM, NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY) IF FOUND."

(z) [(y)] Energy compensation source.

(1) The licensee may use an energy compensation source that is contained within a logging tool or other tool components.

(2) For well logging applications with a surface casing for protecting fresh water aquifers, use of the ECS is only subject to the requirements of subsections (j), (k), and (l) [(i), (j), and (k)] of this section.

(3) For well logging applications without a surface casing for protecting fresh water aquifers, use of the ECS is only subject to the requirements of subsections (e), (j), (k), (l), (cc)(4) and (dd) [(d), (i), (j), (k), (bb)(4) and (ee)] of this section.

(aa) [(z)] Tritium neutron generator target source.

(1) Use of a tritium neutron generator target source, containing quantities not exceeding 30 curies (Ci) (1,110 gigabecquerels [~~gigabecquerel~~] (GBq)) and in a well with a surface casing to protect fresh water aquifers, is subject to the requirements of this section, except subsections (e), (m), and (dd) [(d), (i), and (ee)] of this section.

(2) Use of a tritium neutron generator target source, containing quantities exceeding 30 Ci (1,110 GBq) or in a well without a surface casing to protect fresh water aquifers, is subject to the requirements of this section, except subsection (m) [(h)] of this section.

(bb) [(aa)] Radiation surveys.

(1) Radiation surveys (and calculations for neutron sources) shall be made and recorded for each area where radioactive materials are stored.

(2) Radiation surveys (and calculations for neutron sources) of the radiation levels in occupied positions and on the exterior of each vehicle used to transport radioactive materials shall be made and recorded. Such surveys (and calculations for neutron sources) shall include all sources of radiation transported in the vehicle.

(3) If the sealed source assembly is removed from the logging tool before departing the job site, a survey of the tool to verify that the logging tool is free of contamination shall be made and recorded.

(4) If the encapsulation of the sealed source has been damaged by an operation or is likely to have been damaged by an operation, the licensee shall immediately conduct a radiation survey and make a record of that survey, including a contamination survey, during and after the operation.

(5) Radiation surveys shall be made and recorded at the job site and/or well head for each tracer operation except for those utilizing hydrogen-3, carbon-14, sulfur-35, or krypton-85. These surveys shall include measurements of radiation levels before and after the operation.

(6) Records required in accordance with paragraphs (1) - (5) of this subsection shall also include the dates, the identification of individual(s) making the survey, the unique identification of survey instrument(s) used, radiation measurements in milliroentgen per hour (mR/hr), calculations in millirem per hour (mrem/hr) (microsievert per hour (µSv/hr)), and an exact description of the location of the survey. Each licensee or registrant shall make and maintain records of these surveys in accordance with subsection ~~(ee)(5)~~ [(dd)(5)] of this section.

~~(cc)~~ [(bb)] Records/documents for inspection by the agency.

(1) Each licensee or registrant shall maintain the records/documents specified in subsection ~~(ee)(5)~~ [(dd)(5)] of this section for inspection by the agency.

(2) Each licensee or registrant maintaining additional authorized use/storage locations from which well logging service operations are conducted shall have copies of the records/documents specified in subsection ~~(ee)(5)(B) - (E)~~ [(dd)(5)(B) - (E)] and (G) - (O) of this section that are specific to the site available at each site for inspection by the agency.

(3) Records/documents required in accordance with paragraph (2) of this subsection shall be maintained in accordance with subsection ~~(ee)(5)~~ [(dd)(5)] of this section.

(4) Each licensee or registrant conducting well logging service operations at a temporary job site shall have copies of the records/documents specified in subsection ~~(ee)(5)(B)~~ [(dd)(5)(B)], (C), (I), (K), (L), and (N) of this section available at that site for inspection by the agency.

(5) Records/documents required by paragraph (4) of this subsection shall be maintained at the temporary job site for the period of operation at that site for inspection by the agency.

~~(dd)~~ [(ee)] Notification of incidents and lost sources; abandonment procedures for irretrievable sources.

(1) Notification of incidents and sources lost in other than downhole well logging operations shall be made in accordance with appropriate provisions of §289.202 of this title, or §289.231 of this title, as applicable.

(2) Whenever a sealed source or a device containing radioactive material has been ruptured or is likely to have been ruptured, the licensee shall notify the agency immediately by telephone and submit written notification within 30 days. The written notification shall designate the following:

(A) the well or other location;

(B) a description of the magnitude and extent of the escape of radioactive material;

(C) an assessment of the consequences of the rupture;

and

(D) an explanation of the efforts planned or being taken to mitigate these consequences.

(3) Whenever a sealed source is separated from the logging tool and is lost downhole, the licensee shall notify the agency immediately by telephone prior to beginning source recovery operations.

(4) Whenever a sealed source or device containing radioactive material is lost downhole, the licensee shall do the following:

(A) consult with the well operator, well owner, drilling contractor, or land owner regarding methods to retrieve the source or device that may reduce the likelihood that the source or device will be damaged or ruptured during the logging tool recovery (fishing) operations;

(B) monitor with a radiation survey instrument (or logging tool adjusted to detect gamma emissions from source(s) lost downhole), at the surface for the presence of radioactive contamination during logging tool recovery (fishing) operations; and

(C) notify the agency immediately by telephone and submit written notification within 30 days if radioactive contamination is detected at the surface or if the source appears to be damaged.

(5) When efforts to recover the radioactive source are not successful, the licensee shall do the following:

(A) notify the agency by telephone of the circumstances that resulted in the inability to retrieve the source and obtain agency approval to implement abandonment procedures, or that the licensee implemented abandonment before receiving agency approval because the licensee believed there was an immediate threat to public health and safety; and

(B) advise the well operator of the Railroad Commission of Texas requirements regarding abandonment and an appropriate method of abandonment, that shall include the following:

(i) the immobilization and sealing in place of the radioactive source with a cement plug;

(ii) a means to prevent inadvertent intrusion on the source, such as the setting of a whipstock or other deflection device, unless the source is not accessible to any subsequent drilling operations; and

(iii) the mounting of a permanent identification plaque, containing information required by paragraph (6) of this subsection, at the surface of the well;

(C) notify the agency by telephone giving the circumstances of the loss; and

(D) file a written report with the agency within 30 days of the abandonment, providing the following information:

(i) date of occurrence;

(ii) a description of the radioactive source involved, including radionuclide, activity, chemical and physical form, and manufacturer, model number and serial number;

(iii) surface location and identification of well;

(iv) results of efforts to immobilize and seal the source in place;

(v) depth of the radioactive source;

(vi) depth of the top of the cement plug;

(vii) depth of the well; and

(viii) information contained on the permanent identification plaque.

(6) Whenever a sealed source containing radioactive material is abandoned downhole, the licensee shall provide a permanent plaque (an example of a suggested plaque is shown in subsection (ee)(3) [(dd)(3)] of this section) for posting on the well or wellbore. This plaque shall meet the following requirements:

(A) be constructed of long-lasting material such as stainless steel, brass, bronze, or monel. The size of the plaque should be convenient for use on active or inactive wells; for example, a 7-inch (17 cm) square. Letter size of the word "CAUTION" should be approximately twice the letter size of the rest of the information; for example, 1/2 inch (1.27 cm) and 1/4 inch (0.63 cm) letter size, respectively; and

(B) contain the following engraved information on its face:

- (i) the word "CAUTION;"
- (ii) the radiation symbol (color not required);
- (iii) the date of abandonment;
- (iv) the name of the well operator or well owner;
- (v) the well name and well identification number(s) or other designation;
- (vi) radionuclide(s) and activity(ies) of the source(s);
- (vii) the source depth and the plug back depth (depth to the top of the plug); and
- (viii) an appropriate warning, depending on the specific circumstances of each abandonment, such as the following:
  - (I) "Do not drill below plug back depth;"
  - (II) "Do not enlarge casing;" or
  - (III) "Do not re-enter hole before contacting Radiation Control, Texas Department of State Health Services."

(7) The licensee shall immediately notify the agency by telephone and confirming letter if the licensee knows or has reason to believe that radioactive material has been lost in or to an underground potable water source. Such notice shall designate well location and describe the magnitude and extent of loss of radioactive material, consequences of such loss and efforts taken or planned to mitigate these consequences.

(8) In the event of an uncontrolled release of radioactive tracer material to the environment, the licensee shall notify the agency by telephone within 24 hours and submit written notification within 30 days.

(ee) [(dd)] Appendices.

(1) Subjects to be included in training courses for well logging service operations and/or tracer studies are as follows:

- (A) fundamentals of radiation safety that include:
  - (i) characteristics of radiation;
  - (ii) units of radiation dose (rem) and activity;
  - (iii) units of radiation dose (rem) and activity;
  - (iii) significance of radiation dose specifying radiation protection standards and biological effects of radiation;

(iv) levels of radiation from sources of radiation;

(v) methods of controlling radiation dose specifying time, distance, and shielding;

(vi) radiation safety practices, specifying prevention of contamination and methods of decontamination; and

(vii) discussion of ingestion, inhalation pathways;

(B) radiation detection instrumentation to be used that includes:

(i) use of radiation survey instruments specifying operation, calibration, and limitations;

(ii) survey techniques; and

(iii) use of individual monitoring devices;

(C) equipment to be used that specifies;

(i) handling equipment and remote handling tools;

(ii) sources of radiation;

(iii) storage control, disposal, and transport of equipment and sources of radiation;

(iv) operation and control of equipment; and

(v) maintenance of equipment;

(D) pertinent federal and state requirements;

(E) the licensee's or registrant's written operating, safety, and emergency procedures;

(F) the licensee's or registrant's record keeping procedures; and

(G) case histories and potential consequences of accidents in well logging service operations and tracer studies.

(2) In addition to the subjects for training courses required in paragraph (1) of this subsection, individuals performing tracer studies must also complete training in the following subjects:

(A) sources of contamination;

(B) contamination detection and control;

(C) decontamination techniques and limits;

(D) survey techniques for tracer materials; and

(E) packaging requirements for transportation of radioactive materials, especially residual materials from tracer studies.

(3) The following is an example of a plaque for identifying wells containing sealed sources of radioactive material abandoned downhole:

Figure: 25 TAC §289.253(ee)(3)

[Figure: 25 TAC §289.253(dd)(3)]

(4) The licensee's or registrant's operating, safety, and emergency procedures shall include descriptions of and instructions in at least the following:

(A) the handling and use of sources of radiation in wells without surface casing for protecting fresh water aquifers, if appropriate;

(B) the handling and use of sources of radiation to be employed so that no individual is likely to be exposed to radiation doses in excess of the limits established in §289.202 of this title, or §289.231 of this title, as applicable. Every reasonable effort shall be made to

keep radiation exposures and releases of radioactive material in soils and effluents to unrestricted areas as low as is reasonably achievable;

(C) methods and occasions for conducting radiation surveys;

(D) methods and occasions for locking and securing sources of radiation;

(E) personnel monitoring, including bioassays, and the use of individual monitoring devices;

(F) removal of radioactive material from storage, transportation of radioactive material to field locations and temporary job sites, including packaging of sources of radiation in the vehicles, placarding of vehicles, securing sources of radiation during transportation, and return to storage;

(G) minimizing exposure of individuals during routine use and in the event of an accident;

(H) procedures for notifying proper personnel in the event of an accident or well excursion;

(I) maintenance of records;

(J) use, inspection, and maintenance of source holders, logging tools, source handling tools, storage containers, transport containers, and injection tools;

(K) procedures to be followed in the event a sealed source is lost or lodged downhole;

(L) procedures to be used for picking up, receiving, handling, and opening packages containing radioactive material;

(M) procedures to be used for surveys of temporary job sites and equipment, and decontamination of vehicles, associated equipment, and clothing following tracer studies;

(N) storage and disposal of radioactive waste;

(O) procedures for laundering contaminated clothing, if applicable;

(P) licensee's or registrant's management structure;

(Q) posting of radiation areas and labeling radioactive material containers;

(R) procedures to be followed in the event of an uncontrolled release of radioactive tracer material to the environment; and

(S) actions to be taken if a sealed source is ruptured, including actions to prevent the spread of contamination and minimize inhalation and ingestion of radioactive material, and actions to obtain suitable radiation survey instruments as required by subsection (i) [(h)] of this section.

(5) The following records/documents shall be maintained by the licensee or registrant for inspection by the agency.

~~Figure: 25 TAC §289.253(ee)(5)~~

~~[Figure: 25 TAC §289.253(dd)(5)]~~

§289.256. *Medical and Veterinary Use of Radioactive Material.*

(a) Purpose.

(1) This section establishes requirements for the medical and veterinary use of radioactive material and for the issuance of specific licenses authorizing the medical and veterinary use of radioactive material. Unless otherwise exempted, no person shall manufacture, produce, receive, possess, use, transfer, own, or acquire radioactive material for medical or veterinary use except as authorized in a license issued in accordance with this section.

(2) A person who manufactures, produces, receives, possesses, uses, transfers, owns, or acquires radioactive material prior to receiving a license is subject to the requirements of this chapter.

(3) (No change.)

(b) (No change.)

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

(1) - (2) (No change.)

(3) Authorized medical physicist--An individual who meets the following:

(A) (No change.)

(B) is identified as an authorized medical physicist or teletherapy physicist on one of the following:

(i) a specific medical use license issued by the agency, the United States Nuclear Regulatory Commission (NRC), or an agreement state~~;~~ ~~or licensing state~~;

(ii) (No change.)

(iii) a permit issued by an NRC, ~~or agreement state~~ ~~;~~ ~~or licensing state~~ broad scope medical use licensee; or

(iv) (No change.)

(C) (No change.)

(4) Authorized nuclear pharmacist--A pharmacist who meets the following:

(A) (No change.)

(B) is identified as an authorized nuclear pharmacist on one of the following:

(i) a specific license issued by the agency, the NRC, or an agreement state~~;~~ ~~or licensing state~~ that authorizes medical use or the practice of nuclear pharmacy;

(ii) (No change.)

(iii) a permit issued by the agency, the NRC, ~~or an agreement state~~ ~~;~~ ~~or licensing state~~ licensee with broad scope authorization that authorizes medical use or the practice of nuclear pharmacy; or

(iv) (No change.)

(C) - (E) (No change.)

(5) Authorized user--An authorized user is defined as follows:

(A) for human use, a physician licensed by the Texas Medical Board; or a dentist licensed by the Texas State Board of Dental Examiners; or a podiatrist licensed by the Texas State Board of Podiatric Medicine who:

(i) meets the requirements in subsections (m), (gg), (jj), (nn), (oo), (pp), (qq), (zz), (aaa), (ccc) or (ttt) [(m); (gg)(1); (jj)(1); (nn)(1); (oo)(1); (pp)(1); (zz)(1); (eee)(1) or (ttt)(1)] of this section; or

(ii) is identified as an authorized user on any of the following:

(I) an agency, NRC, or agreement state~~;~~ ~~or licensing state~~ license that authorizes the medical use of radioactive material;

(II) (No change.)

(III) a permit issued by a specific licensee with broad scope authorization issued by the agency, the NRC, or an agreement state~~]; or licensing state~~ authorizing the medical use of radioactive material; or

(IV) (No change.)

(B) for veterinary use, an individual who is, a veterinarian licensed by the Texas State Board of Veterinary Medical Examiners; and

(i) (No change.)

(ii) has received training in accordance with subsections (gg), (jj), (nn) - (qq), (zz), (aaa), (ccc), and (ttt) of this section as applicable; or

(iii) is identified as an authorized user on any of the following:

(I) an agency, NRC, or agreement state~~]; or licensing state~~ license that authorizes the veterinary use of radioactive material;

(II) (No change.)

(III) a permit issued by a specific licensee with broad scope authorization issued by the agency, the NRC, or an agreement state~~]; or licensing state~~ authorizing the medical or veterinary use of radioactive material; or

(IV) (No change.)

(6) - (24) (No change.)

(25) Radiation safety officer (RSO)--For purposes of this section, an individual who:

(A) (No change.)

(B) is identified as an RSO on one of the following:

(i) a specific license issued by the agency, the NRC, or an agreement state~~]; or licensing state license~~ that authorizes the medical or veterinary use of radioactive material; or

(ii) (No change.)

(26) - (36) (No change.)

(d) - (g) (No change.)

(h) Training for radiation safety officer. Except as provided in subsection (l) of this section, the licensee shall require the individual fulfilling the responsibilities of an RSO in accordance with subsection (g) of this section for licenses for medical or veterinary use of radioactive material to be an individual who:

(1) is certified by a specialty board whose certification process has been recognized by the agency, the NRC, or an agreement state and who meets the requirements in paragraphs (5) and (6) of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, or an agreement state~~]; or licensing state~~ appear on the NRC's [agency's] web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html>~~]; www.dshs.state.tx.us/radiation~~).

(A) (No change.)

(B) To have its certification process recognized, a specialty board shall require all candidates for certification to:

(i) (No change.)

(ii) have two years of full-time practical training and/or supervised experience in medical physics as follows:

(I) under the supervision of a medical physicist who is certified in medical physics by a specialty board recognized by the agency, the NRC, or an agreement state~~]; or a licensing state~~; or

(II) (No change.)

(iii) (No change.)

(2) meets the requirements of paragraphs (5) and (6) of this subsection and has completed a structured educational program consisting of the following:

(A) (No change.)

(B) one year of full-time radiation safety experience under the supervision of the individual identified as the RSO on an agency, NRC, or agreement state~~]; or licensing state~~ license or on a permit issued by an NRC master material licensee that authorizes similar type(s) of use(s) of radioactive material involving the following:

(i) - (vii) (No change.)

(3) is a medical physicist who has been certified by a specialty board whose certification process has been recognized by the agency, the NRC, or an agreement state~~]; or licensing state~~ in accordance with subsection (j)(1) of this section and has experience in radiation safety for similar types of use of radioactive material for which the licensee is seeking the approval of the individual as RSO and who meets the requirements in paragraphs (5) and (6) of this subsection; or

(4) - (6) (No change.)

(i) (No change.)

(j) Training for an authorized medical physicist. Except as provided in subsection (l) of this section, the licensee shall require the authorized medical physicist to be an individual who:

(1) is certified by a specialty board whose certification process has been recognized by the agency, the NRC, or an agreement state~~]; or a licensing state~~ and who meets the requirements in paragraphs (2)(C) and (3) of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, or an agreement state appear~~]; or licensing state will be posted~~) on the NRC's [agency's] web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html>~~]; www.dshs.state.tx.us/radiation~~). To have its certification process recognized, a specialty board shall require all candidates for certification to meet the following:

(A) (No change.)

(B) complete two years of full-time practical training and/or supervised experience in medical physics as follows:

(i) under the supervision of a medical physicist who is certified in medical physics by a specialty board recognized by the agency, the NRC, or an agreement state~~]; or licensing state~~; or

(ii) (No change.)

(C) (No change.)

(2) - (3) (No change.)

(k) Training for an authorized nuclear pharmacist. Except as provided in subsection (l) of this section, the licensee shall require the authorized nuclear pharmacist to be a pharmacist who:

(1) is certified by a specialty board whose certification process has been recognized by the agency, the NRC or an agreement state and who meets the requirements of paragraph (2)(C)

of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, or an agreement state~~;~~ or ~~licensing state~~] appear on the NRC's ~~agency's~~ web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html>~~;~~ [www.dshs.state.tx.us/radiation](http://www.dshs.state.tx.us/radiation)). To have its certification process recognized, a specialty board shall require all candidates for certification to:

(A) have graduated from a pharmacy program accredited by the Accreditation Council for Pharmacy Education [American Council on Pharmaceutical Education] (ACPE) or have passed the Foreign Pharmacy Graduate Examination Committee (FPGEC) examination;

(B) - (D) (No change.)

(2) has completed a 700 hour structured educational program including both:

(A) - (B) (No change.)

(C) has obtained written attestation, signed by a preceptor authorized nuclear pharmacist, that the individual has satisfactorily completed the requirements in paragraph (1)(A), (B) and (C) or (2)(A) and (B) If this subsection or this paragraph and has achieved a level of competency sufficient to function independently as an authorized nuclear pharmacist.

(l) Training for experienced RSO, teletherapy or medical physicist, authorized medical physicist, authorized user, nuclear pharmacist, and authorized nuclear pharmacist.

(1) An individual identified as an RSO, a teletherapy or medical physicist, or a nuclear pharmacist on one of the following before October 24, 2002, need not comply with the training requirements of subsections (h), (j), or (k) of this section, respectively:

(A) an agency, NRC, or agreement state~~;~~ or ~~licensing state~~] license;

(B) a permit issued by an agency, NRC, or agreement state~~;~~ or ~~licensing state~~] licensee with broad scope authorization;

(C) - (D) (No change.)

(2) An individual identified as an RSO, an authorized medical physicist, or an authorized nuclear pharmacist on one of the following between October 24, 2002, and April 29, 2005, need not comply with the training requirements of subsections (h), (j) and (k) of this section, respectively:

(A) an agency, NRC, or agreement state~~;~~ or ~~licensing state~~] license;

(B) a permit issued by ~~the~~ ~~[an]~~ agency, ~~the~~ NRC, or an agreement state~~;~~ or ~~licensing state~~] with broad scope authorization;

(C) - (D) (No change.)

(3) An individual identified as a physician, dentist, podiatrist or veterinarian authorized for the medical or veterinary use of radioactive material and who performs only those medical or veterinary uses for which they were authorized on one of the following before the effective date of this rule need not comply with the training requirements of subsections (gg) - (ttt) of this section:

(A) an agency, NRC, or agreement state~~;~~ or ~~licensing state~~] license;

(B) a permit issued by ~~the~~ ~~[an]~~ agency, ~~the~~ NRC, or an agreement state~~;~~ or ~~licensing state~~] licensee with broad scope authorization;

(C) - (D) (No change.)

(4) (No change.)

(m) - (n) (No change.)

(o) License for medical and veterinary uses of radioactive material with broad scope authorization. In addition to the requirements of subsection (f) of this section, a license for medical use of radioactive material with broad scope authorization will be issued if the agency approves the following documentation submitted by the applicant:

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

(6) that the full-time RSO meets the requirements of subsection (h) [~~(h)(2)~~] of this section; and

(7) (No change.)

(p) License for the use of remote control brachytherapy units, teletherapy units, or gamma stereotactic radiosurgery units. In addition to the requirements of subsection (f) of this section, a license for the use of remote control brachytherapy (RCB) units, teletherapy units, or gamma stereotactic radiosurgery units will be issued if the agency approves the following documentation submitted by the applicant:

(1) - (10) (No change.)

(11) of the spot check procedures as required by subsections (~~mmm~~) - (~~ooo~~) [~~(HH)~~ - (~~HHH~~)] of this section, as applicable; and

(12) (No change.)

(q) (No change.)

(r) Amendment of licenses at request of licensee.

(1) (No change.)

(2) A licensee without broad-scope authorization shall apply for and shall receive a license amendment prior to the following:

(A) receiving or using radioactive material for a type of use that is authorized in accordance with ~~[under]~~ this section, but is not authorized on their current license issued in accordance with this section;

(B) - (G) (No change.)

(3) (No change.)

(s) - (t) (No change.)

(u) Suppliers for sealed sources or devices for medical use. A licensee may only use the following for medical use:

(1) sealed sources or devices manufactured, labeled, packaged, and distributed in accordance with a license issued by the agency, the NRC, or an agreement state~~;~~ or ~~licensing state~~];

(2) (No change.)

(3) teletherapy sources manufactured and distributed in accordance with a license issued by the agency, ~~the~~ NRC, or an agreement state~~;~~ or ~~licensing state~~].

(v) Possession, use, and calibration of dose calibrators to measure the activity of unsealed radioactive material.

(1) - (3) (No change.)

(4) The licensee shall maintain a record of each instrument calibration in accordance with subsection (www) of this section. The record shall include the following:

(A) (No change.)

(B) complete date of the calibration including the month, day and year;

(C) - (D) (No change.)

(w) Calibration of survey instruments. A licensee shall calibrate the survey instruments used to show compliance with this subsection and with §289.202 of this title before first use, annually, and following a repair that affects the calibration. A licensee shall:

(1) - (2) (No change.)

(3) conspicuously note on the instrument the complete date of the calibration including the month, day, and year;

(4) - (5) (No change.)

(x) Determination of dosages of unsealed radioactive material for medical use.

(1) (No change.)

(2) For a unit dosage, this determination shall be made by:

(A) (No change.)

(B) a decay correction, based on the activity or activity concentration determined by the following:

(i) a manufacturer or preparer licensed in accordance with §289.252(r) of this title, or under an equivalent NRC or[;] agreement state[; ~~or licensing state~~] license;

(ii) - (iii) (No change.)

(3) For other than unit dosages, this determination shall be made by:

(A) - (B) (No change.)

(C) combination of volumetric measurements and mathematical calculations, based on the measurement made by:

(i) a manufacturer or preparer licensed in accordance with §289.252(r) of this title, or under an equivalent NRC or[;] agreement state[; ~~or licensing state~~] license; or

(ii) (No change.)

(4) - (6) (No change.)

(y) Authorization for calibration and reference sources. Any licensee authorized by subsections (n), (o), (p) or (q) of this section for medical use of radioactive material may receive, possess, and use the following radioactive material for check, calibration, and reference use:

(1) sealed sources manufactured and distributed in accordance with a license issued by the agency, the NRC, or another agreement state and that do not exceed 30 millicuries (mCi) (1.11 gigabecquerel (GBq)) each;

(2) sealed sources redistributed by a licensee authorized to redistribute the sealed sources manufactured and distributed in accordance with a license issued by the agency, the NRC, or another agreement state and that do not exceed 30 mCi (1.11GBq) each, provided the redistributed sealed sources are in the original packaging and shielding and are accompanied by the manufacturer's approved instructions;

(3) (No change.)

(4) any radioactive material with a half-life longer than 120 days in individual amounts not to exceed the smaller of 200 µCi (7.4 MBq) or 1000 times the quantities in §289.202(ggg)(3) [~~§289.202(qqq)(3)~~] of this title; and

(5) (No change.)

(z) - (ee) (No change.)

(ff) Use of unsealed radioactive material for uptake, dilution, and excretion studies that do not require a written directive. Except for quantities that require a written directive in accordance with subsection (t) of this section, a licensee may use any unsealed radioactive material prepared for medical or veterinary use for uptake, dilution, or excretion studies that meets the following:

(1) is obtained from:

(A) a manufacturer or preparer licensed in accordance with §289.252 of this title or equivalent NRC or[;] agreement state[; ~~or licensing state~~] requirements; or

(B) a PET radioactive drug producer licensed in accordance with §289.252(kk) of this title or equivalent NRC or[;] agreement state[; ~~or licensing state~~] requirements; or

(2) (No change.)

(3) is obtained from and prepared by an NRC or [;] agreement state[; ~~or licensing state~~] licensee for use in research in accordance with a Radioactive Drug Research Committee-approved protocol or an IND protocol accepted by the FDA; or

(4) (No change.)

(gg) Training for uptake, dilution, and excretion studies. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of unsealed radioactive material for the uses authorized in subsection (ff) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC or an agreement state and who meets the requirements in paragraph (3)(C) of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, or an agreement state appear[; ~~or licensing state will be posted~~] on the NRC's [agency's] web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html>[; [www.dshs.state.tx.us/radiation](http://www.dshs.state.tx.us/radiation)]). To have its certification recognized, a specialty board shall require all candidates for certification to:

(A) - (B) (No change.)

(2) (No change.)

(3) has completed 60 hours of training and experience, including a minimum of eight hours of classroom and laboratory training, in basic radionuclide handling techniques applicable to the medical use of unsealed radioactive material for uptake, dilution, and excretion studies. The training and experience shall include the following[;]:

(A) classroom [~~Classroom~~] and laboratory training in the following areas:

(i) - (iv) (No change.)

(v) radiation biology; [;]

(B) work [~~Work~~] experience, under the supervision of an authorized user who meets the requirements of this subsection, subsections (l), (jj), or (nn) of this section, or equivalent NRC or agreement state requirements involving the following:

(i) - (vi) (No change.)

(C) written [~~Written~~] attestation, signed by a preceptor authorized user who meets the requirements of this subsection, subsections (l), (jj), or (nn) of this section, or equivalent NRC or agreement state requirements, that the individual has satisfactorily completed the



requirements of paragraph (1)(A) or (3) of this subsection and has achieved a level of competency sufficient to function independently as an authorized user for the medical uses authorized in accordance with subsection (ff) of this section.

(hh) Use of unsealed radioactive material for imaging and localization studies that do not require a written directive. Except for quantities that require a written directive in accordance with subsection (t) of this section, a licensee may use any unsealed radioactive material prepared for medical or veterinary use for imaging and localization studies that meets the following:

(1) is obtained from:

(A) a manufacturer or preparer licensed in accordance with §289.252 of this title or equivalent NRC or [;] agreement state [; or licensing state] requirements; or

(B) a PET radioactive drug producer licensed in accordance with §289.252(kk) of this title or equivalent NRC or [;] agreement state [; or licensing state] requirements; or

(2) (No change.)

(3) is obtained from and prepared by an NRC or [;] agreement state [; or licensing state] licensee for use in research in accordance with a Radioactive Drug Research Committee-approved protocol or an IND protocol accepted by the FDA; or

(4) (No change.)

(ii) Permissible molybdenum-99, strontium-82, and strontium-85 concentrations.

(1) The licensee may not administer to humans a radiopharmaceutical that contains:

(A) more than 0.15  $\mu\text{Ci}$  of molybdenum-99 per mCi [milliCurie] of technetium-99m (0.15 kilobecquerel (kBq) of molybdenum-99 per MBq [megabecquerel] of technetium-99m); or

(B) more than 0.02 Ci of strontium-82 per mCi of rubidium-82 chloride (0.02 kBq [kilobecquerel] of strontium-82 per MBq [megabecquerel] of rubidium-82 chloride) injection; or

(C) more than 0.2  $\mu\text{Ci}$  of strontium-85 per mCi of rubidium-82 (0.2 kBq [kilobecquerel] of strontium-85 per MBq [megabecquerel] of rubidium-82 chloride) injection.

(2) - (3) (No change.)

(4) If the licensee is required to measure the molybdenum-99 or strontium-82 and strontium-85 concentrations, the licensee shall retain a record of each measurement in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) for each measured elution of technetium-99m:

(i) the ratio of the measures expressed as  $\mu\text{Ci}$  [microCuries] of molybdenum-99 per mCi [milliCurie] of technetium-99m (kBq [kilobecquerel] of molybdenum-99 per MBq [megabecquerel] of technetium-99m);

(ii) - (iii) (No change.)

(B) for each measured elution of rubidium-82:

(i) the ratio of the measures expressed as  $\mu\text{Ci}$  of strontium-82 per mCi of rubidium (kBq [kilobecquerel] of strontium-82 per MBq [megabecquerel] of rubidium-82);

(ii) (ii) the ratio of the measures expressed as  $\mu\text{Ci}$  of strontium-85 per mCi of rubidium (kBq [kilobecquerel] of strontium-85 per MBq [megabecquerel] of rubidium-82);

(iii) - (iv) (No change.)

(jj) Training for imaging and localization studies. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of unsealed radioactive material for the uses authorized in subsection (hh) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC or an agreement state and who meets the requirements of paragraph (3)(C) of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, or an agreement state [; or licensing state] appear on the NRC's [agency's] web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html> [; [www.dshs.state.tx.us/radiation](http://www.dshs.state.tx.us/radiation)]). To have its certification process recognized, a specialty board shall require all candidates for certification to:

(A) - (B) (No change.)

(2) - (3) (No change.)

(kk) Use of unsealed radioactive material that requires a written directive. A licensee may use any unsealed radioactive material prepared for medical use that requires a written directive that meets the following:

(1) is obtained from:

(A) a manufacturer or preparer licensed in accordance with §289.252 of this title or equivalent NRC or [;] agreement state [; or licensing state] requirements;

(B) a PET radioactive drug producer licensed in accordance with §289.252(kk) of this title or equivalent NRC or agreement state requirements; or

(2) (No change.)

(3) is obtained from and prepared by an NRC or [;] agreement state [; or licensing state] licensee for use in research in accordance with an IND protocol accepted by the FDA; or

(4) (No change.)

(ll) - (mm) (No change.)

(nn) Training for use of unsealed radioactive material that requires a written directive. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of unsealed radioactive material for the uses authorized in subsection (kk) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC, or an agreement state [; or licensing state] and who meets the requirements in paragraph (2)(B)(vi) and (C) this subsection. (Specialty boards whose certification processes have been recognized by the agency, the NRC, or an agreement state appear [; or licensing state will be posted] on the NRC's [agency's] webpage at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html> [; [www.dshs.state.tx.us/radiation](http://www.dshs.state.tx.us/radiation)]). To be recognized, a specialty board shall require all candidates for certification to:

(A) - (B) (No change.)

(2) (No change.)

(oo) Training for the oral administration of sodium iodide I-131 requiring a written directive in quantities less than or equal to 33 mCi (1.22 GBq). Except as provided in subsection (l) of this section, the licensee shall require an authorized user for the oral administration of sodium iodide I-131 requiring a written directive in quantities less than or equal to 33 mCi (1.22 GBq) to be a physician who:

(1) is certified by a medical specialty board whose certification process includes all of the requirements of paragraph (3)(A) and (B) of this subsection and whose certification has been recognized by the agency, the NRC, or an agreement state[; ~~or licensing state~~] and who meets the requirements in paragraph (3)(C) of this subsection. (The names of board certifications which have been recognized by the agency, the NRC, or an agreement state appear[; ~~or licensing state will be posted~~] on the NRC's [agency's] web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html>[; [www.dshs.state.tx.us/radiation](http://www.dshs.state.tx.us/radiation)]); or

(2) - (3) (No change.)

(pp) Training for the oral administration of sodium iodide I-131 requiring a written directive in quantities greater than 33 mCi (1.22 GBq). Except as provided in subsection (l) of this section, the licensee shall require an authorized user for the oral administration of sodium iodide I-131 requiring a written directive in quantities greater than 33 mCi (1.22 GBq) to be a physician who:

(1) is certified by a medical specialty board whose certification process includes all of the requirements in paragraph (3)(A) and (B) of this subsection and whose certification has been recognized by the agency, the NRC, or an agreement state[; ~~or licensing state~~] and who meets the requirements in paragraph (3) of this subsection. (The names of board certifications which have been recognized by the agency, the NRC, or an agreement state[; ~~or licensing state~~] appear on the NRC's [agency's] web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html>[; [www.dshs.state.tx.us/radiation](http://www.dshs.state.tx.us/radiation)]); or

(2) - (3) (No change.)

(qq) Training for the parenteral administration of unsealed radioactive material requiring a written directive. Except as provided in subsection (l) of this section, the licensee shall require an authorized user for the parenteral administration requiring a written directive to be a physician who:

(1) - (2) (No change.)

(3) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC, or an agreement state[; ~~or licensing state~~] in accordance with subsections (zz) or (tt) of this section, and who meets the requirements of paragraph (4) of this subsection. (The names of board certifications which have been recognized by the agency, the NRC, or an agreement state appear[; ~~or licensing state will be posted~~] on the NRC's [agency's] web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html>[; [www.dshs.state.tx.us/radiation](http://www.dshs.state.tx.us/radiation)]); and

(4) (No change.)

(rr) - (vv) (No change.)

(ww) Calibration measurements of brachytherapy sealed sources.

(1) - (3) (No change.)

(4) The licensee shall retain a record of each calibration in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) complete date of the calibration including the month, day, and year;

(B) - (E) (No change.)

(xx) - (yy) (No change.)

(zz) Training for use of manual brachytherapy sealed sources. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of a manual brachytherapy source for the uses authorized in subsection (rr) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC or an agreement state and who meets the requirements of paragraph (2)(D) of this section. (The names of board certifications that have been recognized by the agency, the NRC, or an agreement state appear[; ~~or licensing state will be posted~~] on the NRC's [agency's] web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html>[; [www.dshs.state.tx.us/radiation](http://www.dshs.state.tx.us/radiation)]). To have its certification recognized, a specialty board shall require all candidates for certification to:

(A) - (B) (No change.)

(2) (No change.)

(aaa) - (bbb) (No change.)

(ccc) Training for use of sealed sources for diagnosis. Except as provided in subsection (l) of this section, the licensee shall require the authorized user of a diagnostic sealed source for use in a device authorized in accordance with subsection (bbb) of this section to be a physician, dentist, or podiatrist who:

(1) is certified by a specialty board whose certification process includes the requirements of paragraphs (2) and (3) of this subsection and whose certification has been recognized by the agency, the NRC, or an agreement state[; ~~or licensing state~~]. (The names of board certifications that have been recognized by the agency, the NRC, or an agreement state appear[; ~~or licensing state will be posted~~] on the NRC's [agency's] web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html>[; [www.dshs.state.tx.us/radiation](http://www.dshs.state.tx.us/radiation)]); or

(2) - (3) (No change.)

(ddd) - (eee) (No change.)

(fff) Installation, maintenance, adjustment, and repair.

(1) Only a person specifically licensed by the agency, the NRC, or an agreement state[; ~~or licensing state~~] shall install, maintain, adjust, or repair a remote afterloader unit, teletherapy unit, or gamma stereotactic radiosurgery unit that involves work on the sealed source(s) shielding, the sealed source(s) driving unit, or other electronic or mechanical component that could expose the sealed source(s), reduce the shielding around the sealed source(s), or compromise the radiation safety of the unit or the sealed source(s).

(2) Except for low dose-rate remote afterloader units, only a person specifically licensed by the agency, the NRC, or an agreement state[; ~~or licensing state~~] shall install, replace, relocate, or remove a sealed source or sealed source contained in other remote afterloader units, teletherapy units, or gamma stereotactic units.

(3) For a low dose-rate remote afterloader unit, only a person specifically licensed by the agency, the NRC, an agreement state, [a licensing state,] or an authorized medical physicist shall install, replace, relocate, or remove a sealed source(s) contained in the unit.

(4) (No change.)

(ggg) - (hhh) (No change.)

(iii) Dosimetry equipment.

(1) - (2) (No change.)

(3) The licensee shall retain a record of each calibration, intercomparison, and comparison of dosimetry equipment in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) complete date of the calibration including the month, day, and year;

(B) - (D) (No change.)

(jjj) Full calibration measurements on teletherapy units.

(1) - (6) (No change.)

(7) The licensee shall retain a record of each calibration in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) complete date of the calibration including the month, day, and year;

(B) - (D) (No change.)

(kkk) Full calibration measurements on remote afterloader units.

(1) - (8) (No change.)

(9) The licensee shall retain a record of each calibration in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) complete date of the calibration including the month, day, and year;

(B) - (E) (No change.)

(lll) Full calibration measurements on gamma stereotactic radiosurgery units.

(1) - (6) (No change.)

(7) The licensee shall retain a record of each calibration in accordance with subsection (www) of this section for inspection by the agency. The record shall include the following:

(A) complete date of the calibration including the month, day and year;

(B) - (D) (No change.)

(mmm) - (qqq) (No change.)

(rrr) Five-year inspection for teletherapy and gamma stereotactic radiosurgery units.

(1) (No change.)

(2) This inspection and servicing may only be performed by persons specifically licensed to do so by the agency, the NRC, or an agreement state~~[- or licensing state]~~.

(3) (No change.)

(sss) (No change.)

(tt) Training for use of remote afterloader units, teletherapy units, and gamma stereotactic radiosurgery units. Except as provided in subsection (l) of this section, the licensee shall require an authorized user of a sealed source for a use authorized in subsection (ddd) of this section to be a physician who:

(1) is certified by a medical specialty board whose certification process has been recognized by the agency, the NRC, or an

agreement state ~~[- or licensing state]~~ and who meets the requirements of paragraphs (2)(D) and (3) of this subsection. (The names of board certifications that have been recognized by the agency, the NRC, or an agreement state appear~~[- or licensing state will be posted]~~ on the NRC's ~~[agency's]~~ web page at <https://www.nrc.gov/materials/miau/med-use-toolkit/spec-board-cert.html>~~[- www.dshs.state.tx.us/radiation]~~). To have its certification recognized, a specialty board shall require all candidates for certification to:

(A) - (B) (No change.)

(2) - (3) (No change.)

(uuu) Report and notification of a medical event.

(1) - (3) (No change.)

(4) The licensee shall submit a written report to the agency within 15 calendar days after discovery of the medical event. The written report shall include the following, excluding the individual's name or any other information that could lead to identification of the individual:

(A) the licensee's name and radioactive material license number;

(B) a description of the licensed source of radiation involved, including, for radioactive material, the kind, quantity, chemical and physical form, source and/or device manufacturer, model number, and serial number, if applicable;

~~(C) [(B)]~~ the name of the prescribing physician;

~~(D) [(C)]~~ a brief description of the medical event;

~~(E) [(D)]~~ why the event occurred;

~~(F) [(E)]~~ the effect, if any, on the individual(s) who received the administration;

~~(G) [(F)]~~ actions, if any, that have been taken, or are planned, to prevent recurrence; and

~~(H) [(G)]~~ certification that the licensee notified the individual (or the individual's responsible relative or guardian), and if not, why not.

(5) - (9) (No change.)

(vvv) Report and notification of a dose to an embryo/fetus or nursing child.

(1) - (3) (No change.)

(4) The licensee shall submit a written report to the agency no later than 15 calendar days after discovery of a dose to the embryo/fetus or nursing child that requires a report in accordance with paragraphs (1) or (2) of this subsection. The written report shall include the following, excluding the individual's or child's name or any other information that could lead to identification of the individual or child:

(A) the licensee's name and radioactive material license number;

(B) a description of the licensed source of radiation involved, including, for radioactive material, the kind, quantity, chemical and physical form, source and/or device manufacturer, model number, and serial number, if applicable;

~~(C) [(B)]~~ the name of the prescribing physician;

~~(D) [(C)]~~ a brief description of the event;

~~(E) [(D)]~~ why the event occurred;

(F) [(E)] the effect, if any, on the embryo/fetus or the nursing child;

(G) [(F)] actions, if any, that have been taken, or are planned, to prevent recurrence; and

(H) [(G)] certification that the licensee notified the pregnant individual or mother (or the mother's or child's responsible relative or guardian), and if not, why not.

(5) - (8) (No change.)

(www) Records/documents for agency inspection. Each licensee shall maintain copies of the following records/documents at each authorized use site and make them available to the agency for inspection, upon reasonable notice.

Figure: 25 TAC §289.256(www)

[Figure: 25 TAC §289.256(www)]

§§289.257. *Packaging and Transportation of Radioactive Material.*

(a) - (c) (No change.)

(d) Definitions. The following words and terms when used in this section shall have the following meaning, unless the context clearly indicates otherwise. To ensure compatibility with international transportation standards, all limits in this section are given in terms of dual units: The International System of Units (SI) followed or preceded by United States (U.S.) standard or customary units. The U.S. customary units are not exact equivalents, but are rounded to a convenient value, providing a functionally equivalent unit. For the purpose of this section, SI units shall be used.

(1) - (10) (No change.)

(11) Contamination--The presence of a radioactive substance on a surface in quantities in excess of 0.4 becquerel per square centimeter (Bq/cm<sup>2</sup>) (10-5 microcurie per square centimeter (µCi/cm<sup>2</sup>)) for beta and gamma emitters and low toxicity alpha emitters, or 0.04 Bq/cm<sup>2</sup> (10-6 µCi/cm<sup>2</sup>) for all other alpha emitters.

(A) Fixed contamination means contamination that cannot be removed from a surface during normal conditions of transport.

(B) Non-fixed contamination means contamination that can be removed from a surface during normal conditions of transport.

(12) [(H)] Conveyance--For transport on:

(A) public highway or rail by transport vehicle or large freight container;

(B) water by vessel, or any hold, compartment, or defined deck area of a vessel including any transport vehicle on board the vessel; and

(C) aircraft.

(13) [(H2)] Criticality Safety Index (CSI)--The dimensionless number (rounded up to the next tenth) assigned to and placed on the label of a fissile material package, to designate the degree of control of accumulation of packages, overpacks or freight containers containing fissile material during transportation. Determination of the criticality safety index is described in subsection (i) of this section and Title 10, Code of Federal Regulations (CFR), §71.22, §71.23, and §71.59. The criticality safety index for an overpack, freight container, consignment or conveyance containing fissile material packages is the arithmetic sum of the criticality safety indices of all the fissile material packages contained within the overpack, freight container, consignment or conveyance.

(14) [(43)] Decontamination facility--A facility operating in accordance with an NRC, agreement state, or agency license whose principal purpose is decontamination of equipment or materials to accomplish recycle, reuse, or other waste management objectives, and, for purposes of this section, is not considered to be a consignee for LLRW shipments.

(15) [(44)] Deuterium--For the purposes of this section, this means deuterium and any deuterium compound, including heavy water, in which the ratio of deuterium atoms to hydrogen atoms exceeds 1:5000.

(16) [(45)] Disposal container--A transport container principally used to confine LLRW during disposal operations at a land disposal facility (also see definition for high integrity container). Note that for some shipments, the disposal container may be the transport package.

(17) [(46)] Environmental Protection Agency (EPA) identification number--The number received by a transporter following application to the administrator of EPA as required by Title 40, CFR, Part 263.

(18) [(47)] Exclusive use--The sole use by a single consignor of a conveyance for which all initial, intermediate, and final loading and unloading are carried out in accordance with the direction of the consignor or consignee. The consignor and the carrier shall ensure that any loading or unloading is performed by personnel having radiological training and resources appropriate for safe handling of the consignment. The consignor shall issue specific instructions, in writing, for maintenance of exclusive use shipment controls, and include them with the shipping paper information provided to the carrier by the consignor.

(19) [(48)] Fissile material--The radionuclides plutonium-239, plutonium-241, uranium-233, uranium-235, or any combination of these radionuclides. Fissile material means the fissile nuclides themselves, not material containing fissile nuclides. Unirradiated natural uranium and depleted uranium, and natural uranium or depleted uranium that has been irradiated in thermal reactors only are not included in this definition. Agency jurisdiction extends only to special nuclear material in quantities not sufficient to form a "critical mass" as defined in §289.201(b) of this title. Certain exclusions from fissile material controls are provided in subsection (h) of this section.

(20) [(49)] Freight forwarder--A person or entity which holds itself out to the general public to provide transportation of property for compensation and in the ordinary course of its business:

(A) assembles and consolidates, or provides for assembling and consolidating, shipments and performs break-bulk and distribution operations of the shipments;

(B) assumes responsibility for the transportation from the place of receipt to the place of destination; and

(C) uses for any part of the transportation a rail, motor or water carrier subject to the jurisdiction of either the Federal Motor Carrier Safety Administration or the Surface Transportation Board.

(21) [(20)] Generator--A licensee operating in accordance with an agency, NRC, or agreement state license who:

(A) is a waste generator as defined in this section; or

(B) is the licensee to whom waste can be attributed within the context of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (e.g., waste generated as a result of decontamination or recycle activities).

(22) [(21)] Graphite--For the purposes of this section, this means graphite with a boron equivalent content of less than 5 parts per million and density greater than 1.5 grams per cubic centimeter.

(23) [(22)] High integrity container (HIC)--A container commonly designed to meet the structural stability requirements of Title 10, CFR, §61.56, and to meet DOT requirements for a Type A package.

(24) [(23)] Indian Tribe [tribe]--An Indian or Alaska Native Tribe [tribe], band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe [tribe] pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §479a.

(25) [(24)] Industrial package (IP)--A packaging that, together with its low specific activity (LSA) material or surface contaminated object (SCO) contents, meets the requirements of Title 49, CFR, §173.410 and §173.411. Industrial packages are categorized in Title 49, CFR, §173.411 as either:

- (A) Industrial package Type 1 (IP-1);
- (B) Industrial package Type 2 (IP-2); or
- (C) Industrial package Type 3 (IP-3).

(26) [(25)] Low-level radioactive waste (LLRW)--Radioactive material that meets the following criteria:

(A) LLRW is radioactive material that is:

(i) discarded or unwanted and is not exempt by rule adopted in accordance with the Texas Radiation Control Act (Act), Health and Safety Code, §401.106;

(ii) waste, as that term is defined in Title 10, CFR, §61.2; and

(iii) subject to:

(I) concentration limits established in Title 10, CFR, §61.55, or compatible rules adopted by the agency or the Texas Commission on Environmental Quality (TCEQ), as applicable; and

(II) disposal criteria established in Title 10, CFR, or established by the agency or TCEQ, as applicable.

(B) LLRW does not include:

(i) high-level radioactive waste as defined in Title 10, CFR, §60.2;

(ii) spent nuclear fuel as defined in Title 10, CFR, §72.3;

(iii) byproduct material defined in the Act, Health and Safety Code, §401.003(3)(B);

(iv) naturally occurring radioactive material (NORM) waste that is not oil and gas NORM waste;

(v) oil and gas NORM waste; or

(vi) transuranics greater than 100 nanocuries (3.7 kilobecquerels) per gram (g).

(27) [(26)] Low specific activity (LSA) material--Radioactive material with limited specific activity which is nonfissile or is accepted in accordance with subsection (h) of this section, and which satisfies the following descriptions and limits set forth in this section. Shielding materials surrounding the LSA material may not be considered in determining the estimated average specific activity of the package contents. LSA material shall be in one of the following three groups:

(A) LSA-I.

(i) Uranium and thorium ores, concentrates of uranium and thorium ores, and other ores containing naturally occurring radionuclides that are [Ores containing only naturally occurring radionuclides (e.g., uranium, thorium) and uranium or thorium concentrates of such ores which are not] intended to be processed for the use of these radionuclides; or

(ii) Natural uranium, depleted uranium, natural thorium or their compounds or mixtures, provided they are unirradiated and in solid or liquid form; [Solid unirradiated natural uranium or depleted uranium or natural thorium or their solid or liquid compounds or mixtures;] or

(iii) Radioactive material other than fissile material for which the  $A_2$  value is unlimited; or

(iv) Other radioactive material (e.g.: mill tailings, contaminated earth, concrete, rubble, other debris, and activated material) in which the radioactivity is distributed throughout, and the estimated average specific activity does not exceed 30 times the value for exempt material activity concentration determined in accordance with subsection (ee) of this section.

(B) LSA-II.

(i) Water with tritium concentration up to 0.8 terabecquerel per liter (TBq/l) (20.0 curies per liter (Ci/l)); or

(ii) Other material in which the radioactivity is distributed throughout, and the average specific activity does not exceed 10-4  $A_2/g$  for solids and gases, and 10-5  $A_2/g$  for liquids.

(C) LSA-III. Solids (e.g., consolidated wastes, activated materials), excluding powders, that satisfy the requirements of Title 10, CFR, §71.77 in which:

(i) the radioactive material is distributed throughout a solid or a collection of solid objects, or is essentially uniformly distributed in a solid compact binding agent (such as concrete, bitumen, ceramic, etc.); and

(ii) the radioactive material is relatively insoluble, or it is intrinsically contained in a relatively insoluble material, so that, even with a loss of packaging, the loss of radioactive material per package by leaching, when placed in water for 7 days, will [would] not exceed 0.1  $A_2$ ; and

(iii) the estimated average specific activity of the solid, excluding any shielding material, does not exceed  $2 \times 10^{-3} A_2/g$ .

(28) [(27)] Low toxicity alpha emitters--Natural uranium, depleted uranium, natural thorium; uranium-235, uranium-238, thorium-232, thorium-228 or thorium-230 when contained in ores or physical or chemical concentrates or tailings; or alpha emitters with a half-life of less than 10 days.

(29) [(28)] Maximum normal operating pressure--The maximum gauge pressure that would develop in the containment system in a period of 1 year under the heat condition specified in Title 10, CFR, §71.71(c)(1), in the absence of venting, external cooling by an ancillary system, or operational controls during transport.

(30) [(29)] Natural thorium--Thorium with the naturally occurring distribution of thorium isotopes (essentially 100 weight percent thorium-232).

(31) [(30)] Normal form radioactive material--Radioactive material that has not been demonstrated to qualify as special form radioactive material.

(32) [(31)] NRC Forms 540, 540A, 541, 541A, 542, and 542A--Official NRC forms referenced in subsection (ff) of this section which includes the information required by DOT in Title 49, CFR, Part 172. Licensees need not use originals of these forms as long as any substitute forms contain the equivalent information. Licensees may include additional information deemed relevant to the licensee's shipment of low-level radioactive waste. Upon agreement between the shipper and consignee, NRC Forms 541 (and 541A) and NRC Forms 542 (and 542A) or equivalent documents may be completed, transmitted, and stored in electronic media. The electronic media shall have the capability for producing legible, accurate, and complete records in the format of the uniform manifest.

(33) [(32)] Package--The packaging together with its radioactive contents as presented for transport.

(A) Fissile material package, Type AF package, Type BF package, Type B(U)F package, or Type B(M)F package--A fissile material packaging together with its fissile material contents.

(B) Type A package--A Type A packaging together with its radioactive contents. A Type A package is defined and shall comply with the DOT regulations in Title 49, CFR, Part 173.

(C) Type B package--A Type B packaging together with its radioactive contents. On approval by the NRC, a Type B package design is designated by NRC as B(U) unless the package has a maximum normal operating pressure of more than 700 kilopascals (kPa) (100 pounds per square inch (lb/in<sup>2</sup>)) gauge or a pressure relief device that would allow the release of radioactive material to the environment under the tests specified in Title 10, CFR, §71.73 (hypothetical accident conditions), in which case it will receive a designation B(M). B(U) refers to the need for unilateral approval of international shipments; B(M) refers to the need for multilateral approval of international shipments. There is no distinction made in how packages with these designations may be used in domestic transportation. To determine their distinction for international transportation, see DOT regulations in Title 49, CFR, Part 173. A Type B package approved before September 6, 1983, was designated only as Type B. Limitations on its use are specified in Title 10, CFR, §71.19.

(34) [(33)] Packaging--The assembly of components necessary to ensure compliance with the packaging requirements of this section. It may consist of one or more receptacles, absorbent materials, spacing structures, thermal insulation, radiation shielding, and devices for cooling or absorbing mechanical shocks. The vehicle, tie-down system, and auxiliary equipment may be designated as part of the packaging.

(35) [(34)] Physical description--The items called for on NRC Form 541 to describe a LLRW.

(36) [(35)] Registered freight forwarder--A freight forwarder that has an emergency plan approved in accordance with subsection (r) of this section and has been issued a registration letter.

(37) [(36)] Registered shipper--A shipper that has an emergency plan approved in accordance with subsection (r) of this section, and shipping containers approved in accordance with subsection(cc)(8) of this section and been issued a registration letter.

(38) [(37)] Registered transporter--A transporter that has an emergency plan approved in accordance with subsection (r) of this section, and proof of financial responsibility submitted and approved in accordance with subsection(e)(4) of this section and has been issued a registration letter.

(39) [(38)] Residual waste--LLRW resulting from processing or decontamination activities that cannot be easily separated into

distinct batches attributable to specific waste generators. This waste is attributable to the processor or decontamination facility, as applicable.

(40) [(39)] Shipper--The licensed entity (i.e., the waste generator, waste collector, or waste processor) who offers LLRW for transportation, typically consigning this type of waste to a licensed waste collector, waste processor, or land disposal facility operator. This definition applies only to shipments of LLRW shipped to a Texas LLRW disposal facility.

(41) [(40)] Site of usage--The licensee's facility, including all buildings and structures between which radioactive material is transported and all roadways that are not within the public domain on which radioactive material can be transported.

(42) Special form radioactive material--Radioactive material that satisfies the following conditions:

(A) it is either a single solid piece or is contained in a sealed capsule that can be opened only by destroying the capsule;

(B) the piece or capsule has at least one dimension not less than 5 millimeters (0.2 in); and

(C) it satisfies the requirements of Title 10, CFR, §71.75. A special form encapsulation designed in accordance with the requirements of this subsection in effect on or after June 30, 1983 (see Title 10, CFR, Part 71, revised as of January 1, 1983), and constructed before July 1, 1985; a special form encapsulation designed in accordance with the requirements of this subsection in effect on or after March 31, 1996 (see Title 10, CFR, Part 71, revised as of January 1, 1996), and constructed before April 1, 1998; and

(D) special form material that was successfully tested before September 10, 2015, in accordance with the requirements of Title 10, CFR, §71.75(d) in effect before September 10, 2015 may continue to be used. Any other special form encapsulation must meet the specifications of this definition.

(43) [(41)] Specific activity of a radionuclide--The radioactivity of the radionuclide per unit mass of that nuclide. The specific activity of a material in which the radionuclide is essentially uniformly distributed is the radioactivity per unit mass of the material.

(44) [(42)] Spent nuclear fuel or spent fuel--Fuel that has been withdrawn from a nuclear reactor following irradiation, has undergone at least 1 year's decay since being used as a source of energy in a power reactor, and has not been chemically separated into its constituent elements by reprocessing. Spent fuel includes the special nuclear material, byproduct material, source material, and other radioactive materials associated with fuel assemblies.

(45) [(43)] Surface contaminated object (SCO)--A solid object that is not itself classed as radioactive material, but which has radioactive material distributed on any of its surfaces. A SCO shall be in one of the following two groups with surface activity not exceeding the following limits:

(A) SCO-I--A solid object on which:

(i) the non-fixed contamination on the accessible surface averaged over 300 square centimeters (cm<sup>2</sup>) (or the area of the surface if less than 300 cm<sup>2</sup>) does not exceed 4 becquerels per square centimeter (Bq/cm<sup>2</sup>) (10-4 microcurie per square centimeter (μCi/cm<sup>2</sup>)) for beta and gamma and low toxicity alpha emitters, or 4 x 10-1 Bq/cm<sup>2</sup> (10-5 μCi/cm<sup>2</sup>) for all other alpha emitters;

(ii) the fixed contamination on the accessible surface averaged over 300 cm<sup>2</sup> (or the area of the surface if less than 300 cm<sup>2</sup>) does not exceed 4 x 10<sup>4</sup> Bq/cm<sup>2</sup> (1 μCi/cm<sup>2</sup>) for beta and gamma and

low toxicity alpha emitters, or 4 x 10<sup>3</sup> Bq/cm<sup>2</sup> (10-1 µCi/cm<sup>2</sup>) for all other alpha emitters; and

(iii) the non-fixed contamination plus the fixed contamination on the inaccessible surface averaged over 300 cm<sup>2</sup> (or the area of the surface if less than 300 cm<sup>2</sup>) does not exceed 4 x 10<sup>4</sup> Bq/cm<sup>2</sup> (1 µCi/cm<sup>2</sup>) for beta and gamma and low toxicity alpha emitters, or 4 x 10<sup>3</sup> Bq/cm<sup>2</sup> (10-1 µCi/cm<sup>2</sup>) for all other alpha emitters.

(B) SCO-II--A solid object on which the limits for SCO-I are exceeded and on which the following limits are not exceeded:

(i) the non-fixed contamination on the accessible surface averaged over 300 cm<sup>2</sup> (or the area of the surface if less than 300 cm<sup>2</sup>) does not exceed 400 Bq/cm<sup>2</sup> (10-2 µCi/cm<sup>2</sup>) for beta and gamma and low toxicity alpha emitters or 40 Bq/cm<sup>2</sup> (10-3 µCi/cm<sup>2</sup>) for all other alpha emitters;

(ii) the fixed contamination on the accessible surface averaged over 300 cm<sup>2</sup> (or the area of the surface if less than 300 cm<sup>2</sup>) does not exceed 8 x 10<sup>5</sup> Bq/cm<sup>2</sup> (20 µCi/cm<sup>2</sup>) for beta and gamma and low toxicity alpha emitters, or 8 x 10<sup>4</sup> Bq/cm<sup>2</sup> (2 µCi/cm<sup>2</sup>) for all other alpha emitters; and

(iii) the non-fixed contamination plus the fixed contamination on the inaccessible surface averaged over 300 cm<sup>2</sup> (or the area of the surface if less than 300 cm<sup>2</sup>) does not exceed 8 x 10<sup>5</sup> Bq/cm<sup>2</sup> (20 µCi/cm<sup>2</sup>) for beta and gamma and low toxicity alpha emitters, or 8 x 10<sup>4</sup> Bq/cm<sup>2</sup> (2 µCi/cm<sup>2</sup>) for all other alpha emitters.

(46) [(44)] Transporter--A carrier who transports radioactive material.

(47) [(45)] Tribal official--The highest ranking individual that represents Tribal leadership, such as the Chief, President, or Tribal Council leadership.

(48) [(46)] Uniform Low-Level Radioactive Waste Manifest or uniform manifest--The combination of NRC Forms 540, 541, and, if necessary, 542, and their respective continuation sheets as needed, or equivalent.

(49) [(47)] Unirradiated uranium--Uranium containing not more than 2 x 10<sup>3</sup> Bq (0.054 µCi) of plutonium per gram of uranium-235, not more than 9 x 10<sup>6</sup> Bq (243 µCi) of fission products per gram of uranium-235, and not more than 5 x 10<sup>-3</sup> g of uranium-236 per gram of uranium-235.

(50) [(48)] Uranium--Natural, depleted, enriched:

(A) Natural uranium--Uranium (which may be chemically separated) with the naturally occurring distribution of uranium isotopes (approximately 0.711 weight percent uranium-235, and the remainder by weight essentially uranium-238).

(B) Depleted uranium--Uranium containing less uranium-235 than the naturally occurring distribution of uranium isotopes.

(C) Enriched uranium--Uranium containing more uranium-235 than the naturally occurring distribution of uranium isotopes.

(51) [(49)] Waste collector--An entity, operating in accordance with an agency, NRC, or agreement state license, whose principal purpose is to collect and consolidate waste generated by others, and to transfer this waste, without processing or repackaging the collected waste, to another licensed waste collector, licensed waste processor, or licensed land disposal facility.

(52) [(50)] Waste description--The physical, chemical and radiological description of a LLRW as called for on NRC Form 541.

(53) [(51)] Waste generator--An entity, operating in accordance with an agency, NRC, or agreement state license, who:

(A) possesses any material or component that contains radioactivity or is radioactively contaminated for which the licensee foresees no further use; and

(B) transfers this material or component to a licensed land disposal facility or to a licensed waste collector or processor for handling or treatment prior to disposal. A licensee performing processing or decontamination services may be a waste generator if the transfer of LLRW from its facility is defined as residual waste.

(54) [(52)] Waste processor--An entity, operating in accordance with an NRC or agreement state license, whose principal purpose is to process, repackage, or otherwise treat LLRW or waste generated by others prior to eventual transfer of waste to a licensed LLRW land disposal facility.

(55) [(53)] Waste type--A waste within a disposal container having a unique physical description (i.e., a specific waste descriptor code or description; or a waste sorbed on or solidified in a specifically-defined media).

(e) (No change.)

(f) Exemption for low-level radioactive materials.

(1) A licensee is exempt from all requirements of this section with respect to shipment or carriage of the following low-level materials:

(A) Natural material and ores containing naturally occurring radionuclides that are either in their natural state, or have only been processed for purposes other than for the extraction of the radionuclides, and which are not intended to be processed for use of these radionuclides, provided the activity concentration of the material does not exceed 10 times the applicable radionuclide activity concentration values specified in [Table 257-4 of] subsection (ee), (ee)(7), and (ee)(8) of this section.

(B) Materials for which the activity concentration is not greater than the activity concentration values specified in [Table 257-4 of] subsection (ee), (ee)(7), and (ee)(8) of this section, or for which the consignment activity is not greater than the limit for an exempt consignment found in [Table 257-4 of] subsection (ee), (ee)(7), and (ee)(8) of this section.

(C) Non-radioactive solid objects with radioactive substances present on any surfaces in quantities not in excess of the levels cited in the definition of contamination in subsection (d) of this section.

(2) - (3) (No change.)

(g) (No change.)

(h) Exemption from classification as fissile material. Fissile materials meeting the requirements of at least one of the paragraphs (1) through (6) of this subsection are exempt from classification as fissile material and from the fissile material package standards of Title 10, CFR §71.55 and §71.59, but are subject to all other requirements of this section, except as noted.

(1) - (3) (No change.)

(4) Uranium enriched in uranium-235 to a maximum of 1% by weight, and with total plutonium and uranium-233 content of up to 1% of the mass of uranium-235, provided that the mass of any beryllium, graphite, and hydrogenous material enriched in deuterium constitutes less than 5% of the uranium mass, and that the fissile material is distributed homogeneously and does not form a lattice arrangement within the package.

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

(i) General license.

(1) NRC-approved package.

(A) - (B) (No change.)

(C) This general license applies only to a licensee who meets the following requirements:

(i) - (ii) (No change.)

(iii) before the licensee's first use of the package, submits in writing to: ATTN: Document Control Desk, Director, Division of Spent Fuel Storage and Transportation [Project Office], Office of Nuclear Material Safety and Safeguards, using an appropriate method listed in Title 10, CFR, Part 71, the licensee's name and license number and the package identification number specified in the package approval.

(D) - (F) (No change.)

(2) - (3) (No change.)

(4) Use of foreign approved package.

(A) A general license is issued to any licensee to transport, or to deliver to a carrier for transport, licensed material in a package the design of which has been approved in a foreign national competent authority certificate that has been revalidated by the DOT as meeting the applicable requirements of Title 49, CFR, §171.23 [~~§171.12~~].

(B) (No change.)

(C) This general license applies only to ~~international~~ shipments made to or from locations outside the United States.

(D) This general license applies only to a licensee who:

(i) (No change.)

(ii) complies with the terms and conditions of the certificate and revalidation, and with the applicable requirements of ~~this section. With respect to the quality assurance provisions of~~ Title 10, CFR, Part 71, Subparts A, G, and H. ~~[the licensee is exempt from design, construction, and fabrication considerations.]~~

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

(j) (No change.)

(k) Preliminary determinations. Before the first use of any packaging for the shipment of licensed material the licensee shall:

(1) (No change.)

(2) where the maximum normal operating pressure will exceed 35 kPa (5 lbf/in<sup>2</sup>) gauge, test the containment system at an internal pressure at least 50% higher than the maximum normal operating pressure, to verify the capability of that system to maintain its structural integrity at that pressure; ~~and~~

(3) conspicuously and durably mark the packaging with its model number, serial number, gross weight, and a package identification number assigned by NRC. Before applying the model number, the licensee shall determine that the packaging has been fabricated in accordance with the design approved by the NRC; ~~and~~[-]

(4) ascertain that the determinations in subsections (a) through (c) of this section have been made in accordance with Title 10, CFR, §71.85.

(l) - (n) (No change.)

(o) Records.

(1) For a period of 3 years after shipment, each licensee shall maintain, for inspection by the agency, a record of each shipment of radioactive material including the following where applicable:

(A) [(4)] identification of the packaging by model number and serial number;

(B) [(2)] verification that there are no significant defects in the packaging, as shipped;

(C) volume and identification of coolant;

(D) [(3)] type and quantity of radioactive material in each package, and the total quantity of each shipment;

(E) for each item of irradiated fissile material:

(i) identification by model number and serial number;

(ii) irradiation and decay history to the extent appropriate to demonstrate that its nuclear and thermal characteristics comply with license conditions; and

(iii) any abnormal or unusual condition relevant to radiation safety;

(F) [(4)] date of the shipment;

(G) [(5)] for fissile packages and for Type B packages, any special controls exercised;

(H) [(6)] name and address of the transferee;

(I) [(7)] address to which the shipment was made; and

(J) [(8)] surveys performed to determine compliance with subsection (I)(9) and (10) of this section.

(2) Each certificate holder shall maintain, for a period of 3 years after the life of the packaging to which they apply, records identifying the packaging by model number, serial number, and date of manufacture.

(4) The licensee, certificate holder, and an applicant for a CoC shall maintain sufficient written records to furnish evidence of the quality of packaging.

(A) The records to be maintained include:

(i) results of the determinations required by subsection (k) of this section;

(ii) design, fabrication, and assembly records;

(iii) results of reviews, inspections, tests, and audits;

(iv) results of monitoring work performance and materials analyses; and

(v) results of maintenance, modification, and repair activities.

(B) Inspection, test, and audit records must identify the:

(i) inspector or data recorder;

(ii) type of observation;

(iii) results;

(iv) acceptability; and

(v) action taken in connection with any deficiencies

noted.

(C) These records must be retained for 3 years after the life of the packaging to which they apply.



(p) Reports. The transporter and shipper shall immediately report by telephone [~~; facsimile, or other electronic media transmission;~~] all radioactive waste transportation accidents to the agency, at (512) 458-7460, and the local emergency management officials [~~planning committees~~] in the county where the radioactive waste accident occurs. All other accidents involving radioactive material shall be reported in accordance with §289.202(xx) and (yy) of this title.

(q) Advance notification of transport of irradiated reactor fuel and certain radioactive waste.

(1) - (3) (No change.)

(4) The following are procedures for submitting advance notification:

(A) - (B) (No change.)

(C) A notification delivered by any other means than mail shall reach the office of the governor or of the governor's designee or the Tribal official or Tribal official's designee at least 4 days before the beginning of the 7-day period during which departure of the shipment is estimated to occur.

(i) (No change.)

(ii) Contact information for each state, including telephone and mailing addresses of governors and governors' designees, and participating Tribes, including telephone and mailing addresses of Tribal officials and Tribal official's designees, is available on the NRC website at: <https://scp.nrc.gov/special/designee.pdf>. [The list of governor's designees and Tribal official's designees of participating Tribes is published annually in the *Federal Register* on or about June 30th to reflect any changes in information.]

(iii) (No change.)

(D) (No change.)

(5) - (7) (No change.)

(r) - (t) (No change.)

(u) Quality assurance program. A quality assurance program shall be maintained as follows:

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

(6) Changes to quality assurance program.

(A) Each quality assurance program approval holder shall submit, in accordance with §289.201(k) of this title, a description of a proposed change to its agency-approved quality assurance program that will reduce commitments in the program description as approved by the agency. The quality assurance program approval holder shall not implement the change before receiving agency approval. The description of a proposed change to the agency-approved quality assurance program must identify the change, the reason for the change, and the basis for concluding that the revised program incorporating the change continues to satisfy the applicable requirements of subsections (s) - (bb) of this section.

(B) Each quality assurance program approval holder may change a previously approved quality assurance program without prior agency approval, if the change does not reduce the commitments in the quality assurance program previously approved by the agency. Changes to the quality assurance program that do not reduce the commitments shall be submitted to the agency every 24 months in accordance with §289.201(k) of this title. In addition to quality assurance program changes involving administrative improvements and clarifications, spelling corrections, and non-substantive changes

to punctuation or editorial items, the following changes are not considered reductions in commitment:

(i) the use of a quality assurance standard approved by the agency that is more recent than the quality assurance standard in the certificate holder's or applicant's current quality assurance program at the time of the change;

(ii) the use of generic organizational position titles that clearly denote the position function, supplemented as necessary by descriptive text, rather than specific titles, provided that there is no substantive change to either the functions of the position or reporting responsibilities;

(iii) the use of generic organizational charts to indicate functional relationships, authorities, and responsibilities, or alternatively, the use of descriptive text, provided that there is no substantive change to the functional relationships, authorities, or responsibilities;

(iv) the elimination of quality assurance program information that duplicates language in quality assurance regulatory guides and quality assurance standards to which the quality assurance program approval holder has committed to on record; and

(v) organizational revisions that ensure that persons and organizations performing quality assurance functions continue to have the requisite authority and organizational freedom, including sufficient independence from cost and schedule when opposed to safety considerations.

(C) Each quality assurance program approval holder shall maintain records of quality assurance program changes.

(v) - (x) (No change.)

(y) Nonconforming materials, parts, or components. The licensee, certificate holder, and applicant for a CoC shall establish measures to control materials, parts, or components that do not conform to the licensee's requirements to prevent their inadvertent use or installation. These measures shall include the following, as appropriate: [;]

(1) procedures for identification, documentation, segregation, disposition, and notification to affected organizations; and

(2) nonconforming items shall be reviewed and accepted, rejected, repaired, or reworked in accordance with documented procedures.

(z) (No change.)

(aa) Quality assurance records. The licensee, certificate holder, and applicant for a CoC shall maintain written records sufficient to describe the activities affecting quality for inspection by the agency for 3 years beyond the date when the licensee, certificate holder, and applicant for a CoC last engage in the activity for which the quality assurance program was developed. If any portion of the written procedures or instructions is superseded, the licensee, certificate holder, and applicant for a CoC shall retain the superseded material for 3 years after it is superseded. The records must [shall] include the following:

(1) instructions, procedures, and drawings to prescribe quality assurance activities, and closely related specifications such as required qualifications of personnel, procedures, and equipment; [-]

(2) instructions or procedures which establish a records retention program that is consistent with applicable regulations and designates factors such as duration, location, and assigned responsibility; and [-]

(3) changes to the quality assurance program as required by subsection (u)(6) of this section.

(bb) - (dd) (No change.)

(ee) Appendices for determination of  $A_1$  and  $A_2$ .

(1) Values of  $A_1$  and  $A_2$ . Values of  $A_1$  and  $A_2$  for individual radionuclides, which are the bases for many activity limits elsewhere in these rules are given in Table 257-3 of paragraph (6) of this subsection. The curie (Ci) values specified are obtained by converting from the terabecquerel (TBq) value [figure]. The TBq [Terabecquerel] values are the regulatory standard. The curie values are for information only and are not intended to be the regulatory standard. Where values of  $A_1$  or  $A_2$  are unlimited, it is for radiation control purposes only. For nuclear criticality safety, some materials are subject to controls placed on fissile material.

(2) Values of radionuclides not listed.

(A) For individual radionuclides whose identities are known, but are not listed in Table 257-3 of paragraph (6) of this subsection, the  $A_1$  and  $A_2$  values contained in Table 257-5 of paragraph (8) of this subsection may be used. Otherwise, the licensee shall obtain prior agency or NRC approval of the  $A_1$  and  $A_2$  values for radionuclides not listed in Table 257-3 of paragraph (6) of this subsection, before shipping the material.

(B) For individual radionuclides whose identities are known, but that are not listed in Table 257-4 of paragraph (7) of this subsection, the exempt material activity concentration and exempt consignment activity values contained in Table 257-5 of paragraph (8) of this subsection may be used. Otherwise, the licensee shall obtain prior agency or NRC approval of the exempt material activity concentration and exempt consignment activity values, for radionuclides not listed in Table 257-4 of paragraph (7) [Table 257-3 of paragraph (6)] of this subsection, before shipping the material.

(C) The licensee shall submit requests for prior approval, described in subparagraphs (A) and (B) of this paragraph to the agency or the NRC.

(3) (No change.)

(4) Determination for mixtures of radionuclides whose identities and respective activities are known. For mixtures of radionuclides whose identities and respective activities are known, the following conditions apply.

(A) For special form radioactive material, the maximum quantity transported in a Type A package is as follows:

Figure: 25 TAC §289.257(ee)(4)(A)  
[Figure: 25 TAC §289.257(ee)(4)(A)]

(B) For normal form radioactive material, the maximum quantity transported in a Type A package is as follows:

Figure: 25 TAC §289.257(ee)(4)(B)  
[Figure: 25 TAC §289.257(ee)(4)(B)]

(C) If the package contains both special and normal form radioactive material, the activity that may be transported in a Type A package is as follows:

Figure: 25 TAC §289.257(ee)(4)(C)

(D) [(E)] Alternatively, an  $A_1$  value for mixtures of special form material may be determined as follows:

Figure: 25 TAC §289.257(ee)(4)(D)  
[Figure: 25 TAC §289.257(ee)(4)(E)]

(E) [(D)] Alternatively, an [~~A<sub>1</sub>~~]  $A_2$  value for mixtures of normal form material may be determined as follows:

Figure: 25 TAC §289.257(ee)(4)(E)  
[Figure: 25 TAC §289.257(ee)(4)(D)]

(F) [(E)] The exempt activity concentration for mixtures of nuclides may be determined as follows:

Figure: 25 TAC §289.257(ee)(4)(F)  
[Figure: 25 TAC §289.257(ee)(4)(E)]

(G) [(F)] The activity limit for an exempt consignment for mixtures of radionuclides may be determined as follows:

Figure: 25 TAC §289.257(ee)(4)(G)  
[Figure: 25 TAC §289.257(ee)(4)(F)]

(5) Determination when individual activities of some of the radionuclides are not known.

(A) When the identity of each radionuclide is known, but the individual activities of some of the radionuclides are not known, the radionuclides may be grouped and the lowest  $A_1$  or  $A_2$  value, as appropriate, for the radionuclides in each group may be used in applying the formulas in paragraph (4) of this subsection. Groups may be based on the total alpha activity and the total beta/gamma activity when these are known, using the lowest  $A_1$  or  $A_2$  values for the alpha emitters and beta/gamma emitters.

(B) When the identity of each radionuclide is known but the individual activities of some of the radionuclides are not known, the radionuclides may be grouped and the lowest [A] (activity concentration for exempt material) or A (activity limit for exempt consignment) value, as appropriate, for the radionuclides in each group may be used in applying the formulas in paragraph (4) of this subsection. Groups may be based on the total alpha activity and the total beta/gamma activity when these are known, using the lowest [A] or A values for the alpha emitters and beta/gamma emitters, respectively.

(6)  $A_1$  and  $A_2$  values for radionuclides. The following Table 257-3 contains  $A_1$  and  $A_2$  values for radionuclides.[-]

Figure: 25 TAC §289.257(ee)(6)  
[Figure: 25 TAC §289.257(ee)(6)]

(7) Exempt material activity concentrations and exempt consignment activity limits for radionuclides. The following Table 257-4 contains exempt material activity concentrations and exempt consignment activity limits for radionuclides:

Figure: 25 TAC §289.257(ee)(7)  
[Figure: 25 TAC §289.257(ee)(7)]

(8) General values for  $A_1$  and  $A_2$ . The following Table 257-5 contains general values for  $A_1$  and  $A_2$ :

Figure: 25 TAC §289.257(ee)(8)  
[Figure: 25 TAC §289.257(ee)(8)]

(9) (No change.)

(ff) Appendices for the requirements for transfers of LLRW intended for disposal at licensed land disposal facilities and manifests.

(1) - (2) (No change.)

(3) Forms. NRC Forms 540, 540A, 541, 541A, 542 and 542A, and the accompanying instructions, in hard copy, may be obtained by writing or calling the Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone (301) 415-5877; or by visiting the NRC's Web site at <http://www.nrc.gov> and selecting forms from the index found on the NRC home page or [from the NRC] at [www.nrc.gov/reading-rm/doc-collections/forms/#NRC](http://www.nrc.gov/reading-rm/doc-collections/forms/#NRC).

(4) - (11) (No change.)

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

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For further information, please call: (512) 834-6656



## TITLE 26. HEALTH AND HUMAN SERVICES

### PART 1. HEALTH AND HUMAN SERVICES COMMISSION

#### CHAPTER 87. OMBUDSMAN SERVICES

The Health and Human Services Commission (HHSC) proposes new rules for Title 26, Health and Human Services, Part 1, Health and Human Services Commission, in new Chapter 87, Ombudsman Services, including Subchapter A, concerning Office of the Ombudsman; Subchapter B, concerning Ombudsman Managed Care Assistance; Subchapter C, concerning Ombudsman for Children and Youth in Foster Care; and Subchapter D, concerning Behavioral Health Ombudsman.

##### BACKGROUND AND PURPOSE

The purpose of the new chapter is to clarify and detail how the Office of the Ombudsman (OO), reauthorized by Senate Bill 200 (84th Legislature, Regular Session, 2015), assists the public and Health and Human Services (HHS) consumers with inquiries and complaints. Chapter 87 also serves the purpose of including various Ombudsman responsibilities and services for different programs and administrative areas in one chapter.

OO is established by Texas Government Code §531.0171, Office of Ombudsman, and has authority and responsibility over the HHS system in providing dispute resolution services, performing consumer protection and advocacy functions, and collecting consumer contact data.

The Ombudsman Managed Care Assistance Team (OMCAT) provides support and information services to persons enrolled in or applying for Medicaid who experience barriers to receiving health care services, in accordance with Texas Government Code §531.0213, Support Services for Medicaid Recipients.

The Ombudsman for Children and Youth in Foster Care (FCO), established by Texas Government Code, Chapter 531, Subchapter Y, as enacted by Senate Bill 830 (84th Legislature, Regular Session, 2015), serves as a neutral party in assisting children and youth in the conservatorship of the Department of Family and Protective Services (DFPS) with complaints regarding issues within the authority of DFPS or HHS.

The Ombudsman for Behavioral Health Access to Care (BHO) established by Texas Government Code §531.02251, Ombudsman for Behavioral Health Access to Care, serves as a neutral party to help consumers, including consumers who are uninsured or have public or private health benefit coverage, and behavioral health care providers navigate and resolve issues related to consumer access to behavioral health care, including care for mental health conditions and substance use disorders.

##### SECTION-BY-SECTION SUMMARY

New proposed §87.101, Definitions, clarifies words and terms used throughout the new chapter related to OO.

New proposed §87.103, Creation of the Office and Populations Served, outlines OO's statutory authority and responsibility. It notes how OO fits into HHSC's customer service process and identifies principles of government ombudsman offices.

New proposed §87.105, Contact Information, sets out OO contact information. It notes that HHS programs are required to provide consumers a complaint resolution process and to provide OO's contact information to consumers who are not satisfied with that process.

New proposed §87.107, Confidentiality, outlines how OO staff protect the confidential information of consumers.

New proposed §87.109, Data and Reports, provides OO will maintain records in a tracking system. It notes OO's statutory authority to access inquiry and complaint records of HHS programs. It outlines a report of HHS consumer contacts to the HHSC Executive Commissioner. It lists policies and procedures HHS programs must have in place to track, analyze, and report consumer contacts.

New proposed §87.111, Referrals to Other HHS Offices or Other Entities, outlines the various referrals OO staff may make to other HHS offices and other entities, depending on the subject of the contact.

New proposed §87.113, Intake of Contacts, outlines actions taken by OO staff when a contact is first received.

New proposed §87.115, Research and Communication with HHS Programs, provides that OO staff research a consumer contact before referring to HHS program staff. It indicates OO staff review complaints to determine if policy was followed by HHS staff and vendors contracted to provide services. It notes elements of administrative fairness reviewed by OO staff. It sets out timelines and processes for OO review of HHS program responses.

New proposed §87.117, Follow-up with Consumers, sets out timeframes for OO staff responses to consumers.

New proposed §87.119, Substantiating and Closing Complaints, notes OO staff determine if a complaint is substantiated before closing it. It outlines timeline goals for resolution of complaints. It indicates a consumer is notified of the outcome of a complaint.

New proposed §87.201, Definitions, clarifies words and terms used throughout the new subchapter B related to the OMCAT.

New proposed §87.203, Creation of the Program and Populations Served, outlines OMCAT's statutory authority and responsibility, including the requirement that OMCAT is sufficiently independent from Medicaid staff.

New proposed §87.205, Contact Information, sets out OMCAT contact information. It notes Medicaid managed care organizations are required to provide OMCAT contact information to consumers.

New proposed §87.207, Confidentiality, outlines how OMCAT staff protect the confidential information of consumers.

New proposed §87.209, Reports, outlines a quarterly report of OMCAT complaints distributed to Medicaid staff.

New proposed §87.211, Referrals to Other HHS Offices or Other Entities, outlines the various referrals OMCAT staff may make to

other HHS offices and other entities, depending on the subject of the contact.

New proposed §87.213, Intake of Contacts, outlines actions taken by OMCAT staff when a contact is first received.

New proposed §87.215, Research and Communication with HHS Programs, Health Care Providers, and Medicaid Managed Care Organizations, provides that OMCAT staff research a consumer contact before referring to HHS program staff of a managed care organization. It indicates OMCAT staff review complaints to determine if policy was followed by HHS staff and the managed care organization. It sets out timelines and processes for OMCAT review of a response by a managed care organization.

New proposed §87.217, Follow-up with Consumers, sets out the timeframe for OMCAT staff responses to consumers.

New proposed §87.219, concerning Substantiating and Closing Complaints, notes OMCAT staff determine if a complaint is substantiated before closing it. It outlines timeline goals for resolution of complaints.

New proposed §87.301, Definitions, clarifies words and terms used throughout the new Subchapter C related to the FCO.

New proposed §87.303, Creation of the Program and Population Served, outlines FCO's statutory authority and responsibility. It clarifies that individuals age 18 and older are not served by FCO since they are no longer "in the conservatorship" of the Department of Family and Protective Services (DFPS).

New proposed §87.305, Contact Information, sets out FCO contact information.

New proposed §87.307, Confidentiality, outlines how FCO staff protect the confidential information of consumers.

New proposed §87.309, Data and Reports, provides that the FCO maintain records in a tracking system that is specifically separate from other OO data. It notes FCO's access to key information systems maintained by HHSC and DFPS. It outlines a statutorily required FCO annual report.

New proposed §87.311, Referrals to Other HHS Offices or Other Entities, outlines the various referrals FCO staff may make to other state agencies, depending on the subject of the contact.

New proposed §87.313, Intake of Contacts, outlines actions taken by FCO staff when a contact is first received. It outlines steps FCO staff take when a contact includes information that gives them reason to suspect abuse or neglect.

New proposed §87.315, Research Using DFPS and HHS Systems and Policies, provides that FCO staff research a consumer contact before referring to HHS or DFPS program staff. It indicates FCO staff review complaints to determine if policy was followed by DFPS, HHS staff, and a vendor contracted to provide services for DFPS or an HHS program. It clarifies violations found by FCO staff during review of a complaint will be tracked. It indicates FCO staff may contact the Independent Ombudsman for the Texas Juvenile Justice System if a complaint is received from a foster youth also in that system.

New proposed §87.317, Follow-up Communication with Youth, sets out the timeframe for FCO staff responses to youth.

New proposed §87.319, Substantiating and Closing Complaints, notes FCO staff determine if a complaint is substantiated and document any program corrective actions before closing the

complaint. It outlines timeline goals for resolution of complaints. It indicates a written summary will always be provided to DFPS and outlines what a written response to a foster youth will include.

New proposed §87.321, Retaliation, notes FCO staff open a new complaint if a foster youth believes they have been retaliated against for submitting a complaint to FCO. It notes FCO staff work with DFPS to identify consequences for retaliatory actions.

New proposed §87.401, Definitions, clarifies words and terms used throughout the new subchapter D related to the BHO.

New proposed §87.403, Creation of the Program and Populations Served, outlines BHO's statutory authority and responsibility.

New proposed §87.405, Contact Information, sets out BHO contact information. It notes state hospitals and local mental health authorities (LMHAs) are required to provide BHO contact information to consumers.

New proposed §87.407, Confidentiality, outlines how BHO staff protect the confidential information of consumers.

New proposed §87.409, Data and Reports, notes BHO's access to a key information system maintained by HHSC. It notes a statutorily-required reports to the Mental Health Condition and Substance Use Disorder Work Group.

New proposed §87.411, Referrals to Other HHS Offices or Other Entities, outlines the various referrals BHO staff may make to other HHS offices or other entities, depending on the subject of the contact.

New proposed §87.413, Intake of Contacts, outlines actions taken by BHO staff when a contact is first received.

New proposed §87.415, Research and Communication with HHS Programs and Agencies that Regulate Health Plans, provides in subsection (a) that BHO staff research a consumer contact before referring to a rights protection officer at a state hospital or LMHA. It indicates BHO staff review complaints to determine if policy was followed by HHS staff and vendors contracted to provide services, including LMHAs. It sets out timelines and processes for BHO review of a response by a rights protection officer. Subsection (b) outlines how BHO staff refer and track potential violations of the State's behavioral health parity law.

New proposed §87.417, Follow-up with Consumers, sets out the timeframe for BHO staff responses to consumers.

New proposed §87.419, Substantiating and Closing Complaints, notes BHO staff determine if a complaint is substantiated before closing it. It outlines timeline goals for resolution of complaints. It outlines what a written response to a consumer includes. It indicates a response is sent to the applicable state hospital or LMHA.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the sections will be in effect, there will be no implications to costs and revenues of state or local governments as a result of enforcing and administering the sections as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to the agency;
- (5) the proposed rules will not create a new regulation;
- (6) the proposed rules will not affect an existing regulation;
- (7) the proposed rules will not change the number of individuals subject to the rules; and
- (8) the proposed rules will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal, Deputy Executive Commissioner for Financial Services, has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule is necessary to protect the health, safety, and welfare of the residents of Texas.

#### PUBLIC BENEFIT

Joel Schwartz, Director of the Office of the Ombudsman, has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections will be a more complete understanding of the HHS consumer complaint process and the role of the HHSC Office of Ombudsman.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to [HHSCRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHSCRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. When e-mailing comments, please indicate "Comments on Proposed Rule 18R024" in the subject line.

## SUBCHAPTER A. OFFICE OF THE OMBUDSMAN

## 26 TAC §§87.101, 87.103, 87.105, 87.107, 87.109, 87.111, 87.113, 87.115, 87.117, 87.119

### STATUTORY AUTHORITY

The new rules are authorized by Government Code §§531.0171, 531.0213, and 531.02251; Government Code Chapter 531, Subchapter Y, as enacted by Senate Bill 830 (84th Legislature, Regular Session, 2015); and Government Code §531.0055, General Responsibility for Health and Human Services System, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies.

The proposed new rules implement Texas Government Code, Chapter 531.

#### §87.101. Definitions.

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

(1) Compact with Texans--A document that describes the Texas Health and Human Services Commission's services, principles, and the process for filing complaints and requesting information.

(2) Complaint--Any expression of dissatisfaction by a consumer of a Texas Health and Human Services (HHS) program or service about HHS benefits or services. Complaints do not include the following, which are handled through other processes:

(A) allegations of abuse, neglect, or exploitation;  
 (B) allegations of discrimination or other civil rights violations;

(C) allegations of fraud, waste, or abuse;  
 (D) requests for Fair Hearings or administrative appeals; or

(E) concerns about regulated individuals and entities.

(3) Consumer--An applicant or a client of HHS programs, as well as a member of the public seeking information about HHS programs.

(4) Contact--A consumer's written or oral inquiry or complaint about HHS programs or services.

(5) Dispute resolution services--An independent and impartial review of a program's actions regarding an HHS consumer complaint that has not been resolved to the consumer's satisfaction.

(6) HEART--HHS enterprise administrative report and tracking system. A web-based system that the HHSC Office of the Ombudsman and some HHS programs use to track inquiries and complaints.

(7) HHS--Texas Health and Human Services. The system for providing or otherwise administering health and human services in this state established in Texas Government Code Chapter 531, comprised of HHSC and the Department of State Health Services.

(8) HHSC--Texas Health and Human Services Commission. The agency established by Texas Government Code Chapter 531.

(9) Inquiry--A request by a consumer for information about HHS programs or services.

(10) Legally authorized representative--A person authorized by law to act on behalf of an individual with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(11) LMHA--Local mental health authority. An entity designated as the local mental health authority by the Department of State Health Services in accordance with the Texas Health and Safety Code §533.035(a).

(12) OO--Office of the Ombudsman. The HHSC office established by Texas Government Code §531.0171, with oversight of the HHS system.

(13) Substantiated complaint--A complaint for which research clearly indicates HHS policy was violated or HHS expectations were not met.

(14) Unable to substantiate a complaint--A complaint for which research does not clearly indicate if HHS policy was violated or HHS expectations were met.

(15) Unsubstantiated complaint--A complaint for which research clearly indicates HHS policy was not violated or HHS expectations were met.

§87.103. Creation of the Office and Populations Served.

(a) OO is established by Texas Government Code §531.0171.

(1) OO has authority and responsibility over the HHS system in:

(A) providing dispute resolution services;

(B) performing consumer protection and advocacy functions; and

(C) collecting consumer contact data.

(2) OO is responsible for a standard process for tracking and reporting consumer contacts within the HHS system, including centralized tracking of consumer contacts submitted to field, regional, or other local offices.

(b) HHSC's Compact With Texans outlines customer service principles and standards, including a complaint process for consumers. As part of that process, a consumer is directed to first contact the HHS program for which they have an inquiry or a complaint. If the concern is not resolved to the consumer's satisfaction, the consumer is directed to contact OO. In accordance with HHSC's Compact With Texans, OO is committed to providing high quality services in a professional and ethical manner by:

(1) treating consumers with courtesy and respect;

(2) ensuring access to and provision of services is fair and equitable;

(3) implementing new and creative approaches to improve quality of services;

(4) operating based on consumers' overall needs and feedback;

(5) providing understandable information in a variety of formats;

(6) ensuring sound management of programs and funds;

(7) working in cooperation with consumers; and

(8) protecting private information and sharing public information in accordance with applicable laws.

(c) In accordance with Texas Government Code §531.0171(c), OO does not have authority to process case actions or overturn HHS program decisions. OO staff also cannot give legal advice.

(d) OO strives to adhere to the United States Ombudsman Association's government ombudsman standards by:

(1) maintaining independence from HHS programs through an organizational structure that has OO report to the HHSC Executive Commissioner through a separate chain of command than program staff;

(2) remaining impartial by receiving and reviewing each contact in an objective and fair manner, free from bias, and treating all parties without favor or prejudice;

(3) maintaining discretion to keep confidential or release information related to a contact or a complaint investigation, if authorized by a consumer to do so; and

(4) providing a credible review process by performing responsibilities in a manner that engenders respect, confidence, and accessibility to all consumers.

(e) Several ombudsman programs are part of OO.

(1) The Ombudsman Managed Care Assistance Team (OMCAT) that provides support and information services to persons enrolled in or applying for Medicaid who experience barriers to receiving health care services, in accordance with Texas Government Code §531.0213. Administrative rules for this program can be found in Subchapter B of this chapter (relating to Ombudsman Managed Care Assistance).

(2) The Ombudsman for Children and Youth in Foster Care (FCO) established by Texas Government Code Chapter 531, Subchapter Y, as enacted by Senate Bill 830 (84th Legislature, Regular Session, 2015). FCO serves as a neutral party in assisting children and youth in the conservatorship of the Department of Family and Protective Services (DFPS) with complaints regarding issues within the authority of DFPS or an HHS agency. Administrative rules for this program can be found in Subchapter C of this chapter (relating to Ombudsman for Children and Youth in Foster Care).

(3) The Ombudsman for Behavioral Health access to care (BHO) established by Texas Government Code §531.02251. BHO serves as a neutral party to help consumers, including consumers who are uninsured or have public or private health benefit coverage, and behavioral health care providers navigate and resolve issues related to consumer access to behavioral health care, including care for mental health conditions and substance use disorders. Administrative rules for this program can be found in Subchapter D of this chapter (relating to Behavioral Health Ombudsman).

(4) The State Long-term Care Ombudsman authorized by Texas Human Resources Code Subchapter F of Chapter 101a; 42 USC 3058f and 3058g; and 45 CFR Part 1324. The purpose of the State Long-term Ombudsman program is to protect the health, safety, welfare, and rights of people living in nursing facilities and assisted living facilities. Administrative rules for this program can be found in 26 TAC Chapter 88 (relating to State Long-term Care Ombudsman Program).

§87.105. Contact Information.

(a) OO staff maintain a public website with its contact information and develop brochures and other materials that can be distributed to consumers.

(b) Each HHS office that provides direct service delivery of programs or services offers a process to a consumer to submit complaints and advises the consumer how to contact OO staff if that office does not resolve the complaint to the consumer's satisfaction. These HHS programs ensure OO contact information is provided on appropriate web pages, in written materials (such as consumer handbooks and denial notices), and is available upon request in local offices. This includes communications made to a consumer by a vendor contracted to provide services on behalf of an HHS program.

(c) An HHS consumer or the consumer's legally authorized representative may contact OO staff through the following methods:

(1) Toll-free phone.

(A) A consumer can call 1-877-787-8999 (8:00 a.m. to 5:00 p.m., Central Standard Time, Monday through Friday).

(B) A consumer needing help with accessing services under a managed care plan can call 1-866-566-8989.

(C) A foster youth can call 1-844-286-0769.

(D) A consumer seeking behavioral health services can call 1-800-252-8154.

(E) A resident of a nursing facility or an assisted living facility can call 1-800-252-2412.

(F) A person who has a hearing or speech disability can call 7-1-1 or 1-800-735-2989.

(2) Toll-free fax: 1-888-780-8099.

(3) Mail: HHS Office of the Ombudsman, P. O. Box 13247, Austin TX 78711-3247.

(4) Online: [hhs.texas.gov/ombudsman](http://hhs.texas.gov/ombudsman).

#### §87.107. Confidentiality.

(a) Before sharing a consumer's information, OO staff confirm the identity of the individual receiving the information by following the requirements outlined in *Texas Works Handbook*, Part B, Section 1200 (Confidentiality), which can be found on HHSC's web page at [hhs.texas.gov/laws-regulations/handbooks](http://hhs.texas.gov/laws-regulations/handbooks).

(b) If a person other than a consumer or the consumer's legally authorized representative contacts OO staff, the person is told that OO staff must have permission from either the consumer or the consumer's legally authorized representative before information about the case can be shared.

(c) OO staff obtain a consumer's consent before sharing the consumer's information with anyone other than HHS staff involved in the review of the contact. Consent can be obtained from the consumer's legally authorized representative.

(d) OO staff follow HHSC's policies relating to transmission of consumer data, including use of secure email to encrypt messages that contains a consumer's confidential information or protected health information.

#### §87.109. Data and Reports.

(a) OO staff maintain records of inquiries and complaints in the HEART system.

(b) Texas Government Code §531.0171(d), allows OO staff to access any system or process for recording inquiries and complaints used or maintained by an HHS agency.

(c) OO staff compile a monthly report of consumer contacts received by HHS programs, including those received by vendors contracted to provide services on behalf of an HHS program. OO submits this report to the HHSC Executive Commissioner and designated program management staff across the HHS agencies on a quarterly basis. OO staff may also provide reporting of program-specific contact data to management teams of particular HHS programs.

(d) HHS programs have policies and procedures in place that address:

(1) Tracking. Use of a formal tracking system that captures essential information necessary for analysis, including:

(A) contact name and other identifying information;

(B) date contact received;

(C) method of receipt;

(D) reason for contact;

(E) details to isolate potential trends, such as location or particular service;

(F) resolution actions;

(G) date of resolution;

(H) whether the complaint was substantiated; and

(I) record of final communication with consumer, including date and method.

(2) Analysis. Monthly trend analysis to address shifts in volume of contacts received greater than five percent within a program. Research to determine the root causes for variations. For example, changes in agency policy or procedures, newly implemented programs, or staffing challenges that impact service delivery. The analysis must include:

(A) a listing of the top five reasons for inquiries, the top five reasons for complaints, and the top five reasons for legislative contacts, as compared to the total number received;

(B) explanation of factors impacting changes in reasons for contact from one month to the next; and

(C) data to indicate patterns, trends, or systemic issues of which program staff should be aware.

(3) Reporting. Monthly submission of contact data in the format determined by OO. Reporting must include:

(A) the number of inquiries, complaints, and legislative contacts received;

(B) the number of complaints resolved (from that month and previous months);

(C) the number of complaints resolved that were substantiated;

(D) the average time for resolution of complaints;

(E) the percent resolved within ten business days; and

(F) summaries of cases that illustrate relevant patterns or trends.

#### §87.111. Referrals to Other HHS Offices or Other Entities.

OO staff inform the consumer or the consumer's legally authorized representative of any referral made to other HHS offices or other entities regarding the consumer's contact with OO and document the referral in the HEART system. Referrals include:

(1) Department of Family and Protective Services, for a contact that includes information that makes OO staff suspect abuse, neglect, or exploitation;

(2) HHSC Civil Rights Office, for a contact alleging a violation of civil rights or discrimination regarding the delivery of HHS programs or services, including those concerning lack of access to benefits and services due to language or disability;

(3) Office of Inspector General, for a contact that includes allegations of fraud, waste, or abuse regarding HHS programs or services;

(4) HHSC legal staff, for a request for a fair hearing;

(5) Medicaid managed care organization, for a request to appeal a decision by a Medicaid managed care organization;

(6) HHSC Regulatory Services Division, for a contact related to an entity regulated by HHSC; and

(7) LMHA closest to the consumer or local law enforcement, for a contact that includes threats of violence to a consumer or others.

§87.113. Intake of Contacts.

(a) A contact received through an online submission is automatically loaded in the HEART system and assigned to available OO staff for action.

(b) A contact received by postal mail, fax, or email is uploaded to the HEART system and assigned to available OO staff for action within one business day of receipt.

(c) A call received by OO staff is immediately entered in the HEART system.

(d) When OO staff begin to review a contact, they take the following actions:

(1) notify the consumer or the consumer's legally authorized representative of OO's roles and responsibilities;

(2) explain any referrals to other HHS staff or external organizations that are recommended;

(3) explain the OO complaint resolution process;

(4) clarify the preferred method and timeline of follow-up communications; and

(5) provide an estimated timeline in which a response can be expected.

(e) OO staff use HHSC's contracted vendors to provide language interpretation services, when necessary.

§87.115. Research and Communication with HHS Programs.

(a) OO staff review all available information about a consumer through inquiry into HHS program systems before referring a contact to HHS staff for review.

(b) Each complaint is investigated to determine if HHS policy was followed by HHS staff and vendors contracted to provide services on behalf of an HHS program. Applicable policies include federal and state law, administrative rules, program handbooks, and contracts.

(c) OO staff consider the following when investigating a complaint:

(1) Legal authority. What is the basis of the HHS program's decision, and was the decision made within the scope of that authority?

(2) Procedural fairness and rights. Was the consumer given a full understanding of the situation, offered all applicable opportunities to appeal, and given sufficient time to respond when information was requested?

(3) Agreed expectations. Did the HHS program follow through after agreeing to take particular actions, and did the program provide an adequate explanation of decisions?

(d) When OO staff research through available systems is not sufficient to address a consumer's concern or determine whether a complaint can be substantiated, OO staff request a response to the complaint from appropriate HHS staff.

(e) HHS staff are given five business days to respond to OO requests. If no response is received, a second communication is made, and documented in the HEART system.

(f) Upon receipt of information from HHS staff, OO staff review to determine if the consumer's concern has been addressed and if they can determine whether a complaint can be substantiated. If the response is inadequate or if additional information is required, OO staff refer the contact back to HHS staff for additional review.

§87.117. Follow-up with Consumers.

(a) OO staff follow-up with a consumer or the consumer's legally authorized representative within five business days of the date of receipt of a contact, and then at least every ten business days thereafter, until the contact is closed.

(b) State law and HHS policy require disclosure of an employee's full name, work phone number, and work email address, if requested by a consumer. However, a consumer or the consumer's legally authorized representative is asked to use the OO toll-free line and shared email address when corresponding with OO staff.

(c) A consumer or the consumer's legally authorized representative requesting the direct phone number or individual email address of any HHS staff not already listed on the HHS website, including OO staff, is directed to HHSC's Open Records process.

§87.119. Substantiating and Closing Complaints.

(a) Once OO staff have determined all pertinent information has been gathered and their investigation of a complaint is complete, they determine if it is substantiated, unsubstantiated, or unable to be substantiated.

(b) OO staff attempt to resolve 90 percent of complaints within ten business days, unless the complaint involves a program with different federal requirements or a state contract with a different timeline. For a contact involving the HHSC Regulatory Services Division, OO attempts to resolve the contact within 45 calendar days. OO staff attempt to resolve a complaint relating to a life-threatening immediacy or emergency within 24 hours.

(c) A consumer or the consumer's legally authorized representative is notified of the outcome of a complaint. A written summary is provided upon request of a consumer or the consumer's legally authorized representative, or if OO staff cannot reach the consumer by telephone to relay the findings.

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

Filed with the Office of the Secretary of State on June 5, 2018.

TRD-201802435

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 706-7120



SUBCHAPTER B. OMBUDSMAN MANAGED CARE ASSISTANCE

26 TAC §§87.201, 87.203, 87.205, 87.207, 87.209, 87.211, 87.213, 87.215, 87.217, 87.219

STATUTORY AUTHORITY



The new rules are authorized by Government Code §§531.0171, 531.0213, and 531.02251; Government Code Chapter 531, Subchapter Y, as enacted by Senate Bill 830 (84th Legislature, Regular Session, 2015); and Government Code §531.0055, General Responsibility for Health and Human Services System, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies.

The proposed new rules implement Texas Government Code, Chapter 531.

§87.201. Definitions.

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

(1) MCO--Managed care organization. An entity contracted with HHSC to provide health care services in a Medicaid managed care program.

(2) Medicaid managed care programs--Includes:

(A) STAR;

(B) STAR+PLUS, including the Texas Dual Eligibles Integrated Care Demonstration Project;

(C) STAR Kids; and

(D) STAR Health.

(3) OMCAT--Ombudsman Managed Care Assistance Team. The team within OO responsible for implementing Texas Government Code §531.0213.

§87.203. Creation of the Program and Populations Served.

(a) OMCAT coordinates a network of entities to provide support and information services to persons enrolled in or applying for Medicaid who experience barriers to receiving health care services, in accordance with Texas Government Code §531.0213.

(b) As a part of the support and information services, OMCAT is responsible for operating a statewide toll-free assistance telephone number and for intervening promptly with HHSC Medicaid program staff, MCOs, health care providers, and any other appropriate entity on behalf of a person who has an urgent need for medical services.

(c) OMCAT is responsible for assisting persons who are experiencing barriers in the Medicaid application and enrollment process and educating them so that they understand the concept of managed care; understand their rights under Medicaid, including grievance and appeal procedures; and are able to advocate for themselves.

(d) In accordance with Texas Government Code §531.0213(e), OMCAT is sufficiently independent from other aspects of Medicaid managed care to represent the best interests of consumers in complaint resolution.

§87.205. Contact Information.

(a) OO staff maintain a public website for OMCAT with its contact information and develop brochures and other materials that can be distributed to consumers and Medicaid providers.

(b) In accordance with requirements of the Uniform Managed Care Manual maintained by HHSC Medicaid program staff and available on the HHSC web site, each MCO includes OMCAT contact information on its member web sites and in member handbooks.

(c) An HHS consumer or the consumer's legally authorized representative may contact OMCAT through the following methods:

(1) toll-free phone:

(A) 1-866-566-8989 (8:00 a.m. to 5:00 p.m., Central Standard Time, Monday through Friday); or

(B) 7-1-1 or 1-800-735-2989 for a person who has a hearing or speech disability;

(2) toll-free fax: 1-888-780-8099;

(3) mail to HHS Office of the Ombudsman, Managed Care Assistance Team, P.O. Box 13247, Austin TX 78711-3247; or

(4) online: [hhs.texas.gov/ombudsman](http://hhs.texas.gov/ombudsman).

§87.207. Confidentiality.

(a) Before sharing a consumer's information, OMCAT staff confirm the identity of the individual receiving the information by following the requirements outlined in *Texas Works Handbook*, Part B, Section 1200 (Confidentiality), which can be found on HHSC's web page at [hhs.texas.gov/laws-regulations/handbooks](http://hhs.texas.gov/laws-regulations/handbooks).

(b) OMCAT staff obtain a consumer's consent before sharing the consumer's information with anyone other than HHS or MCO staff involved in the review of the contact. This includes sharing information with a consumer's health care provider. Consent can be obtained from the consumer's legally authorized representative.

§87.209. Reports.

(a) OMCAT collects and maintains statistical information on contacts relating to each MCO, by region and Medicaid managed care program.

(b) Reports of OMCAT contacts are distributed to HHSC executive staff and Medicaid program staff quarterly, including the number of contacts by region, trends identified in delivery of services and access to care complaints, identified recurring barriers, and other problems identified with Medicaid managed care.

§87.211. Referrals to Other HHS Offices or Other Entities.

(a) If a consumer or the consumer's legally authorized representative contacts OMCAT seeking information or wishing to complain about an HHS program other than Medicaid, the consumer or the consumer's legally authorized representative is transferred to OO staff that handle complaints regarding those programs. OMCAT staff inform the consumer or the consumer's legally authorized representative of this referral and document it in the HEART system.

(b) A request for a fair hearing is referred to HHSC legal staff. A request for an appeal of a decision by an MCO is referred to that entity. OMCAT staff inform the consumer or the consumer's legally authorized representative of these referrals and document them in the HEART system.

(c) A request from a Medicaid provider that does not relate to a consumer's Medicaid case is referred to the HHSC office designated to receive these complaints, in accordance with the Texas Medicaid Provider Procedures Manual maintained by HHSC Medicaid program staff and available on the HHS web site. OMCAT staff inform the provider of this referral and document it in the HEART system.

§87.213. Intake of Contacts.

(a) A contact received through an online submission is automatically loaded in the HEART system and assigned to available OMCAT staff for action.

(b) A contact received by postal mail, fax, or email is uploaded to the HEART system and assigned to available OMCAT staff for action within one business day of receipt.

(c) A call received by OMCAT staff is immediately entered in the HEART system.

(d) When OMCAT staff begin to review a contact, they take the following actions:

- (1) notify the consumer or the consumer's legally authorized representative of OMCAT's roles and responsibilities;
- (2) explain any referrals to other HHS staff or external organizations that are recommended;
- (3) explain the OMCAT complaint resolution process;
- (4) clarify the preferred method and timeline of follow-up communications; and
- (5) provide an estimated timeline in which a response can be expected.

§87.215. Research and Communication with HHS Programs, Health Care Providers, and Medicaid Managed Care Organizations.

(a) OMCAT staff review all available information about a consumer through inquiry into HHS program systems before referring a contact to HHS staff or MCO staff for review.

(b) OMCAT staff may contact a consumer's health care provider, such as a pharmacist or primary care physician, as part of their work on a contact.

(c) Each complaint is investigated to determine if HHS policy was followed by HHS staff and vendors contracted to provide services, including MCO staff. Applicable policies include federal and state law, administrative rules, and the MCO's contract with HHSC.

(d) When OMCAT research through available systems is not sufficient to address a consumer's concern or determine whether a complaint can be substantiated, OMCAT staff request a response to the complaint from appropriate MCO staff. OMCAT staff may also contact the consumer's health care provider directly in order to resolve a complaint.

(e) MCO staff are given ten business days to respond to an OMCAT request. If no response is received, a second communication is made, and documented in the HEART system.

(f) Upon receipt of information from MCO staff, OMCAT staff review to determine if the consumer's concern has been addressed and if they can determine whether the complaint can be substantiated. If the response is inadequate or if additional information is required, OMCAT staff refer the contact back to MCO staff for additional review.

(g) OMCAT staff may seek assistance from HHSC Medicaid program staff on some contacts, at the discretion of OMCAT's managing ombudsman.

§87.217. Follow-up with Consumers.

OMCAT staff follow-up with a consumer or the consumer's legally authorized representative within five business days of the date of receipt of the contact, and then at least every ten business days thereafter, until the contact is closed.

§87.219. Substantiating and Closing Complaints.

(a) Once OMCAT staff have determined all pertinent information has been gathered and their investigation of a complaint is complete, they determine if the complaint is substantiated, unsubstantiated, or unable to be substantiated.

(b) OMCAT attempts to resolve 90 percent of complaints within ten business days. OMCAT attempts to close a complaint relating to a life-threatening immediacy or emergency within 24 hours.

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

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## SUBCHAPTER C. OMBUDSMAN FOR CHILDREN AND YOUTH IN FOSTER CARE

**26 TAC §§87.301, 87.303, 87.305, 87.307, 87.309, 87.311, 87.313, 87.315, 87.317, 87.319, 87.321**

### STATUTORY AUTHORITY

The new rules are authorized by Government Code §§531.0171, 531.0213, and 531.02251; Government Code Chapter 531, Subchapter Y, as enacted by Senate Bill 830 (84th Legislature, Regular Session, 2015); and Government Code §531.0055, General Responsibility for Health and Human Services System, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies.

The proposed new rules implement Texas Government Code, Chapter 531.

§87.301. Definitions.

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

(1) DFPS--Department of Family and Protective Services. The state agency established by Chapter 40 of the Human Resources Code and responsible for administration of Child Protective Services.

(2) DFPS OCR--DFPS Office of Consumer Relations. A neutral party that reviews complaints regarding case-specific activities of DFPS program areas to determine if policies and procedures were followed in compliance with DFPS administrative rules at Title 40, Part 19, Chapter 702, Subchapter I.

(3) FCO--Foster Care Ombudsman. The Ombudsman for Children and Youth in Foster Care established by Texas Government Code Chapter 531, Subchapter Y, as enacted by Senate Bill 830 (84th Legislature, Regular Session, 2015).

(4) Retaliation--A harmful action taken because of, or substantially motivated by, reprisal or revenge in response to a legally protected activity, such as making a good faith complaint.

(5) Vendor contracted to provide services on behalf of DFPS--A vendor contracted as part of the community-based care model established by Texas Family Code Chapter 264, Subchapter B-1, Community-Based Care, including single source continuum contractors that provide placement and case management services.

(6) Youth--Children and youth in the conservatorship of DFPS, which ends at age 18.

§87.303. Creation of Program and Population Served.

(a) FCO is established by Subchapter Y of Chapter 531 of the Government Code as enacted by Senate Bill 830 (84th Legislature, Regular Session, 2015) and is administratively attached to OO.

(b) FCO serves as a neutral party in assisting children and youth in the conservatorship of DFPS with complaints regarding issues within the authority of DFPS or an HHS agency.

(c) While individuals age 18 and older may continue to receive DFPS services, they are not considered part of the population served by FCO because they are no longer "in the conservatorship" of DFPS. However, if FCO receives a complaint from a youth who turns 18 during the course of FCO's investigation, the complaint will be completed.

(d) FCO is responsible for receiving and investigating inquiries and complaints from youth in the conservatorship of DFPS, including youth placed by vendors contracted to provide services on behalf of DFPS.

(e) FCO may refer youth to any DFPS or HHS program or service that can assist with the youth's inquiry. With permission from the youth, FCO may work with staff in any DFPS or HHS program to resolve a complaint.

§87.305. Contact Information.

(a) OO staff maintain a public website for FCO with its contact information and develop brochures and other materials that can be distributed to foster youth and vendors contracted to provide services on behalf of DFPS.

(b) In accordance with requirements in Texas Family Code §40.0041(h), all residential child-care facilities in which foster youth are placed must display FCO contact information in a location that is easily accessible and offers maximum privacy to the youth.

(c) A youth may contact FCO through the following methods:

(1) toll-free phone, 1-844-286-0769 (8:00 a.m. to 5:00 p.m., Monday through Friday);

(2) toll-free fax, 1-888-780-8099;

(3) mail to Texas Health and Human Services Commission, Foster Care Ombudsman, P.O. Box 13247, Austin TX 78711-3247;

(4) online at [hhs.texas.gov/foster-care-help](http://hhs.texas.gov/foster-care-help); or

(5) in person when FCO staff present to a meeting of youth organized by DFPS or visit a residential treatment center or hospital where a youth is placed.

§87.307. Confidentiality.

(a) FCO maintains the confidentiality of its communications and records, including records FCO receives from others.

(b) The disclosure of confidential information to FCO does not constitute a waiver of confidentiality. Any information disclosed to FCO remains confidential and privileged following disclosure.

§87.309. Data and Reports.

(a) FCO maintains records of all inquiries and complaints in the HEART system. FCO contact records are maintained separate from other OO contact records.

(b) FCO staff have access to any DFPS and HHS data and systems necessary to complete their investigations of contacts, including:

(1) Information Management Protecting Adults and Children in Texas (IMPACT); and

(2) Child Care Licensing Automated Support System (CLASS).

(c) FCO submits an annual report to the HHSC Executive Commissioner and the DFPS Commissioner by December 1st, which is posted on the HHSC and DFPS websites. The report includes:

(1) a description of FCO activities;

(2) a list of DFPS or HHS agency changes made in response to substantiated complaints received;

(3) a description of trends in the nature of complaints received, recommendations to address them, and an evaluation of the feasibility of those recommendations;

(4) a glossary of terms;

(5) a description of methods used to promote awareness of FCO and the plan for the coming year; and

(6) any feedback from the public on the previous annual report.

§87.311. Referrals to Other HHS Offices or Other Entities.

(a) If a person other than a youth contacts FCO indicating the person wishes to provide information about a DFPS case, the person is given DFPS OCR's contact information and transferred to that office.

(b) If a youth contacts FCO with a complaint that does not allege a violation of a DFPS or HHS policy or procedure, FCO staff explains to the youth that it is outside the scope of FCO's ability to assist and offers the youth resources for working on the issue.

(c) If an adjudicated youth that is not in foster care contacts FCO, the youth is referred to the Independent Ombudsman for the Texas Juvenile Justice System.

(d) If a person other than a youth contacts FCO seeking information about HHS programs, or indicating the person wishes to complain about an HHS program, the person is transferred to OO staff that handle complaints regarding those programs.

§87.313. Intake of Contacts.

(a) A contact received by online submission, postal mail, fax, or email is uploaded to the HEART system and assigned to available FCO staff for action within one business day of receipt.

(b) A call received by FCO staff is immediately entered in the HEART system.

(c) When FCO staff begin to review a contact, they take the following actions:

(1) notify the youth of FCO's roles and responsibilities;

(2) explain any referrals to DFPS or HHS staff or external organizations that are recommended;

(3) explain the FCO complaint resolution process;

(4) clarify the preferred method and timeline of follow-up communications; and

(5) provide an estimated timeline in which a response can be expected.

(d) When FCO meet a youth in-person who has an inquiry or a complaint, they enter the contact in the HEART system on the first business day after they return to the FCO office.

(e) Calls that include information that give FCO staff reason to suspect abuse or neglect are transferred to the Texas Abuse Hotline operated by DFPS Statewide Intake (SWI). FCO staff assist the youth in making a report. Online reports can be made when hold times warrant.

(f) In the case of written submissions that include information that give FCO reason to suspect abuse or neglect, FCO staff attempt to communicate with the youth by phone. If FCO staff are not able to speak with the youth by phone within one business day, FCO staff report the suspected abuse or neglect by calling SWI. Online reports can be made when hold times warrant.

§87.315. Research Using DFPS and HHS Systems and Policies.

(a) FCO staff review any available information about a foster care case through inquiry into DFPS and HHS systems, including

IMPACT and CLASS, and any system used by vendors contracted to provide services on behalf of DFPS.

(b) Each complaint is investigated to determine if DFPS or HHS policy was followed by agency staff and vendors contracted to provide services on behalf of DFPS or an HHS program. Applicable policies include federal and state law, administrative rules, program handbooks, and contracts.

(c) If FCO staff discover a violation of DFPS or HHS policy during the course of their research that was not outlined in the original submission from the youth, an additional complaint is entered in the existing HEART record.

(d) If FCO staff determine a youth is adjudicated, they note this in the contact record and outreach to the Independent Ombudsman for the Texas Juvenile Justice System to determine if coordination would be helpful.

(e) FCO staff request a response to the complaint from appropriate DFPS or HHS staff, or vendors contracted to provide services on behalf of DFPS or HHS, if the youth has authorized sharing of the youth's information.

§87.317. Follow-up Communication with Youth.

(a) FCO staff follow-up with the youth within one business day of the date of receipt of the contact, and then at least every five business days thereafter, until the contact is closed.

(b) All follow-up communication is in a secure format, unless FCO has received the youth's written consent to provide information in an unsecure format.

§87.319. Substantiating and Closing Complaints.

(a) Once FCO staff have determined all pertinent information has been gathered and their investigation of a complaint is complete, they enter a resolution in the contact record, choosing substantiate, unable to substantiate, or unsubstantiated.

(b) FCO staff attempt to resolve complaints within 45 calendar days. This length of time is intended to allow for completion of investigations by DFPS or the HHSC Regulatory Services Division, when necessary. FCO staff attempt to resolve a complaint relating to a life-threatening immediacy or emergency within 24 hours.

(c) For substantiated complaints, FCO staff also enter a program corrective action based on the response provided by program staff.

(d) An FCO complaint cannot be closed without a resolution and program corrective action.

(e) The complaint record documents informing program staff and the youth of the resolution.

(f) A written response to program staff includes additional recommended corrective actions, when applicable. Regardless of whether DFPS, a vendor contracted to provide services on behalf of DFPS, or an HHS agency was the subject of the youth's complaint, DFPS is provided a copy of the written response to program staff.

(g) A written response may be provided to the youth, if requested, and includes:

- (1) a description of the steps taken to investigate the complaint;
- (2) a general description of what FCO found as a result of the investigation; and
- (3) if a complaint is:

(A) substantiated, a description of the actions taken by DFPS, a vendor contracted to provide services on behalf of DFPS, or the HHS agency in response to that finding; or

(B) unsubstantiated, a description of additional steps the youth can take to have someone review the youth's concern (e.g., speak to a court-appointed advocate or to the judge assigned to the youth's case).

§87.321. Retaliation.

(a) DFPS is asked to review each case where FCO staff believe a youth has been retaliated against based on the definition of retaliation in this subchapter and applicable DFPS policies and procedures. DFPS is asked to respond with its view of whether retaliation occurred.

(b) If after reviewing the DFPS response FCO staff finally determine a youth has been retaliated against because of a complaint submitted to FCO, FCO staff opens a new complaint within the HEART record.

(c) FCO staff collaborate with DFPS staff to identify consequences for any retaliatory action taken against a youth by any person in response to a complaint filed with FCO.

(d) FCO highlights retaliation cases in its annual report.

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

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**SUBCHAPTER D. BEHAVIORAL HEALTH  
OMBUDSMAN**

**26 TAC §§87.401, 87.403, 87.405, 87.407, 87.409, 87.411,  
87.413, 87.415, 87.417, 87.419**

**STATUTORY AUTHORITY**

The new rules are authorized by Government Code §§531.0171, 531.0213, and 531.02251; Government Code Chapter 531, Subchapter Y, as enacted by Senate Bill 830 (84th Legislature, Regular Session, 2015); and Government Code §531.0055, General Responsibility for Health and Human Services System, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies.

The proposed new rules implement Texas Government Code, Chapter 531.

§87.401. Definitions.

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

(1) BHO--Behavioral Health Ombudsman. The ombudsman for behavioral health access to care established by Texas Government Code §531.02251.

(2) IDD--Intellectual and developmental disabilities.

(3) Parity--The requirement outlined in Texas Insurance Code Subchapter F of Chapter 1355 that a health benefit plan provide benefits and coverage for mental health conditions and substance use disorders under the same terms and conditions applicable to the plan's medical and surgical benefits and coverage.

(4) State hospital--A state mental health facility operated by HHSC.

§87.403. Creation of the Program and Populations Served.

(a) BHO is established by Texas Government Code §531.02251, and is administratively attached to OO.

(b) BHO serves as a neutral party to help consumers, including consumers who are uninsured or have public or private health benefit coverage, and behavioral health care providers navigate and resolve issues related to consumer access to behavioral health care, including care for mental health conditions and substance use disorders. BHO identifies, tracks, and helps report potential violations of Texas Insurance Code Subchapter F of Chapter 1355.

(c) BHO advocates for the rights and service needs of consumers who have questions, concerns, or complaints regarding services provided by a state hospital or an LMHA. Specific rights of these consumers are outlined in 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services).

§87.405. Contact Information.

(a) OO staff maintain a public website with BHO contact information and develop brochures and other materials that can be distributed to consumers seeking behavioral health services.

(b) In accordance with 25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services), BHO's toll-free number is published in consumer rights handbooks made available at all service locations at state hospitals or LMHAs. Consumers at these facilities also have a right to be verbally explained all of their rights -- including the right to complain to BHO -- within 24 hours of admission. Additional situations that require a state hospital or an LMHA to notify a consumer of BHO's contact information include:

(1) any time an LMHA determines a consumer is not in their priority population during the admission screening process, as outlined in 25 TAC 412.161 (Screening and Assessment);

(2) any time an LMHA determines a consumer requesting interstate transfer is not eligible for admission to a state hospital; and

(3) in each state hospital and LMHA's "Notice of Privacy Practice."

(c) A consumer or the consumer's legally authorized representative may contact BHO through the following methods:

(1) toll-free phone:

(A) 1-800-252-8154 (8:00 a.m. to 5:00 p.m., Central Standard Time, Monday through Friday); or

(B) 7-1-1 or 1-800-735-2989 for a person who has a hearing or speech disability;

(2) toll-free fax: 1-888-780-8099;

(3) mail to HHS Office of the Ombudsman, Behavioral Health Ombudsman, P.O. Box 13247, Austin TX 78711-3247; or

(4) online at [hhs.texas.gov/ombudsman](http://hhs.texas.gov/ombudsman).

§87.407. Confidentiality.

(a) BHO staff adhere to statutory requirements and policy of the HHSC State Facilities Division when protecting records of consumers receiving services at state hospitals.

(b) BHO staff adhere to statutory requirements and policy of the HHSC IDD-Behavioral Health Services Department when protecting records of consumers receiving services at LMHAs.

(c) BHO staff obtain a consumer's consent before sharing the consumer's information with anyone other than HHS staff or LMHA staff required to receive and respond to BHO complaints. This includes sharing information with a federal or state agency that regulates a consumer's health plan. Consent can be obtained from the consumer's legally authorized representative.

§87.409. Data and Reports.

(a) BHO staff have access to data and systems maintained by the HHSC State Facilities Division and the HHSC IDD-Behavioral Health Services Department necessary to complete their investigation of a contact. Specifically, BHO staff have access to the Client Assignment and Registration (CARE) system.

(b) In accordance with Texas Government Code §531.02251(g), BHO is part of the Mental Health Condition and Substance Use Disorder Parity Work Group and provides summary reports of concerns, complaints, and potential parity violations.

§87.411. Referrals to Other HHS Offices or Other Entities.

(a) If a consumer or the consumer's legally authorized representative contacts BHO seeking information or wishing to complain about an HHS program other than behavioral health, the consumer or the consumer's legally authorized representative is transferred to OO staff that handle complaints regarding those programs. BHO staff inform the consumer or the consumer's legally authorized representative of this referral and document it in the HEART system.

(b) A resident of a state supported living center (SSLC), or the consumer's legally authorized representative, is referred to the Office of the Independent Ombudsman for SSLCs established by Texas Health and Safety Code Subchapter C of Chapter 555. BHO staff inform the consumer or the consumer's legally authorized representative of this referral and document it in the HEART system.

(c) A consumer or the consumer's legally authorized representative seeking to complain about treatment of a substance use disorder at a facility regulated by the HHSC Regulatory Services Division or seeking to complain about inappropriate commitment at a facility regulated by the HHSC Regulatory Services Division is transferred to staff in that division. BHO staff inform the consumer or the consumer's legally authorized representative of this referral and document it in the HEART system.

(d) A referral is made to the HHSC Regulatory Services Division for a consumer receiving IDD services in the community through Home and Community-based Services or the Texas Home Living Program, a consumer receiving services from a local IDD authority, or the legally authorized representative of one of these consumers. BHO staff inform the consumer or the consumer's legally authorized representative of this referral and document it in the HEART system.

(e) A consumer presenting with concerns of imminent threat to the health or safety of the consumer or others is conferenced with LMHA crisis services or local law enforcement. BHO staff stay connected with the consumer until crisis services are obtained. BHO staff document the referral in the HEART system.

(f) A contact that relates to interstate transfer of a consumer in need of behavioral health services is referred to the HHSC Emergency Services Program's Repatriation Program. BHO staff inform the

consumer or the consumer's legally authorized representative of this referral and document it in the HEART system.

(g) A contact where a consumer or the consumer's legally authorized representative alleges a HIPAA violation by state hospital staff is referred to the HHSC Privacy Office. A contact where a consumer or the consumer's legally authorized representative alleges a HIPAA violation by an LMHA staff is referred to the LMHA's contract manager within HHSC's IDD-Behavioral Health Services Department. BHO staff inform the consumer or the consumer's legally authorized representative of the referral and document it in the HEART system.

§87.413. Intake of Contacts.

(a) A contact received by postal mail, fax, or online submission is uploaded to the HEART system and assigned to available BHO staff for action within 24 hours of receipt.

(b) A call received by BHO staff is immediately entered in the HEART system.

(c) When BHO staff begin to review a contact, they take the following actions:

(1) notify the consumer or the consumer's legally authorized representative of BHO's roles and responsibilities;

(2) explain any referrals to other HHS staff or external organizations that are recommended;

(3) explain the BHO complaint resolution process;

(4) clarify the preferred method and timeline of follow-up communications; and

(5) provide an estimated timeline in which a response can be expected.

§87.415. Research and Communication with HHS Programs and Agencies that Regulate Health Plans.

(a) For a contact involving a consumer receiving services at a state hospital or an LMHA:

(1) BHO staff review all available information about a consumer through inquiry into HHS program systems before referring a contact to the rights protection officer at the relevant state hospital or LMHA, who are responsible for receiving complaints from BHO, per 25 TAC 404.164 (Rights Protection Officer at Department Facilities and Community Centers).

(2) Each complaint is investigated to determine if HHS policy was followed by HHS staff and vendors contracted to provide services, including LMHA staff. Applicable policies include federal and state law, administrative rules, and HHSC contracts.

(3) When BHO research through available systems is not sufficient to address the consumer's concern or determine whether a complaint can be substantiated, BHO staff request a response from the rights protection officer at the relevant state hospital or LMHA, if the consumer has consented to discussion of the contact.

(4) A rights protection officer is given one business day to respond to a BHO request.

(5) Upon receipt of a response from a rights protection officer, BHO staff review to determine if the consumer's concerns have been addressed and if they can determine whether a complaint can be substantiated. If the response is inadequate or if additional information is required, BHO staff refer the contact back to the rights protection officer for additional review.

(b) For a contact involving a consumer seeking behavioral health services through the consumer's health plan:

(1) BHO staff refer a potential violation of Texas Insurance Code Subchapter F of Chapter 1355, to the appropriate regulatory or oversight agency.

(A) A referral for a consumer with private insurance, the child health plan established under Chapter 62 of the Texas Health and Safety Code or insurance bought through the federal Healthcare.gov Marketplace is made to the Texas Department of Insurance.

(B) A referral for a consumer whose employer offers a self-funded plan is made to the U.S. Department of Labor or, if applicable, the public agency that administers the plan.

(C) A referral for a consumer with Medicaid is made to the HHSC Medicaid & CHIP Services Department.

(D) A referral for a consumer with Medicare is made to the U.S. Department of Health and Human Services' Medicare Ombudsman program.

(E) A referral for a consumer with Tricare is made to the U. S. Department of Defense's Defense Health Agency, Hearing and Claim's Collection Division.

(2) BHO staff attempt to get a consumer to provide a copy of the explanation of benefits or denial letter from the consumer's health plan, which is submitted to the appropriate regulatory or oversight agency.

(3) A contact relating to a potential parity violation is left open until a response is received from the appropriate regulatory or oversight agency.

(4) BHO staff also provide a consumer information about how they can file an appeal or a complaint with the consumer's health plan.

§87.417. Follow-up with Consumers.

BHO staff follow-up with a consumer or the consumer's legally authorized representative within five business days of the date of receipt of a contact, and then at least every ten business days thereafter, until the contact is closed.

§87.419. Substantiating and Closing Complaints.

(a) Once BHO staff have determined all pertinent information has been gathered and their investigation of a complaint is complete, they determine if the complaint is substantiated, unsubstantiated, or unable to be substantiated.

(b) BHO attempts to resolve 90 percent of complaints within ten business days.

(1) BHO attempts to close a complaint about an LMHA's response to a crisis within five business days.

(2) BHO attempts to close a complaint relating to life-threatening immediacy or emergency within 24 hours.

(c) A written response requested by a consumer or the consumer's legally authorized representative includes:

(1) a description of the steps taken to investigate the complaint;

(2) a description of what BHO found as a result of their investigation; and

(3) if a complaint is:

(A) substantiated, a description of the actions taken in response; or

(B) unsubstantiated, a description of additional steps the consumer can take to have someone review the consumer's concerns (e.g., a referral to Disability Rights Texas).

(d) BHO staff notify the rights protection officer that reviewed a case of the BHO finding. On a substantiated complaint, the superintendent of the relevant state hospital or the HHSC staff responsible for enforcement of the LMHA contract is also asked to respond with a summary of actions taken. If a response is received, BHO staff upload the response into the HEART system.

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

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## CHAPTER 744. MINIMUM STANDARDS FOR SCHOOL-AGE AND BEFORE OR AFTER-SCHOOL PROGRAMS

The Texas Health and Human Services Commission (HHSC) proposes amendments to §§744.901, 744.1103, 744.1105, 744.1301, 744.1303, 744.1305, 744.1307, 744.1309, 744.1311, 744.1317, 744.1331, and 744.2301; new §744.1315; and the repeal of §744.1315 in Title 26, Chapter 744, Minimum Standards for School-Age and Before or After-School Programs. The amendments, new section, and repeal implement needed changes to comply with requirements in the Child Care and Development Block Grant Act (CCDBG) of 2014 related to orientation, initial, and ongoing training requirements for employees in child care operations.

### BACKGROUND AND PURPOSE

The purpose of the amendments, new section, and repeal is to further implement the CCDBG of 2014.

The CCDBG of 2014 (the "Act") is the first comprehensive revision of the Child Care Development Fund (CCDF) program since 1998. (The CCDF is codified in 42 USC §9857 et seq.) The Texas Workforce Commission (TWC) administers the CCDF, which is the primary federal funding source devoted to providing low-income families with access to child care. The Act made significant reforms to the CCDF program to raise the health, safety, and quality of child care by mandating that states comply with a multitude of additional requirements, including health and safety requirements and training on those topics, in order to continue to receive the CCDF funding. Although TWC is the lead agency for determining eligibility and distributing the subsidy monies, Child Care Licensing (CCL), a department of the Health and Human Services Commission, is the agency responsible for licensing child care operations, establishing health and safety regulations, and monitoring eligible operations for compliance.

New rules implementing the CCDBG background checks and health and safety requirements were implemented on Septem-

ber 1, 2016. These amendments, new section, and repeal further implement the CCDBG health and safety requirements to make sure the HHSC minimum standards are as consistent as possible with the CCDBG requirements. The amendments, new section, and repeal: (1) require caregivers and directors to receive training within 90 days of employment in pediatric first aid with rescue breathing and choking and pediatric cardiopulmonary resuscitation (CPR), and the training must be ongoing; (2) clarify that training regarding child abuse and neglect is related to child maltreatment, in order to be more consistent with federal health and safety training topic and the state statutory language; (3) clarify that directors must receive training relevant to the ages of children for whom the operation provides care; (4) require caregivers and directors to receive annual training in the prevention, recognition, and reporting of child maltreatment; (5) clarify that directors must receive training in transportation safety if the operation transports children who are chronologically or developmentally younger than nine years old; (6) streamline and reduce redundancies in rules regarding training requirements; and (7) update language for better readability and understanding.

A workgroup meeting was held on February 9, 2018, to obtain stakeholder input and feedback regarding the development of the proposed rules. The proposed rules were discussed and several rules were updated based on the comments.

### SECTION-BY-SECTION SUMMARY

The proposed amendment to §744.901: (1) updates the description of Licensing background check rules by removing "DFPS" and substituting a reference to the location of the rules; and (2) replaces the phrase "abuse and neglect" with the term "maltreatment" to be more consistent with the required federal health and safety training topic and the state statutory language.

The proposed amendment to §744.1103: (1) deletes the redundant requirement to complete orientation as part of the minimum qualifications for employees, because the requirement for employee orientation is already included in §744.1301 and §744.1303; and (2) updates a citation.

The proposed amendment to §744.1105 deletes the redundant requirement to complete pre-service as part of the minimum qualifications for caregivers, because the requirement for pre-service training is already included in §744.1301 and §744.1305.

The proposed amendment to §744.1301: (1) makes the rule applicable to directors in addition to employees and caregivers; (2) adds requirements for when required training must be completed; (3) for clarity, separates out the training requirements related to pediatric first aid and CPR; (4) updates the language for better readability and understanding; (5) updates citations; and (6) updates the numbering within the chart.

The proposed amendment to §744.1303: (1) replaces the phrase "abuse and neglect" with the term "maltreatment" to be more consistent with the required federal health and safety training topic and the state statutory language; and (2) deletes a grandfather clause that it is no longer necessary.

The proposed amendment to §744.1305: (1) changes the rule title to better reflect the content; (2) removes a redundant requirement regarding when pre-service training for caregivers must be completed; and (3) clarifies the language of the rule for better readability and understanding.

The proposed amendment to §744.1307 updates the reference to the title of §744.1305.

The proposed amendment to §744.1309: (1) changes the rule title to better reflect the content; (2) clarifies that a caregiver must receive training that is relevant to the age of the children for whom the caregiver provides care; (3) clarifies that a site director must receive training that is relevant to the age of the children for whom the operation provides care; (4) adds a requirement for caregivers and site directors to receive annual training related to the prevention, recognition, and reporting of child maltreatment; (5) updates language of the rule for consistency with required federal health and safety training topics; (6) updates the language of the rule related to self-study training to be consistent with the language in Chapters 746 and 747; and (7) reorganizes and clarifies language of the rule for better readability and understanding.

The proposed amendment to §744.1311: (1) changes the rule title to better reflect the content; (2) clarifies that an operation and program director must receive training relevant to the age of the children for whom the operation provides care; (3) adds a requirement for an operation and program director to receive annual training related to the prevention, recognition, and reporting of child maltreatment; (4) updates the language of the rule for consistency with the required federal health and safety training topics; (5) updates the language of the rule related to self-study training to be consistent with the language in Chapters 746 and 747; (6) updates references to rules; and (7) reorganizes and clarifies the language of the rule for better readability and understanding.

The proposed repeal of §744.1315 deletes the rule, because the content has been incorporated and updated in new §744.1315.

Proposed new §744.1315: (1) requires each caregiver and director to have current training in pediatric first aid with rescue breathing and choking and pediatric CPR; (2) specifies that a new caregiver who does not have current training in pediatric first aid cannot have unsupervised access to a child in care; (3) retains a provision that at least one employee or caregiver on the premises while children are in care must have current certification in pediatric CPR; (4) retains a provision outlining that pediatric CPR must adhere to the guidelines established by the American Heart Association; and (5) clarifies that blended learning is allowed for CPR.

The proposed amendment to §744.1317: (1) clarifies the requirement for site, program or operation directors and employees to receive two hours of annual training in transportation safety if the operation transports children whose chronological or development age is younger than nine years old; and (2) clarifies that transportation safety training is exclusive of any requirements for orientation, pre-service training, or annual training.

The proposed amendment to §744.1331: (1) updates references to first aid and CPR training to specify that the training must be in pediatric first aid and pediatric CPR; and (2) updates the wording of the rule for better readability and understanding.

The proposed amendment to §744.2301 updates a requirement regarding field trips, specifically that at least one caregiver per group of children on a field trip must have current training in pediatric first aid and pediatric CPR.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the sections will be in effect, there is a possibility of additional costs because the state provides subsidies for child care through some state agencies. Information is not available to determine if there would be a fiscal impact as a result of these regulations on the providers from whom the state purchases care.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the amendments, new section, and repeal will be in effect implementation of the proposed amended, new, and repealed rules:

- (1) will not create or eliminate a government program;
- (2) will not affect the number of employee positions;
- (3) will not require an increase or decrease in future legislative appropriations;
- (4) will not affect fees paid to the agency;
- (5) will create a new rule;
- (6) will expand some existing rules;
- (7) will increase the number of individuals subject to the rules; and
- (8) will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there will be an adverse economic effect on small businesses or micro-businesses, but not rural communities. This adverse economic effect on small businesses or micro-businesses is only in relation to §744.1301(3) and (4) and §744.1315.

Chapter 2006 of the Government Code defines a small business as one that is for-profit and has fewer than 100 employees. A small business that has no more than 20 employees is also defined as a micro-business. In Fiscal Year 2017 there were 1,934 School-Age Programs and Before and After-School Programs. A 2010 survey conducted by CCL indicated that approximately 55% of the programs are for profit businesses, of those programs 98% have fewer than 100 employees, and of those programs 68% have fewer than 20 employees. Therefore, for Fiscal Year 2017 CCL is estimating that approximately 1,042 School-Age Programs and Before and After-School Programs are small businesses, and approximately 708 of those small businesses are also micro-businesses.

Any fiscal impact to these programs results from the training costs and wages paid to staff for their time to take the training.

CCL staff developed the methodologies used to calculate the fiscal impact of these rules. The impact was calculated using cost research conducted by staff and assumptions regarding child-care practices. The key assumptions and methodologies are described in detail below, as these underlie the individual impact calculations that are projected to have a fiscal impact on at least some programs.

For School-Age Programs and Before and After-School Programs, the staff time required to comply with the standards will impact caregivers and directors, including an operation director, program director, and site director. For caregivers in programs in Texas, CCL is using a \$9.94 per hour mean wage. For all directors, CCL is using a \$23.28 per hour mean wage.



These per hour mean wages were obtained from the current Texas Workforce Commission, Texas Wages and Employment Projections, website for the job titles of "child care workers" and "educational administrator for preschool and child care centers", respectively.

Fiscal Impact for Proposed §744.1301(3) and (4) and §744.1315: These two sections require all caregivers and directors to have current training in both first aid and CPR. Currently, only one caregiver per group of children must have current training in first aid and only one caregiver or employee per operation must have current training in CPR (Note: There are some differences regarding the type of first aid and CPR training that is required by the current rules and the proposed rules (for example, "pediatric first aid" versus "first aid" and "pediatric CPR" versus "CPR for children and adults"). For purposes of this fiscal note, these differences will not be considered).

The fiscal impact this change will have on each School-Age Program or Before and After-School Program will vary depending upon several individual factors, including: (1) the number of caregivers a program has; (2) the number of caregivers a program uses for each group of children; (3) whether a program already requires every caregiver to have training in first aid and/or CPR; and (4) whether a caregiver is taking the training for the first time or being recertified.

Because training in first aid and CPR is a health and safety issue and because it can become a scheduling problem for a program to try and figure out which caregiver has the correct training requirements for each group of children, CCL assumes that many programs are already requiring each caregiver and director to have training in first aid and CPR and will have no increase in costs.

For programs that only require the minimum training of caregivers and directors, then approximately half of the program's caregivers and its one or two directors will need first aid training, and most of the program's caregivers and its one or two directors will also need CPR training.

Free, online training is available for first aid (for example, AgriLife has a free, two hour training online). For purposes of this fiscal note, CCL assumes that there are no training costs for caregivers and directors to take the first aid training. However, programs will need to pay each caregiver and director that is not currently being trained in first aid for the two hours to take the training. CCL assumes a program will pay a caregiver an average of \$9.94 per hour to take the two hour training, which would be \$19.88 per caregiver that is not currently being trained in first aid. CCL assumes a program will pay the one or two directors an average of \$23.28 per hour to take the two hour training, which would be \$46.56 per director that is not currently being trained in first aid. Depending upon the training, recertification may be needed every one to three years. CCL assumes that the caregivers and one or two directors that are not currently being trained in first aid will need to be recertified every two years at a similar cost.

For CPR training the costs are approximately \$45, which includes an e-learning course on CPR (\$20) and a CPR skills test (\$25). The costs can be higher for some classes (i.e. \$68, \$90, and \$110), which generally also include first aid training. The length of the CPR training (without the first aid training) is usually three to five hours (shorter time frames are required when a caregiver is being recertified). For purposes of this fiscal note, CCL assumes that caregivers and directors will take the CPR training separate and apart from the first aid training, and the

costs for the initial CPR training will be approximately \$45 and take approximately five hours. CCL assumes each program will pay the \$45 training costs for each caregiver and one or two directors that are not currently being trained in CPR (Note: another option is for the program to train the caregivers and directors in-house, which would eliminate the \$45 training costs per caregiver and director.). In addition, CCL assumes each program will pay a caregiver an average of \$9.94 per hour to take the five hour training, which would be \$49.70 per caregiver that is not currently being trained in CPR. CCL assumes a program will pay one or two directors an average of \$23.28 per hour to take the five hour training, which would be \$116.40 per director that is not currently being trained in CPR. The total amount to receive initial CPR training is \$94.70 for a caregiver and \$161.40 for a director. CCL assumes that the caregivers and directors that are not currently being trained in CPR will also need to be recertified every two years. However, the costs to be recertified will be less, because usually only a two hour course is needed to be recertified.

Fiscal Impact for Proposed §744.1309(c) and §744.1311(c): These two sections add one clock hour of annual training for caregivers and all directors (operation, program, and site) that must focus on prevention, recognition, and reporting of child maltreatment. There is no increase in the total number of annual training hours required for the caregivers or directors; there is only a change in the content of the required training. There is also free, online training that is currently available regarding the prevention, recognition, and reporting of child maltreatment. Since there is no increase in training hours and free training is available, CCL assumes there will be no additional costs associated with this rule change.

Regulatory Flexibility Analysis: A regulatory flexibility analysis is not required for the proposed rules with fiscal implications because the proposed rules are specifically required by federal law (The CCDBG of 2014). Therefore, the proposed rules are consistent with the health and safety of children, whom the law was intended to protect.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There is an anticipated economic cost to persons who are required to comply with the sections as proposed. Please see the discussion under the previous Small Business, Micro-Business, and Rural Community Impact Analysis.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules: (1) are necessary to protect the health, safety, and welfare of the residents of Texas; and (2) are necessary to receive a source of federal funds and comply with federal law.

#### PUBLIC BENEFIT

Jean Shaw, Associate Commissioner for CCL, has determined that for each year of the first five years that the amendments, new section, and repeal are in effect, the public will benefit from the proposed amendments, new section, and repeal. The public benefit anticipated as a result of enforcing or administering the sections will be: (1) safer child care as a result of more stringent and specific training requirements; (2) a clearer understanding of the training requirements; (3) HHSC will be in compliance with the Act; and (4) low income families will receive improved qual-

ity child care and be able to continue to receive subsidy funding from the CCDBG, because child care providers will be in compliance with federal laws and regulations.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Electronic comments may be submitted to [CCLrules@hhsc.state.tx.us](mailto:CCLrules@hhsc.state.tx.us).

Written comments on the proposal may be submitted to Lee Roberts, Lead Policy Analyst, (18R023), Child Care Licensing, Health and Human Services Commission E-550, P.O. Box 149030, Austin, Texas 78714-9030.

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. If the last day to submit comments falls on a Saturday, Sunday, or holiday, then comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rules 18R023" in the subject line.

Questions about the content of this proposal may be directed Lee Roberts (512) 438-3246 in the Child Care Licensing department of HHSC or e-mail her at [Lee.Roberts@hhsc.state.tx.us](mailto:Lee.Roberts@hhsc.state.tx.us).

### SUBCHAPTER C. RECORD KEEPING

#### DIVISION 4. PERSONNEL RECORDS

##### 26 TAC §744.901

##### STATUTORY AUTHORITY

The amendment is proposed under Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §42.042.

§744.901. *What information must I maintain in my personnel records?*

You must have the following records at the operation and available for review during your hours of operation for each employee, caregiver, substitute, and volunteer as specified in this chapter:

- (1) Documentation showing the dates of the first and last day on the job;
- (2) Documentation showing how the employee meets the minimum age and education qualifications, if applicable;
- (3) A copy of a health card or physician's statement verifying the employee is free of active tuberculosis, if required by the regional Department of State Health Services TB program or local health authority;
- (4) A notarized Licensing *Affidavit for Applicants for Employment* form as specified in Human Resources Code, §42.059;
- (5) A record of training hours;

(6) A statement signed and dated by the employee showing he has received a copy of the operation's:

- (A) Operational policies; and
- (B) Personnel policies;

(7) Proof of request for [DFPS] background checks required under 40 TAC Chapter 745, Subchapter F (relating to Background Checks);

(8) A copy of a photo identification;

(9) A copy of a current driver's license for each person who transports a child in care; and

(10) A statement signed and dated by the employee verifying the date the employee attended training during orientation that includes an overview regarding the prevention, recognition, and reporting of child maltreatment [abuse and neglect], as outlined in §744.1303 of this chapter [title] (relating to What must orientation for employees at my operation include?).

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

Filed with the Office of the Secretary of State on June 6, 2018.

TRD-201802460

Karen Ray

General Counsel

Health and Human Services Commission

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 438-5559



### SUBCHAPTER D. PERSONNEL

#### DIVISION 2. EMPLOYEES AND

#### CAREGIVERS

##### 26 TAC §744.1103, §744.1105

The amendments are proposed under Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendments implement Human Resources Code §42.042.

§744.1103. *What minimum qualifications must each of my employees meet?*

Each employee must:

- (1) Meet the requirements in 40 TAC Chapter 745, Subchapter F [of this title] (relating to Background Checks);
- (2) Have a current record of a tuberculosis examination (TB), showing the employee is free of contagious TB, if required by the Texas Department of State Health Services or local health authority; and
- (3) Complete a notarized Licensing *Affidavit for Applicants for Employment* form as specified in Human Resources Code, §42.059; and
- [(4) Complete orientation to your operation as specified in Division 4 of this subchapter (relating to Professional Development).]

§744.1105. *What additional minimum qualifications must each of my caregivers meet?*

Except as otherwise provided in this division, each caregiver must comply with minimum standards for employees and must:

- (1) Be at least 18 years of age; and
- (2) Have a:
  - (A) High school diploma;
  - (B) High school equivalent; or
  - (C) High school certificate of coursework completion as defined in Texas Education Code, §28.025(d). [~~;~~ and]

~~[(3) Complete pre-service training, as specified in Division 4 of this subchapter (relating to Professional Development)]~~

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

Filed with the Office of the Secretary of State on June 6, 2018.

TRD-201802461

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 438-5559



## DIVISION 4. PROFESSIONAL DEVELOPMENT

**26 TAC §§744.1301, 744.1303, 744.1305, 744.1307, 744.1309, 744.1311, 744.1315, 744.1317, 744.1331**

The amendments and new section are proposed under Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendments and new section implement Human Resources Code §42.042.

§744.1301. *What training must I ensure that my employees, ~~and~~ caregivers, and directors have within specific timeframes?*

You must make sure that employees, ~~and~~ caregivers, and directors have the training required in the following chart:

Figure: 26 TAC §744.1301

§744.1303. *What must orientation for employees at my operation include?*

~~[(a)]~~ Your orientation for employees must include at least the following:

- (1) An overview of the minimum standards found in this chapter;
- (2) An overview of operational policies, including discipline and guidance practices and procedures for the release of children;
- (3) An overview regarding the prevention, recognition, and reporting of child maltreatment ~~[abuse and neglect]~~ including:
  - (A) Factors indicating a child is at risk of abuse or neglect;

(B) Warning signs indicating a child may be a victim of abuse or neglect;

(C) Procedures for reporting child abuse or neglect; and

(D) Community organizations that have training programs available to employees ~~[child-care center staff members]~~, children, and parents;

(4) An overview of the procedures to follow in handling emergencies, which includes sharing the emergency preparedness plan with all employees. Emergencies may include [~~;~~ but are not limited to;] fire, explosion, tornado, toxic fumes, volatile persons, and severe injury or illness of a child or adult; ~~and~~

(5) The location and use of fire extinguishers and first-aid equipment.

~~[(b) For employees you hire on or after September 1, 2016, your orientation must also cover the following areas:]~~

(6) ~~[(4)]~~ Administering medication, if applicable, including compliance with §744.2653 of this chapter ~~[title]~~ (relating to What authorization must I obtain before administering a medication to a child in my care?);

(7) ~~[(2)]~~ Preventing and responding to emergencies due to food or an allergic reaction;

(8) ~~[(3)]~~ Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical ~~[electric]~~ hazards, bodies of water, and vehicular traffic;

(9) ~~[(4)]~~ Handling, storing, and disposing of hazardous materials, including compliance with §744.2523 of this chapter ~~[title]~~ (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?); and

(10) ~~[(5)]~~ Precautions in transporting children, if your operation transports a child whose chronological or developmental age is younger than nine years old.

§744.1305. *What areas of training must ~~[be covered in] the [eight clock hours of] pre-service training for caregivers cover?~~*

The [Before a caregiver can be counted in the child/caregiver ratio, the caregiver must complete] eight clock hours of pre-service training must cover [that covers] the following areas:

- (1) Developmental stages of children;
- (2) Age-appropriate activities for children;
- (3) Positive guidance and discipline of children;
- (4) Fostering children's self-esteem;
- (5) Supervision and safety practices in the care of children;
- (6) Positive interaction with children; and
- (7) Preventing and controlling the spread of communicable diseases, including immunizations.

§744.1307. *Are any caregivers exempt from the pre-service training?*

Yes. A caregiver is exempt from the pre-service training requirements if the caregiver has:

- (1) At least six months prior experience in a regulated operation; or
- (2) Documentation of at least eight clock hours of training in the areas specified in §744.1305 of this division ~~[title]~~ (relating to What areas of training must ~~[be covered in] the [eight clock hours of]~~

pre-service training for caregivers cover?) at another regulated operation.

§744.1309. *What areas [How many clock hours] of [annual] training must the annual training for [be obtained by] caregivers and site directors cover?*

(a) ~~The [Each caregiver and site director must obtain at least] 15 clock hours of annual training must:~~

(1) For a caregiver, be [each year] relevant to the age of the children for whom the caregiver [person] provides care; ~~or[-]~~

(2) For a site director, be relevant to the age of the children for whom the operation provides care.

~~[(b) The 15 clock hours of annual training are exclusive of requirements for orientation, pre-service training, CPR and first aid training, transportation safety training, and high school child-care work-study classes.]~~

~~(b) [(e)] At least six clock hours of the annual training hours must be in one or more of the following topics:~~

- (1) Child growth and development;
- (2) Guidance and discipline;
- (3) Age-appropriate curriculum; and
- (4) Teacher-child interaction.

~~(c) At least one clock hour of the annual training hours must focus on prevention, recognition, and reporting of child maltreatment, including:~~

~~(1) Factors indicating a child is at risk for abuse or neglect;~~  
~~(2) Warning signs indicating a child may be a victim of abuse or neglect;~~

~~(3) Procedures for reporting child abuse or neglect; and~~

~~(4) Community organizations that have training programs available to employees, children, and parents.~~

~~(d) While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:~~

~~(1) Emergency preparedness;~~  
~~(2) Preventing and controlling the spread of communicable diseases, including immunizations;~~

~~(3) Administering medication, if applicable, including compliance with §744.2653 of this chapter [title] (relating to What authorization must I obtain before administering a medication to a child in my care?);~~

~~(4) Preventing and responding to emergencies due to food or an allergic reaction;~~

~~(5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical [electric] hazards, bodies of water, and vehicular traffic; and~~

~~(6) Handling, storing, and disposing of hazardous materials including compliance with §744.2523 of this chapter [title] (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).~~

~~(e) The remaining annual training hours must be in one or more of the following topics:~~

- (1) Care of children with special needs;

(2) Child health (for example, nutrition, and [or] physical activity);

(3) Safety;

(4) Risk management;

(5) Identification and care of ill children;

(6) Cultural diversity for children and families;

(7) Professional development (for example, effective communication with families and time and stress management);

(8) Topics relevant to the particular age group the caregiver is assigned;

(9) Planning developmentally appropriate learning activities; and

(10) Minimum standards and how they apply to the caregiver.

(f) No more than 80% of the required annual training hours may come from [be obtained through] self-instructional training. No more than three [hours] of those [the] self-instructional hours [training] may come from self-study training [a person reading written materials or watching a video on their own].

~~(g) The 15 clock hours of annual training are exclusive of any requirements for orientation, pre-service training, pediatric first aid and pediatric CPR training, transportation safety training, and high school child-care work-study classes.~~

§744.1311. *What areas of training must the annual [How many clock hours of] training for [must] an operation director or a program director cover [obtain each year]?*

(a) ~~The [An operation director and/or a program director must obtain at least] 20 clock hours of annual training must be [each year] relevant to the age of the children for whom the operation provides care.~~

~~[(b) The 20 clock hours of annual training are exclusive of any requirements for orientation, pre-service training, CPR and first aid training, and transportation safety training.]~~

~~(b) [(e)] At least six clock hours of the annual training hours must be in one or more of the following topics:~~

~~(1) Child growth and development;~~

~~(2) Guidance and discipline;~~

~~(3) Age-appropriate curriculum;~~

~~(4) Teacher-child interaction; and~~

~~(5) Serving children with special care needs.~~

~~(c) At least one clock hour of the annual training hours must focus on prevention, recognition, and reporting of child maltreatment, including:~~

~~(1) Factors indicating a child is at risk for abuse or neglect;~~

~~(2) Warning signs indicating a child may be a victim of abuse or neglect;~~

~~(3) Procedures for reporting child abuse or neglect; and~~

~~(4) Community organizations that have training programs available to employees, children, and parents.~~

~~(d) While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:~~

- (1) Emergency preparedness;
  - (2) Preventing and controlling the spread of communicable diseases, including immunizations;
  - (3) Administering medication, if applicable, including compliance with §744.2653 of this chapter [title] (relating to What authorization must I obtain before administering a medication to a child in my care?);
  - (4) Preventing and responding to emergencies due to food or an allergic reaction;
  - (5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical [electric] hazards, bodies of water, and vehicular traffic; and
  - (6) Handling, storing, and disposing of hazardous materials including compliance with §744.2523 of this chapter [title] (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).
- (e) An operation director or program director with:
- (1) Five or fewer years of experience as a designated operation director [of an operation] or [as a] program director must complete at least six clock hours of the annual training hours in management techniques, leadership, or staff supervision; or
  - (2) More than five years of experience as a designated operation director [of an operation] or [as a] program director must complete at least three clock hours of the annual training hours in management techniques, leadership, or staff supervision.
- (f) The remainder of the 20 clock hours of annual training must be selected from the training topics specified in §744.1309(e) of this division [title] (relating to What areas of [How many clock hours of annual] training must the annual training for [be obtained by] caregivers and site directors cover?).
- (g) An operation director or program director may obtain clock hours or CEUs from the same sources as caregivers.
- (h) Training hours may not be earned for presenting training to others.
- (i) No more than 80% of the required annual training hours may come from [be obtained through] self-instructional training. No more than three [hours] of those [the] self-instructional hours [training] may come from self-study training [a person reading written materials or watching a video on their own].
- (j) The 20 clock hours of annual training are exclusive of any requirements for orientation, pre-service training, pediatric first aid and pediatric CPR training, and transportation safety training.

§744.1315. Who must have pediatric first aid and pediatric CPR training?

- (a) Each caregiver, operation director, program director, and site director must have a current certificate of training with an expiration or renewal date in pediatric first aid with rescue breathing and choking.
- (b) Each caregiver, operation director, program director, and site director must have a current certificate of training with an expiration or renewal date in pediatric cardiopulmonary resuscitation (CPR). A new caregiver does not have to have a current certificate in pediatric CPR before having unsupervised access to a child in care. However, the operation must have at least one employee or caregiver on the premises while children are in care that has a current certificate in pediatric CPR. The pediatric CPR:

(1) Must adhere to the guidelines for CPR for a layperson established by the American Heart Association, and consist of a curriculum that includes use of a CPR manikin and both written and hands-on skill-based instruction, practice, and testing; and

(2) May be provided through blended learning that utilizes online technology, including self-instructional training, as long as the criteria in paragraph (1) of this subsection is met.

§744.1317. What additional training must an employee and director have if the operation transports children [in order to transport a child in care]?

(a) If the operation transports children whose chronological or developmental age is younger than nine years old, two clock hours of annual transportation safety training is required for:

- (1) Each employee prior to transporting a child; and
- (2) Each site director, and program director or operation director.

[(a) An employee must complete two hours of annual training on transportation safety in order to transport a child whose chronological or developmental age is younger than nine years old. This training is in addition to other required training hours.]

(b) The [employee must obtain these] two clock hours of transportation safety training is exclusive of any requirements for orientation, pre-service training, and annual training [prior to transporting children].

§744.1331. What documentation must I provide to Licensing to verify that training requirements have been met?

(a) Except as provided in this section, you must maintain original certificates documenting pediatric first aid, pediatric CPR, [CPR/first-aid] and annual training in each employee's personnel record at the operation.

(b) For annual training to [To] be counted toward compliance with the minimum standards, the trainer or training source must provide the participant with an original certificate or letter showing:

- (1) The participant's name;
- (2) Date of the training;
- (3) Title/subject of the training;
- (4) The trainer's name, or the source of the training for self-instructional training;
- (5) The trainer's qualifications, in compliance with §744.1319 of this division [title] (relating to Must the training for my caregivers and the director meet certain criteria?); and
- (6) Length of the training specified in clock hours, CEUs, or college credit hours, as appropriate.

(c) [(b)] For pediatric first aid and pediatric CPR to count toward compliance with the minimum standards, the documentation [Documentation of CPR/first-aid training] must include the same information in subsection (b) [(a)] of this section, and must also include the expiration date of the training, as determined by the organization providing the training. A photocopy of the original first aid and CPR [CPR/first-aid] certificate or letter may be maintained in the personnel record, as long as the employee can provide an original document upon request by Licensing.

(d) [(e)] For orientation and pre-service training, you [You] must obtain a signed and dated statement from the employee and the person providing the orientation or [and] pre-service training stating the employee has received the orientation or [and] pre-service training,

or you may obtain documentation (original certificates or letters) as specified in subsection (b) [(a)] of this section.

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

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Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 438-5559



## 26 TAC §744.1315

The repeal is proposed under Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The repeal implements Human Resources Code §42.042.

*§744.1315. Who must have first-aid and CPR training?*

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

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Chief Counsel

Health and Human Services Commission

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## SUBCHAPTER I. FIELD TRIPS

### 26 TAC §744.2301

The amendments are proposed under Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendments implement Human Resources Code §42.042.

*§744.2301. May I take children away from my operation for field trips?*

Yes. You must ensure the safety of all children on field trips or excursions and during any transportation provided by the operation. Anytime you take a child on a field trip, you must comply with each of the following requirements:

(1) You must have signed permission from the parent to take a child on a field trip, including permission to transport the child, if applicable;

(2) One or more caregivers must carry emergency medical consent forms and emergency contact information for each child on the field trip;

(3) Caregivers must have a written list of all children on the field trip and must check the list frequently to account for the presence of all children;

(4) Caregivers must have a first-aid kit immediately available on field trips;

(5) Caregivers must have a copy of a child's food allergy emergency plan and allergy medications, if applicable;

(6) Each child must wear a shirt, nametag, or other identification listing the name of the operation and the operation's telephone number;

(7) Each caregiver must be easily identifiable by all children on the field trip by wearing a hat, operation tee-shirt, brightly-colored clothes, or other easily spotted identification;

(8) Each caregiver supervising a field trip must have transportation available, a communication device such as a cellular phone or two-way radio available, or an alternate plan for transportation at the field-trip location in case of emergency; and

(9) One or more caregivers per group of children must have current training in pediatric first aid and pediatric CPR [Caregivers with training in CPR and first aid with rescue breathing and choking must be present on the field trip].

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

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## CHAPTER 746. MINIMUM STANDARDS FOR CHILD-CARE CENTERS

The Texas Health and Human Services Commission (HHSC) proposes amendments to §§746.901, 746.1105, 746.1107, 746.1301, 746.1303, 746.1309, 746.1311, 746.1316, 746.1317, 746.1329, 746.3001, 746.3117; new §746.1315; and the repeal of §746.1315 in Title 26, Chapter 746, Minimum Standards for Child-Care Centers. The amendments, new section, and repeal implement needed changes to comply with requirements in the Child Care and Development Block Grant Act (CCDBG) of 2014 related to orientation, initial, and ongoing training requirements for employees in child care operations.

### BACKGROUND AND PURPOSE

The purpose of the amendments, new sections and repeal is to implement the CCDBG of 2014.

The CCDBG of 2014 (the "Act") is the first comprehensive revision of the Child Care Development Fund (CCDF) program since 1998. (The CCDF is codified in 42 USC §9857 et seq.) The Texas Workforce Commission (TWC) administers the

CCDF, which is the primary federal funding source devoted to providing low-income families with access to child care. The Act made significant reforms to the CCDF program to raise the health, safety, and quality of child care by mandating that states comply with a multitude of additional requirements, including health and safety requirements and training on those topics, in order to continue to receive the CCDF funding. Although TWC is the lead agency for determining eligibility and distributing the subsidy monies, Child Care Licensing (CCL), a department of the Health and Human Services Commission, is the agency responsible for licensing child care operations, establishing health and safety regulations, and monitoring eligible operations for compliance.

New rules implementing the CCDBG background checks and health and safety requirements were implemented on September 1, 2016. These amendments, new section, and repeal further implement the CCDBG health and safety requirements to make sure the HHSC minimum standards are as consistent as possible with the CCDBG requirements. The amendments, new section, and repeal: (1) require caregivers and directors to receive training within 90 days of employment in pediatric first aid with rescue breathing and choking and pediatric cardiopulmonary resuscitation (CPR), and the training must be ongoing; (2) clarify that training regarding child abuse and neglect is related to child maltreatment, in order to be more consistent with federal health and safety training topic and the state statutory language; (3) clarify that directors must receive training in transportation safety if the operation transports children who are chronologically or developmentally younger than nine years old; (4) streamline and reduce redundancies in rules regarding training requirements; and (5) update language for better readability and understanding.

A workgroup meeting was held on February 9, 2018, to obtain stakeholder input and feedback regarding the development of the proposed rules. The proposed rules were discussed and several rules were updated based on the comments.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §746.901: (1) updates the description of Licensing background check rules by removing "DFPS" and substituting a reference to the location of the rules; and (2) replaces the phrase "abuse and neglect" with the term "maltreatment" to be more consistent with the required federal health and safety training topic and the state statutory language.

The proposed amendment to §746.1105: (1) deletes the redundant requirement to complete orientation as part of the minimum qualifications for employees, because the requirement for employee orientation is already included in §746.1301 and §746.1303; and (2) updates a citation.

The proposed amendment to §746.1107 deletes the redundant requirement to complete eight hours of pre-service training as part of the minimum qualifications for caregivers, because this requirement is already included in §746.1301.

The proposed amendment to §746.1301: (1) makes the rule applicable to directors in addition to employees and caregivers; (2) adds requirements for when required training must be completed; (3) for clarity, separates out the training requirements related to pediatric first aid and CPR; (4) clarifies the language of the rule for better readability and understanding; (5) updates citations; and (6) updates the numbering within the chart.

The proposed amendment to §746.1303: (1) replaces the phrase "abuse and neglect" with the term "maltreatment" to be more consistent with the required federal health and safety training topic and the state statutory language; (2) deletes a grandfather clause that it is no longer necessary; and (3) updates language for better readability and understanding.

The proposed amendment to §746.1309: (1) changes the rule title to better reflect the content; (2) updates language of the rule for consistency with required federal health and safety training topics; and (3) reorganizes and clarifies language of the rule for better readability and understanding.

The proposed amendment to §746.1311: (1) changes the rule title to better reflect the content; (2) updates language of the rule for consistency with required federal health and safety training topics; and (3) reorganizes and clarifies language of the rule for better readability and understanding.

The proposed repeal of §746.1315 deletes the rule, because the content has been incorporated and updated in new §746.1315.

Proposed new §746.1315: (1) requires each caregiver and child-care center director to have current training in pediatric first aid with rescue breathing and choking and pediatric CPR; (2) specifies that a new caregiver who does not have current training in pediatric first aid cannot have unsupervised access to a child in care; (3) retains a provision that at least one employee or caregiver on the premises while children are in care must have current certification in pediatric CPR; (4) retains a provision outlining that pediatric CPR must adhere to the guidelines established by the American Heart Association; and (5) clarifies that blended learning is allowed for CPR.

The proposed amendment to §746.1316: (1) clarifies the requirement for child-care center directors and employees to receive two hours of annual training in transportation safety if the center transports children whose chronological or development age is younger than nine years old; and (2) clarifies that transportation safety training is exclusive of any requirements for orientation, pre-service training, or annual training.

The proposed amendment to §746.1317 updates language regarding instructor-led and self-study training for consistency with similar requirements in other chapters.

The proposed amendment to §746.1329: (1) updates references to first aid and CPR training to specify that the training must be in pediatric first aid and pediatric CPR; and (2) updates the wording of the rule for better readability and understanding.

The proposed amendment to §746.3001 updates a requirement regarding field trips, specifically that at least one caregiver per group of children on a field trip must have current training in pediatric first aid and pediatric CPR.

The proposed amendment to §746.3117 updates a requirement regarding get-well care programs, specifically that training in first aid and CPR must be in pediatric first aid and pediatric CPR.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the sections will be in effect, there is a possibility of additional costs because the state provides subsidies for child care through some state agencies. Information is not available to determine if there would be a fiscal impact as a result of these regulations on the providers from whom the state purchases care.

## GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the amendments, new section, and repeal will be in effect implementation of the proposed amended, new, and repealed rules:

- (1) will not create or eliminate a government program;
- (2) will not affect the number of employee positions;
- (3) will not require an increase or decrease in future legislative appropriations;
- (4) will not affect fees paid to the agency;
- (5) will create a new rule;
- (6) will expand some existing rules;
- (7) will increase the number of individuals subject to the rules; and
- (8) will not affect the state's economy.

## SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there will be an adverse economic effect on small businesses or micro-businesses, but not rural communities. This adverse economic effect on small businesses or micro-businesses is only in relation to §746.1301(3) and (4) and §746.1315.

Chapter 2006 of the Government Code defines a small business as one that is for-profit and has fewer than 100 employees. A small business that has no more than 20 employees is also defined as a micro-business. In Fiscal Year 2017 there were 8,886 Licensed Child Care Centers. A 2010 survey conducted by CCL indicated that approximately 55% of the centers are for profit businesses, of those centers 98% have fewer than 100 employees, and of those centers 68% have fewer than 20 employees. Therefore, for Fiscal Year 2017 CCL is estimating that approximately 4,789 Licensed Child Care Centers are small businesses, and approximately 3,256 of those small businesses are also micro-businesses.

Any fiscal impact to these centers results from the training costs and wages paid to staff for their time to take the training.

CCL staff developed the methodologies used to calculate the fiscal impact of these rules. The impact was calculated using cost research conducted by staff and assumptions regarding child-care practices. The key assumptions and methodologies are described in detail below, as these underlie the individual impact calculations that are projected to have a fiscal impact on at least some centers.

For Licensed Child Care Centers, the staff time required to comply with the standards will impact caregivers and directors. For caregivers in centers in Texas, CCL is using a \$9.94 per hour mean wage. For a director, CCL is using a \$23.28 per hour mean wage. These per hour mean wages were obtained from the current Texas Workforce Commission, Texas Wages and Employment Projections, website for the job titles of "child care workers" and "educational administrator for preschool and child care centers", respectively.

Fiscal Impact for Proposed §746.1301(3) and (4) and §746.1315: These two sections require all caregivers and the director to have current training in both first aid and CPR. Currently, only one caregiver per group of children must have current training in first aid and only one caregiver or employee

per center must have current training in CPR. [Note: There are some differences regarding the type of first aid and CPR training that is required by the current rules and the proposed rules (for example, "pediatric first aid" versus "first aid" and "pediatric CPR" versus "CPR for children and adults"). For purposes of this fiscal note, these differences will not be considered.]

The fiscal impact this change will have on each Licensed Child Care Center will vary depending upon several individual factors, including: (1) the number of caregivers a center has; (2) the number of caregivers a center uses for each group of children; (3) whether a center already requires every caregiver to have training in first aid and/or CPR; and (4) whether a caregiver is taking the training for the first time or being recertified.

Because training in first aid and CPR is a health and safety issue and because it can become a scheduling problem for a center to try and figure out which caregiver has the correct training requirements for each group of children, CCL assumes that many centers are already requiring each caregiver and the director to have training in first aid and CPR and will have no increase in costs.

For centers that only require the minimum training of caregivers and the director, then approximately half of the center's caregivers and the director will need first aid training, and most of the center's caregivers and the director will also need CPR training.

Free, online training is available for first aid (for example, AgriLife has a free, two hour training online). For purposes of this fiscal note, CCL assumes that there are no training costs for caregivers and the director to take the first aid training. However, centers will need to pay each caregiver and director that is not currently being trained in first aid for the two hours to take the training. CCL assumes a center will pay a caregiver an average of \$9.94 per hour to take the two hour training, which would be \$19.88 per caregiver that is not currently being trained in first aid. CCL assumes a center will pay the director an average of \$23.28 per hour to take the two hour training, which would be \$46.56 for a director that is not currently being trained in first aid. Depending upon the training, recertification may be needed every one to three years. CCL assumes that the caregivers and the director that are not currently being trained in first aid will need to be recertified every two years at a similar cost.

For CPR training the costs are approximately \$45, which includes an e-learning course on CPR (\$20) and a CPR skills test (\$25). The costs can be higher for some classes (i.e. \$68, \$90, and \$110), which generally also include first aid training. The length of the CPR training (without the first aid training) is usually three to five hours (shorter time frames are required when a caregiver is being recertified). For purposes of this fiscal note, CCL assumes that caregivers and the director will take the CPR training separate and apart from the first aid training, and the costs for the initial CPR training will be approximately \$45 and take approximately five hours. CCL assumes each center will pay the \$45 training costs for each caregiver and a director that is not currently being trained in CPR. [Note: another option is for the center to train the caregivers in-house, which would eliminate the \$45 training costs per caregiver.] In addition, CCL assumes each center will pay a caregiver an average of \$9.94 per hour to take the five hour training, which would be \$49.70 per caregiver that is not currently being trained in CPR. CCL assumes a center will pay the director an average of \$23.28 per hour to take the five hour training, which would be \$116.40 for a director that is not currently being trained in CPR. The total amount to receive initial CPR training is \$94.70 for a caregiver and \$161.40 for a



director. CCL assumes that the caregivers and a director that are not currently being trained in CPR will also need to be recertified every two years. However, the costs to be recertified will be less, because usually only a two hour course is needed to be recertified.

**Regulatory Flexibility Analysis:** A regulatory flexibility analysis is not required for the proposed rules with fiscal implications because the proposed rules are specifically required by federal law (The CCDBG of 2014). Therefore, the proposed rules are consistent with the health and safety of children, whom the law was intended to protect.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There is an anticipated economic costs to persons who are required to comply with the sections as proposed. For the specifics, please see the discussion under the previous Small Business, Micro-Business, and Rural Community Impact Analysis.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules: (1) are necessary to protect the health, safety, and welfare of the residents of Texas; and (2) are necessary to receive a source of federal funds and comply with federal law.

#### PUBLIC BENEFIT

Jean Shaw, Associate Commissioner for CCL, has determined that for each year of the first five years that the amendments, new section, and repeal are in effect, the public will benefit from the proposed amendments, new section, and repeal. The public benefit anticipated as a result of enforcing or administering the sections will be: (1) safer child care as a result of more stringent and specific training requirements; (2) a clearer understanding of the training requirements; (3) HHSC will be in compliance with the Act; and (4) low income families will receive improved quality child care and be able to continue to receive subsidy funding from the CCDBG, because child care providers will be in compliance with federal laws and regulations.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Electronic comments may be submitted to [CCLrules@hhsc.state.tx.us](mailto:CCLrules@hhsc.state.tx.us).

Written comments on the proposal may be submitted to Lee Roberts, Lead Policy Analyst, (18R023), Child Care Licensing, Health and Human Services Commission E-550, P.O. Box 149030, Austin, Texas 78714-9030.

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. If the last day to submit comments falls on a Saturday, Sunday, or holiday, then comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) or e-mailed by midnight on the last day of the comment

period. When e-mailing comments, please indicate "Comments on Proposed Rules 18R023" in the subject line.

Questions about the content of this proposal may be directed Lee Roberts (512) 438-3246 in the Child Care Licensing department of HHSC or e-mail her at [Lee.Roberts@hhsc.state.tx.us](mailto:Lee.Roberts@hhsc.state.tx.us).

## SUBCHAPTER C. RECORD KEEPING DIVISION 4. PERSONNEL RECORDS

### 26 TAC §746.901

#### STATUTORY AUTHORITY

The amendment is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §42.042.

*§746.901. What information must I maintain in my personnel records?*

You must have the following records at the child-care center and available for review during hours of operation for each employee, caregiver, substitute, and volunteer as specified in this chapter:

(1) Documentation showing the dates of the first and last day on the job;

(2) Documentation showing how the employee meets the minimum age and education qualifications, if applicable;

(3) A copy of a health card or physician's statement verifying the employee is free of active tuberculosis, if required by the regional Texas Department of State Health Services TB program or local health authority;

(4) A notarized Licensing Affidavit for Applicants for Employment form as specified in Human Resources Code, §42.059;

(5) A record of training hours;

(6) A statement signed and dated by the employee showing he has received a copy of the child-care center's:

(A) Operational policies; and

(B) Personnel policies;

(7) Proof of request for ~~[DFPS]~~ background checks required under 40 TAC Chapter 745, Subchapter F (relating to Background Checks);

(8) A copy of a photo identification;

(9) A copy of a current driver's license for each person who transports a child in care; and

(10) A statement signed and dated by the employee verifying the date the employee attended training during orientation that includes an overview of your policy on the prevention, recognition, and reporting of child maltreatment [~~abuse and neglect~~] outlined in §746.1303 of this chapter [~~title~~] (relating to What must orientation for employees at my child-care center include?).

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

Filed with the Office of the Secretary of State on June 6, 2018.

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SUBCHAPTER D. PERSONNEL  
DIVISION 2. CHILD-CARE CENTER  
EMPLOYEES AND CAREGIVERS

**26 TAC §746.1105, §746.1107**

The amendments are proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendments implement Human Resources Code §42.042.

*§746.1105. What minimum qualifications must each of my child-care center employees meet?*

Each child-care center employee must:

(1) Meet the requirements in 40 TAC [Subchapter F of Chapter 745, Subchapter F of this title] (relating to Background Checks);

(2) Have a current record of a tuberculosis examination, showing the employee is free of contagious TB, if required by the Texas Department of State Health Services or local health authority; and

(3) Complete a notarized Licensing *Affidavit for Applicants for Employment* form as specified in Human Resources Code, §42.059; and

[(4) Complete orientation to your child-care center as specified in Division 4 of this subchapter (relating to Professional Development).]

*§746.1107. What additional minimum qualifications must each of my caregivers meet?*

Except as otherwise provided in this division, each caregiver must comply with minimum standards for employees and must:

(1) Be at least 18 years of age; and

(2) Have a:

(A) High school diploma;

(B) High school equivalent; or

(C) High school certificate of coursework completion as defined in Texas Education Code, §28.025(d). [; and]

[(3) Complete eight hours of the required 24 hours of pre-service training, as specified in Division 4 of this subchapter (relating to Professional Development) before being counted in the child/caregiver ratio.]

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

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DIVISION 4. PROFESSIONAL DEVELOPMENT

**26 TAC §§746.1301, 746.1303, 746.1309, 746.1311, 746.1315 - 746.1317, 746.1329**

The amendments and new section are proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendments and new section implement Human Resources Code §42.042.

*§746.1301. What training must I ensure that my employees, caregivers, and directors have during certain timeframes?*

You must make sure that employees, [and] caregivers, and directors have the training required in the following chart:

Figure: 26 TAC §746.1301

[Figure: 26 TAC §746.1301]

*§746.1303. What must orientation for employees at my child-care center include?*

[(a)] Your orientation for employees must include at least the following:

(1) An overview of the minimum standards found in this chapter;

(2) An overview of your operational policies, including discipline and guidance practices and procedures for the release of children;

(3) An overview of your policy on the prevention, recognition, and reporting of child maltreatment [abuse and neglect], including:

(A) Factors indicating a child is at risk of abuse or neglect;

(B) Warning signs indicating a child may be a victim of abuse or neglect;

(C) Procedures for reporting child abuse or neglect; and

(D) Community organizations that have training programs available to employees [child-care center staff members], children, and parents;

(4) An overview of the procedures to follow in handling emergencies, which includes sharing the emergency preparedness plan with all employees. Emergencies may include, but are not limited to, fire, explosion, tornado, toxic fumes, volatile persons, and severe injury or illness of a child or adult; and

(5) The location and use of fire extinguishers and first-aid equipment.

[(b)] [For employees you hire on or after September 1, 2016, your orientation must also cover the following areas:]

(6) [(4)] Administering medication, if applicable, including compliance with §746.3803 of this chapter [title] (relating to What authorization must I obtain before administering a medication to a child in my care?);

(7) [(2)] Preventing and responding to emergencies due to food or an allergic reaction;

(8) [(3)] Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical [electrie] hazards, bodies of water, and vehicular traffic;

(9) [(4)] Handling, storing, and disposing of hazardous materials including compliance with §746.3425 of this chapter [title] (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?); and

(10) [(5)] Precautions in transporting children if your center transports a child whose chronological or developmental age is younger than nine years old.

§746.1309. *What areas of training must the [How many clock hours of] annual training for [must be obtained by] caregivers cover?*

(a) ~~The [Each caregiver must obtain at least] 24 clock hours of annual training must be [each year] relevant to the age of the children for whom the caregiver provides care.~~

~~[(b) The 24 clock hours of annual training are exclusive of any requirements for orientation, pre-service training, CPR and first aid training, transportation safety training, and high school child-care work-study classes.]~~

(b) [(e)] At least six clock hours of the annual training hours must be in one or more of the following topics:

- (1) Child growth and development;
- (2) Guidance and discipline;
- (3) Age-appropriate curriculum; and
- (4) Teacher-child interaction.

(c) [(d)] At least one clock hour of the annual training hours must focus on prevention, recognition, and reporting of child maltreatment [abuse and neglect], including:

- (1) Factors indicating a child is at risk for abuse or neglect;
- (2) Warning signs indicating a child may be a victim of abuse or neglect;
- (3) Procedures for reporting child abuse or neglect; and
- (4) Community organizations that have training programs available to employees [child-care center staff members], children, and parents.

(d) [(e)] If a caregiver provides care for children younger than 24 months of age, one clock hour of the annual training hours must cover the following topics:

- (1) Recognizing and preventing shaken baby syndrome and abusive head trauma;
- (2) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS); and
- (3) Understanding early childhood brain development.

(e) [(f)] While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:

(1) Emergency preparedness;

(2) Preventing and controlling the spread of communicable diseases, including immunizations;

(3) Administering medication, if applicable, including compliance with §746.3803 of this chapter [title] (relating to What authorization must I obtain before administering a medication to a child in my care?);

(4) Preventing [~~and controlling~~] and responding to emergencies due to food or an allergic reaction;

(5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical [electrie] hazards, bodies of water, and vehicular traffic; and

(6) Handling, storing, and disposing of hazardous materials including compliance with §746.3425 of this chapter [title] (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).

(f) [(g)] The remaining annual training hours must be in one or more of the following topics:

- (1) Care of children with special needs;
- (2) Child health (for example, nutrition and physical activity);
- (3) Safety;
- (4) Risk management;
- (5) Identification and care of ill children;
- (6) Cultural diversity for children and families;
- (7) Professional development (for example, effective communication with families and time and stress management);
- (8) Topics relevant to the particular age group the caregiver is assigned (for example, caregivers assigned to an infant or toddler group should receive training on biting and toilet training);
- (9) Planning developmentally appropriate learning activities;
- (10) Observation and assessment;
- (11) Attachment and responsive care giving; and
- (12) Minimum standards and how they apply to the caregiver.

(g) [(h)] No more than 80% of the required annual training hours may come from [be obtained through] self-instructional training. No more than three [hours] of those [the] self-instructional hours [training] may come from self-study training [a person reading written materials or watching a video on their own].

(h) The 24 clock hours of annual training are exclusive of any requirements for orientation, pre-service training, pediatric first aid and pediatric CPR training, transportation safety training, and high school child-care work-study classes.

§746.1311. *What areas of training must the annual [How many clock hours of] training for [must] my child-care center director cover? [obtain each year?]*

(a) The [child-care center director must obtain at least] 30 clock hours of annual training must be [each year] relevant to the age of the children for whom the child-care center provides care.

~~[(b) The 30 clock hours of annual training are exclusive of any requirements for orientation, pre-service training, CPR and first aid training, and transportation safety training.]~~

~~(b) [(e)] At least six clock hours of the annual training hours must be in one or more of the following topics:~~

- ~~(1) Child growth and development;~~
- ~~(2) Guidance and discipline;~~
- ~~(3) Age-appropriate curriculum;~~
- ~~(4) Teacher-child interaction; and~~
- ~~(5) Serving children with special care needs.~~

~~(c) [(d)] At least one clock hour of the annual training hours must focus on prevention, recognition, and reporting of child maltreatment [abuse and neglect], including:~~

- ~~(1) Factors indicating a child is at risk for abuse or neglect;~~
- ~~(2) Warning signs indicating a child may be a victim of abuse or neglect;~~
- ~~(3) Procedures for reporting child abuse or neglect; and~~
- ~~(4) Community organizations that have training programs available to employees [~~child-care center staff members~~], children, and parents.~~

~~(d) [(e)] If the center provides care for children younger than 24 months of age, one hour of the annual training hours must cover the following topics:~~

- ~~(1) Recognizing and preventing shaken baby syndrome and abusive head trauma;~~
- ~~(2) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS); and~~
- ~~(3) Understanding early childhood brain development.~~

~~(e) [(f)] While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:~~

- ~~(1) Emergency preparedness;~~
- ~~(2) Preventing and controlling the spread of communicable diseases, including immunizations;~~
- ~~(3) Administering medication, if applicable, including compliance with §746.3803 of this chapter [title] (relating to What authorization must I obtain before administering a medication to a child in my care?);~~
- ~~(4) Preventing and responding to emergencies due to food or an allergic reaction;~~
- ~~(5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical [~~electric~~] hazards, bodies of water, and vehicular traffic; and~~
- ~~(6) Handling, storing, and disposing of hazardous materials including compliance with §746.3425 of this chapter [title] (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).~~

~~(f) [(g)] A director with:~~

- ~~(1) Five or fewer years of experience as a designated director of a child-care center must complete at least six clock hours of the~~

annual training hours in management techniques, leadership, or staff supervision; or

~~(2) More than five years of experience as a designated director of a child-care center must complete at least three clock hours of the annual training hours in management techniques, leadership, or staff supervision.~~

~~(g) [(h)] The remainder of the 30 clock hours of annual training must be selected from the training topics specified in §746.1309(f)[(g)] of this division [title] (relating to What areas of training must the [~~How many clock hours of~~] annual training for [~~must be obtained by~~] caregivers cover?).~~

~~(h) [(i)] The director may obtain clock hours or CEUs from the same sources as caregivers.~~

~~(i) [(j)] Training hours may not be earned for presenting training to others.~~

~~(j) [(k)] No more than 80% of the required annual training hours may come from [~~be obtained through~~] self-instructional training. No more than three [~~hours~~] of those [~~the~~] self-instructional hours [~~training~~] may come from self-study training [~~a person reading written materials or watching a video on their own~~].~~

§746.1315. Who must have pediatric first-aid and pediatric CPR training?

(a) Each caregiver and the child-care center director must have a current certificate of training with an expiration or renewal date in pediatric first aid with rescue breathing and choking.

(b) Each caregiver and the child-care center director must have a current certificate of training with an expiration or renewal date in pediatric cardiopulmonary resuscitation (CPR). A new caregiver does not have to have a current certificate in pediatric CPR before having unsupervised access to a child in care. However, the operation must have at least one employee or caregiver on the premises while children are in care that has a current certificate in pediatric CPR. The pediatric CPR:

(1) Must adhere to the guidelines for CPR for a layperson established by the American Heart Association, and consist of a curriculum that includes use of a CPR manikin and both written and hands-on skill-based instruction, practice, and testing; and

(2) May be provided through blended learning that utilizes online technology, including self-instructional training, as long as the criteria in paragraph (1) of this subsection is met.

§746.1316. What additional training must an employee and director have if the operation transports children [in order to transport a child in care]?

(a) If the operation transports children whose chronological or developmental age is younger than nine years old, two clock hours of annual transportation safety training is required for:

- (1) Each employee prior to transporting a child; and
- (2) Each child-care center director.

[(a) An employee must complete two hours of annual training on transportation safety in order to transport a child whose chronological or developmental age is younger than nine years old. This training is in addition to other required training hours.]

(b) The [employee must obtain these] two clock hours of transportation safety training is exclusive of any requirements for orientation, pre-service training, and annual training [~~prior to transporting children~~].

§746.1317. *Must the training for my caregivers and the director meet certain criteria?*

(a) Training may include clock hours or CEUs provided by:

(1) A training provider registered with the Texas Early Childhood Professional Development System Training Registry, maintained by the Texas Head Start State Collaboration Office;

(2) An instructor who teaches early childhood development or another relevant course at a secondary school or institution of higher education accredited by a recognized accrediting agency;

(3) An employee of a state agency with relevant expertise;

(4) A physician, psychologist, licensed professional counselor, social worker, or registered nurse;

(5) A person who holds a generally recognized credential or possesses documented knowledge relevant to the training the person will provide;

(6) A director at your child-care center who has demonstrated core knowledge in child development and caregiving if:

(A) Providing training to the director's own staff; and

(B) Your child-care center has not been on probation, suspension, emergency suspension, or revocation in the two years preceding the training or been assessed an administrative penalty in the two years preceding the training; or

(7) A person who has at least two years of experience working in child development, a child development program, early childhood education, a childhood education program, or a Head Start or Early Head Start program and:

(A) Has a current Child Development Associate (CDA) credential; or

(B) Holds at least an associate's degree in child development, early childhood education, or a related field.

(b) Training may include clock hours or CEUs obtained through self-instructional materials, if the materials were developed by a person who meets one of the qualifications in subsection (a) of this section.

(c) Instructor-led [All training, including instructor-led] and self-instructional training, but not self-study training, must include:

(1) Specifically stated learning objectives;

(2) A curriculum, which includes experiential or applied activities;

(3) An evaluation/assessment tool to determine whether the person has obtained the information necessary to meet the stated objectives; and

(4) A certificate of successful completion from the training source.

§746.1329. *What documentation must I provide to Licensing to verify that training requirements have been met?*

(a) Except as provided in this section, you must maintain original certificates documenting pediatric first aid, pediatric CPR [CPR/first-aid] and annual training in each employee's personnel record at the child-care center.

(b) For annual training to [Tø] be counted toward compliance with the minimum standards, the trainer or training source must provide the participant with an original certificate or letter showing:

(1) The participant's name;

(2) Date of the training;

(3) Title/subject of the training;

(4) The trainer's name, or the source of the training for self-instructional training;

(5) The trainer's qualifications, in compliance with §746.1317 of this division [title] (relating to Must the training for my caregivers and the director meet certain criteria?); and

(6) Length of the training specified in clock hours, CEUs, or college credit hours, as appropriate.

(c) [~~(b)~~] For pediatric first aid and pediatric CPR to count toward compliance with the minimum standards, the documentation [Documentation of CPR/first-aid training] must include the same information in subsection (b) [~~(a)~~] of this section, and must also include the expiration date of the training, as determined by the organization providing the training. A photocopy of the original first aid and CPR [CPR/first-aid] certificate or letter may be maintained in the personnel record, as long as the employee can provide an original document upon request by Licensing.

(d) [~~(e)~~] For orientation and pre-service training, you [Yøu] must obtain a signed and dated statement from the employee and the person providing the orientation or [~~and~~] pre-service training stating the employee has received the orientation or [~~and~~] pre-service training, or you may obtain documentation (original certificates or letters) as specified in subsection (b) [~~(a)~~] of this section.

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

Filed with the Office of the Secretary of State on June 6, 2018.

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Karen Ray  
Chief Counsel

Health and Human Services Commission

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For further information, please call: (512) 438-5559



## 26 TAC §746.1315

The repeal is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The repeal implements Human Resources Code §42.042.

§746.1315. *Who must have first-aid and CPR training?*

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

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## SUBCHAPTER N. FIELD TRIPS

### 26 TAC §746.3001

The amendment is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §42.042.

*§746.3001. May I take children away from my child-care center for field trips?*

Yes. You must ensure the safety of all children on field trips or excursions and during any transportation provided by the child-care center. Anytime you take a child on a field trip, you must comply with each of the following requirements:

(1) You must have signed permission from the parent to take a child on a field trip, including permission to transport the child, if applicable;

(2) One or more caregivers must carry emergency medical consent forms and emergency contact information for each child on the field trip;

(3) Caregivers must have a written list of all children on the field trip and must check the list frequently to account for the presence of all children;

(4) Caregivers must have a first-aid kit immediately available on field trips;

(5) Caregivers must have a copy of a child's food allergy emergency plan and allergy medications, if applicable;

(6) Each child must wear a shirt, nametag, or other identification listing the name of the child-care center and the child-care center's telephone number;

(7) Each caregiver must be easily identifiable by all children on the field trip by wearing a hat, child-care center tee-shirt, brightly-colored clothes, or other easily spotted identification;

(8) Each caregiver supervising a field trip must have transportation available, a communication device such as a cellular phone or two-way radio available, or an alternate plan for transportation at the field-trip location in case of emergency; and

(9) One or more caregivers per group of children must have current training in pediatric first aid and pediatric CPR [Caregivers with training in CPR and first aid with rescue breathing and choking must be present on the field trip].

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

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## SUBCHAPTER O. GET-WELL CARE PROGRAMS

### 26 TAC §746.3117

The amendment is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §42.042.

*§746.3117. Do caregivers in my get-well care program require special training?*

Yes, in addition to the orientation, pre-service training, pediatric first aid, pediatric CPR, and annual training required of caregivers in this chapter, all get-well care program caregivers must have[-]

{(1) Have current certification in CPR and first aid, including rescue breathing and choking, notwithstanding the training specified in §746.1315 of this title (relating to Who must have first-aid and CPR training?); and

{(2) [Have] five additional hours of annual training in prevention and control of communicable diseases and care of ill children for a total of 29 hours per year.

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

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## CHAPTER 747. MINIMUM STANDARDS FOR CHILD-CARE HOMES

The Texas Health and Human Services Commission (HHSC) proposes amendments to §§747.901, 747.1007, 747.1107, 747.1207, 747.1209, 747.1301, 747.1303, 747.1305, 747.1309, 747.1314, 747.1327, 747.1403, and 747.2901; new §747.1313; and the repeal of §747.1307 and 747.1313 in Title 26, Chapter 747, Minimum Standards for Child-Care Homes. The amendments, new section, and repeals implement needed changes to comply with requirements in the Child Care and Development Block Grant Act (CCDBG) of 2014 related to orientation, initial, and ongoing training requirements for employees in child care operations.

### BACKGROUND AND PURPOSE

The purpose of the amendments, new section and repeals is to implement the CCDBG of 2014.

The CCDBG of 2014 (the "Act") is the first comprehensive revision of the Child Care Development Fund (CCDF) program since 1998. (The CCDF is codified in 42 USC §9857 et seq.) The Texas Workforce Commission (TWC) administers the CCDF, which is the primary federal funding source devoted to

providing low-income families with access to child care. The Act made significant reforms to the CCDF program to raise the health, safety, and quality of child care by mandating that states comply with a multitude of additional requirements, including health and safety requirements and training on those topics, in order to continue to receive the CCDF funding. Although TWC is the lead agency for determining eligibility and distributing the subsidy monies, Child Care Licensing (CCL), a department of the Health and Human Services Commission, is the agency responsible for licensing child care operations, establishing health and safety regulations, and monitoring eligible operations for compliance.

New rules implementing the CCDBG background checks and health and safety requirements were implemented on September 1, 2016. These amendments, new section, and repeals further implement the CCDBG health and safety requirements to make sure the HHSC minimum standards are as consistent as possible with the CCDBG requirements. The amendments, new section, and repeals: (1) require caregivers and directors to receive training within 90 days of employment in pediatric first aid with rescue breathing and choking and pediatric cardiopulmonary resuscitation (CPR), and the training must be ongoing; (2) clarify that training regarding child abuse and neglect is related to child maltreatment, in order to be more consistent with federal health and safety training topic and the state statutory language; (3) require caregivers to receive orientation in understanding the developmental stages of children; (4) require caregivers and primary caregivers to receive annual training in the prevention, recognition, and reporting of child maltreatment; (5) clarify that primary caregivers must receive training in transportation safety if the operation transports children who are chronologically or developmentally younger than nine years old; (6) streamline and reduce redundancies in rules regarding training requirements; and (7) update language for better readability and understanding.

A workgroup meeting was held on February 9, 2018, to obtain stakeholder input and feedback regarding the development of the proposed rules. The proposed rules were discussed and several rules were updated based on the comments.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §747.901: (1) updates the description of Licensing background check rules by substituting a reference to the location of the rules; and (2) replaces the phrase "abuse and neglect" with the term "maltreatment" to be more consistent with the required federal health and safety training topic and the state statutory language.

The proposed amendment to §747.1007: (1) adds certain training requirements to be qualified to be a primary caregiver of a registered child-care home, specifically pediatric first aid and pediatric CPR, the prevention, recognition, and reporting of child maltreatment, and the developmental stages of children; (2) updates language of the rule for consistency with required federal health and safety training topics; and (3) updates a citation.

The proposed amendment to §747.1107: (1) adds certain training requirements to be qualified to be a primary caregiver of a licensed child-care home, specifically pediatric first aid and pediatric CPR, the prevention, recognition, and reporting of child maltreatment, and the developmental stages of children; (2) updates language of the rule for consistency with required federal health and safety training topics; (3) and updates a citation.

The proposed amendment to §747.1207: (1) clarifies that the minimum qualifications for an assistant caregiver must be met before the assistant caregiver is counted in the child/caregiver ratio; (2) moves the exceptions found in §747.1211 to the paragraphs relating to the qualifications requiring a caregiver to be 18 years old and having a high school diploma; and (3) updates a citation.

The proposed amendment to §747.1209: (1) clarifies that the minimum qualifications for a substitute caregiver must be met before the substitute caregiver is counted in the child/caregiver ratio; (2) clarifies the language of the rule for better readability and understanding; and (3) adds updated citations where appropriate.

The proposed amendment to §747.1301: (1) replaces the phrase "abuse and neglect" with the term "maltreatment" to be more consistent with the required federal health and safety training topic and the state statutory language; (2) requires understanding the developmental stages of children be covered as a topic in caregiver orientation; and (3) updates language throughout for consistency with other chapters.

The proposed amendment to §747.1303: (1) makes the rule applicable to primary caregivers in addition to assistant and substitute caregivers; (2) adds requirements for when required training must be completed; (3) clarifies the language of the rule for better readability and understanding; (4) updates citations; and (5) updates the numbering within the chart.

The proposed amendment to §747.1305: (1) changes the rule title to better reflect the content; (2) adds a requirement for assistant and substitute caregivers to receive annual training related to the prevention, recognition, and reporting of child maltreatment; (3) updates language of the rule to be consistent with the required federal health and safety training topics; and (4) reorganizes and clarifies the language of the rule for better readability and understanding.

The proposed repeal of §747.1307 is to streamline and reduce redundancy in rules because the content is already included in §747.1303 and §747.1309.

The proposed amendment to §747.1309: (1) changes the rule title to better reflect the content; (2) adds a requirement for a primary caregiver to receive annual training related to the prevention, recognition, and reporting of child maltreatment; (3) updates language of the rule for consistency with required federal health and safety training topics; and (4) reorganizes and clarifies language of the rule for better readability and understanding.

The proposed repeal of §747.1313 deletes the rule, because the content has been incorporated and updated in new §747.1313.

Proposed new §747.1313: (1) requires the primary caregiver, substitute caregiver, and assistant caregiver to have current training in pediatric first aid with rescue breathing and choking and pediatric CPR; (2) retains a provision outlining that pediatric CPR must adhere to the guidelines established by the American Heart Association; and (3) clarifies that blended learning is allowed for CPR.

The proposed amendment to §747.1314: (1) clarifies the requirement for primary caregivers and employees to receive two hours of annual training in transportation safety if the home transports children whose chronological or development age is younger than nine years old; and (2) clarifies that transportation safety training is exclusive of any requirements for orientation, pre-service training, or annual training.

The proposed amendment to §747.1327: (1) updates references to first aid and CPR training to specify that the training must be in pediatric first aid and pediatric CPR; and (2) updates the wording of the rule for better readability and understanding.

The proposed amendment to §747.1403 replaces the phrase "abuse and neglect" with the term "maltreatment" to be more consistent with the required federal health and safety training topic and the state statutory language.

The proposed amendment to §747.2901 updates a requirement regarding field trips, specifically that at least one caregiver per group of children on a field trip must have current training in pediatric first aid and pediatric CPR.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the sections will be in effect, there is a possibility of additional costs because the state provides subsidies for child care through some state agencies. Information is not available to determine if there would be a fiscal impact as a result of these regulations on the providers from whom the state purchases care.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the amendments, new section, and repeals will be in effect implementation of the proposed amended, new, and repealed rules:

- (1) will not create or eliminate a government program;
- (2) will not affect the number of employee positions;
- (3) will not require an increase or decrease in future legislative appropriations;
- (4) will not affect fees paid to the agency;
- (5) will create a new rule;
- (6) will expand some existing rules;
- (7) will increase the number of individuals subject to the rules; and
- (8) will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there will be an adverse economic effect on small businesses or micro-businesses, but not rural communities. This adverse economic effect on small businesses or micro-businesses is only in relation to §§747.1007(5), 747.1207(7), 747.1301(9), 747.1303(2), and 747.1313.

Chapter 2006 of the Government Code defines a small business as one that is for-profit and has fewer than 100 employees. A small business that has no more than 20 employees is also defined as a micro-business. In Fiscal Year 2017 there were 2,208 Licensed Child Care Homes (LCCHs) and 5,410 Registered Child Care Homes (RCCHs). CCL is assuming that virtually all of the homes (both LCCHs and RCCHs) meet the definition of a small business and a micro-business.

Any fiscal impact to these homes results from the training costs and wages paid to staff for their time to take the training or to develop the training.

CCL staff developed the methodologies used to calculate the fiscal impact of these rules. The impact was calculated using cost

research conducted by staff and assumptions regarding child-care practices. The key assumptions and methodologies are described in detail below, as these underlie the individual impact calculations that are projected to have a fiscal impact on at least some homes.

For LCCHs and RCCH, the staff time required to comply with the standards will impact assistant caregivers. For assistant caregivers in homes in Texas, CCL is using a \$9.94 per hour mean wage. For a primary caregiver, CCL is using a \$23.28 per hour mean wage. These per hour mean wages were obtained from the current Texas Workforce Commission, Texas Wages and Employment Projections, website for the job titles of "child care worker" and "educational administrator for preschool and child care centers", respectively.

Fiscal Impact for Proposed §747.1007(7)(A) and (E) and §747.1107(7)(A) and (E): These sections add to the qualification requirements for a primary caregiver in a RCCH and LCCH, respectively (the primary caregiver is also the person that obtains the registration/license for the home). The new qualification requires additional training in prevention, recognition, and reporting of child maltreatment and understanding the developmental stages of children. Training in these two areas will be needed before the primary caregiver will be able to obtain the registration/license. There are two possible costs associated with the trainings: the costs for the actual training and the costs for the time it takes a primary caregiver to participate in the trainings. There are free training modules available that cover both of the training topics regarding child maltreatment and developmental stages of children. In addition, while attending or participating in these trainings will take some time, it is not assumed that the primary caregiver as the applicant will pay oneself for this time. Therefore, CCL assumes there will be no additional costs associated with this rule change.

Fiscal Impact for Proposed §§747.1007(5), 747.1207(7), 747.1303(2) and 747.1313: These sections require all caregivers (primary, substitute, and assistant) to have current training in both first aid and CPR. Currently, only the primary and substitute caregiver must have current training in first aid and CPR. (Note: There are some differences regarding the type of first aid and CPR training that is required by the current rules and the proposed rules (for example, "pediatric first aid" versus "first aid" and "pediatric CPR" versus "CPR for children and adults"). For purposes of this fiscal note, these differences will not be considered.)

The fiscal impact this change will have on each LCCH or RCCH will vary depending upon several individual factors, including: (1) the number of assistant caregivers a home has; (2) whether a home already requires every caregiver to have training in first aid and/or CPR; and (3) whether a caregiver is taking the training for the first time or being recertified.

Because training in first aid and CPR is a health and safety issue, CCL assumes that many homes are already requiring each assistant caregiver to have training in first aid and CPR and will have no increase in costs. CCL also assumes that many homes either do not use assistant caregivers or use them sparingly and will have no or limited increase in costs.

For homes that do not require assistant caregivers to have first aid and CPR training, then each assistant caregiver will need first aid training and CPR training.

Free, online training is available for first aid (for example, AgriLife has a free, two hour training online). For purposes of this



fiscal note, CCL assumes that there are no training costs for assistant caregivers to take the first aid training. However, homes will need to pay each assistant caregiver that is not currently being trained in first aid for the two hours to take the training. CCL assumes a home will pay an assistant caregiver an average of \$9.94 per hour to take the two hour training, which would be \$19.88 per assistant caregiver that is not currently being trained in first aid. Depending upon the training, recertification may be needed every one to three years. CCL assumes that the assistant caregivers that are not currently being trained in first aid will need to be recertified every two years at a similar cost.

For CPR training the costs are approximately \$45, which includes an e-learning course on CPR and a CPR skills test. The costs can be higher for some classes (i.e. \$68, \$90, and \$110), which generally also include first aid training. The length of the CPR training (without the first aid training) is usually three to five hours (shorter time frames are required when a caregiver is being recertified). For purposes of this fiscal note, CCL assumes that assistant caregivers will take the CPR training separate and apart from the first aid training, and the costs for the initial CPR training will be approximately \$45 and take approximately five hours. CCL assumes each home will pay the \$45 training costs for each assistant caregiver that is not currently being trained in CPR. In addition, CCL assumes each home will pay an assistant caregiver an average of \$9.94 per hour to take the five hour training, which would be \$49.70 per assistant caregiver that is not currently being trained in CPR. The total amount to receive initial CPR training is \$94.70 for a caregiver. CCL assumes that the assistant caregivers that are not currently being trained in CPR will also need to be recertified every two years. However, the costs to be recertified will be less, because usually only a two hour course is needed to be recertified.

Fiscal Impact for Proposed §747.1301(9). This section adds a topic, understanding the developmental stages of children, to the caregiver orientation requirements for homes. There are costs associated with modifying the current orientation to include this additional topic. This section does not mandate a time frame for training on these nine topics. However, for purposes of estimating a cost for developing orientation on these topics, it is assumed that orientation on this topic will be for 30 minutes. A common industry standard is 40 hours to develop one hour of curriculum for face-to-face training. This same standard is being used to modify the orientation. It is anticipated that a primary caregiver, or curriculum developer that is similarly paid, will spend an average of 20 hours to develop the 30 minute orientation on this topic. Therefore, the approximate one-time cost for the development of the orientation is approximately \$465.60 (20 X \$23.28). Alternatively, training regarding child development can be found online for free or at a low cost (for example, AgriLife has several 2-hour trainings regarding child development for free and other more in-depth trainings for low cost, such as a training regarding healthy brain development for \$7.50).

Fiscal Impact for Proposed §747.1305(c) and §747.1309(c): These two sections add one clock hour of annual training for all caregivers (substitute, assistant, and primary) that must focus on prevention, recognition, and reporting of child maltreatment. There is no increase in the number of annual training hours required for the caregivers; there is only a change in the content of the required training. There is also free, online training that is currently available regarding the prevention, recognition, and reporting of child maltreatment. Since there is no increase in training hours and free training is available, CCL assumes there will be no additional costs associated with this rule change.

Regulatory Flexibility Analysis: A regulatory flexibility analysis is not required for the proposed rules with fiscal implications because the proposed rules are specifically required by federal law (The CCDBG of 2014). Therefore, the proposed rules are consistent with the health and safety of children, whom the law was intended to protect.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There is an anticipated economic costs to persons who are required to comply with the sections as proposed. For the specifics, please see the discussion under the previous Small Business, Micro-Business, and Rural Community Impact Analysis.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules: (1) are necessary to protect the health, safety, and welfare of the residents of Texas; and (2) are necessary to receive a source of federal funds and comply with federal law.

#### PUBLIC BENEFIT

Jean Shaw, Associate Commissioner for CCL, has determined that for each year of the first five years that the amendments, new section, and repeals are in effect, the public will benefit from the proposed amendments, new section, and repeals. The public benefit anticipated as a result of enforcing or administering the sections will be: (1) safer child care as a result of more stringent and specific training requirements; (2) a clearer understanding of the training requirements; (3) HHSC will be in compliance with the Act; and (4) low income families will receive improved quality child care and be able to continue to receive subsidy funding from the CCDBG, because child care providers will be in compliance with federal laws and regulations.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Electronic comments may be submitted to [CCLrules@hhsc.state.tx.us](mailto:CCLrules@hhsc.state.tx.us).

Written comments on the proposal may be submitted to Lee Roberts, Lead Policy Analyst, (18R023), Child Care Licensing, Health and Human Services Commission E-550, P.O. Box 149030, Austin, Texas 78714-9030.

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. If the last day to submit comments falls on a Saturday, Sunday, or holiday, then comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rules R18023" in the subject line.

Questions about the content of this proposal may be directed Lee Roberts (512) 438-3246 in the Child Care Licensing department of HHSC or e-mail her at [Lee.Roberts@hhsc.state.tx.us](mailto:Lee.Roberts@hhsc.state.tx.us).

SUBCHAPTER C. RECORD KEEPING  
DIVISION 4. RECORDS ON CAREGIVERS  
AND HOUSEHOLD MEMBERS

26 TAC §747.901

STATUTORY AUTHORITY

The amendment is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §42.042.

§747.901. *What information must I maintain in my personnel records?*

You must keep at least the following at the child-care home for each assistant caregiver and substitute caregiver, as specified in this chapter:

- (1) Documentation showing the dates of the first and last day on the job;
- (2) Documentation showing how the caregiver meets the minimum age and education qualifications, if applicable;
- (3) A copy of a health card or physician's statement verifying the caregiver is free of active tuberculosis, if required by the regional Texas Department of State Health Services TB program or local health authority;
- (4) A notarized Licensing *Affidavit for Applicants for Employment* form as specified in Human Resources Code, §42.059;
- (5) A record of training hours;
- (6) Proof of request for all background checks required under 40 TAC Chapter 745, Subchapter F (relating to Background Checks) [~~Background Checks~~];
- (7) A copy of a photo identification;
- (8) A copy of a current driver's license for each person or caregiver that transports a child in care; and
- (9) A statement signed and dated by the caregiver in a licensed child-care home verifying the date the caregiver attended training during orientation that includes an overview regarding the prevention, recognition, and reporting of child maltreatment [~~abuse and neglect~~], as specified in §747.1301 of this chapter [~~title~~] (relating to What must orientation for caregivers at my child-care home include?)

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

Filed with the Office of the Secretary of State on June 6, 2018.

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Karen Ray

Chief Counsel

Health and Human Services Commission

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For further information, please call: (512) 438-5559



SUBCHAPTER D. PERSONNEL

DIVISION 1. PRIMARY CAREGIVER  
QUALIFICATIONS FOR A REGISTERED  
CHILD-CARE HOME

26 TAC §747.1007

The amendment is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §42.042.

§747.1007. *What qualifications must I meet to be the primary caregiver of a registered child-care home?*

Except as otherwise provided in this division, you must:

- (1) Be at least 21 years old;
- (2) Have a:
  - (A) High school diploma; or
  - (B) High school equivalent;
- (3) Have a certificate of completion of the Licensing pre-application course within one year prior to your application date;
- (4) Meet the requirements in Subchapter F of Chapter 745 of this title (relating to Background Checks);
- (5) Have a current certificate of training in pediatric [certification in CPR and] first aid and pediatric CPR as specified in §747.1313 of this subchapter (relating to Who must have pediatric first-aid and pediatric CPR training?) [~~with rescue breathing and choking~~];
- (6) Have a current record of a tuberculosis (TB) examination showing you are free of contagious TB, if required by the Texas Department of State Health Services or local health authority; and
- (7) Have proof of training in the following:
  - (A) Prevention, recognition, and reporting of child maltreatment, including:
    - (i) Factors indicating a child is at risk for abuse or neglect;
    - (ii) Warning signs indicating a child may be a victim of abuse or neglect;
    - (iii) Procedures for reporting child abuse or neglect;
    - (iv) Community organizations that have training programs available to employees, children, and parents.
  - (B) Recognizing and preventing shaken baby syndrome and abusive head trauma;
  - (C) [~~(B)~~] Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS);
  - (D) [~~(C)~~] Understanding early childhood brain development;
  - (E) Understanding the developmental stages of children;
  - (F) [~~(D)~~] Emergency preparedness;

(G) ~~(E)~~ Preventing and controlling the spread of communicable diseases, including immunizations;

(H) ~~(F)~~ Administering medication, if applicable, including compliance with §747.3603 of this chapter ~~[title]~~ (relating to What authorization must I obtain before administering a medication to a child in my care?);

(I) ~~(G)~~ Preventing and responding to emergencies due to food or an allergic reaction;

(J) ~~(H)~~ Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical ~~[electric]~~ hazards, bodies of water, and vehicular traffic;

(K) ~~(I)~~ Handling, storing, and disposing of hazardous materials including compliance with §747.3221 of this chapter ~~[title]~~ (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?); and

(L) ~~(J)~~ Precautions in transporting children if your child-care home plans to transport a child whose chronological or developmental age is younger than nine years old.

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

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Karen Ray

Chief Counsel

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For further information, please call: (512) 438-5559



## DIVISION 2. PRIMARY CAREGIVER QUALIFICATIONS FOR A LICENSED CHILD-CARE HOME

### 26 TAC §747.1107

The amendment is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §42.042.

*§747.1107. What qualifications must I meet to be the primary caregiver of a licensed child-care home?*

Except as otherwise provided in this division, you ~~[a primary caregiver for a licensed child-care home]~~ must:

(1) Be at least 21 years of age;

(2) Have a:

(A) High school diploma; or

(B) High school equivalent;

(3) Have a certificate of completion of the Licensing pre-application course within one year prior to your application date;

(4) Meet the requirements in Subchapter F of Chapter 745 of this title (relating to Background Checks);

(5) Have a current certificate of training in pediatric [certification in CPR and] first aid and pediatric CPR as specified in §747.1313 of this subchapter (relating to Who must have pediatric first-aid and pediatric CPR training?); [with rescue breathing and choking];

(6) Have a current record of a tuberculosis (TB) examination showing you are free of contagious TB, if required by the Texas Department of State Health Services or local health authority;

(7) Have proof of training in the following:

(A) Prevention, recognition, and reporting of child maltreatment, including:

(i) Factors indicating a child is at risk for abuse or neglect;

(ii) Warning signs indicating a child may be a victim of abuse or neglect;

(iii) Procedures for reporting child abuse or neglect;  
and

(iv) Community organizations that have training programs available to employees, children, and parents;

(B) Recognizing and preventing shaken baby syndrome and abusive head trauma;

(C) ~~(B)~~ Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS);

(D) ~~(C)~~ Understanding early childhood brain development;

(E) Understanding the developmental stages of children;

(F) ~~(D)~~ Emergency preparedness;

(G) ~~(E)~~ Preventing and controlling the spread of communicable diseases, including immunizations;

(H) ~~(F)~~ Administering medication, if applicable, including compliance with §747.3603 of this chapter ~~[title]~~ (relating to What authorization must I obtain before administering a medication to a child in my care?);

(I) ~~(G)~~ Preventing and responding to emergencies due to food or an allergic reaction;

(J) ~~(H)~~ Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical ~~[electric]~~ hazards, bodies of water, and vehicular traffic;

(K) ~~(I)~~ Handling, storing, and disposing of hazardous materials including compliance with §747.3221 of this chapter ~~[title]~~ (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?); and

(L) ~~(J)~~ Precautions in transporting children if your child-care home plans to transport a child whose chronological or developmental age is younger than nine years old; and

(8) Have one of the following combinations of education and experience in a licensed child-care center, or in a licensed or registered child-care home, as defined in §747.1113 of this division ~~[title]~~ (relating to What constitutes experience in a licensed child-care center, or in a licensed or registered child-care home?):

Figure: 26 TAC §747.1107(8)  
[Figure: 26 TAC §747.1107(8)]

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

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Karen Ray

Chief Counsel

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### DIVISION 3. ASSISTANT AND SUBSTITUTE CAREGIVERS

#### 26 TAC §747.1207, §747.1209

The amendments are proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendments implement Human Resources Code §42.042.

§747.1207. *What minimum qualifications must an assistant caregiver meet?*

A person must meet the following qualifications in order to be an assistant caregiver who is counted in the child/caregiver ratio [Except as otherwise provided in this division, an assistant caregiver must]:

(1) Be 18 years old, except as provided by §747.1211 of this division (relating to When may I employ a person under the age of 18 or a person who does not have a high school diploma or equivalent as a caregiver?);

(2) Except as provided by §747.1211 of this division, have [Have] a:

(A) High school diploma;

(B) High school equivalent; or

(C) High school certificate of coursework completion, as defined in Texas Education Code, §28.025(d);

(3) Have completed orientation to your child-care home;

(4) Meet the requirements in 40 TAC Chapter 745, Subchapter F (relating to Background Checks);

(5) Have a current record of a tuberculosis (TB) examination showing the caregiver is free of contagious TB, if required by the Texas Department of State Health Services or local health authority; and

(6) Complete a notarized Licensing *Affidavit for Applicants for Employment* form as specified in Human Resources Code, §42.059.

§747.1209. *What minimum qualifications must a substitute caregiver meet?*

A person must meet the following qualifications in order to be a substitute caregiver who is counted in the child/caregiver ratio:

(1) Comply [A substitute caregiver must comply] with all of the minimum qualifications for an assistant caregiver, as specified in §747.1207 of this division (relating to What minimum qualifications must an assistant caregiver meet?); and

(2) Have training in pediatric first aid and pediatric CPR as required by §747.1313 of this subchapter (relating to Who must have pediatric first-aid and pediatric CPR?) [must also have current certification in CPR and first aid with rescue breathing and choking].

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

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Karen Ray

Chief Counsel

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### DIVISION 4. PROFESSIONAL DEVELOPMENT

#### 26 TAC §§747.1301, 747.1303, 747.1305, 747.1309, 747.1313, 747.1314, 747.1327

The amendments and new section are proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendments and new section implement Human Resources Code §42.042.

§747.1301. *What must orientation for caregivers at my child-care home include?*

Orientation for caregivers at your child-care home must include at least the following:

(1) An overview of the minimum standards found in this chapter;

(2) An overview of your operational policies, including discipline and guidance practices and procedures for the release of children, and the provision of copies of these practices and procedures;

(3) An overview regarding the prevention, recognition, and reporting of child maltreatment [abuse and neglect], including:

(A) Factors indicating a child is at risk of abuse or neglect;

(B) Warning signs indicating a child may be a victim of abuse or neglect;

(C) Procedures for reporting child abuse or neglect; and

(D) Community organizations that have training programs available to child-care staff, children, and parents;

(4) An overview of your home's Emergency Preparedness Plan;

(5) Locating and using fire extinguishers and first-aid equipment;

(6) Recognizing and preventing shaken baby syndrome and abusive head trauma;

(7) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS);

(8) Understanding early childhood brain development;

(9) Understanding the developmental stages of children;

(10) [(9)] Preventing and controlling the spread of communicable diseases, including immunizations;

(11) [(10)] Administering medication, if applicable, including compliance with §747.3603 of this chapter [title] (relating to What authorization must I obtain before administering a medication to a child in my care?);

(12) [(11)] Preventing and responding to emergencies due to food or an allergic reaction;

(13) [(12)] Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical [electrie] hazards, bodies of water, and vehicular traffic;

(14) [(13)] Handling, storing, and disposing of hazardous materials including compliance with §747.3221 of this chapter [title] (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?); and

(15) [(14)] Precautions in transporting children if your child-care home transports a child whose chronological or developmental age is younger than nine years old.

§747.1303. *What training must I ensure that my caregivers have within certain timeframes?*

You must make sure that each caregiver has the training within the timeframe required in the following chart:

Figure: 26 TAC §747.1303

[Figure: 26 TAC §747.1303]

§747.1305. *What areas of training [What topics] must the annual training for substitute and assistant caregivers cover [include]?*

(a) Each caregiver counted in the child/caregiver ratio on more than ten separate occasions in one training year, as specified in §747.1311 of this division [title] (relating to When must the annual training be obtained?) must obtain annual training relevant to the age of the children for whom the caregiver provides care.

[(b) Annual training is exclusive of any requirements for orientation, first aid and CPR training, transportation safety training, and any training received through a high school child-care work-study program.]

(b) [(e)] At least six clock hours of the annual training hours must be in one or more of the following topics:

(1) Child growth and development;

(2) Guidance and discipline;

(3) Age-appropriate curriculum; and

(4) Teacher-child interaction.

(c) [(d)] If your home provides care for a child younger than 24 months, one hour of the annual training hours must cover the following topics:

(1) Recognizing and preventing shaken baby syndrome and abusive head trauma;

(2) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS); and

(3) Understanding early childhood brain development.

(d) [(e)] While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:

(1) Emergency preparedness;

(2) Preventing and controlling the spread of communicable diseases, including immunizations;

(3) Administering medication, if applicable, including compliance with §747.3603 of this chapter [title] (relating to What authorization must I obtain before administering a medication to a child in my care?);

(4) Preventing and responding to emergencies due to food or an allergic reaction;

(5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical [electrie] hazards, bodies of water, and vehicular traffic; and

(6) Handling, storing, and disposing of hazardous materials including compliance with §747.3221 of this chapter [title] (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).

(e) [(f)] The remaining annual training hours must be in one or more of the following topics:

(1) Care of children with special needs;

(2) Child health (for example, nutrition and physical activity);

(3) Safety;

(4) Risk management;

(5) Identification and care of ill children;

(6) Cultural diversity for [of] children and families;

(7) Professional development (for example, effective communication with families and time and stress management);

(8) Topics relevant to the particular ages of children in care (for example, caregivers working with infants or toddlers should receive training on biting and toilet training);

(9) Planning developmentally appropriate learning activities;

(10) Observation and assessment;

(11) Attachment and responsive care giving; and

(12) Minimum standards and how they apply to the caregiver.

(f) [(g)] No more than 80% of the required annual training hours may come from self-instructional training. No more than three of those self-instructional hours may come from self-study training.

(g) Annual training is exclusive of any requirements for orientation, pediatric first aid and pediatric CPR training, transportation safety training, and any training received through a high school child-care work-study program.

§747.1309. *What areas of training must the [topics must my] annual training for the primary caregiver cover [include]?*

(a) You must obtain at least 30 clock hours of training each year relevant to the age of the children for whom you provide care.

~~[(b) The 30 clock hours of annual training are exclusive of any requirements for the Licensing pre-application course, first-aid and CPR training, and transportation safety training.]~~

~~(b) [(e)]~~ At least six clock hours of the annual training hours must be in one or more of the following topics:

- (1) Child growth and development;
- (2) Guidance and discipline;
- (3) Age-appropriate curriculum; and
- (4) Teacher-child interaction.

~~(c) [(d)]~~ If your home provides care for children younger than 24 months, one hour of the annual training hours must cover the following topics:

- (1) Recognizing and preventing shaken baby syndrome;
- (2) Understanding and using safe sleep practices and preventing sudden infant death syndrome (SIDS); and
- (3) Understanding early childhood brain development.

~~(d) [(e)]~~ While there are no clock hour requirements for the topics in this subsection, the annual training hours must also include training on the following topics:

- (1) Emergency preparedness;
- (2) Preventing and controlling the spread of communicable diseases, including immunizations;
- (3) Administering medication, if applicable, including compliance with §747.3603 of this chapter [title] (relating to What authorization must I obtain before administering a medication to a child in my care?);
- (4) Preventing and responding to emergencies due to food or an allergic reaction;
- (5) Understanding building and physical premises safety, including identification and protection from hazards that can cause bodily injury such as electrical [electrie] hazards, bodies of water, and vehicular traffic; and

(6) Handling, storing, and disposing of hazardous materials including compliance with §747.3221 of this chapter [title] (relating to Must caregivers wear gloves when handling blood or bodily fluids containing blood?).

~~(e) [(f)]~~ If you have:

- (1) Five or fewer years of experience as a primary caregiver in a licensed or registered child-care home, you must complete at least six of the annual training hours in management techniques, leadership, or staff supervision; or
- (2) More than five years of experience as a primary caregiver in a licensed or registered child-care home, you must complete at least three of the annual training hours in management techniques, leadership, or staff supervision.

~~(f) [(g)]~~ The remainder of annual training hours must be selected from the training topics specified in §747.1305(c)[(f)] of this chapter [title] (relating to What areas of training must the annual training for substitute and assistant caregivers cover?) [topics must the annual training for caregivers include?]).

~~(g) [(h)]~~ You may obtain clock hours or CEUs from the same sources as other caregivers.

~~(h) [(i)]~~ Training hours may not be earned for presenting training to other caregivers.

~~(i) [(j)]~~ No more than 80% of the required annual training hours may come from self-instructional training. No more than three of those self-instructional hours may come from self-study training.

~~(j) The 30 clock hours of annual training are exclusive of any requirements for the Licensing pre-application course, pediatric first aid and pediatric CPR training, and transportation safety training.~~

§747.1313. Who must have pediatric first-aid and pediatric CPR training?

(a) The primary caregiver, each substitute caregiver, and each assistant caregiver must have a current certificate of training with an expiration or renewal date in:

- (1) Pediatric first aid with rescue breathing and choking;
  - and
  - (2) Pediatric cardiopulmonary resuscitation (CPR).
- (b) The pediatric CPR:

(1) Must adhere to the guidelines for CPR for a layperson established by the American Heart Association, and consist of a curriculum that includes use of a CPR manikin and both written and hands-on skill-based instruction, practice, and testing; and

(2) May be provided through blended learning that utilizes online technology, including self-instructional training, as long as the criteria in paragraph (1) of this subsection is met.

§747.1314. What additional training must an employee and [a] caregiver have if the home transports children [in order to transport a child in care]?

(a) If the home transports children whose chronological or developmental age is younger than nine years old, two clock hours of annual transportation safety training is required for:

- (1) Each employee prior to transporting a child; and
- (2) The primary caregiver.

~~[(a) A caregiver must complete two hours of annual training on transportation safety in order to transport a child whose chronological or developmental age is younger than nine years old. This training is in addition to other required training hours.]~~

~~(b) The [caregiver must obtain these] two clock hours of transportation safety training is exclusive of any requirements for orientation, pre-service training, and annual training [prior to transporting children].~~

§747.1327. What documentation must I provide to Licensing to verify that training requirements have been met?

(a) Except as provided in this section, you must maintain original certificates documenting pediatric first aid, pediatric CPR, and annual training in each caregiver's personnel record at your child-care home.

(b) For annual training to [To] be counted toward compliance with the minimum standards, the trainer or training source must provide the participant with an original certificate or letter showing:

- (1) The participant's name;
- (2) Date of the training;

- (3) Title/subject of the training;
- (4) The trainer's name, or the source of the training for self-instructional training;
- (5) The trainer's qualifications, in compliance with §747.1315 of this division [title] (relating to Must child-care training meet certain criteria?); and
- (6) Length of the training specified in clock hours, CEUs, or college credit hours, as appropriate.

(c) [(b)] For pediatric first aid and pediatric CPR to count toward compliance with the minimum standards, the documentation [Documentation of CPR/first-aid training] must include the same information in subsection (b)[(a)] of this section, and must also include the expiration date of the training, as determined by the organization providing the training. A photocopy of the original first aid and CPR [CPR/first-aid] certificate or letter may be maintained in the personnel record, as long as the caregiver can provide an original document upon request by Licensing.

(d) [(e)] For orientation, you must [You may] obtain a signed and dated statement from the caregiver and the person providing the orientation stating the caregiver has received the orientation, or you may obtain documentation (original certificates) [use original certificates,] as specified in subsection (b) of this section [this division].

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

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 Chief Counsel  
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## DIVISION 4. PROFESSIONAL DEVELOPMENT

### 26 TAC §747.1307, §747.1313

The repeal is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The repeal implements Human Resources Code §42.042.

§747.1307. *What training must I have?*

§747.1313. *Who must have first-aid and CPR training?*

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

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 For further information, please call: (512) 438-5559



## DIVISION 5. HOUSEHOLD MEMBERS, VOLUNTEERS, AND PEOPLE WHO OFFER CONTRACTED SERVICES

### 26 TAC §747.1403

The amendment is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §42.042.

§747.1403. *What must orientation for household members at my child-care home include?*

The orientation for household members at your child-care home must include at least the following:

(1) An overview of your home's child-care policies, including discipline and guidance practices and the procedures for the release of children, and the provision of copies of these practices and procedures;

(2) An overview of symptoms of child maltreatment [abuse and neglect] and the responsibility for reporting these;

(3) The procedures to follow in handling emergencies. Emergencies include fire, explosion, tornado, toxic fumes, volatile individuals, and severe injury or illness of a child or adult; and

(4) The location and use of fire extinguishers and first-aid equipment.

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

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## SUBCHAPTER N. FIELD TRIPS

### 26 TAC §747.2901

The amendment is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §42.042.

§747.2901. *May I take children away from my child-care home for field trips?*

(a) Yes. You must ensure the children's safety on field trips and excursions and during any transportation provided by the child-care home. Anytime you take a child on a field trip, you must comply with each of the following requirements:

(1) You must have signed permission from the parent to take a child away from your child-care home, including permission to transport the child, if applicable;

(2) You must carry emergency medical consent forms and emergency contact information for each child on the field trip;

(3) You must have a written list of all children on the field trip and must check the list frequently to account for the presence of all children on the field trip;

(4) You must have a first-aid kit immediately available on all field trips;

(5) You must have a copy of a child's food allergy emergency plan and allergy medications, if applicable;

(6) Each child must wear a shirt, name tag, or other identification listing the name and telephone number of the child-care home;

(7) Each caregiver must be easily identifiable by all children on the field trip, by wearing a hat, specialized tee-shirt, brightly colored clothes, or other easily spotted identification;

(8) Each caregiver supervising a field trip must have transportation available, a communication device such as a cellular phone or two-way radio available, or an alternate plan for transportation at the field trip location in case of emergency; and

(9) You must ensure that a caregiver with current training in pediatric first aid and pediatric CPR [trained in CPR and first aid with rescue breathing and choking] is present on the field trip.

(b) A walk around the caregiver's neighborhood must comply only with paragraphs (2), (5) and (9) of subsection (a) of this section.

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

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## CHAPTER 749. MINIMUM STANDARDS FOR CHILD-PLACING AGENCIES

The Texas Health and Human Services Commission (HHSC) proposes an amendment to §749.41; new §§749.2470, 749.2471, and 749.2827; and the repeal of §749.2471 in Title 26, Chapter 749, Minimum Standards for Child-Placing Agencies. The amendment, new sections, and repeal relate to the definitions of pronouns, what steps must be taken to verify a foster home, how to convert a foster group home to a foster family home, and how long a current foster group home may continue to operate.

## BACKGROUND AND PURPOSE

The purpose of the amendment, new sections, and repeal is to implement House Bill (HB) 5 and HB 7, Section 78, which were both passed in the 85th Legislature, Regular Session, 2017. HB 5 moved the regulation of child care formerly provided by the Department of Family and Protective Services (DFPS) to HHSC. An amendment will clarify that Licensing is now a Department of HHSC. HB 7 prohibits a child-placing agency from verifying a foster group home after August 31, 2017, but allows a foster group home to continue to operate until HHSC adopts rules for the conversion or closure of the foster group home. A new rule will require child-placing agencies to either convert (re-verify) a foster group home to a foster family home or close the foster group home by August 31, 2019. A new rule will also clarify what steps a child-placing agency must take to re-verify a foster group home as a foster family home.

Stakeholder input and feedback were used in the development of the proposed rules relating to child-placing agencies converting a foster group home to a foster family home. A workgroup meeting was held on February 9, 2018. The proposed amendment, new sections, and repeal were posted for informal stakeholder comments on the Health and Human Services rulemaking website from March 9 - 23, 2018. No informal stakeholder comments were received.

## SECTION-BY-SECTION SUMMARY

The proposed amendment of §749.41 clarifies that when the pronoun "we," "us," or "our" or the title "Licensing" is used in Chapter 749, it no longer applies to the Licensing Division of DFPS, but applies to the Child Care Licensing Department of HHSC.

The proposed new §749.2470 explains the steps to verify a foster home and replaces the repeal of §749.2471, while updating the language of the rule for better readability and understanding.

The proposed new §749.2471 outlines the steps an agency must take in order to convert a foster group home to a foster family home, including using an addendum to complete a foster home screening update and issuing a foster family home verification certificate. The rule also clarifies that in certain situations some screening requirements do not have to be completed, including updating the floor plan, updating the photo of outside areas, re-inspecting the home, obtaining a new health and fire inspection, and re-submitting background checks.

The proposed repeal of §749.2471 deletes this rule and replaces it with new §749.2470, while updating the language of the rule for better readability and understanding.

The proposed new §749.2827 clarifies that while a foster group home that was verified before September 1, 2017 may continue to operate, the child-placing agency must convert the home to a foster family home or close the home by August 31, 2019.

## FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each of the first five years that the amendment, new sections, and repeal will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the rules as proposed.

## GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect implementation of the proposed amended, new, and repealed rules:



- (1) will not create or eliminate a government program;
- (2) will not affect the number of employee positions;
- (3) will not require an increase or decrease in future legislative appropriations;
- (4) will not affect fees paid to the agency;
- (5) will create a new rule;
- (6) will not expand an existing rule;
- (7) will not change the number of individuals subject to the rule; and
- (8) will not affect the state's economy.

**SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS**

Greta Rymal, Deputy Executive Commissioner for Financial Services, has also determined that there will be no adverse effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

**ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT**

There are no anticipated costs to persons who are required to comply with the rules as proposed.

**COSTS TO REGULATED PERSONS**

Texas Government Code §2001.0045 does not apply to these rules because the rules: (1) are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules; (2) are necessary to protect the health, safety, and welfare of the residents of Texas; and (3) do not impose a cost on regulated persons.

**PUBLIC BENEFIT**

Jean Shaw, Associate Commissioner for CCL, has determined that for each of the first five years that the amendment, new sections, and repeal are in effect, the public will benefit from the proposed rules. The anticipated public benefits will be that: (1) foster children will receive care and interaction in a smaller home environment; and (2) HHSC will be in compliance with the statutory changes implemented by the 85th Legislature, Regular Session, 2017.

**TAKINGS IMPACT ASSESSMENT**

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

**PUBLIC COMMENT**

Electronic comments may be submitted to [CCLrules@hhsc.state.tx.us](mailto:CCLrules@hhsc.state.tx.us).

Written comments on the proposal may be submitted to Gerry Williams, Rules Developer (18R022), Child Care Licensing, Health and Human Services Commission E-550, P.O. Box 149030, Austin, Texas 78714-9030.

To be considered, comments must be submitted no later than 30 calendar days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the

last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 18R022" in the subject line.

Questions about the content of this proposal may be directed to Gerry Williams at (512) 438-5559 in the Child Care Licensing Department of HHSC or e-mail him at [Gerry.Williams@hhsc.state.tx.us](mailto:Gerry.Williams@hhsc.state.tx.us).

**SUBCHAPTER B. DEFINITIONS AND SERVICES**

**DIVISION 1. DEFINITIONS**

**26 TAC §749.41**

**STATUTORY AUTHORITY**

The amendment is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §42.042 and HB 5 and HB 7, 85th Legislature, Regular Session, 2017, which correspond with the regulatory functions transferred from DFPS to HHSC.

*§749.41. What do certain pronouns mean in this chapter?*

The following words have the following meanings in this chapter:

(1) I, my, you, and your--An applicant or permit holder, unless otherwise stated.

(2) We, us, our, and Licensing--The Child Care Licensing Department [~~Division~~] of the Health and Human Services Commission (HHSC) [~~Department of Family and Protective Services (DFPS)~~].

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**SUBCHAPTER M. FOSTER HOMES: SCREENINGS AND VERIFICATIONS**

**DIVISION 3. VERIFICATION OF FOSTER HOMES**

**26 TAC §749.2470, §749.2471**

The new sections are proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services

agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The new sections implement Human Resources Code §42.042 and HB 5 and HB 7, 85th Legislature, Regular Session, 2017, which correspond with the regulatory functions transferred from DFPS to HHSC.

§749.2470. What must I do to verify a foster family home?

You must take the following steps to verify a foster family home:

(1) Complete and document the requirements for §749.2447 of this subchapter (relating to What information must I obtain for the foster home screening?);

(2) Complete and document the required interviews as specified in §749.2449 of this subchapter (relating to Whom must I interview when conducting a foster home screening?);

(3) Obtain the following:

(A) A floor plan of the home that shows the dimensions and purposes of all rooms in the home and identifies the indoor areas for children's use; and

(B) A sketch or photo of the outside areas that shows the buildings, driveways, fences, storage areas, gardens, recreation areas, and pools, ponds, or other bodies of water;

(4) Inspect the home to ensure and document that the home meets the appropriate rules of this chapter, including:

(A) Subchapter K of this chapter (relating to Foster Care Services: Daily Care, Problem Management); and

(B) Subchapter O of this chapter (relating to Foster Homes: Health and Safety Requirements, Environment, Space and Equipment), including a:

(i) Health inspection; and

(ii) Fire inspection;

(5) If the home will provide a transitional living program, ensure the home complies with the policies developed according to §749.125 of this chapter (relating to What policies must I develop for foster parents who offer a transitional living program?);

(6) Evaluate all areas required in this subchapter and make recommendations regarding the home's ability to care for and work with children with respect to a child's gender and age, the number of children, and the types of services to be provided;

(7) If there are any indicators of potential risk to children based on the assessment and evaluation of an area required in this subchapter, document the indicators and how you addressed them with the prospective foster family before approval and verification of the home;

(8) Obtain from the child placement management staff the review and approval of the home screening, and the recommended verification of the home; and

(9) Issue a verification certificate that specifies the:

(A) Name of the foster family home;

(B) Foster family home address and location;

(C) Foster family home's total capacity, which includes the biological and adopted children of the caregivers who live in the foster family home, any children receiving foster care or respite child-care, and any children for whom the family provides day care;

(D) Foster family home's foster care capacity, a subset of the total capacity, which includes only children placed for foster care or respite child-care;

(E) Gender and ages of children for which the home is verified to provide foster care or respite child-care;

(F) Types of services the foster family home will provide;

(G) Agency's main office or branch office, which issued the verification; and

(H) Expiration date of a time-limited verification, if applicable.

§749.2471. How do I convert a current foster group home verification to a foster family home verification?

(a) When you convert a home that you previously verified as a foster group home to a foster family home, you must:

(1) Complete a foster family home screening update by using an addendum; and

(2) Issue a foster family home verification certificate as specified in §749.2470(9) of this subchapter (relating to What must I do to verify a foster family home?);

(b) When you convert a home that you previously verified as a foster group home to a foster family home, you do not have to:

(1) Update the floor plan of the home that shows the dimensions and purposes of all rooms in the home and identifies the indoor areas for children's use, unless at the time of conversion there have been changes made to the home that require you to update the floor plan;

(2) Update the sketch or photo of the outside areas that shows the buildings, driveways, fences, storage areas, gardens, recreation areas, and pools, ponds, or other bodies of water, unless at the time of conversion there have been changes to the outside areas that require you to update the sketch or photo;

(3) Re-inspect the home to ensure and document that the home meets the rules in Subchapter K of this chapter (relating to Foster Care Services: Daily Care, Problem Management);

(4) Re-inspect the home to ensure and document that the home meets the rules in Subchapter O of this chapter (relating to Foster Homes: Health and Safety Requirements, Environment, Space and Equipment), including:

(A) A new health inspection, although you must update the inspection if a new health inspection is due at the time of the conversion; and

(B) A new fire inspection, although you must update the inspection if a new fire inspection is due at the time of the conversion; or

(5) Re-submit background checks for all applicable household members, although you must submit renewal background checks that are due at the time of the conversion.

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

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## 26 TAC §749.2471

The repeal is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The repeal implements Human Resources Code §42.042 and HB 5 and HB 7, 85th Legislature, Regular Session, 2017, which correspond with the regulatory functions transferred from DFPS to HHSC.

*§749.2471. What must I do to verify a foster home?*

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

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## SUBCHAPTER N. FOSTER HOMES: MANAGEMENT AND EVALUATION

### 26 TAC §749.2827

The new section is proposed under Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The new section implements Human Resources Code §42.042 and HB 5 and HB 7, 85th Legislature, Regular Session, 2017, which correspond with the regulatory functions transferred from DFPS to HHSC.

*§749.2827. How long may a current foster group home continue to operate?*

House Bill 7, 85th Legislature, Regular Session, 2017 prohibits you from verifying a foster group home after August 31, 2017. A foster group home that you previously verified can continue to operate until August 31, 2019, by which time you must:

- (1) Convert the home's verification to a foster family home verification; or
- (2) Close the home, which may include having the foster group home relinquish the verification to you.

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

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## TITLE 28. INSURANCE

### PART 1. TEXAS DEPARTMENT OF INSURANCE

#### CHAPTER 15. SURPLUS LINES INSURANCE

The Texas Department of Insurance proposes the repeal of 28 TAC Chapter 15, Subchapter A, §§15.1 - 15.25 and Subchapter B §15.101, concerning surplus lines insurance. In conjunction, TDI proposes to replace the existing chapter with new 28 TAC Chapter 15, Subchapter A §§15.1 - 15.9, Subchapter B §§15.101 - 15.115, Subchapter C §15.201, and Subchapter D §15.301, concerning surplus lines insurance.

#### EXPLANATION.

*Statutory.* The proposed repeal of existing Chapter 15 and proposed new Chapter 15 are necessary to implement legislation that amended Insurance Code Chapter 981, concerning surplus lines insurance. Specifically, the repeal and new sections implement: Senate Bill 951, 83rd Legislature, Regular Session (2013); House Bill 1405, 83rd Legislature, Regular Session (2013); SB 697, 83rd Legislature, Regular Session (2013); HB 1559, 85th Legislature, Regular Session (2017); and HB 2492, 85th Legislature, Regular Session (2017).

Senate Bill 951 amended Insurance Code Chapter 981 to comply with the Non-admitted and Reinsurance Reform Act (NRA). The NRA is a section of the Dodd-Frank Act that governs surplus lines insurance. SB 951 clarified that Chapter 981 applies to surplus lines insurance if the insured's home state is Texas, provides applicable definitions, exempts commercial purchasers, and states that agreements regarding uniform surplus lines insurance standards made between Texas and other states are binding. The proposed repeal of sections conflicting with SB 951 and proposed new §§15.1, 15.4, 15.110, 15.111, and 15.301 address requirements of SB 951.

House Bill 1405 amended Insurance Code Chapters 225 and 981 and relates to the collection of surplus lines insurance premium taxes for insurance placed with a managing underwriter. HB 1405 clarifies that in instances where more than one individual with a surplus lines license is involved in the transaction, the parties may enter into a written agreement at or before the time coverage is bound under the policy stipulating which party is responsible for the typical agent's duties. HB 1405 requires the surplus lines agent and the managing underwriter maintain a record of the agreement in connection with each policy to which the agreement applies. Proposed new §15.108 addresses requirements of HB 1405.

Senate Bill 697 amended Insurance Code Chapter 981 to allow non-resident surplus lines agents to do business in Texas without a property and casualty license provided they are in compliance with their domiciliary state's licensure requirements. To qualify, the non-resident surplus agent must also have a professional relationship with a licensed property and casualty agent in Texas who first conducts a search for available coverage from an admitted insurer in Texas before placing insurance through the non-resident surplus lines agent. The non-resident surplus lines agent must also supply sufficient information to the Commissioner demonstrating that the agents' home state does not require property and casualty licensure in order to obtain a surplus lines license. Proposed new §15.4 and §15.5 address requirements of HB 697.

House Bill 1559 amended Chapter 981 authorizes a surplus lines agent to offer coverage to an industrial insured that employs or retains a qualified risk manager, and either pays annual premiums of at least \$25,000 or employs at least 25 employees, without first satisfying Insurance Code §981.004(a)(1), relating to the availability of the full amount of required insurance and diligent effort. The bill also requires that the surplus lines agent keep certain records related to the insured's qualifications as an industrial insured. Proposed new §15.110 and §15.112 address requirements of HB 1559.

House Bill 2492 amended Chapter 981 to authorize a property and casualty insurance company organized under statutory provisions of the Insurance Code that has capital and surplus in an amount of at least \$15 million dollars to apply to TDI for designation as a domestic surplus lines insurer. Proposed new §15.5 and §15.301 address requirements of HB 2492.

*Rule Review.* TDI reviewed all sections of current Chapter 15 to assess whether the reasons for initially adopting the sections continue to exist in accordance with Government Code §2001.039. TDI determined that in most, but not all cases, the reasons for initially adopting the sections continue to exist. In those cases, TDI is proposing to repeal these sections and readopt the text in new sections, with changes necessary for consistency with current statutes. Following its review, the department determined that the reasons for adopting §§15.4, 15.6, 15.8, 15.18 - 15.20 and 15.101 no longer exist, so these sections are repealed.

*Proposed Repeal.* The proposed repeal of Chapter 15 is necessary so TDI can reorganize the chapter and adopt updated language. Currently, Chapter 15 has two subchapters: subchapter A is titled general provisions and contains 25 sections relating to multiple topics and subchapter B contains one long section relating to the Surplus Lines Stamping Office's plan of operation. Repealing these two subchapters and creating four new subchapters improves the chapter's organization by grouping sections by subject and it will also improve compliance because surplus lines agents, insurers, and the Surplus Lines Stamping Office (stamping office) will be able to easily identify requirements applicable to them.

Specifically, the proposal repeals Subchapter A, relating to general regulation of surplus lines insurance, because the subchapter has become too long and difficult to navigate and contains too many subjects. Subchapter A consists of §§15.1 - 15.25. TDI has repealed all these sections and readopted the text from some of the current sections in the proposed new subchapters as new sections. The proposal identifies whether a new proposed section contains text from a repealed section.

The proposal also repeals Subchapter B, relating to stamping office, which consists of §15.101, relating to the stamping office's plan of operation, so that the plan can be more efficiently amended. Insurance Code §981.153 requires the Commissioner approve by order the plan of operation, but it does not require the text of the plan be a rule. Procedures to amend the plan of operation are included in the proposed new rule in §15.201. Section 15.201 allows for public comment and requires approval of amendments by Commissioner order.

The current plan of operation will be approved by Commissioner order and posted on the stamping office's website at the same time the adoption of the repeal of Subchapter B occurs. If the current plan of operation is amended, the prior version will be maintained as required under the Texas State Records Retention Schedule in 13 TAC Chapter 6.

The proposal also repeals all tax rules related to the calculation or allocation of premium taxes because taxes are under the scope of the Texas Comptroller of Public Accounts. Repealing the tax rules in Chapter 15 avoids potential conflicts between TDI's and the Comptroller's rules. All tax rules related to surplus lines insurance are in 34 TAC Part 1.

Definitions for terms that are not used in the rules are not included in the proposed new chapter.

*Proposed New Chapter 15.* The proposed new Chapter 15 updates language contained in current Chapter 15 to clarify rule requirements for the industry and consumers. In addition to organizing sections into four subchapters, it also breaks requirements into new shorter subsections and paragraphs to improve readability.

In total, there are six completely new sections: §15.3, relating to regulation of policies; §15.7, relating to submission of applications, notices, and correspondence; §15.111, relating to required documentation supporting exempt commercial purchaser status; §15.112, relating to required documentation supporting industrial insured status; §15.114, relating to untimely filed policies; and §15.201, relating to Commissioner approval of the stamping office's plan of operation.

Additionally, some of the proposed new sections contain updated provisions from the repealed rules, update references to statutes and rules, and improve readability. The nonsubstantive changes do not alter the meaning of the rules. The detailed explanation of each section below will cross-reference to the current rule if the proposed new rule incorporates text from a rule proposed for repeal.

*Subchapter A. General Provisions.* TDI proposes new subchapter A titled "General Provisions" that contains nine sections consisting of §§15.1 - 15.9. In subchapter A, there are two sections that include completely new provisions: §15.3, relating to regulation of policies and §15.7, relating to submission of applications, notices and correspondence. The other sections proposed in new subchapter A are sections that propose text based on the repealed sections. These will be identified in the descriptions below.

*Section 15.1. Effective Date of Rules and Regulations.* New §15.1(a) provides an effective date of the chapter and adds clarification that the chapter applies to transactions if Texas is the home state of the insured.

New §15.1(b) establishes that transactions in effect before the effective date of the chapter are adjudicated under the rules in effect at the time of the transaction.

**Section 15.2. Definitions.** New §15.2 includes new definitions and incorporates some of the definitions from repealed §15.2 in subsections (a) and (b).

New §15.2(a) clarifies that the definitions in Insurance Code §981.002 and §981.071 apply to the chapter.

New §15.2(b)(1) defines "admitted or authorized insurer" as an insurer doing the business of insurance as defined in Insurance Code §101.051 and licensed under the Insurance Code. "Admitted or authorized insurer" is currently defined under §15.2(1).

New §15.2(b)(2) defines "client," as any person to whom a surplus lines agent sells or attempts to sell a surplus lines insurance policy, or from whom an application for surplus lines insurance is accepted, or to whom advice and counsel on a surplus lines insurance policy is given for the purpose of selling a surplus lines insurance policy. "Client" is currently defined under §15.2(11).

New §15.2(b)(3) defines "Commissioner" as "The Texas Commissioner of Insurance."

New §15.2(b)(4) defines "comptroller" as "The office of the Texas Comptroller of Public Accounts."

New §15.2(b)(5) defines "person," which is currently defined under §15.2(4). The proposed definition references the definition in Insurance Code §541.002(2).

New §15.2(b)(6) defines "stamping office" by citing the rule referencing its plan of operation. The definition includes language to clarify that the stamping office is also referred to in the industry as a service office. "Stamping Office" is currently defined under §15.2(6).

New §15.2(b)(7) defines "state" as any state, district, commonwealth, territory, and insular possession of the United States and any area subject to the legislative authority of the United States of America.

New §15.2(b)(8) defines "surplus lines agent." It clarifies that a surplus lines agent can be an individual or entity if it has a surplus lines license issued by TDI under Insurance Code Chapter 981. "Surplus lines agent or agency" is currently defined under §15.2(7).

New §15.2(b)(9) defines "TDI" as the Texas Department of Insurance.

New §15.2(b)(10) defines "timely filed" as a transaction filed with the stamping office that meets the requirements of Insurance Code §981.105(a).

New §15.2(b)(11) defines "untimely filed" as a transaction filed with the stamping office that does not meet the requirements of Insurance Code §981.105(a).

**Section 15.3. Regulation of Policies.** New §15.3 implements SB 951, 83rd Legislature, Regular Session (2013) by clarifying that a surplus lines policy is subject to Texas regulation if the insured's home state is Texas. Under Insurance Code §981.002(5), an insured's home state is the insured's principal place of business or principal residence. Section 15.3(1) clarifies that the principal place of business is the location from which the officers of an insured that is not an individual directs, controls, and coordinates the insured's activities, which is generally the insured's headquarters. Section 15.3(2) clarifies that the principal residence is the state where the insured who is an individual resides for the greatest number of days during a calendar year.

**Section 15.4. Sanctions.** New §15.4 restates current §15.5, relating to sanctions. Like current §15.5, new §15.4 allows for the assessment of administrative penalties against a surplus lines agent. The revocation of suspension of a license continues as an option for TDI after notice and an opportunity for hearing. The grounds for sanctions under new §15.4(a) remain the same as under current §15.5(a) and include: any action that would form the basis for sanctions against a general property and casualty agent or managing general agent, as applicable to the surplus lines agent's other license; failure to allow the inspection of records; failure to file reports; failure to collect and pay required taxes and stamping fee; failure to maintain qualifications for a surplus lines agent license; or violation of any insurance law or regulation.

New §15.4(b) clarifies that except for a nonresident surplus lines agent licensed under Insurance Code §981.203(a-1), a surplus lines agent may not renew their surplus lines license or act as a surplus lines agent if the agent fails to maintain or renew the agent's license as a general property and casualty agent or managing general agent, as appropriate to the license status of the agent.

New §15.4(c) clarifies that a surplus lines agent whose license has been revoked must have all fines, penalties, delinquent taxes, and delinquent stamping fees paid before a license will be issued or renewed, or the suspension lifted.

**Section 15.5. Minimum Content of Contracts.** New §15.5 restates current §15.21, relating to minimum content of contracts. New §15.5 sets out the minimum content required for every new or renewal surplus lines insurance contract, policy, certificate, cover note, or other confirmation of insurance purchased and delivered. Section 15.5(a)(1) - (3) lists the requirements as: the information required by Insurance Code §981.101, a statement designating the name and address of the person to whom service of process will be made, and a stamping fee. Of these requirements, only §15.5(a)(1), referring to the information required under Insurance Code §981.101, is not in current §15.21.

New §15.5(b) clarifies that the requirement under Insurance Code §981.101(b) is not applicable to a contract issued by a domestic surplus lines insurer. New §15.5(c) provides the language that must appear on every domestic surplus lines insurer contract. This implements HB 2492, 85th Legislature, Regular Session (2017), relating to domestic surplus lines insurers. Specifically, it implements Insurance Code §981.076(b), which states that a surplus lines document issued by a domestic surplus lines insurer must include a statement in the form and manner provided by Commissioner rule.

**Section 15.6. Forms.** New §15.6 restates current §15.11, relating to uniformity of reporting forms, though as proposed the new section is titled simply "Forms." New §15.6 states that all required applications, reports, and memorandums required under the Insurance Code or 28 TAC Chapter 15 must include all required information.

**Section 15.7. Submission of Applications, Notices, and Correspondence.** New §15.7(a) states that all submissions to the Commissioner or to TDI must be sent to the appropriate physical, mailing, or electronic address. New §15.7(b) states that all submissions to the stamping office must be sent by a method acceptable to the stamping office.

**Section 15.8. Correct Execution Required for Filing.** New §15.8 restates current §15.13, relating to correct execution required for

filing. As proposed, the new section breaks the provisions from the current section into four subsections, (a) - (d).

The requirements in new §15.8(a) reflect those in current §15.13. New §15.8(a) requires that all reports must comply with new §15.6 before they will be deemed filed with TDI or the stamping office.

New §15.8(b) states that a correct surplus lines policy submitted to the stamping office will be deemed filed the day the transaction is posted by the stamping office. New §15.8(b) does not include a reference to submitting a surplus lines policy by fax or other electronic means. The acceptable submission methods are now stated under proposed new §15.7.

The requirements in §15.8(c) reflect those in current §15.13. New §15.8(c) requires the surplus lines agent responsible for the filing to maintain the contract file at the agent's place of business, and the contract file must be available for inspection by the stamping office upon request.

The requirements in new §15.8(d) reflect those in current §15.13. New §15.8(d) clarifies that nothing in the section limits the requirements to submit information or reports under the Insurance Code or 28 TAC Chapter 15 to TDI.

*Section 15.9. Eligibility Requirements for Surplus Lines Insurance.* New §15.9 restates current §15.7, relating to eligibility requirements for surplus lines insurance. However, new §15.9 does not include the provision in current §15.7(c). The requirements in §15.9(a) reflect those in current §15.7, which requires that the stamping office evaluate all surplus lines documents for eligibility and compliance and permits the stamping office to request additional information needed to complete their evaluation.

New §15.9(b) restates current §15.7(b). New §15.9(b) requires the stamping office report certain instances of noncompliance to TDI. New §15.9(b)(1) requires the stamping office to report within 60 days of discovery: a) surplus lines insurance policies that the stamping office received, or is aware of, that were issued by ineligible insurers; b) surplus lines insurance policies or contracts that the stamping office receives, or is aware of, that are not compliant with the Insurance Code, whether it is due to the type of insurance policy issued or for any other reasons; and, c) any action by an unlicensed agent that requires a license, such as issuing a surplus lines policy, filing the policy with the stamping office, or any other prohibited unlicensed activity.

New §15.9(b)(2) requires the stamping office report promptly upon discovery any surplus lines policy or contract that has uncorrected administrative or technical errors that the stamping office has asked the surplus agent to correct if the surplus lines agent fails to do so.

*Subchapter B. Surplus Lines Agents.* TDI proposes new subchapter B titled "Surplus Lines Agents" that contains 16 sections consisting of §§15.101 - 15.115. There are three sections that include completely new provisions: §15.111, relating to required documentation supporting exempt commercial purchasers; §15.112, relating to required documentation supporting industrial insureds; and §15.115, relating to untimely filed policies. The other remaining sections proposed in new subchapter B are sections that propose text based on the repealed sections. These will be identified in the descriptions below.

*Section 15.101. Licensing of Surplus Lines Agents.* New §15.101 restates current §15.3, relating to licensing of surplus lines agents.

New §15.101(a) lists the type of surplus lines insurance activities that require a surplus lines agent license under Insurance Code Chapter 981, which are the same as those listed under the current rules in §15.3(a)(1) - (3).

New §15.101(b) lists activities that may be performed by unlicensed individuals if supervised by a licensed surplus lines agent. The activities listed in §15.101(b)(1) - (3) are the same as those listed under current §15.3(b)(1) - (4).

New §15.101(c) clarifies that agency profits may be distributed to unlicensed persons, including shareholders, partners, or employees. Section 15.101(c) duplicates current §15.3(c).

New §15.101(d) lists licensing submission requirements. Proposed new §15.101(d) lists the same requirements listed under current §15.3(d).

New §15.101(e) clarifies licensing requirements for Texas residents and nonresident applicants who do not hold a surplus lines license or are residents of a non-reciprocal state. Section 15.101(e) is the same requirement as current §15.3(e).

New §15.101(f) clarifies licensing requirements for nonresident applicants holding surplus lines licenses in reciprocal states. Section 15.101(f) is the same requirement as current §15.3(f).

New §15.101(g) implements a new statutory requirement. It clarifies that nonresident applicants are not required to obtain a general property and casualty agent license if they meet the requirements of Insurance Code §981.203(a-1). This implements SB 697, 83rd Legislature, Regular Session (2013), which allows non-resident surplus lines agents to do business in Texas without a property and casualty license provided they are in compliance with their domiciliary state's licensure requirements and meet the requirements under Insurance Code §981.203(a-1).

New §15.101(h), which is based on current §15.101(g), clarifies license expiration and renewal procedures. Section 15.101(h) is the same requirement as current §15.3(g).

*Section 15.102. Conduct of Agent's Business.* Proposed new §15.102 restates current §15.6, relating to conduct of agent's business.

New §15.102(a) restates current §15.6(a) with only nonsubstantive differences. The section clarifies that a surplus lines agent doing business as an individual may be licensed only in his or her name and may not hold more than one surplus lines license. Additionally, a surplus lines agent doing business under an assumed name must comply with 28 TAC §19.902, relating to one agent, one license. The requirements in §15.102(a) reflect those in current §15.6(a).

New §15.102(b) restates current §15.6(b) with only nonsubstantive differences. The section clarifies that an insurance agent doing business as a partnership, corporation, or limited liability company may obtain a surplus lines agent license if it has the qualifications and has been issued a license under the Insurance Code for either a general property and casualty agent or a managing general agent. The surplus lines agent license will be issued in the same name as the underlying license. A partnership, corporation, or limited liability company is permitted to have only one surplus lines agent license. Additionally, a partnership, corporation, or limited liability company doing business under an assumed name must comply with 28 TAC §19.902, relating to one agent, one license. The requirements in §15.102(b) reflect those in current §15.6(b).

New §15.102(c) restates current §15.6(c). The section clarifies that if a surplus lines agent acts under an assumed name, that the true name of the surplus lines agent must also clearly be disclosed. The requirements in §15.102(c) reflect those in current §15.6(c).

New §15.102(d) restates current §15.6(d). The section clarifies that a surplus lines agent is prohibited from shifting, transferring, delegating, or assigning his or her responsibility to a person not licensed as a surplus lines agent. New §15.102(d) further clarifies a surplus lines agent may not file with the stamping office a policy for a transaction in which the surplus lines agent did not place the policy.

New §15.102(e) is a new requirement and clarifies that the surplus lines agent remains responsible for the timeliness and accuracy of filings regardless of whether the surplus lines agent has contracted with a third party to meet the filing requirements under Insurance Code §981.105(a) and (b) and that the licensed surplus lines agent must pay any fees owed or penalties assessed on untimely filed policies.

New §15.102(f) restates current §15.6(e). The section clarifies that a surplus lines agent may exercise underwriting authority only if there is a current written agreement from each eligible surplus insurer granting the authority, lists the elements that must be contained in the agreement, and requires the agreement be available for review by TDI. The requirements in §15.102(f) reflect those in current §15.6(e).

Due to its length, current §15.6(f) is restated into one proposed new subsection, §15.102(g), and two proposed new paragraphs, §15.102(g)(1) and (2). New §15.102(g) states that there must be a current written agreement in place for a surplus lines agent to exercise claims authority on behalf of an eligible surplus lines insurer, a Texas-licensed adjuster must perform all claims adjustments, and the agreement must be available for review by TDI. It includes a clarification that a Texas-licensed adjuster is not required if the policy covers risks in multiple states and the claim is for a loss on a non-Texas risk. Here, the adjuster must be licensed in the state where the risk is located.

New §15.102(g)(1) states the types of claims authority that may be delegated to a surplus lines agent by an insurer. The requirements in §15.102(g)(1) reflect those in current §15.6(f).

New §15.102(g)(2) states that surplus lines insurers are not relieved of any continuing obligations to the insured if partial payments are made by the surplus lines agent, that a current written agreement must exist if a surplus lines agent is authorized to and does directly pay claims on behalf of the eligible surplus lines insurer, and that the agreement must be available for review by TDI. The requirements in new §15.102(g)(2) reflect those in current §15.6(f).

*Section 15.103. Surplus Lines Stamping Fee.* New §15.103 restates current §15.10. The section states that a surplus lines agent must pay a stamping fee for each surplus lines policy, contract, or other detailed evidence of coverage issued on Texas risks and the fees are due and payable as provided in §15.106. The requirements in new §15.103 reflect those in current §15.10.

*Section 15.104. Duty of Reasonable Effort by Surplus Lines Agents to Ascertain Financial Condition and Other Practices of Eligible Surplus Lines Insurers.* New §15.104 restates current §15.9.

New §15.104(a) restates §15.9(a) and clarifies that a surplus lines agent must make a reasonable inquiry into the financial

condition and operating history of the insurer before placing insurance. The requirements in new §15.105(a) reflect those in current §15.9(a).

New §15.104(b) restates §15.9(b) and clarifies that a surplus lines agent has a continuous duty to stay informed of the insurer's solvency, soundness of its financial strength, and ability to process claims and pay losses promptly and efficiently. The requirements in new §15.104(b) reflect those in current §15.9(b).

New §15.104(c) restates §15.9(c) and clarifies that a surplus lines agent must immediately inform TDI and the stamping office if there is doubt to the capacity, competence, stability, claims practices, or business practices of an insurer. The requirements in new §15.104(c) reflect those in current §15.9(c).

New §15.104(d) restates §15.9(d) and clarifies that a surplus lines agent must immediately inform TDI and the stamping office if the agent has reasonable grounds to believe that an insurer that is not admitted, not on the NAIC's alien insurer list, or is not an eligible surplus lines insurer and is doing the business of insurance in this state. The requirements in new §15.104(d) reflect those in current §15.9(d).

New §15.104(e) restates §15.9(e) and clarifies that a surplus lines agent placing insurance on Texas risks must only do so with an eligible insurer under the Insurance Code and TDI's rules. The requirements in new §15.104(e) reflect those in current §15.9(e).

*Section 15.105. Furnishing Evidence of Insurance.* New §15.105 restates current §15.22.

New §15.105(a) restates §15.22(a) and clarifies that to avoid misunderstanding, the surplus lines agent must give the insured a complete written copy of the evidence of insurance and a temporary confirmation must be replaced as quickly as possible. The requirements in new §15.105(a) reflect those in current §15.22(a).

New §15.105(b) restates §15.22(b) and clarifies that if there is a change in the insurer, the portion of the direct risk assumed by the insurer, or any other major changes, the surplus lines agent must promptly send a substitute document that accurately shows the current status of coverage and the responsible insurers. The requirements in new §15.105(b) reflect those in current §15.22(b).

*Section 15.106. Policy Forms and Stamping Office Fees.* New §15.106 restates current §15.23.

New §15.106(a) clarifies that the surplus lines agent must file a true and correct copy of each executed surplus lines policy, contract, or other detailed evidence of coverage within 60 days of issuance or the effective date, whichever later, with the stamping office. If evidence of coverage other than the policy is initially filed, the policy must be filed within 60 days of it becoming available. This is to ensure that the stamping office receives all executed policies, contracts, or other detailed evidences of coverage, including additions, deletions, or cancellations in a timely manner.

The provision in current §15.23(b) is not restated in the new section as it is no longer applicable. That addresses ways to file the information required by §15.23(a). However, under the proposed rules, the only acceptable means to file the required information is under new §15.7.

New §15.106(b) restates current §15.23(c) and clarifies the items that comprise the term "true and correct copy of a surplus

lines insurance policy." New §15.106(b) adds two new items to those copied from §15.23(c): all coverage parts and schedules (including limits) and risk ZIP code location.

New §15.106(c) restates current §15.23(d) and clarifies that the stamping office will compile the information obtained under new §15.106(b) within 10 days after the end of the month and will provide the surplus lines agent with a notice of the total stamping fees due. The fees are due to the stamping office by the end of the month in which the notice is received. The requirements in new §15.106(c) reflect those in current §15.23(c).

Current §15.23(e) is not restated in a proposed new section as it relates to filing information under proposed new §15.106(b) in lieu of filing an affidavit of diligent effort or other evidence of diligent effort by the surplus lines agent to place the coverage with an admitted carrier.

**Section 15.107. Surplus Lines Insurance Requests for Information, Examination, and Complaints.** New §15.107 restates current §15.12, splitting its provisions into four subsections labeled (a) - (d) to make it easier to read. The requirements in §15.107 reflect those in §15.12.

New §15.107(a) clarifies that the stamping office may need to ask the surplus lines agent for information to evaluate the eligibility of the surplus lines policies, contracts, or other detailed evidence of coverage.

New §15.107(b) clarifies that TDI will be notified if the surplus lines agent does not provide the information to the stamping office in a timely manner.

New §15.107(c) clarifies that the stamping office may review the information at the surplus lines agent's place of business if agreed to by both parties.

New §15.107(d) clarifies that §15.107 does not limit TDI's ability to request information or reports required under the Insurance Code or 28 TAC Chapter 15.

**Section 15.108. Recordkeeping.** New §15.108 restates current §15.14.

New §15.108(a) restates current §15.14(a). It also clarifies what insurance and accounting records surplus lines agents must maintain. These include a policy register, a contract file, general books of account, and any other insurance or accounting records that are required under the Insurance Code or 28 TAC Chapter 15. The only requirement in the new section that is not found in current §15.14(a) is §15.108(a)(4), which requires that a list of all agreements entered into with a managing underwriter under Insurance Code §225.006(c) and copies of the agreements be maintained by each surplus lines agent.

New §15.108(b) restates §15.14(a) and clarifies that the surplus lines agent's records that are required to be kept by the Insurance Code and 28 TAC Chapter 15 are subject to examination by TDI and the comptroller at all times and without notice. Additionally, the records and accounts must be available for inspection and review by TDI for five years following the expiration or termination of an insurance contract, unless specified otherwise in the Insurance Code.

**Section 15.109. Policy Number.** New §15.109 restates current §15.15.

New §15.109(a) restates current §15.15(a) and clarifies that the surplus lines agent must record the policy number and name of the insured immediately upon procuring the insurance for the in-

sured. New §15.109(a) does not include the chronological policy requirement found in §15.15(a) because of a change in industry practice relating to how policy numbers are generated. Other than this, the requirements in new §15.109(a) reflect those in §15.15(a).

New §15.109(b) restates current §15.15(b) and clarifies that if the surplus lines agent can issue policies on behalf of the eligible surplus lines agent, or if there is a policy that is voided or not used, the agent must document an explanation in the policy number register. New §15.109(b) does not include the §15.15(b) requirement for a chronological sequence in the assignment of policy numbers, because of a change in industry practice on how policy numbers are generated. Other than this, the requirements in proposed new §15.109(b) reflect those in §15.15(b).

**Section 15.110. Contract File.** New §15.110 restates current §15.16.

New §15.110 lists the items that the contract file on each individual surplus lines contract must contain in order to be a complete and true record.

New §15.110(1) - (14) restates §15.16(1) - (12), adds clarification to current requirements and adds two requirements not present in current §15.16(1) - (12). No requirements are proposed for deletion.

The current requirements duplicated in new §15.110(1) - (14) include maintaining records related to: amount of insurance and perils insured against; description of property and location; gross premium; return premium paid, if any; premiums charged; effective date of contract and terms; name and mailing address of the insured; name and home office address of the insurer, underwriting syndicate or other risk-bearing entity; amount collected from insured; record of losses or claims filed and payments made; true and correct copy of the insurance policy, contract, and other detailed evidence of coverage, as issued to the insured; and all correspondence relating to the specific insurance coverage of that contract file.

In addition, new §15.110(2) has a requirement to include the ZIP code when identifying the location of the subject of the insured. New §15.110(5) clarifies that all premiums charged should be maintained. New §15.110(13) includes a requirement to maintain the support for the exempt commercial status, if applicable to the insured. Exempt commercial purchaser was added by SB 951. New §15.110(14) includes a requirement to maintain the support for the industrial insured status, if applicable to the insured. Industrial insured was added by HB 1559. Other than these, the requirements in new §15.110 reflect those in §15.16(1) - (12).

**Section 15.111. Required Documentation Supporting Exempt Commercial Purchaser Status.** New §15.111 does not duplicate any of the sections proposed for repeal. It clarifies the type of support required when an insured qualifies as an exempt commercial purchaser. New §15.111(1) requires the surplus lines agent retain a copy of the document described in Insurance Code §981.004(c)(2) and new §15.111(2) requires the surplus lines agent retain a signed statement from the insured identifying which provisions of Insurance Code §981.0031(a)(3) and §981.0032(3) are applicable to the insured. Provisions addressing exempt commercial purchasers were added by SB 951. They permit an exemption from Insurance Code §981.004(a)(1) for insureds meeting certain criteria under Insurance Code Chapter 981. New §15.111 requires the surplus lines agent maintain documentation to support the exemption.



*Section 15.112. Required Documentation Supporting Industrial Insured Status.* New §15.112 does not duplicate any of the sections proposed for repeal. It clarifies the type of support required when an insured qualifies as an industrial insured. New §15.112(1) requires the surplus lines agent retain a copy of the document described in Insurance Code §981.004(d)(3) and new §15.112(2) requires the surplus lines agent retain a signed statement from the insured identifying which provisions of Insurance Code §981.0032(3) and §981.0033(2) are applicable to the insured. Provisions addressing industrial insureds were added by HB 1559. They permit an exemption from Insurance Code §981.004(a)(1) for insureds meeting certain criteria under Insurance Code Chapter 981. New §15.112 requires the surplus lines agent maintain documentation to support the exemption.

*Section 15.113. Agent Accounting Records.* New §15.113 restates current §15.17. New §15.113(a) requires each surplus lines agent to maintain accounting records, and new §15.113(b) requires the records show a summary of operation for month-end and year-to-date. The records also must be kept in accordance with generally accepted accounting principles. The requirements in new §15.113 reflect those in current §15.17.

*Section 15.114. Untimely Filed Policies.* New §15.114 does not duplicate any of the sections proposed for repeal. It clarifies the process for handling policies that were not filed timely with the stamping office.

New §15.114(a) clarifies that the stamping office must provide or make obtainable to the surplus lines agent a report of late filed policies on or before the 15th day of each month.

New §15.114(b) clarifies that the surplus lines agent must take action to any policy listed in the report under §15.114(a) that it believes was filed timely within the earlier of 90 days of the report or February 15th of the following year. New §15.114(b)(1) and (2) clarify that the surplus lines agent must either correct the errors or, if the error cannot be corrected, notify the stamping office of its objection and identify the filing at issue, describe any special factors or unique circumstances, and provide any additional supporting documentation they believe supports their position.

New §15.115(b)(3) clarifies that the stamping office must review and research the notification provided by the surplus lines agent under new §15.115(b)(2) and provide TDI with a summary and its opinion on whether the policy should be considered timely within the earlier of either 30 days or March 1st. TDI will make the final determination on the policy's timeliness by the earlier of 45 days after receipt of the stamping office's analysis or March 15 and the stamping office will make any necessary changes to the records.

New §15.115(c) clarifies that the surplus lines agent waives the right to later dispute the timeliness of a filing unless the process under proposed new §15.115(b) is followed.

New §15.115(d) clarifies that the stamping office will provide TDI with a report no later than the first business day of April that lists all the policies that were not filed on time in the previous calendar year. Filings that were corrected under new §15.115(b)(1) or determined to be on time under new §15.115(b)(3) will not be included in the annual report.

*Section 15.115. Purchase of Insurance by Purchasing Groups through Surplus Lines Agents.* New §15.115 restates current §15.25 and clarifies statutory requirements.

New §15.115(a) restates §15.25(a) and defines purchasing group. New §15.115(a)(1) clarifies that a purchasing group must

have one of its purposes the purchase of liability insurance on a group basis. New §15.115(a)(2) clarifies that a purchasing group must be a group that purchases liability insurance only for its group members and only to cover their similar or related liability exposure. New §15.115(a)(3) clarifies that a purchasing group must be made of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, service, premise, or operation and New §15.115(a)(4) clarifies they must be domiciled in a state. There are no differences between the definition of purchasing group under new §15.115(a)(1) - (4) and current §15.25.

The current rule at §15.25(b) and §15.25(c) provides an exemption that is inconsistent with the statute, so the new rule corrects this. Proposed new §15.115(b) restates §15.25(b) and clarifies the requirement that the surplus agent must submit the filings required under Insurance Code §981.105 and the stamping fees to the stamping office for insurance purchased by registered purchasing groups. This is a change from what is required by current §15.25(b), which states that the purchasing group or the surplus lines agent must submit all registration forms, fees, or taxes required under the Insurance Code directly to the comptroller or TDI. Insurance Code §981.105 requires filing with the stamping office.

New §15.115(c) restates §15.25(c) and clarifies that the surplus lines agent must stamp or write the words "Purchasing Group" conspicuously on every policy, contract, or other detailed evidence of coverage issued to a purchasing group or its members. It does not include the requirement in current §15.25(c) that all copies must be marked the same way, because it is redundant. It also does not include the provision in current §15.25(c) that copies of the policies, contracts, or other detained evidences of coverage need not be filed with the stamping office or TDI unless requested, because under new §15.115(b) these documents must be filed with the stamping office. There is no statutory exemption regarding the filing of purchasing group documents with the stamping office.

Proposed new §15.115(5) clarifies that a surplus lines agent may only sell insurance to a registered purchasing group, unless the purchasing group is exempt from registering under Insurance Code §2201.256. Registered purchasing groups are listed on TDI's website. Purchasing groups are required to register under Insurance Code §2201.256.

*Subchapter C. Surplus Lines Stamping Office Plan of Operation.* New subchapter C is titled "Surplus Lines Stamping Office of Texas Plan of Operation" and consists of one section, §15.201.

The stamping office's plan of operation is currently in subchapter B, relating to the Surplus Lines Stamping Office of Texas. Current subchapter B contains one section, §15.101, relating to the stamping office's plan of operation, and contains the text of the plan. Insurance Code §981.153(a) requires the Commissioner approve the plan of operation, and Insurance Code §981.153(b) requires the Commissioner approve amendments by Commissioner order. Because the plan of operation is currently part of the rule text, amendments to the plan of operation require a rule amendment. New subchapter C does not include the plan of operation in the rule text. Instead, it establishes a more efficient process for approving amendments by Commissioner order in compliance with Insurance Code §981.153(b).

*Section 15.201. Commissioner Approval.* New §15.201 describes the process for approval of amendments to the stamping office's plan of operation.

New §15.201(a) clarifies that the stamping office's plan of operation and any amendments made to it are effective once approved by Commissioner order. It also clarifies that the stamping office must operate under the plan of operation.

New §15.201(b) clarifies that amendments to the plan of operation must be submitted by the stamping office to the Commissioner for approval. New §15.201(b)(1) clarifies that the Commissioner may accept or reject some or all of the amendments and new §15.201(b)(2) clarifies that TDI will provide an opportunity for public comment on the amendments to the plan of operation. Detailed instructions on how to submit comments will be provided on TDI's website along with the proposed amendments. Finally, new §15.201(b)(4) clarifies that the Commissioner will approve amendments to the plan of operation by Commissioner order, which complies with Insurance Code §981.153(b).

New §15.201(c) clarifies that the Commissioner will amend the plan of operation under Insurance Code §981.153(c) in the event that amendments proposed by the stamping office are unacceptable.

New §15.201(d) clarifies that the most recent version of the plan of operation will be posted on the stamping office's website.

New §15.201(e) clarifies the process for changing the stamping fee.

*Subchapter D. Surplus Lines Insurers.* New subchapter D is titled "Surplus Lines Insurers" and consists of one section, §15.301. New §15.301 restates current §15.8, with changes to address text that is no longer relevant regarding what a surplus lines insurer domiciled in another state must submit to TDI.

New §15.301(a) clarifies that surplus lines insurers not designated as domestic surplus lines insurers must submit certain information to TDI and the stamping office. New §15.301(a)(1) clarifies that surplus lines insurers domiciled in other states must only provide evidence of authorization from their domiciliary jurisdiction to write the same kind of business it proposes to write in Texas and that it meets the capital and surplus requirements in Insurance Code §981.057.

New §15.301(a)(2) clarifies that alien insurers listed with the NAIC's International Insurer Department are not required to submit anything to TDI, but are encouraged to submit the address and phone number of a contact in the United States and identify the types of insurance the company will write in Texas.

New §15.301(b) requires domestic surplus lines insurers to provide a copy of the certificate issued to them by TDI to the stamping office and documentation supporting the required capital and surplus.

TDI received comments on an informal draft posted on TDI's website on July 22, 2016. TDI considered those comments when drafting this proposal.

**FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Jeff Hunt, director, Company Licensing and Registration Office, Licensing and Services Section, Financial Regulation Division, has determined that for each year of the first five years the proposed new sections and repealed sections are in effect, there will be no measurable fiscal impact on state and local governments as a result of the enforcement or administration of this proposal.

Mr. Hunt does not anticipate any measurable effect on local employment or the local economy as a result of this proposal.

**PUBLIC BENEFIT AND COST NOTE.** For each year of the first five years the proposed sections and repeals are in effect, Mr. Hunt expects that enforcing the proposed sections and repeals will have the public benefit of ensuring that TDI's rules conform to Insurance Code Chapter 981 and also expects the public benefit of clearer, updated surplus lines insurance rules that are easier to understand and administer consistently.

Mr. Hunt anticipates that surplus lines agents required to comply with proposed new sections and repeals will not increase the cost of compliance with Insurance Code Chapter 981 because it does not impose requirements beyond those in the statute.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS.**

TDI has determined that the new sections and repeals will not have an adverse economic effect or a disproportionate economic impact on small or micro businesses, or on rural communities. TDI estimates that the proposed new sections and repeals may affect all surplus lines agents and agencies the same. The total surplus lines agents and agencies totaled 5,503 and 1,472, respectively, as of February 2018. As a result, and in accordance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

**EXAMINATION OF COSTS UNDER GOVERNMENT CODE §2001.0045.**

TDI has determined that the proposed amendments do not require another rule or rules to be amended or repealed in order to reduce the total costs imposed on regulated persons. The effect of the proposed new sections or repeals is not expected to increase the cost of compliance with Insurance Code Chapter 981 because it does not impose requirements beyond those in the amended statutes. Even if the proposed new sections and repeals were to impose additional costs, Government Code §2001.0045 does not apply to the proposed amendments because the changes are necessary to implement Insurance Code Chapter 981.

**GOVERNMENT GROWTH IMPACT STATEMENT.** TDI has determined that each year of the first five years the proposed amendments and repeals are in effect, the rules will not positively or adversely affect this state's economy. The rules:

- will not create or eliminate a government program;
- will not require the creation of new employee positions or the elimination of existing employee positions;
- do not require an increase or decrease in future legislative appropriations to TDI;
- do not require an increase or decrease in fees paid to TDI;
- create new regulations to implement;
- repeal existing regulations;
- do not increase or decrease the number of individuals subject to the rule's applicability; and
- do not positively or adversely affect the Texas economy.

**TAKINGS IMPACT ASSESSMENT.** TDI has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government

action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. Submit any written comments on the proposal no later than 5 p.m., Central time, on July 23, 2018. TDI requires two copies of your comments. Send one copy to ChiefClerk@tdi.texas.gov; or to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Send the other copy to Chris.Osuna@tdi.texas.gov; or to Chris Osuna, Team Lead, Company Licensing and Registration Office, Mail Code 103-CL, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will also consider written and oral comments on the proposal in a public hearing under Docket No. 2806 at 1:30 a.m., Central time, on July 10, 2018, in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street, Austin, Texas 78701.

## SUBCHAPTER A. GENERAL REGULATION OF SURPLUS LINES INSURANCE

### 28 TAC §§15.1 - 15.25

STATUTORY AUTHORITY. TDI proposes the repeal of §§15.1 - 15.25 under Insurance Code §§981.009, 981.204, and 36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §981.204 provides that the Commissioner may classify surplus lines agents and issue a surplus lines license to an agent in accordance with a classification created under Insurance Code §981.204 and reasonable rules of the Commissioner.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Repealed §§15.1 - 15.25 affect Insurance Code §§981.001 - 981.006, 981.008, 981.051, 981.057, 981.058, 981.063 - 981.066, 981.101 - 981.105, 981.201 - 981.204, 981.210 - 981.215, 981.217, 981.218, and 981.220 - 981.223.

*§15.1. Effective Date of Rules and Regulations.*

*§15.2. Definitions.*

*§15.3. Licensing of Surplus Lines Agents.*

*§15.4. Notice to Department for Commencement and Cessation of Employment of Individual Surplus Lines Agents.*

*§15.5. Sanctions.*

*§15.6. Conduct of Agent's Business.*

*§15.7. Eligibility Requirements for Surplus Lines Insurance.*

*§15.8. Eligibility Requirements of Surplus Lines Insurers.*

*§15.9. Duty of Reasonable Effort by Surplus Lines Agents to Ascertain Financial Condition and Other Practices of Eligible Surplus Lines Insurers.*

*§15.10. Surplus Lines Stamping Fee.*

*§15.11. Uniformity of Reporting Forms.*

*§15.12. Surplus Lines Insurance Requests for Information, Examination, and Complaints.*

*§15.13. Correct Execution Required for Filing.*

*§15.14. Recordkeeping.*

*§15.15. Policy Number.*

*§15.16. Contract File.*

*§15.17. Agency Accounting Records.*

*§15.18. Financed Transactions.*

*§15.19. Allocation of Premium.*

*§15.20. Reporting of Premium Allocation.*

*§15.21. Minimum Content of Contracts.*

*§15.22. Furnishing Evidence of Insurance.*

*§15.23. Policy Forms Filings and Stamping Office Fees.*

*§15.24. Exemption from Minimum Capital and Surplus Requirement.*

*§15.25. Purchase of Insurance by Purchasing Groups through Surplus Lines Agents.*

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

Filed with the Office of the Secretary of State on June 5, 2018.

TRD-201802420

Norma Garcia

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



### 28 TAC §§15.1 - 15.9

STATUTORY AUTHORITY. TDI proposes new §§15.1 - 15.9 under Insurance Code §§981.009, 981.204, and 36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §981.204 provides that the Commissioner may classify surplus lines agents and issue a surplus lines license to an agent in accordance with a classification created under this Insurance Code §981.204 and reasonable rules of the Commissioner.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Proposed new §§15.1 - 15.9 affect Insurance Code §§981.001 - 981.006, 981.008, 981.051, 981.057, 981.058, 981.063 - 981.066, 981.072, 981.073, 981.075, 981.101 - 981.105, 981.115, 981.116, 981.154, 981.201 - 981.204, 981.210 - 981.215, and 981.217 - 981.223.

§15.1. Effective Date of Rules and Regulations.

(a) The sections in this chapter apply to all transactions and circumstances taking place on or after the effective date of each section if Texas is the home state of the insured.

(b) Texas Department of Insurance rules applicable to licensing, regulation, and supervision of surplus lines agents and surplus lines insurers and transactions in effect before the effective date of the applicable section apply in the adjudication of acts and transactions occurring before the effective date of the section.

§15.2. Definitions.

(a) The definitions in Insurance Code §981.002 and §981.071 apply to this chapter.

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

(1) Admitted or authorized insurer--An insurer doing the business of insurance in this state, as defined in Insurance Code §101.051, and licensed under the provisions of the Insurance Code.

(2) Client--Any person to whom a surplus lines agent sells or attempts to sell a surplus lines insurance policy, or from whom an application for surplus lines insurance is accepted, or to whom advice and counsel on a surplus lines insurance policy is given for the purpose of selling a surplus lines insurance policy.

(3) Commissioner--The Texas Commissioner of Insurance.

(4) Comptroller--The office of the Texas Comptroller of Public Accounts.

(5) Person--An individual or entity as defined by Insurance Code §541.002(2).

(6) Stamping Office--The Surplus Lines Stamping Office of Texas created under Insurance Code Subchapter D, Chapter 981, and operating under a plan of operation as specified by §15.201 of this title. The organization is also commonly referred to as a service office by peer offices throughout the country.

(7) State--Any state, district, commonwealth, territory, and insular possession of the United States and any area subject to the legislative authority of the United States of America.

(8) Surplus lines agent--A person, whether an individual or entity, holding a surplus lines license issued by TDI under Insurance Code Chapter 981.

(9) TDI--Texas Department of Insurance.

(10) Timely filed--A transaction filed with the stamping office that meets the requirements of Insurance Code §981.105(a).

(11) Untimely filed--A transaction filed with the stamping office that does not meet the requirements of Insurance Code §981.105(a).

#### §15.3. Regulation of Policies.

A surplus lines insurance policy is subject to Texas regulation if the insured's home state is Texas. Under Insurance Code §981.002(5), an insured's home state is the insured's:

(1) principal place of business, which is the location from which the officers of an insured that is not an individual directs, controls, and coordinates the insured's activities; generally, the insured's main headquarters; or

(2) principal residence, which is the state where the insured who is an individual resides for the greatest number of days during a calendar year.

#### §15.4. Sanctions.

(a) The Commissioner may impose any sanction or remedy in Insurance Code Chapter 82 or any other applicable laws or statutes if the Commissioner determines, after notice and an opportunity for hearing, that the applicant or license holder individually or through any officer, director, or shareholder:

(1) committed any action that would form the basis for sanctioning a general property and casualty agent or a managing general agent, as applicable to the surplus lines agent's other licenses, under the Insurance Code;

(2) failed to allow TDI or the comptroller to examine the surplus lines agent's accounts and records or failed to maintain surplus

lines insurance business accounts and records as required by the Insurance Code and this chapter;

(3) failed to make and file all reports when due, as required by the Insurance Code and this chapter;

(4) failed to properly collect and pay required taxes and stamping fees on surplus lines gross premium or failed to submit tax reports as required by law or regulation;

(5) failed to otherwise maintain the qualifications for a surplus lines agent license; or

(6) is in violation of, or has failed to comply with the Insurance Code, this chapter, or any other applicable laws or regulations of this state.

(b) Except when Insurance Code §981.203(a-1) applies to a nonresident surplus lines agent, an agent's surplus lines license will not be renewed and the surplus lines agent may not act under the surplus lines agent license if the surplus lines agent fails to maintain or renew the surplus lines agent's license as a general property and casualty agent or managing general agent, as appropriate to the license status of the agent.

(c) A surplus lines agent whose license has been revoked or suspended will not have a license issued, renewed, or a suspension lifted until all fines, penalties, delinquent taxes, and delinquent stamping office fees the agent owes have been paid.

#### §15.5. Minimum Content of Contracts.

(a) Each new or renewal insurance contract, policy, certificate, cover note, or other confirmation of insurance purchased and delivered as surplus lines coverage under the Insurance Code must contain, at a minimum:

(1) the information required by Insurance Code §981.101;

(2) a statement designating the name and address of the individual to whom the Commissioner will mail service of process in accordance with the Insurance Code; and

(3) a stamping fee.

(b) As provided by Insurance Code §981.073(b), Insurance Code §981.101(b) does not apply to a new or renewal insurance contract, policy, certificate, cover note, or other confirmation of insurance purchased and delivered as surplus lines coverage under the Insurance Code 981 if issued by a domestic surplus lines insurer.

(c) Under Insurance Code §981.076, a domestic surplus license insurer must include with each new or renewal insurance contract, policy, certificate, cover note, or other confirmation of insurance purchased and delivered as surplus lines coverage under the Insurance Code the following statement: "This insurance contract is issued and delivered as surplus line coverage under the Texas Insurance Code. The insurer is not a member of the property and casualty insurance guaranty association created under Insurance Code Chapter 462. Insurance Code Chapter 225 requires payment of a \_\_\_\_\_ (insert appropriate tax rate) percent tax on gross premium."

#### §15.6. Forms.

Applications, reports, and memorandums, required under the Insurance Code and by this chapter relating to surplus lines insurance must include all required information.

#### §15.7. Submission of Applications, Notices, and Correspondence.

(a) All submissions to the Commissioner or TDI required in this chapter must be sent to the appropriate physical, mailing, or electronic address:

(1) specified on the applicable TDI form being used; or

(2) listed on the TDI website for a particular submission.

(b) All submissions to the stamping office required in this chapter must be sent by a method acceptable to the stamping office.

*§15.8. Correct Execution Required for Filing.*

(a) No report required to be filed under the Insurance Code or this chapter relating to surplus lines insurance will be deemed filed with TDI or the stamping office unless the documents submitted are correctly completed and signed on forms complying with §15.6 of this title.

(b) A correct surplus lines policy filing submitted to the stamping office will be deemed correctly executed and filed the day the transaction is posted by the stamping office.

(c) The surplus lines agent responsible for a filing must maintain the subject contract file, as specified in §15.110 of this title, at the agent's place of business in accordance with §15.108 of this title, and must promptly submit the contract file to the stamping office on request. On mutual agreement, a representative of the stamping office may view the requested contract file at the agent's place of business.

(d) Nothing in this section limits TDI's ability to require the agent to submit information or reports as required by the Insurance Code or this chapter.

*§15.9. Eligibility Requirements for Surplus Lines Insurance.*

(a) The stamping office must evaluate surplus lines insurance policies, contracts, or other evidences of coverage for eligibility and compliance with filing requirements. The stamping office may request additional information from the surplus lines agent responsible for the filing if the information filed is not sufficient to make an evaluation in accordance with this section.

(b) Following its evaluation of filings under this section, the stamping office must provide the following written reports to TDI:

(1) Within 60 days of discovery, a report documenting any surplus lines insurance policy issued by an insurer that is not an eligible surplus license insurer, any surplus lines insurance policy and contract that is of a type that is not compliant with the Insurance Code, and any act that requires a license that is performed by an unlicensed person.

(2) Promptly upon discovery, a report documenting any surplus lines insurance policy or contract that has uncorrected administrative or technical errors that the stamping office has asked the surplus lines agent to correct.

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

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Norma Garcia

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



**SUBCHAPTER B. SURPLUS LINES  
STAMPING OFFICE OF TEXAS**

**28 TAC §15.101**

STATUTORY AUTHORITY. TDI proposes the repeal of §15.1.101 under Insurance Code §§981.009, 981.153, and 36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §981.153 provides that the procedures to administer the stamping office are established by a plan of operation approved by the Commissioner.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Repealed §15.101 affects Insurance Code §§981.153, 981.154, and 981.155.

*§15.101. Plan of Operation of the Surplus Lines Stamping Office of Texas.*

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

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Norma Garcia

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



**28 TAC §§15.101 - 15.115**

STATUTORY AUTHORITY. TDI proposes new §§15.101 - 15.115 under Insurance Code §§981.009, 981.204, and 36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §981.204 provides that the Commissioner may classify surplus lines agents and issue a surplus lines license to an agent in accordance with a classification created under this Insurance Code §981.204 and reasonable rules of the Commissioner.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Proposed new §§15.101 - 15.115 affect Insurance Code §§981.001 - 981.006, 981.008, 981.051, 981.057, 981.058, 981.063 - 981.066, 981.072, 981.073, 981.075, 981.101, 981.104, 981.105, 981.115, 981.116, 981.154, 981.201 - 981.204, 981.210 - 981.215, and 981.217 - 981.223.

*§15.101. Licensing of Surplus Lines Agents.*

(a) Persons performing any of the following surplus lines insurance activities are required to have a surplus lines agent license:

(1) supervising unlicensed staff engaged in activities described in subsection (b) of this section, although unlicensed interme-

diary supervisors may supervise unlicensed staff engaging in these activities if the ultimate supervisor is licensed;

(2) negotiating, soliciting, effecting, procuring, or binding surplus lines insurance contracts for clients or offering advice, counsel, opinions, or explanations of surplus lines insurance products to agents or clients beyond the scope of underwriting policies or contracts, except for a general lines property and casualty agent making a referral of surplus lines business to a surplus lines agent that then completes the surplus lines transaction; or

(3) receiving any direct commission or variance in compensation based on the volume of surplus lines premiums taken and received from, or as a result of, another person selling, soliciting, binding, effecting, or procuring surplus lines insurance policies, contracts, or coverages, except for a general lines property and casualty agent making a referral of surplus lines business to a surplus lines agent that then completes the surplus lines transaction.

(b) The following activities, if supervised by a surplus lines agent, do not require a surplus lines agent license if the employee does not receive any direct commission from selling, soliciting, binding, effecting, or procuring insurance policies, contracts, or coverages, and the employee's compensation is not varied by the volume of premiums taken and received:

(1) full-time clerical and administrative services, including, but not limited to, the incidental taking of information from clients; receipt of premiums in the office of a licensed agent; or transmitting to clients, as directed by a licensed surplus lines agent, prepared marketing materials or other prepared information and materials including, without limitation, invoices and evidences of coverage;

(2) contacting clients to obtain or confirm information necessary to process an application for surplus lines insurance so long as the contact does not involve any activities for which a license would be required under subsection (a)(2) of this section;

(3) performing the task of underwriting any insurance policy, contract, or coverage, including and without limitation, pricing of the policy or contract; or

(4) contacting clients, insureds, agents, other persons, and insurers to gather and transmit information regarding claims and losses under the policy to the extent the contact does not require a licensed adjuster as set forth under Insurance Code Chapter 4101.

(c) This section must not be construed to prohibit distribution of agency profits to unlicensed persons, including shareholders, partners, and employees.

(d) Before TDI issues a surplus lines agent license, the applicant must submit the following:

(1) an appropriate, fully completed written application; and

(2) the fee specified by §19.801 and §19.802 of this title.

(e) Texas-resident applicants, and nonresident applicants who do not hold a surplus lines license in their state of residence or whose state of residence does not license Texas residents on a reciprocal basis as determined by TDI, must meet all licensing requirements set forth in Insurance Code Chapter 981. Nonresident applicants under this section must also comply with Insurance Code §4056.051.

(f) Nonresident applicants who hold a surplus lines agent license in good standing in the agent's state of residence and meet the requirements of Insurance Code §4056.052 must meet all the licensing requirements of Insurance Code Chapter 981 to the extent that the requirements are not waived by the Commissioner under Insurance Code §4056.055.

(g) Notwithstanding any other subsection of this section, nonresident applicants are not required to obtain a general property and casualty agent license if they meet the requirements of Insurance Code §981.203(a-1).

(h) Each surplus lines agent license issued to an agent will be valid for a term as established under Insurance Code §4003.001 and Chapter 19, Subchapter I of this title. The license may be renewed by submitting a renewal application and a nonrefundable license fee as specified by §19.801 and §19.802 of this title.

#### §15.102. Conduct of Agent's Business.

(a) A surplus lines agent engaging in surplus lines business as an individual surplus lines agent may be licensed only in his or her name. No individual may hold more than one surplus lines agent license. A surplus lines agent engaging in surplus lines business under an assumed name must comply with §19.902 of this title.

(b) An insurance agent doing business as a partnership, corporation, or limited liability company may apply for and obtain a surplus lines license, provided that the agent meets the qualifications and has been issued a license under the Insurance Code as either a general property and casualty agent or a managing general agent. The surplus lines agent license will be issued to a partnership, corporation, or limited liability company in the name of the agency as indicated on the underlying license issued under the Insurance Code. No partnership, corporation, or limited liability company may receive more than one surplus lines agent license. A partnership, corporation, or limited liability company doing business under an assumed name must comply with §19.902 of this title.

(c) Every act in placing or servicing a surplus lines insurance contract under an assumed name must also clearly disclose the true name of the surplus lines agent acting under the assumed name, or the true name of the individual licensed surplus lines agent representing the surplus lines agency, partnership, corporation, or limited liability company acting under the assumed name.

(d) A surplus lines agent may not shift, transfer, delegate, or assign his or her responsibility to a person or persons not licensed as a surplus lines agent. A surplus lines agent may not file with the stamping office a policy for a transaction in which the surplus lines agent did not place the policy.

(e) Notwithstanding subsection (d) of this section, a surplus lines agent may contract with a third party to meet the requirements of Insurance Code §981.105(a) and (b) to file policies with the stamping office, but the agent remains responsible for the timeliness and accuracy of the filings including payment of any fees owed and any penalties assessed for policies that were not timely filed.

(f) A surplus lines agent may exercise underwriting authority on behalf of an eligible surplus lines insurer if the surplus lines agent possesses a current written agreement from each eligible surplus lines insurer granting that authority. The written agreement must set forth the identity of the insurer and the scope of the underwriting authority granted, and must reserve the duty of final underwriting review by the insurer. The underwriting agreement must be available for review by TDI. The underwriting authority granted to a surplus lines agent by the insurer may include the rating and acceptance of risks, binding of coverage, issuance of formal evidence of coverage, and cancellation of coverage.

(g) A surplus lines agent may exercise claims authority on behalf of an eligible surplus lines insurer if the surplus lines agent possesses a current written agreement from the eligible surplus lines insurer granting authority. A Texas-licensed adjuster must perform all claims adjustments unless the policy covers risks in multiple states and

the claim is for a loss on a non-Texas risk. The written agreement must be available for review by TDI.

(1) Claims authority delegated to the surplus lines agent by the insurer may include, but is not limited to, the investigation, adjustment, supervision, and payment of claims, including payment from the surplus lines agents' funds, provided the agent is promptly reimbursed by the insurer for the payments.

(2) Partial payments to claimants by the surplus lines agent made under the written agreement do not relieve the surplus lines insurer of any continuing obligations to the insured. Payment of claims may also be made by the surplus lines agent directly from funds of the eligible surplus lines insurer, provided the surplus lines agent possesses a current written agreement that the insurer authorizes the direct payments. This written agreement must be available for review by TDI.

§15.103. Surplus Lines Stamping Fee.

For each surplus lines policy, contract, or other detailed evidence of coverage issued on Texas risks, including additions or deletions to, or cancellations of, the surplus lines agent must submit a stamping fee as approved by TDI. The fees are due and payable as provided in §15.106 of this title.

§15.104. Duty of Reasonable Effort by Surplus Lines Agents to Ascertain Financial Condition and Other Practices of Eligible Surplus Lines Insurers.

(a) Before placing insurance with an eligible surplus lines insurer, a surplus lines agent must make a reasonable inquiry into the financial condition and operating history of the insurer.

(b) During the course of placing coverage with an eligible surplus lines insurer, each surplus lines agent will be under a continuous duty to stay informed of the insurer's solvency and the soundness of its financial strength, and of the insurer's ability to process claims and pay losses expeditiously.

(c) A surplus lines agent must immediately inform TDI and the stamping office if the agent has grounds to reasonably doubt the capacity, competence, stability, claim practices, or business practices of an eligible surplus lines insurer.

(d) A surplus lines agent must immediately inform TDI and the stamping office if the agent has reasonable grounds to believe that an insurer that is not an admitted insurer, an alien insurer listed with the NAIC's International Insurer Department, or an eligible surplus lines insurer is transacting the business of insurance in this state.

(e) A surplus lines agent may place surplus lines insurance on Texas risks with only an eligible insurer that meets the requirements of the Insurance Code and TDI's rules.

§15.105. Furnishing Evidence of Insurance.

(a) A surplus lines agent must promptly provide the insured or the client's agent with written evidence of insurance containing complete terms, conditions, and exclusions pertaining to the coverage so as to protect all parties against misunderstanding. If temporary confirmation of insurance coverage is required by the insured or is given by the surplus lines agent, that temporary confirmation must be replaced as promptly as possible with a policy or certificate stating the complete terms, conditions, and exclusions of the insurance.

(b) If, after delivery to the insured or the insured's agent of any document evidencing insurance coverage, there is any change as to the identity of the insurers or the portion of the direct risk assumed by the insurer as stated in the previously mentioned original documents, or any other material change as to the insurance coverage, the surplus lines agent must promptly send to the insured or the insured's agent a

substitute certificate, cover note, confirmation, or endorsement for the original. All substitute documents must accurately show the current status of the coverage and the responsible insurers.

§15.106. Policy Forms Filings and Stamping Office Fees.

(a) The surplus lines agent must file a true and correct copy of each executed surplus lines policy, contract, or other detailed evidence of coverage, including additions, deletions, or cancellations with the stamping office within 60 days of issuance or the effective date, whichever is later. If evidence of coverage other than the policy is initially filed, a copy of the policy must be filed with the stamping office within 60 days after it becomes available.

(b) For purposes of reporting to the stamping office, the term "true and correct copy of a surplus lines insurance policy" as used in this section, includes:

- (1) a declarations page;
- (2) a listing of all participating insurers on the policy;
- (3) all coverage parts and schedules, including limits;
- (4) extended coverage exclusions;
- (5) all premium-bearing documents;
- (6) risk ZIP code location; and
- (7) any other parts as may be required by the stamping office to review and record the policy.

(c) The stamping office must compile information from the filings submitted under subsection (b) of this section on a surplus lines agent basis within 10 days after the end of each month. The reports will be provided to the surplus lines agent with a notice of the total stamping fees due. The surplus lines agent must pay the fees to the stamping office by the end of the month in which the surplus lines agent receives the notice.

§15.107. Surplus Lines Insurance Requests for Information, Examination, and Complaints.

(a) In addition to those documents required to be filed under §15.106 and §15.301 of this title, the stamping office may request a surplus lines agent to submit additional information necessary to evaluate the eligibility of surplus lines policies, contracts, or other detailed evidence of coverage.

(b) The stamping office must issue a written report to TDI if the requested additional information is not timely submitted by the surplus lines agent.

(c) The stamping office and the surplus lines agent may mutually agree for a representative of the stamping office to review the requested information at the surplus lines agent's place of business.

(d) Nothing in this section limits TDI's ability to require the surplus lines agent to submit information or reports as required by the Insurance Code and this chapter.

§15.108. Recordkeeping.

(a) In order to provide for basic uniformity in recordkeeping requirements, and to make it possible for TDI to make a complete and accurate examination of the surplus lines agent's records, the following insurance and accounting records must be established and maintained by each surplus lines agent:

- (1) a policy register;
- (2) a contract file;
- (3) general books of account;

(4) a list of all agreements entered into with a managing underwriter under Insurance Code §225.006(c) and copies of the agreements; and

(5) any other insurance and accounting records as are necessary to properly and promptly service Texas policyholders and provide required information to TDI.

(b) The surplus lines agent's records and accounts relating to surplus lines insurance that are required to be kept by the Insurance Code and this chapter are subject to examination by TDI and the comptroller at all times and without notice. These records and accounts must be available for inspection and review by TDI for five years following the expiration or termination of the insurance contract, unless specified otherwise in the Insurance Code.

§15.109. Policy Number.

(a) All surplus lines agents must, immediately on procuring insurance from an eligible surplus lines insurer, record the policy number and the name of the insured. The surplus lines agent must inscribe with the same policy number all records and files maintained by the surplus lines agent that are pertinent to a specific risk.

(b) For agents having authority to issue policies on behalf of an eligible surplus lines insurer, and in the instance of voided or unused policy numbers, the agent must record an explanation in the policy number register.

§15.110. Contract File.

Each surplus lines agent must maintain a contract file containing a complete and true record for each individual surplus lines contract, including a copy of the daily report or other evidence of insurance, including the following items, as applicable:

- (1) amount of insurance and perils insured against;
- (2) brief general description of the property insured and its location, including ZIP code;
- (3) gross premium;
- (4) return premium paid, if any;
- (5) all premiums charged;
- (6) effective date of the contract, and the terms;
- (7) name and mailing address of the insured;
- (8) name and home office address of the insurer, underwriting syndicate or other risk-bearing entity;
- (9) amount collected from the insured;
- (10) record of losses or claims filed and payments made;
- (11) a true and correct copy of the insurance policy, contract, and other detailed evidences of coverage, as issued to the insured;
- (12) all correspondence relating to the specific insurance coverage of that contract file;
- (13) support for exempt commercial purchaser status if applicable to insured; and
- (14) support for the industrial insured status if applicable to insured.

§15.111. Required Documentation Supporting Exempt Commercial Purchaser Status.

Support for exempt commercial purchaser status must include documentation of the following:

(1) a copy of the document described in Insurance Code §981.004(c)(2); and

(2) a signed statement from the insured identifying which provisions of Insurance Code §981.0031(a)(3) and §981.0032(3) are applicable to the insured.

§15.112. Required Documentation Supporting Industrial Insured Status.

Support for industrial insured status must include documentation of the following:

(1) a copy of the document described in Insurance Code §981.004(d)(3); and

(2) a signed statement from the insured identifying which provisions of Insurance Code and §981.0032(3) and §981.0033(2) are applicable to the insured.

§15.113. Agent Accounting Records.

(a) Each surplus lines agent must maintain general accounting records, which must include a general ledger, a general journal, cash records, and other items necessary to reflect the financial solvency of the agent.

(b) The surplus lines agent's general accounting records must show a month-end summary of operations and fiscal- or calendar-year-to-date summary of operations, and must be maintained in accordance with generally accepted accounting principles.

§15.114. Untimely Filed Policies.

(a) On or before the 15th day of each month, the stamping office must either directly provide or make easily obtainable to surplus lines agents a report listing any surplus lines policies the agent filed in the previous month that were untimely filed. The surplus lines agent is responsible for confirming the accuracy of the report.

(b) For any policy listed in the report described in subsection (a) of this section that the surplus lines agent believes was timely filed, the agent must, on or before the earlier of 90 days from the date of the report or February 15 of each year following the year in which the policies were filed, either:

(1) correct any errors in the record using electronic procedures established by the stamping office, or

(2) if the error in the record cannot be corrected using electronic procedures established by the stamping office, the agent must notify the stamping office that the agent believes the policy was timely filed. The notification must identify the filing at issue, describe any special factors or unique circumstances that apply, and provide all necessary documentation to support the agent's position that it was timely filed.

(3) Following receipt of notification described in paragraph (2) of this subsection, on or before the earlier of either 30 days after receipt or March 1, the stamping office must review and research the notification and then provide TDI with a summary as well as the stamping office's opinion as to whether the policy should be considered timely filed. On receiving the summary from the stamping office, TDI will decide by the earlier of either 45 days after receiving the stamping office's analysis or March 15 whether the policy should be considered timely filed and notify the agent and stamping office. If TDI determines that the policy should be considered timely filed, the stamping office must make any necessary changes to its records so that the policy is considered timely filed.

(c) An agent waives the right to later dispute the timeliness for any filing if the agent fails to comply with the requirements of subsection (b) of this section.

(d) Not later than the first business day of April of each year, the stamping office must submit a report to TDI listing all of the sur-



plus lines policies that were not timely filed in the previous calendar year. If TDI decides a policy should be considered timely filed under subsection (b)(3) of this section, the filing will not be included in the annual report. The annual report must be in a format acceptable to the Commissioner, and it must reflect any corrections made by the agent under subsection (b)(1) of this section or determinations made by TDI under subsection (b)(3) of this section.

§15.115. Purchase of Insurance by Purchasing Groups through Surplus Lines Agents.

(a) A purchasing group is any group that:

(1) has as one of its purposes the purchase of liability insurance on a group basis;

(2) purchases liability insurance only for its group members and only to cover their similar or related liability exposure;

(3) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, service, premise, or operation; and

(4) is domiciled in any state.

(b) When a registered purchasing group purchases insurance through a surplus lines agent, the surplus lines agent must submit the filings required under Insurance Code §981.105 and stamping fees directly to the stamping office.

(c) A surplus lines agent must stamp or write the words "Purchasing Group" conspicuously on every policy, contract, or other detailed evidence of coverage issued to a purchasing group or its members through the surplus lines agent.

(d) A surplus lines agent may not sell insurance to a purchasing group that is not registered with TDI. Registration may be verified on TDI's website.

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

Filed with the Office of the Secretary of State on June 5, 2018.

TRD-201802424

Norma Garcia

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 676-6584



## SUBCHAPTER C. SURPLUS LINES STAMPING OFFICE PLAN OF OPERATION

### 28 TAC §15.201

STATUTORY AUTHORITY. TDI proposes new §15.201 under Insurance Code §§981.009 and §36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Proposed §15.201 affects Insurance Code §§981.153, 981.154, and 981.155.

§15.201. Commissioner Approval.

(a) The stamping office's plan of operation (plan of operation) and any amendment to it become effective on written approval by Commissioner order, and constitute the manner in which the stamping office must operate and discharge its responsibilities in accordance with the Insurance Code and TDI's rules.

(b) The stamping office must submit proposed amendments to the plan of operation to the Commissioner for consideration and approval.

(1) The Commissioner may accept or reject some or all of the proposed amendments.

(2) TDI will provide public notice and an opportunity to comment on some or all of the proposed amendments.

(3) The Commissioner will approve amendments to the plan of operation by Commissioner order.

(c) If the stamping office fails to submit an acceptable amendment to the plan of operation, the Commissioner may amend the plan of operation as set forth in Insurance Code §981.153(c).

(d) The stamping office must post the most current approved plan of operation on its website.

(e) If the stamping office's board of directors recommends changing the stamping fee, the Commissioner will post notice in the *Texas Register* that a stamping fee change is being considered and allow for a 20-day comment period. The notice will specify the current stamping fee and the proposed stamping fee. After the close of the comment period and review of the comments, the Commissioner will either approve or deny changing the stamping fee by order.

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

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Norma Garcia

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



## SUBCHAPTER D. SURPLUS LINES INSURERS

### 28 TAC §15.301

STATUTORY AUTHORITY. TDI proposes new §15.301 under Insurance Code §§981.009, 981.153, and 36.001.

Insurance Code §981.009 provides that the Commissioner may adopt rules to implement Insurance Code Chapter 981 or to satisfy requirements under federal law or regulations.

Insurance Code §981.153 provides that the procedures to administer the stamping office are established by a plan of operation approved by the Commissioner.

Insurance Code §36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the

powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS-REFERENCE TO STATUTE. Proposed new §15.301 affects Insurance Code §§981.051, 981.057, 981.058, 981.063, and 981.071 - 981.077.

§15.301. Eligibility Requirements of Surplus Lines Insurers.

(a) Surplus lines insurers not designated as a domestic surplus lines insurer by TDI must provide to TDI and to the stamping office information relating to the insurer's eligibility to write surplus lines insurance.

(1) For insurers domiciled in another state, this information must include documents evidencing authorization from the insurer's domiciliary jurisdiction to write the same kind and class of business that it proposes to write in Texas and documentation that the insurer has capital and surplus required by Insurance Code §981.057. Documentation must include:

(A) insurer information, including the insurer's:

(i) full name;

(ii) physical address for its principal place of business;

(iii) mailing address;

(iv) NAIC number; and

(v) contact individual's name, phone number, and email;

(B) the state in which they are domiciled;

(C) a list of all lines and classifications of insurance business the applicant is authorized to insure or reinsure.

(2) Alien insurers listed with the NAIC's International Insurer Department are not required to submit anything under this section, but are encouraged to provide TDI with a contact person located in the United States, including the person's address and phone number, as well as information regarding the types of insurance the company anticipates writing in Texas. This information may be sent electronically to TDI.

(b) Surplus lines insurers designated as a domestic surplus lines insurer by TDI must provide to the stamping office a copy of the domestic surplus lines insurer certificate issued by TDI and documentation that the insurer has capital and surplus required by Insurance Code §981.057.

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

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Norma Garcia

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



## TITLE 30. ENVIRONMENTAL QUALITY

# PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

## CHAPTER 11. CONTRACTS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §11.1 and §11.3.

Background and Summary of the Factual Basis for the Proposed Rules

The Texas Comptroller of Public Accounts (Comptroller) revised and reorganized its rules, 34 TAC Chapter 20, Statewide Procurement and Support Services in 2017. These revisions became effective on January 24, 2017.

Each state agency is required by Texas Government Code, §2161.003, to adopt the Historically Underutilized Businesses (HUB) rules and by Texas Government Code, §2156.005(d), to adopt the Bid Opening and Tabulation rules. The TCEQ's current rules adopting the HUB and Bid Opening and Tabulation rules by reference refer to the prior versions of the rules and do not reflect the current numbering of the rules.

Section by Section Discussion

### §11.1, *Historically Underutilized Business Program*

The commission proposes to amend §11.1 to update agency rules to reflect current citations of the Comptroller regarding HUB (34 TAC Part 1, Chapter 20, Subchapter D). Each state agency is required by Texas Government Code, §2161.003, to adopt the Comptroller's HUB rules. The TCEQ's current rule adopting the HUB rule by reference refers to the prior version of the rule and does not reflect the current numbering of the rule.

### §11.3, *Bid Opening and Tabulation*

The commission proposes to amend §11.3 to update agency rules to reflect current citations of the Comptroller's Bid Opening and Tabulation rules (34 TAC Part 1, §20.207 and §20.208). Each state agency is required by Texas Government Code, §2156.005(d), to adopt the Comptroller's Bid Opening and Tabulation rules. The TCEQ's current rule adopting the Bid Opening and Tabulation rules by reference refers to the prior version of the rule and does not reflect the current numbering of the rule.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The rulemaking is proposed in order to bring the references in Chapter 11 into compliance with the Comptroller's rules regarding procurement and support services. Per the Texas Government Code, each state agency is required to adopt rules relating to both HUB and Bid Opening and Tabulation. The Comptroller's HUB and Bid Opening and Tabulation rules were amended on January 24, 2017, thus making the commission's rules inaccurate. The proposed rulemaking brings the commission's rules relating to contracts into compliance with the Comptroller's rules by removing an incorrect reference to the commission and renumbering a subsection reference in TAC relating to agency purchasing requirements.

Public Benefits and Costs

Ms. Bearse also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and clear rules for the procurement practices of the agency.

The proposed rules are not expected to result in fiscal implications for businesses or individuals. The proposed rules update an outdated reference and clarify that the agency's procurement practice is aligned with policies of the Comptroller.

#### Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

#### Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rules do not adversely affect rural communities in a material way for the first five years that the proposed rules are in effect. The amendments would apply statewide and have the same effect in rural communities as in urban communities.

#### Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are effect. The proposed rules update an outdated reference and clarify that the agency's procurement practice is aligned with policies of the Texas Comptroller of Public Accounts.

#### Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

#### Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rules do not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal or limit an existing regulation, nor does it increase or decrease the number of individuals subject to its applicability. During the first five years the proposed rules should not impact positively or negatively the state's economy.

#### Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rules are not subject to Texas Government Code, §2001.0225, because they do not meet the definition of a "Major environmental rule." The intent of the proposed rulemaking is to conform to Texas Government Code, §2161.003 and §2156.005(d). The changes are not expressly to protect the environment and/or reduce risks to human health and environment.

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

#### Takings Impact Assessment

The commission evaluated the proposed rules and assessed whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rules is to conform to Texas Government Code, §2161.003 and §2156.005(d).

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed regulation does not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), restrict or limit the owner's right to property, nor reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007.

#### Consistency with the Coastal Management Program

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

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

#### Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on July 18, 2018, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

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

#### Submittal of Comments

Written comments may be submitted to Paige Bond, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2018-018-011-AD. The comment period closes on July 24, 2018. Copies of the proposed rulemaking can be obtained from the commission's website at [http://www.tceq.texas.gov/rules/propose\\_adopt.html](http://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Claribel Diaz, Financial Administrative Division, (512) 239-5369.

## SUBCHAPTER A. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

### 30 TAC §11.1

#### Statutory Authority

The amendment is proposed under the Texas Water Code (TWC), §5.012, which provides that the commission is responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; TWC, §5.102, concerning general powers of the commission; TWC, §5.103 and §5.105, which establish the commission's general authority to adopt rules; and Texas Government Code, §2161.003, which provides statutory direction to adopt the Texas Comptroller of Public Accounts' (Comptroller) rules under Texas Government Code, §2161.002 as the agency's or institution's own rules.

The proposed rule implements requirements of Texas Government Code, §2161.003, to adopt the Comptroller's rules under Texas Government Code, §2161.002 as the agency's or institution's own rules.

#### §11.1. *Historically Underutilized Business Program.*

(a) The commission adopts by reference the rules of the Texas Comptroller of Public Accounts in 34 TAC Part 1, Chapter 20, Subchapter D, Division 1 [~~Subchapter B~~] (relating to Historically Underutilized Businesses [~~Business Program~~]).

(b) The adoption of this rule is required by Texas Government Code, §2161.003, 76th Legislature, 1999.

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

Filed with the Office of the Secretary of State on June 7, 2018.

TRD-201802511

David Timberger

Director, General Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 292-2678



## SUBCHAPTER C. BID OPENING AND TABULATION

### 30 TAC §11.3

#### Statutory Authority

The amendment is proposed under the Texas Water Code (TWC), §5.012, which provides that the commission is responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment; TWC, §5.102, concerning general powers of the commission; TWC, §5.103 and §5.105, which establish the commission's general authority to adopt rules; and Texas Government Code, §2156.005(d), which provides statutory direction that state agencies making purchases shall adopt the Texas Comptroller of Public Accounts' (Comptroller) rules related to bid opening and tabulation.

The proposed rule implements requirements of Texas Government Code, §2156.005(d), that state agencies making

purchases shall adopt the Comptroller's rules related to bid opening and tabulation.

#### §11.3. *Bid Opening and Tabulation.*

(a) The commission adopts by reference the rules of the Texas Comptroller of Public Accounts, Statewide [Texas] Procurement and Support Services in 34 TAC §20.207 and §20.208 (relating to Competitive Sealed Bidding and Competitive Sealed Proposals) [34 TAC §20.35(b)] (relating to Bid Submission, Bid Opening, and Tabulation), transferred effective September 1, 2007, as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4237)).

(b) The adoption of this rule is required by Texas Government Code, §2156.005(d), 75th Legislature, 1997.

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

Filed with the Office of the Secretary of State on June 7, 2018.

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David Timberger

Director, General Law Division

Texas Commission on Environmental Quality

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For further information, please call: (512) 292-2678



## TITLE 40. SOCIAL SERVICES AND ASSISTANCE

### PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

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

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, HHSC proposes amendments to §15.5, concerning Definitions, and §15.1408, concerning Administrative Penalties, in Title 40, Chapter 15, Licensing Standards for Prescribed Pediatric Extended Care Centers.

#### BACKGROUND AND PURPOSE

The proposed amendments implement Texas Health and Safety Code, §248A.2515, as added by House Bill (H.B.) 2025, 85th Legislature, Regular Session, 2017. Section 248A.2515 requires HHSC to develop a system to record and track the scope and severity of licensure violations by a prescribed pediatric

extended care center (PPECC) for the purpose of assessing an administrative penalty or taking enforcement action.

The system must be similar to the one used by the Centers for Medicare & Medicaid Services to categorize the scope and severity of violations for nursing facilities.

The proposed amendments also change references from "DADS" to "HHSC" to reflect that DADS was abolished effective September 1, 2017, and its functions were transferred to HHSC.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §15.5 adds a definition for "HHSC," amends the definition of "DADS" to mean "HHSC," and amends the definition of "commissioner" to mean the executive commissioner of HHSC. These changes are necessary because DADS was abolished and its functions were transferred to HHSC. When all references to "DADS" and "commissioner" are removed from Chapter 15, the definitions will be deleted. The proposed amendments also made some acronyms, defined terms, and moved them to be in alphabetical order.

The proposed amendment to §15.1408, Administrative Penalties, adds definitions for "actual harm," "immediate threat to the health or safety of a minor," "isolated," "pattern of violation," "potential for minimal harm," and "widespread in scope." Definitions of those terms are necessary for implementation of the proposed system to record and track licensure violations. Further, the proposed amendment replaces the current administrative penalties table with one that categorizes licensure violations based on their scope and severity and sets forth a penalty range for each category.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the proposed amendments will be in effect, there may be fiscal implications to revenues of state government as a result of enforcing and administering the amendments. HHSC lacks sufficient data to determine if the rule as proposed will result in the collection of administrative penalties in greater or lesser amounts than under current rules.

Ms. Rymal has determined there will be no additional cost to state government because the tracking functionality related to scope and severity currently exists in regulatory survey operations' database and only requires activation for the affected program types. There will be no fiscal implications to local governments as a result of enforcing and administering the rules as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the proposed amendments will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to the agency;
- (5) the proposed rules will not create a new rule;

(6) the proposed rules will not expand, limit, or repeal an existing rule;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not have an effect on the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. There are currently no PPECCs licensed in Texas.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the proposed rules.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these proposed rules because the amendments are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

#### PUBLIC BENEFIT

Mary T. Henderson, Associate Commissioner for Long-Term Care Regulatory Services, has determined that for each year of the first five years the amendments are in effect, the public will benefit from HHSC being able to more efficiently assess administrative penalties, enhancing its ability to enforce health and safety standards in licensed PPECCs.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Questions about the content of this proposal may be directed to Josie Esparza at (512) 438-4077 in HHSC Long-Term Care Regulatory Services Division. Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to [HHSCRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHSCRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 40R063" in the subject line.

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

#### 40 TAC §15.5

## STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §248A.101, which authorizes the executive commissioner to adopt rules regulating prescribed pediatric extended care centers.

The amendment implements Texas Government Code, §531.0055, and Texas Health and Safety Code, §248A.101.

### §15.5. Definitions.

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

- (1) **Active Play**--Any physical activity from which a minor derives amusement, entertainment, enjoyment, or satisfaction by taking a participatory rather than a passive role. Active play includes various forms of activities, from the exploration of objects and toys to the structured play of formal games, sports, and hobbies.
- (2) **Actual census**--The number of minors at a center at any given time.
- (3) **Administration of medication**--The direct application of a medication to the body of a minor by any route. This includes removing an individual or unit dose from a previously dispensed, correctly labeled container, verifying it with the medication order, giving the correct medication and the correct dose to the correct minor at the correct time by the correct route, and accurately recording the time and dose given.
- (4) **Administrator**--The person who is responsible for implementing and supervising the administrative policies and operations of a center and for administratively supervising the provision of services to minors and their parents on a day-to-day basis.
- (5) **Adult minor**--A minor who is 18 years of age or older or is emancipated, and has not been adjudged incompetent.
- (6) **Affiliate**--With respect to an applicant or license holder that is:
  - (A) a corporation--means an officer, director, or stockholder with direct ownership or disclosable interest of at least five percent, a subsidiary, or a parent company;
  - (B) a limited liability company--means an officer, member, or parent company;
  - (C) an individual--means:
    - (i) the individual's spouse;
    - (ii) each partnership and each partner thereof of which an individual or any affiliate of an individual is a partner; and
    - (iii) each corporation in which an individual is an officer, director, or stockholder with a direct ownership of at least five percent;
  - (D) a partnership--means a partner or a parent company of the partnership; and
  - (E) a group of co-owners under any other business arrangement means an officer, director, or the equivalent under the specific business arrangement or a parent company.
- (7) **Applicant**--A person who applies for a license to operate a center under THSC Chapter 248A and this chapter. The applicant is the person in whose name HHSC [~~DADS~~] issues the license.
  - (8) **Audiologist**--A person who has a valid license under Texas Occupations Code, Chapter 401, as an audiologist.
  - (9) **Basic services**--Include:
    - (A) the development, implementation, and monitoring of a comprehensive protocol of care that:
      - (i) is provided to a medically dependent or technologically dependent minor;
      - (ii) is developed in conjunction with the minor's parent; and
      - (iii) specifies the medical, nursing, psychosocial, therapeutic, and developmental services required by the minor; and
    - (B) the caregiver training needs of a medically dependent or technologically dependent minor's parent.
  - (10) **Behavioral emergency**--A situation that occurs after which preventative, or de-escalating techniques are attempted and determined to be ineffective and it is immediately necessary to restrain a minor to prevent immediate probable death or substantial bodily harm to the minor or to others because the minor is attempting serious bodily harm or immediate physical harm to the minor or to others.
  - (11) **Business day**--Any day except a national or state holiday listed in Texas Government Code §662.003(a) or (b). The term includes Saturday or Sunday if the center is open on that day.
  - (12) **Center**--A prescribed pediatric extended care center. A facility operated for profit or on a nonprofit basis that provides non-residential basic services to four or more medically dependent or technologically dependent minors who require the services of the facility and who are not related by blood, marriage, or adoption to the owner or operator of the facility.
  - (13) **Change of ownership**--An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.
  - (14) **Chemical restraint**--The use of any chemical, including pharmaceuticals, through topical application, oral administration, injection, or other means, to restrict the free movement of all or a portion of a minor's body for the purpose of modifying or controlling the minor's behavior and which is not a standard treatment for a minor's medical or psychosocial condition.
  - (15) **Chief financial officer**--An individual who is responsible for supervising and managing all financial activities for a center.
  - (16) **Clinical note**--A notation of a contact with a minor or a minor's family member that is written and dated by any staff providing services on behalf of a center and that describes signs and symptoms of the minor, and treatments and medications administered to the minor, including the minor's reaction or response, and any changes in physical, emotional, psychosocial, or spiritual condition of the minor during a given period of time.
  - (17) **Commission**--The Texas Health and Human Services Commission.
  - (18) **Commissioner**--The term referred to the commissioner of DADS; it now refers to the executive commissioner of HHSC.
  - (19) **Community disaster resources**--A local, statewide, or nationwide emergency system that provides information and resources during a disaster, including weather information, transportation, evacuation and shelter information, disaster assistance and recovery efforts,

evacuee and disaster victim resources, and resources for locating evacuated friends and relatives.

(20) Complaint--An allegation against a center or involving services provided at a center that involves a violation of this chapter or THSC Chapter 248A.

(21) Continuous face-to-face observation--Maintaining an in-person line of sight of a minor that is uninterrupted and free from distraction.

(22) Contractor--An individual providing services ordered by a prescribing physician on behalf of a center that the center would otherwise provide by its employees.

(23) Controlling person--A person who has the ability, acting alone or in concert with others, to directly or indirectly influence, direct, or cause the direction of the management of, expenditure of money for, or policies of a center or other person.

(A) A controlling person includes:

(i) a management company, landlord, or other business entity that operates or contracts with another person for the operation of a center;

(ii) any person who is a controlling person of a management company or other business entity that operates a center or that contracts with another person for the operation of a center; and

(iii) any other person who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of a center, is in a position of actual control of or authority with respect to the center, regardless of whether the person is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the center.

(B) Notwithstanding any other provision of this paragraph, a controlling person of a center or of a management company or other business entity described by subparagraph (A)(i) of this paragraph that is a publicly traded corporation or is controlled by a publicly traded corporation means an officer or director of the corporation. The term does not include a shareholder or lender of the publicly traded corporation.

(C) A controlling person described by subparagraph (A)(iii) of this paragraph does not include a person, including an employee, lender, secured creditor, or landlord, who does not exercise any formal or actual influence or control over the operation of the center.

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

(25) DADS--The term referred to the Department of Aging and Disability Services; it now refers to HHSC [or its successor agency].

(26) Daily census--The number of minors served at a center during a center's hours of operation for a 24-hour period, starting at midnight.

(27) Day--A calendar day, unless otherwise specified in the text. A calendar day includes Saturday, Sunday, and a holiday.

(28) Dietitian--A person who has a valid license under the Licensed Dietitian Act, Texas Occupations Code, Chapter 701, as a licensed dietitian or provisional licensed dietitian, or who is registered as a dietitian by the Commission on Dietetic Registration of the American Dietetic Association.

(29) Direct ownership interest--Ownership of equity in the capital, stock, or profits of, or a membership interest in, an applicant or license holder.

(30) Disclosable interest--Five percent or more direct or indirect ownership interest in an applicant or license holder.

(31) Emergency situation--An impending or actual situation that:

(A) interferes with normal activities of a center or minors at a center;

(B) may:

(i) cause injury or death to a minor or individual at the center; or

(ii) cause damage to the center's property;

(C) requires the center to respond immediately to mitigate or avoid injury, death, damage, or interference; and

(D) does not include a situation that arises from the medical condition of a minor such as cardiac arrest, obstructed airway, or cerebrovascular accident.

(32) Executive commissioner--The executive commissioner of the Texas Health and Human Services Commission.

(33) Functional assessment--An evaluation of a minor's abilities, wants, interests, and needs related to self-care, communication skills, social skills, motor skills, play with toys or objects, growth, and development appropriate for age.

(34) Health care provider--An individual or facility licensed, certified, or otherwise authorized to administer health care in the ordinary course of business or professional practice.

(35) Health care setting--A location at which licensed, certified, or otherwise regulated health care is administered.

(36) HHSC-- The Texas Health and Human Services Commission.

(37) [(36)] IDT-- Interdisciplinary team. Individuals who work together to meet the medical, nursing, psychosocial, and developmental needs of a minor and a minor's parent's training needs.

(38) [(37)] Inactive medical record--A record for a minor who was admitted by a center to receive services and was subsequently discharged by the center.

(39) [(38)] Indirect ownership interest--Any ownership or membership interest in a person that has a direct ownership interest in an applicant or license holder.

(40) [(39)] Inspection--An on-site examination or audit of a center by HHSC [DADS] to determine compliance with THSC Chapter 248A and this chapter.

(41) [(40)] Isolation--The involuntary confinement of a minor in a room of a center for the purposes of infection control, assessment, and observation away from other minors in a room at the center. When in isolation, a minor is physically prevented from contact with other minors.

(42) [(41)] Joint training--Training provided by HHSC [DADS] to service providers and HHSC [DADS] inspectors on subjects that address the 10 most commonly cited violations of state law governing centers, as published in HHSC [DADS] annual reports. HHSC [DADS] determines the frequency of joint training.

(43) [(42)] License--A license to operate a center issued by HHSC [DADS] under THSC<sub>2</sub> Chapter 248A<sub>2</sub> and this chapter. The term includes initial, renewal, and temporary licenses unless specifically stated otherwise.

(44) [(43)] Licensed assistant in speech-language pathology--A person who has a valid license under Texas Occupations Code, Chapter 401, as a licensed assistant in speech-language pathology and who provides speech language support services under the supervision of a licensed speech-language pathologist.

(45) [(44)] License holder--A person that holds a license to operate a center under THSC Chapter 248A and this chapter.

[(45)] [~~licensed vocational nurse--LVN: A person who has a valid license under Texas Occupations Code, Chapter 301, as a licensed vocational nurse.~~]

(46) Life Safety Code--A publication of the National Fire Protection Association (NFPA), also known as NFPA 101, 2000 edition.

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

(48) Local emergency management coordinator--The person identified as the emergency management coordinator by the mayor or county judge for the geographical area in which a center is located.

(49) LVN--Licensed vocational nurse. A person who has a valid license under Texas Occupations Code, Chapter 301, as a licensed vocational nurse.

(50) [(49)] Mechanical restraint--The use of any mechanical device, material, or equipment to restrict the free movement of all or a portion of a minor's body for the purpose of modifying or controlling the minor's behavior.

(51) [(50)] Medical director--A physician who has the qualifications described in §15.307 of this chapter (relating to Medical Director Qualifications and Conditions) and has the responsibilities described in §15.308 of this chapter (relating to Medical Director Responsibilities).

(52) [(51)] Medical record--A record composed first-hand for a minor who has or is receiving services at a center.

(53) [(52)] Medically dependent or technologically dependent--The condition of an individual who, because of an acute, chronic, or intermittent medically complex or fragile condition or disability, requires ongoing, technology-based skilled nursing care prescribed by a physician to avert death or further disability, or the routine use of a medical device to compensate for a deficit in a life-sustaining body function. The term does not include a controlled or occasional medical condition that does not require continuous nursing care, including asthma or diabetes, or a condition that requires an epinephrine injection.

(54) [(53)] Medication administration record--A record used to document the administration of a minor's medications and pharmaceuticals.

(55) [(54)] Medication list--A list that includes all prescriptions, over-the-counter pharmaceuticals, and supplements that a minor is prescribed or taking, including the dosage, preparation, frequency, and the method of administration.

(56) [(55)] Minor--An individual younger than 21 years of age who is medically dependent or technologically dependent.

(57) [(56)] Mitigation--An action taken to eliminate or reduce the probability of an emergency or public health emergency, or reduce an emergency's severity or consequences.

(58) [(57)] Nursing director--The individual responsible for supervising skilled services provided at a center and who has the qualifications described in §15.309 of this chapter (relating to the Nursing Director and Alternate Nursing Director Qualifications and Conditions).

(59) [(58)] Nutritional counseling--Advising and assisting an adult minor or a minor's parent or family on appropriate nutritional intake by integrating information from a nutrition assessment with information on food and other sources of nutrients and meal preparation consistent with cultural background and socioeconomic status, with the goal being health promotion, disease prevention, and nutrition education. The term includes:

(A) dialogue with an adult minor or a minor's parent to discuss current eating habits, exercise habits, food budget, and problems with food preparation;

(B) discussion of dietary needs to help an adult minor or the minor's parent understand why certain foods should be included or excluded from the minor's diet and to help with adjustment to the new or revised or existing diet plan;

(C) a personalized written diet plan as ordered by the minor's physician, to include instructions for implementation;

(D) providing the adult minor or the minor's parent with motivation to help them understand and appreciate the importance of the diet plan in getting and staying healthy; or

(E) working with the adult minor or the minor's parent by recommending ideas for meal planning, food budget planning, and appropriate food gifts.

(60) [(59)] Occupational therapist--A person who has a valid license under Texas Occupations Code, Chapter 454, as an occupational therapist.

(61) [(60)] Occupational therapy assistant--A person who has a valid license under Texas Occupations Code, Chapter 454, as an occupational therapy assistant who assists in the practice of occupational therapy under the general supervision of an occupational therapist.

(62) [(61)] Operating hours--The days of the week and the hours of day a center is open for services to a minor as identified in a center's written policy as required by §15.201 of this chapter (relating to Operating Hours).

(63) [(62)] Overnight--The hours between 9:00 p.m. and 5:00 a.m. during the days of the week a center operates.

(64) [(63)] Over-the-counter pharmaceuticals--A drug or formulary for which a physician's prescription is not needed for purchase or administration.

(65) [(64)] Parent--A person authorized by law to act on behalf of a minor with regard to a matter described in this chapter. The term includes:

(A) a biological, adoptive, or foster parent;

(B) a guardian;

(C) a managing conservator; and

(D) a non-parent decision-maker as authorized by Texas Family Code §32.001.



(66) [(65)] Parent company--A person, other than an individual, who has a direct 100 percent ownership interest in the owner of a center.

(67) [(66)] Person--An individual, firm, partnership, corporation, association, or joint stock association, and the legal successor thereof.

(68) [(67)] Personal care services--Services required by a minor, including:

- (A) bathing;
- (B) maintaining personal hygiene;
- (C) routine hair and skin care;
- (D) grooming;
- (E) dressing;
- (F) feeding;
- (G) eating;
- (H) toileting;
- (I) maintaining continence;
- (J) positioning;
- (K) mobility and bed mobility;
- (L) transfer and ambulation;
- (M) range of motion;
- (N) exercise; and
- (O) use of durable medical equipment.

(69) [(68)] Pharmaceuticals--Of or pertaining to drugs, including over-the-counter drugs and those requiring a physician's prescription for purchase or administration.

(70) [(69)] Pharmacist--A person who is licensed to practice pharmacy under Texas Occupations Code, Chapter 558.

(71) [(70)] Pharmacy--A facility at which a prescription drug or medication order is received, processed, or dispensed as defined in Texas Occupations Code §551.003.

(72) [(71)] Physical restraint--The use of physical force, except for physical guidance or prompting of brief duration, that restricts the free movement of all or a portion of a minor's body for the purpose of modifying or controlling the minor's behavior.

(73) [(72)] Physical therapist--A person who has a valid license under Texas Occupations Code, Chapter 453, as a physical therapist.

(74) [(73)] Physical therapist assistant--A person who has a valid license under Texas Occupations Code, Chapter 453, as a physical therapist assistant and:

- (A) who assists and is supervised by a physical therapist in the practice of physical therapy; and
- (B) whose activities require an understanding of physical therapy.

(75) [(74)] Physician--A person who:

- (A) has a valid license in Texas to practice medicine or osteopathy in accordance with Texas Occupations Code, Chapter 155;
- (B) has a valid license in Arkansas, Louisiana, New Mexico, or Oklahoma to practice medicine, who is the treating physi-

cian of a minor, and orders services for the minor, in accordance with Texas Occupations Code, Chapter 151; or

(C) is a commissioned or contract physician or surgeon who serves in the United States uniformed services or Public Health Service if the person is not engaged in private practice, in accordance with Texas Occupations Code, Chapter 151.

(76) [(75)] Place of business--An office of a center where medical records are maintained and from which services are directed.

(77) [(76)] Plan of care--A protocol of care.

(78) [(77)] Positive intervention--An intervention that is based on or uses a minor's preferences as positive reinforcement, and focuses on positive outcomes and wellness for the minor.

(79) [(78)] Pre-licensing program training--Computer-based training, available on HHSC [DADS] website, designed to acquaint center staff with licensure standards.

(80) [(79)] Preparedness--Actions taken in anticipation of a disaster including a public health disaster.

(81) [(80)] Prescribing physician--A physician who is authorized to write and issue orders for services at a center.

(82) [(81)] Progress note--A dated and signed written notation summarizing facts about services provided to a minor and the minor's response during a given period of time.

(83) [(82)] Protective device--A mechanism or treatment, including sedation, that is:

(A) used:

- (i) for body positioning;
- (ii) to immobilize a minor during a medical, dental, diagnostic, or nursing procedure;
- (iii) to permit wounds to heal; or
- (iv) for a medical condition diagnosed by a physician; and

(B) not used as a restraint to modify or control behavior.

(84) [(83)] Protocol of care--A comprehensive, interdisciplinary plan of care that includes the medical physician's plan of care, nursing care plan and protocols, psychosocial needs, and therapeutic and developmental service needs required by a minor and family served.

(85) [(84)] Psychologist--A person who has a valid license under Texas Occupations Code, Chapter 501, as a psychologist.

(86) [(85)] Psychosocial treatment--The provision of skilled services to a minor under the direction of a physician that includes one or more of the following:

- (A) assessment of alterations in mental status or evidence of suicide ideation or tendencies;
- (B) teaching coping mechanisms or skills;
- (C) counseling activities; or
- (D) evaluation of a plan of care.

(87) [(86)] Public health disaster declaration--A governor's announcement based on a determination by the Department of State Health Services that there exists an immediate threat from a communicable disease that:

(A) poses a high risk of death or serious long-term disability to a large number of people; and

(B) creates a substantial risk of public exposure because of the disease's high level of contagion or the method by which the disease is transmitted.

(88) [(87)] Quiet time--A behavior management technique used to provide a minor with an opportunity to regain self-control, where the minor enters and remains for a limited period of time in a designated area from which egress is not prevented.

(89) [(88)] Recovery--Activities implemented during and after a disaster response, including a public health disaster response, designed to return a center to its normal operations as quickly as possible.

[(89) Registered nurse--RN. A person who has a valid license under Texas Occupations Code, Chapter 301, to practice professional nursing.]

(90) Relocation--The closing of a center and the movement of its business operations to another location.

(91) Respiratory therapist--A person who has a valid license under Texas Occupations Code, Chapter 604, as a respiratory care practitioner.

(92) Response--Actions taken immediately before an impending disaster or during and after a disaster, including a public health disaster, to address the immediate and short-term effects of the disaster.

(93) Restraint--Physical restraint, chemical restraint, or mechanical restraint.

(94) RN --Registered nurse. A person who has a valid license under Texas Occupations Code, Chapter 301, to practice professional nursing.

(95) [(94)] RN delegation--Delegation of tasks by an RN in accordance with 22 TAC Chapter 224 (relating to Delegation of Nursing Tasks by Registering Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments).

(96) [(95)] Sedation--The act of allaying nervous excitement by administering medication that commonly induces the nervous system to calm. Sedation is a protective device.

(97) [(96)] Social worker--A person who has a valid license under Texas Occupations Code, Chapter 505, as a social worker.

(98) [(97)] Speech-language pathologist--A person who has a valid license under Texas Occupations Code, Chapter 401, as a speech-language pathologist.

(99) [(98)] Substantial compliance--A finding in which a center receives no recommendation for enforcement action after an inspection.

(100) [(99)] Supervision--Authoritative procedural guidance by a qualified person that instructs another person and assists in accomplishing a function or activity. Supervision includes initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(101) [(100)] Support services--Social, spiritual, and emotional care provided to a minor and a minor's parent by a center.

(102) [(101)] THSC--Texas Health and Safety Code.

(103) [(102)] Total census--The total number of minors with active plans of care at a center.

(104) [(103)] Transition support--Planning, coordination, and assistance to move the location of services provided to a minor from a center to the least restrictive setting appropriate.

(105) [(104)] Violation--A finding of noncompliance with this chapter or THSC Chapter 248A resulting from an inspection.

(106) [(105)] Volunteer--An individual who provides assistance to a center without compensation other than reimbursement for actual expenses.

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

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4681



## SUBCHAPTER G. ENFORCEMENT

### 40 TAC §15.1408

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §248A.101, which authorizes the executive commissioner to adopt rules regulating prescribed pediatric extended care centers.

The amendment implements Texas Government Code, §531.0055, and Texas Health and Safety Code, §248A.101.

§15.1408. *Administrative Penalties.*

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

(1) Actual harm--A negative outcome that compromises a minor's physical, mental, or emotional well-being.

(2) Immediate threat to the health or safety of a minor--A situation that causes, or is likely to cause, serious injury, harm, or impairment to or the death of a minor.

(3) Isolated--A very limited number of minors are affected and a very limited number of staff are involved, or the situation has occurred only occasionally or in a very limited number of locations.

(4) Pattern of violation--Repeated, but not widespread in scope, failures of a center to comply with THSC Chapter 248A or a rule, standard, or order adopted under THSC Chapter 248A that:

(A) result in a violation; and

(B) are found throughout the services provided by the center or that affect or involve the same minor or center employees.

(5) Potential for minimal harm--A violation that has the potential for causing no more than a minor negative impact on a minor.

(6) Widespread in scope--A violation that:

(A) is pervasive throughout the services provided by the center; or

(B) represents a systemic failure by the center that affects or has the potential to affect a large portion of or all of the minors of the center.

(b) ~~[(a)]~~ Assessing penalties. HHSC ~~[DADS]~~ may assess an administrative penalty against a person who violates:

(1) THSC<sub>2</sub> Chapter 248A; or

(2) a provision in this chapter for which a penalty may be assessed.

(c) ~~[(b)]~~ Criteria for assessing penalties. HHSC ~~[DADS]~~ assesses an administrative penalty based on the scope and severity of a violation in accordance with the table in this section. Within an established range, HHSC determines the amount of an administrative penalty ~~[administrative penalties in accordance with the schedule of appropriate and graduated penalties established in this section. The schedule of appropriate and graduated penalties for each violation is]~~ based on the following criteria:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation;

(2) the threat to the health or safety caused by the violation;

(3) any previous violations;

(4) the amount necessary to deter future violations;

(5) efforts made by the violator to correct the violation; and

(6) any other matters that justice may require.

(d) ~~[(e)]~~ Penalty calculation and assessment. The table in this section sets forth the ranges for administrative penalties that HHSC assesses, based on the scope and severity of a violation. An administrative penalty ~~[The amount of the penalty]~~ may not exceed \$500 for each violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

(e) ~~[(d)]~~ Schedule of appropriate and graduated penalties.

(f) ~~[(e)]~~ The penalty range for a Severity Level A violation is \$400 - \$500 per violation.

(g) ~~[(f)]~~ A Severity Level A violation is a violation that results in immediate threat to a minor's health or safety ~~[serious harm to or death of a minor]~~.

~~[(g)] DADS may assess a separate Severity Level A administrative penalty for each of the rules listed in the table in subsection (p) of this section.]~~

(h) The penalty range for a Severity Level B violation is \$300 - \$400 per violation.

(i) A Severity Level B violation is a violation that results in actual harm that is not considered an immediate threat ~~[constitutes a serious threat to the health or safety of a minor]~~.

~~[(i)] DADS may assess a separate Severity Level B administrative penalty for each of the rules listed in the table in subsection (p) of this section.]~~

(j) ~~[(k)]~~ The penalty range for a Severity Level C violation is \$200 - \$300 per violation.

(k) ~~[(j)]~~ A Severity Level C violation is a violation with no actual harm with potential for more than minimal harm ~~[substantially limits the center's capacity to provide care]~~.

~~[(m)] DADS may assess a separate Severity Level C administrative penalty for each of the rules listed in the table in subsection (p) of this section.]~~

(l) ~~[(n)]~~ The penalty range for a Severity Level D violation is \$100 - \$200 per violation.

(m) ~~[(o)]~~ A Severity Level D violation is a violation with no actual harm with potential for minimal harm ~~[or had minimal or no health or safety significance]~~.

Figure: 40 TAC §15.1408(m)

~~[(p)] DADS may assess a separate Severity Level D administrative penalty for each of the rules listed in the following table.]~~

~~[(Figure: 40 TAC §15.1408(p))]~~

(n) ~~[(q)]~~ Proposal of administrative penalties. If HHSC ~~[DADS]~~ assesses an administrative penalty, HHSC ~~[DADS]~~ provides a written notice of violation letter to a center. The notice includes:

(1) a brief summary of the violation;

(2) the amount of the proposed penalty; and

(3) a statement of the center's right to a formal administrative hearing on the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(o) ~~[(r)]~~ A center may accept HHSC's ~~[DADS]~~ determination and recommended penalty not later than 20 days after the date on which the center receives the notice of violation letter, including the proposed penalty, or make a written request for a formal administrative hearing on the occurrence of the violation, the amount of the penalty, or both.

(1) If a center that is notified of a violation accepts HHSC's ~~[DADS]~~ determination and recommended penalty or fails to respond to the notice, the executive ~~[DADS]~~ commissioner or designee issues an order approving the determination and ordering that the center pay the proposed penalty.

(2) If a center that is notified of a violation does not accept HHSC's ~~[DADS]~~ determination, the center must submit to HHSC ~~[the Health and Human Services Commission]~~ a written request for a formal administrative hearing on the determination and must not pay the proposed penalty. Remittance of the penalty to HHSC ~~[DADS]~~ is deemed acceptance by the center of HHSC's ~~[DADS]~~ determination, is final, and waives the center's right to a formal administrative hearing.

(3) If a center requests a formal administrative hearing, the hearing is held in accordance with THSC §248A.255.

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

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Karen Ray  
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Department of Aging and Disability Services

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For further information, please call: (512) 438-4681

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CHAPTER 15. LICENSING STANDARDS FOR  
PRESCRIBED PEDIATRIC EXTENDED CARE  
CENTERS

SUBCHAPTER B. LICENSING APPLICATION,  
MAINTENANCE, AND FEES

## 40 TAC §§15.105, 15.106, 15.108, 15.112

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC proposes amendments to §15.105, Initial License Application Procedures and Issuance; §15.106, Renewal License Application Procedures and Issuance; §15.108, Change of Ownership License Application Procedures and Issuance; and §15.112, Licensing Fees, in Title 40, Chapter 15, Licensing Standards for Prescribed Pediatric Extended Care Centers.

### BACKGROUND AND PURPOSE

The purpose of the proposal is to implement part of House Bill 2025, 85th Legislature, Regular Session, 2017, by extending the term of a license for a prescribed pediatric extended care center from two years to three years. In addition, the proposed rules prorate the license fees to reflect the longer term of a license.

The proposed rules change "DADS" to "HHSC" to reflect that DADS was abolished effective September 1, 2017, and its functions were transferred to HHSC.

### SECTION-BY-SECTION SUMMARY

The proposed amendment to §15.105 extends the term of an initial license from two years to three years.

The proposed amendment to §15.106 extends the term of a renewal license from two years to three years.

The proposed amendment to §15.108 extends the term of a change of ownership license from two years to three years.

The proposed amendment to §15.112 prorates the fees for an initial license, for a renewal license, and for an increase in center capacity.

### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the proposed rules will be in effect, there will be an increase in revenue to state government for the first three years that the rules are in effect but this will be offset when all license holders have been issued three-year licenses. There will be no fiscal implications to local governments as a result of enforcing and administering the rules as proposed.

### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of HHSC employee positions;

(3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;

(4) the proposed rules will affect fees paid to HHSC;

(5) the proposed rules will not create a new rule;

(6) the proposed rules will not expand, limit, or repeal an existing rule;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities. The proposal increases license fees but the increase is offset by the longer term of a license.

### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

Greta Rymal has also determined that for the first five years the rules are in effect there are no anticipated economic costs to persons who are required to comply with the proposed rules, because the increase in license fees is offset by the longer term of a license.

There is no anticipated negative impact on local employment.

### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because they are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

### PUBLIC BENEFIT

Mary T. Henderson, Associate Commissioner for Long-Term Care Regulatory Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be increased efficiency in the licensure process by extending the term of a license from two years to three years.

### TAKINGS IMPACT ASSESSMENT

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

### PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sandy Herrera at (512) 438-4681 in HHSC Long-Term Care Regulatory. Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030; street address 4900 North Lamar Boulevard, Mail Code H600, Austin, Texas 78751; or e-mailed to [HHSRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHSRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mail-

ing comments, please indicate "Comments on Proposed Rule 40R064" in the subject line.

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §248A.101, which authorizes the HHSC Executive Commissioner to adopt rules regulating prescribed pediatric extended care centers.

The amended rules implement Texas Government Code, §531.0055 and Texas Health and Safety Code, §248A.053.

#### §15.105. *Initial License Application Procedures and Issuance.*

(a) The center's administrator must complete pre-licensing program training before an applicant may submit an initial application for a license.

(b) An applicant for an initial license must submit:

(1) a complete and correct application including all documents and information that HHSC [DADS] requires as part of the application process;

(2) the correct license fee established in §15.112 of this subchapter (relating to Licensing Fees);

(3) a letter of credit for \$250,000 from a bank that is insured by the Federal Deposit Insurance Corporation, or other documentation acceptable to HHSC [DADS], to demonstrate an applicant's financial viability; and

(4) all other documents described in the instructions provided on the application and on the HHSC [DADS] website.

(c) After HHSC [DADS] receives an application for an initial license and the correct license fee, HHSC [DADS] reviews the application and notifies the applicant if additional information is needed to complete the application.

(d) An applicant must submit written notice to HHSC [DADS] that the center is ready for a Life Safety Code inspection.

(1) The written notice must be submitted:

(A) with the application; or

(B) no later than 120 days after HHSC [DADS] Licensing and Credentialing Section [Unit] receives the application.

(2) After HHSC [DADS] receives the written notice for a Life Safety Code inspection and an applicant has satisfied the application submission requirements, HHSC [DADS] staff conducts an on-site Life Safety Code inspection.

(e) The center must meet the building requirements described in Subchapter E of this chapter (relating to Building Requirements). If a center fails to meet the building requirements and fails to implement an approved written plan of correction no later than 120 days after the initial Life Safety Code inspection, HHSC [DADS] denies the license application.

(f) If a center meets the building requirements in Subchapter E of this chapter, the center may admit no more than three minors. If the center admits a minor, the applicant must send written notice to HHSC [DADS] indicating the center is ready for a health inspection. The health inspection request must be submitted no later than 120 days after the date the center meets the building requirements.

(1) HHSC [DADS] conducts an on-site health inspection to determine compliance with this chapter.

(2) If the center fails to comply with this chapter and fails to implement an approved written plan of correction no later than 120 days after the date of the initial health inspection, HHSC [DADS] denies the license application.

(g) If an applicant receives a notice from HHSC [DADS] that some or all of the information is missing or incomplete, an applicant must submit the requested information no later than 30 days after the date of the notice. If the applicant fails to timely submit the requested information, HHSC [DADS] denies the application. If HHSC [DADS] denies the application, HHSC [DADS] does not refund the license fee.

(h) HHSC [DADS] issues an initial license if it determines that an applicant has met the provisions of this chapter and THSC Chapter 248A.

(i) The issuance of an initial license constitutes notice from HHSC [DADS notice] to the center of the approval of the application.

(j) HHSC [DADS] issues a center license to the license holder named on the license at the place of business listed on the license. The license is not transferable or assignable.

(k) The license includes:

(1) the license holder's name;

(2) the name of the center;

(3) the center's place of business;

(4) the center's licensed capacity;

(5) a statement that the center provides services to minors for 12 hours or less in a 24-hour period but no overnight care; and

(6) the effective date of the license.

(l) HHSC [DADS] may deny an application for an initial license if the applicant, a controlling person, or a person required to submit background and qualification information fails to meet the criteria for a license established in §15.101 of this subchapter (relating to Criteria and Eligibility for a License) or for any reason specified in §15.115 of this subchapter (relating to Criteria for Denial of a License).

(m) If HHSC [DADS] denies an application for an initial license, HHSC [DADS] sends the applicant written notice of the denial and informs the applicant of the right to request an administrative hearing to appeal the denial. The administrative hearing is held in accordance with 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) and Chapter 91 of this title (relating to Hearings Under the Administrative Procedure Act).

(n) An initial license expires on the third [second] anniversary after the effective date of the initial license.

#### §15.106. *Renewal License Application Procedures and Issuance.*

(a) A center license expires on the third [second] anniversary after [of] the effective date. To renew a license, a license holder must submit a renewal application to HHSC [DADS] before the expiration date. HHSC [DADS] sends written notice of expiration of a license to the license holder at least 120 days before the expiration date of a license. The written notice includes instructions for completing the renewal application.

(b) A license holder must comply with the requirements in §15.102 of this subchapter (relating to General Application Requirements) and §15.114 of this subchapter (relating to Time Periods for Processing All Types of License Applications) to renew a license.

(c) In accordance with Texas Government Code, §2001.054, HHSC [DADS] considers that a license holder meets the renewal application submission deadline if the license holder submits:

(1) no later than 60 days before the expiration date of the current license:

(A) a complete application for renewal or an incomplete application for renewal with a letter explaining the circumstances that prevented the inclusion of the missing information; and

(B) the correct license fee established in §15.112 of this subchapter (relating to Licensing Fees); or

(2) during the 60-day period ending on the date the current license expires:

(A) a complete application for renewal or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information;

(B) the correct license fee established in §15.112 of this subchapter; and

(C) the late fee established in §15.112 of this subchapter.

(d) HHSC [DADS] reviews a renewal application and notifies the license holder if additional information is needed to complete the application.

(e) It is the license holder's responsibility to ensure that the application is timely received by HHSC [DADS]. Failure to submit a timely and sufficient renewal application with the correct license fee will result in the expiration of the license.

(f) If a license holder submits a renewal application to HHSC [DADS] that is postmarked after the expiration date of the license, HHSC [DADS] denies the renewal application and does not refund the renewal license fee. The license holder is not eligible to renew the license and must cease operation on the date the license expires. A license holder whose license expires must apply for an initial license in accordance with §15.105 of this subchapter (relating to Initial License Application Procedures and Issuance).

(g) HHSC [DADS] issues a renewal license after determining that an applicant and the center have met the provisions of this chapter.

(h) The issuance of a renewal license constitutes notice from HHSC [DADS notice] to the center that the application is approved.

(i) A renewal license issued in accordance with this chapter expires on the third [second] anniversary after the effective date.

(j) HHSC [DADS] may pend action on an application for the renewal of a license for up to six months if the center is not in compliance with this chapter based on an on-site inspection.

(k) HHSC [DADS] may deny an application for the renewal of a license if an applicant, controlling person, or any person required to submit background and qualification information fails to meet the criteria for a license established in §15.101 of this subchapter (relating to Criteria and Eligibility for a License) or for any reason specified in §15.115 of this subchapter (relating to Criteria for Denial of a License).

(l) Before denying a license renewal application, HHSC [DADS] gives the license holder:

(1) notice by personal service or by registered or certified mail of the facts or conduct alleged to warrant the proposed action; and

(2) an opportunity to show compliance with all the requirements of THSC Chapter 248A and this chapter to retain the license.

(m) To request an opportunity to show compliance, the license holder must send a written request to HHSC [DADS]. The request must:

(1) be postmarked no later than 10 days after the date of notice from HHSC [DADS notice] of the proposed action and received by HHSC [DADS] no later than 10 days after the date of the postmark; and

(2) contain documentation that refutes HHSC [DADS] allegations specifically.

(n) The opportunity to show compliance is limited to a review of documentation submitted by the license holder and information HHSC [DADS] used as the basis for the proposed action. The opportunity to show compliance is not an administrative hearing. HHSC [DADS] gives the license holder a written affirmation or reversal of the proposed action.

(o) If HHSC [DADS] denies an application for a renewal license, HHSC [DADS] sends the license holder a written notice of the denial and informs the license holder of the right to request an administrative hearing to appeal the denial. The administrative hearing is held in accordance with 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) and HHSC [DADS] hearing rules found in Chapter 91 of this title (relating to Hearings Under the Administrative Procedure Act).

*§15.108. Change of Ownership License Application Procedures and Issuance.*

(a) A center license is not assignable or transferable. If a change of ownership occurs, the applicant must obtain a license in accordance with subsection (c) of this section.

(b) An application for a center license when there is a change of ownership is an application for an initial license.

(c) An applicant must submit to HHSC [DADS]:

(1) a complete application for a license in accordance with §15.101 of this subchapter (relating to Criteria and Eligibility for a License) or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information;

(2) the application fee, in accordance with §15.112 of this subchapter (relating to Licensing Fees);

(3) a letter of credit for \$250,000 from a bank that is insured by the Federal Deposit Insurance Corporation, or other documentation acceptable to HHSC [DADS], to demonstrate the applicant's financial viability; and

(4) a signed written notice from the center's existing license holder of intent to transfer operation of the center to the applicant beginning on a date specified by the applicant, unless waived in accordance with subsection (f) of this section.

(d) HHSC [DADS] may deny issuance of a license if the applicant, a controlling person, or any person required to submit background and qualification information fails to meet the criteria for a license established in §15.101 of this subchapter or for any reason specified in §15.115 of this subchapter (relating to Criteria for Denial of a License).

(e) To avoid a center operating without a license, an applicant must submit all items in subsection (c) of this section at least 30 days before the anticipated date of the change of ownership in accordance with HHSC [DADS] application instructions.

(f) The 30-day notice required by subsection (e) of this section may be waived by HHSC [DADS] if:

(1) the applicant presents evidence to HHSC [~~DADS~~] demonstrating that an eviction of the center or a foreclosure of the property from which the center operates is imminent and that circumstance prevented the timely submission of the notice; or

(2) HHSC [~~DADS~~], in its sole discretion, determines that circumstances are present that threaten a minor's health, safety, or welfare and necessitate waiver of timely submission of the notice.

(g) HHSC [~~DADS~~] conducts an on-site health inspection to verify compliance with the licensure requirements before issuing a license as a result of a change of ownership. HHSC [~~DADS~~] may conduct a desk review instead of an on-site health inspection before issuing a license as a result of a change of ownership if:

(1) less than 50 percent of the direct or indirect ownership interest in the former license holder changed, when compared to the new license holder; or

(2) every person with a disclosable interest in the new license holder had a disclosable interest in the former license holder.

(h) HHSC [~~DADS~~], in its sole discretion, may conduct an on-site Life Safety Code inspection before issuing a license as a result of a change of ownership.

(i) If an applicant meets the requirements for a license, HHSC [~~DADS~~] issues a license. The effective date of the license is the same date as the effective date of the change of ownership and cannot precede the date the application was received by HHSC [~~DADS~~] Licensing and Credentialing Section [~~Unit~~].

(j) The initial license issued to the new license holder expires on the third [~~second~~] anniversary after [~~of~~] the effective date.

(k) The previous license holder's license is invalid on the effective date of the new license holder's initial license.

#### *§15.112. Licensing Fees.*

(a) The schedule of fees for licensure of a center is as follows:

(1) initial license fee (includes changes of ownership and relocation)--\$2625 [~~\$1750~~];

(2) renewal license fee--\$2625 [~~\$1750~~]; and

(3) increase in capacity--\$1312.50 [~~\$875~~].

(b) HHSC [~~DADS~~] does not waive the license fee for a change of ownership application despite a demonstration of the circumstances referenced in §15.108(f) of this subchapter (relating to Change of Ownership License Application Procedures and Issuance). HHSC [~~DADS~~] may waive the timely submission of an application for a change of ownership in accordance with §15.108(f) of this subchapter.

(c) The late fee established in §15.106 of this subchapter (relating to Renewal License Application Procedures and Issuance) is \$50 per day to a license holder who submits a renewal application after the date as described at §15.106 of this subchapter, except that the total amount of a late fee may not exceed \$500.00.

(d) HHSC [~~DADS~~] does not consider an application as submitted until an applicant pays the correct license fee as required in this section. The fee must accompany the application.

(e) A fee paid to HHSC [~~DADS~~] is not refundable, except as provided by §15.114 of this chapter (relating to Time Periods for Processing All Types of License Applications).

(f) HHSC [~~DADS~~] accepts payment according to methods described in the application instructions provided on the HHSC [~~DADS~~] website.

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

Filed with the Office of the Secretary of State on June 6, 2018.

TRD-201802490

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 438-4681



## CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, HHSC proposes amendments to §19.1920, concerning Operating Policies and Procedures; and §19.2114, concerning Right to Correct, in Title 40, Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

### BACKGROUND AND PURPOSE

The proposed amendments implement new Chapter 326 and amendments of §242.0665, Texas Health and Safety Code, made by House Bill (H.B.) 2025, 85th Legislature, Regular Session, 2017.

New Chapter 326, Texas Health and Safety Code, requires a nursing facility to adopt and enforce a written policy requiring training for a facility employee who provides direct care to a person with Alzheimer's disease or a related disorder and ensuring that the care provided to that person meets the person's needs related to the diagnosis of Alzheimer's disease or a related disorder. Chapter 326 also makes a nursing facility subject to an administrative penalty without a right to correct the violation before the penalty is enforced for a second or subsequent violation of this new requirement.

The amendment of Texas Health and Safety Code, §242.0665, limits a nursing facility's right to correct a violation of the licensing rules before HHSC imposes an administrative penalty on the facility. The right to correct does not apply to violations that meet a certain level of scope and severity or to second or subsequent violations of the requirements in §326.002, Texas Health and Safety Code.

### SECTION-BY-SECTION SUMMARY

The proposed amendment to §19.1920 implements new Chapter 326, Texas Health and Safety Code, by adding subsection (e) to the section. This new subsection requires a nursing facility to develop, implement, and enforce a written policy related to the training of facility staff who provide direct care for residents with Alzheimer's disease or related disorders. New subsection (e) also requires a nursing facility to ensure that the care provided to a person with Alzheimer's disease or a related disorder meets that person's needs related to the Alzheimer's disease or related disorder.

The proposed amendment to §19.2114 implements the amendment of §242.0065, Texas Health and Safety Code by describing additional situations in which a facility does not have a right to correct a violation before being assessed an administrative penalty.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner, Financial Services, has determined that for each year of the first five years that the proposed amendments will be in effect, there may be fiscal implications to revenues of state governments as a result of enforcing and administering the proposed amendments. HHSC lacks sufficient data to determine if the proposed rules will result in the collection of administrative penalties in greater or lesser amounts than under the current rules.

Ms. Rymal has determined there will be no additional costs to state government because the tracking functionality related to scope and severity currently exists in regulatory survey operations' database and only requires activation for the affected program types. There will be no fiscal implications to local governments as a result of enforcing and administering the rules as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the proposed amendments will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to the agency;
- (5) the proposed rules will not create a new rule;
- (6) the proposed rules will expand an existing rule;
- (7) the proposed rules will not change the number of individuals subject to the rule; and
- (8) the proposed rules will not have an effect on the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there may be an economic impact to small businesses, micro-businesses, or rural communities as a result of the proposed rules. HHSC lacks data to provide an estimate of how many may be adversely affected by the proposed rule change.

There will be no additional cost to license holders to comply with the requirement to adopt, implement, and enforce a policy re-

lated to training staff in caring for persons with Alzheimer's disease as required by H.B. 2025. License holders are currently required to provide basic training to staff. The rule includes additional topics relating to Alzheimer's disease that must be covered in training.

License holders currently must pay administrative penalties for licensure violations under certain circumstances. The rule adds a requirement that HHSC assess penalties for repeated violations of certain requirements within two years of the initial violation and provides no opportunity for the license holder to correct the violation and avoid a penalty. HHSC cannot determine if the proposed new subsection and rules for assessing administrative penalties will result in any license holders paying more administrative penalties than under current rules.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the rules as proposed. HHSC cannot determine if the proposed new subsection and rules for assessing administrative penalties will result in any license holders paying more administrative penalties than under current rules.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the amendments are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

#### PUBLIC BENEFIT

Mary T. Henderson, Associate Commissioner for Long-Term Care Regulatory Services, has determined that for each year of the first five years the amendments are in effect, the public will benefit from adoption of the amendments. Residents of nursing facilities will benefit from additional training for a facility employee who provides care to a resident with Alzheimer's disease or a related disorder and from policies that ensure the care provided to a person with Alzheimer's disease or a related disorder meets that person's needs related to the Alzheimer's disease or related disorder. Residents of nursing facilities will also benefit from HHSC's enhanced ability to enforce minimum health and safety standards.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Questions about the content of this proposal may be directed to Josie Esparza at (512) 438-4077 in the HHSC Long-Term Care Regulatory Services Division. Written comments on the proposal may be submitted to the Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to [HHSCRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHSCRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on



the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 40R063" in the subject line.

## SUBCHAPTER T. ADMINISTRATION

### 40 TAC §19.1920

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Health and Safety Code, §242.037, which authorizes the executive commissioner to adopt rules to implement Chapter 242; and Texas Health and Safety Code, §326.004, which authorized the executive commissioner to administer and implement Chapter 326.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, Chapter 242 and Chapter 326.

*§19.1920. Operating Policies and Procedures.*

(a) The facility must have an administrative policy and procedure manual that outlines the general operating policies and procedures of the facility. The manual must include policies and procedures related to admission and admission agreements, resident care services, refunds, transfers and discharges, termination from Medicaid or Medicare participation in accordance with §19.2121 of this chapter (relating to General Provisions), receiving and responding to complaints and recommendations, and protection of a resident's [residents'] personal property and civil rights. A copy of this manual must be made available for review upon request to each physician, staff member, resident, and resident's next of kin or guardian and to the public.

(b) The facility must have written personnel policies and procedures that are explained to employees during initial orientation and are readily available to them after that time.

(c) The facility must ensure that personnel records are correct and contain sufficient information to support placement in the assigned position (including a resume of training and experience). When appropriate, a current copy of the person's license or permit must be in the file.

(d) Upon request of HHSC [Texas Department of Aging and Disability Services (DADS)], the facility must make available financial records to demonstrate the facility's compliance with applicable state laws and standards relating to licensing.

(e) A facility must develop, implement, and enforce a written policy that:

(1) requires a facility employee who provides direct care to a resident with Alzheimer's disease or a related disorder to successfully complete training in the provision of care to residents with Alzheimer's disease and related disorders. Training must include at least:

- (A) symptoms and treatment of dementia;
- (B) stages of Alzheimer's disease;
- (C) behavior management; and
- (D) communication; and

(2) ensures the care and services provided by a facility employee to a resident with Alzheimer's disease or a related disorder meet

the specific identified needs of the resident relating to the diagnosis of Alzheimer's disease or a related disorder.

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

Filed with the Office of the Secretary of State on June 7, 2018.

TRD-201802515

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 438-4681



## SUBCHAPTER V. ENFORCEMENT

### DIVISION 2. LICENSING REMEDIES

#### 40 TAC §19.2114

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; Texas Health and Safety Code, §242.037, which authorizes the executive commissioner to adopt rules to implement Chapter 242; and Texas Health and Safety Code, §326.004, which authorized the executive commissioner to administer and implement Chapter 326.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, Chapter 242 and Chapter 326.

*§19.2114. Right To Correct.*

(a) HHSC may not collect an administrative penalty if, not later than the 45th day after the date the facility receives notice, the facility corrects the violation.

(b) If the facility reports to HHSC that the violation has been corrected, HHSC inspects the facility for the correction or takes any other steps necessary to confirm that the violation has been corrected and notifies the facility that:

(1) the correction is satisfactory and a penalty is not assessed; or

(2) the correction is not satisfactory and a penalty is recommended.

(c) The facility must request a hearing on the violation no later than the 20th day after the date on which the notice is sent.

(d) Subsection (a) of this section does not apply to:

(1) a violation that HHSC determines:

(A) represents a pattern of violation that results in [serious] actual harm [to or death of a resident];

(B) is widespread in scope and results in actual harm;

(C) is widespread in scope, constitutes a potential for actual harm, and relates to:

(i) treatment of residents as described in §19.602 of this chapter (relating to Incidents of Abuse and Neglect Reportable to the Texas Department of Aging and Disability Services (DADS) and Law Enforcement Agencies by Facilities);

(ii) resident behavior and institution practices as described in §19.601 of this chapter (relating to Resident Behavior and Facility Practice);

(iii) quality of care as described in §19.901 of this chapter (relating to Quality of Care);

(iv) medication errors as described in §19.901(13) of this chapter;

(v) standard menus and nutritional adequacy as described in §19.1107 of this chapter (relating to Menus and Nutritional Adequacy);

(vi) physician visits as described in §19.1201 (relating to Physician Services), §19.1202 (relating to Physician Visits), §19.1203 (relating to Frequency of Physician Visits), §19.1204 (relating to Availability of Physician for Emergency Care), §19.1205 (relating to Physician Delegation of Tasks), §19.1206 (relating to Physician Signatures) and §19.1207 (relating to Prescription of Psychoactive Medication) of this chapter;

(vii) infection control as described in §19.1601 of this chapter (relating to Infection Control);

(viii) life safety from fire as described in §19.101(69) and (70) (relating to Definitions); or

(ix) emergency preparedness and response as described in §19.1914 of this chapter (relating to Emergency Preparedness and Response);

(D) ~~[(B)]~~ constitutes an immediate [a serious] threat to the health or safety of a resident; or

(E) ~~[(C)]~~ substantially limits the facility's capacity to provide care;

(2) the violations listed in §19.214(a)(2)-(6) of this chapter ~~[title]~~ (relating to Criteria for Denying a License or Renewal of a License);

(3) the violation of a resident right; ~~[or]~~

(4) a violation listed in §19.2112(a)(8) or (9) of this chapter (relating to Administrative Penalties); or ~~[-]~~

(5) to a second or subsequent violation of §19.1920(e) of this chapter (relating to Operating Policies and Procedures) or §19.1929(2)(A) of this chapter (relating to Staff Development).

(e) A facility that corrects a violation under subsection (a) of this section must maintain the correction. If the facility fails to maintain the correction until the first anniversary of the date the correction was made, HHSC may assess an administrative penalty equal to three times the amount of the original penalty assessed, but not collected. HHSC does not provide a facility an opportunity to correct the subsequent violation.

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

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4681

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## CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH AN INTELLECTUAL DISABILITY OR RELATED CONDITIONS

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, HHSC proposes amendments to §90.3, concerning Definitions; §90.236, concerning Administrative Penalties; and §90.240, concerning Right to Correct, in Title 40, Chapter 90, Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions.

### BACKGROUND AND PURPOSE

The proposed amendments implement Texas Health and Safety Code (THSC) §252.065, as amended by House Bill (H.B.) 2025, 85th Legislature, Regular Session, 2017. Specifically, §252.065 requires HHSC to develop a system to record and track the scope and severity of licensure violations by an intermediate care facility for individuals with an intellectual disability (ICF/IID) for the purpose of assessing an administrative penalty or taking other enforcement action. The system must be similar to the one used by the Centers for Medicare & Medicaid Services to categorize the scope and severity of violations for nursing facilities. Section 252.065 also describes the circumstances under which HHSC may not allow an ICF/IID license holder to correct a violation before assessing an administrative penalty. The proposed amendments describe the system for assessing administrative penalties based on the scope and severity of a violation. The proposed amendments also add the circumstances under which HHSC will not allow an ICF/IID license holder to correct a violation before HHSC assesses an administrative penalty.

The proposed amendments also change references from "DADS" to "HHSC" to reflect that DADS was abolished on September 1, 2017, and its functions were transferred to HHSC.

### SECTION-BY-SECTION SUMMARY

The proposed amendment to §90.3, Definitions, adds definitions for "actual harm," "immediate threat to the health or safety of a resident," "isolated," "pattern of violation," "potential for minimal harm," "violation," and "widespread in scope." Definitions of those terms are necessary for implementation of the proposed system to record and track licensure violations. The proposed amendment deletes the definition of "immediate and serious threat" because the term will no longer be used in Chapter 90. The proposed amendment adds a definition of "resident," a term used throughout Chapter 90, to clarify that it means a person who resides in an ICF/IID. In addition, the proposed amendment adds a definition of "HHSC" and amends the definitions of "DADS" and "department" to mean HHSC. This change is

necessary because DADS has been abolished and its functions were transferred to HHSC. When all references to "DADS" and "department" are removed from Chapter 90, the definitions will be deleted. Edits were made to ensure consistency and clarity and the section was renumbered to accommodate the addition and removal of definitions.

The proposed amendment to §90.236, Administrative Penalties, states that HHSC may assess an administrative penalty for a violation that creates a potential for more than minimal harm, results in actual harm, or poses an immediate threat to the health or safety of a resident. In addition, the current administrative penalties table is replaced with a table that categorizes licensure violations based on their scope and severity. Subsection (e) is amended to state that the scope and severity of a violation will be used to determine the range of the administrative penalty assessed. Subsection (b) is deleted because necessary definitions are proposed in §90.3. Subsections (f) and (g) are deleted because progressive administrative penalties will not be used to assess administrative penalties in accordance with subsection (a)(1). The proposed amendment sets forth the amounts that will be assessed for violations described in subsection (a)(2) - (8), which are based on the licensed capacity of the ICF/IID and the number of times the license holder has been cited for the violation. The proposed amendment makes other non-substantive editorial changes for consistency and clarity, including replacing "DADS" with "HHSC."

The proposed amendment to §90.240, Right to Correct, describes the circumstances under which HHSC does not allow a facility to correct a violation prior to assessing an administrative penalty, consistent with Texas Health and Safety Code, §252.065(e). The proposed amendment also clarifies that HHSC gives a facility at least 45 days to correct minor violations before assessing an administrative penalty. The proposed amendment makes other non-substantive editorial changes for consistency and clarity, including replacing "DADS" with "HHSC" and adding reference titles where appropriate.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the proposed amendments will be in effect, there may be fiscal implications to revenues of state governments as a result of enforcing and administering the amendments. HHSC lacks sufficient data to determine if the rule as proposed will result in the collection of administrative penalties in greater or lesser amounts than under current rules.

Greta Rymal has also determined that there will be no additional costs to state government because the tracking functionality related to scope and severity currently exists in regulatory survey operations' database and only requires activation for ICF/IID. There will be no fiscal implications to local governments as a result of enforcing and administering the rules as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the proposed amendments will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of employee positions;

- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to the agency;
- (5) the proposed rules will not create a new rule;
- (6) the proposed rules will not expand, limit, or repeal an existing rule;
- (7) the proposed rules will not change the number of individuals subject to the rule; and
- (8) the proposed rules will not have an effect on the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there may be an economic impact to small businesses, micro-businesses or rural communities as a result of the proposed rules. HHSC lacks data to provide an estimate of how many may be adversely affected by the proposed rule change.

License holders currently must pay administrative penalties for licensure violations under certain circumstances. The rule adds a requirement that HHSC assess penalties for repeated violations of certain requirements within two years of the initial violation and provides no opportunity for the ICF/IID to correct the violation and avoid penalty. HHSC cannot determine if the proposed rules for assessing administrative penalties will result in any license holders paying more administrative penalties than under the current rules.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the proposed rules.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these proposed rules because the amendments are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

#### PUBLIC BENEFIT

Mary T. Henderson, Associate Commissioner for Long-Term Care Regulatory Services, has determined that for each year of the first five years the amendments are in effect, the public will benefit from HHSC being able to more efficiently assess administrative penalties, enhancing its ability to enforce health and safety standards in licensed ICF/IIDs.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Questions about the content of this proposal may be directed to Josie Esparza at (512) 438-4077 in HHSC Long-Term Care Regulatory Services Division. Written comments on the proposal may be submitted to Rules Coordination Office, P. O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street

address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to HHSCRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 40R063" in the subject line.

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §90.3

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; and Texas Health and Safety Code, §252.033, which authorizes the executive commissioner to adopt rules related to the licensure of ICF/IIDs.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §252.033.

#### §90.3. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise. Individual subchapters may have definitions that are specific to the subchapter.

(1) Actual harm--A negative outcome that compromises a resident's physical, mental, or emotional well-being.

(2) [(4)] Addition--The addition of floor space to a facility.

(3) [(2)] Administrator--The administrator of a facility.

(4) [(3)] Administration of medication--Removing a unit or dose of medication from a previously dispensed, properly labeled container; verifying the medication with the medication order; giving the proper medication in the proper dosage to the proper resident at the proper time by the proper administration route; and recording the time of administration and dosage administered.

(5) [(4)] Advanced practice nurse--A person licensed to practice professional nursing in accordance with Texas Occupations Code, Chapter 301, and authorized by the Texas Board of Nursing to practice as an advanced practice nurse.

(6) [(5)] Applicant--A person applying for a license under Texas Health and Safety Code, Chapter 252.

(7) [(6)] APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001.

(8) [(7)] Attendant personnel--All persons who are responsible for direct and non-nursing services to residents of a facility. (Nonattendant personnel are all persons who are not responsible for direct personal services to residents.) Attendant personnel come within the categories of: administration, dietitians, medical records, activities, housekeeping, laundry, and maintenance.

(9) [(8)] Behavioral emergency--A situation in which severely aggressive, destructive, violent, or self-injurious behavior exhibited by a resident:

(A) poses a substantial risk of imminent probable death of, or substantial bodily harm to, the resident or others;

(B) has not abated in response to attempted preventive de-escalatory or redirection techniques;

(C) is not addressed in a behavior therapy program; and

(D) does not occur during a medical or dental procedure.

(10) [(9)] Care and treatment--Services required to maximize resident independence, personal choice, participation, health, self-care, psychosocial functioning and provide reasonable safety, all consistent with the preferences of the resident.

(11) [(10)] Change of ownership--An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.

(12) [(11)] CMS--Centers for Medicare & Medicaid Services. The federal agency that provides funding and oversight for the Medicare and Medicaid programs. CMS was formerly known as the Health Care Financing Administration (HCFA).

(13) [(12)] Controlled substance--A drug, substance, or immediate precursor as defined in the Texas Controlled Substance Act, Health and Safety Code, Chapter 481, as amended, or the Federal Controlled Substance Act of 1970, Public Law 91-513, as amended.

(14) [(13)] Controlling person of an applicant, license holder, or facility--A person who, acting alone or with others, has the ability to directly or indirectly influence or direct the management, expenditure of money, or policies of an applicant or license holder or of a facility owned by an applicant or license holder.

(A) The term includes:

(i) a spouse of the applicant or license holder;

(ii) an officer or director, if the applicant or license holder is a corporation;

(iii) a partner, if the applicant or license holder is a partnership;

(iv) a trustee or trust manager, if the applicant or license holder is a trust;

(v) a person that operates or contracts with others to operate the facility;

(vi) a person who, because of a personal, familial, or other relationship is in a position of actual control or authority over the facility, without regard to whether the person is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility; and

(vii) a person who would be a controlling person of an entity described in clauses (i) - (vi) of this subparagraph, if that entity were the applicant or license holder.

(B) The term does not include an employee, lender, secured creditor, or other person who does not exercise formal or actual influence or control over the operation of a facility.

(15) [(14)] DADS--The term referred to the Department of Aging and Disability Services; it now refers to HHSC [The Department of Aging and Disability Services or its successor agency].

(16) [(15)] Dangerous drug--Any drug as defined in the Texas Dangerous Drug Act, Health and Safety Code, Chapter 483.

(17) [(16)] Department--~~HHSC~~ [The Department of Aging and Disability Services.]

(18) [(17)] Designee--A state agency or entity with which ~~HHSC~~ [DADS] contracts to perform specific, identified duties related to the fulfillment of a responsibility prescribed by this chapter.

(19) [(18)] Direct ownership interest--Ownership of equity in the capital, stock, or profits of, or a membership interest in, an applicant or license holder.

(20) [(19)] Disclosable interest--Five percent or more direct or indirect ownership interest in an applicant or license holder.

(21) [(20)] Drug (also referred to as medication)--A drug is:

(A) any substance recognized as a drug in the official United States Pharmacopeia, official Homeopathic Pharmacopeia of the United States, or official National Formulary, or any supplement to any of them;

(B) any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man;

(C) any substance (other than food) intended to affect the structure or any function of the human body; and

(D) any substance intended for use as a component of any substance specified in subparagraphs (A) - (C) of this paragraph. It does not include devices or their components, parts, or accessories.

(22) [(21)] Establishment--A place of business or a place where business is conducted which includes staff, fixtures, and property.

(23) [(22)] Facility--A facility serving persons with an intellectual disability or related conditions licensed under this chapter as described in §90.2 of this chapter (relating to Scope) and required to be licensed under the Health and Safety Code, Chapter 252, or the entity that operates such a facility; or, in Subchapters C, D, and F of this chapter, a program provider that must comply with those subchapters in accordance with §9.212 of this title (relating to Non-licensed Providers Meeting Licensure Standards).

(24) [(23)] Governmental unit--A state or a political subdivision of the state, including a county or municipality.

(25) [(24)] Health care professional--A person licensed, certified, or otherwise authorized to administer health care, for profit or otherwise. The term includes a physician, licensed nurse, physician assistant, podiatrist, dentist, physical therapist, speech therapist, and occupational therapist.

(26) [(25)] Hearing--A contested case hearing held in accordance with the Administrative Procedure Act, Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I.

[(26) Immediate and serious threat--A situation in which there is a high probability that serious harm or injury to residents could occur at any time or has already occurred and may occur again if residents are not protected effectively from the harm or if the threat is not removed.]

(27) HHSC--The Texas Health and Human Services Commission.

(28) [(27)] Immediate jeopardy to health and safety--A situation in which immediate corrective action is necessary because the facility's noncompliance with one or more requirements has caused, or

is likely to cause, serious injury, harm, impairment, or death to a resident receiving care in the facility.

(29) Immediate threat to the health or safety of a resident--A situation that causes, or is likely to cause, serious injury, harm, or impairment or death of a resident.

(30) [(28)] Incident--An unusual or abnormal event or occurrence in, at, or affecting the facility or the residents of the facility.

(31) [(29)] Indirect ownership interest--Any ownership or membership interest in a person that has a direct ownership interest in an applicant or license holder.

(32) [(30)] Inspection--Any on-site visit to or survey of a facility by ~~HHSC~~ [DADS] for the purpose of inspection of care, licensing, monitoring, complaint investigation, architectural review, or similar purpose.

(33) [(31)] IPP--Individual program plan. A plan developed by the interdisciplinary team of a facility resident that identifies the resident's training, treatment, and habilitation needs, and describes programs and services to meet those needs.

(34) Isolated--A very limited number of residents are affected and a very limited number of staff are involved, or the situation has occurred only occasionally or in a very limited number of locations.

(35) [(32)] Large facility--Facilities with 17 or more resident beds.

(36) [(33)] Legal guardian--A person who is appointed guardian under §693 of the Probate Code.

(37) [(34)] Legally authorized representative--A person authorized by law to act on behalf of a person with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(38) [(35)] License--Approval from ~~HHSC~~ [DADS] to establish or operate a facility.

(39) [(36)] License holder--A person that holds a license to operate a facility.

(40) [(37)] Licensed nurse--A licensed vocational nurse, registered nurse, or advanced practice nurse.

(41) [(38)] Life Safety Code--NFPA 101.

(42) [(39)] Life safety features--Fire safety components required by the Life Safety Code such as building construction, fire alarm systems, smoke detection systems, interior finishes, sizes and thicknesses of doors, exits, emergency electrical systems, sprinkler systems, etc.

(43) [(40)] Local authorities--A local health authority, fire marshal, building inspector, etc., who may be authorized by state law, county order, or municipal ordinance to perform certain inspections or certifications.

(44) [(41)] Local health authority--The physician having local jurisdiction to administer state and local laws or ordinances relating to public health, as described in the Texas Health and Safety Code, §§121.021 - 121.025.

(45) [(42)] LVN--Licensed vocational nurse. A person licensed to practice vocational nursing in accordance with Texas Occupations Code, Chapter 301.

(46) [(43)] Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance,

or delivery of resident services. Management services shall not include contracts solely for maintenance, laundry, or food services.

(47) [(44)] Metered dose inhaler--A device that delivers a measured amount of medication as a mist that can be inhaled.

(48) [(45)] NFPA--The National Fire Protection Association. If the term is immediately followed by a number, it is a reference to a publication of NFPA, as referenced in NFPA 101.

(49) [(46)] NFPA 99--NFPA 99, Health Care Facilities Code, 2012 Edition. A publication of the NFPA that provides minimum requirements for the installation, testing, maintenance, performance, and safe practices for health care facilities and for material, equipment, and appliances, used for patient care in health care facilities. CMS [The Centers for Medicare and Medicaid Services] has incorporated NFPA 99, 2012 Edition, except Chapters 7, 8, 12, and 13, by reference as a Condition of Participation in the ICF/IID program for facilities that meet the definition of a health care occupancy. Copies of NFPA 99 may be obtained from NFPA, 1 Batterymarch Park, Quincy, MA 02169.

(50) [(47)] NFPA 101--NFPA 101, Life Safety Code, 2012 Edition. A publication of the NFPA that provides minimum requirements, with due regard to function, for the design, operation, and maintenance of buildings and structures for safety to life from fire. CMS [The Centers for Medicare and Medicaid Services] has incorporated NFPA 101, 2012 Edition, by reference as a Condition of Participation in the ICF/IID program. Copies of NFPA 101 may be obtained from NFPA, 1 Batterymarch Park, Quincy, MA 02169.

(51) [(48)] Oral medication--Medication administered by way or through the mouth and does not include sublingual or buccal.

(52) Pattern of violation--Repeated, but not widespread in scope, failures of a facility to comply with Texas Health and Safety Code, Chapter 252, or a rule, standard or order adopted under Chapter 252 that:

(A) result in a violation; and

(B) are found throughout the services provided by the facility or that affect or involve the same residents or facility employees.

(53) [(49)] Person--An individual, firm, partnership, corporation, association, or joint stock company, and any legal successor of those entities.

(54) [(50)] Personal hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(55) Potential for minimal harm--A violation that has the potential for causing no more than a minor negative impact on a resident.

(56) [(51)] QIDP--Qualified intellectual disability professional. A person who has at least one year of experience working directly with persons with an intellectual disability or related conditions and is one of the following:

(A) a doctor of medicine or osteopathy;

(B) a registered nurse; or

(C) an individual who holds at least a bachelor's degree in one of the following areas:

(i) occupational therapy;

(ii) physical therapy;

(iii) social work;

(iv) speech-language pathology or audiology;

(v) recreation or a specialty area such as art, dance, music or physical education;

(vi) dietetics; or

(vii) human services, such as sociology, special education, rehabilitation counseling, or psychology (as specified in Title 42, Code of Federal Regulations, §483.430(b)(5)(x)(W180)).

(57) [(52)] Quality-of-care monitor--A registered nurse, pharmacist, or dietitian, employed by HHSC [DAAS], who is trained and experienced in long-term care regulations, standards of practice in long-term care, and evaluation of resident care and functions independently of HHSC Long Term Care [DAAS] Regulatory Services Division.

[(53) Registered nurse--A person licensed to practice professional nursing in accordance with Texas Occupations Code, Chapter 301.]

(58) [(54)] Remodeling--The construction, removal, or relocation of walls and partitions, or construction of foundations, floors, or ceiling-roof assemblies, including expanding of safety systems (i.e., sprinkler systems, fire alarm systems), that will change the existing plan and use areas of the facility.

(59) [(55)] Renovation--The restoration to a former better state by cleaning, repairing, or rebuilding, e.g., routine maintenance, repairs, equipment replacement, painting.

(60) Resident--A person who resides in a facility.

(61) [(56)] Restraint--A manual method, or a physical or mechanical device, material, or equipment attached or adjacent to the resident's body that the resident cannot remove easily, that restricts freedom of movement or normal access to the resident's body. This term includes a personal hold.

(62) RN--Registered nurse. A person licensed to practice professional nursing in accordance with Texas Occupations Code, Chapter 301.

(63) [(57)] Seclusion--The involuntary separation of a resident away from other residents and the placement of the resident alone in an area from which the resident is prevented from leaving.

(64) [(58)] Small facilities--Facilities with 16 or fewer resident beds.

(65) [(59)] Specialized staff--Personnel with expertise in developmental disabilities.

(66) [(60)] Standards--The minimum conditions, requirements, and criteria with which a facility will have to comply to be licensed under this chapter.

(67) [(61)] Topical medication--Medication applied to the skin but does not include medication administered in the eyes.

(68) [(62)] Universal precautions--The use of barrier precautions by facility personnel to prevent direct contact with blood or other body fluids that are visibly contaminated with blood.

(69) [(63)] Vaccine preventable diseases--The diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

(70) Violation--Any noncompliance with Texas Health and Safety Code, Chapter 252, or any rule under this chapter.

(71) [(64)] Well-recognized church or religious denomination--An organization which has been granted a tax-exempt status as a religious association from the state or federal government.

(72) Widespread in scope--A violation that:

(A) is pervasive throughout the services provided by the facility; or

(B) that affects or has the potential to affect a large portion of or all of the residents of the facility.

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

Filed with the Office of the Secretary of State on June 7, 2018.

TRD-201802517

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 438-4681



## SUBCHAPTER H. ENFORCEMENT

### 40 TAC §90.236, §90.240

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; and Texas Health and Safety Code, §252.033, which authorizes the executive commissioner to adopt rules related to the licensure of ICF/IIDs.

The amendments implement Texas Government Code, §531.0055 and Texas Health and Safety Code, §252.033.

§90.236. *Administrative Penalties.*

(a) HHSC [DADS] may assess an administrative penalty [penalties] against a license holder if the license holder [person who]:

(1) violates Texas Health and Safety Code, Chapter 252, or any rule, standard, or order adopted or a license issued under such chapter and the violation creates a potential for more than minimal harm, results in actual harm, or poses an immediate threat to the health or safety of a resident;

(2) makes a false statement, that the person knows or should know is false, of a material fact:

(A) on an application for issuance or renewal of a license or in documentation submitted to HHSC [DADS] in support of the application; or

(B) with respect to a matter under investigation by HHSC [DADS];

(3) refuses to allow a representative of HHSC [DADS] to inspect:

(A) a book, record, or file required to be maintained by the person; or

(B) any portion of the premises of a facility;

(4) willfully interferes with the work of a representative of HHSC [DADS] or the enforcement of Texas Health and Safety Code, Chapter 252;

(5) willfully interferes with a representative of HHSC [DADS] preserving evidence of a violation of Texas Health and Safety Code, Chapter 252, or a rule, standard, or order adopted or license issued under such chapter;

(6) fails to pay a penalty assessed by HHSC [DADS] under Texas Health and Safety Code, Chapter 252, not later than the 10th day after the date the assessment of the penalty becomes final;

(7) fails to submit a plan of correction to HHSC [DADS] within 10 working days after receiving the final statement of licensing violations; or

(8) fails to notify HHSC [DADS] of a change in ownership before the effective date of that change of ownership.

[(b) Definitions:]

[(1) For purposes of this section, a "violation" is defined as any noncompliance with Texas Health and Safety Code, Chapter 252, or any rule under this chapter.]

[(2) For purposes of this section, "immediate and serious threat" means a situation in which there is a high probability that serious harm or injury to residents could occur at any time or has already occurred and may occur again if individuals are not protected effectively from the harm or if the threat is not removed. "Immediate and serious threat" is described in Appendix Q of the State Operations Manual, "Guidelines for Determining Immediate and Serious Threat to Patient Health and Safety."] ]

[(3) For the purposes of this section, "serious harm" is any condition or situation that could result in severe, temporary or permanent injury, or death, or harm to the mental or physical condition of an individual.]

[(4) For the purposes of this section, "previous history" means any violation that resulted in the recommendation of an administrative penalty documented against a facility in the 24-month period immediately preceding the citation of the violation.]

[(e) Failure to meet the requirements of §90.42(e) of this chapter (relating to Standards for Facilities Serving Persons with Mental Retardation or Related Conditions) is a cause to assess an administrative penalty.]

[(b) [(d) When a violation cited by DADS is determined to be within the scope, severity, and description of the penalty schedules as stated in subsection (m) of this section, the violation may be cause for assessment of a penalty as described in this section and as listed in subsection (m) of this section.] In determining if a violation described in subsection (a)(1) of this section warrants an administrative penalty, HHSC considers [which violations warrant penalties, DADS will consider]:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation; [and]

(2) the hazard of the violation to the health and safety of a resident the clients; and

(3) [(2)] whether the affected license holder [facility] had identified the violation as part of its internal quality assurance process and had made appropriate progress on correction.

(c) [(e)] HHSC does not assess an administrative penalty against a license holder [No facility will be penalized] because of a physician's or consultant's nonperformance beyond the license holder's [facility's] control or if documentation clearly indicates the violation is beyond the license holder's [facility's] control.

[(f)] An offense is defined as a sum of the licensure violations found during an inspection. The first offense violations carry the penalty shown in the "first offense" column under subsections (l) and (m) of this section. The second offense violations carry the penalty shown in the "second offense" column. The third offense violations carry the penalty shown in the "third offense" column. An offense is counted against the facility even if the facility corrected the prior violation and an administrative penalty was not actually imposed.]

[(g)] The progression of offenses described in subsection (f) of this section applies to facilities regardless of license renewals; however, when a facility has not had an offense for a period of two years, the facility's next offense will be in the "first offense" column under subsections (l) and (m) of this section. A suspension of a license and subsequent reinstatement does not interrupt the progression.]

(d) [(h)] An [The] administrative penalty assessed in accordance with subsection (a)(1) of this section begins on the first date HHSC establishes that [DADS first established] the violation that caused the penalty to be assessed exists. [deficiency existed. Administrative penalties will not be imposed on minor infractions. Penalties will be imposed on a per diem basis for those infractions in the administrative penalty schedule, as outlined under subsection (m) of the section. If DADS determines that a violation has occurred that will result in an administrative penalty, the penalty for a facility with fewer than 60 beds will be not less than \$100 or more than \$1,000 for each violation. The penalty for a facility with 60 beds or more will not be less than \$100 or more than \$5,000 for each violation. The total amount of the penalty assessed for a violation continuing or occurring on separate days under this subsection may not exceed \$5,000 for a facility with fewer than 60 beds or \$25,000 for a facility with 60 beds or more.]

(e) [(i)] An administrative [A per diem] penalty assessed in accordance with subsection (a)(1) of this section ceases on the date the [a] violation is [has been] corrected. A violation is corrected if the license holder [, and the facility]:

(1) notifies HHSC [DADS] in writing that the violation has been corrected; [and]

(2) states [provides] the date of the correction in the notification; and

(3) maintains evidence [evidences later] that the violation was corrected on the date in the notification.

(f) An administrative penalty assessed in accordance with subsection (a)(1) of this section is determined based on the scope and severity of the violation, in accordance with the figures in this section. Figure: 40 TAC §90.236(f)

(g) An administrative penalty assessed in accordance with subsection (a)(2), (3), (4), (5), (6), (7) or (8) of this section is in the following amount:

(1) for a facility with a licensed capacity of 59 or less:

(A) \$500 for the first violation of the paragraph;

(B) \$750 for the second violation of the same paragraph; and

(C) \$1000 for the third violation of the same paragraph; and

(2) for a facility with a license capacity of 60 or more:

(A) \$500 for the first violation of the paragraph;

(B) \$3500 for the second violation of the same paragraph; and

(C) \$5000 for the third violation of the same paragraph.

(h) [(j)] If HHSC [DADS] determines that a violation has occurred and that an administrative penalty is proposed, HHSC notifies the license holder [DADS gives written notice] of the proposal to assess an administrative penalty [to the person designated by the facility to receive notice]. The notification includes [notice will include]:

(1) a brief summary of the alleged violation;

(2) a statement of the amount of the proposed penalty [based on the factors listed in subsections (d), (l) and (m) of this section]; and

(3) a statement of the license holder's [person's] right to request a hearing on the occurrence of the violation, the amount of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(i) [(k)] A license holder that is notified in accordance with subsection (h) of this section [facility for which an administrative penalty has been proposed] may file a request for a hearing with HHSC. To receive a hearing, a license holder must request a hearing [the Health and Human Services Commission. The hearing must be requested] in accordance with 1 TAC §357.484 (relating to Request [Requests] for a Hearing) except, as provided by Texas Health and Safety Code, §252.066, the license holder [facility] must make a written request for a hearing within 20 calendar days after the date on which the license holder [facility] receives written notice of the administrative penalty. A hearing requested under this section is governed by 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

[(l)] Assessments for violations warranting administrative penalties for licensed facilities, for which there is no right to correct prior to administrative penalty assessment are as follows: [Figure: 40 TAC §90.236(l)]

[(m)] Assessments for violations warranting administrative penalties for licensed facilities for which there is a right to correct prior to administrative penalty assessment are as follows: [Figure: 40 TAC §90.236(m)]

§90.240. *Right to Correct.*

(a) Except as provided in subsection (b) of this section, before imposing an administrative penalty, HHSC gives [DADS will provide] a reasonable period of time, not less than 45 days, to correct a violation if a plan of correction is implemented. A facility may request a shorter period of time to correct the violation by submitting a [specific] written request for an early inspection to clear the violation. If, during the requested early inspection, HHSC [DADS] finds that the correction is not satisfactory, an administrative penalty may immediately be assessed from the first day of violation.

(b) HHSC does not allow [DADS is not required to give] a facility [the right] to correct a violation before [prior to] assessing an administrative penalty if HHSC [DADS] determines that the violation:



(1) is a pattern of violation that results in actual [has resulted in serious] harm [to or death of a resident];

(2) is widespread in scope and results in actual harm;

(3) is widespread in scope, creates a potential for more than minimal harm, and relates to:

(A) staff treatment of a resident, as described in 42 Code of Federal Regulations (CFR) §483.410, §90.42(e) (relating to Standards for Facilities Serving Individuals with an Intellectual Disability or Related Conditions), §90.212 (relating to Reporting Abuse, Neglect, and Exploitation to DFPS), §90.213 (relating to Reporting Incidents to DADS) and §90.214 (relating to Protection of Residents After Report of Abuse, Neglect, and Exploitation) of this chapter;

(B) active treatment, as described in 42 CFR §483.440;

(C) client behavior and facility practices, as described in 42 CFR §483.450 and §90.42(e) of this chapter;

(D) health care services, as described in 42 CFR §483.460;

(E) drug administration, as described in 42 CFR §483.460(k) and §90.42(e) and §90.43 (relating to Administration of Medication) of this chapter;

(F) infection control, as described in 42 CFR §483.470(l);

(G) food and nutrition services, as described in 42 CFR §483.480; or

(H) emergency preparedness and response, as described in 42 CFR §483.475 and §90.50 (relating to Emergency Preparedness and Response) of this chapter;

(4) [~~2~~] constitutes an immediate [a serious] threat to the health or safety of a resident [or];

(5) [~~3~~] substantially limits the facility's capacity to provide care; or

(6) [~~4~~] is described in §90.236(a)(2) - (8) of this subchapter (relating to Administrative Penalties).

(c) HHSC [~~DADS~~] may not assess an administrative penalty for a minor violation that HHSC gave the facility time to correct if the facility corrects the violation not later than the 46th day after the facility receives notice of the violation.

(d) If the facility reports to HHSC [~~DADS~~] that the violation has been corrected, HHSC inspects [~~DADS will inspect~~] the facility [~~correction~~] or takes [~~take~~] any other steps necessary to confirm that the violation has been corrected and notifies [~~notify~~] the facility that:

(1) the correction is satisfactory and a penalty is not assessed; or

(2) the correction is not satisfactory and a penalty is recommended.

(e) If the facility wishes to appeal the administrative penalty, the facility must file a notice to request a hearing on the violation or penalty no later than the 20th calendar day after the date on which the facility received the notice to pay an administrative penalty [is received].

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

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4681

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## CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH AN INTELLECTUAL DISABILITY OR RELATED CONDITIONS

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC proposes the repeal of and new §90.15, Renewal Procedures and Qualifications; and amendments to §90.19, License Fees, and §90.191, Procedural Requirements, in Title 40, Chapter 90, Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions.

### BACKGROUND AND PURPOSE

The purpose of the proposal is to implement the part of House Bill 2025, 85th Legislature, Regular Session, 2017, that increased the term of a license for an intermediate care facility for individuals with an intellectual disability (ICF/IID) from two years to three years. Specifically, the proposed rules extend the licensing period to three years for an initial license and create a system under which existing licenses expire on staggered dates to extend the licensing period for renewal licenses to three years. In addition, the proposed rules prorate license fees as appropriate. The proposed rules provide that two unannounced inspections will be conducted during a two-year licensing period and three unannounced inspections will be conducted during a three-year licensing period.

The proposed rules change "DADS" to "HHSC" to reflect that DADS was abolished effective September 1, 2017, and its functions were transferred to HHSC.

### SECTION-BY-SECTION SUMMARY

The proposed repeal of §90.15 allows new §90.15, which also addresses the requirements for renewing a license, to be proposed.

Proposed new §90.15 describes the staggered system under which the licensing period will increase from two years to three years. Under the system, all new licenses will be valid for three years, and renewal of a license that expires after December 31, 2018, and before January 1, 2021, will be valid for two or three years, depending on the identification number of the facil-

ity. All licenses expiring January 1, 2021, or later will be valid for three years. The proposed new section describes what a license holder must submit to HHSC for a timely and sufficient application to renew a license. Like current §90.15, the proposed new section states that it is the responsibility of a license holder to ensure that a renewal application is timely received by HHSC. The references in current §90.15 to the reasons a renewal application may be denied and to license fees are deleted because those topics are addressed in §90.17 and §90.19, respectively.

The proposed amendment to §90.19 prorates the license fee for an initial or renewal license based on the term of the license. The proposed amendment also increases the fee that a license holder must pay for an increase in capacity of a facility from \$5.00 to \$7.50 for each unit of capacity approved. The proposed amendment corrects statutory cites related to the emergency assistance fund. In addition, the proposed amendment allows a facility to pay a fee using a credit card or cashier's check. Fees may also be paid by check or money order. An additional method of payment is being added to make paying a fee more convenient for a facility. The proposed amendment corrects the reference to rules governing the collection of a quality assurance fee and deletes information that is addressed in those rules.

The proposed amendment to §90.191 states that HHSC conducts at least two unannounced inspections during a two-year licensing period and at least three unannounced inspections of a facility during a three-year licensing period. The survey frequency is revised to correspond with the different licensing periods during the transition from two-year to three-year licenses. The practice of HHSC conducting an average of one unannounced inspection per year will continue.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the proposed rules will be in effect, there will be implications to state government revenues as a result of enforcing and administering the rules as proposed. The expected effect on revenues for each year are increases of \$8,325 General Revenue (GR) in State Fiscal Year (SFY) 2019, \$15,525 GR in SFY 2020, \$5,475 GR in SFY 2021, \$1,575 in SFY 2022, and a reduction of \$14,325 in SFY 2023.

There will be no fiscal implications to local governments as a result of enforcing and administering the rules as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will affect fees paid to HHSC;
- (5) the proposed rules will create a new rule;
- (6) the proposed rules will repeal an existing rule;
- (7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect have an effect on the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities. The proposal increases license fees but the increase is offset by the longer license term.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

Greta Rymal has also determined that for the first five years the rules are in effect there are no anticipated economic costs to persons who are required to comply with the proposed rules, because the increase in license fees is offset by the longer term of a license.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because they are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

#### PUBLIC BENEFIT

Mary T. Henderson, Associate Commissioner for Long-Term Care Regulatory Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be increased efficiency in the licensure process by extending the term of a license from two years to three years.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sandy Herrera at (512) 438-4681 in HHSC Long-Term Care Regulatory. Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030; street address 4900 North Lamar Boulevard, Mail Code H600, Austin, Texas 78751; or e-mailed to [HHSRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHSRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 40R064" in the subject line.

## SUBCHAPTER B. APPLICATION PROCEDURES

### 40 TAC §90.15

#### STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §252.008, which directs the HHSC Executive Commissioner to adopt rules related to the licensure of ICF/IIDs in accordance with Chapter 252.

The repeal implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §252.008.

*§90.15. Renewal Procedures and Qualifications.*

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

Filed with the Office of the Secretary of State on June 6, 2018.

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4681



**40 TAC §90.15, §90.19**

The new rule and amendment are proposed under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §252.008, which directs the HHSC Executive Commissioner to adopt rules related to the licensure of ICF/IIDs in accordance with Chapter 252.

The new rule and amendment implement Texas Government Code, §531.0055 and Texas Health and Safety Code, §252.008.

*§90.15. Renewal Procedures and Qualifications.*

(a) A license expires three years after the date it is issued, except as provided in subsections (b)(1) and (c)(1) of this section. HHSC does not automatically renew a license. For a license to remain in effect after its expiration date, a license holder must apply to renew the license in accordance with this section.

(b) If HHSC renews a license that expires after December 31, 2018, and before January 1, 2020, HHSC:

(1) issues a license that is valid for two years, if the license is for a facility with a facility identification number that ends in 0-3 or 7-9; and

(2) issues a license that is valid for three years, if the license is for a facility with a facility identification number that ends in 4-6.

(c) If HHSC renews a license that expires after December 31, 2019, and before January 1, 2021, HHSC:

(1) issues a license that is valid for two years, if the license is for a facility with a facility identification number that ends in 4-6; and

(2) issues a license that is valid for three years, if the license is for a facility with a facility identification number that ends in 0-3 or 7-9.

(d) To renew a license, a license holder must submit to HHSC a timely and sufficient application to renew the license. A license holder has submitted a timely and sufficient application to renew a license if:

(1) the license holder submits the following to HHSC so HHSC receives it no later than the 45th day before the license expires:

(A) the fee required by §90.19(a)(1) of this subchapter; and

(B) one of the following:

(i) a complete application; or

(ii) an incomplete application with a letter explaining the circumstances that prevent the license holder from including the missing information; or

(2) the license holder submits the following to HHSC so HHSC receives it during the 45-day period ending on the date the license expires:

(A) the fee and documentation described in paragraph (1) (A) and (B) of this subsection; and

(B) the late renewal fee described in §90.19(a)(4) of this subchapter (relating to License Fees).

(e) If HHSC receives an application that is postmarked before the submission deadline, the application is timely if:

(1) HHSC's Long-term Care Regulatory Licensing and Credentialing Section receives the application within 15 days after the postmark; or

(2) HHSC's Long-term Care Regulatory Licensing and Credentialing Section receives the application within 30 days after the postmark and the license holder proves to HHSC that the delay was the fault of the United States Postal Service.

(f) It is the responsibility of a license holder to ensure that its application is timely received by HHSC.

*§90.19. License Fees.*

(a) Basic fees.

(1) Initial and renewal license. The license fee for a three year initial or renewal license is \$225 [is \$150] plus \$7.50 [\$5.00] for each unit of capacity [or bed space] for which the [a] license is sought. The license fee for a two-year renewal license issued in accordance with §90.15(b)(1) or (c)(1) of this subchapter (relating to Renewal Procedures and Qualifications) is \$150 plus \$5.00 for each unit of capacity for which the license is sought. [The fee must be paid with each initial and renewal of license application.]

(2) Increase in capacity [bed space]. If a license holder requests an [An approved] increase in the capacity of its facility, the license holder must pay HHSC [bed space is subject to] an additional fee of \$7.50 [\$5.00] for each unit of capacity approved [or bed space].

(3) Change of administrator. If a license holder [A facility that ] hires a new administrator for a facility, the license holder must notify HHSC [DADS] in writing not later than the 30th day after the date on which the change of administrator becomes effective and pay HHSC a \$20 fee [to DADS].

(4) Late renewal fee. If a [A] license holder [that] submits an application for renewal during the 45-day period before a [ending on the date the current] license expires, the license holder must pay a late renewal fee in an amount equal to one-half of the fee for a license renewal [fee] described in paragraph (1) of this subsection.

(b) Emergency Assistance Fee.

(1) HHSC [In addition to the licensing and renewal fee collected under Texas Health and Safety Code, §252.034, DADS] may

collect an annual fee to be used to make emergency assistance money available to a facility [licensed under this chapter].

(2) The fee collected under this subsection must [section shall] be in the amount allowed [prescribed] by Texas Health and Safety Code, §252.095(b) [~~§252.097(b)~~], and must [shall] be deposited to the credit of the [nursing and convalescent home trust] fund established under the Texas Health and Safety Code, §242.096 [~~§252.096~~].

(3) HHSC disburses [DADS may disburse] money to a trustee [for a facility licensed under this chapter] to alleviate an immediate threat to the health or safety of a [the] facility's residents in accordance with [ Payments under this section may include payments described by] Texas Health and Safety Code, §252.095(c) [~~§252.096(b)~~].

(4) HHSC disburses emergency assistance money [A court may order DADS to disburse emergency assistance money to a trustee for a facility licensed under this chapter,] if a [the] court order is issued in accordance with [makes the findings provided by] Texas Health and Safety Code, §252.095(d) [~~§252.096(e)~~].

(c) Method of Payment. A facility must pay a fee, [Payment of fees for initial licenses, changes of ownership, increases in bed size, and license renewals must be] by check, cashier's check, [or] money order, or credit card, made payable to HHSC [DADS]. HHSC does not refund a fee [All fees are non-refundable] except as provided by Chapter 2005 of the Texas Government Code.

(d) Quality Assurance Fee. HHSC collects a [A] quality assurance fee from a license holder in accordance with Chapter 11 of this title [is imposed on each facility licensed under Texas Health and Safety Code, Chapter 252, each intermediate care facility for persons with mental retardation owned by a community mental retardation center, and each facility owned by DADS. The fee is payable monthly and is in addition to other fees imposed under this chapter. The amount of the fee, method of payment, and penalties for noncompliance are stated in 1 TAC Chapter 352] (relating to Quality Assurance Fee).

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

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4681



## SUBCHAPTER F. INSPECTIONS, SURVEYS, AND VISITS

### 40 TAC §90.191

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Health and Safety Code, §252.008, which directs the HHSC Executive Commissioner to adopt rules related to the licensure of ICF/IIDs in accordance with Chapter 252.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §252.008.

### §90.191. Procedural Requirements.

(a) HHSC [Texas Department of Human Services (DHS)] inspection and survey personnel must perform inspections, [and] surveys, follow-up visits, complaint investigations, investigations of abuse or neglect, and other contact visits from time to time as HHSC deems [they deem] appropriate or as required for carrying out the responsibilities of licensing.

(b) A [An inspection must be conducted by an individual] qualified surveyor or [by] a team, of which one member is a specialized staff person who has expertise in developmental disabilities, conducts an inspection.

(c) To determine standard compliance that [which] cannot be determined [verified] during regular working hours, HHSC may conduct night or weekend inspections [may be conducted] to cover specific segments of operation. HHSC completes the inspections [and will be completed] with the least possible interference to staff and residents.

(d) Generally, HHSC does not announce an inspection, survey, complaint investigation, or other visit [all inspections, surveys, complaint investigations and other visits], whether routine or non-routine, made for the purpose of determining the appropriateness of resident care and day-to-day operations of a facility [will be unannounced; any exceptions must be justified].

(e) HHSC may announce a visit, including:

(1) a consultation visit to determine how a physical plant may be expanded or upgraded;

(2) a visit to determine the progress of physical plant construction or repairs, equipment installation or repairs, or systems installation or repairs; or

(3) a visit resulting from an emergency, including a fire, a windstorm, or malfunctioning or nonfunctioning electrical or mechanical systems.

{(e) Certain visits may be announced, including, but not limited to, consultation visits to determine how a physical plant may be expanded or upgraded and visits to determine the progress of physical plant construction or repairs, equipment installation or repairs, or systems installation or repairs, or conditions when certain emergencies arise, such as fire, windstorm, or malfunctioning or nonfunctioning of electrical or mechanical systems.}

(f) Persons authorized to receive advance information on unannounced inspections include:

(1) citizen advocates invited to attend inspections, as described in subsection (g) of this section;

(2) representatives of the United States Department of Health and Human Services whose programs relate to the Medicare/Medicaid Long Term Care Program; and

(3) representatives of HHSC [DHS] whose programs relate to the Medicare/Medicaid long term care program.

(g) HHSC conducts [DHS will conduct] at least two unannounced inspections of a facility during a two-year [each] licensing period and at least three unannounced inspections of a facility during a three-year licensing period [for each institution licensed under Health and Safety Code, Chapter 252,] except as provided [for] in this subsection.

(1) HHSC conducts a [A] sufficient number of inspections [will be conducted] between the hours of 5:00 p.m. and 8:00 a.m. In randomly selected facilities [institutions], HHSC conducts a cursory after-hours inspection [will be conducted] to determine [verify] staffing,

[assurance of] emergency egress, resident care, medication security, food service or nourishments, sanitation, and other items determined necessary by HHSC. HHSC attempts to make any disruption of residents as minimal as feasible. [as deemed appropriate. To the greatest extent feasible, any disruption of the residents will be minimal.]

(2) For at least two unannounced inspections each licensing period, HHSC [DHS] may invite to the inspections at least one person as a citizen advocate who has an interest in or who is employed by or affiliated with an organization or agency that represents or advocates for persons with intellectual disability [mental retardation] or a related condition. HHSC provides [DHS will provide] to these organizations basic licensing information and requirements for the organizations' dissemination to their members whom they engage to attend the inspections. Advocates participating in the inspections must follow all HHSC [DHS] protocols. Advocates must provide their own transportation. The schedule of inspections in this category will be arranged confidentially in advance with the organizations. Participation by the advocates is not a condition precedent to conducting the inspection.

(h) A [The] facility must make all [of its] books, records, and other documents that are maintained by or on behalf of the [a] facility accessible to HHSC on [DHS upon] request.

(1) HHSC may [DHS is authorized to] photocopy documents, photograph residents, and use any other available recording devices to preserve [all] relevant evidence of conditions found during an inspection, survey, or investigation [that DHS reasonably believes threaten the health and safety of a resident].

(2) An example [Examples] of records that HHSC may request and photocopy [and documents which may be requested and photocopied] or otherwise reproduce [reproduced are] resident medical records, including nursing notes, pharmacy records, medication records, and physician's orders.

(3) When HHSC requests a [the] facility [is requested to] furnish [the] copies of documents, the facility may charge HHSC [DHS] at a rate not to exceed the rate charged by HHSC [DHS] for copies. The administrator or his designee must ensure the documents are copied. [The procedure of copying is the responsibility of the administrator or his designee.] If the documents must be removed from the facility to be copied [copying requires the records be removed from the facility], a representative of the facility must [is expected to] accompany the documents [records] and assure their order and preservation.

(4) HHSC [DHS] protects the copies for privacy and confidentiality in accordance with recognized standards of medical records practice, applicable state laws, and HHSC [DHS] policy.

(5) A facility must not falsify [Falsification of] information contained in client records [is prohibited].

(i) HHSC may [DHS will] provide [for] a special team to conduct validation surveys or to verify findings of previous licensure surveys.

(1) At HHSC's [DHS's] discretion, based on record review, random sample, or any other determination, HHSC [DHS] may assign a team to conduct a validation survey. HHSC [DHS] may use the information to verify previous determinations or identify training needs to ensure [assure] consistency in deficiencies cited and in punitive actions recommended throughout the state.

(2) A facility must [Facilities are required to] correct any additional deficiencies cited by a [the] validation team but is [are] not subject to any new or additional punitive action as a result of those deficiencies.

(j) During an investigation, survey, or inspection, HHSC may conduct an interview with a resident of a [and/or survey inspections, interviews of individuals residing in the] facility or staff employed by the facility in private. A facility must not retaliate against the resident or staff. [may be conducted in private without fear of retaliation toward staff or residents.]

(k) Facility staff must be available at the facility within 45 minutes of telephone contact by survey staff.

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

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Karen Ray

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Department of Aging and Disability Services

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For further information, please call: (512) 438-4681



## CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, HHSC proposes amendments to §92.2, concerning Definitions; §92.551, concerning Administrative Penalties, and new §92.43, concerning Policy for Residents with Alzheimer's Disease or a Related Disorder, in Title 40, Chapter 92, Licensing Standards for Assisted Living Facilities.

### BACKGROUND AND PURPOSE

The proposed new section and amendments implement §247.0451 and §247.0452 of the Texas Health and Safety Code, as amended by House Bill (H.B.) 2025, 85th Legislature, Regular Session, 2017. Section 247.0451 requires HHSC to develop a system to record and track the scope and severity of licensure violations by an assisted living facility for the purpose of assessing an administrative penalty or taking other enforcement action. The system must be similar to the system used by the Centers for Medicare & Medicaid Services to categorize the scope and severity of violations for nursing facilities.

Section 247.0452 describes the circumstances under which HHSC may not allow an assisted living facility to correct a violation before assessing an administrative penalty. The proposed amendments describe the system for assessing administrative penalties based on the scope and severity of a violation. The proposed amendments also add the circumstances under which

HHSC will not allow assisted living facility license holder to correct a violation before HHSC assesses an administrative penalty.

The proposed amendments also change references from "DADS" to "HHSC" to reflect that DADS was abolished on September 1, 2017, and its functions were transferred to HHSC.

The proposed new section implements Chapter 326 of the Texas Health and Safety Code, which was added by H.B. 2025 and requires an assisted living facility to train employees who provide direct care to residents with Alzheimer's disease or related disorders and to ensure the care and services provided to those residents meet their needs related to their diagnosis of Alzheimer's disease or a related disorder.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §92.2, Definitions, adds definitions for "actual harm," "immediate threat to the health or safety of a resident," "isolated," "pattern of violation," "potential for minimal harm", and "widespread in scope." Definitions of those terms are necessary for implementation of the proposed system to record and track licensure violations. In addition, the proposed amendment adds a definition of "HHSC." This change is necessary because DADS and the Department of Human Services have been abolished and their functions have been transferred to HHSC. When all references to "DADS" and "DHS" are removed from Chapter 92, the definitions will be deleted. This section is renumbered to account for the additional definitions.

Proposed new §92.43, Policy for Residents with Alzheimer's Disease or a Related Disorder, requires a facility to develop, implement, and enforce a written policy that (1) requires a facility employee who provides direct care to a resident with Alzheimer's disease or a related disorder to complete training that addresses at least the four topics listed in the rule; and (2) ensures the care and services provided to a resident with Alzheimer's disease or a related disorder meets the needs of the resident relating to the resident's diagnosis of Alzheimer's disease or a related disorder.

The proposed amendment to §92.551, Administrative Penalties, replaces the current administrative penalties table with a table that categorizes licensure violations based on their scope and severity. With regard to severity, HHSC may assess an administrative penalty for a violation that creates a potential for more than minimal harm, results in actual harm, or poses an immediate threat to the health or safety of a resident. The proposed amendment to subsection (d) states that HHSC uses the proposed table to determine the amount of an administrative penalty assessed in accordance with subsection (b) of the section. The proposed amendment to subsection (g) describes the circumstances under which HHSC does not allow a facility to correct a violation before assessing an administrative penalty, consistent with Texas Health and Safety Code, §247.0452(b). The proposed amendment makes other non-substantive editorial changes for consistency and clarity.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the proposed amendments will be in effect, there may be fiscal implications to revenues of state governments as a result of enforcing and administering the amendments. HHSC lacks sufficient data to determine if the rule as proposed will result in the collection of administrative penalties in greater or lesser amounts than under current rules.

Greta Rymal has also determined that there will be no additional costs to state government because the tracking functionality related to scope and severity currently exists in regulatory survey operations' database and only requires activation for assisted living facilities. There will be no fiscal implications to local governments as a result of enforcing and administering the rules as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the proposed new section and amendments will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to the agency;
- (5) the proposed rules will create a new rule;
- (6) the proposed rules will not expand, limit, or repeal an existing rule;
- (7) the proposed rules will not change the number of individuals subject to the rule; and
- (8) the proposed rules will not have an effect on the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there may be an economic impact to small, micro-business or rural communities as a result of the proposed rules. HHSC lacks data to provide an estimate of how many may be adversely affected by the proposed rule change.

License holders currently must pay administrative penalties for licensure violations under certain circumstances. The rule adds a requirement that HHSC assess penalties for repeated violations of certain requirements within two years of the initial violation and provides no opportunity for the license holder to correct the violation and avoid the penalty. HHSC cannot determine if the proposed new section and rules for assessing administrative penalties will result in any license holders paying more administrative penalties than under current rules.

There will be no additional cost to license holders to comply with the requirement to adopt, implement, and enforce a policy related to training staff in caring for persons with Alzheimer's disease as required by H.B. 2025. License holders are currently required to provide basic training to staff. The rule includes additional topics relating to Alzheimer's disease that must be covered in training.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the proposed new section and amended rules. HHSC cannot determine if the proposed new section and rules for assessing administrative penalties will result in any license holders paying more administrative penalties than under current rules.

There is no anticipated negative impact on local employment.

## COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these proposed new section and amended rules because the new section and amendments are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

## PUBLIC BENEFIT

Mary T. Henderson, Associate Commissioner for Long-Term Care Regulatory Services, has determined that for each year of the first five years the proposed new section and amendments are in effect, the public benefit will be HHSC's ability to more efficiently assess administrative penalties, enhancing its ability to enforce health and safety standards in assisted living facilities. The requirements to have training and ensure the care and services for a resident with Alzheimer's disease or a related disorder meet the resident's needs will result in better care being provided to those residents.

## TAKINGS IMPACT ASSESSMENT

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

## PUBLIC COMMENT

Questions about the content of this proposal may be directed to Josie Esparza at (512) 438-4077 in the HHSC Long-Term Care Regulatory Services Division. Written comments on the proposal may be submitted to the Rules Coordination Office, P. O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to HHSCRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 40R063" in the subject line.

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §92.2

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; and Texas Health and Safety Code, §247.025, which authorizes the executive commissioner to adopt rules related to the licensure of assisted living facilities; and Texas Health and Safety Code, §326.004, which authorized the executive commissioner to administer and implement Chapter 326.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code §247.025 and §326.004.

#### §92.2. Definitions.

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

#### (1) Abuse--

(A) For [fœr] a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes, the term has the meaning in Texas Family Code §261.001(1) [~~§261.401(1)~~], which is an intentional, knowing, or reckless act or omission by an employee, volunteer, or other individual working under the auspices of a facility or program that causes or may cause emotional harm or physical injury to, or the death of, a child served by the facility or program as further described by rule or policy; and

(B) For [fœr] a person other than one described in subparagraph (A) of this paragraph, the term has the meaning in Texas Health and Safety Code §260A.001(1), which is:

(i) the negligent or willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to a resident by the resident's caregiver, family member, or other individual who has an ongoing relationship with the resident; or

(ii) sexual abuse of a resident, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Section 21.08, Penal Code (indecent exposure), or Chapter 22, Penal Code (assaultive offenses), committed by the resident's caregiver, family member, or other individual who has an ongoing relationship with the resident.

(2) Accreditation commission--Has the meaning given in Texas Health and Safety Code, §247.032.

(3) Actual harm--A negative outcome that compromises a resident's physical, mental, or emotional well-being.

(4) [~~3~~] Advance directive--Has the meaning given in Texas Health and Safety Code, §166.002.

(5) [~~4~~] Affiliate--With respect to:

(A) a partnership, each partner thereof;

(B) a corporation, each officer, director, principal stockholder, subsidiary, and each person with a disclosable interest, as the term is defined in this section; and

(C) a natural person:

(i) said person's spouse;

(ii) each partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

(iii) each corporation in which said person is an officer, director, principal stockholder, or person with a disclosable interest.

(6) [~~5~~] Alzheimer's Assisted Living Disclosure Statement form--The HHSC-prescribed form a facility uses to describe the nature of care or treatment of residents with Alzheimer's disease and related disorders.

(7) [~~6~~] Alzheimer's disease and related disorders--Alzheimer's disease and any other irreversible dementia described by the Centers for Disease Control and Prevention (CDC) or the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

(8) [~~7~~] Alzheimer's facility--A type B assisted living facility that is certified to provide specialized services to residents with Alzheimer's or a related condition.

(9) [(8)] Applicant--A person applying for a license to operate an assisted living facility under Texas Health and Safety Code, Chapter 247.

(10) [(9)] Attendant--A facility employee who provides direct care to residents. This employee may serve other functions, including cook, janitor, porter, maid, laundry worker, security personnel, bookkeeper, activity director, and manager.

(11) [(10)] Authorized electronic monitoring (AEM)--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

(12) [(11)] Behavioral emergency--Has the meaning given in §92.41(p)(2) of this chapter (relating to Standards for Type A and Type B Assisted Living Facilities).

(13) [(12)] Certified ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(14) [(13)] CFR--Code of Federal Regulations.

(15) [(14)] Change of ownership--An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.

(16) [(15)] Commingles--The laundering of apparel or linens of two or more individuals together.

(17) [(16)] Controlling person--A person with the ability, acting alone or with others, to directly or indirectly influence, direct, or cause the direction of the management, expenditure of money, or policies of an assisted living facility or other person. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of an assisted living facility;

(B) any person who is a controlling person of a management company or other business entity that operates an assisted living facility or that contracts with another person for the operation of an assisted living facility;

(C) an officer or director of a publicly traded corporation that is, or that controls, a facility, management company, or other business entity described in subparagraph (A) of this paragraph but does not include a shareholder or lender of the publicly traded corporation; and

(D) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of an assisted living facility, is in a position of actual control or authority with respect to the facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility, except an employee, lender, secured creditor, landlord, or other person who does not exercise formal or actual influence or control over the operation of an assisted living facility.

(18) [(17)] Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and HHSC have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(19) [(18)] DADS-- Prior to September 1, 2017, the Department of Aging and Disability Services. September 1, 2017, and after, the Texas Health and Human Services Commission (HHSC).

(20) [(19)] DHS--Formerly, this term referred to the Texas Department of Human Services; it now refers to HHSC.

(21) [(20)] Dietitian--A person who currently holds a license or provisional license issued by the Texas State Board of Examiners of Dietitians.

(22) [(21)] Direct ownership interest--Ownership of equity in the capital, stock, or profits of, or a membership interest in, an applicant or license holder.

(23) [(22)] Disclosable interest--Five percent or more direct or indirect ownership interest in an applicant or license holder.

(24) [(23)] Disclosure statement--An HHSC form for prospective residents or their legally authorized representatives that a facility must complete. The form contains information regarding the preadmission, admission, and discharge process; resident assessment and service plans; staffing patterns; the physical environment of the facility; resident activities; and facility services.

(25) [(24)] Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(26) [(25)] Exploitation--

(A) For [(for)] a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes, the term has the meaning in Texas Family Code §261.001(3) [(§261.401(2))], which is the illegal or improper use of a child or of the resources of a child for monetary or personal benefit, profit, or gain by an employee, volunteer, or other individual working under the auspices of a facility or program as further described by rule or policy; and

(B) For [(for)] a person other than one described in subparagraph (A) of this paragraph, the term has the meaning in Texas Health and Safety Code §260A.001(4), which is the illegal or improper act or process of a caregiver, family member, or other individual who has an ongoing relationship with the resident using the resources of a resident for monetary or personal benefit, profit, or gain without the informed consent of the resident.

(27) [(26)] Facility--An entity required to be licensed under the Assisted Living Facility Licensing Act, Texas Health and Safety Code, Chapter 247.

(28) [(27)] Fire suppression authority--The paid or volunteer fire-fighting organization or tactical unit that is responsible for fire suppression operations and related duties once a fire incident occurs within its jurisdiction.

(29) [(28)] Flame spread--The rate of fire travel along the surface of a material. This is different than other requirements for time-rated "burn through" resistance ratings, such as one-hour rated. Flame spread ratings are Class A (0-25), Class B (26-75), and Class C (76-200).

(30) [(29)] Governmental unit--The state or any county, municipality, or other political subdivision, or any department, division, board, or other agency of any of the foregoing.

(31) [(30)] Health care professional--An individual licensed, certified, or otherwise authorized to administer health care, for profit or otherwise, in the ordinary course of business or professional practice. The term includes a physician, registered nurse, licensed vo-



cational nurse, licensed dietitian, physical therapist, and occupational therapist.

~~(31) Immediate threat--There is considered to be an immediate threat to the health or safety of a resident, or a situation is considered to put the health or safety of a resident in immediate jeopardy, if there is a situation in which an assisted living facility's noncompliance with one or more requirements of licensure has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.]~~

(32) HHSC--The Texas Health and Human Services Commission.

(33) Immediate threat to the health or safety of a resident--A situation that causes, or is likely to cause, serious injury, harm, or impairment to or the death of a resident.

(34) [(32)] Immediately available--The capacity of facility staff to immediately respond to an emergency after being notified through a communication or alarm system. The staff are to be no more than 600 feet from the farthest resident and in the facility while on duty.

(35) [(33)] Indirect ownership interest--Any ownership or membership interest in a person that has a direct ownership interest in an applicant or license holder.

(36) Isolated-- A very limited number of residents are affected and a very limited number of staff are involved, or the situation has occurred only occasionally or in a very limited number of locations.

(37) [(34)] Large facility--A facility licensed for 17 or more residents.

(38) [(35)] Legally authorized representative--A person authorized by law to act on behalf of a person with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(39) [(36)] License holder--A person that holds a license to operate a facility.

(40) [(37)] Listed--Equipment, materials, or services included in a list published by an organization concerned with evaluation of products or services, that maintains periodic inspection of production of listed equipment or materials or periodic evaluation of services, and whose listing states that either the equipment, material, or service meets appropriate designated standards or has been tested and found suitable for a specified purpose. The listing organization must be acceptable to the authority having jurisdiction, including HHSC or any other state, federal, or local authority.

(41) [(38)] Local code--A model building code adopted by the local building authority where the assisted living facility is constructed or located.

(42) [(39)] Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, transportation, or food services.

(43) [(40)] Manager--The individual in charge of the day-to-day operation of the facility.

(44) [(41)] Managing local ombudsman--Has the meaning given in 26 TAC §88.2.

(45) [(42)] Medication--

(A) Medication is any substance:

(i) recognized as a drug in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, Texas Drug Code Index or official National Formulary, or any supplement to any of these official documents;

(ii) intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease;

(iii) other than food intended to affect the structure or any function of the body; and

(iv) intended for use as a component of any substance specified in this definition.

(B) Medication includes both prescription and over-the-counter medication, unless otherwise specified.

(C) Medication does not include devices or their components, parts, or accessories.

(46) [(43)] Medication administration--The direct application of a medication or drug to the body of a resident by an individual legally allowed to administer medication in the state of Texas.

(47) [(44)] Medication assistance or supervision--The assistance or supervision of the medication regimen by facility staff. Refer to §92.41(j) of this chapter.

(48) [(45)] Medication (self-administration)--The capability of a resident to administer the resident's own medication or treatments without assistance from the facility staff.

(49) [(46)] Neglect--

(A) For [fœr] a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes, the term has the meaning in Texas Family Code, §261.001(4) [§261.401(3)], which is a negligent act or omission by an employee, volunteer, or other individual working under the auspices of a facility or program, including failure to comply with an individual treatment plan, plan of care, or individualized service plan, that causes or may cause substantial emotional harm or physical injury to, or the death of, a child served by the facility or program as further described by rule or policy; and

(B) For [fœr] a person other than one described in subparagraph (A) of this paragraph, the term has the meaning in Texas Health and Safety Code §260A.001(6), which is the failure to provide for one's self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of a caregiver to provide such goods or services.

(50) [(47)] NFPA 101--The 2000 publication titled "NFPA 101 Life Safety Code" published by the National Fire Protection Association, Inc., 1 Batterymarch Park, Quincy, Massachusetts 02169.

(51) [(48)] Ombudsman intern--Has the meaning given in 26 TAC §88.2.

(52) [(49)] Ombudsman program--Has the meaning given in 26 TAC §88.2.

(53) Pattern of violation--Repeated, but not widespread in scope, failures of a facility to comply with this chapter or a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247 that:

(A) result in a violation; and

(B) are found throughout the services provided by the facility or that affect or involve the same residents or facility employees.

(54) [(50)] Person--Any individual, firm, partnership, corporation, association, or joint stock association, and the legal successor thereof.

(55) [(51)] Personal care services--Assistance with feeding, dressing, moving, bathing, or other personal needs or maintenance; or general supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent residence in the facility or who needs assistance to manage his or her personal life, regardless of whether a guardian has been appointed for the person.

(56) [(52)] Physician--A practitioner licensed by the Texas Medical Board.

(57) Potential for minimal harm--A violation that has the potential for causing no more than a minor negative impact on a resident.

(58) [(53)] Practitioner--An individual who is currently licensed in a state in which the individual practices as a physician, dentist, podiatrist, or a physician assistant; or a registered nurse approved by the Texas Board of Nursing to practice as an advanced practice registered nurse.

(59) [(54)] Private and unimpeded access--Access to enter a facility, or communicate with a resident outside of the hearing and view of others, without interference or obstruction from facility employees, volunteers, or contractors.

(60) [(55)] Qualified medical personnel--An individual who is licensed, certified, or otherwise authorized to administer health care. The term includes a physician, registered nurse, and licensed vocational nurse.

(61) [(56)] Resident--An individual accepted for care in a facility.

(62) [(57)] Respite--The provision by a facility of room, board, and care at the level ordinarily provided for permanent residents of the facility to a person for not more than 60 days for each stay in the facility.

(63) [(58)] Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(64) [(59)] Restraints--Chemical restraints are psychoactive drugs administered for the purposes of discipline or convenience and are not required to treat the resident's medical symptoms. Physical restraints are any manual method, or physical or mechanical device, material, or equipment attached or adjacent to the resident that restricts freedom of movement. Physical restraints include restraint holds.

(65) [(60)] Safety--Protection from injury or loss of life due to such conditions as fire, electrical hazard, unsafe building or site conditions, and the hazardous presence of toxic fumes and materials.

(66) [(61)] Seclusion--The involuntary separation of a resident from other residents and the placement of the resident alone in an area from which the resident is prevented from leaving.

(67) [(62)] Service plan--A written description of the medical care, supervision, or nonmedical care needed by a resident.

(68) [(63)] Short-term acute episode--An illness of less than 30 days duration.

(69) [(64)] Small facility--A facility licensed for 16 or fewer residents.

(70) [(65)] Staff--Employees of an assisted living facility.

(71) [(66)] Standards--The minimum conditions, requirements, and criteria established in this chapter with which a facility must comply to be licensed under this chapter.

(72) [(67)] State Ombudsman--Has the meaning given in 26 TAC §88.2.

(73) [(68)] Terminal condition--A medical diagnosis, certified by a physician, of an illness that will result in death in six months or less.

(74) [(69)] Universal precautions--An approach to infection control in which blood, any body fluids visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids are treated as if known to be infectious for HIV, hepatitis B, and other blood-borne pathogens.

(75) [(70)] Vaccine Preventable Diseases--The diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the CDC.

(76) Widespread in scope--A violation of Texas Health and Safety Code, Chapter 247 or a rule, standard, or order adopted under Chapter 247 that:

(A) is pervasive throughout the services provided by the facility; or

(B) represents a systemic failure by the facility that affects or has the potential to affect a large portion of or all of the residents of the facility.

(77) [(71)] Willfully interfere--To act or not act to intentionally prevent, interfere with, or impede or to attempt to intentionally prevent, interfere with, or impede.

(78) [(72)] Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

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

Filed with the Office of the Secretary of State on June 7, 2018.

TRD-201802519

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 438-4681



## SUBCHAPTER C. STANDARDS FOR LICENSURE

### 40 TAC §92.43

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive com-

missioner shall adopt rules for the operation and provision of services by the health and human services agencies; and Texas Health and Safety Code, §247.025, which authorizes the executive commissioner to adopt rules related to the licensure of assisted living facilities; and Texas Health and Safety Code, §326.004, which authorized the executive commissioner to administer and implement Chapter 326.

The new section implements Texas Government Code, §531.0055 and Texas Health and Safety Code §247.025 and §326.004.

§92.43. Policy for Residents with Alzheimer's Disease or a Related Disorder.

A facility must adopt, implement, and enforce a written policy that:

(1) requires a facility employee who provides direct care to a resident with Alzheimer's disease or a related disorder to successfully complete training in the provision of care to residents with Alzheimer's disease and related disorders. Training must include at least:

- (A) symptoms and treatment of dementia;
- (B) stages of Alzheimer's disease;
- (C) behavior management; and
- (D) communication; and

(2) ensures the care and services provided by a facility employee to a resident with Alzheimer's disease or a related disorder meet the specific identified needs of the resident relating to the diagnosis of Alzheimer's disease or a related disorder.

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

Filed with the Office of the Secretary of State on June 7, 2018.

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 438-4681



## SUBCHAPTER H. ENFORCEMENT

### DIVISION 9. ADMINISTRATIVE PENALTIES

#### 40 TAC §92.551

##### STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; and Texas Health and Safety Code, §247.025, which authorizes the executive commissioner to adopt rules related to the licensure of assisted living facilities; and Texas Health and Safety Code, §326.004, which authorized the executive commissioner to administer and implement Chapter 326.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code §247.025 and §326.004.

*§92.551. Administrative Penalties.*

(a) Assessment of an administrative penalty. HHSC may assess an administrative penalty if a license holder:

(1) violates:

- (A) Texas Health and Safety Code, Chapter 247;
- (B) a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247; or
- (C) a term of a license issued under Texas Health and Safety Code, Chapter 247;

(2) makes a false statement of material fact that the license holder knows or should know is false:

- (A) on an application for issuance or renewal of a license;
- (B) in an attachment to the application; or
- (C) with respect to a matter under investigation by HHSC;

(3) refuses to allow an HHSC representative to inspect:

- (A) a book, record, or file that a facility must maintain; or
- (B) any portion of the premises of a facility;

(4) willfully interferes with the work of, or retaliates against, an HHSC representative or the enforcement of this chapter;

(5) willfully interferes with, or retaliates against, an HHSC representative preserving evidence of a violation of Texas Health and Safety Code, Chapter 247; a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247; or a term of a license issued under Texas Health and Safety Code, Chapter 247;

(6) fails to pay an administrative penalty not later than the 30th calendar day after the penalty assessment becomes final;

(7) fails to notify HHSC of a change of ownership before the effective date of the change of ownership;

(8) willfully interferes with the State Ombudsman, a certified ombudsman, or an ombudsman intern performing the functions of the Ombudsman Program as described in 26 TAC Chapter 88 (relating to State Long-Term Care Ombudsman Program); or

(9) retaliates against the State Ombudsman, a certified ombudsman, or an ombudsman intern:

(A) with respect to a resident, employee of a facility, or other person filing a complaint with, providing information to, or otherwise cooperating with the State Ombudsman, a certified ombudsman, or an ombudsman intern; or

(B) for performing the functions of the Ombudsman Program as described in 26 TAC Chapter 88.

(b) Criteria for assessing an administrative penalty. HHSC considers the following in determining the amount of an administrative penalty:

(1) the gradations of penalties established in subsection (d) of this section;

(2) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the situation, and the hazard or potential hazard created by the situation to the health or safety of the public;

(3) the history of previous violations;

- (4) deterrence of future violations;
- (5) the license holder's efforts to correct the violation;
- (6) the size of the facility and of the business entity that owns the facility; and
- (7) any other matter that justice may require.

(c) Late payment of an administrative penalty. A license holder must pay an administrative penalty within 30 calendar days after the penalty assessment becomes final. If a license holder fails to timely pay the administrative penalty, HHSC may assess an administrative penalty under subsection (a)(6) of this section, which is in addition to the penalty that was previously assessed and not timely paid.

(d) Administrative penalty schedule. HHSC uses the schedule of appropriate and graduated administrative penalties in this subsection to determine which violations warrant an administrative penalty.

Figure: 40 TAC §92.551(d)

[Figure: 40 TAC §92.551(d)]

(e) Administrative penalty assessed against a resident. HHSC does not assess an administrative penalty against a resident, unless the resident is also an employee of the facility or a controlling person.

(f) Proposal of administrative penalties.

(1) HHSC issues a preliminary report stating the facts on which HHSC concludes that a violation has occurred after HHSC has:

- (A) examined the possible violation and facts surrounding the possible violation; and
- (B) concluded that a violation has occurred.

(2) HHSC may recommend in the preliminary report the assessment of an administrative penalty for each violation and the amount of the administrative penalty.

(3) HHSC provides a written notice of the preliminary report to the license holder not later than 10 calendar days after the date on which the preliminary report is issued. The written notice includes:

- (A) a brief summary of the violation;
- (B) the amount of the recommended administrative penalty;
- (C) a statement of whether the violation is subject to correction in accordance with subsection (g) of this section and, if the violation is subject to correction, a statement of:

(i) the date on which the license holder must file with HHSC a plan of correction for approval by HHSC; and

(ii) the date on which the license holder must complete the plan of correction to avoid assessment of the administrative penalty; and

(D) a statement that the license holder has a right to an administrative hearing on the occurrence of the violation, the amount of the penalty, or both.

(4) Not later than 20 calendar days after the date on which a license holder receives a written notice of the preliminary report, the license holder may:

(A) give HHSC written consent to the preliminary report, including the recommended administrative penalty; or

(B) make a written request to HHSC [the Texas Health and Human Services Commission (HHSC)] for an administrative hearing.

(5) If a violation is subject to correction under subsection (g) of this section, the license holder must submit a plan of correction to HHSC for approval not later than 10 calendar days after the date on which the license holder receives the written notice described in paragraph (3) of this subsection.

(6) If a violation is subject to correction under subsection (g) of this section, and after the license holder reports to HHSC that the violation has been corrected, HHSC inspects the correction or takes any other step necessary to confirm the correction and notifies the facility that:

(A) the correction is satisfactory and HHSC will not assess an administrative penalty; or

(B) the correction is not satisfactory and a penalty is recommended.

(7) Not later than 20 calendar days after the date on which a license holder receives a notice under paragraph (6)(B) of this subsection (notice that the correction is not satisfactory and recommendation of a penalty), the license holder may:

(A) give HHSC written consent to HHSC report, including the recommended administrative penalty; or

(B) make a written request to HHSC for an administrative hearing.

(8) If a license holder consents to the recommended administrative penalty or does not timely respond to a notice sent under paragraph (3) of this subsection (written notice of the preliminary report) or paragraph (6)(B) of this subsection (notice that the correction is not satisfactory and recommendation of a penalty):

(A) HHSC [the commissioner or the commissioner's designee] assesses the recommended administrative penalty;

(B) HHSC gives written notice of the decision to the license holder; and

(C) the license holder must pay the penalty not later than 30 calendar days after the written notice given in subparagraph (B) of this paragraph.

(g) Opportunity to correct.

(1) HHSC allows a [A] license holder [has an opportunity] to correct a violation before assessing an administrative penalty, except a violation described in paragraph (2) of this subsection. To avoid assessment of a penalty, a license holder must correct a [; and to avoid paying an administrative penalty, if the license holder corrects the] violation not later than 45 calendar days after the date the facility receives the written notice described in subsection (f)(3) of this section.

(2) HHSC does not allow a [A] license holder [does not have an opportunity] to correct a violation:

[(A) that HHSC determines results in serious harm to or death of a resident;]

(A) [(B)] described by subsection (a)(2) - (9) of this section;

(B) of Texas Health and Safety Code §260A.014 or §260A.015;

(C) related to advance directives as described in §92.41(g) of this chapter (relating to Standards for Type A and Type B Assisted Living Facilities);

(D) that is the second or subsequent violation of:

(i) a right of the same resident under §92.125 of this chapter (relating to Resident's Bill of Rights and Provider Bill of Rights [Advance Directives or]);

(ii) the same right of all residents under §92.125 of this chapter; or

(iii) §92.43 of this chapter (relating to Policy for Residents with Alzheimer's Disease or a Related Disorder) that occurs before the second anniversary of the date of a previous violation of §92.43 of this chapter;

(E) [a violation] that is written because of an inappropriately placed resident, except as described in §92.41(f) of this chapter [(relating to Inappropriate Placement)].

(F) that is a pattern of violation that results in actual harm;

(G) that is widespread in scope and results in actual harm;

(H) that is widespread in scope, constitutes a potential for more than minimal harm, and relates to:

(i) resident assessment as described in §92.41(c) of this chapter;

(ii) staffing, including staff training, as described in §92.41(a) of this chapter;

(iii) administration of medication as described in §92.41(j) of this chapter;

(iv) infection control as described in §92.41(n) and §92.41(r) of this chapter;

(v) restraints as described in §92.41(p) of this chapter; or

(vi) emergency preparedness and response as described in §92.62(a) - (d) of this chapter (relating to General Requirements).

(I) is an immediate threat to the health or safety of a resident.

(3) Maintenance of violation correction.

(A) A license holder that corrects a violation must maintain the correction. If the license holder fails to maintain the correction until at least the first anniversary of the date the correction was made, HHSC may assess and collect an administrative penalty for the subsequent violation.

(B) An administrative penalty assessed under this paragraph is equal to three times the amount of the original administrative penalty that was assessed but not collected.

(C) HHSC is not required to offer the license holder an opportunity to correct the subsequent violation.

(h) Hearing on an administrative penalty. If a license holder timely requests an administrative hearing as described in subsection (f)(3) or (f)(7) of this section, the administrative hearing is held in accordance with HHSC rules at 1 TAC Chapter 357, Subchapter I (relating to Hearings under the Administrative Procedure Act).

(i) HHSC may charge interest on an administrative penalty. The interest begins the day after the date the penalty becomes due and ends on the date the penalty is paid in accordance with Texas Health and Safety Code, §247.0455(e).

(j) Amelioration of a violation.

(1) In lieu of demanding payment of an administrative penalty, the commissioner may allow a license holder to use, under HHSC supervision, any portion of the administrative penalty to ameliorate the violation or to improve services, other than administrative services, in the facility affected by the violation. Amelioration is an alternate form of payment of an administrative penalty, not an appeal, and does not remove a violation or an assessed administrative penalty from a facility's history.

(2) A license holder cannot ameliorate a violation that HHSC determines constitutes immediate jeopardy to the health or safety of a resident.

(3) HHSC offers amelioration to a license holder not later than 10 calendar days after the date a license holder receives a final notification of the recommended assessment of an administrative penalty that is sent to the license holder after an informal dispute resolution process but before an administrative hearing.

(4) A license holder to whom amelioration has been offered must:

(A) submit a plan for amelioration not later than 45 calendar days after the date the license holder receives the offer of amelioration from HHSC; and

(B) agree to waive the license holder's right to an administrative hearing if HHSC approves the plan for amelioration.

(5) A license holder's plan for amelioration must:

(A) propose changes to the management or operation of the facility that will improve services to or quality of care of residents;

(B) identify, through measurable outcomes, the ways in which and the extent to which the proposed changes will improve services to or quality of care of residents;

(C) establish clear goals to be achieved through the proposed changes;

(D) establish a time line for implementing the proposed changes; and

(E) identify specific actions the license holder will take to implement the proposed changes.

(6) A license holder's plan for amelioration may include proposed changes to:

(A) improve staff recruitment and retention;

(B) offer or improve dental services for residents; and

(C) improve the overall quality of life for residents.

(7) HHSC may require that an amelioration plan propose changes that would result in conditions that exceed the requirements of this chapter.

(8) HHSC approves or denies a license holder's amelioration plan not later than 45 calendar days after the date HHSC receives the plan. If HHSC approves the amelioration plan, any pending request the license holder has submitted for an administrative hearing must be withdrawn by the license holder.

(9) HHSC does not offer amelioration to a license holder:

(A) more than three times in a two-year period; or

(B) more than one time in a two-year period for the same or a similar violation.

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

Filed with the Office of the Secretary of State on June 7, 2018.

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4681



## CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC proposes amendments to §92.4, License Fees; §92.20, Provisional License; §92.51, Certification of a Facility or Unit for Persons with Alzheimer's Disease and Related Disorders; and §92.81, Inspections and Surveys; and the repeal of and new §92.15, Renewal Procedures and Qualifications, in Title 40, Chapter 92, Licensing Standards for Assisted Living Facilities.

### BACKGROUND AND PURPOSE

The purpose of the proposal is to implement the part of House Bill 2025, 85th Legislature, Regular Session, 2017, that increases the term of a license for an assisted living facility from two years to three years. The proposed rules create a system under which initial licenses have a term of three years and existing licenses expire on staggered dates to extend license periods. In addition, the proposed rules prorate license fees as appropriate. The proposed rules also extend the length of certification for an Alzheimer's facility or unit from two years to three years. The proposed rules clarify that at least one inspection will be conducted at an assisted living facility every two years.

The proposed rules change "DADS" to "HHSC" to reflect that DADS was abolished effective September 1, 2017, and its functions were transferred to HHSC.

### SECTION-BY-SECTION SUMMARY

The proposed amendment to §92.4 prorates the license fee based on the term of the license for an initial license, change of ownership license, renewal license, and Alzheimer's certification. In addition, the proposed amendment increases the fee that a license holder must pay for an increase in capacity of a facility from \$5.00 to \$7.50 for each unit of capacity approved. The proposed amendment also adds credit cards as a method

of payment for licensing fees. The proposed amendment also deletes outdated Life Safety Code references from the fee schedules

The proposed repeal of §92.15 allows new §92.15 to be proposed, which also addresses the requirements for renewing a license.

Proposed new §92.15 describes the staggered system under which the term of a license will increase from two years to three years. Under the system, a new license will be valid for three years and renewal licenses will be staggered as two and three-year licenses until all licenses have a three-year term. The proposed new section describes what a license holder must submit to HHSC for a timely and sufficient application to renew a license. Like current §92.15, the proposed new section states that it is the responsibility of a license holder to ensure that a renewal application is timely received by HHSC.

The proposed amendment to §92.20 extends the term of a provisional license from two years to three years.

The proposed amendment to §92.51 extends the validity of an Alzheimer's certificate for a facility or unit from two years to three years, to be consistent with the term of a license.

The proposed amendment to §92.81 states that HHSC inspects a facility at least once every two years after the initial inspection. This provision clarifies that HHSC will continue to inspect facilities at least once every two years, even though a license is valid for three years.

### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the proposed rules will be in effect, there will be implications to state government revenue as a result of enforcing and administering the rules as proposed. The expected effect on revenue for each year are increases of \$32,800 General Revenue (GR) in State Fiscal Year (SFY) 2019, \$61,100 GR in SFY 2020, \$4,800 GR in SFY 2021, and \$3,900 GR in SFY 2022, and a reduction of \$23,100 in SFY 2023.

There are no expected implications to costs or revenues of local governments.

### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will affect fees paid to HHSC;
- (5) the proposed rules will create a new rule;
- (6) the proposed rules will repeal an existing rule;
- (7) the proposed rules will not change the number of individuals subject to the rules; and
- (8) the proposed rules will not affect the state's economy.

### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities. The proposal increases license fees but the increase is offset by the longer term of a license.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

Greta Rymal has also determined that for the first five years the rules are in effect there are no anticipated economic costs to persons who are required to comply with the proposed rules, because the increase in license fees is offset by the longer term of a license.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because they are necessary to implement legislation that does not specifically state that §2001.0045 applies.

#### PUBLIC BENEFIT

Mary T. Henderson, Associate Commissioner for Long-Term Care Regulatory Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be increased efficiency in the licensure process by extending the term of a license from two years to three years.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sandy Herrera at (512) 438-4681 in HHSC Long-Term Care Regulatory. Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030; street address 4900 North Lamar Boulevard, Mail Code H600, Austin, Texas 78751; or e-mailed to [HHSRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHSRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 40R064" in the subject line.

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §92.4

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system and Texas Health and Safety Code, §247.025, which authorizes the executive commissioner to adopt rules necessary to license assisted living facilities.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §247.025.

#### §92.4. License Fees.

##### (a) Basic fees.

(1) Type A and ~~;~~ Type B~~;~~ and Type E. The license fee is \$300 ~~[\$200]~~, plus \$15 ~~[\$10]~~ for each bed for which a license is sought, with a maximum of \$2,250 for a three-year license ~~[\$1,500]~~. The license fee for a two-year ~~[one-year]~~ license issued in accordance with §92.15(b)(1) or (c)(1) of this chapter ~~[(relating to Renewal Procedures and Qualifications)]~~ is \$200 ~~[\$100]~~, plus \$10 ~~[\$5]~~ for each bed for which a license is sought, with a maximum of \$1,500 ~~[\$750]~~. The fee must be paid with an ~~[each]~~ initial application, change of ownership application, or [and with each] renewal application.

(2) Type C. The license fee is \$150 ~~[\$100]~~ for a three-year license. The license fee for a two-year ~~[one-year]~~ license issued in accordance with §92.15(b)(1) of this chapter is \$100 ~~[\$50]~~. The fee must be paid with a ~~[with each initial application and with each] renewal application.~~

(3) Increase in capacity. An approved increase in capacity is subject to an additional fee of \$15 ~~[\$10]~~ for each bed.

(b) Late renewal fee. An applicant that submits an application for license renewal later than the 45th day before the expiration date of the license must pay a late fee of an amount equal to one-half of the basic fee required in accordance with subsection (a)(1) and (2) of this section.

(c) Alzheimer's certification. In addition to the basic license fee described in subsection (a) of this section, a facility that applies for certification as an Alzheimer's facility under Subchapter C of this chapter (relating to Standards for Licensure) must pay an additional license fee. For a three-year license issued in accordance with subsection (a)(1) of this section or §92.15(a)(1) of this chapter, the additional fee is \$300. For a two-year license issued in accordance with §92.15(b)(1) or (c)(1), the additional fee is \$200. [The additional fee is \$200, except the additional fee for a facility renewing its Alzheimer's certification in accordance with §92.51(f)(1) of this chapter (relating to Licensure of Facilities for Persons with Alzheimer's Disease) is \$100 for the first renewal beginning September 1, 2008.]

##### (d) Trust fund fee.

(1) If the amount in the assisted living facility trust fund, established under Texas Health and Safety Code, Chapter 242, Subchapter D, and Chapter 247, §247.003(b), is less than \$500,000, HHSC ~~[DADS]~~ collects an annual fee from each facility. The fee is based on a monetary amount specified for each licensed unit of capacity or bed space, and is in an amount sufficient to provide not more than \$500,000 in the trust fund. When the trust fund fee is collected, HHSC ~~[DADS]~~ sends written notice to each facility stating the amount of the fee and the date the fee is due. A facility must pay the amount of the fee within 90 days after the date the fee is due.

(2) HHSC ~~[DADS]~~ may charge and collect a trust fund fee more than once a year if necessary to ensure that the amount in the assisted living facility trust fund is sufficient to make the disbursements required under Texas Health and Safety Code, §242.0965. When this subsequent trust fund fee is collected, HHSC ~~[DADS]~~ sends written notice to each facility stating the amount of the fee and the date the fee is due. A facility must pay the amount of the fee within 90 days after the date the fee is due.

(3) Failure to pay the trust fund fee within 90 days after the date the fee is due as stated on the written notice described in paragraphs (1) and (2) of this subsection may result in an assessment of

an administrative penalty under the administrative penalties described in Subchapter H, Division 9 of this chapter (relating to Administrative Penalties).

(e) Plan review fee. An applicant may submit building plans for a new building, an addition, the conversion of a building not licensed, or for the remodeling of an existing licensed facility for review by HHSC [DADS] architectural staff. If the applicant chooses to submit building plans for review, the applicant must pay a fee for the plan review according to the following schedule:

Figure: 40 TAC §92.4(e)  
[Figure: 40 TAC §92.4(e)]

(f) Payment of fees. A facility or applicant must pay fees [Payment of fees must be] by check, cashier's check, [or] money order, or credit card, made payable to HHSC [the Department of Aging and Disability Services]. All fees are nonrefundable, except as provided in Texas Government Code, Chapter 2005, and in §92.13(d) of this chapter (relating to Time Periods for Processing All Types of License Applications).

(g) Expedited Life Safety Code and physical plant inspection fee. An applicant may obtain a Life Safety Code and physical plant inspection within 15 business days after HHSC [DADS] receives a written request for an expedited inspection if:

(1) the applicant:

(A) meets the criteria in §92.14 of this chapter (relating to Initial License Application Procedures and Requirements); or

(B) has a current license, and is completing construction that does not alter the capacity of the facility; and

(2) the applicant submits the appropriate Life Safety Code fee listed in the following schedule: [-]

Figure: 40 TAC §92.4(g)(2)  
[Figure: 40 TAC §92.4(g)(2)]

(h) If, after HHSC [DADS] conducts two Life Safety Code inspections for a given application, [and] the applicant requests an additional inspection, then the applicant must pay a fee of \$25 per bed, with a minimum payment of \$1,000 for the third and each subsequent inspection pertaining to the same application.

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

Filed with the Office of the Secretary of State on June 6, 2018.

TRD-201802494

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 438-4681



## SUBCHAPTER B. APPLICATION PROCEDURES

### 40 TAC §92.15

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system and Texas

Health and Safety Code, §247.025, which authorizes the executive commissioner to adopt rules necessary to license assisted living facilities.

The repeal implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §247.025.

#### §92.15. *Renewal Procedures and Qualifications.*

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

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4681



### 40 TAC §92.15, §92.20

The new rule and amendment are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system and Texas Health and Safety Code, §247.025, which authorizes the executive commissioner to adopt rules necessary to license assisted living facilities.

The new rule and amendment implement Texas Government Code, §531.0055 and Texas Health and Safety Code, §247.025.

#### §92.15. *Renewal Procedures and Qualifications.*

(a) A license issued under this chapter:

(1) expires three years after the date issued, except as provided in subsections (b)(1) and (c)(1) of this section;

(2) must be renewed before the license expiration date; and

(3) is not automatically renewed.

(b) If HHSC renews a license that expires after December 31, 2018, and before January 1, 2020, HHSC:

(1) issues a license that is valid for two years, if the license is for a facility with a facility identification number that ends in 0-3 or 7-9; and

(2) issues a license that is valid for three years, if the license is for a facility with a facility identification number that ends in 4-6.

(c) If HHSC renews a license that expires after December 31, 2019, and before January 1, 2021, HHSC:

(1) issues a license that is valid for two years, if the license is for a facility with a facility identification number that ends in 4-6; and

(2) issues a license that is valid for three years, if the license is for a facility with a facility identification number that ends in 0-3 or 7-9.

(d) An application for renewal must comply with the requirements of §92.12 of this subchapter (relating to General Application Requirements) and §92.13 of this subchapter (relating to Time Periods for Processing All Types of License Applications). The submission of a license fee alone does not constitute an application for renewal.



(e) To renew a license, a license holder must submit an application for renewal with HHSC before the expiration date of the license. HHSC considers the license holder to have met the renewal application submission deadline if the license holder submits to HHSC the basic fee described in §92.4(a)(1) or (2) of this chapter (relating to License Fees) and:

(1) a complete application for renewal no later than 45 days before the expiration of the current license;

(2) an incomplete application for renewal, with a letter explaining the circumstances that prevented the inclusion of the missing information no later than 45 days before the expiration of the current license; or

(3) a complete application or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information, and the late fee described in §92.4(b) of this chapter during the 45-day period ending on the date the current license expires.

(f) If a renewal application is postmarked on or before the submission deadline, the application is considered to be timely if it is received in HHSC Licensing and Credentialing Section, Long-term Care Regulatory Services Division, within 15 days after the date of the postmark, or within 30 days after the date of the postmark and the license holder proves to the satisfaction of HHSC that the delay was due to the carrier. It is the license holder's responsibility to ensure that the application is timely received by HHSC

(g) For purposes of Texas Government Code, §2001.054, a license holder has submitted a timely and sufficient application for the renewal of a license if the license holder's application is submitted in accordance with subsections (e) and (f) of this section. A license expires if the license holder fails to submit a timely and sufficient application before the expiration date of the license.

(h) An application for renewal submitted after the expiration date of the license is considered to be an application for an initial license and must comply with the requirements for an initial license in §92.14 of this subchapter (relating to Initial License Application Procedures and Requirements).

(i) HHSC reviews an application for a renewal license within 30 days after the date HHSC Licensing and Credentialing Section receives the application and notifies the applicant if additional information is needed to complete the application.

(j) A license holder applying for a renewal license must show that the facility meets HHSC licensing standards based on an on-site inspection by HHSC. The on-site inspection must include an observation of the care of a resident.

(k) If an applicant is relying on meeting standards for accreditation in accordance with §92.11(c)(2) of this subchapter (relating to Criteria for Licensing) to show that it meets the requirements for licensure, the application for a renewal license must include a copy of the license holder's accreditation report from the accreditation commission with its application for renewal.

(l) HHSC may pend action on an application for the renewal of a license for up to six months if the facility does not meet licensure requirements during an on-site inspection.

(m) The issuance of a license constitutes official written notice from HHSC to the facility that its application is approved.

(n) HHSC may deny an application for the renewal of a license if the applicant, controlling person, or any person required to submit

background and qualification information fails to meet the criteria for a license established in §92.11 of this subchapter.

(o) Before denying an application for renewal of a license, HHSC gives the license holder:

(1) notice by registered or certified mail of the facts or conduct alleged to warrant the proposed action; and

(2) an opportunity to show compliance with all requirements of law for the retention of the license.

(p) To request an opportunity to show compliance, the license holder must send its written request to the director of the Enforcement Section, Long-Term Care Regulatory. The request must:

(1) be postmarked no later than 10 days after the date of HHSC notice and be received in the office of the director of the Enforcement Section, Long-Term Care Regulatory, no later than 10 days after the date of the postmark; and

(2) contain specific documentation refuting HHSC allegations.

(q) The opportunity to show compliance is limited to a review of documentation submitted by the license holder and information HHSC used as the basis for its proposed action and is not conducted as an adversary hearing. HHSC gives the license holder a written affirmation or reversal of the proposed action.

(r) If HHSC denies an application for the renewal of a license, the applicant may request:

(1) an informal reconsideration by HHSC; and

(2) an administrative hearing or binding arbitration, as described in §92.601 of this chapter (relating to Arbitration), to appeal the denial.

#### *§92.20. Provisional License.*

(a) HHSC [DADS] may issue a six-month provisional license in the case of a corporate change of ownership.

(b) HHSC [DADS] must issue a six-month provisional license for a newly constructed facility without conducting an NFPA 101 inspection if:

(1) an applicant makes a request in writing for a provisional license;

(2) the applicant submits working drawings and specifications to HHSC [DADS] for review in accordance with §92.64 of this chapter (relating to Plans, Approvals, and Construction Procedures) before facility construction begins;

(3) the applicant obtains all approvals, including a certificate of occupancy in a jurisdiction that requires one, from local authorities having jurisdiction in the area in which the facility is located, such as the fire marshal, health department and building inspector;

(4) the applicant submits a complete license application within 30 days after receipt of all local approvals described in paragraph (3) of this subsection;

(5) the applicant pays the license fee required by §92.4 of this chapter (relating to License Fees);

(6) the applicant, or a person who is a controlling person and an owner of the applicant, has constructed another facility in this state that complies with the NFPA 101; and

(7) the applicant is in compliance with resident-care standards for licensure required by Subchapter C of this chapter (relating to Standards for Licensure) based on an on-site inspection conducted

in accordance with §92.81 of this chapter (relating to Inspections and Surveys).

(c) HHSC [~~DADS~~] considers the date facility construction begins to be the date the building construction permit for the facility was approved by local authorities.

(d) A provisional license expires on the earlier of:

(1) the 180th day after the effective date of the provisional license or the end of any extension period granted by HHSC [~~DADS~~]; or

(2) the date a three-year [~~two-year~~] license is issued to the provisional license holder.

(e) HHSC [~~DADS~~] conducts an NFPA 101 inspection of a facility as soon as reasonably possible after HHSC [~~DADS~~] issues a provisional license to the facility.

(f) After conducting an NFPA 101 inspection, HHSC [~~DADS~~] issues a license in accordance with Texas Health and Safety Code §247.023 to the provisional license holder if the facility passes the inspection and the applicant meets all requirements for a license.

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

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Karen Ray  
Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4681



## SUBCHAPTER C. STANDARDS FOR LICENSURE

### 40 TAC §92.51

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services system and Texas Health and Safety Code, §247.025, which authorizes the executive commissioner to adopt rules necessary to license assisted living facilities.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §247.025.

*§92.51. Certification of a Facility or Unit for Persons with Alzheimer's Disease and Related Disorders.*

(a) A facility that advertises, markets, or otherwise promotes that the facility or a distinct unit of the facility provides specialized care for persons with Alzheimer's disease or related disorders must be certified or have the unit certified under subsection (d) of this section or §92.22 of this chapter (relating to Alzheimer's Certification of a Type B Facility for an Initial License Applicant in Good Standing). Certification under this section is not required for a facility to use advertising terms such as "medication reminders or assistance," "meal and activity reminders," "escort service," or "short-term memory loss, confusion, or forgetfulness."

(b) To be certified under subsection (d) of this section, a facility must be licensed as a Type B facility.

(c) A license holder must request certification of a facility or unit under subsection (d) of this section by using forms prescribed by HHSC [~~DADS~~] and include the fee described in §92.4(c) of this chapter (relating to Licensing Fees).

(d) After HHSC [~~DADS~~] receives a request for certification in accordance with subsection (c) of this section, HHSC [~~DADS~~] certifies a licensed Type B facility as a certified Alzheimer's facility or a unit of a licensed Type B facility as a certified Alzheimer's unit, if HHSC [~~DADS~~] determines:

(1) that the facility or unit is in compliance with §92.53(i) of this subchapter (relating to Standards for Certified Alzheimer's Assisted Living Facilities) and Subchapter D of this chapter (relating to Facility Construction), including meeting the requirements of a Life Safety Code (LSC) inspection within 120 days after the date HHSC [~~DADS~~] conducts an initial LSC inspection; and

(2) that the facility or unit meets the requirements of §92.53 (a) - (h) of this subchapter based on an on-site health inspection, during which HHSC [~~DADS~~] must observe the facility's or unit's provision of care to at least one resident who has been admitted to the Alzheimer's facility or unit.

(e) A facility or unit must not exceed the maximum number of residents specified on the Alzheimer's certificate issued to the facility by HHSC [~~DADS~~].

(f) A facility must post the facility's or unit's Alzheimer's certificate in a prominent location for public view.

(g) An Alzheimer's certificate is valid for three [~~two~~] years from the effective date of approval by HHSC [~~DADS~~].

(h) HHSC [~~DADS~~] cancels an Alzheimer's certificate if:

(1) a certified facility, or the facility in which a certified unit is located, undergoes a change of ownership; or

(2) HHSC [~~DADS~~] determines that a certified facility or unit is not in compliance with applicable laws and rules.

(i) A facility must remove a cancelled certificate from display and advertising, and surrender the certificate to HHSC [~~DADS~~].

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

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Karen Ray  
Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4681



## SUBCHAPTER E. INSPECTIONS, SURVEYS, AND VISITS

### 40 TAC §92.81

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of

services by the health and human services system and Texas Health and Safety Code, §247.025, which authorizes the executive commissioner to adopt rules necessary to license assisted living facilities.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §247.025.

§92.81. *Inspections and Surveys.*

(a) ~~HHSC [Texas Department of Human Services (DHS)]~~ inspection and survey personnel will perform inspections and surveys, follow-up visits, complaint investigations, investigations of abuse or neglect, and other contact visits from time to time as they deem appropriate or as required for carrying out the responsibilities of licensing.

(b) In addition to the inspection required under §92.14(f)(1) of this chapter (relating to Initial License Application Procedures and Requirements), HHSC inspects a facility at least once every two years after the initial inspection.

(c) ~~[(b)]~~ An inspection may be conducted by an individual surveyor or by a team, depending on the purpose of the inspection or survey, size of facility, and service provided by the facility, and other factors.

(d) ~~[(e)]~~ To determine standard compliance which cannot be verified during regular working hours, night or weekend inspections may be conducted to cover specific segments of operation and will be completed with the least possible interference to staff and residents.

(e) ~~[(d)]~~ Generally, all inspections, surveys, complaint investigations and other visits, whether routine or nonroutine, made for the purpose of determining the appropriateness of resident care and day-to-day operations of a facility will be unannounced; any exceptions must be justified.

(f) ~~[(e)]~~ Certain visits may be announced, including, but not limited to, conditions when certain emergencies arise, such as fire, windstorm, or malfunctioning or nonfunctioning of electrical or mechanical systems.

(g) ~~[(f)]~~ The facility must make all books, records, and other documents maintained by or on behalf of a facility accessible to HHSC [DHS] upon request.

(1) ~~HHSC [DHS]~~ is authorized to photocopy documents, photograph residents, and use any other available recording devices to preserve all relevant evidence of conditions found during an inspection, survey, or investigation that ~~HHSC [DHS]~~ reasonably believes threaten the health and safety of a resident.

(2) Records and documents which may be requested and photocopied or otherwise reproduced include, but are not limited to, admission sheets, medication profiles, observation notes, medication refusal notes, and menu records.

(3) When the facility is requested to furnish the copies, the facility may charge ~~HHSC [DHS]~~ at the rate not to exceed the rate charged by ~~HHSC [DHS]~~ for copies. Collection must be by billing HHSC [DHS]. The procedure of copying is the responsibility of the administrator or his designee. If copying requires removal of the records from the facility, a representative of the facility will be expected to accompany the records and assure their order and preservation.

(4) ~~HHSC [DHS]~~ will protect the copies for privacy and confidentiality in accordance with recognized standards of medical records practice, applicable state laws, and HHSC [DHS] policy.

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

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4681



#### 40 TAC §92.83

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1, govern functions previously held by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, HHSC proposes an amendment to §92.83, concerning Informal Dispute Resolution, in Chapter 92, Licensing Standards for Assisted Living Facilities.

#### BACKGROUND AND PURPOSE

The purpose of the amendment is to implement Texas Health and Safety Code, §247.051, as amended by Senate Bill (S.B.) 924, 85th Legislature, Regular Session, 2017. Specifically, the proposed amendment deletes the reference to HHSC conducting informal dispute resolution (IDR) between an assisted living facility and HHSC regarding a licensure violation because S.B. 924 requires IDR to be conducted by an appropriate disinterested person who contracts with HHSC. The proposed amendment also states that HHSC sends documents to an assisted living facility if the facility requests documents from HHSC as part of IDR. The proposed amendment identifies the documents HHSC sends to a facility and the information that will be redacted or excluded from the documents. The proposed amendment also allows HHSC to charge a facility \$15.00 per hour for the time HHSC spends preparing, copying, redacting, and delivering documents requested by the facility.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §92.83 states that HHSC sends certain documents to an assisted living facility no later than 20 working days after the facility submits a request for IDR if the facility also requests documents from HHSC. The documents sent by HHSC include any notes taken by or emails or messages sent by an HHSC employee involved with the survey, inspection, investigation, or other regulatory visit that relates to the IDR. The proposed amendment states that HHSC redacts or excludes the following information from the documents sent to a facility: 1) the name of a complainant, witness, or informant; 2) information that would reasonably lead to the identification of a complainant, witness, or informant; 3) information obtained from or contained in the records of an assisted living facility; 4) information that is publicly available; and 5) information that is confidential by law. The proposed amendment also allows HHSC to charge a facility \$15.00 per hour for the time HHSC spends preparing, copying, redacting, and delivering documents requested by the facility.

The proposed amendment requires a facility to pay any amounts charged by HHSC in accordance with the rule.

The proposed amendment also adds a reference to Texas Government Code, §531.058 as one of the statutory bases for the IDR process. In addition, the proposed amendment references HHSC instead of DADS, to reflect that DADS was abolished and all of its functions were transferred to HHSC on September 1, 2017. Finally, the proposed amendment makes the following editorial changes: (1) moves the reference to §92.82(f) from subsection (b) to (a) to clarify that HHSC cites a licensure violation subject to IDR in accordance with that rule; and (2) clarifies that a facility is not required to request IDR unless it wants to avail itself of the process.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner, Financial Services, has determined that for each year of the first five years that the section will be in effect, the rule is expected to result in additional revenue to state government from implementing and enforcing the rule because HHSC may charge an assisted living facility to prepare, copy, redact, and deliver documents requested by the facility. HHSC does not have sufficient data at this time to estimate the additional revenue.

HHSC anticipates no effect on costs or revenues of local governments to implement and enforce the rule as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the section will be in effect:

- (1) the proposed rule will not create or eliminate a government program;
- (2) implementation of the proposed rule will not affect the number of employee positions;
- (3) implementation of the proposed rule will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rule will affect fees paid to the agency;
- (5) the proposed rule will not create a new rule;
- (6) the proposed rule will not expand, limit, or repeal an existing rule;
- (7) the proposed rule will not change the number of individuals subject to the rule; and
- (8) the proposed rule will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has determined there will be an adverse economic effect on a small business or micro-business that holds a license to operate an assisted living facility and is charged by HHSC to prepare, redact, copy, or deliver documents associated with IDR. No alternatives were considered to minimize the adverse effect on small businesses or micro-businesses because Texas Health and Safety Code, §247.051 requires an assisted living facility that requests IDR to pay reasonable costs associated with these activities. The costs to perform the activities do not vary based on the size of a facility and are proposed in the rule at \$15.00 per hour.

Ms. Rymal has determined there will not be an adverse economic effect on a rural community because no rural municipal governments are required to comply with the rule.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There is an anticipated economic effect to persons who are required to comply with the proposed amendment because an assisted living facility that requests documents during the IDR process will have to pay to have the documents prepared, copied, redacted, and delivered.

There is no anticipated negative impact on a local economy.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to this rule because the rule is necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule.

#### PUBLIC BENEFIT

Mary T. Henderson, Associate Commissioner for Long-Term Care Regulatory Services, has determined that, for each year of the first five years the amendment is in effect, the public will benefit from adoption of the amended rule because assisted living facilities will have the opportunity to receive more information from HHSC concerning licensing violations when requesting IDR.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Questions about the content of this proposal may be directed to Tahoe Fintel at (512) 438-3161 in the Long-Term Care Regulatory Services Division. Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030; or street address 4900 North Lamar Boulevard, Mail Code H600, Austin, Texas 78751; or e-mailed to [HHRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to HHSC before 5:00 p.m. on HHSC's last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 40R062" in the subject line.

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which requires the HHSC executive commissioner to adopt rules for the operation and provision of services by the health and human services agencies, and §531.058, which requires the executive commissioner to establish an IDR process to resolve certain disputes between an assisted living facility and HHSC; and Texas Health and Safety Code, §247.025, which requires the executive commissioner to adopt rules for the licensure of assisted living facilities, and §247.051, which requires the executive commissioner to adopt rules establishing an IDR process to address disputes between an assisted living facility and HHSC concerning a statement of violations.

The amendment implements Texas Government Code, §531.0055 and §531.058 and Texas Health and Safety Code, §247.025 and §247.051.

*§92.83. Informal Dispute Resolution.*

(a) If a facility disputes [and DADS cannot resolve a dispute regarding] a violation of a licensing rule, which HHSC cites on a statement of violations in accordance with §92.82(f) of this subchapter (relating to Determinations and Actions), the facility may request [is entitled to an] informal dispute resolution [(IDR)] conducted [by the Texas Health and Human Services Commission (HHSC)] in accordance with Texas Government Code §531.058 and Texas Health and Safety Code §247.051.

(b) To request informal dispute resolution, a facility must submit a completed Informal Dispute Resolution Request Form to HHSC in accordance with the form's instructions no later than [Within] 10 days after the facility receives the statement of violations summarizing the violation that the facility disputes [described in §92.82(f) of this subchapter (relating to Determinations and Actions); the facility must submit a written request for an IDR using the form and in accordance with procedures on the HHSC website at www.hhsc.state.tx.us]. A facility must indicate on the form if it is requesting documents from HHSC.

(c) If a facility requests documents from HHSC in accordance with subsection (b) of this section, HHSC sends to the facility a copy of all documents referenced in the disputed statement of violations or on which a cited licensure violation is based in connection with the survey, inspection, investigation, or other regulatory visit, including any notes taken by or emails or messages sent by an HHSC employee involved with the survey, inspection, investigation, or other regulatory visit, no later than 20 working days after the facility submits its request for informal dispute resolution. HHSC redacts or excludes the following information from the documents it sends to the facility:

- (1) the name of any complainant, witness, or informant;
- (2) information that would reasonably lead to the identification of a complainant, witness, or informant;
- (3) information obtained from or contained in the records of the facility;
- (4) information that is publicly available; and
- (5) information that is confidential by law.

(d) HHSC may charge a facility \$15.00 per hour for the time HHSC spends to prepare, redact, copy, and deliver documents requested by the facility for informal dispute resolution. A facility must pay any amounts that HHSC charges it in accordance with this subsection.

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

Filed with the Office of the Secretary of State on June 7, 2018.

TRD-201802509

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: July 22, 2018

For further information, please call: (512) 438-3161



## CHAPTER 98. DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the executive commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, HHSC proposes amendments to §98.2, concerning Definitions; §98.62, concerning Program Requirements; and §98.105, concerning Administrative Penalties in Title 40, Chapter 98, Day Activity and Health Services Requirements.

### BACKGROUND AND PURPOSE

The proposed amendments implement §103.12 and §103.13 of the Texas Human Resources Code, as amended by House Bill (H.B.) 2025, 85th Legislature, Regular Session, 2017. Section 103.12 requires HHSC to develop a system to record and track the scope and severity of licensure violations by a day activity and health services (DAHS) facility for the purpose of assessing an administrative penalty or taking other enforcement action. The system must be similar to the system used by the Centers for Medicare & Medicaid Services to categorize the scope and severity of violations for nursing facilities. Section 103.13 describes the circumstances under which HHSC may not allow a DAHS facility to correct a violation before assessing an administrative penalty.

The proposed amendments also implement Chapter 326 of the Texas Health and Safety Code, which was added by H.B. 2025, by requiring a DAHS facility to train employees who provide direct care to individuals with Alzheimer's disease or related disorders and to ensure the care and services provided to those individuals meet their needs related to their diagnosis of Alzheimer's disease or a related disorder.

The proposed amendments also change references from "DADS" and "department" to "HHSC" to reflect that DADS was abolished on September 1, 2017, and its functions were transferred to HHSC. Similarly, responsibilities of the former DADS commissioner are now the responsibilities of the HHSC executive commissioner, so those references are changed from "DADS commissioner" to "executive commissioner."

### SECTION-BY-SECTION SUMMARY

The proposed amendment to §98.2, Definitions, adds definitions for "actual harm", "immediate threat to the health or safety of an elderly person or a person with a disability", "isolated", "pattern of violation", "potential for minimal harm", and "widespread in scope." Definitions of those terms are necessary for implementation of the proposed system to record and track licensure violations. In addition, the proposed amendment adds definitions of "HHSC" and "executive commissioner" and amends the definitions of "DADS" and "department" to mean HHSC. This change is necessary because DADS has been abolished and its functions have been transferred to HHSC. When all references to

"DADS" and "department" are removed from Chapter 98, the definitions will be deleted. The proposed amendment adds a definition of "Alzheimer's disease and related disorders" because new requirements are being added related to the provision of services to persons with those diagnoses. Edits were made to replace "DADS" with "HHSC", reorganize acronyms in this section as appropriate, and renumber the section to account for changes.

The proposed amendment to §98.62, Program Requirements, requires a DAHS facility to develop, implement, and enforce a written policy that (1) requires a facility employee who provides direct care to an individual with Alzheimer's disease or a related disorder to complete training that addresses at least the four topics listed in the rule; and (2) ensures the care and services provided to an individual with Alzheimer's disease or a related disorder meets the needs of the individual relating to the resident's diagnosis of Alzheimer's disease or a related disorder. Edits were made to update referenced rule titles.

The proposed amendment to §98.105, Administrative Penalties, replaces the current administrative penalties schedule with a schedule that categorizes licensure violations based on their scope and severity. With regard to severity, HHSC may assess an administrative penalty for a violation that creates a potential for more than minimal harm, results in actual harm, or poses an immediate threat to the health or safety of a resident. The proposed amendment to subsection (f) describes the circumstances under which HHSC does not allow a facility to correct a violation before assessing an administrative penalty. These circumstances are consistent with Texas Human Resources Code, §103.013. Several of the circumstances are based on the scope and severity of the violation. In addition, a violation of the new requirements for persons with Alzheimer's disease or related conditions may not be corrected before an administrative penalty is assessed if the violation occurs within two years of a previous violation. The proposed amendment also deletes the term formerly used to refer to a facility licensed under Chapter 103 of the Texas Human Resources Code, which was "adult day care facility", to "facility", defined as a licensed DAHS facility. Edits were made to replace "DADS" with "HHSC."

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the proposed amendments will be in effect, there may be fiscal implications to revenues of state governments as a result of enforcing and administering the amendments. HHSC lacks sufficient data to determine if the rule as proposed will result in the collection of administrative penalties in greater or lesser amounts than under current rules.

Greta Rymal has also determined that there will be no additional costs to state government because the tracking functionality related to scope and severity currently exists in regulatory survey operations' database and only requires activation for DAHS facilities.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the proposed amendments will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of employee positions;

- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to the agency;
- (5) the proposed rules will not create a new rule;
- (6) the proposed rules will expand an existing rule;
- (7) the proposed rules will not change the number of individuals subject to the rule; and
- (8) the proposed rules will not have an effect on the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there may be an economic impact to small, micro-business or rural communities as a result of the proposed rules. HHSC lacks data to provide an estimate of how many may be adversely affected by the proposed rule change.

License holders currently must pay administrative penalties for licensure violations under certain circumstances. The rule adds a requirement that HHSC must assess penalties for repeated violations of certain requirements within two years of the initial violation and provides no opportunity for the DAHS to correct the violation and avoid a penalty. HHSC cannot determine if the proposed new section and rules for assessing administrative penalties will result in any license holders paying more administrative penalties than under current rules.

There will be no additional cost to license holders to comply with the requirement to adopt, implement, and enforce a policy related to training staff in caring for persons with Alzheimer's disease as required by H.B. 2025. License holders are currently required to provide basic training to staff. The rule includes additional topics relating to Alzheimer's disease that must be covered in training.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the proposed rules. HHSC cannot determine if the proposed new section and rules for assessing administrative penalties will result in any license holders paying more administrative penalties than under current rules.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these proposed rules because the amendments are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

#### PUBLIC BENEFIT

Mary T. Henderson, Associate Commissioner for Long-Term Care Regulatory Services, has determined that for each year of the first five years the amendments are in effect, the public benefit will be HHSC's ability to more efficiently assess administrative penalties, enhancing its ability to enforce health and safety standards in DAHS facilities. The requirements to have training and to ensure the care and services for a person with Alzheimer's disease or a related disorder meet the resident's needs will result in better care provided to those persons.

#### TAKINGS IMPACT ASSESSMENT

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

## PUBLIC COMMENT

Questions about the content of this proposal may be directed to Josie Esparza at (512) 438-4077 in the HHSC Long-Term Care Regulatory Services Division. Written comments on the proposal may be submitted to the Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to [HHSCRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHSCRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 40R063" in the subject line.

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §98.2

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; and Texas Human Resource Code, §103.004, which authorizes the executive commissioner to adopt rules related to the administration and implementation of DAHS facilities.

The amendment implements Texas Government Code, §531.0055 and Texas Human Resources Code, §103.004.

#### §98.2. Definitions.

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

(1) Abuse--The negligent or willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person by the person's caretaker, family member, or other individual who has an ongoing relationship with the person, or sexual abuse of an elderly or disabled person, including any involuntary or nonconsensual sexual conduct that would constitute an offense under Texas Penal Code, §21.08, (indecent exposure) or Texas Penal Code, Chapter 22, (assaultive offenses) committed by the person's caretaker, family member, or other individual who has an ongoing relationship with the person.

(2) Actual harm--A negative outcome that compromises the physical, mental, or emotional well-being of an elderly person or a person with a disability receiving services at a facility.

(3) [(2)] Adult--A person 18 years of age or older, or an emancipated minor.

(4) [(3)] Affiliate--With respect to a:

(A) partnership, each partner of the partnership;

(B) corporation, each officer, director, principal stockholder, and subsidiary; and each person with a disclosable interest;

(C) natural person, which includes each:

(i) person's spouse;

(ii) partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

(iii) corporation in which the person is an officer, director, principal stockholder, or person with a disclosable interest.

(5) Alzheimer's disease and related disorders--Alzheimer's disease and any other irreversible dementia described by the Centers for Disease Control and Prevention (CDC) or the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

(6) [(4)] Ambulatory--Mobility not relying on walker, crutch, cane, other physical object, or use of wheelchair.

(7) [(5)] Applicant--A person applying for a license under Texas Human Resources Code, Chapter 103.

(8) [(6)] Authorization--A case manager's decision, before DAHS begins and before payment can be made, that DAHS may be provided to an individual.

(9) [(7)] Case manager--An HHSC [A DADS] employee who is responsible for DAHS case management activities. Activities include eligibility determination, individual enrollment, assessment and reassessment of an individual's need, service plan development, and intercession on the individual's behalf.

(10) [(8)] Caseworker--Case manager.

(11) [(9)] Change of ownership--An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.

(12) [(10)] Client--Individual.

(13) [(11)] Construction, existing--See definition of existing building.

(14) [(12)] Construction, new--Construction begun after April 1, 2007.

(15) [(13)] Construction, permanent--A building or structure that meets a nationally recognized building code's details for foundations, floors, walls, columns, and roofs.

(16) [(14)] DADS--The term referred to the Department of Aging and Disability Services; it now refers to HHSC [The Department of Aging and Disability Services or its successor agency].

(17) [(15)] DAHS--Day activity and health services. Health, social, and related support services.

(18) [(16)] DAHS facility--A facility that provides services under a day activity and health services program on a daily or regular basis, but not overnight, to four or more elderly persons or persons with disabilities who are not related by blood, marriage, or adoption to the owner of the facility.

(19) [(17)] DAHS program--A structured, comprehensive program offered by a DAHS facility that is designed to meet the needs of adults with functional impairments by providing DAHS in accordance with individual plans of care in a protective setting.

(20) [(18)] Days--Calendar days, unless otherwise specified.

(21) [(19)] Department--HHSC [Department of Aging and Disability Services or its successor agency].

(22) [(20)] Dietitian consultant--A registered dietitian; a person licensed by the Texas State Board of Examiners of Dietitians;

or a person with a bachelor's degree with major studies in food and nutrition, dietetics, or food service management.

(23) [(21)] Direct service staff--An employee or contractor of a facility who directly provides services to individuals, including the director, a licensed nurse, the activities director, and an attendant. An attendant includes a driver, food service worker, aide, janitor, porter, maid, and laundry worker. A dietitian consultant is not a member of the direct service staff.

(24) [(22)] Director--The person responsible for the overall operation of a facility.

(25) [(23)] Direct ownership interest--Ownership of equity in the capital, stock, or profits of, or a membership interest in, an applicant or license holder.

(26) [(24)] Disclosable interest--Five percent or more direct or indirect ownership interest in an applicant or license holder.

(27) [(25)] Elderly person--A person 65 years of age or older.

(28) Executive Commissioner--The executive commissioner of HHSC.

(29) [(26)] Existing building--A building or portion thereof that, at the time of initial inspection by HHSC [DADS], is used as an adult day care occupancy, as defined by Life Safety Code, NFPA 101, 2000 edition, Chapter 17 for existing adult day care occupancies; or has been converted from another occupancy or use to an adult day care occupancy, as defined by Chapter 16 for new adult day care occupancies.

(30) [(27)] Exploitation--An illegal or improper act or process of a caretaker, family member, or other individual, who has an ongoing relationship with the elderly person or person with a disability, using the resources of an elderly person or person with a disability for monetary or personal benefit, profit, or gain without the informed consent of the elderly person or person with a disability.

(31) [(28)] Facility--A licensed DAHS facility.

(32) [(29)] Fence--A barrier to prevent elopement of an individual or intrusion by an unauthorized person, consisting of posts, columns, or other support members, and vertical or horizontal members of wood, masonry, or metal.

(33) [(30)] FM--FM Global (formerly known as Factory Mutual). A corporation whose approval of a product indicates a level of testing and certification that is acceptable to HHSC [DADS].

(34) [(31)] Fraud--A deliberate misrepresentation or intentional concealment of information to receive or to be reimbursed for service delivery to which an individual is not entitled.

(35) [(32)] Functional impairment--A condition that requires assistance with one or more personal care services.

(36) [(33)] Health assessment--An assessment of an individual by a facility used to develop the individual's plan of care.

(37) [(34)] Health services--Services that include personal care, nursing, and therapy services.

(A) Personal care services include:

- (i) bathing;
- (ii) dressing;
- (iii) preparing meals;
- (iv) feeding;

- (v) grooming;
- (vi) taking self-administered medication;
- (vii) toileting;
- (viii) ambulation; and
- (ix) assistance with other personal needs or maintenance.

(B) Nursing services may include:

- (i) the administration of medications;
- (ii) physician-ordered treatments, such as dressing changes; and
- (iii) monitoring the health condition of the individual.

(C) Therapy services may include:

- (i) physical;
- (ii) occupational; and
- (iii) speech therapy.

(38) HHSC--The Texas Health and Human Services Commission.

(39) [(35)] Human services--Include the following services:

(A) personal social services, including:

- (i) DAHS;
- (ii) counseling;
- (iii) in-home care; and
- (iv) protective services;

(B) health services, including:

- (i) home health;
- (ii) family planning;
- (iii) preventive health programs;
- (iv) nursing facility; and
- (v) hospice;

(C) education services, meaning:

- (i) all levels of school;
- (ii) Head Start; and
- (iii) vocational programs;

(D) housing and urban environment services, including public housing;

(E) income transfer services, including:

- (i) Temporary Assistance for Needy Families; and
- (ii) Supplemental Nutrition Assistance Program;

and

(F) justice and public safety services, including:

- (i) parole and probation; and
- (ii) rehabilitation.



(40) [(36)] Human service program--An intentional, organized, ongoing effort designed to provide good to others. The characteristics of a human service program are:

(A) dependent on public resources and are planned and provided by the community;

(B) directed toward meeting human needs arising from day-to-day socialization, health care, and developmental experiences; and

(C) used to aid, rehabilitate, or treat people in difficulty or need.

(41) Immediate threat to the health or safety of an elderly person or a person with a disability--A situation that causes, or is likely to cause, serious injury, harm, or impairment to or the death of an elderly person or a person with a disability receiving services at a facility.

(42) [(37)] Indirect ownership interest--Any ownership or membership interest in a person that has a direct ownership interest in an applicant or license holder.

(43) [(38)] Individual--A person who applies for or is receiving services at a facility.

(44) Isolated--A very limited number of elderly persons or persons with disabilities receiving services at a facility are affected and a very limited number of staff are involved, or the situation has occurred only occasionally or in a very limited number of locations.

(45) [(39)] License holder--A person that holds a license to operate a facility.

[(40) Licensed vocational nurse (LVN)--A person licensed by the Texas Board of Nursing who works under the supervision of a registered nurse (RN) or a physician.]

(46) [(41)] Life Safety Code, NFPA 101--The Code for Safety to Life from Fire in Buildings and Structures, NFPA 101, a publication of the National Fire Protection Association, Inc. that:

(A) addresses the construction, protection, and occupancy features necessary to minimize danger to life from fire, including smoke, fumes, or panic; and

(B) establishes minimum criteria for the design of egress features so as to permit prompt escape of occupants from buildings or, where desirable, into safe areas within the building.

(47) [(42)] Long-term care facility--A facility that provides care and treatment or personal care services to four or more unrelated persons, including:

(A) a nursing facility licensed under Texas Health and Safety Code, Chapter 242;

(B) an assisted living facility licensed under Texas Health and Safety Code, Chapter 247; and

(C) an intermediate care facility serving individuals with an intellectual disability or related conditions licensed under Texas Health and Safety Code, Chapter 252.

(48) LVN--Licensed vocational nurse. A person licensed by the Texas Board of Nursing who works under the supervision of a registered nurse (RN) or a physician.

(49) [(43)] Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, and delivery of services. Management services do not include contracts solely for maintenance, laundry, or food services.

(50) [(44)] Manager--A person having a contractual relationship to provide management services to a facility.

(51) [(45)] Medicaid-eligible--An individual who is eligible for Medicaid.

(52) [(46)] Medically related program--A human services program under the human services-health services category in the definition of human services in this section.

(53) [(47)] Neglect--The failure to provide for one's self the goods or services, including medical services, that are necessary to avoid physical harm, mental anguish, or mental illness; or the failure of a caregiver to provide these goods or services.

(54) [(48)] NFPA--The National Fire Protection Association. NFPA is an organization that develops codes, standards, recommended practices, and guides through a consensus standards development process approved by the American National Standards Institute.

(55) [(49)] NFPA 10--Standard for Portable Fire Extinguishers. A standard developed by NFPA for the selection, installation, inspection, maintenance, and testing of portable fire extinguishing equipment.

(56) [(50)] NFPA 13--Standard for the Installation of Sprinkler Systems. A standard developed by NFPA for the minimum requirements for the design and installation of automatic fire sprinkler systems, including the character and adequacy of water supplies and the selection of sprinklers, fittings, pipes, valves, and all maintenance and accessories.

(57) [(51)] NFPA 70--National Electrical Code. A code developed by NFPA for the installation of electric conductors and equipment.

(58) [(52)] NFPA 72--National Fire Alarm Code. A code developed by NFPA for the application, installation, performance, and maintenance of fire alarm systems and their components.

(59) [(53)] NFPA 90A--Standard for the Installation of Air Conditioning and Ventilating Systems. A standard developed by NFPA for systems for the movement of environmental air in structures that serve spaces over 25,000 cubic feet or buildings of certain heights and construction types, or both.

(60) [(54)] NFPA 90B--Standard for the Installation of Warm Air Heating and Air-Conditioning Systems. A standard developed by the NFPA for systems for the movement of environmental air in one- or two-family dwellings and structures that serve spaces not exceeding 25,000 cubic feet.

(61) [(55)] NFPA 96--Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations. A standard developed by NFPA that provides the minimum fire safety requirements related to the design, installation, operation, inspection, and maintenance of all public and private cooking operations, except for single-family residential usage.

(62) [(56)] Nurse--A registered nurse (RN) or a licensed vocational nurse (LVN) licensed in the state of Texas.

(63) [(57)] Nursing services--Services provided by a nurse, including:

(A) observation;

(B) promotion and maintenance of health;

(C) prevention of illness and disability;

(D) management of health care during acute and chronic phases of illness;

(E) guidance and counseling of individuals and families; and

(F) referral to physicians, other health care providers, and community resources when appropriate.

(64) Pattern of violation--Repeated, but not widespread in scope, failures of a facility to comply with Texas Human Resources Code, Chapter 103 or a rule, standard, or order adopted under Texas Human Resources Code, Chapter 103 that:

(A) result in a violation; and

(B) are found throughout the services provided by the facility or that affect or involve the same elderly persons or persons with disabilities receiving services at the facility or the same facility employees.

(65) [(58)] Person--An individual, corporation, or association.

(66) [(59)] Person with a disability--A person whose functioning is sufficiently impaired to require frequent medical attention, counseling, physical therapy, therapeutic or corrective equipment, or another person's attendance and supervision.

(67) [(60)] Physician's orders--An order that is signed and dated by a medical doctor (MD) or doctor of osteopathy (DO) who is licensed to practice medicine in the state of Texas. The HHSC [DAHS] physician's order form used by a DAHS facility that contracts with HHSC [DAHS] must include the MD's or DO's license number.

(68) [(61)] Plan of care--A written plan, based on a health assessment and developed jointly by a facility and an individual or the individual's responsible party, that documents the functional impairment of the individual and the DAHS needed by the individual.

(69) Potential for minimal harm--A violation that has the potential for causing no more than a minor negative impact to an individual.

(70) [(62)] Protective setting--A setting in which an individual's safety is ensured by the physical environment by staff.

[(63) Registered nurse (RN)--A person licensed by the Texas Board of Nursing to practice professional nursing.]

(71) [(64)] Related support services--Services to an individual, family member, or caregiver that may improve the person's ability to assist with an individual's independence and functioning. Services include:

- (A) information and referral;
- (B) transportation;
- (C) teaching caregiver skills;
- (D) respite;
- (E) counseling;
- (F) instruction and training; and
- (G) support groups.

(72) [(65)] Responsible party--A person designated by an individual as the individual's representative.

(73) RN--Registered nurse. A person licensed by the Texas Board of Nursing to practice professional nursing.

(74) [(66)] Safety--Protection from injury or loss of life due to conditions such as fire, electrical hazard, unsafe building or site conditions, and the presence of hazardous materials.

(75) [(67)] Sanitation--Protection from illness, the transmission of disease, or loss of life due to unclean surroundings, the presence of disease transmitting insects or rodents, unhealthful conditions or practices in the preparation of food and beverage, or the care of personal belongings.

(76) [(68)] Semi-ambulatory--Mobility relying on a walker, crutch, cane, other physical object, or independent use of wheelchair.

(77) [(69)] Serious injury--An injury requiring emergency medical intervention or treatment by medical personnel, either at a facility or at an emergency room or medical office.

(78) [(70)] Social activities--Therapeutic, educational, cultural enrichment, recreational, and other activities in a facility or in the community provided as part of a planned program to meet the social needs and interests of an individual.

(79) [(71)] UL--Underwriters Laboratories, Inc. A corporation whose approval of a product indicates a level of testing and certification that is acceptable to HHSC [DAHS].

(80) Widespread in scope--A violation of Texas Human Resources Code, Chapter 103 or a rule, standard, or order adopted under Texas Human Resources Code, Chapter 103 that:

(A) is pervasive throughout the services provided by the facility; or

(B) represents a systematic failure by the facility that affects or has the potential to affect a large portion of or all of the elderly persons or persons with disabilities receiving services at the facility.

(81) [(72)] Working with people--Responsible for the delivery of services to individuals either directly or indirectly. Experience as a manager would meet this definition; however, an administrative support position such as a bookkeeper does not. Experience does not have to be in a paid capacity.

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

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## SUBCHAPTER D. LICENSURE AND PROGRAM REQUIREMENTS

### 40 TAC §98.62

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; and Texas Human Resource Code, §103.004, which authorizes the executive commissioner to adopt rules related to the administration and implementation of DAHS facilities.

The amendment implements Texas Government Code, §531.0055 and Texas Human Resources Code, §103.004.

§98.62. *Program Requirements.*

(a) Staff qualifications.

(1) Director. A facility must employ a director.

(A) The director must:

(i) have graduated from an accredited four-year college or university and have no less than one year of experience in working with people in a human service or medically related program, or have an associate degree or 60 semester hours from an accredited college or university with three years of experience working with people in a human service or medically related program;

(ii) be an RN with one year of experience in a human service or medically related program;

(iii) meet the training and experience requirements for a license as a nursing facility administrator under Texas Administrative Code (TAC), Title 40, Chapter 18, Nursing Facility Administrators; or

(iv) have met, on July 16, 1989, the qualifications for a director required at that time and have served continuously in the capacity of director since that date.

(B) The director must show evidence of 12 hours of annual continuing education in at least two of the following areas:

(i) individual and provider rights and responsibilities, abuse, neglect, exploitation and confidentiality;

(ii) basic principles of supervision;

(iii) skills for working with individuals, families, and other professional service providers;

(iv) individual characteristics and needs;

(v) community resources;

(vi) basic emergency first aid, such as cardiopulmonary resuscitation (CPR) or choking; or

(vii) federal laws, such as Americans with Disabilities Act, Civil Rights Act of 1991, the Rehabilitation Act of 1993, and the Family and Medical Leave Act of 1993.

(C) The activities director may fulfill the function of director if the activities director meets the qualifications for facility director.

(D) One person may not serve as facility nurse, activities director, and director, regardless of qualifications.

(E) The facility must have a policy regarding the delegation of responsibility in the director's absence from the facility.

(F) The facility must notify the HHSC [~~DA~~DS] regional office in which the facility is located if the director is absent from the facility for more than 10 working days.

(2) Nurse. A facility must employ a nurse.

(A) An RN must have a license from the Texas Board of Nursing and practice in compliance with the Nurse Practice Act and rules and regulations of the Texas Board of Nursing.

(B) An LVN must have a license from the Texas Board of Nursing and practice in compliance with the Nurse Practice Act and rules and regulations of the Texas Board of Nursing.

(C) If a nurse serving as director leaves the facility to perform other duties related to the DAHS program, an LVN or another RN must fulfill the duties of the facility nurse.

(D) A facility that does not have a DAHS contract, but has a Special Services to Persons with Disabilities contract, is not required to have an RN on duty, if the individual receiving services has no medical needs and is able to self-administer medication.

(3) Activities director. A facility must employ an activities director.

(A) Except as provided in subparagraph (B) of this paragraph, an activities director must have graduated from a high school or have a certificate recognized by a state of the United States as the equivalent of a high-school diploma and have:

(i) a bachelor's degree from an accredited college or university, and one year of full-time experience working with elderly people or people with disabilities in a human service or medically related program;

(ii) 60 semester hours from an accredited college or university, and two years of full-time experience working with elderly people or people with disabilities in a human service or medically related program; or

(iii) completed an activities director's course, and two years of full-time experience working with elderly people or people with disabilities in a human service or medically related program.

(B) An activities director hired before May 1, 1999, with four years of full-time experience working with elderly people or people with disabilities in a human service or medically related program is not subject to the requirements of subparagraph (A) of this paragraph.

(4) Attendants. An attendant must be at least 18 years of age and may be employed as a driver, aide, cook, janitor, porter, housekeeper, or laundry worker.

(A) If a facility employs a driver, the driver must have a current operator's license, issued by the Texas Department of Public Safety, which is appropriate for the class of vehicle used to transport individuals.

(B) If an attendant handles food in the facility, the attendant must meet requirements of the Department of State Health Services rules on food service sanitation as described in 25 TAC, Chapter 228, Subchapters A - J (relating to Retail Food [~~Texas Food Establishments~~]).

(5) Food service personnel. If a facility prepares meals on site, the facility must have sufficient food service personnel to prepare meals and snacks. Food service personnel must meet the requirements of the Department of State Health Services rules on food service sanitation as described in 25 TAC, Chapter 228, Subchapters A - J (relating to Retail Food [~~Texas Food Establishments~~]).

(6) Additional requirements for a facility that contracts with HHSC [~~DA~~DS].

(A) Housekeeper. A facility that contracts with HHSC [~~DA~~DS] may employ a part-time or full-time housekeeper.

(B) Driver. If a facility that contracts with HHSC [~~DA~~DS] employs a driver, the driver must:

(i) operate the facility's vehicles in a safe manner; and

(ii) maintain adult cardiopulmonary resuscitation (CPR) certification.

(b) Staffing. A facility must ensure that:

(1) the ratio of direct service staff to individuals is at least one to eight, which must be maintained during provision of all DAHS except during facility-provided transportation;

(2) at least one RN or LVN is working at the facility for at least eight hours per day and sufficient nurses are at the facility to meet the nursing needs of the individuals at all times;

(3) the facility director routinely works at least 40 hours per week performing duties relating to the provision of the DAHS program;

(4) the activities director routinely works at least 40 hours a week;

(5) individuals whose needs cannot be met by the facility are not admitted or retained; and

(6) sufficient staff are on duty at all times to meet the needs of the individuals who are served by the facility.

(c) Staff health. All direct service staff must be free of communicable diseases.

(1) A facility must screen all employees for tuberculosis within two weeks of employment and annually, according to Center for Disease Control and Prevention (CDC) screening guidelines. All persons providing services under an outside resource contract must also screen all employees for tuberculosis within two weeks of employment and annually according to CDC screening guidelines.

(2) If an employee contracts a communicable disease that is transmissible to individuals through food handling or direct individual care, the facility must exclude the employee from providing these services while the employee is infectious.

(d) Staff responsibilities.

(1) The facility director:

(A) manages the DAHS program and the facility;

(B) trains and supervises facility staff;

(C) monitors the facility building and grounds to ensure compliance;

(D) maintains all financial and individual records;

(E) develops relationships with community groups and agencies for identification and referral of individuals;

(F) maintains communication with an individual's family members or responsible parties;

(G) assures the development and maintenance of the individual's plan of care; and

(H) ensures that, if the facility director serves as the RN consultant, the facility director fulfills the responsibility as director.

(2) The facility nurse:

(A) assesses an individual's nursing and medical needs;

(B) develops an individual's plan of care;

(C) obtains physician's orders for medication and treatments to be administered;

(D) determines whether self-administered medications have been appropriately taken, applied, or used;

(E) enters, dates, and signs monthly progress notes on medical care provided;

(F) administers medication and treatments;

(G) provides health education; and

(H) maintains medical records.

(3) The activities director:

(A) plans and directs the daily program of activities, including physical fitness exercises or other recreational activities;

(B) records the individual's social history;

(C) assists the individual's related support needs;

(D) assures that the identified related support services are included in the individual's plan of care; and

(E) signs and dates monthly progress notes about social and related support services activities provided.

(4) An attendant:

(A) provides personal care services to assist with activities of daily living;

(B) assists the activities director with recreational activities; and

(C) provides protective supervision through observation and monitoring.

(5) Food service personnel:

(A) prepare meals and snacks; and

(B) maintain the kitchen area and utensils in a safe and sanitary condition.

(6) A facility must obtain consultation at least four hours per month from a dietitian consultant.

(A) The dietitian consultant plans and reviews menus and must:

(i) approve and sign snack and luncheon menus;

(ii) review menus monthly to ensure that substitutions were appropriate; and

(iii) develop a special diet for an individual, if ordered by a physician.

(B) A facility must obtain consultation from a dietitian consultant, even if the facility has meals delivered from another facility with a dietitian consultant or the facility contracts for the preparation and delivery of meals with a contractor that employs a registered dietitian. A consultant who provides consultation to several facilities must provide at least four hours of consultation per month to each facility.

(7) If a facility employs an LVN as the facility nurse, the facility must ensure that an RN consultant provides consultation at the facility at least four hours per week. The RN consultant must document the consultation provided. The RN consultant must provide the consultation when individuals are present in the facility. The RN consultant may provide the following types of assistance:

(A) review plans of care and suggest changes, if appropriate;

(B) assess individuals' health conditions;

(C) consult with the LVN in solving problems involving care and service planning;

(D) counsel individuals on health needs;

(E) train, consult, and assist the LVN to maintain proper medical records; and

(F) provide in-service training for direct service staff.

(e) Training.

(1) Initial training.

(A) A facility must:

(i) provide direct service staff with training in the fire, disaster, and evacuation procedures within three workdays after the start of employment and document the training in the facility records; and

(ii) provide direct service staff a minimum of 18 hours of training during the first three months after the start of employment and document the training in the facility records.

(B) The training provided in accordance with subparagraph (A)(ii) of this paragraph must include:

(i) any nationally or locally recognized adult CPR course or certification;

(ii) first aid; or

(iii) orientation to health care delivery, including the following topics:

(I) safe body function and mechanics;

(II) personal care techniques and procedures;

and

(III) overview of the population served at the facility; and

(iv) identification and reporting of abuse, neglect, or exploitation.

(2) Ongoing training.

(A) A facility must provide at least three hours of ongoing training to direct service staff quarterly. The facility must ensure that direct delivery staff maintain current certification in CPR.

(B) A facility must practice evacuation procedures with staff and individuals at least once a month. The facility must document evacuation results in the facility records.

(3) Policy for individuals with Alzheimer's disease or a related disorder. A facility must adopt, implement, and enforce a written policy that:

(A) requires a facility employee who provides direct care at the facility to an individual with Alzheimer's disease or a related disorder to successfully complete training in the provision of care to individuals with Alzheimer's disease or related disorders. Training must include at least:

(i) symptoms and treatment of dementia;

(ii) stages of Alzheimer's disease;

(iii) behavior management; and

(iv) communication; and

(B) ensures the care and services provided by a facility employee to an individual with Alzheimer's disease or a related disorder meet the specific identified needs of the individual relating to the diagnosis of Alzheimer's disease or a related disorder.

(f) Medications.

(1) Administration.

(A) A facility must ensure that a person who holds a current license under state law that authorizes the licensee to administer medications to individuals who choose not to or cannot self-administer their medications.

(B) A facility must ensure that all medication prescribed to an individual that is administered at the facility is dispensed through a pharmacy or by the individual's treating physician or dentist.

(C) A facility may administer physician sample medications at the facility if the medication has specific dosage instructions for the individual.

(D) A facility must record an individual's medications on the individual's medication profile record. The recorded information must be obtained from the prescription label and must include the medication name, strength, dosage, amount received, directions for use, route of administration, prescription number, pharmacy name, and the date each medication was issued by the pharmacy.

(2) Assistance with self-administration. A nurse may assist with self-administration of an individual's medication if the individual is unable to administer the medication without assistance. Assistance with self-administration of medication is limited to the following activities:

(A) reminding an individual to take medications at the prescribed time;

(B) opening and closing containers or packages;

(C) pouring prescribed dosage according to the individual's medication profile record;

(D) returning medications to the proper locked areas;

(E) obtaining medications from a pharmacy; and

(F) listing on an individual's medication profile record the medication name, strength, dosage, amount received, directions for use, route of administration, prescription number, pharmacy name, and the date each medication was issued by the pharmacy.

(3) Self-administration.

(A) A nurse must counsel an individual who self-administers medication or treatment at least once per month to ascertain if the individual continues to be able to self-administer the medication or treatment. The facility must keep a written record of the counseling.

(B) A facility may permit an individual who chooses to keep the individual's medication locked in the facility's central medication storage area to enter or have access to the area for the purpose of self-administering medication or treatment. A facility staff member must remain in or at the storage area the entire time the individual is present.

(4) General.

(A) A facility director, an activities director, or a facility nurse must immediately report to an individual's physician and responsible party any unusual reactions to a medication or treatment.

(B) When a facility supervises or administers medications, the facility must document in writing if an individual does not receive or take the medication and treatment as prescribed. The documentation must include the date and time the dose should have been taken, and the name and strength of medication missed.

(5) Storage.

(A) A facility must provide a locked area for all medications, which may include:

- (i) a central storage area; and
- (ii) a medication cart.

(B) A facility must store an individual's medication separately from other individuals' medications within the storage area.

(C) A facility must store medication requiring refrigeration in a locked refrigerator that is used only for medication storage or in a separate, permanently attached, locked medication storage box in a refrigerator.

(D) A facility must store poisonous substances and medications labeled for "external use only" separately within the locked area.

(E) A facility must store drugs covered by Schedule II of the Controlled Substances Act of 1970 in a locked, permanently attached cabinet, box, or drawer that is separate from the locked storage area for other medications.

(6) Disposal.

(A) A facility must keep medication that is no longer being used by an individual for the following reasons separate from current medications and ensure the medication is disposed of by a registered pharmacist licensed in the State of Texas:

- (i) the medication has been discontinued by order of the physician;
- (ii) the individual is deceased; or
- (iii) the expiration date of the medications has passed.

(B) A facility must dispose of needles and hypodermic syringes with needles attached as required by 25 TAC, Chapter 1, Subchapter K (relating to the Definition, Treatment, and Disposition [~~Disposal~~] of Special Waste from Health Care-Related [~~Care Related~~] Facilities).

(C) A facility must obtain a signed receipt from an individual or the individual's responsible party if the facility releases medication to the individual or responsible party.

(g) Accident, injury, or acute illness.

(1) A facility must stock and maintain in a single location first aid supplies to treat burns, cuts, and poisoning.

(2) In the event of accident or injury to an individual requiring emergency medical, dental, or nursing care, or in the event of death of an individual, a facility must:

(A) make arrangements for emergency care or transfer to an appropriate place for treatment, including:

- (i) a physician's office;
- (ii) a clinic; or
- (iii) a hospital;

(B) immediately notify an individual's physician and responsible party, or agency who admitted the individual to the facility; and

(C) describe and document the accident, injury, or illness on a separate report. The report must contain a statement of final disposition and be maintained on file.

(h) Menus.

(1) A facility must plan, date, and post a menu at least two weeks in advance and maintain a copy of the menu. A facility must serve meals according to approved menus.

(2) A facility must ensure that a special diet meal ordered by an individual's physician and developed by the dietician consultant is labeled with the individual's name and type of diet.

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

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For further information, please call: (512) 438-4681



## SUBCHAPTER G. ENFORCEMENT

### 40 TAC §98.105

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies; and Texas Human Resource Code, §103.004, which authorizes the executive commissioner to adopt rules related to the administration and implementation of DAHS facilities.

The amendment implements Texas Government Code, §531.0055 and Texas Human Resources Code, §103.004.

*§98.105. Administrative Penalties.*

(a) HHSC [~~DADS~~] may assess an administrative penalty if a [~~an adult day care~~] facility:

(1) violates Texas Human Resources Code (THRC)<sub>2</sub> Chapter 103, a rule, standard, or order adopted under this chapter, or a term of a license issued under this chapter;

(2) makes a false statement of a material fact that the facility knows or should know is false:

(A) on an application for a license or a renewal of a license or in an attachment to the application; or

(B) with respect to a matter under investigation by HHSC [~~DADS~~];

(3) refuses to allow an HHSC [~~a DADS~~] representative to inspect:

(A) a book, record, or file required to be maintained by a [~~an adult day care~~] facility; or

(B) any portion of the premises of a [~~an adult day care~~] facility;

(4) willfully interferes with the work of a representative of HHSC [~~DADS~~] or the enforcement of this chapter;

(5) willfully interferes with an HHSC [~~a DADS~~] representative who is preserving evidence of a violation of THRC<sub>2</sub> Chapter 103, a rule adopted under this chapter, or a term of a license issued under this chapter;

(6) fails to pay a penalty assessed under THRC<sub>2</sub> Chapter 103 or a rule adopted under this chapter not later than the 30th day after the date the assessment of the penalty becomes final; or

(7) fails to notify HHSC [DADS] of a change of ownership before the effective date of the change of ownership.

(b) HHSC [DADS] assesses administrative penalties against a [an adult day care] facility in accordance with the schedule of appropriate and graduated penalties established in this section. HHSC [DADS] considers the following in determining the amount of an administrative penalty:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the situation, and the hazard or potential hazard created by the situation to the health or safety of the public;

(2) the history of previous violations by a facility;

(3) the amount necessary to deter future violations;

(4) the facility's efforts to correct the violation; and

(5) any other matter that justice may require.

(c) Each day of a continuing violation constitutes a separate violation. The administrative penalties for each day of a continuing violation cease on the date the violation is corrected. A violation that is the subject of a penalty is presumed to continue on each successive day until it is corrected. The date of correction alleged by the facility in its written plan of correction will be presumed to be the actual date of correction unless it is later determined by HHSC [DADS] that the correction was not made by that date or was not satisfactory.

(d) The administrative penalty schedule includes violations that warrant an administrative penalty.

Figure: 40 TAC §98.105(d)  
[Figure: 40 TAC §98.105(d)]

(e) HHSC [DADS] may not collect an administrative penalty from a [an adult day care] facility if, not later than the 45th day after the date the facility receives notice under subsection (j) of this section, the facility corrects the violation.

(f) Subsection (e) of this section does not apply to:

(1) a violation that HHSC [DADS] determines:

(A) is a pattern of violation that results in actual harm;

(B) is widespread in scope and results in actual harm;

(C) is widespread in scope, constitutes a potential for more than minimal harm, and relates to:

(i) staffing, including staff training, ratio, and health under §98.62(b), §98.62(c), and §98.62(e) of this chapter (relating to Program Requirements);

(ii) administration of medication under §98.62(f) of this chapter; or

(iii) emergency preparedness and response under §98.64 of this chapter (relating to Emergency Preparedness and Response);

(D) is an immediate threat to the health or safety of an elderly person or a person with a disability receiving services at a facility; or

[(A) results in serious harm to or death of a person attending the adult day care facility;]

[(B) constitutes a serious threat to the health and safety of a person attending the facility; or]

(E) [(C)] substantially limits the facility's capacity to provide care;

(2) a violation described by subsection (a)(2) - (7) of this section; [or]

(3) a violation of THRC<sub>2</sub> Chapter 102; or[-]

(4) a second or subsequent violation of §98.62(e)(3) of this chapter that occurs before the second anniversary of the date of a previous violation of §98.62(e)(3) of this chapter.

(g) A [An adult day care] facility that corrects a violation must maintain the correction. If the facility fails to maintain the correction until at least the first anniversary after the date the correction was made, HHSC [DADS] may assess and collect an administrative penalty for the subsequent violation. An administrative penalty assessed under this subsection is equal to three times the amount of the original penalty assessed but not collected. HHSC [DADS] is not required to provide the facility with an opportunity to correct the subsequent violation.

(h) HHSC [DADS] issues a preliminary report stating the facts on which HHSC [DADS] concludes that a violation has occurred after HHSC [DADS] has:

(1) examined the possible violation and facts surrounding the possible violation; and

(2) concluded that a violation has occurred.

(i) In the report, HHSC [DADS] may recommend the assessment of an administrative penalty for each violation and the amount of the administrative penalty.

(j) HHSC [DADS] provides a written notice of a preliminary report to the [adult day care] facility not later than 10 days after the date HHSC [DADS] issues the preliminary report. The written notice includes:

(1) a brief summary of each violation;

(2) the amount of each recommended administrative penalty;

(3) a statement of whether a violation is subject to correction in accordance with subsection (e) of this section and, if the violation is subject to correction, a statement of:

(A) the date on which the facility must file with HHSC [DADS] a plan of correction for approval by HHSC [DADS]; and

(B) the date on which the facility must complete the plan of correction to avoid assessment of the administrative penalty; and

(4) a statement that the facility has a right to an administrative hearing on the occurrence of the violation, the amount of the penalty, or both.

(k) Not later than 20 days after the date on which a [an adult day care] facility receives a written notice of a preliminary report, the facility may:

(1) give HHSC [DADS] written notice that the facility agrees with HHSC's [DADS] report and consents to the recommended penalty; or

(2) make a written request for an administrative hearing.

(l) If a violation is subject to correction under subsection (e) of this section, the [adult day care] facility must submit a plan of cor-

rection to HHSC [DADS] for approval not later than 10 days after the date on which the facility receives the written notice.

(m) If a violation is subject to correction, and the [adult day care] facility reports to HHSC [DADS] that the violation has been corrected, HHSC [DADS] inspects the correction or takes any other step necessary to confirm the correction and notify the facility that:

(1) the correction is satisfactory and HHSC [DADS] will not assess an administrative penalty; or

(2) the correction is not satisfactory and HHSC [DADS] recommends an administrative penalty.

(n) Not later than 20 days after the date on which a [an adult day care] facility receives a notice that the correction is not satisfactory and HHSC [DADS] recommends an administrative penalty, the facility may:

(1) give HHSC [DADS] written notice that the facility agrees with HHSC's [DADS] determination and consents to the recommended administrative penalty; or

(2) make a written request to HHSC [the Texas Health and Human Services Commission (HHSC)] for an administrative hearing.

(o) If a [an adult day care] facility consents to the recommended administrative penalty or does not timely respond to a notice sent under subsection (j) of this section (written notice of the preliminary report), the executive [DADS] commissioner or [commissioner's] designee assesses the recommended administrative penalty. If the executive [DADS] commissioner or [commissioner's] designee assesses the penalty, HHSC [DADS] gives written notice of the penalty to the facility and the facility must pay the penalty within 30 days after receiving the notice.

(p) An administrative hearing is held in accordance with Chapter 91 of this title (relating to Hearings Under the Administrative Procedure Act) and HHSC rules at 1 Texas Administrative Code Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

(q) An administrative law judge sets a hearing and gives notice of the hearing if a [an adult day care] facility that is assessed a penalty requests a hearing.

(r) The hearing is held before an administrative law judge who makes findings of fact and conclusions of law regarding the occurrence of a violation under THRC<sub>2</sub> Chapter 103, a rule adopted under this chapter or a term of a license issued under this chapter.

(s) Based on the findings of fact and conclusions of law and the recommendation of the administrative law judge, the executive [DADS] commissioner or [commissioner's] designee, by order, finds:

(1) a violation has occurred and assesses an administrative penalty; or

(2) a violation has not occurred.

(t) Executive [DADS] commissioner or [the commissioner's] designee provides notice of the findings made under subsection (s) of this section to the [adult day care] facility charged with a violation. If the executive [DADS] commissioner finds that a violation has occurred, the executive commissioner or [commissioner's] designee provides written notice to the facility of:

(1) the findings;

(2) the amount of the administrative penalty;

(3) the rate of interest payable on the penalty and the date on which interest begins to accrue; and

(4) the facility's right to judicial review of the order of the executive commissioner.

(u) Not later than the 30th day after the date on which the order of the executive [DADS] commissioner or [commissioner's] designee is final, the [adult day care] facility assessed an administrative penalty must:

(1) pay the full amount of the penalty; or

(2) file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both.

(v) Notwithstanding subsection (o) of this section, HHSC [DADS] may permit a [an adult day care] facility to pay an administrative penalty in installments.

(w) If a [an adult day care] facility does not pay an administrative penalty within the period provided by subsection (o) or (u) of this section or in accordance with the installment plan permitted by HHSC [DADS]:

(1) the penalty is subject to interest; and

(2) HHSC [DADS] may refer the matter to the attorney general for collection of the penalty and interest.

(x) Interest accrues:

(1) at a rate equal to the rate charged on loans to depository institutions by the New York Federal Reserve Bank; and

(2) for the period beginning on the day after the date on which the penalty becomes due and ending on the date the penalty is paid.

(y) If the amount of a penalty is reduced or the assessment of a penalty is not upheld on judicial review, the executive [DADS] commissioner or [commissioner's] designee must:

(1) remit to the [adult day care] facility the appropriate amount of any penalty payment plus accrued interest; or

(2) execute a release of the supersedeas bond if one has been posted.

(z) Accrued interest on the amount remitted by the executive [DADS] commissioner or [commissioner's] designee must be paid:

(1) at a rate equal to the rate charged on loans to depository institutions by the New York Federal Reserve Bank; and

(2) for the period beginning on the date the penalty is paid and ending on the date the penalty is remitted to the [adult day care] facility.

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

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Karen Ray

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Department of Aging and Disability Services

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For further information, please call: (512) 438-4681



## CHAPTER 98. DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS



As required by Texas Government Code, §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Health and Human Services Commission (HHSC) in accordance with Texas Government Code, §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code, §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC proposes amendments to §98.11, Criteria for Licensing; §98.15, Renewal Procedures and Qualifications; §98.21, License Fees; and §98.81, Procedural Requirements in Title 40, Chapter 98, Day Activity and Health Services Requirements.

#### BACKGROUND AND PURPOSE

The purpose of the proposal is to implement the part of House Bill 2025, 85th Legislature, Regular Session, 2017, that increased the term of a license for a day activity and health services facility from two years to three years. The proposed amendments create a system under which existing licenses expire on staggered dates to extend license periods to three years. In addition, the proposed amendments prorate license fees as appropriate. The proposed amendments clarify that an inspection is conducted at least once every two years.

The proposed amendments change "DADS" to "HHSC" to reflect that DADS was abolished effective September 1, 2017, and its functions were transferred to HHSC.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §98.11 extends the term of a license for a day activity and health services facility from two years to three years.

The proposed amendment to §98.15 describes the staggered system under which the license period will increase from two years to three years. Under the system, all new licenses will be valid for three years and renewal licenses will be two or three years, depending on the facility identification number, until all licenses have a three year term.

The proposed amendment to §98.21 prorates the fee for an initial license, change of ownership license, or renewal license based on the term of the license. The proposed amendment also allows a facility to pay a fee using a credit card or cashier's check. An additional method of payment is being added to make paying a fee more convenient for a license holder.

The proposed amendment to §98.81 provides that HHSC inspects a facility at least once every two years after the facility's initial inspection. This provision clarifies that HHSC will continue to inspect facilities at least once every two years, even though a license is valid for three years.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the proposed rules are in effect, there will be implications to state government revenues as a result of enforcing and administering the rules as proposed. The expected effect on revenues for each year are increases of \$1,950 General Revenue (GR) in

State Fiscal Year (SFY) 2019, \$3,750 GR in SFY 2020, \$375 GR in SFY 2021, and reductions of \$150 in SFY 2022, and \$1,200 in SFY 2023.

There are no expected implications to costs or revenues of local governments.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rules will not require an increase or decrease in future legislative appropriations;
- (4) the proposed rules will affect fees paid to HHSC;
- (5) the proposed rules will not create a new rule;
- (6) the proposed rules will not expand, limit, or repeal an existing rule;
- (7) the proposed rules will not change the number of individuals subject to the rules; and
- (8) the proposed rules will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The proposed rules do not impose any additional costs on small businesses, micro-businesses, or rural communities. The proposal increases license fees, but the increase is offset by the longer term of a license.

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

Greta Rymal has also determined that for the first five years the rules are in effect there are no anticipated economic costs to persons who are required to comply with the proposed rules, because the increase in license fees is offset by the longer term of a license.

There is no anticipated negative impact on local employment.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because they are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule amendments.

#### PUBLIC BENEFIT

Mary T. Henderson, Associate Commissioner for Long-Term Care Regulatory Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be increased efficiency in the licensure process by extending the term of a license from two years to three years.

#### TAKINGS IMPACT ASSESSMENT

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

## PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sandy Herrera at (512) 438-4681 in HHSC Long-Term Care Regulatory. Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 149030, Mail Code H600, Austin, Texas 78714-9030; street address 4900 North Lamar Boulevard, Mail Code H600, Austin, Texas 78751; or e-mailed to HHSRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When e-mailing comments, please indicate "Comments on Proposed Rule 40R064" in the subject line.

## SUBCHAPTER B. APPLICATION PROCEDURES

### 40 TAC §§98.11, 98.15, 98.21

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Human Resource Code, §103.004, which requires the HHSC Executive Commissioner to adopt rules necessary to license DAHS facilities.

The amendments implement Texas Government Code, §531.0055 and Texas Human Resources Code, §103.004.

#### §98.11. *Criteria for Licensing.*

(a) A person must not establish or operate a DAHS facility in Texas without a license issued by HHSC [DADS] in accordance with Texas Human Resources Code, Chapter 103, and this chapter.

(b) An applicant for a license must submit a complete application form and license fee to HHSC [DADS].

(c) An applicant for a license must affirmatively demonstrate that the DAHS facility meets:

(1) the standards of the Life Safety Code, NFPA 101, 2000 edition;

(2) the construction standards in Subchapter C of this chapter (relating to Facility Construction Procedures); and

(3) the requirements for operation based on an on-site survey.

(d) HHSC [DADS] may deny an application that remains incomplete after 120 days.

(e) Before issuing a license, HHSC [DADS] considers the background and qualifications of:

- (1) the applicant or license holder;
- (2) a person with a disclosable interest;
- (3) an affiliate of the applicant or license holder;
- (4) a director; and
- (5) a manager.

(f) HHSC [DADS] issues a license if it finds that the DAHS facility, and any person described in subsection (e) of this section, meets all requirements of this chapter. The license is valid for three [two] years, except as provided by §98.15(b)(1) and (c)(1) of this subchapter (relating to Renewal Procedures and Qualifications).

(g) A facility must not provide services to more individuals than the number of individuals specified on its license.

(h) A facility must prominently and conspicuously post its license for display in a public area of the facility that is readily accessible to individuals, employees, and visitors.

#### §98.15. *Renewal Procedures and Qualifications.*

(a) A license issued under this chapter:

(1) expires three years after the date issued, except as noted in subsection (c) of this section;

(2) must be renewed before the license expiration date; and

(3) is not automatically renewed.

~~[(a) Each license issued under this chapter must be renewed before the license expiration date. Each license expires two years from the date issued, except as provided by subsection (b)(1) of this section. A license issued under this chapter is not automatically renewed.]~~

(b) If HHSC renews a license that expires after December 31, 2018, and before January 1, 2020, HHSC:

(1) issues a license that is valid for two years, if the license is for a facility with a facility identification number that ends in 0-3 or 7-9; and

(2) issues a license that is valid for three years, if the license is for a facility with a facility identification number that ends in 4-6;

~~[(b) A facility must submit an application for license renewal and a renewal license will be valid as follows:]~~

~~[(1) For two years beginning September 1, 2008, a facility with a facility identification number that ends in an odd number (1, 3, 5, 7, or 9) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's first renewal license issued beginning September 1, 2008, is valid for one year, and subsequent renewal licenses are valid for two years.]~~

~~[(2) A facility with a facility identification number that ends in an even number (0, 2, 4, 6, or 8) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's renewal licenses are valid for two years.]~~

(c) If HHSC renews a license that expires after December 31, 2019, and before January 1, 2021, HHSC:

(1) issues a license that is valid for two years, if the license is for a facility with a facility identification number that ends in 4-6; and

(2) issues a license that is valid for three years, if the license is for a facility with a facility identification number that ends in 0-3 or 7-9.

~~(d) [(e)] The submission of a license fee alone does not constitute an application for renewal.~~

~~(e) [(d)] To renew a license, a license holder must submit an application for renewal with HHSC [DADS] no later than the 45th day before the expiration date of the current license. HHSC [DADS] con-~~

siders that an application for renewal has met the submission deadline, if the license holder:

(1) submits a complete application to HHSC [DADS], and HHSC [DADS] receives that complete application no later than the 45th day before the expiration date of the current license;

(2) submits an incomplete application to HHSC [DADS] with a letter explaining the circumstances that prevented the inclusion of the missing information, and HHSC [DADS] receives the incomplete application and letter no later than the 45th day before the expiration date of the current license; or

(3) submits a complete application or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information to HHSC [DADS], HHSC [DADS] receives the application during the 45-day period ending on the date the current license expires, and the license holder pays a late fee in accordance with §98.21(b) of this subchapter (relating to License Fees) in addition to the license renewal fee.

(f) [(e)] If the application is postmarked by the submission deadline, the application will be considered to be timely filed if received in HHSC [DADS]' Long-Term Care Regulatory [Services] Licensing and Credentialing Section within 15 days after the postmark, or within 30 days after the date of the postmark and the license holder proves to the satisfaction of HHSC [DADS] that the delay was due to the carrier [shipper]. It is the license holder's responsibility to ensure that the application is timely received by HHSC [DADS].

(g) [(f)] For purposes of Texas Government Code, §2001.054, HHSC [DADS] considers that an individual has submitted a timely and sufficient application for the renewal of a license if the license holder's application has met the submission deadlines in subsections (f) and (g) [(d) and (e)] of this section. Failure to submit a timely and sufficient application will result in the expiration of the license on the expiration date listed on the license.

(h) [(g)] An application for renewal submitted after the expiration date of the license is considered to be an application for an initial license and must comply with the requirements for an initial license in §98.11 of this subchapter (relating to Criteria for Licensing) and §98.13 of this subchapter (relating to Application Disclosure Requirements).

(i) [(h)] The application for renewal must contain the same information required for an original application and the license fee as described in §98.21 of this subchapter.

(j) [(i)] The renewal of a license may be denied for the same reasons an original application for a license may be denied (see §98.19 of this subchapter (relating to Criteria for Denying a License or Renewal of a License)).

(k) [(j)] The facility must have an annual inspection by the local fire marshal and must submit a copy of the most current inspection as part of the renewal procedures.

#### §98.21. License Fees.

(a) The license fee is \$75 for a three-year license [\$50]. The license fee for a two-year [~~one-year~~] license issued in accordance with §98.15(b)(1) or (c)(1) of this subchapter (relating to Renewal Procedures and Qualifications) is \$50 [\$25]. The fee must be paid with each initial application, change of ownership application, and with each application for renewal of the license. A facility or applicant must pay fees [Payment of fees must be] by check, cashier's check, [or] money order, or credit card made payable to HHSC. [the Department of Aging and Disability Services.]

(b) An applicant for license renewal that submits an application during the 45-day period ending on the date the current license ex-

pires must pay a late fee of \$25 in addition to the license fee described in subsection (a) of this section.

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

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Karen Ray

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For further information, please call: (512) 438-4681



## SUBCHAPTER E. INSPECTIONS, SURVEYS, AND VISITS

### 40 TAC §98.81

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services system; and Texas Human Resource Code, §103.004, which requires the HHSC Executive Commissioner to adopt rules necessary to license DAHS facilities.

The amendment implements Texas Government Code, §531.0055 and Texas Human Resources Code, §103.004.

#### §98.81. Procedural Requirements.

(a) HHSC [DADS] may enter the premises of a facility at reasonable times and make an inspection necessary to issue a license or renew a license. HHSC [DADS] inspection and survey personnel will perform inspections and surveys, follow-up visits, complaint investigations, investigations of abuse or neglect, and other contact visits as required for carrying out the responsibilities of licensing.

(b) An inspection may be conducted by a surveyor.

(c) Generally, all inspections, surveys, complaint investigations, and other visits, whether routine or nonroutine, made for the purpose of determining the appropriateness of client care and day-to-day operations of a facility will be unannounced. Any exceptions must be justified.

(d) Certain visits may be announced, including initial architectural inspections, visits to determine the progress of physical plant construction or repairs, equipment installation or repairs, systems installation or repairs, or conditions when certain emergencies arise, such as fire, windstorm, or malfunctioning or nonfunctioning of electrical or mechanical systems.

(e) Any person may request an inspection of a facility by notifying HHSC [DADS] in writing of an alleged violation of a licensing requirement. The complaint shall be as detailed as possible and signed by the complainant. HHSC [DADS] performs an on-site inspection as soon as feasible but no later than 30 days after receiving the complaint, unless after an investigation the complaint is found to be frivolous. HHSC [DADS] will respond to the complainant in writing.

(f) HHSC [DADS] will receive and investigate anonymous complaints.

(g) The facility must make all of its books, records, and other documents maintained by or on behalf of a facility accessible to HHSC [DADS] upon request.

(1) HHSC [DADS] is authorized to photocopy documents, photograph clients, and use any other available recording devices to preserve all relevant evidence of conditions found during an inspection, survey, or investigation that HHSC [DADS] reasonably believes threaten the health and safety of a client.

(2) Examples of records and documents that may be requested and photocopied or otherwise reproduced are client medical records, including nursing notes, pharmacy records, medication records, and physician's orders.

(3) The facility may charge HHSC [DADS] at a rate not to exceed the rate HHSC [DADS] charges for copies. The procedure of copying is the responsibility of the director or his designee. If copying requires that the records be removed from the facility, a representative of the facility is expected to accompany the records and assure their order and preservation.

(4) HHSC [DADS] protects the copies for privacy and confidentiality in accordance with recognized standards of medical records practice, applicable state laws, and HHSC [DADS] policy.

(h) The source of the complaint is not revealed.

(i) HHSC inspects a facility at least once every two years after the initial inspection.

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

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For further information, please call: (512) 438-4681



# WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

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## TITLE 22. EXAMINING BOARDS



### PART 5. STATE BOARD OF DENTAL EXAMINERS

#### 22 TAC §110.17

The State Board of Dental Examiners withdraws the proposed new §110.17 which appeared in the March 9, 2017, issue of the *Texas Register* (43 TexReg 1375).

### CHAPTER 110. SEDATION AND ANESTHESIA

#### 22 TAC §110.16

The State Board of Dental Examiners withdraws the proposed new §110.16, which appeared in the March 9, 2018, issue of the *Texas Register* (43 TexReg 1374).

Filed with the Office of the Secretary of State on June 7, 2018.

TRD-201802507

Alex Phipps

General Counsel

State Board of Dental Examiners

Effective date: June 7, 2018

For further information, please call: (512) 305-9380

Filed with the Office of the Secretary of State on June 7, 2018.

TRD-201802506

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State Board of Dental Examiners

Effective date: June 7, 2018

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*Trey Pardue*



# ADOPTED RULES

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

## TITLE 1. ADMINISTRATION

### PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

#### CHAPTER 355. REIMBURSEMENT RATES SUBCHAPTER J. PURCHASED HEALTH SERVICES

#### DIVISION 5. GENERAL ADMINISTRATION

##### 1 TAC §355.8095

The Texas Health and Human Services Commission (HHSC) adopts new §355.8095, concerning Medicaid Administrative Claiming Program, without changes to the proposed text as published in the March 16, 2018, issue of the *Texas Register* (43 TexReg 1541); therefore, the rule will not be republished.

##### BACKGROUND AND JUSTIFICATION

The Medicaid Administrative Claiming (MAC) program provides qualified Texas governmental entities, including Early Childhood Intervention programs, local health departments, local mental health or intellectual and developmental disability authorities, and school districts reimbursement for certain costs related to the administration of health activities that support the Medicaid program. MAC activities include outreach, utilization review, eligibility determination, and scheduling or arranging transportation.

Title XIX of the Social Security Act (the Act) authorizes grants to states for a proportion of expenditures for medical assistance under an approved Medicaid State Plan, and for expenditures necessary for administration of the State Plan. This joint federal-state financing of expenditures is described in §1903(a) of the Act, and the statute sets rates for different types of expenditures.

MAC reimbursements can enhance, improve, or expand the level and quality of health and medical services provided to clients of participating governmental entities. The new rule establishes MAC program requirements and ensures that eligible providers follow MAC billing requirements.

##### COMMENTS

The 30-day comment period ended April 15, 2018. During this period, HHSC did not receive any comments regarding the proposed rule.

##### STATUTORY AUTHORITY

The new rule is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a),

which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for Medicaid payments under the Human Resources Code, Chapter 32.

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 June 11, 2018.

TRD-201802572

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Effective date: July 1, 2018

Proposal publication date: March 16, 2018

For further information, please call: (512) 730-7455

## TITLE 16. ECONOMIC REGULATION

### PART 1. RAILROAD COMMISSION OF TEXAS

#### CHAPTER 3. OIL AND GAS DIVISION

##### 16 TAC §3.70

The Railroad Commission of Texas (Commission) adopts amendments to §3.70, relating to Pipeline Permits Required, with changes to the proposed text as published in the April 6, 2018, issue of the *Texas Register* (43 TexReg 2103). The amendments implement fees to fund the Commission's Pipeline Safety Program pursuant to Texas Natural Resources Code §81.071. The amendments also specify time periods for filing permit renewals, require the electronic filing of permits, require specific time periods for Commission review of permit filings, specify time periods and procedures for transfers of permits, and state that an operator who fails to comply with the rule may be assessed a penalty. The changes to the proposed text include: (1) correcting subsection (i) such that pipelines, not operators, will be classified as either Group A or Group B for fee calculation; (2) including in subsection (j) a date after which the permit processing fee will be required; and (3) clarifying in subsection (o) that the fees do not apply to interstate pipelines.

The Sunset Advisory Commission (Sunset Commission) reviewed the Commission from 2016-2017. Upon completion of its review, the Sunset Commission submitted a final report to the 85th Legislature, Regular Session, 2017, containing various

recommendations for changes to the Commission's funding and operations. The legislature reviewed the Sunset Commission's recommendations and adopted a final "sunset bill," House Bill 1818 (HB 1818). Included in HB 1818 were amendments to §81.071 of the Natural Resources Code, which authorizes the Commission to establish pipeline safety and regulatory fees to be assessed for permits or registrations for pipelines under the jurisdiction of the Commission's pipeline safety and regulatory program. Before the enactment of §81.071, the Commission received funding for the pipeline safety program from the legislature's General Revenue Fund. However, the 85th Legislature authorized the Commission to fund its pipeline safety program with federal funds and fees collected from the industry. Therefore, §81.071 was promulgated to provide necessary funding for the Commission's pipeline safety and regulatory program.

Section 81.071(b) authorizes the Commission to assess: (1) an annual fee to permit or registration holders; and (2) individual fees for new permits or registrations, permit or registration renewals, and permit or registration amendments. Section 81.071(d) authorizes the Commission to establish by rule the methods by which the fees will be calculated and assessed. The Commission may base the fees on any factor it considers necessary to efficiently and fairly recover the pipeline safety and regulatory program's costs. Section 81.071(e) authorizes reasonable late payment penalties for such fees. In accordance with these provisions, the Commission adopts amendments to §3.70 to establish an annual mileage fee, a permit processing fee for new permits and annual permit renewals, and the procedure by which pipeline operators will pay both fees.

The Commission received five comments on the proposed amendments, two of which were from associations. The Commission appreciates the stakeholders' participation in this rulemaking effort.

Atmos Pipeline - Texas (Atmos) expressed support for the amendments, including the proposed fee structure, decreased permit processing period, clarification to pipeline transfer procedures, and, more generally, the self-funded structure enabled by HB 1818. Atmos also supports the requirement for online filing of permit applications provided the online system will allow easy uploading of required data as opposed to manual entry of each data element. The Commission thanks Atmos for its support and notes that the programming modifications being made pursuant to this rulemaking include changes to enable uploading of required data.

Similarly, one individual did not recommend any rule changes, but requested that the Commission publish the payment portal link, make the fee calculation clear in the online portal by listing the miles of pipe and the pipeline classification type (Group A or Group B), and generally make the online system more user-friendly. As noted in response to Atmos' comment and explained more below, the Commission has made this information available and is revising the online system. Another individual submitted comments that appear intended for the proposed Oil and Gas Strategic Monitoring and Enforcement Plan, which was posted for public comment at the same time as the amendments to §3.70. The Commission did not consider these comments, which expressed concerns with noise created by oil and gas operations, because the proposed changes fall outside the Commission's jurisdiction and outside the scope of this rulemaking.

The Texas Oil and Gas Association (TXOGA) asked the Commission to clarify that the proposed changes do not apply to inter-

state pipelines. The Commission agrees that interstate pipelines are not required to pay the new fees and, therefore, the Commission adopts new subsection (o) to clarify that interstate pipelines are exempt from the fee requirements. In addition, TXOGA suggested that the Commission clarify that pipelines, rather than operators, will be classified as Group A or Group B. The Commission agrees and has corrected subsection (i) accordingly.

The Texas Pipeline Association (TPA) expressed support for reducing the permit processing time and for the pipeline transfer requirements. TPA also requested clarification regarding whether the annual mileage fee and permit processing fees apply to interstate pipelines. As stated above, the Commission has adopted §3.70(o) to address this concern.

The Commission adopts amendments to subsection (a) to clarify that operators are required to renew permits annually.

Adopted amendments to subsections (b) and (c) require an operator to utilize the Commission's online filing system (currently known as the Pipeline Online Permitting System or POPS) to file an application for a new permit, renew an existing permit, amend an existing permit, or cancel an existing permit.

Adopted amendments to subsections (d) and (e) shorten the time period for Commission staff's review of permit filings from 45 days upon the receipt of an administratively complete application to 30 days.

Adopted amendments in subsection (h) add that the Commission may call a hearing to revoke a permit if the permit is not renewed annually.

Adopted new subsection (i) establishes an annual fee based on the pipeline operator's permitted mileage. For purposes of calculating the mileage fee, pipelines are categorized into two groups. Group A includes transmission and gathering pipelines that are required by Commission rules to have a valid T-4 permit to operate and are subject to the regulations in 49 Code of Federal Regulations (CFR) Parts 192 and 195. Group A pipelines include natural gas transmission and storage pipelines, natural gas gathering pipelines, hazardous liquids transmission and storage pipelines, and hazardous liquids gathering pipelines. Group A pipelines are subject to pipeline safety inspections by the Commission. Group B includes gathering pipelines that are required by Commission rules to have a valid T-4 permit to operate but are not subject to the regulations in 49 CFR Parts 192 and 195. Group B pipelines include intrastate production and gathering pipelines leaving a lease. Group B pipelines are subject to pipeline safety inspections as codified in Texas Natural Resources Code, §§117.011 and 117.012, and Texas Utilities Code, §121.201 pursuant to House Bill 2982, 83rd Regular Session, and are also required to comply with any other applicable Commission rules. However, because the Commission inspects pipelines in Group A more regularly pursuant to 49 CFR Parts 192 and 195, Group A pipelines create higher costs to the Commission. Therefore, pipelines in Group A will be assessed a higher annual mileage fee.

Subsection (i) is adopted with a change to correct a statement that pipeline operators will be divided into Group A or Group B. The Commission will divide pipelines, not pipeline operators, into Group A or Group B.

New subsection (i)(2) requires operators of Group A pipelines to pay an annual fee of \$20 per mile of pipeline based on the number of miles permitted to the operator as of June 29, 2018, for the initial year that the amendments are in effect, and as of



December 31 for each subsequent year. Adopted subsection (i)(3) requires operators of Group B pipelines to pay an annual fee of \$10 per mile of pipeline based on the number of miles permitted to the operator as of June 29, 2018 for the initial year that the amendments are in effect, and as of December 31 for each subsequent year. Adopted subsection (i)(4) assesses a \$20 or \$10 fee, as appropriate, for any pipeline distance that is a fraction of a mile.

For the first year that the amendments are in effect, the mileage fee will be calculated using the number of pipeline miles permitted to an operator as of June 29, 2018, with the mileage fee payable to the Commission by August 31, 2018. For all subsequent years, the mileage fee will be calculated using the number of pipeline miles permitted to an operator as of December 31 of each year with the mileage fee payable to the Commission by April 1 of each subsequent year.

For example, a pipeline operator that has 20.1 miles of Group A pipeline included on its permit as of June 29, 2018, must pay \$420 to the Commission by August 31, 2018. A pipeline operator that has 20.1 miles of Group B pipeline included on its permit as of June 29, 2018, must pay \$210 to the Commission by August 31, 2018.

The Commission will provide an online portal for the payment of all fees. Pipeline operators are directed to monitor the Pipeline Safety page of the Commission's website for more information regarding the online payment portal. The number of permitted miles assigned to each operator in Commission records on June 29, 2018, will be the number used in the online payment portal to calculate the mileage fee that each operator must pay by August 31, 2018. The annual fee payment function of the Commission's online payment portal will be available no later than August 1, 2018, giving operators a month to pay the mileage fee. The Commission has posted a table showing the number of permitted miles in Commission records assigned to each operator. Staff is updating the table periodically. The Commission requests that operators review the table and contact staff with any questions or corrections as soon as possible. Similarly, leading up to the December 31st mileage calculation cutoff date each year, the Commission will post the table on its website. Operators are encouraged to review the table and promptly submit any corrections to ensure adequate processing time prior to each December 31st cutoff.

Adopted subsection (j) establishes a \$500 permit processing fee, which must be paid for each new permit application and permit renewal. Each pipeline operator is required to annually renew its T-4 permit. Therefore, the \$500 permit processing fee will be assessed annually upon the pipeline operator's renewal date. When applying for a new permit, a pipeline operator will pay the \$500 fee and will subsequently pay the fee every year thereafter upon the permit renewal date. The permit renewal date for a pipeline operator who has an existing, valid permit will be the date shown in the Commission's online filing system on June 29, 2018, when the pipeline mileage is calculated for purposes of paying the mileage fee. Permit amendments that may occur in the future will not change the permit renewal date.

The processing fee function of the Commission's online payment portal will be available on October 1, 2018. Therefore, subsection (j) is adopted with a change such that these fees are not required until after October 1, 2018.

Subsections (k) and (l) establish reasonable late fees, as authorized by Texas Natural Resources Code, §81.071(e), for a

pipeline operator who fails to pay the annual fee or renewal processing fee on time. A pipeline operator who fails to renew a permit on or before the permit expiration date or who fails to timely pay the annual mileage fee will owe a late-filing fee.

Adopted amendments in subsection (m) specify that an operator has 30 days after completion of a transfer to notify the Commission of the transfer and the procedure to do so, and in subsection (n), clarify that a violation of §3.70 may result in a penalty. Lastly, new subsection (o) clarifies that interstate pipelines are exempt from the fee requirements of the rule.

As authorized by HB 1818, the fees will be sufficient to support the Commission's pipeline safety and regulatory program costs. The fees generated will be used entirely to support the pipeline safety and regulatory program costs, including permitting or registration costs, administrative costs, costs of employee salaries and benefits, inspection costs including travel, and supplies and equipment. The General Appropriations Act (Senate Bill 1, 85th Legislature, Regular Session, 2017) appropriated \$14,047,137 for Pipeline Safety funding in state fiscal year 2018, of which \$9,037,449 is from the General Revenue Dedicated Fund, the Oil and Gas Regulation Cleanup Account. Existing fees assessed pursuant to Utilities Code §121.211 contribute over half of that cost and therefore the remaining, additional cost must be covered by the new fees.

The annual mileage fee will generate the majority of the program funding. At the time of the rule proposal, Commission staff estimated that there are approximately 73,000 miles of Group A pipelines permitted in Texas and 173,000 miles of Group B pipelines permitted in Texas. Thus, the annual mileage fee of \$20 per Group A mile would generate \$1,460,000 and the annual mileage fee of \$10 per Group B mile would generate \$1,730,000 for a total of \$3,190,000.

At the time of proposal, Commission staff estimated that the new \$500 fee for each permit application and permit renewal would generate an estimated \$1,095,000 per year. On average, Commission staff processes approximately 170 new permit applications a year, and 2,020 permit renewals per year, which will continue to be required pursuant to subsection (a) to be renewed every year. The annual revenue derived from the \$500 permit processing fee will vary depending on the number of new permits and permit renewals requested in any given year. Therefore, Commission staff estimated that the annual mileage fee and the permit application and permit renewals fee would generate approximately \$4,285,000 a year.

The Commission adopts the amendments to §3.70 pursuant to Texas Natural Resources Code, §81.071, enacted by the 85th Legislature (Regular Session, 2017) in House Bill 1818, which authorizes the Commission to establish pipeline safety and regulatory fees to be assessed for permits or registrations for pipelines under the jurisdiction of the Commission's pipeline safety and regulatory program. Additionally, the Commission adopts the amendments pursuant to §81.051 and §81.052, which provide the Commission with jurisdiction over all persons owning or operating pipelines in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Natural Resources Code §81.0531, which authorizes the Commission to assess a penalty for a violation of a provision of Title 3 of the Natural Resources Code, or a rule, order, license, permit, or certificate that relates to pipeline safety; §85.202, which authorizes the Commission to promulgate rules requiring records to be kept and reports made, and providing for the

issuance of permits, tenders, and other evidences of permission when the issuance of the permits, tenders, or permission is necessary or incident to the enforcement of the Commission's rules for the prevention of waste; Natural Resources Code §86.041 and §86.042, which allow the Commission broad discretion in adopting rules to prevent waste in the piping and distribution of gas, require records to be kept and reports made, and provide for the issuance of permits and other evidences of permission when the issuance of the permit or permission is necessary or incident to the enforcement of its blanket grant of authority to make any rules necessary to effectuate the law; Natural Resources Code §111.131 and §111.132, which authorize the Commission to promulgate rules for the government and control of common carriers and public utilities; Natural Resources Code §§117.001 - 117.101, which give the Commission jurisdiction over all pipeline transportation of hazardous liquids or carbon dioxide and over all hazardous liquid or carbon dioxide pipeline facilities as provided by 49 U.S.C. §§60101, et seq.; and Texas Utilities Code §§121.201 - 121.210, which authorize the Commission to adopt safety standards and practices applicable to the transportation of gas and associated pipeline facilities within Texas to the maximum degree permissible under, and to take any other requisite action in accordance with, 49 United States Code Annotated, §§60101, et seq.

Statutory authority: Texas Natural Resources Code §§81.051, 81.052, 81.0531, 81.071, 85.202, 86.041, 86.042, 111.131, 111.132, and §§117.001 - 117.101; Texas Utilities Code, §§121.201 - 121.210; and 49 United States Code Annotated, §§60101, et seq.

Cross-reference to statute: Texas Natural Resources Code, Chapter 81, Chapter 111, and Chapter 117; Texas Utilities Code, Chapter 121; and 49 United States Code Annotated, Chapter 601.

### §3.70. Pipeline Permits Required.

(a) Each operator of a pipeline or gathering system, other than a production or flow line that does not leave a lease or an operator excluded under §8.1(b)(4) of this title, relating to General Applicability and Standards, subject to the jurisdiction of the Commission, shall obtain a pipeline permit, to be renewed annually, from the Commission as provided in this rule.

(b) To obtain a new pipeline permit or to amend a permit because of a change of classification, an operator shall file an application for a pipeline permit on the Commission's online permitting system. The operator shall include or attach the following documentation and information:

- (1) the contact information for the individual who can respond to any questions concerning the pipeline's construction, operation or maintenance;
- (2) the requested classification and purpose of the pipeline or pipeline system as a common carrier, a gas utility or a private line;
- (3) a sworn statement from the pipeline applicant providing the operator's factual basis supporting the classification and purpose being sought for the pipeline, including, if applicable, an attestation to the applicant's knowledge of the eminent domain provisions in Texas Property Code, Chapter 21, and the Texas Landowner's Bill of Rights as published by the Office of the Attorney General of Texas; and
- (4) documentation to provide support for the classification and purpose being sought for the pipeline, if applicable; and
- (5) any other information requested by the Commission.

(c) To renew an existing permit, to amend an existing permit for any reason other than a change in classification, or to cancel an existing permit, an operator shall file an application for a pipeline permit on the Commission's online filing system. The operator shall include or attach:

- (1) the contact information for the individual who can respond to any questions concerning the pipeline's construction, operation, or maintenance; change in operator or ownership; or other change including operator cessation of pipeline operation;
- (2) a statement from the pipeline operator confirming the current classification and purpose of the pipeline or pipeline system as a common carrier, a gas utility or a private line, if applicable; and
- (3) any other information requested by the Commission.

(d) Upon receipt of a complete permit application, the Commission has 30 calendar days to issue, amend, or deny the pipeline permit as filed. If the Commission determines that the application is incomplete, the Commission shall promptly notify the applicant of the deficiencies and specify the additional information necessary to complete the application. Upon receipt of a revised application, the Commission has 30 calendar days to determine if the application is complete and issue, amend, or deny the pipeline permit as filed.

(e) If the Commission is satisfied from the application and the documentation and information provided in support thereof, and its own review, that the proposed line is, or will be laid, equipped, managed and operated in accordance with the laws of the state and the rules and regulations of the Commission, the permit may be granted. The pipeline permit, if granted, shall classify the pipeline as a common carrier, a gas utility, or a private pipeline based upon the information and documentation submitted by the applicant and the Commission's review of the application.

(f) This rule applies to applications made for new pipeline permits and to amendments, renewals, and cancellations of existing pipeline permits. The classification of a pipeline under this rule applies to extensions, replacements, and relocations of that pipeline.

(g) The Commission may delegate the authority to administratively issue pipeline permits.

(h) The pipeline permit, if granted, shall be revocable at any time after a hearing, held after 10 days' notice, if the Commission finds that the pipeline is not being operated in accordance with the laws of the state and the rules and regulations of the Commission including if the permit is not renewed annually as required in subsection (a) of this section.

(i) Each pipeline operator shall pay an annual fee based on the pipeline operator's permitted mileage of pipeline by August 31, 2018, for the initial year that the requirement is in effect, and by April 1 for each subsequent year.

(1) For purposes of calculating the mileage fee, the Commission will categorize pipelines into two groups.

(A) Group A includes transmission and gathering pipelines that are required by Commission rules to have a valid T-4 permit to operate and are subject to the regulations in 49 CFR Parts 192 and 195. Group A pipelines include natural gas transmission and storage pipelines, natural gas gathering pipelines, hazardous liquids transmission and storage pipelines, and hazardous liquids gathering pipelines.

(B) Group B includes gathering pipelines that are required by Commission rules to have a valid T-4 permit to operate but are not subject to the regulations in 49 CFR Parts 192 and 195. Group

B pipelines include intrastate production and gathering pipelines leaving a lease.

(2) An operator of a Group A pipeline shall pay an annual fee of \$20 per mile of pipeline based on the number of miles permitted to that operator as of June 29, 2018, for the initial year that the requirement is in effect and as of December 31 for each subsequent year.

(3) An operator of a Group B pipeline shall pay an annual fee of \$10 per mile of pipeline based on the number of miles permitted to that operator as of June 29, 2018, for the initial year that the requirement is in effect and as of December 31 for each subsequent year.

(4) Any pipeline distance that is a fraction of a mile will be considered as one mile and will be assessed a \$20 or \$10 fee, as appropriate.

(5) Fees due to the Commission for mileage transferred from one operator to another operator pursuant to subsection (m) of this section will be captured in the next mileage fee to be calculated on the following December 31 and paid by the new operator.

(j) Beginning October 1, 2018, each pipeline operator shall pay a \$500 permit processing fee for each new permit application and permit renewal. The permit renewal date for a pipeline operator who has an existing, valid permit in the Commission's online filing system will be the date shown in the online filing system on June 29, 2018, when the pipeline mileage is calculated for purposes of paying the mileage fee. A permit renewal date will not be affected or changed by an operator requesting or receiving a permit amendment.

(k) A pipeline operator who fails to renew a permit on or before the permit expiration date shall pay a late-filing fee as follows:

(1) \$250, if the renewal application is received within 30 calendar days after the expiration date;

(2) \$500, if the renewal application is received more than 30 calendar days and no more than 60 calendar days after the expiration date; and

(3) \$700, if the renewal application is received more than 60 calendar days after the expiration date.

(4) If the renewal application is not received within 90 calendar days of the expiration date, the Commission may assess a penalty and/or revoke the operator's permit in accordance with subsection (h) of this section.

(l) A pipeline operator who fails to pay the annual mileage fee shall pay a late-filing fee as follows:

(1) \$250, if the fee is received within 30 calendar days of August 31 for the initial year that the requirement is in effect and April 1 for each subsequent year;

(2) \$500, if the fee is received more than 30 calendar days and no more than 60 calendar days after August 31 for the initial year that the requirement is in effect and April 1 for each subsequent year; and

(3) \$700, if the fee is received more than 60 calendar days after August 31 for the initial year that the requirement is in effect and April 1 for each subsequent year.

(4) If the fee is not received within 90 calendar days of August 31 for the initial year that the requirement is in effect or April 1 for each subsequent year, the Commission may assess a penalty and/or revoke the operator's permit in accordance with subsection (h) of this section.

(m) A pipeline operator who has been issued a permit and is transferring the pipeline or a portion of the pipeline included on the permit to another operator shall file a notification of transfer with the Commission within 30 days following the transfer. An operator may file a fully executed Form T-4B as a notification of transfer. The Commission may use a fully executed Form T-4B to remove the pipeline that is the subject of the transfer from the transferor operator and assign the mileage to the transferee operator for calculation of the annual mileage fee. The operator to which the pipeline has been transferred shall amend its permit to include the pipeline or portion of the pipeline within 30 days following the transfer or the operator may be subject to a penalty for operating without a permit pursuant to subsection (n) of this section.

(n) A pipeline operator who operates a pipeline without a permit, with an expired permit, or who otherwise fails to comply with this section, may be assessed a penalty as prescribed in §8.135 of this title, relating to Penalty Guidelines for Pipeline Safety Violations.

(o) Interstate pipelines are exempt from the fee requirements 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.

Filed with the Office of the Secretary of State on June 5, 2018.

TRD-201802427

Haley Cochran

Rules Attorney, Office of the General Counsel

Railroad Commission of Texas

Effective date: June 25, 2018

Proposal publication date: April 6, 2018

For further information, please call: (512) 475-1295



## PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

### CHAPTER 116. DIETITIANS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 116, Subchapter A, §116.2; Subchapter C, §116.20; Subchapter D, §116.30; Subchapter E, §116.40 and §116.44; Subchapter I, §116.80 and §116.83; Subchapter J, §116.91; Subchapter K, §§116.100, 116.101, 116.103 - 116.105; Subchapter L, §116.110; Subchapter M, §116.120; Subchapter N, §116.130; Subchapter O, §116.142; and adopts the repeal of existing rules at Subchapter E, §116.41 and §116.43; Subchapter G, §§116.60 - 116.65; and Subchapter H, §116.70, regarding the Dietitians program, without changes to the proposed text as published in the March 16, 2018, issue of the *Texas Register* (43 TexReg 1544). The rules will not be republished.

The Commission also adopts amendments at 16 TAC Chapter 116, Subchapter F, §116.50, regarding the Dietitians program, with changes to the proposed text as published in the March 16, 2018, issue of the *Texas Register* (43 TexReg 1544). The rules will be republished.

#### JUSTIFICATION AND EXPLANATION OF THE RULES

This rulemaking is necessary to implement House Bill 4007 (H.B. 4007), 85th Legislature, Regular Session (2017); to eliminate un-

necessary and outdated rules regarding the required preplanned professional experience programs and internships to reflect current Dietitians industry practice; and to make clean-up changes to the current rules identified by Department staff. These three categories of rule changes have been combined into one adoption, since there is overlap in a few of the affected rule sections and this combined adoption eliminates the need for separate rulemakings.

#### *H.B. 4007 Changes*

H.B. 4007, in part, made changes to the Dietitians statute, Occupations Code Chapter 701. H.B. 4007 repealed the Provisional Licensed Dietitian and the Temporary Licensed Dietitian provisions. It also repealed provisions that were outdated or were barriers to efficient regulation. It also repealed redundancies in the Dietitians statute with provisions already found in Occupations Code Chapter 51, which is the enabling statute for the Texas Commission of Licensing and Regulation (Commission) and the Department and which applies to all Department programs. The adopted rules implement these changes.

#### *Changes to Reflect Current Dietitians Industry Practice Regarding Preplanned Professional Experience Programs and Internships*

The adopted rules made changes to the Department's rules regarding preplanned professional experience programs and internships in dietetics practice. These changes eliminate unnecessary and outdated rules and reflect the current Dietitians industry practice.

The Commission on Dietetic Registration (CDR) is the credentialing agency that registers dietitians on a national basis. The requirements to become a registered dietitian include completing a preplanned professional experience program, internship, or other accredited supervised program or pathway approved or recognized by CDR and passing the CDR written examination. Applicants must meet the CDR requirements to be eligible to take the CDR examination.

Under the Dietitians statute and rules, the requirements to become a Texas licensed dietitian include completing a preplanned professional experience program or internship in dietetics practice and passing a license examination. As provided for by statute and rule, the required examination for licensure is the CDR examination.

Under the former rules, the preplanned professional experience program or internship had to be approved by the Department. The former rules, however, provided that an applicant's preplanned professional experience program or internship accepted for registration by the CDR shall be acceptable for licensure by the Department.

Since applicants must qualify under CDR's requirements to take the CDR exam, persons seeking state licensure go through the CDR process to obtain the CDR registration prior to seeking a Texas license. Applicants were not using the separate, alternative paths for preplanned professional experience programs and internships set out the former rules. Meeting the qualifications for CDR registration means that the person also meets or exceeds the qualifications for state licensure.

Based on the Dietitians industry practice of persons completing preplanned professional experience programs or internships that are approved or recognized by CDR in order to meet the CDR requirements to qualify to take the CDR examination, there was no

need to retain separate, alternative paths that are not approved or recognized by CDR. The adopted rules eliminate unnecessary and outdated provisions in the rules.

#### *Clean-up Changes*

The adopted rules make clean-up changes identified by Department staff since the Dietitians program was transferred from the Department of State Health Services (DSHS) to the Department effective October 3, 2016, pursuant to S.B. 202, 84th Legislature, Regular Session (2015).

#### SECTION-BY-SECTION SUMMARY

The adopted rules amend §116.2, Definitions. The adopted rules amend the definition of licensee; remove the definition of provisional licensed dietitian; and renumber the definition of registered dietitian. These changes are a result of H.B. 4007.

The adopted rules amend §116.20, Degrees and Course Work. The adopted rules amend subsection (c) by removing the reference to provisional licensure. This change is a result of H.B. 4007.

The adopted rules amend §116.30, Preplanned Professional Experience Programs and Internships. The adopted rules remove former subsections (e) and (h), regarding provisional licensure and provisional licensed dietitians. These changes are a result of H.B. 4007.

In addition, the adopted rules under §116.30 amend subsections (b), (c), and (d) to state that the Department approves, and accepts as meeting the licensure requirements, a preplanned professional experience program or an internship approved or recognized by the Commission on Dietetic Registration (CDR). The adopted rules eliminate the separate, alternative paths for preplanned professional experience programs and internships that have not been used in many years. These changes reflect the current Dietitians industry practice and ensure that a person seeking licensure meets or exceeds the statutory license requirements and is eligible to take the examination administered by CDR.

The adopted rules under §116.30 also remove former subsections (e) and (f) to eliminate unnecessary and outdated provisions. The adopted rules re-letter former subsection (g) as new subsection (e) and update this subsection to reflect the current Dietitians industry practice. The license applicant must submit a photocopy of the CDR registration card in active status to show proof of completing the preplanned professional experience program or internship in dietetics practice. These changes are part of the changes to reflect current Dietitians industry practice regarding preplanned professional experience programs and internships in dietetics practice.

The adopted rules amend §116.40, License Examination Requirements. The adopted rules amend the title of the section and consolidate former §116.41(a) into §116.40 as new subsection (d). The remaining provisions under §116.41 were repealed as a result of H.B. 4007.

The adopted rules repeal §116.41, License Examination Qualifications. The adopted repeal is a result of H.B. 4007, which repealed outdated license examination provisions from the statute.

The adopted rules repeal §116.43, Examination Failures. The adopted repeal is a result of H.B. 4007, which repealed the restriction on retaking the licensing examination if the applicant fails the examination three times.

The adopted rules amend §116.44, Texas Jurisprudence Examination. The adopted rules update the cross-reference to other rules and remove the reference to a provisional licensed dietitian. These changes are a result of H.B. 4007.

The adopted rules amend §116.50, Licensed Dietitians--Application and Eligibility Requirements. The adopted rules remove former subsection (e) regarding the Department notifying the applicant whether the applicant qualifies to take the license examination. This change is a result of H.B. 4007, which repealed outdated license examination provisions from the statute.

In addition, the adopted rules under §116.50 provide that a license applicant shall submit a copy of a CDR registration in active status as proof that the applicant successfully completed the required preplanned professional experience program or internship in dietetics practice and passed the required examination. The adopted rules remove the requirement that the applicant submit the internship or preplanned professional experience program documentation form. The adopted rules also add cross-references to the applicable sections in the statute and rules. These changes are part of the changes to reflect current Dietitians industry practice regarding preplanned professional experience programs and internships in dietetics practice.

The adopted rules repeal Subchapter G, Provisional Licensed Dietitians. The adopted repeal is a result of H.B. 4007, which repealed the provisional licensed dietitian provisions from the statute.

The adopted rules repeal §116.60, Provisional Licensed Dietitians--Application and Eligibility Requirements. The adopted repeal is a result of H.B. 4007.

The adopted rules repeal §116.61, Provisional Licensed Dietitians--Fitness of Applicants for Licensure. The adopted repeal is a result of H.B. 4007.

The adopted rules repeal §116.62, Provisional Licensed Dietitians--Issuing Licenses and Identification Cards. The adopted repeal is a result of H.B. 4007.

The adopted rules repeal §116.63, Provisional Licensed Dietitians--License Term; Renewals. The adopted repeal is a result of H.B. 4007.

The adopted rules repeal §116.64, Provisional Licensed Dietitians--Upgrading to Licensed Dietitian. The adopted repeal is a result of H.B. 4007.

The adopted rules repeal §116.65, Provisional Licensed Dietitians--Supervision. The adopted repeal is a result of H.B. 4007.

The adopted rules repeal Subchapter H, Temporary Licensed Dietitians. The adopted repeal is a result of H.B. 4007, which repealed the temporary licensed dietitian provisions from the statute.

The adopted rules repeal §116.70, Temporary Licensed Dietitians--Application and Eligibility Requirements; License Term. The adopted repeal is a result of H.B. 4007.

The adopted rules amend §116.80, Continuing Education--General Requirements and Hours. The adopted rules remove former subsection (c) regarding provisional licensed dietitians and completing continuing education hours. This change is a result of H.B. 4007.

The adopted rules amend §116.83, Continuing Education--Failure to Complete. The adopted rules remove the reference to pro-

visional licensed dietitian and make a related technical change. These changes are a result of H.B. 4007.

The adopted rules amend §116.91, Rules. The adopted rules remove the placeholder language and insert the specific citation to 16 TAC Chapter 100, General Provisions for Health-Related Programs. These changes are part of the clean-up changes.

The adopted rules amend §116.100, Display of License. The adopted rules amend subsection (a) by removing the reference to provisional licensed dietitians. This change is a result of H.B. 4007.

The adopted rules amend §116.101, Changes of Name or Address. The adopted rules amend subsection (a) by removing the reference to provisional licensed dietitians. This change is a result of H.B. 4007.

The adopted rules amend §116.103, Disclosure. The adopted rules remove subsection (b) regarding provisional licensed dietitian disclosures in advertising and announcements of services. These changes are a result of H.B. 4007.

The adopted rules amend §116.104, Unlawful, False, Misleading, or Deceptive Advertising. The adopted rules amend subsection (c) by removing references to provisional licensed dietitian and temporary licensed dietitian. These changes are a result of H.B. 4007.

The adopted rules amend §116.105, Code of Ethics. The adopted rules amend subsection (a) by removing former paragraph (12), regarding supervising provisional licensed dietitians, and by renumbering the following paragraphs. The adopted rules remove former subsection (c), regarding supervising a provisional licensed dietitian or a temporary licensed dietitian, and re-letter the following subsections. These changes are a result of H.B. 4007. In addition, the adopted rules remove unnecessary subheadings in former subsections (f) and (g) (re-lettered subsections (e) and (f)). These changes are part of the clean-up changes.

The adopted rules amend §116.110, Fees. The adopted rules remove: the upgrade fee for provisional licensed dietitians under subsection (b); the provisional licensed dietitian fees under former subsection (c); and the temporary licensed dietitian fees under former subsection (d). The adopted rules also re-letter the subsequent subsections. These changes are a result of H.B. 4007. In addition, the adopted rules remove the application processing fee for preplanned professional experience approval under subsection (b). This change is part of the changes to reflect current Dietitians industry practice regarding preplanned professional experience programs and internships in dietetics practice.

The adopted rules amend §116.120, Complaints Regarding Standard of Care. The adopted rules remove the placeholder language and insert the specific citation to 16 TAC Chapter 100, General Provisions for Health-Related Programs. These changes are part of the clean-up changes.

The adopted rules amend §116.130, Administrative Penalties and Sanctions. The adopted rules make a technical change that reflects the change made by H.B. 4007. The bill repealed the program-specific administrative penalties section in Occupations Code Chapter 701. Occupations Code Chapter 51, which applies to all the Department's programs, includes administrative penalties provisions, which will apply to the Dietitians program. These changes are a result of H.B. 4007.

The adopted rules amend §116.142, Licensed Dietitians Providing Diabetes Self-Management Training. The adopted rules remove former subsection (g), regarding provisional licensed dietitians. This change is a result of H.B. 4007. In addition, the adopted rules revise or remove subheadings within the section. These changes are part of the clean-up changes.

#### PUBLIC COMMENTS

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the March 16, 2018, issue of the *Texas Register* (43 TexReg 1544). During the 30-day public comment period the Department received 10 public comments from interested parties consisting of 7 individuals and the Board for Certification of Nutrition Specialists (BCNS), which submitted three public comments. Two of the individuals, who submitted written public comments, and the BCNS also provided oral public comments at the Dietitians Advisory Board meeting on May 3, 2018. The public comments received are summarized below.

**Comment--**One commenter, who is a Registered Dietitian Nutritionist and a Texas Licensed Dietitian, thanked the Department for implementing the improvements made to the statute.

**Department Response--**The Department appreciates this comment. The Department did not make any changes to the proposed rules in response to this public comment.

**Comment--**The Board for Certification of Nutrition Specialists (BCNS) submitted three comments on the proposed rules. Two of the comment letters were the same but were submitted to the Department through different means. The third comment letter was similar to the first two comment letters. All three comments included recommended rule changes; an appendix entitled "Certified Nutrition Specialist Requirements Comparison of RD and CSN Preparation"; charts comparing the certification examinations of nutrition specialists by BCNS and of Registered Dietitians by the Commission on Dietetic Registration; a document entitled "CNS Supervised Practice Experience Handbook for Candidates & Supervisors" dated December 2017; a BCNS Exam Content Outline; and the BCNS Code of Ethics. BCNS provided marked up versions of the existing rules to reflect the BCNS recommended rule changes to the requirements regarding education, experience, examinations, license application and eligibility, and continuing education.

BCNS also provided oral public comments at the Dietitians Advisory Board meeting on May 3, 2018. The oral public comments highlighted key issues identified in the written comment letters including the BCNS exam, the individualized program, the licensure of nutritionists in other states, and the statements from the Centers for Medicare and Medicaid Services and the U.S. Department of Labor, Bureau of Labor Statistics. The Department has summarized the issues raised in all three BCNS written public comments and the oral public comments and will address the comments together by topic.

**Exam:** In combination with retaining the individualized professional experience program, BCNS wanted the Department to recognize and include the BCNS Certified Nutrition Specialist (CNS) exam as an acceptable exam to becoming a licensed dietitian. BCNS expressed concerns that the rules only identify the Commission on Dietetic Registration (CDR) exam as the only acceptable licensing exam. BCNS stated that CDR is not the only private credentialing body for nutrition professionals and stated that the Department has the authority under the statute to ac-

cept other exams. BCNS provided documentation and charts comparing the content and areas of examination for the CDR Registered Dietitian (RD) exam and the BCNS Certified Nutrition Specialist (CNS) exam. BCNS also provided recommended changes to the rules to add references to the BCNS examination.

**Pre-Planned Professional Experience Program and Internship:** In combination with recognizing and including the BCNS exam, BCNS wanted the Department to retain the individualized program pathway under the pre-planned professional experience program as an option for licensure candidates who complete a preplanned professional experience approved by the BCNS. BCNS also wanted the BCNS internship in nutrition to qualify as an acceptable internship for obtaining the dietitian license. BCNS provided recommended changes to the rules to add "a clinical experience as part of a graduate nutrition program" under the current list of acceptable internships in "dietetics."

**Curriculum/Courses:** BCNS also recommended changes to the curriculum of study to become a licensed dietitian. BCNS wanted a more flexible curriculum that would recognize alternative courses and make some of the required dietitian courses elective. BCNS provided charts regarding the Certified Nutrition Specialists areas of study. BCNS also provided recommended changes to the Dietitian rules to include areas of study and continuing education for Certified Nutrition Specialists.

**Licensing and Recognition of Nutritionists:** BCNS stated that many other states recognize nutrition specialists, and BCNS wanted the Department to recognize them as well. According to BCNS, Certified Nutrition Specialists are authorized to practice in 33 states, with licensure available in 14 states and growing. (A specific list of states was not referenced or provided with the BCNS written or oral public comments.) BCNS stated that the industry has changed in the last two decades since the Texas law was enacted. BCNS stated that its recommended changes to the rules would create a pathway for other highly qualified nutrition professionals to obtain licensure.

BCNS also stated that the Centers for Medicare and Medicaid Services (CMS) in its 2014 final rule on Hospital Conditions of Participation, related to the Medicare and Medicaid Programs, noted that the use of the terms "registered dietitian" and "qualified dietitian" "was not meant to be exclusive of other nutrition professionals" and was not intended to be defined solely as "an individual specifically registered with the Commission on Dietetic Registration." BCNS also stated that the Certified Nutrition Specialist credential is listed by the U.S. Department of Labor, Bureau of Labor Statistics Occupational Outlook Handbook, Dietitians and Nutritionists, as an advanced nutrition credential.

**Department Response--**The Department acknowledges and respects the Certified Nutrition Specialists and their education and training, but the Department cannot include them in the Department's rules for purposes of obtaining a dietitian license. The statute would have to be amended by the Texas Legislature to recognize and include nutrition specialists and to provide a pathway for licensure for nutrition specialists. Nutrition specialists are not included in the current Dietitians statute, and the Department cannot add them by rule. A person may become a licensed dietitian by following and completing the current dietitian licensing requirements under the Dietitians statute and rules. Following is the Department's responses to each of the issues raised in the three BCNS written comments and in the oral comments provided at the Dietitians Advisory Board.

*Exam:* While the statute provides that the "examination prescribed by the department may be or may include an examination given by the Commission on Dietetic Registration or by a national or state testing service instead of an examination prepared by the department or the department's designee" (Occ. Code §701.253(c)), the prescribed exam would need to be an exam for licensing or credentialing dietitians. Dietitians are the only type of nutrition professional licensed under the Dietitians statute. It would not meet the current statutory requirements for the Department to accept another type of health care credentialing exam or another health care profession's credentialing exam for purposes of obtaining a dietitian license. The current Texas Dietitians statute does not include or recognize nutrition specialists nor does it make dietitians and nutrition specialists interchangeable or make "dietetics" and "nutrition" equivalent terms. The Department cannot make these changes by rule. This is the jurisdiction of the Texas Legislature.

While BCNS stated that the Commission on Dietetic Registration (CDR) exam should not be the only recognized exam, the CDR exam was selected by the former licensing board and regulatory agency and has been the official licensing exam for dietitians in Texas since 1985. The Department continued with the CDR exam when the Dietitians program transferred from the Department of State Health Services (and the associated former licensing board, the Texas State Board of Examiners of Dietitians) on October 3, 2016. While the nutrition-related industry as a whole may have changed since the Texas Dietitians statute was enacted in 1983, to the Department's knowledge, the CDR exam is the only dietitian examination available.

BCNS states that the Certified Nutrition Specialist exam should be allowed for purposes of obtaining a dietitian license, but the nutrition specialist exam is different from the dietitian exam. CDR and BCNS are two separate credentialing agencies in the nutrition-related industry, and they offer two separate credentials using separate education, experience, and exam pathways.

BCNS submitted a document comparing the content and areas of exam for the 2017 CDR Registered Dietitian exam and the BCNS Certified Nutrition Specialist exam. This document included a chart that "highlights key differences in focus" between the two exams. For nutrition and food sciences, there is a 50% focus for nutritionists and a 25% focus for dietitians. For clinical nutrition assessment, intervention, and monitoring, there is a 45% focus for nutritionists, and a 40% focus for dietitians. For food systems and food program management, there is a 3% focus for nutritionists and a 35% focus for dietitians. The BCNS document states: "This comparison illustrates the differences in core competencies of the two professions, inclusive of academic and experience preparation. Although there is some overlap, there are significant differences. A significant part of dietitian preparation is in areas that are not fundamental to the nutritionist and vice versa." In its own document, BCNS recognizes that these are two separate professions with different areas of education, experience, and examination focus. The Department cannot recognize or accept the BCNS Certified Nutrition Specialist exam for purposes of meeting the dietitian examination requirements.

The Dietitian Advisory Board discussed the issue of the BCNS Certified Nutrition Specialist exam. The advisory board members stated that they did not know enough about the BCNS exam, including the areas or topics on the exam, how the exam was developed, and who developed the exam questions. The advisory board members stated that they would need more

information and research and a better understanding about the BCNS exam before they could evaluate it and even consider it or accept it as a substitution for the CDR exam.

*Pre-Planned Professional Experience Program and Internship:* The statute, Occ. Code §701.254(2), requires the applicant to have completed an internship or pre-planned professional experience program in "dietetics practice" under the supervision of a licensed dietitian or registered dietitian. The adopted rules retain the pre-planned professional experience programs and internships in dietetics practice, but remove the outdated "individualized program" under the pre-planned professional experience program provisions that has not been used in the dietetics industry in many years. The adopted rules provide that the Department will accept pre-planned professional experience programs or internships that are approved or recognized by CDR.

While BCNS recommended retaining the individualized program to recognize BCNS-approved pre-planned professional experience programs and including internships in nutrition, the current Texas Dietitians statute does not include or recognize nutrition specialists, nor does it make dietitians and nutrition specialists interchangeable or make "dietetics" and "nutrition" equivalent terms. The Department cannot make these changes by rule. This is the jurisdiction of the Texas Legislature.

*Curriculum/Courses:* The Dietitian statute defines "dietetics", and the statute and rules establish the education and training requirements for dietitian licensure. As such, the curriculum and course content need to cover dietetics. Changing the curriculum and course requirements for dietitians to allow a broader, more flexible curriculum, to make some required dietetic courses elective, and to include the nutrition specialists' curriculum would change the scope of the education and training of a dietitian and would change what the practice of "dietetics" includes. While dietitians and nutrition specialists are both in the nutrition-related industry, they are two different credentials with two different education and training paths. The Department cannot change the curriculum and courses in the Dietitian rules to include other nutrition professions that are not included in the Dietitians statute.

The current Texas Dietitians statute does not include or recognize nutrition specialists, nor does it make dietitians and nutrition specialists interchangeable or make "dietetics" and "nutrition" equivalent terms. The Department cannot make these changes by rule. This is the jurisdiction of the Texas Legislature.

*Licensing and Recognition of Nutritionists:* Regarding the licensure of nutritionists in 14 other states, a specific list of states was not referenced or provided with the BCNS comments. Another individual commenter did provide a list of 14 states and the District of Columbia (DC) that license nutritionists (comment discussed later in this preamble). These 14 states and DC include nutritionists in their statutes (or municipal regulations for DC). Some of them have separate licenses for dietitians and nutritionists, and others have combined dietitian and nutritionist licenses.

While other states may license nutritionists, either separately or combined with the dietitians, the current Texas Dietitians statute does not include or recognize nutrition specialists, nor does it make dietitians and nutrition specialists interchangeable or make "dietetics" and "nutrition" equivalent terms. The Department is only authorized to license Dietitians under the Texas statute, not other nutrition professionals. The Department cannot include, recognize, or license nutritionists by rule.

The Department notes that several bills addressing nutritionists have been introduced in past Texas Legislative Sessions, specifically during the 2005 Regular Session (H.B. 191, S.B. 989, H.B. 44 and S.B. 1209), the 2007 Regular Session (H.B. 1942, H.B. 2419, and S.B. 1168), and the 2009 Regular Session (H.B. 3528). These bills would have either included nutritionists in the Dietitians statute or created a separate nutritionist statute, but these bills did not pass. These legislative efforts demonstrate that the appropriate venue to make these changes is through the legislative process, not through the Department's rulemaking process.

While the Centers for Medicare and Medicaid Services and the U.S. Department of Labor, Bureau of Labor Statistics may recognize dietitians and nutrition specialists for their purposes, the Texas Dietitians statute only recognizes and includes dietitians.

*Recommended Rule Changes and Mark-Up of Existing Rules:* BCNS provided marked up versions of the existing rules to reflect the BCNS recommended rule changes to the requirements regarding education, experience, examinations, license application and eligibility, and continuing education. Even if the Department had the statutory authority to make these changes, which the Department does not, the Department also could not make the recommended changes from a technical and procedural stand-point.

The BCNS recommended changes are substantive changes that would expand the scope of the proposed rules as published and would affect additional persons not included in the proposed rules. In addition, some of the recommended changes affected rules that were not open for public comment (§116.42 and §116.81) or rules that were open for public comment but did not include any proposed changes for certain rule subsections (§116.20(d) and §116.40(c)). A state agency is limited in the changes that can be made to proposed rules at this point in the rulemaking process. For substantive changes, the Department would have to withdraw the proposed rules and start the rulemaking process over or proceed with the proposed rules and include substantive changes in a future proposed rulemaking. Neither option is necessary regarding the BCNS recommended changes, since the Department does not have the statutory authority to make the BCNS recommended changes.

The Department did not make any changes to the proposed rules in response to the BCNS written and oral public comments.

*Comment--*One commenter, who is a Certified Nutrition Specialist and holds several types of degrees, stated that the commenter is prevented from becoming licensed to practice in Texas under the current restrictive dietetics licensure rules. The commenter stated that it was not appropriate for Texas to select one private credential over other qualified education and training pathways. The commenter requested that the CNS exam be added in addition to the current dietitians' Registered Dietitian exam and that pre-professional experience continue to be allowed along with individual internship programs. In addition, the commenter wanted the course content requirements for licensure to be sufficiently flexible to broadly cover the many aspects for nutrition and not just dietetics. The commenter stated that the "purpose of dietetic licensing rules is not to restrict licensing to one degree or organization but to ensure that qualified individual with diverse background are able to promote the health and nutritional well-being of the citizens of the State."

*Department Response--*The Department acknowledges and respects the Certified Nutrition Specialists and their education and

training, but the Department cannot include them in the Department's rules for purposes of obtaining a dietitian license. The statute would have to be amended by the Texas Legislature to recognize and include nutrition specialists and to provide a pathway for licensure for Certified Nutrition Specialists. Nutrition specialists are not included in the current Dietitians statute, and the Department cannot add them by rule. A person may become a licensed dietitian by following and completing the current dietitian licensing requirements under the Dietitians statute and rules.

Regarding the commenter's request to add the CNS exam in addition to the CDR exam to the Dietitian rules, the Department's response to this comment is the same as explained in the response to the BCNS comment regarding exams. Regarding the comment about selecting one private credential over others, to the Department's knowledge, the CDR exam is the only available dietitian licensing exam. The Department is not selecting one entity's dietitian exam over another entity's dietitian exam. Regarding the commenter's request to continue the pre-professional experience and the individual internship programs, the Department's response to this comment is the same as explained in the response to the BCNS comment regarding pre-planned professional experience programs and internships. Regarding the commenter's request to expand the course content to cover the many aspects of nutrition and not just dietetics, the Department's response to this comment is the same as explained in the response to the BCNS comment regarding courses/curriculum.

While the Department acknowledges that there are other professionals in the nutrition-related industry, the purpose and scope of the Dietitians statute and rules is to license dietitians, not other nutrition professionals.

The Department did not make any changes to the proposed rules in response to this public comment.

*Comment--*One commenter, who is a Certified Nutrition Specialist, stated that without the ability to gain state licensure, the commenter is not offered positions in hospitals and other traditional medical workplaces and is unable to partner with insurance providers or be listed as part of preferred insurance networks. The commenter stated that having a state license would allow the practice to grow, be more competitive, and be financially consistent and the commenter would be able to serve insured clients. The commenter recommended changing the current Dietitian rules to include naming other recognized exams such as CNS exam in addition to the dietitians Registered Dietitian exam; to include an individualized pre-planned professional practice experience in the licensing requirements; and to include the Board for Certification of Nutrition Specialist as an approved internship. In addition, the commenter suggested flexibility in course content to include therapeutic nutrition and not just dietetics, and offering food science and food service management as an elective. The commenter requested that the Department "consider changing this legislation".

*Department Response--*The Department acknowledges and respects the Certified Nutrition Specialists and their education and training, but the Department cannot include them in the Department's rules for purposes of obtaining a dietitian license. The statute would have to be amended by the Legislature to recognize and include nutrition specialists and to provide a pathway for licensure for Certified Nutrition Specialists. Nutrition specialists are not included in the current Dietitians statute, and the Department cannot add them by rule. A person may become a licensed dietitian by following and completing the current dietitian licensing requirements under the Dietitians statute and rules.



Regarding the commenter's request to add the CNS exam in addition to the CDR exam to the Dietitian rules, the Department's response to this comment is the same as explained in the response to the BCNS comment regarding exams. Regarding the commenter's request to include the pre-planned professional practice experience and the BCNS-approved internship, the Department's response to this comment is the same as explained in the response to the BCNS comment regarding pre-planned professional experience programs and internships. Regarding the commenter's request for flexibility in the course content to include other course not just dietetics and to make some required dietitian courses elective, the Department's response to this comment is the same as explained in the response to the BCNS comment regarding courses/curriculum.

Regarding the issues involving employers or facilities requiring licensure for employment and the issues involving insurance and preferred providers, the Department cannot resolve those issues, since they are outside of the Department's jurisdiction and statutory authority.

The Department did not make any changes to the proposed rules in response to this public comment.

*Comment--*One commenter, who is a Certified Nutrition Specialist and a Registered Pharmacist, submitted a comment letter "advocating for the state licensure for the CNS certification for nutrition." The commenter stated that only dietitians are authorized to become licensed in the state, and because licensure is frequently required for a provider's service to be covered by insurance, this unnecessarily limits access to covered service for consumers. The commenter stated individuals who attain the CNS certification are "high caliber nutritional practitioners that receive rigorous academic training" and allowing CNS licensure would allow individuals to utilize health insurance for nutrition services which would lower individual health related cost and improve quality of life. In addition, licensure of CNSs and other highly qualified nutritionists will allow the commenter to advertise as a licensed provider and be recognized as such by other health care providers, employers, and consumers.

This commenter also provided oral public comments at the Dietitians Advisory Board meeting on May 3, 2018. In the oral comments, the commenter highlighted the issues identified in the written comment letter. The commenter recognized that licensure is not required to practice nutrition in Texas, but stated that there are serious practical implications to CNSs who cannot obtain licensure, including the inability to become enrolled in insurance plans and the inability to advertise as a "licensed practicing nutritionist" in Texas. The commenter stated that Texas needs expanded access to nutrition care. The commenter requested that the rules be updated to reflect today's workforce, to include other highly qualified professionals, and to allow CNSs to become licensed.

*Department Response--*This response addresses the written and oral comments from this commenter. The Department acknowledges and respects the Certified Nutrition Specialists and their education and training, but the Department cannot create state licensure for Certified Nutrition Specialists or other highly qualified nutritionists by rule or issue a nutritionist license by rule. This is the jurisdiction of the Texas Legislature. The statute would have to be amended by the Legislature to recognize and include nutrition specialists and to provide a pathway for licensure for Certified Nutrition Specialists or other qualified nutritionists as licensed nutritionists or licensed nutrition

specialists. Nutrition specialists are not included in the current Dietitians statute, and the Department cannot add them by rule.

A nutrition specialist (or other person) may become a licensed dietitian by following and completing the current dietitian licensing requirements under the Dietitians statute and rules, but the nutrition specialist (or other person) would become a licensed dietitian at the end of the process not a licensed nutrition specialist.

Regarding the issues involving insurance, the Department cannot resolve those issues, since they are outside of the Department's jurisdiction and statutory authority.

The Department did not make any changes to the proposed rules in response to this individual's written and oral public comments.

*Comment--*One commenter, who is a Certified Nutrition Specialist, submitted a comment "in reference to licensing in title Certified Nutrition Specialists." The commenter stated that the commenter's ability to grow the business is greatly hindered because the commenter is not licensed and cannot not accept insurance. The commenter stated that Texas licenses dietitians in name only, not practice. The commenter stated that the Department of Labor's website lists two certifications for nutritionists or dietitians - the Registered Dietitian and the Certified Nutrition Specialist. In states where licensure is available for any member of the dietetics/nutrition profession, Medicare requires licensure to apply and accept Medicare clients. The commenter stated that the commenter could become a Licensed Dietitian-Nutritionist in other states, but the commenter has not. The commenter explained that to enroll as a provider in insurance in those states, insurance companies require that the commenter be licensed and enrolled as an insurance provider in the commenter's home state.

The commenter recommended that if the Department allows one private credential such as CDR, then the Department should allow other private credentials such as the Certification of Nutrition Specialists. The commenter also recommended keeping the current language allowing individualized pre-professional practice experience and allowing other paths to licensure similar to various other states.

*Department Response--*The Department acknowledges and respects the Certified Nutrition Specialists and their education and training, but the Department cannot include them in the Department's rules for purposes of obtaining a dietitian license and cannot create state licensure for Certified Nutrition Specialists as licensed nutritionists by rule. This is the jurisdiction of the Texas Legislature. The statute would have to be amended by the Legislature to recognize and include nutrition specialists and to provide a pathway for licensure for Certified Nutrition Specialists. Nutrition specialists are not included in the current Dietitians statute, and the Department cannot add them by rule.

Regarding the commenter's request to recognize CNS in addition to CDR, the Department's response to this comment is the same as explained in the response to the BCNS comment regarding exams. Regarding the commenter's request to keep the current language allowing individualized pre-professional practice experience, the Department's response to this comment is the same as explained in the response to the BCNS comment regarding pre-planned professional experience programs and internships.

Regarding the commenter's request to allow other paths to licensure similar to other states, a specific list of states that license

nutritionists was not provided with this comment. Another individual commenter did provide a list of 14 states and the District of Columbia (DC) that license nutritionists (comment discussed later in this preamble). These 14 states and DC include nutritionists in their statutes (or municipal regulations for DC). Some of them have separate licenses for dietitians and nutritionists, and others have combined dietitian and nutritionist licenses.

While other states may license nutritionists, either separately or combined with the dietitians, the Department cannot create other paths to licensure by rule. This is the jurisdiction of the Texas Legislature. The current Texas Dietitians statute does not include or recognize nutrition specialists, nor does it make dietitians and nutrition specialists interchangeable or make "dietetics" and "nutrition" equivalent terms. The Department is only authorized to license Dietitians under the Texas statute, not other nutrition professionals. The Department cannot include, recognize, or license nutritionists by rule.

Regarding the "licensing in name only" issue, it is accurate that the Texas Dietitians statute is a title protection act, not a practice act, but it still only applies to dietitians. While the Department of Labor may recognize both dietitians and nutrition specialists for its purposes, the Texas Dietitians statute only recognizes and includes dietitians.

Regarding the issues involving insurance companies and Medicare billing requirements, the Department cannot resolve those issues, since they are outside the Department's jurisdiction and statutory authority.

The Department did not make any changes to the proposed rules in response to this comment.

*Comment*--One commenter, who is a Licensed Dietitian, requested an understanding of the intent for a dietitian duly and legally licensed under a state-approved individualized program in 1991. The commenter stated she is not seeking licensure because she was licensed under the rules in 1991. This commenter also provided oral public comments at the Dietitians Advisory Board meeting on May 3, 2018. In the oral comments, the commenter highlighted the issues identified in the written comment letter and asked what would happen to her license and would she still be a licensed dietitian under the rule changes.

*Department Response*--This response addresses the written and oral comments from this commenter. The proposed rules do not affect persons who are currently licensed as dietitians in Texas. The only way a current licensed dietitian would be affected by the rule changes would be if the person allowed his or her license to expire beyond the late renewal period and the person would have to start the licensing process over again, and the individualized internship program that was available in 1991 would no longer be an option. The removal of the provisional license requirements from the rules is a result of the removal of the provisional license from the statute pursuant to H.B. 4007. The Department did not make any changes to the proposed rules in response to this individual's written and oral public comments.

*Comment*--One commenter, who is a Certified Nutrition Specialist and is licensed in Alaska and Maryland, stated that she is "negatively affected by the fact that Texas will not grant me a state license." The commenter recognized that she is not required to have a state license to practice in Texas; however, the commenter explained the difficulties of growing a business without being licensed. The commenter explained that health insurance plans will not credential her as a provider since she does

not have a Texas state license. The commenter cannot accept health insurance from clients or partner with other providers. It also impacts the commenter's ability to provide telehealth nutrition services in other states since the commenter is not licensed in Texas. The commenter stated that persons looking for a health care provider look for someone with a state license, and that for health insurance companies, a state license means a potential provider has met certain standards. The commenter stated that having a state license in Texas is critical, and that she would like the opportunity to provide more services and have them covered through insurance.

The commenter stated that many other states have a non-Registered Dietitian pathway to state recognition and more states are following each year. The commenter provided the following list of 14 states along with the District of Columbia: Alaska, Connecticut, Delaware, Florida, Illinois, Kentucky, Massachusetts, Maryland, Minnesota, New York, North Dakota, Pennsylvania, South Dakota, and Washington.

The commenter requested the Department revise "its current dietetics licensing law" to include a non-Registered Dietitian pathway as many other states have done by accepting the BCNS board exam and/or the CNS credential. The nutrition industry had changed significantly and people in Texas should have the opportunity to have choice among licensed providers to provide nutrition services. Other health care providers should also have a choice in who they refer clients to. The commenter requested changes to the licensing rules to be more inclusive of other qualified nutrition professionals.

*Department Response*--The Department acknowledges and respects the Certified Nutrition Specialists and their education and training, but the Department cannot include them in the Department's rules for purposes of obtaining a dietitian license and cannot create state licensure for Certified Nutrition Specialists as licensed nutritionists by rule. In addition, the Department cannot revise the Dietitians licensing law (statute). These changes are the jurisdiction of the Texas Legislature. The statute would have to be amended by the Legislature to recognize and include nutrition specialists and to provide a pathway for licensure for Certified Nutrition Specialists. Nutrition specialists are not included in the current Dietitians statute, and the Department cannot add them by rule.

Regarding the commenter's request to accept the BCNS exam and/or the CNS credential, the Department's response to this comment is the same as explained in the response to the BCNS comment regarding exams.

Regarding the commenter's request to allow other pathways to licensure similar to other states, the Department reviewed the statutes of the 14 states that were listed in this commenter's letter along with the municipal regulations of the District of Columbia (DC). These 14 states and DC include nutritionists in their statutes (or municipal regulations for DC). Some of them have separate licenses for dietitians and nutritionists, and others have combined dietitian and nutritionist licenses.

While other states may license nutritionists, either separately or combined with the dietitians, the Department cannot create other paths to licensure by rule. This is the jurisdiction of the Texas Legislature. The current Texas Dietitians statute does not include or recognize nutrition specialists, nor does it make dietitians and nutrition specialists interchangeable or make "dietetics" and "nutrition" equivalent terms. The Department is only authorized to license Dietitians under the Texas statute, not other

nutrition professionals. The Department cannot include or license nutritionists by rule.

Regarding the issues involving insurance companies' provider and billing requirements, the Department cannot resolve those issues, since they are outside the Department's jurisdiction and statutory authority.

The Department did not make any changes to the proposed rules in response to this public comment.

Other Changes: The Department is making technical changes to §116.50 to remove the word "rule" from §116.50(b)(3)(A) and the word "rules" from §116.50(b)(3)(B).

#### LATE PUBLIC COMMENT

The Board for Certification of Nutrition Specialists (BCNS) submitted a comment letter to the Commission on May 16, 2018. This comment was submitted after the public comment period closed on April 16, 2018, and after the Dietitians Advisory Board meeting on May 3, 2018. It is technically a late comment, but the Department believes a response is necessary to address some of the issues raised in this public comment.

Comment--The BCNS comment letter dated May 16, 2018, included several concerns. First, BCNS reiterated the same issues raised in its previous three written comment letters and the oral public comment made at the Dietitians Advisory Board meeting on May 3, 2018.

Second, BCNS disagreed with the Department staff's interpretations and recommended responses to the public comments that were provided during the Dietitians Advisory Board meeting. In its letter, BCNS included selected excerpts of some of TDLR's recommended responses to some of the public comments during the Advisory Board meeting. BCNS then provided feedback and comments on the Department's recommended responses to the BCNS comments and to other individuals' comments. BCNS stated that Department staff did not understand BCNS' requested changes. BCNS stated that it wants a pathway for nutrition specialists to become Licensed Dietitians using the BCNS nutrition specialist exam, education, and experience. BCNS states that it is not looking for Certified Nutrition Specialists to become Licensed Nutritionists or Licensed Nutrition Specialists. BCNS requested the Commission hold off on adopting the proposed rules and send the proposed rules back to the Department staff to reconsider BCNS' comments.

Third, BCNS reiterated its position that dietitians and nutritionists and the terms "dietetics" and "nutrition" are functionally equivalent for purposes of regulation and licensure. BCNS asserts that nutritionists and their requirements for certification could be added to the Dietitian rules, because dietitians and nutritionists are functionally equivalent.

Fourth, BCNS stated that Department staff provided no reasoning during the May 3, 2018, Advisory Board meeting regarding why the individualized program was being removed.

*Department Response*--The Department's response to each BCNS concern is as follows.

#### *Response to BCNS' First Concern*

In response to the issues that were previously raised by BCNS in its three written comment letters submitted during the comment period and in its oral public comments made at the Dietitians Advisory Board meeting on May 3, 2018, the Department reiterates its responses provided to the BCNS written and oral comments.

The Department's responses to these issues are the same as the Department's responses found earlier in this preamble.

#### *Response to BCNS' Second Concern*

In response to the comment that Department staff do not understand the BCNS requested changes, with all due respect, the Department staff do understand the BCNS requested changes. There were two types of comments that were submitted by Certified Nutrition Specialists in response to the Dietitian proposed rules. The Department staff addressed both types of comments in the responses.

The first type of comments, which included BCNS and several individual commenters, wanted a pathway for nutrition specialists to become licensed dietitians using the nutrition specialists' exam, education, and experience. These commenters wanted to add the BCNS exam, to retain the individualized program, and to include the nutrition specialist education and areas of study/coursework in the Dietitian rules, for purposes of obtaining a dietitian license. BCNS provided marked-up versions of the current rules to show how it wanted the Dietitian rules amended to include the nutrition specialists' requirements.

The Department has summarized these public comments and has addressed the specific issues regarding the exam, the experience, and the education in the Department's full responses to these comments in this adoption notice. In the responses, the Department explains why the Department cannot include nutritionists, their exam, their education, or their experience in the Dietitian rules for purposes of obtaining a dietitian license.

The bottom line is that the current Texas Dietitians statute only includes and recognizes dietitians. The statute does not include or recognize nutrition specialists, nor does it make dietitians and nutrition specialists interchangeable or make "dietetics" and "nutrition" equivalent terms. The Department does not have the statutory authority to create a pathway for licensure for Certified Nutrition Specialists as licensed dietitians by rule.

The second type of comments wanted state licensure for nutritionists or Certified Nutrition Specialists and/or wanted a pathway for licensure like other states that license nutritionists. The Department understood that these commenters wanted to be licensed nutritionists, not licensed dietitians. Several commenters (including BCNS) stated that other states license nutritionists. One of the individual commenters provided a list of 14 states and the District of Columbia (DC) that recognize nutritionists. These 14 states and DC include nutritionists in their state statutes (or municipal regulations for DC). Some of them have separate dietitian and nutritionist licenses, and others have combined dietitian and nutritionist licenses.

The Department has summarized these public comments and has addressed the licensure issues in the Department's full responses to these comments in this adoption notice. In the responses, the Department explains that while other states may license nutritionists, either separately or in combination with the dietitians, Texas does not.

The bottom line is that the current Texas Dietitians statute only includes and recognizes dietitians. The statute does not include or recognize nutrition specialists, nor does it make dietitians and nutrition specialists interchangeable or make "dietetics" and "nutrition" equivalent terms. The Department does not have the statutory authority to create a pathway for licensure for Certified Nutrition Specialists as licensed nutritionists by rule or to create a new license type by rule.

### *Response to BCNS' Third Concern*

In response to the comment that dietitians and nutritionists are functionally equivalent for purposes of regulation and licensure, the Texas Dietitians statute does not make them functionally equivalent. While the nutrition-related industry as a whole may have changed since 1983, when the Dietitian statute was enacted, the statute has not changed. The current Texas Dietitians statute does not include or recognize nutrition specialists, nor does it make dietitians and nutrition specialists interchangeable or make "dietetics" and "nutrition" equivalent terms. Under the statute, the Department is only authorized to license dietitians in this state, not other health care professions.

Several bills addressing nutritionists were introduced in past Texas Legislative Sessions, specifically during the 2005 Regular Session (H.B. 191, S.B. 989, H.B. 44 and S.B. 1209), the 2007 Regular Session (H.B. 1942, H.B. 2419, and S.B. 1168), and the 2009 Regular Session (H.B. 3528). These bills would have either included nutritionists in the Dietitians licensing statute or created a separate nutritionist licensing statute, but these bills did not pass.

To date, the Texas Legislature has not determined that "dietetics" and "nutrition" are functionally equivalent for purposes of statutory regulation and licensure. As such, the Department cannot make them functionally equivalent by rule.

### *Response to BCNS' Fourth Concern*

Regarding the comment that no reasoning was provided during the May 3, 2018, Advisory Board meeting regarding why the individualized program was being removed, the Department provided the reasons for eliminating the individualized program during the February 27, 2018, Advisory Board meeting and in the preamble of the proposed rules published in the *Texas Register* and posted on the Department's website.

The reasons and explanations regarding the changes to the pre-planned professional experience program and internship provision, including the individualized program, were discussed at the Dietitians Advisory Board meeting on February 27, 2018. The change was being made to eliminate unnecessary and outdated rules regarding the required preplanned professional experience programs and internships to reflect current Dietitians industry practice. The Advisory Board agreed with the proposed changes and recommended that the proposed rules be published for public comment. The full detailed reasons and explanations were included in the preamble of the proposed rules that were published in the *Texas Register* on March 16, 2018, as required by the Administrative Procedure Act (APA), Government Code Chapter 2001. The preamble and the proposed rules were also posted on the Department's website for review.

The reasons and explanations for removing the individualized program, summaries of the public comments wanting to keep the individualized program, and the Department's full responses to those comments are included in this adoption notice, as required by the APA.

### ADVISORY BOARD DISCUSSIONS AND RECOMMENDATIONS

The Department staff presented the draft proposed rules to the Dietitians Advisory Board (Advisory Board) at its meeting on February 27, 2018. The Advisory Board discussed the draft proposed rules and did not make any changes. The Advisory Board recommended that the draft proposed rules be published in the *Texas Register* as proposed rules for public comment.

The Advisory Board met again on May 3, 2018, to discuss the proposed rules and the public comments received. The Advisory Board members had copies of all the written public comments received during the comment period. In addition, two of the individuals, who submitted written public comments, and the BCNS provided oral public comments at the Advisory Board meeting. The Advisory Board recommended adopting the proposed rules with the technical changes recommended by the Department to §116.50.

### COMMISSION MEETING AND DECISION

The Commission met on May 24, 2018, to discuss the proposed rules and written and oral public comments received. The Commission had copies of all the written public comments submitted to the Department and to the Commission, summaries of the written and oral comments, and the Department's recommended responses to the public comments. The Department staff presented the proposed rules and highlighted a few key points, including those in the Department's response to the May 16, 2018, BCNS comment letter (Department response is above in this preamble). The key points are summarized below.

First, the Department staff do understand the BCNS requested changes. There were two types of comments submitted by the Certified Nutrition Specialists in response to the Dietitian proposed rules: (1) those who wanted a pathway to be licensed dietitians by using the BCNS exam, education, and experience; and (2) those who wanted a pathway to be licensed nutritionists. The Department responded to both types of comments. The bottom line is the same for both--the Texas Dietitians statute does not recognize or include nutritionists, so the Department does not have the statutory authority to include, recognize, or license Certified Nutrition Specialists by rule.

Second, while the nutrition-related industry as a whole may have changed since the Dietitians statute was enacted in 1983, the statute has not. "Dietetics" and "nutrition" are not equivalent under the Texas Dietitians statute. Legislative efforts in 2005, 2007, and 2009 that would have included nutritionists in the Dietitian licensing statute or created a separate nutritionist licensing statute did not pass.

Third, an individual commenter provided a list of 14 states that license nutritionists. The Department reviewed the statutes of these 14 states and all of them include nutritionists in their statutes, which is different from Texas. The Texas Dietitian statute does not include or recognize nutritionists, so the Department cannot include or recognize them in rule.

Finally, even if the Department had the statutory authority to make the changes recommended by BCNS and other individual commenters to add references to BCNS and add the BCNS exam, education, and experience to the Dietitian rules, the Department could not do so from a technical and procedural standpoint. The BCNS requested changes were substantive changes that go beyond the proposed rules as published and could not be made at this point in the process for this rulemaking.

A representative from the Board for Certification of Nutrition Specialists (BCNS) appeared before the Commission and made an oral public comment, which is summarized below.

Comment--The BCNS representative reiterated the issues presented in the BCNS May 16, 2018, comment letter (summarized above in this preamble). BCNS requested that the proposed rules be placed on hold for more careful consideration of their requested changes. The BCNS representative stated that the

Department staff do not understand BCNS' requested changes to the rules. BCNS stated that Certified Nutrition Specialists want to become licensed dietitians and that their request is being denied based on a misreading or misinterpretation of their request. BCNS stated that "dietitian" and "nutritionist" and "dietetics" and "nutrition" are interchangeable. Regarding the past Texas legislation to address nutritionists, the BCNS representative stated that those bills were not proposed by BCNS and BCNS was not part of those efforts. The BCNS representative stated that just because there were statutory efforts in the past does not mean that changes could not be made by rule. The BCNS representative stated that of the 14 states that authorize nutritionists for licensure, Kansas authorizes Certified Nutrition Specialists to become licensed dietitians. The BCNS representative stated that there may or may not be the word "nutritionist" in the title, but there is a broad understanding in the industry that the terms are very interchangeable.

*Department Response*--Regarding the issues that were reiterated from the BCNS May 16, 2018, letter, the Department's responses to this oral public comment are the same as the Department's responses to the May 16, 2018, written comment letter (see above in this preamble). Regarding the comment about the past statutory efforts, these legislative efforts to include, recognize, and license nutritionists in statute demonstrates that the appropriate venue to make these changes is through the legislative process, not through the Department's rulemaking process.

Regarding the comment that Kansas licenses nutritionists, this was the first time BCNS provided or referenced any specific states in its written or oral public comments. Kansas was not included in the list of 14 states provided by another individual commenter. As a follow-up, the Department reviewed the Kansas "Dietitians Licensing Act" and the Kansas "Rules and Regulations for Licensure of Kansas Dietitians." It is not apparent in the review whether the Kansas Dietitians statute, rules, and regulations include or recognize nutritionists. Obviously, the Department defers to the State of Kansas and its licensing agency on the interpretation and administration of the Kansas Dietitians statute, rules, and regulations and whether nutritionists are included or recognized or are eligible to become licensed dietitians. The Department's interpretation of the Texas Dietitians statute, however, remains the same. The Texas Dietitians statute does not include or recognize nutritionists.

At the May 24, 2018, Commission meeting, the Commissioners asked questions of Department staff, who provided the Department's interpretation regarding its statutory authority under the Dietitians statute, clarified the scope of the proposed rulemaking, and explained the technical and procedural limitations to adding new provisions into the proposed rulemaking. The Commissioners also asked questions of the BCNS representative about the legislation from 2005, 2007, and 2009 regarding nutritionists and about introducing legislation in the future to address the BCNS concerns. The BCNS representative stated that she briefly reviewed those bills and was not as familiar with them since they were not BCNS bills, but that the Dietitians statute does not require a licensed dietitian to be someone credentialed by CDR. The BCNS representative had no comment on whether BCNS would introduce legislation in the future.

The Commissioners discussed that there needed to be a statutory change to make the changes requested by BCNS and the Certified Nutrition Specialists. It appeared that legislative efforts in the past had failed, and this was an attempt to "back-door" the changes through rule. The Commissioners stated that the

Department should not make those types of changes by rule. If the Legislature did not find that it was necessary to license nutritionists in the past, the Department would not take that on to increase the scope of practice. In addition, the Commissioners stated that the BCNS requested changes were beyond the scope of the proposed rulemaking as published and could not be made as part of this rulemaking. The Commission Chair requested that the Executive Office and General Counsel's Office meet with BCNS to begin discussions to see if there is a way for the Department to assist. These discussions may also include the dietitians.

The Commission adopted the proposed rules with two technical changes to §116.50, as recommended by the Dietitians Advisory Board and the Department.

## SUBCHAPTER A. GENERAL PROVISIONS

### 16 TAC §116.2

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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

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## SUBCHAPTER C. EDUCATION REQUIREMENTS

### 16 TAC §116.20

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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## SUBCHAPTER D. EXPERIENCE REQUIREMENTS

### 16 TAC §116.30

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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## SUBCHAPTER E. EXAMINATION REQUIREMENTS

### 16 TAC §116.40, §116.44

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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### 16 TAC §116.41, §116.43

The repeal is adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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## SUBCHAPTER F. LICENSED DIETITIANS

### 16 TAC §116.50

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

*§116.50. Licensed Dietitians--Application and Eligibility Requirements.*

(a) Unless otherwise indicated, an applicant must submit all required information and documentation of credentials on official department-approved forms.

(b) An applicant must submit the following required documentation:

(1) a completed application on a department-approved form;

(2) official transcript(s) of all relevant college work showing successful completion of the education requirements under Texas Occupations Code §701.254(1);

(3) copy of the registration card issued by the Commission on Dietetic Registration as proof that the applicant:

(A) successfully completed the preplanned professional experience program or internship requirements under Texas Occupations Code §701.254(2) and §116.30; and

(B) passed the examination prescribed under Texas Occupations Code §701.253 and §116.40 and §116.42;

(4) the form providing information regarding other state licenses, certificates or registrations that an applicant holds or held, if applicable;

(5) proof of successfully completing the Texas Jurisprudence Examination under Texas Occupations Code §701.2575 and rule §116.44; and

(6) the fee required under §116.110.

(c) The applicant must successfully pass a criminal history background check.

(d) The applicant must meet the fitness requirements under §116.51.

(e) Pursuant to Texas Occupations Code §701.151, the commission or the department shall deny the application for violation of the Act, this chapter, or a provision of the Code of Ethics in §116.105.

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. PROVISIONAL LICENSED DIETITIANS

### 16 TAC §§116.60 - 116.65

The repeal is adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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## SUBCHAPTER H. TEMPORARY LICENSED DIETITIANS

### 16 TAC §116.70

The repeal is adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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## SUBCHAPTER I. CONTINUING EDUCATION

### 16 TAC §§116.80, §116.83

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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## SUBCHAPTER J. RESPONSIBILITIES OF THE COMMISSION AND THE DEPARTMENT

### 16 TAC §116.91

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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## SUBCHAPTER K. RESPONSIBILITIES OF THE LICENSEE AND CODE OF ETHICS

### 16 TAC §§116.100, 116.101, 116.103 - 116.105

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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## SUBCHAPTER L. FEES

### 16 TAC §116.110

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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## SUBCHAPTER M. COMPLAINTS

### 16 TAC §116.120

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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Proposal publication date: March 16, 2018  
For further information, please call: (512) 463-3671



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SUBCHAPTER N. ENFORCEMENT  
PROVISIONS

**16 TAC §116.130**

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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

Filed with the Office of the Secretary of State on June 8, 2018.

TRD-201802544

Brian E. Francis

Executive Director

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-3671

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SUBCHAPTER O. THE DIETETIC  
PROFESSION

**16 TAC §116.142**

The amendments are adopted under Texas Occupations Code, Chapters 51 and 701, 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.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 701, and Texas Insurance Code §1358.055. No other statutes, articles, or codes are affected by the adoption.

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

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Brian E. Francis

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**TITLE 19. EDUCATION**

**PART 2. TEXAS EDUCATION AGENCY**

**CHAPTER 61. SCHOOL DISTRICTS**

**SUBCHAPTER CC. COMMISSIONER'S**

**RULES CONCERNING SCHOOL FACILITIES**

**19 TAC §61.1032**

The Texas Education Agency (TEA) adopts an amendment to §61.1032, concerning the instructional facilities allotment (IFA). The amendment is adopted without changes to the proposed text as published in the April 20, 2018, issue of the *Texas Register* (43 TexReg 2331) and will not be republished. The adopted amendment updates the rule to align with current practice for administering the IFA program.

**REASONED JUSTIFICATION.** The adopted amendment to 19 TAC §61.1032 exercises the commissioner's authority to adopt rules to implement the IFA program under Texas Education Code (TEC), Chapter 46, Subchapter A, which provides assistance to school districts in making debt service payments on qualifying bond or lease-purchase agreements. Bond or lease-purchase proceeds must be used for the construction or renovation of an instructional facility. The adopted amendment reflects changes in how the TEA administers this program. Specifically, the following changes have been made.

The adopted amendment simplifies the requirements for school districts by removing obsolete requirements to send to the TEA paper copies of documents that are already on file with the state information repository, the Municipal Advisory Council of Texas (MAC), and to send debt service schedules for interest rate management agreements that are updated with the state information repository (MAC). In addition, the adopted amendment removes the requirement for financial advisors to certify net present value savings for refinancing to school districts separate from the IFA program amendment process prior to school districts submitting to the TEA. Instead, school districts are required to submit those certifications directly to the TEA through the IFA program amendment process.

Rule text that re-states statutory requirements was removed.

Subsection (d)(11) was rearranged and rule text added or removed to clarify the TEA's practice for calculating the amount of excess collections, if any, to be applied to satisfy the IFA local share requirement.

Rule text that has expired was removed.

Rule text was modified in subsection (d)(2) to clarify requirements for timely submission of an application for funding of bonded debt service in accordance with the TEC, §46.003(h). New definitions were added as subsection (a)(6) for the state information repository (MAC) referenced throughout §61.1032 and as subsection (a)(7) to define sale date referenced in subsection (d)(2).

**SUMMARY OF COMMENTS AND AGENCY RESPONSES.** The public comment period on the proposal began April 20, 2018, and ended May 21, 2018. No public comments were received.

**STATUTORY AUTHORITY.** The amendment is adopted under Texas Education Code (TEC), §46.002, which permits the commissioner of education to adopt rules for the implementation of the TEC, Chapter 46, Subchapter A; TEC, §46.003, which provides for an allotment of state funds to certain school districts to pay the principal and interest on eligible bonds issued to

construct, acquire, renovate, or improve an instructional facility; TEC, §46.004, which permits a district to receive assistance in connection with a lease-purchase agreement concerning an instructional facility; TEC, §46.005, which provides for certain limits on the amount of state and local funds that a district may be awarded under TEC, §46.003; TEC, §46.006, which defines the process for allocating funding for new projects if the amount appropriated is less than the amount of money to which school districts applying for state assistance are entitled for that year; TEC, §46.007, which outlines the requirements for refunding bonds to be eligible for state assistance; TEC, §46.009, which provides for the amounts and timing of payments of state assistance to school districts; TEC, §46.013, which clarifies that school districts are not eligible for state assistance under TEC, Chapter 46, Subchapter A, for any taxes for which a district receives assistance under TEC, Chapter 42, Subchapter F; and TEC, §46.061, which permits the commissioner of education to adopt rules governing state assistance for refinancing school district debt. The commissioner may allocate state assistance for a refinancing to TEC, Chapter 46, Subchapter A.

**CROSS REFERENCE TO STATUTE.** The amendment implements Texas Education Code, §§46.002-46.007, 46.009, 46.013, and 46.061.

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 June 8, 2018.

TRD-201802546

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: June 28, 2018

Proposal publication date: April 20, 2018

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



## CHAPTER 74. CURRICULUM REQUIREMENTS

### SUBCHAPTER A. REQUIRED CURRICULUM

#### 19 TAC §74.5

The State Board of Education (SBOE) adopts an amendment to §74.5, concerning academic achievement records/transcripts. The amendment is adopted with changes to the proposed text as published in the March 9, 2018, issue of the *Texas Register* (43 TexReg 1353). The adopted amendment updates the section to align with recent changes to graduation and instructional requirements.

**REASONED JUSTIFICATION.** The 83rd Texas Legislature, Regular Session, 2013, passed House Bill (HB) 5, amending the Texas Education Code (TEC), §28.025, to change the high school graduation programs from the minimum, recommended, and advanced high school programs to one foundation high school program with endorsements to increase flexibility in graduation requirements for students.

In January 2014, the SBOE adopted rules to implement the Foundation High School Program, effective July 8, 2014. Under the Foundation High School Program, a specific speech course

is not a requirement to graduate; alternatively, to satisfy the speech requirement, a student must demonstrate proficiency, as determined by the district in which the student is enrolled, in a set of speech-related skills: delivering clear verbal messages; choosing effective nonverbal behaviors; listening for desired results; applying valid critical-thinking and problem-solving processes; and identifying, analyzing, developing, and evaluating communication skills needed for professional and social success in interpersonal situations, group interactions, and personal and professional presentations. In April 2014, the SBOE gave final approval for proposed revisions to 19 TAC Chapter 74, Subchapter A, to align with the requirements of HB 5, including changes to the required content for the academic achievement records/transcripts and diplomas.

In 2013, the 83rd Texas Legislature also passed HB 897, amending the TEC, §28.0023, to require that the SBOE include instruction in cardiopulmonary resuscitation (CPR) for students in Grades 7-12. The legislation also requires school districts and open-enrollment charter schools to provide instruction in CPR and for students to receive the CPR instruction at least once before graduation. The legislation specifies that the instruction may be provided as part of any course.

The 84th Texas Legislature, 2015, passed HB 181, amending the TEC, §28.025(c-1), (c-5), and (e-1), to remove the requirement that school districts and charter schools identify endorsements and performance acknowledgments on high school diplomas. Districts must still include this information on high school academic achievement records/transcripts. The SBOE approved a proposed amendment to 19 TAC §74.5 to align the rule for the academic achievement records with the requirements of HB 181 in April 2016.

The 85th Texas Legislature, Regular Session, 2017, passed SB 30, also known as the Community Safety Education Act. The legislation added TEC, §28.012, to require the SBOE to enter into a memorandum of understanding with the Texas Commission on Law Enforcement to establish the respective responsibilities of each agency in developing required instruction, including curriculum and instructional modules, on proper interaction with peace officers during traffic stops and other in-person encounters. SB 30 also required the SBOE to adopt rules to include the instruction on proper interaction with peace officers during traffic stops and other in-person encounters in one or more courses in the required curriculum for students in Grades 9-12. At its November 2017 meeting, the Committee of the Full Board discussed the requirements of the new legislation and the SBOE's rulemaking responsibility.

The 85th Texas Legislature, Regular Session, 2017, also passed SB 671, adding TEC, §28.025(b-21), to require that the SBOE adopt criteria to allow a student to satisfy one graduation credit toward the languages other than English requirement by successfully completing a dual language immersion program at an elementary school.

The adopted amendment to 19 TAC §74.5 updates the rule to require the academic achievement record to document the completion of requirements for speech, CPR instruction (if the instruction is provided in Grades 9-12), instruction on proper interaction with law enforcement, and completion of one language other than English credit requirement through successful completion of a dual language immersion program in elementary school. A technical change was approved at second reading and final adoption to update a cross reference in §74.5(l).

The SBOE approved the amendment for first reading and filing authorization at its February 2, 2018, meeting and for second reading and final adoption at its April 13, 2018, meeting.

The effective date of the amendment is August 27, 2018.

**SUMMARY OF COMMENTS AND RESPONSES.** Following is a summary of the public comments received on the proposal and the corresponding responses.

**Comment.** One administrator expressed concern about the proposed requirement to transcript whether a student satisfies a language other than English graduation credit by successfully completing a dual language immersion program at an elementary school.

**Response.** The SBOE disagrees and has determined that all credit earned must be recorded on the student academic achievement record (AAR).

**Comment.** One counselor and four administrators expressed concern about adding the completion of instruction on CPR and appropriate interactions with police officers to the AAR.

**Response.** The SBOE disagrees and has determined that it is essential to record on the AAR completion of instructional requirements, especially for students who transfer from one school to another.

**Comment.** One administrator expressed concern about adding the completion of instruction on appropriate interactions with police officers to the AAR.

**Response.** The SBOE disagrees and has determined that it is essential to record on the AAR completion of instructional requirements, especially for students who transfer from one school to another.

**Comment.** One counselor requested that the SBOE not adopt the proposed amendment to §74.5 that would require the completion of instruction on proper interaction with peace officers to be indicated on the AAR. The commenter stated that Texas public schools do not have the resources to provide the instruction and the unfunded mandate would put undue stress on schools, teachers, students, and counselors.

**Response.** The SBOE disagrees. The SBOE is required by state statute to adopt rules requiring instruction on proper interaction with peace officers during traffic stops and other in-person encounters in the required curriculum for students in Grades 9-12.

**Comment.** One teacher asked whether recording the completion of a one-half credit speech course on the AAR would satisfy the proposed requirement to report that the speech requirement for the Foundation High School Program has been met.

**Response.** The SBOE provides the following clarification. In accordance with 19 TAC §74.11(a)(3), students on the Foundation High School Program are required to demonstrate proficiency in certain speech skills. Local districts may determine how proficiency is to be demonstrated. One option is through a course.

**STATUTORY AUTHORITY.** The amendment is adopted under the Texas Education Code (TEC), §7.102(c)(13), which requires the State Board of Education (SBOE) to adopt transcript forms and standards for differentiating high school performance for purposes of reporting academic achievement under TEC, §28.025; TEC, §28.0023, which requires the SBOE to adopt rules to require instruction in cardiopulmonary resuscitation for students in Grades 7-12; and TEC, §28.025, which requires

the SBOE to adopt rules to include the instruction on proper interaction with peace officers during traffic stops and other in-person encounters in one or more courses in the required curriculum for students in Grades 9-12 and requires that the SBOE adopt criteria to allow a student to satisfy one graduation credit toward the languages other than English requirement by successfully completing a dual language immersion program at an elementary school.

**CROSS REFERENCE TO STATUTE.** The amendment implements the Texas Education Code, §§7.102(c)(13), 28.0023, and 28.025.

*§74.5. Academic Achievement Record (Transcript).*

(a) The commissioner of education shall develop and distribute to each school district and institution of higher education the state guidelines for a common academic achievement record and coding system for courses and instructions for recording information on the academic achievement record. Each school district must use the coding system provided by the commissioner.

(b) Following guidelines developed by the commissioner, each school district must use an academic achievement record (transcript) form that includes the following:

- (1) student demographics;
- (2) school data;
- (3) student data; and
- (4) the record of courses and credits earned.

(c) The academic achievement record shall serve as the academic record for each student and must be maintained permanently by the district. Each district must ensure that copies of the record are made available for a student transferring from one district to another. To ensure appropriate placement of a transfer student, a district must respond promptly to each request for student records from a receiving school district.

(d) Any credit earned by a student must be recorded on the academic achievement record, regardless of when the credit was earned.

(e) A student who completes high school graduation requirements shall have attached to the academic achievement record a seal approved by the SBOE.

(f) A student who completes the requirements for an endorsement shall have the endorsement clearly indicated on the academic achievement record.

(g) A student who earns a performance acknowledgment shall have the performance acknowledgment clearly indicated on the academic achievement record.

(h) A student who earns the distinguished level of achievement shall have the distinguished level of achievement clearly indicated on the academic achievement record.

(i) A student who demonstrates proficiency in speech as specified in §74.11(a)(3) of this title (relating to High School Graduation Requirements) shall have completion of the speech requirement clearly indicated on the academic achievement record.

(j) A student who completes the required instruction in cardiopulmonary resuscitation (CPR) as specified in §74.38 of this title (relating to Requirements for Instruction in Cardiopulmonary Resuscitation (CPR)) in Grade 9, 10, 11, or 12 shall have completion of the CPR instruction clearly indicated on the academic achievement record.

(k) A student who completes the required instruction on proper interaction with peace officers shall have completion of the instruction clearly indicated on the academic achievement record.

(l) A student who satisfies a languages other than English graduation credit requirement by successfully completing a dual language immersion program at an elementary school in accordance with §74.12(b)(5)(F) of this title (relating to Foundation High School Program) shall have the credit clearly indicated on the academic achievement record.

(m) A student who completes all graduation requirements except for required end-of-course assessment instruments may be issued a certificate of coursework completion. The academic achievement record will include a notation of the date such a certificate was issued to the student.

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 June 7, 2018.

TRD-201802525

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

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Proposal publication date: March 9, 2018

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



## SUBCHAPTER B. GRADUATION REQUIREMENTS

### 19 TAC §§74.11 - 74.14

The State Board of Education (SBOE) adopts amendments to §§74.11 - 74.14, concerning graduation requirements. The amendment to §74.11 is adopted without changes to the proposed text as published in the December 15, 2017, issue of the *Texas Register* (42 TexReg 7044) and will not be republished. The amendments to §§74.12 - 74.14 are adopted with changes to the proposed text as published in the December 15, 2017, issue of the *Texas Register* (42 TexReg 7044). The adopted amendments update the rules and align with recent legislative changes.

**REASONED JUSTIFICATION.** The 83rd Texas Legislature, Regular Session, 2013, passed House Bill (HB) 5, amending the Texas Education Code (TEC), §28.025, to transition from three high school graduation programs to one foundation high school program with endorsement options to increase flexibility for students. HB 5 gave the SBOE the authority to identify advanced courses related to the new graduation program, identify the curriculum requirements for the endorsements, and determine the requirements for performance acknowledgments related to the new graduation program.

The 85th Texas Legislature, Regular Session, 2017, passed Senate Bill (SB) 826, amending the TEC, §28.025(b-2), to eliminate course sequencing requirements in English language arts and reading and mathematics under the foundation high school program. HB 728, passed by the 85th Texas Legislature, Regular Session, 2017, added new TEC, §28.018, to require the SBOE by rule to develop and implement a program under which students may comply with the curriculum requirements for an

advanced mathematics credit or an advanced science credit by successfully completing an advanced computer science course. HB 3593, passed by the 85th Texas Legislature, Regular Session, 2017, amended TEC, §28.025(b-12), to allow students to comply with the curriculum requirements for two credits in a language other than English by substituting two credits in computer programming languages, including computer coding. HB 3593 also amended TEC, §28.025(c-1)(1), to add cybersecurity and computer coding to the courses to be included in a science, technology, engineering, and mathematics (STEM) endorsement. HB 3593 also added TEC, §28.025(c-10), to require the SBOE to adopt or select five technology applications courses to be included in a cybersecurity pathway for the STEM endorsement. SB 671, passed by the 85th Texas Legislature, Regular Session, 2017, added TEC, §28.025(b-21), to require the SBOE to adopt criteria to allow a student to comply with the curriculum requirement for one credit in a language other than English by successfully completing a dual language immersion program at an elementary school.

At the September 2017 meeting, the committee discussed changes to align the rules with recent legislative changes. At that time, the committee provided direction on proposed changes and requested that staff move forward with updates to the rule text reflecting the committee's direction to be presented for first reading and filing authorization. Changes to the rules would be effective beginning with the 2018-2019 school year. The SBOE approved proposed amendments to 19 TAC Chapter 74, Subchapter B, for first reading and filing authorization at the November 2017 meeting.

The SBOE considered the proposed amendments for second reading and final adoption at its January-February 2018 meeting and made additional amendments to §74.12 and §74.13. However, the SBOE postponed final action on the amendments until the April 2018 SBOE meeting. At the April 2018 meeting, the SBOE again considered the proposed amendments for second reading and final adoption and made further amendments to §§74.12 - 74.14.

Following is a description of the changes to 19 TAC Chapter 74, Subchapter B.

Section 74.11, High School Graduation Requirements, was amended to add the requirement that each district annually report to the Texas Education Agency the names of courses approved by the board of trustees and the institutions of higher education in which the district's students have enrolled as part of locally developed cybersecurity programs, as required by HB 3593. Section 74.11 was also amended to specify that a district must allow a student who successfully completes either Advanced Placement (AP) Computer Science A or International Baccalaureate (IB) Computer Science Higher Level to satisfy both a mathematics and languages other than English (LOTE) graduation requirement.

Section 74.12, Foundation High School Program, was amended to eliminate course sequencing requirements in English language arts and reading under the foundation high school program, as required by SB 826.

Section 74.12 was also amended to update language that references computer programming languages to include computer coding to align with HB 3593 and to add language specifying the criteria required for a student who successfully completes a dual language immersion program under TEC, §28.0051, at an elementary school to satisfy one credit of the two credits required

in a language other than English, as required by SB 671. Section 74.12 was also amended to clarify language regarding AP and IB courses that may satisfy specific graduation requirements and to update a course title to align with the new Texas Essential Knowledge and Skills for career and technical education adopted in 2015. Additionally, §74.12 was amended to add IB Computer Science Higher Level to the list of courses that may satisfy the third mathematics credit and AP Computer Science Principles, AP Computer Science A, IB Computer Science Standard Level, and IB Computer Science Higher Level to the list of computer programming courses that may satisfy the LOTE requirement.

Changes were made to §74.12 since published as proposed. Section 74.12(b)(5)(E)(i), relettered as §74.12(b)(5)(F)(i), was amended to clarify the requirements for successfully completing a dual language immersion program at an elementary school. In addition, new §74.12(b)(2)(C), (3)(D), and (5)(B) were added to specify that a single two-credit IB course in mathematics, science, or LOTE may only satisfy one mathematics, science, or LOTE requirement, respectively.

Additionally, §74.12(b)(5)(D), relettered as §74.12(b)(5)(E), was amended to clarify that a student with a disability may only substitute the languages other than English credits with other allowed academic courses if those courses are not being used to satisfy another specific graduation requirement.

Section 74.13, Endorsements, was amended to update the LOTE courses that may satisfy requirements for an arts and humanities endorsement and to allow certain AP and IB courses to satisfy requirements for four credits in English under a multidisciplinary studies endorsement. Section 74.13 was also amended to add IB Computer Science Higher Level to the list of courses that may satisfy the fourth mathematics credit required to earn an endorsement.

Changes were made to §74.13 since published as proposed. New §74.13(e)(5) and (6)(Y) were added to specify that a single two-credit IB course in mathematics or science may only satisfy one mathematics or science requirement, respectively. In addition, §74.13(f)(1)(A), (f)(2)(A)(xi), and (f)(3)(A)(vi) were amended to reflect the change of the name of the Problems and Solutions course to its new title, Project-Based Research.

Section 74.14, Performance Acknowledgments, was amended to update the number of subject tests on the ACT Aspire™ examination that are required to earn a performance acknowledgment and to update the qualifying score on the SAT® exam to a single composite score of 1310.

One change was made to §74.14 since published as proposed. A reference in §74.14(d)(3) to a composite score on the SAT was changed to total score.

The amendments were approved by the SBOE for first reading and filing authorization at its November 10, 2017, meeting and for second reading and final adoption at its April 13, 2018 meeting.

The effective date of the amendments is August 27, 2018.

**SUMMARY OF COMMENTS AND RESPONSES.** Following the November 2017 SBOE meeting, notice of the proposed amendments to 19 TAC §§74.11 - 74.14 was filed with the *Texas Register*, initiating the public comment period. Following is a summary of the public comments received and the corresponding responses.

**Comment.** One counselor expressed concern that districts are required to indicate multiple endorsements and/or performance acknowledgements on a student's academic achievement record.

**Response.** This comment is outside the scope of the proposed rulemaking.

**Comment.** One administrator expressed concern that the college preparatory course in English that districts are required to offer does not satisfy the English IV requirement under the multidisciplinary studies endorsement.

**Response.** The SBOE disagrees and has determined that the college preparatory course is not appropriate under this option for the multidisciplinary studies endorsement. The SBOE also provides the following clarification. There are additional options outlined in §74.13(f)(5)(A) and §74.13(f)(5)(C) that allow a student to earn the multidisciplinary studies endorsement without completing English IV.

**Comment.** One administrator stated that the sequencing provision in TEC, §28.014, which requires a student to complete the mathematics requirement for the Foundation High School Program before the student may earn credit for the college preparatory course in mathematics, is not included in the proposed amendments to the graduation requirements.

**Response.** The SBOE provides the following clarification. TEC, §28.014(e), states that a student may use credit earned through a college preparatory course in mathematics toward an advanced mathematics curriculum requirement after completion of the mathematics requirement for the Foundation High School Program, which includes Algebra I, Geometry, and an advanced mathematics course. In accordance with this requirement, §74.13(e)(5) states that the college preparatory mathematics course may count as the fourth mathematics course required to earn an endorsement.

**Comment.** Texas Computer Education Association expressed support for the proposed amendment to §74.11(k), which would allow students who successfully complete either AP Computer Science A or IB Computer Science Higher Level to satisfy both one advanced mathematics requirement and one LOTE requirement for graduation.

**Response.** The SBOE agrees and maintained language as proposed.

**Comment.** One community member expressed support for the proposed amendment to §74.12(b)(5)(A)(ii) to add AP Computer Science Principles, AP Computer Science A, IB Computer Science Standard Level, and IB Computer Science Higher Level to the list of courses that may satisfy the LOTE requirement for graduation.

**Response.** The SBOE agrees and maintained language as proposed.

**Comment.** One community member expressed support for the proposed amendment to §74.13(e)(2) to add IB Computer Science Higher Level to the list of courses that may satisfy the fourth mathematics credit requirement.

**Response.** The SBOE agrees and maintained language as proposed.

**Comment.** One teacher expressed concern that the proposed amendments to specify AP and IB courses that satisfy certain graduation requirements and endorsements do not include AP

and IB fine arts courses. The commenter stated that since these fine arts courses have been excluded, a student may not earn an arts and humanities endorsement under the fine arts option if the student is participating in AP or IB coursework.

Response. The SBOE disagrees. Students may earn the arts and humanities endorsement by completing a coherent sequence of four credits by selecting courses from one or two disciplines in fine arts from 19 TAC Chapter 117, Texas Essential Knowledge and Skills for Fine Arts. Multiple AP and IB courses are currently identified in 19 TAC Chapter 117 as fine arts courses and satisfy the arts and humanities endorsement requirement.

Comment. One administrator asked whether a student would be allowed to combine two different one-half credit fine arts courses to satisfy the fine arts requirement for graduation.

Response. The SBOE provides the following clarification. Section 74.26 allows districts to award proportionate credit to students who successfully complete only one semester of a two-semester course. Two one-half credits may be combined unless specifically prohibited by statute.

Comment. One administrator recommended requiring a health education course for graduation.

Response. The SBOE provides the following clarification. TEC, §28.025(a), prohibits the SBOE from designating a specific course or a specific number of credits in the enrichment curriculum as requirements for graduation. Any such changes would fall under the authority of the Texas Legislature.

Comment. One administrator asked for clarification regarding whether the LOTE substitution outlined in proposed §74.12(b)(5)(B) and (C) applies only to students receiving special education services and services under Section 504.

Response. The SBOE provides the following clarification. The exception allowed under proposed §74.12(b)(5)(B) and (C), relettered as §74.12(b)(5)(C) and (D) at adoption, are not limited to only students who receive special education or Section 504 services.

Comment. One administrator suggested that the SBOE clarify in proposed §74.12(b)(5)(D) whether a student may use credit already earned in English language arts, mathematics, science, social studies, career and technical education, or technology applications courses to substitute for the LOTE requirement.

Response. The SBOE agrees that additional clarification is necessary. The SBOE took action at second reading and final adoption to amend proposed §74.12(b)(5)(D), relettered as §74.12(b)(5)(E) at adoption, to specify that the substitution credits must be earned in English language arts, mathematics, science, social studies, career and technical education, or technology applications courses only if that course(s) is not being used to satisfy another specific graduation requirement.

Comment. One administrator suggested changing the requirement for participation in a dual language immersion program under proposed new §74.12(b)(5)(E) from five consecutive years of participation, including Grade 5, to four consecutive years of participation.

Response. The SBOE disagrees and has determined that five consecutive years of participation in a dual language immersion program was appropriate as proposed.

Comment. Two administrators expressed concern regarding the requirement in proposed new §74.12(b)(5)(E)(i)(II) that dual language students reach the "Meets" or "Masters" performance levels on the State of Texas Assessments of Academic Readiness (STAAR®) assessment in English and Spanish in order to satisfy one LOTE credit for graduation. The commenters stated that students who successfully complete the high school LOTE, Level I course are only at a novice level; therefore, the expectation that a student perform at the "Meets" or "Masters" levels is too high.

Response. The SBOE disagrees and has determined that the "Meets" and "Masters" performance levels are appropriate as proposed.

Comment. One administrator asked whether an English language learner in a two-way dual language program would be ineligible for the LOTE credit under proposed new §74.12(b)(5)(E) if the language proficiency assessment committee decided to exit the student out of the program in Grade 4.

Response. The SBOE provides the following clarification. To be eligible to earn one LOTE credit for graduation in accordance with proposed §74.12(b)(5)(E), relettered as §74.12(b)(5)(F) at adoption, a student must meet each component of the criteria as adopted, including participating in a dual language immersion program for at least five consecutive years.

Comment. One administrator asked whether proposed new §74.12(b)(5)(E)(i)(I) would apply to students who came into the country in the later elementary years. The commenter also asked whether the proposed amendment would apply to students who continued in a dual language program in middle school.

Response. The SBOE provides the following clarification. To be eligible to earn one LOTE credit for graduation in accordance with proposed §74.12(b)(5)(E), relettered as §74.12(b)(5)(F) at adoption, a student must meet each component of the criteria as adopted, including participating in a dual language immersion program in elementary school for at least five consecutive years.

Comment. One administrator asked if, according to proposed new §74.12(b)(5)(E)(i)(I), schools could add a year if a child was retained in elementary school.

Response. The SBOE provides the following clarification. To be eligible to earn one LOTE credit for graduation in accordance with proposed §74.12(b)(5)(E)(i)(I), relettered as §74.12(b)(5)(F)(i)(I) at adoption, a student must have participated in a dual language immersion program for at least five consecutive years. The rule does not address whether consecutive years in a grade level would impact the fulfillment of the requirement.

Comment. One administrator requested a definition of *five consecutive years* in proposed new §74.12(b)(5)(E)(i)(I). The commenter asked if students who transfer in and out of a dual language program would still be eligible to receive the one credit of LOTE for graduation requirements.

Response. The SBOE disagrees that a definition of *five consecutive years* is needed and determined that the language as proposed is sufficiently clear.

Comment. Two administrators suggested revising the wording of proposed new §74.12(b)(5)(E)(i)(II) to read English or Spanish, not English and Spanish because students do not take English and Spanish STAAR® tests.

Response. The SBOE agrees. In response to this and other comments, the SBOE took action at second reading and final adoption to amend proposed §74.12(b)(5)(E)(i)(II), relettered as §74.12(b)(5)(F)(i)(II) at adoption, to read "achieve high levels of academic competence as demonstrated by performance of meets or masters grade level on the State of Texas Assessments of Academic Readiness (STAAR®) in English or Spanish, as applicable."

Comment. One administrator asked whether all STAAR® subject areas are included in proposed new §74.12(b)(5)(E)(i)(II) or whether the amendment should say only reading.

Response. The SBOE provides the following clarification. The rule as adopted requires a student to achieve a score of "Meets" or "Masters" on any state-required STAAR® assessment at the grade level in which the student is enrolled.

Comment. One administrator asked whether students are required to achieve the "Meets" or "Masters" performance levels in Grades 3, 4, and 5 or whether the amendment requires students to achieve the "Meets" or "Masters" levels at only Grade 5. The commenter also asked whether students could meet this requirement by taking a second administration of the STAAR® test at Grade 5.

Response. The SBOE provides the following clarification. The rule as adopted requires a student to achieve a score of "Meets" or "Masters" on any state-required STAAR® assessment at each appropriate grade level.

Comment. One administrator expressed concern that some of the tests listed in proposed new §74.12(b)(5)(E)(i)(III) combine the listening and speaking domains and provide only an overall score. The commenter asked whether districts would be required to administer only the speaking questions on the test.

Response. The SBOE provides the following clarification. The language proficiency or achievement tests administered to a student in a dual language program are determined locally. It would, therefore, be up to the local district to determine which portions of the test must be administered to a student.

Comment. One administrator asked whether students would be required in proposed new §74.12(b)(5)(E)(i)(III) to take the assessments every year for five consecutive years or only in Grade 5.

Response. The SBOE provides the following clarification. The rule as adopted does not require administration of a language proficiency or achievement test each year. Proposed §74.12(b)(5)(E)(i)(III), relettered as §74.12(b)(5)(F)(i)(III) at adoption, requires a student to achieve a score of proficient or higher in the reading and speaking domains on language proficiency or achievement tests in both English and a language other than English at some point before completing the requirements in rule.

Comment. One administrator asked whether students who earned a LOTE credit under proposed new §74.12(b)(5)(E)(ii) could enroll in a second LOTE course in Grade 6 if they have already received the first LOTE credit in Grade 5.

Response. The SBOE provides the following clarification. Proposed §74.12(b)(5)(E)(ii), relettered as §74.12(b)(5)(F)(ii) at adoption, states that the second credit of a language other than English must be in the same language as the successfully completed dual language immersion program. Section 74.26(b)

allows districts to offer courses designated for Grades 9-12, including high school LOTE courses, in earlier grade levels.

Comment. One administrator asked how proposed new §74.12(b)(5)(E)(ii) would affect students' grade point average in high school.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. One administrator asked whether, under proposed new §74.12(b)(5)(E)(ii), students can take an AP Language and Literacy course in middle school and, if so, how this would impact a district's accountability rating.

Response. This comment is outside the scope of the proposed rulemaking.

Comment. One administrator asked for a definition of *proficiency* in proposed new §74.12(b)(5)(E)(i)(III).

Response. The SBOE disagrees that a definition of *proficiency* is needed in the rule. Proficiency would be determined by the language proficiency levels established by the specific assessment being used.

Comment. One administrator suggested that it is not necessary in proposed new §74.12(b)(5)(E) for students to show proficiency in English if the LOTE credit is for a language other than English.

Response. The SBOE agrees. In response to this and other comments, the SBOE took action at second reading and final adoption to amend §74.12(b)(5)(E)(i)(II), relettered as §74.12(b)(5)(F)(i)(II) at adoption, to read "achieve high levels of academic competence as demonstrated by performance of meets or masters grade level on the State of Texas Assessments of Academic Readiness (STAAR®) in English or Spanish, as applicable."

Comment. One administrator asked whether proposed new §74.12(b)(5)(E) would be applicable to students who are enrolled in a Spanish-language immersion program.

Response. The SBOE provides the following clarification. The language of instruction under proposed §74.12(b)(5)(E), relettered as §74.12(b)(5)(F) at adoption, is not identified or limited to any one specific language other than English.

Comment. One administrator stated that Senate Bill (SB) 826 changed the sequencing requirement for mathematics on the Foundation High School Program; however, no changes are proposed for §74.13(e)(2)(P), which states that students must successfully complete Algebra I and Geometry before taking a locally developed mathematics course to satisfy the fourth mathematics credit requirement.

Response. The SBOE provides the following clarification. SB 826, 85th Texas Legislature, Regular Session, 2017, amended TEC, §28.025(b-2)(1), to eliminate the sequencing requirement for the English language arts and reading and mathematics curriculum requirements on the Foundation High School Program only. TEC, §28.002(g-1), outlines a sequence requirement specific to locally developed mathematics and science courses that were not impacted by SB 826.

Comment. One counselor asked whether students who will be seniors next year would be able to apply the proposed new scale scores for the performance acknowledgement in §74.14(d)(3) to SAT examinations they took prior to the 2018-2019 school year.

Response. The SBOE provides the following clarification. The adopted amendments to Chapter 74, Subchapter B, will be effective on August 27, 2018, and applicable to students enrolled during the 2018-2019 school year.

STATUTORY AUTHORITY. The amendments are adopted under the Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; TEC, §28.002, as amended by House Bill (HB) 3593, 85th Texas Legislature, Regular Session, 2017, which identifies the subjects of the required curriculum and requires the SBOE by rule to identify the essential knowledge and skills of each subject in the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the state assessment instruments; TEC, §28.018, as added by HB 728, 85th Texas Legislature, Regular Session, 2017, which requires the SBOE by rule to develop and implement a program under which students may comply with the curriculum requirements for an advanced mathematics credit or an advanced science credit by successfully completing an advanced computer science course; TEC, §28.025(a), which requires the SBOE by rule to determine the curriculum requirements for the foundation high school program that are consistent with the required curriculum and to designate the specific courses in the foundation curriculum that are required under the foundation high school program; TEC, §28.025(b-1), which requires the SBOE by rule to require that the curriculum requirements for the foundation high school program include a requirement that students successfully complete four credits in English language arts, including one credit in English I, one credit in English II, one credit in English III, and one credit in an advanced English course; three credits in mathematics, including one credit in Algebra I, one credit in geometry, and one credit in any advanced mathematics course; three credits in science, including one credit in biology, one credit in any advanced science course, and one credit in integrated physics and chemistry or in an additional advanced science course; three credits in social studies, including one credit in United States history, at least one-half credit in government and at least one-half credit in economics, and one credit in world geography or world history; two credits in the same language in a language other than English; five elective credits; one credit in fine arts; and one credit in physical education; TEC, §28.025(b-2), as amended by Senate Bill 826, 85th Texas Legislature, Regular Session, 2017, which requires the SBOE, in adopting rules, to provide for a student to comply with the curriculum requirements for an advanced English course, advanced mathematics course, and an advanced science course by successfully completing a course in the appropriate content area that has been approved as an advanced course by board rule or that is offered as an advanced course for credit without board approval as provided by the TEC, §28.002(g-1). TEC, §28.025(b-2), also requires the SBOE, in adopting rules, to allow a student to comply with the curriculum requirements for the third and fourth mathematics credits or the third and fourth science credits under the TEC, §28.025(b-1)(1), by successfully completing an advanced career and technical education course designated by the SBOE as containing substantively similar and rigorous academic content; TEC, §28.025(b-3), which requires the SBOE, in adopting rules for purposes of the TEC, §28.025(b-2), to approve a variety of advanced English, mathematics, and science courses that may be taken to comply with the foundation high school program requirements, provided that each approved course prepares students to enter the workforce

successfully or postsecondary education without remediation; and TEC, §28.025(c-2), which requires the SBOE, in adopting rules, to require a student in order to earn any endorsement to successfully complete four credits in mathematics, which must include Algebra I, geometry, and two advanced mathematics courses; four credits in science, which must include biology, integrated physics and chemistry or an additional advanced science course, and two advanced science courses or an advanced career and technology course; and two additional elective credits. The SBOE, in adopting rules, is also required to develop additional curriculum requirements for each endorsement with the direct participation of educators and business, labor, and industry representatives and to require each school district to report to the agency the categories of endorsements for which the district offers all courses for curriculum requirements, as determined by board rule.

CROSS REFERENCE TO STATUTE. The amendments implement the Texas Education Code, §§7.102(c)(4); 28.002; 28.018; and 28.025.

§74.12. *Foundation High School Program.*

(a) Credits. A student must earn at least 22 credits to complete the Foundation High School Program.

(b) Core courses. A student must demonstrate proficiency in the following.

(1) English language arts—four credits. Two of the credits must consist of English I and II. (Students with limited English proficiency who are at the beginning or intermediate level of English language proficiency, as defined by §74.4(d) of this title (relating to English Language Proficiency Standards), may satisfy the English I and English II graduation requirements by successfully completing English I for Speakers of Other Languages and English II for Speakers of Other Languages.) A third credit must consist of English III or a comparable Advanced Placement (AP) or International Baccalaureate (IB) English language arts course that does not count toward another credit required for graduation. A fourth credit may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses:

- (A) English IV;
- (B) Independent Study in English;
- (C) Literary Genres;
- (D) Creative Writing;
- (E) Research and Technical Writing;
- (F) Humanities;
- (G) Public Speaking III;
- (H) Communication Applications, which must be combined with another half credit from the other courses listed in subparagraphs (A)-(G) and (I)-(S) of this paragraph;
- (I) Oral Interpretation III;
- (J) Debate III;
- (K) Independent Study in Speech;
- (L) Independent Study in Journalism;
- (M) Advanced Broadcast Journalism III;
- (N) Advanced Journalism: Newspaper III;
- (O) Advanced Journalism: Yearbook III;



(P) a comparable Advanced Placement (AP) or International Baccalaureate (IB) English language arts course that does not count toward another credit required for graduation;

(Q) after the successful completion of English I, II, and III, a locally developed English language arts course or other activity, including an apprenticeship or training hours needed to obtain an industry-recognized credential or certificate that is developed pursuant to the Texas Education Code (TEC), §28.002(g-1);

(R) Business English; and

(S) a college preparatory English language arts course that is developed pursuant to the TEC, §28.014.

(2) Mathematics--three credits. Two of the credits must consist of Algebra I and Geometry.

(A) The additional credit may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses or a credit selected from the courses listed in subparagraph (B) of this paragraph:

- (i) Mathematical Models with Applications;
- (ii) Mathematical Applications in Agriculture, Food, and Natural Resources;
- (iii) Digital Electronics;
- (iv) Robotics Programming and Design;
- (v) Financial Mathematics;
- (vi) Applied Mathematics for Technical Professionals;
- (vii) Accounting II;
- (viii) Manufacturing Engineering Technology II;
- (ix) Robotics II.

(B) The additional credit may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses:

- (i) Algebra II;
- (ii) Precalculus;
- (iii) Advanced Quantitative Reasoning;
- (iv) Independent Study in Mathematics;
- (v) Discrete Mathematics for Problem Solving;
- (vi) Algebraic Reasoning;
- (vii) Statistics;
- (viii) a comparable AP or IB mathematics course that does not count toward another credit required for graduation;
- (ix) AP Computer Science A;
- (x) IB Computer Science Higher Level;
- (xi) Engineering Mathematics;
- (xii) Statistics and Business Decision Making;
- (xiii) Mathematics for Medical Professionals;
- (xiv) Discrete Mathematics for Computer Science;

(xv) pursuant to the TEC, §28.025(b-5), after the successful completion of Algebra II, a mathematics course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The Texas Education Agency (TEA) shall maintain a current list of courses offered under this subparagraph; and

(xvi) after the successful completion of Algebra I and Geometry, a locally developed mathematics course or other activity, including an apprenticeship or training hours needed to obtain an industry-recognized credential or certificate that is developed pursuant to the TEC, §28.002(g-1).

(C) A single two-credit IB mathematics course may only satisfy one mathematics requirement.

(3) Science--three credits. One credit must consist of Biology or a comparable AP or IB biology course.

(A) One credit must be selected from the following laboratory-based courses:

- (i) Integrated Physics and Chemistry;
- (ii) Chemistry;
- (iii) Physics;
- (iv) Principles of Technology; and

(v) a comparable AP or IB chemistry or physics course that does not count toward another credit required for graduation.

(B) The additional credit may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following laboratory-based courses:

- (i) Chemistry;
- (ii) Physics;
- (iii) Aquatic Science;
- (iv) Astronomy;
- (v) Earth and Space Science;
- (vi) Environmental Systems;
- (vii) a comparable AP or IB science course that does not count toward another credit required for graduation;
- (viii) Advanced Animal Science;
- (ix) Advanced Plant and Soil Science;
- (x) Anatomy and Physiology;
- (xi) Medical Microbiology;
- (xii) Pathophysiology;
- (xiii) Food Science;
- (xiv) Forensic Science;
- (xv) Biotechnology I;
- (xvi) Biotechnology II;
- (xvii) Principles of Technology;
- (xviii) Scientific Research and Design;
- (xix) Engineering Design and Problem Solving;

(xx) Engineering Science;

(xxi) pursuant to the TEC, §28.025(b-5), after the successful completion of physics, a science course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The TEA shall maintain a current list of courses offered under this clause; and

(xxii) a locally developed science course or other activity, including an apprenticeship or training hours needed to obtain an industry-recognized credential or certificate that is developed pursuant to the TEC, §28.002(g-1).

(C) Credit may not be earned for both physics and Principles of Technology to satisfy science credit requirements.

(D) A single two-credit IB science course may only satisfy one science requirement.

(4) Social studies--three credits. Two of the credits must consist of United States History Studies Since 1877 (one credit), United States Government (one-half credit), and Economics with Emphasis on the Free Enterprise System and Its Benefits (one-half credit). The additional credit may be selected from the following courses:

(A) World History Studies; and

(B) World Geography Studies; and

(C) a comparable AP or IB world history or world geography course that does not count toward another credit required for graduation.

(5) Languages other than English (LOTE)--two credits.

(A) The credits may be selected from the following:

(i) any two levels in the same language, including comparable AP or IB language courses that do not count toward another credit required for graduation; or

(ii) two credits in computer programming languages, including computer coding, to be selected from Computer Science I, II, and III, AP Computer Science Principles, AP Computer Science A, IB Computer Science Standard Level, and IB Computer Science Higher Level.

(B) A single two-credit IB LOTE course may only satisfy one LOTE requirement.

(C) If a student, in completing the first credit of LOTE, demonstrates that the student is unlikely to be able to complete the second credit, the student may substitute another appropriate course as follows:

(i) Special Topics in Language and Culture;

(ii) World History Studies or World Geography Studies for a student who is not required to complete both by the local district;

(iii) another credit selected from Chapter 114 of this title (relating to Texas Essential Knowledge and Skills for Languages Other Than English); or

(iv) computer programming languages, including computer coding.

(D) The determination regarding a student's ability to complete the second credit of LOTE must be agreed to by:

(i) the teacher of the first LOTE credit course or another LOTE teacher designated by the school district, the principal or

designee, and the student's parent or person standing in parental relation;

(ii) the student's admission, review, and dismissal (ARD) committee if the student receives special education services under the TEC, Chapter 29, Subchapter A; or

(iii) the committee established for the student under Section 504, Rehabilitation Act of 1973 (29 United States Code, Section 794) if the student does not receive special education services under the TEC, Chapter 29, Subchapter A, but is covered by the Rehabilitation Act of 1973.

(E) A student, who due to a disability, is unable to complete two credits in the same language in a language other than English, may substitute a combination of two credits that are not being used to satisfy another specific graduation requirement selected from English language arts, mathematics, science, or social studies or two credits in career and technical education or technology applications for the LOTE credit requirements. The determination regarding a student's ability to complete the LOTE credit requirements will be made by:

(i) the student's ARD committee if the student receives special education services under the TEC, Chapter 29, Subchapter A; or

(ii) the committee established for the student under Section 504, Rehabilitation Act of 1973 (29 United States Code, Section 794) if the student does not receive special education services under the TEC, Chapter 29, Subchapter A, but is covered by the Rehabilitation Act of 1973.

(F) A student who successfully completes a dual language immersion/two-way or dual language immersion/one-way program in accordance with §89.1210(d)(3) and (4) of this title (relating to Program Content and Design), §89.1227 of this title (relating to Minimum Requirements for Dual Language Immersion Program Model), and §89.1228 of this title (relating to Dual Language Immersion Program Model Implementation) at an elementary school may satisfy one credit of the two credits required in a language other than English.

(i) To successfully complete a dual language immersion program, a student must:

(I) have participated in a dual language immersion program for at least five consecutive school years;

(II) achieve high levels of academic competence as demonstrated by performance of meets or masters grade level on the State of Texas Assessments of Academic Readiness (STAAR®) in English or Spanish, as applicable; and

(III) achieve proficiency in both English and a language other than English as demonstrated by scores of proficient or higher in the reading and speaking domains on language proficiency or achievement tests in both languages.

(ii) The second credit of a language other than English must be in the same language as the successfully completed dual language immersion program.

(6) Physical education--one credit.

(A) The required credit may be selected from any combination of the following one-half to one credit courses:

(i) Foundations of Personal Fitness;

(ii) Adventure/Outdoor Education;

(iii) Aerobic Activities; and

(iv) Team or Individual Sports.

(B) In accordance with local district policy, the required credit may be earned through completion of any Texas essential knowledge and skills-based course that meets the requirement in subparagraph (E) of this paragraph for 100 minutes of moderate to vigorous physical activity per five-day school week and that is not being used to satisfy another specific graduation requirement.

(C) In accordance with local district policy, credit for any of the courses listed in subparagraph (A) of this paragraph may be earned through participation in the following activities:

(i) Athletics;  
(ii) Junior Reserve Officer Training Corps (JROTC); and

(iii) appropriate private or commercially sponsored physical activity programs conducted on or off campus. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in physical education. Such approval may be granted under the following conditions.

(I) Olympic-level participation and/or competition includes a minimum of 15 hours per week of highly intensive, professional, supervised training. The training facility, instructors, and the activities involved in the program must be certified by the superintendent to be of exceptional quality. Students qualifying and participating at this level may be dismissed from school one hour per day. Students dismissed may not miss any class other than physical education.

(II) Private or commercially sponsored physical activities include those certified by the superintendent to be of high quality and well supervised by appropriately trained instructors. Student participation of at least five hours per week must be required. Students certified to participate at this level may not be dismissed from any part of the regular school day.

(D) In accordance with local district policy, up to one credit for any one of the courses listed in subparagraph (A) of this paragraph may be earned through participation in any of the following activities:

- (i) Drill Team;
- (ii) Marching Band; and
- (iii) Cheerleading.

(E) All substitution activities allowed in subparagraphs (B)-(D) of this paragraph must include at least 100 minutes per five-day school week of moderate to vigorous physical activity.

(F) Credit may not be earned more than once for any course identified in subparagraph (A) of this paragraph. No more than four substitution credits may be earned through any combination of substitutions allowed in subparagraphs (B)-(D) of this paragraph.

(G) A student who is unable to participate in physical activity due to disability or illness may substitute an academic elective credit (English language arts, mathematics, science, or social studies) or a course that is offered for credit as provided by the TEC, §28.002(g-1), for the physical education credit requirement. The determination regarding a student's ability to participate in physical activity will be made by:

(i) the student's ARD committee if the student receives special education services under the TEC, Chapter 29, Subchapter A;

(ii) the committee established for the student under Section 504, Rehabilitation Act of 1973 (29 United States Code, Sec-

tion 794) if the student does not receive special education services under the TEC, Chapter 29, Subchapter A, but is covered by the Rehabilitation Act of 1973; or

(iii) a committee established by the school district of persons with appropriate knowledge regarding the student if each of the committees described by clauses (i) and (ii) of this subparagraph is inapplicable. This committee shall follow the same procedures required of an ARD or a Section 504 committee.

(7) Fine arts--one credit.

(A) The credit may be selected from the following courses subject to prerequisite requirements:

- (i) Art, Level I, II, III, or IV;
- (ii) Dance, Level I, II, III, or IV;
- (iii) Music, Level I, II, III, or IV;
- (iv) Music Studies;
- (v) Theatre, Level I, II, III, or IV;
- (vi) Musical Theatre, Level I, II, III, or IV;
- (vii) Technical Theatre, Level I, II, III, or IV;
- (viii) Floral Design;
- (ix) Digital Art and Animation; and
- (x) 3-D Modeling and Animation.

(B) In accordance with local district policy, credit may be earned through participation in a community-based fine arts program not provided by the school district in which the student is enrolled. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in fine arts. Approval may be granted if the fine arts program provides instruction in the essential knowledge and skills identified for a fine arts course as defined by Chapter 117, Subchapter C, of this title (relating to High School, Adopted 2013).

(c) Elective courses--five credits. The credits must be selected from the list of courses specified in §74.11(g) or (h) of this title (relating to High School Graduation Requirements) or from a locally developed course or activity developed pursuant to the TEC, §28.002(g-1), for which a student may receive credit and that does not satisfy a specific course requirement.

(d) Substitutions. No substitutions are allowed in the Foundation High School Program, except as specified in this chapter.

§74.13. *Endorsements.*

(a) A student shall specify in writing an endorsement the student intends to earn upon entering Grade 9.

(b) A district shall permit a student to enroll in courses under more than one endorsement before the student's junior year and to choose, at any time, to earn an endorsement other than the endorsement the student previously indicated. This section does not entitle a student to remain enrolled to earn more than 26 credits.

(c) A student must earn at least 26 credits to earn an endorsement.

(d) A school district may define advanced courses and determine a coherent sequence of courses for an endorsement area, provided that prerequisites in Chapters 110-118, 126, 127, and 130 of this title are followed.

(e) To earn an endorsement a student must demonstrate proficiency in the following.

(1) The curriculum requirements for the Foundation High School Program as defined by §74.12 of this title (relating to Foundation High School Program).

(2) A fourth credit in mathematics that may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses:

- (A) Algebra II;
- (B) Precalculus;
- (C) Advanced Quantitative Reasoning;
- (D) Independent Study in Mathematics;
- (E) Discrete Mathematics for Problem Solving;
- (F) Algebraic Reasoning;
- (G) Statistics;

(H) a comparable Advanced Placement (AP) or International Baccalaureate (IB) mathematics course that does not count toward another credit required for graduation;

- (I) AP Computer Science A;
- (J) IB Computer Science Higher Level;
- (K) Engineering Mathematics;
- (L) Statistics and Business Decision Making;
- (M) Mathematics for Medical Professionals;
- (N) Discrete Mathematics for Computer Science;

(O) pursuant to the Texas Education Code (TEC), §28.025(b-5), after the successful completion of Algebra II, a mathematics course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The Texas Education Agency (TEA) shall maintain a current list of courses offered under this subparagraph; and

(P) after the successful completion of Algebra I and Geometry, a locally developed mathematics course or other activity, including an apprenticeship or training hours needed to obtain an industry-recognized credential or certificate that is developed pursuant to the TEC, §28.002(g-1).

(3) A student may complete a course listed in paragraph (2) of this subsection before or after completing a course listed in §74.12(b)(2)(A) of this title.

(4) The fourth mathematics credit may be a college preparatory mathematics course that is developed and offered pursuant to the TEC, §28.014.

(5) A single two-credit IB mathematics course may only satisfy one mathematics requirement.

(6) An additional credit in science that may be selected from one full credit or a combination of two half credits from two different courses, subject to prerequisite requirements, from the following courses:

- (A) Chemistry;
- (B) Physics;
- (C) Aquatic Science;
- (D) Astronomy;

(E) Earth and Space Science;

(F) Environmental Systems;

(G) a comparable AP or IB science course that does not count toward another credit required for graduation;

(H) Advanced Animal Science;

(I) Advanced Plant and Soil Science;

(J) Anatomy and Physiology;

(K) Medical Microbiology;

(L) Pathophysiology;

(M) Food Science;

(N) Forensic Science;

(O) Biotechnology I;

(P) Biotechnology II;

(Q) Principles of Technology;

(R) Scientific Research and Design;

(S) Engineering Design and Problem Solving;

(T) Engineering Science;

(U) pursuant to the TEC, §28.025(b-5), after the successful completion of physics, a science course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The TEA shall maintain a current list of courses offered under this subparagraph;

(V) a locally developed science course or other activity, including an apprenticeship or training hours needed to obtain an industry-recognized credential or certificate that is developed pursuant to the TEC, §28.002(g-1);

(W) pursuant to the TEC, §28.025(c-3), a student pursuing an arts and humanities endorsement who has the written permission of the student's parent or a person standing in parental relation to the student may substitute a course that is not being used to satisfy another specific graduation requirement selected from:

(i) Chapter 110 of this title (relating to Texas Essential Knowledge and Skills for English Language Arts and Reading);

(ii) Chapter 113 of this title (relating to Texas Essential Knowledge and Skills for Social Studies) or Chapter 118 of this title (relating to Texas Essential Knowledge and Skills for Economics with Emphasis on the Free Enterprise System and Its Benefits);

(iii) Chapter 114 of this title (relating to Texas Essential Knowledge and Skills for Languages Other Than English); or

(iv) Chapter 117 of this title (relating to Texas Essential Knowledge and Skills for Fine Arts); and

(X) credit may not be earned for both physics and Principles of Technology to satisfy science credit requirements.

(Y) A single two-credit IB science course may only satisfy one science requirement.

(7) Two additional elective credits that may be selected from the list of courses specified in §74.11(g) or (h) of this title (relating to High School Graduation Requirements).

(f) A student may earn any of the following endorsements.

(1) Science, technology, engineering, and mathematics (STEM). A student may earn a STEM endorsement by completing the requirements specified in subsection (e) of this section, including Algebra II, chemistry, and physics or Principles of Technology and:

(A) a coherent sequence of courses for four or more credits in career and technical education (CTE) that consists of at least two courses in the same career cluster and at least one advanced CTE course. The courses may be selected from Chapter 130 of this title (relating to Texas Essential Knowledge and Skills for Career and Technical Education), Chapter 127 of this title (relating to Texas Essential Knowledge and Skills for Career Development), or CTE innovative courses approved by the commissioner of education. The final course in the sequence must be selected from Chapter 130, Subchapter O, of this title (relating to Science, Technology, Engineering, and Mathematics) or Career Preparation I or II and Project-Based Research in Chapter 127, Subchapter B, of this title (relating to High School), if the course addresses a STEM-related field; or

(B) a coherent sequence of four credits in computer science selected from the following:

- (i) Fundamentals of Computer Science; or
- (ii) Computer Science I; or
- (iii) Computer Science II; or
- (iv) Computer Science III; or
- (v) Digital Forensics; or
- (vi) Discrete Mathematics for Computer Science; or
- (vii) Game Programming and Design; or
- (viii) Mobile Application Development; or
- (ix) Robotics Programming and Design; or
- (x) Independent Studies in Technology Applications; or
- (xi) AP Computer Science A; or
- (xii) AP Computer Science Principles; or
- (xiii) IB Computer Science, Standard Level; or
- (xiv) IB Computer Science, Higher Level; or

(C) three credits in mathematics by successfully completing Algebra II and two additional mathematics courses for which Algebra II is a prerequisite by selecting courses from subsection (e)(2) of this section; or

(D) four credits in science by successfully completing chemistry, physics, and two additional science courses by selecting courses from subsection (e)(5) of this section; or

(E) in addition to Algebra II, chemistry, and physics, a coherent sequence of three additional credits from no more than two of the categories or disciplines represented by subparagraphs (A), (B), (C), and (D) of this paragraph.

(2) Business and industry. A student may earn a business and industry endorsement by completing the requirements specified in subsection (e) of this section and:

(A) a coherent sequence of courses for four or more credits in CTE that consists of at least two courses in the same career cluster and at least one advanced CTE course. The courses may be selected from Chapter 130 of this title, Chapter 127 of this title, or CTE innovative courses approved by the commissioner. The final course in the sequence must be selected from one of the following:

(i) Chapter 130, Subchapter A, of this title (relating to Agriculture, Food, and Natural Resources); or

(ii) Chapter 130, Subchapter B, of this title (relating to Architecture and Construction); or

(iii) Chapter 130, Subchapter C, of this title (relating to Arts, Audio/Video Technology, and Communications); or

(iv) Chapter 130, Subchapter D, of this title (relating to Business Management and Administration); or

(v) Chapter 130, Subchapter F, of this title (relating to Finance); or

(vi) Chapter 130, Subchapter I, of this title (relating to Hospitality and Tourism); or

(vii) Chapter 130, Subchapter K, of this title (relating to Information Technology); or

(viii) Chapter 130, Subchapter M, of this title (relating to Manufacturing); or

(ix) Chapter 130, Subchapter N, of this title (relating to Marketing); or

(x) Chapter 130, Subchapter P, of this title (relating to Transportation, Distribution, and Logistics); or

(xi) Career Preparation I or II and Project-Based Research in Chapter 127, Subchapter B, of this title if the course addresses a career from a field listed in clauses (i)-(x) of this subparagraph; or

(B) four English credits by selecting courses from Chapter 110 of this title to include three levels in one of the following areas:

- (i) public speaking; or
- (ii) debate; or
- (iii) advanced broadcast journalism; or
- (iv) advanced journalism: newspaper; or
- (v) advanced journalism: yearbook; or
- (vi) advanced journalism: literary magazine; or

(C) four technology applications credits by selecting from the following:

- (i) Digital Design and Media Production; or
- (ii) Digital Art and Animation; or
- (iii) 3-D Modeling and Animation; or
- (iv) Digital Communications in the 21st Century; or
- (v) Digital Video and Audio Design; or
- (vi) Web Communications; or
- (vii) Web Design; or
- (viii) Web Game Development; or
- (ix) Independent Study in Evolving/Emerging Technologies; or

(D) a coherent sequence of four credits from subparagraph (A), (B), or (C) of this paragraph.

(3) Public services. A student may earn a public services endorsement by completing the requirements specified in subsection (e) of this section and:

(A) a coherent sequence of courses for four or more credits in CTE that consists of at least two courses in the same career cluster and at least one advanced CTE course. The courses may be selected from Chapter 130 of this title, Chapter 127 of this title, or CTE innovative courses approved by the commissioner. The final course in the sequence must be selected from one of the following:

(i) Chapter 130, Subchapter E, of this title (relating to Education and Training); or

(ii) Chapter 130, Subchapter G, of this title (relating to Government and Public Administration); or

(iii) Chapter 130, Subchapter H, of this title (relating to Health Science); or

(iv) Chapter 130, Subchapter J, of this title (relating to Human Services); or

(v) Chapter 130, Subchapter L, of this title (relating to Law, Public Safety, Corrections, and Security); or

(vi) Career Preparation I or II and Project-Based Research in Chapter 127, Subchapter B, of this title if the course addresses a field from a cluster listed in clauses (i)-(v) of this subparagraph; or

(B) four courses in Junior Reserve Officer Training Corps (JROTC).

(4) Arts and humanities. A student may earn an arts and humanities endorsement by completing the requirements specified in subsection (e) of this section and:

(A) five social studies credits by selecting courses from Chapter 113 of this title or Chapter 118 of this title (relating to Texas Essential Knowledge and Skills for Economics with Emphasis on the Free Enterprise System and Its Benefits); or

(B) four levels of the same language in a language other than English by selecting courses in accordance with Chapter 114 of this title, which may include Advanced Language for Career Applications; or

(C) two levels of the same language in a language other than English and two levels of a different language in a language other than English by selecting courses in accordance with Chapter 114 of this title; or

(D) four levels of American sign language by selecting courses in accordance with Chapter 114 of this title; or

(E) a coherent sequence of four credits by selecting courses from one or two categories or disciplines in fine arts from Chapter 117 of this title or innovative courses approved by the commissioner; or

(F) four English credits by selecting from the following:

(i) English IV; or

(ii) Independent Study in English; or

(iii) Literary Genres; or

(iv) Creative Writing; or

(v) Research and Technical Writing; or

(vi) Humanities; or

(vii) Communication Applications; or

(viii) AP English Literature and Composition; or

(ix) AP English Language and Composition; or

(x) IB Language Studies A: Language and Literature Standard Level; or

(xi) IB Language Studies A: Language and Literature Higher Level; or

(xii) IB Language Studies A: Literature Standard Level; or

(xiii) IB Language Studies A: Literature Higher Level; or

(xiv) IB Literature and Performance Standard Level.

(5) Multidisciplinary studies. A student may earn a multidisciplinary studies endorsement by completing the requirements specified in subsection (e) of this section and:

(A) four advanced courses that prepare a student to enter the workforce successfully or postsecondary education without remediation from within one endorsement area or among endorsement areas that are not in a coherent sequence; or

(B) four credits in each of the four foundation subject areas to include chemistry and/or physics and English IV or a comparable AP or IB English course; or

(C) four credits in Advanced Placement, International Baccalaureate, or dual credit selected from English, mathematics, science, social studies, economics, languages other than English, or fine arts.

(g) A course completed as part of the set of four courses needed to satisfy an endorsement requirement may also satisfy a requirement under §74.12(b) and (c) of this title and subsection (e)(2), (4), (5), and (6) of this section, including an elective requirement. The same course may count as part of the set of four courses for more than one endorsement.

#### §74.14. Performance Acknowledgments.

(a) A student may earn a performance acknowledgment on the student's transcript for outstanding performance in a dual credit course by successfully completing:

(1) at least 12 hours of college academic courses, including those taken for dual credit as part of the Texas core curriculum, and advanced technical credit courses, including locally articulated courses, with a grade of the equivalent of 3.0 or higher on a scale of 4.0; or

(2) an associate degree while in high school.

(b) A student may earn a performance acknowledgment on the student's transcript for outstanding performance in bilingualism and biliteracy as follows.

(1) A student may earn a performance acknowledgment by demonstrating proficiency in accordance with local school district grading policy in two or more languages by:

(A) completing all English language arts requirements and maintaining a minimum grade point average (GPA) of the equivalent of 80 on a scale of 100; and

(B) satisfying one of the following:

(i) completion of a minimum of three credits in the same language in a language other than English with a minimum GPA of the equivalent of 80 on a scale of 100; or

(ii) demonstrated proficiency in the Texas Essential Knowledge and Skills for Level IV or higher in a language other than English with a minimum GPA of the equivalent of 80 on a scale of 100; or

(iii) completion of at least three credits in foundation subject area courses in a language other than English with a minimum GPA of 80 on a scale of 100; or

(iv) demonstrated proficiency in one or more languages other than English through one of the following methods:

(I) a score of 3 or higher on a College Board Advanced Placement examination for a language other than English; or

(II) a score of 4 or higher on an International Baccalaureate examination for a higher-level language other than English course; or

(III) performance on a national assessment of language proficiency in a language other than English of at least Intermediate High or its equivalent.

(2) In addition to meeting the requirements of paragraph (1) of this subsection, to earn a performance acknowledgment in bilingualism and biliteracy, an English language learner must also have:

(A) participated in and met the exit criteria for a bilingual or English as a second language (ESL) program; and

(B) scored at the Advanced High level on the Texas English Language Proficiency Assessment System (TELPAS).

(c) A student may earn a performance acknowledgment on the student's transcript for outstanding performance on a College Board Advanced Placement test or International Baccalaureate examination by earning:

(1) a score of 3 or above on a College Board Advanced Placement examination; or

(2) a score of 4 or above on an International Baccalaureate examination.

(d) A student may earn a performance acknowledgment on the student's transcript for outstanding performance on an established, valid, reliable, and nationally norm-referenced preliminary college preparation assessment instrument used to measure a student's progress toward readiness for college and the workplace or on an established valid, reliable, and nationally norm-referenced assessment instrument used by colleges and universities as part of their undergraduate admissions process by:

(1) earning a score on the Preliminary SAT/National Merit Scholarship Qualifying Test (PSAT/NMSQT®) that qualifies the student for recognition as a commended scholar or higher by the College Board and National Merit Scholarship Corporation, as part of the National Hispanic Recognition Program (NHRP) of the College Board or as part of the National Achievement Scholarship Program of the National Merit Scholarship Corporation;

(2) achieving the ACT® readiness benchmark score on at least three of the five subject tests on the ACT Aspire™ examination;

(3) earning a total score of at least 1310 on the SAT®; or

(4) earning a composite score on the ACT® examination of 28 (excluding the writing subscore).

(e) A student may earn a performance acknowledgment on the student's transcript for earning a state-recognized or nationally or internationally recognized business or industry certification or license as follows.

(1) A student may earn a performance acknowledgment with:

(A) performance on an examination or series of examinations sufficient to obtain a nationally or internationally recognized business or industry certification; or

(B) performance on an examination sufficient to obtain a government-required credential to practice a profession.

(2) Nationally or internationally recognized business or industry certification shall be defined as an industry-validated credential that complies with knowledge and skills standards promulgated by a nationally or internationally recognized business, industry, professional, or government entity representing a particular profession or occupation that is issued by or endorsed by:

(A) a national or international business, industry, or professional organization;

(B) a state agency or other government entity; or

(C) a state-based industry association.

(3) Certifications or licensures for performance acknowledgments shall:

(A) be age appropriate for high school students;

(B) represent a student's substantial course of study and/or end-of-program knowledge and skills;

(C) include an industry-recognized examination or series of examinations, an industry-validated skill test, or demonstrated proficiency through documented, supervised field experience; and

(D) represent substantial knowledge and multiple skills needed for successful entry into a high-skill occupation.

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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Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

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



## CHAPTER 110. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR ENGLISH LANGUAGE ARTS AND READING SUBCHAPTER D. OTHER HIGH SCHOOL ENGLISH LANGUAGE ARTS AND READING COURSES

### 19 TAC §§110.86, 110.87, 110.89 - 110.93

The State Board of Education (SBOE) adopts amendments to §110.86 and §110.87 and new §§110.89-110.93, concerning International Baccalaureate (IB) courses for English language arts and reading. The amendments to §110.86 and §110.89 and new §110.92 are adopted with changes to the proposed text as published in the December 15, 2017 issue of the *Texas Register* (42 TexReg 7055). The amendment to §110.87 and new §§110.90, 110.91, and 110.93 are adopted without changes to the proposed

text as published in the December 15, 2017 issue of the *Texas Register* (42 TexReg 7055) and will not be republished. The adopted amendments and new sections align the rules with current course offerings by the IB organization.

**REASONED JUSTIFICATION.** For students to earn state credit toward specific graduation requirements, a course must be approved by the SBOE and included in SBOE rule. At the September 2017 SBOE meeting, the committee discussed IB courses that are not currently included in SBOE rule and considerations regarding the appropriate amount of state credit that should be awarded for IB courses. At that time, the board requested that agency staff prepare rule text to address these issues and requested that staff balance the chapters that would be updated over two different meetings.

At the November 2017 meeting, the SBOE approved for first reading and filing authorization proposed revisions to align the TEKS for English language arts and reading, mathematics, science, and languages other than English with current IB course offerings. The revisions add new IB courses, update course titles, and establish an amount of credit equivalent to the content and rigor of the course.

At adoption, changes were made to §§110.86, 110.89, and 110.92 to award two credits for successful completion of those courses.

The amendments and new sections were approved by the SBOE for first reading and filing authorization at its November 10, 2017 meeting and for second reading and final adoption at its February 2, 2018 meeting. The effective date of the adopted amendments and new sections is August 27, 2018.

**SUMMARY OF COMMENTS AND RESPONSES.** Following is a summary of the public comments received on the proposal and the corresponding responses.

**Comment.** A community member, 17 teachers, 14 administrators, 24 parents, and 12 charter school staff members stated that students should receive two credits for completing §110.86, International Baccalaureate (IB) Language Studies A1 Standard Level (One-Half to One Credit).

**Response.** The SBOE agrees and took action at second reading and final adoption to amend §110.86 to increase the amount of credit for the course to two credits.

**Comment.** Five teachers and six administrators recommended that §110.87, International Baccalaureate (IB) Language Studies A1 Higher Level (One-Half to One Credit), should be offered for two credits.

**Response.** The SBOE agrees and took action at second reading and final adoption to amend §110.87 to increase the amount of credit for the course to two credits.

**Comment.** A community member, 17 teachers, 14 administrators, 24 parents, and 12 charter school staff members stated that students should receive two credits for completing proposed new §110.89, International Baccalaureate (IB) Language Studies A: Literature Standard Level (One Credit).

**Response.** The SBOE agrees and took action at second reading and final adoption to amend new §110.89 to increase the amount of credit for the course to two credits.

**Comment.** Four administrators stated that IB English language arts and reading courses should be offered for two credits.

**Response.** The SBOE agrees that students should be awarded two credits for successful completion of an IB English language arts and reading course. In response to this and other comments, the SBOE took action at second reading and final adoption to amend §110.86 and §110.89 to increase the amount of credit for the courses to two credits.

**Comment.** One teacher and three administrators stated that all IB courses offered for two years should be awarded two credits.

**Response.** The SBOE agrees that students should be awarded two credits for successful completion of an IB course. However, the SBOE determined that the amount of instructional time necessary for a course is a local district decision. In response to this and other comments, the SBOE took action at second reading and final adoption to amend §110.86 and §110.89 to increase the amount of credit for the courses to two credits.

**Comment.** Two administrators expressed concern that the proposed revisions would limit districts' flexibility. The commenters stated that districts should have the option to teach IB Standard Level courses in one school year for one credit or in two school years for two credits.

**Response.** The SBOE disagrees that districts should be able to award different amounts of credit for the same content. However, the SBOE determined that the amount of instructional time necessary for a course is a local district decision. In response to other comments, the SBOE took action at second reading and final adoption to amend §110.86 and §110.89 to increase the amount of credit for the courses to two credits.

**Comment.** One teacher and two administrators expressed support for establishing four Public Education Information Management System (PEIMS) codes for all IB courses. The commenters stated that the variety of IB programs across the state need this flexibility.

**Response.** This comment is outside the scope of the proposed rulemaking.

**STATUTORY AUTHORITY.** The amendments and new sections are adopted under the Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; TEC, §28.002, which identifies the subjects of the required curriculum and requires the SBOE by rule to identify the essential knowledge and skills of each subject in the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the state assessment instruments; and TEC, §28.025, as amended by House Bill 3593 and Senate Bill 826, 85th Texas Legislature, Regular Session, 2017, which requires the SBOE by rule to determine the curriculum requirements for the foundation high school graduation program that are consistent with the required curriculum under the TEC, §28.002.

**CROSS REFERENCE TO STATUTE.** The amendments and new sections implement the Texas Education Code, §§7.102(c)(4); 28.002; and 28.025, as amended by House Bill 3593 and Senate Bill 826, 85th Texas Legislature, Regular Session, 2017.

*§110.86. International Baccalaureate (IB) Language Studies A: Language and Literature Standard Level (Two Credits).*

(a) General requirements. Students shall be awarded two credits for successful completion of this course. Recommended prerequisite: English II. This course is recommended for students in Grade 11 or 12.



(b) Content requirements. Content requirements for IB Language Studies A: Language and Literature Standard Level are prescribed by the International Baccalaureate Organization and in §110.33 of this title (relating to English Language Arts and Reading, English III (One Credit), Beginning with School Year 2009-2010) and §110.34 of this title (relating to English Language Arts and Reading, English IV (One Credit), Beginning with School Year 2009-2010). Subject guides may be obtained from International Baccalaureate of North America.

§110.89. *International Baccalaureate (IB) Language Studies A: Literature Standard Level (Two Credits).*

(a) General requirements. Students shall be awarded two credits for successful completion of this course. Recommended prerequisite: English II. This course is recommended for students in Grade 11 or 12.

(b) Content requirements. Content requirements for IB Language Studies A: Literature Standard Level are prescribed by the International Baccalaureate Organization and in §110.33 of this title (relating to English Language Arts and Reading, English III (One Credit), Beginning with School Year 2009-2010) and §110.34 of this title (relating to English Language Arts and Reading, English IV (One Credit), Beginning with School Year 2009-2010). Subject guides may be obtained from International Baccalaureate of North America.

§110.92. *International Baccalaureate (IB) Philosophy Standard Level (Two Credits).*

(a) General requirements. Students shall be awarded two credits for successful completion of this course. Recommended prerequisite: English II. This course is recommended for students in Grade 11 or 12.

(b) Content requirements. Content requirements for IB Philosophy Standard Level are prescribed by the International Baccalaureate Organization. Subject guides may be obtained from International Baccalaureate of North America.

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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Cristina De La Fuente-Valadez

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



## CHAPTER 111. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR MATHEMATICS

### SUBCHAPTER D. OTHER HIGH SCHOOL MATHEMATICS COURSES

#### 19 TAC §§111.56 - 111.59

The State Board of Education (SBOE) adopts amendments to §§111.56-111.59, concerning International Baccalaureate (IB) courses for mathematics. The amendments are adopted without changes to the proposed text as published in the December 15, 2017 issue of the *Texas Register* (42 TexReg 7057) and will not

be republished. The adopted amendments align the rules with current course offerings by the IB organization.

**REASONED JUSTIFICATION.** For students to earn state credit toward specific graduation requirements, a course must be approved by the SBOE and included in SBOE rule. At the September 2017 SBOE meeting, the committee discussed IB courses that are not currently included in SBOE rule and considerations regarding the appropriate amount of state credit that should be awarded for IB courses. At that time, the board requested that agency staff prepare rule text to address these issues and requested that staff balance the chapters that would be updated over two different meetings.

At the November 2017 meeting, the SBOE approved for first reading and filing authorization proposed revisions to align the TEKS for English language arts and reading, mathematics, science, and languages other than English with current IB course offerings. The revisions add new IB courses, update course titles, and establish an amount of credit equivalent to the content and rigor of the course.

The amendments were approved by the SBOE for first reading and filing authorization at its November 10, 2017 meeting and for second reading and final adoption at its February 2, 2018 meeting. The effective date of the adopted amendments and is August 27, 2018.

**SUMMARY OF COMMENTS AND RESPONSES.** Following is a summary of the public comments received on the proposal and the corresponding responses.

**Comment.** A community member, 19 teachers, 2 counselors, 10 administrators, 23 parents, and 13 charter school staff members expressed support for increasing the credit for §111.56, IB Mathematical Studies Standard Level (One-Half to One Credit), to two credits.

**Response.** The SBOE agrees and maintained language as proposed that increased the amount of credit for §111.56 to two credits.

**Comment.** A community member, 19 teachers, 2 counselors, 10 administrators, 23 parents, and 13 charter school staff members expressed support for increasing the credit for §111.57, IB Mathematics Standard Level (One-Half to One Credit), to two credits.

**Response.** The SBOE agrees and maintained language as proposed that increased the amount of credit for §111.57 to two credits.

**Comment.** A community member, 16 teachers, 2 counselors, 9 administrators, and 23 parents expressed support for increasing the credit for §111.58, IB Mathematics Higher Level (One-Half to One Credit), to two credits.

**Response.** The SBOE agrees and maintained language as proposed that increased the amount of credit for §111.58 to two credits.

**Comment.** A community member, 16 teachers, 2 counselors, 9 administrators, and 23 parents expressed support for increasing the credit for §111.59, IB Further Mathematics Higher Level (One-Half to One Credit), to two credits.

**Response.** The SBOE agrees and maintained language as proposed that increased the amount of credit for §111.59 to two credits.

**Comment.** One teacher and three administrators stated that all IB courses offered for two years should be awarded two credits.

Response. The SBOE agrees that students should be awarded two credits for successful completion of an IB course. However, the SBOE determined that the amount of instructional time necessary for a course is a local district decision and took action to approve the changes to IB mathematics courses as published as proposed.

Comment. Two administrators expressed concern that the proposed revisions would limit districts' flexibility. The commenters stated that districts should have the option to teach IB Standard Level courses in one school year for one credit or in two school years for two credits.

Response. The SBOE disagrees that districts should be able to award different amounts of credit for the same content and took action to approve the changes to IB mathematics standard level courses as published as proposed.

Comment. One teacher and two administrators expressed support for establishing four Public Education Information Management System (PEIMS) codes for all IB courses. The commenters stated that the variety of IB programs across the state need this flexibility.

Response. This comment is outside the scope of the proposed rulemaking.

**STATUTORY AUTHORITY.** The amendments are adopted under the Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; TEC, §28.002, which identifies the subjects of the required curriculum and requires the SBOE by rule to identify the essential knowledge and skills of each subject in the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the state assessment instruments; and TEC, §28.025, as amended by House Bill 3593 and Senate Bill 826, 85th Texas Legislature, Regular Session, 2017, which requires the SBOE by rule to determine the curriculum requirements for the foundation high school graduation program that are consistent with the required curriculum under the TEC, §28.002.

**CROSS REFERENCE TO STATUTE.** The amendments and new sections implement the Texas Education Code, §§7.102(c)(4); 28.002; and 28.025, as amended by House Bill 3593 and Senate Bill 826, 85th Texas Legislature, Regular Session, 2017.

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 112. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR SCIENCE

### SUBCHAPTER D. OTHER SCIENCE COURSES

#### 19 TAC §§112.70, 112.73 - 112.80

The State Board of Education (SBOE) adopts amendments to §112.70 and §§112.73-112.78 and new §112.79 and §112.80, concerning International Baccalaureate (IB) courses for other science courses. The amendments to §§112.70, 112.73, 112.75, and 112.77 and new §112.79 and §112.80 are adopted with changes to the proposed text as published in the December 15, 2017 issue of the *Texas Register* (42 TexReg 7058). The amendments to §§112.74, 112.76, and 112.78 are adopted without changes to the proposed text as published in the December 15, 2017 issue of the *Texas Register* (42 TexReg 7058) and will not be republished. The adopted amendments and new sections align the rules with current course offerings by the IB organization.

**REASONED JUSTIFICATION.** For students to earn state credit toward specific graduation requirements, a course must be approved by the SBOE and included in SBOE rule. At the September 2017 SBOE meeting, the committee discussed IB courses that are not currently included in SBOE rule and considerations regarding the appropriate amount of state credit that should be awarded for IB courses. At that time, the board requested that agency staff prepare rule text to address these issues and requested that staff balance the chapters that would be updated over two different meetings.

At the November 2017 meeting, the SBOE approved for first reading and filing authorization proposed revisions to align the TEKS for English language arts and reading, mathematics, science, and languages other than English with current IB course offerings. The revisions add new IB courses, update course titles, and establish an amount of credit equivalent to the content and rigor of the course.

At adoption, changes were made to §§112.70, 112.73, 112.75, 112.77, 112.79, and 112.80 to award two credits for successful completion of those courses.

The amendments and new sections were approved by the SBOE for first reading and filing authorization at its November 10, 2017 meeting and for second reading and final adoption at its February 2, 2018 meeting. The effective date of the adopted amendments and new sections is August 27, 2018.

**SUMMARY OF COMMENTS AND RESPONSES.** Following is a summary of the public comments received on the proposal and the corresponding responses.

**Comment.** A counselor, 17 teachers, 9 administrators, 25 parents, a community member, and 16 charter school staff members stated that students should receive two credits for completing §112.70, International Baccalaureate Environmental Systems (IB) (One Credit).

**Response.** The SBOE agrees and took action at second reading and final adoption to amend §112.70 to increase the amount of credit for the course to two credits.

**Comment.** A counselor, 17 teachers, 9 administrators, 25 parents, a community member, and 16 charter school staff members stated that students should receive two credits for completing §112.73, International Baccalaureate (IB) Biology Standard Level (One Credit).

**Response.** The SBOE agrees and took action at second reading and final adoption to amend §112.73 to increase the amount of credit for the course to two credits.

Comment. Three administrators stated that all IB biology courses should be taught as two-year courses for two credits.

Response. The SBOE agrees that students should be awarded two credits for successful completion of an IB biology course. However, the SBOE determined that the amount of instructional time necessary for a course is a local district decision. In response to this and other comments, the SBOE took action at second reading and final adoption to amend §112.73 to increase the amount of credit for the course to two credits.

Comment. A counselor, 15 teachers, 8 administrators, 25 parents, and a community member stated that §112.75, International Baccalaureate (IB) Chemistry Standard Level (One Credit), should be offered for two credits.

Response. The SBOE agrees and took action at second reading and final adoption to amend §112.75 to increase the amount of credit for the course to two credits.

Comment. Three administrators stated that all IB chemistry courses should be taught as two-year courses for two credits.

Response. The SBOE agrees that students should be awarded two credits for successful completion of an IB chemistry course. However, the SBOE determined that the amount of instructional time necessary for a course is a local district decision. In response to this and other comments, the SBOE took action at second reading and final adoption to amend §112.75 to increase the amount of credit for the course to two credits.

Comment. A counselor, 15 teachers, 9 administrators, 25 parents, and a community member stated that §112.77, International Baccalaureate (IB) Physics Standard Level (One Credit), should be offered for two credits.

Response. The SBOE agrees and took action at second reading and final adoption to amend §112.77 to increase the amount of credit for the course to two credits.

Comment. Three administrators stated that all IB physics courses should be taught as two-year courses for two credits.

Response. The SBOE agrees that students should be awarded two credits for successful completion of an IB physics course. However, the SBOE determined that the amount of instructional time necessary for a course is a local district decision. In response to this and other comments, the SBOE took action at second reading and final adoption to amend §112.77 to increase the amount of credit for the course to two credits.

Comment. One teacher and three administrators stated that all IB courses offered for two years should be awarded two credits.

Response. The SBOE agrees that students should be awarded two credits for successful completion of an IB course. However, the SBOE determined that the amount of instructional time necessary for a course is a local district decision. In response to this and other comments, the SBOE took action at second reading and final adoption to amend §§112.70, 112.73, 112.75, and 112.77 to increase the amount of credit for the courses to two credits.

Comment. Two administrators expressed concern that the proposed revisions would limit districts' flexibility. The commenters stated that districts should have the option to teach IB Standard Level courses in one school year for one credit or in two school years for two credits.

Response. The SBOE disagrees that districts should be able to award different amounts of credit for the same content. How-

ever, the SBOE determined that the amount of instructional time necessary for a course is a local district decision. In response to other comments, the SBOE took action at second reading and final adoption to amend §§112.70, 112.73, 112.75, and 112.77 to increase the amount of credit for the courses to two credits.

Comment. One teacher and two administrators expressed support for establishing four Public Education Information Management System (PEIMS) codes for all IB courses. The commenters stated that the variety of IB programs across the state need this flexibility.

Response. This comment is outside the scope of the proposed rulemaking.

STATUTORY AUTHORITY. The amendments and new sections are adopted under the Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; TEC, §28.002, which identifies the subjects of the required curriculum and requires the SBOE by rule to identify the essential knowledge and skills of each subject in the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the state assessment instruments; and TEC, §28.025, as amended by House Bill 3593 and Senate Bill 826, 85th Texas Legislature, Regular Session, 2017, which requires the SBOE by rule to determine the curriculum requirements for the foundation high school graduation program that are consistent with the required curriculum under the TEC, §28.002.

CROSS REFERENCE TO STATUTE. The amendments and new sections implement the Texas Education Code, §§7.102(c)(4); 28.002; and 28.025, as amended by House Bill 3593 and Senate Bill 826, 85th Texas Legislature, Regular Session, 2017.

*§112.70. International Baccalaureate (IB) Environmental Systems and Societies Standard Level (Two Credits).*

(a) General Requirements. Students shall be awarded two credits for successful completion of this course. Recommended prerequisite: one credit of high school science. This course is recommended for students in Grade 11 or 12.

(b) Content Requirements. Content requirements for International Baccalaureate (IB) Environmental Systems and Societies Standard Level are prescribed by the International Baccalaureate Organization. Subject guides may be obtained from International Baccalaureate of North America.

*§112.73. International Baccalaureate (IB) Biology Standard Level (Two Credits).*

(a) General requirements. Students shall be awarded two credits for successful completion of this course. Recommended prerequisites: two credits of high school laboratory science. This course is recommended for students in Grade 11 or 12.

(b) Content requirements. Content requirements for International Baccalaureate (IB) Biology Standard Level are prescribed by the International Baccalaureate Organization. Subject guides may be obtained from International Baccalaureate of North America.

*§112.75. International Baccalaureate (IB) Chemistry Standard Level (Two Credits).*

(a) General requirements. Students shall be awarded two credits for successful completion of this course. Recommended prerequisites: two credits of high school laboratory science. This course is recommended for students in Grade 11 or 12.

(b) Content requirements. Content requirements for International Baccalaureate (IB) Chemistry Standard Level are prescribed by the International Baccalaureate Organization. Subject guides may be obtained from International Baccalaureate of North America.

§112.77. *International Baccalaureate (IB) Physics Standard Level (Two Credits).*

(a) General requirements. Students shall be awarded two credits for successful completion of this course. Recommended prerequisites: two credits of high school laboratory science. This course is recommended for students in Grade 11 or 12.

(b) Content requirements. Content requirements for International Baccalaureate (IB) Physics Standard Level are prescribed by the International Baccalaureate Organization. Subject guides may be obtained from International Baccalaureate of North America.

§112.79. *International Baccalaureate (IB) Sports, Exercise, and Health Science Standard Level (Two Credits).*

(a) General requirements. Students shall be awarded two credits for successful completion of this course. Recommended prerequisites: two credits of high school laboratory science. This course is recommended for students in Grade 11 or 12.

(b) Content requirements. Content requirements for International Baccalaureate (IB) Sports, Exercise, and Health Science Standard Level are prescribed by the International Baccalaureate Organization. Subject guides may be obtained from International Baccalaureate of North America.

§112.80. *International Baccalaureate (IB) Sports, Exercise, and Health Science Higher Level (Two Credits).*

(a) General requirements. Students shall be awarded two credits for successful completion of this course. Recommended prerequisites: two credits of high school laboratory science. This course is recommended for students in Grade 11 or 12.

(b) Content requirements. Content requirements for International Baccalaureate (IB) Sports, Exercise, and Health Science Higher Level are prescribed by the International Baccalaureate Organization. Subject guides may be obtained from International Baccalaureate of North America.

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 June 7, 2018.

TRD-201802528

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Effective date: August 27, 2018

Proposal publication date: December 15, 2017

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



CHAPTER 114. TEXAS ESSENTIAL  
KNOWLEDGE AND SKILLS FOR LANGUAGES  
OTHER THAN ENGLISH  
SUBCHAPTER D. OTHER LANGUAGES  
OTHER THAN ENGLISH COURSES

**19 TAC §§114.70 - 114.74**

The State Board of Education (SBOE) adopts amendments to §§114.70-114.73 and new §114.74, concerning International Baccalaureate (IB) courses for languages other than English. The amendments and new section are adopted without changes to the proposed text as published in the December 15, 2017, issue of the *Texas Register* (42 TexReg 7060) and will not be republished. The adopted amendments and new section align the rules with current course offerings by the IB organization.

REASONED JUSTIFICATION. For students to earn state credit toward specific graduation requirements, a course must be approved by the SBOE and included in SBOE rule. At the September 2017 SBOE meeting, the committee discussed IB courses that are not currently included in SBOE rule and considerations regarding the appropriate amount of state credit that should be awarded for IB courses. At that time, the board requested that agency staff prepare rule text to address these issues and requested that staff balance the chapters that would be updated over two different meetings.

At the November 2017 meeting, the SBOE approved for first reading and filing authorization proposed revisions to align the TEKS for English language arts and reading, mathematics, science, and languages other than English with current IB course offerings. The revisions add new IB courses, update course titles, and establish an amount of credit equivalent to the content and rigor of the course.

The amendments and new section were approved by the SBOE for first reading and filing authorization at its November 10, 2017, meeting and for second reading and final adoption at its February 2, 2018, meeting. The effective date of the adopted amendments and new section is August 27, 2018.

SUMMARY OF COMMENTS AND RESPONSES. Following is a summary of the public comments received on the proposal and the corresponding responses.

Comment. A counselor, 9 teachers, 13 administrators, 24 parents, a community member, and 14 charter school staff members expressed support for increasing the credit for §114.70, International Baccalaureate (IB) Language B, Modern Languages, Standard Level (One Credit), to two credits.

Response. The SBOE agrees and maintained language as proposed that increased the amount of credit for §114.70 to two credits.

Comment. A counselor, 6 teachers, 12 administrators, 24 parents, and a community member expressed support for increasing the credit for §114.71, International Baccalaureate (IB) Language B, Modern Languages, Higher Level (One Credit), to two credits.

Response. The SBOE agrees and maintained language as proposed that increased the amount of credit for §114.71 to two credits.

Comment. A counselor, 5 teachers, 12 administrators, 24 parents, and a community member expressed support for increasing the credit for §114.72, International Baccalaureate (IB) Classical Languages, Standard Level (One Credit), to two credits.

Response. The SBOE agrees and maintained language as proposed that increased the amount of credit for §114.72 to two credits.

Comment. A counselor, 5 teachers, 12 administrators, 24 parents, and a community member expressed support for increasing the credit for §114.73, International Baccalaureate (IB) Classical Languages, Higher Level (One Credit), to two credits.

Response. The SBOE agrees and maintained language as proposed that increased the amount of credit for §114.73 to two credits.

Comment. A counselor, 8 teachers, 13 administrators, 24 parents, a community member, and 14 charter school staff members expressed support for awarding students two credits for completing the proposed new Language Ab Initio Standard Level course.

Response. The SBOE agrees that the course credit for the course is appropriate and took action to adopt new §114.74, International Baccalaureate (IB) Language Ab Initio Standard Level (Two Credits), as proposed.

Comment. Two teachers stated that proposed new §114.74 should not be offered for two credits because it is a lower level course and the requirements are significantly less rigorous than the requirements for IB Language B, Modern Languages, Standard Level and Higher Level.

Response. The SBOE disagrees and determined that the course credit for the course was appropriate as proposed.

Comment. One teacher and three administrators stated that all IB courses offered for two years should be awarded two credits.

Response. The SBOE agrees that students should be awarded two credits for successful completion of an IB course. However, the SBOE determined that the amount of instructional time necessary for a course is a local district decision and took action to adopt the changes to IB languages other than English courses as published as proposed.

Comment. Two administrators expressed concern that the proposed revisions would limit districts' flexibility. The commenters stated that districts should have the option to teach IB Standard Level courses in one school year for one credit or in two school years for two credits.

Response. The SBOE disagrees that districts should be able to award different amounts of credit for the same content and took action to adopt the changes to IB languages other than English courses as published as proposed.

Comment. One teacher and two administrators expressed support for establishing four Public Education Information Management System (PEIMS) codes for all IB courses. The commenters stated that the variety of IB programs across the state need this flexibility.

Response. This comment is outside the scope of the proposed rulemaking.

STATUTORY AUTHORITY. The amendments and new section are adopted under the Texas Education Code (TEC), §7.102(c)(4), which requires the State Board of Education (SBOE) to establish curriculum and graduation requirements; TEC, §28.002, which identifies the subjects of the required curriculum and requires the SBOE by rule to identify the essential knowledge and skills of each subject in the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the state assessment instruments; and TEC, §28.025, as amended by House Bill 3593 and Senate Bill 826, 85th Texas Legislature, Regular Session, 2017, which requires the SBOE by rule to

determine the curriculum requirements for the foundation high school graduation program that are consistent with the required curriculum under the TEC, §28.002.

CROSS REFERENCE TO STATUTE. The amendments and new section implement the Texas Education Code, §§7.102(c)(4); 28.002; and 28.025, as amended by House Bill 3593 and Senate Bill 826, 85th Texas Legislature, Regular Session, 2017.

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 June 7, 2018.

TRD-201802529

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

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



## TITLE 25. HEALTH SERVICES

### PART 1. DEPARTMENT OF STATE HEALTH SERVICES

#### CHAPTER 33. EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT SUBCHAPTER E. MEDICAL CHECK-UPS

##### 25 TAC §33.60

The Executive Commissioner of the Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts amendments to §33.60, concerning Medical Check-ups, under the Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program. The amendments are adopted with changes to the proposed text as published in the March 16, 2018, issue of the *Texas Register* (43 TexReg 1566), and therefore will be republished.

##### BACKGROUND AND JUSTIFICATION

The EPSDT benefit, known in Texas as Texas Health Steps (THSteps), provides preventive health and comprehensive care services for children birth through 20 years of age who are enrolled in Medicaid. THSteps provides preventive medical and dental check-ups for Medicaid children to allow early identification and treatment of identified problems.

The 85th Legislature, Regular Session, passed House Bill (H.B.) 1600 and H.B. 2466 requiring the Executive Commissioner to adopt rules allowing additional screenings during a THSteps recipient's annual medical exam.

Previously, THSteps required one mental health screening using one or more validated, standardized mental health screening tools be conducted for recipients ages 12 through 18. H.B. 1600 expanded this benefit by amending Chapter 32, Texas Human Resources Code, to include new Section 32.0249. The new section requires the THSteps program to allow providers to conduct, and be reimbursed for conducting, a mental health screening us-

ing one or more validated, standardized mental health screening tools during each annual medical exam of a THSteps recipient at least 12 years of age but younger than 19. The adopted rule is comparable to the American Academy of Pediatrics' (AAP) recommendation regarding the frequency of conducting mental health screenings.

H.B. 2466 amended Chapter 32, Texas Human Resources Code, by adding new Section 32.0561, which requires the THSteps program to allow providers to conduct, and be reimbursed for conducting, a maternal depression screening for a recipient's mother, regardless of whether the mother is also a recipient, during a THSteps medical exam that occurs before the recipient's first birthday. The adopted rule is based on clinical and empirical evidence provided in the Centers for Medicare & Medicaid Services Informational Bulletin, "Maternal Depression Screening and Treatment: A Critical Role for Medicaid in the Care of Mothers and Children," and the AAP recommendation to screen mothers for maternal depression as a best practice for primary care pediatricians caring for infants and their families.

The amendments to §33.60 are necessary to comply with Chapter 32, Texas Human Resources Code, Sections 32.0249 and 32.0561.

#### COMMENTS

The 30-day comment period ended April 15, 2018. During this period, HHSC received comments regarding the proposed rule from the Texas Medical Association, the Texas Pediatric Society, and the Texas Hospital Association. A summary of comments relating to the rule and HHSC's responses follows.

Comment: Two commenters expressed support for the proposed rule and appreciation to HHSC for improving access to regular mental health screenings for adolescents and to maternal depression screenings for the mothers of children enrolled in Medicaid.

Response: HHSC appreciates the comments and support.

Comment: One commenter suggested amending proposed §33.60(e) to add "client's" before "covered medical check-up" to increase clarity that the covered medical check-up referred to is for the client.

Response: HHSC agrees and has revised the rule as suggested.

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.033 that provides the Executive Commissioner of HHSC with broad rulemaking authority to adopt rules necessary to carry out the Commission's duties under Chapter 531; Texas Government Code §531.0055(e) that directs the Executive Commissioner of HHSC to adopt rules and policies for the operation of and provision of health and human services by the health and human services system; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a) that provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

#### §33.60. Medical Check-ups.

(a) Clients are entitled to receive a comprehensive medical check-up for the early detection of health problems and the referral for definitive diagnosis and treatment when indicated by the check-up.

(b) Following are the federally-mandated components of a THSteps comprehensive medical check-up:

- (1) comprehensive health and developmental history, including physical and mental health and development;
- (2) comprehensive unclothed physical examination;
- (3) immunizations appropriate for age and health history;
- (4) laboratory tests appropriate to age and risk, including lead toxicity screening; and
- (5) health education, including anticipatory guidance.

(c) THSteps providers may be required to perform additional services or screening during a medical check-up, as described in the TMPPM.

(d) THSteps providers may conduct mental health screenings, using one or more validated, standardized mental health screening tools, during each annual medical check-up for clients who are at least 12 years of age but younger than 19 years of age. THSteps providers are reimbursed for conducting one such screening annually.

(e) THSteps providers may conduct maternal depression screenings for a client's mother, regardless of whether the mother is also a client, that are performed before the client's first birthday during a client's covered medical check-up. THSteps providers are reimbursed for conducting one such screening.

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 June 5, 2018.

TRD-201802431

Karen Ray

Chief Counsel

Department of State Health Services

Effective date: June 25, 2018

Proposal publication date: March 16, 2018

For further information, please call: (512) 776-6675

## TITLE 31. NATURAL RESOURCES AND CONSERVATION

### PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

#### CHAPTER 51. EXECUTIVE

#### SUBCHAPTER O. ADVISORY COMMITTEES

#### 31 TAC §§51.601, 51.606 - 51.611, 51.631, 51.671, 51.672

The Texas Parks and Wildlife Commission in a duly noticed meeting on May 24, 2018, adopted amendments to §§51.601, 51.606 - 51.611, 51.631, 51.671, and 51.672, concerning advisory committees, without changes to the proposed text as published in the April 20, 2018, issue of the *Texas Register* (43 TexReg 2364).

The amendments establish an expiration date of July 1, 2022, for the following advisory committees: White-tailed Deer Advisory Committee (WTDAC), Migratory Game Bird Advisory Committee (MGBAC), Upland Game Bird Advisory Committee (UGBAC), Private Lands Advisory Committee (PLAC), Bighorn Sheep Advisory Committee (BSAC), Wildlife Diversity Advisory Committee (WDAC), Freshwater Fisheries Advisory Committee

(FFAC), State Parks Advisory Committee (SPAC), and Coastal Resources Advisory Committee (CRAC). The amendments also realign the terms of current advisory committee members to facilitate the beginning of new terms on July 1, 2018.

Unless extended, these advisory committees will expire by rule on October 1, 2018. The department believes that these advisory committees continue to perform a valuable service for the department. Therefore, the department wishes to continue these advisory committees.

Parks and Wildlife Code, §11.0162, authorizes the Chairman of the Texas Parks and Wildlife Commission (the Commission) to "appoint committees to advise the commission on issues under its jurisdiction." Government Code, Chapter 2110, requires that rules be adopted regarding each state agency advisory committee. Unless otherwise provided by specific statute, the rules must (1) state the purpose of the committee; (2) describe the manner in which the committee will report to the agency; and (3) establish the date on which the committee will automatically be abolished, unless the advisory committee has a specific duration established by statute.

The department received four comments opposing adoption of the proposed rules via the department's website; however, the department has determined that three of the comments were generated by a bot and are therefore immaterial. The remaining commenter opposed adoption and stated that the terms of advisory board members should be staggered in order to provide for continuity of knowledge. The department disagrees with the comment and responds that historically, when advisory committees have been reauthorized, the Commission Chairman's appointments have consisted of both reappointments of previous committee members, as well as new committee members. The department anticipates that appointments to the committees authorized by this rulemaking will similarly include both reappointments and new appointments. As a result, the institutional knowledge will be retained on the committee. Therefore, it is unnecessary to provide for staggered membership terms, which would also be problematic from a purely administrative point of view. No changes were made as a result of the comment.

The department received six comments supporting adoption of the rules as proposed; however three of those comments were also determined to have been generated by a bot and are therefore immaterial.

The amendments are adopted under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §2110.005 and §2110.008.

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 June 4, 2018.

TRD-201802408  
Robert D. Sweeney, Jr.  
General Counsel  
Texas Parks and Wildlife Department  
Effective date: June 24, 2018  
Proposal publication date: April 20, 2018  
For further information, please call: (512) 389-4775

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**TITLE 34. PUBLIC FINANCE**

**PART 1. COMPTROLLER OF PUBLIC ACCOUNTS**

**CHAPTER 20. STATEWIDE PROCUREMENT AND SUPPORT SERVICES**

**SUBCHAPTER B. PUBLIC PROCUREMENT AUTHORITY AND ORGANIZATION**

**DIVISION 3. CONTRACT MANAGEMENT GUIDE AND TRAINING**

**34 TAC §20.133**

The Comptroller of Public Accounts adopts the repeal of existing §20.133, concerning training program, without changes to the proposed text as published in the February 23, 2018, issue of the *Texas Register* (43 TexReg 1028). The existing §20.133 is repealed in order to update the content of the existing section under a new §20.133 to reflect the changes to Government Code, §§656.051, 656.052, and 656.054 by Senate Bill 255, 85th Legislature, 2017; and to make various other revisions to improve the clarity and organization of the section.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Government Code, §§656.051, 656.052, and 656.054, which provide the comptroller with the authority to adopt rules relating to the administration of the training and certification of state agency purchasing and contract management personnel.

The adopted repeal affects Government Code, §§656.051, 656.052, and 656.054.

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

Filed with the Office of the Secretary of State on June 7, 2018.

TRD-201802503  
Don Neal  
Chief Counsel  
Comptroller of Public Accounts  
Effective date: June 27, 2018  
Proposal publication date: February 23, 2018  
For further information, please call: (512) 475-0387

◆ ◆ ◆  
**34 TAC §20.133**

The Comptroller of Public Accounts adopts new §20.133, concerning training and certification program, with changes to the proposed text as published in the February 23, 2018, issue of the *Texas Register* (43 TexReg 1029). New §20.133 updates the content of the existing section, which was proposed for repeal, to reflect the changes to Government Code, §§656.051, 656.052, and 656.054 by Senate Bill 255, 85th Legislature, 2017; and makes various other revisions to standardize the processes for training and certification of procurement professionals.

Subsection (a) provides the purpose of the section.

Subsection (b) provides definitions for "purchasing", "contract development", "contract management", and "procurement" in order to inform state agencies as to which job functions performed

by employees would require those employees to attain certification.

Subsection (c)(1) specifies purchasing functions which would necessitate completion of Statewide Procurement Division's Texas Purchasing Course by the performing state agency employee. Paragraph (2) specifies contract development functions which would necessitate Certified Texas Contract Development certification by the performing state agency employee. Paragraph (3) specifies contract management functions which would necessitate Certified Texas Contract Management certification by the performing state agency employee. Paragraph (4) provides an exemption from the certifications required by the section for licensed attorneys employed by state agencies that engage in procurement activities.

Subsection (d) provides certification eligibility standards, including current state agency or local government employees; and, recent Texas university or community college graduates, to address the growing need for public procurement professionals.

Subsection (e)(1) details the specific requirements that must be satisfied in order for an applicant to receive Certified Texas Contract Developer certification. Paragraph (2) details the specific requirements that must be satisfied in order for an applicant to receive Certified Texas Contract Manager certification.

Subsection (f) provides the process for training registration.

Subsection (g) provides the process for taking the certification examinations. Additionally, it provides the number of examination attempts that an applicant may execute and the period of time during which the attempts must be made before the applicable course would need to be completed again for examination eligibility.

Subsection (h) provides the process eligible applicants must follow in order to be issued a certification.

Subsection (i) specifies the continuing education requirements that a procurement professional must satisfy in order to maintain certification.

Subsection (j) provides the process and applicable timelines for certification renewal.

The comptroller received comments from Mr. Robby Bounds of Texas A&M University, Ms. Carolyn Cooper (no affiliation provided), and Ms. Julie Dumbeck of the Texas Department of Housing and Community Affairs related to proposed §20.133(i)(1) and (2). The commenters expressed concern that the number of required continuing education hours was a significant reduction from the division's previous informal policy. In order to address this concern, the revised section will reflect a requirement of 24 hours of continuing education for the renewal of one certification, and 36 hours of continuing education for the renewal of two certifications.

Ms. Cooper and Ms. Dumbeck also expressed concern that the section limiting continuing education to division-sponsored continuing education would restrict their ability to seek training from other sources. The division has a responsibility to ensure that the training received by its certificate holders is high-quality, relevant, and delivered by a reputable source. For that reason, the division will work with other governmental entities, including agencies, cities, and universities, to critically examine certain offerings for continuing education eligibility. These options will be approved prior to the event or offering and will be listed on the comptroller's website along with division-sponsored education.

However, to further address the concern, the revised section will allow for one hour of elective credit per certification. The division reserves the right to deny the elective credit for any reason.

Ms. Cooper expressed concern that the requirement for one hour of ethics-related continuing education would not be sufficient. The division notes the concern; however, the division believes the proposed rule meets the existing need in light of the absence of any previous requirement for ethics in continuing education. The division also notes that substantial ethics instruction is included in the core curriculum.

The comptroller received comments from Mr. Bounds and Ms. Dumbeck related to the definitions of purchasing, contract development, contract management, and procurement; and also to the certification designations. The commenters expressed concern regarding perception of a reduction of value in the certification due to the designation changes. The division clarifies that existing holders of the Certified Texas Procurement Manager (CTPM) certification will be converted to Certified Texas Contract Developers (CTCD) upon their first renewal. And the division notes that the proposed rule further clarifies previously existing certification requirements, and defines various procurement roles in line with nationally accepted standards.

The comptroller received comments from Mr. Cory Henrickson of the Texas Department of Transportation (TxDOT) related to proposed §20.133(c)(2) and (3). Mr. Henrickson submits that the rule should provide an exemption from the Contract Manager certification requirement for certain TxDOT contract management personnel. As Texas Government Code, §656.052(h)(2) provides an exemption for contract managers whose contract management duties primarily relate to highway construction, highway engineering, or highway improvement contracts, the revised section will reflect this exemption.

Mr. Henrickson also submits that the rule should provide an exemption from the Contract Developer certification requirement for contract developers working on highway improvement contracts. However, the comptroller finds there is no statutory exemption from this requirement for TxDOT personnel. Mr. Henrickson also submits that "purchasing" training requirements only apply to TxDOT procurements made under Government Code, Chapter 2155. However, Government Code, §656.051(c) requires all state agency personnel, including those otherwise exempt from the comptroller purchasing authority, to comply with the comptroller's training requirements. The comptroller declines to make the requested change.

Ms. Carrie Rawn of the National Institute of Governmental Purchasing, Ms. Phebe Mosley of Bryan Texas Utilities, Mr. Bounds, Ms. Dumbeck, and Ms. Cooper submitted general comments not related to the proposed rule. Since the comments did not address substantive portions of the rule, the comptroller declines to make any changes in the rules in response to the comments.

This new section is adopted under Government Code, §§656.051, 656.052, and 656.054 which provides the comptroller with the authority to adopt rules relating to the administration of the training and certification of state agency purchasing and contract management personnel.

The adopted new section affects Government Code, §§656.051, 656.052, and 656.054.

§20.133. *Training and Certification Program.*



(a) Purpose. The purpose of these rules is to provide a uniform procedure through which the division will train and certify individuals who conduct government procurement functions.

(b) Definitions. The following words and terms when used in this section shall have the following meanings.

(1) Purchasing--The receipt and processing of requisitions, development of specifications, development of scope of work, the issuance of purchase orders against existing cooperative or agency contracts, and the verification of the inspection of merchandise or receipt of services by the agency. The term does not include the development of solicitations and contract awards that must be posted to the Electronic State Business Daily or in the *Texas Register*.

(2) Contract development--The term applies to actions taken prior to contract execution, including the receipt and processing of requisitions, assessment of need, development and review of specifications, development and review of scopes of work, identification and selection of procurement methods, identification and preparation of evaluation criteria, preparation of and advertising solicitation documents, tabulation of respondent bids, evaluation of respondent proposals, negotiation of proposals, and the preparation and completion of contract award documents. The term does not include invoice or audit functions.

(3) Contract management--The term applies to actions taken following contract execution, including the assessment of risk, verification of contractor performance, monitoring compliance with deliverable and reporting requirements, enforcement of contract terms, monitoring and reporting of vendor performance, and ensuring that contract performance and practices are consistent with applicable rules, laws and the State of Texas Procurement Manual and Contract Management Guide.

(4) Procurement--The performance of any purchasing, contract development, or contract management functions.

(c) Training required.

(1) Purchasing requirements. A state agency employee must complete the division's Texas Purchasing Course to engage in purchasing functions on behalf of a state agency if the employee:

(A) has the job title of "purchaser";

(B) performs purchasing functions as 15% or more of their job functions; or

(C) makes a purchase in excess of \$5,000.

(2) Certified Texas Contract Developer requirements.

(A) A state agency employee must be certified as a Certified Texas Contract Developer to engage in contract development functions on behalf of a state agency and issues a solicitation or contract award required to be posted to the Electronic State Business Daily or in the *Texas Register*.

(B) A Certified Texas Contract Developer may conduct purchasing functions.

(3) Certified Texas Contract Manager requirements. A state agency employee must be certified as a Certified Texas Contract Manager to engage in contract management functions on behalf of a state agency if the employee:

(A) has the job title of "contract manager" or "contract administration manager" or "contract technician";

(B) performs contract management functions as 50% or more of their job functions; or

(C) manages any contract in excess of \$5,000,000.

(4) Certified Texas Contract Manager exemption. In accordance with Government Code, §656.052(h)(2), a contract manager whose contract management duties primarily relate to contracts described by Government Code, §2262.002(b) is exempt from the contract management certification requirements of this section.

(5) Licensed attorneys exemption. A licensed attorney employed by a state agency performing procurement or contract management functions described by this section is exempt from the certification requirements of this section.

(d) Eligible applicants. To be eligible to apply for and receive a certification, an applicant must be:

(1) a current Texas state or local government employee; or

(2) at the sole discretion of the director, a student:

(A) currently enrolled in an accredited Texas university or community college; or

(B) who has graduated within the last three years from an accredited Texas university or community college.

(e) Requirements to receive certification.

(1) To be a Certified Texas Contract Developer, an eligible applicant must:

(A) complete the Texas Contract Developer Certification training course provided by the division;

(B) complete the division approved Texas Contract Developer Certification examination with a score of 80% or higher;

(C) have completed payment for the course and the examination; and

(D) be issued a Texas Contract Developer Certification.

(2) To be a Certified Texas Contract Manager, an eligible applicant must:

(A) complete the Texas Contract Manager Certification training course provided by the division;

(B) complete the division approved Texas Contract Manager Certification examination with a score of 80% or higher;

(C) have completed payment for the course and the examination; and

(D) be issued a Texas Contract Manager Certification.

(f) Training completion. To complete any training required in this section, an eligible applicant must:

(1) register for the applicable training using the electronic registration provided by the division on the official comptroller website;

(2) provide documentation of eligibility acceptable to the director;

(3) attend the applicable training course; and

(4) receive confirmation of course completion from the director.

(g) Certification examinations.

(1) To take any certification examination required in this section, an eligible applicant must register to take the examination using the electronic registration provided by the division on the official comptroller website within:

(A) three months of confirmation of completion of the applicable course by the director; or

(B) the time period determined at the sole discretion of the director with documented extenuating circumstances not to exceed twelve months from confirmation of completion of the applicable course.

(2) If an applicant receives a score of less than 80% following completion of the course, the applicant shall have two additional attempts to obtain a score of 80% or higher during a time period not to exceed six months following completion of the course.

(3) If the applicant does not obtain a score of 80% or higher after three attempts, the applicant must retake the applicable training course prior to retaking the examination.

(h) Certification issuance.

(1) To be issued any certification in this section, eligible applicants must within three months of the issuance of examination completion with a score of 80% or higher, submit:

(A) an application provided by the division on the official comptroller website; and

(B) any other documents required by the director.

(2) If the director determines that all applicable requirements have been satisfied, a certification will be issued to the applicant.

(i) Continuing education.

(1) A procurement professional certified in this section must complete twenty-four hours of in-person or online continuing education every three years, one hour of which must be ethics, to maintain certification. Twenty-three hours of the required hours must be division-sponsored training and one hour may be an elective selected by the professional, subject to division approval. The ethics requirement must be satisfied by division-sponsored training.

(2) A procurement professional dual certified in this section must complete thirty-six hours of in-person or online continuing education every three years, one hour of which must be ethics, to maintain dual certification. Thirty-four hours of the required hours must be division-sponsored training and two hours may be elective courses selected by the professional, subject to division approval. The ethics requirement must be satisfied by division-sponsored training.

(3) A procurement professional certified in this section is required to take the Renewal Refresher course offered by division once every three years in order to maintain certification. The Renewal Refresher course does not count towards continuing education hours.

(4) The Renewal Refresher course must be completed no earlier than two years following the date of initial certification or last renewal. Renewal Refresher courses completed prior to two years following the date of initial certification or last renewal will not be considered applicable to the Renewal Refresher requirement.

(5) Division-sponsored or elective course continuing education will be counted as credit with the completion of the course and approval of the continuing education course credit application. The division will email a certificate of completion to the certified procurement professional upon approval of the continuing education course credit application. The same course may not be taken more than once per renewal period for credit.

(j) Certification renewal.

(1) Certifications issued in this section expire three years following the date of issuance.

(2) Procurement professionals certified in this section must submit an application for certification renewal at least thirty calendar days prior to the expiration date of their certification.

(3) The application must include a certificate of completion of the applicable Renewal Refresher course, and certificates of completion for twelve hours of division sponsored continuing education, one hour of which must be ethics.

(4) If a certified procurement professional allows the certification to expire, an extension may be requested within thirty calendar days from the date of expiration. If the division approves the extension, the certified procurement professional has sixty calendar days from the date of extension approval to complete the requirements for renewal. If the certified procurement professional does not complete the requirements during the extension period, the initial certification requirements must be completed to receive a new certification.

(5) Certifications awarded or renewed under previous requirements are valid until the date of first renewal.

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 June 7, 2018.

TRD-201802504

Don Neal

Chief Counsel for Operations and Support

Comptroller of Public Accounts

Effective date: June 27, 2018

Proposal publication date: February 23, 2018

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



## TITLE 43. TRANSPORTATION

### PART 3. AUTOMOBILE BURGLARY AND THEFT PREVENTION AUTHORITY

#### CHAPTER 57. AUTOMOBILE BURGLARY AND THEFT PREVENTION AUTHORITY

##### 43 TAC §57.18

The Automobile Burglary and Theft Prevention Authority (ABTPA) adopts amendments to §57.18, Grant Adjustments, without changes to the proposed text as published in the December 15, 2017, issue of the *Texas Register* (42 TexReg 7115). The rule will not be republished. The remaining rules included in the proposal, §§57.48 - 57.521 are withdrawn in accordance with §2001.027, Texas Government Code. The ABTPA anticipates future meetings and discussions with stakeholders regarding these withdrawn sections.

##### EXPLANATION OF ADOPTED AMENDMENTS

Amendments to §57.18 are adopted to add language to further clarify the types of grant adjustments which require grantees to secure the prior written approval of the ABTPA Director.

##### COMMENTS

No comments were received relating to amendments to §57.18.

##### STATUTORY AUTHORITY

The amendments are adopted under Texas Revised Civil Statutes, Article 4413(37), §6(a), which provides the Board of the Automobile Burglary and Theft Prevention Authority with the authority to adopt rules that are necessary and appropriate to implement the powers and the duties of the ABTPA.

CROSS REFERENCE TO STATUTE

Texas Revised Civil Statutes, Article 4413(37).

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 June 7, 2018.

TRD-201802530

David Richards

General Counsel

Automobile Burglary and Theft Prevention Authority

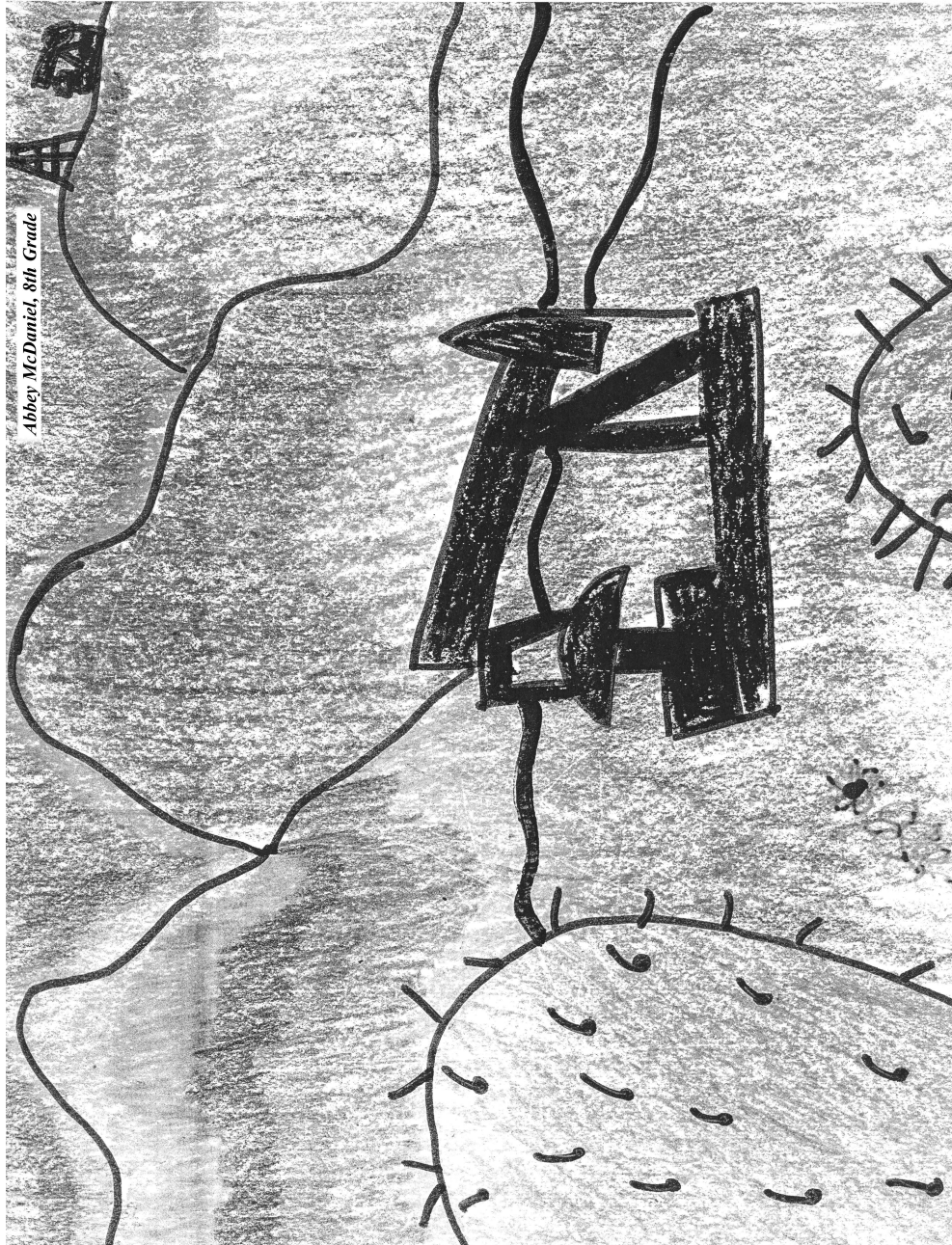
Effective date: June 27, 2018

Proposal publication date: December 15, 2017

For further information, please call: (512) 465-5665



Abbey McDaniel, 8th Grade



# TABLES & GRAPHICS

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Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word “Figure” followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

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## STATE BOARD FOR EDUCATOR CERTIFICATION Petition for Adoption of a Rule

The Texas Government Code, §2001.021, provides that any interested person may petition an agency requesting the adoption of a rule.

Petitions should be signed and submitted to:

Office of Educator Leadership and Quality  
Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494

---

Name:

Affiliation/Organization (if applicable):

Address:

Telephone:

Date:

Texas Government Code, §2001.021, specifies that an interested person must meet one of the following criteria. Please check all of the following that apply to you.

- resident of Texas
- business entity located in Texas
- governmental subdivision located in Texas
- public or private organization located in Texas that is not a state agency

Proposed rule text (indicate words to be added or deleted from the current text):

Statutory authority for the proposed rule action:

Why is this rule action necessary or desirable?

(If more space is required, attach additional sheets.)

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Petitioner's Signature

Figure: 22 TAC §102.1

Texas State Board of Dental Examiners  
 Fee Schedule - FY 2019

	Current Board Fee	Texas Online	Peer Assistance	Patient Protection	83rd Leg HB 3201	85th Leg NPDB	85th Leg SB195 PMP	Total Fee
<b>DENTISTS</b>								
Application by Exam	\$215.00	\$5.00	\$7.00	\$5.00	\$55.00		\$24.00	\$311.00
Annual Renewal	\$150.00	\$4.00	\$7.00	\$1.00	\$55.00	\$1.00	\$24.00	\$242.00
Annual Renewal - Late 1 to 90 days	\$225.00	\$4.00	\$7.00	\$1.00	\$55.00	\$1.00	\$24.00	\$317.00
Annual Renewal - Late 91 to 365 days	\$300.00	\$4.00	\$7.00	\$1.00	\$55.00	\$1.00	\$24.00	\$392.00
Licensure by Credentials	\$2,800.00	\$5.00	\$7.00	\$5.00	\$55.00		\$24.00	\$2,896.00
Temporary Licensure by Credentials	\$750.00	\$5.00	\$7.00	\$5.00	\$55.00		\$24.00	\$846.00
Provisional License	\$100.00							\$100.00
Faculty Initial Application	\$115.00	\$4.00	\$7.00	\$5.00	\$55.00		\$24.00	\$210.00
Faculty Annual Renewal	\$97.00	\$3.00	\$7.00	\$1.00	\$55.00	\$1.00	\$24.00	\$188.00
Faculty Annual Renewal - Late 1 to 90 days	\$144.00	\$3.00	\$7.00	\$1.00	\$55.00	\$1.00	\$24.00	\$235.00
Faculty Annual Renewal - Late 91 to 365 days	\$191.00	\$3.00	\$7.00	\$1.00	\$55.00	\$1.00	\$24.00	\$282.00
Conversion Fee - Faculty to Full Privilege	\$50.00	\$3.00	\$7.00	\$1.00	\$55.00	\$1.00	\$24.00	\$141.00
Nitrous Permit	\$10.00							\$10.00
Level 1 Permit	\$32.00							\$32.00
Level 2 Permit	\$260.00							\$260.00
Level 3 Permit	\$260.00							\$260.00
Level 4 Permit	\$260.00							\$260.00
Level 1 Permit Renewal	\$10.00							\$10.00
Level 2 Permit Renewal	\$60.00							\$60.00
Level 3 Permit Renewal	\$60.00							\$60.00
Level 4 Permit Renewal	\$60.00							\$60.00
Application to Reactivate a Retired License	\$75.00	\$4.00	\$7.00	\$1.00	\$55.00	\$1.00	\$24.00	\$167.00
Reinstatement of a Canceled Dental License	\$300.00	\$4.00	\$7.00	\$1.00	\$55.00	\$1.00	\$24.00	\$392.00
Duplicate License / Renewal	\$25.00							\$25.00
Conversion Fee - Full Privilege to Faculty	\$50.00	\$3.00	\$7.00	\$1.00	\$55.00	\$1.00	\$24.00	\$141.00
Conversion Fee - Temporary Licensure by Credentials to Full Privilege	\$2,050.00	\$5.00	\$7.00	\$5.00	\$55.00		\$24.00	\$2,146.00
<b>DENTAL HYGIENISTS</b>								
Application by Exam	\$115.00	\$4.00	\$2.00	\$5.00				\$126.00
Annual Renewal	\$100.00	\$3.00	\$2.00	\$1.00		\$1.00		\$107.00
Annual Renewal - Late 1 to 90 days	\$150.00	\$3.00	\$2.00	\$1.00		\$1.00		\$157.00
Annual Renewal - Late 91 to 365 days	\$200.00	\$3.00	\$2.00	\$1.00		\$1.00		\$207.00
Licensure by Credentials	\$630.00	\$4.00	\$2.00	\$5.00				\$641.00
Temporary Licensure by Credentials	\$220.00	\$4.00	\$2.00	\$5.00				\$231.00
Faculty Initial Application	\$115.00	\$4.00	\$2.00	\$5.00				\$126.00
Faculty Annual Renewal	\$85.00	\$3.00	\$2.00	\$1.00		\$1.00		\$92.00
Faculty Annual Renewal - Late 1 to 90 days	\$127.00	\$3.00	\$2.00	\$1.00		\$1.00		\$134.00
Faculty Annual Renewal - Late 91 to 365 days	\$169.00	\$3.00	\$2.00	\$1.00		\$1.00		\$176.00
DENTAL HYGIENISTS (continued on page 2)								

Texas State Board of Dental Examiners  
Fee Schedule - FY 2019

	Current Board Fee	Texas Online	Peer Assistance	Patient Protection	83rd Leg HB 3201	85th Leg NPDB	85th Leg SB195 PMP	Total Fee
<b>DENTAL HYGIENISTS (continued)</b>								
Conversion Fee - Faculty to Full Privilege	\$50.00	\$3.00	\$2.00	\$1.00		\$1.00		\$57.00
Application to Reactivate a Retired License	\$75.00							\$75.00
Reinstatement of a Canceled Dental Hygiene License	\$212.00		\$2.00	\$1.00		\$1.00		\$216.00
Duplicate License / Renewal	\$25.00							\$25.00
Nitrous Oxide Cons Sed Monitoring Application	\$25.00							\$25.00
Nitrous Oxide Monitoring Duplicate Certificate	\$25.00							\$25.00
Conversion Fee - Full Privilege to Faculty	\$50.00	\$4.00	\$2.00	\$5.00		\$1.00		\$62.00
Conversion Fee - Temporary Licensure by Credentials to Full Privilege	\$410.00	\$4.00	\$2.00	\$5.00				\$421.00
<b>DENTAL ASSISTANTS</b>								
Initial Application	\$31.00			\$5.00				\$36.00
Annual Renewal	\$31.00	\$2.00		\$1.00		\$1.00		\$35.00
Annual Renewal - Late 1 to 90 days	\$46.00	\$2.00		\$1.00		\$1.00		\$50.00
Annual Renewal - Late 91 to 365 days	\$61.00	\$2.00		\$1.00		\$1.00		\$65.00
Duplicate License / Renewal	\$25.00							\$25.00
Nitrous Oxide Cons Sed Monitoring Application	\$12.00							\$12.00
Nitrous Oxide Monitoring Duplicate Certificate	\$25.00							\$25.00
<b>DENTAL LABORATORIES</b>								
Application	\$120.00			\$5.00				\$125.00
Annual Renewal	\$133.00	\$4.00		\$1.00				\$138.00
Annual Renewal - Late 1 to 90 days	\$199.00	\$4.00		\$1.00				\$204.00
Annual Renewal - Late 90 to 365 days	\$265.00	\$4.00		\$1.00				\$270.00
Duplicate Certificate	\$25.00							\$25.00
<b>OTHER</b>								
Mobile Application	\$120.00							\$120.00
Annual Mobile Renewal	\$62.00			\$1.00				\$63.00
Annual Mobile Renewal - 1 to 90 days	\$92.00							\$92.00
Annual Mobile Renewal - 91 to 365 days	\$122.00							\$122.00
Duplicate Certificate Mobile Certificate	\$25.00							\$25.00
Dentist Intern / Resident Prescription Privileges	\$50.00					\$1.00	\$24.00	\$75.00
Jurisprudence	\$54.00							\$54.00
Licensure Verification with Seal	\$9.00							\$9.00
Criminal History Evaluation	\$25.00							\$25.00
Board Scores	\$25.00							\$25.00



Figure: 22 TAC §110.18(d)

## ANESTHESIA LEVELS 2-4 INSPECTION FORM

Dentist Name and License Number:	Date of Evaluation:
Address:	Telephone Number:
Anesthesia Level Inspected (Circle): <b>2          3          4</b>	Time of Evaluation: <i>Start Time:          Completion Time:</i>
Evaluators Name / Telephone Number:	Type of Inspection:  <i>Prior Inspection date (s):</i>  <i>Tier 1:          Tier 2:</i>

**INSTRUCTIONS FOR COMPLETING TSBDE ANESTHESIA INSPECTION FORM:**

1. Prior to inspection, review criteria found in TSBDE Rules and Regulations related to Level of Anesthesia being inspected. Specifically, see Rule 110.5 for levels 2 and 3, 110.6 for level 4, and Rules 110.9 and 110.13 – 110.18 for all permit levels.
2. Each inspector should complete an **Anesthesia Levels 2-4 Inspection Form** independently by checking the appropriate answer box to the corresponding question or by filling in a blank space. The inspector shall not identify violations outside the applicable sedation/anesthesia rules in effect for each permit level.
3. The inspector shall identify all violations and inform the permit holder for remediation as soon as possible. A delay of more than thirty (30) days to remediate any violation shall trigger a risk-based inspection of the permit holder.
4. Sign the **Anesthesia Levels 2-4 Inspection Form** and return to the Board office within ten (10) days after inspection has been completed.
5. IF RISK-BASED: Collect five (5) sedation/anesthesia records documenting procedures at the permit holder’s highest permit level for review by DRP.

## ANESTHESIA PERMIT INSPECTION

<b>A. Office Equipment</b>	YES	NO
1. Adequate and unexpired supply of drugs and anesthetic agents sufficient for the emergency treatment of any patient reasonably expected in the practice (e.g., adequate dose for a single patient of the largest weight expected in the practice), or proof of backorder status for the drugs. This supply must include, but is not limited to, pharmacologic antagonists and resuscitative drugs appropriate for the sedation/anesthesia drugs used. Specifically, the drugs below or their functional equivalents: LEVEL 2 – Naloxone, Epinephrine, Nitroglycerin LEVEL 3 – The above drugs, plus Flumazenil LEVEL 4 – The above drugs, plus appropriate pharmacologic agents if known triggering agents of malignant hyperthermia are administered		
2. Automated external defibrillator as required by Rule 110.15.		
3. Positive pressure ventilation device as required by Rule 110.15.		
4. Supplemental oxygen as required by Rule 110.15.		
5. Stethoscope as required by Rule 110.15.		
6. Sphygmomanometer or automatic blood pressure monitor as required by Rule 110.15.		
7. Pulse oximeter as required by Rule 110.15.		
8. Oxygen delivery system with various full face masks capable of connection to supplemental oxygen and providing positive pressure ventilation, together with an adequate backup system as required by Rule 110.15.		
9. Suction equipment which permits aspiration of the oral and pharyngeal cavities and a backup suction device which will function in the event of a general power failure as required by Rule 110.15.		
10. Lighting system which permits evaluation of the patient's skin and mucosal color and a backup lighting system of sufficient intensity to permit completion of any operation underway in the event of a general power failure as required by Rule 110.15.		
11. Pre-cordial/pre-tracheal stethoscope, size and shape appropriate advanced airway device, intravenous fluid administration equipment, and/or electrocardiogram consistent with permit requirements as required by Rule 110.15 and 110.6, as applicable.		
12. Capnography if level 4 as required by Rule 110.15.		
Notes/Recommendations:		

<b>B. Documentation</b>	<b>YES</b>	<b>NO</b>
1. Emergency preparedness policies and procedures specific to the practice setting, with documentation of specific protocols and annual review logs as required by Rule 110.14.		
2. Proof of continuing education required for most recent permit renewal (8 hours every 2 years for level 2 and 3, 12 hours every 2 years for level 4) as required by Rule 110.9.		
3. Proof of satisfaction of the requirements of 110.16 <b>if</b> providing sedation/anesthesia to patients with ASA III and IV		
4. Proof of satisfaction of the requirements of 110.17 <b>if</b> providing sedation/anesthesia to patients under 13		
5. Current BLS for assistant staff (if applicable) - Levels 2-3, one additional person present with BLS as required by Rule 110.5. - Level 4, two (2) additional individuals present with BLS as required by Rule 110.6.		
6. Current BLS (Expiration date: _____), and ACLS (Expiration date: _____) and/or PALS (Expiration date: _____) for dentist.	_____	_____
Notes/Recommendations:		
<b>C. Patient Record Audit</b>	<b>YES</b>	<b>NO</b>
1. Pre-operative checklist in accordance with Rule 110.13.		
2. Written time-oriented anesthetic record including the names and dosages of all drugs administered and the names of individuals present during the administration of drugs as required by Rules 110.5 and 110.6.		
3. Pulse oximetry, heart rate, respiratory rate, and blood pressure continually monitored and documented at appropriate intervals of no more than 10 minutes for Levels 2 and 3 as required by Rule 110.5.		
4. Pulse oximetry, heart rate, end-tidal CO2 measurements, respiratory rate, and blood pressure continually monitored and documented at appropriate intervals of no more than 5 minutes for Level 4 as required by Rule 110.6.		

5. Proper recovery and discharge, including documentation of continuous monitoring of consciousness, oxygenation, ventilation, and circulation, as well as post-procedure verbal and written instructions to the patient or their escort.		
Notes/Recommendations:		

Number of violations found: \_\_\_\_\_

**Detailed Description of Violations** \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

\_\_\_\_\_  
 Signature of Inspector

\_\_\_\_\_  
 Date



Figure: 26 TAC §746.1301

<b>Type of training:</b>	<b>Who is required to take the training?</b>	<b><u>When must the training be completed?</u></b>
(1)(A) Orientation to your child care center as required by §746.1303 of this division (relating to What must orientation for employees at my child care center include?).	(B) Each employee.	(C) Within seven days of employment and before having unsupervised access to a child in care.
(2)(A) 24 clock hours of pre-service training as required by §746.1305 of this division (relating to What must be covered in pre-service training for caregivers?).	(B) Each nonexempt caregiver. A caregiver may be exempt from pre-service training as specified in §746.1307 of this division (relating to Are any caregivers exempt from the pre-service training?).	(C) For nonexempt caregivers:  (i) Eight hours before the caregiver may be counted in the child/caregiver ratio; and  (ii) 16 hours within 90 days of employment.
(3)(A) Pediatric first aid with rescue breathing as required by §746.1315(a) of this division (relating to Who must have pediatric first-aid and pediatric CPR training?).	(B) Each caregiver and child-care center director.	(C)(i) Within 90 days of employment and before having unsupervised access to a child in care; and  (C)(ii) The person must stay current in this training.
(4)(A) Pediatric CPR as required by §746.1315(b) of this division.	(B) Each caregiver and child-care center director.	(C)(i) Within 90 days of employment; and  (C)(ii) The person must stay current in this training.
(5) 24 clock hours of annual training as required by §746.1309 of	(B) Each caregiver.	(C)(i) Within 12 months of employment; and

<p>this division (relating to What areas of training must the annual training for caregivers cover?).</p>		<p>(C)(ii) During each 12-month period, and as further required by §746.1313 of this division (relating to When must annual training for my caregivers and director be obtained?).</p>
<p>(6)(A) 30 clock hours of annual training as required by §746.1311 of this division (relating to What areas of training must the annual training for my child-care center director cover?).</p>	<p>(B) A child-care center director.</p>	<p>(C)(i) Within 12 months of employment; and (C)(ii) During each 12-month period, and as further required by §746.1313 of this division.</p>
<p>(7)(A) Two clock hours of transportation training as required by §746.1316 of this division (relating to What additional training must an employee and director have if the operation transports children?).</p>	<p>(B)(i) The child-care center director, if the center transports a child whose chronological or developmental age is younger than nine years old; and (B)(ii) Each employee who transports a child whose chronological or developmental age is younger than nine years old.</p>	<p>(C)(i) Prior to transporting children; and (C)(ii) Annually, thereafter.</p>

Figure: 26 TAC §747.1107(8)

<b>Education</b>	<b>Experience</b>
(A) A bachelor’s degree with 12 college credit hours in child development and three college credit hours in management,	and at least one year of experience in a licensed child-care center or licensed or registered child-care home;
(B) An associate’s of applied science degree in child development or a closely related field with six college credit hours in child development and three college credit hours in management. A “closely related field” is any educational instruction pertaining to the growth, development, physical or mental care, or education of children ages birth through 13 years,	and at least one year of experience in a licensed child-care center or licensed or registered child-care home;
(C) Sixty college credit hours with six college credit hours in child development and three college credit hours in management,	and at least one year of experience in a licensed child-care center or licensed or registered child-care home;
(D) A Child Development Associate credential or Certified Child-Care Professional credential with three college credit hours in management,	and at least one year of experience in a licensed child-care center or licensed or registered child-care home;
(E) A child-care administrator’s certificate from a community college with at least 15 college credit hours in child development and three college credit hours in management,	and at least two years of experience in a licensed child-care center or licensed or registered child-care home;
(F) A day-care administrator’s credential issued by a professional organization or an educational institution and approved by Licensing based on criteria specified in <u>40 TAC [Subchapter P of] Chapter 745, Subchapter P [of this title]</u> (relating to Day-Care Administrator’s Credential Program),	and at least two years of experience in a licensed child-care center or licensed or registered child-care home; or
(G) Seventy-two clock hours of training in child development and 30 clock hours in management,	and at least three years of experience in a licensed child-care center or licensed or registered child-care home.



Figure: 26 TAC §747.1107(8)

<b>Education</b>	<b>Experience</b>
(A) A bachelor's degree with 12 college credit hours in child development and three college credit hours in management,	and at least one year of experience in a licensed child-care center or licensed or registered child-care home;
(B) An associate's of applied science degree in child development or a closely related field with six college credit hours in child development and three college credit hours in management. A "closely related field" is any educational instruction pertaining to the growth, development, physical or mental care, or education of children ages birth through 13 years,	and at least one year of experience in a licensed child-care center or licensed or registered child-care home;
(C) Sixty college credit hours with six college credit hours in child development and three college credit hours in management,	and at least one year of experience in a licensed child-care center or licensed or registered child-care home;
(D) A Child Development Associate credential or Certified Child-Care Professional credential with three college credit hours in management,	and at least one year of experience in a licensed child-care center or licensed or registered child-care home;
(E) A child-care administrator's certificate from a community college with at least 15 college credit hours in child development and three college credit hours in management,	and at least two years of experience in a licensed child-care center or licensed or registered child-care home;
(F) A day-care administrator's credential issued by a professional organization or an educational institution and approved by Licensing based on criteria specified in <u>40 TAC [Subchapter P of] Chapter 745, Subchapter P [of this title]</u> (relating to Day-Care Administrator's Credential Program),	and at least two years of experience in a licensed child-care center or licensed or registered child-care home; or
(G) Seventy-two clock hours of training in child development and 30 clock hours in management,	and at least three years of experience in a licensed child-care center or licensed or registered child-care home.

Figure: 26 TAC §747.1303

<b>Type of training:</b>	<b>Who is required to take the training?</b>	<b>When must the training be completed?</b>
<p>(1)(A) Orientation to your child-care home, as specified in §747.1301 of this division [title] (relating to What must orientation for caregivers at my child-care home include), within seven days of employment. [7]</p>	<p>(B) Each caregiver [All caregivers].</p>	<p>(C) Within seven days of employment and before having unsupervised access to a child in care.</p>
<p>(2)(A) Pediatric first aid with rescue breathing and choking and pediatric CPR training, as specified in §747.1313 of this division (relating to Who must have pediatric first-aid and pediatric CPR training?).</p>	<p>(B) The primary caregiver, each substitute caregiver, and each assistant caregiver.</p>	<p>(C)(i) For the primary caregiver, before we register or license the child care home, as required by §747.1003 and §747.1103 of this subchapter (relating to When must I meet qualifications to be a primary caregiver?);</p> <p>(C)(ii) For a substitute caregiver, before being counted in the child/caregiver ratio, as required by §747.1209 of this subchapter (relating to What minimum qualifications must a substitute caregiver meet?);</p> <p>(C)(iii) For an assistant caregiver, within 90 days of employment; and</p> <p>(C)(iv) Each caregiver must stay current in this training.</p>

<p><del>(3)(A)(2)</del> 15 clock hours of annual training, as specified in §747.1305 of this <del>title</del> <u>division</u> (relating to <del>What areas of training topics</del> <u>What areas of training</u> must the annual training for <u>substitute and assistant caregivers cover</u> <del>[include]?</del>).</p>	<p><u>(B) Each substitute and assistant caregiver [Caregivers] in a registered child-care home that is counted in the child/caregiver ratio on more than ten separate occasions in one training year.</u></p>	<p><u>(C)(i) Within 12 months of employment; and</u> <u>(C)(ii) During each subsequent 12-month period, and as further required by §747.1311 of this division (relating to When must the annual training be obtained?).</u></p>
<p><del>(4)(A)(3)</del> 24 clock hours of annual training, as specified in §747.1305 of this <del>division</del>. <del>[title (relating to What topics must the annual training for caregivers include?);]</del></p>	<p><u>(B) Each substitute and assistant caregiver [Caregivers] in a licensed child-care home that is counted in the child/caregiver ratio on more than ten separate occasions in one training year.</u></p>	<p><u>(C)(i) Within 12 months of employment; and</u> <u>(C)(ii) During each subsequent 12-month period, and as further required by §747.1311 of this division.</u></p>
<p><del>(5)(A)</del> 30 clock hours of annual training, as specified in §747.1309 of this <del>division</del> (relating to <u>What areas of training must the annual training for the primary caregiver cover?</u>).</p> <p><del>[(4)CPR and first-aid training; and]</del></p>	<p><u>(B) The primary caregiver [Caregivers as specified in §747.1313 of this title (relating to Who must have first-aid and CPR training?).]</u></p>	<p><u>(C)(i) Within 12 months of employment; and</u> <u>(C)(ii) During each subsequent 12-month period, and as further required by §747.1311 of this division.</u></p>
<p><del>(6)(A)(5)</del> Two clock hours of transportation <del>[Transportation]</del> training as specified in §747.1314 of this <del>division</del> (relating to <u>What additional training must an employee and caregiver have if the home transports children?</u>).</p>	<p><u>(B)(i) The primary caregiver, if the operation transports a child whose chronological or developmental age is younger than nine years old; and</u> <u>(B)(ii) Each substitute or assistant [Any] caregiver who transports a child whose chronological or developmental age is younger than nine years</u></p>	<p><u>(C)(i) Prior to transporting children and;</u> <u>(C)(ii) Annually, thereafter.</u></p>

	old [ <del>7</del> as specified in §747.1314 of this title (relating to What additional training must a person have in order to transport a child in care?)].	
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Figure: 40 TAC §15.1408(m)

S E V E R E R I T Y		<u>Isolated</u>	<u>Pattern</u>	<u>Widespread</u>
	<u>Severity Level A: Immediate threat</u>	<u>\$400-\$500</u>	<u>\$400-\$500</u>	<u>\$400-\$500</u>
		<u>J</u>	<u>K</u>	<u>L</u>
	<u>Severity Level B: Actual harm</u>	<u>\$300-\$400</u>	<u>\$300-\$400</u>	<u>\$300-\$400</u>
		<u>G</u>	<u>H</u>	<u>I</u>
<u>Severity Level C: No actual harm with a potential for more than minimal harm</u>	<u>\$200-\$300</u>	<u>\$200-\$300</u>	<u>\$200-\$300</u>	
	<u>D</u>	<u>E</u>	<u>F</u>	
<u>Severity Level D: No actual harm with a potential for minimal harm</u>	<u>\$100-\$200</u>	<u>\$100-\$200</u>	<u>\$100-\$200</u>	
	<u>A</u>	<u>B</u>	<u>C</u>	
S C O P E				

Note: To assist in using the scope and severity table, the following example is provided: a center that is cited for a violation that is an immediate threat to the health or safety of a minor and is widespread in scope will receive a penalty amount of \$400-\$500 as reflected in box L.

Figure: 40 TAC §90.236(f)

Licensed Capacity of 60 or More

	<u>Isolated</u>	<u>Pattern</u>	<u>Widespread</u>
S E V E R E R I T Y	<u>Immediate threat</u>	<u>\$2000 - 3000</u>	<u>\$4000 - 5000</u>
		<u>J</u>	<u>K</u>
	<u>Actual harm</u>	<u>\$500 - 1000</u>	<u>\$1500 - 2000</u>
		<u>G</u>	<u>I</u>
	<u>No actual harm with a potential for more than minimal harm</u>	<u>\$200 - 300</u>	<u>\$400 - 500</u>
		<u>D</u>	<u>E</u>
	<u>No actual harm with a potential for minimal harm</u>	<u>\$0</u>	<u>\$0</u>
	<u>A</u>	<u>B</u>	<u>C</u>
	S C O P E		

Note: To assist in using the scope and severity table, the following example is provided: a license holder that is cited for a violation that is an immediate threat to the health or safety of a resident and is widespread in scope will have an administrative penalty assessed in an amount of \$4000-\$5000, as shown in box "L".

Licensed Capacity of 59 or Less

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	<u>Isolated</u>	<u>Pattern</u>	<u>Widespread</u>
<u>Immediate threat</u>	<u>\$700 - 800</u> <u>J</u>	<u>\$800 - 900</u> <u>K</u>	<u>\$900 - 1000</u> <u>L</u>
<u>Actual harm</u>	<u>\$300 - 400</u> <u>G</u>	<u>\$400 - 500</u> <u>H</u>	<u>\$500 - 600</u> <u>I</u>
<u>No actual harm with a potential for more than minimal harm</u>	<u>\$100 - 150</u> <u>D</u>	<u>\$150 - 200</u> <u>E</u>	<u>\$200 - 300</u> <u>F</u>
<u>No actual harm with a potential for minimal harm</u>	<u>\$0</u> <u>A</u>	<u>\$0</u> <u>B</u>	<u>\$0</u> <u>C</u>

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Note: To assist in using the scope and severity table, the following example is provided: a license holder that is cited for a violation that is an immediate threat to the health or safety of a resident and is widespread in scope will have an administrative penalty assessed in the amount of \$900-\$1000, as shown in box "L".

Figure: 40 TAC §92.4(e)

Facility Type	New or Conversion: Single story	New or Conversion: Multiple story	Addition or Remodeling	Alzheimer's Certification
Small Type A (4 to 16 beds) [ <del>based on residential board and care occupancy of the Life Safety Code, Chapter 21-2 Slow</del> )]	\$900	\$1,100	2% of construction cost  Minimum: \$350 Maximum: 50% of the plan review fee for a new facility of the same type	Not applicable
Large Type A (17 or more beds) [ <del>based on residential board and care of the Life Safety Code, Chapter 21-3</del> )]	17-80 beds: \$1,100	17-80 beds: \$1,650	2% of construction cost  Minimum: \$400 Maximum: 50% of the plan review fee for a new facility of the same type	Not applicable
	81-120 beds: \$1,650	81-120 beds: \$2,150		
	121+ beds: \$14 per bed	121+ beds: \$18 per bed		
Small Type B (4 to 16 beds) [ <del>based on residential board and care occupancy of the Life Safety Code, Chapter 21-2 Impractical</del> )]	\$1,100	\$1,650	2% of construction cost  Minimum: \$350 Maximum: 50% of the plan review fee for a new	\$350 additional fee



			facility of the same type	
Large Type B (17 or more beds) [ <del>based on the health care occupancy of the Life Safety Code, Chapter 12</del> ]	17-80 beds: \$1,600	17-80 beds: \$2,100	2% of construction cost	\$550 additional fee
	81-120 beds: \$2,150	81-120 beds: \$2,650	Minimum: \$500	
	121+ beds: \$18 per bed	121+ beds: \$22 per bed	Maximum: 50% of the plan review fee for a new facility of the same type	

Figure: 40 TAC §92.4(g)(2)

Facility Type	New or Conversion: Single story	New or Conversion: Multiple story	Addition or Remodeling	Alzheimer's Certification
Small Type A (4 to 16 beds) [ <del>based on residential board and care occupancy of the Life Safety Code, Chapter 21-2</del> Slow)]	\$1,950	\$2,250	3% of construction cost  Minimum: \$1,110  Maximum: 75% of the fee for a new facility of the same type	Not applicable
Large Type A (17 or more beds) [ <del>based on residential board and care of the Life Safety Code, Chapter 21-3</del> ]	17-80 beds \$2,250	17-80 beds \$3,000	3% of construction cost  Minimum: \$1,200  Maximum: 75% of the fee for a new facility of the same type	Not applicable
	81-120 beds: \$3,000	81-120 beds: \$3,800		
	121+ beds: \$25 per bed	121+ beds: \$32 per bed		
Small Type B (4 to 16 beds) [ <del>based on residential board and care occupancy of the Life Safety Code,</del>	\$2,250	\$3,000	3% of construction cost  Minimum: \$1,100  Maximum: 75% of the	\$350 additional fee

Chapter 21-2 Impractical)]			fee for a new facility of the same type	
Large Type B (17 or more beds) [based on the health care occupancy of the Life Safety Code, Chapter 12)]	17-80 beds: \$3,000	17-80 beds: \$3,750	3% of construction cost  Minimum: \$1,350  Maximum: 75% of the fee for a new facility of the same type	\$550 additional fee
	81-120 beds: \$3,800	81-120 beds: \$4,550		
	121+ beds: \$32 per bed	121+ beds: \$38 per bed		

Figure: 40 TAC §92.551(d)

	<u>Isolated</u>	<u>Pattern</u>	<u>Widespread</u>	
S  E  V  E  R  I  T  Y	<u>Immediate threat</u>	<u>\$1500-3000</u>	<u>\$2000-4000</u>	<u>\$2500-5000</u>
		<u>J</u>	<u>K</u>	<u>L</u>
	<u>Actual harm</u>	<u>\$250-1000</u>	<u>\$500-1500</u>	<u>\$1000-2500</u>
		<u>G</u>	<u>H</u>	<u>I</u>
	<u>No actual harm with a potential for more than minimal harm</u>	<u>\$100-300</u>	<u>\$100-400</u>	<u>\$200-500</u>
	<u>D</u>	<u>E</u>	<u>F</u>	
	<u>No actual harm with a potential for minimal harm</u>	<u>\$0</u>	<u>\$0</u>	<u>\$0</u>
	<u>A</u>	<u>B</u>	<u>C</u>	

S C O P E

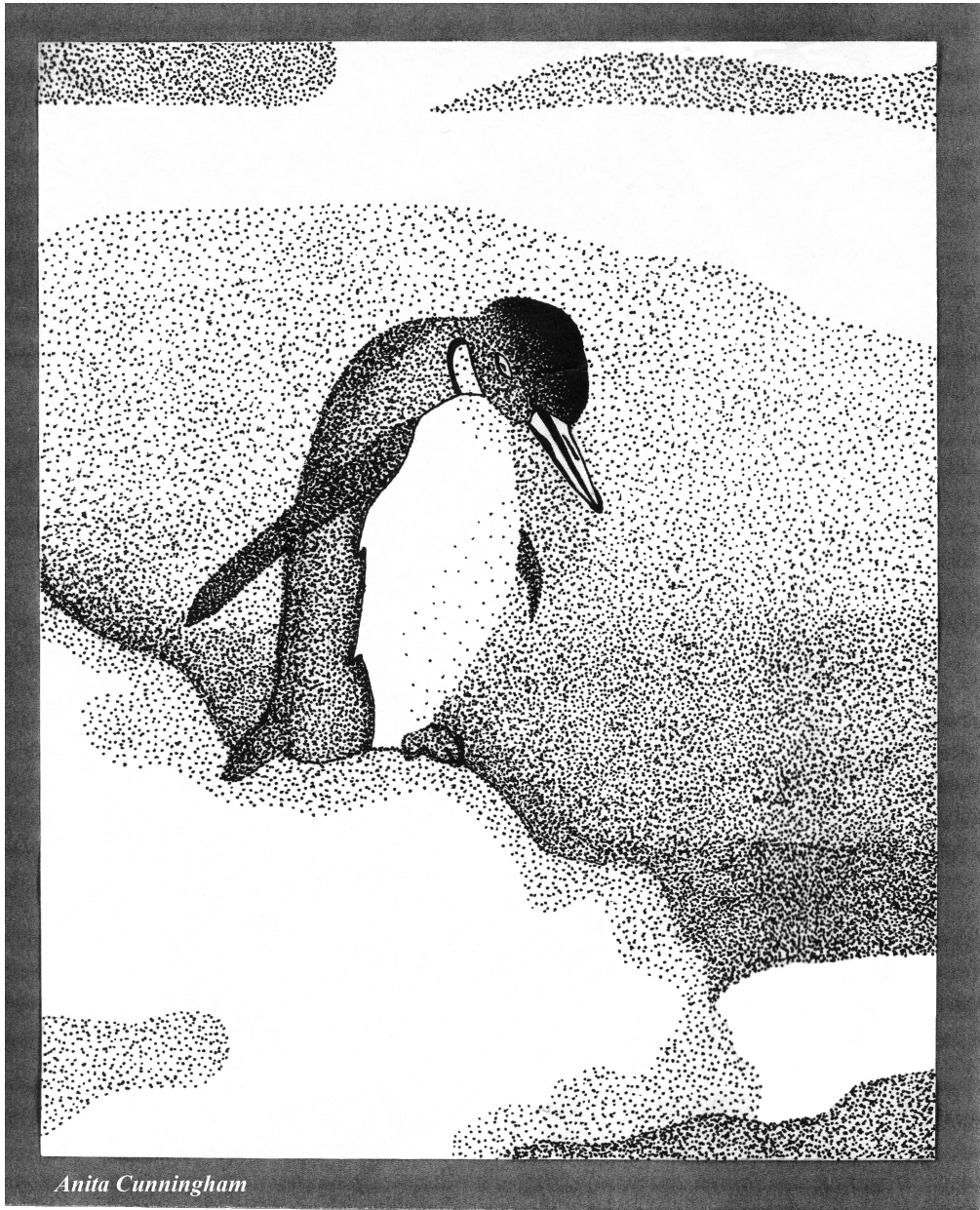
Note: To assist in using the scope and severity chart, the following example is provided: a license holder cited for a violation that is an immediate threat to the health and safety of residents and is widespread in scope will have an administrative penalty assessed in the amount of \$2500-5000, as shown in box "L".

Figure: 40 TAC §98.105(d)

		<u>Isolated</u>	<u>Pattern</u>	<u>Widespread</u>
S E V E R I T Y	<u>Immediate threat</u>	<u>\$350 - \$500</u> <u>J</u>	<u>\$350 - \$500</u> <u>K</u>	<u>\$350 - \$500</u> <u>L</u>
	<u>Actual harm</u>	<u>\$200 - \$350</u> <u>G</u>	<u>\$200 - \$350</u> <u>H</u>	<u>\$200 - \$350</u> <u>I</u>
	<u>No actual harm with a potential for more than minimal harm</u>	<u>\$100 - \$200</u> <u>D</u>	<u>\$100 - \$200</u> <u>E</u>	<u>\$100 - \$200</u> <u>F</u>
	<u>No actual harm with a potential for minimal harm</u>	<u>\$0</u> <u>A</u>	<u>\$0</u> <u>B</u>	<u>\$0</u> <u>C</u>

S C O P E

Note: To assist in using the administrative penalty schedule, the following example is provided: a facility cited for a violation that is an immediate threat to the health or safety of elderly persons or persons with disabilities and is widespread in scope will have an administrative penalty assessed in the amount of \$350-\$500, as shown in box "L".



*Anita Cunningham*

# IN

# ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

## Texas State Affordable Housing Corporation

### Notice of the Implementation of a 2018 Qualified Mortgage Credit Certificate Program

The Texas State Affordable Housing Corporation (the "Corporation"), a nonprofit corporation organized under the laws of the State of Texas (the "Program Area"), is implementing a qualified mortgage credit certificate program (the "Program") within the Program Area to assist eligible purchasers. A Mortgage Credit Certificate ("MCC") is an instrument designed to assist persons better afford home ownership. The MCC Program allows first-time homebuyers an annual federal income tax credit equal to the lesser of \$2,000 or the credit rate for the MCC multiplied by the amount of interest paid by the holder on a home mortgage loan during each year that they occupy the home as their principal residence.

An eligible purchaser of a residence located within the Program Area may apply to the Corporation for an MCC through a participating lender of his or her choice at the time of purchasing a principal residence and obtaining a mortgage loan from a participating lender.

To be an eligible purchaser to receive an MCC, a purchaser must meet the following criteria:

(1) Be one of the following:

(a) A person living in Texas whose annual household income does not exceed 100% of area median family income ("AMFI") (for families of two persons or less) or 115% of AMFI (for families of three or more persons); or

(b) A full-time Texas classroom teacher, teacher's aide, school librarian, school nurse, school counselor, or an allied health or nursing faculty member whose annual family income does not exceed 100% of AMFI (for families of two persons or less) or 115% of AMFI (for families of three or more persons); or

(c) A full-time paid fire fighter, peace officer, corrections officer, juvenile corrections officer, county jailer, EMS personnel, veteran, or public security officer, working in the State of Texas whose annual family income does not exceed 100% of AMFI (for families of two persons or less) or 115% of AMFI (for families of three or more persons).

Visit [www.tsahc.org](http://www.tsahc.org) for a more complete description of the maximum income limits.

(2) The applicant for the MCC cannot have had an ownership interest in his or her principal residence during the three-year period ending on the date the mortgage loan is obtained.

(3) The applicant must intend to occupy the residence with respect to which the MCC is obtained as his or her principal residence within 60 days after the MCC is issued. The MCC issued to an applicant will be revoked if the residence to which the MCC relates ceases to be occupied by the applicant as his or her principal residence.

(4) The MCC cannot be issued to an applicant in conjunction with the replacement or refinancing of an existing mortgage loan. The MCC can, however, be obtained in conjunction with the replacement of a construction period or bridge loan having a term of less than 24 months.

(5) Federal law imposes limitations on the purchase price of homes financed under the program. These limitations are periodically adjusted. Visit [www.tsahc.org](http://www.tsahc.org) to view the current maximum purchase prices allowed. Two-family, three-family and four-family residences are also eligible, provided that one of the units will be occupied by the mortgagor as his or her principal residence and that the residence was first occupied for residential purposes at least five years prior to the closing of the mortgage.

**Anyone receiving an MCC and selling his or her residence within nine years of the issuance of the MCC may be required to return all or a portion of the tax credit received in connection therewith to the Internal Revenue Service.**

To defray the costs of implementing the Program, the Corporation will charge applicants a compliance fee, plus an MCC issuance fee.

The Corporation strongly encourages anyone who believes that he or she qualifies for an MCC to apply at the offices of a participating lender. For more information regarding the Program and its restrictions, including a list of current participating lenders, please contact Joniel Crim, Homeownership Programs Director, at (512) 477-3561 or by email at [jcrim@tsahc.org](mailto:jcrim@tsahc.org).

TRD-201802614

David Long

President

Texas State Affordable Housing Corporation

Filed: June 13, 2018

## Office of the Attorney General

### Texas Water Code and Texas Health & Safety Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code and Texas Health & Safety Code. Before the State may settle a judicial enforcement action under the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code.

Case Title and Court: *Ector County, Texas and the State of Texas v. Commercial Metals Company v. Eddy Shelton, et al.*; Cause No. D-1-GN-16-001724; in the 201st Judicial District, Travis County, Texas.

Nature of suit and Defendant's operations: Defendant Commercial Metals Company owns and operates a metal recycling facility located at 3303 and 3501 West Second Street, Odessa, Texas (the "Site"). Ector County sued the Defendant for violations of the Texas Solid Waste Disposal Act, Texas Clean Air Act, Texas Health and Safety Code, and Texas Commission on Environmental Quality rules. The Defendant sued Ector County government officials regarding the County's retention of private counsel to pursue this lawsuit.

Proposed Agreed Final Judgment: The proposed Agreed Final Judgment ("Judgment") requires the Defendant to pay a civil penalty of \$2,250,000, to be equally divided between Ector County and the State, \$150,000 in attorneys' fees to the State, \$1,400,000 in attorneys' fees to Ector County, and \$200,000 in costs to the County. The Judgment disposes of Defendant's claims against Ector County government officials and includes an injunction requiring Defendant to remediate contaminated soils and minimize smoke emissions.

For a complete description of the proposed settlement, the complete Judgment should be reviewed. Requests for copies of the Judgment, and written comments on the proposed settlement, should be directed to Jake K. Brown, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, MC 066, Austin, Texas 78711-2548; phone (512) 463-2012; facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-201802590  
Amanda Crawford  
General Counsel  
Office of the Attorney General  
Filed: June 12, 2018

## Office of Consumer Credit Commissioner

### Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 06/18/18 - 06/24/18 is 18% for Consumer<sup>1</sup>/Agricultural/Commercial<sup>2</sup> credit through \$250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 06/18/18 - 06/24/18 is 18% for Commercial over \$250,000.

<sup>1</sup> Credit for personal, family or household use.

<sup>2</sup> Credit for business, commercial, investment or other similar purpose.

TRD-201802593  
Leslie L. Pettijohn  
Commissioner  
Office of Consumer Credit Commissioner  
Filed: June 12, 2018

### Request for Official Interpretation

Under Texas Finance Code, §14.108, the Consumer Credit Commissioner of Texas may issue official interpretations of Texas Finance Code, Title 4, Subtitle A or B, after approval of the official interpretation by the Finance Commission. The provisions of Texas Government Code, Chapter 2001 that relate to the adoption of an administrative rule do not apply to the issuance of an official interpretation under this section.

On November 7, 2017, the Commissioner received Request Number 2017-03, from Robert T. Mowrey of Dallas, Texas. The request concerns the following issue: "The issue for consideration by the Commissioner is whether the department requires, pursuant to Texas law or otherwise, a motor vehicle dealership to include a paper or electronic copy of the privacy policy notice in the transaction file as part of a retail installment sales contract, in addition to providing a copy of the privacy policy notice to the customer."

The request was published in the December 1, 2017, issue of the *Texas Register* (42 TexReg 6832). The Office of Consumer Credit Commissioner (OCCC) did not receive any briefs or proposals on the request during the 31-day public comment period.

On June 1, 2018, the OCCC declined to issue an official interpretation in response to the request for two reasons. First, the OCCC believes that the issue was adequately addressed in the preamble to motor vehicle recordkeeping rules adopted by the Finance Commission, as published in the May 4, 2018, issue of the *Texas Register* (43 TexReg 2747). For this reason, an official interpretation is unnecessary. Second, the request does not identify any provision of the Texas Finance Code to be interpreted. For this reason, an official interpretation is not an appropriate way to address the question presented in the request.

TRD-201802596  
Laurie B. Hobbs  
Assistant General Counsel  
Office of Consumer Credit Commissioner  
Filed: June 12, 2018

## Texas Commission on Environmental Quality

### Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is July 24, 2018. TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on July 24, 2018. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission's enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in writing.

(1) COMPANY: Abstract Contractors LLC; DOCKET NUMBER: 2018-0670-WQ-E; IDENTIFIER: RN110300936; LOCATION: Tuscola, Taylor County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: \$875; ENFORCEMENT COORDINATOR: Farhaud Abbaszadeh, (512) 239-0779; REGIONAL



OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(2) COMPANY: Billie W. Egger; DOCKET NUMBER: 2018-0592-WOC-E; IDENTIFIER: RN103567152; LOCATION: Smiley, Gonzales County; TYPE OF FACILITY: wastewater plant; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: \$175; ENFORCEMENT COORDINATOR: Raime Hayes-Falero, (713) 767-3567; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(3) COMPANY: City of Bartlett; DOCKET NUMBER: 2017-1286-PWS-E; IDENTIFIER: RN101375590; LOCATION: Bartlett, Williamson County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(e)(4)(B) and Texas Health and Safety Code, §341.033(a), by failing to operate the facility under the direct supervision of a water works operator who holds a minimum of a Class C or higher license; PENALTY: \$291; ENFORCEMENT COORDINATOR: James Boyle, (512) 239-2527; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0355

(4) COMPANY: City of Mexia; DOCKET NUMBER: 2018-0662-WQ-E; IDENTIFIER: RN105937882; LOCATION: Mexia, Limestone County; TYPE OF FACILITY: wastewater treatment facility; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: \$875; ENFORCEMENT COORDINATOR: Aaron Vincent, (512) 239-0855; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: City of Roxton; DOCKET NUMBER: 2017-1642-MWD-E; IDENTIFIER: RN101920759; LOCATION: Roxton, Lamar County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010204001, Effluent Limitations and Monitoring Requirements Numbers 1, 3, and 6, by failing to comply with permitted effluent limitations; PENALTY: \$7,750; Supplemental Environmental Project offset amount of \$6,200; ENFORCEMENT COORDINATOR: Christopher Moreno, (512) 239-2618; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(6) COMPANY: Craig A. Doreck; DOCKET NUMBER: 2018-0706-WQ-E; IDENTIFIER: RN106117468; LOCATION: Gregory, San Patricio County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: \$875; ENFORCEMENT COORDINATOR: Herbert Darling, (512) 239-2520; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(7) COMPANY: Custom Design Services, Incorporated; DOCKET NUMBER: 2018-0694-WQ-E; IDENTIFIER: RN109452045; LOCATION: Rockport, Aransas County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: \$875; ENFORCEMENT COORDINATOR: Herbert Darling, (512) 239-2520; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(8) COMPANY: Daryl Gregg; DOCKET NUMBER: 2018-0645-WQ-E; IDENTIFIER: RN103362208; LOCATION: Longview, Panola County; TYPE OF FACILITY: on-site sewage facility; RULE VIOLATED: 30 TAC §285.61(4), by failing to ensure that an authorization to construct has been issued prior to beginning construction of an on-site sewage facility; PENALTY: \$175; ENFORCEMENT

COORDINATOR: Harley Hobson, (512) 239-1337; REGIONAL OFFICE: 2616 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(9) COMPANY: DEAD RIVER RANCH MATERIALS, LLC; DOCKET NUMBER: 2018-0707-WQ-E; IDENTIFIER: RN109593020; LOCATION: Waco, McLennan County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: \$875; ENFORCEMENT COORDINATOR: Herbert Darling, (512) 239-2520; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(10) COMPANY: ELITE OIL FIELD AND CONSTRUCTION SERVICES LLC; DOCKET NUMBER: 2017-1427-PWS-E; IDENTIFIER: RN107203887; LOCATION: Crystal City, Zavala County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.122(c)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification to the executive director regarding the failure to conduct routine coliform monitoring during the months of July 2014 - December 2014, and March 2015, and failing to conduct repeat coliform monitoring during the month of September 2015; PENALTY: \$400; ENFORCEMENT COORDINATOR: James Boyle, (512) 239-2527; REGIONAL OFFICE: 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(11) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2015-1204-AIR-E; IDENTIFIER: RN100210319; LOCATION: La Porte, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), 117.310(c)(2), and 122.143(4), Federal Operating Permit Number O2223, Special Terms and Conditions Number 18, New Source Review Permit Numbers 18978, PSDTX752M5, and N162, Special Conditions Numbers 1 and 2.C, and Texas Health and Safety Code, §382.085(b), by failing to comply with the maximum allowable ammonia emissions rate of 3.11 pounds per hour and the ammonia slip concentration of ten parts per million by volume at 3% oxygen for Furnace 11, Emission Point Number QE1011B; PENALTY: \$6,563; ENFORCEMENT COORDINATOR: Raime Hayes-Falero, (713) 767-3567; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: Erna Frac Sand, L.C.; DOCKET NUMBER: 2018-0149-MLM-E; IDENTIFIER: RN105643027; LOCATION: Mason, Mason County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.42(b)(1) and (e)(3), by failing to provide disinfection facilities for the groundwater supply for the purpose of microbiological control and distribution protection; 30 TAC §290.39(e)(1) and (h)(1) and Texas Health and Safety Code, §341.035(a), by failing to submit plans and specifications to the executive director (ED) for review and approval prior to the construction of a new public water supply; 30 TAC §290.39(m), by failing to provide written notification to the ED of the reactivation of an existing public water system; and 30 TAC §324.1 and 40 Code of Federal Regulations §279.22(c)(1), by failing to mark or label used oil storage containers with the words Used Oil; PENALTY: \$948; ENFORCEMENT COORDINATOR: Jason Fraley, (512) 239-2552; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(13) COMPANY: Glenn Bennett; DOCKET NUMBER: 2018-0556-WOC-E; IDENTIFIER: RN110287505; LOCATION: Brookeland, Sabine County; TYPE OF FACILITY: on-site sewage facility; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: \$175; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: GSM Land Holdings, Ltd.; DOCKET NUMBER: 2018-0298-PWS-E; IDENTIFIER: RN108441551; LOCATION: Hereford, Deaf Smith County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.106(f)(2) and Texas Health and Safety Code, §341.031(a), by failing to comply with the acute maximum contaminant level of ten milligram per liter for nitrate; PENALTY: \$600; ENFORCEMENT COORDINATOR: Jonathan Nguyen, (512) 239-1661; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(15) COMPANY: Haitham Laila dba Stop and Go; DOCKET NUMBER: 2018-0046-PST-E; IDENTIFIER: RN102353026; LOCATION: De Kalb, Bowie County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.49(a)(2) and (c)(4)(C) and TWC, §26.3475(d), by failing to ensure the UST corrosion protection system was operated and maintained in a manner that will ensure continuous corrosion protection; and 30 TAC §334.10(b)(2), by failing to assure all UST recordkeeping requirements are met; PENALTY: \$7,492; ENFORCEMENT COORDINATOR: Carlos Molina, (512) 239-2557; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(16) COMPANY: Jerry Durant; DOCKET NUMBER: 2018-0629-WR-E; IDENTIFIER: RN105462261; LOCATION: Granbury, Hood County; TYPE OF FACILITY: impoundment; RULES VIOLATED: TWC §11.081 and §11.121, by failing to obtain authorization prior to impounding, diverting, or using state water; PENALTY: \$875; ENFORCEMENT COORDINATOR: Aaron Vincent, (512) 239-0855; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: Jose Arellano; DOCKET NUMBER: 2018-0509-WOC-E; IDENTIFIER: RN103293288; LOCATION: Anthony, Dona Anna County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: \$175; ENFORCEMENT COORDINATOR: Epifano Villareal, (361) 825-3425; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(18) COMPANY: Juanita and Manuel Jimenez dba Long Branch Saloon; DOCKET NUMBER: 2017-1630-PWS-E; IDENTIFIER: RN106435993; LOCATION: Laredo, Webb County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.122(c)(2)(A) and (f), by failing to issue public notification and submit a copy of the public notification to the executive director regarding the failure to conduct repeat coliform monitoring during the month of March 2016; PENALTY: \$51; ENFORCEMENT COORDINATOR: James Boyle, (512) 239-2527; REGIONAL OFFICE: 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(19) COMPANY: KIM'S CONVENIENCE STORES, INCORPORATED dba Smith Tex Express, dba Kims 35, and dba Kims 36; DOCKET NUMBER: 2018-0183-PST-E; IDENTIFIERS: RN101820058, RN101841542, and RN101846079; LOCATIONS: Atlanta and Bloomburg, Cass County; TYPE OF FACILITY: convenience stores with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certifi-

cate before accepting delivery of a regulated substance into the UST; PENALTY: \$11,691; ENFORCEMENT COORDINATOR: Carlos Molina, (512) 239-2557; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(20) COMPANY: Milner Consulting, LLC; DOCKET NUMBER: 2018-0441-WR-E; IDENTIFIER: RN110234788; LOCATION: San Diego, Duval County; TYPE OF FACILITY: impoundment; RULES VIOLATED: TWC, §11.081 and §11.121, by failing to obtain authorization prior to impounding, diverting, or using state water; PENALTY: \$350; ENFORCEMENT COORDINATOR: Aaron Vincent, (512) 239-0855; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(21) COMPANY: Nalco Company LLC; DOCKET NUMBER: 2018-0031-IWD-E; IDENTIFIER: RN102185717; LOCATION: Freeport, Brazoria County; TYPE OF FACILITY: chemical manufacturing facility; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0001806000, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, Outfall Numbers 001, 101 and 201, by failing to comply with the permitted effluent limitations; PENALTY: \$8,025; ENFORCEMENT COORDINATOR: Austin Henck, (512) 239-6155; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(22) COMPANY: NORTHWEST PETROLEUM LP dba Sam Bass Shell; DOCKET NUMBER: 2018-0081-PST-E; IDENTIFIER: RN101493351; LOCATION: Round Rock, Williamson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the underground storage tanks (USTs); 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; and 30 TAC §334.7(a)(1) and (c) and §334.8(c)(4)(A)(vi)(II), by failing to register with the commission, on authorized agency forms, all USTs in existence on or after September 1, 1987, by submitting a properly completed UST registration and self-certification form to the agency within 30 days after the date any regulated substance was placed into the UST; PENALTY: \$3,240; ENFORCEMENT COORDINATOR: Ken Moller, (512) 239-6111; REGIONAL OFFICE: P.O. Box 13087, Austin, Texas 78711-3087, (512) 339-2929.

(23) COMPANY: PADMA CORPORATION dba Step N Go; DOCKET NUMBER: 2018-0170-PST-E; IDENTIFIER: RN102469681; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: \$4,500; ENFORCEMENT COORDINATOR: Rahim Momin, (512) 239-2544; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: Primoris Service Corporation; DOCKET NUMBER: 2018-0696-WR-E; IDENTIFIER: RN109801878; LOCATION: Navasota, Brazos County; TYPE OF FACILITY: construction site; RULES VIOLATED: TWC, §11.081 and §11.121, by failing to obtain authorization prior to impounding, diverting, or using state water; PENALTY: \$350; ENFORCEMENT COORDINATOR: Herbert Darling, (512) 239-2520; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(25) COMPANY: RRM VENTURE LLC dba Bennys Mart; DOCKET NUMBER: 2017-1165-PST-E; IDENTIFIER: RN102233541; LOCATION: Garland, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.10(b)(2), by failing to assure that all recordkeeping requirements are met; and 30 TAC §334.602(a), by failing to designate, train, and certify at least one named individual for each class of operator - Class A, Class B, and Class C; PENALTY: \$5,213; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(26) COMPANY: San Felipe Stone, Incorporated; DOCKET NUMBER: 2018-0693-WQ-E; IDENTIFIER: RN106586605; LOCATION: Granbury, Hood County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: \$875; ENFORCEMENT COORDINATOR: Herbert Darling, (512) 239-2520; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(27) COMPANY: Sprint Montgomery County Landfill, LP; DOCKET NUMBER: 2017-1711-WQ-E; IDENTIFIER: RN104006879; LOCATION: Conroe, Montgomery County; TYPE OF FACILITY: landfill construction site; RULES VIOLATED: TWC, §26.121(a)(3), 30 TAC §281.25(a)(4), and Texas Pollutant Discharge Elimination System (TPDES) General Permit (GP) Number TXR150019049, Part VII, Section 8, by failing to take all reasonable steps to minimize or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment; and 30 TAC §281.25(a)(4) and TPDES GP Number TXR150019049, Part III, Section F.6(c), by failing to maintain adequate best management practices; PENALTY: \$3,250; ENFORCEMENT COORDINATOR: Caleb Olson, (512) 239-2541; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(28) COMPANY: Steven D. Miller; DOCKET NUMBER: 2018-0703-OSI-E; IDENTIFIER: RN103690749; LOCATION: Brady, McCulloch County; TYPE OF FACILITY: on-site sewage facility; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: \$175; ENFORCEMENT COORDINATOR: Herbert Darling, (512) 239-2520; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(29) COMPANY: Sunset Water, LLC; DOCKET NUMBER: 2018-0131-PWS-E; IDENTIFIER: RN101232916; LOCATION: Dumas, Moore County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3) and §290.122(c)(2)(A) and (f), by failing to submit a Disinfectant Level Quarterly Operating Report (DLQOR) to the executive director (ED) each quarter by the tenth day of the month following the end of each quarter, and failing to provide public notification and submit a copy of the public notification to the ED regarding the failure to submit a DLQOR for the second quarter of 2016, failing to provide the results of nitrate sampling for the January 1, 2015 - December 31, 2015, monitoring period, and failing to provide the results of volatile organic chemical contaminants sampling for the January 1, 2015 - December 31, 2015, monitoring period; 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1st for each year, and failing to submit to the TCEQ by July 1st for each year a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that the information in

the CCR is correct and consistent with compliance monitoring data for calendar years 2015 and 2016; and 30 TAC §290.117(c)(2)(C), (h), and (i)(1), by failing to collect lead and copper tap samples at the required five sample sites, have the samples analyzed, and report the results to the ED for the January 1, 2015 - December 31, 2017, monitoring period; PENALTY: \$1,182; ENFORCEMENT COORDINATOR: Ross Luedtke, (512) 239-3157; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(30) COMPANY: Texas Health and Human Services Commission; DOCKET NUMBER: 2017-1784-PWS-E; IDENTIFIER: RN101199479; LOCATION: Carlsbad, Tom Green County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.39(j)(2) and Texas Health and Safety Code, §341.0351, by failing to notify the executive director in writing of the addition of treatment chemicals, including long-term treatment changes, that will impact the corrosivity of the water; 30 TAC §290.42(f)(1)(E)(ii), by failing to provide adequate containment facilities for all liquid chemical storage tanks; 30 TAC §290.121(a) and (b), by failing to maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the public water system will use to comply with the monitoring requirements; 30 TAC §290.42(f)(1)(C), by failing to provide all chemical bulk storage facilities and day tanks with a label that identifies the facility's or tank's contents; and 30 TAC §290.42(m), by failing to enclose each water treatment plant and all appurtenances by an intruder-resistant fence that is six feet or greater in height with three strands of barbed wire extending outward from the top of the fence; PENALTY: \$250; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 403-4077; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(31) COMPANY: West Commerce Real Estate, LLC dba Castroville Food Mart; DOCKET NUMBER: 2016-1377-PST-E; IDENTIFIER: RN101764868; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tank for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: \$3,375; ENFORCEMENT COORDINATOR: Tyler Gerhardt, (512) 239-1704; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(32) COMPANY: Wildhorse Resources Management Company LLC; DOCKET NUMBER: 2018-0641-WR-E; IDENTIFIER: RN110275948; LOCATION: Dime Box, Lee County; TYPE OF FACILITY: impoundment; RULES VIOLATED: TWC, §11.081 and §11.121, by failing to obtain authorization prior to impounding, diverting, or using state water; PENALTY: \$875; ENFORCEMENT COORDINATOR: Aaron Vincent, (512) 239-0855; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-201802588

Charmaine Backens

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: June 12, 2018



Correction of Error

The Texas Commission on Environmental Quality published proposed amendments to 30 TAC Chapter 336 in the June 8, 2018, issue of the *Texas Register*. On page 3733, in the proposed amendment to 30 TAC

§336.131l, the text of subsection (g) is existing language and should not be underlined. Subsection (g) should read as follows:

"(g) In computing allowable expenses for revisions to maximum disposal rates, only the licensee's test year expenses as adjusted for known and measurable changes will be considered."

TRD-201802595



### Enforcement Orders

An agreed order was adopted regarding ANUM TEXAS CORP dba Big Country Mart, Docket No. 2016-1340-PST-E on June 12, 2018, assessing \$4,629 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Logan Harrell, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Point Evans, LLC dba Albert Ice House & Dance Hall, Docket No. 2017-0402-PWS-E on June 12, 2018, assessing \$550 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Amanda Patel, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Clear Diamond, Inc., Docket No. 2017-1002-MSW-E on June 12, 2018, assessing \$1,312 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Audrey Liter, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Shyamaji Inc. dba Shop N Go, Docket No. 2017-1246-PST-E on June 12, 2018, assessing \$5,813 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding OILTON RURAL WATER SUPPLY CORPORATION THE STATE OF TEXAS, Docket No. 2017-1300-PWS-E on June 12, 2018, assessing \$415 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Ryan Rutledge, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201802610

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: June 13, 2018



### Notice of Application and Opportunity to Request a Public Meeting for a New Municipal Solid Waste Facility Registration Application No. 40295

Application. U.S. Department of the Army, Building 777, Pleasonton Road, Fort Bliss, Texas 79916, has applied to the Texas Commission on Environmental Quality (TCEQ) for proposed Registration No. 40295, to construct and operate a Type V municipal solid waste processing facility. The proposed facility, Fort Bliss Bio-cell will be located 3.7 Miles North of the intersection of Fred Wilson Ave and Chaffee Street, in El Paso County. The Applicant is requesting authorization to process municipal solid waste which includes: soil and crystalline absorbents contaminated with petroleum, oil and lubricants and dried

sediments from oil-water separators. The registration application is available for viewing and copying at the El Paso Public Library, 501 Oregon Street, El Paso, Texas, 79901-0058 and may be viewed online at <https://www.bliss.army.mil/DPW/Environmental/EISDocuments2.html>. The following link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice: <https://www.tceq.texas.gov/assets/public/hb610/index.html?lat=31.147777&lng=-97.758055&zoom=13&type=r%2520>. For exact location, refer to application.

Public Comment/Public Meeting. Written public comments or written requests for a public meeting must be submitted to the Office of the Chief Clerk at the address included in the information section below. If a public meeting is held, comments may be made orally at the meeting or submitted in writing by the close of the public meeting. A public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the development is to be located, or if there is a substantial public interest in the proposed development. The purpose of the public meeting is for the public to provide input for consideration by the commission, and for the applicant and the commission staff to provide information to the public. A public meeting is not a contested case hearing. The executive director will review and consider public comments and written requests for a public meeting submitted during the comment period. The comment period shall begin on the date this notice is published and end 60 calendar days after this notice is published. The comment period shall be extended to the close of any public meeting. The executive director is not required to file a response to comments.

Executive Director Action. The executive director shall, after review of an application for registration, determine if the application will be approved or denied in whole or in part. If the executive director acts on an application, the chief clerk shall mail or otherwise transmit notice of the action and an explanation of the opportunity to file a motion to overturn the executive director's decision. The chief clerk shall mail this notice to the owner and operator, the public interest counsel, to adjacent landowners as shown on the required land ownership map and landowners list, and to other persons who timely filed public comment in response to public notice. Not all persons on the mailing list for this notice will receive the notice letter from the Office of the Chief Clerk.

Information. Written public comments or requests to be placed on the permanent mailing list for this application should be submitted to the Office of the Chief Clerk mail code MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 or electronically submitted to <http://www14.tceq.texas.gov/epic/eComment/>. If you choose to communicate with the TCEQ electronically, please be aware that your e-mail address, like your physical mailing address, will become part of the agency's public record. For information about this application or the registration process, individual members of the general public may call the TCEQ Public Education Program at (800) 687-4040. General information regarding the TCEQ can be found at our web site at [www.tceq.texas.gov](http://www.tceq.texas.gov). Further information may also be obtained from U.S. Department of the Army at the address stated above or by calling Lilia Lenhart, Environmental Engineer at (915) 568-5724

TRD-201802612

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: June 13, 2018



### Notice of District Petition

Notice issued June 11, 2018

TCEQ Internal Control No. D-07132017-015; Knox County Rural Water Supply Corporation (Petitioner) filed an application with the Texas Commission on Environmental Quality (TCEQ) to convert Knox County Rural Water Supply Corporation to Knox County Rural Special Utility District of Haskell, King, and Knox Counties. Knox County Rural Special Utility District's business address will be: 1006 East Main Street, P.O. Box 403, Knox City, Texas 79529. The petition was filed pursuant to Chapter 65 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The nature and purpose of the petition are for the conversion of Knox County Rural Water Supply Corporation and the organization, creation and establishment of Knox County Rural Special Utility District of Haskell, King, and Knox Counties under the provisions of Article XVI, §59 of the Texas Constitution, and Chapter 65 of the Texas Water Code, as amended. The District shall have the purposes and powers provided in Chapter 65 of the Texas Water Code, as amended. The nature of the services presently performed by Knox County Rural Water Supply Corporation are to supply water for municipal uses, domestic uses, power and commercial purposes, and other beneficial uses or controls. The nature of the services proposed to be provided by Knox County Rural Special Utility District of Haskell, King, and Knox Counties are to supply water for municipal uses, domestic uses, power and commercial purposes, and other beneficial uses or controls. It is anticipated that conversion will have no adverse effects on the rates and services provided to the customers.

#### INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at [www.tceq.texas.gov/agency/cc/pub\\_notice.html](http://www.tceq.texas.gov/agency/cc/pub_notice.html) or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at [www.tceq.state.tx.us](http://www.tceq.state.tx.us).

TRD-201802611

Bridget C. Bohac  
Chief Clerk  
Texas Commission on Environmental Quality  
Filed: June 13, 2018



#### Notice of Hearing

Rancho Viejo Waste Management, LLC

SOAH Docket No. 582-18-3319

TCEQ Docket No. 2013-1506-MSW

Proposed Permit No. 2374

#### APPLICATION.

Rancho Viejo Waste Management, LLC, 1116 Calle del Norte, Laredo, Webb County, Texas 78041, a waste management company, has applied to the Texas Commission on Environmental Quality (TCEQ) for a permit to authorize the Pescadito Environmental Resource Center, a new MSW Type I landfill facility. The facility is proposed to be located at 2864 Jordan Road, approximately 20 miles east of Laredo and 5 miles southeast of U.S. Highway 59 at Ranchitos Las Lomas in Webb County, Texas 78043. The TCEQ received the land use compatibility portion (Parts I and II) of the application on March 28, 2011. Parts III and IV of the permit application were received by the TCEQ on March 9, 2015. The TCEQ consolidated the review and processing of Parts I through IV of the application, and issued a Notice of Application and Preliminary Decision on March 22, 2016. The application was subsequently amended on August 18, 2017. As a public courtesy, we have provided the following Web page to an online map of the site or the facility's general location. The online map is not part of the application or the notice: <http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=27.559&lng=-99.160&zoom=13&type=r>. For the exact location, refer to the application.

The TCEQ Executive Director has prepared a draft permit which, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at the Laredo Public Library, 1120 East Calton Road, Laredo, Webb County, Texas. The permit application may be viewed online at <http://www.pescaditoerc.com>.

#### DIRECT REFERRAL.

The Notice of Application and Preliminary Decision was published in English on February 11, 2018, and in Spanish on February 14, 2018. On February 16, 2018, the Applicant filed a request for direct referral to the State Office of Administrative Hearings (SOAH). Therefore, the chief clerk has referred this application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

#### CONTESTED CASE HEARING.

The State Office of Administrative Hearings (SOAH) will conduct a preliminary hearing at:

10:00 a.m. - July 18, 2018

Texas A&M International University

Student Center Ballroom 203

5201 University Boulevard

Laredo, Texas 78041

The purpose of a preliminary hearing is to establish jurisdiction, name the parties, establish a procedural schedule for the remainder of the proceeding, allow an opportunity for settlement discussions, and to address other matters as determined by the judge. The evidentiary hearing phase of the proceeding will be similar to a civil trial in state district court. The hearing will be conducted in accordance with Chapter 2001, Texas Government Code; Chapter 361, Texas Health and Safety Code; TCEQ rules including 30 Texas Administrative Code (TAC) Chapter 330; and the procedural rules of the TCEQ and SOAH, including 30 TAC Chapter 80 and 1 TAC Chapter 155.

To request to be a party, you must attend the hearing and show you would be adversely affected by the application in a way not common to members of the general public. Any person may attend the hearing and request to be a party. Only persons named as parties may participate at the hearing.

In accordance with 1 Tex. Admin. Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at [www.soah.texas.gov](http://www.soah.texas.gov), or in printed format upon request to SOAH."

#### INFORMATION.

If you need more information about the hearing process for this application, please call the Public Education Program, toll free, at (800) 687-4040. General information about the TCEQ can be found at our web site at <http://www.tceq.texas.gov/>. The mailing address for the TCEQ is P.O. Box 13087, Austin TX 78711-3087.

Further information may also be obtained from Rancho Viejo Waste Management, LLC at the address stated above or by calling Mr. Carlos Y. Benavides, III, Manager, at (956) 523-1400.

Persons with disabilities who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week prior to the hearing.

Issued: May 30, 2018

TRD-201802594

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: June 12, 2018



#### Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of Martin Parker DBA Bird's Tire Service

SOAH Docket No. 582-18-4136

TCEQ Docket No. 2016-1433-MSW-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

10:00 a.m. - July 12, 2018

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of the hearing will be to consider the Executive Director's Preliminary Report and Petition mailed June 22, 2017, concerning as-

sessing administrative penalties against and requiring certain actions of Martin Parker dba Bird's Tire Service, for violations in Travis County, Texas, of: 30 Tex. Admin. Code §328.56(c) and §328.63(c).

The hearing will allow Martin Parker dba Bird's Tire Service, the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford Martin Parker dba Bird's Tire Service, the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. Upon failure of **Martin Parker dba Bird's Tire Service** to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's Preliminary Report and Petition, attached hereto and incorporated herein for all purposes. Martin Parker dba Bird's Tire Service, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Tex. Water Code §7.054 and ch. 7, Tex. Health & Safety Code ch. 361, and 30 Tex. Admin. Code chs. 70 and 328; Tex. Water Code §7.058, and the Rules of Procedure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 Tex. Admin. Code §70.108 and §70.109 and ch. 80, and 1 Tex. Admin. Code ch. 155.

Further information regarding this hearing may be obtained by contacting Tracy Chandler, Staff Attorney, Texas Commission on Environmental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Vic McWherter, Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at <http://www.tceq.texas.gov/goto/eFilings> or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.

In accordance with 1 Tex. Admin. Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at [www.soah.texas.gov](http://www.soah.texas.gov), or in printed format upon request to SOAH."

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

Issued: June 12, 2018

TRD-201802609

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: June 13, 2018

◆ ◆ ◆  
Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 11

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 11, Contracts, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The rulemaking is proposed to update commission's rules in Chapter 11 to reflect current references in the Texas Comptroller of Public Accounts' rules for Historically Underutilized Businesses (HUB) and Bid Opening and Tabulation.

The commission will hold a public hearing on this proposal in Austin on July 18, 2018, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

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

Written comments may be submitted to Paige Bond, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2018-018-011-AD. The comment period closes July 24, 2018. Copies of the proposed rulemaking can be obtained from the commission's website at [https://www.tceq.texas.gov/rules/propose\\_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Claribel Diaz, HUB Program, (512) 239-5369.

TRD-201802510  
David Timberger  
Director, General Law Division  
Texas Commission on Environmental Quality  
Filed: June 7, 2018

◆ ◆ ◆  
Notice of Public Meeting Air Quality Standard Permit for Concrete Batch Plants Proposed Registration No. 150603

**Application.** Texas Concrete Enterprise Ready Mix, Inc., has applied to the Texas Commission on Environmental Quality (TCEQ) for an Air Quality Standard Permit, Registration No. 150603, which would authorize continued operation of an existing concrete batch plant and construction of a second permanent concrete batch plant located at 6001 Homestead Road, Houston, Harris County, Texas 77028. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For exact location, refer to application. <http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=29.81333&lng=-95.3025&zoom=13&type=r>. The proposed facility will emit the following air contaminants: particulate matter including (but not limited to) aggregate, cement, road dust,

and particulate matter with diameters of 10 microns or less and 2.5 microns or less.

The executive director has completed the administrative and technical reviews of the application and determined that the application meets all of the requirements of a standard permit authorized by 30 TAC §116.611, which would establish the conditions under which the plant must operate. The executive director has made a preliminary decision to issue the registration because it meets all applicable rules.

**Public Comment/Public Meeting. You may submit public comments to the Office of the Chief Clerk at the address below.** The TCEQ will consider all public comments in developing a final decision on the application. A public meeting will be held and will consist of two parts, an Informal Discussion Period and a Formal Comment Period. A public meeting is not a contested case hearing under the Administrative Procedure Act. During the Informal Discussion Period, the public will be encouraged to ask questions of the applicant and TCEQ staff concerning the permit application. The comments and questions submitted orally during the Informal Discussion Period will not be considered before a decision is reached on the permit application and no formal response will be made. Responses will be provided orally during the Informal Discussion Period. During the Formal Comment Period on the permit application, members of the public may state their formal comments orally into the official record. At the conclusion of the comment period, all formal comments will be considered before a decision is reached on the permit application. A written response to all formal comments will be prepared by the Executive Director and will be sent to each person who submits a formal comment or who requested to be on the mailing list for this permit application and provides a mailing address. Only relevant and material issues raised during the Formal Comment Period can be considered if a contested case hearing is granted on this permit application.

**The Public Meeting is to be held:**

**Monday, June 18, 2018 at 7:00 p.m.**

**McGowen Elementary School**

**6820 Homestead**

**Houston, Texas 77028**

**INFORMATION.** Citizens are encouraged to submit written comments anytime during the public meeting or by mail before the close of the public comment period to the Office of the Chief Clerk, TCEQ, Mail Code MC-105, P.O. Box 13087, Austin, Texas 78711-3087 or electronically at <http://www.tceq.texas.gov/about/comments.html>. If you need more information about the permit application or the permitting process, please call the TCEQ Public Education Program, toll free, at (800) 687-4040. General information can be found at our Web site at [www.tceq.texas.gov](http://www.tceq.texas.gov). *Si desea información en español, puede llamar al (800) 687-4040.*

The application, executive director's preliminary decision, and standard permit will be available for viewing and copying at the TCEQ central office, the TCEQ Houston regional office, and the Tuttle Neighborhood Library, 702 Kress Street, Houston, Harris County, Texas. The facility's compliance file, if any exists, is available for public review at the TCEQ Houston Regional Office, 5425 Polk St Ste H, Houston, Texas. Visit [www.tceq.texas.gov/goto/cbp](http://www.tceq.texas.gov/goto/cbp) to review the standard permit. Further information may also be obtained from Texas Concrete Enterprise Ready Mix, Inc., 6001 Homestead Rd, Houston, Texas 77028, or by calling Mr. Venkata Godasi, Graduate Engineer, AARC Environmental, Inc. at (713) 974-2272.

Persons with disabilities who need special accommodations at the meeting should call the Office of the Chief Clerk at (512) 239-3300 or (800) RELAY-TX (TDD) at least one week prior to the meeting.

Notice Issuance Date: June 6, 2018

TRD-201802508

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: June 7, 2018



### Notice of Receipt of Application and Intent to Obtain Municipal Solid Waste Permit Proposed Permit No. 2399

Application. City of Mason, P.O. Box 68, Mason, Mason County, Texas 76856, has applied to the Texas Commission on Environmental Quality (TCEQ) for a permit to authorize the construction and operation of a new Municipal Solid Waste (MSW) landfill that will accept Type I and Type IV waste in separate areas. The facility will be located at 2107 E. State Highway 29, Mason, Mason County, Texas 76856. The TCEQ received this application on April 17, 2018. The permit application is available for viewing and copying at the City of Mason, City Hall, 124 Moody Street, Mason, Mason County, Texas 76856, and may be viewed online at <http://www.MasonTxEastLandfill.com>. The following link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice: <http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=30.746096&lng=-99.205570&zoom=13&type=r>. For exact location, refer to application.

Additional Notice. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

Public Comment/Public Meeting. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

Opportunity for a Contested Case Hearing. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

To Request a Contested Case Hearing, You Must Include The Following Items in Your Request: your name, address, phone number; appli-

cant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; a list of all disputed issues of fact that you submit during the comment period, and the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify by name and physical address an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose.

Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission may only grant a request for a contested case hearing on issues the requestor submitted in their timely comments that were not subsequently withdrawn.

If a hearing is granted, the subject of a hearing will be limited to disputed issues of fact or mixed questions of fact and law that are relevant and material to the Commission's decision on the application submitted during the comment period.

Mailing List. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. To be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

Information Available Online. For details about the status of the application, visit the Commissioners' Integrated Database (CID) at [www.tceq.texas.gov/goto/cid](http://www.tceq.texas.gov/goto/cid). Once you have access to the CID using the above link, enter the permit number for this application, which is provided at the top of this notice.

Agency Contacts and Information. All public comments and requests must be submitted either electronically at [www.tceq.texas.gov/about/comments.html](http://www.tceq.texas.gov/about/comments.html) or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. Please be aware that any contact information you provide, including your name, phone number, email address and physical address will become part of the agency's public record. For more information about this permit application or the permitting process, please call the TCEQ's Public Education Program, Toll Free, at (800) 687-4040 or visit their website at [www.tceq.texas.gov/goto/pep](http://www.tceq.texas.gov/goto/pep). Si desea información en español, puede llamar al (800) 687-4040.

Further information may also be obtained from the City of Mason at the address stated above or by calling Mr. Daniel Hinckley, P.E., Professional Engineer with Blue Oak Engineering, LLC at (830) 220-2988.

TRD-201802613

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: June 13, 2018





## Texas Ethics Commission

### List of Late Filers

Below is a list from the Texas Ethics Commission naming the filers who failed to pay the penalty fine for failure to file the report, or filing a late report, in reference to the specified filing deadline. If you have any questions, you may contact Domingo Gonzales at (512) 463-5800.

#### **Deadline: Semiannual Report due January 16, 2018 for Candidates and Officeholders**

John W. McBee, 409 Williams St., Cedar Hill, Texas 75704

#### **Deadline: 8-Day Pre-Election Report due February 26, 2018 for Candidates and Officeholders**

Arnoldo A. Alonzo, 3719 Rey David, Brownsville, Texas 78521

Candace A. Aylor, P.O. Box 1371, Austin, Texas 78767

Christopher Lauren Graham, P.O. Box 226265, Dallas, Texas 75222

Andres Holliday, 6629 E. Kings Crown, San Antonio, Texas 78233

Christopher C. Spellmon, 10414 Royal Oaks Dr., Houston, Texas 77016

#### **Deadline: Semiannual Report due January 16, 2018 for Committees**

Sylvia Arjona, Concerned Citizens of Hidalgo, 7601 Saint John Ct., Pharr, Texas 78577

Darold P. Adami, Back the Bond Sherman ISD, 123 N. Crockett, Ste. 100, Sherman, Texas 75090

Mark A. Baker II, Friends of the Branch, 12118 Eunice St., Farmers Branch, Texas 75234

Vish Bhaskaran, Indo American Political Action Committee, 814 Skimmer Ct., Sugar Land, Texas 77478

Stuart Campbell, Harris County Deputies Org., 1314 Texas St. #2000, Houston, Texas 77002

Richard W. Ferguson, Move Sweetwater Forward, 10 Club Terrace, Sweetwater, Texas 79556

Wanda S. Fewell, Limestone County Republican Women PAC, 562 LCR 421, Groesbeck, Texas 76642

Douglas L. Foshee, Texas Aspires, P.O. Box 684606, Austin, Texas 78768

Susan R. Fowler, Texas Motion Picture Alliance PAC, 4809 Comal St., Pearland, Texas 77581

Refugio 'Rey' Gonzales, Texas Health & Science PAC, 8014 Clearwater Crossing, Humble, Texas 77396

Lance Gooden, Young Texans Legislative Caucus, P.O. Box 2910, Austin, Texas 78768-2910

Bobby Gutierrez, Partners for a Better Bryan - Political Action Committee, 1401 S. Texas Ave., Bryan, Texas 77802

Lee O. Henderson, Texas Democratic Action Fund, P.O. Box 892, Fort Worth, Texas 76101

Clayton Kenworthy, Odessans 4 Kids, Inc. (DBA 4 Kids' Future), 2425 E. 8th St., Odessa, Texas 79761

Curtis A. Kleoppel, Southwestern Association PAC, 638 W. 39th St., Kansas City, Missouri 64111

T.C. Langford, Brazos County Democratic Party (P), 307 S. Main St., #102, Bryan, Texas 77802

Darwin McKee, Central Texas PAC Centre Development, P.O. Box 14105, Austin, Texas 78761

George S. Stephens, Lone Star Overnight Political Committee, 6500 River Place Blvd., Bldg. 2, Ste. 105, Austin, Texas 78730

Michael K. Stewart, Aggregate Transporters Association of Texas Political Action Committee, 502 W. 13th St., Austin, Texas 78701-1827

Jesus Urenda, Eastside Democrats, 10345 Luella, El Paso, Texas 79925

TRD-201802505

Seana Willing

Executive Director

Texas Ethics Commission

Filed: June 7, 2018

## Texas Department of Insurance

### Award Notice

#### **Contract No. 454-18-20415**

#### **Call Center Assessment**

#### *Project Description.*

In accordance with the Texas Department of Insurance's (TDI) request for Proposals (RFP) No. 454-18-20415-DGG, issued April 3, 2018, TDI executed Contract No. 454-18-20415 on June 6, 2018, for individuals or companies to study, advise, and conduct an assessment of call center operations. The assessment will include the review of current processes as well as review of key documents related to recruitment, training, quality assurance, coaching, information technology, and workforce management. The service will also include an executive report including recommended changes to the current system to improve TDI services.

#### *Awarded Contractor:*

The North Highland Company, LLC

100 Congress Avenue, Suite 2000, Austin, TX, 78701

#### *Contract Amount and Term.*

The initial term of this Contract will be from June 6, 2018, and continue through December 31, 2018.

The total amount of fees to be paid under this Contract during the initial term shall not exceed One-Hundred Thousand Dollars and Zero Cents (\$100,000.00) and shall be in accordance with Contractor's final Cost Proposal accepted by TDI.

#### *Delivery Schedule.*

A Final Report is due no later than August 31, 2018, which will include a comprehensive review of TDI's Agent and Adjuster Licensing Office Call Center.

TRD-201802573

Norma Garcia

General Counsel

Texas Department of Insurance

Filed: June 11, 2018

### Company Licensing

Application for NEBRASKA LIFE ASSURANCE COMPANY, a foreign life, accident and/or health company, to change its name to AMERICAN FAMILY LIFE ASSURANCE COMPANY OF

COLUMBUS, (merger pending). The home office is in Omaha, Nebraska.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Jeff Hunt, 333 Guadalupe Street, MC 103-CL, Austin, Texas 78701.

TRD-201802608

Norma Garcia

General Counsel

Texas Department of Insurance

Filed: June 13, 2018

◆ ◆ ◆  
**Texas Lottery Commission**

**Scratch Ticket Game Number 2040 "Mad Money Multiplier"**

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2040 is "MAD MONEY MULTIPLIER". The play style is "multiple games".

1.1 Price of Scratch Ticket Game.

A. Tickets for Scratch Ticket Game No. 2040 shall be \$20.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2040.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: SINGLE CHERRY SYMBOL, GOLD BAR SYMBOL, BANANA SYMBOL, DICE SYMBOL, DIAMOND SYMBOL, SPADE SYMBOL, PIGGY BANK SYMBOL, BELL SYMBOL, SUN SYMBOL, ANCHOR SYMBOL, APPLE SYMBOL, HORSESHOE SYMBOL, LIGHTNING BOLT SYMBOL, LEMON SYMBOL, HEART SYMBOL, STRAWBERRY SYMBOL, CLUB SYMBOL, POT OF GOLD SYMBOL, FOUR LEAF CLOVER SYMBOL, WISHBONE SYMBOL, 01, 03, 04, 06, 07, 08, 09, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 2X SYMBOL, 5X SYMBOL, 10X SYMBOL, \$20.00, \$25.00, \$50.00, \$75.00, \$100, \$200, \$500, \$1,000, \$10,000 and \$1,000,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 2040 - 1.2D

<b>PLAY SYMBOL</b>	<b>CAPTION</b>
SINGLE CHERRY SYMBOL	CHERRY
GOLD BAR SYMBOL	BAR
BANANA SYMBOL	BANANA
DICE SYMBOL	DICE
DIAMOND SYMBOL	DIAMOND
SPADE SYMBOL	SPADE
PIGGY BANK SYMBOL	PIGBNK
BELL SYMBOL	BELL
SUN SYMBOL	SUN
ANCHOR SYMBOL	ANCHOR
APPLE SYMBOL	APPLE
HORSESHOE SYMBOL	HRSHOE
LIGHTNING BOLT SYMBOL	BOLT
LEMON SYMBOL	LEMON
HEART SYMBOL	HEART
STRAWBERRY SYMBOL	STRWBY
CLUB SYMBOL	CLUB
POT OF GOLD SYMBOL	GOLD
FOUR LEAF CLOVER SYMBOL	CLOVER
WISHBONE SYMBOL	WISHBN
01	ONE
03	THR
04	FOR
06	SIX
07	SVN
08	EGT
09	NIN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY

21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
41	FRON
42	FRTO
43	FRTH
44	FRFR
45	FRV
46	FRSX
47	FRSV
48	FRET
49	FRNI
50	FFTY
2X SYMBOL	WINX2
5X SYMBOL	WINX5
10X SYMBOL	WINX10
\$20.00	TWY\$
\$25.00	TWV\$
\$50.00	FFTY\$
\$75.00	SVV\$
\$100	ONHN
\$200	TOHN
\$500	FVHN

\$1,000	ONTH
\$10,000	10TH
\$1,000,000	TPPZ

E. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Scratch Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

G. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (2040), a seven (7) digit Pack number, and a three (3) digit Scratch Ticket number. Scratch Ticket numbers start with 001 and end with 025 within each Pack. The format will be: 2040-0000001-001.

H. Pack - A Pack of "MAD MONEY MULTIPLIER" Scratch Ticket Game contains 025 Scratch Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The front of Ticket 001 will be shown on the front of the Pack; the back of Ticket 025 will be revealed on the back of the Pack. All Packs will be tightly shrink-wrapped. There will be no breaks between the Tickets in a Pack. Every other Pack will reverse i.e., reverse order will be: the back of Ticket 001 will be shown on the front of the Pack and the front of Ticket 025 will be shown on the back of the Pack.

I. Non-Winning Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

J. Scratch Ticket Game, Scratch Ticket or Ticket - A Texas Lottery "MAD MONEY MULTIPLIER" Scratch Ticket Game No. 2040.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule 401.302, Scratch Ticket Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "MAD MONEY MULTIPLIER" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose 60 (sixty) Play Symbols. BONUS QUICK WIN PLAY AREAS: If a player reveals 2 matching Play Symbols in the same BONUS QUICK WIN play area, the player wins \$500! MAIN PLAY AREA: If the player matches any of the YOUR NUMBERS Play Symbols to any of the MAD MONEY NUMBERS Play Symbols, the player wins the prize for that number. If the player reveals a "2X" Play Symbol, the player wins 2 TIMES the prize for that symbol. If the player reveals a "5X" Play Symbol, the player wins 5 TIMES the prize for that symbol. If the player reveals a "10X" Play Symbol, the player wins 10 TIMES the prize for that symbol. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly 60 (sixty) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The Scratch Ticket shall be intact;
6. The Serial Number, Retailer Validation Code and Pack-Scratch Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;
8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The Scratch Ticket must not be counterfeit in whole or in part;
10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;
11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;
12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Scratch Ticket Number must be right side up and not reversed in any manner;
13. The Scratch Ticket must be complete and not miscut, and have exactly 60 (sixty) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Scratch Ticket Number on the Scratch Ticket;
14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;
15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;
16. Each of the 60 (sixty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;
17. Each of the 60 (sixty) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Scratch Ticket Number must

be printed in the Pack-Scratch Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

## 2.2 Programmed Game Parameters.

A. GENERAL: Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of either Play Symbols or Prize Symbols.

B. GENERAL: A Ticket will win as indicated by the prize structure.

C. GENERAL: A Ticket can win up to twenty-seven (27) times.

D. BONUS QUICK WIN PLAY AREAS: A Ticket can win up to two (2) times in this play area: once in each BONUS QUICK WIN play area.

E. BONUS QUICK WIN PLAY AREAS: Winning Tickets will contain two (2) matching Play Symbols in a BONUS QUICK WIN play area.

F. BONUS QUICK WIN PLAY AREAS: Consecutive Non-Winning Tickets within a Pack will not have matching BONUS QUICK WIN play areas. For example if the first Ticket contains a Lemon Play Symbol and Dice Play Symbol in either BONUS QUICK WIN play area, then the next Ticket may not contain a Lemon Play Symbol and Dice Play Symbol in either BONUS QUICK WIN play area, in any order.

G. BONUS QUICK WIN PLAY AREAS: A BONUS QUICK WIN Play Symbol will not appear more than one (1) time per Ticket across both BONUS QUICK WIN play areas, unless used in a winning combination.

H. MAIN PLAY AREA: A Ticket can win up to twenty-five (25) times in the main play area.

I. MAIN PLAY AREA: No matching non-winning YOUR NUMBERS Play Symbols will appear on a Ticket.

J. MAIN PLAY AREA: Tickets winning more than one (1) time will use as many MAD MONEY NUMBERS Play Symbols as possible to create matches, unless restricted by other parameters, play action or prize structure.

K. MAIN PLAY AREA: No matching MAD MONEY NUMBERS Play Symbols will appear on a Ticket.

L. MAIN PLAY AREA: YOUR NUMBERS Play Symbols will never equal the corresponding Prize Symbol (i.e., 20 and \$20, 25 and \$25, 50 and \$50).

M. MAIN PLAY AREA: On winning and Non-Winning Tickets, the top cash prizes of \$10,000 and \$1,000,000 will each appear at least once, except on Tickets winning twenty-five (25) times in the main play area.

N. MAIN PLAY AREA: On all Tickets, a Prize Symbol will not appear more than four (4) times, except as required by the prize structure to create multiple wins.

O. MAIN PLAY AREA: Non-winning Prize Symbols will not match a winning Prize Symbol on a Ticket.

P. MAIN PLAY AREA: On Non-Winning Tickets, a MAD MONEY NUMBERS Play Symbol will never match a YOUR NUMBERS Play Symbol.

Q. MAIN PLAY AREA: The "2X" (WINX2) Play Symbol will win DOUBLE the prize for that Play Symbol and will win as per the prize structure.

R. MAIN PLAY AREA: The "2X" (WINX2) Play Symbol will never appear more than once on a Ticket.

S. MAIN PLAY AREA: The "2X" (WINX2) Play Symbol will never appear on a Non-Winning Ticket.

T. MAIN PLAY AREA: The "2X" (WINX2) Play Symbol will never appear as a MAD MONEY NUMBERS Play Symbol.

U. MAIN PLAY AREA: The "5X" (WINX5) Play Symbol will win 5 TIMES the prize for that Play Symbol and will win as per the prize structure.

V. MAIN PLAY AREA: The "5X" (WINX5) Play Symbol will never appear more than once on a Ticket.

W. MAIN PLAY AREA: The "5X" (WINX5) Play Symbol will never appear on a Non-Winning Ticket.

X. MAIN PLAY AREA: The "5X" (WINX5) Play Symbol will never appear as a MAD MONEY NUMBERS Play Symbol.

Y. MAIN PLAY AREA: The "10X" (WINX10) Play Symbol will win 10 TIMES the prize for that Play Symbol and will win as per the prize structure.

Z. MAIN PLAY AREA: The "10X" (WINX10) Play Symbol will never appear more than once on a Ticket.

AA. MAIN PLAY AREA: The "10X" (WINX10) Play Symbol will never appear on a Non-Winning Ticket.

BB. MAIN PLAY AREA: The "10X" (WINX10) Play Symbol will never appear as a MAD MONEY NUMBERS Play Symbol.

## 2.3 Procedure for Claiming Prizes.

A. To claim a "MAD MONEY MULTIPLIER" Scratch Ticket Game prize of \$20.00, \$25.00, \$50.00, \$75.00, \$100, \$200 or \$500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a \$25.00, \$50.00, \$75.00, \$100, \$200 or \$500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above

prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "MAD MONEY MULTIPLIER" Scratch Ticket Game prize of \$1,000, \$10,000 or \$1,000,000, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MAD MONEY MULTIPLIER" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "MAD MONEY MULTIPLIER" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "MAD MONEY MULTIPLIER" Scratch Ticket Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Ticket Prizes. There will be approximately 7,080,000 Scratch Tickets in the Scratch Ticket Game No. 2040. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2040 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
\$20	849,600	8.33
\$25	566,400	12.50
\$50	623,040	11.36
\$75	113,280	62.50
\$100	207,975	34.04
\$200	15,930	444.44
\$500	1,775	3,988.73
\$1,000	170	41,647.06
\$10,000	45	157,333.33
\$1,000,000	10	708,000.00

\*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

\*\*The overall odds of winning a prize are 1 in 2.98. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 2040 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket Game closing procedures and the Scratch Ticket Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 2040, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-201802580  
 Bob Biard  
 General Counsel  
 Texas Lottery Commission  
 Filed: June 11, 2018

◆ ◆ ◆  
**Panhandle Regional Planning Commission**

Legal Notice

The Panhandle Regional Planning Commission (PRPC) is seeking to procure items for workforce training provided to students in the areas

of welding, industrial machinery mechanics, instrumentation and electrical, pump and engine, process technology and nursing.

A copy of the solicitation(s) can be obtained Monday through Friday, 8:00 a.m. to 5:00 p.m., at 415 Southwest Eighth Ave., Amarillo, Texas 79101 or by contacting Leslie Hardin, PRPC's Workforce Development Contracts Coordinator at (806) 372-3381 or lhardin@theprpc.org. Proposals must be received at PRPC by 3:00 p.m. on Friday, July 13, 2018.

PRPC, as administrative and fiscal agent for the Panhandle Workforce Development Board dba Workforce Solutions Panhandle, a proud partner of the AmericanJobCenter network, is an equal Opportunity Employer/Program. Auxiliary aids and services are available upon request to individuals with disabilities. Relay Texas: 711

TRD-201802574  
 Leslie Hardin  
 WFD Contracts Coordinator  
 Panhandle Regional Planning Commission  
 Filed: June 11, 2018

◆ ◆ ◆  
**Public Utility Commission of Texas**

Notice of Application for a Service Provider Certificate of Operating Authority

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on June 8, 2018, in accordance with Public Utility Regulatory Act §§54.151-54.156.



Docket Title and Number: Application of McAllen Data Center, LLC dba MDC for a Service Provider Certificate of Operating Authority, Docket Number 48449.

The applicant seeks to provide facilities-based, data, and resale telecommunication services and it will own and operate fiber optic network facilities in the state of Texas.

Persons wishing to comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than June 28, 2018. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48449.

TRD-201802601  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: June 12, 2018



#### Notice of Application for Review of the Cost of Decommissioning Units 1 and 2 of the South Texas Project

Notice is given to the public of an application for review of the cost of decommissioning units 1 and 2 of the South Texas Project Electric Generating Station filed with the Public Utility Commission of Texas (commission) on June 8, 2018, in accordance with the Public Utility Regulatory Act, §39.205.

Docket Style and Number: Application of NRG South Texas LP for Review of the Cost of Decommissioning Units 1 and 2 of the South Texas Project Electric Generating Station, Docket Number 48447.

The Application: NRG South Texas LP requests that the commission reduce the annual decommissioning funding amount for its 30.8% Trust from \$570,704 to \$197,708 with \$119,812 to be deposited in the large component disposal subaccount for unit 1 and \$77,896 to be deposited in the large component disposal subaccount for unit 2. For its 13.2% Trust, NRG requests a reduction in the annual decommissioning funding amount from \$188,087 to \$66,643 with \$35,495 to be deposited in the large component disposal subaccount for unit 1 and \$31,148 to be deposited in the large component disposal subaccount for unit 2.

Persons wishing to intervene or comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48447.

TRD-201802600  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: June 12, 2018



#### Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on June 4, 2018, under the Public Utility Regulatory Act, Tex. Util. Code Ann. §39.154 and §39.158.

Docket Style and Number: Application of Tahoka Wind Project Holdings, LLC Under §39.158 of the Public Utility Regulatory Act, Docket Number 48429.

The Application: On June 4, 2018, Tahoka Wind Project Holdings, LLC (TWPH) filed a joint application for approval of the sale of Class A interests in TWPH to MidAmerican. Tahoka Wind Class B Member, LLC owns 100% of the equity interest in TWPH which is developing a 300 MW wind-powered electric generation facility located in Lynn County. The combined generation owned and controlled by MidAmerican and its affiliates following the proposed purchase will not exceed 20% of the total electricity offered for sale in the Electric Reliability Council of Texas.

Persons wishing to intervene or comment on the action sought should contact the commission as soon as possible as an intervention deadline will be imposed. A comment or request to intervene should be mailed to P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48429.

TRD-201802602  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: June 12, 2018



#### Notice of Application for Service Area Exception

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on June 4, 2018, for a certificate of convenience and necessity service area exception within Gregg County.

Docket Style and Number: Application of Southwestern Electric Power Company for a Certificate of Convenience and Necessity Service Area Exception in Lynn County. Docket Number 48428.

The Application: American Electric Power/Southwestern Electric Power Company (SWEPCO) filed an application for a service area exception to allow SWEPCO to serve a specific customer located within the certificated service area of Upshur Rural Electric Cooperative Corporation (Upshur). Upshur has provided SWEPCO an affidavit of relinquishment for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the commission no later than June 25, 2018, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48428.

TRD-201802558  
Andrea Gonzalez  
Assistant Rules Coordinator  
Public Utility Commission of Texas  
Filed: June 8, 2018



#### Notice of Application to Amend a Certificated Service Area Boundary

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on June 4, 2018, for an amendment to a certificated service area boundary in the Comfort exchange.

Docket Style and Number: Application of Hill Country Telephone Cooperative, Inc. to Amend its Certificate of Convenience and Necessity for a Minor Boundary Change in the Comfort Exchange. Docket Number 48430.

The Application: The applicant seeks the amendment in order to offer voice and broadband services to customers within an area outside of the current certificate of convenience and necessity number 40040.

Persons wishing to intervene or comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is June 29, 2018. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48430.

TRD-201802603

Adriana Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: June 12, 2018



#### Notice of Application to Amend a Service Provider Certificate of Operating Authority

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on June 4, 2018, in accordance with Public Utility Regulatory Act §§54.151-54.156.

Docket Title and Number: Application of XO Communications Services, LLC and MCI Communications Services, Inc. dba Verizon Business Services to Amend a Service Provider Certificate of Operating Authority, Docket No. 48431.

XO Communications Services, LLC and MCI Communications Services, Inc. dba Verizon Business Services seeks approval to amend SPCOA 60173 to reflect a change in ownership and control. Applicants request an amendment to reflect a merge of XO Communications into MCI Communications.

Persons wishing to comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than June 24, 2018. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48431.

TRD-201802501

Andrea Gonzalez

Assistant Rules Coordinator

Public Utility Commission of Texas

Filed: June 6, 2018



#### Notice of Application to Amend a Service Provider Certificate of Operating Authority

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on June 7, 2018, in accordance with Public Utility Regulatory Act §§54.151-54.156.

Docket Title and Number: Application of Mitel Cloud Services Inc. to Amend a Service Provider Certificate of Operating Authority, Docket No. 48445.

Mitel Cloud Services Inc. seeks approval to amend a service provider certificate of operating authority number 60066 to reflect a corporate restructuring.

Persons wishing to comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than June 29, 2018. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48445.

TRD-201802599

Adriana Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: June 12, 2018



#### Notice of Application to Amend a Sewer Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application to amend a water certificate of convenience and necessity (CCN) in Burnet County.

Docket Style and Number: Application of Windermere Oaks Water Supply Corporation to Amend a Sewer Certificate of Convenience and Necessity in Burnet County, Docket Number 48435.

The Application: On June 5, 2018, Windermere Oaks Water Supply Corporation filed an application to amend sewer CCN No. 20662 in Burnet County and reflect the correct service area boundary. The total service area requested includes approximately 181 acres and 14 current customers.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the commission as soon as possible as an intervention deadline will be imposed. A comment or request to intervene should be mailed to Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Docket Number 48435.

TRD-201802586

Adriana Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: June 11, 2018



#### Notice of Application to Amend a Water Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application to amend a water certificate of convenience and necessity (CCN) in Johnson County.

Docket Style and Number: Application of Crest Water Company to Amend a Certificate of Convenience and Necessity in Johnson County, Docket Number 48405.

The Application: On May 31, 2018, Crest Water Company filed an application to amend its water CCN in Johnson County. The total area being requested includes approximately 195 acres and 0 current customers.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the commission as soon as possible as an intervention deadline will be imposed. A comment or request to intervene should be mailed to Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Docket Number 48405.

TRD-201802585  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: June 11, 2018



### Notice of Application to Amend a Water Certificate of Convenience and Necessity

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application to amend a water certificate of convenience and necessity (CCN) in Burnet County.

Docket Style and Number: Application of Windermere Oaks Water Supply Corporation to Amend a Water Certificate of Convenience and Necessity in Burnet County, Docket Number 48436.

The Application: On June 5, 2018, Windermere Oaks Water Supply Corporation filed an application to amend water CCN No. 12011 in Burnet County and reflect the correct service area boundary. The total service area requested includes approximately 181 acres and 14 current customers.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the commission as soon as possible as an intervention deadline will be imposed. A comment or request to intervene should be mailed to Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Docket Number 48436.

TRD-201802587  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: June 11, 2018



### Notice of Application to Amend and Decertify a Portion of Its Certificates of Convenience and Necessity

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) for approval of a service area contract designating areas to be served.

Docket Style and Number: Application of the City of Edinburg to Amend a Water Certificate of Convenience and Necessity Under TWC

§13.255 and to Decertify a Portion of Sharyland Water Supply Corporation's Service Area in Hidalgo County, Docket Number 48437.

The Application: On June 6, 2018, City of Edinburg filed an application to amend its water certificate of convenience and necessity (CCN) No. 12106 and to decertify a portion of Sharyland Water Supply Corporation's CCN No. 10558 in order for the City of Edinburg to provide water to the Encinos Escondidos Phase #2 subdivision in Hidalgo County. The City of Edinburg is currently providing service to the area and has provided service to the area since the subdivision was built.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the commission as soon as possible as an intervention deadline will be imposed. A comment or request to intervene should be mailed to Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Docket Number 48437.

TRD-201802598  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: June 12, 2018



### Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on June 5, 2018, to relinquish a service provider certificate of operating authority (SPCOA).

Docket Title and Number: Application of Reliance Globalcom Services, Inc. to Relinquish a Service Provider Certificate of Operating Authority, Docket Number 48061.

The applicant has no customers in Texas and seeks to relinquish SP-COA No. 60376.

Persons wishing to comment on the action sought should contact the commission by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than June 29, 2018. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 48061.

TRD-201802597  
Adriana Gonzales  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: June 12, 2018



### State Securities Board

#### Correction of Error

The Texas State Securities Board published several proposed amendments in the June 8, 2018, issue of the *Texas Register*. Those amendments contained errors as follows.

In the first paragraph of the preamble for the amendment to 7 TAC §109.13 that begins on page 3676, the word "all" is missing from the last sentence of the paragraph. The sentence should read as follows:

"It also updates the rule to reflect the current practice followed by the Agency now that almost all of the Form D filings are made through the EFD system."

In the text of the proposed amendment to 7 TAC §133.33 on page 3683, new language in subsection (c) was not underlined. The subsection should read as follows:

(c) Section 109.13(k)[(5)] of this title (relating to Limited Offering Exemptions) and §114.4(b)(1) of this title (relating to Filings and Fees) require the filing of a Form D, "Notice of Exempt Offering of Securities." [~~"Notice of Sale of Securities Pursuant to Regulation D, §4(6), and/or Uniform Limited Offering Exemption."~~]

In the preamble for the proposed amendments to 7 TAC §115.1 and 7 TAC §115.3, the word "making" is misspelled in the second sentence of the second full paragraph in the second column on page 3681. The sentence should read as follows:

"Mr. Edgar, Ms. Diaz and Mr. Yarroll also have determined that for each year of the first five years that §115.3 is in effect the public benefit anticipated as a result of enforcing it will be that the restructured examination program will more closely correspond to the uniform examinations administered by FINRA, making it easier for applicants entering the securities industry in Texas to understand which examinations are required in the registration category they are pursuing."

TRD-201802591

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## Texas Water Development Board

### Applications for May 2018

Pursuant to Texas Water Code §6.195, the Texas Water Development Board provides notice of the following applications:

Project ID #62757 a request from the City of Dickens, P.O. Box 118, Dickens, Texas 78229-0188, received August 4, 2017, for \$760,000 in financial assistance, consisting of \$460,000 in financing and \$300,000 in principal forgiveness from the Drinking Water State Revolving Fund for planning, design, and construction of water system improvements.

Project ID # 73796 a request from the City of San Juan, 709 South Nebraska, San Juan, Texas 78589, received January 5, 2018, for \$1,270,000 in financing from the Clean Water State Revolving Fund for design and construction of improvements to its wastewater treatment plant.

Project ID #73781 a request from the North Fort Bend Water Authority, c/o Allen Boone Humphries Robinson LLP, 3200 Southwest Freeway, Suite 2600, Houston, Texas 77027, received December 1, 2017, for \$2,421,800 in financial assistance consisting of \$2,070,000 in financing and \$351,800 in principal forgiveness from the Clean Water State Revolving Fund for construction of a reclaimed water system.

Project ID #73766 a request from the Sienna Plantation Municipal Utility District No. 1, 16555 Southwest Freeway, Suite 200, Sugar Land, Texas 77479, received May 3, 2017, for \$30,000,000 in financing from the Clean Water State Revolving Fund for design and construction of regional wastewater system improvements.

Project ID #73795 a request from the City of Alba, P.O. Box 197, Alba, Texas 75410-0197, received December 18, 2017, for \$990,000 in financing from the Clean Water State Revolving Fund for planning, design and construction of wastewater system improvements.

Project ID #62791 a request from the Greater Texoma Utility Authority on behalf of the City of Paradise, 5100 Airport Drive, Denton, Texas 75020-8448, received January 23, 2018, for \$1,235,000 in financial assistance consisting of \$935,000 in financing and \$300,000 in principal forgiveness from the Drinking Water State Revolving Fund for planning, acquisition, design and construction of water system improvements.

Project ID #21773 a request from the City of Elmendorf, 8304 Farm-to-Market Road 327, Elmendorf, Texas 78112, received October 30, 2017, for \$10,770,000 in financing from the Drinking Water State Revolving Fund for planning, acquisition, design, and construction of a water supply and treatment system and a request for a waiver from the requirement that the project be addressed in a manner that is consistent with the state and regional water plans.

Project ID #62769 a request from the City of Eastland, P.O. Box 749, Eastland, Texas 76448-0749, received October 10, 2017, for \$1,227,000 in financial assistance consisting of \$695,000 in financing and \$532,000 in principal forgiveness from the Drinking Water State Revolving Fund for planning, design, and construction of water system improvements.

Project ID #62794 a request from the Johnson County Special Utility District, P.O. Box 509, Cleburne, Texas 76033-0509, received February 28, 2018, for \$22,000,000 in financing from the Drinking Water State Revolving Fund for planning, acquisition, design, and construction of a meter replacement and water system improvements project.

Project ID #62787 a request from New Ulm Water Supply Corporation, 1195 Walnut Street, New Ulm, Texas 78950-2163, received December 14, 2017, for \$97,060 in principal forgiveness from the Drinking Water State Revolving Fund for purchase of water meters.

TRD-201802502

Todd Chenoweth

General Counsel

Texas Water Development Board

Filed: June 6, 2018

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## How to Use the Texas Register

**Information Available:** The sections of the *Texas Register* represent various facets of state government. Documents contained within them include:

**Governor** - Appointments, executive orders, and proclamations.

**Attorney General** - summaries of requests for opinions, opinions, and open records decisions.

**Texas Ethics Commission** - summaries of requests for opinions and opinions.

**Emergency Rules** - sections adopted by state agencies on an emergency basis.

**Proposed Rules** - sections proposed for adoption.

**Withdrawn Rules** - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

**Adopted Rules** - sections adopted following public comment period.

**Texas Department of Insurance Exempt Filings** - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

**Review of Agency Rules** - notices of state agency rules review.

**Tables and Graphics** - graphic material from the proposed, emergency and adopted sections.

**Transferred Rules** - notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

**In Addition** - miscellaneous information required to be published by statute or provided as a public service.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

**How to Cite:** Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 43 (2018) is cited as follows: 43 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "43 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 43 TexReg 3."

**How to Research:** The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code* section numbers, or TRD number.

Both the *Texas Register* and the *Texas Administrative Code* are available online at: <http://www.sos.state.tx.us>. The *Texas Register* is available in an .html version as well as a .pdf version through the internet. For website information, call the Texas Register at (512) 463-5561.

## Texas Administrative Code

The *Texas Administrative Code (TAC)* is the compilation of all final state agency rules published in the *Texas Register*. Following its effective date, a rule is entered into the *Texas Administrative Code*. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the *TAC*.

The *TAC* volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete *TAC* is available through the Secretary of State's website at <http://www.sos.state.tx.us/tac>.

The Titles of the *TAC*, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
26. Health and Human Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

**How to Cite:** Under the *TAC* scheme, each section is designated by a *TAC* number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the *Texas Administrative Code*; *TAC* stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

**How to Update:** To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Index of Rules*.

The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the *Texas Register*.

If a rule has changed during the time period covered by the table, the rule's *TAC* number will be printed with the *Texas Register* page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

### TITLE 1. ADMINISTRATION Part 4. Office of the Secretary of State Chapter 91. Texas Register

1 TAC §91.1.....950 (P)

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