TEXAS REGISTER

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How to Use the Texas Register

Information Available: The 11 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.

Secretary of State - opinions based on the election laws.

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Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.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 a 30-day public comment period.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

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 20 (1995) is cited as follows: 20 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 "20 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 20 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, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Texas Administrative Code

The ***Texas Administrative Code*** (***TAC***) is the official 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***. West Publishing Company, the official publisher of the ***TAC***, publishes on an annual basis.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman 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 ***Official TAC*** also is available on WESTLAW, West's computerized legal research service, in the TX-ADC database.

To purchase printed volumes of the ***TAC*** or to inquire about WESTLAW access to the ***TAC*** call West: **1-800-328-9352.**

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
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 ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 12, and October 11, 1994). In its second issue each month the ***Texas Register*** contains a cumulative ***Table of TAC Titles Affected*** for the preceding month. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704..............950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

Update by FAX: An up-to-date ***Table of TAC Titles Affected*** is available by FAX upon request. Please specify the state agency and the TAC number(s) you wish to update. This service is free to ***Texas Register*** subscribers. Please have your subscription number ready when you make your request. For non-subscribers there will be a fee of $2.00 per page (VISA, MasterCard). (512) 463-5561.

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4 TAC §§27.2, 27.3, 27.6, 27.21, 27.23-27.25, 27.50, 27.102 7569

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16 TAC §23.12 7571

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Texas Agricultural Diversification Program: Linked Deposits

4 TAC §§26.1-26.12 7595

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16 TAC §401.308 7600

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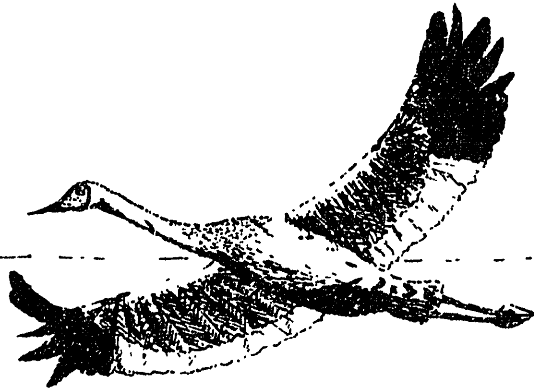
Primary Home Care

40 TAC §47.2901 7609

40 TAC §47.2907 7609



Name: Greg Martinez
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Name: Mike Castillo
Grade: 9
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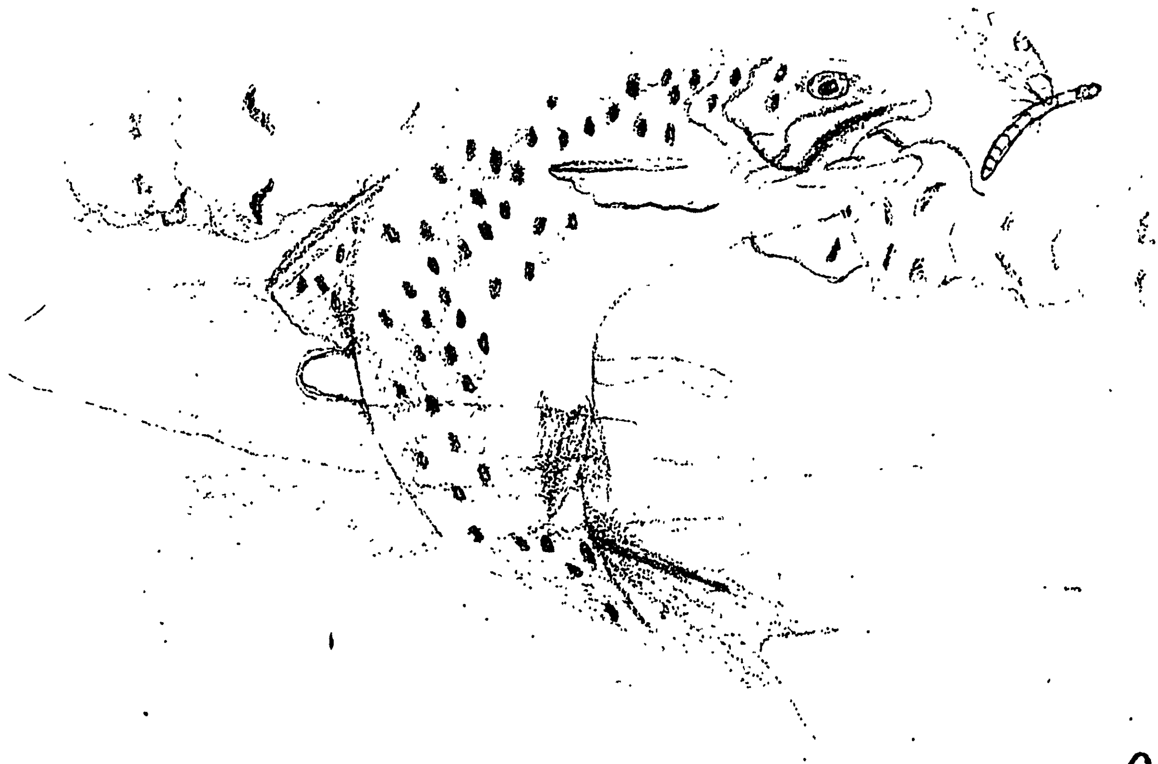

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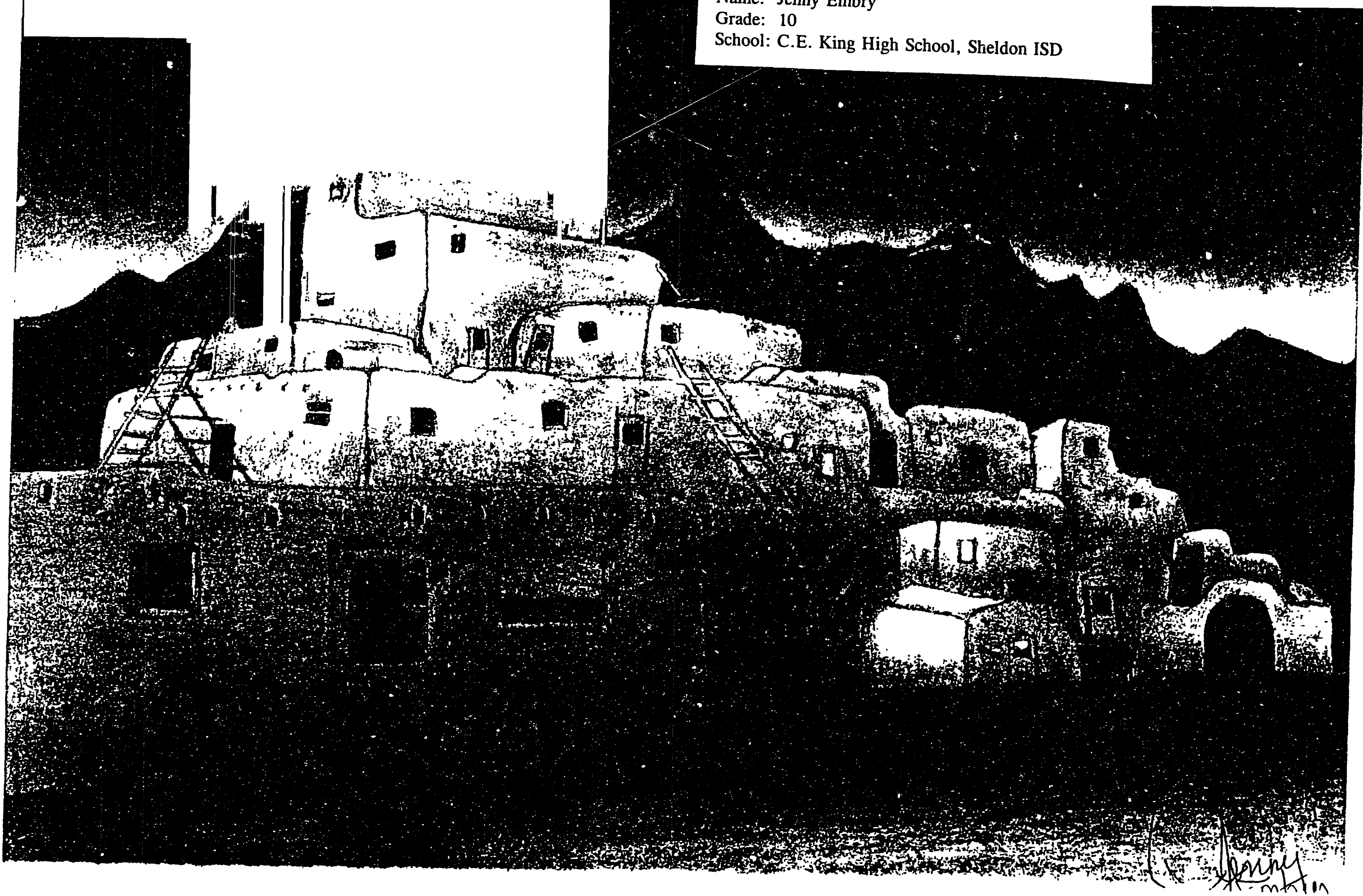

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THE GOVERNOR

As required by Texas Civil Statutes, Article 6252-13a, §6, the ***Texas Register*** publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments Made September 5, 1995

To be a member of the **Justice of the Court of Appeals, Second Court of Appeals District** until the next General Election and until his successor shall be duly elected and qualified: The Honorable Dixon W. Holman, 2322 Wild Goose Way, Arlington, Texas 76016. Judge Holman will be replacing Justice Hal Lattimore of Fort Worth who retired.

To be a member of the **Teacher Retirement System of Texas Board of Trustees** for a term at the pleasure of the Governor pursuant to Senate Bill 9, 74th Legislature, Regular Session: designating Ronald G. Steinhart of Dallas as presiding officer. Mr. Steinhart will be replacing Dana Williams of Corpus Christi as presiding officer. Mr. Williams no longer serves on the board.

To be a member of the **Teacher Retirement System of Texas Board of Trustees** for a term to expire August 31, 1997: Ronald G. Steinhart, 7719 Maplecrest, Dallas, Texas 75240. Pursuant to House Bill Number 3193, Mr. Steinhart will be filling the unexpired term of Dana Williams of Corpus Christi. This appointment was formerly made by the State Board of Education.

To be a member of the **Texas Natural Resource Conservation Commission** for a term to expire August 31, 2001: John M. Baker, Jr., Ph.D. , 510 Phoenix, Temple, Texas 76504. Dr. Baker will be replacing Pam Reed of Austin whose term expired.

To be a member of the **Teacher Retirement System of Texas Board of Trustees** for a term to expire August 31, 2001: James H. Simms, 5304 Tawney, Amarillo, Texas 79106. Pursuant to House Bill Number 3193, 74th Legislature, Regular Session. Mr. Simms will be replacing George M. Crowson of Lovelady whose term expired. This appointment was formerly made by the State Board of Education.

To be a member of the **Teacher Retirement System of Texas Board of Trustees** for a term to expire August 31, 2001: Lisa Trevino Cummins, 13130 Blanco, #1001, San Antonio, Texas 78212. Mrs. Cummins will be replacing Ronald G. Steinhart of Dallas whose term expired. Mr. Steinhart is being moved to a new position on the board.

To be a member of the **Teacher Retirement System of Texas Board of Trustees** for a term to expire August 31, 2001: Wendell Whittenburg, 300 County Road 277, Sweetwater, Texas 79556. Mr. Whittenburg will be replacing Sue McGarvey of Hallsville whose term expired.

To be a member of the **Texas Youth Commission** for a term to expire August 31, 2001: Lisa Saemann Teschner, 10855 Yorkspring, Dallas, Texas 75218. Ms. Teschner will be replacing Marilla King of Austin whose term expired.

To be a member of the **Texas Youth Commission** for a term to expire August 31, 2001: Pete C. Alfaro, 5020 Glen Haven, Baytown, Texas 77521. Mr. Alfaro will be replacing Gary D. Compton of Amarillo whose term expired.

To be a member of the **Texas Board of Nursing Facility Administrators** for a term to expire February 1, 2001: Audrey G. Williamson, 126 Tanglewood Trail, Elgin, Texas 78621. Ms. Williamson will be replacing Johnnie Richardson of Houston whose term expired.

Appointments Made September 6, 1995

To be a member of the **University of Houston Board of Regents** for a term to expire August 31, 2001: Charles E. McMahen, 6112 Burgoyne, Houston, Texas 77057. Mr. McMahen will be replacing Elizabeth Ghrist of Houston whose term expired.

To be a member of the **University of Houston Board of Regents** for a term to expire August 31, 2001: Gary L. Rosenthal, 3929 Del Monte, Houston, Texas 77019. Mr. Rosenthal will be replacing John T. Cater of Houston whose term expired.

To be a member of the **University of Houston Board of Regents** for a term to expire August 31, 2001: Eduardo Aguirre, Jr., 1634 Park Haven Drive, Houston, Texas 77077. Mr. Aguirre will be replacing Vidal Martinez of Houston whose term expired.

To be a member of the **Red River Authority of Texas Board of Directors** for a term to expire August 11, 2001: George W. Arrington, 1540 South Willard, P.O. Box 608, Canadian, Texas 79014. Mr. Arrington is being reappointed.

To be a member of the **Red River Authority of Texas Board of Directors** for a term to expire August 11, 1999: James P. Fallon, 210 Arapaho West, Sherman, Texas 75092. Mr. Fallon will be replacing Gerry Daugherty of Denison who was not confirmed.

To be a member of the **Red River Authority of Texas Board of Directors** for a term to expire August 11, 2001: Betty Pemberton Peveto, 604 South Denton, Gainesville, Texas 76240. Ms. Peveto will be replacing Eric Clifford of Paris whose term expired.

To be a member of the **Red River Authority of Texas Board of Directors** for a term to expire August 11, 2001: W. F. Smith, Jr., 500 Earle, Box 613, Quanah, Texas 79252. Mr. Smith will be replacing Joe Johnson of Wichita Falls whose term expired.

To be members of the **Red River Boundary Commission** for terms to expire June 30, 1998, pursuant to House Concurrent Resolution Number 128, 74th Legislature, Regular Session: William A. (Bill) Abney, 2408 Guimon Road, Marshall, Texas 75670; Charles T. Henderson, Route 1 Box 83, Byers, Texas 76357; Don Ross Malone, 16631 FM Road 1207, Vernon, Texas 76384; Mildred Whatley Nunneley, P.O. Box 59, Nocona, Texas 76255; Patricia Crawford Peale, 1111 Kiowa Drive, West, Lake Kiowa, Texas 76240; and Christine Smart, 27 Whispering Oaks Drive, Denison, Texas 75020.

To be a member of the **Red River Boundary Commission** pursuant to House Concurrent Resolution Number 128, 74th Legislature, Regular Session: William A. (Bill) Abney of Marshall as chair.

Appointments Made September 8, 1995

To a member of the **Executive Council of Physical Therapy and Occupational Therapy Examiners** for a term to expire February 1, 1997, is hereby withdrawn for the appointment of Joe C. Frush.

Appointments Made September 11, 1995

To be a member of the **Upper Guadalupe River Authority Board of Directors** for a

term to expire February 1, 2001: Marsha E. Copeland, 1401 Lucky Ridge, Kerrville, Texas 78028. Ms. Copeland will be replacing Mary V. Holekamp of Kerrville whose term expired.

To be a member of the **Upper Guadalupe River Authority Board of Directors** for a term to expire February 1, 2001: T. Beck Gipson, 309 Earl Garrett Street, Kerville, Texas 78028. Mr. Gipson will be replacing Robert Finch of Kerrville whose term expired.

To be a member of the **Upper Guadalupe River Authority Board of Directors** for a term to expire February 1, 2001: George Granger MacDonald, Jr., 2951 Fall Creek Road, Kerrville, Texas 78028. Mr. MacDonald will be replacing Jack Furman who resigned.

To be a member of the **Upper Guadalupe River Authority Board of Directors** for a term to expire February 1, 1999: William H. Williams, II, 172 St. Andrews Loop, Kerrville, Texas 78028. Mr. Williams will be replacing Ernest Linares of Kerrville who resigned.

To be a member of the **Justice of the Second Court of Appeals** on September 1, 1995: Judge Dixon W. Holman of Arlington. Governor Bush appointed Judge Holman's appointment to be September 5, 1995, but the corrected record show the effective date as September 1, 1995.

Issued in Austin, Texas on September 13, 1995.

TRD-9511780 George W. Bush
Governor of Texas

♦ ♦ ♦

Texas Ethics Commission

The Texas Ethics Commission is authorized by 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.

Ethics Advisory Opinions

EAO-275. Whether a former commissioner or a former executive director of the Texas Natural Resource Conservation Commission (TNRCC) may participate in certain types of permit matters filed after the former commissioner's or former executive director's service at the TNRCC ended.

Summary. Former officers and employees of the TNRCC should look to Health and Safety Code §361.0885 and §382.0591 and Water Code, §26. 0283, not to §572.054 of the Government Code, to determine whether they may work on a permit matter.

EAO-276. Whether a judge may use political contributions to pay the costs of defending a lawsuit.

Summary. If a judge determines in good faith that a groundless lawsuit has been filed against him solely because of his status as a judge, the judge may use political contributions to pay the expenses of defending the lawsuit.

EAO-277. Whether a Texas corporation may make political contributions and expenditures in connection with elections in a state in which corporate contributions are permissible.

Summary. The Texas Election Code, Title 15 does not prohibit a Texas corporation from making contributions and expenditures in connection with elections in other states.

Issued in Austin, Texas, on September 8, 1995.

TRD-9511790 Lucia Dodson
Executive Assistant
Texas Ethics Commission

Filed: September 14, 1995

♦ ♦ ♦

Name: Cynthia Thompson
Grade: 7
School: Henderson Middle School, Henderson ISD

EMERGENCY RULES

An agency may adopt a new or amended section or repeal an existing section on an emergency basis if it determines that such action is necessary for the public health, safety, or welfare of this state. The section may become effective immediately upon filing with the ***Texas Register***, or on a stated date less than 20 days after filing and remaining in effect no more than 120 days. The emergency action is renewable once for no more than 60 additional days.

Symbology in amended emergency sections. New language added to an existing section is indicated by the use of **bold text.** [Brackets] indicate deletion of existing material within a section.

TITLE 22. EXAMINING BOARDS

Part XXXIII. Texas State Board of Examiners of Perfusionists

Chapter 761. Perfusionists

• 22 TAC §761.10

The Texas State Board of Examiners of Perfusionists adopts on an emergency basis an amendment to existing §761.10, concerning the licensure of perfusionists. Specifically, the section covers application procedures for the grandfather period. This amendment is also proposed for permanent adoption the September 15, 1995, issue of the *Texas Register* (20 TexReg 7258).

The adoption is necessary to implement the provisions in Acts 1995, 74th Legislature, Regular Session, Chapter 761 (Senate Bill 1291), which requires persons applying under the grandfather provision of the statute to have filed completed applications prior to December 31, 1995. Therefore it is necessary to have amendment governing the grandfather provision in place no later than September 1, 1995.

The amendment is adopted on an emergency basis under Texas Civil Statutes, Article 4529e, §7, which provide the Texas State Board of Examiners of Perfusionists with the authority to adopt rules concerning the regulation and licensure of perfusionists.

§761.10. Grandfather Period.

(a) The grandfather period begins on January 1, 1995, and expires **December 31, 1995** [September 1, 1995].

(b)-(d) (No change.)

(e) All application materials and fees required under this section must be received by the board or bear a postmark on correspondence to the board prior to **January 1, 1996** [September 1, 1995].

(f) (No change.)

Issued in Austin, Texas, on September 13, 1995.

TRD-9511750 Shannon E. Ballard
Chairman
Texas State Board of Examiners of Perfusionists

Effective date: September 13, 1995

Expiration date: January 11, 1996

For further information, please call: (512) 834-6751

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TITLE 25. HEALTH SERVICES

Part II. Texas Department of Mental Health and Mental Retardation

Chapter 401. System Administration

Subchapter E. Contracts Management

• 25 TAC §§401.371-401.393

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts on an emergency basis the repeal of §§409.371-401.393 of Chapter 401, Subchapter E, concerning contracts management. The emergency repeal is contemporaneously proposed for public comment in this issue of the *Texas Register*. The emergency adoption of new §§409.371-401.399 of Chapter 401, Subchapter E, concerning the same, is contemporaneously published in this issue of the *Texas Register*.

The subchapter is repealed on an emergency basis to allow for the emergency adoption of sections which enable the department to act expeditiously and effectively in remedying contractual problems that may affect the life, health, welfare, or safety of people receiving mental health and mental retardation services funded by TDMHMR.

The repeals are adopted on an emergency basis under the Texas Health and Safety Code, Title 7, §532.015, which provides the Texas Board of Mental Health and Mental Retardation with rulemaking powers; under the provisions of Texas Civil Statutes, Article 4413(502), §15, which provides the Health and Human Services Commission with authority over TDMHMR rules; and under the Texas Government Code, §2001.034, which authorizes emergency rulemaking.

§401.371. Purpose.

§401.372. Application.

§401.373. Definitions.

§401.374. Principles of Contracting at TDMHMR.

§401.375. General Requirements for the Department and MHMRAs.

§401.376. General Requirements for Contractors.

§401.377. Criteria for Determination of Method of Procurement.

§401.378. Requirements for Competitive Procurement: Competitive Sealed Bid and Competitive Negotiation (Request for Proposal).

§401.379. Additional Requirements Specific to Competitive Procurement (Sealed Bid).

§401.380. Additional Requirements Specific to Competitive Procurement: Competitive Negotiation (Request for Proposal).

§401.381. Requirements for Noncompetitive Procurement: Noncompetitive Negotiation (Sole Source Contracting).

§401.382. Requirements Specific to Type of Contract: Support Services Contracts.

§401.383. Requirements Specific to Type of Contract: Program Contracts.

§401.384. Requirements Specific to Type of Contract: Direct Services Contracts.

§401.385. Requirements Specific to Type of Contract: Contracts for Services (Performance Contracts).

§401.386. Fiscal Policy.

§401.387. Adverse Action.

§401.388. Administrative Hearing to Contest Adverse Action.

§401.389. Contract Terminations.

§401.390. Abeyance and Removal of Current or Potential Contractual Rights.

§401.391. Exhibits.

§401.392. References.

§401.393. Distribution.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511877 Ann Utley
Chairman
Texas Department of Mental Health and Mental Retardation

Effective date: September 15, 1995

Expiration date: January 13, 1996

For further information, please call: (512) 206-4516

♦ ♦ ♦

• 25 TAC §§409.371-401.399

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts on an emergency basis new §§409.371-401.399 of Chapter 401, Subchapter E, concerning contracts management. The new subchapter is contemporaneously proposed with additional provisions for public comment in this issue of the *Texas Register*. The existing Chapter 401, Subchapter E, also concerning contracts management, is repealed on an emergency basis and proposed for public comment in this issue of the *Texas Register*.

The subchapter is adopted on an emergency basis to enable the department to act expeditiously and effectively in remedying contractual problems that may affect the life, health, welfare, or safety of people receiving mental health and mental retardation services funded by TDMHMR.

The new sections are adopted on an emergency basis under the Texas Health and Safety Code, Title 7, §532.015, which provides the Texas Board of Mental Health and Mental Retardation with rulemaking powers; under the provisions of Texas Civil Statutes, Article 4413(502), §15, which provides the Health and Human Services Commission with authority over TDMHMR rules; and under the Texas Government Code, §2001.034, which authorizes emergency rulemaking.

§401.371. Purpose. The purpose of this subchapter is to provide rules governing the administration of contracts which are funded in whole or part by the Texas Department of Mental Health and Mental Retardation (TDMHMR), as follows:

(1) authority contracts, including:

(A) performance contracts between the state authority and local authorities;

(B) designated provider contracts between the state authority and designated providers;

(C) performance subcontracts between a local authority and subcontractors providing specific community-based services; and

(D) designated provider subcontracts between the designated provider and subcontractors providing specific community-based services; and

(2) provider contracts, including contracts between the department and a contractor in the following categories:

(A) support services contracts;

(B) consultant contracts;

(C) professional services contracts;

(D) employee education and training contracts;

(E) contracts for community-based residential and nonresidential mental health and mental retardation services; and

(F) other standard contracts contained in the TDMHMR Contracts Manual.

§401.372. Application.

(a) This subchapter applies to the Texas Department of Mental Health and Mental Retardation (TDMHMR) as the state authority for mental health and mental retardation services; to local authorities; to designated providers; to facilities and the Central Office of TDMHMR; and to their respective contractors and subcontractors.

(b) This subchapter applies to Medicaid contracts and subcontracts except to the extent that it conflicts with Medicaid rules, in which case the Medicaid rules prevail.

(c) This subchapter does not apply to grants awarded pursuant to the Texas Health and Safety Code, Chapter 535.

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

Acceptable bid or acceptable offer–A bid or offer which has been prepared and submitted according to the timeframes, procedures, and format specified in the procurement package; which indicates the offeror can meet the minimum requirements specified in the procurement package; and which is made by an offeror who is legally eligible to receive state and/or federal funds.

Amendment–An attachment to a contract legally executed by authorized parties prior to the expiration of the contract term that alters, deletes, or adds provisions.

Board–The Texas Board of Mental Health and Mental Retardation.

Commissioner–The commissioner of the Texas Department of Mental Health and Mental Retardation or designee.

Community-based services–Mental health and/or mental retardation services provided in the community that are designated in the performance contract, performance memorandum, performance subcontract, designated provider contract, or contracts for community-based residential or nonresidential mental health and mental retardation services.

Community center–A community mental health and/or mental retardation center established pursuant to the Texas Health and Safety Code, Chapter 534, Subchapter A.

Consultant contract–A contract to retain the services of an individual or organization to study an existing or proposed operation or project, or to provide advice with regard to the operation or project consistent with Texas Government Code, Subchapter B, §§2254.021 et seq, to exclude engaging registered professional engineers or registered architects for the design or construction of state facilities; private legal counsel; investment counselors; actuaries; or physicians, dentists, or their medical or dental services providers.

Contract–Any written document (or series of documents) that obligates a party to pay money to a person or organization in exchange for goods or services from that person or organization or that obligates a party to provide goods or services in exchange for money.

Contracting entity-The entity which provides the funds for services pursuant to a contract.

Contractor-An entity that provides services for funds pursuant to a contract.

Department-A facility or the Central Office of the Texas Department of Mental Health and Mental Retardation.

Designated provider-Pursuant to the Texas Health and Safety Code, §534.054, a service provider with whom the department contracts for the delivery of a specific community-based mental health or mental retardation service in a specified local service area of the state. The term does not include a local authority.

Emergency-A state of imminent peril to the health, safety, or welfare of employees, persons served, or the general public.

Employee education and training contract-A contract to acquire professional expertise for in-facility or other in-house training of employees. The term does not refer to training sponsored by another organization at conferences, seminars, or training sessions.

Facility-Any state hospital, state school, state center, or other entity which is now or is hereafter made a part of the Texas Department of Mental Health and Mental Retardation.

Financial or other interest-The condition that exists when an employee or officer of TDMHMR or a local authority who initiates or approves contracts has or intends employment with a contractor; paid consultation with a contractor; membership on a contractor's board of directors; or ownership of stock, partnership, or other substantial interest in a contractor, as defined in Local Government Code, §171.002. The term also applies to the condition that exists when a person related within the second degree of consanguinity or affinity (as described in §401.397 of this title (relating to Exhibits) as Exhibit A) to such an employee or officer participates in such activities.

Foster or family home placement-A residential placement where the caregiver or caregivers have no more than three unrelated persons with disabilities in their home at any given time and the caregiver or caregivers are providing this service in their primary residence.

Historically underutilized business (HUB)-A for-profit corporation, sole proprietorship, partnership, or joint venture in which at least 51% of all classes of the shares of stock or other equitable securities are owned by one or more persons who have been historically underutilized (socially disadvantaged) because of their identification as members of the following groups: Black American, Hispanic American, Asian Pacific American, Native American, and Women. These persons must have a proportionate interest and demonstrate active participation in the control, operation, and management of the business.

Local authority-An entity to which the Texas Board of Mental Health and Mental Retardation delegates its authority and responsibility within a specified region for the planning, policy development, coordination, resource development and allocation, and for supervising and ensuring the provision of mental health services to persons with mental illness and/or mental retardation services to people with mental retardation in one or more local service areas pursuant to a performance contract.

Local service area-A geographic area composed of one or more Texas counties delimiting the population which may receive services from a local authority.

Offeror-An entity that submits to a contracting entity a proposal to be considered for a contract.

Performance contract-The contract between the state authority and a local authority in which the state authority agrees to pay the local authority a specified sum for ensuring the provision of specified mental health and mental retardation services in a local service area. The term includes a performance memorandum.

Persons with a mental disability-Persons with mental illness, mental retardation, or a related condition, or a pervasive developmental disorder, and persons younger than four years of age who are eligible for Early Childhood Intervention services.

Plan of service-The systematic, organized compilation of information relevant to the services provided to an individual admitted for services provided using funds received from or through TDMHMR.

Priority population-Groups of persons with a mental disability identified in the performance contract or subcontract for whom the department purchases mental health or mental retardation services.

Procurement package-The invitation for bids or request for proposals and any other associated documentation that serves to describe the requirements of the contract.

Professional services-Those services within the scope of the practice of accounting, architecture, optometry, medicine, or professional engineering as defined by state law, or services performed by any licensed architect, optometrist, physician, surgeon, certified public accountant, or professional engineer in connection with his professional employment or practice, as specified in the Texas Government Code, Chapter 2254, Subchapter A, §§2254.001 et seq.

Proposal-Documents prepared by an offeror which are submitted to a contracting entity in response to a procurement package provided by the contracting entity.

Prospective payment funds-Money which the state authority prospectively provides to a local authority to provide community-based services to certain persons with a mental disability. Such funds are provided through programs including, but not limited to, the Prospective Payment Program (PPP) and the Companion Program.

Small business-A corporation, partnership, sole proprietorship, or other legal entity formed for the purpose of making a profit, which is independently owned and operated and has either fewer than 100 employees or less than $1 million in annual gross receipts.

Start-up costs-Costs associated with the development of one or more community-based services.

State authority-The Texas Department of Mental Health and Mental Retardation (TDMHMR).

Subcontract-A contract between the party contracting with the department and the subcontractor which is paid for with funds from the contract with the department.

Support services contract-A contract between the department and a contractor to provide specified ancillary and support services for a designated sum in areas including, but not limited to, laundry, housekeeping, grounds maintenance, plant maintenance, food service, vehicle maintenance, and technical services in radiology, laboratory services, and pharmacy.

Term-The period of time during which a contract is in effect and which is identified by starting and ending dates.

§401.374. Principles of Contracting.

(a) To provide a foundation for administering contracts funded in whole or part by or through TDMHMR, the department must:

(1) consider the best interests of persons served, the public, and TDMHMR at all times;

(2) promote competition to the extent appropriate and allowable by state and federal laws and policies to secure a best price and quality and to provide opportunity for all qualified organizations or persons to apply to do business with the department; and

(3) use funds to meet only documented needs for authorized goods and services.

(b) Employees and officers of the department and its contractors and subcontractors must not participate in the selection, award, or administration of a contract paid with funds received from or through TDMHMR if a conflict of interest, real or apparent, is involved. A conflict of interest arises anytime such an employee or officer has a financial interest or other interest, e.g., dual employment, in the entity selected for an award, and the existence of such conflict of interest will result in a voided contract.

(1) No officer or employee of a contractor may be employed by the department.

(2) No officer or employee of the department may directly or indirectly receive any pecuniary interest from a contract entered by the department or the entity. For department employees and officers, the provisions of Texas Government Code, Chapter 572, Subchapter C pertain.

(c) The contracting entity may implement additional requirements if those requirements are in writing and do not conflict, deviate from, or alter the provisions of this subchapter or the contract/subcontract.

(d) The contracting entity must ensure that funds provided by or through the department, which are used to support its activities, are distributed across all providers and suppliers, including historically underutilized businesses.

(e) The contracting entity shall ensure quality care during the transition from one provider to another.

(f) Employees and officers of the contracting entity shall comply with the standards of conduct provisions set forth in the Texas Government Code, §572.051, and with the Texas Health and Safety Code, §§532.008, 534.007, and 551.002.

(g) Pursuant to the Uniform Grant and Contract Management Act of 1981 (Texas Government Code, Chapter 783), TDMHMR is required to comply with the Uniform Grant and Contract Management Standards for State Agencies of the Governor's Office of Budget and Planning when administering contracts with cities, counties, and other political subdivisions of the state, excluding school districts and special purpose districts.

§401.375. Accountability.

(a) Procurement by government agencies must be conducted so as to obtain the most effective use of public monies. Contracting is the preferred alternative to direct provision of government services when contracting obtains the same or higher quality of services at a lower cost than possible through governmental provision. The department conducts and regulates all procurements using TDMHMR funds to promote maximum free and open competition whenever feasible.

(b) The state authority may terminate a contract immediately or remove consumers when the life, health, welfare, or safety of persons served is endangered or could be endangered either directly or through the contractor's willful or negligent discharge of duties under the contract, including failure to deliver services in accordance with the terms and conditions of the contract, or if the department has reason to believe that the contractor has engaged in the misuse of state or federal funds, fraud, or illegal acts.

(c) In a cost reimbursement contract, the contractor/subcontractor must substantiate all claims.

(d) The department recovers improper payments when it is verified that contractors/subcontractors have been overpaid because of improper billing or accounting practices or failure to comply with the contract terms, e.g., the department will not pay for contracted services not received, and repayment will be claimed, at the proportional rate of payment, for such services. The determination of impropriety is based on federal, state, and local laws and rules; department procedures; contract provisions; or statistical data on program use compiled from paid claims and other sources of data.

(e) At the end of each contract period, the contractor must return to the department any state or federal funds received from or through TDMHMR which have not been encumbered.

(f) The department may make advance payments to a contractor provided that the contractor is a community center or governmental entity. The purpose of the advance payment must meet a public purpose and sufficient controls must be in place to ensure accomplishment of the public purpose.

(g) Equipment and furniture are defined as nonconsumable property having a value of at least $1,000 and a useful life of more than one year. Equipment and furniture specifically purchased under a contract budget by a governmental entity, a private non-profit entity, or private for-profit entity are subject to an equitable claim by state and federal government as follows: Disposition of property.

(1) Control of equipment and furniture. A control system must be maintained by the contractor to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft must be investigated. The control system must indicate the source of funds (state, federal, other) used in the purchase of the equipment and furniture.

(2) Equipment and furniture purchased with state funds by a designated provider and/or other governmental entities become the property of the designated provider and/or other governmental entity. Disposition of equipment and furniture purchased with federal funds by a designated provider, and/or other governmental entity must be made according to the provision of federal OMB A-102, A-87, and any other applicable federal regulations. Any real or personal property purchased by a private entity which are purchased with funds provided by or through TDMHMR belong to the department and cannot be disposed without approval from the department.

(3) Disposition of property purchased by private for-profit entities. The purchase of equipment and furniture by private for-profit entities under a specific contract budget should not be approved but such entity should include the depreciation of furniture and equipment as costs of providing the services under the contract.

§401.376. Methods of Procurement.

(a) Criteria for sealed bids. In competitive sealed bids, the contracting entity publicly solicits sealed bids from interested bidders through an invitation for bids (IFB). This method of procurement is used for contracts including, but not limited to, support services contracts. The contracting entity awards a firm fixed-price contract (lump sum or unit price) to the lowest and best bidder whose bid conforms with all terms and conditions of the invitation for bids. Sealed bids are used when the following conditions exist:

(1) the exact specification for the service or product to be purchased is available;

(2) following advertising, two or more responsible bidders are willing and able to compete for the contract;

(3) the procurement lends itself to a firm fixed-price contract (unit rate or cost reimbursement with a maximum not to exceed the reimbursable amount);

(4) the contract can appropriately be awarded to a responsible bidder on the basis of the lowest and best price; and

(5) sufficient time is available for the contracting entity to prepare specifications on which it can purchase the service and for bidders to prepare and submit bids.

(b) Criteria for request for proposal. The contracting entity requests proposals from a number of sources by soliciting responses to a request for proposal (RFP) for contracts including, but not limited to, consultant contracts, service contracts, and employee education and training contracts if:

(1) the service cannot be quantified and specified in terms of price alone; or

(2) negotiation is authorized by applicable law or rule, e.g., the Texas Mental Health and Mental Retardation Act, Texas Health and Safety Code, §533. 034.

(c) Criteria for sole source contracting. The contracting entity solicits an offer from only one source only when the award of a contract is not feasible under sealed

bids or RFP procedures. This method of procurement is always used for professional services contracts and contracts for foster or family home placements, and may be used for other types of contracts that meet one or more of the following criteria:

(1) noncompetitive negotiation is authorized or required by law or rule, e.g., Texas Government Code, Chapter 2254, Subchapter A prohibits contracting for professional services on a competitive bid basis;

(2) the contract is between governmental entities, e.g., a community center and a state facility;

(3) in an emergency, it is necessary to proceed without formal advertising because of the delay it causes;

(4) the material or service to be procured is available from only one source;

(5) no acceptable bids or offers, as defined in §401.373 of this title (relating to Definitions) are received; or

(6) the purchases are for highly perishable material or medical supplies; or for services for which the prices are established by law; or for experimental, developmental, or research work.

§401.377. Sealed Bid and Request for Proposal.

(a) The provisions of this section apply to both sealed bids and RFPs.

(1) Additional requirements relative to sealed bids are contained in §401. 378 of this title (relating to Additional Requirements for Sealed Bid).

(2) Additional requirements relative to RFPs are contained in §401. 379 of this title (relating to Additional Requirements for Request for Proposal).

(b) The contracting entity must formally advertise procurements by publishing a notice of the intent to contract when the contract is to be awarded by sealed bid or RFP.

(1) Staff must ensure that all solicitations (notice of intent to contract) contain the following minimum information:

(A) the service to be purchased;

(B) the geographic area to be served;

(C) funding limitations;

(D) method of payment;

(E) the beginning through the ending date of the contract;

(F) any limitations on who may submit an offer and any limitations in the services or products to be provided; and

(G) the place and method of obtaining a procurement package and the deadlines for obtaining and submitting it.

(2) Staff must attempt to reach as many potential contractors as possible.

(A) The contracting entity must publicize a solicitation in one or more of the following ways:

(i) advertisement in local newspapers;

(ii) publication in the *Texas Register* for contracting entity consultant contracts as required in §401.390 (relating to Consultant Contracts);

(iii) announcements in professional association newsletters.

(B) The contracting entity may additionally solicit offers through announcements by direct mail to all known potential contractors.

(C) The contracting entity shall document all transactions concerning contracts.

(c) Persons who have questions about a procurement package must request the information according to the instructions in the package. Oral answers to questions about a procurement package are nonbinding. They are not official until released in writing.

(d) Unless information is exempted by the Texas Open Records Act, i.e., information which, if released, would give advantage to competitors or bidders, all information in an offer is confidential only until:

(1) bid opening; or

(2) the contracting entity sends both written notification to the successful offeror(s) and written notification of nonselection to the unsuccessful offeror(s) concerning requests for proposal.

(e) The contracting entity has the right to reject all bids/offers submitted in response to a solicitation. The contracting entity may cancel a solicitation for any of the following reasons:

(1) funds to purchase goods or services are not available;

(2) the supplies or services are no longer required;

(3) the bids/offers received indicated that the services requested can be purchased by a different, less expensive method;

(4) all otherwise acceptable bids/offers received are for unreasonable prices;

(5) staff have reason to believe during the course of the procurement that the bids/offers were collusive or were submitted in bad faith;

(6) none of the bids/offers is acceptable;

(7) the specifications and costs given in the IFB/RFP were inadequate, ambiguous, or otherwise deficient; or

(8) the responsible contracting entity determines cancellation is in the best interest of the department and the individuals to be served.

(f) The contracting entity has the right to issue addenda prior to the closing date for bids/offers provided all bidders/offerors are provided fair opportunity to respond. All such addenda become, upon issuance, an inseparable part of the specifications which must be met for the bid/offer to be considered.

(g) A solicitation suspended because of uncertainty in federal or state regulations, departmental policy or similar requirements may nevertheless be processed if the procurement is still in the best interest of the department and the individuals to be served, and uncertainties about purchasability are amenably resolved.

(h) The contracting entity develops procurement packages based on a clear and accurate description of the services to be purchased. The contracting entity must include in the package all requirements the offeror must fulfill for the proposals to be evaluated. The contracting entity may not include in the service descriptions any requirement which unduly restricts competition by eliminating or limiting potential contractors' participation in the procurement process.

(i) When responding to a solicitation, offerors must respond to all items, including those about financial ability to perform.

(j) Upon written request, an unsuccessful offeror is entitled to receive information from the contracting entity concerning why its offer was not accepted.

(k) Corrections, deletions, or additions to offers may be made prior to the closing date for solicitations or the date for opening of bids. No oral, telephone, telegraphic, fax, E-mail, or other electronically transmitted corrections, deletions, or additions will be accepted. The offeror must

submit either a comprehensive form for this purpose, if provided, or substitute pages in the appropriate number of copies with a letter documenting the changes and the specific pages for substitution. The signatures on the form or the letter must be original and must be of equal authority as the signatures on the offer.

(l) Corrections, deletions, or additions which affect the competitiveness of other offers will not be accepted.

(m) For withdrawals, the offeror must submit a letter prior to the closing date. The signature on the letter must be original and must be of equal authority as the signature on the offer.

(n) The contracting entity must establish mechanisms beforehand for evaluating the offers including ways of determining responsible offerors, providing information for debriefings, and selecting successful offeror(s) for contract award(s).

(o) If a procurement package is to be considered by the contracting entity, the offeror must meet the contracting entity requirements, demonstrate the ability to perform successfully and responsibly under the terms of the prospective contract, and submit the completed offer according to the timeframes, procedures, and format stipulated by the contracting entity in the solicitation.

(p) The contracting entity may validate any information in a bid or offer by using outside sources or materials.

(1) If the contracting entity validates the information in one offer or application for a specific program site or project, it must apply the process without providing unfair advantage to any offer or range of offers for that site or project.

(2) If validation discloses that information provided by an offeror is deliberately false, the offer will be ineligible for consideration.

(q) When the purpose of the procurement is to obtain community-based residential or nonresidential services for persons with mental illness or mental retardation (direct services contracts), the determination of the lowest and best bid or offer must address the offerors' response to the procurement package, including:

(1) price;

(2) the ability of the offeror to perform the contract and to provide the required services;

(3) whether the offeror can perform the contract or provide the services within the period required, without delay or interference;

(4) the offeror's history of compliance with the laws relating to the offeror's business operations and the affected services and whether the offeror is currently in compliance;

(5) whether the offeror's financial resources are sufficient to perform the contract and to provide the services;

(6) whether necessary or desirable support and ancillary services are available to the offeror;

(7) the character, responsibility, integrity, reputation, and experience of the offeror;

(8) the quality of the facilities and equipment available to or proposed by the offeror;

(9) the ability of the offeror to provide continuity of services; and

(10) the ability of the offeror to meet all applicable written departmental policies, principles, and regulations.

(r) Each offeror whose offer meets the screening requirements but is not selected for a contract is entitled to timely notification in writing that the offer is no longer being considered.

§401.378. Additional Requirements for Sealed Bid.

(a) Procurement using sealed bids. At its discretion, the contracting entity may require a bid bond, a certified check or cashier's check drawn on a solvent bank in the State of Texas and made payable to the contracting entity in an amount to be specified in the procurement package. The bid security shall be a guarantee, legally assigned without limitation, that the bidder will, if awarded the contract, within a reasonable time of such award, furnish the performance/payment bond (if required) and execute a contract in full accordance with the proposal. No other form of security will be accepted.

(1) If the offer is not accepted within 60 days after the closing date for acceptance of bids, or upon the successful execution and delivery of contracted services, the bid bond, certified check, or cashier's check will be returned to the bidder.

(2) If the offer is accepted but the contractor through failure, neglect, or refusal does not execute and deliver according to the terms of the contract, the security will be retained by the contracting entity to the measure of the liquidated damages.

(b) Awarding the contract.

(1) All bids received are opened at the same time in the presence of all interested persons. Bids are read aloud and recorded.

(2) After the public opening of the sealed bids, anyone present may examine the bids in the presence of the contracting entity's representative. Individuals may not inspect the original bids if copies of the bids are available for public inspection. If copies are unavailable, the original bids may be examined only under the supervision of an official of the contracting entity and under conditions which preclude the possibility of a substitution, addition, deletion, or alteration of the bids.

(3) Bids are evaluated only on the basis that they meet the specific requirements of the invitation for bids. All bids meeting the exact service specifications are rated in terms of cost or cost and other factors as designated in the specifications.

(4) The contracting entity awards the contract to a bidder who is both responsive and responsible and who has the lowest and best bid consistent with terms and conditions of the invitation for bids. The contract is not necessarily awarded at the time of bid opening.

(5) When two or more low bids are equal in all respects, lots will be drawn, duly recorded, and witnessed.

(6) No negotiation is used in the competitive bid method.

§401.379. Additional Requirements for Request for Proposal.

(a) Before the contracting entity negotiates a contract, the prospective contractor must complete a procurement package and submit it to the contracting entity.

(b) Negotiations are conducted with one or more of the sources submitting offers.

(c) Negotiation may be conducted either to complete the procurement process or to complete an evaluation of acceptable offers. When only one offer has a reasonable chance of being selected for the contract award, contract staff and the potential contractor negotiate the contract requirements as necessary to complete the procurement process. When more than one acceptable offer is received, negotiation is used to further evaluate competitive offers and to select one or more for contract award. In this situation, no potential contractor is given information that will give the contractor a competitive advantage over the other potential contractors.

(d) During negotiation, the offeror must clearly identify all changes in and/or revisions to the offer.

(e) The contracting entity shall award the contract to the offeror with the lowest and best offer.

(f) The contracting entity awards either a flat rate, unit rate, or a cost-reimbursement contract, as appropriate.

§401.380. Sole Source Contracting.

(a) The contracting entity may validate any information in an offer by using outside sources or materials. If validation discloses that information provided by an offeror is deliberately false, the offer will be ineligible for consideration.

(b) The contracting entity must justify and document awarding a sole source contract funded by or through TDMHMR to a contractor. Documentation must accurately and concisely substantiate the necessity for a sole source contract on the basis of one or more of the reasons listed in subsection (c) of §401. 376 of this title (relating to Methods of Procurement).

§401.381. Fiscal Requirements.

(a) Every effort should be made to contract with contractors who will not require the department to provide start-up funds. As a last resort, contractors who are expanding into a new service area or are just beginning to provide services may, if allowed by program-specific policy and with appropriate TDMHMR approvals, budget and bill for start-up funds. Start-up funds shall be used for operating costs, such as hiring and orienting staff, purchasing supplies, utilities, maintenance and repairs, and recruiting eligible persons with mental illness or mental retardation.

(1) A contractor who requires start-up funds must receive required licensure, accreditation and/or certification to provide contracted services within the timeframe designated in the contract.

(2) The contractor shall not provide start-up funding using TDMHMR funds to subcontractors.

(3) The contractor will provide documentation to support the amount of start-up funds requested. Justification should be adequately documented to include a projected cash flow analysis.

(4) The repayment of the start-up funds must be completed within five years from the date of the payment of the start-up funds. The amount to be repaid is the principal amount with interest equal to the United States Treasury commercial paper rate on the date that the start-up funds payment is approved by the Texas Board of Mental Health and Mental Retardation. Payments will be withheld from the contractor's quarterly allocation and transferred to the department for a period of five years.

(b) In accordance with Texas Health and Safety Code, §534.035, periodic program reviews and management audits will be conducted in sufficient quantity and type to provide reasonable assurance that adequate and appropriate fiscal controls exist in community centers. These program reviews and management audits at community centers shall be conducted in accordance with the most recent edition of "Guidelines for Annual Fiscal Audits of Community MHMR Centers."

(c) When the local authority provides or subcontracts programs for which there is a matching funds requirement, the local authority is accountable for certifying to the state authority on a quarterly basis that it has sufficient local revenues to meet the requirements for matching funds that exceed state-certified matching funds necessary to meet performance targets specified in the performance contract.

§401.382. Procurement of Performance Contracts.

(a) The state authority shall identify an entity to serve as the local authority for each service area and, if the entity is not operated by a facility, enter into a performance contract with it. In identifying a local authority for a service area, the state authority shall give preference to a community center located in that service area and will attempt to execute a performance contract with that community center.

(b) If a performance contract cannot be executed with a community center, the state authority shall designate the community services division of a facility as the local authority for that service area or will execute a performance contract with another agency, entity, or organization to be the local authority for that service area.

§401.383. Procurement of Performance Subcontracts. The local authority shall consider public input, ultimate cost-benefit, and client care issues to ensure consumer choice and the best use of public money in:

(1) assembling a network of service providers; and

(2) determining whether to become a provider of a service or to contract that service to another organization.

§401.384. Provisions for Performance Subcontracts and Designated Provider Contracts.

(a) Performance subcontracts and designated provider contracts must be consistent with the terms and provisions of the performance contract. Performance subcontracts and designated provider contracts must contain, but are not limited to, provisions stating:

(1) the beginning and ending date of the contract;

(2) the method of payment and maximum amount payable under the contract;

(3) that no person will be excluded from participation in, denied the benefits of, or discriminated against, in any program or activity funded by the contract on the grounds of race, color, national origin, religion, sex, age, disability, or political affiliation;

(4) that all records pertinent to the contract, including appropriate plans of service, will be retained by the provider for a period of five years;

(5) that all client-identifying information will be maintained by the provider as confidential, in accordance with applicable law and department rules;

(6) that the provider is not held in abeyance or barred from the award of a federal or state contract at the time of executing the contract;

(7) that any allegation of abuse, neglect, or exploitation of persons served under the contract will be reported in accordance with applicable law, including department rules, rules of the Texas Department of Protective and Regulatory Services, and rules of the Texas Department of Health;

(8) that AIDS/HIV workplace guidelines, similar to those adopted by the department, and AIDS/HIV confidentiality guidelines, consistent with state and federal law, will be adopted and implemented by the provider;

(9) that if, as a result of a change to a department rule, state or federal law, or community standard, the contractual obligations of the provider are materially changed or a significant financial burden is placed on the provider, the parties may renegotiate in good faith to amend the contract;

(10) that the provider will comply with relevant department rules and community standards, certifications, accreditations, and licenses, as specified in the contract;

(11) that services will be provided in accordance with the plans of service of persons served;

(12) that pursuant to Texas Health and Safety Code, §534.060, the state authority and/or local authority and their representatives, including independent financial auditors, shall have unrestricted access to all facilities, records, data, and other information under the control of the local authority or its subcontractors as necessary to enable the state authority and/or local authority to audit, monitor, and review all financial and programmatic activities and services associated with the contract as part of their responsibilities as contract managers;

(13) that the provider shall provide sufficient information to the contracting entity to enable the contracting entity to receive criminal history record information on the provider's applicants or employees, pursuant to the Texas Health and Safety Code, §533.007 and the Texas Government Code, §411.115;

(14) that if an applicant or employee of the provider has a criminal history relevant to his or her employment as described in §404.304 of this title (relating to Pre-employment Criminal History Clearance), then the provider will take appropriate action with respect to the applicant or employee, including removing the employee from direct contact with persons with a mental disability served by the provider; and

(15) that if a performance subcontract or designated provider contract is for the provision of residential services in a family home, the home will be used only to house disabled persons and may not be used as a restitution center, a home for substance abusers, or a halfway house. For purposes of this paragraph, "family home" and "disabled persons" are defined as in the Community Homes for Disabled Persons Location Act, Texas Human Resources Code, Chapter 123; and

(b) Contracts which require the provider to assume responsibility for the funds of persons with a mental disability must contain provisions which require the provider to have and abide by a written policy for protecting and accounting for such funds in accordance with generally accepted accounting principles and is subject to approval by the contracting entity.

§401.385. Renewal of Performance Contracts, Subcontracts, and Designated Provider Contracts. Performance contracts and subcontracts and designated provider contracts are renewed in accordance with the Texas Health and Safety Code, §534.065 and §534.055.

§401.386. Remedying Contractual Problems With a Performance Subcontract. A local authority may take the same breach and remedies actions as are available to the state authority.

§401.387. General Requirements for the Department.

(a) Unless otherwise noted, all provider contracts funded by or through TDMHMR are governed by this subchapter and the TDMHMR Contracts Manual.

(b) There must be some basis in state or federal law or regulation for the department to provide a mental health or mental retardation service which is to be contracted in whole or part using TDMHMR or federal funds. The statutory authority must be referenced in the provider contract.

(c) The department must use the standard contract forms as provided in the TDMHMR Contracts Manual. The standard contract forms and required contract provisions may be modified to accommodate unique circumstances only as follows:

(1) modifications may take the form of additional contract requirements, but may not delete or materially change the provisions of standard contract forms or required contract provisions; and

(2) any contract or contract amendment of any amount that modifies the provisions of a standard contract form or a required contract provision requires approval by the Office of Contract Support.

(d) If a contractor is required to comply with an additional requirement and compliance results in a material change in the contractor's rights or obligations under the contract or places a significant financial burden on the contractor, the contractor may request to renegotiate the contract.

(e) The department must ensure that all contracts specify a date of termination, a maximum allowable total payment for the contract term, and the method of payment. Contracts that do not have termination dates, maximums, and method of payment will not be approved for payment.

§401.388. General Requirements for Provider Contractors.

(a) A contractor must comply with all applicable federal and state laws, rules, and regulations, and standards. Unless explicitly stated otherwise in this subchapter, a contractor will not be subject to the general personnel rules and policies which affect the activities of employees of the department with which it contracts.

(b) A contractor must allow the department unrestricted access to all facilities, service providers, individuals served, records, data, and other information under the control of the contractor as necessary to enable the department to audit, monitor, and review all financial and programmatic activities and services associated with the contract.

(c) A contractor must keep financial and supporting documents, statistical records, and any other records pertinent to the services for which a claim or cost report was submitted to the department, including plans of service, for a period of five years unless otherwise specified by the department in the provider contract.

(d) For the purpose of confidentiality of records identifying persons served, contractors are subject to the requirements of Chapter 403, Subchapter K of this title (relating to client-identifying Information).

(e) A contractor must disclose to the department if it is currently held in abeyance from or barred from the award of a federal or state contract. A contractor currently held in abeyance from or barred from the award of a federal or state contract may not contract or subcontract with the department.

(f) The department may refuse to enter into a provider contract or may terminate a provider contract if it determines that the contractor did not fully and accurately disclose information concerning persons convicted of crimes. If an applicant or employee of the provider has a criminal history relevant to his or her employment as described in §404.304 of this title (relating to Pre-employment Criminal History Clearance), then the contractor will take appropriate action with respect to the applicant or employee, including but not limited to removing the employee from direct contact with persons with a mental disability served by the contractor;

(g) The contractor operating a Medicaid-contracted facility shall comply with federal regulations relative to supplementation for recipient-residents, as contained in the Social Security Act, §1320a-1 through a-9; Title 42 CFR 447.15; Public Law 95-142 (Medicare-Medicaid Antifraud and Abuse Amendments); and TDHS-TDMHMR-TDH joint agency policy interpretations.

(h) Before a corporation's offer or provider contract renewal can be considered, the corporation must give the department franchise tax certification. For-profit corporations subject to Texas' franchise tax must provide certification that their payments are current. All other corporations must certify that they are not subject to the franchise tax.

(1) If the contractor is or becomes delinquent in the payment of its Texas franchise tax, payment to the contractor may be withheld until such delinquency is remedied.

(2) Making a false certification is a material breach of provider contract and grounds for provider contract termination.

(i) A contractor must report allegations of abuse, neglect, and exploitation in compliance with federal and state law and departmental rules, as applicable, including but not limited to, Chapter 404, Subchapter A (relating to Abuse, Neglect, and Exploitation of Persons Served by TDMHMR Facilities).

(j) A contractor must report to the department any allegation that a professional licensed or certified by the State of

Texas and employed by the contractor has committed an action that constitutes a grounds for the denial or revocation of the certification or licensure, e.g., physicians, nurses, psychologists, etc., and the department must immediately submit a copy of the report to the appropriate state board.

(k) A provider contract, bid, or application for a provider contract must include an affidavit of eligibility to receive payments from state funds as required by the Texas Family Code, §231.006.

§401.389. Support Services Contracts. Pursuant to Texas Civil Statutes, Article 601b, department support services contracts and purchases governed by the rules, regulations and procedures manual of the General Services Commission and the TDMHMR Purchasing and Supply Operating Instruction are exempted from the requirements of this subchapter. All other department purchases and contracts are governed by this subchapter.

§401.390. Consultant Contracts.

(a) The term of a consultant contract shall not exceed two years. Department contracts that exceed two years require approval through the Office of Contracts Support.

(b) Facilities must submit the following contracts and contract amendments to the Office of Contracts Support to be approved by the appropriate Central Office authorities prior to execution:

(1) contracts or contract amendments through which the department will pay the consultant more than $10,000 in a fiscal year;

(2) contracts or contract amendments in which the consultant will be paid more than $65/hour; or

(3) contracts or contract amendments in which the consultant will be paid more than $400 in a 24-hour period.

(c) Central Office staff must submit all consultant contracts and amendments to the Office of Contracts Support to be approved by appropriate Central Office authorities prior to execution.

(d) The Office of Contracts Support must coordinate the *Texas Register* publication of the solicitation, the finding of fact requirements, and the award of the contract for all department contracts and contract amendments in which the consultant will be paid more than $10,000 in a fiscal year. Existing contracts for more than $10,000 may be extended or otherwise amended without advertising if both the department and the contractor agree and the department does not incur additional costs from the contractor.

(e) Verification that contracted services were provided as required must be documented in the contract file. For services provided on an hourly or other unit basis, each consultant and a responsible staff member who can certify to the presence and the duties performed by the consultant will record the information required on the "Contract Log for Consultant Services, Professional Services, Direct Care Services," which is referenced in §401. 397 of this title (relating to Exhibits) as Exhibit B. The consultant and responsible staff member must sign the form, which becomes a part of the contract file.

§401.391. Professional Services Contracts.

(a) The term of a professional services contract shall not exceed two years. Department contracts that exceed two years require approval through the Office of Contracts Support.

(b) Verification that contracted services were provided as required must be documented in the contract file. For services to persons with mental illness or mental retardation provided on an hourly or other unit basis, each contractor and a responsible staff member who can certify to the presence and the duties performed by the contractor will record the information required on a "Contract Log for Consultant Services, Professional Services, Direct Care Services," which is referenced in §401. 397 of this title (relating to Exhibits) as Exhibit B.

(1) The contractor and responsible staff member must sign the form, which becomes a part of the contract file.

(2) For contractors who perform services involving large numbers of persons with mental illness or mental retardation, the file and file location of individual case numbers of persons seen may be referenced rather than listed in full. If case numbers are referenced to another file, that file must be readily accessible.

(c) In cases of emergency medical treatment or required nonemergency surgical procedures performed off campus or on campus, the mandatory prior approval required in subsection (b)(1) of this section is waived. In such cases, the fees paid shall not exceed those normally charged for the service in the area in which the services are provided.

(d) Contracts for professional services may not be procured through the use of bids.

§401.392. Employee Education and Training Contracts.

(a) The term of an employee education and training contract shall not exceed two years. Department contracts that exceed two years require approval through the Office of Contracts Support.

(b) Employee education and training contracts may be procured using a method other than sealed bid.

§401.393. Community-based Residential and Nonresidential Services Contracts.

(a) The method of procurement of all service contracts must be in compliance with §401.376 of this title (relating to Methods of Procurement).

(1) The term of a residential service contract shall not exceed five years. Department contracts that exceed five years require approval through the Office of Contracts Support.

(2) The term of a nonresidential service contract shall not exceed two years. Department contracts that exceed two years require approval through the Office of Contracts Support.

(b) The department must require the contractor to:

(1) comply with the person's treatment plan, including ensuring consultants are knowledgeable of the plan at the time of placement and that staff providing direct care have received training necessary to implement the plan in accordance with the terms of the contract; and

(2) comply with specified rules and standards governing services to persons with mental illness or mental retardation.

(c) Contractors for residential services must sign an acknowledgement of awareness of applicable federal and state rules, regulations, laws, and executive orders that govern the provision of services to persons with mental illness or mental retardation using the form referenced in §401.397 of this title (relating to Exhibits) as Exhibit C.

(d) Contractors must provide insurance, including liability coverage, for the residence or other structure and its contents and any vehicles used to transport persons with mental illness or mental retardation.

(e) Contractors providing residential services will assume fiduciary responsibility for trust funds of persons served, unless otherwise specified in the contract requirement. Prior to executing a residential contract, the contractor must submit for Central Office approval a written policy and procedure to protect and account for trust funds according to generally accepted accounting principles and applicable laws, rules, and standards, including, as applicable, §405.625 of this title (relating to Rights of Clients Receiving Residential Mental Retardation Services) and §407.2 of this title

(relating to Trust Funds and Personal Effects). Any amendments to the trust fund policy and procedure must be submitted to Central Office for approval prior to implementation.

(f) Quality care must be maintained for all persons served during the transition from one provider to another.

§401.394. Other Provider Contracts. All other provider contracts are governed by the TDMHMR Contracts Manual.

§401.395. Provider Contract Terminations.

(a) Terminations of contracts occur when the term of the contract expires, both parties mutually agree to end the contract, and/or when either party terminates a contract because of the other party's breach of contract terms.

(b) The department may immediately terminate a contract for cause.

(1) Termination for cause is the contractual right to terminate, in whole or in part, the contractor's right to proceed with contract by reason of the contractor's failure to perform obligations under the contract. Included are failure to:

(A) deliver supplies or perform services within the time specified in the contract;

(B) perform any other provision of the contract; or

(C) progress, thus endangering the performance of the contract.

(2) Under a termination for cause, the department is not liable for the contractor's costs on undelivered work.

(3) Upon termination for cause the department is entitled to the repayment of any advance payments or other payments for such work.

(4) The department may elect to require the contractor to transfer title and deliver to the department completed supplies and materials in the manner and to the extent directed by the commissioner or his designee.

(c) Either party, unless stated differently in the contract, may terminate the contract at will if the other party is given a written notice.

(d) The department may terminate a contract if the contractor submits falsified documents or fraudulent billings or makes false statements.

(e) When a contract is terminated, a fiscal audit is conducted as necessary to determine any over-or underpayment. Disposition of equipment purchased under contract with the department will be subject to disposition according to departmental determinations.

(f) The contractor is responsible for establishing proof of the amount claimed to be due for settlement of a terminated contract to the department's satisfaction by submitting sufficient proof.

(g) Upon termination of a contract between the department and a contractor, the contractor is responsible for the prompt settlement of the termination claims, including claims from employees and vendors.

§401.396. Abeyance and Removal of Current or Potential Contractual Rights.

(a) Abeyance is a pending status. It may be imposed immediately, as appropriate, by the department upon a contractor's right to conduct a contract or a potential contractor's right to make an offer or bid for a department contract until an investigation, hearing or trial result is concluded and the department can make a determination about the contractor's or potential contractor's right to contract or subcontract.

(1) The department may withhold payments to a contractor during the abeyance.

(2) If the final determination is favorable to the contractor, the department must, if applicable,

(A) pay the withheld payments for any services that were provided during the abeyance, and

(B) resume contract payments.

(b) Removal of contractual rights by the department is the abrogation of rights to conduct a contract or to make an offer or bid for a department contract. The removal is for a reasonable and specified time and commensurate with the seriousness of the cause for removing contractual rights. Removal of rights may, but does not have to, be limited to those components of the contractor or potential contractor involved in the conduct leading to removal of rights.

(c) The department is authorized to remove contractual rights from an organization or individual for causes including, but not limited to, the following:

(1) pleading guilty or nolo contendere, receiving a deferred adjudication, or being found guilty in a court judgment for a violation relating to:

(A) obtaining, attempting to obtain, or performing a public or private contract or subcontract;

(B) the Organized Crime Control Act of 1970, embezzlement, theft, forgery, bribery, falsification or destruction of records, other forms of fraud, receipt of stolen property, moral turpitude, or any other offense indicating a lack of business integrity or honesty that seriously and directly affects the question of responsibility as a contractor with the department;

(C) dangerous drugs, controlled substances, or other drug-related offense;

(D) federal antitrust statutes arising from the submission of bids or proposals.

(2) violating contract provisions including:

(A) failing to perform according to the terms, conditions, and specifications or within the time limit(s) specified in the contract, including but not limited to the following:

(i) failing to abide by applicable federal and state statutes, such as those regarding handicapped persons and civil rights;

(ii) failing to meet standards that are required by state or federal law, department rule, or department policy concerning contractors;

(iii) failing to execute amendments, if required in the contract;

(iv) billing for services or merchandise not provided to persons served;

(v) submitting cost reports containing costs not associated with and/or not covered by the contract;

(vi) submitting a false statement or misrepresentation which, if used, may increase individual or statewide rates or fees;

(vii) charging fees to persons served contrary to TDMHMR rules or policy;

(viii) failing to notify and reimburse the department for services the department paid for when the contractor received reimbursement from a liable third party;

(ix) failing to disclose or make available, upon demand, to the department or representatives (including appropriate federal and state agencies and their representatives, including independent financial auditors) any records the contractor is required to maintain;

(x) failing to provide and maintain services within standards required by statute, regulation, or contract;

(xi) violating the Texas Mental Health and Mental Retardation Act (Texas Health and Safety Code, §§531.001, et seq) provisions applicable to the contract or any rule or regulation issued under the act;

(B) having a record of failure to perform or of unsatisfactory performance according to the terms of one or more contracts or subcontracts if that failure or unsatisfactory performance has occurred within five years or two contracting periods (preceding the determination to remove contractual rights) for long-term contracts, with failure to perform or unsatisfactory performance in evidence at time of determination to remove contractual rights. Failure to perform and unsatisfactory performance includes, but is not limited to, the following:

(i) failing to correct contract performance deficiencies after receiving written notice about them from the department; and

(ii) failing to repay or make and follow through with arrangements satisfactory to the department to repay identified overpayment or other erroneous payments;

(C) rebating or accepting a fee or part of a fee in violation of contractual provisions.

(3) submitting an offer or bid that contains a false statement or misrepresentation or omits pertinent facts or documents material to the procurement;

(4) any other cause affecting the contractor's or potential contractor's responsibility of such a serious nature that the commissioner or his designee determines it to warrant removal of contractual rights. Grounds include, but are not limited to, engaging in any abusive or neglectful practice that results in or could result in death or injury to persons served by the contractor;

(5) removal of contractual rights by some other state or federal agency.

(d) The department may place a contractor's or potential contractor's contractual rights in abeyance whenever the department finds that there is a reasonable basis to believe that grounds for removal of contractual rights exist. In addition, abeyance may be imposed on a potential contractor if he has an outstanding indictment for an offense that is grounds for removal of contractual rights. The following conditions for removal of contractual rights apply:

(1) Violations of contract provisions do not necessarily cause abeyance and/or removal of contractual rights. Depending upon circumstances, the department's options range from a notice to the contractor explaining the violation or cause and requiring corrective actions to the removal of contractual rights. Causes in subsection (c)(1) of this section are established by proof of pleading guilty or nolo contendere, receiving a deferred adjudication of guilt, or being a defendant in a court judgment of guilt for violations relating to charges enumerated in subsection (c)(1) of this section. If an appeal results in a reversal, contractual rights must be restored upon written request, unless another cause for their removal exists.

(2) Removal of contractual rights because another state or federal agency has removed contractual rights is based entirely upon the initial agency's official notice that the rights have been removed.

(e) In addition to the information required in the notice of adverse action, the required content for notices of abeyance and removal of contractual rights includes:

(1) the grounds for the actions. If an indictment filed by the department is underway, the nature of the irregularities is described in general terms without disclosing evidences;

(2) the length of the abeyance or removal of contractual rights;

(3) a statement that responses to RFPs, IFBs, and other proposals will not be accepted or approved; and

(4) a statement of whether the abeyance or removal of contractual rights is in effect throughout the department and for all local authorities.

(f) The department may impose additional program-specific requirements if the requirements do not conflict with the abeyance and removal of contractual rights requirements in this section.

§401.397. Exhibits. The following exhibits, referenced in this subchapter, are available from the Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668:

(1) Exhibit A-Persons Related within the Second Degree of Consanguinity or Affinity;

(2) Exhibit B-Contract Log for Consultant Services, Professional Services, Direct Care Services; and

(3) Exhibit C-Acknowledgement.

§401.398. Refercnces. The following laws and rules are referenced in this subchapter:

(1) Appropriations Act of 1989, Article V, §118;

(2) Chapter 403, Subchapter K of this title, relating to client-identifying Information;

(3) Chapter 404, Subchapter A of this title, relating to Abuse, Neglect, and Exploitation of Persons Receiving Services in TDMHMR Facilities;

(4) Chapter 404, Subchapter B of this title, relating to Abuse, Neglect, and Exploitation of People Served by Providers of Local Authorities;

(5) Chapter 404, Subchapter H of this title, relating to Criminal History Clearances of Applicants for Employment;

(6) Chapter 405, Subchapter Y of this title, relating to Client Rights-Mental Retardation Services;

(7) Chapter 407 of this title, relating to Financial Services;

(8) "Guidelines for Annual Fiscal Audits of Community MHMR Centers," most recent edition, Texas Department of Mental Health and Mental Retardation;

(9) Local Government Code, §171.002;

(10) Organized Crime Control Act of 1970;

(11) Public Law 95-142;

(12) Social Security Act, §§1320a-1 through a-9;

(13) Title 42 CFR 447.15;

(14) Texas Civil Statutes, Article 601b;

(15) Texas Family Code, §231.006;

(16) Texas Government Code, Chapter 783;

(17) Texas Government Code, Subchapter A, §§2254.001 et seq; Subchapter B, §§2254.021 et seq; §411.115; and Chapter 572, Subchapter C;

(18) Texas Health and Safety Code, Title 7, Chapters 531, 532, 533, 534, 535, and 551;

(19) Texas Human Resources Code, Chapter 123;

(20) Texas Open Records Act;

(21) TDMHMR Contracts Manual;

(22) TDMHMR Purchasing and Supply Operating Instruction; and

(23) Uniform Grant and Contract Management Standards for State Agencies, Governor's Office of Budget and Planning.

§401.399. Distribution. This subchapter shall be distributed to members, Texas Board of Mental Health and Mental Retardation; the assistant commissioner and directors of Central Office; superintendents/directors, all TDMHMR facilities; chairpersons, board of trustees or governing body, and chief executive officers, all local authorities and designated providers.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511878 Ann Utley
Chairman
Texas Department of Mental Health and Mental Retardation

Effective date: September 15, 1995

Expiration date: January 13, 1996

For further information, please call: (512) 206-4516

PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the ***Texas Register*** at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the use of **bold text.** [Brackets] indicate deletion of existing material within a section.

TITLE 4. AGRICULTURE

Part I. Texas Department of Agriculture

Chapter 27. Aquaculture Regulations

- **4 TAC §§27.2, 27.3, 27.6, 27.21, 27.23-27.25, 27.50, 27.102**

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

The Texas Department of Agriculture (the department) proposes the repeal of §§27.2, 27.3, 27.6, 27.21, 27.23-27.25, 27.50 and 27.102, concerning aquaculture license required, fish farm vehicle license required, records, bill of lading required, invoices for shipment of dead redfish or dead speckled seatrout, transported dead redfish and dead speckled sea trout, labeling of redfish or speckled sea trout package, packaging requirements for importation of dead redfish and dead speckled sea trout and inspection. These sections are being repealed because they restate statutory language or have been determined by the department to place an unnecessary burden on the aquaculture industry.

Edwin J. Price, director for consumer programs, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Price also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be reduced state regulation. There will be no effect on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments on the proposal may be submitted to Edwin J. Price, Director for Consumer Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The repeals are proposed under the Texas Agriculture Code, §134.005, which provides the Texas Department of Agriculture with the authority to enforce the provisions of the Texas Agriculture Code, Chapter 134, concerning the regulations of the Aquaculture industry in the state of Texas.

The code affected by this proposal is the Texas Agriculture Code, Chapter 134.

§27.2. Aquaculture License Required.

§27.3. Fish Farm Vehicle License Required.

§27.6. Records.

§27.21. Bill of Lading Required.

§27.23. Invoices for Shipments of Dead Redfish or Dead Speckled Sea Trout.

§27.24. Transported Dead Redfish and Dead Speckled Sea Trout.

§27.25. Labeling of Redfish or Speckled Sea Trout Package.

§27.50. Packaging Requirements for Importation of Dead Redfish and Dead Speckled Sea Trout.

§27.102. Inspection.

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

Issued in Austin, Texas, on September 18, 1995.

TRD-9511893 Dolores Alvarado Hibbs
Chief Administrative Law Judge
Texas Department of Agriculture

Earliest possible date of adoption: October 23, 1995

For further information, please call: (512) 463-7583

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Records and Reports

- **16 TAC §23.11**

The Public Utility Commission of Texas proposes an amendment to §23.11, concerning general reports. The amendment is required to comply with the Public Utility Regulatory Act of 1995 (PURA '95), §1.407, which directs the commission to require each utility subject to regulation under PURA '95 to prepare and submit to the commission a comprehensive annual report detailing its use of historically underutilized businesses.

The proposed change to §23.11 eliminates from Subsection (j) any reference to historically underutilized businesses. The proposed amendment also adds a Subsection (k) entitled "Annual Report on Historically Underutilized Businesses". This provision requires all utilities that are subject to regulation under PURA '95 to prepare and submit to the commission a comprehensive annual report detailing its use of historically underutilized businesses.

Acting General Counsel Martin Wilson has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of the enforcing or administering the section.

Mr. Wilson also has determined that for each year of the first five years the section is in effect the public benefit and the benefit to small businesses anticipated as a result of administering the rule is the availability of information pertaining to the use of historically underutilized businesses in contracting. There is no additional economic cost to comply with this subsection that is not required by PURA '95, §1.407.

Mr. Wilson has further determined that for the first five years the proposed amendment is in effect there will be no impact on the opportunities for employment in the geographic areas of Texas affected by implementing the requirements of the rules.

Comments on the proposed rule (13 copies) may be submitted to Paula Mueller, Secretary of the Commission, 7800 Shoal Creek Boulevard, Austin, Texas 78757, within 20 days after publication. All comments should refer to Project Number 14437.

The commission staff will conduct a public hearing on this rulemaking under Government Code, §2002.029 at the Commission's offices on November 10, 1995, at 10:00 a.m.

The amendment is proposed under PURA '95, §1.101, which provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and PURA '95, §1.407, which directs the commission to require each utility subject to regulation under PURA '95 to prepare and submit to the commission a comprehensive annual report detailing its use of historically underutilized businesses.

The following statute is affected by this rule: the Public Utility Regulatory Act of 1995, §1.101 and §1.407.

§23.11. General Reports.

(a)-(i) (No change.)

(j) Equal opportunity reports.

(1) The term **"Minority group members"** [Definitions. The following words and terms], when used within this subsection, shall have the following meaning. [meanings, unless the context clearly indicates otherwise]

(A)[(i)] African-Americans;

(B)[(ii)] American-Indians;

(C)[(iii)] Asian-Americans;

(D)[(v)] Hispanic-Americans and other Americans of Hispanic origin; and

(E)[(vi)] women.

[(A) Minority group members-include:

[(B) "Historically underutilized business" a business entity at least 51% of which is owned by minority group members, or in the case of corporation, at least 51% of the share of which are owned, managed, and controlled by minority group members.]

(2) Each utility that files any forms with local, state or federal governmental agencies relating to equal employment opportunities for minority group members, [and/or relating to contracting opportunities for historically underutilized business] (e.g., EEOC Form EEO-1, FCC Form 395, RUS [GSA Form SF 295, REA] Form 268, etc.) shall file copies of those same completed forms with the commission, and submit copies of any other forms required to be filed which contain the same or similar information such as that addressing[:]

[(A) the number and value of contracts awarded to historically underutilized businesses and goals relating thereto, if any, and

[(B)] personnel data identifying numbers and occupations of minority group members employed by the utility, and employment goals relating thereto, if any.

(3)-(4) (No change.)

(k) Annual report on historically underutilized businesses.

(1) In this subsection, "historically underutilized business" has the same meaning as in §481.101, Texas Government Code, as it may be amended.

(2) Except as otherwise provided in paragraph 1 of this subsection, "historically underutilized business" means:

(A) a corporation formed for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities is owned by one or more persons who are socially disadvantaged because of their identification as members of certain groups , including black Americans, Hispanic Americans, women, Asian Pacific Americans, and American Indians, who have suffered the effects of discriminatory practices or similar insidious circumstances over which they have no control;

(B) a sole proprietorship formed for the purpose of making a profit that is 100% owned, operated and controlled by a person described by Subparagraph (A) of this paragraph;

(C) a partnership formed for the purpose of making a profit in which 51% of the assets and interest in the partnership is owned by one or more persons described by Subparagraph (A) of this paragraph. Those persons must have proportionate interest in the control, operation, and management of the partnership's affairs;

(D) a joint venture in which each entity in the joint venture is a historically underutilized business under this paragraph;

(E) a supplier contract between a historically underutilized business under this paragraph and a prime contractor under which the historically underutilized business is directly involved in the manufacture or distribution of the supplies or materials or otherwise warehouses and ships the supplies.

(3) On or before December 1 of each year, every utility subject to regulation under the Public Utility Regulatory Act of 1995 shall prepare and submit to the commission a comprehensive annual report detailing its use of historically underutilized businesses. The requirements of this paragraph shall be met by making the annual filing on a commission prescribed form. Additionally, every utility subject to regulation under the Public Utility Regulatory Act of 1995 shall also file any other documents it publishes or maintains regarding its use of historically underutilized businesses.

(4) This subsection may not be used to discriminate against any citizen on the basis of sex, race, color, creed, or national origin.

(5) This subsection does not create a new cause of action, either public or private.

(l)[(k)] Special and additional reports. Each utility, including municipally owned utilities, shall report on forms prescribed by the commission special and additional information as requested which relates to the operation of the business of the utility.

(m)[(l)] Service quality reports. Service quality reports shall be submitted quarterly on a form prescribed by the commission.

(n)[(m)] Research and development reports. Research and development reports shall be submitted annually on a form prescribed by the commission.

(o)[(n)] Report amendments. Corrections of reports resulting from new information or errors shall be filed on a form prescribed by the commission.

(p)[(o)] Annual earnings report. Each utility shall report its annual earnings on forms prescribed by the commission as set out in §23.12 of this title, (relating to Financial Records and Reports).

(q)[(p)] Penalty for refusal to file on time. In addition to penalties prescribed by law, the commission may disallow for rate making purposes the costs related to the activities for which information was requested and not timely filed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and

found to be within the agency's authority to adopt.

Issued in Austin, Texas, on September 12, 1995.

TRD-9511679 Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas

Earliest possible date of adoption: October 23, 1995

For further information, please call: (512) 458-0100

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• 16 TAC §23.12

The Public Utility Commission of Texas proposes an amendment to §23.12, relating to Financial Records and Reports. The purpose of the amendment is to comply generally with the Public Utility Regulatory Act of 1995 (PURA '95, §3.053). This amendment exempts incumbent local exchange companies electing under Subtitle H, Title III of PURA '95, certificate of operating authority companies and service provider certificate of operating authority companies from sale, transfer and merger reporting requirements. In addition, the amendment also requires the commission to complete an investigation under PURA '95, §1.251 for other dominant carriers, and enter a final order within 180 days after the date of notification by the utility. If an order is not entered, the utility's action is considered consistent with the public interest. Finally, although not required by changes to PURA '95, for administrative convenience the commission also proposes to standardize the timing requirements for all ownership transaction reports.

Joyce Gonzalez, Assistant General Counsel, has determined that for the first five-year period the amendment is in effect, the commission will save an indeterminable amount of resources by not performing PURA 1995 §1.251 investigations that would otherwise be required. There will be no other fiscal implications for the state or local government as a result of enforcing or administering the amendment.

Ms. Gonzalez has also determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment includes removing regulatory uncertainties for some telecommunications utilities. There will be no effect on small businesses. There will be no economic cost of complying with the amendment as proposed.

Ms. Gonzalez has also determined that for each of the first five years the proposed amendment is in effect there will be no impact on employment in the geographical areas affected by implementing the requirements of the amendment.

Written comments (13 copies) on the proposal may be submitted to Paula Mueller, Secretary of the Commission, 7800 Shoal Creek Boulevard, Austin, Texas 78757 within 30 days after publication. Specific comments should refer to Project Number 14558. The public hearing required by Government Code, §2001.029(b) will be held at 10:00 a.m. on October 5, 1995 by a member of the commission's staff at the commission's offices in Austin, Texas. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the amendment. The commission will consider the costs and benefits in deciding whether to adopt the amendment.

The amendment is proposed under PURA '95, §1.101, which provides the commission with the authority to make and enforce the rules reasonably required in the exercise of its powers and jurisdiction; and §3.053, which exempts certain companies from the §1.251 sale, transfer and merger reporting requirements, requires the commission to complete an investigation under §1.251 of non-exempt telecommunications utilities, within 180 days.

The following statute is affected by this rule: the Public Utility Regulatory Act of 1995, §1.251 and §3.053.

§23.12. Financial Records and Reports.

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

(c) Reports on sale of property and mergers.

(1) **Except for a local exchange company exempted in paragraph (5) of this subsection, an electric utility or dominant carrier** [a public utility] shall not sell, acquire, lease or rent any plant as an operating unit or system in the State of Texas for a total consideration in excess of $100, 000 unless the public utility reports such transaction to the commission **while pending or within 30 days of the transaction.**

(2) **Except for a local exchange company exempted in paragraph (5) of this subsection,** [a public utility] **an electric utility or dominant carrier** shall not merge or consolidate with another public utility operating in the State of Texas unless the public utility reports such transaction to the commission while pending or within 30 days of the transaction.

(3) **Electric utilities and dominant carriers** [a public utility] shall not purchase voting stock in another public utility doing business in the State of Texas, unless the utility reports such purchase to the commission **while pending or within 30 days of the transaction.**

(4) **Electric utilities and dominant carriers** [a public utility] shall not loan money, stocks, bonds, notes or other evidences of indebtedness to any corporation or person owning or holding directly or indirectly any stock of the public utility unless the public utility reports such transaction to the commission **while pending or within 30 days of the transaction** [within a reasonable time]. A properly filed tariff change with respect to energy conservation loans available to customers, who may or may not be shareholders as described [defined] in this paragraph, will be considered adequate reporting to the commission.

(5) Incumbent local exchange companies electing under Subtitle H, Title III of the Public Utility Regulatory Act of 1995, COAs, and SPCOAs are exempt from the requirements of paragraphs (1) and (2) of this subsection.

(6) For dominant carriers, investigations by the commission, with or without public hearing, of the transactions described in paragraphs (1) and (2) of this subsection must be completed within 180 days after the date of notification by the carrier. If an order is not entered within that time, the utility's action is considered consistent with the public interest.

(d) Reports on sale of 50% or more of stock. All transactions involving the sale of 50% or more of the stock of an **electric utility or dominant carrier except a local exchange company exempted in paragraph (1) of this subsection** [a public utility] shall be reported to the commission **while pending or within 30 days of the transaction** [If, after review, the commission finds that such transactions are not in the public interest, the commission shall take the effect of the transaction into consideration in the next rate making proceeding and disallow any portion of the transaction found to be un reasonable].

(1) Incumbent local exchange companies electing under subtitle H, Title III of the Public Utility Regulatory Act of 1995, COAs, and SPOCAs are exempt from the requirements of this subsection.

(2) For dominant carriers, investigations by the commission, with or without public hearing, of the transactions described in this subsection must be completed within 180 days after the date of notification by a the carrier. If an order is not entered within that time, the utility's action is considered consistent with the public interest.

(e) (No change.)

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

Issued in Austin, Texas, on September 12, 1995.

TRD-9511680 Paula Mueller
Secretary of the Commission
Public Utility Commission of Texas

Earliest possible date of adoption: October 23, 1995

For further information, please call: (512) 458-0100

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TITLE 22. EXAMINING BOARDS

Part XII. Board of Vocational Nurse Examiners

Chapter 231. Administration

General Provisions

• 22 TAC §231.1

The Board of Vocational Nurse Examiners proposes an amendment to §231.1, relative to definitions. The rule is amended to add definitions for the term "current license" and "delinquent license".

Marjorie A. Bronk, executive director, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mrs. Bronk also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be a clear understanding of what these terms mean. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendment is proposed under Texas Civil Statutes, Article 4528c, §5(h) , which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this amendment.

§231.1. Definitions. The following words and terms, when used throughout this manual, shall have the following meanings, unless the context clearly indicates otherwise.

Current License-A license that reflects a date which has not expired.

Delinquent Licensee-An individual holding a license to practice vocational nursing, whose license had expired for nonpayment of renewal fees, and whose license has not been suspended or revoked by disciplinary action.

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

Issued in Austin, Texas, on September 15, 1995.

TRD-9511859 Marjorie A. Bronk, R.N.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: October 23, 1995

For further information, please call: (512) 835-2071

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Chapter 233. Education

Vocational Nursing Education Standards

• 22 TAC §233.65

The Board of Vocational Nurse Examiners proposes an amendment to §233. 65, relative to admission criteria. The rule is amended to comply with changes in the Vocational Nurse Act.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mrs. Bronk also has determined that for each year of the first five years the section is in effect there will be no public benefit anticipated as a result of enforcing the section. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendment is proposed under Texas Civil Statutes, Article 4528c, §5(h) , which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this amendment.

§233.65. Admission Criteria. Admission requirements shall be stated in the student policies. **Schools shall set reasonable educational requirements for admission.** [Applicants shall furnish evidence of completion of a minimum of 10th grade education requirements via transcript or General Education Development equivalency test.] Applicants shall present evidence of being in good physical and mental health. All students shall be pretested. Tests shall measure reading comprehension and mathematical ability.

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

Issued in Austin, Texas, on September 15, 1995.

TRD-9511860 Marjorie A. Bronk, R.N.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: October 23, 1995

For further information, please call: (512) 835-2071

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Chapter 235. Licensing

Issuance of Licenses

• 22 TAC §235.48

The Board of Vocational Nurse Examiners proposes an amendment to §235. 48, relative to reactivation of a license. The rule is amended to comply with changes in the Vocational Nurse Act and to make rules consistent.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mrs. Bronk also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be nurses who are current in education and procedures for nursing. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendment is proposed under Texas Civil Statutes, Article 4528c, §5(h) , which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this amendment.

§235.48. Reactivation of a License.

(a) (No change.)

(b) A vocational nurse who has been on inactive status or whose license has been delinquent for one full renewal period, but less [not more] than five [four] years shall meet the following criteria for licensure:

(1) (No change.)

(2) submit verification of employment as a licensed vocational nurse in another state or employment as a registered nurse in this state or another state within the past **five** [four] years immediately prior to **renewal** [application];

(3)-(4) (No change.)

(c) (No change.)

(d) **An individual whose license in an inactive or delinquent status for five**

years or longer will not be issued a renewed license. The licensee shall be required to repeat the vocational nursing program, and shall take and pass the national licensure examination, unless subsection (b)(2) of this section is met. [Effective September 1, 1995, a vocational nurse who has been on inactive status or whose license has been delinquent for more than four years, but less than five years shall not be renewed unless the individual takes and passes the national licensure examination or subsection (a)(2) of this section has been met.]

[(e) A license that has been inactive or delinquent for four years or longer shall not be renewed unless subsection (b)(2) of this section is met.

[(f) An individual whose license has been inactive or delinquent for more than five years will be required to repeat the vocational nursing program and shall take and pass the national licensure examination unless subsection (b)(2) of this section is met.]

(e)[(g)] An individual whose license is in an inactive status or is delinquent for nonpayment of renewal fees, continues to be a licensee of the board, and is subject to all provisions of the Vocational Nurse Act and Board rules governing licensed vocational nurses, until such time as the license is suspended or revoked by the Board, or the license is not renewable as set out in subsection (d) [(e)] of this section.

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

Issued in Austin, Texas, on September 15, 1995.

TRD-9511861 Marjorie A. Bronk, R.N.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: October 23, 1995

For further information, please call: (512) 835-2071

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Chapter 239. Contested Case Procedure

Definitions

• 22 TAC §239.1

The Board of Vocational Nurse Examiners proposes an amendment to §239.1, relating to definitions of language as used in the Rules and Regulations. The rule is amended to reflect changes in the Vocational Nurse Act and for consistency with other sections of the rules and regulations.

Marjorie A. Bronk, executive director, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mrs. Bronk also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that individuals whose licenses have been revoked through the disciplinary process will be unable to return to nursing without meeting specific requirements as set out in other sections of the rules and regulations of the board. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Marjorie A. Bronk, R.N., M.S.H. P., Executive Director, Board of Vocational Nurse Examiners, 9101 Burnet Road, Suite 105, Austin, Texas 78758, (512) 835-2071.

The amendment is proposed under Texas Civil Statutes, Article 4528c, §5(h), which provide the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this amendment.

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

Reinstatement-The individual with a revoked or suspended license must demonstrate or supply evidence to the board of their rehabilitation or current fitness to hold a license. Reinstatement petitions shall be considered no sooner than **five years following a revocation order, one year following a voluntary surrender revocation order, or in the case of a suspension order, upon conclusion of the specified period of suspension.** [one year after the revocation order becomes final and enforceable or in the case of a suspension order, upon conclusion of any specified period of suspension.]

Revocation-The withdrawal or repeal of a license. Revocation is established for a minimum period of **five years**. [one year]

Voluntary Surrender-The unprescribed relinquishment of a license, which results in the revocation of a license without formal charges, notice, or a hearing. The licensee must execute a sworn statement to the Board that he or she no longer desires to be licensed. Voluntary surrender revocation is established for a minimum period of one year.

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

Issued in Austin, Texas, on September 15, 1995.

TRD-9511863 Marjorie A. Bronk, R.N.
Executive Director
Board of Vocational Nurse Examiners

Earliest possible date of adoption: October 23, 1995

For further information, please call: (512) 835-2071

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TITLE 25. HEALTH SERVICES

Part II. Texas Department of Mental Health and Mental Retardation

Chapter 401. System Administration

Subchapter E. Contracts Management

• 25 TAC §§401.371-401.393

(Editor's Note: The Texas Department of Mental and Mental Retardation proposes for permanent adoption the repealed sections it adopts on an emergency basis in this issue. The text of the repealed sections may be examined in the offices of the Texas Department of Mental and Mental Retardation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes the repeal of §§409.371-401.393 of Chapter 401, Subchapter E, concerning contracts management. New sections are contemporaneously proposed for public comment in this issue of the *Texas Register*.

The subchapter is proposed for repealed to allow for the proposal of new sections which enable the department to act expeditiously and effectively in remedying contractual problems that may affect the life, health, welfare, or safety of people receiving mental health and mental retardation services funded by TDMHMR.

Don Green, chief financial officer, has determined that for the first five-year period the repeals would be in effect there would be no additional fiscal cost to state or local government. There will be no significant local economic impact. There will be no effect on small businesses.

Steve Shon, MD, director, Managed Care, has determined that the public benefit is updating the repeals to reflect current organizational structure and laws. There is no cost to persons required to comply with the subchapter as proposed.

The repeals are proposed under the Texas Health and Safety Code, Title 7, §532.015, which provides the Texas Board of Mental Health and Mental Retardation with rulemaking powers; under the provisions of Texas Civil Statutes, Article 4413(502) §15, which provides the Health and Human Services Commission with authority over

TDMHMR rules; and under the Texas Government Code, §2001.034, which authorizes emergency rulemaking.

The proposal affects the Health and Safety Code, §534.052.

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

Issued in Austin, Texas, on September 15, 1995.

TRD-9511875 Ann Utley
Chairman
Texas Department of Mental Health and Mental Retardation

Earliest possible date of adoption: October 23, 1995

For further information, please call: (512) 206-4516

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• 25 TAC §§409.371-401.399

(Editor's Note: The Texas Department of Mental Health and Mental Retardation proposes for permanent adoption the new sections it adopts on an emergency basis in this issue. The text of the new sections is in the Emergency Rules section of this issue.)

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes new §§409.371-401.399 of Chapter 401, Subchapter E, concerning contracts management. A modified version of the new subchapter is adopted on an emergency basis in this issue of the *Texas Register*. The existing Chapter 401, Subchapter E, also concerning contracts management, is repealed on an emergency basis and proposed for public comment in this issue of the *Texas Register*.

The purpose of the proposal is to update contracting policies. The proposal reflects changes in laws; recent authority-provider organizational changes; requirements for subcontracts between authorities and their subcontractors; the requirement to comply with the Uniform Grants and Contracts Management policy; a provision for the repayment of start-up funding; a requirement that all mental health authorities use a fund accounting system by September 1, 1996; and provisions by which the department can, without undue delay, terminate contracts of mental health and mental retardation authorities under certain conditions and in certain situations which represent imminent danger to public health, welfare, or safety, or in which the department has reason to believe the contractor has engaged in the misuse of state or federal funds, fraud, or illegal acts.

Don Green, chief financial officer, has determined that for the first five years the new sections are in effect, the extent of the fiscal implications for state or local government or small businesses as a result of administering the sections as proposed cannot be satisfactorily projected, since additional costs are directly related to contractors' and subcontractors' compliance with the new subchapter. It is anticipated that there will be some additional cost attached to compliance by local authorities depending on the degree to which they subcontract services. In addition, the requirement to use fund accounting will have potential implications for the fiscal management practices of authorities that do not currently use this method of accounting. There is no anticipated local economic impact.

Steve Shon, MD, director, Managed Care, has determined that the public benefit is updating the rules to reflect current organizational structure and laws. The new subchapter will better enable the department to remedy situations in which contract terms and conditions are not being met. There is no cost to persons required to comply with the subchapter as proposed.

A public hearing will be held on October 16, 1995, at 1:30 p.m., in the TDMHMR Central Office auditorium at 909 West 45th Street, Austin. Persons requiring an interpreter for the hearing impaired should notify Laura Thomas, Office of Policy Development, within 24 hours prior to the hearing.

Written comments on the proposal may be submitted to Linda Logan, director, Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, within 30 days of publication.

The new sections are proposed under the Texas Health and Safety Code, §532.015, which provides the Texas Department of Mental Health and Mental Retardation with broad rulemaking powers, and §534.052, which gives the board rulemaking authority for community-based mental health and mental retardation services provided by community centers and other contract providers.

The proposal affects the Health and Safety Code, §534.052.

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

Issued in Austin, Texas, on September 15, 1995.

TRD-9511876 Ann Utley
Chairman
Texas Department of Mental Health and Mental Retardation

Earliest possible date of adoption: October 23, 1995

For further information, please call: (512) 206-4516

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TITLE 28. INSURANCE

Part II. Texas Workers' Compensation Commission

Chapter 134. Guidelines for Medical Services, Charges, and Payments

Subchapter K. Treatment Guidelines

• 28 TAC §134.1002

The Texas Workers' Compensation Commission proposes new §134.1002, concerning upper extremities treatment guidelines. At the request of the Texas Register staff, this proposed guideline has been filed with the Register and will be published in its entirety in the *Texas Register* in rule format. The proposed text of the Upper Extremities Treatment Guideline is also available from the Publications Department of the Texas Workers' Compensation Commission, 4000 South IH-35, Southfield Building, Austin, Texas 78704-7491. The Medical Review Division of the Texas Workers' Compensation Commission prohibits use of this proposed Upper Extremities Treatment Guideline in its current proposed format. The commission does not condone, nor support application or implementation of this document in its entirety or any portion thereof; as a clinical policy or in a clinical decision-making capacity to determine reimbursement for medical services or treatment provided in the workers' compensation arena.

The Upper Extremities Treatment Guideline is proposed in order to clarify those services that are reasonable and necessary for operative and nonoperative care of the upper extremities for the injured workers of Texas. The guideline is not to be used as a fixed treatment protocol, but rather identifies a normal course of treatment, and reflects typical courses of intervention. It is anticipated that there will be injured workers who will require less or more treatment than average. It is acknowledged that in atypical cases, treatment falling outside this guideline will occasionally be necessary. However, those cases that exceed the guideline level of treatment will be subject to more careful scrutiny and review and will require documentation of the special circumstances that justify the treatment. This guideline should not be seen as prescribing the type and frequency or length of intervention. Treatment must be based on patient need and professional judgement. The proposed rule is designed to function as a guideline and should not be used as the sole reason for denial of treatments and services. It is anticipated that this guideline will be subject to review and possible revision on a regular basis.

The guideline has been designed to achieve the following goals:

(1) to assist all parties with regard to the appropriate treatment and management of upper extremity injuries;

(2) to establish elements against which aspects of care can be compared;

(3) to establish a guideline to exemplify clinically acceptable courses of treatment for specific disorders;

(4) to establish documentation standards which support the appropriateness of the level of service; and

(5) to provide a mechanism of prospective, concurrent, and retrospective review for efficient and effective health care utilization.

The clinical and diagnostic treatment guidelines contained in this new rule have been developed in conjunction with health care providers and other parties in the workers' compensation system. The development process involved a national search of state agencies administering workers' compensation programs, which revealed that only a few states had developed treatment guidelines. Research revealed a matrix approach to be the most understandable format for the guideline. A survey of the successful guidelines developed in the private sector identified that involvement from provider work groups achieved the best outcome regarding clinical policy development. The agency recognizes that the evaluation of the proposed guideline should be broad and include comments from employees, employers, health care providers and insurance carriers.

The guideline is proposed in order to promote quality health care, injury specific treatment and appropriateness of care, by facilitating communication between all parties in order to achieve rapid recovery from the effects of an injury. This communication will also promote a timely return to modified or full duty work that takes into account the job demands and the functional capabilities of the injured worker.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the section is in effect there will be no fiscal implications as a result of enforcing or administering the section.

For the first five years the section is in effect, local government as a regulating entity is expected to have no additional or reduced costs and no loss or increase in revenue. Local government as a covered entity will be impacted in the same manner as described later in this preamble for persons required to comply with the section as proposed. State government may realize a savings in costs or resources, as the number of disputes regarding upper extremities treatments and preauthorization requests should be reduced because the guideline clarifies what is a normal course of treatment and reflects typical courses of intervention. In addition, disputes as to upper extremities treatments and preauthorization requests should be resolved more quickly by the Medical Review Division for the same reason. There should be no loss or increase in revenue for state government.

Ms. Chamness also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be the promotion of quality health care and injury specific treatment for injured workers by identifying clinically acceptable courses of care for specific upper extremities injuries. Another benefit will be that the rule will provide a mechanism to monitor the necessity of treatment administered and establish treatment parameters, thus providing greater efficiency in the provision of upper extremities treatment to the injured worker. The number of disputes regarding upper extremities treatments and preauthorization requests should be reduced because the guideline clarifies what is a normal course of treatment and reflects typical courses of intervention. In addition, disputes should result in a reduction of costs to the workers' compensation system and in more timely and appropriate treatment of an injured worker.

Persons required to comply with the rule as proposed should experience a reduction in costs because the number of disputes regrading upper extremities treatments and preauthorization requests should be reduced by clarification of what is a normal course of treatment and typical courses of intervention. In addition, there may be a cost savings from quicker resolution of preauthorization and treatment disputes by the Medical Review Division. There will be no difference in cost of compliance for small businesses compared to larger businesses.

Comments on the proposal must be received by 4:00 p.m. on October 20, 1995 and should be submitted to Elaine Crease, Office of the General Counsel, Mail Stop #4D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491. A public hearing is scheduled for October 11, 1995 at 2:00 p.m., and will be held in the Tippy Foster Room (Room 910) at the central office of the Commission.

The new section is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code, §413.011, which authorizes the commission to establish by rule medical policies and guidelines relating to necessary treatments for injuries, and §413.013, which authorizes the commission to establish by rule a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; and to establish by rule a program for the systematic monitoring of the necessity of treatments administered and fees charged and paid for medical treatments or services, including the authorization of prospective, concurrent, or retrospective review under the medical policies of the commission to ensure that the medical policies or guidelines are not exceeded.

The new section affects the Texas Labor Code, §§402.061, 413.011, and 413. 013.

§134.1002. Upper Extremities Treatment Guideline.

(a) Table of Contents. The following headings and their corresponding subdivisions comprise a table of contents for this section:

(1) Introduction-subsection (b);

(A) Purpose-subsection (b)(1);

(B) Goals-subsection (b)(2);

(C) Development Process-subsection (b)(3);

(D) Philosophy of Care-subsection (b)(4) ;

(2) Role of the Primary Gatekeeper-subsection (c):

(A) Statutory Requirements-subsection (c)(1);

(B) Primary Gatekeeper Responsibilities-subsection (c)(2);

(C) Referrals-subsection (c)(3) ;

(D) Diagnostics-subsection (c)(4);

(E) Expectations and Compliance-subsection (c)(5);

(3) Application Instructions for Involved Parties/Concepts and Governing Principles-subsection (d);

(4) Ground Rules-subsection (e):

(A) Introduction-subsection (e)(1) ;

(B) Ground Rules-subsection (e)(2);

(C) General Documentation Requirements-subsection (e)(3);

(D) Documentation Requirements for Unrelated or Intercurrent Illness-subsection (e)(4);

(5) Nonoperative Treatment Tables-subsection (f):

(A) Introduction to Treatment Tables-subsection (f)(1);

(B) Definition of Levels of Care-subsection (f)(2);

(C) The Hand and Wrist-subsection (f)(3);

(D) The Elbow-subsection (f)(4);

(E) The Shoulder-subsection (f)(5);

(F) Upper Extremity-subsection (f)(6);

(6) Surgical Indicators-subsection (g):

(A) Hand and Wrist-subsection (g)(1);

(B) Elbow-subsection (g)(2);

(C) Shoulder-subsection (g)(3);

(D) Upper Extremities-subsection (g)(4);

(7) Glossary-subsection (h); and

(8) Bibliography-subsection (i);

(b) Introduction.

(1) Purpose. The purpose of this guideline is to clarify those services that are reasonable and medically necessary for treatment of upper extremity injuries for the injured workers of Texas. This guideline identifies a normal course of treatment. It is anticipated that there will be injured workers who will require less treatment than the average and other injured workers who will require more treatment. This is a guideline and shall not be used as the sole reason for requirement or denial of treatments and services.

(2) Goals. The following outlines the primary goals of this guideline:

(A) to assist all parties with regard to the appropriate treatment and management of upper extremity injuries;

(B) to establish elements against which aspects of care can be compared;

(C) to establish a guideline to exemplify clinically acceptable courses of treatment for specific disorders;

(D) to establish documentation standards which support the appropriateness of the level of service; and

(E) to provide a mechanism of prospective, concurrent, and retrospective review for efficient and effective health care utilization.

(3) Development Process. The Texas Workers' Compensation Commission (TWCC), in conjunction with health care providers and other parties in the system, have developed clinical and diagnostic treatment guidelines. Three major components in the guideline development process are as follows:

(A) Design and Methodology. A search of all 50 workers' compensation state agencies revealed that only a few had developed treatment guidelines. The format and design of these guidelines were mainly in narrative presentation. The focus of this treatment guideline is toward a matrix approach versus straight text.

(B) Provider Work Group. Research into successful guidelines developed in the private sector identified that involvement from provider work groups achieves the best outcome regarding clinical policy development.

(C) Public Evaluation. The evaluation of the developed guideline should be broad and include comments from employees, employers, health care providers and insurance carriers.

(4) Philosophy of Care. The health care of the injured worker is a coordinated team effort. All parties including employees, employers, health care providers, insurance carriers and the Texas Workers' Compensation Commission should promote quality health care, injury specific treatment and appropriateness of care. Communication between all parties must remain open in order to achieve rapid recovery from the effects of the injury. This communication should promote a timely return to modified or full duty work that takes into account the job demands and the functional capabilities of the injured worker.

(c) Role of Primary Gatekeeper.

(1) Statutory Requirements. The following sections of the Texas Labor Code and specific Commission rules address key areas pertaining to those services that are reasonable and necessary for treatment of the upper extremity.

(A) Section 408.021(a). An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that:

(i) cures or relieves the effects naturally resulting from the compensable injury;

(ii) promotes recovery; or

(iii) enhances the ability of the employee to return to or retain employment.

(B) Section 408.021(b). Medical benefits are payable from the date of the compensable injury.

(C) Section 408.021(c). Except in an emergency, all health care must be approved or recommended by the employee's treating doctor.

(D) Section 408.025(b). The commission by rule shall adopt reasonable requirements for reports and records to be made available to other health care providers to prevent unnecessary duplication of tests and examinations.

(E) Section 408.025(c). The treating doctor shall be responsible for maintaining efficient utilization of health care.

(2) Primary Gatekeeper Responsibilities.

(A) The role of the treating doctor is an important role which requires the treating doctor to monitor all health care services being provided for the injured worker. These responsibilities of the treating doctor are vital aspects of the goal to ensure that the injured worker receives quality health care. This monitoring extends to ensure:

(i) the identification of the extent and severity of the injury initially;

(ii) the appropriateness of all services;

(iii) the relatedness of all services to the workers' compensation injury;

(iv) separation and referral of nonrelated health care services for management by other health plans;

(v) whether the treatment is duplicative, necessary and/or effective;

(vi) the appropriate cost of the services;

(vii) the quality of the treatment; and

(viii) enhancement and promotion of effective communication among all involved parties.

(B) Refer to Commission §126.9 of this title (relating to Choice of Treating Doctor and Liability for Payment) and §133.3 of this title (relating to Respon-

sibilities of Treating Doctor) for responsibilities of the treating doctor.

(3) Referrals. The treating doctor is responsible for recommending timely and appropriate referrals. The treating doctor must clearly delineate the clinical rationale for all referrals. The documentation contained in the TWCC 64 should clearly outline whether the purpose of the referral is to corroborate the diagnosis and/or proposed course of treatment or to initiate ongoing treatment. It is appropriate for the treating doctor to document and explain the referral in the TWCC 61 or 64. Once a consultation or referral has occurred, the consulting or referral doctor should submit a summary report or initiate a case management phone call back to the treating doctor. This communication by the consulting or referral doctor is necessary to enable the treating doctor to meet his responsibility to submit a TWCC 64 every 60 days.

(4) Diagnostics. Diagnostic work should be performed in accordance with the recommended testing and timeframes contained in this guideline. If the need arises to deviate from the guideline, then a clinical rationale must be provided which adequately substantiates the need for this deviation. The need to repeat previously completed diagnostic procedures due to the quality of the study may trigger a review. All health care providers involved in the treatment of an injured worker must share copies of all diagnostic studies, films, and reports in order to avoid unnecessary duplication of procedures. Section 133.2 of this title (relating to Sharing Medical Reports and Test Results) addresses the need to share medical records, including diagnostic studies, to avoid duplication. Section 133.106 of this title (relating to Fair and Reasonable Fees for Required Reports and Records) addresses reimbursement for copies of records.

(5) Expectation and Compliance.

(A) All health care providers must encourage injured workers to be active participants in their health care treatment regimens and must communicate to the injured worker realistic expectations regarding the potential outcome of this treatment as it relates to his/her physical functioning and/or ability to return to work. Therefore, it is important to document the injured worker's compliance with his/her treatment regimen when reporting the progress of his/her recovery.

(B) Health care providers must explain to the injured worker in clear terms the extent and severity of the injury and the treatment needed. Health care providers must define the symptomatology that is directly and/or indirectly related to the injury and specify treatment not covered under workers' compensation.

(d) Application Instructions for Involved Parties-Concepts and Governing Principles.

(1) Health Care Provider. This guideline is to be used as a tool by the health care provider to establish the required elements for all providers to initiate and continue treatment. If, for example, a provider's treatment deviates from the guideline, this would require documentation of a clearly delineated rationale for the need for this treatment.

(A) This guideline identifies typical treatment based on normal tissue healing responses for the average injured worker.

(B) It is expected that a subset of injured workers will be found to be outside the parameters of these guidelines.

(C) This guideline should be used as a tool which identifies the recommended treatment parameters for treatment of injured workers within the workers' compensation system.

(D) This guideline identifies the need to provide documentation which clearly explains the reason for the treatment, the relatedness to the workers' compensation injury and alternative treatment.

(E) The health care provider should educate the injured worker about health care treatment appropriate to the workers' compensation injury.

(F) This guideline recommends early return to work based upon the injured worker's functional capacity which includes ability, clinical status, and either full or modified job requirements.

(2) Insurance Carriers. The insurance carrier should use this guideline to compare treatment prospectively, concurrently and retrospectively with the predetermined elements contained in the guides.

(A) This document and its parameters serve only as a guideline and are not to be used as the sole reason for denial or requirement of treatments and services.

(B) This guideline provides a tool by which to monitor the injured worker's recovery process.

(C) This guideline serves as a tool to assist the insurance carriers in the medical audit process.

(D) This guideline is not to be used to direct care toward a specific health care discipline or to a specific type of treatment. It is the responsibility of the insurance carrier to provide their specific documentation and rationale if treatment is denied. This rationale may include elements of the guideline. Additional information regarding the rationale for denial of treatment may also be derived from the injured worker's medical records and from the professional opinion of a peer review, if utilized.

(E) It is expected that a subset of injured workers will be found to be outside the parameters of this guideline.

(3) Medical Review Division. The Medical Review Division will use the guideline as a tool for the basis of their administrative review of prospective, concurrent and retrospective treatment. It will also be used as a tool in conducting on-site audits for both health care providers and insurance carriers.

(4) Consulting or Peer Review Health Care Provider. This guideline should be used as a reference when advising the Medical Review Division and when the need for an unbiased medical opinion is indicated. The peer reviewer should use his/her clinical expertise in conjunction with the clinical intent of the guideline to address issues.

(5) Injured Worker. It is essential that the injured worker understands his/her role in complying with recommended treatment. The recovery and return to work process requires active cooperation of the injured worker.

(6) Employer. It is the responsibility of the employer to report the compensable injury in a timely fashion to ensure that there is no delay in the treatment of the compensable injury. It is also the responsibility of the employer to work with the insurance carrier and health care providers to ensure that the injured worker is afforded the opportunity to return to work in either a modified or full employment capacity as rapidly as possible within the medical limitations of his/her injury.

(e) Ground Rules.

(1) Introduction. The guidelines are not to be used as fixed treatment protocols. The guidelines reflect typical courses of intervention. It is acknowledged that, in atypical cases, treatment may fall outside these guidelines. However, those cases that exceed the guidelines' level of treatment will be subject to more careful scrutiny and review and will require documentation of

the special circumstances justifying that treatment. The guidelines should not be seen as prescribing the type, frequency, or duration of treatment. Treatment must be based on injured worker's need and the doctor's professional judgment.

(2) Ground Rules.

(A) Notwithstanding any other provision of this rule, treatment of a work related injury must be:

(i) adequately documented;

(ii) evaluated for effectiveness and modified based on clinical changes;

(iii) provided in the least intensive setting;

(iv) cost effective;

(v) consistent with this guideline or contain a documented clinical rationale for deviation from this guideline;

(vi) objectively measured and demonstrate functional gains; and

(vii) consistent in demonstrating ongoing progress in the recovery process by appropriate re-evaluation of the treatment.

(B) Communication between all health care providers involved in treating the injured worker must ensure that all previous treatment and diagnostic tests are considered when developing a plan of treatment. All reports and records should be made available to all health care providers to prevent unnecessary duplication of tests and examinations. Refer to treating doctor/referral doctor section.

(C) Patient education is an essential component in ensuring patient compliance to all treatment. Education is essential for the active cooperation of the patient in all aspects of health care and as a means to prevent re-injury. It is essential that the patient understand his/her role in the recovery and return to work process.

(D) All parties in the workers' compensation system should work together to ensure that the injured worker returns to work at the earliest medically appropriate time. Return-to-work is an important therapeutic approach which benefits the injured worker. The health care provider should communicate with the injured worker, employer and the insurance carrier to coordinate a successful return to work.

(E) The level of service should be the same as the health care provider's usual and customary level of service regardless of the payor system.

(F) The injured worker may move between levels of care or utilize interventions in more than one level of care simultaneously, depending on clinical indicators.

(G) All health care providers providing services to an injured worker have the responsibility to substantiate in their documentation the level of service for which they request reimbursement. All payors have the responsibility to review all documentation submitted as the basis for the treatment and services provided.

(H) Treatment durations are cumulative; however it should not always be necessary to use full durations for any given level of care.

(I) Any new treatment must meet acceptable standards of care and may be subject to review by Texas Workers' Compensation Commission.

(J) Preauthorization of any treatments or services will be as required in the Commission's preauthorization rule.

(K) When the injured worker displays signs and symptoms which may require further evaluation by a Qualified Mental Health Provider, refer to the Mental Health Treatment Guideline for parameters regarding documentation, evaluation and treatment.

(3) General Documentation Requirements.

(A) The health care provider's documentation is vital as an information source of the injured worker's injury and treatment, it also provides information which impacts income benefits. For these reasons, many of the Commission's rules have set time requirements for submission of required reports. For example, the TWCC 61 could be the first report submitted which informs the insurance carrier of the injury. The TWCC 64 provides medical information regarding the injured worker's clinical progress and the need for continuation of any income benefits. The TWCC 69 provides the determination of MMI and an impairment rating which may result in a change in income benefits.

(B) Documentation should be provided by the health care provider to determine the level of care to be provided and the necessity for that care. The elements of the documentation may include:

(i) a description of the injury, including the events surrounding that injury and the extent and severity of that injury;

(ii) a description of any pre-existing condition(s), complicating conditions and/or any non-related conditions;

(iii) a plan of treatment, including proposed methods of treatment, expected outcomes, and probable duration of treatment;

(iv) updates to the plan of treatment as needed, including the clinical progress of the injured worker, and any revisions needed to the plan of treatment in light of the injured worker's response to treatment;

(v) education/information provided to the injured worker regarding his injury and plan of treatment, and the injured worker's compliance with this plan of treatment; and

(vi) documentation substantiating the need for deviation from the guideline, if necessary.

(C) Permanent impairment for compensable injuries in workers' compensation should be limited to those injuries and illnesses for which doctors are able to demonstrate objective findings.

(D) The need for emergency treatment must be based on the doctor's professional judgment. This documentation must provide a clear explanation of the nature of the emergency, the injured worker's medical condition, complications which could occur as well as any irreversible conditions which occurred or could occur as a result of this event.

(4) Documentation Requirements for Unrelated or Intercurrent Illness. Situations may arise where certain medical conditions need to be delineated or clarified prior to intervention. Treatment administered to other body areas (not a part of the original injury) or for a pre-existing medical condition(s) must be identified and the relation of this treatment to the compensable injury documented by the health care provider. If it appears that this treatment is not related to the compensable injury, the injured worker should be informed by the health care provider that this treatment may not be covered by the insurance carrier. The rationale for such treatment and its relation to the compensable injury should also be clearly documented for the insurance carrier by the health care provider.

(f) Nonoperative Treatment Tables.

(1) Introduction to Nonoperative Treatment Tables. The treatments, set out in the following tables, represent typical ap-

propriate treatment for a given period of time according to the diagnosis(es). The "Treatment Interventions" sections and "Diagnostic Procedures" sections of the Treatment Tables are in alphabetical order and do not infer numerical sequence. It is anticipated that there will be some injured workers who will require less treatment, and other injured workers who will require more treatment than is outlined. This document serves as a guideline and should not be used as the sole reason for denial or requirement of treatment. The provision of specific services to an injured worker is dependent on the injured worker's diagnosis, and response to treatment.

(2) Definition of Levels of Care.

(A) Primary level of care. This level of care is generally considered to be appropriate for injured workers immediately following the compensable injury; however, the injured worker in this level of care may also be an early postoperative patient or may be experiencing an acute exacerbation of his/her chronic pain. Since partial or total cessation of work over a brief period of time (i.e., two to three days maximum) is also considered to be part of the primary level of care, further treatment by a health care provider may not be considered necessary at this level of care. Little or no deconditioning has occurred due to the injury, immobilization or decreased activity. The goals are the prevention of disease, alleviating or minimizing the effects of the illness or injury and to maintain function.

(B) Secondary level of care. This level of care is the first stage of rehabilitation for those injured workers who have not returned to productivity through the normal healing process. It is designed to facilitate return to productivity before the onset of chronic disability. It is individualized, time limited and of limited intensity. The injured worker has a history of a limited-to-good response to early primary treatment with persistent symptoms limiting activities of daily living. The objective physical examination demonstrates findings suggestive of early deconditioning including loss of range of motion and/or strength with limitation of activities of daily living. Evidence of mental health or psychosocial barriers may be present which impede the injured worker's clinical progress.

(C) Tertiary level of care. This level of care is interdisciplinary, individualized, coordinated, and intensive, designed for the injured worker who demonstrates physical and psychological changes consistent with chronic disability. There is a documented history of persistent failure to respond to nonoperative or operative treatment which surpasses the usual healing period for that injury. Psychosocial issues such as substance abuse, affective disorders, and other psychological disorders may be present. There is a documented inhibition of physical functioning evidenced by pain sensitivity, loss of sensation, and nonorganic signs such as fear which produce a physical inhibition or limited response to reactivation treatment. This level of care may also be indicated for the injured worker whose physical capacity to work still does not meet the job requirements for heavy physical labor after adequate treatment, thereby causing an inability to return to full duty. This situation would be evidenced by an excessive transitional period of light duty or significant episodes of lost work time due to the need for continued medical treatment. This level of care is also indicated for those injured workers who cannot tolerate either primary or secondary levels of care.

(D) Criteria to distinguish between secondary and tertiary level of care. Many factors may determine the choice between secondary and tertiary levels of care. In general, if lower cost secondary treatment can be effective, this level of care is preferred over the more expensive tertiary care. However, if the documented condition of the injured worker is indicative of the need for more intensive treatment, the tertiary level of care may be more appropriate. Key factors in determining the need for secondary versus tertiary care include:

(i) the time elapsed since injury;

(ii) the presence of psychosocial barriers to recovery such as depression, substance abuse, personality disorder, etc., and the severity of these barriers;

(iii) the lack of responsiveness to previously attempted treatment;

(iv) the severity of physical/functional deconditioning; and/or

(v) socioeconomic barriers to recovery.

(3) Hand and Wrist Treatment Tables.

(A) See Figure 1 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 1: 28 TAC §134.1002(f)(3)(A)

(B) See Figure 2 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 2: 28 TAC §134.1002(f)(3)(B)

(C) See Figure 3 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 3: 28 TAC §134.1002(f)(3)(C)

(4) Elbow Treatment Tables.

(A) See Figure 4 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 4: 28 TAC §134.1002(f)(4)(A)

(B) See Figure 5 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 5: 28 TAC §134.1002(f)(4)(B)

(C) See Figure 6 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 6: 28 TAC §134.1002(f)(4)(C)

(D) See Figure 7 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 7: 28 TAC §134.1002(f)(4)(D)

(E) See Figure 8 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 8: 28 TAC §134.1002(f)(4)(E)

(F) See Figure 9 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 9: 28 TAC §134.1002(f)(4)(F)

(5) Shoulder Treatment Tables.

(A) See Figure 10 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 10: 28 TAC §134.1002(f)(5)(A)

(B) See Figure 11 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 11: 28 TAC §134.1002(f)(5)(B)

(C) See Figure 12 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 12: 28 TAC §134.1002(f)(5)(C)

(D) See Figure 13 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 13: 28 TAC §134.1002(f)(5)(D)

(E) See Figure 14 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 14: 28 TAC §134.1002(f)(5)(E)

(F) See Figure 15 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 15: 28 TAC §134.1002(f)(5)(F)

(6) Upper Extremities Tables.

(A) See Figure 16 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 16: 28 TAC §134.1002(f)(6)(A)

(B) See Figure 17 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 17: 28 TAC §134.1002(f)(6)(B)

(C) See Figure 18 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 18: 28 TAC §134.1002(f)(6)(C)

(D) See Figure 19 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 19: 28 TAC §134.1002(f)(6)(D)

(E) See Figure 20 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 20: 28 TAC §134.1002(f)(6)(E)

(F) See Figure 21 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 21: 28 TAC §134.1002(f)(6)(F)

(G) See Figure 22 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 22: 28 TAC §134.1002(f)(6)(G)

(H) See Figure 23 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 23: 28 TAC §134.1002(f)(6)(H)

(I) See Figure 24 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 24: 28 TAC §134.1002(f)(6)(I)

(J) See Figure 25 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 25: 28 TAC §134.1002(f)(6)(J)

(K) See Figure 26 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 26: 28 TAC §134.1002(f)(6)(K)

(L) See Figure 27 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 27: 28 TAC §134.1002(f)(6)(L)

(M) See Figures 28 and 29 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figures 28 and 29: 28 TAC §134.1002(f)(6)(M)

(N) See Figures 30 and 31 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figures 30 and 31: 28 TAC §134.1002(f)(6)(N)

(O) See Figure 32 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 32: 28 TAC §134.1002(f)(6)(O)

(P) See Figures 33 and 34 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figures 33 and 34: 28 TAC §134.1002(f)(6)(P)

(Q) See Figure 35 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 35: 28 TAC §134.1002(f)(6)(Q)

(R) See Figure 36 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 36: 28 TAC §134.1002(f)(6)(R)

(S) See Figure 37 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 37: 28 TAC §134.1002(f)(6)(S)

(T) See Figure 38 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 38: 28 TAC §134.1002(f)(6)(T)

(U) See Figure 39 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 39: 28 TAC §134.1002(f)(6)(U)

(V) See Figure 40 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 40: 28 TAC §134.1002(f)(6)(V)

(W) See Figure 41 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 41: 28 TAC §134.1002(f)(6)(W)

(X) See Figure 42 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 42: 28 TAC §134.1002(f)(6)(X)

(Y) See Figure 43 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 43: 28 TAC §134.1002(f)(6)(Y)

(Z) See Figure 44 in the Tables and Graphics Section of this issue of the *Texas Register*.
Figure 44: 28 TAC §134.1002(f)(6)(Z)

(g) Surgical Indications. Indications for surgery include but are not limited to the following list.

(1) Hand and Wrist–Tendinitis/Stenosing–Tenosynovitis/Musculotendinitis/Musculotendinou s Problems. Indications for surgery include, but are not limited to:

(A) unresponsive to at least a four to eight week trial of conservative treatment;

(B) tendon is locked in position; and/or

(C) severe pain is present in the finger, thumb or wrist which is unresponsive to conservative therapy.

(2) Elbow.

(A) Musculotendinitis/Tendinitis (Lateral Epidoncylitis, Medial Epidondylitis, Musculotendinous and Periarticular Problems of the Elbow). Indications for surgery include, but are not limited to:

(i) failure to respond to non-operative treatment program after six to 12 months;

(ii) no improvement after a total of three corticosteroid injections;

(iii) presence of atrophy or weakness of the forearm extensors; and/or

(iv) early surgical intervention (before six months), which may be considered if the patient is severely disabled.

(B) Olecranon Bursitis. Indications for surgery include, but are not limited to:

(i) infection is present; and/or

(ii) bursitis is recurrent despite aspiration.

(3) Shoulder-Rotator Cuff (Sprain/Strain, Tear, Shoulder Impingement Syndrome). Indications for surgery include, but are not limited to:

(A) confirmed tear unresponsive to physical medicine; and/or

(B) profound weakness.

(4) Upper Extremities.

(A) Neuropathy.

(i) Indications for Surgery in Carpal Tunnel Syndrome. Indications for surgery include, but are not limited to:

(I) failure to respond to non-operative treatment;

(II) presence of thenar atrophy or weakness or significant hyperesthesia/dysesthesia (especially with objective impairment of sensibility as determined by two point discrimination or by light touch);

(III) progressive symptoms;

(IV) presence of space-occupying lesion in carpal canal; and/or

(V) presence of compartment syndrome or extensive injury to forearm and wrist.

(ii) General Indications. Indications for surgery include, but are not limited to EMG/NC studies indicative of neuropathy accompanying positive physical findings and symptoms that are persistent despite conservative management

(B) Muscle/Ligament/Capsular Injuries (Acute/Chronic).

(i) Indications for Surgery in Ulnar Collateral Ligament Injury of the Thumb (Sprain/Tear). Indications for surgery include, but are not limited to:

(I) any displaced or avulsed fracture with ligament attachment;

(II) complete ligament disruption;

(III) Stener's lesion (displacement of the ulnar collateral ligament superficial to the abductor tendon);

(IV) open wound; and/or

(V) open contaminated wound.

(ii) Indications for Surgery in DeQuervain's Stenosing Tenosynovitis. Indications for surgery include, but are not limited to:

(I) no response or incomplete response to nonoperative treatment after six to 12 weeks of treatment; and/or

(II) presence of a condition which is not amenable to nonsurgical treatment (e.g., separate abductor pollicis longus and extensor pollicis brevis tendon compartments).

(iii) General Indications. Indications for surgery include, but are not limited to:

(I) joint instability;

(II) joint malalignment; and/or

(III) pain impairing the functional use of the joint;

(C) Fractures.

(i) Indications for Surgery in Clavicle Fracture. Indications for surgery include, but are not limited to displaced fractures.

(ii) Indications for Surgery in Fracture Surgical Neck, Humerus. Indications for surgery include, but are not limited to:

(I) displaced or angulated fracture that needs closed reduction;

(II) displaced or angulated fracture needing open reduction and internal fixation of the fragments; and/or

(III) associated neurologic or vascular injury present.

(iii) Indications for Surgery in Distal Radius Fracture. Indications for surgery include, but are not limited to:

(I) displaced fracture requiring reduction and immobilization;

(II) comminuted displaced fracture requiring reduction and fixation;

(III) open fracture; and/or

(IV) acute carpal tunnel syndrome;

(V) associated complex soft-tissue injury (consideration of compartment syndrome); and/or

(VI) failure of outpatient treatment.

(iv) General Indications. Indications for surgery include, but are not limited to:

(I) displaced fracture requiring reduction and immobilization;

(II) cominuted displaced fracture requiring reduction and fixation;

(III) open fracture; and/or

(IV) nonunion of the fracture.

(D) Avascular Necrosis.

(E) Intraarticular Pathology (Traumatic Arthritis). Indications for surgery include, but are not limited to:

(i) persistent synovitis;

(ii) locking of the joint; and/or

(iii) painful traumatic arthritis documented radiologically.

(F) Joint Instability. Indications for surgery include, but are not limited to repeated episodes of instability despite conservative therapy

(G) Lacerations (Tendons, Nerves). Indications for surgery include, but are not limited to:

(i) open wound; and/or

(ii) open contaminated wound.

(H) Crush Injuries.

(h) Glossary.

(1) Acceptable standards of care.

(A) Standard-something established by authority, custom, or general consent as a model or example; the generally accepted norm for quality and quantity.

(B) Acceptable standards of care-outlines of the types of tests and treatments which are established as normal and warranted for a specific type of injury.

(2) Active care vs. passive care.

(A) Active care-modes of treatment or care requiring that the injured worker participate in the level of care received.

(B) Passive care-modes of treatment or care which do not require the injured worker to participate in his/her care; i.e., the care is "done to" or "applied to" the injured worker (e.g., hot packs or cold packs)

(3) Algorithm-a step-by-step procedural pathway for solving a problem or accomplishing some end.

(4) Assessment/Evaluation-the act or process of inspecting or testing for evidence of injury, disease or abnormality.

(5) Chronic pain management-a program which provides coordinated, goal-oriented, interdisciplinary team services to reduce pain, improve functioning, and decrease the dependence on the health care system of persons with chronic pain syndrome.

(6) Clinical plateau-a period of time of relative stability in which the injured worker displays minimal or minor changes in his/her condition.

(7) Clinical progress vs. lack of clinical progress.

(A) Clinical progress-documented improvement in the condition of the injured worker, in response to the injured worker's current treatment program.

(B) Lack of clinical progress-documented absence of change in the condition of the injured worker over a period of time of no less than one month, requiring re-evaluation of the injured worker's condition and re-evaluation of the current treatment program.

(8) Consulting doctor-a doctor who provides an opinion or advice regarding the evaluation and/or management of a specific problem, as requested by the treating doctor, the Commission, or the insurance carrier. A consulting doctor may only initiate diagnostic and/or therapeutic services with approval from the treating doctor.

(9) Decompensation-the inability of the body to maintain adequate functioning in the presence of an injured, abnormal, or nonfunctioning body system

(10) Denial parameters-a set of established elements or boundaries beyond which testing or treatment may be denied.

(11) Diagnosis-the art or act of identifying a disease or injury from evaluation of its signs and symptoms.

(12) Diagnostic module-a standard which establishes normal parameters or boundaries of time within which to perform studies to assist in identifying a disease, injury, or abnormality.

(13) Diagnostic tests-objective studies performed to assist in identifying a disease, injury, or abnormality.

(14) Doctor-a doctor of medicine, osteopathic medicine, optometry, dentistry, podiatry, or chiropractic who is licensed and authorized to practice.

(15) Examination-the act or process of inspecting or testing for evidence of disease, injury, or abnormality.

(16) First doctor.

(A) First-preceding all others in time

(B) First doctor-the initial doctor who evaluates and treats the injured worker, and who may or may not ultimately become the treating doctor.

(17) Focus review-to critically examine the prospective, concurrent, and retrospective care received by the injured worker as related to the compensable injury.

(18) Frequency of intervention.

(A) Intervention-the process of interfering with a condition to modify or change its course.

(B) Frequency of intervention-the number of occurrences in a specified time in which the health care provider acts to treat the injured worker.

(19) Functional capacity evaluation-a battery of tests administered and evaluated to determine the injured worker's ability to perform tasks related to both his daily activities and his job performance. This evaluation consists of the following elements:

(A) a physical examination and neurological evaluation which includes an assessment of the physical appearance of the injured worker, flexibility of the extremity joint or spinal region, posture and deformities, vascular integrity, the presence or absence of sensory deficit, muscle strength and reflex symmetry;

(B) a physical capacity evaluation which includes quantitative measurements of range of motion and muscular strength and endurance; and

(C) a dynamic functional abilities test which includes activities of daily living, hand function tests, cardiovascular endurance tests, and static positional tolerance.

(20) Health care facility-a hospital, emergency clinic, outpatient clinic, or other facility providing health care.

(21) Health care practitioner. A health care practitioner is:

(A) an individual who is licensed to provide or render and provides or renders health care; or

(B) a nonlicensed individual who provides or renders health care under the direction or supervision of a doctor.

(22) Health care provider-a health care facility or health care practitioner.

(23) Impairment-any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent.

(24) Interdisciplinary programs-programs in which the delivery of services is provided by more than one type of health care service (e.g., occupational therapy, physical therapy, counseling services, medical services) and in which there is a coordination between the disciplines regarding the care plan and the delivery of care to the injured worker. Examples of this type of program include work hardening, outpatient medical rehabilitation, and chronic pain management.

(25) Intervention-the act or fact of interfering with a condition to modify it or with a process to change its course.

(26) Level of service-refers to primary, secondary, or tertiary care.

(27) Maximum Medical Improvement (MMI)-the earlier of the following two items:

(A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; or

(B) the expiration of 104 weeks from the date on which income benefits begin to accrue.

(28) Medical necessity-the determination that the tests or treatment provided is required based on the presenting signs and symptoms.

(29) Module-a standard or unit of measurement.

(30) Objective findings.

(A) Objective-perceptible to persons other than the affected individual.

(B) Objective findings-signs, or test results that can be measured or quantified or are otherwise perceptible to persons other than the affected individual.

(31) Outpatient medical rehabilitation-a program of coordinated and integrated services, evaluation, and/or treatment with emphasis on improving the functional levels of the persons served. The program is interdisciplinary in nature and is applicable to those persons who have severe functional limitations of recent onset or recent regression or progression or those persons who have not had prior exposure to rehabilitation. Services may be directed toward the development and/or maintenance of the optimal level of functioning and community integration of the persons served.

(32) Primary/secondary/tertiary levels of care.

(A) Primary level of care-this level of care is generally considered to be appropriate for injured workers immediately following the compensable injury; however, the injured worker in this level of care may also be an early postoperative patient or may be experiencing an acute exacerbation of his/her chronic pain. Since partial or total cessation of work over a brief period of time (i.e., two to three days maximum) is also considered to be part of the primary level of care, further treatment by a health care provider may not be considered necessary at this level of care. Little or no deconditioning has occurred due to the injury, immobilization or decreased activity. The goals are the prevention of disease, alleviating or minimizing the effects of the illness or injury and to maintain function.

(B) Secondary level of care-this level of care is the first stage of rehabilitation for those injured workers who have not returned to productivity through the normal healing process. It is designed to facilitate return to productivity before the onset of chronic disability. It is individualized, time limited and of limited intensity. The injured worker has a history of a limited-to-good response to early primary treatment with persistent symptoms limiting activities of daily living. The objective physical examination demonstrates findings suggestive of early deconditioning including loss of range of motion and/or strength with limitation of activities of daily living. Evidence of mental health or psychosocial barriers may be present which impede the injured worker's clinical progress.

(C) Tertiary level of care-this level of care is interdisciplinary, individualized, coordinated, and intensive, designed for the injured worker who demonstrates physical and psychological changes consistent with chronic disability. There is a documented history of persistent failure to respond to nonoperative or operative treatment which surpasses the usual healing period for that injury. Psychosocial issues such as substance abuse, affective disorders, and other psychological disorders may be present. There is a documented inhibition of physical functioning evidenced by pain sensitivity, loss of sensation, and nonorganic signs such as fear which produce a physical inhibition or limited response to reactivation treatment. This level of care may also be indicated for the injured worker whose physical capacity to work still does not meet the job requirements for heavy physical labor after adequate treatment, thereby causing an inability to return to full duty. This situation would be evidenced by an excessive transitional period of light duty or significant episodes of lost work time due to the need for continued medical treatment. This level of care is also indicated for those injured workers who cannot tolerate either primary or secondary levels of care.

(33) Proper clinical documentation-written records which meet the requirements outlined by statute and rule and which convey the following information to the required parties:

(A) a description of the injury, including the events surrounding that injury and the extent and severity of that injury;

(B) a description of any preexisting condition(s), complicating conditions, and/or any non-related conditions;

(C) a plan of treatment, including proposed methods frequency and probable duration of treatment, and expected outcomes;

(D) updates to the plan of treatment as needed, including the clinical progress of the injured worker, and any revisions needed to the treatment plan in light of the injured worker's response to treatment;

(E) education/information provided to the injured worker regarding his injury and plan of treatment, and the injured worker's compliance with this plan of treatment; and

(F) documentation substantiating the need for deviation from the guideline, if necessary.

(34) Reason for denial-see denial parameters.

(35) Referral-the process of directing or redirecting (as a medical case or a patient) to an appropriate specialist or agency for definitive treatment.

(36) Referral doctor-a consulting doctor who initiates health care treatments at the request of the treating doctor.

(37) Secondary treatment-see secondary level of care under primary/secondary/tertiary level of care.

(38) Self-referral-the direction of a patient to another doctor, institution or facility whereby the referring doctor has a financial or conflict of interest element.

(39) Significant neurological deficit-rapidly progressing symptoms of sensory impairment, progressive numbness, or increased physiological impairment such as severe weakness, bowel or bladder dysfunction directly related to the spinal injury.

(40) Single point of contact-one person whom the doctor/health care provider(s) may contact for all questions regarding a specific injured worker.

(41) Sprain-an injury to a ligament.

(A) Mild (Grade 1) -only a few fibers are torn; ligament is mostly intact and the joint is stable;

(B) Moderate (Grade 2)-more fibers are torn, resulting in some instability with abnormal joint motion and some functional loss;

(C) Severe (Grade 3)-ligaments are completely disrupted and instability may be severe (synonymous with marked).

(42) Static-characterized by a lack of movement or change.

(43) Strain-an injury to a muscle.

(A) Mild (Grade 1)-only a few fibers are torn; muscle is mostly intact and functional;

(B) Moderate (Grade 2)-more muscle fibers are torn resulting in muscle pain with contraction;

(C) Severe (Grade 3)-tendons are completely disrupted, extreme pain and loss of use of muscle.

(44) Subjective complaints-report of signs or symptoms, perceivable only by the injured employee, relating to the injury and which cannot be independently verified or confirmed by recognized laboratory or diagnostic tests or signs observable by physical examination.

(45) Time limited-a specific duration of clock or calendar time which is not exceeded on a routine basis.

(46) Treating doctor-the doctor primarily responsible for coordinating the employee's health care for an injury. (synonymous with Primary Gatekeeper).

(47) Treatment duration-calendar time allowed for treatment for a specific level of care.

(48) Treatment module-a standard which establishes routine parameters of time within which to provide therapy for the illness or injury.

(49) Treatment plan-this is a written document which must contain the following components:

(A) type of intervention/treatment modality;

(B) frequency of treatment;

(C) expected duration of treatment;

(D) expected clinical response to treatment; and

(E) specification of a re-evaluation timeframe.

(50) Work conditioning-a highly structured, goal-oriented, individualized treatment program using real or simulated work activities in conjunction with conditioning tasks. Work conditioning is a single disciplinary approach.

(51) Work hardening-a highly structured, goal-oriented, individualized treatment program designed to maximize the ability of the persons served to return to work. Work Hardening programs are interdisciplinary in nature with a capability of addressing the functional, physical, behavioral, and vocational needs of the injured worker. Work Hardening provides a transition between management of the initial injury and return to work while addressing the issues of productivity, safety, physical tolerances, and work behaviors. Work Hardening programs use real or simulated work activities in a relevant work environment in conjunction with physical conditioning tasks. These activities are used to progressively improve the biomechanical, neuromuscular, cardiovascular/metabolic, behavioral, attitudinal, and vocational functioning of the persons served.

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

Issued in Austin, Texas, on September 15, 1995.

TRD-9511868 Susan Cory
General Counsel
Texas Workers' Compensation Commission

Earliest possible date of adoption: October 20, 1995

For further information, please call: (512) 440-3700

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TITLE 34. PUBLIC FINANCE

Part VIII. State Depository Board

Chapter 171. Collateral Transactions

- **34 TAC §171.1**

The Texas State Depository Board proposes an amendment to §171.1, concerning the deposit of security collateral by financial institutions designated as state depositories. The proposed amendment clarifies what securities are acceptable as collateral for state funds and will eliminate some of the high risk securities which in the past have been difficult to accurately price. The proposed amendment will facilitate the ongoing repricing of pledged securities which are deemed acceptable by the Texas State Depository Board.

John Bell, Assistant Deputy Treasurer, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Bell also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section as proposed will be an increase in the safety of state deposits through the acceptance of pledged securities that can be more accurately priced. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to James R. Howell, General Counsel, Texas State Treasury, P.O. Box 12608, Austin, Texas 78711-2608, (512) 463-5971.

The amendment is proposed under Texas Government Code, §404.013, which authorizes the State Depository Board to adopt rules governing the establishment and conduct of state depositories.

Texas Government Code, §404.0221 is affected by this amendment.

§171.1. Deposit of Acceptable Security Collateral.

(a) Acceptable security collateral. The state treasurer shall approve all acceptable securities offered as collateral for state funds. Acceptable securities shall include only those securities with fixed, stated rates for which prices may be easily obtained through a nationally recognized market information service selected for use by the treasurer and shall include acceptable mortgage-backed securities with declining principal balances. The following securities are hereby deemed acceptable by the State Depository Board as collateral for state funds:

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

[(5) collateralized mortgage obligations issued by any of the federal agencies set forth in paragraphs (2)-(4) of this subsection with a remaining maturity of ten years or less;

[(6) Small Business Administration Loans, the portions of which are guaranteed by the United States government, and were originated in and serviced by Texas banks and savings and loan institutions for businesses domiciled in the State of Texas. The total amount of Small Business Administration loans pledged as collateral may not exceed $1 million in total market value (remaining principal balance multiplied by the market price) or 25% of the market value of the total amount of pledged securities, whichever is greater;]

(5)[(7)] Federal Home Loan Bank system consolidated bonds and discount notes issued in book-entry form;

(6)[(8)] Federal Farm Credit Banks Consolidated Systemwide Bonds and discount notes issued in book-entry form;

[(9) new public housing authority bonds and preliminary loan notes issued under the Housing Act of 1937, §22, as amended if:

[(A) the annual contribution contract has been entered into between the housing authority and the Federal Housing Administration; and

[(B) the United States government has fully guaranteed the principal and interest of the annual contributions contract;]

(7)[(10)] State of Texas bonds issued by the various state agencies and four-year educational institutions of the State of Texas;

(8)[(11)] Bonds issued by political subdivisions of the State of Texas. By way of illustration, and not limitation, the governmental entities include independent school districts, incorporated cities, certain road districts, certain municipal water and/or utility districts, hospital districts (excluding health facility bonds), and water and air pollution control districts, as well as junior college revenue bonds;

[(12) industrial development bonds which carry the tax exempt status of a political subdivision of the State of Texas and have received a credit rating of not less than AA or its equivalent by a nationally recognized investment rating firm.]

(b)-(e) (No change.)

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

Issued in Austin, Texas, on September 15, 1995.

TRD-9511867 James R. Howell
General Counsel
Texas State Treasury

Earliest possible date of adoption: October 23, 1995

For further information, please call: (512) 463-5971

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 15. Medicaid Eligibility

The Texas Department of Human Services (DHS) proposes amendments to §§15.420, 15.435, 15.460, and 15.475; and new §15.453 and §15.461, concerning resources and income, in its Medicaid Eligibility rule chapter. The purpose of the amendments and new sections is to include Long-Term Care Medicaid eligibility rules concerning conversion of a resource; Indian-related exemptions from income and resources; and wage-related exemptions.

Burton F. Raiford, commissioner, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Raiford also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that DHS eligibility policy will be in compliance with federal guidelines. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Questions about the content of the proposal may be directed to Judy Coker at (512) 450-3227 in DHS's Long Term Care Division. Written comments on the proposal may be submitted to Nancy Murphy, Agency Liaison, Media and Policy Services-581, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

Subchapter D. Resources

• 40 TAC §15.420, §15.435

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs; and under Texas Civil Statutes, Article 4413(502), §16, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments implement the Human Resources Code, §§22.001-22.024 and §§32.001-32.042.

§15.420. Conversion of Resources. If a client converts one type of resource to another, the **Texas Department of Human Services** [department] considers the new resource according to the policy governing that type of resource. Any cash received from the sale of a resource is considered a resource, not income. **This includes proceeds from the sale of a natural resource, such as cutting timber from the client's home property and selling it as firewood. There are two exceptions:**

(1) The owner leases the land or resource rights. The income received from the lease is unearned income.

(2) The sale of the natural resource is part of the client's trade or business. The income received is self-employment income.

§15.435. Liquid Resources.

(a)-(o) (No change.)

(p) If a client or spouse is of Indian descent from a federally-recognized Indian tribe, any interests of the client or spouse in trust or restricted lands are excluded from resources.

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

Issued in Austin, Texas, on September 14, 1995.

TRD-9511803 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Proposed date of adoption: December 1, 1995

For further information, please call: (512) 450-3765

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Subchapter E. Income

• 40 TAC §§15.453, 15.460, 15.461, 15.475

The amendments and new sections are proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs; and under Texas Civil Statutes, Article 4413(502), §16, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendments and new sections implement the Human Resources Code §§22. 001-22.024 and §§32.001-32.042.

§15.453. Wage-related Exemptions.

(a) Cafeteria Plans.

(1) Salary reductions to purchase qualified benefits under a cafeteria plan are not part of the employee's wages and are not income for eligibility or applied income purposes.

(2) Payroll deductions used to purchase cafeteria plan benefits in addition to or instead of those purchased under a salary reduction agreement are part of the employee's wages and are counted as earned income.

(3) A cafeteria plan is a written benefit plan offered by an employer in which all participants are employees and can choose, cafeteria-style, from a menu of qualified benefits. A qualified benefit is a benefit that the Internal Revenue Service (IRS), by express provision of Section 125 of Chapter 1 of the Internal Revenue Code (IRC) or IRS regulations, does not consider part of an employee's gross income. Qualified benefits include, but are not limited to:

(A) accident and health plans (including medical plans, vision plans, dental plans, accident and disability insurance);

(B) group term life insurance plans (up to $50,000);

(C) dependent care assistance plans; and

(D) certain profit-sharing or stock bonus plans under section 401(k)(2) of the IRC. IRS does not exclude from income salary reductions made under 401(k)(1) plans. Salary reductions to fund benefits under 401(k)(1) are counted as wages for eligibility and applied income purpose.

(4) Cash is not a qualified benefit.

(5) A salary reduction agreement is an agreement between employer and employee whereby the employee, in exchange for the right to participate in a cafeteria plan, accepts a lower salary or forgoes a salary increase.

(b) Employer-paid Taxes. When an employer pays an employee's share of social security or Federal Insurance Contribution Act (FICA) or unemployment compensation taxes without making a reduction in the employee's wages, the amount the employer pays is countable income. There are two exceptions:

(1) when the employee is in domestic service in the employer's home; and

(2) for agricultural labor only.

§15.460. Income Exemptions.

(a) (No change.)

(b) The **Texas Department of Human Services** [department] exempts income that a client receives from any of the following sources:

(1)-(15) (No change.)

[(16) payments made to natives from revenues originating under the Alaska Native Claims Settlement Act.

[(17) per capita payments to members of an Indian tribe in settlement of claims against the United States under Public Law 93-134.

[(18) per capita judgment payments made to the Blackfeet Tribe of Montana and the Gros Ventre Tribe of the Fort Belknap Reservation, Montana under Public Law 92-254.]

(16)[(19)] benefits received from Title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

(17)[(20)] salaries, value of meals, and travel allowances to participate in the Retired Senior Volunteer Program and in the Foster Grandparent Program of Title II of the Domestic Volunteer Service Act of 1973 (formerly Title VI of the Older Americans Act). Also included are payments from Title III of the same act, which include the Service Corps of Retired Executives (SCORE), the Active Corps of Executives (ACE), and the Action Cooperative Volunteer Program (ACV).

(18)[(21)] payments by the Federal Disaster Assistance Administration authorized by the Disaster Relief Act, as amended.

[(22) per capita judgment funds, paid under Public Law 94-540, to members of the Grand River Band of Ottawa Indians.]

(19)[(23)] value of any housing assistance payment paid on a house under the United States Housing Act of 1937, the National Housing Act, the Housing and Urban Development Act of 1965, §101, or Title V of the Housing Act of 1949, as authorized by Public Law 94-375.

[(24) income received by members of 21 designated Indian tribes from lands held in trust by the U.S. under Section 6 of Public Law 94-114. Although none of these tribes is located in Texas, tribal members may live in the state.]

(20)[(25)] home energy assistance, except food or clothing under Public Laws 97-377 and 97-424. Home energy assistance is assistance in cash or in-kind that is provided by a private, nonprofit organization or a utility company. Some examples of home energy assistance are heating, cooling, weatherization, storm windows, and blankets.

(21)[(26)] proceeds of either a commercial loan or an informal loan, for which repayment is required with or without interest. The proceeds (amount borrowed) are not counted as income in the month in which they are received but are considered to be a resource in the following month(s). To claim exemption of the proceeds of a loan, a client must prove that he acknowledges an obligation to repay and that some plan for repayment exists. If these conditions can be verified, no written contract is required.

(22)[(27)] interest earned on excluded burial funds and any appreciation in the value of an excluded burial arrangement that are left to accumulate and become a part of separately identifiable burial fund. If the burial funds increase by more than $1,500 because of contributions by client actions, the amount in excess of $1,500 is a countable resource.

(23)[(28)] value of any noncash item (other than food, clothing, or shelter) for the month of receipt, if that item would become a partially or totally excluded resource were it kept into the month after the month of receipt.

(24)[(29)] Agent Orange Settlement Fund or any other fund established in settlement of the Agent Orange product liability litigation. Public Law 101-239 excludes the payments from countable income and resources. The law covers both disability and death benefits and is retroactive as of January 1, 1989.

(25)[(30)] reparation payments received by Holocaust survivors from the Federal Republic of Germany. The payments may be made periodically or as a lump sum. **DHS** [The department] accepts the client's signed statement of amounts involved and dates of payment.

(26)[(31)] payments from a state-administered fund to aid victims of crime.

(27)[(32)] payments a state or local government may make as relocation assistance.

(28)[(33)] compensation received under the Radiation Exposure Compensation Act for injuries resulting from exposure to radiation from nuclear testing and uranium mining.

(29)[(34)] payments to an ICF-MR client by the MR facility, intended to enhance the client's social skills and functional abilities. The use of such payments must be included in the client's active treatment plan.

(30)[(35)] hazardous duty pay of a spouse or parent absent from the home because of active military service.

[(36) the first $2,000 per year of income from leases on individually-owned trust or restricted Indian lands.]

(31)[(37)] restitution payments made by the United States government under Public Law 100-383 to Japanese-Americans (or, if deceased, to their survivors) and Aleuts who were interned or relocated during World War II.

(32)[(38)] reparation payments received under Sections 500-506 of the Austrian General Social Insurance Act.

[(39) per capita judgement funds (including interest and investment income earned on such funds while the funds are held in trust) distributed to members of the Seminole Nation of Oklahoma, the Seminole Tribe of Florida, the independent Seminole Indians of Florida, and the Miccosukee Tribe of Indians of Florida, under Public Law 101-277.

[(40) judgment funds, including interest and investment income which accrued on Indian judgment funds while held in trust, distributed under Public Law 97-458.

[(41) per capita distributions of funds held in trust by the Secretary of the Interior to members of an Indian tribe, under Public Law 98-64.

[(42) all money and land transferred to members of the Puyallup Tribes under the Puyallup Tribe of Indians Settlement Act of 1989 (Public Law 101-141, Section 10).]

(33)[(43)] payments under the Netherlands' Act on Benefits for Victims of Persecution 1940-1945 (Dutch acronym, WUV).

§15.461. Indian-related Exemptions.

(a) Type of payment. The following statutes provide that certain types of payments made to members of Indian tribes are exempt from income and resources as specified in paragraphs (1)-(4) of this subsection, or only from income as specified in paragraph (5) of this subsection.

(1) Indian Judgement Funds Distribution Act-Public Law 93-134. Effective October 19, 1973, per capita distribution payments to members of Indian tribes who are due judgment funds, according to a plan of the Secretary of the Interior (or legislation, when a plan cannot be prepared or is not approved by the Congress) are excluded from income and resources. This does not include payments of funds distributed or held in trust (i.e., in the possession or care of a trustee) according to public laws enacted before October 19, 1973.

(2) Distribution of Indian Judgment Funds-Public Law 97-458. Effective January 12, 1983, Indian judgment funds held in trust (i.e., in the possession or care of a trustee) or distributed per capita, pursuant to an approved plan, or their availability, are excluded from income and resources. Indian judgment funds include interest and investment income accrued while the funds are held in trust. Initial purchases made with distributed judgment funds are excluded from resources.

(3) Per Capita Act-Public Law 98-64.

(A) Effective August 2, 1983, per capita distributions of all funds held in trust by the Secretary of the Interior to members of an Indian tribe are excluded from income and resources.

(B) Any local tribal funds that a tribe distributes to individuals on a per capita basis, but which have not been held in trust by the Secretary of the Interior (e.g., tribally managed gaming revenues) are not excluded from income and resources under this provision.

(4) Alaska Native Claims Settlement Act (ANCSA)-Public Law 100-241.

(A) Effective February 3, 1988, the following items received from a native corporation are excluded from income and resources:

(i) cash received from a native corporation (including cash dividends on stock received from a native corporation) to the extent it does not exceed $2,000, per individual per year;

(ii) stock (including stock issued or distributed by a native corporation as a dividend or distribution on stock);

(iii) a partnership interest;

(iv) land or an interest in land (including land or an interest in land received from a native corporation as a dividend or distribution on stock) ; and

(v) an interest in a settlement trust.

(B) The ANCSA also provides that up to $2,000 in retained distributions from a native corporation may be excluded from resources for each year beginning with 1988.

(5) payments from Individual Interests in Trust or Restricted Lands-Public Law 103-66.

(A) Effective January 1, 1994, up to $2,000 per year received by Indians that is derived from individual interests in trust or restricted lands is excluded from income.

(B) Interests of individual Indians in trust or restricted lands are excluded from resources.

(b) Payments to specific Indian tribes and groups. The following statutes provide that certain payments made to members of specified Indian tribes and groups are exempt from income and resources.

(1) Distribution of Per Capita Funds-Public Law 85-794. Effective August 28, 1958, per capita payments to members of the Red Lake Band of Chippewa Indians from the proceeds of the sale of timber and lumber on the Red Lake Reservation are excluded from income and resources.

(2) Distribution of Judgment Funds-Public Law 92-254. Effective March 18, 1972, per capita distribution payments by the Blackfeet and Gros Ventre tribal governments to members, which resulted from judgment funds to the tribes, are excluded from income and resources.

(3) Distribution of Claims Settlement Funds-Public Law 93-531 and Public Law 96-305. Effective December 22, 1974, settlement fund payments to members of the Hopi and Navajo Tribes, and the availability of such funds, are excluded from income and resources.

(4) Receipts from Lands Held in Trust for Indian Tribes-Public Law 94-114.

(A) Effective October 17, 1975, receipts derived from the following trust lands and distributed to members of designated Indian tribes are excluded from income and resources.

(B) The first four Indian groups had lands conveyed with mineral rights prior to Public Law 94-114; that law

conveyed the rest of the land to the remaining Indian groups.
Figure 1: 40 TAC §15.461(b)(4)(B)

(5) Distribution of Judgment Funds-Public Law 94-189. Effective December 31, 1975, judgment funds distributed per capita to, or held in trust for, members of the Sac and Fox Indian Nation, and the availability of such funds, are excluded from income and resources.

(6) Distribution of Judgment Funds-Public Law 94-540. Effective October 18, 1976, judgment funds distributed per capita to, or held in trust for, members of the Grand River Band of Ottawa Indians, and the availability of such funds, are excluded from income and resources.

(7) Distribution of Judgment Funds-Public Law 95-433. Effective October 10, 1978, any judgment funds distributed per capita to members of the Confederated Tribes and Bands of the Yakima Indian Nation or the Apache Tribe of the Mescalero Reservation are excluded from income and resources.

(8) Receipts from Lands Held in Trust-Public Law 95-498. Effective October 21, 1978, receipts derived from trust lands awarded to the Pueblo of Santa Ana and distributed to members of that tribe are excluded from income and resources.

(9) Receipts from Lands Held in Trust-Public Law 95-499. Effective October 21, 1978, receipts derived from trust lands awarded to the Pueblo of Zia and distributed to members of that tribe are excluded from income and resources.

(10) Distribution of Judgment Funds-Public Law 96-318. Effective August 1, 1980, any judgment funds distributed per capita or made available for programs for members of the Delaware Tribe of Indians and the absentee Delaware Tribe of Western Oklahoma are excluded frc · income and resources.

(11) Maine Indian Claims Settlement Act-Public Law 96-420. Effective October 10, 1980, all funds and distributions to members of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians under the Maine Indian Claims Settlement Act, and the availability of such funds, are excluded from income and resources.

(12) Distribution of Judgment Funds-Public Law 97-95. Effective December 17, 1981, any distributions of judgment funds to members of the San Carlos Tribe of Arizona are excluded from income and resources.

(13) Distribution of Judgment Funds-Public Law 97-371. Effective December 20, 1982, any distributions of judgment funds to members of the Wyandot Tribe of Indians of Oklahoma are excluded from income and resources.

(14) Distribution of Judgment Funds-Public Law 97-372. Effective December 20, 1982, distributions of judgment funds to members of the Shawnee Tribe of Indians (Absentee Shawnee Tribe of Oklahoma, the Eastern Shawnee Tribe of Oklahoma, and the Cherokee Band of Shawnee descendants) are excluded from income and resources.

(15) Distribution of Judgment Funds-Public Law 97-376. Effective December 21, 1982, judgment funds distributed per capita or made available for programs for members of the Miami Tribe of Oklahoma and the Miami Indians of Indiana are excluded from income and resources.

(16) Distribution of Judgment Funds-Public Law 97-402. Effective December 31, 1982, distributions of judgment funds to members of the Clallam Tribe of Indians of the State of Washington (Port Gamble Indian Community, Lower Elwha Tribal Community, and the Jamestown Band of Clallam Indians) are excluded from income and resources.

(17) Distribution of Judgment of Funds-Public Law 97-403. Effective December 31, 1982, judgment funds distributed per capita or made available for programs for members of the Pembina Chippewa Indians (Turtle Mountain Band, Chippewa Cree Tribe, Minnesota Chippewa Tribe, and Little Shell Band of Chippewa Indians of Montana) are excluded from income and resources.

(18) Distribution of Judgment Funds-Public Law 97-408. Effective January 3, 1983, per capita distributions of judgment funds to members of the Gros Ventre and Assiniboine Tribes of Fort Belknap Indian Community, and the Papago Tribe of Arizona, are excluded from income and resources.

(19) Distribution of Judgment Funds-Public Law 97-436. Effective January 8, 1983, up to $2,000 of per capita distributions of judgment funds to members of the Confederated Tribes of the Warm Springs Reservation are excluded from income and resources.

(20) Distribution of Judgment Funds-Public Law 98-123. Effective October 13, 1983, judgment funds distributed to the Red Lake Band of Chippewa Indians are excluded from income and resources.

(21) Distribution of Judgment Funds-Public Law 98-124. Effective October 13, 1983, funds distributed per capita or family interest payments for members of the Assiniboine Tribe of the Fort Belknap Indian Community of Montana and the Assiniboine Tribe of the Fort Peck Indian Reservation of Montana are excluded from income and resources.

(22) Distribution of Clams Settlement Funds-Public Law 98-432. Effective September 28, 1984, judgment funds and income therefrom distributed to members of the Shoalwater Bay Indian Tribe are excluded from income and resources.

(23) Distribution of Claims Settlement Funds-Public Law 98-500. Effective October 19, 1984, all distributions to heirs of certain deceased Indians under the Old Age Assistance Claims Settlement Act are excluded from income and resources.

(24) Distribution of Judgment Funds-Public Law 98-602. Effective October 30, 1984, judgment funds distributed per capita or made available for any tribal program, for members of the Wyandotte Tribe of Oklahoma and the Absentee Wyandottes, are excluded from income and resources.

(25) Distribution of Judgment Funds-Public Law 99-130. Effective October 28, 1985, per capita and dividend payment distributions of judgment funds to members of the Santee Sioux Tribe of Nebraska, the Flandreau Santee Sioux Tribe, and the Prairie Island Sioux, Lower Sioux,and Shakopee Mdewakanton Sioux Communities of Minnesota are excluded from income and resources.

(26) Distribution of Judgment funds-Public Law 99-146. Effective November 11, 1985, funds distributed per capita or held in trust for members of the Chippewas of Lake Superior and the Chippewas of the Mississippi are excluded from income and resources.

(27) Distribution of Claims Settlement Funds-Public Law 99-264. Effective March 24, 1986, distributions of clams settlement funds to members of the White Earth Band of Chippewa Indians as allottees, or their heirs, are excluded from income and resources.

(28) Distribution of Judgment Funds-Public Law 99-346. Effective June 30, 1986, payments or distributions of judgment funds, and the availability of any amount for such payments or distributions, to members of the Saginaw Chippewa Indian Tribe of Michigan are excluded from income and resources.

(29) Distribution of Judgment Funds-Public Law 99-377. Effective August 8, 1986, judgment funds distributed per capita or held in trust for members of the Chippewas of Lake Superior and the Chippewas of the Mississippi are excluded from income and resources.

(30) Distribution of Judgment Funds-Public Law 100-139. Effective October 26, 1987, judgment funds distributed to

members of the Cow Creek Band of Umpqua Tribe of Indians are excluded from income and resources.

(31) Aleutian and Pribilof Islands Restitution Act-Public Law 100-383. Effective August 10, 1988, per capita restitution payments made to eligible Aleuts who were relocated or interned during World War II are excluded from income and resources.

(32) Distribution of Claims Settlement Funds-Public Law 100-411. Effective August 22, 1988, per capita payments of claims settlement funds to members of the Coushatta Tribe of Louisiana are excluded from income and resources.

(33) Hoopa-Yurok Settlement Act-Public Law 100-580. Effective October 31, 1988, funds distributed per capita for members of the Hoopa Valley Indian Tribe and the Yurok Indian Tribe are excluded from income and resources.

(34) Distribution of Judgment Funds-Public Law 100-581. Effective November 1, 1988, judgment funds held in trust by the United States, including interest and investment income accruing on such funds, and judgment funds made available for programs or distributed to members of the Wisconsin Band of Potawatomi (Hannahville Indians Community and Forest County Potawatomi) are excluded from income and resources.

(35) Distribution of Money and Land-Public Law 101-41. Effective June 21, 1989, all funds, assets, and income from the trust fund transferred to the members of the Puyallup Tribe under the Puyallup Tribe of Indians Settlement Act of 1989 are excluded from income and resources.

(36) Distribution of Judgment Funds-Public Law 101-277. Effective April 30, 1990, judgment funds distributed per capita, or held in trust, or made available for programs, for members of the Seminole Nation of Oklahoma, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and the independent Seminole Indians of Florida, (plus any interest and investment income accruing on the funds held in trust), and the availability of those funds, are excluded from income and resources.

(37) Distribution of Settlement Funds-Public Law 101-503. Effective November 3, 1990, payments, funds, distributions, or income derived from them under the Seneca Nation Settlement Act of 1990 are excluded from income and resources.

(38) Distribution of Settlement Funds-Public Law 101-618. Effective November 16, 1990, per capita distributions of settlement funds under the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990 are excluded from income and resources.

§15.475. Deeming of Income.

(a) The following requirements apply:

(1)-(3) (No change.)

(4) **The Texas Department of Human Services (DHS)** [department] exempts certain types of income that may be received by a client's ineligible spouse, ineligible parent, a parent's ineligible spouse, or any ineligible children living in the household. The following types of income are not deemed to the client:

(A)-(N) (No change.)

[(O) payments made to natives from revenues originating under the Alaska Native Claims Settlement Act;

[(P) per capita payments to members of an Indian tribe in settlement of claims against the U.S. under Public Law 93-134;

[(Q) per capita judgement payments made to the Blackfeet Tribe of Montana and the Gros Ventre Tribe of the Fort Belknap Reservation, Montana under Public Law 92-254;]

(O) certain payments made to members of Indian tribes and groups. Many federal statutes provide for the exemption from income and resources of certain payments made to Indian tribes and groups. Some statutes pertain to specific tribes or Indian groups, while others apply to certain types of payments.

(P)[(R)] benefits received from Title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970;

(Q)[(S)] salaries, value of meals, and travel allowances to participate in the Retired Senior Volunteer Program and in the Foster Grandparent Program of Title II of the Domestic Volunteer Service Act of 1973 (formerly Title VI of the Older Americans Act). Also included are payments from Title III of the same act, which includes the Service Corps of Retired Executives (SCORE), the Active Corps of Executives (ACE), and the Action Cooperative Volunteer Program(ACV);

(R)[(T)] payments by the Federal Disaster Assistance Administration authorized by the Disaster Relief Act, as amended;

[(U) per capita judgement funds, paid under Public Law 94-540, to members of the Grand River Band of Ottawa Indians;]

(S)[(V)] value of any housing assistance payment paid on a house under the United States Housing Act of 1937, the National Housing Act, Section 101 of the Housing and Urban Development Act of 1965, or Title V of the Housing Act of 1949, as authorized by Public Law 94-375;

[(W) income received by members of 21 designated Indian tribes from lands held in trust by the U.S. under Section 6 of Public Law 94-114. Although none of these tribes is located in Texas, tribal members may live in the state;]

(T)[(X)] home energy assistance, except food or clothing, under Public Laws 97-377 and 97-424. Home energy assistance is assistance in cash or in kind that is provided by a private, non-profit organization or a utility company;

(U)[(Y)] Agent Orange Settlement Fund or any other fund established in settlement of the Agent Orange product liability litigation. Public Law 101-239 excludes the payments from countable income and resources. The law covers both disability and death benefits and is retroactive as of January 1, 1989;

(V)[(Z)] reparation payments received by Holocaust survivors from the Federal Republic of Germany. The payments may be made periodically or as a lump sum. **DHS** [The department] accepts the client's signed statement of amounts involved and dates of payment;

(W)[(AA)] payments from a state-administered fund to aid victims of crime;

(X)[(BB)] payments a state or local government may make as relocation assistance; and

(Y)[(CC)] compensation received under the Radiation Exposure Compensation Act for injuries resulting from exposure to radiation from nuclear testing and uranium mining.

(Z)[(DD)] payments to an ICF-MR client by the MR facility, intended to enhance the client's social skills and functional abilities. The use of such payments must be included in the client's active treatment plan.

(AA)[(EE)] hazardous duty pay of a spouse or parent absent from the home because of active military service.

[(FF) the first $2,000 per year of income from leases on individually-owned trust or restricted Indian lands.]

(BB)[(GG)] restitution payments made by the U.S. government under Public Law 100-383 to Japanese-Americans (or, if deceased, to their survivors) and Aleuts who were interned or relocated during World War II.

(CC)[(HH)] reparation payments received under Sections 500-506 of the Austrian General Social Insurance Act.

[(II) per capita judgment funds (including interest and investment income earned on such funds while the funds are held in trust) distributed to members of the Seminole Nation of Oklahoma, the Seminole Tribe of Florida, the independent Seminole Indians of Florida, and the Miccosukee Tribe of Indians of Florida, under Public Law 101-277.

[(JJ) judgment funds, including interest and investment income which accrued on Indian judgment funds while held in trust, distributed under Public Law 97-458.

[(KK) per capita distributions of funds held in trust by the Secretary of the Interior to members of an Indian tribe, under Public Law 98-64.

[(LL) all money and lands transferred to members of the Puyallup Tribes under the Puyallup Tribe of Indians Settlement Act of 1989 (Public Law 101-141, §10).]

(DD)[MM)] payments under the Netherlands' Act on Benefits for Victims of Persecution 1940-1945 (Dutch acronym, WUV).

(EE)[(NN)] value of medical services provided free of charge or paid for with direct payment to the provider by someone else.

(b) (No change.)

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

Issued in Austin, Texas, on September 14, 1995.

TRD-9511804

Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Proposed date of adoption: December 1, 1995

For further information, please call: (512) 450-3765

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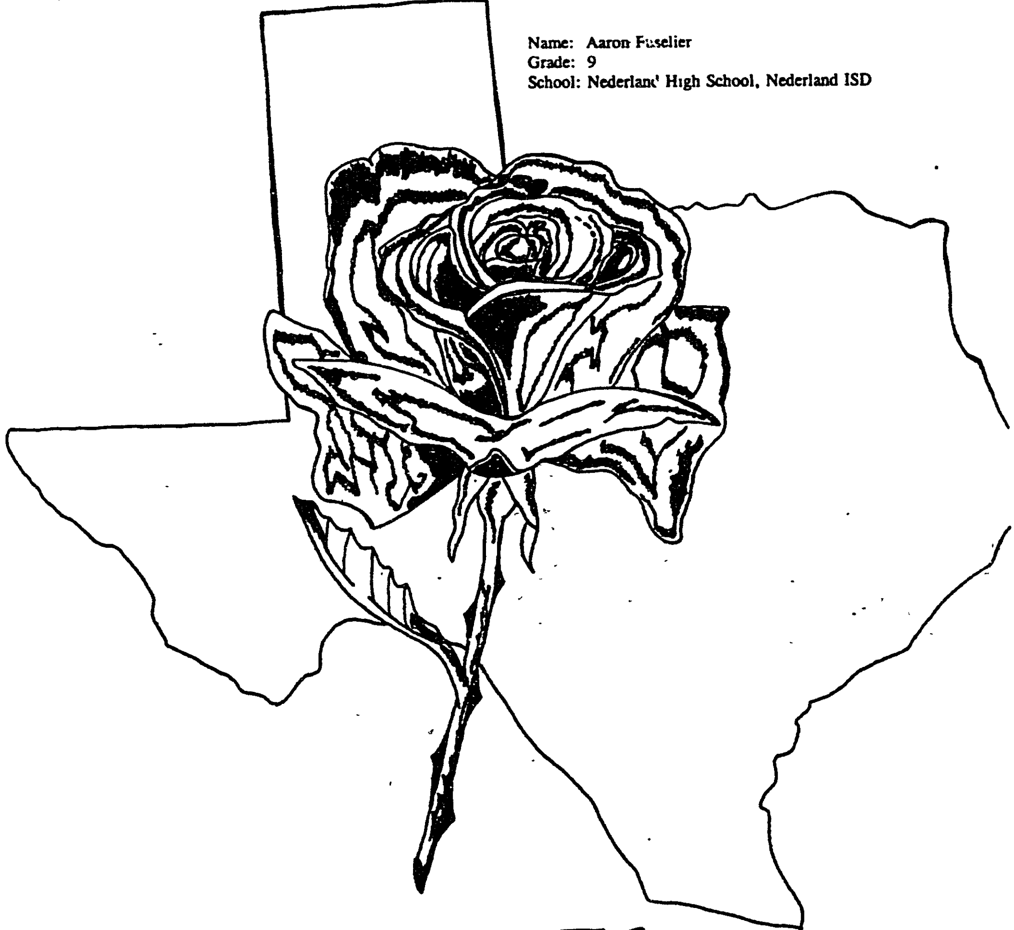

Name: Aaron Fuselier
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Name: Josh Loflin
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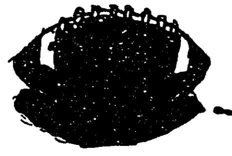

WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register***.

TITLE 16. ECONOMIC REGULATION

Part VIII. Texas Racing Commission

Chapter 321. Pari-mutuel Wagering

Subchapter C. Simulcast Wagering

Simulcasting at Horse Racetracks

- 16 TAC §321.235

The Texas Racing Commission has withdrawn from consideration for permanent adoption a proposed amendment to §321.235, which appeared in the July 25, 1995, issue of the *Texas Register* (20 TexReg 5470). The effective date of this withdrawal is September 15, 1995.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511851 Paula Cochran Carter
General Counsel
Texas Racing Commission

Effective date: September 15, 1995

For further information, please call: (512) 794-8461

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TITLE 25. HEALTH SERVICES

Part II. Texas Department of Mental Health and Mental Retardation

Chapter 401. System Administration

Subchapter E. Contracts Management

- **25 TAC §401.375, §401.389**

The Texas Department of Mental Health and Mental Retardation has withdrawn the emergency effectiveness of the amended §401.375 and §401.389, concerning the contracts management. The text of the emergency amended §401. 375 and §401.389 appeared in the August 4, 1995, issue of the *Texas Register* (20 TexReg 5835). The effective date of this withdrawal is October 6, 1995.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511874 Ann Utley
Chairman
Texas Department of Mental Health and Mental Retardation

Effective date: October 6, 1995

For further information, please call: (512) 206-4516

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 4. AGRICULTURE

Part I. Texas Department of Agriculture

Chapter 24. Texas Agricultural Finance Authority: Farm and Ranch Finance Program

• 4 TAC §24.8, §24.12

The Board of Directors of the Texas Agricultural Finance Authority (the Authority), a public authority within the Texas Department of Agriculture (the department), adopts amendments to §24.8 and §24.12, concerning the Farm and Ranch Finance Program, without changes to the proposed text as published in the July 21, 1995, issue of the *Texas Register* (20 TexReg 5342).

These amendments are adopted in order to comply with statutory changes enacted by the 74th Legislature, Senate Bill 699.

The amendment to §24.8 will function by requiring that an applicant have at least three years experience in agriculture production relevant to the application, increasing the maximum acceptable net worth of the applicant to $400,000, and requiring that the applicant disclose any and all business and familial affiliations with board members, staff, and the lender, that could present a conflict of interest. The amendment to §24.12 will function by deleting references to the down payment, and renumbering the paragraphs accordingly.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the Texas Agriculture Code, §59.022, which provides the Texas Agricultural Finance Authority with the authority to adopt rules governing various aspects of the program; §59.023, which states that the Authority has the power to adopt rules and procedures as necessary to carry out Chapter 59; and Texas Government Code, §2001.004, which requires that the Authority adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on September 13, 1995.

TRD-9511751 Dolores Alvarado Hibbs
Chief Administrative Law Judge
Texas Department of Agriculture

Effective date: October 4, 1995

Proposal publication date: July 21, 1995

For further information, please call: (512) 463-7583

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Chapter 26. Texas Agricultural Diversification Program: Linked Deposits

• 4 TAC §§26.1-26.12

The Texas Department of Agriculture (the department) adopts the repeal of §§26.1-26.12. concerning the Texas Agricultural Diversification Program: Linked Deposits, without changes to the proposed text as published in the July 21, 1995, issue of the *Texas Register* (20 TexReg 5343).

The repeals are adopted in order to comply with statutory changes enacted by the 74th Legislature, Senate Bill 372, which, effective September 1, 1995, transfers rulemaking authority for the Linked Deposit Program from the Commissioner of Agriculture to the Board of Directors of the Texas Agricultural Finance Authority (the Authority).

The repeals will function by repealing these sections so that they may be replaced by new sections adopted by the Authority.

No comments were received regarding adoption of the repeals.

The repeals are adopted under the Texas Agriculture Code, §44.007, which provides the Texas Department of Agriculture with the authority to promulgate rules for the administration of the linked deposit program.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on September 13, 1995.

TRD-9511752 Dolores Alvarado Hibbs
Chief Administrative Law Judge
Texas Department of Agriculture

Effective date: October 4, 1995

Proposal publication date: July 21, 1995

For further information, please call: (512) 463-7583

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Chapter 26. Texas Agricultural Finance Authority: Linked Deposit Program

• 4 TAC §§26.1-26.12

The Board of Directors of the Texas Agricultural Finance Authority (the Authority), a public authority within the Texas Department of Agriculture (the department), adopts new §§26.1-26.12, concerning the Linked Deposit Program (the program), without changes to the proposed text as published in the July 21, 1995, issue of the *Texas Register* (20 TexReg 5343).

These new sections are adopted in order to comply with statutory changes enacted by the 74th Legislature, Senate Bill 372, which, effective September 1, 1995, transfers rulemaking authority for the program from the Commissioner of Agriculture to the Authority. These new sections replace sections repealed by the department, and provide for the continued implementation of the program.

New §§26.1-26.4 will function by providing definitions, an introduction to the program rules, and a statement of the program's purpose and scope. New §26.5 will function by outlining the application procedures for applicants to the linked deposit program, and new §26.6 will function by outlining the application procedures for lenders wishing to participate in the program. New §26.7 will function by describing the application review procedure for the program. New §26.8 will function by describing the acceptance and rejection procedures for the program. New §26.9 will function by stating the permissible and impermissible uses of loan proceeds under the program, and new §26.10 will function by describing the program limitations. New §26.11 will function by providing that any sections of the new rules found to be invalid by any court shall not affect the validity of the remaining provisions. New §26.12 will function by providing the address to which communications regarding the program should be sent.

One comment was received regarding the adoption of the new sections. Jack Burkett, Associate Counsel for the Independent Bank-

ers Association of Texas (IBAT), commented that the Linked Deposit Program failed to recognize that loans under the program were set at interest rates with set maturities tied to the State's biennium. Mr. Burkett stated that, apparently, when rates dropped in 1994, the Texas State Treasury arbitrarily changed the deposits such that they were no longer tied to the State's biennium, failing to recognize that loans had set interest rates with set maturities tied to the State's biennium. Mr. Burkett stated that it was the bank's and IBAT's belief that the loans made under the Linked Deposit Program were to be locked in to an interest rate not to exceed four points above the rate of interest earned on the deposit. Mr. Burkett felt that loans made under the program are, in fact, variable rate loans, many banks will not participate, because the nature of the commercial banking business depends upon a bank being able to predict with accuracy the bank's future income based on certain U.S. Treasury maturities and not be subject to some arbitrary reduction in interest income. If the loans turn out to be variable rate loans, states Mr. Burkett, then the note is incorrect and the bank will have incorrectly disclosed the terms of the loan, which can have serious consequences under both state and federal law. As a solution, Mr. Burkett suggested adding a sentence at the end of new §26.6(5) which would state, "The rate thus set shall remain fixed at that rate until the end of the then existing fiscal biennium." The board does not disagree with Mr. Burkett's suggestion, but at this time, the board does not have the authority to incorporate the comment into this rule. The board's rulemaking authority is limited to the loan portion of the program. The proposal contained in the comment seeks to control the actions of the Texas State Treasury (the Treasury) in the depository portion of the program. The board will enter into discussions with the Treasury and, if agreement is reached with the Treasury, may consider the amendment of these rules at a later date.

The new sections are adopted under the Texas Agriculture Code, §44.007, as amended by the 74th Legislature, Senate Bill 372, which, effective September 1, 1995, provides that the Board of Directors of the Authority shall promulgate rules for the administration of the loan portion of the linked deposit program; and Texas Government Code, §2001.004, which requires that the Authority adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on September 13, 1995.

TRD-9511753 Dolores Alvarado Hibbs
Chief Administrative Law Judge
Texas Department of Agriculture

Effective date: October 4, 1995

Proposal publication date: July 21, 1995

For further information, please call: (512) 463-7583

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Chapter 28. Texas Agricultural Finance Authority: Loan Guaranty Program

• 4 TAC §§28.3, 28.5-28.13

The Board of Directors of the Texas Agricultural Finance Authority (the Authority), a public authority within the Texas Department of Agriculture (the department), adopts amendments to §§28.3, 28.5-28.13, concerning the Loan Guaranty Program, without changes to the proposed text as published in the July 21, 1995, issue of the *Texas Register* (20 TexReg 5346).

These amendments are adopted in order to comply with statutory changes enacted by the 74th Legislature, Senate Bill 372, to delete duplicative and unnecessary provisions, to better reflect the actual practice of the program, to provide greater clarity to the rules, and to provide for more efficient operation of the program.

The amendment to §28.3 will function by deleting references to the complete title of the Texas Agricultural Finance Authority throughout the sections, and use the term "Authority" instead, to make full use of the definition of Authority contained in §28.3, and by clarifying the definitions of "Act", "interest rate", and "qualified application." The amendment to §28.6 will function by deleting subsection (b), which provides for maximum loan guaranty amounts and ratios, as it is an unnecessary duplication of other sections. The amendment to §28.7(a)(2) will function by deleting the requirement that the employment opportunities created by a proposed project be in the field of diversified, innovative, or value-added agricultural production, processing, marketing, or exporting of agricultural products. The deleted provision is unnecessary and duplicative of other provisions regarding the nature of businesses to be assisted by the loan guaranty program. The amendment to §28.7(a)(7) will function by deleting the word "preliminary" in reference to the letter of commitment from a lender to the Authority. The amendment to §28.7(c) will function by clarifying that refinancing of a debt is not an eligible project cost where the refinancing will be used to improve the lender's position in the loan, thereby preventing lenders from refinancing loans in an attempt to decrease their exposure on the loans. The amendment to §28.8(e) will function by adding a time limitation of 30 days for the acceptance of a loan commitment, altering the time limitation for closing of a loan from 90 to 180 days, and providing that the board may approve an additional extension of not more than 60 days. The amendment to §28.9(a)(15) will function by providing that applicants must disclose business and familial affiliations with employees of the department that may create a conflict of interest. The amendment to §28.9(a)(16) will function by requiring that an acknowledgment form be provided by the applicant for all guarantors and/or owners with more than 20% ownership. The amendment to §28.10(c) will function by providing that the maximum aggregate loan amount may not exceed $1 million, but upon a two-thirds vote, the maximum aggregate loan amount may exceed $1 million, but may not exceed $2 million. The amendment also provides that a business that already has an existing loan with the authority may not obtain a second loan except upon a two-thirds vote of the board. The amendment to §28.10(d) will function by deleting provisions regarding maximum loan amounts as duplicative, and by stating that the Authority shall participate in every loan in an amount no less than 80% of the loan guaranty amount. The amendment reflects the current practice of the Authority. The proposed amendment to §28.10(h) will function by deleting the amount of the nonrefundable application fee. The amendment to §28.10(i) will function by deleting, as unnecessary verbiage, the language that states that the loan closing will be held at the date, time, and location determined by the Authority.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the Texas Agriculture Code, §58.022, which provides the Authority with the authority to adopt rules and procedures as necessary for the administration of its programs; §58.023, which provides the Authority with the authority to adopt rules to establish criteria for eligibility of applicants and lenders under the Loan Guaranty Program; and Texas Government Code, §2001.004, which requires that the Authority adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on September 13, 1995.

TRD-9511754 Dolores Alvarado Hibbs
Chief Administrative Law Judge
Texas Department of Agriculture

Effective date: October 4, 1995

Proposal publication date: July 21, 1995

For further information, please call: (512) 463-7583

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TITLE 13. CULTURAL RESOURCES

Part I. Texas State Library and Archives Commission

Chapter 7. Local Records

Records Retention Schedules

• 13 TAC §7.125

The Texas State Library and Archives Commission adopts an amendment to §7.125, concerning the adoption of a records retention schedule for records of various public works and services departments of local governments and a revised records retention schedule for records common to all local gov-

emments pursuant to the Government Code, §441.158(a). Section 7.125 is adopted with changes to the proposed text as published in the April 28, 1995, issue of the *Texas Register* (20 TexReg 3125). The changes occurred only to the Local Schedule GR, FIGURE 1: 13 TAC §7.125(b)(1), and Local Schedule PW, FIGURE 2: 13 TAC §7.125(b)(2), and are adopted with minor editorial changes to correct the title of Form SLR 501, (Request for Authority to Destroy Unscheduled Records) on page 2 of each schedule and to correct typographical errors. A retention note was added to item number 1075-01(a) in Local Schedule GR (page 22) to clarify application of the retention period. There were no changes made to the text of §7.125 and the rule will be republished only for clarification.

The schedules establish mandatory minimum periods of time the records listed must be retained by local governments and elected county officers before disposal. Local Schedule PW provides retention periods for building inspection records, traffic and transportation records, environmental hazards records, parks and recreation records, libraries and museum records, records of social services, and records of other public works or services activities in local governments. Local Schedule GR is amended by adding retention periods for records relating to workplace safety and data processing.

The schedules provide guidelines to local officials concerning how long records must be retained before they are eligible for disposal as specified by the Local Government Code, §203.042, and assist those officials in meeting the requirements of the Local Government Code, §203.41, for preparation and filing of records control schedules that conform to the records retention schedules issued by the commission.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Government Code, §441.158(a), which requires the commission to prepare and distribute records retention schedules for local government records and to adopt the schedules by rule. The amendments were approved by the Local Government Records Committee, as required by the Government Code, §441.165, at an open meeting held in Austin on June 20, 1995.

The Government Code, §441.158(a) is affected by the amendment.

§7.125. Records Retention Schedules.

(a) The following records retention schedules, required to be adopted by rule under the Government Code, 441.158(a), are adopted by reference. Copies of the schedules are available from the State and Local Records Management Division, Texas State Library, P.O. Box 12927, Austin, Texas 78711-2927; (512) 452-9242.

(1) Local Schedule LC: Records of Justice and Municipal Courts;

(2) Local Schedule TX: Records of Property Taxation, 2nd Edition;

(3) Local Schedule EL: Records of Elections and Voter Registration;

(4) Local Schedule SD: Records of Public School Districts;

(5) Local Schedule JC: Records of Public Junior Colleges;

(6) Local Schedule HR: Records of Public Health Agencies;

(7) Local Schedule PS: Records of Public Safety Agencies;

(8) Local Schedule CC: Records of County Clerks;

(9) Local Schedule DC: Records of District Clerks;

(10) Local Schedule UT: Records of Utility Services.

(b) The following records retention schedules, required to be adopted by rule under the Government Code, 441.158(a), are adopted.

(1) Local Schedule GR: Records Common to All Local Governments, 3rd Edition.
FIGURE 1: 13 TAC 7.125(b)(1).

(2) Local Schedule PW: Records of Public Works and Services.
FIGURE 2: 13 TAC 7.125(b)(2).

(c) The retention periods in the records retention schedules adopted under subsections (a) and (b) of this section serve to amend and replace the retention periods in all editions of the county records manual published by the commission between 1978 and 1988. The retention periods in the manual, which were validated and continued in effect by the Government Code, 441.159, until amended, are now without effect.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 14, 1995.

TRD-9511793 Raymond Hitt
Assistant State Librarian
Texas State Library and Archives Commission

Effective date: November 1, 1995

Proposal publication date: April 28, 1995

For further information, please call: (512) 463-5460

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Part III. Texas Commission on the Arts

Chapter 31. Agency Procedures

• 13 TAC §31.10

The Texas Commission on the Arts adopts by reference an amendment to §31.10, concerning the Application Forms and Instructions for the Financial Assistance Application, with changes to the proposed text as published in the August 8, 1995, issue of the *Texas Register* (20 TexReg 5978).

This section is being adopted to be consistent with the Texas Arts Plan as amended September, 1993.

By adopting the amendment, the commission will be better able to assist applicants in completing the application form for financial assistance.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Government Code, §444.009, which provide the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§31.10. Financial Assistance Application Form. The commission adopts by reference the application form and instructions for the Financial Assistance as outlined in the Texas Arts Plan as amended September, 1993. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 14, 1995.

TRD-9511795 Rhonda L. Hill
Director of Finance and Administration
Texas Commission on the Arts

Effective date: October 5, 1995

Proposal publication date: August 8, 1995

For further information, please call: (512) 463-5535

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Chapter 35. Texas Arts Plan

• 13 TAC §35.2

The Texas Commission on the Arts adopts by reference new §35.2, concerning the Addendum to the Texas Arts Plan which outlines the activities of the commission, with changes to the proposed text as published in the August 8, 1995, issue of the *Texas Register* (20 TexReg 5978).

This section is being adopted to be consistent with the Texas Arts Plan as amended September, 1993.

By adopting the new section, the commission will be able to inform the public of changes to select programs and procedures in the Texas Arts Plan.

No comments were received regarding adoption of the new section.

The new section is adopted under Texas Civil Statutes, Government Code, §444.009, which

provide the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§35.2. Addendum to the Texas Arts Plan. The commission adopts by reference the Addendum to the Texas Arts Plan. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 14, 1995.

TRD-9511796 Rhonda L. Hill
Director of Finance and Administration
Texas Commission on the Arts

Effective date: October 5, 1995

Proposal publication date: August 8, 1995

For further information, please call: (512) 463-5535

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Chapter 37. Application Forms and Instructions for Financial Assistance

• 13 TAC §37.23, §37.24

The Texas Commission on the Arts adopts by reference amendments to §37. 23 and §37.24, concerning the Application Forms and Instructions for the Arts In Education Program-Sponsors and the Texas Touring Arts Program-Company/Artist, with changes to the proposed text as published in the August 8, 1995, issue of the *Texas Register* (20 TexReg 5979).

These sections are being adopted to be consistent with the Texas Arts Plan as amended September, 1993.

By adopting the amendments, the commission will be able to better assist applicants in completing the financial assistance application forms.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, Government Code, §444.009, which provide the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§37.23. Application Form and Instructions for Arts In Education Program-Sponsors. The commission adopts by reference the application form and instructions for the Arts In Education Program-Sponsors as outlined in the Texas Arts Plan as amended September, 1993. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

§37.24. Application Form and Instructions for Texas Touring Arts Program-Company/Artist. The commission adopts by reference the application form and instructions for the Texas Touring Arts Program-Company/Artist as outlined in the Addendum to the Texas Arts Plan. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 14, 1995.

TRD-9511797 Rhonda L. Hill
Director of Finance and Administration
Texas Commission on the Arts

Effective date: October 5, 1995

Proposal publication date: August 8, 1995

For further information, please call: (512) 463-5535

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• 13 TAC §37.25

The Texas Commission on the Arts adopts the repeal of §37.25, concerning the Applications Forms and Instructions for the Texas Touring Arts Program-Visual Arts, without changes to the proposed text as published in the August 8, 1995, issue of the *Texas Register* (20 Tex Reg 5978).

This section is being adopted to be consistent with the Texas Arts Plan as amended September, 1993.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Texas Civil Statutes, Government Code, §444. 009, which provide the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§37.25. Application Forms and Instructions for the Texas Tour Arts Program-Visual Arts.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 14, 1995.

TRD-9511798 Rhonda L. Hill
Director of Finance and Administration
Texas Commission on the Arts

Effective date: October 5, 1995

Proposal publication date: August 8, 1995

For further information, please call: (512) 463-5535

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• 13 TAC §37.26

The Texas Commission on the Arts adopts by reference an amendment to §37.26, concerning the Applications Forms and Instructions for the Texas Touring Arts Program-Fee Support, with changes to the proposed text as published in the August 8, 1995, issue of the *Texas Register* (20 TexReg 5979).

This section is being adopted to be consistent with the Texas Arts Plan as amended September, 1993.

By adopting the amendment, the commission will be able to conform with the new application procedures for the Touring Arts Program as reflected in the Addendum to the Texas Arts Plan.

No comments were received regarding adoption of the amendment.

The amendmnet is adopted under Texas Civil Statutes, Government Code, §444.009, which provide the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§37.26. Application Form and Instructions for Texas Touring Arts Progam Fee Support. The commission adopts by reference the application form and instructions for the Texas Touring Arts Program Fee Support as outlined in the Texas Arts Plan as amended September, 1993. This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 14, 1995.

TRD-9511799 Rhonda L. Hill
Director of Finance and Administration
Texas Commission on the Arts

Effective date: October 5, 1995

Proposal publication date: August 8, 1995

For further information, please call: (512) 463-5535

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TITLE 16. ECONOMIC REGULATION

Part VIII. Texas Racing Commission

Chapter 305. Licenses for Pari-mutuei Racing

Subchapter B. Individual Licenses

Specific Licensees

• 16 TAC §305.47

The Texas Racing Commission adopts an amendment to §305.47, concerning jockey

and apprentice jockey license, without changes to the proposed text as published in the July 25, 1995, issue of the *Texas Register* (20 TexReg 5469).

The amendment is adopted to ensure that jockeys will be fit and ready to ride.

The amendment requires a jockey to have a current physical examination at all times.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3. 02, which authorize the commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; and §7.02, which authorizes the commission to adopt rules specifying the qualifications and experience for occupational licenses.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511848 Paula Cochran Carter
General Counsel
Texas Racing Commission

Effective date: October 15, 1995

Proposal publication date: July 25, 1995

For further information, please call: (512) 794-8461

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Chapter 315. Officials and Rules for Greyhound Racing

Subchapter A. Officials

Appointment of Officials

• 16 TAC §315.1

The Texas Racing Commission adopts an amendment to §315.1, concerning the required officials at greyhound racetracks, without changes to the proposed text as published in the July 25, 1995, issue of the *Texas Register* (20 TexReg 5470).

The amendment is adopted to ensure that pari-mutuel greyhound racing will be of the highest caliber and will be conducted with the utmost integrity.

The amendment authorizes the executive secretary to rescind the approval of an official if the executive secretary makes certain determinations.

One comment was received regarding the proposal. The commenter suggested that the amendment include some procedural safeguards. The commission disagrees with the comment because the amendment as proposed requires the executive secretary to make specific findings before the approval of an official may be rescinded. The commission finds that the required findings before recission provides sufficient procedural safeguards.

The amendment is adopted under the Texas Civil Statutes, Article 179e, §3. 02, which authorize the commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.07, which authorizes the commission to approve racetrack officials; and §6.06, which authorizes the commission to adopt rules relating to all aspects of the operation of pari-mutuel racetracks.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511849 Paula Cochran Carter
General Counsel
Texas Racing Commission

Effective date: October 15, 1995

Proposal publication date: July 25, 1995

For further information, please call: (512) 794-8461

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Subchapter B. Entries and Pre-Race Procedures

• 16 TAC §315.111

The Texas Racing Commission adopts an amendment to §315.111, concerning schooling, with changes to the proposed text as published in the July 25, 1995, issue of the *Texas Register* (20 TexReg 5470).

The amendment is adopted to ensure that pari-mutuel greyhound racing will be of the highest caliber and will be conducted with the utmost integrity.

The amendment changes the schooling requirements for greyhounds who come to a racetrack who have recently raced at another Texas track.

Comments were received regarding the proposal from the Texas Greyhound Association and a pari-mutuel greyhound racetrack. Both commenters suggested the commission merely state that the racing judges may waive the schooling requirement if a greyhound has transferred from a Texas track. The commission disagrees with these comments on the grounds that authorizing the racing judges to waive the schooling requirement on a case-by-case basis will not promote uniformity of application of the rules. The pari-mutuel greyhound racetrack also suggested the need for the racing judges to be authorized to require additional schooling if it is necessary to protect the welfare of the greyhound and the betting public. The commission disagrees with the comment on the grounds that the racing judges are already authorized to require additional schooling at any time.

The changes from the proposed text consists of a minor stylistic change which clarifies the number of days during which a greyhound must have raced to forego the schooling requirement.

The amendment is proposed under the Texas Civil Statutes, Article 179e, §3.02, which authorize the commission to adopt rules for conducting racing with wagering and for administering the Texas Racing Act; §3.07, which authorizes the commission to approve racetrack officials; and §6.06 which authorizes the commission to adopt rules relating to all aspects of the operation of pari-mutuel racetracks.

§315.111. Schooling.

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

(c) A greyhound that transfers from a racetrack outside of Texas must school at least once before it may start in a race other than a stakes or futurity race. A greyhound that transfers from a Texas racetrack may start in a race without additional schooling if the greyhound has raced in the ten-day period preceding the race.

(d)-(g) (No change.)

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511850 Paula Cochran Carter
General Counsel
Texas Racing Commission

Effective date: October 15, 1995

Proposal publication date: July 25, 1995

For further information, please call: (512) 794-8461

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Part IX. Texas Lottery Commission

Chapter 401. Administration of the State Lottery Act

Subchapter A. Procurement

• 16 TAC §401.101

The Texas Lottery Commission adopts an amendment to §401.101, concerning the lottery procurement procedures, without changes to the proposed text as published in the July 18, 1995, issue of the *Texas Register* (20 TexReg 5121).

The section, as amended, makes the procurement procedures set out in the rule consistent with the procurement procedures set out in Texas Government Code, Chapter 466.

The section, as amended, sets out the procurement procedures to be used by the Texas Lottery in procuring goods and services.

No comments were received regarding the amendment of the section.

The amendment is adopted under Texas Government Code, §466.015, which provides the Texas Lottery Commission with the authority necessary to administer the State Lottery Act, Texas Government Code, Chapter 466.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on September 13, 1995.

TRD-9511761 Kimberly L. Kiplin
General Counsel
Texas Lottery Commission

Effective date: October 4, 1995

Proposal publication date: July 18, 1995

For further information, please call:(512) 323-3791

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Subchapter D. Lottery Game Rules

• 16 TAC §401.308

The Texas Lottery Commission adopts new §401.308, concerning on-line game rules relating to a new on-line game, "Cash 5", without changes to the proposed text as published in the July 18, 1995, issue of the *Texas Register* (20 TexReg 5123).

The new section will generate additional revenue for the state of Texas through the sales of the new on-line game's tickets.

The new section will provide specific game details and requirements for the Texas Lottery's on-line game "Cash 5".

No comments were received regarding adoption of the new section.

The new section is adopted under Texas Government Code, §466.015, which provides the Texas Lottery Commission with the authority to adopt rules governing the type of lottery games to be conducted.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Issued in Austin, Texas, on September 13, 1995.

TRD-9511760 Kimberly L. Kiplin
General Counsel
Texas Lottery Commission

Effective date: October 4, 1995

Proposal publication date: July 18, 1995

For further information, please call: (512) 323-3791

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TITLE 25. HEALTH SERVICES

Part II. Texas Department of Mental Health and Mental Retardation

Chapter 401. System Administration

Subchapter B. Interagency Agreements

• 25 TAC §401.49

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeal of §401.49, concerning memorandum of agreement: community resource coordination groups for youth, without changes to the proposed text as published in the July 28, 1995, issue of the *Texas Register* (20 TexReg 5587).

The section is replaced by new §401.49 dealing with similar matters which is adopted contemporaneously in this issue of the *Texas Register*.

No public hearing was held concerning the proposal. No written comments were received.

The repeal is adopted under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and with Texas Human Resources Code, §41.0011, which requires the MOU to be adopted by rule.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511879 Ann Utley
Chair
Texas Department of Mental Health and Mental Retardation

Effective date: October 6, 1995

Proposal publication date: July 28, 1995

For further information, please call: (512) 206-4516

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The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §401.49, concerning memorandum of understanding (MOU) on coordinated services to children and youths, without changes to the proposed text as published in the July 28, 1995 issue of the *Texas Register* (20 TexReg 5587).

The new section replaces existing §401.49 dealing with similar matters which is repealed contemporaneously in this issue of the *Texas Register*.

The new section adopts by reference rules of the Texas Department of Protective and Regulatory Services (TDPRS) in §736.701 (relating to Memorandum of Understanding for Coordinated Services to Children and Youths). The adopted text of the TDPRS rule was published in the March 10, 1995, issue of the *Texas Register* (20 TexReg 1765).

The TDPRS rule constitutes a memorandum of understanding (MOU) between TDPRS, TDMHMR, Texas Commission for the Blind, Texas Department of Health, Texas Department of Human Services, Texas Education Agency, Texas Interagency Council on Early Childhood Intervention, Texas Juvenile Probation Commission, Texas Rehabilitation Commission, and Texas Youth Commission as required by the Texas Human Resources Code, §41.0011. The MOU provides for the implementation of a system of community resource coordination groups to coordinate services for children and youths who need services from more than one agency. The statute further requires the signatory agencies to regularly review and update the MOU and to adopt all revisions by rule.

No public hearing was held concerning the proposal. Written comments were received from Riceland Regional Mental Health Authority in Wharton, Texas, and the Texas Alliance for the Mentally Ill (TEXAMI).

A commenter questioned how coordination groups could "clarify" the financial and service responsibilities of a mental health authority (MHA) as described in the MOU at §736.701(c)(3) when those responsibilities are outlined in the MHA's contract with the department. The department responds that the "clarification" occurs on a case-by-case basis when a child or youth receives services from several agencies and some of those services are duplicated. As the language specifies, "whenever necessary in particular cases," the coordination group will clarify which agency is to provide the duplicated service, for how long, and how it is to be coordinated. Each local agency involved is represented on the coordination group, so the MHA would be involved in decisions affecting one of its consumers.

The same commenter requested a clarification of the term "cost-sharing" as used in the MOU at §736.701(e), questioning whether the MHA is expected to set aside money for services not provided by the MHA. The commenter stated that a coordinating group could not tell the MHA to share costs for services not required in the MHA's contract with the department, and that if the services being suggested by the coordinating group are core services needed by the consumer then the matter is an issue between the MHA and the department. The department responds that the referenced subsection clearly specifies that costs are to be shared by agencies who are part of the coordination group when the services are within the agencies' financial capabilities and statutory responsibilities. Therefore, the MHA would not be required to set aside money for services which it does not provide. In fact, if a child or youth served by the MHA were to need more extensive services than the MHA could provide and that child or youth was eligible for similar or related services from another agency, the MHA could request that the coordination group consider that case. The MOU clearly does not permit a coordination group to require an agency to provide services which are not within either its financial capabilities or its statutory responsibilities.

The same commenter questioned how the private sector groups serving on the coordinating group could have the same status as public agencies, as required by §736.701(h) of the MOU. The commenter stated that private agencies have no statutory responsibilities and it is highly doubtful that they will share their organizations' financial capabilities, and further suggested that private agencies would bring cases to the coordination group when their resources were exhausted and expect the public agencies to pick up the provision of services. The department responds that coordination groups have been

operating effectively with private agency involvement for several years since the original MOU-of which this document is a revision-was adopted in 1988. The department reiterates that coordination groups cannot require a public agency such as an MHA to provide services which are not within either its financial capabilities or statutory responsibilities. The MHA, therefore, could not be required to provide services to a child or youth if there were no funds to do so and/or the assistance requested was not a part of the MHA's service array or within its statutory authority, e.g., the child or youth was not a part of the priority population.

Another commenter stated that although the MOU acknowledges the importance of the family, it fails to encourage the inclusion of the family in planning of the services for the child or adolescent. The department acknowledges the lack of such language, noting that nine other agencies were party to the development of the MOU. The department notes, however, that various policy documents for which this agency is solely responsible, including the strategic plan, numerous rules, community standards, board policy manual, and the quality of life principles, reiterate department's commitment to involving both the consumer and the consumer's family, as appropriate, in the planning of services.

The new section is adopted under the Texas Health and Safety Code, §532. 015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority, and with Texas Human Resources Code, §41.0011, which requires the MOU to be adopted by rule.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511880 Ann Utley
Chair
Texas Department of Mental Health and Mental Retardation

Effective date: October 6, 1995

Proposal publication date: July 28, 1995

For further information, please call: (512) 206-4516

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Chapter 403. Other Agencies and the Public

Subchapter B. Charges for Community-Based Services

• 25 TAC §§403.41-403.53

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §§403.41-403.53 of a new subchapter, concerning charges for community-based services. Sections 403.46, 403.48, 403.50, and 403.51 are adopted with changes to the proposed text as published in the July 18, 1995, issue of the *Texas Register* (20 TexReg 5136). Sections 403.41-403.45, 403.47, 403.49, 403.52, and 403.53 are adopted without changes to the proposed text and will not be republished.

Language was added to §403.45(c)(1) clarifying that the person's interdisciplinary or multidisciplinary team must determine that the person's failure to produce financial documentation is related to the person's mental illness or mental retardation. Language was added to §403.46(a) clarifying that when two or more members of the same family are receiving services, the provider may bill the family as a unit if a family member is identified as the payor of services. Subsection (c) was expanded to require a copy of the financial assessment form to be sent to the person. Language was added requiring the person to be notified in writing that he/she may discuss concerns regarding information in the written notification with his/her interdisciplinary or multidisciplinary team.

Language was changed in §403.48(c) to direct the local MHMR authority to bill third-party payors first, then subtract the third-party payment from the person's monthly services charge, leaving the remaining balance to be paid by the person, up to the person's maximum monthly fee. Language was also added which directs local MHMR authorities to charge a person in accordance with any contract the local MHMR authority may have with the person's insurance company or HMO. In subsection (d), language was added clarifying "itemized list" to include day and type of services in the statement. Language was also added to allow for certain types of billing when required by federal regulations and to clarify the conditions and requirements under which a person would not be charged or billed for services. A subsection was added requiring receipts for cash payments. In §403.50, the term "procedures" was changed to "content" for accuracy. In §403.51, language was added exempting the requirement in a crisis or emergency.

The Monthly Ability-to-Pay Fee Schedule (Exhibit A) was revised to reflect the 1995 Federal Poverty Guidelines.

A public hearing was held on August 2, 1995, at the TDMHMR Central Office in Austin, Texas, to accept oral and written testimony on the proposed new sections. Written and/or oral testimony was provided by Brad Rzepniewski, Tarrant County MHMR Center, Fort Worth; Cynthia Hopkins, Texas Mental Health Consumers, Austin; and two consumers of community-based mental health services, Fort Worth.

During the public comment period written comments were also received from Burke Center, Lufkin; Tarrant County MHMR Center, Fort Worth; Andrews Center, Tyler; Dallas County MHMR Center, Dallas; The Arc of Texas, Austin; Advocacy, Inc., Austin; Texas Advocates, Austin; Disability Policy Consortium, Austin; Texas Planning Council for Developmental Disabilities, Austin; Texas Mental Health Consumers, Austin; Mental Health Association of Tarrant County, Fort Worth; Montgomery County Alliance for Mentally Ill, Conroe; Erath Mental Health Consumers, Stephenville; Lufkin Alliance for the Mentally Ill, Lufkin; Temple Area Alliance for the Mentally Ill, Temple; Tarrant Alliance for the Mentally Ill, Fort Worth; Alliance for the Mentally Ill/Dallas, Inc., Dallas; Gulf Coast Alliance for the Mentally Ill, Alvin; Panhandle Alliance for the Mentally Ill; El Paso Alliance for the Mentally Ill, El Paso; five advocates for persons with mental retardation or mental illness; and 137 private citizens.

Seventeen advocacy organizations, five advocates, and 137 private citizens from all areas of the state were overwhelmingly in favor of the proposed rules and the fee schedule. The commenters stated that persons with an ability to pay *should* pay for services but indigent persons *should not* be charged.

Texas Mental Health Consumers and Gulf Coast AMI stated that charging indigent persons would only alienate them and drive them away from seeking much-needed services. One of the commenters stated that the only reason her homeless son was currently recovering from mental illness was because he was not charged for services.

Texas Mental Health Consumers (TMHC) stated that while it recognized the public mental health system is underfunded, it does not believe that underfunding should affect billing policies for indigent consumers who are being served by the department. The organization noted that charges for services are a barrier that only compounds consumers' problems because lack of resources is the same reason consumers can't get services in the private sector. TMHC wanted to dispel the myth that consumers feel "dignified" when deciding whether to walk to the clinic and pay for their medication or to put $.50 in the bus meter and then not be able to afford their medication. Consumers find nothing dignifying about going to their parents and asking for money to pay for their mental health care or having to borrow money for necessities while putting their money toward treatment.

Texas Mental Health Consumers explained that the fee schedule was based on 150% of the Federal Poverty Guidelines to allow consumers to break the "minimum wage barrier" before being charged for services. The organization further explained that family income is only considered for minor consumers to prevent families from being charged for services for their adult children. TMHC strongly disagrees with the notion that the department will foster an unhealthy entitlement attitude in the consumers it serves with this rule.

Texas Advocates believed the fee schedule was fair and supported no additional fees or co-payments for medication unless approved by the federal government. The Disability Policy Consortium felt the fee schedule would help assure that persons with little or no income would not be unfairly charged or denied services if they lacked a source of third-party payment. The Texas Planning Council for Developmental Disabilities believed the rule will ensure that consumers across the state are treated equitably and are not denied access or discriminated against based on their ability to pay. The Council also supported the inclusion of medication in the fee schedule.

Erath Mental Health Consumers stated that for an indigent consumer, any fee imposed can become an insurmountable barrier to overcome, which escalates anxiety.

The Mental Health Association of Tarrant County stated that a uniform fee schedule for all MHMR centers was an optimal goal. The organization stated that experience and literature have shown the value of paying even a nominal fee for service, but recognizes that not everyone will be able to pay a nominal fee, or that a nominal fee may place a hardship on some consumers' already limited means. The organization strongly agrees that no eligible consumer should be denied services due to an inability to pay.

Advocacy, Inc. submitted comments that chronicled the events which led to the proposal of this subchapter, which are: the fee for service statute was first enacted in 1985; the department did not attempt to develop a statewide uniform fee collection policy until 1991; the 1991 policy only required community services divisions of state facilities to comply, giving community MHMR centers the option of adopting the department's policy or developing an alternate policy that was consistent with the department's; community MHMR centers that developed an alternate policy were instructed to submit their policy to the department for review to determine if the centers' policies were consistent with the department's policy; only seven of 35 community MHMR centers submitted alternate policies; in addition to the seven community services divisions of state facilities, approximately ten community MHMR centers adopted the department's policy; the department never reviewed the seven alternate policies submitted, failing to comply with its own directive; as a result of the department's failure to implement a uniform fee collection policy, indigent consumers have been charged for services and a lawsuit was filed against a community MHMR center and the department. Advocacy, Inc. detailed the fee collection actions taken against three consumers of the community MHMR center named in the lawsuit. The action taken by the center was inconsistent with the fee collection policy of the department.

Advocacy, Inc. stated it conducted an informal analysis of 29 community MHMR centers that revealed a wide deviation from the department's policy by those centers choosing to develop an alternate policy. Advocacy, Inc. believed it demonstrated the necessity of having a prescribed training program to prevent community MHMR centers from adopting the policy in letter but circumventing the spirit and intent of the policy through their own in-house training procedures.

Advocacy, Inc. commented that the proposed rules represented a compromise which balanced the interests of consumers and community MHMR centers and are a product of extensive negotiations with the Texas Council of Community MHMR Centers, Advocacy, Inc., Texas Mental Health Consumers, and Texas Alliance for the Mentally Ill. The following compromises were made in order to reach a consensus over the proposed rules: a sliding fee schedule based on 150% of the federal poverty guidelines, rather than 200% which is the department's current policy; increased maximum monthly fees for consumers with the ability to pay; increased consumer responsibility in providing documentation to verify income; inclusion of medications under the fee schedule; and co-payments for medications if Medicaid waiver is approved.

Advocacy, Inc. stated that the proposed rules are necessary to prevent community MHMR centers from denying services to indigent consumers who lack a source of third-party payments. The organization stated that unlike the private mental health system, the public sector cannot be driven by whether the consumer has the money or the insurance to pay for services. The organization commented that it is imperative that the department establish and enforce a uniform fee for service policy that does not discriminate against persons who lack the ability to pay, adding that the whole community mental health system will be subverted if centers are allowed to select clients to serve based on whether or not they have access to Medicaid or private insurance. This rule would ensure that community MHMR centers serve persons with severe and persistent mental illness whether or not they have Medicaid or private insurance.

One commenter who is a clinician by training, the coordinator of consumer accounts and benefits at an MHMR authority, and a family member of a consumer of services, was pleased to see a recognition of the need to eliminate charges for consumers without an ability to pay, believing it was always clinically inappropriate to bill a consumer with no income. The commenter stated that it was much more realistic to recognize the consumer's inability to pay and allow him/her to receive the needed services with dignity. As the coordinator of consumer accounts and benefits at a large MHMR authority, the commenter stated it would be much more appropriate and efficient from a business perspective to write off the cost of the service for an indigent consumer at the time of service, adding that to carry a false accounts receivable balance that has no likelihood of ever being collected gives a false impression of an ability to offset the expense of operations to the public.

An advocate and a family member of a consumer of services stated that as a tax-payer and supporter of the public system, the commenter supported the right of (and need for) community centers to be able to collect fees for services when fees are set consistently and reasonably. The commenter believed that the integrity of the public system will only be retained when those persons who have the least amount of support have equal access to public services.

One commenter, a consumer of services from a local MHMR authority, expressed appreciation that when the rule goes into effect she will no longer have to pay for services. Her current income is $646 per month and she is being charged a monthly fee. The commenter also stated that whenever she wants a copy of any form she filled out for the community local MHMR authority, she must request it in writing and pay $.75 per page. The department responds by requiring the local MHMR authority to provide each person with a copy of his/her financial assessment form.

One commenter requested language be modified so that only one member of a family would be billed when more than two members of the family are receiving services. The department responds that this was already allowed, but added language to clarify the intent. The same commenter believed sending a statement with "an itemized list of all services received" would result in lengthy statements (sometimes two inches thick), and suggested "summary of all services received" as replacement language. The department responds by adding language to clarify the information to be included.

The same commenter requested that language in §403.48(c) regarding third-party coverage be replaced with: "If a person has third-party coverage, then the local MHMR authority will bill the third-party payor. The local MHMR authority will subtract the third-party payment from the person's monthly service charge, and the remaining balance, if any, is what the person will pay up to the person's maximum monthly fee." The department responds by using the commenter's suggested language with additional language to ensure billing only takes place if the local MHMR authority has an assignment of benefits from the person.

The commenter requested that language be added so that local MHMR authorities with managed care contracts (with a capitated rate) could charge rates below the Medicaid rates to non-Medicaid persons. The department responds that capitated rates and fees for service are two very different payment systems. This subchapter applies only to department-funded services provided to the priority population and addresses only the fees for service payment system; it would be inappropriate to refer to another type of payment system. This subchapter does not preclude an MHMR authority from entering into managed care contracts with other entities with capitated rates.

The same commenter expressed concern about being able to implement the changes in the computerized billing system by the time the rule became effective. The department responds by delaying the effective date of the subchapter to November 1, 1995, to allow adequate time for billing implementation and staff training.

Two commenters expressed concern over third-party payments being used to "pay for" the person's maximum monthly fee, and asked what the legal implications were of using an insurance payment to pay for the person's insurance co-payment. The department responds by changing the language to require billing of third-party payors first, then subtracting the third-party payment from the person's monthly service charge, and charging the remaining balance to the person, up to the person's maximum monthly fee.

Two commenters believed that the fee schedule, when used for persons with third-party payors, was too generous with taxpayers' dollars. The department responds that the change in third-party payment language allows for the person to pay up to his/her maximum monthly fee in addition to his/her third-party payments.

One commenter requested adding the requirement to provide receipts for cash pay-

ments. The department responds by adding the requirement.

One commenter wanted to know how the principle "paying for services rendered reinforces the role of the persons served as a customer, having the right and responsibility to influence the provision of those services" had any effect on someone who has Medicaid, and what was the role of the Medicaid-eligible person or his/her guardian. The department responds that Medicaid pays on behalf of the person, just as private insurance pays on behalf of the person; therefore, the person is considered to have "paid" for his/her services, giving the person or guardian, as appropriate, "the right and responsibility to influence the provision of those services."

The same commenter requested adding the requirement of the person to submit a copy of his/her last tax return for financial documentation of annual or monthly gross income/earnings. The department responds that a copy of the person's most recent tax return would be sufficient to document income, but the department recognizes that not all consumers have access to their tax returns; therefore, the department would accept other verification, e.g., W-2 form, Statement of Wages from employer, recent pay check stub, etc.

Two commenters from a community MHMR center suggested that the department substitute its center's fee schedule for the fee schedule that was proposed. The department responds that the fee schedule suggested by the commenter presumes no one has an inability to pay. The fee schedule adopted by the department would begin charging $23 a month when the person had an annual income of $11,190. The fee schedule suggested by the commenter would begin charging $10 a month when the person had an annual income of $368. The department cannot support or endorse a fee schedule which charges one-third of a person's income for mental health or mental retardation services.

Several commenters from the same community center claimed that the proposed rules would drastically cut their center's revenue and probably result in employee layoffs. The commenter stated that the community center recently implemented a local fee policy and fee schedule which "is both affordable to the consumer and allows us to collect revenues locally to supplement funding." Based upon the projected revenue from its local fee schedule, the commenter reported that the center would lose $484,020 of budgeted revenue and would incur an additional $255,583 in expenses for fiscal year 1996. The commenter further stated that implementing the proposed rules would result in 85% of the center's consumers paying nothing for services/medications, encouraging overutilization of services and a lack of consumer investment in the treatment process. The commenter claimed clinical research and experience shows that payment for services is likely to increase a consumer's investment in treatment and improve compliance. The department responds that this community center and the department have differing views of what constitutes an ability to pay. The department notes that the majority of consumers in the priority population are poor and do not have an ability to pay for services. Charging consumers with an inability to pay does not result in payment, but rather it heightens consumer anxiety and can result in them *not* seeking much-needed services. Additionally, the department notes that it does not distinguish between "services" and "medications" when charging for services. The provision of medication is included as a community-based service in statute.

One person receiving mental health services from the community center mentioned in the previous paragraph testified at the public hearing that she could not afford what she was being charged for services. The commenter stated that she was on a fixed income of $419 a month. Her rent was $388 a month and she could not afford all of her other bills as well as a co-payment for medication. Another person receiving services from the same center testified that if consumers cannot afford to pay for their services then they don't know where to turn. The commenter said that the center's fee schedule was making it very difficult for consumers like himself. Texas Mental Health Consumers stated that research generated by the department showed why consumers failed to follow-up at clinics, failed to follow through with treatment, and failed to take their medications and it wasn't because they receive the service for free. The reasons cited were: (1) people couldn't afford the co-pay, (2) they weren't treated with dignity and respect, (3) they didn't like the side effects of their treatment, and (4) they didn't have choices about the treatment they received.

One commenter, an advocate and family member of a consumer of services from the same community center, expressed concerns about access to mental health services for an uninsured consumer and appreciated the department recognizing the necessity of treating people who cannot pay. The commenter also supported reasonable charges for those have an ability to pay. The commenter agreed with the fee schedule and believed that the out-of-pocket fees to her family member, who is insured by an HMO, is within only a few dollars of the limit on the proposed fee schedule for the family member's household income.

The new sections are adopted under the Texas Health and Safety Code, Title 7, §532.015, which provides the Texas Board of Mental Health and Mental Retardation with rulemaking powers.

§403.46. Determination of Ability to Pay.

(a) Maximum monthly fee. A maximum monthly fee is established for persons who are determined as having an ability to pay. The maximum monthly fee is based on the person's financial assessment and calculated using the Monthly Ability-To-Pay Fee Schedule, referenced as Exhibit A, copies of which are available by contacting TXMHMR, Policy Development, P.O. Box 12668, Austin, Texas 78711-2668. This calculation is based on the number of family members, annual gross income reduced by extraordinary expenses paid during the past 12 months or projected for the next 12 months. No other sliding scale may be used. If two or more members of the same family are receiving services, then the family's maximum monthly fee is divided equally among those members, unless the service provider is able to bill the family as a unit and a family member is identified as the payor of services.

(b) Inability to pay. A maximum monthly fee of zero is established for persons who are determined as having an inability to pay, based on the person's financial assessment and calculated using the Monthly Ability-To-Pay Fee Schedule. No other minimum fee (e.g., co-payment) may be assessed, unless a federal waiver to allow co-payments by Medicaid is approved.

(c) Notification. Written notification is provided to the person that includes:

(1) the determination of whether the person has an ability or an inability to pay;

(2) a copy of the financial assessment form that is signed by the person and a copy of the Monthly Ability-to-Pay Fee Schedule, with the applicable areas indicated (i.e., annual gross income, number of household members, etc.);

(3) the amount of the person's maximum monthly fee, if any;

(4) a statement that the person may discuss with his/her interdisciplinary or multidisciplinary team any concerns the person may have regarding the information contained in the written notification; and

(5) a statement that the person may voluntarily pay more than their maximum monthly fee.

§403.48. Billing Procedures.

(a) Monthly services charge. All services provided during a month, and the rates for those services, are listed on the person's monthly services charge. If the total charges:

(1) exceed the person's maximum monthly fee, then the charges are discounted to equal the maximum monthly fee and the person is billed the maximum monthly fee;

(2) are less than the person's maximum monthly fee, then the person is billed for the charges listed on the monthly services charge.

(b) Medicaid recipients. For Medicaid recipients, the Medicaid program is billed for Medicaid-covered services rendered according to federal and state regulations and procedures. Medicaid reimbursement is considered full payment.

(c) Third-party coverage. If a person has third-party coverage and executes an assignment of benefits, then the local MHMR authority will bill the third-party payor. The local MHMR authority will subtract the third- party payment from the person's monthly service charge, and the remaining balance, if any, is what the person will pay up to the person's maximum monthly fee. Charges to a person must be made in accordance with any contract the local MHMR authority may have with the person's insurance provider.

(d) Statements.

(1) Persons who have been determined as having the ability to pay are sent monthly or quarterly statements that include:

(A) an itemized list, at least by date and by type, of all services received;

(B) the standard rate for each service;

(C) the total charge for the period;

(D) the amount that is being discounted, if any; and

(E) the amount to be paid, if any.

(2) Statements may not be sent to persons who have been determined as having an inability to pay, except when required by federal regulations.

(3) When the persons's interdisciplinary or multidisciplinary team has determined that being charged for services and receiving statements will result in a reduction in the functioning level of the person or the person's refusal or rejection of the needed services, then charges will cease and statements will no longer be sent. This determination requires clinical documentation and must be reassessed at least annually by the team.

(e) Receipts. Receipts must be provided for all cash payments.

§403.50. Training. All professional and support staff who are involved in implementing or explaining the content of this subchapter must annually demonstrate competency in accordance with a prescribed training program developed by the department, in consultation with local MHMR authorities and consumer representatives.

§403.51. Information for Persons. Persons must be provided department-approved information on the department's policy of charges for community-based services contained in this subchapter prior to entry into services except in a crisis or emergency.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511873 Ann Utley
Chairman
Texas Department of Mental Health and Mental Retardation

Effective date: November 1, 1995

Proposal publication date: July 28, 1995

For further information, please call: (512) 206-4516

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Chapter 408. Standards and Quality Assurance

Subchapter B. Mental Health Community Services Standards

• 25 TAC §§408.21-408.25

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §§408.21-408.25. Section 408.21 is adopted with changes to the proposed text as published in the August 4, 1995, issue of the *Texas Register* (20 TexReg 5850). Sections 408.22-408.25 are adopted without changes and will not be republished.

Figure 1, the 1995 Mental Health Community Services Standards, is revised on adoption to clarify and reorganize standards and definitions consistent with program structure, law, rules, and performance measures of the Legislative Budget Board. Many changes are made to clarify intont. An introduction, which will be proposed for public comment in a subsequent issue of the *Texas Register*, provides more information concerning the minimum array of mental health services, core services, types of standards, and accountability for ensuring compliance.

In Chapter 1, Requisite Standards, Standard 1.3.R is modified to include the clarifying phrase "such as Hepatitis B." The word "Appropriate" is deleted from Standard 1.4.R as unnecessary. Standard 1.11.R is revised to remove language that would have allowed delays of immediate assessment of persons in crisis. Standard 1.17.R is revised to require constant observation of an individual in mechanical restraint. Standard 1.20.R adds social workers and psychologists to the list of staff who must maintain evidence of current certification/licensure. In Standard 1.21.R, the requirement to comply with the Americans with Disabilities Act (ADA) is broadened to reference all local, state and federal laws.

In Chapter 2, Rights and Responsibilities, confusing language in Standard 2. 2.O is clarified. Standard 2.8.P is revised to note that research must be conducted in accordance with applicable state and federal laws.

Standard 3.4.P in Chapter 3, Information and Accessibility, is modified to more clearly state expectations concerning cultural competency. Sentence structure in Standard 3.5.P is corrected.

In Chapter 4, Records Administration, Standard 4.1.P is revised to note that the record system should be nonduplicative. Standard 4.2.P is modified to reference the purging of records. Standard 4.4.P is modified to reflect that the role of the records committee is to review data that results from clinical records review by records administrators.

In Chapter 5, material in Standard 5.4.P has been reorganized.

In Chapter 6, Quality Improvement, capitalization is corrected in Standards 6.1.0 and 6.4.P. Standard 6.4.P is revised to include reference to departmental rules and other applicable documents listed in the current edition of the department's Policy News and Comment. Standard 6.5.P is added to require the mental health authority to have a utilization management program.

In Standard 7.1.P of Chapter 7, Special Treatment Procedures, the requirement that aversive or highly restrictive procedures comply with departmental rules governing behavior therapy has been changed to require approval by the commissioner or the commissioner's designee.

In Chapter 8, Environment, Standard 8.5.P is modified to add monitoring as a component of an infection control program. In the first bullet, language is added to reference infections.

The title of Chapter 9 is changed from "Screening and Crisis Services" to "Crisis Services." Standard 9.5.P is revised to require the continuity of services staff person to notify other treatment staff when a crisis contact occurs.

In Chapter 10, Assessment, Treatment and General Medical Care, the definition of "Medication-related Services" has been changed to include "provision of medication" as an element of this service. Standard 10.2.O is revised to delete reference to increasing coping skills as an indicator of symptom management because the terminology is vague and undefined. A more descriptive standard addressing the same issues is added as Standard 10.5.O, concerning improved functioning. Subsequent standards are renumbered. In new Standard 10.7.P, it is clarified that the referenced plan is a treatment plan. In new Standard 10.10.P, the third bullet, "substance usage" is deleted. In the fourth bullet, new language is added concerning determination of co-occurring substance abuse and mental illness disorders. The ninth and tenth bullets have been relocated to Standard 10.11.P.

In new Standard 10.12.P, language changes address individual functioning and require that the treatment plan from the facility, which may be used, must be reviewed within 14 calendar days of the date of discharge or absence with assignment. In new Standard 10.13.P, language is added referencing the diagnosis and level of functioning as ele-

ments of the treatment plan which are reviewed.

In Chapter 11, Services for Children and Adolescents, the definition of "Family Support Services" is altered to add classes/workshops as elements of the service. Language concerning case management is updated. Language concerning respite services is revised to be consistent with the language used in Chapter 13, Respite Services.

In Chapter 12, Supports to Individuals, the definition for "Consumer Advocacy Network" has been extensively revised. In the definition of "Peer Support Services," examples are added. References to definitions and standards relating to socialization services are moved to Chapter 14. Definitions and standards related to supported housing are moved to Chapter 16.

In Chapter 14, Psychosocial Rehabilitation Services, the definition for "Skills Training Services" is extensively revised.

In Chapter 15, Continuity of Services, and throughout the standards, the definition of "case management services" is modified to correspond to the department's current definition for this service. Other minor language changes are made.

Chapter 16, Housing and Residential Services, the definition of "Treatment/Training Residences" is revised to reference a specific timeframe. The definition of "Assisted Living Services" is also revised. Standards 16.1.O and 16.2.O are revised to reference satisfaction with support services and services for living environments of choice. New Standard 16.3.P is added.

In the glossary to the standards, the following terms have been revised to be consistent with departmental definitions already in use: "aversive procedures"; "continuity of services staff person"; "self-assessment for quality"; and "treatment plan." The term "qualified mental health professional (QMHP)" has been changed to "qualified mental health professional-community services (QMHPCS)" to differentiate it from the term that is used in inpatient mental health settings. New definitions are added for "immediate crisis screening/QMHP assessment" and "utilization management." The definition of "supported housing" is deleted because it appears in Chapter 16.

A public hearing was held on August 21, 1995, at TDMHMR Central Office in Austin, and testimony was provided by Mary Dees and another individual who also provided written comments. Written comments were received from Advocacy, Inc., Austin; Texas Mental Health Consumers, Austin; the Texas Alliance for the Mentally Ill, Austin; the National Association for Social Workers, Austin; and the Persons Experiencing Severe and Persistent Mental Illness Task Force, National Association of Social Workers/Texas, Dallas. Comments were received from the Texas Council of Community Mental Health and Mental Retardation Centers, Inc., Austin, and from the following mental health authorities which are community centers: Burke Center, Lufkin; the Center for Health Care Services, San Antonio; Lubbock Regional Mental Health Mental Retardation Center, Lubbock; and MHMR Services for the Concho Valley, San Angelo. Comments were received from one individual.

Comments were also received from mental health authorities that are community-based services divisions of state hospitals and other employees. The mental health authorities made suggestions for revisions to the wording of specific standards to clarify intent, and many of these commenters' suggestions were incorporated in the adopted standards document. A comprehensive listing of recommendations for technical changes and the department's specific response to them is available from the department by writing or calling the Office of Policy Development, Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711-2668, (512) 206-4570. Additional comments are discussed below.

A number of comments were received after the closing date for the public comment period. These comments will be considered in the formulation of a subsequent submission to the to the *Texas Register*.

A commenter stated that the standards need to reflect governance issues and should more adeptly define the outcomes expected of local boards of trustees, which should be audited. The department responds that it is in full agreement with the commenter and that in amendments to this new subchapter, new standards will address governance issues.

Another commenter requested that language be added to ensure that mental health authorities comply with the Texas Health and Safety Code, §534.004(b), which governs the appointment of boards of trustees. The department responds although it is unnecessary to add such language to the standards when appointments to boards of trustees are mandated by state statute, a number of issues related to governance will be included in new standards which will be submitted in a subsequent issue of the *Texas Register*. The commenter is encouraged to review and comment on the new standards when they are proposed.

A commenter supported the attempts of the department to increase accountability of services and to create shorter timeframes for the completion of clinical activities.

Two commenters expressed concern that the standards relied heavily upon input from consumers and family members regarding their satisfaction with services but did not provide an avenue for gathering the information. The commenters suggested the department require mental health authorities to conduct consumer/family satisfaction surveys and, to ensure consistency in collecting such data, suggested that the department develop a uniform consumer/family satisfaction survey form and procedures for authorities to implement. The department responds that the development and improvement of methods of evaluating services is a priority for the department.

A commenter stated that the standards fail to delineate the specific expectation for each service as well as the designation and emphasis of those which are core services as did the previous standards. The commenter stated that the previous standards clearly conveyed more information about the direction and goal of a particular service. The department responds that the new standards will continue to be refined over time.

The commenter stated that in the past, enforcement of consequences was very difficult to address. The commenter supported strong consistent consequences which reflect directly on the contract of the mental health authority and impact funding when lack of compliance occurs. The department responds that the standards will play an important role in ensuring quality services are delivered, monitored, and improved.

A commenter questioned why the department was revising the standards prior to the completion of major changes in the reorganization of services. The department responds that it is required by the Texas Health and Safety Code, §534.058(c) to review the standards every two years. As TDMHMR moves to a managed care system of service delivery and administration, the provider network will expand to include new providers who are not familiar with the TDMHMR system, the updated standards can provide a valuable grounding and link to the department's values and expectations.

A commenter was concerned that the standards do not identify a minimum array of services. The department responds that an introduction to the standards that addresses this need will be proposed in a subsequent issue of the *Texas Register*. The service array has also been included in the Fiscal Year 1996 performance contract.

A commenter called for more specificity and prescriptiveness in the standards. The department responds that it has attempted to balance the specificity and prescriptiveness of nationally accepted standards for mental health services and managed care plans, such as the standards of the Joint Commission, NCQA, and the Health Care Financing Administration, with the department's desire to move toward outcome-based standards. By retaining process standards for services requiring that level of specificity to ensure the health, safety, and rights of individuals, outcome and process standards can form an effective system.

A commenter questioned the statement in the preamble to the proposal of the subchapter that stated that the public benefit is "the way in which the standards promote the critical evaluation of effects that mental health services have on people receiving the services." The commenter requested a copy of the analysis methodology. The department responds that it is currently developing a system of evaluation and as products relating to methodology become available, all MHAs will be provided copies.

A commenter noted that the standards do not give sufficient attention to issues related to persons dually diagnosed with mental illness and chemical dependency/substance abuse. The department responds by adding Standard 10.9.P.

A commenter urged the department to work with the Quality Services Council and the Office of Monitoring and Compliance to de-

velop outcome measurements as expeditiously as possible. The department responds that the development of outcome measures will be a priority.

A commenter recommended that the standards be based solely on person-based outcomes and that process standards be eliminated entirely. The commenter stated support for the increased accountability to consumers, families, and communities and stated that self-assessments are a valuable tool, noting the desire that self-assessment be reflective of people-based outcome measures. The department responds that it has carefully selected a limited number of areas in which process standards are necessary to ensure patient health, welfare, and safety. The MHA is required to conduct a self-assessment, although the type is not prescribed.

A commenter noted that all applicable rules and laws must be adhered to and there is unnecessary to cite them individually in the standards document. Another commenter expressed the opinion that the rules of the department should always be cited unless they clearly do not apply to the MHA setting. The department responds that it cites applicable rules in an effort to produce a user-friendly document in which all rules and standards related to service delivery can be identified easily.

A commenter stated that as TDMHMR reorganizes and develops an approach based on managed care concepts, it must make greater efforts to educate consumers and family members and to include them in treatment and system development. The commenter noted that the standards are a key resource for individuals who want to participate in the development and oversight of their mental health care. The current edition of the standards is not as detailed as its predecessor and therefore is more difficult for system users to understand. The commenter suggested that rules be referenced as often as possible and that any inconsistencies between rules and standards be eliminated. The commenter gave as an example of inconsistency Standard 1.16.R, which allows for a physician's order for restraint to be obtained "prior to, or as soon as possible following, implementation of the procedure." The commenter notes that the rule requires the order to be obtained prior to or within an hour of implementation. The department responds that inconsistencies such as this one will be corrected in a subsequent submission to the *Texas Register.*

One commenter expressed concern that in several areas (Standards 1.1, 1.8, and 1.9) mental health authorities should develop a system to collect and review data for trends and patterns so they may explore opportunities to address problems. The department agrees with the commenter.

Regarding Standard 1.8.R, the commenter supported the change mandating written criteria be approved by an authority psychiatrist. The commenter also supports the language specifying training. The commenter requested language specifying the frequency of assessment of an individual on homicide or suicide precaution. The department responds that the frequency of assessment of an individual on suicide or homicide precautions is individually determined.

Another commenter requested clarification concerning Standard 1.8.R. The department responds that the commenter appears to be referencing other material.

Regarding Standard 1.9.R, the commenter stated that the standard failed to define or indicate what an unusual incident is and suggested that department rules governing unusual incidents be referenced. The department concurs with the commenter and responds that with the reorganization of the department, the development of a risk management system will require consistency in specification of what constitutes this types of incident.

Regarding Standard 1.10.R, the commenter requested language specifying the qualifications and expertise of the staff responsible for telephone screening and crisis response system. The commenter described a situation in which the 24-hour response system was a telephone answering service with referrals to call 9-1-1. The department responds that language specifying staff qualification and expertise would not remedy the situation that the commenter described. The situation described by the commenter does not meet the standard and the department would cite a mental heath authority in such a situation.

Regarding 1.11.R, the same commenter suggested language be added that provides guidelines as to what would be acceptable clinical justification for delaying assessment of an individual experiencing a behavioral/emotional crisis. The commenter also questioned how such clinically justified delays would be documented and evaluated. The department responds by deleting language that would provide a mechanism for delaying evaluation of an individual in crisis.

With regard to Standards 1.13.R, 1.18.R, and 5.1.P, a commenter stated that if the standards require more in terms of professional competency than is required by licensing and certifying agencies, an undue burden is placed on MHAs. The department responds that it is hoped that the MHA will normally have expectations concerning staff competencies that are more specific to the populations it serves than the general licensing and certification standards of agencies.

Concerning Standard 1.11.R, which states that an assessment by a QMHP for acute psychiatric crisis must be available 24 hours a day, 365 days a year "unless clinically documented," a commenter noted that the requirement should be stated in a manner that is easily understood and in agreement with the rules. Another commenter made similar comments and requested that more direction be given concerning what constitutes a clinically justifiable delay of evaluation of an individual in crisis. The department responds that language related to delaying evaluation of individuals in crisis has been deleted.

Regarding 1.14.R, the commenter stated that language was too vague to understand how a determination of sufficient staffing is to be made. The commenter stated that this set up a system in which determinations were made reactively, after an accident occurred. The department responds that it is not possible to develop explicit staffing requirements for the range of programs that are provided by MHAs. The burden is on the MHA to demonstrate that staffing is adequate, not for the department to demonstrate that it is inadequate.

The commenter expressed concern over the lack of guidelines regarding restraint and seclusion. The commenter stated that assurances must be in place which ensure that restraint and seclusion occurs only on an emergency basis; that the physician's order indicate what specific behaviors must be exhibited prior to release and that the individual be released as soon as those behaviors are exhibited; that restraint or seclusion is not used as punishment, solely for the convenience of staff, or as a substitute for effective treatment or habilitation; that the justification for the restraint or seclusion, target behaviors, and the individual's response to the restraint or seclusion be documented; that the physician's order not exceed four hours without reassessment; and that after restraint or seclusion occurs, individuals should be provided the opportunity to process the incident and intervention with staff. The commenter requested that the Standard reference compliance with department rules governing restraint and seclusion. The department responds that it has reviewed the commenter's concerns and will propose language addressing the concerns in a subsequent issue of the *Texas Register*

Regarding 1.17.R, the same commenter requested that language be added which requires that individuals in mechanical restraint be on one-to-one or close observation by staff to ensure the individual's protection and safety. The department responds by adding language to reflect the commenter's concern.

Concerning Standard 1.20.R, a commenter suggested requiring posting licenses in the offices of QMHPs. The department responds that each profession has its own requirements concerning the availability of licenses/certifications for inspection. Also concerning Standard 1.20.R, two commenters suggested that social workers be included in the list of professionals. The department agrees and social workers have been added to the standard as adopted.

A commenter requested that language be revised to require that reasonable accommodations be made for consumers and other persons with disabilities employed by the mental health authority. The commenter stated that this would ensure that individuals with disabilities, who were are not "MHMR" consumers and employed by the authority, are provided reasonable accommodations. The department responds that reasonable accommodations are ensured with Standard 1. 21.R., which requires mental health authorities to comply with the Americans With Disabilities Act.

A commenter questioned the meaning of Standard 2.2.O. Another commenter stated that the language describing due process was incomprehensible and suggested referencing the department rule and federal regulation that addresses notice and appeal

rights. The department agrees that as proposed the standard is unclear and has revised the language.

A commenter requested that language be added to Standard 2.8.P which states that mental health authorities operated by the department must comply with the department's rules governing research. The department responds by adding language to reflect the commenter's concerns.

Concerning Standard 3.1.O, a commenter stated that this and other proposed standards may be in compliance with department rules but do not define a measurable process or a specific minimum outcome measure. The department responds that the development of outcome measures is a priority.

With reference to Standard 3.2.P, a commenter questioned whether it is fair for persons with the ability to pay for private services to be served equally with persons unable to pay. The department responds that the priority population definition mandating who should be served does make this distinction. By serving individuals who are able to pay, the system is able to collect revenue to enable it to serve more individuals who are not able to pay.

The commenter expressed concern that the language in Standard 3.2.P was too vague to accomplish its intent to prioritize access to services for the priority population. The commenter suggested mandating the use of the department's definition of "priority population" as well as the use of the GAF. The commenter stated that the evaluation of the standard must include not only individuals who were able to access services, but also the population of individuals who were unable to access services. The department responds that the new performance contract requires MHAs to strictly adhere to the department's definition of priority population. The department is in the process of developing a uniform assessment system which will be used in all community-based programs and which includes the GAP and related assessments.

The commenter requested that language be added to Standard 3.4.P, regarding cultural competency, requiring the mental health authority to comply with department rules governing the right to communication in a language and format understandable to the individual for all services provided. The commenter also requested that language be added requiring compliance with state statute governing the information provided to individuals related to prescription medication. The department responds by adding language to reflect the commenter's concerns.

With reference to Standard 5.2.P, a commenter questioned expectations concerning competency-based job descriptions and performance evaluations. The department responds that expectations concerning competency-based job descriptions and performance evaluations are tied to each specific position and should be individualized by the MHA consistent with generally accepted practices relating to competency-based assessments.

Concerning Standard 5.3, a commenter requested that direct contact staff receive training in basic pharmacology in order to identify and help individuals identify issues pertaining to medication. The department responds that resources are sufficiently limited to require training to be targeted to needs.

Concerning Standards 5.4.P, a commenter questioned how a staff member will demonstrate true sensitivity through a competency-based evaluation. The commenter also disagreed with the requirement that sensitivity should be taught by individual and/or their families. The department responds that the involvement of individuals receiving services and their families provides a practical and realistic perspective on mental health services and the concerns of the people we serve.

Regarding Standard 5.6.P, a commenter requested that there be a waiver for students and volunteers who can demonstrate that they have had training in required areas. The department responds that the training required of these individuals is minimal and if they can demonstrate that they have had specific training previously then there is no need to repeat it.

With regard to Standard 6.1.O, a commenter questioned the meaning of "improved quality of life," and called for a less subjective measure of the impact of services. The department responds that there are currently available a number of valid and reliable measures for quality of life.

Regarding Standard 6.1.O, the commenter stated that the Quality Improvement Process should be instrumental in providing ongoing information to the mental health authority CEO, its board of trustees, the department, consumers, family members, and advocates. The department agrees.

Regarding Standard 6.4.O, the commenter requested that contracts ensure compliance with accreditation agencies, licensing and regulation standards, department rules, and directives. The department responds that the Fiscal Year 1996 performance contract requires compliance with the items requested by the commenter.

Concerning Standard 8.5.P, a commenter noted that there was some question concerning the confidentiality code for HIV, but did not state the question.

Concerning Standard 9.2.P and other references, a commenter stated that the emphasis on individual preferences, wishes, and desires risks stimulated unrealistic expectations. The commenter noted that there are times when the wishes of patients must be overridden and the Mental Health Code was designed to protect patients in this situation. The commenter further noted that resource limitations make it impossible to respond to all patient wishes, e.g., Clozaril, and that the medications desired by the patient or family may not be clinically appropriate. The commenter further stated that the influence of managed care is to prioritize cost effectiveness over the wishes of patients and even their physicians, and that there is no reason to expect that managed care will function differently in public care. The department responds that it appreciates the commenter's remarks and agrees that there are many instances in which the wishes and preferences of the consumer will not correspond to the choices available. However, if the wishes and preferences of the consumer are not explored, they cannot be taken into consideration when available. Also, by better understanding consumer choices and preferences, the system is better able to change to accommodate them in clinically appropriate ways.

A commenter stated that Chapter 9 does not clearly state whether mental health authorities must provide any or all of the screening and crisis services listed in the standard. The department notes that Standard 9.2.P responds to the issue, i.e., individuals experiencing crises must have access to services that meet their needs.

A commenter requested that Standard 9.4.P. include language requiring compliance with the notice and appeal requirement for crisis resolution services in accordance with §401.464(b)(2). The department responds that the notice and appeal requirement is contained in the referenced rule and is not repeated for each service to which it would pertain.

A commenter requested that Standard 9.5.P. be revised to require crisis contacts by an individual receiving other authority services are communicated to the individual's treating psychiatrist and case manager. The department responds that language has been added requiring information to be communicated.

A commenter requested that the definition of "crisis residential/in-home services" be amended to include crisis resolution house. The department responds that the current definition is sufficiently broad.

A commenter recommended that a timeframe be added within which a person in crisis must be screened by a qualified mental health professional. The department responds that the requirement is contained in Standard 9.2.P, which requires individuals to have immediate access to services that meet thoir needs.

A commenter requested criteria be added for the acceptable conditions of detention (i.e., what must be provided while persons are being detained before they are screened and/or treated). The department agrees that criteria are needed and will be developed.

The commenter requested that language be added to Chapter 10 and 11 clarifying that the provision of medication is included in medication-related services. The department responds by adding language to reflect the commenter's concerns.

Regarding Standard 10.2.O, a commenter suggested that relapse interruption, or relapse prevention, be included in all treatment rehabilitation, and support of persons experiencing a serious mental illness as an element of symptom management. The department responds that language has been added concerning reducing relapse.

With reference to Standards 10.7.P and 10.11.P, a commenter requested that the treatment plan, like the interim plan, be given to the consumer. The department responds that it is important that the individual receive a

copy of the interim plan because the interim plan is developed to be understandable to consumers and to serve as a bridge to community services. Treatment plans are not formulated in the same manner and are not necessarily written in a way that is meaningful to the individual.

Also concerning Standard 10.11.P, a commenter noted that the wording is more appropriate for hospital care and should be rewritten to take into account outpatient care plans. The department responds that the language as written addresses issues that apply in outpatient care plans.

A commenter requested a more realistic array of services for children in Chapter 11. The department responds that the array listed in Chapter 11 is appropriate.

Concerning the definition of "case management" in Chapter 11, a commenter stated that case management does not assure that persons "have access to and receive all resources available" but only those that are included in the treatment plan. The department responds that the commenter's point, which is correct, is implicit.

With reference to the definition of "family support services" in Chapter 11, a commenter requested that language concerning respite found in Chapter 13 be incorporated to clearly reflect that the purpose of respite is to assist caregivers by providing a brief break from the responsibilities of providing care or from the usual living situation. The department agrees that the definitions should be consistent and has modified the definition of "family support services" accordingly.

Concerning the definition of "hospital services/crisis stabilization" in Chapter 11, a commenter noted that these services are sometimes treatments of choice and are not only alternatives to long-term inpatient hospitalization. The department responds that in the context of the public system of care, these services are conceptualized as represented in the definition.

Concerning the definition of "assessment services" in Chapter 11, a commenter stated that these services depend primarily on the direct person interview and examination of the patient by the professional. The department responds that the term can also include the other elements listed in the definition.

Regarding the definition of "substance abuse treatment" in Chapter 11, a commenter noted that psychologists and psychiatrists are not required to obtain TCADA licensure to deliver these services. The department responds that the commenter is correct and language has been changed.

Regarding the standards in Chapter 11, a commenter expressed a desire that the outcomes be detailed in an appendix to include such factors as changes in school attendance, school grades, and other performance measures routinely maintained by schools. The department responds that development of an outcome measurement system is a priority.

A commenter strongly supported Chapter 16, Housing and Residential Services.

A commenter noted that the definition of "aversive procedures," which appears to allow restraint to be used as a method of providing an aversive stimulus, is in conflict with departmental rules. The department responds that current rules provide for use of contingent restraint; furthermore, standards have been revised so that all aversive procedures must be approved by the commissioner or the commissioner's designee.

A commenter praised the definition of "case manager."

Regarding the definition of "case management," a commenter noted that the service must be guided and limited by the treatment plan developed by the responsible multidisciplinary team. The department responds that the commenter is correct.

A commenter questioned the reference to DSM-IV-R. The department responds that the reference was in error and should be DSM-IV.

A commenter praised the definition of "mental illness."

A commenter questioned whether the definition of CADAC was consistent with TCADA licensure described in Chapter 11. The department responds that language has been changed to reflect its intent that CADACs provide substance abuse treatment to children and adolescents.

A commenter noted that the definition of "treatment plan" was based on treatment plans developed by state facilities and should reflect treatment planning appropriate to outpatients. The department responds that the definition of treatment plan takes into account transition and community support phases of development and therefore should accommodate special treatment planning needs related to community-based services.

Concerning the definition of "qualified mental health professional," a commenter noted that the reference to Certified Alcohol and Drug Abuse Counselor (CADAC) should be a Licensed Chemical Dependency Counselor (LCDC). The department responds that both are included and that LCDCs have been added to the definition.

The commenter questioned the absence of a definition of a "requisite standard." The department responds by adding a definition to the introduction which will be proposed in a subsequent issue of the *Texas Register.*

A commenter requested that the terminology with reference to individuals receiving services be changed to "patient" for people receiving mental health services and "client" for persons receiving mental retardation services. The commenter based the request on a change in language in the Mental Health Code. The department responds that over the years the terminology used to refer to persons receiving services has changed a number of times. Because medical care may not be the central component of treatment planning for individuals receiving community-based services, the use of the term "patient" is not always appropriate.

A commenter was confused about how Appendix I, MH Service Array Additional Service Definitions, fits in the community standards, since there is no reference to the appendix. The department responds by adding an explanation.

The new sections are adopted under the Texas Health and Safety Code, §532. 015, which provides the Texas Department of Mental Health and Mental Retardation with broad rulemaking powers, and §534.052, which gives the board rulemaking authority for community-based mental health and mental retardation services provided by community centers and other contract providers.

§408.21. Purpose. The purpose of this subchapter is to define the requisite, organizational, and services standards for community-based mental health services funded by the Texas Department of Mental Health and Mental Retardation (TDMHMR).

FIGURE 1: 25 TAC §408.21.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 15, 1995.

TRD-9511871 Ann Utley
Chairman
Texas Department of Mental Health and Mental Retardation

Effective date: October 6, 1995

Proposal publication date: August 4, 1995

For further information, please call: (512) 206-4516

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 116. Control of Air Pollution by Permits for New Construction or Modification

Subchapter C. Permit Exemptions

Construction or Modification

• 30 TAC §116.211

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts an amendment to §116.211, concerning Standard Exemption List, with changes to the proposed text as published in the April 11, 1995, issue of the *Texas Register* (20 TexReg 2693).

The amendment to §116.211 will change the effective date of the Standard Exemption List to identify the date of the latest revisions to the list. The adopted changes to the Standard Exemption List clarify and update Standard Exemption (SE) 62. The adopted changes to SE 62, regarding confined animal feeding operations (CAFO) and associated feeding operations (AFO), will make the exemption consistent with Chapter 321, Subchapter K, which establishes permit requirements for

CAFOs which cannot qualify for standard exemption.

A public hearing on the proposal was held April 21, 1995, at 10:00 a.m. in Room 201S of TNRCC Building E, located at 12118 North IH-35, Park 35 Technology Center, Austin. Testimony was received from one commenter. The individual suggested the following changes to proposed SE 62: conditions (a) -(h) should limit the number of animals to no greater than 1,000; condition (b) should not count a nursing calf and cow as one animal and should count swine as one animal regardless of weight; and condition (e) should not eliminate the requirement for a dry manure handling and storage system for odor control problems. The individual was also concerned about the expansion of the chicken industry in Texas and the potential threat to the public health and welfare.

The TNRCC believes the herd sizes established in this exemption are reasonable and will not be a significant source of nuisance odors. These limits were revised to provide consistency between federal, state air, and state water permitting regulations. It should be noted that the facilities authorized by this exemption must still comply with the rules and regulations of the TNRCC, including the prohibition against nuisance.

The TNRCC believes the nursing young associated with animal confinement operations are an insignificant contributor of odors and waste. Most operations which house or confine nursing young employ extra measures to ensure a clean environment for mother and young to safeguard against high mortality rates. As with the mature animals, allowance for nursing young does not authorize a producer to create nuisance level odors.

The TNRCC believes the requirement to incorporate a dry manure handling and storage system was eliminated to provide consistency with federal, state water, and state air permitting regulations. The TNRCC believes animal, as well as poultry operations with a wet manure handling system can be designed and operated without creating nuisance level odors. Operating under this paragraph does not eliminate the prohibition against nuisance level odors.

In response to the final concerns relating to the increase of poultry farms and the citizen's interest, the TNRCC does not have the authority to limit the number of these types of operations in the state. The TNRCC does have responsibility for developing and enforcing rules for air emissions. The staff believes that the varying compliance history established by the TNRCC (and Texas Air Control Board) on existing animal feeding operations does not support lowering the confinement numbers, adding buffer zones, or prescribing certain waste management designs. As in most standard exemptions, Number 62 has been limited to smaller confinement operations that do not exceed maximum head counts.

The staff revised the language in condition (h), concerning feed handling for better clarification in the standard exemption. There was some confusion over the intent of this condition. The revised language should clarify that off-site feed shippers may still use the exemption for their pens and confinement areas. They must obtain separate authorization for the feed milling/handling operations that are used for off-site shipping.

The amendment is proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the TNRCC with the authority to adopt rules consistent with the policy and purposes of the TCAA.

§116.211. Standard Exemption List.

(a) Pursuant to the Texas Clean Air Act (TCAA), §382.057, the facilities or types of facilities listed in the Standard Exemption List, dated September 6, 1995, are exempt from the permit requirements of the TCAA, §382. 0518, because such facilities will not make a significant contribution of air contaminants to the atmosphere. A facility shall meet the following conditions to be exempt from permit requirements.

(1)-(6) (No change.)

(b)-(e) (No change.)

(f) Installations exempted by the TNRCC may be required by local air pollution control agencies to receive a permit or permits from that agency, or register with that agency. Any such requirements must be in accordance with the TCAA, §382.113 and any other applicable law.

Figure 1: 30 TAC §116.211(f)

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 6, 1995.

TRD-9511755 Lydia Gonzalez-Gromatzky
Acting Director, Legal Services Division
Texas Natural Resource Conservation Commission

Effective date: October 4, 1995

Proposal publication date: April 11, 1995

For further information, please call: (512) 239-1966

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 47. Primary Home Care

The Texas Department of Human Services (DHS) adopts an amendment to §47. 2901, concerning referrals to provider agencies, and adopts the repeal of §47.2907, concerning 60-day supervisory visits, in its Primary Home Care chapter. The amendment and repeal are adopted without changes to the proposed text as published in the July 28, 1995, issue of the *Texas Register* (20 TexReg 5607).

The justification for the amendment is to allow clients freedom of choice to change provider agencies without restriction.

The justification for the repeal is to avoid duplication and/or possible conflict with the Texas Department of Health's licensing standards related to supervisory visits.

The amendment and repeal will function by ensuring that clients will have an opportunity to select provider agencies that can better serve their needs.

No comments were received regarding adoption of the amendment and repeal.

Service Requirements

• 40 TAC §47.2901

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Civil Statutes, Article 4413 (502), §16, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 14, 1995.

TRD-9511805 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Effective date: November 1, 1995

Proposal publication date: July 28, 1995

For further information, please call: (512) 450-3765

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• 40 TAC §47.2907

The repeal is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Civil Statutes, Article 4413 (502), §16, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

This agency hereby certifies that the rule as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on September 14, 1995.

TRD-9511806 Nancy Murphy
Section Manager, Media and Policy Services
Texas Department of Human Services

Effective date: November 1, 1995

Proposal publication date: July 28, 1995

For further information, please call: (512) 450-3765

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SCHEDULE PUBLICATION

The following is the 1995 Publication Schedule for the Texas Register. Listed below are the deadline dates for the June-December 1995 issues of the Texas Register. Because of printing schedules, material received after the deadline for an issue cannot be published until the next issue. Generally, deadlines for a Tuesday edition of the Texas Register are Wednesday and Thursday of the week preceding publication, and deadlines for a Friday edition are Monday and Tuesday of the week of publication. No issues will be published on July 7, November 10, November 28, and December 29. An asterisk beside a publication date indicates that the deadlines have been moved because of state holidays.

FOR ISSUE PUBLISHED ON	ALL COPY EXCEPT NOTICES OF OPEN MEETINGS BY 10 A.M.	ALL NOTICES OF OPEN MEETINGS BY 10 A.M.
42 Friday, June 2	*Friday, May 26	Tuesday, May 30
43 Tuesday, June 6	Wednesday, May 31	Thursday, June 1
44 Friday, June 9	Monday, June 5	Tuesday, June 6
45 Tuesday, June 13	Wednesday, June 7	Thursday, June 8
46 Friday, June 16	Monday, June 12	Tuesday, June 13
47 Tuesday, June 20	Wednesday, June 14	Thursday, June 15
48 Friday, June 23	Monday, June 19	Tuesday, June 20
49 Tuesday, June 27	Wednesday, June 21	Thursday, June 22
50 Friday, June 30	Monday, June 26	Tuesday, June 27
51 Tuesday, July 4	Wednesday, June 28	Thursday, June 29
Friday, July 7	NO ISSUE PUBLISHED	
52 Tuesday, July 11	Wednesday, July 5	Thursday, July 6
Friday, July 14	Second Quarterly Index	
53 Tuesday, July 18	Wednesday, July 12	Thursday, July 13
54 Friday, July 21	Monday, July 17	Tuesday, July 18
55 Tuesday, July 25	Wednesday, July 19	Thursday, July 20
56 Friday, July 28	Monday, July 24	Tuesday, July 25
57 Tuesday, August 1	Wednesday, July 26	Thursday, July 27
58 Friday, August 4	Monday, July 31	Tuesday, August 1
59 Tuesday, August 8	Wednesday, August 2	Thursday, August 3
60 Friday, August 11	Monday, August 7	Tuesday, August 8
61 Tuesday, August 15	Wednesday, August 9	Thursday, August 10
62 Friday, August 18	Monday, August 14	Tuesday, August 15
63 Tuesday, August 22	Wednesday, August 16	Thursday, August 17
64 Friday, August 25	Monday, August 21	Tuesday, August 22
65 Tuesday, August 29	Wednesday, August 23	Thursday, August 24
66 Friday, September 1	Monday, August 28	Tuesday, August 29