TEXAS REGISTER

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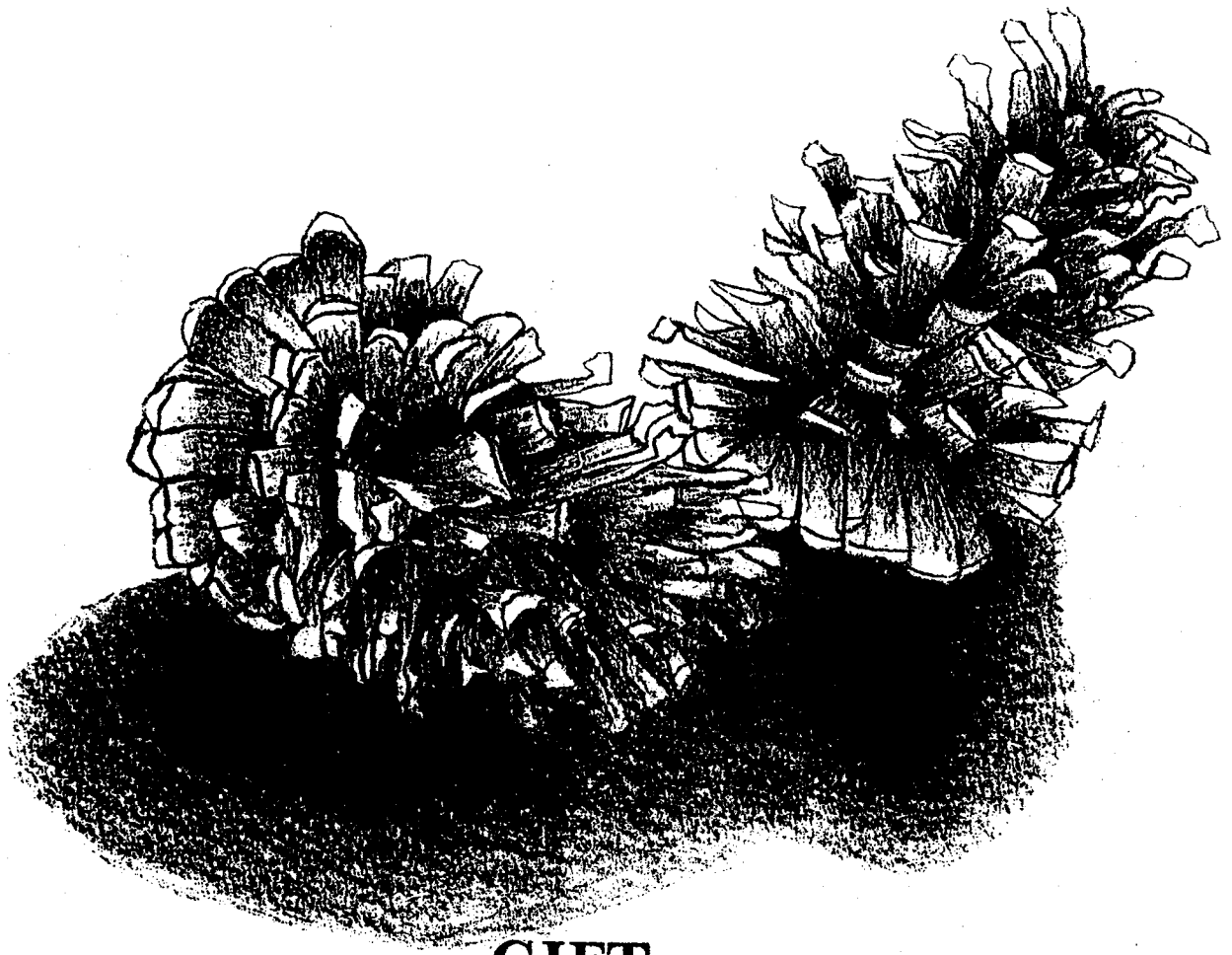

This month's front cover artwork:

Artist: *Joshua Smith*

9th Grade

Killeen Ninth Grade Center

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

We will display artwork on the cover of each *Texas Register.* The artwork featured on the front cover is chosen at random.

The artwork is published on what would otherwise be blank pages in the *Texas Register.* These blank pages are caused by the production process used to print the *Texas Register.* The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register.*

For more information about the student art project, please call (800) 226-7199.

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ATTORNEY GENERAL

EMERGENCY RULES

PROPOSED RULES

WITHDRAWN RULES

ADOPTED RULES

OFFICE OF THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code. Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the ***Texas Register***. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. To request copies of opinions, please fax your reuqest to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Letter Opinions

LO# 98–110 (RQ-1087). Requested from William R. Archer III, M.D., Commissioner of Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3199, concerning whether employees of the University of Texas Southwestern Medical Center at Dallas who dispense contact lenses under the direct supervision and control of Southwestern physicians and optometrists are exempt from permitting requirements set forth in V.T.C.S. article 4552-A.

Summary. An employee of the University of Texas Southwestern Medical Center at Dallas who dispenses contact lenses under the direct supervision and control of a physician or optometrist, also employed by the Medical Center, need not obtain a permit under the Contact Lens Prescription Act, V.T.C.S. art. 4552-A. Because these individuals are excepted from the reach of the act, the Board of Health may not require them to obtain a permit.

LO# 98–111 (RQ-1173). Requested from The Honorable Cindy Maria Garner, District Attorney, 349th Judicial District of Texas, P.O. Box 1076, Crockett, Texas, 75835, concerning constitutionality of municipal juvenile curfew ordinance.

Summary. The juvenile curfew ordinance adopted by the City of Crockett, Texas is facially constitutional.

LO# 98–112 (RQ-1158). Requested from The Honorable Marcus D. Taylor, Wood County Criminal District Attorney, P.O. Box 689, Quitman, Texas, 75783, concerning whether, under Local Government Code section 171.003(a), the Wood County Commissioners Court may approve an invoice from an inn owned by a member of the Wood County Industrial Commission and his wife.

Summary. Based the facts provided to this office, it does not appear that Local Government Code chapter 171 bars the Wood County Commissioners Court from approving the payment of invoices, submitted to the commissioners court by the executive director of the Wood County Industrial Commission, to an inn owned by a member of the Wood County Industrial Commission and his wife.

TRD-9818102
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: December 2, 1998

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Opinions

Opinion# DM-491 (RQ-970). Requested from The Honorable James M. Kuboviak, County Attorney, Brazos County, 300 East 26th Street, Suite 325, Bryan, Texas, 77803, concerning whether a delinquent tax penalty to defray collection costs authorized pursuant to Tax Code section 33.07 applies to taxes delinquent on or after July 1 under Tax Code sections 31.03, 31.031, 31.032, or 31.04.

Summary. The additional delinquent tax penalty authorized pursuant to Tax Code section 33.07 may only be imposed against taxes that become delinquent on a date at least 30 days before July 1 and that remain delinquent on July 1 of the year in which they become delinquent, if notice of the delinquency and of the penalty is delivered within the requisite time period. The notice of delinquency and of penalty must be delivered after the applicable delinquency date at least 30 and not more than 60 days before July 1. Thus, the section 33.07 penalty may not be imposed against taxes that become delinquent on or after June 1 under Tax Code sections 31.03, 31.031, 31.032, or 31.04.

Opinion# DM–492 (RQ-953). Requested from The Honorable Bobby Lockhart, Bowie County Criminal District Attorney, P.O. Box 3030, Bi-State Justice Center, Texarkana, Texas, 75504, The Honorable Dan C. Clower, Walker County Auditor, 1100 University Avenue, Huntsville, Texas, 77340, and The Honorable Jeffrey D. Herrington, Anderson County Criminal District Attorney, 500 North Church Street, Palestine, Texas, 75801, concerning whether the commissioners court or the county clerk is authorized to control the expenditure of records management and preservation fees collected under Local Government Code section 118.0216, and related questions.

Summary. Neither the commissioners court nor the county clerk controls the use of the records management and preservation fees collected under section 118.0216 of the Local Government Code. As a practical matter, both must agree on the use of the funds. Funds collected under section 118.0216 may be used to pay for the costs of initially recording documents by microfilm, but only if the commissioners court determines that this process is part of a specific records preservation and automation project within section 118.0216 of the Local Government Code. The records management and preservation fee must be spent for specific records preservation and automation projects, subject to the commissioners court's advance approval, and may not be diverted from its statutorily assigned purposes to pay other expenses of the clerk's office.

Opinion# DM-493 (RQ-1104). Requested from The Honorable Ron Lewis, Chair, County Affairs Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas, 78768-2910, concerning whether Water Code section 49.072, which provides that a water district director who becomes a candidate for another office is no longer qualified to serve as director, violates article XV, section 7 of the Texas Constitution, and related questions.

Summary. Water Code section 49.072 must be construed to incorporate any constitutionally required removal proceedings and is therefore not unconstitutional under article XV, section 7 of the Texas Constitution or any other constitutional removal provision.

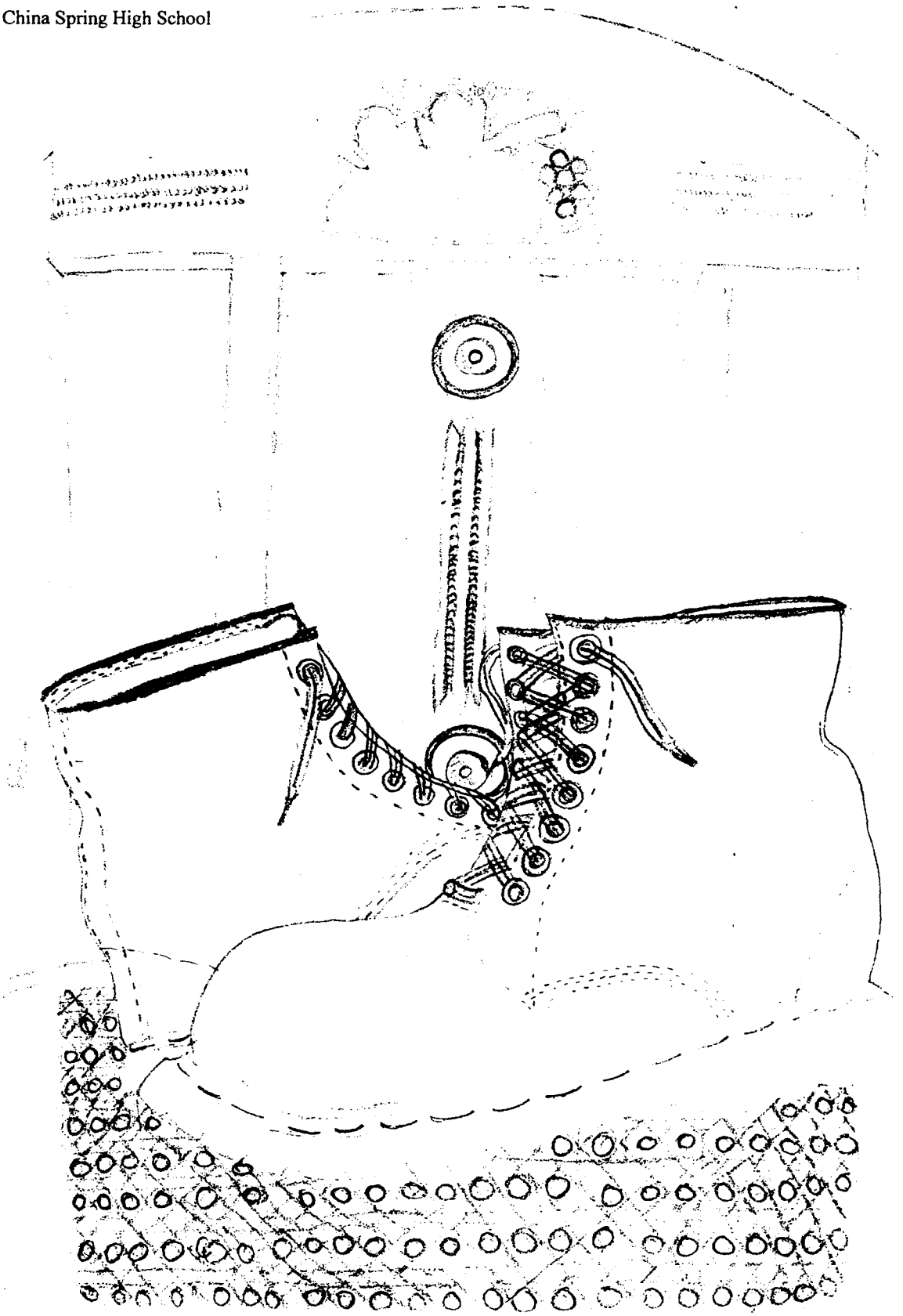
Section 49.072 applies only to a water district director who becomes a candidate after its effective date, September 1, 1997. To the extent section 49.072 operates to shorten the term of an incumbent officer, it is not an unconstitutional retroactive law. Whether a water district director who "is no longer qualified to serve" under section 49.072 holds over in office by operation of article XVI, section 17 of the Texas Constitution depends upon the circumstances.

TRD-9818101

Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: December 2, 1998

♦ ♦ ♦

Name: Lindsay Matthijetz
Grade: 9
School: China Spring High School



Open Meetings

A notice of a meeting filed with the Secretary of State by a state governmental body or the governing body of a water district or other district or political subdivision that extends into four or more counties is posted at the main office of the Secretary of State in the lobby of the James Earl Rudder Building, 1019 Brazos, Austin, Texas.

Notices are published in the electronic *Texas Register* and available on-line. http://www.sos.state.tx.us/texreg

To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

Information about the Texas open meetings law is available from the Office of the Attorney General. The web site is http://www.oag.state.tx.us. Or phone the Attorney General's Open Government Hotline, (512) 478-OPEN (478-6736).

For on-line links to information about the Texas Legislature, county governments, city governments, and other government information not available here, please refer to this on-line site. http://www.texas.gov/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas (1-800-735-2989).

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 text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part X. Texas Water Development Board

Chapter 363. Financial Assistance Programs

Subchapter A. General Provisions

Division 1. Introductory Provisions

31 TAC §363.2

The Texas Water Development Board is renewing the effectiveness of the emergency adoption of amended section, for a 60-day period. The text of amended section was originally published in the September 4, 1998, issue of the *Texas Register* (23 TexReg 8947).

Issued in Austin, Texas, on November 30, 1998.

TRD–9818018
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 18, 1998
Expiration date: February 16, 1999
For further information, please call: (512) 463–7981

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Division 2. General Application Procedures

31 TAC §363.17

The Texas Water Development Board is renewing the effectiveness of the emergency adoption of amended section, for a 60-day period. The text of amended section was originally published in the September 4, 1998, issue of the *Texas Register* (23 TexReg 8947).

Issued in Austin, Texas, on November 30, 1998.

TRD–9818019
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 18, 1998
Expiration date: February 16, 1999
For further information, please call: (512) 463–7981

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Division 7. Grants for Emergency

31 TAC §§363.81–363.88

The Texas Water Development Board is renewing the effectiveness of the emergency adoption of new section, for a 60-day period. The text of new section was originally published in the September 4, 1998, issue of the *Texas Register* (23 TexReg 8947).

Issued in Austin, Texas, on November 30, 1998.

TRD–9818020
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 18, 1998
Expiration date: February 16, 1999
For further information, please call: (512) 463–7981

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Subchapter G. Small Community Emergency Loan Program

Division 1. Introductory Provisions

31 TAC §363.704

The Texas Water Development Board is renewing the effectiveness of the emergency adoption of amended section, for a 60-day period. The text of amended section was originally published in the September 4, 1998, issue of the *Texas Register* (23 TexReg 8947).

Issued in Austin, Texas, on November 30, 1998.

TRD–9818021
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 18, 1998
Expiration date: February 16, 1999
For further information, please call: (512) 463–7981

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Division 2. Application Procedures

31 TAC §363.713, §363.715

The Texas Water Development Board is renewing the effectiveness of the emergency adoption of amended section, for a 60-day period. The text of amended section was originally published in the September 4, 1998, issue of the *Texas Register* (23 TexReg 8947).

Issued in Austin, Texas, on November 30, 1998.

TRD–9818022
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 18, 1998
Expiration date: February 16, 1999
For further information, please call: (512) 463–7981

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Division 3. Closing and Release of Funds

31 TAC §363.721

The Texas Water Development Board is renewing the effectiveness of the emergency adoption of amended section, for a 60-day period. The text of amended section was originally published in the September 4, 1998, issue of the *Texas Register* (23 TexReg 8947).

Issued in Austin, Texas, on November 30, 1998.

TRD–9818023
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 18, 1998
Expiration date: February 16, 1999
For further information, please call: (512) 463–7981

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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 text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 13. CULTURAL RESOURCES

Part VI. Texas Emancipation Juneteenth Cultural and Historical Commission

Chapter 81. General Rules for Operation of the Commission

13 TAC §§81.1, 81.3, 81.5, 81.7

The Texas Emancipation Juneteenth Cultural and Historical Commissionproposes new Sections 81.1, 81.3, 81.5, and 81.7, concerning Definitions, Administration, Finance, and Advisory Committee. These sections are necessary to provide for the basic operational procedures of the Commission. The statute creating the Commission gives the Commission broad authority to provide by rule for the operations and administration of the Commission.

Section 81.1 provides definitions of the terms "Chairman," "Commission," and "Juneteenth." Section 81.3 of the proposal provides for the selection of a chairman of the Commission at the first meeting of each state fiscal year by election from among the members. The chairman may select a vice chairman to serve in the absence of the chairman and may appoint committees of the Commission. The proposal assigns certain duties to the chairman of the Commission, including the authority to call meetings and set their agenda, approve expenditures and hire staff. The Commission may delegate duties to staff by resolution, except the authority to approve rules. The Commission may contract as necessary to carry out its duties. Section 81.5 provides for the budget and finances of the Commission. The Commission must annually approve a budget for the Commission and biennially approve a legislative appropriation request. The Commission may accept donation of money or real or personal property for the purposes of the Commission. Section 81.7 of the proposal provides that the Commission may select an advisory committee to advise the Commission on matters pertaining to the construction, dedication, and maintenance of a monument for the commemoration of Juneteenth. The advisory committee will be selected through nominations from the members of the Commission and a final vote by the Commission. Members of the advisory committee may be reimbursed on the same basis as member of the Commission.

Representative Al Edwards, Chairman of the Texas Emancipation Juneteenth Cultural and Historical Commission, has determined that for the first five year period the rule is in effect there should be no fiscal implications for state or local government as a result of enforcing or administering the proposed rules.

Representative Edwards also has determined that for each year of the first five year period the rules are in effect, the public benefit anticipated as a result of administering the proposed rules will be more efficient conduct of the business of the Commission. There should be no effect on small businesses. There should also be no fiscal implications for private citizens.

Comments on the proposal may be submitted to Representative Al Edwards, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768. Comments will be accepted for 30 days after publication in the Texas Register. Any questions regarding these proposed amendments should be directed to Representative Al Edwards, at the same address, or by calling (512) 463–0518.

The amendments are proposed under the Texas Government Code, Title 4, Subtitle D, Chapter 448. The Texas Emancipation Juneteenth Cultural and Historical Commission was established by the Legislature in 1997 through the adoption of House Bill 1216, and is effective September 1, 1997. Section 448.031, Texas Government Code, provides the Commission with the authority to promulgate rules to effect the purposes of this chapter. No other statutes, articles, or codes are affected by these rules.

§81.1. Definitions.

The following words and terms shall have the meanings assigned to them unless the context clearly requires otherwise:

(1) Chairman means the presiding officer elected by the Commission in accordance with Texas Government Code §448.008.

(2) Commission means the Texas Emancipation Juneteenth Cultural and Historical Commission.

(3) Juneteenth means the anniversary of the event of emancipation from slavery that occurred in Texas on June 19, 1865.

§81.3. Administration.

(a) Governance.

(1) Chairman.

(A) At the first regularly called meeting of each state fiscal year, the commission shall elect a chairman from among the members of the commission.

(B) Either appointed or ex officio members shall be eligible to serve as the chairman.

(C) In the event of the resignation or ineligibility of the chairman to serve, the commission shall select a new chairman at any regular or called meeting of the commission.

(2) Vice Chairman

(A) The chairman may appoint a vice chairman to fulfill the duties of the chairman in the absence of the chairman.

(B) The vice chairman serves at the pleasure of the chairman.

(3) Committees.

(A) The chairman may appoint committees from among the members of the commission as may be determined necessary to conduct the business of the commission.

(B) Members of committees serve at the pleasure of the chairman.

(b) Duties of the Chairman.

(1) The chairman shall preside over the meetings of the commission.

(2) The chairman shall call regular and special meetings of the commission as necessary to conduct the business of the commission, including:

(A) posting such notice of meetings as is legally required;

(B) notifying all members of the commission of the time, date, and place of meetings; and

(C) determining the agenda of such meetings.

(3) The chairman shall approve expenditures by the commission, including vouchers, contracts, and other expenditures authorized by law or rule of the commission.

(4) The chairman may hire such staff as is necessary to conduct the business of the commission, at a salary within the appropriate classification as established by the legislature.

(5) The commission, by resolution, may delegate appropriate duties to the staff, but such staff may not be delegated the duty to adopt rules.

(c) Conduct of Business.

(1) The commission may conduct business at any regularly scheduled or specially called meeting of the commission.

(2) A quorum for the conduct of business shall be a majority of the voting members of the commission.

(3) When a quorum is present, action may be taken by a vote of a majority of the voting members present.

(4) Nonvoting (ex officio) members of the commission may participate in all business of the commission, except they shall not vote.

(5) The commission shall allow the general public an opportunity to comment on the business of the commission at each regularly scheduled meeting of the commission. The time allotted to members of the public may be limited to a time not less than three minutes per person if necessary to expedite the business of the commission.

(d) Contracting.

(1) The commission may perform through contract with another governmental body or a private person or entity, any function it is otherwise allowed to perform.

(2) The chairman may approve and sign any contract with a total value not to exceed $10,000.

(3) The commission by vote shall approve any contract with a total value in excess of $10,000.

(4) The commission, through the General Services Commission, may lease or contract for space for staff offices in a state-owned or other appropriate building.

§81.5. Finances.

(a) Budget and Appropriations.

(1) The commission shall annually approve an operating budget for the operations of the commission.

(2) The commission shall, on the schedule established by the legislature or such other times as shall be appropriate, approve a legislative appropriations request and forward the request to the appropriate agencies.

(3) The chairman shall monitor the expenditure of the funds of the commission and shall report to the commission at each regularly scheduled meeting on the accounts of the commission.

(b) Donations.

(1) The commission may solicit and accept donations of money to fund the operations of the commission, the advisory committee to the commission, the monuments to be created by the commission, the celebration of Juneteenth, or for any other purpose of the commission. The commission may solicit and accept donations of personal property or real property to be used by the commission in any manner within the authority of the commission.

(2) The commission may contract with another state agency or with a private entity to raise funds.

(3) Donations of money shall be deposited into the Emancipation Juneteenth Cultural and Historical Commission Account in the state treasury.

(4) Donations of personal property shall be held for safekeeping as may be provided by the commission.

(5) Donations of real property may be used for the placement of monuments to commemorate the Juneteenth holiday, or, if not used for that purpose, may be disposed of in accordance with state law and any conditions imposed by the grantor. The proceeds from any sale shall be deposited into the Emancipation Juneteenth Cultural and Historical Commission Account in the state treasury.

§81.7. Advisory Committee.

(a) The commission shall appoint an advisory committee to advise the commission on all matters relating to the construction, dedication, and maintenance of the monuments, markers or other commemorations, including:

(1) site selection;

(2) fund raising from public and private sources;

(3) establishing a schedule for the design, construction, and dedication of the monuments;

(4) procedures for soliciting designs for the monuments;

(5) selecting the final design of the monuments

(6) procedures for selecting a contractor to construct the monuments; and

(7) reviewing and monitoring the design and construction process.

(b) The advisory committee shall be composed of not less than 10 nor more than 15 members. Members of the advisory committee should have exhibited an interest in the cultural and historical heritage of Texas, be knowledgeable of architecture or construction of monuments, be acknowledged community leaders, or bring other important qualities to the advisory committee.

(c) Selection of the advisory committee.

(1) Each member of the Commission may nominate not more than two persons to serve on the advisory committee.

(2) Persons nominated by the members of the commission may provide information concerning their qualifications and concerning their availability and willingness to serve to the commission.

(3) The commission shall select the members of the advisory committee by vote at a meeting of the commission.

(d) Members of the advisory committee may be reimbursed for their expenses for service on the advisory committee on the same basis as members of the commission.

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

Filed with the Office of the Secretary of State, on November 23, 1998.

TRD-9817914
Representative Al Edwards
Chairman
Texas Emancipation Juneteenth Cultural and Historical Commission
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 463–0518

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Subchapter H. Telephone

16 TAC §23.92

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

The Public Utility Commission of Texas (commission) proposes the repeal of §23.92, relating to Expanded Interconnection. Project Number 17709 has been assigned to this proceeding. The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. As a result of this reorganization, §23.92 will be duplicative of proposed new §26.271 of this title (relating to Expanded Interconnection) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

Martin Wilson, assistant general counsel, Office of Regulatory Affairs, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Wilson has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be the elimination of a duplicative rule. There will be no effect on small businesses as a result of repealing this section. There is no anticipated economic cost to persons as a result of repealing this section.

Mr. Wilson also has determined that the proposed repeal should not affect a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed repeal (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. All comments should refer to Project Number 17709, repeal of §23.92.

This repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002.

§23.92. Expanded Interconnection.

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

Filed with the Office of the Secretary of State, on November 23, 1998.

TRD-9817931
Rhonda Dempsey
Rules Coordinator

Public Utility Commission of Texas
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 936–7308

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Chapter 25. Substantive Rules Applicable to Electric Service Providers

Subchapter B. Customer Service and Protection

16 TAC §§25.21-25.26, 25.28-25.31

The Public Utility Commission of Texas (commission) proposes new §25.21, relating to General Provisions of Customer Service and Protection, new §25.22, relating to Request for Service, new §25.23, relating to Refusal of Service, new §25.24, relating to Credit Requirements and Deposits, new §25.25, relating to Issuance and Format of Bills, new §25.26, relating to Spanish Language Requirements, new §25.28, relating to Bill Payment and Adjustments, new §25.29, relating to Disconnection of Service, new §25.30, relating to Complaints, and new §25.31, relating to Information to Applicants and Customers. Project Number 19513 has been assigned to this proceeding.

The proposed new §25.21 presents specific definitions for "customers", "applicants", and "days", and establishes that the purpose of the customer service and protection rules is to set a minimum standard for the provision of utility service. Proposed new §25.21 also provides that utilities may adopt less restrictive standards for differing groups of customers as long as they do not discriminate against protected groups. Proposed new §25.22 will replace §23.44(c)(3) and (d) of this title (relating to New Construction). Proposed new §25.23 will replace §23.42 of this title (relating to Refusal of Service). Proposed new §25.24 will replace §23.43 of this title (relating to Applicant and Customer Deposit). Proposed new §25.25 will replace §23.45(a), (b), (c), and (e) of this title (relating to Billing). Proposed new §25.26 will replace §23.6 of this title (relating to Spanish Language Requirements). Proposed new §25.28 will replace §23.45 of this title (relating to Billing). Proposed new §25.29 will replace §23.46 of this title (relating to Discontinuance of Service). Proposed new §25.30 will replace §23.41(c) of this title (relating to Customer Relations). Proposed new §25.31 will replace §23.41(a) and (b) of this title (relating to Customer Relations).

The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 25 has been established for all commission substantive rules applicable to electric service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

The customer service rules are those most often used by the public to determine their rights in dealing with the utilities that provide electric services. It is essential that they be clear and easy to read and understand, so the proposed rules have been reorganized and redrafted to make them more accessible to customers and providers alike. The proposed rules are rearranged so that they appear in the order we would expect customers to need as they apply for and receive service. Significant, but non-substantive, wording changes were made to make them more readable. As a result, the rules have been reduced from 63 to 33 pages and from 11,345 words to 8,294.

The proposed new sections reflect different section, subsection, and paragraph designations due to the reorganization of the rules. Citations to the Public Utility Regulatory Act have been updated to conform to the Texas Utilities Code throughout the sections and citations to other sections of the commission's rules have been updated to reflect the new section designations. Some text has been proposed for deletion as unnecessary in the new sections, as a result of making the new chapters industry specific; or because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. The *Texas Register* will publish these sections as all new text.

Other changes specific to each section:

Proposed new §25.24(a)(1)(B) establishes a 12 month period of time for application of credit histories to former spouses, replacing the former wording that credit histories be applied for "a reasonable period of time."

Proposed new §25.24(d) reduces the time given to customers to pay an additional deposit from 15 days to ten days once a written notice of termination and request for additional deposit has been provided to the customer. This reduction in the number of days is consistent with other provisions in the subchapter.

Proposed new §25.24(m) clarifies and streamlines the intent of the commission by requiring that all customer deposit records be provided to the buyer or the seller at the time of sale, as opposed to being filed with the commission.

Proposed new §25.25(c)(2) requires that the due date of the bill be included on the bill.

Proposed new §25.26 is being streamlined to eliminate the details specifying how written plans are to be filed and approved by the commission. As proposed, the new rule reflects that all utilities at this point have filed and received approval on their plans.

Proposed new §25.28(a) reflects a clarification that the due date shown on the bill is to be the actual due date, not one that is potentially on a holiday or weekend.

Proposed new §25.28(b) allows charging a one-time penalty not to exceed 5.0% on delinquent residential bills.

Proposed new §25.28(c)(3)(C) has been changed to reflect that interest on overbillings shall be compounded *monthly* at the annual rate.

Proposed new §25.28(d)(4) has been changed to reflect that interest on underbillings resulting from theft of service shall be compounded *monthly* at the annual rate.

Proposed new §25.28(e)(2) has been changed to clarify that service cannot be disconnected until the commission has completed its informal complaint resolution process and notified the customer of its determination. This change eliminates the 60 day threshold and allows for both shorter and longer resolution times, as may be appropriate.

Proposed new §25.28(i) contains many substantive changes to our current deferred payment plan rule to reflect our experience with this summer's emergency heat rule. Specific changes include the deletion of the "reasonable" standard and the imposition of a fixed, minimum term of three billing cycles for deferred payment plans. Other changes include requiring the plan to be in writing and signed by the customer, and the plan shall state the term of the plan, the total amount to be paid under the plan, and the specific amount of each installment. Additional language has been added to clarify that if the plan is not signed, and the customer is otherwise making payments, then the customer can be immediately disconnected, if notice was previously provided to the customer on the outstanding amount.

Proposed new §25.29(c) has been changed to reflect the change in §25.28(e)(2) regarding disconnections for disputed bills, which states that service may not be disconnected for failure to pay disputed charges until either the utility or the commission has completed its complaint investigation and notified the customer of its determination.

Proposed new §25.29(f) has been changed to clarify that a condition must be life- threatening, as opposed to the current wording that a person be seriously ill.

Proposed new §25.29(g) has been changed to clarify that customers must obtain energy assistance funds from a designated governmental agency to be protected from disconnection.

Proposed new §25.29(h) was modified to more clearly define when a heat emergency exists. This change stems from the difficulty encountered this summer with the wording of our current rule.

Finally, disconnection moratoriums for nonpayment of charges related to combat war zones have been eliminated. These moratoriums were instituted during the Gulf War and should have had an ending date, much like this summer's emergency heat rule. The commission believes that if the need arises again, these types of customer protection rules can be readopted as short-term emergency rules.

Proposed new §25.30(a) places a new requirement upon utilities to respond to customer complaints placed directly with them within 15 days. This ensures that customers who complain directly to their utility have their complaints investigated and responded to in a timely fashion. Further, proposed new §25.30 has been clarified to focus on the commission's informal complaint resolution process. As a result, the requirement to file a complaint with a municipal authority (if applicable) has been deleted, since it is generally related to the filing of a formal, docketed complaint.

Finally, proposed new §25.30(c) reduces the time a utility has to investigate and provide a response to complaints forwarded to it by the commission from 30 days to 15 days. With the commission's efforts to improve the processing of complaints, and the turnaround times in use by other states, this reduction in time should not place an inordinate burden on the utilities.

Proposed new §25.31 requires the addition of two new items for inclusion in the information packet as set out in subsection (c), and provides that utilities must provide a toll-free (or equivalent) number where customers can report service problems and make billing inquiries.

Ms. Trish Dolese, assistant director, Office of Customer Protection, has determined that for each year of the first five-year period the proposed sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Dolese has also determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcing the sections will be a standard level of service that each utility is required to provide its customers, a minimum set of rights that each customer is entitled to as a utility customer in Texas, and an easy to read guide for utility customers to exercise their rights as a utility customer in Texas. There will be no effect on small businesses as a result of enforcing this section. There may be an anticipated economic cost to persons who are required to comply with the sections as proposed. The costs incurred are likely to vary from utility to utility, and are difficult to ascertain.

Ms. Dolese has further determined that for each year of the first five years the proposed sections are in effect, there will be no impact on employment in the geographic area affected by implementing the requirements of the sections.

Comments on the proposed sections (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed sections. The commission will consider the costs and benefits in deciding whether to adopt the sections. The commission also invites specific comments regarding the Section 167 requirement as to whether the reason for adopting or readopting the rules continues to exist. All comments should refer to Project Number 19513.

The Public Utility Commission of Texas will conduct a public hearing in rulemaking Project Number 19513, *Electric Utility Customer Service Rules,* pursuant to the Administrative Procedure Act, Texas Government Code, §2001.029, at 9:00 a.m. on Tuesday, February 9, 1999, in the commissioners' hearing room located on the seventh floor of the William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701. If you have any questions, contact Trish Dolese, Office of Customer Protection, at (512) 936-7125.

These new sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, §37.151 and §38.001 which require the commission to regulate electric utility operations and services; §37.151 which grants the commission authority to require an electric utility to make service available within a reasonable time after receipt of

a bona fide request for service; §36.051 which authorizes the commission to establish and regulate rates of an electric utility; §37.051 and §38.151 which require certificate holders to provide continuous and adequate service in their service areas; §38.001 which requires electric utilities to furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable; §38.002 which grants the commission authority to adopt just and reasonable standards, classifications, rules, or practices an electric utility must follow, to adopt adequate and reasonable standards for measuring a condition, including quantity and quality relating to the furnishing of service, to adopt reasonable rules for examining, testing and measuring a service, and adopt or approve reasonable rules, specifications, and standards to ensure the accuracy of equipment, including meters and instruments, used to measure service.

Cross Index to Statutes: Public Utility Regulatory Act §§14.002, 36.051, 37.051, 37.151, 38.001, and 38.151.

§25.21. General Provisions of Customer Service and Protection Rules.

(a) Application. Unless the context clearly indicates otherwise, in this subchapter the term "electric utility" applies to all investor-owned and cooperative electric utilities that provide retail electric utility service in Texas. It does not apply to municipal utilities.

(b) Purpose. The purpose of the rules in this subchapter is to establish minimum customer service standards that electric utilities must follow in providing electric service to the public. Nothing in these rules should be interpreted as preventing an electric utility from adopting less restrictive policies for all customers or for differing groups of customers, as long as those policies do not discriminate based on race, color, sex, nationality, religion, or marital status.

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

(1) Applicant - A person who applies for service for the first time or reapplies at a different location after discontinuance of service.

(2) Customer - A person who is currently receiving service from an electric utility in the person's own name or the name of the person's spouse.

(3) Days - Unless the context clearly indicates otherwise, in this subchapter the term "days" shall refer to calendar days.

§25.22. Request for Service.

Every electric utility shall initiate service to each qualified applicant for service within its certificated area in accordance with this section.

(1) Applications for new electric service not involving line extensions or construction of new facilities shall be filled within seven working days after the applicant has complied with all applicable state and municipal regulations.

(2) An electric utility may require a residential applicant for service to satisfactorily establish credit in accordance with §25.24 of this title (relating to Credit Requirements and Deposits), but such establishment of credit shall not relieve the customer from complying with rules for prompt payment of bills.

(3) Requests for new residential service requiring construction, such as line extensions, shall be completed within 90 days if the applicant has met the credit requirements as provided for in §25.24 of this title and made satisfactory payment arrangements for construction charges. For this section, facility placement which requires a permit for a road or railroad crossing will be considered a line extension.

(4) If facilities must be constructed, then the electric utility shall contact the customer within ten working days of receipt of the application and give the customer an estimated completion date and an estimated cost for all charges to be incurred by the customer.

(5) The electric utility shall explain any construction cost options such as rebates to the customer, sharing of construction costs between the electric utility and the customer, or sharing of costs between the customer and other applicants following the assessment of necessary line work.

(6) Unless the delay is beyond the reasonable control of the electric utility, a delay of more than 90 days shall constitute failure to serve. The commission may revoke or amend an electric utility's certificate of convenience and necessity (or other certificate) for such failures to serve, or grant the certificate to another electric utility to serve the applicant, and the electric utility may be subject to administrative penalties pursuant to the Public Utility Regulatory Act §15.023 and §15.024.

(7) If an electric utility must provide a line extension to or on the customer's premises and the utility will require that customer to pay a Contribution in Aid to Construction (CIAC), a prepayment, or sign a contract with a term of one year or longer, the electric utility shall provide the customer with information about on- site renewable energy and distributed generation technology alternatives. The information shall comply with guidelines established by the commission, and shall be provided to the customer at the time the estimate of the CIAC or prepayment is given to the customer. If no CIAC or prepayment is required, the information shall be given to the customer before a contract is signed. The information is intended to educate the customer on alternate options that are available.

(8) As part of their initial contact, electric utility employees shall inform applicants of their right to file a complaint with the commission pursuant to §25.30 of this title (relating to complaints).

§25.23. Refusal of Service.

(a) Acceptable reasons to refuse service. An electric utility may refuse to serve an applicant for any of the reasons identified below.

(1) Applicant's facilities inadequate. The applicant's installation or equipment is known to be hazardous or of such character that satisfactory service cannot be given, or the applicant's facilities do not comply with all applicable state and municipal regulations.

(2) Violation of an electric utility's tariffs. The applicant fails to comply with the electric utility's tariffs pertaining to operation of nonstandard equipment or unauthorized attachments which interfere with the service of others. The electric utility shall provide the applicant notice of such refusal and afford the applicant a reasonable amount of time to comply with the utility's tariffs.

(3) Failure to pay guarantee. The applicant has acted as a guarantor for another customer and failed to pay the guaranteed amount, where such guarantee was made in writing to the electric utility and was a condition of service.

(4) Intent to deceive. The applicant is applying for service at a location where another customer has received, or continues to receive, service and the applicant fails to pay the bill of that other customer in an attempt to help the other customer avoid or evade payment of an electric utility bill. An applicant may request a

supervisory review as specified in §25.30 of this title (relating to Complaints) if the electric utility determines that the applicant intends to deceive the electric utility and refuses to provide service.

(5) For indebtedness. The applicant owes a debt to any electric utility for the same kind of service as that being requested. In the event an applicant's indebtedness is in dispute, the applicant shall be provided service upon paying a deposit pursuant to §25.24 of this title (relating to Credit Requirements and Deposits).

(6) Refusal to pay a deposit. Refusing to pay a deposit if applicant is required to do so under §25.24 of this title.

(b) Applicant's recourse. If an electric utility has refused to serve an applicant under the provisions of this section, the electric utility must inform the applicant of the reason for its refusal and that the applicant may file a complaint with the commission as described in §25.30 of this title.

(c) Insufficient grounds for refusal to serve. The following are not sufficient cause for refusal of service to a present customer or applicant:

(1) delinquency in payment for service by a previous occupant of the premises to be served;

(2) failure to pay for merchandise or charges for non-regulated services, including but not limited to insurance policies, Internet service, or home security services, purchased from the electric utility; and

(3) failure to pay a bill that corrects a previous electric utility underbilling that occurred more than six months before the date of application.

§25.24. Credit Requirements and Deposits.

(a) Credit requirements for permanent residential applicants.

(1) An electric utility may require a residential applicant for service to establish and maintain satisfactory credit as a condition of providing service.

(A) Establishment of credit shall not relieve any customer from complying with the electric utility's requirements for prompt payment of bills.

(B) The credit worthiness of spouses established in the 12 months prior to their divorce, will be equally applied to both spouses for 12 months immediately after their divorce.

(2) A residential applicant can demonstrate satisfactory credit using any one of the criteria listed in subparagraphs (A) through (C) of this paragraph.

(A) The residential applicant:

(i) has been a customer of any electric utility for the same kind of service within the last two years;

(ii) is not delinquent in payment of any such electric utility service account;

(iii) during the last 12 consecutive months of service was not late in paying a bill for electric service;

(iv) did not have service disconnected for nonpayment; and

(v) obtains a letter of credit history from the previous electric utility.

(B) The residential applicant demonstrates a satisfactory credit rating by appropriate means, including, but not limited to, the production of:

(i) generally acceptable credit cards;

(ii) letters of credit reference;

(iii) the names of credit references which may be quickly and inexpensively contacted by the electric utility; or

(iv) ownership of substantial equity that is easily liquidated.

(C) The residential applicant is 65 years of age or older and does not have an outstanding account balance incurred within the last two years with the electric utility or another electric utility for the same type of utility service.

(3) If satisfactory credit cannot be demonstrated by the residential applicant using these criteria, the applicant may be required to pay a deposit pursuant to subsection (c) of this section.

(b) Credit requirements for non-residential applicants. For non-residential service, if an applicant's credit has not been demonstrated satisfactorily to the electric utility, the applicant may be required to pay a deposit.

(c) Initial deposits.

(1) A residential applicant or customer who is required to pay an initial deposit may provide the electric utility with a written letter of guarantee pursuant to subsection (j) of this section, instead of paying a cash deposit.

(2) An initial deposit may not be required from an existing customer unless the customer was late paying a bill more than once during the last 12 months of service or had service disconnected for nonpayment. The customer may be required to pay this initial deposit within ten days after issuance of a written termination notice that requests such deposit. Instead of an initial deposit, the customer may pay the current bill by the due date of the bill, provided the customer has not exercised this option in the previous 12 months.

(d) Additional deposits.

(1) An additional deposit may be required if:

(A) the customer's actual average billings for the last 12 months are at least twice the amount of the original estimated annual billings; and

(B) a disconnect notice has been issued for the account within the previous 12 months.

(2) A new deposit may be required to be paid within ten days after the electric utility has issued a written disconnect notice and requested the additional deposit.

(3) Instead of an additional deposit, the customer may pay the current bill by the due date of the bill, provided the customer has not exercised this option in the previous 12 months.

(4) The electric utility may disconnect service if the additional deposit is not paid within ten days of the request, provided a written disconnect notice has been issued to the customer. A disconnect notice may be issued concurrently with either the written request for the additional deposit or current usage payment.

(e) Deposits for temporary or seasonal service and for weekend residences. The electric utility may require a deposit sufficient to reasonably protect it against the assumed risk for temporary or seasonal service or weekend residences, as long as the

policy is applied in a uniform and nondiscriminatory manner. These deposits shall be returned according to guidelines set out in subsection (k) of this section.

(f) Amount of deposit. The total of all deposits shall not exceed an amount equivalent to one- sixth of the estimated annual billing.

(g) Interest on deposits. Each electric utility requiring deposits shall pay interest on these deposits at an annual rate at least equal to that set by the commission on December first of each year, pursuant to Texas Utilities Code §183.003 (Vernon 1998) (relating to Rate of Interest). If a deposit is refunded within 30 days of deposit, no interest payment is required. If the electric utility keeps the deposit more than 30 days, payment of interest shall be made retroactive to the date of deposit.

(1) Payment of the interest to the customer shall be made annually, if requested by the customer, or at the time the deposit is returned or credited to the customer's account.

(2) The deposit shall cease to draw interest on the date it is returned or credited to the customer's account.

(h) Notification to customers. When a deposit is required, the electric utility shall provide the applicants or customers written information about deposits. This information shall contain:

(1) the circumstances under which an electric utility may require an initial or additional deposit;

(2) how a deposit is calculated;

(3) the amount of interest paid on a deposit and how this interest is calculated; and

(4) the time frame and requirement for return of the deposit to the customer.

(i) Records of deposits.

(1) The electric utility shall keep records to show:

(A) the name and address of each depositor;

(B) the amount and date of the deposit; and

(C) each transaction concerning the deposit.

(2) The electric utility shall issue a receipt of deposit to each applicant paying a deposit and shall provide means for a depositor to establish a claim if the receipt is lost.

(3) A record of each unclaimed deposit must be maintained for at least four years.

(4) The electric utility shall make a reasonable effort to return unclaimed deposits and if the electric utility is unable to do so, unclaimed deposits shall escheat to the comptroller's office.

(j) Guarantees of residential customer accounts.

(1) A guarantee agreement between an electric utility and a guarantor must be in writing and shall be for no more than the amount of deposit the electric utility would require on the applicant's account pursuant to subsection (f) of this section. The amount of the guarantee shall be clearly indicated in the signed agreement.

(2) The guarantee shall be voided and returned to the guarantor according to the provisions of subsection (k) of this section.

(3) Upon default by a residential customer, the guarantor of that customer's account shall be responsible for the unpaid balance of the account only up to the amount agreed to in the written agreement.

(4) The electric utility shall provide written notification to the guarantor of the customer's default, the amount owed by the guarantor, and the due date for the amount owed.

(A) The electric utility shall allow the guarantor 16 days from the date of notification to pay the amount owed on the defaulted account. If the sixteenth day falls on a holiday or weekend, the due date shall be the next work day.

(B) The electric utility may transfer the amount owed on the defaulted account to the guarantor's own service bill provided the guaranteed amount owed is identified separately on the bill as required by §25.25(c)(10) of this title (relating to the Issuance and Format of Bills).

(5) The electric utility may disconnect service to the guarantor for nonpayment of the guaranteed amount only if the disconnection was included in the terms of the written agreement, and only after proper notice as described by paragraph (4) of this subsection, and §25.29(b)(5) of this title (relating to Disconnection of Service).

(k) Refunding deposits and voiding letters of guarantee.

(1) If service is not connected, or is disconnected, the electric utility shall promptly void and return to the guarantor all letters of guarantee on the account or provide written documentation that the contract has been voided, or refund the customer's deposit plus accrued interest on the balance, if any, in excess of the unpaid bills for service furnished. A transfer of service from one premise to another within the service area of the electric utility is not a disconnection, and no additional deposit may be required.

(2) When the customer has paid bills for service for 12 consecutive residential billings or for 24 consecutive non-residential billings without having service disconnected for nonpayment of a bill and without having more than two occasions in which a bill was delinquent, and when the customer is not delinquent in the payment of the current bills, the electric utility shall promptly refund the deposit plus accrued interest to the customer, or void and return the guarantee or provide written documentation that the contract has been voided. If the customer does not meet these refund criteria, the deposit and interest may be retained.

(l) Re-establishment of credit. Every applicant who previously has been a customer of the electric utility and whose service has been disconnected for nonpayment of bills or theft of service (meter tampering or bypassing of meter) shall be required, before service is reconnected, to pay all amounts due the utility or execute a deferred payment agreement, if offered, and reestablish credit. The electric utility must prove the amount of utility service received but not paid for and the reasonableness of any charges for the unpaid service, and any other charges required to be paid as a condition of service restoration.

(m) Upon sale or transfer of utility or company. Upon the sale or transfer of any electric utility or any of its operating units, the seller shall provide the buyer all required deposit records.

§25.25. Issuance and Format of Bills.

(a) Frequency of bills. The electric utility shall issue bills monthly, unless otherwise authorized by the commission, or unless service is provided for a period less than one month. Bills shall be issued as promptly as possible after reading meters. Bills shall list all charges due including outstanding amounts in the same customer

class the electric utility transferred from a customer's delinquent account(s).

(b) Billing information. The electric utility shall provide free to the customer a breakdown of charges at the time the service is initially installed or modified and upon request by the customer, as well as, the applicable rate schedule.

(c) Bill content. Each customer's bill shall include all the following information:

(1) if the meter is read by the electric utility, the date and reading of the meter at the beginning and at the end of the billing period;

(2) the due date of the bill, as specified in §25.28 of this title (relating to Bill Payment and Adjustments);

(3) the number and kind of units metered;

(4) the applicable rate schedule and title or code should be provided upon request by the customer;

(5) a notice of the customer's right to receive a copy of the applicable rate schedule;

(6) the total amount due for services provided, including any transferred amounts pursuant to subsection (f) of this section;

(7) the total amount due after addition of any penalty for nonpayment within a designated period. The terms "gross bill" and "net bill" or other similar terms implying the granting of a discount for prompt payment shall be used only when an actual discount for prompt payment is granted. The terms shall not be used when a penalty is added for nonpayment within a designated period;

(8) the word "Estimated" prominently displayed to identify an estimated bill;

(9) any conversions from meter reading units to billing units, or any other calculations to determine billing units from recording or other devices, or any other factors used in determining the bill; and

(10) any amount owed under a written guarantee contract provided the guarantor was previously notified in writing by the electric utility as required by §25.24 of this title (relating to Credit Requirements and Deposits).

(d) Estimated bills.

(1) An electric utility may submit estimated bills for good cause provided that an actual meter reading is taken no less than every third month. In months where the meter reader is unable to gain access to the premises to read the meter on regular meter reading trips, or in months where meters are not read, the electric utility must provide the customer with a postcard and request the customer to read the meter and return the card to the electric utility. If the postcard is not received by the electric utility in time for billing, the electric utility may estimate the meter reading and issue a bill.

(2) If an electric utility has a program in which customers read their own meters and report their usage monthly and no meter reading is submitted by a customer the electric utility may estimate the customer's usage and issue a bill. However, the electric utility must read the meter if the customer does not submit readings for three consecutive months so that a corrected bill may be issued.

(e) Record retention. Each electric utility shall maintain monthly billing records for each account for at least two years after the date the bill is mailed. The billing records shall contain sufficient data to reconstruct a customer's billing for a given month. Copies of a customer's billing records may be obtained by that customer on request.

(f) Transfer of delinquent balances. An electric utility may include outstanding amounts in the same customer class the electric utility has chosen to transfer from a customer's prior delinquent account(s). The transferred account(s) cannot include continuation of service from one address to another within the same electric utility service area.

§25.26. Spanish Language Requirements.

(a) Application. This section applies to each electric utility that serves a county where the number of Spanish speaking persons as defined in §25.5 of this title (relating to Definitions) is 2000 or more according to the 1990 U.S. Census of Population (Bureau of Census, U.S. Department of Commerce, Census of Population and Housing, 1990).

(b) Written plan.

(1) Requirement. Each electric utility shall have a commission approved written plan that describes how a Spanish-speaking person is provided, or will be provided, reasonable access, on a system-wide basis, to the utility's programs and services.

(2) Minimum elements. The written plan required by paragraph (1) of this subsection shall include a clear and concise statement as to how the electric utility is doing or will do the following, for each part of its entire system:

(A) inform Spanish-speaking applicants how they can get information contained in the utility's plan in the Spanish language;

(B) inform Spanish-speaking applicants and customers of their rights contained in this subchapter;

(C) inform Spanish-speaking applicants and customers of new services, discount programs, and promotions;

(D) allow Spanish-speaking persons to request repair service;

(E) ballot Spanish-speaking customers for services requiring a vote by ballot;

(F) allow access by Spanish-speaking customers to services specified in subchapter F of this chapter (relating to Metering);

(G) inform all of its service and repair representatives of the requirements of the plan.

§25.28. Bill Payment and Adjustments.

(a) Bill due date. The bill provided to the customer shall include the payment due date which shall not be less than 16 days after issuance. A payment for electric utility service is delinquent if not received at the electric utility or at the electric utility's authorized payment agency by the close of business on the due date. If the sixteenth day falls on a holiday or weekend, then the due date shall be the next work day after the sixteenth day.

(b) Penalty on delinquent bills for retail service. A one-time penalty not to exceed 5.0% may be charged on each delinquent bill. The 5.0% penalty on delinquent bills may not be applied to any balance to which the penalty has already been applied. An electric utility providing any service to the state of Texas shall not assess a fee, penalty, interest, or other charge to the state for delinquent payment of a bill.

(c) Overbilling. If charges are found to be higher than authorized in the utility's tariffs, then the customer's bill shall be corrected.

(1) The correction shall be made for the entire period of the overbilling.

(2) If the utility corrects the overbilling within three billing cycles of the error, it need not pay interest on the amount of the correction.

(3) If the utility does not correct the overcharge within three billing cycles of the error, it shall pay interest on the amount of the overcharge at the rate set by the commission each year.

(A) The interest rate shall be based on an average of prime commercial paper rates for the previous 12 months.

(B) Interest on overcharges that are not adjusted by the electric utility within three billing cycles of the bill in error shall accrue from the date of payment or from the date of the bill in error.

(C) All interest shall be compounded monthly at the annual rate.

(D) Interest shall not apply to leveling plans or estimated billings.

(d) Underbilling. If charges are found to be lower than authorized by the utility's tariffs, or if the electric utility failed to bill the customer for service, then the customer's bill may be corrected.

(1) The electric utility may backbill the customer for the amount that was underbilled. The backbilling shall not collect charges that extend more than six months from the date the error was discovered unless the underbilling is a result of theft of service by the customer.

(2) The electric utility may disconnect service if the customer fails to pay underbilled charges arising from theft of service as defined in §25.126 of this title (relating to Meter Tampering).

(3) If the underbilling is $50 or more, the electric utility shall offer the customer a deferred payment plan option for the same length of time as that of the underbilling. A deferred payment plan need not be offered to a customer whose underpayment is due to theft of service.

(4) The utility shall not charge interest on underbill amounts unless such amounts are found to be the result of theft of service (meter tampering, bypass, or diversion) by the customer, as defined in §25.126 of this title. Interest on underbilled amounts shall be compounded monthly at the annual rate and shall accrue from the day the customer is found to have first stolen (tampered, bypassed or diverted) the service.

(e) Disputed bills.

(1) If there is a dispute between a customer and an electric utility about a bill for service, the electric utility shall investigate and report the results to the customer. If the dispute is not resolved, the electric utility shall inform the customer of the complaint procedures of the commission pursuant to §25.30 of this title (relating to Complaints).

(2) A customer's service shall not be disconnected for nonpayment of the disputed portion of the bill until the commission completes its informal complaint resolution process and informs the customer of its determination.

(f) Notice of alternate payment programs or payment assistance. When a customer contacts an electric utility and indicates inability to pay a bill or a need for assistance with the bill payment, the electric utility shall inform the customer of all alternative payment and payment assistance programs available from the electric utility, such as deferred payment plans, disconnection moratoriums for the ill, or energy assistance programs, as applicable, and of the eligibility requirements and procedure for applying for each.

(g) Level and average payment plans. Electric utilities with seasonal usage patterns or seasonal demands are encouraged to offer a level or average payment plan.

(1) The payment plan may use one of the following methods:

(A) A level payment plan allowing residential customers to pay one-twelfth of that customer's estimated annual consumption at the appropriate customer class rates each month, with provisions for annual adjustments as may be determined based on actual electric use.

(B) An average payment plan allowing residential customers to pay one-twelfth of the sum of that customer's current month's consumption plus the previous 11 month's consumption (or an estimate, for a new customer) at the appropriate customer class rates each month, plus a portion of any unbilled balance.

(2) If a customer for electric utility service does not fulfill the terms and obligations of a level payment agreement or an average payment plan, the electric utility shall have the right to disconnect service to that customer pursuant to §25.29 of this title (relating to Disconnection of Service).

(3) The electric utility may require a customer deposit from all customers entering into level payment plans or average payment plans pursuant to the requirements §25.24 of this title (relating to Credit Requirements and Deposits). The electric utility shall pay interest on the deposit and may retain the deposit for the duration of the level or average payment plan.

(h) Payment arrangements. A payment arrangement is any agreement between the electric utility and a customer that allows a customer to pay the outstanding bill after its due date, but before the due date of the next bill. If the utility issued a disconnect notice before the payment arrangement was made, that disconnection should be suspended until after the due date for the payment arrangement. If a customer does not fulfill the terms of the payment arrangements, the electric utility may disconnect service after the later of the due date for the payment arrangement or the disconnection date indicated in the disconnect notice, pursuant to §25.29 of this title without issuing an additional disconnect notice.

(i) Deferred payment plans. A deferred payment plan is any written arrangement between the electric utility and a customer that allows a customer to pay an outstanding bill in installments that extend beyond the due date of the next bill. A deferred payment plan may be established in person or by telephone, however, a deferred payment plan made by telephone shall be put in writing.

(1) The electric utility shall offer a deferred payment plan to any residential customer, including a guarantor of any residential customer, who has expressed an inability to pay all of the bill, if that customer has not been issued more than two disconnect notices during the preceding 12 months.

(2) Every deferred payment plan shall provide that the delinquent amount may be paid in equal installments lasting at least three billing cycles.

(3) When a customer has received service from its current electric utility for less than three months, the electric utility is not required to offer a deferred payment plan if the customer lacks:

(A) sufficient credit; or

(B) a satisfactory history of payment for service from a previous utility.

(4) Every deferred payment plan offered by an electric utility:

(A) shall state, immediately preceding the space provided for the customer's signature and in boldface 14 point print, the following: "If you are not satisfied with this contract, or if agreement was made by telephone and you feel this contract does not reflect your understanding of that agreement, contact the electric utility immediately and do not sign this contract. If you do not contact the electric utility, or if you sign this agreement, you may give up your right to dispute the amount due under the agreement except for the electric utility's failure or refusal to comply with the terms of this agreement." In addition, where the customer and the electric utility representative or agent meet in person, the electric utility representative shall read the preceding statement to the customer. The electric utility shall provide information to the customer in English and Spanish as necessary to make the preceding boldface language understandable to the customer;

(B) may include a 5.0% penalty for late payment but shall not include a finance charge;

(C) shall state the term covered by the plan;

(D) shall state the total amount to be paid under the plan;

(E) shall state the specific amount of each installment;

(F) shall allow the electric utility to disconnect service if the customer does not fulfill the terms of the deferred payment plan, and shall state the terms for disconnection;

(G) shall not refuse a customer participation in such a program on the basis of race, color, sex, nationality, religion, or marital status;

(H) shall be signed by the customer and a copy of the signed plan must be provided to the customer. If the agreement is made over the telephone, then the electric utility shall send a copy of the plan to the customer for signature and return to the electric utility; and

(I) shall allow either the customer or the electric utility to initiate a renegotiation of the deferred payment plan, if the customer's economic or financial circumstances change substantially during the time of the deferred payment plan.

(5) An electric utility may disconnect a customer who does not meet the terms of a deferred payment plan. However, the electric utility may not disconnect service until a disconnect notice has been issued to the customer indicating the customer has not met the terms of the plan. The notice and disconnection shall conform with the disconnection rules in §25.29 of this title. The electric utility may renegotiate the deferred payment plan agreement prior to disconnection. If the customer did not sign the deferred payment plan, and is not otherwise fulfilling the terms of the plan, and the customer was previously provided a disconnect notice for the outstanding amount, no additional disconnect notice shall be required.

§25.29. Disconnection of Service.

(a) Disconnection policy. If an electric utility chooses to disconnect a customer, it must follow the procedures below, or modify them in ways that are more generous to the customer in terms of the cause for disconnection and timing of the disconnect notice and the period between notice and disconnection. Each electric utility is encouraged to develop specific policies for disconnection that treat its customers with dignity and respect its customers' or members' circumstances and payment history, and to implement those policies in ways that are consistent and non-discriminatory. Disconnection is an option offered by the commission, not a requirement placed upon the utility by the commission.

(b) Disconnection with notice. Electric utility service may be disconnected after proper notice for any of these reasons:

(1) failure to pay a bill for electric utility service or make deferred payment arrangements by the date of disconnection;

(2) failure to comply with the terms of a deferred payment agreement;

(3) violation of the electric utility's rules on using service in a manner which interferes with the service of others or the operation of nonstandard equipment, if a reasonable attempt has been made to notify the customer and the customer is provided with a reasonable opportunity to remedy the situation;

(4) failure to pay a deposit as required by §25.24 of this title (relating to Credit Requirements and Deposits); or

(5) failure of the guarantor to pay the amount guaranteed, when the electric utility has a written agreement, signed by the guarantor, that allows for disconnection of the guarantor's service.

(c) Disconnection without prior notice. Electric utility service may be disconnected without prior notice for any of the following reasons:

(1) where a known dangerous condition exists for as long as the condition exists. Where reasonable, given the nature of the hazardous condition, the electric utility shall post a notice of disconnection and the reason for the disconnection at the place of common entry or upon the front door of each affected residential unit as soon as possible after service has been disconnected;

(2) where service is connected without authority by a person who has not made application for service;

(3) where service was reconnected without authority after termination for nonpayment; or

(4) where there are instances of tampering with the electric utility company's equipment or evidence of theft of service.

(d) Disconnection prohibited. Electric utility service may not be disconnected for any of the following reasons:

(1) delinquency in payment for electric utility service by a previous occupant of the premises;

(2) failure to pay for merchandise, or charges for non-electric utility service, including but not limited to insurance policies or home security systems, provided by the electric utility;

(3) failure to pay for a different type or class of electric utility service unless charges for such service were included on that account's bill at the time service was initiated;

(4) failure to pay charges arising from an underbilling, except theft of service, more than six months prior to the current billing;

(5) Failure to pay disputed charges until a determination as to the accuracy of the charges has been made by the electric utility or the commission and the customer has been notified of this determination;

(6) failure to pay charges arising from an underbilling due to any faulty metering, unless the meter has been tampered with or unless such underbilling charges are due under §25.126 of this title (relating to Meter Tampering); or

(7) failure to pay an estimated bill other than a bill rendered pursuant to an approved meter-reading plan, unless the electric utility is unable to read the meter due to circumstances beyond its control.

(e) Disconnection on holidays or weekends. Unless a dangerous condition exists or the customer requests disconnection, service shall not be disconnected on holidays or weekends, or the day immediately preceding a holiday or weekend, unless utility personnel are available on those days to take payments and reconnect service.

(f) Disconnection due to electric utility abandonment. No electric utility may abandon a customer or a certified service area without written notice to its customers and all similar neighboring utilities, and approval from the commission.

(g) Disconnection of ill and disabled. No electric utility may disconnect service at a permanent, individually metered dwelling unit of a delinquent customer when that customer establishes that disconnection of service will threaten the life of some person residing at that residence.

(1) Each time a customer seeks to avoid disconnection of service under this subsection, the customer must accomplish all of the following by the stated date of disconnection:

(A) have the person's attending physician (for purposes of this subsection, the term "physician" shall mean any public health official, including medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar public health official) call or contact the electric utility by the due date of the bill;

(B) have the person's attending physician submit a written statement to the electric utility; and

(C) enter into a deferred payment plan.

(2) The prohibition against service termination provided by this subsection shall last 63 days from the issuance of the electric utility bill or a shorter period agreed upon by the electric utility and the customer or physician.

(h) Disconnection of energy assistance grantees. No electric utility may terminate service to a delinquent residential customer for a billing period in which the customer has been granted energy assistance funds if the granting agency or its designee has notified the electric utility before the date of disconnection of approval of an award sufficient to pay the bill or a deferred payment plan payment.

(i) Disconnection during extreme weather. An electric utility cannot disconnect a customer until it ascertains that no life-threatening condition exists in the customer's household or would exist because of disconnection on a day when the previous day's:

(1) highest temperature did not exceed 32 degrees Fahrenheit, and the temperature is predicted to remain at or below that level for the next 24 hours, according to the nearest National Weather Service (NWS) reports; or

(2) the heat index exceeded 104 degrees Fahrenheit and the heat index is predicted to reach or exceed that level in the next 24 hours, according to the nearest National Weather Service (NWS) reports.

(j) Disconnection of master-metered apartments. When a bill for electric utility services is delinquent for a master-metered apartment complex:

(1) The electric utility shall send a notice to the customer as required in subsection (k) of this section. At the time such notice is issued, the electric utility shall also inform the customer that notice of possible disconnection will be provided to the tenants of the apartment complex in six days if payment is not made before that time.

(2) At least six days after providing notice to the customer and at least four days before disconnecting, the electric utility shall post a minimum of five notices in conspicuous areas in the corridors or other public places of the apartment complex. Language in the notice shall be in large type and shall read: "Notice to residents of (name and address of apartment complex): Electric utility service to this apartment complex is scheduled for disconnection on (date), because (reason for disconnection)."

(k) Disconnect notices. Any disconnect notice issued by an electric utility to a customer must:

(1) not be issued before the first day after the bill is due, to enable the utility to determine whether the payment was received by the due date. Payment of the delinquent bill at the electric utility's authorized payment agency is considered payment to the electric utility.

(2) be a separate mailing or hand delivered with a stated date of disconnection with the words "disconnect notice" or similar language prominently displayed.

(3) have a disconnect date that is not a holiday or weekend day not less than ten days after the notice is issued.

(4) be in English and Spanish.

(5) include a statement notifying the customer that if they need assistance paying their bill by the due date, or are ill and unable to pay their bill, they may be able to make some alternate payment arrangement, establish deferred payment plan, or possibly secure payment assistance. The notice shall also advise the customer to contact the local office of the electric utility for more information.

§25.30. Complaints.

(a) Complaints to the electric utility. A customer or applicant may file a complaint in person, by letter, or by telephone with the electric utility. The electric utility shall promptly investigate and advise the complainant of the results within 15 days.

(b) Supervisory review by the electric utility. Any electric utility customer or applicant has the right to request a supervisory review if they are not satisfied with the electric utility's response to their complaint.

(1) If the electric utility is unable to provide a supervisory review immediately following the customer's request, then arrangements for the review shall be made for the earliest possible date.

(2) Service shall not be disconnected before completion of the review. If the customer chooses not to participate in a review, or to make arrangements for a review within five days after requesting it, then the company may disconnect service, providing proper notice has been issued under the disconnect procedures in §25.29 of this title (relating to Disconnection of Service).

(3) The results of the supervisory review must be provided in writing to the customer within ten days of the review, if requested.

(4) Customers who are dissatisfied with the electric utility's supervisory review must be informed of their right to file a complaint with the commission.

(c) Complaints to the commission.

(1) If the complainant is dissatisfied with the results of the electric utility's complaint investigation or supervisory review, the electric utility must advise the complainant of the commission's informal complaint resolution process. The electric utility must also provide the customer the following contact information for the commission: Public Utility Commission of Texas, Office of Customer Protection, P.O. Box 13326, Austin, Texas 78711-3326, (512)936-7120 or in Texas (toll-free) 1-888-782-8477, fax (512)936-7003, e-mail address: customer@puc.state.tx.us, internet address: www.puc.state.tx.us, TTY (512)936- 7136, and Relay Texas (toll-free) 1-800-735-2989.

(2) The electric utility shall investigate all complaints and advise the commission in writing of the results of the investigation within 15 days after the complaint is forwarded to the electric utility.

(3) The electric utility shall keep a record for two years after determination by the commission of all complaints forwarded to it by the commission. This record shall show the name and address of the complainant, the date, nature and adjustment or disposition of the complaint. Protests regarding commission- approved rates or charges which require no further action by the electric utility need not be recorded.

§25.31. Information to Applicants and Customers.

(a) Information to applicants. Each electric utility shall provide this information to applicants when they request new service or transfer existing service to a new location:

(1) the electric utility's lowest-priced alternatives available at the applicant's location. The information shall begin with the lowest-priced alternative and give full consideration to applicable equipment options and installation charges;

(2) the electric utility's alternate rate schedules and options, including time of use rates and renewable energy tariffs if available; and

(3) the customer information packet described in subsection (c) of this section.

(b) Information regarding rate schedules and classifications and electric utility facilities.

(1) Each utility shall notify customers affected by a change in rates or schedule of classifications.

(2) Each electric utility shall maintain copies of its rate schedules and rules in each office where applications are received.

(3) Each electric utility shall post a notice in a conspicuous place in each office where applications are received, informing the public that copies of the rate schedules and rules relating to the service of the electric utility, as filed with the commission, are available for inspection.

(4) Each electric utility shall maintain a current set of maps showing the physical locations of its facilities that includes an accurate description of all facilities (substations, transmission lines, etc.). These maps shall be kept by the electric utility in a central location and will be available for commission inspection during normal working hours. Each business office or service center shall have available up-to-date maps, plans, or records of its immediate service area, with other information as may be necessary to enable the electric utility to advise applicants, and others entitled to the information, about the facilities serving that locality.

(c) Customer information packets.

(1) The information packet shall be entitled "Your Rights as a Customer". Cooperatives may use the title, "Your Rights as a Member".

(2) The information packet, containing the information required by this section, shall be mailed to all customers on at least every other year at no charge to the customer.

(3) The information shall be written in plain, non-technical language.

(4) The information shall be provided in English and Spanish; however, an electric utility is exempt from the Spanish language requirement if 10% or fewer of its customers are exclusively Spanish-speaking. If the utility is exempt from the Spanish language requirement, it shall notify all customers through a statement in both English and Spanish, in the packet, that the information is available in Spanish from the electric utility, both by mail and at the electric utility's offices.

(5) The information packet shall include all of the following:

(A) the customer's right to information concerning rates and services and the customer's right to inspect or obtain at reproduction cost a copy of the applicable tariffs and service rules;

(B) the electric utility's credit requirements and the circumstances under which a deposit or an additional deposit may be required, how a deposit is calculated, the interest paid on deposits, and the time frame and requirement for return of the deposit to the customer;

(C) the time allowed to pay outstanding bills;

(D) grounds for disconnection of service;

(E) the steps that must be taken before an electric utility may disconnect service;

(F) the steps for resolving billing disputes with the electric utility and how disputes affect disconnection of service;

(G) information on alternative payment plans offered by the electric utility, including, but not limited to, deferred payment plans, level billing programs, average payment plans, as well as a statement that a customer has the right to request these alternative payment plans;

(H) the steps necessary to have service reconnected after involuntary disconnection;

(I) the customer's right to file a complaint with the electric utility, the procedures for a supervisory review, and right to file a complaint with the commission, regarding any matter concerning the electric utility's service. The commission's address and telephone number shall accompany this information;

(J) the hours, addresses, and telephone numbers of electric utility offices and any authorized locations where bills may be paid and information may be obtained;

(K) a toll-free telephone number or the equivalent (such as WATS or collect calls) where customers may call to report service problems or make billing inquiries;

(L) a statement that electric utility services are provided without discrimination as to a customer's race, color, sex, na-

tionality, religion, or marital status, and a summary of the company's policy regarding the provision of credit history based upon the credit history of a customer's former spouse;

(M) notice of any special services such as readers or notices in Braille, if available, and the telephone number of the text telephone for the deaf at the commission;

(N) how customers with physical disabilities, and those who care for them, can identify themselves to the electric utility so that special action can be taken to inform these persons of their rights;

(O) the customer's right to have his or her meter tested without charge under §25.124 of this title (relating to Meter Testing);

(P) the customer's right to be instructed by the utility how to read his or her meter, if applicable;

(Q) a statement that funded financial assistance may be available for persons in need of assistance with their electric utility payments, and that additional information may be obtained by contacting the local office of the electric utility, Texas Department of Housing and Community Affairs, or the Public Utility Commission of Texas. The main office telephone number (toll-free number, if available) and address for each state agency shall also be provided; and

(R) information on the electric utility's critical load customer registry; the criteria for the customer to be recognized as a critical load customer; the benefits of being on the registry in an emergency situation; and how to sign up as a critical load customer.

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

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818011
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 936-7308

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Chapter 26. Substantive Rules Applicable to Telecommunications Service Providers

Subchapter B. Customer Service and Protections

16 TAC §§26.21-26.31

The Public Utility Commission of Texas (commission) proposes new §26.21, relating to General Provisions of Customer Service and Protection, new §26.22, relating to Request for Service, new §26.23, relating to Refusal of Service, new §26.24, relating to Credit Requirements and Deposits, new §26.25, relating to Issuance and Format of Bills, new §26.26, relating to Spanish Language Requirements, new §26.27, relating to Bill Payment and Adjustments, new §26.28, relating to Suspension or Disconnection of Service, new §26.29, relating to Prepaid Local Telephone Service, new §26.30, relating to Complaints, and new §26.31, relating to Information to Applicants and Customers. Project Number 19517 has been assigned to this proceeding.

The proposed new §26.21 presents specific definitions for "customers", "applicants", and "days", and establishes that the purpose of the customer service and protection rules is to set a minimum standard for the provision of utility service. Proposed new §26.21 also provides that utilities may adopt less restrictive standards for differing groups of customers as long as they do not discriminate against protected groups. Proposed new §26.22 will replace §23.44(d) of this title (relating to New Construction). Proposed new §26.23 will replace §23.42 of this title (relating to Refusal of Service). Proposed new §26.24 will replace §23.43 of this title (relating to Applicant and Customer Deposit). Proposed new §26.25 will replace §23.45(a), (b), (c), and (e) of this title (relating to Billing). Proposed new §26.26 will replace §23.6 of this title (relating to Spanish Language Requirements). Proposed new §26.27 will replace §23.45(k), (l), (n), (o), and (p) of this title (relating to Billing). Proposed new §26.28 will replace §23.46 of this title (relating to Discontinuance of Service). Proposed new §26.29 will replace §23.40 of this title (relating to Prepaid Local Telephone Service). Proposed new §26.30 will replace §23.41(c) of this title (relating to Customer Relations). Proposed new §26.31 will replace §23.41(a) and (b) of this title (relating to Customer Relations).

The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

The customer service rules are those most often used by the public to determine their rights in dealing with the utilities that provide telecommunications services. It is essential that they be clear and easy to read and understand, so the proposed rules have been reorganized and redrafted to make them more accessible to customers and providers alike. The proposed rules are rearranged so that they appear in the order we would expect customers to need as they apply for and receive service. Significant, but non-substantive, wording changes were made to make them more readable. As a result, the rules have been reduced from 73 to 36 pages and from 15,548 words to 9,933.

The proposed new sections reflect different section, subsection, and paragraph designations due to the reorganization of the rules. Citations to the Public Utility Regulatory Act have been updated to conform to the Texas Utilities Code throughout the sections and citations to other sections of the commission's

rules have been updated to reflect the new section designations. Some text has been proposed for deletion as unnecessary in the new sections, as a result of making the new chapters industry specific; or because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. The *Texas Register* will publish these sections as all new text.

Other changes specific to each section:

Proposed new §26.23(c)(2) clarifies the intent of the commission that a customer's service cannot be refused for debts owed except those for local telephone service, and that the provision of local telephone service should not relate in any way to a customer's need, desire, or ability to pay for long distance telephone service.

A change in proposed new §26.24(a)(1)(B) establishes a 12 month period of time for application of credit histories to former spouses, replacing the former wording that credit histories be applied for "a reasonable period of time." Proposed new §26.24(d) reduces the time allowed for customers to pay an additional deposit from 15 to ten days once a written notice of termination and request for additional deposit has been provided to the customer. This reduction in the number of days is consistent with other provisions in the subchapter. Proposed new §26.24(m) clarifies the intent of the commission and reduces paperwork by requiring that all customer deposit records be provided to the buyer or the seller at the time of sale, instead of being filed with the commission.

Proposed new §26.25(b)(4)(B) requires that the due date of the bill be included on the bill.

Parties are specifically requested to comment on whether the commission should change the provisions of §26.25(c)(4) to enable more customer-friendly presentations of telephone bills and to provide suggested changes.

Proposed new §26.26 eliminates specifications about how plans are to be filed and approved by the commission because all utilities have already filed and received approval of their Spanish language plans.

Proposed new §26.27(a) clarifies that the due date shown on the bill must be the true due date, not one that potentially could fall on a holiday or weekend. Proposed new §26.27(b) allows charging a one-time penalty not to exceed 5.0% on delinquent residential bills. Proposed new §26.27(d)(3)(C) has been changed to reflect that interest on overbillings shall be compounded *monthly* at the annual rate. Proposed new §26.27(e)(4) has been changed to reflect that interest on underbillings resulting from theft of service shall be compounded *monthly* at the annual rate.

Proposed new §26.27(f)(2) clarifies the requirement that service cannot be disconnected until the commission has completed its informal complaint resolution process and notified the customer of its determination. This eliminates the 60-day threshold and allows for both shorter and longer resolution times, as may be appropriate. Proposed new §26.27(f)(3) clarifies the requirement that local telephone service cannot be suspended or disconnected for nonpayment of disputed charges not related to local telephone service. This safeguards a customer's local telephone service from disconnection if long distance charges are disputed by the customer.

Proposed new §26.27(i) contains substantive changes to the commission's current deferred payment plan rule to reflect the commission's experience with this summer's emergency heat rule. Specific changes include the deletion of the "reasonable" standard and the imposition of a fixed, minimum term of three billing cycles for deferred payment plans. Other changes include requiring that the plan be in writing and signed by the customer, and that it shall state the term of the plan, the total amount to be paid under the plan, and the specific amount of each installment. Additional language has been incorporated to specify that if the plan is not signed, and the customer is not otherwise making payments, the customer can be immediately disconnected, if notice was previously provided to the customer on the outstanding amount.

Proposed new §26.28 includes the term "suspension" and provides a possible mechanism by which service can be involuntarily interrupted by the utility. Further, because local telephone service is a necessity to many persons with health problems, a disconnection exemption has been added for the ill and disabled which mirrors the exemption for customers of electric utilities. Finally, disconnection moratoriums for nonpayment of charges related to combat war zones have been eliminated. These moratoriums were instituted during the Gulf War and should have had an ending date, much like this summer's emergency heat rule. The commission believes that if the need arises again, these types of customer protection rules can be readopted as short-term emergency rules.

Proposed new §26.30(a) places a new requirement upon utilities to respond to customer complaints placed directly with them within 15 days. This ensures that customers who complain directly to their utility have their complaints investigated and responded to in a timely fashion. Further, proposed new §26.30 has been clarified to focus on the commission's informal complaint resolution process. As a result, the requirement to file a complaint with a municipal authority (if applicable) has been deleted, since it is generally related to the filing of a formal, docketed complaint. Customers are advised of their right to file a formal docketed complaint during the informal complaint resolution process. Finally, proposed new §26.30(c) reduces from 30 to 15 days the time a utility has to investigate and provide a response to complaints forwarded to it by the commission. This takes into account electronic communication methods which permit faster turnaround. Because the commission has improved complaint processing and other states now require faster turnaround times, this change should not be unduly burdensome to utilities.

Proposed new §26.31 adds two items to the customer information packet required in subsection (c), and provides that utilities must provide a toll-free (or equivalent) number where customers can report service problems, make billing inquiries, and ascertain the availability of prepaid local telephone service.

Ms. Trish Dolese, deputy chief, Office of Customer Protection, has determined that for each year of the first five-year period the proposed sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Dolese has also determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcing the sections will be a standard level of service that each utility is required to provide its customers, a minimum set of rights that each customer

is entitled to as a utility customer in Texas, and an easy to read guide for utility customers to exercise their rights as a utility customer in Texas. There will be no effect on small businesses as a result of enforcing this section. There may be an anticipated economic cost to persons who are required to comply with the sections as proposed. The costs incurred are likely to vary from utility to utility, and are difficult to ascertain.

Ms. Dolese has further determined that for each year of the first five years the proposed sections are in effect, there will be no impact on employment in the geographic area affected by implementing the requirements of the sections.

Comments on the proposed sections (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed sections. The commission will consider the costs and benefits in deciding whether to adopt the sections. The commission also invites specific comments regarding the Section 167 requirement as to whether the reason for adopting or readopting the rules continues to exist. All comments should refer to Project Number 19517.

The Public Utility Commission of Texas will conduct a public hearing in rulemaking Project Number 19517, *Telephone Customer Service Rules,* pursuant to the Administrative Procedure Act, Texas Government Code, §2001.029, at 9:00 a.m. on Tuesday, February 9, 1999, in the commissioners' hearing room located on the seventh floor of the William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701. If you have any questions, contact Trish Dolese, Office of Customer Protection, at (512) 936-7125.

These new sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, §52.002, §52.102, and §52.152 which require the commission to regulate telecommunication utility operations and services; §52.109 which grants the commission authority to require a telecommunications utility to make service available within a reasonable time after receipt of a bona fide request for service; §53.001 which authorizes the commission to establish and regulate rates of a telecommunication utility; §54.101 and §54.151 which require certificate holders to provide continuous and adequate service in their service areas; §55.001 which requires telecommunication utilities to furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable; §55.002 which grants the commission authority to adopt just and reasonable standards, classifications, rules, or practices a telecommunications utility must follow, to adopt adequate and reasonable standards for measuring a condition, including quantity and quality relating to the furnishing of service, to adopt reasonable rules for examining, testing and measuring a service, and adopt or approve reasonable rules, specifications, and standards to ensure the accuracy of equipment, including meters and instruments, used to measure service.

Cross Index to Statutes: Public Utility Regulatory Act §§14.002, 52.002, 52.102, 52.152, 52.109, 53.001, 54.101, 54.151, 55.001, and 55.002

§26.21. General Provisions of Customer Service and Protection Rules.

(a) Application. Unless the context clearly indicates otherwise, in this subchapter the terms "utility" and "public utility," as they relate to telecommunications utilities, shall refer to dominant carriers.

(b) Purpose. The purpose of the rules in this subchapter is to establish minimum customer service standards that utilities must follow in providing telephone service to the public. Nothing in these rules should be interpreted as preventing a utility from adopting less restrictive policies for all customers or for differing groups of customers, as long as those policies do not discriminate based on race, nationality, color, religion, sex, or marital status.

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

(1) Applicant - A person who applies for service for the first time or reapplies at a different location after discontinuance of service.

(2) Customer - A person who is currently receiving service from a utility in the person's own name or the name of the person's spouse.

(3) Days - Unless the context clearly indicates otherwise, in this subchapter the term "days" shall refer to calendar days.

§26.22. Request for Service.

Every public utility shall initiate service to each qualified applicant for service within its certificated area in accordance with this section.

(1) Applications for new telephone service shall be filled in accordance with §23.61(e) of this title (relating to Telephone Utilities) as it concerns service objectives and surveillance levels.

(2) A utility may require a residential applicant for service to satisfactorily establish credit in accordance with §26.24 of this title (relating to Credit Requirements and Deposits), but such establishment of credit shall not relieve the customer from complying with rules for prompt payment of bills.

(3) Requests for new residential telephone service requiring construction, such as line extensions shall be completed within 90 days if the applicant has met the credit requirements as provided for in §26.24 of this title and made satisfactory payment arrangements for construction charges. A telephone "drop" wire less than 300 feet in length which connects the utility distribution facility to the customer premises is not considered a line extension. For this section, facility placement which requires a permit for a road or railroad crossing will be considered a line extension.

(4) If facilities must be constructed, then the utility shall contact the customer within ten working days of receipt of the application and give the customer an estimated completion date and an estimated cost for all charges to be incurred by the customer.

(5) Following the assessment of necessary line work, the utility shall explain any construction cost options such as rebates to the customer, sharing of construction costs between the utility and the customer, or sharing of costs between the customer and other applicants.

(6) Unless the delay is beyond the reasonable control of the utility, a delay of more than 90 days shall constitute failure to serve under the Public Utility Regulatory Act 54.008. The commission may revoke or amend a utility's certificate of convenience and necessity (or other certificate) for such failures to service, or grant the certificate to another utility to serve the applicant, and the utility may be subject

to administrative penalties pursuant to the Public Utility Regulatory Act §15.023 and §15.024.

(7) As part of the initial contact, utility employees shall inform applicants of the their right to file a complaint with the commission in accordance with §26.30 of this title (relating to Complaints).

§26.23. Refusal of Service.

(a) Acceptable reasons to refuse service. A utility may refuse to serve an applicant for any of the reasons identified below.

(1) Applicant's facilities inadequate. The applicant's installation or equipment is known to be hazardous or of such character that satisfactory service cannot be given, or the applicant's facilities do not comply with all applicable state and municipal regulations.

(2) Violation of utility's tariffs. The applicant fails to comply with the utility's tariffs pertaining to operation of nonstandard equipment or unauthorized attachments which interfere with the service of others. The utility shall provide the applicant notice of such refusal and afford the applicant a reasonable amount of time to comply with the utility's tariffs.

(3) Failure to pay guarantee. The applicant has acted as a guarantor for another customer and fails to pay the guaranteed amount, where such guarantee was made in writing to the utility and was a condition of service.

(4) Intent to deceive. The applicant is applying for service at a location where another customer has received, or continues to receive, service and the applicant failed to pay the bill of that other customer in an attempt to help the other customer avoid or evade payment of a utility bill. An applicant may request a supervisory review as specified in §26.30 of this title (relating to Complaints) if the utility determines that the applicant intends to deceive the utility and refuses to provide service.

(5) For indebtedness. Except as provided in §26.29 of this title (relating to Prepaid Local Telephone Service), service may be refused, if the applicant owes a debt to any utility for the same kind of service as that applied for. In the event an applicant's indebtedness is in dispute, the applicant shall be provided service upon complying with the deposit requirement in §26.24 of this title (relating to Credit Requirements and Deposits).

(6) Refusal to pay a deposit. Refusing to pay a deposit if applicant is required to do so under §26.24 of this title.

(b) Applicant's recourse.

(1) If a utility has refused to serve an applicant under the provisions of this section, the utility must inform the applicant of the reason for its refusal and that the applicant may file a complaint with the commission as described in §26.30 of this title.

(2) Additionally, the utility will inform applicants eligible for Prepaid Local Telephone Service, under §26.29 of this title, that this service is available if they are not eligible for standard local telephone service.

(c) Insufficient grounds for refusal to serve. The following are not sufficient cause for refusal of service to a present customer or applicant:

(1) delinquency in payment for service by a previous occupant of the premises to be served;

(2) failure to pay for anything other than local telephone service; and

(3) failure to pay a bill that corrects a previous utility underbilling that occurred more than six months before the date of application.

§26.24. Credit Requirements and Deposits.

(a) Credit requirements for permanent residential applicants.

(1) A utility may require a residential applicant for service to establish and maintain satisfactory credit as a condition of providing service.

(A) Establishment of credit shall not relieve any customer from complying with the utility's requirements for prompt payment of bills.

(B) The credit worthiness of spouses established in the 12 months prior to their divorce, will be equally applied to both spouses for 12 months immediately after their divorce.

(2) A residential applicant can demonstrate satisfactory credit using any one of the criteria listed in subparagraphs (A) – (C) of this paragraph.

(A) The residential applicant:

(i) has been a customer of any utility for the same kind of service within the last two years;

(ii) is not delinquent in payment of any utility service account;

(iii) during the last 12 consecutive months of service was not late in paying a bill;

(iv) did not have service disconnected for nonpayment; and

(v) obtains a letter of credit history from their previous utility.

(B) The residential applicant demonstrates a satisfactory credit rating by appropriate means, including, but not limited to, the production of:

(i) generally acceptable credit cards;

(ii) letters of credit reference;

(iii) the names of credit references which may be quickly and inexpensively contacted by the utility; or

(iv) ownership of substantial equity that is easily liquidated.

(C) The residential applicant is 65 years of age or older and does not have an outstanding account balance incurred within the last two years with the utility or another utility for the same type of utility service.

(3) If satisfactory credit cannot be demonstrated by the residential applicant using these criteria, the applicant may be required to pay a deposit pursuant to subsection (c) of this section.

(b) Credit requirements for non-residential applicants. For non-residential service, if an applicant's credit for service has not been demonstrated satisfactorily to the utility, the applicant may be required to pay a deposit.

(c) Initial deposits.

(1) A residential applicant or customer who is required to pay an initial deposit may provide the utility with a written letter of guarantee pursuant to subsection (j) of this section, instead of paying a cash deposit.

(2) An initial deposit may not be required from an existing customer unless the customer was late paying a bill more than once during the last 12 months of service or had service disconnected for nonpayment. The customer may be required to pay this initial deposit within ten days after issuance of a written disconnect notice that requests such deposit. Instead of an initial deposit, the customer may pay the current bill by the due date of the bill, provided the customer has not exercised this option in the previous 12 months.

(d) Additional deposits.

(1) Residential Customers. During the first 12 months of service, the utility may request an additional deposit from a residential customer before issuing a bill.

(A) to require the deposit, the customer's actual usage must:

(i) be three times estimated usage (or three times average usage of most recent three bills);

(ii) exceed $150; and

(iii) exceed 150% of the security held.

(B) An additional deposit may also be required if:

(i) actual billings of a residential customer are at least twice the amount of the estimated billings after two billing periods; and

(ii) a suspension or disconnect notice has been issued for the account within the previous 12-months.

(C) A new deposit may be required to be paid within ten days after issuing written notice of suspension or disconnection and requested additional deposit

(D) Instead of additional deposit, the customer may elect to pay the current bill by the due date of the bill, provided the customer has not exercised this option in the previous 12 months.

(E) The utility may disconnect service if the additional deposit or the current usage payment is not paid within ten days of request provided a written suspension or disconnect notice has been issued to the customer. A suspension or disconnect notice may be issued concurrently with the written request for the additional deposit or current usage payment.

(2) Non-residential customers. An additional deposit may be requested from a non- residential customer.

(A) To require such a deposit, the actual billings of the non-residential customer must be at least twice the amount of the estimated billings, and a suspension or disconnect notice must have been issued on a bill within the previous 12-months.

(B) The new deposit may be required to be made within ten days after issuing a written suspension or disconnect notice and a requested for an additional deposit.

(e) Deposits for temporary or seasonal service and for weekend residences. The utility may require a deposit sufficient to reasonably protect it against the assumed risk for temporary or seasonal service or weekend residence, as long as the policy is applied in a uniform and nondiscriminatory manner. These deposits shall be returned according to guidelines set out in subsection (k) of this section.

(f) Amount of deposit.

(1) The total of all deposits shall not exceed an amount equivalent to one-sixth of the estimated annual billing, except as provided in §26.29 of this title (relating to Prepaid Local Telephone Service). The estimated annual billings shall include only those charges related to local telephone service.

(2) In determining the amount of any deposit permitted by this section, no revenue from estimated telephone directory advertising may be used.

(g) Interest on deposits. Each utility requiring deposits shall pay interest on these deposits at an annual rate at least equal to that set by the commission on December first of each year, pursuant to Texas Utilities Code Annotated §183.003 (Vernon 1998) (relating to Rate of Interest). If a deposit is refunded within 30 days of receipt, no interest payment is required. If the utility keeps the deposit more than 30 days, payment of interest shall be made retroactive to the date of deposit.

(1) Payment of the interest to the customer shall be made annually, if requested by the customer, or at the time the deposit is returned or credited to the customer's account.

(2) The deposit shall cease to draw interest on the date it is returned or credited to the customer's account.

(h) Notification to customers. When a deposit is required, the utility shall provide applicants or customers written information about deposits. This information shall contain:

(1) the circumstances under which a utility may require a deposit;

(2) how a deposit is calculated;

(3) the amount of interest paid on a deposit and how this interest is calculated; and

(4) the time frame and requirement for return of the deposit to the customer.

(i) Records of deposits.

(1) The utility shall keep records to show:

(A) the name and address of each depositor;

(B) the amount and date of the deposit; and

(C) each transaction concerning the deposit.

(2) The utility shall issue a receipt of deposit to each applicant paying a deposit and shall provide means for a depositor to establish claim if the receipt is lost.

(3) A record of each unclaimed deposit must be maintained for at least four years.

(4) The utility shall make a reasonable effort to return an unclaimed deposit and escheat to the Office of Comptroller of Public Accounts if unable to do so.

(j) Guarantees of residential customer accounts.

(1) A guarantee between a utility and a guarantor must be in writing and shall be for no more than the amount of deposit the utility would require on the applicant's account pursuant to subsection (f) of this section. The amount of the guarantee shall be clearly indicated in the signed agreement.

(2) The guarantee shall be voided and returned to the guarantor according to the provisions of subsection (k) of this section.

(3) Upon default by a residential customer, the guarantor of that customer's account shall be responsible for the unpaid balance

of the account only up to the amount agreed to in the written agreement.

(4) The utility shall provide written notification to the guarantor of the customer's default, the amount owed by the guarantor, and the due date for the amount owed.

(A) The utility shall allow the guarantor 16 days from the date of notification to pay the amount owed on the defaulted account. If the sixteenth day falls on a holiday or weekend, the due date shall be the next work day.

(B) The utility may transfer the amount owed on the defaulted account to the guarantor's own service bill provided the guaranteed amount owed is identified separately on the bill as required by §26.25(c)(4)(I) of this title (relating to the Issuance and Format of Bills).

(5) The utility may disconnect service to the guarantor for nonpayment of the guaranteed amount only if the disconnection was included in the terms of the written agreement, and only after proper notice as described by paragraph (4) of this subsection, and §26.28(b)(5) of this title (relating to Suspension or Disconnection of Service).

(k) Refunding deposits and voiding letters of guarantee.

(1) If service is not connected, or is disconnected, the utility shall promptly void and return to the guarantor all letters of guarantee on the account or provide written documentation that the contract has been voided, or refund the customer's deposit plus accrued interest on the balance, if any, in excess of the unpaid bills for service furnished. A transfer of service from one premise to another within the service area of the utility is not a disconnection, and no additional deposit may be required.

(2) When the customer has paid bills for service for 12 consecutive residential billings or for 24 consecutive non-residential billings without having service disconnected for nonpayment of a bill and without paying bills late more than twice, and when the customer is not delinquent in the payment of the current bills, the utility shall promptly refund the deposit plus accrued interest to the customer, or void and return the guarantee, or provide written documentation that the contract has been voided. If the customer does not meet these refund criteria, the deposit and interest may be retained.

(l) Re-establishment of credit. Every applicant who previously has been a customer of the utility and whose service has been disconnected for nonpayment of bills or theft of service shall be required, before service is reconnected, to pay all amounts due the utility or execute a deferred payment agreement, if offered, and reestablish credit. The utility must prove the amount of utility service received but not paid for and the reasonableness of any charges for the unpaid service, and any other charges required as a condition of service restoration.

(m) Upon sale or transfer of utility or company. Upon the sale or transfer of any utility or any of its operating units, the seller shall provide the buyer with all deposit records.

§26.25. Issuance and Format of Bills.

(a) Frequency of bills. The utility shall issue bills monthly unless otherwise authorized by the commission, or unless service is for less than one month. Bills shall list all charges due including outstanding amounts in the same customer class the utility transferred from a customer's prior delinquent account(s).

(b) Billing information.

(1) The utility shall provide free to the customer, a breakdown of local service charges at the time the service is initially installed or modified and upon request.

(2) Customer billing sent through the United States mail shall be sent in an envelope.

(c) Bill content.

(1) A notice shall be included on the customer's bill of the customer's right to a free annual or monthly itemized breakdown of all local service charges. The itemized breakdown may be on the customer's bill or a separate mailing.

(2) If the utility is billing the customer for services from another service provider, the bill shall identify the service provider and provide a toll-free number to call to resolve disputes or obtain information.

(3) The information required by this paragraph shall be arranged to allow the customer to readily compute the bill with the information provided.

(4) Each customer's bill shall include but not be limited to:

(A) the billing period;

(B) the due date of the bill, as specified in §26.27 of this title (relating to Bill Payment and Adjustments);

(C) each applicable telephone number and/or account number;

(D) the total amount due for features and services;

(E) the subtotal for basic local telecommunications service;

(i) if expanded calling scope services are mandatory, charges for the service shall be included in the subtotal for basic local service; or

(ii) if expanded calling scope service is optional, the incremental charges for the service shall be included in the subtotal for optional features;

(F) the sub-total for all optional features or services included in the bill;

(G) a separate line for any tax, fee, or charge mandated by a federal, state, or local governmental agency that is to be specifically collected from all customers;

(H) itemized long distance charges;

(I) any amount owed under a written guarantee contract provided the guarantor was previously notified in writing by the utility as required by §26.24 of this title (relating to Credit Requirements and Deposits);

(J) lease payments, including applicable sales taxes, for customer premises equipment owned by the carrier as part of its nonregulated operations or owned by another entity, which are clearly distinguished from charges for regulated services; and

(K) explanations of any abbreviations, symbols, or acronyms used that identify specific charges and concisely states the nature or purpose of the tax, fee, or charge if not immediately obvious.

(d) Record retention. Each utility shall maintain monthly billing records for each account for at least two years after the date the bill is mailed. The billing records shall contain sufficient data to reconstruct a customer's billing for a given month. Copies of a

customer's billing records may be obtained by that customer upon request.

(e) Prepaid Local Telephone Service. To the extent any provisions of this section are applied to customers subscribing to Prepaid Local Telephone Service and are inconsistent with the rates, terms, and conditions of §26.29 of this title (relating to Prepaid Local Telephone Service), the provisions of §26.29 of this title shall apply.

§26.26. Spanish Language Requirements.

(a) Application. This section applies to each utility that serves a county where the number of Spanish speaking persons as defined in §26.5 of this title (relating to Definitions) is 2000 or more according to the 1990 U.S. Census of Population (Bureau of Census, U.S. Department of Commerce, Census of Population and Housing, 1990).

(b) Written plan.

(1) Requirement. Each utility shall have a commission-approved written plan that describes how a Spanish-speaking person is provided, or will be provided reasonable access to the utility's programs and services.

(2) Minimum elements. The written plan required by paragraph (1) of this subsection shall include a clear and concise statement as to how the utility is doing or will do the following, for each part of its entire system:

(A) inform Spanish-speaking applicants and customers how they can get information contained in the utility's plan in the Spanish language;

(B) inform Spanish-speaking applicants and customers of their rights contained in this subchapter;

(C) inform Spanish-speaking applicants and customers of new services, discount programs, and promotions;

(D) allow Spanish-speaking customers to request repair service;

(E) ballot Spanish-speaking customers for services requiring a vote by ballot; and

(F) inform all of its service and repair representatives of the requirements of the plan.

§26.27. Bill Payment and Adjustments.

(a) Bill due date. The bill provided to the customer shall include the payment due date, which shall not be less than 16 days after issuance. Payment for utility service is delinquent if not received at the utility or at the utility's authorized payment agency by close of business on the due date. If the sixteenth day falls on a holiday or weekend, then the due date shall be the next work day after the sixteenth day.

(b) Penalty on delinquent bills for retail service. A one-time penalty not to exceed 5.0% may be charged on delinquent bill. The 5.0% penalty on delinquent bills may not be applied to any balance to which the penalty has already been applied. A telecommunications utility providing any service to the state, including service to an agency in any branch of government, shall not assess a fee, penalty, interest, or other charge to the state for delinquent payment of a bill.

(c) Billing adjustments due to service interruptions. In the event a customer's service is interrupted other than by the negligence or willful act of the customer, and it remains interrupted for 24 hours or longer after access to the premises is made available and after being reported, appropriate adjustment or refunds shall be made to the customer.

(1) The amount of adjustment or refund shall be determined on the basis of the known period of interruption, generally beginning from the time the service interruption is first reported.

(2) The refund to the customer shall be the proportionate part of the month's flat rate charges for the period of days and that portion of the service facilities rendered useless or inoperative.

(3) The refund may be accomplished by a credit on a subsequent bill.

(d) Overbilling. If charges are found to be higher than authorized by the utility's tariffs, then the customer's bill shall be corrected.

(1) The correction shall be made for the entire period of the overbilling.

(2) If the utility corrects the overbilling is within three billing cycles of the error, it need not pay interest on the amount of correction.

(3) If the utility does not correct the overcharge within three billing cycles of the bill in error, it shall pay interest on the amount of the overcharge at the rate set by the commission each year.

(A) The interest rate shall be based on an average of prime commercial paper rates for the previous 12 months.

(B) Interest on overcharges that are not adjusted by the utility within three billing cycles of the bill in error shall accrue from the date of payment or the date of the bill in error.

(C) All interest shall be compounded monthly at the annual rate.

(e) Underbilling. If charges are found to be lower than authorized by the utility's tariffs, or if the utility failed to bill the customer for service, then the customer's bill may be corrected.

(1) The utility may backbill the customer for the amount that was under-billed. The backbilling shall not collect charges that extend more than six months from the date the error was discovered unless underbilling is a result of theft of service by the customer.

(2) The utility may disconnect service if the customer fails to pay charges arising from an underbilling that is the result of theft of service.

(3) If the underbilling is $50 or more, the utility shall offer the customer a deferred payment plan option for the same length of time as that of the under-billing. A deferred payment plan need not be offered to a customer whose underpayment is due to theft of service.

(4) The utility shall not charge interest on underbilled amounts unless such amounts are found to be the result of theft of service by the customer. Interest on underbilled amounts shall be compounded monthly at the annual rate and shall accrue from the day the customer is found to have first tampered, bypassed or diverted the service.

(f) Disputed bills.

(1) If there is a dispute between a customer and a utility regarding any bill for utility service, the utility shall investigate and report the results to the customer. If the dispute is not resolved, the utility shall inform the customer of the complaint procedures of the commission pursuant to §26.30 of this title (relating to Complaints).

(2) A customer's service shall not be suspended or disconnected for nonpayment of the disputed portion of the bill until

the commission completes its informal complaint resolution process and informs the customer of its determination.

(3) A customer's local telephone service shall not be suspended or disconnected for nonpayment of disputed charges not related to local telephone service; including but not limited to long distance service, optional services, voice mail.

(g) Notice of alternative payment programs or payment assistance. When a customer contacts a utility and indicates an inability to pay a bill or need of assistance with bill payment, the utility shall inform the customer of all alternative payment and payment assistance programs available from the utility, such as deferred payment plans, disconnection moratoriums for the ill, as applicable, and of the eligibility requirements and procedure for applying for each.

(h) Payment arrangements. A "payment arrangement" is any agreement between the utility and a customer which allows the customer to pay the outstanding bill after its due date, but before the due date of the next bill. If the utility issued a suspension or disconnect notice before the payment arrangement was made, that suspension or disconnection should be suspended until after the due date for the payment arrangement. If a customer does not fulfill the terms of the payment arrangement, the utility may suspend or disconnect service after the later of the due date for the payment arrangement or the suspension or disconnect date indicated in the notice, pursuant to §26.28 of this title (relating to Suspension or Disconnection of Service), without issuing an additional notice.

(i) Deferred payment plan. A deferred payment plan is any written agreement between the utility and a customer that allows a customer to pay an outstanding bill in installments that extend beyond the due date of the next bill. A deferred payment plan may be established at the utility's business office or by telephone. A deferred payment plan made by telephone shall be put in writing.

(1) The utility shall offer a deferred payment plan to any residential customer, including a guarantor of any residential customer, who has expressed an inability to pay all of the bill, if that customer has not been issued more than two suspension or disconnect notices during the preceding 12 months; and.

(2) Every deferred payment plan entered into pursuant to paragraph (1) of this subsection shall provide that the delinquent amount may be paid in equal installments lasting at least three billing cycles.

(3) When a customer has received service from its current utility for less than three months, the utility is not required to offer a deferred payment plan if the customer lacks:

(A) sufficient credit; or

(B) a satisfactory history of payment for service from a previous utility.

(4) Every deferred payment plan offered by a utility:

(A) shall state, immediately preceding the space provided for the customer's signature and in boldface of at least 14 point print, the following: "If you are not satisfied with this contract, or if agreement was made by telephone and you feel this contract does not reflect your understanding of that agreement, contact the utility immediately and do not sign this contract. If you do not contact the utility, or if you sign this agreement, you may give up your right to dispute the amount due under the agreement except for the utility's failure or refusal to comply with the terms of this agreement." In addition, where the customer and the utility representative or agent meet in person, the utility representative shall read the preceding statement to the customer. The utility shall provide information to the customer in English and Spanish as necessary to make the preceding boldface language understandable to the customer;

(B) may include a 5.0% penalty for late payment but shall not include a finance charge;

(C) shall state the term (time length) covered by the plan;

(D) shall state the total amount to be paid;

(E) shall state the specific amount of each installment;

(F) shall allow the utility to disconnect service if a customer does not fulfill the terms of the deferred payment plan;

(G) shall not refuse a customer participation in such a program on the basis of race, nationality, religion, color, sex, or marital status;

(H) shall be signed by the customer and a copy of the signed plan must be provided to the customer. If the agreement is made over the telephone, then the utility shall send a copy of the plan to the customer for signature and return to the utility;

(I) shall allow either the customer or the utility to renegotiate the deferred payment plan, if the customer's economic or financial circumstances change substantially during the time of the plan.

(5) A utility may disconnect a customer who does not meet the terms of a deferred payment plan. However, the utility may not disconnect service until a disconnect notice has been issued to the customer indicating the customer has not met the terms of the plan. The notice and disconnection shall conform with the disconnection rules in §26.28 of this title. The utility may renegotiate the deferred payment plan agreement before disconnection. If the customer did not sign the deferred payment plan, and is not otherwise fulfilling the terms of the plan, and the customer was previously provided a disconnect notice for the outstanding amount, no additional notice is required.

§26.28. Suspension or Disconnection of Service.

(a) Suspension or Disconnection Policy. If a utility chooses to suspend or disconnect a customer, it must follow the procedures below, or modify them in ways that are more generous to the customer in terms of the cause for suspension or disconnection and timing of the suspension or disconnect notice and the period between notice and suspension or disconnection. Each utility is encouraged to develop specific policies for suspension and disconnection that treat its customers with dignity and respect its customers' or members' circumstances and payment history , and to implement those policies in ways that are consistent and non-discriminatory. Suspension or disconnection are options offered by the commission, not requirements placed upon the utility by the commission.

(b) Suspension or disconnection with notice. Utility service may be suspended or disconnected after proper notice, for any of these reasons:

(1) failure to pay a bill for utility service or make deferred payment arrangements by the date of suspension or disconnection;

(2) failure to comply with the terms of a deferred payment agreement except as provided in §26.29 of this title (relating to Prepaid Local Telephone Service);

(3) violation of the utility's rules on the use of service in a manner which interferes with the service of others or the operation

of nonstandard equipment, if a reasonable attempt has been made to notify the customer and the customer has a reasonable opportunity to remedy the situation;

(4) failure to pay a deposit as required by §26.24 of this title (relating to Credit Requirements and Deposits); or

(5) failure of the guarantor to pay the amount guaranteed, when the utility has a written agreement, signed by the guarantor, that allows for disconnection of the guarantor's service for nonpayment.

(c) Suspension or disconnection without notice. Utility service may be suspended or disconnected without notice, except as provided in §26.29 of this title, for any of the following reasons:

(1) where a known dangerous condition exists for as long as the condition exists. Where reasonable, given the nature of the hazardous condition, the utility shall post a notice of disconnection and the reason therefore at the place of common entry or upon the front door of each affected residential unit as soon as possible after service has been disconnected;

(2) where service is connected without authority by a person who has not made application for service;

(3) where service was reconnected without authority after termination for nonpayment; or

(4) where there are instances of tampering with the utility company's equipment or evidence of theft of service.

(d) Suspension or disconnection prohibited. Utility service may not be suspended or disconnected for any of these reasons:

(1) failure to pay for anything other than local telephone service;

(2) failure to pay for a different type or class of utility service unless charges were included on the bill at the time service was initiated;

(3) failure to pay charges resulting from underbilling that is more than six months before the current billing, except for theft of service; or

(4) failure to pay disputed charges until a determination is made on the accuracy of the charges.

(e) Suspension or disconnection on holidays or weekends. Unless a dangerous condition exists or the customer requests disconnection, service shall not be suspended or disconnected on holidays or weekends, or the day immediately preceding a holiday or weekend, unless utility personnel are available on those days to take payments and reconnect service.

(f) Disconnection due to utility abandonment. No public utility may abandon a customer or a certified service area without written notice to its customers and all neighboring utilities, and approval from the commission.

(g) Suspension or disconnection for ill and disabled. No utility may suspend or disconnect service at the permanent residence of a delinquent customer if that customer establishes that such action will prevent the customer from summoning emergency medical help for someone who is seriously ill residing at that residence.

(1) Each time a customer seeks to avoid suspension or disconnection of service under this subsection, the customer before the date of suspension or disconnection shall:

(A) have the person's attending physician (for purposes of this subsection, the term "physician" shall mean any public health official, including, but not limited to, medical doctors, doctors of osteopathy, nurse practitioners, registered nurses, and any other similar public health official) contact the utility by the due date of their bill;

(B) have the person's attending physician submit a written statement to the utility; and

(C) enter into a deferred payment plan.

(2) The prohibition against suspension or disconnection provided by this subsection shall last 63 days from the issuance of the utility bill or a shorter period agreed upon by the utility and the customer or physician.

(h) Suspension and disconnect notices. Any suspension or disconnect notice issued by a utility to a customer must:

(1) not be issued to the customer before the first day after the bill is due. Payment of the delinquent bill at a utility's authorized payment agency is considered payment to the utility.

(2) be a separate mailing or hand delivery with a stated date of suspension or disconnection and with the words "suspension notice," or "disconnect notice," or similar language prominently displayed on the notice.

(3) have a suspension or disconnect date that is not a holiday or weekend day, not less than days after the notice is issued.

(4) be in English and Spanish.

(5) include a statement notifying customers that if they need assistance paying their bill, or are ill and unable to pay their bill, they may be able to make some alternative payment arrangement or establish a deferred payment plan. The notice shall advise customers to contact the local office of the utility for more information.

§26.29. Prepaid Local Telephone Service (PLTS).

(a) Applicability. The provisions of this section shall apply to all dominant certificated telecommunications utilities (DCTUs) unless specifically indicated otherwise. A DCTU shall provide prepaid local telephone service (PLTS) as required by this section and shall not refuse to provide PLTS to an applicant for such service because the applicant is indebted to any DCTU or other telecommunications carrier for telecommunication services, including the carriage charges of interexchange carriers where the DCTU bills those charges under tariffs or contracts.

(b) Eligible customers.

(1) Former customers. In cases where a DCTU would refuse to provide service to an applicant for residential telephone service because of indebtedness to any DCTU or other telecommunications carrier, the applicant is eligible to receive PLTS as required by this section.

(2) Current customers. A current residential customer who has not been disconnected but who has received a notice following suspension of service for non-payment for services is eligible to receive PLTS as required by this section.

(3) Applicant previously disconnected from PLTS by a DCTU. Any applicant who was previously disconnected from PLTS by a DCTU, pursuant to subsection (e)(6) of this section, does not have the right to receive PLTS from that DCTU again.

(4) Business customers shall not be eligible for PLTS.

(c) Requirements for notifying customers about PLTS. A DCTU shall provide notice to its customers about PLTS as required by this subsection.

(1) Timing of notice.

(A) If the DCTU's standard practice is to suspend a customer's service for non- payment of charges before disconnecting service, it shall notify the customer of the availability of PLTS in the suspension notice.

(B) If the DCTU's standard practice is to disconnect a customer's service without suspension, the DCTU shall notify such customer of the availability of PLTS within three days after disconnection.

(2) Content of notice. The notice provided by a DCTU offering PLTS shall be reviewed in the DCTU's compliance filing and shall notify customers of the rates, terms, and conditions of PLTS, as described in subsection (e) of this section, including:

(A) a customer's eligibility to enter into the PLTS plan;

(B) a description of the PLTS plan including its features, charges, and options;

(C) a customer's responsibility to make an initial payment for PLTS and any applicable service connection charges, as defined in subsection (e)(2)(A) of this section;

(D) a customer's responsibility to make the initial deferred payment, if applicable, in the third billing cycle and every month thereafter, for up to 12 months;

(E) a customer's responsibility not to incur additional charges for calls, including long distance or other usage-sensitive services that will be charged on the local telephone bill, nor to subscribe to any services other than those included in PLTS, as defined in §26.5 of this title (relating to Definitions);

(F) a customer's violation of the terms and conditions of the PLTS plan may result in disconnection;

(G) if a customer is disconnected for violation of the terms and conditions of the PLTS plan, a DCTU has the right to retain and apply any credit in the PLTS account to the customer's outstanding balances for telecommunications services;

(H) if a customer is disconnected for violation of the terms and conditions of the PLTS plan, that customer does not have the right to receive PLTS from that DCTU again; and

(I) the customer's responsibility to subscribe to PLTS within a certain time period in order to defer service restoration or connection charges as described in subsection (e)(1)(B) of this section.

(d) Subscription to PLTS.

(1) Customer request to subscribe to PLTS. To subscribe to PLTS, the eligible customer (per subsection (b) of this section) must contact the DCTU during regular business hours to request PLTS.

(2) Confirmation letter. Within 24 hours after a customer requests PLTS, the DCTU shall mail the customer a confirmation letter in English or Spanish as necessary, explaining the PLTS plan, including the customer's rights and responsibilities upon enrollment and information about the rates, terms, and conditions of service under the PLTS plan.

(e) Rates, terms, and conditions of PLTS. A DCTU shall offer PLTS under the following terms and conditions:

(1) Rates for PLTS.

(A) The monthly rate for PLTS shall include only:

(i) the applicable residential tariffed rate (or lifeline rates, if applicable) for services included in the PLTS definition in §26.5 of this title;

(ii) tariffed charges for non-listed and non-published service, if requested by the customer; and

(iii) surcharges and fees authorized by a governmental entity that are billed by the DCTU, including 911, subscriber line charges, sales tax, and municipal fees.

(B) Non-recurring rates.

(i) If a DCTU does not suspend basic local service before disconnection, the DCTU must defer service connection charges until the customer returns to basic local telecommunications service. However, if a customer does not subscribe to PLTS within ten days from the date the DCTU mailed a termination notice containing notice of PLTS eligibility, the DCTU may charge service connection charges when subscribing to PLTS.

(ii) If a DCTU suspends basic local service prior to disconnection, the DCTU must defer service restoration charges until the subscribing customer returns to basic local telecommunications service.

(C) Late charges. The DCTU shall not assess late charges on a PLTS customer.

(2) Payments under PLTS.

(A) A DCTU may require the residential PLTS customer to make an initial payment for service, which shall not exceed:

(i) the rates as described in paragraph (1)(A) of this subsection for up to two months of service; and

(ii) applicable non-recurring service connection charges.

(B) A DCTU shall not require subsequent monthly payments that exceed the rates for one month of PLTS. The due date of monthly payments shall be based on the DCTU's regular monthly billing cycle.

(C) A customer may be required to make payments under the deferred payment plan according to paragraph (4) of this subsection.

(3) Toll blocking. PLTS subscribers shall have mandatory toll blocking and usage sensitive blocking placed on the telephone lines.

(A) Customer responsibility. A customer subscribing to PLTS shall not place or receive calls, including long distance or other usage-sensitive services, for which additional charges are billed to the customer's telephone number, nor subscribe to any services other than those included in PLTS.

(B) DCTU responsibility. The DCTU shall notify the customers of their responsibilities under PLTS when the customer inquires about the service in the confirmation letter.

(4) Deferred payment plan under PLTS. As a condition of subscribing to PLTS, the DCTU may require an applicant to enter into a deferred payment plan for any outstanding debt owed to the DCTU for local basic telephone service. The DCTU shall not require an applicant to enter into a deferred payment plan to pay any outstanding debt for any services that the customer cannot use under PLTS including long distance services. If the DCTU is unable to determine the amount of outstanding debt, the DCTU shall not require an applicant to enter into a deferred payment plan.

(A) Determination of deferred payment plan amount. To determine the deferred payment plan amount, the DCTU shall:

(i) determine the amount the customer owes for basic local telephone service;

(ii) apply any undesignated partial payment made by the customer before subscribing to PLTS to past debt for local telecommunications service and which the customer subscribes to under PLTS; and

(iii) not reallocate any undesignated partial payments assigned under clause (ii) of this subparagraph to amounts not yet incurred for basic local telecommunications service.

(B) Monthly payments under the deferred payment plan.

(i) A deferred payment plan for past due charges shall not require the applicant to make monthly payments which exceed $10 per month or one-twelfth of the outstanding debt as determined in subparagraph (A) of this paragraph, whichever is greater.

(ii) If the DCTU and PLTS customer enter into a deferred payment, the initial deferred payment shall be billed beginning with the third billing cycle after initiation of service and on a monthly basis thereafter.

(5) Customer deposit. No deposit shall be required from any residential applicant for PLTS.

(6) Disconnection of PLTS.

(A) Disconnection with notice. A DCTU may disconnect PLTS after notice for these reasons:

(i) failure to comply with the terms of a deferred payment plan for PLTS;

(ii) upon conclusion of all periods for which an advance payment has been applied to the PLTS account and when the customer's PLTS account has a zero balance; or

(iii) violation of the DCTU's rules on using PLTS in a manner which interferes with the service of others or the operation of nonstandard equipment, if a reasonable attempt has been made to notify the customer and the customer has a reasonable opportunity to remedy the situation.

(B) Disconnection without notice. A DCTU may immediately disconnect PLTS without notice:

(i) if the customer accrues new charges for toll or other services on the telephone bill as described in paragraph (3) of this subsection;

(ii) where a known dangerous condition exists for as long as the condition exists; or

(iii) where service is connected without authority by a person who has not applied for the service or who has reconnected service without authority after termination.

(C) Notice after disconnection. If a PLTS customer is disconnected under subparagraph (A) or (B) of this paragraph, a DCTU shall send a final notice stating that the customer is permanently disconnected from PLTS and that the customer shall not be eligible for PLTS from that DCTU. That notice shall also state the terms and conditions that the customer must satisfy before the customer can return to basic local telecommunications service.

(f) Return to basic local telecommunications service.

(1) A customer subscribing to PLTS may return to basic local telecommunications service if the customer has paid:

(A) all outstanding debt to the DCTU, including the carriage charges of interexchange carriers where the DCTU bills those charges pursuant to tariffs or contracts; and

(B) bills for PLTS.

(2) When a customer completes the obligations identified in paragraph (1) of this subsection, a DCTU shall notify the customer of the:

(A) eligibility requirements for returning to basic local telecommunications services;

(B) option of receiving basic local telecommunications service with toll blocking and/or usage sensitive blocking; and

(C) requirement to contact the DCTU if the customer wants to return to basic local telecommunications service.

(3) Customer obligations after receiving notice. If the customer is eligible to return to basic local telecommunications service, the customer shall:

(A) request basic local telecommunications service from the DCTU; and

(B) pay the service restoration, if applicable.

(g) Customer education.

(1) The commission shall provide information about the PLTS plan to customers.

(2) A DCTU subject to the requirements of this section shall provide information about the PLTS plan annually in customers bills. This information shall be subject to review during the DCTU's compliance filing.

(3) A DCTU or its affiliate publishing a white pages directory on behalf of the DCTU shall disclose in clear language the availability, terms, and conditions of the PLTS plan in the same part of its telephone directory in the section of the directory stating the rights of a customer.

(h) Toll and usage sensitive blocking capability.

(1) The DCTU shall provide toll blocking and usage sensitive blocking to its maximum technical capability.

(A) If the DCTU's tariffs reflect its maximum technical capability, it shall provide toll blocking and usage sensitive blocking.

(B) If the DCTU's tariffs do not reflect its maximum technical blocking capability, it shall inform the commission of the maximum level of blocking it is required to provide under PLTS in its compliance filings.

(C) If the DCTU does not have a tariff for toll or usage sensitive blocking but has such technical capability, it shall inform the commission of the maximum level of blocking it is required to provide under PLTS in its compliance filings.

(D) As the DCTU's blocking capability increases, it shall notify the commission of such enhancements and provide such enhanced blocking under PLTS.

(2) Where technically capable, toll blocking shall not deny access to toll free numbers.

(3) When imposing a toll or usage sensitive services block, the DCTU shall do so in a manner that is not unreasonably preferential, prejudicial, or discriminatory.

(i) Waiver request.

(1) A DCTU may request exemption from the requirements of this section, on a wire- center by wire-center basis, if it cannot meet the toll blocking and/or usage sensitive requirements.

(2) A DCTU requesting a waiver shall fully document in its compliance filings the technical reasons for its inability to toll and/or usage sensitive block and indicate when such technical capability will be available in the wire center.

(3) A waiver shall expire when the DCTU acquires the capability to block toll and/or usage sensitive services or when the DCTU is required to acquire the capability to toll and/or usage sensitive block by federal or state law or regulations, whichever comes first. The DCTU shall notify the commission in writing within 30 days of acquiring or being required to acquire the capability.

(j) Interexchange carrier (IXC) notification. A DCTU serving 31,000 or more access lines and that is not a cooperative corporation shall:

(1) Within 24 hours after a customer subscribes to PLTS, the DCTU shall include a notice in the Customer Access Record Exchange (CARE) or similar report if developed by the DCTU, and the Line Identification Database (LIDB) indicating that the customer is subscribed to PLTS and any number changes;

(2) Make access to the information contained in LIDB available to all IXCs serving the customer's area; and

(3) If CARE, or similar report if developed by the DCTU, and LIDB are not available, the DCTU shall specify in its tariffs a comparable method of providing such notice to IXCs serving the area indicating a customer's subscription to PLTS; and

(4) This subsection should not be interpreted as expanding access to CARE, or similar report if developed by the DCTU, to IXCs other than the customers' presubscribed carriers.

(k) Tariff compliance. A DCTU subject to this section shall file tariffs in compliance with this section, and pursuant to §23.24 of this title (relating to Form and Filing of Tariffs).

§26.30. Complaints.

(a) Complaints to the utility. A customer may file a complaint in person, by letter, or by telephone with the utility. The utility shall investigate and advise the complainant of the results within 15 days.

(b) Supervisory review by the utility. Any utility customer or applicant has the right to request a supervisory review if they are not satisfied with the utility's response to their complaint.

(1) If the utility is unable to provide a supervisory review immediately following the customer's request, then arrangements for the review shall be made for the earliest possible date.

(2) Service shall not be disconnected before completion of the review. If the customer chooses not to participate in a review, or to make arrangements for the review within five days after requesting it, then the company may disconnect service, providing proper notice has been issued under the disconnect procedures in §26.28 of this title (relating to Suspension or Disconnection of Service).

(3) The results of the supervisory review must be provided in writing to the customer within ten days of the review, if requested.

(4) Customers who are dissatisfied with the utility's supervisory review must be informed of their right to file a complaint with the commission.

(c) Complaints to the commission.

(1) If the complainant is dissatisfied with the results of the utility's complaint investigation or supervisory review, the utility must advise the complainant of the commission's informal complaint resolution process. The utility must also provide the customer the following contact information for the commission: Public Utility Commission of Texas, Office of Customer Protection, PO Box 13326, Austin, Texas 78711-3326, (512) 936-7120 or in Texas (toll-free) 1-888- 782-8477, fax (512) 936-7003, e-mail address customer@puc.state.tx.us, Internet address www.puc.state.tx.us, TTY (512) 936-7136, and Relay Texas (toll-free) 1- 800-735-2989.

(2) The utility shall investigate all complaints and advise the commission in writing of the results of the investigation within 15 days after the complaint is forwarded to the utility.

(3) The utility shall keep a record for two years after determination by the commission of all complaints forwarded to it by the commission. This record shall show the name and address of the complainant, the date, nature and adjustment or disposition of the complaint. Protests regarding commission-approved rates or charges which require no further action by the utility need not be recorded.

§26.31. Information to Applicants and Customers.

(a) Information to residential applicants. Each utility shall provide this information to applicants when they request new service or transfer existing service to a new location:

(1) the utility's lowest-priced alternatives and range of service offerings available at the applicant's location. The information shall begin with the lowest-priced alternative and give full consideration to applicable equipment options and installation charges; and

(2) the customer information packet described in subsection (c) of this section.

(b) Information regarding rate schedules and classifications and utility facilities.

(1) Each utility shall notify customers affected by a change in rates or schedule of classification.

(2) Each utility shall maintain copies of its rates and services tariff in each office where applications are received.

(3) Each utility shall post a notice in a conspicuous place in each office where service applications are received, informing the public that copies of the rate schedules and rules relating to the service of the utility, as filed with the commission, are available for inspection.

(4) Each utility shall maintain a current set of maps showing the physical locations of its facilities that include an accurate description of all facilities (central office facilities, buried cable, etc.). These maps shall be kept by the utility in a central location and will be available for commission inspection during normal working hours. Each business office or service center shall have available up-to-date maps, plans, or records of its immediate service area, with any other information as may be necessary to enable the utility to advise applicants, and others entitled to the information, about the facilities serving that locality.

(c) Customer information packets.

(1) The information packet shall be entitled "Your Rights as a Customer." Cooperatives may use the title "Your Rights as a Member."

(2) The information packet shall be mailed to all customers at least every other year at no charge to the customer. If the utility provides the customer with the same information in the telephone directories provided to each customer pursuant to §23.61(b) of this title (relating to Telephone Utilities), the utility shall provide a printed statement on the bill, or a billing insert identifying the location of the information in paragraph (5) of this subsection. The statement shall be published every six months.

(3) The information shall be written in plain, non-technical language.

(4) The information shall be provided in English and Spanish; however, a utility is exempt from the Spanish language requirement if 10% or fewer of its customers are exclusively Spanish-speaking. If the utility is exempt from the Spanish language requirement, it shall notify all customers through a statement in both English and Spanish, in the packet, that the information is available in Spanish from the utility, both by mail and at the utility's offices.

(5) The information packet shall include all of the following:

(A) the customer's right to information about rates and services and the customer's right to inspect or obtain at reproduction cost a copy of the applicable tariffs and service rules;

(B) the utility's credit requirements and the circumstances under which a deposit or an additional deposit may be required, how a deposit is calculated, the interest paid on deposits, and the time frame and requirement for return of the deposit to the customer;

(C) the time allowed to pay outstanding bills;

(D) grounds for suspension and/or disconnection of service;

(E) the steps that must be taken before a utility may suspend and/or disconnect service;

(F) the steps for resolving billing disputes with the utility and how disputes affect suspension and/or disconnection of service;

(G) information on alternative payment plans offered by the utility, including, but not limited to, payment arrangements and deferred payment plans, as well as a statement that a customer has the right to request these alternative payment plans;

(H) the steps necessary to have service restored and/or reconnected after involuntary suspension or disconnection;

(I) the availability of prepaid local telephone service;

(J) the customer's right to a file a complaint with the utility, the procedures for a supervisory review, and right to file a complaint with the commission regarding any matter concerning the utility's service. The commission's address and telephone number shall accompany this information;

(K) the hours, addresses, and telephone numbers of utility offices where bills may be paid and information may be obtained;

(L) a toll-free telephone number or the equivalent (such as WATS or collect calls) where customers may call to report service problems or make billing inquiries.

(M) a statement that utility services are provided without discrimination as to a customer's race, nationality, color, religion, sex, or marital status, and a summary of the company's policy regarding the provision of credit history based upon the credit history of a customer's former spouse;

(N) notice of any special services such as readers or notices in Braille, if available, and the telephone number of the text telephone for the deaf at the commission; and

(O) how customers with physical disabilities, and those who care for them, can identify themselves to the utility so that special action can be taken to appropriately inform these persons of their rights.

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

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818009
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 936-7308

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Subchapter L. Wholesale Market Provisions

16 TAC §26.271

The Public Utility Commission of Texas (commission) proposes new §26.271 relating to Expanded Interconnection. The proposed section will replace §23.92 of this title (relating to Expanded Interconnection). The Public Utility Regulatory Act §60.141 requires that the commission adopt rules for expanded interconnection. Project Number 17709 has been assigned to this proceeding.

The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

The proposed new section reflects different section, subsection, and paragraph designations due to the reorganization of the rules. Some text has been proposed for deletion as unnecessary in the new section because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. The *Texas Register* will publish this section as all new text. Persons who desire a copy of the proposed new section as it reflects changes to existing section §23.92 may obtain a redlined version from the commission's Central Records under Project Number 17709.

Other changes specific to each section:

Proposed new §26.271 does not include §23.92(b) concerning definitions. The definitions in §23.92(b) have been moved to §26.5 of this title (relating to Definitions). In addition, §26.271 does not include §23.92(j)(2), which references an initial implementation date for the existing §23.92.

Proposed new §26.271 does not include the references to specific dates contained in §23.92(c)(4)(A) - (B) and §23.92(d)(2)(E), which are no longer needed to establish an initial timeline.

Proposed new §26.271(b)(2),(3), (5); (c)(1),(2); (e), (f) and (g)-(i) contain capitalization changes to their captions. Section 26.271(b)(2)(A) contains an updated reference to the definition rule, and subparagraphs (b)(4)(B) and (c)(2)(E) contain minor wording changes. Proposed new §26.271(d)-(f) and (i) all contain updated references to §26.271 subsections, and §26.271(d) spells out "Federal Communications Commission."

Martin Wilson, assistant general counsel, has determined that for each year of the first five-year period the proposed 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. Wilson has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be continued growth in competition that should increase incentives for efficiency, encourage deployment of new technologies that facilitate innovative service offerings, and reduce prices for services available from both the local exchange companies (LECs) and alternative providers. It should also improve LEC responsiveness to customers in the provision of existing services and increase choices available to access customers who value redundancy and route diversity. There will be some effect on both large and small businesses resulting from increased competition in affected telecommunications markets. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Wilson also has determined that for each year of the first five years the proposed section is in effect there will be no impact on employment in the geographic area affected by implementing the requirements of the section.

Comments on the proposed section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. The commission also invites specific comments regarding the Section 167 requirement as to whether the reason for adopting §23.92 continues to exist in corresponding §26.271. All comments should refer to Project Number 17709-§26.271 relating to Expanded Interconnection.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §60.141 which requires the commission to adopt rules for expanded interconnection that are consistent with rules and regulations of the Federal Communications Commission relating to expanded interconnection, treat intrastate private line services as special access service, and provide that an incumbent local exchange company is required to provide expanded interconnection to another local exchange company, the second local exchange company shall in a similar manner provide expanded interconnection to the first company.

Cross Index to Statutes: Public Utility Regulatory Act §14.002 and §60.141.

§26.271. Expanded Interconnection.

(a) Applicability. Unless the context clearly indicates otherwise, the provisions relating to expanded interconnection for special access and/or private line services in this section apply to each carrier that is dominant with respect to special access services and that has interstate tariffs in effect that provide for expanded interconnection for special access services. Similarly, unless the context clearly indicates otherwise, the provisions relating to expanded interconnection for switched transport services in this section apply to each carrier that is dominant with respect to switched transport services and that has interstate tariffs in effect that provide for expanded interconnection for switched transport services. A carrier that is dominant with respect to local exchange telephone service is, by definition, also dominant with respect to switched transport services.

(b) Expanded interconnection for special access and private line services.

(1) Expanded interconnection for DS1 and DS3 special access services, and special access services for which interstate expanded interconnection has been granted. Each dominant carrier that is subject to this section shall offer expanded interconnection as specified in this subsection for the services listed in subparagraphs (A) - (C) of this paragraph. The dominant carrier shall offer expanded interconnection for these services at the same locations, in the same manner, and, except for price, under the same terms and conditions as it offers expanded interconnection for interstate special access services, unless ordered otherwise by the commission. This paragraph applies to the following intrastate special access services:

(A) special access DS1;

(B) special access DS3; and

(C) special access services for which interstate expanded interconnection has been granted.

(2) Expanded interconnection for all special access and private line services. Each dominant carrier that is subject to this section shall offer expanded interconnection as specified in this subsection for the services listed in subparagraphs (A) - (B) of this paragraph. The dominant carrier shall offer expanded interconnection for these services at the same locations, in the same manner, and, except for price, under the same terms and conditions as it offers expanded interconnection for interstate special access services, unless ordered otherwise by the commission. This paragraph applies to the following intrastate services:

(A) all private line services, as that term is defined in §26.5 of this title (relating to Definitions); and

(B) all special access services.

(3) Tariff provisions.

(A) Each dominant carrier that is subject to this section shall file tariff revisions to unbundle each service for which expanded interconnection shall be offered and to remove any resale or sharing restrictions for each such service. As used in this subparagraph, to unbundle means to make available, on an unrestricted basis, the individual rate elements necessary to provide a special access service or a private line service.

(B) Each dominant carrier that is subject to this section shall file tariffs to establish connection charges for the use of equipment and facilities that are associated with offerings of expanded interconnection under this subsection. Unless ordered otherwise by the commission, the definitions of such connection charges and the regulations governing their application shall be the same as those contained in the carrier's interstate expanded interconnection tariffs. The dominant carrier shall not impose a separate charge or rate element that is not included in its interstate tariffs for interconnection for special access services. The dominant carrier shall not impose a separate charge or rate element for interconnection for private line services that is not included in its tariffs for interconnection for special access services.

(4) Implementation. All dominant carriers subject to this section shall file tariff amendments in compliance with paragraph (3) of this subsection.

(A) Initial filing to implement paragraph (1) of this subsection. A dominant carrier shall file initial tariff amendments to implement the provisions of paragraph (1) of this subsection within 60 days of being declared a dominant carrier.

(B) Initial filing to implement paragraph (2) of this subsection. A dominant carrier shall file initial tariff amendments to implement the provisions of paragraph (2) of this subsection within 60 days of being declared a dominant carrier.

(C) Initial filings in compliance with this subsection shall be filed pursuant to §23.26 of this title (relating to New and Experimental Services). Initial tariff amendments filed in compliance with this subsection shall be filed pursuant to §23.26; provided, however, the provisions of §23.26(c)(6) shall not apply with respect to rates proposed in compliance with paragraph (3)(A) or (B) of this subsection if the dominant carrier proposes rates that are the same as the rates in effect for the carrier's interstate provision of the same, equivalent or substitutable service. Tariff revisions filed pursuant to this subsection shall not be combined in a single application with any other tariff revision.

(D) Additional filings. A dominant carrier shall make, within 15 days of the effective date of an interstate tariff providing for expanded interconnection, such additional tariff filings as are required to remain in compliance with this subsection. The proposed effective date of such additional tariff filings shall be not later than 60 days after the filing date, unless suspended.

(5) Customer specific contracts. This subsection does not require the unbundling or removal of resale prohibitions in customer specific contracts in effect on or before February 22, 1994.

(c) Expanded interconnection for switched transport services.

(1) Expanded interconnection for all switched transport services. Each dominant carrier that is subject to this section shall offer expanded interconnection as specified in this subsection for all switched transport services at the same locations, in the same manner, and except for price, under the same terms and conditions as it offers expanded interconnection for interstate switched transport services, unless ordered otherwise by the commission.

(2) Tariff provisions and implementation. Each dominant carrier that is subject to this section shall file tariffs to establish connection charges for the use of equipment and facilities that are associated with offerings of expanded interconnection under this subsection.

(A) Unless ordered otherwise by the commission, the definitions of such connection charges and the regulations governing their application shall be the same as those contained in the carrier's interstate expanded interconnection tariffs.

(B) Absent additional costs, the dominant carrier shall impose a single charge when the same facilities are used to provide expanded interconnection for both special access and switched transport services. If additional facilities are used, the dominant carrier may assess additional cost-based connection charge subelements for the use of such additional facilities.

(C) The dominant carrier shall not impose a separate charge or rate element that is not included in its interstate tariffs for interconnection for switched transport services.

(D) A dominant carrier shall apply nonrecurring reconfiguration charges in a neutral manner to customers of either the interconnector or dominant carrier unless justified by specific identifiable cost differences. In addition, any differences between the charges applicable when a customer shifts to an interconnector's service and those applicable when a customer reconfigures its service with the dominant carrier must be cost-based.

(E) A dominant carrier shall file initial tariffs to implement the provisions of this subsection within 60 days of being declared a dominant carrier.

(F) Initial tariff filings in compliance with this subsection shall be filed pursuant to the provisions of §23.26; provided, however the provisions of §23.26(c)(6) shall not apply with respect to rates proposed in compliance with subparagraph (A) - (E) of this paragraph if the dominant carrier proposes rates that are the same as the rates in effect for the carrier's interstate provision of the same, equivalent or substitutable service. Tariff revisions filed pursuant to this subsection shall not be combined in a single application with any other tariff revision.

(G) A dominant carrier shall make, within 15 days of the effective date of an interstate tariff providing for expanded interconnection, such additional tariff filings as are required to remain in compliance with this subsection. The proposed effective date for such additional tariff filings shall be not later than 60 days after the filing date, unless suspended.

(d) Waivers. A dominant carrier may seek a waiver from the requirements of subsections (b) and (c) of this section at a location where the opportunity for the application of an Federal Communications Commission (FCC) waiver does not exist. The request shall be granted if the presiding officer of the commission finds that the dominant carrier has demonstrated that it is not feasible to provide interconnection at a specific location due to lack of space.

(e) Voluntary agreements. A dominant carrier and one or more interconnectors may agree to alternative interconnection arrangements at a specific location that are different from those required by subsections (b) and/or (c) of this section, provided

such arrangements are tariffed and made generally available for that location. Any such agreement shall not modify the dominant carrier's obligations under subsections (b) and (c) with respect to any other interconnector that does not elect to subscribe to the voluntary arrangement.

(f) Bona fide requests. If a dominant carrier would be required to provide expanded interconnection for interstate special access or switched transport services at a particular location upon receipt of a bona fide request for such interstate interconnection, the dominant carrier shall provide interconnection for intrastate services as required by subsections (b) and (c) of this section upon receipt of a bona fide request for such intrastate interconnection at any location not covered by its interstate tariffs, subject only to the same conditions and exceptions that would be applicable to a bona fide request for interconnection for interstate services.

(g) Utilization of collocation space. A dominant carrier shall permit an interconnector to use the same collocation space for both interstate and intrastate interconnection services.

(h) Utilization of facilities. A dominant carrier shall permit an interconnector to use the same facilities for both interstate and intrastate switched access traffic.

(i) Reciprocal expanded interconnection. An incumbent local exchange carrier is required to provide expanded interconnection to another local exchange carrier pursuant to the requirements of subsections (b) and (c) of this section only if the second local exchange carrier agrees to provide expanded interconnection, in a like manner, to the incumbent local exchange carrier.

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

Filed with the Office of the Secretary of State, on November 23, 1998.

TRD-9817932
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 936–7308

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Part III. Texas Alcoholic Beverage Commission

Chapter 45. Marketing Practices

Subchapter D. Advertising and Promotion-All Beverages

16 TAC §45.100

The Alcoholic Beverage Commission proposes a new rule, §45.100, concerning advertising and promotional activities by industry members at publicly owned entertainment venues. The rule is proposed to clarify when industry members may engage in promotional activities without violating various provisions of the Alcoholic Beverage Code regulating the relationship between the retail, wholesale and manufacturing tiers of the alcoholic beverage industry.

Lou Bright, General Counsel, has determined that for the first five year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing the rule.

Mr. Bright has determined that the public will benefit from this rule in that members of the alcoholic beverage industry will have greater ability to advertise and promote products at public venues. There is no anticipated costs to owners of small businesses or to persons required to comply with this rule.

Comments should be submitted to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P. O. Box 13127, Austin, Texas 78711

This rule is imposed under Alcoholic Beverage Code, §5.31, which provides the Alcoholic Beverage Commission with authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §§102.01, 102.04, 102.07, 102.12, 102.13, 102.15, 102.16, 108.05 and 108.06 are affected by this rule.

§45.100. Advertising and Promotion in Public Entertainment Facilities.

(a) This rule relates to §§102.07(a)(2), (6), (8), 102.12, 102.15, 108.05 and 108.06 of the Alcoholic Beverage Code.

(b) Members of the manufacturing and wholesale tiers may advertise, promote and sponsor entertainment events at public entertainment facilities, provided that alcoholic beverages sold or served at such facilities may only be furnished by an independent concessionaire. However, no advertising materials or signs provided by members of the manufacturing or wholesale tiers may be placed in the concessionaire's fixed service areas from which alcoholic beverages are served or sold, or any area immediately adjacent thereto except as otherwise provided by the rules of the commission.

(c) Public entertainment facilities, for purposes of this rule, are defined as any arena, stadium, amphitheatre, auditorium, theater or civic center which is primarily designed and used for live artistic, theatrical, cultural, educational, charitable, musical, sporting or entertainment events. This definition shall not include facilities the primary purpose of which is the sale of food or alcoholic beverages.

(d) Independent concessionaire, for purposes of this rule, means a licensed or permitted member of the retail tier who:

(1) receives no direct or indirect monetary benefit from advertising or sponsorship revenues generated by operation of the facility; and

(2) has no right or authority to control, directly or indirectly, any programming or booking decision at the facility; and

(3) is not subject to the direction or control, directly or indirectly, of the facility owner, operator, event producer, or any upper tier member of the alcoholic beverage industry as to the quantities or brands of alcoholic beverages bought and sold by the retailer.

(e) All advertising, promotional, sponsorship and concession agreements made by members of the alcoholic beverage industry pursuant to this rule and executed after the effective date of this rule shall:

(1) within thirty days of execution, be filed with the office of the commission having jurisdiction over the facility; and

(2) contain an affirmative provision disavowing the right of any party to engage in the conduct prohibited by paragraph (d)(3) of this section.

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

Filed with the Office of the Secretary of State, on November 24, 1998.

TRD-9817945
Doyne Bailey
Administrator
Alcoholic Beverage Commission
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 206–3204

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Part VIII. Texas Racing Commission

Chapter 309. Operation of Racetracks

Subchapter B. Horse Racetracks

Division 4. Operations

16 TAC §309.199

The Texas Racing Commission proposes an amendment to §309.199 concerning the purse account. The amendment was presented to the commission as a rulemaking petition by the Texas Horsemen's Partnership, LLP, the officially recognized horsemen's organization in this state. According to the petition, the amendment relates to and clarifies the distribution of the purse money accrued at horse racetracks which do not conduct live races for an extended period of time.

Roselyn Marcus, General Counsel for the Texas Racing Commission, has determined, based on the petition, that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the proposal.

Ms. Marcus has also determined, based on the petition, that for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the proposal will be that when an association fails to run live races during any calendar year, the funds in the respective breed's purse accounts will be adequately protected and properly distributed. There will be no fiscal implications for small businesses. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. There may be positive fiscal implications for the state's horse owners and trainers who receive the funds from the purse account; the exact amount of the gain cannot be determined at this time. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 11, 1999, to Roselyn Marcus, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080.

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; §3.22, which authorizes the Commission to adopt rules relating to the horsemen's account; and §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of racetracks.

The proposed amendment implements Texas Civil Statutes, Article 179e.

§309.199. Purse Accounts.

(a) All money required to be set aside for purses, whether from wagering on live races or on simulcast wagering, are trust funds held by an association as custodial trustee for the benefit of horsemen. No more than three business days after the end of each week's wagering, the association shall deposit the amount set aside for purses into purse accounts maintained by breed by the horsemen's organization in one or more federally or privately insured depositories.

(b) (No change.)

(c) If an association fails to run live races during any calendar year [~~12-month period~~], all money in the respective breed's purse account may, at the discretion of the horsemen's organization [~~shall~~] be distributed as follows: [~~paid to the horsemen running in the last live meet conducted by the association in a pro rata amount based on the published condition book(s) for that meet.~~]

(1) first, payment of earned but unpaid purses; and

(2) second, subject to the approval of the horsemen's organization, transfer after the above mentioned calendar year period of the balance in the respective breed's purse account to the respective breed's purse account for one or more other association.

(d) If an association ceases a live race meet before completion of the live race dates granted by the commission, the funds in and due the respective breed's purse account shall be distributed as follows:

(1)-(2) (No change.)

(3) third, subject to the approval of the horsemen's organization, transfer within 120 days after cessation of live racing of the balance in the respective breed's purse account to the respective breed's purse account for one or more other associations.

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

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

Filed with the Office of the Secretary of State, on November 25, 1998.

TRD-9817995
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Proposed date of adoption: January 15, 1999
For further information, please call: (512) 833–6699

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Chapter 319. Veterinary Practices and Drug Testing

Subchapter B. Treatment of Horse

16 TAC §319.11

The Texas Racing Commission proposes an amendment to §319.111 concerning the bleeder and furosemide (Lasix) pro-

gram. The amendment modifies the time within which a trainer of a horse must request that the horse be admitted to the furosemide (Lasix) program. The amendment allows the stewards the flexibility to authorize a late filing if in the best interest of the patrons and the horse.

Roselyn Marcus, General Counsel for the Texas Racing Commission, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the proposal.

Ms. Marcus has also determined that for each of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the proposal will be that pari-mutuel horse racing will be safe for the race horses and the participants and the patrons will have the most accurate information concerning the race horses. There will be no fiscal implications for small businesses. There is no anticipated economic cost to an individual required to comply with the amendment as proposed. The proposal has no effect on the state's agricultural, horse breeding, horse training, greyhound breeding, or greyhound training industries.

Comments on the proposal may be submitted on or before January 11, 1999, to Roselyn Marcus, General Counsel for the Texas Racing Commission, P.O. Box 12080, Austin, Texas 78711-2080.

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; §6.06, which authorizes the Commission to adopt rules on all matters relating to the operation of racetracks; and §3.16, which authorizes the Commission to adopt rules to prohibit the illegal influencing of the outcome of a race.

The proposed amendment implements Texas Civil Statutes, Article 179e.

§319.111. Bleeders and Furosemide (Lasix) Program.

(a) (No change.)

(b) Admission to Furosemide (Lasix) Program.

(1) (No change.)

(2) The trainer of a horse that was certified as a bleeder in another pari-mutuel racing jurisdiction and who competed with furosemide (Lasix) in its most recent start out-of-state is required to request the horse's admission to the furosemide (Lasix) program. The trainer must provide documentation satisfactory to the commission veterinarian that the horse was certified as a bleeder in another jurisdiction. The request that the horse be admitted to the furosemide (Lasix) program must be filed before the horse is entered [~~starts~~] in its next race. The stewards may authorize a late filing if they determine it is in the best interest of the patrons and the horse.

(c)-(g) (No change.)

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

Filed with the Office of the Secretary of State, on November 25, 1998.

TRD-9817994
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Proposed date of adoption: January 15, 1999
For further information, please call: (512) 833–6699

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TITLE 19. EDUCATION

Part II. Texas Education Agency

Chapter 161. Commissioner's Rules Concerning Advisory Committees

19 TAC §161.1003

The Texas Education Agency (TEA) proposes an amendment to §161.1003, concerning advisory committees. The section provides a list of public education advisory committees in effect. The proposed amendment is necessary to conform to the Texas Education Code, TEA operating procedures, and the Comptroller of Public Accounts approval of the TEA advisory committee list.

The proposed amendment adds the Task Force on Adult Education Accountability, Charter School Proposal Evaluation Committee, and Computer Network Study Project to the list of TEA advisory committees. The proposed amendment also removes the Essential Knowledge and Skills Review Committee, Statewide Site-Based Decision Making Committee, and Committee on Teacher Appraisal/Assessment from the list. In addition, two small technical corrections are proposed to change the title of 19 TAC Chapter 161 to "Commissioner's Rules Concerning Advisory Committees" and remove "Subchapter AA." Sections 161.1001-161.1003 do not need to be organized under a subchapter.

Mr. Virgil E. Flathouse, chief of staff, 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. Flathouse and Criss Cloudt, associate commissioner for policy planning and research, have 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 an avenue for educators, parents, and the general public to advise the commissioner of education and members of the State Board of Education on a wide range of educational policy issues. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted in writing to Criss Cloudt, Policy Planning and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to: rules@tmail.tea.state.tx.us or faxed to (512) 475-3499. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §7.055(b)(11), which authorizes the commissioner of education to appoint advisory committees, in accordance with Govern-

ment Code, Chapter 2110, as necessary to advise the commissioner in carrying out the duties of the Texas Education Agency.

The proposed amendment implements the Texas Education Code, §7.055(b)(11).

§161.1003. Advisory Committees.

The following public education advisory committees are in effect:

(1) Task Force on Adult Education Accountability;

(2) [~~(1)~~] Committee of Practitioners for Career and Technology Education;

(3) Charter School Proposal Evaluation Committee;

(4) [~~(2)~~] Comprehensive System of Personnel Development Leadership Council;

(5) Computer Network Study Project;

(6) [~~(3)~~] ~~Ed-Flex, State Panel;~~

(7) [~~(4)~~] Educational Technology Advisory Committee;

(8) [~~(5)~~] [~~Texas~~] Environmental Education Advisory Committee;

[~~(6)~~ SBOE Texas Essential Knowledge and Skills Review Committee]

(9) [~~(7)~~] Commissioner's Advisory Council on the Education of Gifted Students;

(10) [~~(8)~~] Academics 2000 State Panel;

(11) [~~(9)~~] HIV Program Review Panel;

(12) [~~(10)~~] Policy Committee on Public Education Information;

(13) [~~(11)~~] State Parent Advisory Council for Migrant Education;

(14) [~~(12)~~] Investment Advisory Committee on the Permanent School Fund;

[~~(13) Statewide Site-Based Decision Making Advisory Committee;~~]

(15) [~~(14)~~] Continuing Advisory Committee for Special Education;

[~~(15) Committee on Teacher Appraisal/Assessment;~~]

(16) State Textbook Committees; and

(17) Title I, Committee of Practitioners.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818002
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 463–9701

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Part VII. State Board for Educator Certification

Chapter 230. Professional Educator Preparation and Certification

Subchapter M. Certification of Educators in General

19 TAC §230.414

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

The State Board for Educator Certification (SBEC) proposes the repeal of §230.414, concerning Certificates for Persons with Criminal Backgrounds. The rule is being repealed because it is being moved with minor revisions to proposed new Chapter 249 for inclusion with the general disciplinary rules. New chapter 249 is concurrently being proposed in this issue of the *Texas Register*.

Pamela B. Tackett, Executive Director, State Board for Educator Certification, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Tackett also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be updated rules and regulations that will be part of a comprehensive scheme for enforcing standards of conduct of educators and others under the agency's jurisdiction. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas, 78701-2603.

The repeal is proposed under the Texas Education Code (TEC), §§21.041(b)(2) and (4), 21.044, 21.048, 21.050, and 22.082, which require the State Board for Educator Certification to propose rules that establish the academic, internship, and examination requirements for all candidates for certification; specify the classes of certificates offered; and to obtain all criminal history information that relates to an applicant for certification.

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

§230.414. Certificates for Persons with Criminal Backgrounds.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818031
Pamela B. Tackett
Executive Director
State Board for Educator Certification

Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Subchapter U. Assignment of Public School Personnel

19 TAC §230.601

The State Board for Educator Certification (SBEC) proposes an amendment to §230.601, concerning Assignment of Public School Personnel. The amendments establish assignment criteria for newly-approved courses based on the Texas Essential Knowledge and Skills (TEKS).

Pamela B. Tackett, Executive Director, State Board for Educator Certification, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Tackett also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be school district personnel who are appropriately certified and have the necessary skills and knowledge for the assignment can more effectively educate students. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Mary Charley, Certification Official, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas, 78701-2603.

The amendment is proposed under the Texas Education Code (TEC), §21.041(b)(2) which requires the State Board for Educator Certification to propose rules that specify the classes of certificates to be offered.

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

§230.601. Assignment of Public School Personnel.

(a)-(e) (No change.)

(f) A public school employee must have the appropriate credentials for his or her current assignment specified in the charts in this section, unless the appropriate permit has been issued under Subchapter Q of this chapter.
Figure: 19 TAC 230.601(f)

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818032
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Subchapter V. Induction for Beginning Teachers

19 TAC §230.611

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

The State Board for Educator Certification (SBEC) proposes the repeal of §230.611, concerning Standards for Management and Leadership Development for Administrators. The rule is being repealed because it is no longer necessary. 19 TAC Chapter 232, Subchapter R, relating to Certificate Renewal and Continuing Education Requirements, will satisfy the requirements of the Texas Education Code (TEC), §21.041(9) and §21.054 relating to continuing education requirements.

Pamela B. Tackett, Executive Director, State Board for Educator Certification, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Tackett also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the new rules governing certificate renewal and continuing professional education will be implemented and old rules eliminated. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Stephanie A. Korcheck, Director of Policy and Planning, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas, 78701-2603.

The repeal is proposed under the Texas Education Code (TEC), §21.041(b)(9) which requires the Board to provide for continuing education requirements.

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

§230.611. Standards for Management and Leadership Development for Administrators.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818033
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Chapter 241. Principal Certificate

19 TAC §§241.1, 241.5, 241.10, 241.15, 241.20, 241.25, 241.30, 241.35, 241.40

The State Board for Educator Certification (SBEC) proposes new §§241.1, 241.5, 241.10, 241.15, 241.20, 241.25, 241.30, 241.35 and 241.40, concerning Principal Certificate. The new rules focus on defining seven specific standards with accompanying knowledge and skills, rather than specific coursework requirements. The Standard Principal Certificate would be-

come the appropriate certificate under Texas Education Code §21.003(a) to be employed as a principal or assistant principal. In addition to identifying the standards, the new rules contain language addressing requirements for admission to a principal preparation program, specific activities that must occur during preparation, requirements to receive the Provisional and Standard Principal Certificates, and renewal requirements.

Pamela B. Tackett, Executive Director, State Board for Educator Certification, has determined that for the first five-year period the rules are in effect there may be fiscal implications for state or local government as a result of enforcing or administering the rules. There may be a cost to educator preparation programs to modify their programs to meet the new standards. Candidates for principal certification would be responsible for paying the costs of the certification exams. The costs of the required individual assessment and continuing education would be incurred by the individual certificate holder and/or school district. The individual will pay a renewal fee to offset the cost to the SBEC of developing and implementing procedures to verify compliance with renewal requirements and to approve the individual assessments. Candidates for the Principal Certificate would pay the cost of the certification exams. The SBEC would pay the cost of notifying the Board of Trustees regarding whether their principal has decided to voluntarily comply with renewal requirements. The SBEC would incur the cost of a mechanism for principals to submit whether they met continuing education requirements (if required to do so) to SBEC as well as a mechanism for whether beginning superintendents and principals have complied with mentor and first-year professional development requirements.

Ms. Tackett also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be that a consistent format between the superintendent and the principal standards will benefit all areas of SBEC and the profession in creating standards that are similar to leadership but also unique to each level. In the future preparation programs, certification exams, and continuing education and principals will be based on standards developed by Texas principals. Students will benefit from principals and assistant principals who possess and continually update the knowledge base and skills that are essential to success as a campus leader.

Comments on the proposal may be submitted to Stephanie A. Korcheck, Director of Policy and Planning, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas, 78701-2603.

The new sections are proposed under the Texas Education Code (TEC), Chapter 21, Subchapter B. TEC §21.040(4) requires the Board to appoint for each class of educator certificate an advisory committee composed of members of that class to recommend standards for that class to the Board. TEC §21.041(b)(2)-(4) requires the Board to specify the classes of certificates to be issued, specify the period of validity for each class of educator certificate, and specify requirements for the issuance and renewal of an educator certificate. TEC §21.046(b) requires that the qualifications for certification of a principal must: allow an outstanding teacher to qualify by substituting approved experience and professional training for part of the educational experience; provide that supervised and approved on-the-job experience must be accepted in lieu of classroom hours; and emphasize instructional leadership; administration, supervision, and communication skills; curriculum and instruction management; performance evaluation; and organization and fiscal management. TEC §21.046(c) requires the Board to ensure that each candidate for certification as a principal is of the highest caliber and multilevel screening processes, validated comprehensive assessment programs, and flexible internships with successful mentors exist to determine whether a candidate for certification as a principal possesses the essential knowledge, skills, and leadership capabilities necessary for success. TEC §21.046(d) requires the Board to consider the knowledge, skills, and proficiencies for principals as developed by relevant national organizations and the State Board of Education. TEC §21.054(a) requires the Board to establish a process for identifying continuing education courses and programs that fulfill continuing education requirements. TEC §21.054(b) requires that continuing education for principals be based on an individual assessment of the knowledge, skills, and proficiencies necessary to perform successfully as a principal; an individualized professional growth plan shall be developed as a result of the assessment; assessment results and the growth plan may only be released with the approval of the principal assessed and be used for professional growth purposes; and each certified principal shall participate in the assessment process at least once every five years.

No other statutes, articles or codes are affected by the proposed new rules.

§241.1. General Provisions.

(a) Due to the critical role the principal plays in campus effectiveness and student achievement, and consistent with the Texas Education Code (TEC) §21.046(c), the rules adopted by the State Board for Educator Certification will ensure that each candidate for the Principal Certificate is of the highest caliber and possesses the knowledge and skills necessary for success.

(b) As required by TEC §21.046(b)(1)-(6), the standards identified in §241.15 of this title (relating to Standards for the Principal Certificate) emphasize instructional leadership; administration, supervision, and communication skills; curriculum and instruction management; performance evaluation; organization; and fiscal management.

(c) Each individual serving as a principal or assistant principal is expected to actively participate in professional development activities to continually update his or her knowledge and skills. Currency in best practices and research as related to both campus leadership and student learning is essential.

(d) The Principal Certificate shall be the appropriate certificate for employment as an assistant principal or principal, pursuant to TEC §21.003(a).

§241.5. Minimum Requirements for Admission to a Principal Preparation Program.

(a) Prior to admission to a preparation program leading to the Principal Certificate, an individual must:

(1) hold a baccalaureate degree from an accredited institution of higher education;

(2) demonstrate an acceptable combination of a score on a nationally-normed assessment and grade point average, as determined by the preparation program; and

(3) successfully resolve any criminal history, as defined by §249.23 of this title (relating to Criminal Background).

(b) Preparation programs may adopt requirements for admission in addition to those required in subsection (a) of this section.

(c) Each preparation program must develop and implement specific criteria and procedures that allow admitted individuals to substitute experience and/or professional training directly related to the standards identified in §241.15 of this title (relating to Standards for the Principal Certificate) for part of the preparation requirements.

§241.10. Preparation Requirements.

(a) After completion of one-third of the preparation program, the individual must complete a program-approved screening instrument based on the standards identified in §241.15 of this title (relating to Standards for the Principal Certificate) and devise a corresponding professional development plan.

(b) Structured, field-based training must be focused on actual experiences with each of the standards identified in §241.15 of this title to include:

(1) experiences at diverse types of campuses; and

(2) development and implementation of an action research plan for change based on a need linked to a campus improvement plan.

§241.15. Standards for the Principal Certificate.

(a) The knowledge and skills identified in this section must be used by educator preparation programs in the development of curricula and coursework and will be used by the State Board for Educator Certification as the basis for developing the assessments required to obtain the Provisional and Standard Principal Certificates. These standards must also serve as the foundation for the individual assessment, professional growth plan, and continuing professional education activities required by §241.30 of this title (relating to Requirements to Renew the Standard Principal Certificate).

(b) Learner-Centered Values and Ethics of Leadership. A principal is an educational leader who promotes the success of all students by acting with integrity and fairness, and in an ethical manner. At the campus level, a principal understands, values, and is able to:

(1) model and promote the highest standard of conduct, ethical principles, and integrity in decision making, actions, and behaviors.

(2) implement policies and procedures that encourage all campus personnel to comply with Chapter 247 of this title (relating to Code of Ethics and Standards Practices for Texas Educators).

(3) model and promote the continuous and appropriate development of all learners in the campus community.

(4) promote awareness of learning differences, multicultural awareness, gender sensitivity, and ethnic appreciation in the campus community.

(5) articulate the importance of education in a free democratic society.

(c) Learner-Centered Leadership and Campus Culture. A principal is an educational leader who promotes the success of all students and shapes campus culture by facilitating the development, articulation, implementation, and stewardship of a vision of learning that is shared and supported by the school community. At the campus level, a principal understands, values, and is able to:

(1) create a campus culture that sets high expectations, promotes learning, and provides intellectual stimulation for self, students, and staff.

(2) ensure that parents and other members of the community are an integral part of the campus culture.

(3) utilize strategies to ensure the development of collegial relationships and effective collaboration of campus staff.

(4) respond appropriately to the diverse needs of individuals within the community in shaping the campus culture.

(5) utilize emerging issues, trends, demographic data, knowledge of systems, campus climate inventories, student learning data, and other information to develop a campus vision and plan to implement the vision.

(6) facilitate the collaborative development of a shared campus vision that focuses on teaching and learning.

(7) facilitate the collaborative development of a plan in which objectives and strategies to implement the campus vision are clearly articulated.

(8) align financial, human, and material resources to support the implementation of the campus vision.

(9) establish processes to assess and modify the plan of implementation to ensure achievement of the campus vision.

(10) support innovative thinking and risk-taking efforts of everyone within the school community and view unsuccessful experiences as learning opportunities.

(11) acknowledge, recognize, and celebrate the contributions of students, staff, parents, and community members toward the realization of the campus vision.

(d) Learner-Centered Human Resources Leadership and Management. A principal is an educational leader who promotes the success of all students by implementing a staff evaluation and development system to improve the performance of all staff members, selects and implements appropriate models for supervision and staff development, and applies the legal requirements for personnel management. At the campus level, a principal understands, values, and is able to:

(1) collaboratively develop, implement, and revise a comprehensive and on-going plan for professional development of campus staff which addresses staff needs and aligns professional development with identified goals.

(2) facilitate the application of adult learning and motivation theory to all campus professional development, including the use of appropriate content, processes, and contexts.

(3) ensure the effective implementation of the professional development plan by allocation of appropriate time, funding, and other needed resources.

(4) implement effective, legal, and appropriate strategies for the recruitment, selection, assignment, and induction of campus staff.

(5) utilize formative and summative evaluation processes to further develop the knowledge and skills of campus staff.

(6) diagnose and improve campus organizational health and morale through the implementation of strategies designed to provide on-going support to campus staff members.

(7) engage in on-going, meaningful, professional growth activities to further develop necessary knowledge and skills, and to model lifelong learning.

(e) Learner-Centered Communications and Community Relations. A principal is an educational leader who promotes the success of all students by collaborating with families and community

members, responding to diverse community interests and needs, and mobilizing community resources. At the campus level, a principal understands, values, and is able to:

(1) demonstrate effective communication through oral, written, auditory, and nonverbal expression.

(2) utilize effective conflict management and group consensus building skills.

(3) implement effective strategies to systematically gather input from all campus stakeholders.

(4) develop and implement strategies for effective internal and external communications.

(5) develop and implement a comprehensive program of community relations which utilizes strategies that will effectively involve and inform multiple constituencies, including the media.

(6) provide varied and meaningful opportunities for parents to be engaged in the education of their children.

(7) establish partnerships with parents, businesses, and other groups in the community to strengthen programs and support campus goals.

(8) respond to pertinent political, social, and economic issues that exist in the internal and external environment

(f) Learner-Centered Organizational Leadership and Management. A principal is an educational leader who promotes the success of all students through leadership and management of the organization, operations, and resources for a safe, efficient, and effective learning environment. At the campus level, a principal understands, values, and is able to:

(1) implement appropriate management techniques and group processes to define roles, assign functions, delegate authority, and determine accountability for campus goal attainment.

(2) gather and organize information from a variety of sources for use in creative and effective campus decision making.

(3) frame, analyze, and creatively resolve campus problems using effective problem solving techniques to make timely, high quality decisions.

(4) develop, implement, and evaluate change processes for organizational effectiveness.

(5) implement strategies that enable the physical plant, equipment, and support systems to operate safely, efficiently, and effectively to maintain a conducive learning environment.

(6) apply local, state, and federal laws and policies to support sound decisions while considering implications related to all school operations and programs.

(7) acquire, allocate, and manage human, material, and financial resources according to district policies and campus priorities.

(8) collaboratively plan and effectively manage the campus budget.

(9) utilize technology to enhance school management.

(10) utilize effective planning, time management, and organization of work to maximize attainment of district and campus goals.

(g) Learner-Centered Curriculum Planning and Development. A principal is an educational leader who promotes the success of all students by facilitating the design and implementation of curricula and strategic plans that enhance teaching and learning; alignment of curriculum, curriculum resources, and assessment; and the use of various forms of assessment to measure student performance. At the campus level, a principal understands, values, and is able to:

(1) use emerging issues, occupational and economic trends, demographic data, student learning data, motivation theory, learning theory, legal requirements, and other information as a basis for campus curriculum planning.

(2) facilitate the use of sound research-based practice in the development and implementation of campus curricular, co-curricular, and extracurricular programs.

(3) facilitate campus participation in collaborative district planning, implementation, monitoring, and revision of curriculum to ensure appropriate scope, sequence, content, and alignment.

(4) facilitate the use and integration of technology, telecommunications, and information systems to enrich the campus curriculum.

(5) facilitate the effective coordination of campus curricular, co-curricular, and extracurricular programs in relation to other district programs.

(h) Learner-Centered Instructional Leadership and Management. A principal is an educational leader who promotes the success of all students by advocating, nurturing, and sustaining a campus culture and instructional program conducive to student learning and staff professional growth. At the campus level, a principal understands, values, and is able to:

(1) facilitate the development of a campus learning organization that supports instructional improvement and change through an on-going study of relevant research and best practice.

(2) facilitate the implementation of sound, research-based instructional strategies, decisions, and programs in which multiple opportunities to learn and be successful are available to all students.

(3) implement special campus programs to ensure that all students are provided quality, flexible instructional programs and services to meet individual student needs.

(4) utilize interpretation of formative and summative data from a comprehensive student assessment program to develop, support, and improve campus instructional strategies and goals.

(5) facilitate the use and integration of technology, telecommunications, and information systems to enhance learning.

(6) facilitate the implementation of sound, research-based theories and techniques of classroom management, student discipline, and school safety to ensure an environment conducive to teaching and learning.

(7) facilitate the development, implementation, evaluation, and refinement of student activity programs to fulfill academic, developmental, social, and cultural needs.

(8) acquire and allocate sufficient instructional resources on the campus in the most equitable manner to support and enhance student learning.

§241.20. Requirements for the Issuance of the Provisional Principal Certificate and the Induction Period.

(a) To be eligible to receive the Provisional Principal Certificate, the individual must:

(1) successfully complete the assessments required under §230.5 of this title (relating to Educator Assessment); and

(2) have two years of creditable teaching experience as a classroom teacher, as defined by Chapter 230, Subchapter Y, of this title (relating to Definitions).

(b) The induction period must occur during employment as an assistant principal or principal in a Texas public or private school, as defined by Chapter 230, Subchapter Y, of this title. An individual seeking to enter the induction period more than five years after the date of issuance of the Provisional Principal Certificate must be approved by the educator preparation program that recommended him or her for the certificate. To ensure that the individual possesses the knowledge and skills identified in the standards under §241.15 of this title (relating to Standards for the Principal Certificate), the preparation program may require the individual to satisfy certain requirements prior to entering and/or during the induction period.

§241.25. Requirements for the Issuance of the Standard Principal Certificate.

To be eligible to receive the Standard Principal Certificate, the individual must:

(1) successfully complete the assessments required under §230.5 of this title (relating to Educator Assessment);

(2) hold a master's degree from an accredited institution of higher education; and

(3) successfully complete the induction period required under this chapter.

§241.30. Requirements to Renew the Standard Principal Certificate.

(a) Each individual who holds the Standard Principal Certificate, issued on or after September 1, 1999, is subject to Chapter 232, Subchapter R of this title (relating to Certificate Renewal and Continuing Professional Education Requirements).

(b) An individual who holds a valid Texas professional administrator certificate issued prior to September 1, 1999, and who is employed as a principal or assistant principal:

(1) must complete the assessment described in §241.35 of this title (relating to Assessment Process Definition and Approval of Individual Assessments); and

(2) may voluntary comply with the requirements of this section under procedures adopted by the executive director under §232.810, Subchapter R, of this title (relating to Voluntary Renewal of Current Texas Educators). The executive director shall report to the employing school district those individuals who choose to renew under this subsection.

(c) To satisfy the requirements of this section, an individual must complete 200 clock hours of continuing professional education every five years. The activities must fulfill the professional growth plan developed under subsection (e) of this section.

(d) Individuals holding the Standard Principal Certificate must select an assessment from the list approved under §241.35 of this title and must participate in the assessment the first year of each five-year renewal period. The individual seeking to renew is solely responsible for selecting the assessment used to satisfy the requirements of this subsection.

(e) Based on the results of the assessment required under subsection (d) of this section, each individual shall develop a professional growth plan which includes components adopted by the executive director. The plan must be directly related to the standards identified in §241.15 of this title (relating to Standards for the Principal Certificate), and must allow for the prioritization of professional growth needs.

(f) Consistent with TEC §21.054(b), the results of the individual assessment and the professional growth plan shall be used exclusively for professional growth purposes, and may only be released with the approval of the individual assessed.

§241.35. Assessment Process Definition and Approval of Individual Assessments.

(a) The individual assessment process determines primarily through a series of job-like activities the presence of knowledge and skills directly related to the standards identified in §241.15 of this title (relating to Standards for the Principal Certificate). The assessment process will include a structured self-assessment and may also include other job-related activities as appropriate. Job-related activities must also determine the presence of skills related to the standards identified in §241.15 of this title. The assessment must be conducted and completed within a 30-day time period.

(b) Not later than January 1, 1999, the executive director shall implement procedures to approve the individual assessments that may be used to satisfy §241.30(d) of this title (relating to Requirements to Renew the Standard Principal Certificate). The executive director shall adopt procedures to receive and investigate complaints that allege noncompliance with this section, including available sanctions against the assessment provider if the investigation determines noncompliance has occurred.

(c) The following characterize an appropriate assessment and must be included in the approval criteria adopted by the executive director:

(1) performance is analyzed solely on the presence of defined skills embedded in the assessment activities;

(2) standards of performance on defined skills are measured in a consistent manner;

(3) a minimum of two assessors integrate their analyses of data for the individual being assessed;

(4) assessors are chosen by the assessment provider and must successfully demonstrate both a strong familiarity with the principalship and leadership skills and are in no way involved in evaluation activities or employment decisions affecting the principal being assessed;

(5) assessors are trained by the assessment provider and must successfully demonstrate acceptable performance for the following assessor duties:

(A) assessment process procedures;

(B) analysis of performance of individuals being assessed in job-like activities;

(C) integration of data from job-like and job-related activities; and

(D) development of detailed feedback related to the standards identified in §241.15 of this title.

(6) structured feedback provides detailed results for each of the standards assessed, compares the results with the self-assessment required under this section, and includes a series of recommendations identifying specific professional development activities that should be considered in the development of the professional growth plan required under §241.30(d) of this title; and

(7) documentation verifies that the assessment process has been field tested for appropriate content and design.

§241.40. Implementation Dates.

(a) September 1, 1999–§241.1 of this title (relating to General Provisions); §241.25(1) of this title (relating to Requirements for Issuance of the Standard Principal Certificate); §241.30 of this title (relating to Requirements to Renew the Standard Principal Certificate); and §241.35 of this title (relating to Assessment Process Definition and Approval of Individual Assessments).

(b) September 1, 2000–§241.5 of this title (relating to Minimum Requirements for Admission to a Principal Preparation Program); §241.10 of this title (relating to Preparation Requirements); and §241.15 of this title (relating to Standards for the Principal Certificate).

(c) September 1, 2001–§241.20 of this title (relating to Requirements for Issuance of the Provisional Principal Certificate and the Induction Period).

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818034
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Chapter 242. Superintendent Certificate

19 TAC §§242.5, 242.10, 242.15, 242.20, 242.25, 242.30, 242.35

The State Board for Educator Certification (SBEC) proposes new §§242.5, 242.10, 242.15, 242.20, 242.25, 242.30, and 242.35 concerning Superintendent Certificate. The new rules are necessary to create standards for leadership that are unique to the campus and district levels.

Pamela B. Tackett, Executive Director, State Board for Educator Certification, has determined that for the first five-year period the rules are in effect there will be fiscal implications for state or local government as a result of enforcing or administering the rules. There may be a cost to educator preparation programs to modify their programs to meet the new standards. The costs of continuing education will be incurred by the superintendent and/or school district for those certified after September 1, 1999, and for current superintendents who wish to voluntarily comply with renewal requirements. Candidates for the Superintendent Certificate would pay the cost of the certification exams. The SBEC would pay the cost of notifying the Board of Trustees regarding whether their superintendent has decided to voluntarily comply with renewal requirements. The SBEC would incur the cost of a mechanism for superintendents to submit to the SBEC whether they met continuing professional education requirements as well as a mechanism for whether beginning superintendents have complied with mentor and first-year professional development requirements.

Ms. Tackett also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be that the consistent format between the superintendent and the principal standards will benefit the profession in creating standards for leadership that are unique to the campus and district levels. In the future, preparation programs, certification exams, and continuing professional education for superintendents will be based on standards developed by Texas superintendents. Students, faculty, staff, and local communities will benefit from superintendents who possess and continually update the knowledge and skills that are essential to success as a school district leader.

Comments on the proposal may be submitted to Stephanie Korcheck, Director of Policy and Planning, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas, 78701-2603.

The new rules are proposed under the Texas Education Code (TEC), Chapter 21, Subchapter B, §21.040(4) which requires the Board to appoint for each class of educator certificate an advisory committee composed of members of that class to recommend standards for that class to the Board. TEC §21.041 (b) (2) (3) (4) requires the Board to specify the classes of certificates to be issued, specify the period of validity for each class of educator certificate, and specify the requirements for issuance and renewal of an educator certificate. TEC §21.046 (a) requires that the qualifications for superintendent must permit a candidate for certification to substitute management training or experience for part of the educational experience.

No other statutes, articles or codes are affected by the proposed new rules.

§242.5. Minimum Requirements for Admission to a Superintendent Preparation Program.

(a) Successful completion of an assessment that is based upon characteristics of effective educational leaders.

(b) Hold, at a minimum, a provisional Principal Certificate, issued under Chapter 241 of this title (relating to Principal Certificate).

(c) Hold, at a minimum, a Master's degree from an accredited institution of higher education.

(d) As determined by the preparation program, an acceptable combination of scores from a nationally-normed assessment and grade point average.

(e) Successfully resolve any criminal history, as defined by §249.23 of this title (relating to Representation of Parties).

§242.10. Preparation Program Requirements.

(a) The design of the superintendency preparation program resides with the SBEC-approved educator preparation program(s) and curricula and coursework shall be based upon the standards in §242.15 of this title.

(b) The superintendency shall include a field-based practicum whereby candidates must demonstrate proficiency in each of the eight standards in §242.15 of this title.

(c) Each preparation program must develop and implement specific criteria and procedures that allow admitted individuals to substitute experience and/or professional training directly related to the standards identified in §242.15 of this title (relating to Standards Required for the Superintendent Certificate) for part of the preparation requirements.

§242.15. Standards Required for the Superintendent Certificate.

(a) The knowledge and skills identified in this section must be used by the Board as the basis for developing the assessment(s) required to obtain the superintendent certificate.

(b) Learner-Centered Values and Ethics of Leadership. A superintendent is an educational leader who promotes the success of all students by acting with integrity, fairness, and in an ethical manner. A superintendent understands, values, and is able to:

(1) Model and promote the highest standard of conduct, ethical principles, and integrity in decision making, actions, and behaviors.

(2) Implement policies and procedures that encourage all district personnel to comply with §247.2 of this title, (relating to the Code of Ethics and Standard Practices for Texas Educators).

(3) Serve as an articulate spokesperson for the importance of education to a free democratic society.

(4) Enhance teaching and learning by participation in quality professional development activities, study of current professional literature and research, and interaction with the district's staff and students.

(5) Maintain personal physical and emotional wellness.

(6) Demonstrate the courage to be a champion for children.

(c) Learner-Centered Leadership and District Culture. A superintendent is an educational leader who promotes the success of all students and shapes district culture by facilitating the development, articulation, implementation, and stewardship of a vision of learning that is shared and supported by the school community. A superintendent understands, values, and is able to:

(1) Establish and support a district culture that promotes learning, high expectations, and academic rigor for self, student, and staff performance.

(2) Facilitate the development and implementation of a shared vision that focuses on teaching and learning.

(3) Implement strategies for the involvement of all stakeholders in planning processes and facilitate planning between constituencies.

(4) Conduct and analyze district/school climate inventories for effective, responsive decision-making.

(5) Institute and monitor planning processes that include strategies designed to ensure the accomplishment of district goals and objectives to achieve the district's vision.

(6) Facilitate the use and allocation of all available resources to support the implementation of the district's vision and goals.

(7) Recognize and celebrate contributions of staff and community toward realization of the district's vision.

(8) Demonstrate an awareness of emerging issues and trends affecting the education community.

(9) Encourage and model innovative thinking and risk-taking and view problems as learning opportunities.

(10) Promote multicultural awareness, gender sensitivity, and the appreciation of diversity in the education community.

(d) Learner-Centered Human Resources Leadership and Management. A superintendent is an educational leader who promotes the success of all students by implementing a staff evaluation and development system to improve the performance of all staff members, selects appropriate models for supervision and staff development, and applies the legal requirements for personnel management. A superintendent understands, values, and is able to:

(1) Develop, implement, and evaluate a comprehensive professional development plan designed specifically to address areas of identified district, campus, and/or staff need.

(2) Facilitate the application of adult learning principles to all professional development activities, including the use of relevant issues and tasks and the use of support and follow-up strategies to facilitate implementation.

(3) Implement strategies to enhance professional capabilities at the district and campus level to ensure support for a continuum of services and programming.

(4) Deliver effective presentations and facilitate the learning of both small and large groups.

(5) Implement effective strategies for the recruitment, selection, induction, development, and promotion of staff.

(6) Develop and institute comprehensive staff evaluation models that include both formative and summative assessment and appraisal strategies.

(7) Demonstrate use of district and staff evaluation data for personnel policy development and decision making.

(8) Demonstrate and apply knowledge of certification requirements and standards.

(9) Diagnose and improve organizational health/morale by the implementation of strategies and programs designed to provide on-going assistance and support to personnel.

(e) Learner-Centered Policy and Governance. A superintendent is an educational leader who promotes the success of all students by understanding, responding to, and influencing the larger political, social, economic, legal, and cultural context and by working with the board of trustees to define mutual expectations, policies, and standards. A superintendent understands, values, and is able to:

(1) Define and apply the general characteristics of internal and external political systems to the educational organization.

(2) Demonstrate and apply appropriate knowledge of legal issues affecting education.

(3) Provide leadership in defining superintendent and board roles, mutual expectations, and effective superintendent-board working relationships.

(4) Determine the political, economic, and social aspects and/or needs of groups in the community, and those of the community at large, for effective and responsive decision making.

(5) Prepare and recommend district policies to improve student learning and district performance in compliance with state and federal requirements.

(6) Utilize legal systems to protect the rights of students and staff and to improve learning opportunities.

(7) Apply laws, policies, and procedures fairly, wisely, and considerately.

(8) Access state and national political systems to provide input on critical educational issues.

(f) Learner-Centered Communications and Community Relations. A superintendent is an educational leader who promotes the success of all students by collaborating with families and community

members, responding to diverse community interests and needs, and mobilizing community resources. A superintendent understands, values, and is able to:

(1) Develop and implement an effective and comprehensive district internal and external communications plan and public relations program.

(2) Analyze community and district structures and identify major opinion leaders and their relationships to district goals and programs.

(3) Establish partnerships with parents, area businesses, institutions of higher education, and community groups to strengthen programs and support district goals.

(4) Implement effective strategies to systematically communicate with and gather input from all stakeholders in the district.

(5) Communicate effectively with all social, cultural, ethnic, and racial groups in the school district and community.

(6) Develop and utilize formal and informal techniques to obtain accurate perceptions of the district staff, parents, and community.

(7) Use effective consensus building and conflict management skills.

(8) Articulate the district's vision and priorities to the community and to the media.

(9) Influence the media by utilizing proactive communication strategies that serve to enhance and promote the district's vision.

(10) Communicate an articulate position on educational issues.

(11) Demonstrate effective and forceful writing, speaking, and active listening skills.

(g) Learner-Centered Organizational Leadership and Management. A superintendent is an educational leader who promotes the success of all students by leadership and management of the organization, operations, and resources for a safe, efficient, and effective learning environment. A superintendent understands, values, and is able to:

(1) Implement appropriate management techniques and group processes to define roles, assign functions, delegate effectively, and determine accountability for goal attainment.

(2) Implement processes for gathering, analyzing, and using data for informed decision-making.

(3) Frame, analyze, and resolve problems using appropriate problem-solving techniques and decision-making skills.

(4) Develop, implement, and evaluate change processes for organizational effectiveness.

(5) Implement strategies that enable the physical plant, equipment, and support systems to operate safely, efficiently, and effectively to maintain a conducive learning environment throughout the district.

(6) Apply legal concepts, regulations, and codes for school district operations.

(7) Perform effective budget planning, management, account auditing, and monitoring and establish district procedures for accurate and effective fiscal reporting.

(8) Acquire, allocate, and manage resources according to district vision and priorities.

(9) Manage one's own time and the time of others to maximize attainment of district goals.

(10) Use technology to enhance school district operations.

(h) Learner-Centered Curriculum Planning and Development. A superintendent is an educational leader who promotes the success of all students by facilitating the design and implementation of curricula and strategic plans that enhance teaching and learning; alignment of curriculum, curriculum resources and assessment; and the use of various forms of assessment to measure student performance. A superintendent understands, values, and is able to:

(1) Apply understanding of pedagogy, cognitive development, and child and adolescent growth and development to facilitate effective district curricular decisions.

(2) Implement curriculum planning methods to anticipate and respond to occupational and economic trends and to achieve optimal student learning.

(3) Implement core curriculum design and delivery systems to ensure instructional continuity and instructional integrity across the district.

(4) Develop and implement collaborative processes for the systematic assessment and renewal of the curriculum to ensure appropriate scope, sequence, content, and alignment.

(5) Evaluate and provide direction for improving district curriculum in ways that are based upon sound, research-based practices.

(6) Facilitate the use of technology, telecommunications, and information systems to enrich the school district curriculum and enhance learning for all students.

(7) Facilitate the use of creative, critical thinking, and problem solving tools by staff and other school district stakeholders.

(8) Facilitate the effective coordination of district and campus curricular and extracurricular programs.

(i) Learner-Centered Instructional Leadership and Management. A superintendent is an educational leader who promotes the success of all students by advocating, nurturing and sustaining a district culture and instructional program conducive to student learning and staff professional growth. A superintendent understands, values, and is able to:

(1) Apply knowledge and understanding of motivational theories to create conditions that empower staff, students, families, and the community to strive to achieve the district's vision.

(2) Facilitate the implementation of sound, research-based theories and techniques of classroom management, student discipline, and school safety to ensure a school district environment conducive to learning.

(3) Facilitate the development of a learning organization that supports instructional improvement, builds and implements an appropriate curriculum, and incorporates best practice.

(4) Facilitate the ongoing study of current best practice and relevant research and encourage the application of this knowledge to district/school improvement initiatives.

(5) Plan and manage student activity programs to fulfill developmental, social, cultural, athletic, leadership and scholastic needs.

(6) Institute a comprehensive school district program of student assessment, interpretation of data, and reporting of state and national data results.

(7) Apply knowledge and understanding of special programs to ensure that students with special needs are provided quality, flexible instructional programs and services.

(8) Analyze and deploy available instructional resources in the most effective and equitable manner to enhance student learning.

(9) Develop, implement, and evaluate change processes to improve student and adult learning, and the climate for learning.

(10) Create an environment in which all students can learn.

§242.20. Requirements for the Standard Superintendent Certificate.

(a) The candidate shall satisfactorily complete an assessment based on the standards identified in §242.15 of this title (relating to Standards Required for the Superintendent Certificate).

(b) The candidate shall successfully complete an SBEC-approved superintendent preparation program and be recommended for certification by that program.

§242.25. Requirements for the First-Time Superintendent in Texas.

(a) First-time superintendents (including the first time in the state) shall participate in a one-year mentorship to include at least 36 clock hours of professional development directly related to the standards identified in §242.15 of this title (relating to Standards Required for the Superintendent Certificate).

(b) During this one-year mentorship, the superintendent must have contact with his or her mentor at least twelve times. The mentorship program for first-year superintendents must be completed within the first 18 months of employment in the superintendency in order to maintain the standard certificate.

(c) Experienced superintendents willing to serve as mentors must participate in training for the role.

§242.30. Requirements for Continuing Education and the Renewal of the Standard Superintendent Certificate.

(a) Each individual who holds the Standard Superintendent Certificate issued on or after September 1, 1999, and who is employed as a superintendent by a Texas public school district is subject to the requirements of Chapter 232, Subchapter R of this title (relating to Certificate Renewal and Continuing Professional Education), except §232.830(d).

(b) An individual who holds a valid Texas professional administrator certificate issued prior to September 1, 1999, may voluntarily comply with the requirements of this section under procedures adopted by the executive director under §232.810 of this title (relating to Voluntary Renewal of Current Texas Educators.

(c) To satisfy the requirements of this section, an individual must complete 200 clock hours of continuing professional education every five years.

(d) If an individual employed as a superintendent in a Texas public school does not meet the requirements , the SBEC will notify that superintendent's Board of Trustees.

(e) For superintendents who meet or exceed these requirements, an exemplary designation using a format approved by the executive director shall be placed on the individual's certificate or service record.

§242.35. Implementation Dates.

§242.20 of this title (relating to Requirements for the Standard Superintendent Certificate), and §242.30 of this title (relating to Requirements for Continuing Education and the Renewal of the Standard Superintendent Certificate), will be implemented September 1, 1999. All remaining sections will be implemented September 1, 2000.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818035
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Chapter 249. Disciplinary Proceedings, Sanctions, and Contested Cases, including Enforcement of the Educator's Code of Ethics

The State Board for Educator Certification (SBEC) proposes new §249.1-249.56, concerning Disciplinary Proceedings, Sanctions, and Contested Cases, including Enforcement of the Educator's Code of Ethics.

Under the new rules, the SBEC's Staff would investigate and litigate complaints on behalf of the education profession, public school students and their parents, and the State of Texas. The State Office of Administrative Hearings (SOAH) would conduct the adjudicative hearings for SBEC. After the hearing, the SOAH administrative law judge would recommend disposition of the case to the SBEC in the form of a "Proposal for Decision". The Board would make the final decision in the case and impose appropriate sanctions. The Board, however, would be limited by law in overruling or modifying the administrative law judge's Proposal for Decision.

The rules provide a range of possible actions the Board may take to regulate the preparation certification, continuing education, and standards of conduct of educators, including enforcement of the educator's code of ethics. Actions the Board may take under the proposed chapter include the denial, restriction, reprimand suspension, cancellation, or revocation of a certificate; the denial of admission of an educator preparation program; or the cancellation of an examinee's test registration or score.

Pamela B. Tackett, Executive Director, State Board for Educator Certification, has determined that for the first five-year period the rules are in effect there will be fiscal implications for state or local government as a result of enforcing or administering the rules. Using SOAH will cost the SBEC about $250,000 a year, including contracted court-reporting services and including estimated costs for code of ethics enforcement.

Ms. Tackett also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be that the education profession, students and their parents, and the State of Texas will be afforded a fair and efficient means of regulating the preparation, certification, continuing education, and standards of conduct of educators, including the enforcement of the educator's code of ethics. Having the Executive Director and a review committee made up of Board members decide which ethics code cases SOAH would hear ensures that all such complaints receive appropriate consideration and action. Having SOAH conduct the contested adjudicative hearings would provide an objective, neutral, competent, and cost-effective forum in which to help the SBEC determine legal and factual issues in contested cases brought under proposed Chapter 249. The proposed rules also provide an opportunity for parties involved in code of ethics complaints to meaningfully resolve their issues at the school district level without state intervention or sanction. Having the Executive Director and a review committee made up of Board members consider ethics code complaints for enforcement action would ensure that only serious cases go forward. Having the SBEC impose appropriate sanctions in all cases after opportunity for hearing would enable educators to regulate themselves according to the highest professional standards and would ensure the public is represented in any such decisions. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rules as proposed beyond the costs individuals may choose to incur in contesting and litigating matters arising under the proposed chapter.

Comments on the proposal may be submitted to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas, 78701-2603.

Subchapter A. General Provisions

§§249.1–249.10

The new rules are proposed under the following statutory provisions:

Senate Bill 1, Acts 1995, 74th Legislature, chapter 260, §§1, 63, 78, effective May 30, 1995.

Subchapter B, Chapter 21, Education Code: §21.031 (relating to the board's establishment to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators); §21.039 (relating to the powers and duties of the executive director); §21.040(6) (relating to the board's duty to develop and implement policies defining the respective responsibilities of the board and board's staff); §21.040(8) (relating to the board's duty to execute interagency contracts to perform routine administrative functions); §21.041(a) (relating to the board's power to adopt rules as necessary for its own procedures); §21.041(b)(1) (relating to the board's power and duty to propose rules that provide for the regulation and general administration of Subchapter B, Chapter 21, Education Code); §21.041(b)(4) (relating to the board's power and duty to propose rules that specify the requirements for the issuance and renewal of an educator certificate); §21.041(b)(7) (relating to the board's power and duty to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code); §21.041(b)(8) (relating to the board's power and duty to propose rules that provide for the enforcement of an educator's code of ethics); §21.042 (relating to the State Board of Education's review of board rules); §21.044 (relating to the board's power and duty to propose rules establishing requirements for educator preparation);

Subchapter E, Chapter 21, Education Code: §21.105 (relating to sanctions the board may impose against an educator who abandons a probationary contract); §21.160 (relating to sanctions the board may impose against an educator who abandons a continuing contract); §21.210 (relating to sanctions the board may impose against an educator who abandons a term contract);

Subchapter C, Chapter 22, Education Code (relating to criminal history records of applicants for and holders of educator certificates);

Subchapter C, Chapter 57, Education Code (relating to nonrenewal of a certificate based on student loan default);

Subchapter F, Chapter 411, Government Code: §411.090 (relating to the board's access to criminal history record information);

Chapter 2001 (relating to adoption of agency rules and application of general rules of practice for formal and informal proceedings brought pursuant to the Administrative Procedure Act);

Subchapter A, Chapter 2051: §2051.001 (relating to adoption of seal by state commissions and boards);

Articles 6252-13c and 6252-13d, Revised Civil Statutes, (relating to the denial or sanction of a state issued license based on a criminal conviction); and

Chapter 232 (relating to suspension of certificate for child support arrears) and Chapter 261, Family Code (relating to the obligation of educators to report child abuse).

No other statutes, articles or codes are affected by the proposed new rules. Subchapter A. General Provisions.

§249.1. Board's Regulatory Authority.

This chapter is adopted pursuant to the authority granted to the State Board for Educator Certification (the board) and the State Board of Education under the following provisions:

(1) Senate Bill 1, Acts 1995, 74th Legislature, chapter 260, §§1, 63, 78, effective May 30, 1995.

(2) Subchapter B, Chapter 21, Education Code: §21.031 (relating to the board's establishment to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators); §21.039 (relating to the powers and duties of the executive director); §21.040(6) (relating to the board's duty to develop and implement policies defining the respective responsibilities of the board and board's staff); §21.040(8) (relating to the board's duty to execute interagency contracts to perform routine administrative functions); §21.041(a) (relating to the board's power to adopt rules as necessary for its own procedures); §21.041(b)(1) (relating to the board's power and duty to propose rules that provide for the regulation and general administration of Subchapter B, Chapter 21, Education Code); §21.041(b)(4) (relating to the board's power and duty to propose rules that specify the requirements for the issuance and renewal of an educator certificate); §21.041(b)(7) (relating to the board's power and duty to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code); §21.041(b)(8) (relating to the board's power and duty to propose rules that provide for the enforcement of an educator's code of ethics); §21.042 (relating to the State Board of Education's

review of board rules); §21.044 (relating to the board's power and duty to propose rules establishing requirements for educator preparation);

(3) Subchapter E, Chapter 21, Education Code: §21.105 (relating to sanctions the board may impose against an educator who abandons a probationary contract); §21.160 (relating to sanctions the board may impose against an educator who abandons a continuing contract); §21.210 (relating to sanctions the board may impose against an educator who abandons a term contract);

(4) Subchapter C, Chapter 22, Education Code (relating to criminal history records of applicants for and holders of educator certificates);

(5) Subchapter C, Chapter 57, Education Code (relating to nonrenewal of a certificate based on student loan default);

(6) Subchapter F, Chapter 411, Government Code: §411.090 (relating to the board's access to criminal history record information);

(7) Chapter 2001 (relating to adoption of agency rules and application of general rules of practice for formal and informal proceedings brought pursuant to the Administrative Procedure Act);

(8) Subchapter A, Chapter 2051: §2051.001 (relating to adoption of seal by state commissions and boards);

(9) Articles 6252-13c and 6252-13d, Revised Civil Statutes, (relating to the denial or sanction of a state issued license based on a criminal conviction); and

(10) Chapter 232 (relating to suspension of certificate for child support arrears) and Chapter 261, Family Code (relating to the obligation of educators to report child abuse).

§249.2. Sunset Provision.

This chapter expires four years after its initial effective date, unless readopted or amended by the board before then.

§249.3. Definitions.

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

(1) Act–the Texas Education Code, as amended.

(2) Administrative denial–a decision or action by the agency to deny a person any of the following based on evidence of a lack of good moral character or improper conduct:

(A) admission to an educator preparation program;

(B) certification (including certification following revocation, cancellation, or surrender of a previously issued certificate) or renewal of certification;

(C) reinstatement of a previously suspended certificate; or

(D) removal or modification of a sanction other than revocation, cancellation, or surrender.

(3) ALJ–administrative law judge; a person appointed by the chief judge of the office under Chapter 2003 of the Government Code.

(4) Agency–the board acting through its executive director, staff, or agents, as distinguished from the board acting through its voting members in a decision making capacity. The term includes the executive director and his or her designee.

(5) Agency headquarters–the main offices of the board's executive director and staff located at 1001 Trinity, Austin, Texas, 78701-2603.

(6) Answer–the initial responsive pleading filed in reply to factual and legal issues raised by a petition.

(7) APA–the Administrative Procedure Act, Chapter 2001, Government Code.

(8) Applicant–a party seeking any of the following from the agency or the board: admission to an educator preparation program; issuance of a certificate (including issuance of a new certificate following revocation, cancellation, or surrender of a previously issued certificate); renewal of a certificate; reinstatement of a suspended certificate; or removal or modification of a sanction other than revocation, cancellation, or surrender. In a particular circumstance, an applicant may also be an educator or an examinee.

(9) Board–the State Board for Educator Certification acting through its voting members in a decision making capacity.

(10) Board headquarters–the main offices of the board's executive director and staff located at 1001 Trinity Street, Austin, Texas, 78701-2603.

(11) Board member(s)–one or more of the members of the board, appointed and qualified under the Act, §21.033.

(12) Cancellation or canceled–the withholding or voiding of test scores; the invalidation of a test registration; the invalidation of a surrendered certificate in lieu of revocation; the invalidation of an erroneously issued certificate.

(13) Certificate–the whole or part of any certificate, permit, approval, endorsement, or similar form of permission issued by the executive director or the board.

(14) Certificate holder or holder of a certificate–a person who holds a certificate issued under Subchapter B, Chapter 21, of the Act.

(15) Certificate requirement–any requirement, obligation, condition, or prerequisite prescribed by law, the board, or the executive director for the issuance of a certificate, including items such as required examinations, course transcripts, recommendations, information, or other documentation related to certification.

(16) Chair–the presiding officer of the board, elected pursuant to the §21.036 of the Act or other person designated by the chair to act in his or her absence or inability to serve.

(17) Chief judge–the chief administrative law judge of the office.

(18) Code of Ethics–the Code of Ethics and Standards of Practices for Texas Educators (19 Texas Administrative Code, Chapter 247 (relating to Educator's Code of Ethics)).

(19) Complaint–a written statement submitted to the agency that contains essential facts alleging improper conduct by an educator, applicant, or examinee, and provides grounds for sanctions.

(20) Contested case–a proceeding under this chapter in which the legal rights, duties, and privileges of a party are to be determined by the board after an opportunity for an adjudicative hearing.

(21) Conviction–an adjudication of guilt for a criminal offense. The term does not include the imposition of deferred adjudication for which the judge has not proceeded to an adjudication

of guilt, except as provided by Article 42.12, Code of Criminal Procedure.

(22) Day–a calendar day, unless otherwise specified in this chapter.

(23) Disciplinary proceedings–contested case proceedings before the agency, the office, and the board that commence when a request for hearing is timely filed under this chapter.

(24) Educator–a person who is required to hold a certificate issued under Subchapter B, Chapter 21, of the Act.

(25) Effective date–

(A) as applied to this chapter upon the board's adoption, 20 days after the date on which it is filed in the office of the secretary of state, pursuant to the APA;

(B) as applied to a non-rulemaking decision or action by the board or staff, the date the decision or action becomes final under the appropriate legal authority.

(26) Examinee–a person who registers to take or who takes a basic skills examination prescribed by the board for admission to an educator preparation program or a comprehensive examination prescribed by the board for a certificate.

(27) Executive director–the executive director employed by the board pursuant to §21.039 of the Act and other agency employees acting on behalf of the executive director.

(28) Filing–any written petition, answer, motion, response, other written instrument, or item appropriately filed with the agency, the board, or the office under this chapter.

(29) Good moral character–the virtues of a person as evidenced, at a minimum, by his or her not having committed crimes relating directly to the duties and responsibilities of the education profession as described in §249.16(b) of this title (relating to Eligibility of Persons with Criminal Convictions for a Certificate under Articles 6252-13c and 6252-13d, Revised Civil Statutes) or acts involving moral turpitude.

(30) Hearings coordinator–the staff person designated by the executive director to receive petitions and serve as the primary agency contact with the office.

(31) Informal conference–an informal meeting between agency staff and an educator, applicant, or examinee; the purpose of such a meeting being to give the person an opportunity to show compliance with all requirements of law for the granting or retention of a certificate or test score.

(32) Invalidated or invalidation–rendered void; lacking legal or administrative efficacy.

(33) Law–the United States and Texas Constitutions, state and federal statutes, regulations, rules, relevant case law, and decisions and orders of the board and the commissioner of education.

(34) Mail or mailed –certified United States mail, return receipt requested, unless otherwise provided by this chapter.

(35) Majority of the voting members present–a majority of the voting members of the board who are present and voting on the issue at the time the vote is recorded.

(36) Moral turpitude–improper conduct including, but not limited to, the following: dishonesty; fraud; deceit; theft; misrepresentation; deliberate violence; base, vile, or depraved acts that are intended to arouse or to gratify the sexual desire of the actor; drug or alcohol related offenses as described in §249.16(b) of this title; or acts constituting abuse under §261.001 of the Texas Family Code.

(37) Office–the State Office of Administrative Hearings.

(38) Party–each person named or admitted to participate in a contested case under this chapter.

(39) Person–any individual, representative, corporation, or other entity, including the following: an educator, applicant, or examinee; the agency, board, or office; any other agency or instrumentality of federal, state, or local government; or any public or non-profit corporation.

(40) Petition–the written pleading filed by the petitioner in a contested case under this chapter.

(41) Petitioner–the party having the burden of proof by a preponderance of the evidence in any contested case hearing or proceeding under this chapter. The term includes the following persons:

(A) the agency;

(B) a person appealing the administrative cancellation of scores based on irregularities involving an agency administered test;

(C) a person appealing the administrative denial of any of the following:

(i) admission to an educator preparation program;

(ii) certification (including certification following revocation, cancellation, or surrender of a previously issued certificate) or renewal of certification;

(iii) reinstatement of a suspended certificate; or

(iv) removal or modification of a sanction other than revocation, cancellation, or surrender.

(42) Presiding officer–the chair or acting chair of the board.

(43) Proposal for decision–a recommended decision issued by an administrative law judge in accordance with the APA, §2001.062.

(44) Quorum–a majority of the 12 voting members appointed to and serving on the board pursuant to §21.033 of the Act; seven voting board members.

(45) Reinstatement–the reactivation to valid status of a certificate suspended by the board; the lifting or discharging of a suspension on a certificate.

(46) Representative–a person representing an educator, applicant, or examinee in matters arising under this chapter; in a contested case proceeding before the office, an attorney licensed to practice law in the State of Texas.

(47) Reprimand–the board's formal censuring of a certificate:

(A) an "inscribed reprimand" is a formal, published censure appearing on the face of the educator's official certification records;

(B) a "non-inscribed reprimand" is a formal, unpublished censure that does not appear on the face of the educator's official certification record.

(48) Revocation–a sanction imposed by the board permanently invalidating an educator's certificate.

(49) Respondent–the party who contests factual or legal issues or both raised in a petition; the party filing an answer in response to a petition.

(50) Sanction–

(A) a disciplinary action by the board, including a restriction, reprimand, suspension, surrender, cancellation, or revocation of a certificate;

(B) a reasonable and lawful punitive measure imposed by the ALJ or presiding officer against a party, representative, or other participant involved in a disciplinary proceeding, hearing, or other matter under this chapter.

(51) Staff–employees of the board as a state agency and hired by the executive director.

(52) Surrender–an educator's voluntary, permanent relinquishment and invalidation of a particular certificate in lieu of disciplinary proceedings under this chapter and possible revocation of the certificate.

(53) Suspension or suspend(ed)–a sanction imposed by the board temporarily invalidating a particular certificate until reinstated by the board.

(54) Test administration rules and procedures–rules and procedures governing professional examinations administered by the board through the staff and a test contractor, including policies, regulations, and procedures set out in a test registration bulletin.

(55) Unworthy to instruct or to supervise the youth of this state–the determination that a person is unfit to hold a certificate under Subchapter B, Chapter 21, of the Act or to be allowed on a school campus under the auspices of an educator preparation program.

§249.4. Applicability.

(a) In conjunction with the rules of practice and procedure of the office (1 Texas Administrative Code Chapter 155 (relating to Rules of Procedure)) and other applicable law, this chapter shall govern disciplinary matters before the board, including the following proceedings:

(1) sanctions sought against a certificate holder;

(2) enforcement of the code of ethics;

(3) appeals of administrative denials;

(4) appeals of the administrative cancellation or withholding of test scores for alleged violation of test administration rules;

(5) reinstatement of a suspended certificate;

(6) removal or modification of a sanction other than revocation, cancellation, or surrender;

(7) complaints of contract abandonment filed with the agency pursuant to §§21.105(c), 21.160(c), or 21.210(c), of the Act; and

(8) sanctions sought against a certificate for the holder's knowing failure to report criminal history or other information required to be reported under Subchapter C, Chapter 22, of the Act; Subchapter B, Chapter 261, of the Texas Family Code; or this chapter.

(b) The office shall conduct all contested case hearings held under this chapter.

(c) This chapter shall apply to any matter referred to the office on or after the effective date of this chapter.

(d) This chapter does not apply to matters related to the proposal or adoption of board rules under the APA or to internal personnel policies or practices of the executive director or the board. The provisions of this chapter may not be used to seek sanctions against a member of the board or the agency's staff acting in that capacity.

§249.5. Purposes.

The purposes of this chapter are as follows:

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

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

(3) to regulate and to enforce the standards of conduct of educators and applicants;

(4) to provide for disciplinary proceedings in conformity with the APA and the rules of practice and procedure of the office;

(5) to enforce an educator's code of ethics;

(6) to fairly and efficiently resolve disciplinary proceedings at the least expense possible to the parties and the state;

(7) to promote the development of legal precedents through board decisions to the end that disciplinary proceedings may be justly resolved; and

(8) to provide for regulation and general administration pursuant to the board's enabling statutes.

§249.6. Construction.

(a) This chapter shall be liberally construed in conformity with the APA and the rules of practice and procedure of the office so as to achieve the purposes for which it was adopted, without changing the statutory jurisdiction, powers, or authority of the board.

(b) "Includes" and "including" are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.

(c) If any provision of this chapter is declared invalid by a court of competent jurisdiction, such invalidity shall not affect other provisions of this chapter that can be applied without the invalid provision. To that end, the board declares the provisions of this chapter to be severable.

§249.7. Signature Authority; Seal.

(a) The board may delegate to the chair the authority to sign on behalf of a majority of the board members a decision made or order issued under this chapter.

(b) As provided by this chapter, the executive director may sign final orders dismissing cases by agreement of the parties or by non-suit of the petitioner as well as those relating to other matters as provided by this chapter.

(c) The board and executive director may maintain a seal to authenticate their official acts under this chapter, including certifying copies of records showing decisions or orders of the board or the executive director. The seal shall have a star with five points and the words "State Board for Educator Certification" on it.

§249.8. Agreements to Be in Writing.

Unless otherwise provided in this chapter, no agreement between parties or their representatives related to a matter under this chapter

will be enforced unless it be in writing and signed by the parties to the agreement or their representatives and appropriately filed with the papers as part of the record.

§249.9. Ex Parte Communications.

Subjects, parties, their authorized representatives, or anyone else on a party's behalf shall not communicate or attempt to communicate with any board member regarding a complaint, investigation, or disciplinary proceeding under this chapter, except as allowed by law. The chair may impose sanctions against a violator of this section.

§249.10. Conduct and Decorum.

(a) Parties, authorized representatives, witnesses, and other persons involved in a proceeding, hearing, or other matter under this chapter shall conduct themselves with proper dignity, courtesy, and respect for the board, executive director, staff, ALJ, and all other participants. Disorderly conduct shall not be tolerated. The rules of the office governing conduct and decorum under 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure) shall also apply to matters referred to the office.

(b) Authorized representatives shall observe the standards of conduct prescribed for their professions.

(c) The presiding officer or ALJ may impose sanctions against a violator of this section, including barring the person from attending further proceedings. Sanctions allowed by the rules of the office under 1 Texas Administrative Code, Chapter 155 governing sanctions against a party or its representative and the grounds for them under that chapter are also available to the chair in any other proceeding before the board that is not conducted by the office.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818036
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Subchapter B. Enforcement Actions and Guidelines

§§249.11-249.17

The new rules are proposed under the following statutory provisions:

Senate Bill 1, Acts 1995, 74th Legislature, chapter 260, §§1, 63, 78, effective May 30, 1995.

Subchapter B, Chapter 21, Education Code: §21.031 (relating to the board's establishment to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators); §21.039 (relating to the powers and duties of the executive director); §21.040(6) (relating to the board's duty to develop and implement policies defining the respective responsibilities of the board and board's staff); §21.040(8) (relating to the board's duty to execute interagency contracts to perform routine administrative functions); §21.041(a) (relating to the board's power to adopt rules as necessary for its own procedures); §21.041(b)(1) (relating to the board's power and duty to propose rules that provide for the regulation and general administration of Subchapter B, Chapter 21, Education Code); §21.041(b)(4) (relating to the board's power and duty to propose rules that specify the requirements for the issuance and renewal of an educator certificate); §21.041(b)(7) (relating to the board's power and duty to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code); §21.041(b)(8) (relating to the board's power and duty to propose rules that provide for the enforcement of an educator's code of ethics); §21.042 (relating to the State Board of Education's review of board rules); §21.044 (relating to the board's power and duty to propose rules establishing requirements for educator preparation);

Subchapter E, Chapter 21, Education Code: §21.105 (relating to sanctions the board may impose against an educator who abandons a probationary contract); §21.160 (relating to sanctions the board may impose against an educator who abandons a continuing contract); §21.210 (relating to sanctions the board may impose against an educator who abandons a term contract);

Subchapter C, Chapter 22, Education Code (relating to criminal history records of applicants for and holders of educator certificates);

Subchapter C, Chapter 57, Education Code (relating to nonrenewal of a certificate based on student loan default);

Subchapter F, Chapter 411, Government Code: §411.090 (relating to the board's access to criminal history record information);

Chapter 2001 (relating to adoption of agency rules and application of general rules of practice for formal and informal proceedings brought pursuant to the Administrative Procedure Act);

Subchapter A, Chapter 2051: §2051.001 (relating to adoption of seal by state commissions and boards);

Articles 6252-13c and 6252-13d, Revised Civil Statutes, (relating to the denial or sanction of a state issued license based on a criminal conviction); and

Chapter 232 (relating to suspension of certificate for child support arrears) and Chapter 261, Family Code (relating to the obligation of educators to report child abuse).

No other statues article or codes are affected by the proposed new rules.

§249.11. Test Irregularities; Appeal; Sanctions.

(a) The agency may administratively cancel the scores of an examinee because of test irregularities and shall mail written notice of such cancellation to the examinee, including the reasons for such action. The examinee shall be given the opportunity to show compliance with test administration rules or procedures.

(b) The examinee may appeal the administrative cancellation of test scores by requesting a hearing before the office. The appeal of an administrative cancellation shall be in the form of a request for hearing before the office and shall be filed with the agency. No appeal of an administrative cancellation shall receive a contested case hearing on the merits unless the request for hearing is received by the agency within 30 calendar days after the person received written notice of the agency's action. If supported by an ALJ's proposal

for decision, the executive director may dismiss an appeal not timely filed.

(c) The agency shall mail to the examinee written notice of the referral of the matter to the office for further proceedings. Not later than 30 calendar days after receiving such written notice of the referral, the examinee shall file a petition with the office that complies in content and form with the requirements of this chapter and 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure). At the time of filing with the office, a copy of the petition shall be served on the agency as respondent through the executive director by United States certified mail, return receipt requested. If supported by an ALJ's proposal for decision, the board may dismiss an examinee's petition not timely filed or in compliance with the applicable requirements under this chapter or 1 Texas Administrative Code, Chapter 155.

(d) Upon satisfactory evidence that the examinee has violated test administration rules or procedures, the board may cancel the examinee's test scores or registration or bar the person from being admitted to a future test administration.

§249.12. Administrative Denial; Appeal.

(a) This section applies to the following matters:

(1) admission to an educator preparation program;

(2) certification (including certification following revocation, cancellation, or surrender of a previously issued certificate) or renewal of certification;

(3) reinstatement of a suspended certificate; or

(4) removal or modification of a restriction placed on a certificate.

(b) The agency may administratively deny any of the matters set out in subsection (a) of this section, and the board may make the final decision in the matter based upon satisfactory evidence that:

(1) the person has committed a crime or an offense relating directly to the duties and responsibilities of the education profession;

(2) the person lacks good moral character; or

(3) the person is unworthy to instruct or to supervise the youth of this state.

(c) The agency shall mail to the person whose application or request has been administratively denied written notice of the denial and the factual and legal reasons for it. The person shall be given an opportunity to show compliance with legal requirements for the relief sought. A person may appeal an administrative denial.

(d) The appeal of an administrative denial shall be in the form of a request for hearing before the office and shall be filed with the agency. No appeal of an administrative denial shall receive a contested case hearing on the merits unless the request for hearing is received by the agency within 30 calendar days after the person received written notice of the agency's action. If supported by an ALJ's proposal for decision, the executive director may dismiss an appeal not timely filed.

(e) The agency shall mail to the person appealing an administrative denial written notice of the referral of the matter to the office for further proceedings. Not later than 30 calendar days after receiving such written notice of the referral, the person appealing an administrative denial shall file a petition with the office that complies in content and form with the requirements of this chapter and 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure). At the time of filing with the office, a copy of the petition shall be served on the agency as respondent through the executive director by United States certified mail, return receipt requested. If supported by an ALJ's proposal for decision, the board may dismiss a petition not timely filed or in compliance with the applicable requirements under this chapter or 1 Texas Administrative Code, Chapter 155.

§249.13. Cancellation of an Erroneously Issued Certificate.

(a) When satisfactory evidence indicates that a certificate was issued in error and the person issued the certificate has not fulfilled all certification requirements, the agency shall demand the return of the certificate, which the executive director shall cancel upon receipt.

(b) The agency shall notify the person's employing school district, if any, that the person was issued a certificate in error, what actions the agency may take to cancel the erroneously issued certificate, and how the person can be issued a valid certificate.

(c) If the person who was issued the erroneously issued certificate fails to return the certificate, the agency may request a contested case hearing before the office. After opportunity for hearing and the issuance of a proposal for decision by an ALJ, the board may cancel the erroneously issued certificate.

(d) The agency will issue the person a valid certificate when it receives satisfactory evidence that all certification requirements have been fulfilled.

§249.14. Complaint, Required Reporting, and Investigation; Agency's Filing of Petition.

(a) Staff may obtain and investigate information concerning alleged improper conduct by an educator, applicant, examinee, or other person subject to this chapter that would warrant the board denying relief to or taking disciplinary action against the person or certificate.

(b) Complaints against an educator, applicant, or examinee must be filed in writing.

(c) The executive director and staff may also obtain and act on other information providing grounds for investigation and possible action under this chapter.

(d) A person who serves as the superintendent of a school district or the director of an open-enrollment charter school, private school, regional education service center, or shared services arrangement shall promptly notify in writing the board by filing a report with the executive director within seven calendar days of the date the person first obtains or has knowledge of information indicating any of the following circumstances:

(1) that an applicant for or a holder of a certificate has a reported criminal history;

(2) that a certificate holder was terminated from employment based on a determination that he or she committed any of the following acts:

(A) sexually or physically abused a minor or engaged in any other illegal conduct with a minor;

(B) possessed, transferred, sold, or distributed a controlled substance;

(C) illegally transferred, appropriated, or expended school property or funds;

(D) attempted by fraudulent or authorized means to obtain or to alter any certificate or permit that would entitle the individual to be employed in a position requiring such certificate

or permit or to receive additional compensation associated with a position; or

(E) committed a crime, any part of such crime having occurred on school property or at a school-sponsored event; or

(3) that a certificate holder resigned and reasonable evidence supported a recommendation by the person to terminate a certificate holder because he or she committed one of the acts specified in paragraph (2) of this subsection.

(A) Before accepting an employee's resignation that, under this paragraph, requires a person to notify the board by filing a report with the executive director, the person shall inform the certificate holder in writing that such a report will be filed and sanctions against his or her certificate may result as a consequence.

(B) A person required to comply with paragraph (3) of this subsection shall notify the governing body of the employing school district before filing the report with the executive director.

(e) A report filed under subsection (d) of this section shall, at a minimum, summarize the factual circumstances requiring the report and identify the subject of the report by providing the following available information: name and any aliases; certificate number, if any, or social security number; and last known mailing address and home and daytime phone numbers. A person who is required to file a report under subsection (d) of this section but fails to do so timely is subject to sanctions under this chapter.

(f) The agency shall not pursue sanctions against an educator who is alleged to have abandoned his or her contract in violation of §§21.105(c), 21.160(c), or 21.210(c) of the Act unless the board of trustees of the employing school district:

(1) renders a finding that good cause did not exist under §§21.105(c)(2), 21.160(c)(2), or 21.210(c)(2) of the Act; and

(2) submits a written complaint to the agency within 30 calendar days after the educator separates from employment.

(g) To efficiently administer and implement the board's purpose under this chapter and the Act, the staff may set priorities for the investigation of complaints based on the severity and immediacy of the allegations and the likelihood of harm posed by the subject of the investigation.

(h) Only the agency may file a petition seeking sanctions under this chapter. Prior to the agency's filing a petition, the agency shall mail to the person affected written notice of the facts or conduct alleged to warrant the intended action and shall provide the person an opportunity to show compliance with all requirements of law for the retention of the certificate or other enjoyment.

§249.15. Disciplinary Action by Board.

(a) Pursuant to this chapter, the board may take any of the following actions:

(1) require the withdrawal of a person from an educator preparation program;

(2) place restrictions on the issuance, renewal, or holding of a certificate, either indefinitely or for a set term;

(3) issue an inscribed or non-inscribed reprimand;

(4) suspend a certificate for a set term; or

(5) revoke or cancel, which includes accepting the surrender of, a certificate without opportunity for reapplication for a set term or permanently.

(b) The board may impose any additional conditions or restrictions upon a certificate that the board deems necessary to facilitate the rehabilitation and professional development of the educator or to protect students, parents of students, school personnel, or school officials.

(c) The board may order disciplinary action against a person or certificate over which the board has jurisdiction upon a determination based on satisfactory evidence that:

(1) the person has conducted school or education activities in violation of law;

(2) the person is unworthy to instruct or to supervise the youth of this state;

(3) the person has violated a provision of the educator's code of ethics;

(4) the person has failed to report or has hindered the reporting of child abuse or the known criminal history of an educator as required by law and §249.14 of this title (relating to Complaint, Required Reporting, and Investigation; Agency's Filing of Petition);

(5) the person has abandoned a contract in violation of §§21.105(c), 21.160(c), or 21.210(c), of the Act; or

(6) the person has failed to cooperate as provided by law with the agency in an investigation commenced under this chapter.

(d) The provisions of this section are not exclusive and do not preclude consideration of other grounds or measures available by law to the board or the agency, including student loan default or child support arrears. The board may request the Office of the Attorney General to pursue available civil, equitable, or other legal remedies to enforce an order or decision of the board under this chapter.

§249.16. Eligibility of Persons with Criminal Convictions for a Certificate under Articles 6252-13c and 6252-13d, Revised Civil Statutes.

(a) Pursuant to Articles 6252-13c and 6252-13d, Revised Civil Statutes, and Subchapter C, Chapter 22, Education Code, the board may suspend or revoke an existing valid certificate, deny an applicant a certificate, or bar a person from being assessed or examined for a certificate because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of the education profession.

(b) Subsection (a) of this section applies to a crime that: indicates a threat to the health, safety, or welfare of a student, parent of a student, fellow employee, or professional colleague; interferes with the orderly, efficient, or safe operation of a school district, campus, or activity; or indicates impaired ability or misrepresentation of qualifications to perform the functions of an educator. Crimes considered to relate directly to the duties and responsibilities of the education profession include:

(1) the crime involves moral turpitude;

(2) the crime involves any form of sexual or physical abuse of a minor or student or other illegal conduct with a minor or student;

(3) the facts underlying the crime would support a felony conviction for possession, transfer, sale, distribution, or conspiracy to possess, transfer, sell, or distribute any controlled substance defined in Chapter 481, Health and Safety Code;

(4) the crime involves school property or funds;

(5) the crime involves any attempt by fraudulent or unauthorized means to obtain or alter any certificate or permit that would entitle any person to hold or obtain a position as an educator;

(6) the crime occurs wholly or in part on school property or at a school-sponsored activity; or

(7) two or more crimes are committed within any 12-month period that involve public intoxication, operating a motor vehicle while under the influence of alcohol, or disorderly conduct.

(c) Pursuant to Article 6252-13d, Revised Civil Statutes, the executive director shall notify the applicant or certificate holder in writing of the agency's intent to seek disciplinary action, including denial or revocation, and the reasons for the proposed action. The applicant or certificate holder shall have the opportunity to be heard according to the procedures set forth in this chapter.

§249.17. Decision Making Guidelines.

(a) Purpose. The purpose of these guidelines is to achieve the following objectives:

(1) to provide a framework of analysis for the staff, the presiding ALJ, and the board in considering matters under this chapter;

(2) to promote consistency in the exercise of sound discretion by the staff, the presiding ALJ, and the board in seeking, proposing, and making decisions under this chapter; and

(3) to provide guidance for the informal resolution of potentially contested matters.

(b) Construction and application. This section shall be construed and applied so as to preserve board members' discretion in making final decisions under this chapter. This section shall be further construed and applied so as to be consistent with the Act, the rest of this chapter, and other applicable law, including board decisions and orders.

(c) The following factors may be considered in seeking, proposing, or making a decision under this chapter:

(1) the type and severity of actual physical or mental harm to a student or to school personnel;

(2) the severity of economic harm to a student, the parent(s) of a student, school personnel, a school official, school district, or the state, and the ability of the person causing the harm to make restitution;

(3) premeditated or intentional misconduct;

(4) misconduct;

(5) motive;

(6) attempted concealment of misconduct;

(7) prior misconduct of a similar or related nature;

(8) disciplinary or criminal history;

(9) violation of a board order;

(10) prior written reprimands, warnings, or admonishments from any governmental agency or official regarding misconduct or violation of laws pertaining to the educator;

(11) likelihood of present harm or potential for continuing harm to students, parents of students, school personnel, or school or certification officials;

(12) terms and status of probation, community supervision, community service, restitution, or other requirement or condition judicially imposed in connection with a criminal offense;

(13) the likelihood of future misconduct of a similar or related nature as shown by:

(A) lack of remorse;

(B) failure to implement remedial measures to correct or alleviate harm arising from the misconduct; or

(C) lack of rehabilitative motivation or potential; or

(14) any other relevant circumstances or facts.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818037
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Subchapter C. Prehearing Matters

19 TAC §§249.18–249.29

The new rules are proposed under the following statutory provisions:

Senate Bill 1, Acts 1995, 74th Legislature, chapter 260, §§1, 63, 78, effective May 30, 1995.

Subchapter B, Chapter 21, Education Code: §21.031 (relating to the board's establishment to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators); §21.039 (relating to the powers and duties of the executive director); §21.040(6) (relating to the board's duty to develop and implement policies defining the respective responsibilities of the board and board's staff); §21.040(8) (relating to the board's duty to execute interagency contracts to perform routine administrative functions); §21.041(a) (relating to the board's power to adopt rules as necessary for its own procedures); §21.041(b)(1) (relating to the board's power and duty to propose rules that provide for the regulation and general administration of Subchapter B, Chapter 21, Education Code); §21.041(b)(4) (relating to the board's power and duty to propose rules that specify the requirements for the issuance and renewal of an educator certificate); §21.041(b)(7) (relating to the board's power and duty to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code); §21.041(b)(8) (relating to the board's power and duty to propose rules that provide for the enforcement of an educator's code of ethics); §21.042 (relating to the State Board of Education's review of board rules); §21.044 (relating to the board's power and duty to propose rules establishing requirements for educator preparation);

Subchapter E, Chapter 21, Education Code: §21.105 (relating to sanctions the board may impose against an educator who abandons a probationary contract); §21.160 (relating to sanc-

tions the board may impose against an educator who abandons a continuing contract); §21.210 (relating to sanctions the board may impose against an educator who abandons a term contract);

Subchapter C, Chapter 22, Education Code (relating to criminal history records of applicants for and holders of educator certificates);

Subchapter C, Chapter 57, Education Code (relating to nonrenewal of a certificate based on student loan default);

Subchapter F, Chapter 411, Government Code: §411.090 (relating to the board's access to criminal history record information);

Chapter 2001 (relating to adoption of agency rules and application of general rules of practice for formal and informal proceedings brought pursuant to the Administrative Procedure Act);

Subchapter A, Chapter 2051: §2051.001 (relating to adoption of seal by state commissions and boards);

Articles 6252-13c and 6252-13d, Revised Civil Statutes, (relating to the denial or sanction of a state issued license based on a criminal conviction); and

Chapter 232 (relating to suspension of certificate for child support arrears) and Chapter 261, Family Code (relating to the obligation of educators to report child abuse).

No other statues article or codes are affected by the proposed new rules.

§249.18. Jurisdiction.

(a) A contested case commences under this chapter when a request for hearing is timely filed with the agency's hearings coordinator.

(b) Jurisdiction of the office is determined by the ALJ under 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure).

§249.19. Powers and Duties of ALJ.

The powers and duties of an ALJ are determined by 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure).

§249.20. Recusal and Disqualification of ALJs.

The recusal or disqualification of an ALJ shall be governed by 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure).

§249.21. Substitution of ALJs.

Substitution of an ALJ shall be governed by 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure).

§249.22. Classification of Parties; Current Addresses.

(a) Regardless of errors as to designation of a party, parties shall be accorded their true status in the proceeding.

(b) The petitioner in a contested case proceeding under this chapter and 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure) is the party in a contested case seeking relief from the decision maker and requesting an adjudicative hearing with the office. The petitioner shall have the burden of proof to show by a preponderance of the evidence entitlement to such relief.

(c) Parties shall keep the agency apprised of their current addresses and shall notify the agency of a change of address within five calendar days of the effective date of such change.

§249.23. Representation of Parties.

(a) Representatives of parties shall notify the office and other parties of the representation.

(b) At an informal conference offered pursuant to the APA, a person may be represented by a person who is not an attorney.

(c) Parties in contested cases before the office may represent themselves or be represented by an attorney licensed to practice law in the State of Texas.

§249.24. Filing or Serving Documents on the Agency or the ALJ.

(a) The following requirements govern the filing or service on the agency of documents related to a proceeding under this chapter:

(1) The following original papers shall be filed with the agency: appeal of an administrative denial and request for a contested case hearing under this chapter; exceptions and replies to the ALJ's proposal for decision; and motions for rehearing. Such filings shall be directed to: Hearings Coordinator, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas, 78701-2603. The date of filing shall be determined by the file stamp affixed by the agency.

(2) For any original paper required to be filed with the agency, the original and four copies shall be filed.

(b) The filing of papers with the office or service of documents on the ALJ in contested cases shall be governed by 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure), unless modified by order of the ALJ as allowed by law.

§249.25. Pleadings.

(a) Pleadings filed with the office include petitions, answers, replies, exceptions, and motions. Regardless of any error in its designation, a pleading shall be accorded its true status in the proceeding in which it is filed.

(1) Amended and supplemental pleadings may be filed at such time so as not to operate as a surprise on the opposing party.

(2) The ALJ may allow a pleading to be amended during the contested case evidentiary hearing on the merits and shall do so freely when the trial amendment will facilitate determining the merits of the case but will not unduly prejudice the objecting party.

(b) In addition to this chapter, 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure) shall also govern the following matters related to pleadings: the content generally of pleadings; purpose and effect of motions; general requirements for motions; responses to motions generally; motions to intervene; motions for continuance; responses to written motions for continuance; and amendment of pleadings.

§249.26. Petition.

(a) The party seeking relief and requesting a contested case hearing under this chapter shall file a petition with the office. The petitioner shall have the burden of proof by a preponderance of the evidence in all contested case proceedings brought under this chapter.

(b) The petition shall contain the following items:

(1) a statement of the legal authority and jurisdiction under which the disciplinary action is being sought and the hearing is to be held;

(2) a reference to the particular sections of the statutes and rules involved;

(3) a statement of the matters asserted;

(4) a statement regarding the failure of the parties to reach an agreed settlement of the matters asserted in the petition;

(5) the name, current mailing address, daytime telephone number, if any, and facsimile number, if any, of the petitioner and the petitioner's authorized representative; and

(6) if the petition seeks sanctions against a certificate holder, a notification set forth as follows in capital letters and in at least 10-point boldface type: IF YOU DO NOT FILE A WRITTEN ANSWER TO THIS PETITION WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS WITHIN 30 CALENDAR DAYS OF BEING SERVED WITH THIS PETITION, ANY SCHEDULED HEARING MAY BE CANCELED AND THE STATE BOARD FOR EDUCATOR CERTIFICATION MAY GRANT THE RELIEF REQUESTED IN THIS PETITION, INCLUDING REVOCATION OF YOUR CERTIFICATE BY DEFAULT. THE MATTERS ASSERTED IN THE PETITION WILL BE DEEMED ADMITTED UNLESS YOUR WRITTEN ANSWER SPECIFICALLY DENIES EACH ASSERTION PLED AND IS FILED WITHIN THE PRESCRIBED TIME PERIOD. IF YOU FILE A WRITTEN ANSWER BUT THEN FAIL TO ATTEND A SCHEDULED HEARING, THE STATE BOARD FOR EDUCATOR CERTIFICATION MAY GRANT THE RELIEF REQUESTED IN THIS PETITION, INCLUDING REVOCATION OF YOUR CERTIFICATE.

(c) The petition shall be served on the respondent by United States certified mail, return receipt requested. The agency as petitioner shall also serve the petition on the respondent by regular first-class United States mail. A certificate evidencing service shall be included in the petition. For purposes of this section and §249.27 of this title (relating to answers), it is a rebuttable presumption that a petition was served on the respondent no later than five calendar days after mailing.

(d) A petition that does not comply with the requirements of this chapter and 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure) is subject to dismissal.

§249.27. Answer.

(a) The party responding to a petition filed under this chapter shall file a written answer with the office within 30 calendar days after being served with such petition. For purposes of this section and §249.26 of this title (relating to petitions), it is a rebuttable presumption that a petition was served on the respondent no later than five calendar days after mailing. At the time of filing with the office, the respondent shall serve a copy of the answer on the petitioner by United States certified mail, return receipt requested.

(b) The answer shall specifically admit or deny each allegation in the petition and shall plead all affirmative defenses.

(c) The answer shall contain the name, current mailing address, daytime telephone number, if any, and facsimile number, if any, of the respondent and the respondent's authorized representative.

(d) All well-pled factual allegations in the petition will be deemed admitted unless the respondent's answer, containing specific denials to each allegation, is filed within the time period prescribed in subsection (a) of this section. A general denial shall not be sufficient to controvert factual allegations contained in the petition.

(e) An answer that does not comply with the requirements of this chapter and 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure) may provide grounds for judgment in favor of the petitioner.

§249.28. Stipulations.

Stipulations shall be governed by 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure).

§249.29. Discovery.

The APA, 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure), this chapter, and the Texas Rules of Civil Procedure, as applicable, shall govern discovery.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818038
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Subchapter D. Hearing Procedures

19 TAC §§249.30–249.35

The new rules are proposed under the following statutory provisions:

Senate Bill 1, Acts 1995, 74th Legislature, chapter 260, §§1, 63, 78, effective May 30, 1995.

Subchapter B, Chapter 21, Education Code: §21.031 (relating to the board's establishment to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators); §21.039 (relating to the powers and duties of the executive director); §21.040(6) (relating to the board's duty to develop and implement policies defining the respective responsibilities of the board and board's staff); §21.040(8) (relating to the board's duty to execute interagency contracts to perform routine administrative functions); §21.041(a) (relating to the board's power to adopt rules as necessary for its own procedures); §21.041(b)(1) (relating to the board's power and duty to propose rules that provide for the regulation and general administration of Subchapter B, Chapter 21, Education Code); §21.041(b)(4) (relating to the board's power and duty to propose rules that specify the requirements for the issuance and renewal of an educator certificate); §21.041(b)(7) (relating to the board's power and duty to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code); §21.041(b)(8) (relating to the board's power and duty to propose rules that provide for the enforcement of an educator's code of ethics); §21.042 (relating to the State Board of Education's review of board rules); §21.044 (relating to the board's power and duty to propose rules establishing requirements for educator preparation);

Subchapter E, Chapter 21, Education Code: §21.105 (relating to sanctions the board may impose against an educator who abandons a probationary contract); §21.160 (relating to sanctions the board may impose against an educator who abandons a continuing contract); §21.210 (relating to sanctions the board may impose against an educator who abandons a term contract);

Subchapter C, Chapter 22, Education Code (relating to criminal history records of applicants for and holders of educator certificates);

Subchapter C, Chapter 57, Education Code (relating to nonrenewal of a certificate based on student loan default);

Subchapter F, Chapter 411, Government Code: §411.090 (relating to the board's access to criminal history record information);

Chapter 2001 (relating to adoption of agency rules and application of general rules of practice for formal and informal proceedings brought pursuant to the Administrative Procedure Act);

Subchapter A, Chapter 2051: §2051.001 (relating to adoption of seal by state commissions and boards);

Articles 6252-13c and 6252-13d, Revised Civil Statutes, (relating to the denial or sanction of a state issued license based on a criminal conviction); and

Chapter 232 (relating to suspension of certificate for child support arrears) and Chapter 261, Family Code (relating to the obligation of educators to report child abuse).

No other statues article or codes are affected by the proposed new rules.

§249.30. Notice of Contested Case Hearing.

(a) Notice of a contested case hearing is governed by the APA, 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure), and this chapter.

(b) The agency may serve the notice of hearing by sending it certified, return receipt requested, and regular first-class United States mail to the party's last known address as shown by the agency's records. An educator shall notify the agency of his or her current mailing address.

§249.31. Venue.

Hearings shall be conducted in Austin, Texas, at a site designated by the office in accordance with applicable law and 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure).

§249.32. Conduct and Record of Hearings.

The rules of the office under 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure) shall govern the procedure at hearing and the making of a record of a contested case.

§249.33. Use of Deposition Transcripts in Contested Case Hearings.

The use of deposition transcripts in contested case hearings shall be governed by Rule 207 of the Texas Rules of Civil Procedure. The terms "court proceedings" and "trial" used in Rule 207 are deemed to refer to "contested case hearing(s)" for purposes of applying this section and Rule 207 to contested case hearings before the office.

§249.34. Consolidated Proceedings.

A party may move to consolidate two or more proceedings under this chapter if:

(1) they involve common questions of law and fact; and

(2) separate proceedings would result in unwarranted expense, delay, or substantial injustice.

§249.35. Disposition Prior to Hearing; Default.

(a) This chapter and 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure) shall govern disposition prior to hearing, default, and attendant relief.

(b) The executive director may issue and sign orders on behalf of the board resolving a case by waiver, stipulation, compromise, agreed settlement, consent order, agreed statement of facts, or any other informal or alternative resolution agreed to by the parties and not precluded by law.

(c) If supported by an ALJ's proposal for decision, the board may dispose of a case prior to a contested case hearing on the merits on the following grounds: unnecessary duplication of proceedings; res judicata; withdrawal; mootness; lack of jurisdiction; failure of a party requesting relief to timely file or file in proper form a pleading that would support an order or decision in that party's favor; failure to comply with an applicable order, deadline, rule, or other requirement issued by the board, the executive director, or the presiding ALJ; failure to state a claim for which relief can be granted; or failure to prosecute.

(d) For purposes of this chapter, an event described in paragraphs (1) or (2) of this subsection shall constitute a default on the part of a respondent in a contested case:

(1) the failure of the respondent to timely file a written answer in proper form as required by this chapter; or

(2) the failure of the respondent to appear in person or by authorized representative on the day and at the time set for hearing in a contested case, regardless of whether a written answer has been filed.

(e) In the event a respondent defaults, the petitioner may seek from the ALJ or the board or both the appropriate relief as provided by paragraphs (1)-(3) of this subsection, in addition to and in conformance with any remedies for default available under 1 Texas Administrative Code, Chapter 155:

(1) Upon the failure to timely file a written answer in proper form as provided by §249.27 of this title (relating to answers) and 1 Texas Administrative Code, Chapter 155, the ALJ may propose entry of a default judgment against the respondent. The board may dispose of the case by entering a default judgment against the respondent and granting any relief requested in the petition, including the revocation of a certificate. Upon notice of the board's disposition, the ALJ shall dismiss the case from the office's docket.

(2) The petitioner, upon oral or written motion, shall be entitled to a continuance of a contested case hearing for a reasonable period of time determined by the ALJ if all the following conditions exist:

(A) the respondent has failed to timely file a written answer in proper form as provided by §249.27 of this title and 1 Texas Administrative Code, Chapter 155;

(B) the board has not disposed of the case; and

(C) both the petitioner and the respondent appear in person or by authorized representative on the date and time at a scheduled hearing before the office.

(3) Upon the failure to appear in person or by authorized representative on the date and time at a scheduled hearing before the office, regardless of whether a written answer has been filed, the ALJ may propose entry of a default judgment against the respondent pursuant to 1 Texas Administrative Code, §155.55 (relating to failure to attend hearing and default) or abate proceedings in the case and defer to the board for disposition. The board may dispose of the case by entering a default judgment and granting any relief requested in the petition, including the revocation of a certificate. Upon notice of the board's disposition, the ALJ shall dismiss the case from the office's docket.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818039
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Subchapter E. Posthearing Matters

19 TAC §§249.36–249.45

The new rules are proposed under the following statutory provisions:

Senate Bill 1, Acts 1995, 74th Legislature, chapter 260, §§1, 63, 78, effective May 30, 1995.

Subchapter B, Chapter 21, Education Code: §21.031 (relating to the board's establishment to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators); §21.039 (relating to the powers and duties of the executive director); §21.040(6) (relating to the board's duty to develop and implement policies defining the respective responsibilities of the board and board's staff); §21.040(8) (relating to the board's duty to execute interagency contracts to perform routine administrative functions); §21.041(a) (relating to the board's power to adopt rules as necessary for its own procedures); §21.041(b)(1) (relating to the board's power and duty to propose rules that provide for the regulation and general administration of Subchapter B, Chapter 21, Education Code); §21.041(b)(4) (relating to the board's power and duty to propose rules that specify the requirements for the issuance and renewal of an educator certificate); §21.041(b)(7) (relating to the board's power and duty to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code); §21.041(b)(8) (relating to the board's power and duty to propose rules that provide for the enforcement of an educator's code of ethics); §21.042 (relating to the State Board of Education's review of board rules); §21.044 (relating to the board's power and duty to propose rules establishing requirements for educator preparation);

Subchapter E, Chapter 21, Education Code: §21.105 (relating to sanctions the board may impose against an educator who abandons a probationary contract); §21.160 (relating to sanctions the board may impose against an educator who abandons a continuing contract); §21.210 (relating to sanctions the board may impose against an educator who abandons a term contract);

Subchapter C, Chapter 22, Education Code (relating to criminal history records of applicants for and holders of educator certificates);

Subchapter C, Chapter 57, Education Code (relating to nonrenewal of a certificate based on student loan default);

Subchapter F, Chapter 411, Government Code: §411.090 (relating to the board's access to criminal history record information);

Chapter 2001 (relating to adoption of agency rules and application of general rules of practice for formal and informal proceedings brought pursuant to the Administrative Procedure Act);

Subchapter A, Chapter 2051: §2051.001 (relating to adoption of seal by state commissions and boards);

Articles 6252-13c and 6252-13d, Revised Civil Statutes, (relating to the denial or sanction of a state issued license based on a criminal conviction); and

Chapter 232 (relating to suspension of certificate for child support arrears) and Chapter 261, Family Code (relating to the obligation of educators to report child abuse).

No other statues article or codes are affected by the proposed new rules.

§249.36. Proposal for Decision.

(a) As appropriate, the presiding ALJ shall prepare a proposal for decision containing the following items:

(1) separately stated findings of fact and conclusions of law; and

(2) a proposed order.

(b) The ALJ may amend the proposal for decision pursuant to exceptions, replies to exceptions, and briefs.

(c) The ALJ shall submit the proposal for decision to the board's headquarters, with a copy to each party.

(d) Except as otherwise provided or prohibited by these rules and other applicable law, the board's general counsel may issue procedural directives relating to matters that arise after the submission of the proposal for decision to the board and that are not delegated to the office for action or decision.

§249.37. Exceptions and Replies.

(a) A party who is aggrieved by the ALJ's proposal for decision shall file any exceptions to the proposal for decision within 30 calendar days of the date of the proposal for decision. Any replies to the exceptions shall be filed by other parties within 50 calendar days of the proposal for decision. Exceptions and replies shall be:

(1) filed with the board by mailing, hand-delivering, or faxing them to the agency's general counsel at agency headquarters;

(2) served upon the other party by mail, hand-delivery, or fax; and

(3) served on the ALJ in accordance with 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure).

(b) Any disagreement with a factual finding or conclusion of law in the proposal for decision not contained in an exception to the proposal shall be waived.

(c) Each exception or reply to a finding of fact or conclusion of law shall be concisely stated and shall summarize the evidence in support of each exception.

(1) Any evidence or arguments relied upon shall be grouped under the exceptions to which they relate.

(2) In summarizing evidence, the parties shall include a specific citation to the hearing record where such evidence appears.

(3) Arguments shall be logical and coherent and citations to authorities shall be complete.

§249.38. Review and Presentation of Proposal to Board.

The board shall review the record of the hearing conducted by the office before making a final decision or issuing an order in a case. The board may require the presiding ALJ to make a presentation on the proposal for decision at a public meeting of the board.

§249.39. Final Decisions and Orders.

(a) The chair having certified a quorum present at a regularly scheduled board meeting, a majority vote of the voting members present shall be required to make a final decision on a proposal for decision, unless provided otherwise by this chapter.

(b) A copy of the board's decision or order shall be delivered by hand or certified mailed to the parties or to their authorized representatives, as appropriate, and to the office.

(c) All final decisions and orders of the board under this chapter shall be in writing and signed by the members of the board voting in favor of the decision or order or by the chair on behalf of the majority as allowed by this chapter. A final decision or order shall include findings of fact and conclusions of law separately stated.

(d) The board may change a proposal for decision submitted by the ALJ in accordance with the APA. If the board changes an ALJ's proposal for decision, the board's final decision or order shall show how the proposal was changed, state the specific reason and legal basis for a change, and cite the portion of the hearing record supporting the change. If the board changes a proposal for decision because no evidence in the record supports the ALJ's finding of fact or conclusion of law, then the board may cite the record as a whole for such a change.

§249.40. Motion for Rehearing; Administrative Finality.

(a) A motion for rehearing of the board's decision in a contested case and the determination of administrative finality shall be governed by the APA, applicable case law, and this section.

(b) A motion for rehearing unsupported by satisfactory evidence shall be overruled. This subsection does not limit the overruling of a motion for rehearing on other grounds or by operation of law.

§249.41. Procedure for Reprimand; Restriction.

(a) When the board reprimands an educator or restricts an educator's certificate, the agency shall mail to the educator a copy of the board's order.

(b) Inscribed reprimand.

(1) The agency shall demand that the educator return all certificates or permits issued by the State of Texas as well as all copies of them and substitute a certificate provided by the agency showing the reprimand on the face of the certificate.

(2) A record of the board's action publicly reprimanding the educator shall become part of the educator's official certification records maintained by the agency.

(3) The agency shall also notify the employing school district of the board's order reprimanding the educator.

(c) Non-inscribed reprimand.

(1) The educator may retain all copies of all certificates or permits issued by the State of Texas as well as all copies of them without being required to substitute a certificate showing the reprimand.

(2) The board's action reprimanding the certificate holder shall only become part of the person's confidential investigative/ litigation case file maintained by the agency and shall not be available for public inspection except as required by law.

(3) The agency, the presiding ALJ, and the board may consider a non-inscribed reprimand in seeking, recommending, or ordering sanctions based on subsequently obtained evidence of improper or criminal conduct by the educator.

(d) Restriction.

(1) The agency shall demand that the educator return all certificates or permits issued by the State of Texas as well as all copies of them and substitute a certificate provided by the agency showing each restriction.

(2) A record of the board's action restricting the educator's certificate shall become part of the person's official records maintained by the agency.

(3) The agency shall notify the employing school district of the board's order restricting the educator's certificate.

§249.42. Procedure for the Suspension, Cancellation, or Revocation of a Certificate.

(a) When the board issues an order of suspension, cancellation, or revocation, the agency shall mail a copy of the order to the person who formerly held the certificate.

(b) When an order of suspension, cancellation, or revocation becomes administratively final, the agency shall mail to the former certificate holder notification of finality and a demand that he or she return all certificates or permits issued by the State of Texas as well as all copies of them.

(c) A record of the board action suspending, canceling, or revoking the certificate shall become part of the person's official records maintained by the agency.

(d) The agency shall also notify the employing school district of the board's order when it becomes administratively final.

(e) The agency shall notify all Texas school district superintendents and certification officers in each state or territory of the United States of the suspension, cancellation, or revocation.

§249.43. Procedure for Reinstating a Suspended Certificate.

(a) At the end of the suspension period designated by the board, the person whose certificate was suspended may request that the executive director reinstate the certificate.

(b) A record of reinstatement of the certificate shall become part of the educator's official certification records.

(c) The agency shall notify all Texas school district superintendents and certification officers in each state or territory of the United States of the reinstatement of the certificate.

§249.44. Reapplication Following Denial, Cancellation, or Revocation.

(a) Except as provided by this section, the agency shall process and review in its usual and customary manner the certificate application of a person whose previous application was denied or whose certificate was canceled or revoked by the board under this chapter. For purposes of this section, the term "canceled" refers only to the surrender of a certificate in lieu of disciplinary action, including possible revocation.

(b) A person whose certificate has been denied, canceled, or revoked under this chapter shall not reapply for a certificate before the

first anniversary after the date of the board's order denying, canceling, or revoking a certificate became administratively final. The executive director shall reject without processing or further proceedings any application received in violation of this subsection.

(c) In addition to other sanctions available under this chapter, the board may order that a person whose certificate has been denied, canceled, or revoked under this chapter shall not reapply for a certificate before a time period longer than one year after the order of denial, cancellation, or revocation became administratively final. The executive director shall reject without processing or further proceedings any application received in violation of such an order.

(d) In reviewing a certificate application, the agency, the presiding ALJ, and the board may consider prior board orders denying, canceling, or revoking a certificate previously applied for or held by the applicant.

(e) After investigation and opportunity for hearing under this chapter, the board may grant or deny, in whole or in part, the relief requested in the applicant's petition.

(f) A person whose petition for relief under this section has been denied by the board, in whole or in part, shall not file a subsequent application or petition earlier than the first anniversary of the effective date of such denial.

(g) The executive director shall reject without further proceedings any application or petition filed in violation of this section, any other applicable law, or related lawful contract or agreement.

(h) The agency shall publish notice of any certificate issued to a person whose previous application was denied or whose certificate was canceled or revoked by the board under this chapter.

§249.45. Factors for Modifying Sanctions.

In determining whether to modify a sanction other than revocation imposed under this chapter, the ALJ and the board may consider the following factors:

(1) moral character in the community as shown by satisfactory evidence;

(2) employment history;

(3) providing or failing to provide legally obligated financial support for any children or spouse;

(4) participation in continuing education programs or other methods of maintaining currency with the education profession;

(5) criminal history record, including arrests, indictments, and convictions for crimes involving moral turpitude;

(6) successful completion or discharge of any sentence, incarceration, fine, parole, mandatory supervision, probation, community supervision, community service, restitution, or other requirement or condition judicially imposed in connection with a criminal offense;

(7) offers of employment in the education profession;

(8) involvement in public service activities in the community;

(9) compliance or non-compliance with the provisions of a board order;

(10) action by other state or federal regulatory agencies;

(11) any evidence of drug or alcohol abuse that may impair the applicant's ability to perform duties as an educator;

(12) the gravity of the improper conduct for which the sanction was imposed and the impact the misconduct had on students, parents of students, school officials, fellow employees, or professional colleagues;

(13) the length of time since the sanction was imposed, considered in light of whether the person seeking modification has had sufficient time for successful rehabilitation; or

(14) other actions taken by the person seeking modification to ably and responsibly resume full duties as an educator.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818040
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Subchapter F. Enforcement of the Educator's Code of Ethics

19 TAC §§249.46–249.56

The new rules are proposed under the following statutory provisions:

Senate Bill 1, Acts 1995, 74th Legislature, chapter 260, §§1, 63, 78, effective May 30, 1995.

Subchapter B, Chapter 21, Education Code: §21.031 (relating to the board's establishment to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators); §21.039 (relating to the powers and duties of the executive director); §21.040(6) (relating to the board's duty to develop and implement policies defining the respective responsibilities of the board and board's staff); §21.040(8) (relating to the board's duty to execute interagency contracts to perform routine administrative functions); §21.041(a) (relating to the board's power to adopt rules as necessary for its own procedures); §21.041(b)(1) (relating to the board's power and duty to propose rules that provide for the regulation and general administration of Subchapter B, Chapter 21, Education Code); §21.041(b)(4) (relating to the board's power and duty to propose rules that specify the requirements for the issuance and renewal of an educator certificate); §21.041(b)(7) (relating to the board's power and duty to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code); §21.041(b)(8) (relating to the board's power and duty to propose rules that provide for the enforcement of an educator's code of ethics); §21.042 (relating to the State Board of Education's review of board rules); §21.044 (relating to the board's power and duty to propose rules establishing requirements for educator preparation);

Subchapter E, Chapter 21, Education Code: §21.105 (relating to sanctions the board may impose against an educator who abandons a probationary contract); §21.160 (relating to sanctions the board may impose against an educator who abandons

a continuing contract); §21.210 (relating to sanctions the board may impose against an educator who abandons a term contract);

Subchapter C, Chapter 22, Education Code (relating to criminal history records of applicants for and holders of educator certificates);

Subchapter C, Chapter 57, Education Code (relating to nonrenewal of a certificate based on student loan default);

Subchapter F, Chapter 411, Government Code: §411.090 (relating to the board's access to criminal history record information);

Chapter 2001 (relating to adoption of agency rules and application of general rules of practice for formal and informal proceedings brought pursuant to the Administrative Procedure Act);

Subchapter A, Chapter 2051: §2051.001 (relating to adoption of seal by state commissions and boards);

Articles 6252-13c and 6252-13d, Revised Civil Statutes, (relating to the denial or sanction of a state issued license based on a criminal conviction); and

Chapter 232 (relating to suspension of certificate for child support arrears) and Chapter 261, Family Code (relating to the obligation of educators to report child abuse).

No other statues article or codes are affected by the proposed new rules.

§249.46. Definitions.

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

(1) Code of Ethics–the Code of Ethics and Standards of Practices for Texas Educators (19 Texas Administrative Code, Chapter 247 (relating to Educator's Code of Ethics)).

(2) Complainant–a person who files a complaint with the agency under this subchapter alleging a violation of the code of ethics by an educator.

(3) Complaint–written information verified by affidavit and filed with the agency asking for the investigation and prosecution of an alleged violation of the code of ethics. The term includes any exhibits attached to a complaint and any additional written information requested by the executive director under this subchapter.

(4) Office–the State Office of Administrative Hearings.

(5) Party–the agency as petitioner and the educator alleged to have violated the code of ethics as respondent in a contested case before the office and the board.

(6) Review committee–a body composed of three voting board members appointed by the presiding officer of the board and including one administrator or counselor member, one teacher member, and one citizen member.

(7) Staff–as used in this subchapter, the executive director and other employees or agents of the board; in particular, the agency's employees or agents responsible for investigating or litigating administrative cases involving code of ethics complaints.

§249.47. Purpose and Scope.

(a) Pursuant to §21.041(b)(8) of the Act, and in accordance with the provisions of this chapter, the board is authorized to impose sanctions against an educator who violates a principle or standard of the Code of Ethics and Standard Practices for Texas Educators, 19 Texas Administrative Code, Chapter 247 (relating to Educators' Code of Ethics) (effective March 1, 1998), or its predecessor, as the code of ethics existed on January 1, 1995, if the conduct occurred while that code was in effect. The effective date of this subchapter shall be 20 days after the date on which the adopted rules are filed in the office of the secretary of state, pursuant to the APA.

(b) Any person, including an educator or the parent of a student, may file a complaint against an educator under this subchapter. Any person may provide information to the agency regarding a possible violation of the code of ethics.

(c) This subchapter applies to a complaint filed with the executive director under this subchapter on or after the effective date of this subchapter. Complaints that were submitted to the agency before the effective date of this subchapter but received no disposition shall be reviewed for dismissal pursuant to this subchapter with the exception that the executive director or the review committee may apply only the following grounds for dismissal to them:

(1) the commissioner of education, the board, or a court of competent jurisdiction has previously disposed of a similar complaint based on the same alleged facts; or

(2) the complaint fails to state a violation of the code of ethics after, for purposes of determining jurisdiction only, accepting the facts stated on the face of the complaint as true.

(d) A petition based on a code of ethics complaint submitted to the agency before the effective date of this subchapter and filed by the agency with the office shall be subject to dismissal pursuant to subsection (c)(2) of this section and shall comply with the applicable requirements for pleadings under this chapter and 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure).

(e) The provisions of this subchapter prevail over any conflicting rules in the remainder of this chapter. Unless expressly provided elsewhere in this chapter, the provisions of this subchapter do not apply to matters arising under Subchapters A-E of this chapter.

(f) Only the agency may file a petition seeking enforcement of the code of ethics under this subchapter. The agency may file a petition on its own initiative or on behalf of a complainant.

(g) This subchapter does not apply to a petition filed by the agency alleging a ground for sanction under this chapter in addition to an alleged violation of the code of ethics. The agency is not required to file a separate action under this subchapter if the additional ground for sanction arises out of the same facts as the alleged violation of the code of ethics.

(h) The provisions of this subchapter may not be used to seek sanctions against a member of the board or the agency's staff acting in that capacity.

(i) The agency shall provide a copy of these rules to any person upon request.

§249.48. Time for Filing of Complaint.

A complaint under this subchapter shall be filed with the executive director by the later of:

(1) 180 calendar days after the effective date of this subchapter; or

(2) 90 calendar days after the date of the last act giving rise to the complaint.

§249.49. Form of Complaint; Required Service; Local Resolution.

(a) A complaint shall be verified by affidavit and shall include the information specified by this subsection:

(1) the full name, current mailing address, and telephone number of the complainant and the complainant's representative, if any;

(2) the full name, current mailing address, and telephone number of the educator alleged to have violated the code of ethics and the educator's representative, if any;

(3) a clear and complete description of each act alleged to have violated the code of ethics, including the specific place, date, and time of each such act;

(4) a specific citation of each principle and standard of the code of ethics allegedly violated by the educator, linking each act described in paragraph (3) of this subsection to the principle and standard allegedly violated and explaining how each such act constitutes a violation of the applicable principle and standard;

(5) as available, the full name, current mailing address, and telephone number of each witness to each act alleged to have violated the code of ethics;

(6) a declaration that the complainant has informed in writing the educator against whom the complaint is being made as well as the superintendent or the president of the board of trustees of the district employing that educator, as appropriate under subsection (c) of this section, of the nature of the complaint, and providing the dates upon which such written notifications occurred; and

(7) a declaration that to the best of the complainant's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the complaint is not frivolous as defined by §249.53 of this title (relating to Frivolous Complaints).

(b) The executive director may develop a complaint form that complies with subsection (a) of this section.

(c) A complaint shall be filed with the executive director and, at the time of filing, served on the educator accused of having violated the code of ethics and the superintendent of the school district employing the accused educator by certified United States mail, return receipt requested. If the superintendent is the educator alleged to have violated the code of ethics, then the complainant shall notify the president of the board of trustees of the district employing the accused superintendent. The agency shall also notify the accused educator of the filing of a complaint against him or her.

(d) The superintendent or president of the board of trustees notified under subsection (c) of this section shall have 45 calendar days after receiving written notice of the complaint in which to resolve the complainant's allegations before the agency acts on the complaint. The agency shall suspend its review of a complaint under this subchapter until the earlier of:

(1) the date on which the agency receives notice from the complainant withdrawing the complaint;

(2) the date on which the agency receives notice from the superintendent or the board president notified under subsection (c) of this section that the accused educator is no longer employed by the district; or

(3) 50 calendar days after the complaint was filed with the agency.

§249.50. Grounds for Dismissal of a Complaint by Executive Director or Review Committee.

The executive director or the review committee may dismiss all or part of a complaint only based on a determination that:

(1) the commissioner of education, executive director, review committee, office, or board has previously disposed of a similar complaint or petition based on the same alleged facts;

(2) the complaint fails to comply with the requirements of §249.49 of this title (relating to Form of Complaint; Required Service; Local Resolution);

(3) the complaint fails to state a violation of the code of ethics after, for purposes of determining jurisdiction only, accepting the facts stated on the face of the complaint as true;

(4) the complaint was not timely filed; or

(5) the complaint is frivolous as defined by §249.53 of this title (relating to Frivolous Complaints).

§249.51. Executive Director's Review and Notice.

(a) The executive director shall review a complaint filed under this subchapter for possible dismissal. In conducting this review, the executive director shall consider only the complaint and any additional information he or she may have requested from the complainant or the staff.

(b) Not later than 70 calendar days after receiving a complaint filed under this subchapter, the executive director shall notify appropriate staff, the complainant, and the accused educator of his or her disposition in accordance with the following:

(1) dismissal of the complaint in whole or in part; or

(2) approval of the complaint in whole or in part and ordering staff to file an appropriate petition on behalf of the complainant with the office within 60 days of the notice provided under this subsection.

(c) The executive director may issue such further orders as are necessary to accomplish his or her intended disposition, including requiring the complainant to supplement the complaint and establishing consequences for failure to comply. The executive director shall set a reasonable deadline for staff and the complainant to comply with an order under this subsection.

(d) The executive director shall send a notice of disposition with related orders to the complainant and the accused educator by certified United States mail, return receipt requested. A notice reflecting a dismissal shall specify which of the grounds set out in §249.50 of this title (relating to Grounds for Dismissal of a Complaint by Executive Director or Review Committee) the executive director relied upon in making his or her decision.

§249.52. Appeal; Review Committee.

(a) The complainant may appeal the executive director's dismissal by filing a notice of appeal with the executive director. The executive director shall forward the notice of appeal and related materials to a review committee.

(1) A notice of appeal received later than 30 calendar days after the complainant received notice of the executive director's dismissal shall not be forwarded to a review committee and the complaint shall be dismissed as a final decision of the board without opportunity for appeal or further proceedings.

(2) At the time of filing a notice of appeal, the complainant shall serve a copy of the notice on the accused educator by certified United States mail, return receipt requested. The notice shall include a certificate of service that certifies compliance with this paragraph. The executive director shall reject an appeal that does not

include a certificate of service in the notice as required by this paragraph.

(3) The executive director shall also notify the accused educator of the appeal.

(b) The presiding officer of the board shall appoint the review committee for a case that shall be composed of one teacher member, one administrator or counselor member, and one citizen member of the board. The review committee is subject to the open meetings law, Chapter 551 of the Government Code.

(c) The review committee shall consider only the notice of appeal, the complaint, any additional information requested by the executive director, and the executive director's notice of dismissal and related orders. Not later than 45 calendar days after the executive director's dismissal, the review committee shall notify the executive director of its disposition of the appeal according to the following:

(1) an order dismissing the complaint in whole or in part upon the same or different grounds as the executive director; or

(2) an order directing the executive director to have staff file an appropriate petition on behalf of the complainant with the office within 60 days of the notice provided under this subsection.

(d) The review committee may issue such further orders as are necessary to accomplish its intended disposition, including requiring the complainant to supplement the complaint and establishing consequences for failure to comply. The review committee shall set a reasonable deadline for the executive director, staff, or the complainant to carry out an order issued under this subsection.

(e) The review committee's disposition of an appeal under this subchapter shall be final and not subject to appeal. The review committee's dismissal of a complaint shall specify which of the grounds set out in §249.50 of this title (relating to Grounds for Dismissal of a Complaint by Executive Director or Review Committee) the committee relied in making its decision.

(f) As soon as practicable, the executive director shall notify the complainant and the accused educator of the review committee's disposition by certified United States mail, return receipt requested.

§249.53. Frivolous Complaints.

The executive director may seek and the board may impose sanctions under this chapter against an educator who files a frivolous complaint. A frivolous complaint is one that:

(1) has no basis in fact;

(2) has no basis in law; or

(3) is filed solely to harass, to intimidate, to unduly burden, or to otherwise oppress.

§249.54. Petition and Answer.

(a) Only the agency as petitioner and the accused educator as respondent shall be parties to any contested case referred to the office under this subchapter. The petitioner shall have the burden of proof by a preponderance of evidence in any contested case brought under this subchapter.

(b) At the time a petition is referred to the office for contested case proceedings under this subchapter, the agency shall send notice of the referral and a copy of the petition to the complainant by regular first class United States mail and to the accused educator by certified, return receipt requested, and regular first class United States mail. It is a rebuttable presumption that a petition was served on the respondent no later than five calendar days after mailing.

(c) Not later than 30 calendar days after receiving notice of the referral to the office and a copy of the petition, the respondent shall file with the office an answer complying with the requirements of this chapter and 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure). At the time of filing with the office, the respondent shall mail to the petitioner a copy of the answer.

(d) In a contested case proceeding referred to the office under this subchapter, a respondent may raise an affirmative defense that he or she was exercising appropriate and ethical discretion within the course and scope of the educator's duties. The party pleading the affirmative defense shall have the burden to prove such defense by a preponderance of the evidence.

§249.55. Proceedings before the Office.

(a) Hearings and other matters before the office, including discovery, shall be conducted in accordance with this subchapter, the APA, 1 Texas Administrative Code, Chapter 155 (relating to Rules of Procedure), and applicable provisions in Subchapters C through D of this chapter.

(b) Each party is responsible for arranging and paying the costs of any desired reporting, shorthand, transcription, or recording services for any of the proceedings under this subchapter, including depositions.

(c) The parties are encouraged to pursue and these rules do not preclude informal disposition of any of the matters brought pursuant to this subchapter. The parties are responsible for arranging and paying the cost of any mediation or other type of alternative dispute resolution.

(d) The agency may non-suit a petition if the complainant on whose behalf the petition was filed fails to cooperate in the prosecution of the case.

§249.56. Board Decision and Orders; Publication of Sanctions.

(a) After a scheduled hearing, the ALJ shall issue a proposal for decision in accordance with this chapter. The ALJ shall submit the proposal for decision to the board as final decision maker through the agency's general counsel and furnish copies of the proposal for decision to each party. Exceptions to the proposal for decision and any replies to such exceptions shall be governed by this chapter.

(b) After reviewing the record of a contested case in which the ALJ has issued a proposal for decision, the board shall make the final decision in the case.

(1) Board members who served on the review committee in a case shall recuse themselves from participating in the final decision on that same case.

(2) The parties are not entitled to make oral presentations to the board or to submit additional materials after filing exceptions or replies.

(3) Motions for rehearing shall be governed by this chapter.

(c) The board may impose the following sanctions under this subchapter:

(1) place a restriction on a certificate, either indefinitely or for a set term;

(2) issue an inscribed or non-inscribed reprimand;

(3) suspend a certificate for a set term;

(4) revoke or cancel, which includes accepting the surrender of, a certificate without opportunity for reapplication for a set term or permanently; or

(5) impose any additional conditions or restrictions upon a certificate that the board deems necessary to facilitate the rehabilitation and professional development of the educator or to protect students, parents of students, school personnel, or school officials.

(d) The agency shall notify the complainant and the respondent of the board's final decision or order by certified or first class United States mail. The agency shall periodically publish a list of those individuals who have been sanctioned under this subchapter. The list shall include the following information about the sanctioned individual: the name of the individual; the certificate(s) sanctioned; the sanction; and the effective date of any sanction. A non-inscribed reprimand shall not be published.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818041
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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Chapter 250. Agency Administration

Subchapter A. Purchasing

19 TAC §250.1

The State Board for Educator Certification (SBEC) proposes new §250.1, concerning Historically Underutilized Business (HUB) Program.

Pamela B. Tackett, Executive Director, State Board for Educator Certification, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. The agency is already complying with the General Service Commission's (GSC) HUB goals.

Ms. Tackett also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be helping to eliminate barriers to equal economic opportunities in state purchasing for HUBs. There will be no effect on small businesses other than to maintain appropriate levels of HUB usage. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Dan Junell, General Counsel, State Board for Educator Certification, 1001 Trinity Street, Austin, Texas, 78701-2603.

The new rule is proposed under House Bill 1, General Appropriations Act, 75th Legislature, Regular Session (1997), Article IX, Section 124.5; Texas Government Code, §2161; TEC §§21.031, 21.041(a).

No other statues article or codes are affected by the proposed new rules. Subchapter A. Purchasing.

§250.1. Historically Underutilized Business (HUB) Program.

The State Board for Educator Certification hereby adopts the rules of the General Services Commission relating to the Historically Underutilized Business (HUB) Program and codified at 1 Texas Administrative Code Part V, Chapter 111, Subchapter B, §§111.11-111.16.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818042
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 469–3001

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TITLE 22. EXAMINING BOARDS

Part V. State Board of Dental Examiners

Chapter 107. Dental Board Procedures

Subchapter B. Procedures for Investigating Complaints

22 TAC §107.101

The State Board of Dental Examiners proposes amendments to §107.101 concerning guidelines for the conduct of investigations.

Douglas A. Beran, Executive Director, State Board of Dental Examiners (SBDE), has determined for the first five-year period the rule is in effect there will be no fiscal implications for state nor local government as a result of enforcing or administering the rule.

Mr. Beran has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer understanding of the types of conduct over which the Board has jurisdiction. It is anticipated that such understanding will result in a more meaningful complaint resolution process.

The SBDE has determined that the proposed rule will not have an adverse economic impact on small businesses.

Comments on the proposal may be submitted to Mei Ling Clendennen, Executive Assistant, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 463-6400. To be considered, all comments and written requests for public hearing must be received by the State Board of Dental Examiners on or before January 11, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, Article 4548h §(1)(e)(1) which provides that the board shall distinguish categories of complaints, and Article 4551d which provides the State Board

of Dental Examiners with the authority to adopt and promulgate rules consistent with the Dental Practice Act.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.101. Guidelines for the Conduct of Investigations.

(a) Every complaint shall be classified into one or more of the following categories: [Upon receipt of a complaint and in order to provide proper statistical and/or a reporting mechanism, the alleged complaint violation(s) shall be classified into one or more of the following 17 categories defined as follows:]

(1) Quality of care: failure to treat a patient according to the standard of care in the practice of dentistry or dental hygiene. [Abandonment - Discontinuing treatment of a patient without timely notice whereby the patient is unable to provide for continued treatment.]

(2) Sanitation: failure to maintain the dental office in a sanitary condition. [Advertising - Advertising through false, misleading, and deceptive statements, whether in person and/or via a print or nonprint medium.]

(3) Professional Conduct: violations arising out of the day-to-day practice of dentistry, not including administrative requirements. [Allowing the Auxiliary to Practice Dentistry - Allowing an auxiliary person to perform dental services which are reserved for licensed dentists or dental hygienists.]

(4) Administration: failure to follow the administrative requirements of the Dental Practice Act/and or the Board's Rules and Regulations. [Dishonorable Conduct - Conduct which brings discredit upon the dental profession.]

(5) Dental Laboratories: violations of the Dental Practice Act and/or the board's Rules and Regulations pertaining to the operation of dental laboratories. [Failure to Abide with Rules/Regulations - A violation of the day-to-day practice of dentistry, including but not limited to, the failure to use proper protection (e.g., lead apron) while taking radiographs, fair dealing, and/or special knowledge requirements cited in Rule 109.122.]

(6) Business Promotion: violations arising out of efforts to obtain business, such as advertising and referral schemes. [Fee dispute - Unless involved in fraud or other extenuating circumstances, this type of violation usually is outside the jurisdiction of the Board.]

[(7) Fraud - Attempting or practicing financial gain through deception, misrepresentation, and/or illegal means in the course of providing dental treatment. Fraud also includes the waiving of the insurance co-payment.]

[(8) Impairment - Impaired due to self-abuse of drugs, alcohol abuse, and/or the use of Nitrous Oxide.]

[(9) Controlled Substances and Prescriptions - Promoting or furthering addiction, violation of record keeping rules, prescribing for non-dental purposes, and/or over prescribing of controlled substances.]

[(10) Negligence - Dental treatment considered to be below the standard (parameters) of care based on second opinion evaluations.]

[(11) Patient Abuse - The mistreatment of a patient - verbally or physically.]

[(12) Patient Death - As specified in Rule 109.177, a requirement to submit a written report within 30 days after the death of a patient as a result of dental treatment.]

[(13) Patient Hospitalization - As in "Patient Death," a requirement to submit a written report of a patient's hospitalization as a result of dental treatment whose hospitalization was not in the normal course of dental treatment. This includes any injury (morbidity) or incident in the dental office.]

[(14) Practicing Dentistry Without a License (PDWOL) - Practicing dentistry without a Texas dental license as defined in Article 4551a, Dental Practice Act.]

[(15) Operating a Dental Laboratory Without Registration (ODLWOR) - Any dental laboratory (in-state or out-of-state) providing services without being registered with the Board.]

[(16) Probation Violation/Non Compliance - Violation of a Board Order requirement.]

[(17) Sanitation - Failure to maintain a sterile, clean dental office environment; failure to follow appropriate infection control procedures.]

(b) Every complaint shall be assigned a priority classification. Priority 1 represents more serious allegations of violations, including but not limited to, Patient Mortality, Patient Morbidity, Practicing Without a License, and Sanitation. Priority 2 represents less serious threats to the public welfare, including but not limited to records-keeping violations and Advertising. [Upon the Board Secretary's authorization to initiate an investigation of a complaint, the Director of Enforcement shall insure complaints are assigned a priority classification with appropriate investigative action.]

(c) Upon receipt, every complaint shall be evaluated by the Director of Enforcement to determine whether temporary suspension, in compliance with Article 4548h, Section 2(d), should be considered. [Upon the receipt of an investigation file, the assigned investigator shall commence an investigation and provide a preliminary report to the Director of Enforcement who, in coordination with the Board Secretary and Executive Director, shall then evaluate the imminent danger to the public of Texas. A decision for immediate temporary suspension of license shall be made if danger or harm is ongoing.]

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

Filed with the Office of the Secretary of State, on November 25, 1998.

TRD-9817986
Douglas A. Beran, Ph.D.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 463–6400

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22 TAC §107.102

The State Board of Dental Examiners proposes amendments to §107.102 concerning procedures in the conduct of investigations. The proposed amendments are intended to ensure that the rule and procedures followed thereunder more closely comply with the requirements of article 4548h, §1 than procedures prescribed by the current rule.

Douglas A. Beran, Executive Director, State Board of Dental Examiners (SBDE), has determined for the first five-year period the rule is in effect there will be no fiscal implications for state

nor local government as a result of enforcing or administering the rule.

Mr. Beran has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the public will have a clearer idea of the rights and responsibilities of the parties to a complaint alleging a violation of the Dental Practice Act and SBDE rules and regulations.

The SBDE has determined that the proposed rule could have an adverse economic impact on small businesses. The economic impact would be contingent upon any administrative action authorized at rule §107.102(c) and (f) and imposed upon a dental practitioner. The fiscal impact of several of the actions (e.g., SOAH proceedings, settlement conference) would not be so negative as to impact the economic viability of a small business. However, the SBDE has determined the cost of compliance by a practitioner with the outcomes of such actions (e.g., administrative penalty, temporary suspension) could impact the economic viability of a small business.

Comments on the proposal may be submitted to Mei Ling Clendennen, Executive Assistant, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 463-6400. To be considered, all comments and written requests for public hearing must be received by the State Board of Dental Examiners on or before January 11, 1999.

The amended rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, Article 4548h, §1 which provides that the board shall adopt rules concerning the processing of complaints and Article 4548h, §2 (d) which provides that the board, in certain circumstances, may temporarily suspend a license, and Article 4551d which provides the State Board of Dental Examiners with the authority to adopt and promulgate rules consistent with the Dental Practice Act.

The proposed amended rule does not affect other statutes, articles, or codes.

§107.102. Procedures in Conduct of Investigations.

(a) An investigative file accounting for each complaint filed with the Board shall be maintained under the supervision of the Director of Enforcement. [~~An information system of each complaint received, processed, and investigated shall be maintained under the supervision of the Director of Enforcement. Such information system shall be from the time the complaint is received until final disposition of the complaint. The information system shall include all pertinent information regarding all parties involved in the investigative phases.~~]

(b) Every complaint shall be reviewed by the Director of Enforcement to determine jurisdiction. If jurisdiction exists, a complaint shall be investigated to determine the facts concerning the complaint. All investigators shall be state employees. [~~Upon receipt of a complaint, the Director of Enforcement or his/her designee shall contact and provide the Board Secretary a copy of each complaint received. A review of the complaint shall be made by the Board Secretary or his/her designee and a determination of the complaint shall be accomplished. Such determination shall include, but not be limited to, State Board of Dental Examiners jurisdiction or to contact the complainant and request additional information.~~]

(c) If, upon initial review, the complaint reveals a possible threat to a person's welfare, the complaint shall be referred to the Board or an executive committee of the Board, for consideration of temporary suspension, pursuant to Article 4548h, Section 2(d). [~~If an investigation of a complaint is authorized, an appropriate case number shall be assigned, along with the allegation category, date the investigative report is due, and other factors necessary to "track" the complaint and the investigation process. Complaints shall be numbered sequentially by current fiscal year.~~]

(d) During the course of an investigation, the complainant shall be given an opportunity to explain or comment on the allegations made in the complaint. At the initiation of the investigation, the respondent shall be provided a copy of the complaint to facilitate a response, unless to do so would jeopardize an undercover investigation. [~~The Director of Enforcement shall supervise and ensure that the accountability of investigations shall follow the established protocol as specified in the Dental Practice Act and/or the Board's rules and regulations. No investigation shall be initiated or conducted without authorization of the Board Secretary or his/her designee.~~]

(e) The parties to the complaint shall receive notice of the status of the complaint, at least quarterly, until final disposition of the complaint, unless such notice would jeopardize an undercover investigation. [~~Should an investigator receive information that may reflect a violation(s) of the Dental Practice Act and/or the Board's rules and regulations, a memorandum shall be written and submitted to the Director of Enforcement. The Director of Enforcement, after approval from the Executive Director, shall coordinate with the Board Secretary or his/her designee as to whether to open a case file or not.~~]

(f) Upon completion, the Board Secretary or designee shall review the investigative file. The Secretary may: dismiss the case; refer the case to the State Office of Administrative Hearing; refer the case to an informal settlement conference; refer the case to the Executive Director or a subcommittee of the Board for imposition of an administrative penalty; or, direct further investigation. [~~Each investigative case file (complaint) shall contain an up-to date record of all persons/witnesses contacted in relation to the case investigation. Investigators shall be responsible for maintaining and updating this current record as the investigation progresses.~~]

(g) No case will be dismissed without appropriate consideration. A letter shall be sent to the complainant, explaining why the case was dismissed. If the complainant objects to closure and provides new evidence to support the allegations, the case shall be reviewed by at least three members of the Enforcement Committee to determine whether further action is appropriate. [~~Investigators shall ensure, at least as frequently as quarterly and until final disposition of the complaint, that the complainant and respondent to the complaint shall be notified of the status of the complaint unless the notice would jeopardize an undercover investigation.~~]

[~~(h) During the course of the investigation, the complainant and respondent involved in the complaint shall be given an opportunity to explain or to comment on the allegations made in the complaint. At the initiation of the investigation, the respondent shall be provided with a copy of the complaint to facilitate his/her response.~~]

[~~(i) The Director of Enforcement shall ensure that complaints are not dismissed or disposed until the investigative file has been reviewed by the Board Secretary or his/her designee. Upon completion of the review, the Board Secretary or his/her designee may elect to close the case, refer the case to a settlement conference, refer the case for the imposition of an administrative penalty, or direct further investigative action. On those cases in which the Board Secretary closes the case and the complainant objects to such closure and provides additional documentation to support his/her allegations, the investigative case shall be reviewed by at least three members of the Enforcement Committee to determine an appropriate course of action.~~]

~~[(j) Upon completion of the review, the complainant and respondent shall be provided correspondence reflecting the decision of the Board Secretary or his/her designee. If the case is referred to a settlement conference, the complainant and respondent to the complaint shall be notified timely as to the date and time of the conference.]~~

~~[(k) Settlement Conference sessions shall follow established protocol as detailed in Chapter 107, Dental Board Procedures, of the Board's rules and regulations. As part of the notification of an informal proceeding which is held in compliance with Sec. 2001.054(c), Government Code, the complainant and licensee shall be given the opportunity to be heard at the informal conference.]~~

~~[(l) All revocations, cancellations, or suspensions of licenses by the Board shall be enacted in the manner provided by the Chapter 2001, Government Code Administrative Procedure Act.]~~

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

Filed with the Office of the Secretary of State, on November 25, 1998.

TRD-9817985
Douglas A. Beran, Ph.D.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 463–6400

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Chapter 109. Conduct

Subchapter H. Health and Sanitation

22 TAC §109.132

The State Board of Dental Examiners proposes new §109.132 concerning access to a dental office.

Douglas A. Beran, Executive Director, State Board of Dental Examiners (SBDE), has determined for the first five-year period the rule is in effect there will be no fiscal implications for state nor local government as a result of enforcing or administering the rule.

Mr. Beran has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be enhanced protection of the public safety. Unsanitary conditions could pose a threat to the health and welfare of the people of Texas. It is anticipated that this rule will aid in the early detection and correction of unsanitary conditions.

The SBDE has determined that the proposed rule could have an adverse economic impact on small businesses contingent upon any findings of fact and administrative actions precipitated by any discovery during an on-site inspection (e.g., a finding of unsanitary conditions followed by settlement conference and/or SOAH proceedings). The fiscal impact of those actions would not be so negative as to impact the economic viability of a small business. However, the SBDE has determined the cost of compliance by a practitioner with any outcomes of such actions (e.g., administrative penalty) could impact the economic viability of a small business. Moreover, the proposed rule provides that the SBDE may impose a temporary license suspension if a practitioner fails to permit access to the dental office. Such a temporary license suspension could impact the economic viability of the practitioner's business.

Comments on the proposal may be submitted to Mei Ling Clendennen, Executive Assistant, State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 463-6400. To be considered, all comments and written requests for public hearing must be received by the State Board of Dental Examiners on or before January 11, 1999.

The new rule is proposed under Texas Government Code §2001.021 et.seq; Texas Civil Statutes, Article 4551d, §(a) which provides the State Board of Dental Examiners with the authority to adopt and promulgate rules consistent with the Dental Practice Act, and Article 4551d, §(c) which provides that the board may adopt rules to control the spread of infection in the practice of dentistry.

The proposed new rule does not affect other statutes, articles, or codes.

§109.132. Access to dental office.

A person practicing dentistry in the State of Texas shall, upon demand by the officers, agents or employees of the State Board of Dental Examiners acting pursuant to a sanitation complaint, grant immediate access to the entire dental office premises to those persons making such demand. Failure to grant such access may subject a practitioner to temporary license suspension, pursuant to Article 4548h, Section 2(d).

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

Filed with the Office of the Secretary of State, on November 25, 1998.

TRD-9817984
Douglas A. Beran, Ph.D.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 463–6400

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 11. Health Maintenance Organizations

Subchapter F. Evidence of Coverage

28 TAC §11.506

The Texas Department of Insurance proposes an amendment to Chapter 11 by amending §11.506, concerning mandatory contractual provisions of group, individual and conversion agreements and certificates. This proposed amendment is necessary to address numerous complaints received by the department regarding the removal of prescription drugs from drug formularies.

Section 11.506(25) addresses the concern that enrollees may select an HMO on the basis of a specific drug appearing on its drug formulary, only to be left without coverage for that drug upon a change in the HMO's formulary. Such a practice is unfair to enrollees, and is a common source of complaints to

the department. The proposed rule requires prior notification to enrollees, physicians, and providers of the removal of a drug from an HMO's drug formulary and allows enrollees to appeal to continue using such a drug using the complaint and appeals process specified in Chapter 20A and Articles 21.58A and 21.58C of the Insurance Code. By requiring the notice 90 days before the removal of the drug, an enrollee may appeal to continue using the drug without incurring a lapse in use of the prescribed medication during the pendency of the enrollee's appeal. If the removal of a drug from the formulary raises issues of medical necessity, the appropriate appeal route is via the utilization review and, if necessary, independent review organization process.

Rose Ann Reeser, Senior Associate Commissioner, Regulation and Safety, has determined that for each year of the first five years the proposed amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendment. There will be no adverse effects on local employment or the local economy.

Ms. Reeser has determined that for each year the proposed amendment is in effect there are public benefits anticipated as a result of the adoption of this proposed amendment. Specifically, enrollees will no longer be faced with a potential lapse in coverage for a prescription drug that is removed from the drug formulary. Instead, the enrollee will have 90 days in which to appeal to continue using a particular prescription drug.

The economic cost that will result from the adoption of this amendment is the cost to HMOs of providing notice to its affected enrollees of the removal of a drug from its formulary. Ms. Reeser estimates that the cost of producing and mailing a notice as a separate mailing would cost no more than $1.75 per notice. The actual total cost to each HMO would vary depending upon the number of enrollees to whom the notice must be sent and the method by which the HMO chooses to notify its enrollees. In an effort to minimize costs, HMOs will be allowed to notify enrollees via any newsletters provided to enrollees. If an HMO opts to utilize a newsletter to satisfy the requirements of this amendment, such notice must appear under a separate heading within the newsletter. Additionally, HMOs are allowed to deliver the notice with other plan documents rather than in a separate mailing.

Ms. Reeser has determined that there is no adverse impact on small businesses as a result of this proposed section. The only cost associated with the proposed section is $1.75 per notice. This additional cost is not dependent upon the size of the HMO, but rather is dependent upon the number of enrollees affected by the removal of a drug from the formulary. Both small HMOs and the largest HMO affected by this section would incur the same cost per notice. Assuming that a small HMO and the largest HMO administered health benefit plans with approximately the same number of enrollees to whom this notice must be provided, the cost per hour of labor would not vary between the small and the largest HMOs. For example, in providing the notice to 1000 enrollees, assuming it took ten man-hours to provide the notice to these enrollees, it would take both a small and the largest HMO ten man-hours to comply with this section. Any difference in the cost of labor per hour is inherent in the difference in size of the HMOs, and does not arise from this rule. There is thus no adverse economic effect upon small businesses, and the requirements of the rule should not be waived.

Comments on the proposal must be submitted within 30 days after publication of the proposed section in the *Texas Register* to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas, 78714-9104. Additional copies of the comment are to be submitted to Linda Von Quintus, Deputy Commissioner, Regulation and Safety, Mail Code 107-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas, 78714-9104. Any requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendment is proposed under the Insurance Code, Chapter 20A, Article 21.21, and Article 1.03A. Insurance Code Article 20A.22(a) provides that the commissioner may promulgate rules and regulations as are necessary and proper to carry out the provisions of the HMO Act (Insurance Code, Chapter 20A). Article 21.21, Section 13 authorizes the promulgation of rules necessary to prevent unfair competition and unfair practices under Article 21.21. Article 1.03A provides that the Commissioner of Insurance may adopt rules necessary for the conduct and execution of the duties and functions of the Texas Department of Insurance only as authorized by a statute.

The following statutes are affected by this proposal: Articles 20A.22 and 21.21

§11.506. Mandatory Contractual Provisions: Group, Individual and Conversion Agreement and Group Certificate.

Each group, individual and conversion contract and group certificate must contain the following provisions. Use of the standard language for each provision as presented in Subchapter L of this chapter (relating to Standard Language for Mandatory and Other Provisions) shall exempt from review that portion of the evidence of coverage where standard language is contained. Such standard language shall not be the only language accepted by the commissioner for such provisions.

(1)-(24) (No change.)

(25) Drug Formulary changes–If the agreement or certificate includes benefits for prescription drugs, a provision that the drug formulary may change during the contract year. Before the drug formulary may be revised to remove a prescription drug, notice of the proposed revision must be sent to all physicians, providers, and enrollees affected by the proposed revision. The notice must be provided at least 90 days prior to the proposed revision, and must inform the physician, provider and enrollee of the right to appeal to use a drug to be discontinued, pursuant to the complaints/appeals process provided by the Insurance Code Article 20A.12. The notice may be provided as a separate notice, or included in a regular publication of the HMO, such as an enrollee newsletter. If the notice required by this paragraph is included in a regular publication of the HMO, the notice must be prominently displayed and titled to indicate a potential change in prescription drug benefits to enrollees. The notice required by this paragraph need not be provided if the drug is removed from the formulary by a regulatory agency or pharmaceutical company for safety reasons.

(26) (No change.)

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818030

Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 463–6327

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part II. Texas Parks and Wildlife Department

Chapter 65. Wildlife

The Texas Parks and Wildlife Department proposes the repeal of §65.321, new §65.321, and new §65.322, concerning the Migratory Game Bird Proclamation. The repeal and new sections are necessary to implement measures being implemented by the U.S. Fish and Wildlife Service to manage the severe impact that the overpopulation of light geese are exerting on their arctic and subarctic breeding grounds, threatening the long-term health of those species. The repeal and new sections will function by establishing early closures for current migratory game bird seasons and by setting forth special shooting hours, means and methods, hunting dates, and bag limits for the take of light geese. The repeal and new rules are contingent upon final federal regulations that will not be released until mid-January of 1999; however, the department does not anticipate that final federal rules will exceed the scope of this proposal or affect any additional class of persons affected by the proposed rule.

Robert Macdonald, Wildlife Division regulations coordinator, has determined that for each of the first five years that the proposed rules are in effect, there will be no additional fiscal implications to state or local governments as a result of enforcing or administering the proposed rules.

Mr. Macdonald also has determined that for each of the first five years the new rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules as proposed will be the department's discharge of its statutory obligation to manage the state's populations of migratory game birds, and to assist other states and the signatories to the Migratory Bird Treaty Act in conservation efforts with respect to migratory game bird resources enjoyed by the citizens of this state.

There will be no effect on small businesses. There are no additional economic costs to persons required to comply with the rules as proposed.

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

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rules may be submitted to Vernon Bevill, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4578 or 1-800-792-1112.

Subchapter N. Migratory Game Bird Proclamation

31 TAC §65.321

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

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

The repeal affects Parks and Wildlife Code, Chapter 64, Subchapter C.

§65.321. Penalties.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818043
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 389–4775

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31 TAC §65.321, 65.322

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

The new rules affect Parks and Wildlife Code, Chapter 64, Subchapter C.

§65.321. Special Management Provisions.

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

(1) Means and methods. In addition to the means and methods authorized in §65.310(a) of this title (relating to Means , Methods, and Special Requirements), the following means and methods are lawful during the time periods set forth in paragraph (5) of this section:

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

(B) electronic calling devices.

(2) Possession. During the time periods set forth in paragraph (5) of this section:

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

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

(C) a person may give, leave, receive, or possess legally taken light geese or their parts, provided the birds are

accompanied by a wildlife resource document from the person who killed the birds. The wildlife resource document is not required if the possessor lawfully killed the birds; the birds are transferred at the personal residence of the donor or donee; or the possessor also possesses a valid hunting license, a valid waterfowl stamp, and is HIP certified. The wildlife resource document shall accompany the birds until the birds reach their final destination, and must contain the following information:

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

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

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

(iv) the date the birds were killed; and

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

(3) Shooting hours. During the time periods set forth in paragraph (5) of this section, shooting hours are from one half-hour before sunrise until one half-hour after sunset.

(4) Early closures. At sunset on January 31, 1999, the open seasons for the following species of migratory birds are closed until further notice.

(A) sandhill crane: in Zones B and C;

(B) light geese: in the Eastern Zone;

(C) ducks, coots, and mergansers (extended falconry season): statewide; and

(D) woodcock (extended falconry season): statewide.

(5) Special Light Goose Conservation Period.

(A) From February 1, 1999 through April 25, 1999, the take of light geese is lawful in the Eastern Zone as defined in §65.317 of this title (relating to Zones and Boundaries for Late Season Species).

(B) From February 15, 1999 through April 25, 1999, the take of light geese is lawful in the Western Zone as defined in §65.317 of this title (relating to Zones and Boundaries for Late Season Species).

§65.322. Penalties.

The penalty for violations of this subchapter is prescribed by Parks and Wildlife Code, §64.027.

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818044
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 389–4775

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part II. Texas Rehabilitation Commission

Chapter 103. Vocational Rehabilitation Services Program

Subchapter A. Provision of Vocational Rehabilitation Services

40 TAC §103.7

The Texas Rehabilitation Commission proposes an amendment to §103.7, concerning mental restoration services.

The section is being amended to include master social workers-advanced clinical practitioners who are licensed by the Texas State Board of Social Work Examiners to mental restoration services provided by the commission.

Charles E. Harrison, Jr., Deputy Commissioner for Financial Services, 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.

Mr. Harrison also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the inclusion of master social workers-advanced clinical practitioners to mental restoration services. 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 Roger Darley, Assistant General Counsel, Texas Rehabilitation Commission, 4900 North Lamar Boulevard, Suite 7300, Austin, Texas 78751.

The amendment is proposed under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

No other statute, article, or code is affected by this proposal.

§103.7. Mental Restoration Services.

(a)-(c) (No change.)

(d) The commission provides mental restoration services utilizing only physicians licensed by the state and skilled in the diagnosis and treatment of mental or emotional disorders, [~~or~~] psychologists licensed or certified in accordance with state law or master social workers-advanced clinical practitioners who are licensed by the Texas State Board of Social Work Examiners .

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

Filed with the Office of the Secretary of State, on November 30, 1998.

TRD-9818015
Charles Schiesser
Chief of Staff
Texas Rehabilitation Commission
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 424–4050

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TITLE 43. TRANSPORTATION

Part I. Texas Department of Transportation

Chapter 9. Contract Management

Subchapter D. Business Opportunity Programs

The Texas Department of Transportation proposes the repeal of §§9.59-9.61, amendments to §§9.51, 9.56, and 9.58, and new §9.59, concerning business opportunity programs.

EXPLANATION OF PROPOSED REPEAL, AMENDMENTS AND NEW SECTION

The repeal, amendments and new section streamline the procedure for complaints, investigation, resolution, and appeal concerning the business opportunity program, including sanctions. Under the current sections, a bidder or proposer complaint is made to the Deputy Executive Director of Administrative Services (DED). The DED or designee sends a response to the complainant. A program administration complaint, including discrimination, is sent to the DED who tries to resolve it. Bidder/proposer and program complaints may ask for an investigation by the Civil Rights Division. After the investigation, the DED makes a final determination. An appeal of a final determination or sanction may be made to the business appeals committee. The business appeals committee then makes a determination.

The proposed sections streamline the procedure from a three-step process to a two-step process and eliminate the business appeals committee. The proposed process would authorize the Business Opportunity Section of the Construction Division (CSTB) to investigate because CSTB is the section most knowledgeable about the business opportunity programs. The director of the Construction Division will make the initial decision since that director is in charge of the programs. The director's decision can then be appealed to the executive director or designee.

The sections remove the ability of vendors to protest purchases using this procedure because it is no longer necessary. Vendors may now contest purchases pursuant to §9.3 in accordance with Government Code, §2155.076, the State Purchasing and General Services Act, which is consistent with the General Services Commission's rules found in 1 TAC Chapter 111. In addition it removes the protest procedure for contract awards. This procedure has not been utilized and eliminating it will reduce bureaucracy. The federal appeal procedures have not changed.

The amendments to §9.51 number the definitions to conform with Texas Register form. The definition for "business appeal committee" has been deleted to correspond with the elimination of the committee and with the repeal of §9.60. Changes, additions, and deletions of other definitions reflect the reorganization of the department.

The amendments to §9.56 and §9.58 reflect the reorganization of the Business Opportunity Office as part of the Construction Division (CST), include revised new cross-references as a result of the repeal and new section, and clarify some of the provisions.

New §9.59 establishes a procedure for an aggrieved person to file a complaint concerning the business opportunity programs.

A complaint related to a federally-funded contract or a DBE certification complaint may be filed directly with the U.S. Department of Transportation at any time within 180 days of the date of an alleged discrimination or a violation of the DBE Program, or after the date on which a continuing course of conduct in violation of the DBE program was discovered. A firm may file an appeal with U.S. Department of Transportation during the department process if a firm: believes that it has been wrongly denied DBE certification; has challenged DBE certification, except for SBA 8(a) certification; or alleges discrimination on a federally-funded contract or is aggrieved by a department determination related to the DBE program.

An aggrieved person or firm may file a complaint concerning a violation of the business opportunity programs, including a discrimination claim, with the department. A complaint may be filed on behalf of another person or any specific class of individuals.

The complaint must be made to the director within 90 calendar days of the alleged discrimination or violation. CSTB will review the complaint notify the complainant whether an investigation is necessary. If the complaint is made against the Construction Division or a section of the Construction Division, then the executive director will appoint another division or office to review and investigate the complaint.

If the finding confirms the complaint, the department will meet with the complainant and respondent to discuss a conciliation agreement. If a conciliation agreement is reached, the department will monitor it to completion. If no conciliation agreement is reached, the director will make a decision regarding corrective action needed and monitor the corrective action, if any.

A final determination or a department sanction may be appealed to the executive director or designee within 10 days after receiving notice of final determination or sanction. The executive director or designee will consider an appeal if the appealing party identifies: new information or witnesses that, if considered, might have changed the outcome; harmful procedural error by the department which could have led to a different conclusion; or a finding contrary to the evidence, department policy, or law. The executive director or designee will: review the sanction or determination; consult with witnesses and review evidence, if necessary; and review the appealing party's written rebuttal.

FISCAL NOTE

Frank J. Smith, Director, Finance Division, has determined that for the first five-year period the repeals, amendments, and new section are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the proposed sections. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Thomas Bohuslav, Director of Construction Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals, amendments, and new section.

PUBLIC BENEFIT

Mr. Bohuslav 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 or administering the repeal, amendments, and new section will be to ensure that complaints concerning the business opportunity programs will be processed in an efficient, effective, and expeditious manner. There will be no effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed sections may be submitted to Mr. Thomas Bohuslav, Director, Construction Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on January 11, 1998.

43 TAC §§9.51, 9.56, 9.58, 9.59

STATUTORY AUTHORITY

The amendments and new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

No statutes, articles, or codes are affected by the proposed repeal, amendment, and new sections.

§9.51. Definitions.

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

(1) SBA 8(a) certification - The United States [~~U.S.~~] Small Business Administration's (SBA) certification of a small business as socially and economically disadvantaged pursuant to Section 8(a) of the Small Business Act, 15 United States Code, Chapters 631-656.

(2) Affiliate - Concerns are affiliates of each other when, either directly or indirectly one concern controls or has the power to control the other, a third party or parties control or has the power to control both, or an "identity of interest" between or among parties exists such that affiliation may be found. In determining whether affiliation exists, the department will consider all appropriate factors, including common ownership, common management, sharing of services and facilities, and contractual relationships.

(3) Bidder - An individual, partnership, limited liability company, corporation, joint venture or any combination that submits a bid for a contract advertised by the department.

(4) Broker - An intermediary or middleman who does not take possession of a commodity, does not act as a regular dealer selling to the public, or procures a service that is provided by another. [~~Business appeal committee (BAC) - A department committee appointed by the executive director to allow an aggrieved party an opportunity to rebut the findings of a formal investigation or sanction.~~]

(5) Business opportunity programs section (CSTB) of the Construction Division [~~office (BOP)~~] - The department section [~~office~~] that certifies DBEs and administers the DBE and HUB programs.

(6) Clearinghouse list - The DBE directory's list of organizations that provide assistance in the recruitment and placement of DBEs for the purpose of linking contractors with minority subcontractors.

(7) Commission - The Texas Transportation Commission.

(8) Concern - A business entity organized for profit, with a place of business located in the United States and which makes a significant contribution to the United States [~~U.S.~~] economy through payment of taxes and/or use of American products, materials and/or labor.

(9) DBE certification - The process governed by 49 CFR Part 23 which verifies an applicant's eligibility to be a DBE.

(10) DBE/HUB participation goal - A number representing participation in contracts and purchasing by a DBE/HUB firm determined by a percentage of the total cost of the contract or purchase.

(11) Department - The Texas Department of Transportation. [~~DED - Deputy Executive Director of Administrative Services.~~]

(12) Director - The director of the Construction Division of the department.

(13) Disadvantaged Business Enterprise (DBE) - As defined in 49 CFR §23.62, a small business concern which is at least 51% owned by one or more socially and economically disadvantaged individuals, or in the case of a publicly owned business, at least 51% of the stock of which is owned by one or more socially and economically disadvantaged individuals, and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

(14) District engineer - The chief administrative officer in charge of a district of the department.

(15) Division - An organizational unit in the department's Austin headquarters.

(16) Executive director - The executive director of the department or designee not below the level of assistant executive director.

(17) Federal aid contract - A contract between the department and a contractor that is paid for in whole or in part with United States [~~U.S.~~] Department of Transportation or other federal financial assistance.

(18) GSC - General Services Commission.

(19) Highway improvement contract - A contract awarded by the commission under Transportation Code, Chapter 223.

(20) Historically Underutilized Business (HUB) - Any business so certified by the General Services Commission.

(21) Joint venture - An association of two or more businesses to carry out a single business enterprise for profit which combines their property, capital, efforts, skills, and knowledge.

(22) Liquidated damages - Project-related damages to the department's DBE/HUB programs separate from those costs associated with construction engineering costs.

(23) Maximum opportunity - The opportunity to bid and receive contracts and to perform those contracts without unnecessary barriers which could jeopardize successful completion.

(24) Minority - As defined by 49 CFR §23.5, a person who is a citizen or lawful permanent resident of the United States and who is:

(A) Black (a person having origins in any of the black racial groups of Africa);

(B) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)[;

[~~(C) Portuguese (a person of Portuguese, Brazilian, or other Portuguese culture or origin, regardless of race)~~];

(C) [~~(D)~~] Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands);

(D) [~~(E)~~] American Indian and Alaskan Native (a person having origins in any of the original peoples of North America); or

(E) [~~(F)~~] members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration pursuant to Title 15, United States Code, §637(a).

(25) Office - An organizational unit in the department's Austin headquarters.

(26) Packager - A person or firm engaged in the commercial packing of materials or supplies produced by others.

(27) Proposer - An individual, partnership, limited liability company, corporation, or any combination that submits a proposal for a contract advertised by the department.

(28) Small business concern - A small business as defined in the Small Business Act, codified in 15 USC §632, and related regulations.

(29) Socially and economically disadvantaged individuals - As defined in 49 CFR §23.62, individuals who are United States citizens (or lawfully admitted permanent residents) and who are Women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, or any other minorities or individuals found to be disadvantaged pursuant to SBA 8(a). There is a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged:

(A) Black Americans which includes persons having origins in any of the Black racial groups of Africa;

(B) Hispanic Americans which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(C) Native Americans which includes persons who are American Indian, Eskimo, Aleut, or native Hawaiian;

(D) Asian-Pacific Americans which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, Philippines, Samoa, Guam, the Northern Marianas or the United States [~~U.S.~~] Pacific Trust Territories; or

(E) Asian-Indian Americans which includes persons whose origins are from India, Pakistan, or Bangladesh; or

(F) women.

(30) Subcontractor - An individual, partnership, corporation, or other business entity to which the prime contractor sublets, or proposes to sublet, any portion of a contract.

§9.56. DBE Certification.

(a) Responsibility. The department will certify a small business as a DBE, upon request, if it qualifies with certification standards listed in subsection (d) of this section. Firms are certified for a two year period with an annual update required.

(b) Requests. A business must submit a written request for certification as a DBE using an application form approved by the department. A DBE firm may renew its certification using an abbreviated application unless the following situations require that the long form be completed:

(1) a DBE's certification has lapsed;

(2) the firm's previous application was withdrawn; or

(3) there is a change of ownership or control of a certified firm at any time.

(c) Out of state firm. An out of state firm must be certified by the resident state department of transportation or equivalent agency.

(d) Certification standards. A firm must meet each of the following eligibility standards to be certified.

(1) Size. The firm must be a small business concern.

(A) The firm must meet the criteria included in §3 of the Small Business Act and 13 CFR Part 121 to be considered a small business concern. A firm will be required to furnish financial documentation for up to four complete years, if applicable.

(B) If a firm is not a small business concern according to the standards promulgated in [~~at~~] 13 CFR Part 121, the department will not certify the firm as a DBE even though it may be owned and controlled by minorities, women, or socially and economically disadvantaged individuals, and is eligible in all other respects.

(2) Social and economic disadvantage status. At least 51% of the firm or, in the case of any publicly owned business, at least 51% of the stock must be owned by one or more socially and economically disadvantaged individuals. The following groups are eligible for social and economic disadvantage status.

(A) An applicant who has been approved as an SBA 8(a) firm.

(B) An applicant may establish his or her membership in a bona fide minority group on the basis of the individual's claim that he or she is a member of a minority group and is so regarded by that particular minority community. The department will not certify a firm as a DBE if it determines the applicant's claim to be invalid.

(C) If an individual is not a member of a minority group or a woman, but can prove social and economic disadvantage on an individual basis using standards set forth in Appendix C to Subpart D, Guidance for Making Determinations of Social and Economic Disadvantage, 49 CFR Part 23, the department will consider that individual to be socially and economically disadvantaged.

(3) Independent, operational business. A business must be existing, operational, independent, and for-profit. The department will consider the date the business was established, the adequacy of its resources and its expertise for the work of the contract and the degree to which financial, equipment leasing, and other relationships with non-minority firms vary from industry practice. Recognition of the business by the Internal Revenue Service as a separate entity for tax or corporate purposes is not in itself sufficient for DBE certification.

(4) Ownership control. The management and daily business operations must be controlled by one or more of the socially and economically disadvantaged individuals who own it. The ownership and control by minorities or women must be real, substantial, and continuing, and must go beyond the form of the ownership as reflected in its ownership documents.

(A) The minority or women owners must enjoy the customary incidents of ownership and must share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance rather than the form of the arrangement.

(B) The minority or women owners must possess and exercise the power to direct or cause the direction of the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operations.

(C) A firm must not be subject to any formal or informal restrictions which limit the customary discretion of the minority or women owners, including, but not limited to, bylaw provisions, partnership agreements, third-party agreements, or charter requirements for cumulative voting rights or other rules that prevent the minority or women owners from making a business decision of the firm without the cooperation or vote of any owner who is not a minority or woman.

(5) Management responsibility and control. If the owners of a firm who are not minorities or women are disproportionately responsible for the operation of the firm, the firm will not be considered a DBE. Where the actual management of the firm is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers will be considered as controlling the business.

(6) Securities. The minorities or women must directly hold all securities constituting ownership and/or control of a corporation for purposes of establishing it as a DBE. The department will not consider securities held in trust for any reason in determining the ownership or control of the corporation.

(7) Real and substantial contribution. The minority or women owners' contributions of capital or expertise to acquire their interests in the firm must be real and substantial. A promise to contribute capital, a note payable to the firm or its owners who are not socially and economically disadvantaged, or the participation as an employee rather than a manager constitute insufficient contributions by the minority or women owners.

(8) Special considerations. The department will give special consideration and careful review to:

(A) newly formed firms and firms whose ownership and/or control has changed since the date of the advertisement of a contract under which the new firm will contract to determine reasons affecting the timing of the formation of or change in ownership or control;

(B) previous and/or continuing employer-employee relationship between or among present owners to determine that the minority or woman owner has management responsibilities and capabilities described in subsection (d)(4)-(6) of this section; and

(C) any relationship between a DBE and a non-DBE business having an interest in the DBE to determine if the interest of the non-DBE conflicts with ownership and control requirements.

(e) Certification categories.

(1) Schedule A. This category includes, but is not limited to, trucking firms, manufacturers, regular dealers, construction firms, general contractors, and specialty contractors. A firm may apply for DBE status using the Schedule A application form.

(A) Construction firms, general contractors and specialty contractors. The department will certify a firm as a DBE if it meets all other certification requirements set forth in subsection (d) of this section.

(B) Regular dealers. The department will certify a firm as a DBE if it meets all other certification requirements set forth in subsection (d) of this section, engages in the purchase and sale of the products as its principal business and in its own name, is not a broker or packager; and

(i) owns, operates, or maintains a store, warehouse, or other establishment in which materials or supplies required for a contract are bought, kept in stock, and regularly sold to the public in the usual course of business; or

(ii) is a dealer in bulk items such as steel, cement, gravel, stone, and petroleum products not kept in stock which are distributed or delivered using equipment owned or operated by the firm.

(C) DBE manufacturer. The department will certify a manufacturer as a DBE if it:

(i) meets all other certification requirements set forth in subsection (d) of this section; and

(ii) operates or maintains a factory or an establishment that produces on the premises materials or supplies to be used in a contract.

(D) Disadvantaged trucking firm. The department will certify a trucking firm as a DBE trucking firm if it:

(i) meets all other certification requirements set forth in subsection (d) of this section;

(ii) owns or leases on a long term basis at least two operational trucks; and

(iii) furnishes operators, fuel, maintenance and insurance for all trucks.

(2) Schedule B - Joint venture.

(A) A joint venture may apply for DBE status using the Schedule B application form for a specific project.

(B) The department will certify the joint venture if:

(i) one or more of the partners of the joint venture is a certified DBE;

(ii) the DBE partner is responsible for a clearly defined portion of the work to be performed; and

(iii) the DBE partner shares in the ownership, control, management responsibilities, risks, and profits of the joint venture.

(3) Schedule O - Disadvantaged truck owner-operator.

(A) An independent owner-operator of one truck may apply for disadvantaged truck owner-operator status using the Schedule O application form.

(B) The department will certify a truck owner-operator who:

(i) does not have an employee/employer relationship with a prime contractor:

(ii) is eligible in accordance with subsection (d) of this section;

(iii) proves ownership of the truck;

(iv) proves ability to operate the truck, including, but not limited to, maintaining a commercial driver's license; and

(v) is responsible for maintaining the required insurance on the truck.

(f) On-site review.

(1) The department will conduct an on-site review, in accordance with 49 CFR §23.45, of any firm when:

(A) it applies for DBE certification for the first time;

(B) certification is challenged by a third party; or

(C) the department questions its DBE eligibility.

(2) If the review involves a certified firm, the firm's certification remains valid unless the CSTB [~~BOP Office~~] notifies the firm in writing that its certification is suspended during the review.

(3) If the on-site review indicates that the firm meets eligibility standards, the firm will be certified or remain certified.

(4) If the on-site review indicates that the firm does not meet eligibility standards, the firm will be denied certification in accordance with subsection (i) of this section.

(g) Certification renewals.

(1) DBE certifications are valid for two years with an annual update required.

(2) To be recertified as a DBE, a firm must submit a written application in accordance with subsection (b) of this section.

(3) Renewals are subject to certification standards set forth in subsection (d) of this section.

(h) Third-party actions.

(1) Social and economic challenge.

(A) A third party may challenge the social and economic disadvantaged status of an owner of a certified firm or a firm seeking to be certified as a DBE unless the firm has a current SBA 8(a) certification as provided in 49 CFR §23.69.

(B) A challenge must be made in writing, signed and dated by the challenger, and set forth the factual basis for the challenge.

(C) DBE certification remains valid during department proceedings.

(D) After receiving a written challenge, the department will determine if there is reason to believe that the challenged party is in fact not socially and economically disadvantaged on the basis of the information provided by the challenging party.

(E) If the department based certification upon SBA 8(a) program certification pursuant to 49 CFR §23.62, the department will refer the challenging party to the Small Business Administration.

(F) If the department based certification upon an applicant's claim to be socially and economically disadvantaged, and if there is a basis to believe that the challenged party is not socially and economically disadvantaged, the department will:

(i) notify the firm in writing that the individual's social/economic disadvantaged status has been challenged, identify the challenging party, summarize the grounds for the challenge, and request information to be submitted within 15 working days to substantiate their claim of social and economic disadvantage;

(ii) make a determination of social and economic disadvantage according to standards set forth in Appendix C to Subpart D, Guidance for Making Determinations of Social and Economic Disadvantage, 49 CFR Part 23; and

(iii) notify both parties in writing, setting forth reasons for the determination, and asking each party to respond in writing to the determination.

(G) If both parties accept the department's determination, the challenge is closed.

(H) If either party is aggrieved by the department's determination, the aggrieved party may request an eligibility conference in accordance with subsection (j) of this section.

(2) DBE Certification.

(A) A third party who alleges that another firm has been wrongly denied or granted certification as a DBE or joint venture may advise the United States [~~U.S.~~] Department of Transportation pursuant to 49 CFR §23.55.

(B) The United States [~~U.S.~~] Department of Transportation may deny participation as a DBE during the pendency of the investigation after providing the DBE or joint venture an opportunity to show cause by written statement why participation should not be denied.

(3) HUB Certification Challenge. A challenge regarding a firm's eligibility as a HUB based on the department's certification process must be submitted to the department for resolution.

(i) Denial or withdrawal of certification.

(1) An applicant who withdraws its application may reapply at any time.

(2) [~~(1)~~]The department will notify an applicant in writing if certification is to be denied and set forth reasons for denial.

[~~(2) An applicant who withdraws its application may reapply at any time.~~]

(3) An applicant may answer the department's notice of denial within 15 working days after receiving notice of denial.

(A) If the applicant does not answer within the 15 day period, the denial of certification is final.

(B) If an applicant answers within the 15 day period, and the response resolves eligibility deficiencies, the department will certify the applicant.

(C) If an applicant answers within the 15 day period, but does not resolve eligibility deficiencies, the applicant may accept the department's denial of certification or it may request an eligibility conference.

(j) Eligibility conference.

(1) An applicant who believes the department has wrongly denied certification may request an eligibility conference no later than 15 days after receiving notification of the department's denial of certification.

(2) A third party who has challenged a firm's social and economic status pursuant to subsection (h)(1) of this section may request an eligibility conference no later than 15 days after receiving notification of the department's determination.

(3) During an eligibility conference, the applicant, challenged firm, or challenging party may submit additional information to substantiate or refute eligibility.

(4) The department will include the information received pursuant to paragraphs (1)-(3) of this subsection in its final determination.

(5) An applicant denied certification must wait six months from the date of denial to reapply for certification.

(6) Any party aggrieved by the department's certification determination may appeal to the United States [~~U.S.~~] Department of

Transportation in accordance with §9.59 [~~§9.61~~] of this title (relating to Business Opportunity Programs Complaints [~~Appeals~~]).

(k) DBE directory. The department will maintain a directory of certified DBEs. Monthly amendments to the directory will be sent to prequalified contractors indicating deletions and decertification.

§9.58. Contract Compliance.

(a) Contract provision. Department contracts involving the expenditure of funds will include a contract provision addressing DBE or HUB requirements.

(1) A contract with a goal assigned will include a provision which sets forth program requirements for the type of contract receiving the goal, including, but not limited to, the department's DBE/HUB policy, the DBE/HUB contract goal, good faith efforts, honoring commitments, DBE/HUB substitutions, nondiscrimination, crediting procedures, commercially useful function, contract modifications, reporting requirements, maintenance of records, compliance procedures, enforcement, and sanctions for noncompliance with the terms of the contract provision.

(2) A contract without a goal assigned will include provisions:

(A) encouraging the use of minority, disadvantaged, and historically underutilized business enterprises in subcontracting activities; and

(B) prohibiting discrimination.

(b) Monitoring. The department will monitor contractor compliance by:

(1) reviewing contractor reports; and

(2) making on-site visits to the project or the offices of a contractor or subcontractor.

(c) Contractor representative. A contractor receiving a contract with an assigned goal must designate an employee to serve as a DBE/HUB contact person during the contract, and must inform the department of the representative's name, title, and telephone number no later than five days after the contract is signed. The DBE/HUB representative is responsible for submitting reports, maintaining records, and documenting good faith efforts to use DBE/HUBs pursuant to §9.55 of this title (relating to Good Faith Effort).

(d) Commitments. The following requirements must be satisfied by the contractor unless the contractor is a DBE/HUB.

(1) Within the time specified in the contract or proposal [~~contract/proposal~~], the contractor must furnish a list of commitments made to certified DBE/HUBs to meet the contract goal along with a commitment agreement containing the original signatures of the contractor and the proposed DBE/HUB which includes, but is not limited to:

(A) a statement that the contractor intends to provide the DBE/HUB the opportunity to perform the subcontract;

(B) the items of work to be performed;

(C) the quantities of work or material;

(D) the unit measure, unit price, and total cost for each item;

(E) the total amount of the DBE/HUB commitment; and

(F) if the commitment involves a DBE/HUB material supplier, an explanation of the function to be performed and a description of any arrangements, including joint check agreements, made with other material suppliers, manufacturers, distributors, hauling firms, or freight companies.

(2) The contractor must document good faith efforts taken to meet the goal in accordance with:

(A) §9.55 of this title (relating to Good Faith Effort); and

(B) applicable contract provisions.

(e) Reporting. Each contractor receiving a contract with an assigned goal must submit the following reports.

(1) The contractor must submit periodic reports at intervals specified in the contract using a report form acceptable to the department that includes, but is not limited to, identification of the DBE/HUB by name and vendor number, and showing the actual amount paid to the DBE/HUB. The report must be submitted even if no payments were made during the period being reported. When required by the department, the contractor must attach proof of payment including, but not limited to, copies of canceled checks.

(2) The contractor must submit a final report in accordance with the contract, using a form acceptable to the department which shows:

(A) the total paid to each DBE/HUB; and

(B) if the contract goal is not met, a description of good faith efforts taken in accordance with:

(C) §9.55 of this title (relating to Good Faith Effort); and

(D) applicable contract provisions.

(f) Credit for expenditures.

(1) Full credit for federal aid contracts. A contractor awarded a federal aid contract will receive credit for all payments made to a DBE firm certified in accordance with §9.56 of this title (relating to DBE certification) unless:

(A) a DBE firm is paid but does not assume contractual responsibility for providing the goods or performing the services;

(B) a DBE firm does not perform a commercially useful function as set forth in subsection (g)(1) of this section;

(C) a contractor makes payment directly to a material supplier for the cost of materials or supplies used by a DBE subcontractor unless the payment is made with a joint check to the DBE subcontractor and the material supplier in accordance with an invoice submitted by the material supplier;

(D) a contractor deducts payment of the cost of materials used by a DBE subcontractor or the cost of leased or rented equipment used by the DBE/HUB from an invoice submitted by the DBE;

(E) a payment is made:

(i) to a DBE that cannot be linked by an invoice or canceled check to the contract under which credit is claimed;

(ii) to a broker or a firm with a brokering-type operation;

(iii) to a DBE manufacturer for a product purchased for the project and not manufactured by the DBE manufacturer;

(iv) to a DBE trucking firm that does not perform 30% of the contract with trucks owned or leased on a long term basis or with owner-operators, and does not furnish operators, fuel, maintenance and insurance for the owned or leased trucks;

(v) for the amount of materials and supplies required on a job site, when the hauler, trucker, or delivery service is not also a manufacturer of or a regular dealer in the materials and supplies; or

(vi) for a bona fide service, such as professional, technical, consultant, or managerial services, and assistance in the procurement of essential personnel, facilities, equipment, materials, or supplies required for performance of the contract (The credit is reduced to the amount of the fee or commission charged provided the fee or commission does not exceed that customarily allowed for similar services); or

(2) Partial credit for federal aid contracts. A contractor awarded a federal aid contract will receive:

(A) 60% credit for payment to a regular dealer;

(B) credit for the percentage of DBE ownership in the joint venture for payment to a joint venture; or

(C) the amount of any fee or commission charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission does not exceed that customarily allowed for such fee or commission.

(3) Non-federal aid contracts. A contractor will receive credit for all payments actually made to a HUB for work performed and costs incurred in accordance with the contract with the following exceptions and/or stipulations and only if the arrangement is consistent with standard industry practice.

(A) Payments:

(i) to brokers or firms with a brokering-type operation will be credited only for the amount of the commission;

(ii) to a joint venture will not be credited unless all partners in the joint venture are HUBs;

(iii) to a HUB subcontractor who has subcontracted a portion of the work required under the subcontract will not be credited unless the HUB performs a commercially useful function;

(iv) to a HUB firm will not be credited if the firm does not provide the goods or perform the services paid for;

(v) made by a contractor directly to a material supplier for the cost of materials or supplies used by a HUB subcontractor will not be credited unless payment is made, from an invoice submitted by the supplier, with a joint check to the supplier and HUB;

(vi) made to a HUB supplier not directly involved in the manufacture or distribution of the supplies or materials or who does not otherwise warehouse and ship the supplies will not be credited; or

(vii) made to a HUB that cannot be linked by an invoice or canceled check to the contract under which credit is claimed will not be credited.

(B) Deductions made by a contractor for the cost of materials used by a HUB subcontractor or the cost of leased or rented equipment used by the HUB from an invoice submitted by the HUB will not be credited.

(4) The department may request a contractor to furnish proof of payment made to a DBE/HUB firm including, but not limited to, canceled checks to substantiate expenditures.

(5) A contractor must not withhold or reduce payments to any DBE/HUB firm without a reason that is accepted as standard industry practice.

(g) Performance. A DBE/HUB contractor or subcontractor must comply with the terms of the contract or subcontract for which it was selected. Work products, services, and commodities must meet contract specifications whether performed by a contractor or subcontractor.

(1) Commercially useful function.

(A) DBE subcontractors must perform a commercially useful function required in the contract in order for payments to be credited toward meeting the contract goal. A DBE performs a commercially useful function when it:

(i) is responsible for a distinct element of the work of a contract; and

(ii) actually manages, supervises, and controls the materials, equipment, employees, and all other business obligations attendant to the satisfactory completion of contracted work.

(B) The department may conduct an on-site review of a DBE/HUB's performance to determine that it is performing a commercially useful function as part of its routine monitoring program or in response to information or allegations that the DBE is not performing a commercially useful function.

(C) If the department determines that a DBE/HUB firm is not performing a commercially useful function under the contract, the department may:

(i) suspend the DBE/HUB firm from the DBE/HUB program for a period to be determined by the department;

(ii) deny all credit if the prime contractor did the work itself or directed another company to do the work, or deny credit from the time the department determined and notified the prime contractor that the DBE/HUB did not perform a commercially useful function;

(iii) review DBE certification; and

(iv) revoke DBE certification if an eligibility review indicates that the firm does not meet the standard as described in §9.56 of this title (relating to DBE Certification).

(D) A DBE may appeal the department's determination to United States [~~U.S.~~] Department of Transportation pursuant to 49 CFR §23.47.

(2) Subcontracting.

(A) A DBE contractor or subcontractor may subcontract no more than 70% of a federal aid contract. The DBE shall perform not less than 30% of the value of the contract work with:

(i) assistance of employees employed and paid directly by the DBE; and

(ii) equipment owned or rented directly by the DBE.

(B) A HUB prime contractor must perform at least 25% of a nonfederal aid contract with its employees (as defined by the Internal Revenue Service). A HUB prime contractor may subcontract the remaining 75% of the contract to a HUB or non-HUB firm.

(C) A HUB subcontractor may subcontract 75% of a nonfederal aid contract as long as the HUB subcontractor performs a commercially useful function. If the subcontractor uses an employee leasing firm for the purpose of providing salary and benefit administration, the employees must in all other respects be supervised and perform on the job as if they were employees of the subcontractor.

(D) A contractor may not furnish work crews or equipment to a DBE/HUB subcontractor.

(i) A DBE may lease equipment consistent with standard industry practice. A DBE may lease equipment from the prime contractor provided a rental agreement, separate from the subcontract specifying the terms of the lease arrangement, is approved by the department prior to the DBE starting the work. If the equipment is of a specialized nature, the lease may include the operator. If the practice is generally acceptable within the industry, the operator may remain on the lessor's payroll. The operation of the equipment shall be subject to the full control of the DBE, for a short term, and involve a specialized piece of heavy equipment readily available at the job site.

(ii) For equipment that is not specialized, the DBE shall provide the operator and be responsible for all payroll and labor compliance requirements.

(3) Maximum opportunity. A contractor must allow a DBE/HUB maximum opportunity to perform the work by not creating unnecessary barriers or artificial requirements for the purpose of hindering a DBE/HUB's performance under the contract such as, but not limited to:

(A) inadequate notice to perform work;

(B) failure to make timely payments; and

(C) failure to prepare the worksite on schedule.

(h) Substitutions. A contractor must request approval from the department to subcontract with a DBE/HUB firm other than the firm originally authorized.

(1) A contractor must provide written justification for a request to substitute a DBE/HUB firm, including, but not limited to, demonstrating that the original firm is unable or unwilling to carry out the terms of the subcontract.

(2) The department will contact the DBE/HUB to be displaced and other parties as needed to determine if the DBE/HUB firm to be displaced is willing and able to carry out the terms of the contract.

(A) The term "unable" includes, but is not limited to:

(i) a firm that does not have the resources and expertise to finish the project;

(ii) a firm that substantially increases the time to complete the project causing liquidated damages; or

(iii) a firm that creates a safety hazard.

(B) If the displaced firm is unwilling or unable to carry out the terms of the subcontract, the department will notify the contractor in writing within five working days of the request of its consent to the substitution, and the contractor must make a good faith effort to substitute another certified DBE/HUB firm for the one being displaced if the cancellation of the DBE/HUB subcontract results in the prime not meeting the goal.

(C) If the firm to be displaced is willing and able to carry out the terms of the subcontract, the department will deny the substitution.

(3) Any party aggrieved by the determination effecting the substitution of subcontractors may avail itself of the complaint procedures under §9.59 of this title (relating to Business Opportunity Programs Complaints).

(i) Records. A contractor must retain all records specified in the contract provisions for three years after final payment is made under the contract, or until any investigation, audit, examination, or other review undertaken during the three years is completed. The records must be made available to representatives of the department and other agencies for inspection, audit, examination, investigation, or other review at all reasonable times during the retention period.

(j) Compliance conference. The following process is made available to the contractor whenever a finding of noncompliance with DBE/HUB special provisions is made by the department. A contractor involved in a violation may be given an opportunity to remedy the violation before the department issues sanctions.

(1) A letter will be sent to the contractor notifying the contractor that it is not in compliance with the DBE/HUB special provision in the contract.

(2) The contractor may respond in writing. If the written response does not resolve the issues, the department will invite the contractor to attend an informal compliance conference, within 15 calendar days from the date of the written response, to discuss the issues.

(3) The contractor will be given 15 calendar days from the date of the conference to submit additional information to resolve the issues.

(4) The department will make a final determination regarding compliance within 15 calendar days from the conference or receipt of any additional information.

(5) If a determination of noncompliance has been made by the department, a contractor will be given an opportunity to submit a voluntary written corrective action plan to correct the violations.

(6) When a contractor fails to take corrective actions, the department may issue a notice to the contractor requiring the contractor to:

(A) show cause for noncompliance; and

(B) provide reasons why enforcement proceedings should not be instituted.

(7) The department may impose sanctions, pursuant to subsection (k) of this section, for failure to show cause why enforcement proceedings should not be instituted.

(k) Sanctions.

(1) The department may issue sanctions to a contractor that does not comply with contract requirements.

(2) If a successful bidder for a highway improvement contract does not furnish the required DBE/HUB commitment information during the time period specified in the DBE/HUB special provision, the department may declare the contractor to be in default and retain the proposal guaranty as liquidated damages in accordance with §9.18 of this title (relating to After Contract Award).

(3) The department will impose sanctions if the contractor:

(A) is found to have discriminated against a DBE/HUB firm;

(B) has failed to meet the contract DBE/HUB goal and has failed to demonstrate a good faith effort to meet the goal;

(C) has not kept DBE/HUB commitments [~~were not kept~~]; or

(D) has not given DBE/HUB firms [~~were not given~~] the maximum opportunity to perform under a subcontract.

(4) The department may impose any of the following sanctions:

(A) letter of reprimand;

(B) liquidated damages computed up to the amount of goal dollars not met;

(C) contract termination; and/or

(D) other remedies available by law.

(5) Factors to be considered in issuing sanctions may include, but are not limited to:

(A) the magnitude and the type of the offense;

(B) the degree of the contractor's culpability;

(C) any steps taken to rectify the situation;

(D) the contractor's record of performance on other projects including, but not limited to:

(i) annual DBE/HUB participation over DBE/HUB goals;

(ii) annual DBE/HUB participation on projects without goals or payment incentives;

(iii) number of complaints the department has received from DBEs/HUBs; and

(iv) the number of times the contractor has been previously sanctioned by the department pursuant to this section; and

(E) whether a contractor falsified, misrepresented, or withheld information.

(6) A contractor may appeal the department's sanction [~~to the Business Appeals committee~~] pursuant to §9.59 [~~§9.61~~] of this title (relating to Business Opportunity Programs Complaints [~~Appeals~~]).

§9.59. Business Opportunity Programs Complaints.

(a) Purpose. The purpose of this section is to provide a procedure for an aggrieved person to file a complaint concerning the Business Opportunity Programs. This section does not apply to:

(1) subcontractor claims for additional payments and time extensions; or

(2) a discrimination complaint made against a department employee because that type of complaint is handled in accordance with the department's Human Resources Manual.

(b) Federal-aid contracts. A complaint related to a federally-funded contract or a DBE certification complaint may be filed directly with the United States Department of Transportation at any time within 180 days of the date:

(1) of an alleged discrimination or a violation of the DBE Program; or

(2) on which a continuing course of conduct in violation of the DBE program was discovered.

(c) Program complaints. An aggrieved person or firm may file a written complaint that there has been a violation of a business opportunity program, including a discrimination claim. A complaint may also be filed on behalf of another person or any specific class of individuals.

(1) Filing. The complaint must be made to the director within 90 calendar days:

(A) of an alleged discrimination or a violation of the business opportunity program; or

(B) after the date on which a continuing course of conduct in violation of a business opportunity program was discovered.

(2) Review and investigation.

(A) CSTB will review the complaint and notify the complainant:

(i) of the reasons an investigation is warranted; or

(ii) that an investigation is not necessary.

(B) If the complaint is made against the Construction Division or a section of the Construction Division, then the executive director will appoint another division or office to review and investigate the complaint.

(3) Determination and conciliation.

(A) CSTB or the reviewing division or office will forward the written findings to the complainant and respondent.

(B) If the finding confirms the complaint, CSTB or the reviewing division or office will meet with the complainant and respondent to discuss a conciliation agreement.

(C) If the parties concur, CSTB or the reviewing division or office will prepare a conciliation agreement for execution, and monitor the agreement to completion.

(D) If the parties do not agree to a conciliation agreement, the director or the director of the reviewing division or office will make a decision regarding corrective action needed and monitor the corrective action, if any.

(d) Appeal.

(1) Appeal to U.S. Department of Transportation.

(A) A firm may file an appeal with U.S. Department of Transportation at any time pursuant to the process outlined in:

(i) 49 CFR §23.55, if a firm believes that it has been wrongly denied certification under §9.56 of this title (relating to DBE Certification);

(ii) 49 CFR §23.69, if a firm has challenged certification under §9.56(h) of this title, except for SBA 8(a) certification; or

(iii) 49 CFR §23.73, if a firm alleges discrimination on a federally-funded contract or is aggrieved by a department determination related to the DBE program.

(B) The appeal must be made in writing, signed and dated, no later than 180 days after the date of the offense or the date on which a continuing course of conduct in violation was discovered. The Secretary of Transportation may extend the time for filing or waive the time limit in the interest of justice.

(C) The outcome of the U.S. Department of Transportation appeal process is final.

(2) Department appeals.

(A) A final determination or a sanction issued pursuant to §9.58 of this title (relating to Contract Compliance) may be appealed to the executive director within 10 days after receiving notice of final determination or sanction. If an appeal is not timely filed, the determination or sanction is final and further administrative appeal will be barred.

(B) The executive director will consider an appeal if the appealing party identifies:

(i) new information or witnesses that, if considered, might have changed the outcome;

(ii) harmful procedural error by the department which, had it not been made, could have led to a different conclusion; or

(iii) a finding contrary to the evidence, department policy, or law.

(C) The executive director will:

(i) review the sanction or determination;

(ii) consult with witnesses and review evidence, if necessary; and

(iii) review the appealing party's written rebuttal of the proposed sanction or determination.

(D) The executive director will give written notice of the determination.

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

Filed with the Office of the Secretary of State, on November 23, 1998.

TRD-9817918

Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 463–8630

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43 TAC §§9.59–9.61

(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 Transportation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

No statutes, articles, or codes are affected by the repeal sections.

§9.59. Business Complaints.

§9.60. Investigation.

§9.61. Appeals.

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

Filed with the Office of the Secretary of State, on November 23, 1998.

TRD-9817917
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 10, 1999
For further information, please call: (512) 463–8630

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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 1. ADMINISTRATION

Part IV. Office of the Secretary of State

Chapter 91. Texas Register

Subchapter A. Administrative

1 TAC §91.7

The Office of the Secretary of State has withdrawn from consideration for permanent adoption the amendment to §91.7, which appeared in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9877).

Filed with the Office of the Secretary of State on November 25, 1998.

TRD-9817997
Clark Kent Ervin
Assistant Secretary of State
Office of the Secretary of State
Effective date: November 25, 1998
For further information, please call: (512) 463–5562

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Subchapter H. Telephone

16 TAC §23.104

The Public Utility Commission of Texas has withdrawn from consideration for permanent adoption the proposed repeal §23.104, which appeared in the May 22, 1998, issue of the *Texas Register* (23 TexReg 5293).

Issued in Austin, Texas, on November 23, 1998.

TRD–9817940
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: November 23, 1998
For further information, please call: (512) 936–7308

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Chapter 26. Substantive Rules Applicable to Telecommunications Service Providers

Subchapter J. Costs, Rates and Tariffs

16 TAC §26.213

The Public Utility Commission of Texas has withdrawn from consideration for permanent adoption the proposed new §26.213, which appeared in the May 22, 1998, issue of the *Texas Register* (23 TexReg 5305).

Issued in Austin, Texas, on November 23, 1998.

TRD–9817941
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: November 23, 1998
For further information, please call: (512) 936–7308

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Part III. Texas Alcoholic Beverage Commission

Chapter 45. Marketing Practices

Subchapter D. Advertising and Promotion-All Beverages

16 TAC §45.100

The Texas Alcoholic Beverage Commission has withdrawn from consideration for permanent adoption new to §45.100, which appeared in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8331).

Filed with the Office of the Secretary of State on November 24, 1998.

TRD-9817944
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Effective date: November 24, 1998
For further information, please call: (512) 206–3204

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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 1. ADMINISTRATION

Part IV. Office of the Secretary of State

Chapter 91. Texas Register

The Office of the Secretary of State adopts amendments and new sections for Chapter 91 concerning the Texas Register. Sections 91.1, 91.14, and 91.62 are adopted with changes to the proposed text as published in the October 2, 1998 issue of the *Texas Register* (23 TexReg 9877). Sections 91.5, 91.13, 91.61, 91.63, 91.66 and 91.122 are adopted without changes and will not be republished. Proposed amendments to §91.7 are withdrawn. The repeal of §91.28 is adopted.

The adopted rules revise existing filing and publication procedures for notices of open meetings filed with the Secretary of State. The rules establish procedures for internet filing and publication of meeting notices. The full text of meeting notices filed in accordance with these rules will be published days earlier than notices published under the existing rules. A notice filed through the internet will be published typically within a few minutes of filing. A notice filed electronically through e-mail or diskette will be published within one work day.

The rules will replace the current practice of publishing summaries of meeting notices in the print version of the *Texas Register*, which appear often after the meetings have occurred. The Secretary of State will continue to post the meeting notices in the lobby of the James Earl Rudder State Office Building, 1019 Brazos, Austin, Texas.

In §91.1 the definition of "Register" is amended to include internet publication.

The Secretary of State received comments from the Railroad Commission of Texas, the State Securities Board, and the Workers' Compensation Commission.

The State Securities Board requested clarification about the relationship of the proposed rules to the statutory requirements under Texas Government Code, Chapters 551 and 2002.

"The open meetings law provides that the 'secretary of state must post notice of a meeting of a state board....' It is our understanding that, after the implementation of these proposals sometime in November 1998, open meetings notices would be posted only to the Secretary of State's web site (an no longer published in the print version of the Texas Register)....Our concerns about these matters stem from our desire that the changes to these regulations not adversely impact an agency's ability to act on matters in an open meeting, or have their actions taken in a meeting challenged, because the notice requirements of the Open Meetings Act are not fully met through compliance with the new rules."

The Office of the Secretary of State is confident that the adoption of these rules does not adversely affect the notice of state agency meetings–notice being the only role of the Secretary of State regarding open meetings. On the contrary, the Office of the Secretary of State believes that implementation of these rules will permit an agency to provide notice in a more timely and more convenient manner for the public as well as the agency.

The Texas Government Code, §551.048, directs the Secretary of State to post meeting notices "on a bulletin board at a place convenient to the public in the main office of the secretary of state." With implementation of these rules, the Office of the Secretary of State is posting the notices on an electronic bulletin board in the lobby of the Rudder State Office Building, 1019 Brazos, Austin, Texas. This bulletin board will display the same documents that until now were printed on paper then tacked to a bulletin board in the lobby of the building. Visitors to the Secretary of State's office building will continue to have access to the same information as before. Because the notices are being posted electronically, the same documents are simultaneously available to anyone anywhere via the internet.

The Texas Government Code, §2002.011, requires the *Texas Register* to contain "notices of open meetings issued and filed in the Office of the Secretary of State as provided by law". As the State Securities Board correctly points out, the Secretary of State may omit information from the *Texas Register* under the provisions of the Government Code, §2002.014. Accordingly, the meeting notices in the print *Texas Register* have always contained summaries of the agendas. Publishing meeting notices in the electronic *Texas Register*, however, differs from other instances when information has been omitted from the print *Texas Register*. Because, more information is made available in a more timely manner in the electronic *Texas Register* than was available previously. Implementation of these rules makes complete meeting agendas available for the first time. The difference is that the text appears only in the electronic publication. A notice about the availability of the meeting notices appears in the print publication.

The State Securities Board comments on §91.1, suggesting that if information contained in the electronic *Texas Register* is not contained in the print *Texas Register* or vice versa that each version should notify the reader of this.

We agree. The print *Texas Register* will contain a reference about the availability of any information omitted, as will the electronic *Texas Register*.

The State Securities Board comments on §91.5, suggesting that we extend the deadline for inclusion of open meeting notices in the print *Texas Register*.

We disagree with this suggestion. Because the text of meeting notices will not appear in the print *Texas Register*, there is no longer a publication deadline for open meeting notices. If an agency files its notice through the internet, that notice will be posted within two or three minutes. If an agency files its notice through diskette or e-mail, that notice will be posted within one work day.

The State Securities Board and the Texas Workers' Compensation Commission commented on §91.7. The comments questioned the meaning of the terms "certify" and "verify", and suggested that the rule as proposed for amendment may be inconsistent and confusing. The Railroad Commission recommended that the rules better explain how an agency would change its liaison or certifying official.

We agree with the comments. Section 91.7, concerning Liaison and Certifying Official, will be withdrawn and republished for proposed amendment.

The State Securities Board and the Texas Workers' Compensation Commission commented against the proposed amendment to §91.13, concerning nonacceptance of rules and miscellaneous documents. The comments said the proposed change could result in delaying publication, and cause the agency to miss the next filing deadline.

We disagree with the comments. Our rules permit some flexibility for publication deadlines. An agency's request to expedite publication of a document due to special circumstances carries significant weight, which is lightened only when exercised frequently. The current wording, which we adopted in error last February, has placed us in the position of accepting documents for publication that violate our own format rules.

The State Securities Board commented on new §91.14, as follows.

"This new section addresses nonacceptance of open meetings documents. Since the topic addressed in subsection (a) (rejection notification) is also addressed in new §91.62(f), we suggest that the addition of a cross-reference may be appropriate. Also, it is unclear whether the two reasons listed for rejecting a document enumerated in subsection (b) are the only reasons for rejection of an open meetings document, or if other, unnamed bases exist. If the listing isn't exclusive, can it be made so or does a secondary (readily, publicly available) source, indicating what these additional grounds for rejection are, exist?"

We agree with the comments and will adopt §91.14 with changes for clarification. If we are unable to open and read a file from an agency, the submission will be rejected. There are no reasons for rejection besides those listed, but we will try to clarify that in the adopted text.

In a footnote to its comments, the State Securities Board asked if an updated Form and Style Manual would impose additional mandatory procedures. The answer is no. The Form and Style Manual functions solely as a filing guide. It makes reference to our rules, but it does not have the effect and authority of an administrative rule adopted under the Administrative Procedure Act.

The State Securities Board and the Railroad Commission of Texas commented on §91.62. The comments noted that agencies have several format choices for filing meeting notices. These include an automated web form, file transfer protocol, e-mail, and diskette. The comments asked if the specified two-hour response time for acknowledgment of filing is applicable to all of these filing options.

In response to these comments, we will adopt §91.62 with changes that will better describe the advantage to the agency of filing through the internet. The filing methods which require handling by the Texas Register staff – diskette and e-mail– will not be posted as quickly and will not be acknowledged as quickly as submission filed through the internet. Internet filing will be posted and acknowledged within a few minutes. If a submission filed through the internet does not appear and is not acknowledged within two hours of submission, then something has gone wrong, and the agency should notify the *Texas Register* right away. If an agency submits its filing on diskette or through e-mail, the posting delay may be as long as one business day.

The Railroad Commission suggested that §91.62(k) be clarified to better explain the restriction on posting a meeting no earlier three months before the date of the meeting. The rule is adopted with changes to specify how to calculate the earliest possible day a filing will be accepted.

The Railroad Commission suggested that §91.62 and §91.66 be combined as one section with the general requirements in §91.66 published before the more specific information in §91.62.

We agree with the suggestion, and intend to propose this change in future rulemaking.

The Railroad Commission commented that the rules fail to address the following issues: (1) the possible availability of meeting notice archives on CD-ROM, (2) the times that the Office of the Secretary of State will post paper meeting notices, (3) instructions for an agency to change its liaison or certifying official, (4) size limitation for meeting notices, and (5) instructions for an agency to add to an agenda electronically.

We do not currently archive any documents on CD-ROM. If we do, copies will be publicly available. We agree that the following items should be covered in the rules. Because they were not included in our proposed rules, they will be proposed as amendments. Exceptional items that necessitate paper posting will be posted as soon as practicable, and no later than the same work day on which they are filed with the Texas Register Section of the Secretary of State. There are volume limitations. Our database is capable of handling the equivalent of 40 pages in a meeting file. And there are other volume limitations related to at least one brand of internet browser used by an agency to submit a file. We anticipate receiving few meeting notices that will exceed these limitations. We will propose rule amendments to address these exceptions. An agency that experiences difficulty in filing a notice, should alert the Texas Register to ensure that the notice is posted in a timely manner.

Subchapter A. Administrative

1 TAC §§91.1, 91.5, 91.13, 91.14

The amendments and new rule are adopted under the Government Code, Chapter 2002, Subchapter B, §2002.017 which provides the Secretary of State with the authority to promulgate rules consistent with the code.

§91.1. Definitions.

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

(1) - (6) (No change.)

(7) Electronic transmission - - The submission of electronic data to the Texas Register by Internet, file transfer protocol (FTP) via Internet, e-mail or diskette.

(8) - (10) (No change.)

(11) Register–The Texas Register established by the Government Code, Chapter 2002, Subchapter B. Contents of the Register shall be published in print or through the Internet. The print Register will contain a reference about the availability of any information that is available only in the electronic Register.

(12) - (14) (No change.)

§91.14. Nonacceptance of Open Meetings Documents.

(a) We may reject open meeting documents that do not conform to the Texas Register requirements found in §91.62 (of this title relating to Electronic Procedures for Filing Open Meeting Documents). We will notify the agency liaison by e-mail or fax when an open meeting submission fails to conform to our rules.

(b) The three reasons for rejecting an open meetings document include the following:

(1) electronic format which does not conform to our procedures in §91.62 of this title, and

(2) filing procedures which do not conform to §91.66 of this title (relating to Procedures for Filing Open Meetings.), and

(3) agency's file can not be opened and read by the Texas Register.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 25, 1998.

TRD-9817996
Clark Kent Ervin
Assistant Secretary of State
Office of the Secretary of State
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Proposal publication date: October 2, 1998
For further information, please call: (512) 463–5562

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1 TAC §91.28

The repeal is adopted under the Government Code, Chapter 2002, Subchapter B, §2002.017 which provides the Secretary of State with the authority to promulgate rules consistent with the code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Clark Kent Ervin
Assistant Secretary of State
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For further information, please call: (512) 463–5562

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Subchapter B. Filing Procedures

1 TAC §§91.61–91.63, 91.66

The amendments and new rule are adopted under the Government Code, Chapter 2002, Subchapter B, §2002.017 which provides the Secretary of State with the authority to promulgate rules consistent with the code.

§91.62. Electronic Procedures for Filing Open Meeting Documents.

(a) Submit documents in electronic format using one of the following methods: Internet Web form, file transfer protocol (FTP), 3-1/2 inch diskette or by e-mail. Submit files in the American Standard Code for Information Interchange (ASCII) format. ASCII means standard keyboard characters limited to those represented by a decimal 32 (a space) to a decimal 126 (a tilde). Characters above 127 (extended characters) are not acceptable without our permission.

(b) Submitting open meetings using the Internet web form. Enter all required information into the Internet web form. Attach the agenda to the form before submitting or include the agenda as part of the form. Attached agendas will be in ASCII format.

(c) Submitting open meetings using FTP or 3-1/2 diskette.

(1) Send only one submission per file.

(2) Submit files in ASCII format.

(3) Format files according to the form at the end of this paragraph. Include all category designations. In the "date of submission" and "date of meeting" categories, enter the date in month/date/year order. Separate month, date, and year with slashes and use two digits for the month and date and four digits for the year, for example, 09/22/1998. The file will be rejected if it contains extraneous information.
Figure: 1 TAC §91.62(c)(3)

(4) Name files in this format: "MMDDOMAL.123". "MM" designates month. "DD" designates the filing date (not the date of the meeting). "OMA" designates the number of open meetings filed on this date. If there are several meetings, name them "OMA", "OMB", "OMC" and so on. "L" designates the liaison's I.D. number. "123" designates the three-digit agency code and is preceded by a decimal. For example "0903OMC1.004" indicates that the file was submitted on September 3. It is the third open meeting filed on this day from liaison number one at the Office of the Secretary of State.

(5) If submitting by FTP, use the required FTP address and the appropriate login and password as designated by the staff of the Texas Register.

(6) When submitting documents on diskette, format the diskette using DOS 3.1 or a newer version of the operating system. We accept high-density formatted diskettes. Diskettes must contain only the files being submitted. We will reject diskettes containing files not related to the submission. We do not return diskettes to the issuing agency. You may request a diskette in exchange for the submitted diskette. Attach a label to the diskette identifying your agency.

(d) Submitting open meetings using e-mail.

(1) Send only one submission per e-mail.

(2) Send file to the required e-mail address as designated by the staff of the Texas Register.

(3) The e-mail subject line contains the name of the file in accordance with the requirements specified in subsection (c)(4) of this section.

(4) Open meetings will be attached to the e-mail in ASCII format. Exclude extraneous information from the body of the e-mail.

(5) Format files according to the example in subsection (c)(3) of this section. Include all category designations.

(e) Texas Register liaisons. Liaisons and their alternates will receive a liaison number and login and password for the web applications by the Texas Register.

(f) Acknowledgments and Rejections. The Register will acknowledge acceptance or rejection of an open meeting filed by fax or e-mail within one business day of receipt in the Register office. If you do not receive an acknowledgment or rejection within one business day, contact the Texas Register office.

(g) Type of acknowledgment and rejection messages.

(1) An Acknowledgment of Receipt message may indicate that the submission has been accepted and posted to the Internet. The message gives the agency name, the board or committee holding the meeting, the time and date of the meeting and the TRD number.

(2) An Acknowledgment of Receipt message may indicate that the submission has been accepted and posted to the Internet but fails to meet the seven-day or 72-hour deadline. The message will give the agency name, the board or committee, the time and date of the meeting and the TRD number.

(3) A rejection message indicates that the file was not posted and gives the reason why. Reasons may include that the liaison name is not authorized, a liaison's ID is inactive, the meeting date is past, or the submission is incomplete.

(h) Submissions received by the Internet web form and by file transfer protocol (FTP) will be accepted 24 hours a day, seven days a week.

(i) Agency liaisons can cancel their open meetings using secure Internet access.

(j) Do not include any type of graphics.

(k) Do not submit an open meeting notice earlier than the 90th calendar day before the meeting date.

(l) Include only one meeting per submission. If a meeting is to be held on consecutive days, submit each day as a separate open meeting file.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Clark Kent Ervin
Assistant Secretary of State
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Subchapter C. Miscellaneous

1 TAC §91.122

The amendment is adopted under the Government Code, Chapter 2002, Subchapter B, §2002.017 which provides the Secretary of State with the authority to promulgate rules consistent with the code.

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Part XV. Texas Health and Human Services Commission

Chapter 355. Medicaid Reimbursement Rates

Subchapter D. Reimbursement Methodology

1 TAC §§355.451, 355.452, 355.456, 355.457

The Texas Health and Human Services Commission (commission) adopts amendments to §§355.451, 355.452, and 355.456 of Chapter 355, Subchapter D, concerning reimbursement methodology without changes to the text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8321-8323). Section 355.457 is adopted with changes.

The amendments impact reimbursement for the Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) program operated by the Texas Department of Mental Health and Mental Retardation (TDMHMR). In §355.451, the term "direct services cost survey" is changed to "fiscal accountability cost report" to more accurately reflect the nature of the report. In §355.452, the citation to a commission rule is updated to reflect the correct citation of a TDMHMR rule. Language in §355.456 is amended to state that annual rates for the time period between the years that modeled rates are rebased are set by inflating the "direct service portion" of the previous year's rate, rather than the previous year's "direct costs." The amendments to §355.457 require the recoupment thresholds and percentages applied to providers that do not spend at least 90% of their direct service revenues on direct service costs to increase effective January 1, 1999. The amendments to §355.457 also require providers that contract with another entity for the management and operation of their ICF/MR facilities to be responsible for submitting the fiscal accountability cost report on the subcontractor's direct care costs and paying any recoupment. The amendments will ensure that more resources are devoted to the delivery of direct services to the consumer.

Section 355.457 is revised on adoption to correct several technical errors including lowercasing words after the first word in the terms "Cost report," "Fiscal accountability cost report," and "Full cost report" in §355.451(a); changing an incorrect citation in subsection (b) from §355.453 to §355.452; correcting the format of citations in subsection (e)(1); and adding "the" before "difference" in subsection (e)(2)(C). In addition, the language in subsection (b)(2) is revised to clarify the provision concerning provider contracts with another entity for management or operation of a facility, and to clarify that when a staff person providing direct services is an owner, operator, or a related party, the salary and benefits must be the lesser of the actual wages and benefits paid or the wages and benefits for a comparable staff person assumed in the model.

A public hearing to accept testimony regarding the proposed amendments was held at TDMHMR Central Office in Austin, on Thursday, September 9, 1998. Written and/or oral comments were submitted by the following organizations and individuals: American Habilitation Services, Inc, Austin; Empowerment Options, Austin; The Arc of Texas, Austin; Community Access, Inc., Tyler; Harmony Living Centers, Inc., Longview; Res-Care, Inc., Louisville, Kentucky; The Texas Council of Community Mental Health and Mental Retardation Centers, Inc., Austin; Concept Six, Austin; Edu-Care Community Living Corporation of America, Austin; Private Providers Association of Texas, Austin; Independent Horizons, Inc., San Antonio; a representative of four related corporations, Texas Home Management, Normal Life of North Texas, RSCR of Texas, and Community Alternatives of Texas; Richard Jordan, San Antonio; Corpus Christi State School; San Angelo State School; and San Antonio State School.

Three commenters stated that they had no comments.

Seven commenters stated that it is too early in the process of implementing fiscal accountability to raise the penalty threshold. They suggested that the commission wait until late spring of 1999 when a sufficient amount of meaningful data will be available to indicate whether or not the rates are adequate with regard to the indirect portion of costs. The commenter noted that the issue is made more complex because the ICF/MR program has multiple rates based on the size of the facility and the needs of individual residents. The commission responds that the methodology and rates, which were developed two years ago, were implemented in January 1997. The commission believes that this has given providers sufficient time to adjust. The amended rules still provide a 10 percent margin in direct care reimbursement that will not be taken from the provider regardless of whether the money was spent on direct services. That margin plus the portion of the rate for indirect costs should be more than enough to cover the indirect costs of any efficient provider.

One commenter expressed concern that moving the penalty threshold from 80 percent to 85 percent will establish battle lines with providers on audit issues. The commission responds that a higher penalty threshold does not create additional audit or recoupment issues to those existing with the current penalty threshold.

Seven commenters stated that the penalty threshold should not be increased from 80 percent to 85 percent. One commenter noted that increasing the threshhold would have a disproportionate negative impact on small providers. Three commenters expressed support for the increase. The commission responds that the higher threshold implements the intention of the commission and the Texas Mental Health and Mental Retardation Board that more money be spent on direct service costs to benefit the consumer.

One commenter suggested that §355.457(b)(2) be revised to clarify that the exclusion of that percentage of salary and benefits for duties other than provision of direct services should be limited to owners and related parties and not to "staff." The commission agrees and has modified the language as recommended.

One commenter expressed concern about the rising cost of the Medicaid programs operated by TDMHMR and the effect that "cost of living increases" and other adjustments have on the amount of general revenue available to provide services to non-Medicaid eligible consumers. The commission recognizes the commenter's concerns but must refer these considerations to a more appropriate forum for official response because they are not included within the subject matter of the proposed amendments.

The amendments are adopted under the Texas Government Code, §531.033, which provides the commissioner of the Texas Health and Human Services Commission (THHSC) with broad rulemaking authority; the Texas Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide THHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides THHSC with the authority to adopt rules governing the determination of Medicaid rates.

§355.457. Fiscal Accountability.

(a) (No change.)

(b) Annual reporting. Fiscal accountability will consist of the annual reporting of direct service costs from all non-state operated providers. The data will be collected on a cost report designed by TDMHMR or its designee in accordance with §355.452 of this title (relating to Cost Reporting Procedures).

(1) Direct service costs are defined to include costs associated with personnel who provide direct hands-on support for consumers and include personnel such as direct care workers, first-level supervisors of direct care staff, QMRPs, registered nurses, and licensed vocational nurses. Direct service costs include: costs related to wage rates, benefits, payroll taxes, contracts for direct services, and direct service supervision information. Accrued leave (sick or annual) can only be counted as a direct service cost if the employee has a right to the cash value of that leave upon termination.

(2) The provider is responsible for submission of the fiscal accountability cost report, and payment of amounts to TDMHMR in accordance with subsection (e)(2) and (3) of this section, regardless of whether the provider contracts with another entity for the management or operation of the ICF/MR. If the provider contracts with another entity for the management or operation of the ICF/MR, the provider must report the specific direct services costs of that entity as required in the cost report instructions and not the amount for which the provider is contracting for the entity's services. For staff whose duties include work other than the provision of direct services, the proportion of work that is spent on direct services may be included in the direct service costs. The proportion of their salary and benefits that are compensation for direct services work can be included in the direct service cost report. If the staff providing direct services is an owner, operator, or a related party as defined in §355.701(a)(9)

of this title (relating to General Reimbursement Methodology for All Medical Assistance Programs), the salary and benefits must be the lesser of the actual wages and benefits paid or the wages and benefits for a comparable staff person assumed in the model. The facility must have a procedure that specifies how direct service work time is allocated.

(3) The direct service portions of the current rate model are inflated on an annual basis as specified in §355.456(d)(2) of this title (relating to Rate Setting Methodology).

(4) A vendor hold will be placed on a prior owner at a change of ownership which results in the execution of a new provider agreement. The prior owner will submit a fiscal accountability report for the current reporting period. Upon receipt of an acceptable fiscal accountability report and resolution of any outstanding balances, the vendor hold will be released.

(c)-(d) (No change.)

(e) The department will require providers to report all direct costs incurred in their annual fiscal year. The department will compare the reported direct service costs to the direct service cost component of the modeled rates.

(1) Paragraph (2) of this subsection, concerning the fiscal accountability repayment, applies to that portion of the provider's fiscal year that occurs after April 5, 1998. Paragraph (3) of this subsection, concerning the fiscal accountability repayment, applies to that portion of the provider's fiscal year that begins on or after January 1, 1999.

(2) The total direct service revenue of the modeled rates is the direct service portion of the rate multiplied by the number of allowable units paid for services provided during the reporting period.

(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers whose direct service costs are less than 80% of the direct service revenues will be required to pay to TDMHMR the difference between the direct service costs and 95% of the direct service revenues.

(C) Providers whose direct service costs are between 80% and 85% of the direct service revenues will be required to pay to TDMHMR 100% of the difference between the direct service costs and 85% of the direct service revenues plus 50% of the difference between 85% and 90% of the direct service revenues.

(D) Providers whose direct service costs are between 85% and 90% of the direct service revenues will be required to pay to TDMHMR 50% of the difference between the direct service costs and 90% of the direct service revenues.

(3) The total direct service revenue of the modeled rates is the direct service portion of the rate multiplied by the number of allowable units paid for services provided during the reporting period.

(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers whose direct service costs are less than 85% of the direct service revenues will be required to pay to TDMHMR the difference between the direct service costs and 95% of the direct service revenues.

(C) Providers whose direct service costs are between 85% and 90% of the direct service revenues will be required to pay to TDMHMR 75% of the difference between the direct service costs and 90% of the direct service revenues.

(4) Providers will be notified of their repayment status within 90 days of submitting their cost reports. A provider's repayment status may change as a result of the desk reviews or outside audits of cost reports, or by adjustments to claims paid to the provider for services provided in the cost reporting period. Providers will submit the repayment amount within 60 days of notification.

(5) Repayment will be collected from the following:

(A) the provider or legal entity submitting the report;

(B) any other legal entity responsible for the debts or liabilities of the submitting entity; or

(C) the legal entity on behalf of which a report is submitted.

(6) These entities will be jointly and severally liable for any repayment due to TDMHMR. Failure to repay the amount due when notified may result in a vendor hold on all of the facilities included in the cost report.

(7) Providers who wish to appeal the requirement to make payment to TDMHMR in accordance with this section may do so in accordance with 25 TAC Chapter 409, Subchapter B.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
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Subchapter F. General Reimbursement Methodology for all Medical Assistant Programs

1 TAC §355.722

The Texas Health and Human Services Commission (commission) adopts amendments to §355.722 of Chapter 355, Subchapter F, concerning general reimbursement methodology for all medical assistance programs, with changes to the text as proposed in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8323-8325)

The amendments impact reimbursement for the home and community-based services (HCS) program operated by the Texas Department of Mental Health and Mental Retardation (TDMHMR). The amendments to §355.722 require the recoupment thresholds and percentages applied to HCS providers that do not spend at least 90% of their direct service revenues on direct service costs to increase effective January 1, 1999. The amendments will ensure that more resources are devoted to the delivery of direct care services to the consumer.

Subsection (s)(2) is revised upon adoption to add new subparagraph (A) requiring a vendor hold on payments to a provider whose provider agreement is being assigned or terminated.

Upon receipt by the department of an appropriate cost report and repayment of any amounts due, the vendor hold will be released. The provision is added to assure compliance with fiscal accountability requirements and to be consistent with fiscal accountability provisions in the intermediate care facilities for persons with mental retardation (ICF/MR) program which also is operated by TDMHMR. New subparagraph (B) exempts providers which have converted to the mental retardation local authority (MRLA) program operated by TDMHMR from submitting costs reports for the fiscal year in which the conversion occurred.

In addition, several technical and/or grammatical errors are corrected in subsection (s) by deleting a comma inadvertently inserted in the proposal after "paid" in subsection (s)(8); adding "service" between "direct" and "costs" in subsection (s)(8)(D); replacing "recoupment will be collected from" with "repayment will be made by" in subsection (s)(10).

A public hearing to accept testimony regarding the proposed amendments was held at TDMHMR Central Office, Austin, on Thursday, September 9, 1998. No oral and/or written testimony was offered. Written comments were submitted by the following organizations and individuals: The Arc of Texas, Austin; Beaumont State Center, Beaumont; The Texas Council of Community Mental Health and Mental Retardation Centers, Inc., Austin; the Private Providers Association of Texas (PPAT), Austin; and Concept Six, Austin.

Two commenters expressed their strong support of the proposed changes. The commission and TDMHMR acknowledge the comments.

A commenter expressed concern that the phrase "actual expenses incurred" was replaced with "direct service costs," explaining that the latter phrase appears to apply only to charges for services listed in a consumer's service plan and not for other items such as transportation for a doctor visit or required extra staff. The commenter suggested that this change would impact private providers more than state-operated providers. The commission responds that the phrase "direct services costs" was substituted for "actual costs incurred" in the amendments to clarify the intention of the commission and TDMHMR that costs being captured are those necessary to fulfill the services listed in the individual service plan.

Two commenters recommended that providers in the MRLA program be exempted from submitting cost reports as otherwise required in subsection (s) because of the minimal time period between April 5, 1998, and May 31, 1998, and the disproportionate efforts necessary to collect employment and cost data for these non-standard time periods. The commission has added new subsection (s)(2)(B) exempting the providers as requested.

One commenter expressed concern about the rising cost of the Medicaid programs operated by TDMHMR and the effect that "cost of living increases" and other adjustments have on the amount of general revenue available to provide services to non-Medicaid eligible consumers. The commission recognizes the commenter's concerns but must refer these considerations to a more appropriate forum for official response because they are not included within the subject matter of the proposed amendments.

The amendment is adopted under the Texas Government Code, §531.033, which provides the commissioner of the Texas Health and Human Services Commission (THHSC) with broad rulemaking authority; the Texas Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide THHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides THHSC with the authority to adopt rules governing the determination of Medicaid rates.

§355.722. Reporting Costs.

(a)-(r) (No Change.)

(s) Fiscal Accountability.

(1) General principles. Fiscal accountability is a process used to gauge the ongoing financial performance under the non-state operated reimbursement rates.

(2) Annual reporting. Fiscal accountability will consist of the annual reporting of direct service costs including wages, and benefits, from all non-state operated providers. The data will be collected on a cost report designed by TDMHMR or its designee.

(A) TDMHMR will place a vendor hold on payments to a provider whose provider agreement is being assigned or terminated. The provider will submit a cost report for the current reporting period to TDMHMR. Upon receipt of an appropriate cost report and repayment of any amounts due to TDMHMR in accordance with this section, the vendor hold will be released.

(B) Providers are exempt from submitting cost reports in accordance with this section for the portion of their programs which converted to the mental retardation local authority (MRLA) program for the fiscal year in which the conversion occurred.

(3) In the initial rate period, providers are required to submit direct services costs on a report for a uniform three-month period of the year, as selected by the department. The report will reflect the provider's actual direct costs for the three-month period. The direct service costs will be compared to the "direct service cost" component of the modeled rates. Instances where a provider's actual direct service costs, as captured by the quarterly cost surveys, are less than 85% of the direct service revenues in the model, will require additional reporting of costs and other information from the provider.

(4) TDMHMR will review the results obtained from the direct services cost reports submitted for 1997 with representatives of provider associations and advocacy groups to further refine the fiscal accountability process. TDMHMR may require the provider to:

(A) report more detailed financial information;

(B) submit to a quality assurance survey and review;

(C) submit to a utilization review of all services provided, and/or

(D) submit to a detailed audit of all relevant financial records.

(5) The department will require providers to report all direct costs incurred on an annual fiscal year basis. The department will compare the reported direct service costs to the total direct service revenue.

(6) Paragraph (7) of this subsection applies to that portion of the provider's fiscal year that occurs after April 5, 1998. Paragraph (8) of this subsection, concerning the following fiscal accountability repayment, applies to that portion of the provider's fiscal year that begins on or after January 1, 1999.

(7) Direct service revenues are calculated by multiplying the number of units eligible for payment that have been paid, for services delivered during the reporting period times the appropriate direct service portion of the rate for the service billed.

(A) Providers whose direct service costs are 85% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers whose direct service costs are less than 80% of the direct service revenues will be required to pay to TDMHMR the difference between the direct service costs and 95% of the direct service revenues.

(C) Providers whose direct service costs are between 80% and 85% of the direct service revenues will be required to pay to TDMHMR 100% of the difference between the direct service costs and 85% of the direct service revenues.

(8) Direct Service Revenues are calculated by multiplying the number of units eligible for payment that have been paid for services delivered during the reporting period times the appropriate direct service portion of the rate for the service billed.

(A) Providers whose direct service costs are 90% or more of the direct service revenues will not be subject to repayment under this section.

(B) Providers whose direct service costs are between 85% and 90% of the direct service revenues will be required to pay to TDMHMR 50% of the difference between the direct service costs and 90% of the direct service revenues.

(C) Providers whose direct service costs are between 80% and 85% of the direct service revenues will be required to pay to TDMHMR 100% of the difference between the direct service costs and 85% of the direct service revenues plus 50% of the difference between 85% and 90% of the direct service revenues.

(D) Providers whose direct service costs are less than 80% of the direct service revenues will be required to pay to TDMHMR the difference between the direct service costs and 95% of the direct service revenues.

(9) Where applicable, providers will be notified of the requirement to repay revenues within 90 days of submitting their cost reports. A provider's repayment status may change as a result of the desk reviews or outside audits of cost reports, or adjustments to claims paid to the provider for services provided in the cost reporting period. Providers will submit the repayment amount within 60 days of notification.

(10) Repayment will be made by the following:

(A) the provider or legal entity submitting the report;

(B) any other legal entity responsible for the debts or liabilities of the submitting entity; or

(C) the legal entity on behalf of which a report is submitted.

(11) Providers required by TDMHMR to repay revenues will be jointly and severally liable for any repayment. TDMHMR may apply a vendor hold on Medicaid payments to all providers included in a report for not making the repayment amount to TDMHMR within 60 days of receiving notice.

(12) Providers who wish to appeal the requirement to make payment to TDMHMR should do so in accordance with 25 TAC §409.106.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
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1 TAC §355.743

The Texas Health and Human Services Commission (THHSC) adopts amendments to §355.743 of 1 TAC Chapter 355, Medicaid Reimbursement Rates, Subchapter F, General Reimbursement Methodology for all Medical Assistance Programs (regarding reimbursement for the service coordination program operated by the Texas Department of Mental Health and Mental Retardation (TDMHMR)). The amendments are adopted with changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8325 - 8329).

Associated with the adoption is the adopted repeal by THHSC of §§355.751-355.753 of 1 TAC Chapter 355, Medicaid Reimbursement Rates, Subchapter F, General Reimbursement Methodology for all Medical Assistance Programs (regarding reimbursement for the case management program operated by TDMHMR). Also associated with the current adoption are adopted repeals by TDMHMR of Chapter 409, Medicaid Programs, Subchapter F, concerning Case Management Program Requirements, and Chapter 409, Medicaid Programs, Subchapter G, concerning Case Management for Persons with Severe and Persistent Mental Illness, and the adoption of new §§412.451-412.464 of Chapter 412, Local Authority Responsibilities, Subchapter J, concerning Service Coordination.

The adopted amendments to §355.743 consolidate service coordination reimbursement methodology for service coordination provided to persons with mental retardation and for persons with severe and persistent mental illness. The amendments also provide for payment on a monthly unit rate for service coordination for individuals in the mental retardation priority population and persons with a related condition, for individuals in the adult mental health priority population, and for individuals in the child mental health priority population. The amendments disallow payment for telephone contacts.

On adoption the proposed text was reorganized and clarified. The terms "provider" and "providers" were replaced with the terms "local authority" and "local authorities" throughout the subchapter because only local authorities provide service coordination. The term "case management" was replaced with the synonymous term "service coordination." Throughout the section minor corrections in capitalization, punctuation, and citation were made, and material was organized to be more understandable. Duplicative language was deleted. The term "desk review" has been added to distinguish it from an on-site review. Language has been added as (e)(2)(A)(ii) to indicate that local authorities placed on vendor hold may request an administrative hearing in accordance with Chapter 409, Subchapter B, concerning Adverse Actions. Language that was proposed in

(g)(3)(A)-(C) has been moved to (e)(3)(A)-(C). No substantive changes were made to the reimbursement methodology.

A public hearing was held in Austin on September 9, 1998. No public testimony was provided. Written comments were received from Tarrant County Mental Health and Mental Retardation Services, Fort Worth; and the Medicaid Committee of the Community MHMR Centers Executive Directors Consortium, Life Resource Center, Beaumont. Comments relevant to the amendments were provided at a public hearing concerning 25 TAC Chapter 412, Subchapter J, concerning Service Coordination, and are referenced in this preamble.

A commenter provided public testimony supporting the change in reimbursement methodology. The commenter noted three concerns: First, in moving toward facility-specific rates based on reimbursement methodology, the Time and Financial Instrument has shortcomings. The commenter suggested that it may be more valid to allow centers to place specific case management costs into the "unstudied staff" area and exclude them from the allocation related to personnel time studies. Second, there is no incentive for efficiency in the proposed reimbursement methodology, i.e., a center that is able to perform more economically will come in below targeted costs and be required to pay back funds. There is no mechanism to readjust rates so that they can share in some of the financial gains and efficiencies. Third, there needs to be closer coordination between reimbursement staff and contract staff who deal with targets for case management in contract with community centers. The commenter noted that several centers felt that had the new methodology been implemented prior to the most recent contracting period, the reduced contracted targeted amounts would have severely adversely affected them. Regarding the Time and Financial Instrument process, THHSC responds that this process is approved by the Health Care Financing Administration for collecting costs associated with providing Medicaid reimbursable services. Regarding the commenter's concerns about the incentives for efficiency, THHSC responds that it disagrees that there are no incentives for efficiency because a center is reimbursed based on a cost methodology derived from the center's actual performance and that rates are readjusted at least annually or as required by law. Additionally, the new case rate reimburses providers for the costs of providing service coordination. Regarding the commenter's request for closer coordination between reimbursement and TDMHMR contract staff, THHSC responds that the targets for service coordination in the performance contract/memorandum will be revised by TDMHMR for consistency with this subchapter.

A consortium of community mental health and mental retardation center executives expressed support for the service coordination program with reservations. The commenters noted that the rules are the result of statewide discussion and consensus and accomplish a simpler billing system which is at less risk for errors and audit exceptions resulting in fiscal penalties. The commenters also stated that the rules provide uniform requirements across all three priority population groups, which should result in fewer administrative complexities, and the rules allow providers to discard the current highly prescriptive guidelines for case management. The commenters also stated that in mental health services, the rules provide for a clearer distinction between service coordination and Medicaid-reimbursable rehabilitation services, which is likely to result in more effective utilization of the revenue available through rehabilitation services. THHSC responds that it appreciates the consortium's support of the rules.

The support of the commenters was conditioned on the several factors: the rules should be implemented no earlier than April 1, 1999; TDMHMR should commit staff resources to provide timely responses to questions that will arise as centers redesign their systems and budgets; TDMHMR should include the consortium in statewide planning and technical assistance efforts; and TDMHMR should include the consortium in an ongoing evaluation of anticipated outcomes, e.g., more persons will receive service and less documentation will be required. These conditions were based on a number of concerns discussed below.

The consortium noted that changing the programmatic requirements for a core service, i.e., case management, or service coordination, across three major populations, i.e., adult mental health priority population, child mental health priority population, and mental retardation priority population, requires significant readjustment of personnel in the assignment of staff and staff responsibilities. The adjustment has fiscal implications, which, in the context of a new reimbursement methodology, makes forecasting the financial impact on a center challenging. Implementation prior to April 1, 1999, does not provide sufficient time to obtain technical assistance so that the changes minimally affect the financial status of each local authority. Other commenters also expressed concern about the implementation date. THHSC responds by making the subchapter's effective date April 1, 1999.

The consortium further commented that variables which are unique to each center make a general statewide presentation by TDMHMR staff inadequate for planning at the local level, e.g., increasing the numbers of persons served and shifting to rehabilitation billable services may not be programmatically or financially feasible for some centers. THHSC agrees that statewide training may not be sufficient to meet local need and advises the commenters that regional training and individual technical assistance will be made available.

The consortium noted that some centers/local authorities will experience significant revenue reductions as a result of the change in method of finance for service coordination. The outcome may be the reduction of services to persons who are not Medicaid-eligible. The centers are concerned that this could result in a two-tiered service system in which Medical-eligible persons are given priority. This is a concern because in mental health services, those persons form less than 50 percent of the priority population enrolled in services. The priority population, in the main, whether Medicaid- or non-Medicaid eligible, is indigent as well as having a major severe and persistent mental illness or mental retardation. In order for centers to capture more of their cost for service coordination under the case rate methodology, it may be necessary for there to be diminished access and/or quality of service for non-Medicaid eligible persons. THHSC responds that, unfortunately, some centers/local authorities will experience revenue reductions; however, more will experience increases in revenue. THHSC believes that the new rate methodology will allow more centers to recover their costs and will not cause diminished service access or quality.

With regard to the lack of cost data differentiated by adults and children historically available to TDMHMR the consortium noted that more collaboration between centers and TDMHMR

would be needed to assure that the statewide rate for children's service coordination is established fairly. THHSC responds that it is planning to implement changes to its cost data collection system to differentiate the costs associated with delivering children's services as opposed to adult services.

With reference to mental retardation services, the consortium expressed concern that centers have few options for recouping those losses and that further careful analysis would be needed to minimize reductions in services to that population. THHSC responds by assuring the commenter that careful analysis of the new rate methodology will continue throughout the first year of implementation.

The commenter stated that the new case rate "penalizes efficient, cost-conscious, and productive case management services" and that this "penalty is a direct contradiction of managed care principles." The commenter also notes that it has "substantially lowered its costs" while its "total monthly unduplicated client counts have increased significantly." THHSC responds that the new case rate reimburses the local authority's costs for providing service coordination if those services are provided in an efficient and cost effective manner.

The amendment is adopted under the Texas Government Code, §531.033, which provides the commissioner of the Texas Health and Human Services Commission (THHSC) with broad rulemaking authority; the Texas Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide THHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides THHSC with the authority to adopt rules governing the determination of Medicaid rates.

§355.743. Reimbursement Methodology for Service.

(a) General information. As specified in §§335.701-355.707 of this title (relating to Definitions and General Specifications; Method for Cost Determination; Basic Objectives and Criteria for Review of Cost Reports; Determination of Inflation Indices; Notification; Adjusting Rates When New Legislation, Regulations, or Economic Factors Affect Costs; and Reviews and Administrative Hearings), the Texas Department of Mental Health and Mental Retardation (TDMHMR) reimburses qualified local authorities for service coordination provided to Medicaid-eligible individuals who are eligible for service coordination according to 25 TAC §412.455 (Eligibility). The Texas Health and Human Services Commission (THHSC) determines reimbursement with the advice and recommendation of the TDMHMR Board at least annually for service coordination. Reimbursement is:

(1) uniform statewide;

(2) prospective (as defined in §355.741 of this title (relating to Definitions)); and

(3) cost related with a year-end settlement.

(b) Separate rates. Separate rates are set for services provided to:

(1) individuals in the mental retardation priority population as defined in 25 TAC §412.453 (to Definitions) and persons with a related condition (as defined in 42 CFR §435.1009);

(2) individuals in the adult mental health priority population as defined in 25 TAC §412.453 (Definitions); and

(3) individuals in the child mental health priority population as defined in 25 TAC §412.453 (Definitions).

(c) Local authority qualifications. Section 1396n(g) of 42 USC is invoked to limit the provision of service coordination to the state mental retardation authorities, the state mental health authorities, TDMHMR, or its designated local authorities authorized under §534.054 of the Texas Health and Safety Code, who offer a service delivery system of required services as outlined in §534.053 of the Texas Health and Safety Code.

(d) Rules and procedures. TDMHMR has implemented rules and procedures to ensure that service coordination is provided by persons who meet the requirements specified by TDMHMR and is provided in compliance with federal and state laws, rules, and regulations.

(e) Reimbursement methodology THHSC determines reimbursement according to §355.701 of this title (relating to General Specifications) with the advice and recommendation of the TDMHMR Board. As specified in §355.706 of this title (relating to Adjusting Rates When New Legislation, Regulations, or Economic Factors Affect Costs), THHSC may also adjust reimbursements when new legislation, regulations, or economic factors affect costs as recommended by the TDMHMR Board. The TDMHMR Board approves reimbursement recommendations for submission to THHSC.

(1) For the reimbursement period beginning April 1, 1999, local authorities will be reimbursed a statewide rate comprising a modeled rate plus a statewide weighted average associated service add-on.

(A) The modeled rate is based on cost calculations that include a statewide weighted average hourly wage for persons who provide service coordination as 100 percent of their job responsibilities, a predetermined caseload size, a statewide weighted average supervisory wage rate and span of control, and a statewide weighted average benefits factor.

(B) The associated service add-on includes clerical and support costs, travel and training costs, and other allowable operating costs (e.g., rent, utilities, office supplies, administration, and depreciation) necessary to provide service coordination.

(2) At the end of each reimbursement period TDMHMR will compare the difference between the statewide rate and each local authority's service coordination costs as submitted on its cost report in accordance with subsection (g) of this section.

(A) If a local authority's costs are less than 95 percent of the statewide rate, the local authority will pay TDMHMR the difference between that local authority's costs and 95 percent of the statewide rate. The local authority will be notified of the amount due to TDMHMR by certified mail.

(i) The local authority will have 30 days to make payment. If payment is not received from the local authority within 30 days of the date that the notice was received, as specified on the certified mail receipt, payment to the local authority will be placed on vendor hold.

(ii) A local authority that has been placed on vendor hold may request an administrative hearing in accordance with 25 TAC Chapter 409, Subchapter B, concerning Adverse Actions.

(B) If a local authority's costs exceed the statewide rate, TDMHMR will reimburse the local authority its costs up to 125 percent of the statewide rate. TDMHMR will notify the local authority by certified mail of the amount that is owed to the local

authority and will make payment within 30 days of the date that the notice was received, as specified on the certified mail receipt.

(3) At such time as TDMHMR determines that cost data collected as described in subsection (g) of this section are reliable, statewide reimbursement rates will be developed based on the cost data submitted by local authorities in the following manner:

(A) Total allowable costs for each provider for each rate will be determined from analyzing the allowable historical costs reported on the cost report.

(B) Each provider's total allowable costs are projected from the historical cost reporting period to the prospective reimbursement period using inflation factors according to §355.704 of this title (relating to Determination of Inflation Indices) for each covered contact.

(C) Each provider's projected cost per unit of service is calculated. The mean provider cost per contact is calculated, and the statistical outliers (those providers whose cost per contact exceeds plus or minus (+/-) two standard deviations of the mean provider cost per contact) are removed. After removal of the statistical outliers, the mean cost per contact is calculated. This mean cost per contact becomes the recommended cost per contact. Following each annual reimbursement period, allowable costs will be compared to reimbursement and any resulting monetary reconciliation will be made in accordance with paragraph (2) of this subsection.

(f) Reimbursable unit of service.

(1) The unit of service upon which reimbursement is made is a face-to-face contact with a Medicaid-eligible individual eligible for service coordination in accordance with 25 TAC §412.455 (Eligibility) by:

(A) a local authority as required by subsection (c) of this section; and

(B) a person who meets the qualifications set forth in 25 TAC §412.461 (Minimum Qualifications).

(2) The face-to-face contact must include the provision of one or more services as defined in 25 TAC §412.453(18) (Definitions).

(3) Reimbursement is limited to one unit of service per Medicaid-eligible individual per month.

(g) Reporting of costs. TDMHMR or its designee collects from local authorities statistical and cost data. The statistical data includes, but is not limited to, the total number of individuals receiving service coordination, and the number of Medicaid-eligible individuals receiving service coordination. The cost data include direct costs, programmatic indirect costs, and general and administrative costs including salaries, benefits, and non-labor costs.

(1) Cost reports. Each local authority must submit financial and statistical information in a cost report or survey format designated by TDMHMR or its designee. The cost report will capture the expenses of the local authority including salaries and benefits, administration, building and equipment, utilities, supplies, travel, and indirect overhead costs related to the provision of service coordination. Only allowable cost information is used to compile the cost base, as defined in §355.741 of this title and §355.708 of this title (relating to Allowable and Unallowable Costs).

(A) Accounting requirements. All information submitted on the cost reports must be based upon the accrual method of accounting unless the governmental entity operates on a cash or modified accrual basis. The local authority must complete the cost report according to the prescribed statement of allowable and unallowable costs as referenced in §355.702 of this title (relating to Method of Cost Determination). Cost reporting should be consistent with generally accepted accounting principles (GAAP). In cases in which cost reporting rules conflict with GAAP, Internal Revenue Service, or other authorities, the cost reporting rules take precedence.

(B) Reporting period. The local authority must prepare the cost report according to §355.702 of this title (relating to Method of Cost Determination).

(2) Exclusions or adjustments. Local authorities must exclude unallowable costs from the cost report. TDMHMR or its designee excludes from the cost reimbursement base any unallowable costs included in the cost report and makes adjustments to expenses reported by local authorities to ensure that the cost reimbursement base reflects costs which are consistent with efficiency, economy, and quality care, are necessary for the provision of service coordination services, and are consistent with federal and state Medicaid regulations as specified in §355.701 of this title (relating to Definitions and General Specifications). If there is doubt as to the accuracy of allowability of a significant part of the information reported, individual cost reports may be eliminated from the cost base.

(3) Desk reviews. As specified in §355.703 of this title (relating to Basic Objectives and Criteria for Review of Cost Reports), TDMHMR or its designee reviews such cost reports or surveys. Cost reports not completed according to instructions or rules will be corrected and resubmitted by the local authority within the time frame prescribed by TDMHMR.

(4) On-site audit of cost reports. TDMHMR or its designee performs a sufficient number of audits each year to ensure the fiscal integrity of the service coordination reimbursement. The number of on-site audits actually performed each year may vary.

(A) TDMHMR or its designee notifies local authorities of disallowances and adjustments to reported expenses made during desk reviews and on-site audits of cost reports according to §355.705 of this title (relating to Notification).

(B) Reviews of cost report disallowances. A local authority which disagrees with TDMHMR or its designee on cost report disallowances may request a review of the disallowances as specified in §355.707 of this title (relating to Reviews and Administrative Hearings).

(5) Recordkeeping requirements. Each local authority must maintain records according to the requirements specified in 40 TAC §69.205 (Contractor's Records). The local authority must ensure that the records are accurate and sufficiently detailed to support the financial and statistical information reported in the cost report. If a local authority does not maintain records which support the financial and statistical information submitted on the cost report, the local authority will be given 90 days to correct this recordkeeping. TDMHMR will place a vendor hold on Medicaid payments to the local authority if the correction is not made within 90 days from the date the local authority receives notification.

(6) Access to records. The local authority must allow TDMHMR or its designated agents access to any and all records necessary to verify information on the cost report.

(h) Billing and payment reviews. The provider must allow TDMHMR access to any and all records regarding service coordination.

(1) TDMHMR will conduct periodic billing and payment reviews utilizing TDMHMR's Billing and Payment Review Protocol.

(2) Recoupment will be taken according to the application of error calculations contained in TDMHMR's Billing and Payment Review Protocol.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818013
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Effective date: April 1, 1999
Proposal publication date: August 14, 1998
For further information, please call: (512) 424-6576

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1 TAC §§355.751-355.753

The Texas Health and Human Services Commission (THHSC) adopts the repeal of §§355.751-355.753 of 1 TAC Chapter 355, Medicaid Reimbursement Rates, Subchapter F, General Reimbursement Methodology for all Medical Assistance Programs (regarding reimbursement methodology for case management (service coordination) for persons with severe and persistent mental illness program operated by the Texas Department of Mental Health and Mental Retardation (TDMHMR)). The repeals are adopted without changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8329 - 8330).

Associated with the adopted repeal is the adoption of amendments to §355.743 of TAC Chapter 355, Medicaid Reimbursement Rates, Subchapter F, General Reimbursement Methodology for all Medical Assistance Programs (regarding reimbursement for the case management program operated by the Texas Department of Mental Health and Mental Retardation (TDMHMR)). Also associated with the current adoption are adopted repeals by TDMHMR of Chapter 409, Medicaid Programs, Subchapter F, concerning Case Management Program Requirements, and Chapter 409, Medicaid Programs, Subchapter G, concerning Case Management for Persons with Severe and Persistent Mental Illness, and the adoption of new §§412.451-412.464 of Chapter 412, Local Authority Responsibilities, Subchapter J, concerning Service Coordination.

The adopted repeals enable the consolidation of the service coordination reimbursement methodology for service coordination provided to persons with mental retardation and for persons with severe and persistent chronic mental illness.

A public hearing was held in Austin on September 9, 1998. No public testimony was provided. Comments relevant to the amendments were provided at a public hearing concerning 25 TAC Chapter 412, Subchapter J, concerning Service Coordination, and are discussed in the preamble to the adoption of new 25 TAC Chapter 412, Subchapter J, concerning Service Coordination, also published in this issue of the Texas Register. No written comments were received.

The repeal is adopted under the Texas Government Code, §531.033, which provides the commissioner of the Texas Health and Human Services Commission (THHSC) with broad rulemaking authority; the Texas Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide THHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides THHSC with the authority to adopt rules governing the determination of Medicaid rates.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
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Proposal publication date: August 14, 1998
For further information, please call: (512) 424-6576

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Chapter 355. Medicaid Reimbursement Rates

(Editor's Note: Section 1 of House Bill No. 2913 of the 75th Legislative session amended §531.021 of the Government Code, which designates the Texas Health and Human Services Commission [HHSC] as the agency responsible for administration of the Medicaid program. On September 1, 1997, HHSC also became responsible for adopting reasonable rules and standards to govern the setting of Medicaid rates, fees, and charges. Prior to this date, these functions primarily were performed by three agencies- the Texas Department of Health [TDH], the Texas Department of Human Services [TDHS], and the Texas Department of Mental Health and Mental Retardation [TDMHMR].

The Texas Register is administratively transferring the following rules listed in the conversion chart published in this issue uner the Tables and graphics section. The table lists the old rule numbers and the new rule numbers that corresponds to them.)

Figure: 1 TAC 355

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TITLE 4. AGRICULTURE

Part I. Texas Department of Agriculture

Chapter 30. Texas Agricultural Finance Authority: Young Farmer Loan Guarantee Program

Subchapter C. Interest Reduction Program Rules

4 TAC §§30.60-30.63

The Board of Directors of the Texas Agricultural Finance Authority (the Authority) of the Texas Department of Agriculture adopts new §§30.60-30.63, concerning the interest reduction program for the Young Farmer Loan Guarantee Program, without changes to the proposal published in the September 25, 1998, issue of the *Texas Register* (23 TexReg 9673). The new sections are adopted to implement an interest reduction program for loans guaranteed under the Authority's Young Farmer Loan Guarantee program, as authorized by the Texas Agriculture Code, §253.002(e). The new sections establish requirements and procedures for participation in the interest

reduction program, including criteria for eligible participants, the rate and method of paying and to whom the interest reduction payment will be submitted, and criteria for borrower and lender participation in the program.

No comments were received on the proposal.

The new sections are adopted under the Texas Agriculture Code (the Code), 253.007(e), which provides the Authority with the authority the to adopt rules for implementation of an interest reduction program for loans guaranteed under the Young Farmer Loan Guarantee Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 25, 1998.

TRD-9817982
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: December 15, 1998
Proposal publication date: September 25, 1998
For further information, please call: (512) 463-7541

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TITLE 16. ECONOMIC REGULATION

Part III. Texas Alcoholic Beverage Commission

Chapter 45. Marketing Practices

Subchapter D Advertising and Promotion-All Beverages

16 TAC §45.110

The Texas Alcoholic Beverage Commission adopts an amendment to §45.110(c)(4) with changes to the proposed text as published in the September 11, 1998, issue of the *Texas Register,* (23 TexReg 9226). The amendment operates to allow members of the manufacturing and wholesale tiers to provide food, beverages and entertainment to members of the retail tier under certain conditions.

The amendment, as originally proposed, would allow upper tier members to provide retailers with food and beverages, but not entertainment or recreation. For the reasons stated below, the commissioners concluded that provision of entertainment and recreation should be allowed, although within stated limitations. Accordingly, the originally proposed deletions were replaced with the adopted language contained in §45.110(c)(4)(A)-(E).

Rule 45.110 operates to define the term "inducement" as it is used in §§102.04, 102.07, 102.12 and 108.06 of the Alcoholic Beverage Code. Generally, inducements are defined as practices that operate to place retailer independence at risk; that is, practices that would tend to cause retailers to make commercial decisions for other than normal market based reasons, or would allow upper tier members to exercise an unwarranted amount of control over retail operations. Paragraph (c) of the rule provides examples of practices that, in the normal course of events, would operate to place independence of retailers at risk. Thus, the first question before the commissioners was whether the provision of entertainment and recreation to retailers by wholesalers and manufacturers is of such a nature as to jeopardize the independence of retailers.

The commissioners agreed with a number of industry commenters who pointed out that the provision of entertainment and recreation by suppliers to customers is common in most industries without adverse effects in the marketplace. One commenter argued that, while the purchase of food and beverages is usually an innocuous event, supplying entertainment and recreation was more calculated to provoke favorable marketing decisions by retailers in direct exchange for entertainment and recreation value given. The commissioners disagreed with this argument as contrary to routine experience in business. Further, the commissioners concluded there was not a substantive difference in effect between the purchase of meals and the purchase of entertainment and recreation for the enjoyment of another.

The commissioners did recognize, however, that unlimited practice in this area would, more likely than not, result in the evils sought to be avoided by the statutory proscriptions against inducements. Therefore, the commissioners elected to restrict this practice in three ways. First, the value of food, beverages, entertainment and recreation provided may not exceed $500.00 per person per occasion. Some commenters suggested that no value cap was necessary. The commissioners disagreed because this approach would allow provision of benefits of such value as to induce favorable marketing decisions by retailers in exchange. The limit of $500.00 struck the commissioners, and was received by the majority of industry commenters, as a reasonable balance between the relative costs of food, beverages and entertainment in various parts of the state.

A second limitation imposed by the commissioners is that food, beverages, entertainment and recreation provided may only be consumed or enjoyed in the presence of both upper tier and retail tier members. The commissioners reasoned that the purpose for allowing such interactions between the tiers is to allow the normal exchanges that occur between buyer and seller to occur in social settings. Such exchanges cannot happen unless both parties are present. Further, the commissioners concluded that a pure gift of entertainment tickets or the like is more calculated to solicit favorable treatment by retailers than a jointly enjoyed social event. Several commenters suggested this limitation and no commenters opposed it.

Third, the commissioners were concerned that significant travel expenses, as an adjunct to the offer of food, beverages, entertainment and recreation, should not be supplied by upper tier members. Nevertheless, it is reasonable for supplying members to provide some transportation in this connection. The limitation to ground transportation strikes a reasonable balance between these concerns. Again, several commenters suggested this restriction and no commenter opposed it.

Paragraph (4)(D) was adopted in recognition of the fact that upper tier members and retailers frequently attend the same conferences and conventions. The commissioners concluded that the social exchanges that normally occur during such events are not calculated to undermine the independence of retailers's commercial decisions. No comments were received about this specific provision.

Finally, the commissioners recognized that conduct within the provisions of this rule could nevertheless induce specific retail-

ers to engage in practices unfairly favoring one supplier over another. Therefore, it would be periodically necessary for agency representatives to review exchanges of food, beverages, entertainment and recreation between the tiers with a view toward measuring what effect, if any, such practices have in the marketplace. In service to that end, upper tier members are required to keep records of activities covered by this rule for two years. No commenter objected to this requirement although several commenters suggested it was unnecessary, given common business practices. The commissioners concluded that the requirement was not unduly onerous to affected industry members and that reliance on common business practices gives insufficient assurance that relevant records would be available when needed by the agency.

The Wholesale Beer Distributors of Texas were in favor of the rule amendment as originally published and opposed to a rule allowing provision of entertainment and recreation.

The following entities and organizations were opposed to the amendment as originally proposed and in favor of allowing the provision of entertainment and recreation with reasonable limitations: Anheuser-Busch; the Texas Package Stores Association; the Licensed Beverage Distributors; the Distilled Spirits Council of the United States, the Harris County Beer Wholesalers Association; Hiram Walker, Domecq Importers, Republic Beverages, Mike's Beverage Warehouse and Miller Brewing.

This amendment is adopted under the Alcoholic Beverage Code, §5.31, which provides the Texas Alcoholic Beverage Commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §§102.04, 102.07, 102.12, 108.06, are affected by this rule.

§45.110. Inducements.

(a) General. This rule is enacted pursuant to §§102.04, 102.07, 102.12 and 108.06.

(b) This rule applies to members of the manufacturing and wholesale tiers for all alcoholic beverages.

(c) Inducements. Notwithstanding any other provision of these rules, practices and patterns of conduct that place retailer independence at risk constitute an illegal inducement as that term is used in the Alcoholic Beverage Code. Examples of unlawful inducements are:

(1) purchasing or renting shelf, floor or warehouse space from or for a retailer;

(2) requiring a retailer to purchase one product in order to be allowed to purchase another product at the same time;

(3) providing or purchasing, in whole or in part, any type of advertising benefitting any specific retailer;

(4) furnishing food and beverages, entertainment or recreation to retailers or their agents or employees except under the following conditions:

(A) the value of food, beverages, entertainment and recreation shall not exceed $500.00 per person on any one occasion; and

(B) food, beverages, entertainment and recreation provided may only be consumed or enjoyed in the immediate presence of both the providing upper tier member and the receiving retail tier member; and

(C) in the course of providing food, beverages, entertainment or recreation under this rule, upper tier members may only furnish ground transportation.

(D) food, beverages, recreation and entertainment may also be provided during attendance at a convention, conference, or similar event so long as the primary purpose for the attendance of the retailer at such event is not to receive benefits under this rule.

(E) each upper tier member shall keep complete and accurate records of all expenses incurred for retailer entertainment for two years.

(5) furnishing of service trailers with equipment to a retailer; or

(6) furnishing transportation or other things of value to organized groups of retailers. Members of the manufacturing and distribution tiers may advertise in convention programs, sponsor functions or meetings and other participate in meetings and conventions of trade associations of general membership.

(d) Criteria for determining retailer independence. The following criteria shall be used as a guideline in determining whether a practice or pattern of conduct places retailer independence at risk. The following criteria are not exclusive, nor does a practice need to meet all criteria in order to constitute an inducement.

(1) The practice restricts or hampers the free economic choice of a retailer to decide which products to purchase or the quantity in which to purchase them for sale to consumers.

(2) The retailer is obligated to participate in a program offered by a member of the manufacturing or wholesale tier in order to obtain that member's product.

(3) The retailer has a continuing obligation to purchase or otherwise promote the industry member's product.

(4) The retailer has a commitment not to terminate its relationship with a member of the manufacturing or wholesale tier with respect to purchase of that member's products.

(5) The practice involves a member of the manufacturing or wholesale tier in the day-to-day operations of the retailer. For example, the member controls the retailer's decisions on which brand of product to purchase, the pricing of products, or the manner in which the products will be displayed on the retailer's premises.

(6) The practice is discriminatory in that it is not offered to all retailers in the local market on the same terms without business reasons present to justify the difference in treatment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818010
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
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Proposal publication date: September 11, 1998
For further information, please call: (512) 206–3204

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Part VIII. Texas Racing Commission

Chapter 309. Operation of Racetracks

Subchapter A. General Provisions

Division 1. General Provisions

16 TAC §309.3

The Texas Racing Commission adopts new §309.3 concerning the construction and renovation of racetrack facilities. This new rule is adopted without changes to the proposed text published in the October 16, 1998 issue of the *Texas Register* (23 TexReg 10606). The Texas Racing Act was revised by sunset legislation effective September 1, 1997, and in that legislation, the Commission is required to adopt a method of supervising and approving the construction and renovation of racetrack facilities. The method adopted shall by done through the adoption of rules. This rule implements the sunset legislation.

One comment was received regarding the adoption of the new rule. Other than supporting the new rule, concern was expressed that the rule does not set a specific time period within which the staff need respond. The Commission understood the concern but felt that staff has always responded promptly and that a specific time requirement is not needed at this time.

The new section 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 §6.062, which requires the Commission to enact rules which adopt a method of supervising and approving the construction and renovation of racetrack facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 24, 1998.

TRD-9817968
Paula C. Flowerday
Executive Secretary
Texas Racing Commission
Effective date: December 14, 1998
Proposal publication date: October 16, 1998
For further information, please call: (512) 833–6699

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 29. Purchased Health Services

(Editor's Note: Section 1 of House Bill No. 2913 of the 75th Legislative session amended §531.021 of the Government Code, which designates the Texas Health and Human Services Commission [HHSC] as the agency responsible for administration of the Medicaid program. On September 1, 1997, HHSC also became responsible for adopting reasonable rules and standards to govern the setting of Medicaid rates, fees, and charges. Prior to this date, these functions primarily were performed by three agencies- the Texas Department of Health [TDH], the Texas Department of Human Services [TDHS], and the Texas Department of Mental Health and Mental Retardation [TDMHMR].

The Texas Register is administratively transferring the following rules listed in the conversion chart published in this issue uner the Tables and graphics section. The table lists the old rule numbers and the new rule numbers that corresponds to them.)

Figure: 1 TAC 355

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Chapter 97. Communicable Diseases

The Texas Department of Health (department) adopts the repeal of existing §§97.131-97.134; amendments to §§97.1-97.4, 97.6, and 97.139; and new §§97.131-97.134, and 97.145-97.146 concerning reporting requirements for sexually transmitted diseases (STD), which include Acquired Immune Deficiency Syndrome (AIDS), chancroid, *Chlamydia trachomatis* infection, gonorrhea, Human Immunodeficiency Virus (HIV) infection, and syphilis. Amended §§97.3 and 97.139; and new §§97.132-97.133 and 97.145 are adopted with changes to the proposed text as published in the July 31, 1998, issue of the *Texas Register* (23 Tex Reg 7692). Amended §§97.1-97.2, 97.4, and 97.6; new §§97.131, 97.134 and 97.146; and repealed §§97.131-97.134 are adopted without change, and therefore the sections will not be republished.

Specifically, §§97.1-97.4 and 97.6 are amended to remove the definitions of HIV and AIDS from the general communicable disease definition section to eliminate redundancy, consistently define STD to include HIV and AIDS, and consistently list all the reportable STD together and alphabetically as AIDS, chancroid, *Chlamydia trachomatis* infection, gonorrhea, HIV infection, and syphilis. All definitions are numbered in new *Texas Register* format required to comply with Title 1, Administrative Code §91.1, effective February 17, 1998. Section §97.139 is amended to delete a reference to an obsolete phone number.

New §97.131 combines and modifies the definitions of HIV and AIDS, adds a definition of reportable STD which is consistent with the definition of these diseases by the Centers for Disease Control and Prevention, and allows for the definitions to reflect changes in testing technologies and disease knowledge when they occur in the future. In keeping with current definitions of AIDS, CD4+ lymphocyte cell counts of less than 200 cells/microliter or percentages less than 14% are reportable.

New §§97.132-97.134 combine all reportable STD, eliminating separate sections for HIV and AIDS. The sections allow for similar information to be reported on all STD, reducing the need for required reporters to submit different information for each STD. Specifically, all reportable STD, including HIV and AIDS, will be reported by name along with other minimally required information, regardless of the age of the patient. In keeping with current definitions of AIDS, CD4+ lymphocyte cell counts of less than 200 cells/microliter or percentages less than 14% are reportable by name. The adopted rules eliminate HIV infection reporting by a numerical code for persons aged 13 and older.

New sections §§97.134 and 97.146 add language on the confidentiality of all case reports and test results in addition to combining all reportable STD, eliminating separate sections for HIV and AIDS, and allowing for similar reporting of all STD.

Section 97.146 adds references to the penalties for release or disclosure of a confidential test result.

New §97.145 provides for certain state-funded clinics to offer voluntary and affordable counseling and testing programs for HIV infection or refer clients to such programs, stipulating that all HIV testing sites funded by the department shall offer confidential and anonymous HIV testing on site.

The repeal, amendments, and new sections involve major revisions in the format and content of the sections. The amendments to existing sections and new sections will enable the reporting sources to more clearly identify the conditions and diseases which must be reported, define the minimal reportable information on these conditions and diseases, and describe the procedures for reporting to the local health authority or the department.

The department is making a minor change due to staff comment and to clarify a misprint in the *Texas Register*.

Change: Concerning §97.139 the words "(HIV)-Related Test Results to an Applicant for Insurance" should be part of the section title, not the section text as printed in the *Texas Register*.

The department received one hundred and eighty-five comments concerning the proposed sections. Seventy-nine of these communications supported the proposed changes, while one-hundred and six opposed the proposal. Following each comment is the department's response and any resulting change(s).

Comment: Concerning the definition of carrier in §97.1(2), three commenters recommended replacing the word "man" with either "mankind" or "human kind".

Response: The department disagrees with the commenters. As the proposed rule changes and preamble focused on reporting issues for STD, it would be inappropriate to make changes to §97.1(2), which is not directly related to STD, without further public comment. The comments have been forwarded to the appropriate program within the department. No change was made as a result of this comment.

Comment: Concerning §97.1, a commenter requested that the department include a definition for a tuberculosis suspect.

Response: The department declines to make any amendments to these sections. This comment was not relevant to the reporting of STD. No change was made as a result of this comment.

Comment: Concerning §97.3(c)(3), three commenters recommended that wording be revised to clarify who is responsible for reporting changes in antibiotic therapy for tuberculosis patients.

Response: The department declines to make any amendments to these sections. These comments were not relevant to the reporting of STD. No change was made as a result of these comments.

Comment: Concerning §97.3(a)(2), three commenters recommended amending the phrase "repetitive test results" to read "repetitive diagnostic test results" in order to clarify that only diagnostic test results for STD should be reported multiple times for one patient. One commenter requested that the phrase "that relates to" be inserted to clarify that it is only repetitive diagnostic test results of infections that must be reported.

Response: The department agrees with the comments that the wording requires clarification: however, the department does not agree with the commenters' recommended language. Under the current rules, STD, including HIV and AIDS, are not listed as conditions for which repetitive test results should be reported. The department does not feel that reporting of STD will be compromised if the status quo continues. The department is deleting "... and sexually transmitted diseases, including AIDS and HIV infection." from the section.

Comment: Concerning §97.4(g), one commenter suggested including the phrase "using specimen submission form G-1 available from department."

Response: The department disagrees. The comment was not relevant to the reporting of STD.

Comment: Concerning §97.133, eight commenters expressed concern that reporting all CD4+ T lymphocyte cell counts constituted a burden on reporters and surveillance authorities. One commenter suggested a level of 400 cells/microliter and below, while two suggested a threshold of 200 cells/microliter or 14%. Two communications commented on the limited utility of CD4+ T lymphocyte cell counts as an HIV case finding device.

Response: The department agrees, and amended the proposed rules to return reporting thresholds for CD4+ T lymphocyte cell counts to the current level, making all CD4+ T lymphocyte cell counts which fall below 200 cells/microliter or 14% reportable by name. This amends the proposed rules to maintain laboratory-based AIDS reporting. Little information is available on the case finding efficiency of CD4+ T lymphocyte cell reporting.

Comment: Concerning §97.133, two commenters recommended making viral load measurements reportable instead of CD4+ T lymphocyte cell counts.

Response: The department disagrees with the recommendation. The definitions of AIDS and HIV infection are set by the Centers for Disease Control and Prevention (CDC), and change over time. In order to build flexibility into the reporting rules, the department declines to specifically reference viral load as reportable, for at this time, viral load is not part of the CDC HIV definition. If the CDC amends the definition to include viral load measurements, those measurements would then be reportable. In order to accommodate reporting of AIDS, the department must maintain reporting by name of CD4+ T lymphocyte cell counts which fall below 200 cells/microliter or 14%. The department has withdrawn the requirement that all CD4+ T lymphocyte cell counts be reported, and has returned to the current requirements that only CD4+ T lymphocyte cell counts which fall below 200 cells/microliter or 14% be reported.

Comment: Concerning §97.133, one commenter commented on the limited utility of CD4+ T lymphocyte cell counts as an HIV case finding device, noting that such tests are not indicative solely of AIDS/HIV infection, and commenting that reporting CD4+ T lymphocyte cell counts represents a breach of confidentiality for those patients who are not HIV infected.

Response: The department agrees in part. It is true that low CD4+ T lymphocyte cell counts may be found for reasons other than HIV infection/AIDS. However, reporting of counts which fall below 200 or 14% results in very few non-AIDS patients being reported through surveillance channels. Currently less than 10% of all CD4+ T lymphocyte cell counts reported to local surveillance authorities as suspect AIDS cases are for individuals who are not infected with HIV. Finally, as CD4+ T lymphocyte cell counts are handled with the same security

measures and concern for confidentiality as other case reports within the surveillance system, there is no breach of the patient's confidentiality. No changes were made as a result of this comment.

Comment: Concerning §97.133, seventy-six commenters opposed named HIV infections because this may act to deter HIV testing among high-risk populations. Populations mentioned as especially vulnerable to testing deterrence effects were gay men (three commenters), African Americans (three commenters), Hispanics (three commenters), border populations (one commenter), substance users (one commenter), young people (two commenters), and women, especially women in abusive relationships (one commenter). Five commenters further expressed concern that any deterrence to testing would lead to more HIV infected individuals being unaware of their infections and unknowingly infecting others, thus increasing the number of infections.

Response: The department disagrees with the commenters. The department believes that the potential deterrent effect of named reporting of HIV infection may be blunted through active education of providers and the community about surveillance processes, data security measures, and the privileged nature of disease reporting information. The department will also continue to require state-wide access to anonymous testing for HIV, and has renewed its commitment to the availability of anonymous testing for HIV in §97.145(b). No change was made as a result of this comment.

Comment: Concerning §97.133, forty-one commenters recommended the proposal for named HIV reporting be withdrawn due to potential increases in discrimination in the professional and personal arenas against individuals living with HIV infection. These commenters described the devastating impact of discrimination, personal rejection, and the threat of being victimized by hate crimes on the health and well being of individuals with HIV.

Response: The department recognizes the current potential for discrimination, but disagrees that named reporting for HIV will increase discrimination. These commenters have incorrectly assumed that the information in the surveillance system is easily accessed by those outside the system. Surveillance data are not public information, they cannot be requested through open record requests, and they are not subject to reporting under the Freedom of Information Act or through subpoenas. Health and Safety Code §81.103 outlines the limited circumstances under which test results may be released and provides for criminal penalties for releases in violation of the law. Willful and inappropriate release of surveillance information is a Class A misdemeanor. The department acknowledges that individuals who are infected with HIV can face discrimination, but it is not the result of HIV surveillance case reporting, and cannot be remedied by continuing inadequate surveillance of HIV. No change was made as a result of this comment.

Comment: Concerning §97.133, twenty-seven commenters remarked that the current non-named HIV reporting system, in which HIV infections are reported by numeric code, was a desirable alternative to named reporting, and had not been given a sufficient test in Texas. These commenters urged the department to improve the non-named system (twenty-six commenters), with one commenter specifically urging the department to make efforts to make laboratories more compliant.

Response: The department disagrees with the commenters. The department initiated non-named reporting of HIV infection in April 1994. Evaluation of the system shows that reporting disease with out the name of the infected person fails to support the essential public health functions aimed at preventing the spread of disease. No change was made as a result of this comment.

Comment: Concerning §97.133, twenty-five commenters considered the reporting requirement for HIV to be an invasion of privacy.

Response: The department disagrees. Reporting of HIV and other sexually transmitted diseases by physicians and laboratories allows the department, and by extension, the community, to become aware of epidemics, to target resources, and to intervene in the spread of disease. Although these commenters may have philosophical objections to public health disease reporting databases and systems, the benefits to the public in terms of disease control and prevention are great. Since information on individuals with HIV infection is not available beyond the bounds of the surveillance system, the actual intrusion upon privacy is minimal. The great public good done with disease reporting information more than justifies this reporting requirement. No change was made as a result of this comment.

Comment: Concerning §97.133, eighteen commenters opposed named reporting of HIV infection based on possible breaches of confidentiality in the surveillance system. Four commenters remarked on the catastrophic effects of possible breaches on the health, safety, and well being of members of the affected communities. In addition, five commenters remarked that employees who handle surveillance data are not adequately trained or sufficiently sensitive to the importance of the data to ensure that breaches would not occur.

Response: The department disagrees with the commenters. The named HIV data would be reported using the same protocols, practices, and data security systems that are used for other reportable sexually transmitted diseases, including AIDS. Although there have been more than 46,000 reported AIDS cases in Texas since 1983, the department is not aware of any breaches of confidentiality associated with the surveillance system. No change was made as a result of this comment.

Comment: Concerning §97.133, twenty-three commenters opposed named reporting of HIV infection due to the potential misuse of named HIV data by the following groups: the Texas Legislature (four commenters), the Immigration and Naturalization Service (one commenter), law enforcement personnel and agencies, including the Department of Public Safety (four commenters), hate groups (three commenters), insurance companies (two commenters), and employers (one commenter).

Response: The department disagrees with the commenters. Surveillance data are not public information. They cannot be requested by individuals or groups through open record requests, and they are not subject to reporting under the Freedom of Information Act or through subpoenas. The department does not allow access to named reporting databases by any state or federal agency for any reason, nor does it provide lists of infected individuals to any agencies. It is true that members of the Legislature could request confidential information for the purposes of developing legislation. However, any legislator requesting names of individuals reported with STD would have to justify why the names of infected individuals would be pertinent and why aggregate summary information about the cases reported in various geographical areas or demographic groups of inter-

est would not suffice. Even then, the legislators using the data would be governed by the same confidentiality laws and standards as public health officials and health care providers and could not release the information requested. This restricted access means that the potential for misuse is minimal. No change was made as a result of this comment.

Comment: Concerning §97.133, eight commenters expressed the concern that HIV named reporting would cause a breakdown of hard-won trust between prevention outreach educators/counselors and their clients.

Response: The department is aware of this concern. The department is currently in consultation with the affected communities to minimize the negative impact of reporting changes on prevention and services efforts ongoing across the State. These concerns are a reason to strengthen education on the surveillance safeguards that protect the identity of infected individuals rather than to reject the named reporting of individuals with HIV infection. No change was made as a result of this comment.

Comment: Concerning §97.133, five commenters remarked that the proposal would increase the use of anonymous testing, thereby skewing HIV reporting data and raising questions of its appropriateness for epidemiological purposes, and for purposes of allocation, advocacy, and planning.

Response: The department partially agrees. Based on the experiences of other states which have instituted named reporting of HIV infection, the department anticipates that the amount of anonymous testing will rise following the implementation of named reporting, but that it will return to the level characteristic of the state over time. The department further submits that named reporting will produce data that is more representative of the epidemic than the data currently being reported through the non-named system for HIV reporting. No change was made as a result of this comment.

Comment: Concerning §97.133, five commenters expressed concerns about HIV-infected individuals delaying access to medical treatment because of named reporting rules.

Response: The department disagrees. There is no evidence that named reporting delays access to treatment. These concerns are a reason to strengthen educational efforts aimed at HIV services providers and communities on the surveillance safeguards that protect the identity of infected individuals rather than to reject the named reporting of individuals with HIV infection. No change was made as a result of this comment.

Comment: Concerning §97.133, two commenters expressed doubts that local surveillance staffing levels were sufficient to handle the volume of HIV case work that named reporting would require, resulting in under reporting of cases.

Response: The department disagrees. Almost all local surveillance authorities have assured the department that with declining syphilis morbidity and the efficiency of adding new conditions to existing named reporting structures, the workload of HIV cases can be handled by existing staff through reprioritization of current caseloads. No change was made as a result of this comment.

Comment: Concerning §97.133, two commenters were concerned that named HIV reporting would make individuals testing less likely to disclose risky behaviors they practice for fear that those practices which are illegal in Texas will be reported to law enforcement, thus making reporting information on the mode of transmission less reliable.

Response: The department disagrees. Surveillance data are not available to law enforcement agencies, and cannot be used as evidence in legal proceedings. However, the perception that named reporting information could be used in this manner is a reason to strengthen educational efforts aimed at HIV services providers and communities on the surveillance safeguards that protect the identity of infected individuals rather than to reject the named reporting of individuals with HIV infection. No change was made as a result of this comment.

Comment: Concerning §97.133, two commenters urged caution in adopting named reporting of HIV due to potential harassment of HIV-positive individuals by counselors, disease intervention specialists (DIS) and other providers attempting to link them into a care system. One commenter discussed such notifications in the context of triggering battering of women in abusive relationships.

Response: The department disagrees with the commenters. Partner elicitation/notification is an integral part of the process of informing someone of their HIV-positive status. The health department has a duty to discuss partners with infected clients and to warn partners of possible exposure to HIV, and the staff who carry out such notifications are highly trained specialists. This process is always voluntary. When health department staff conduct the notification, the process is strictly confidential. The original HIV-infected person's identity is never revealed to the partner. The potential for intimate violence exists during the partner notification process, but partner notification does not cause the violence. The potential for intimate violence already existed in the relationship prior to partner notification. Sometimes when a partner realizes they have been exposed to a deadly infection, they will choose to end a relationship that has involved infidelity, mistrust, or intimate violence. Counselors need to be aware of the potential for intimate violence and refer clients to appropriate sources of help when desired by the client. The department feels that the current guidelines for workers who contact HIV positive individuals are adequate, although the adoption of named reporting of HIV provides an opportunity for a recommitment to these guidelines and standards. No change was made as a result of this comment.

Comment: Concerning §97.133, one commenter urged the department to reject named reporting of HIV because the State bureaucracy was inherently insensitive to local community and program needs, and therefore this proposal is discordant with local concerns.

Response: The department disagrees. The need for reliable minimum estimates of HIV infection and epidemiologic profiles of HIV disease expressed by local communities and program administrators was one impetus for the proposed changes to the rules. No change was made as a result of this comment.

Comment: Concerning §97.133, one commenter objected to proposed changes due to the belief that HIV did not cause AIDS.

Response: The department disagrees. The weight of medical evidence argues against this comment. Furthermore, Texas law requires HIV infections to be reported to the department (Health and Safety Code §81.041). No change was made as a result of this comment.

Comment: Concerning §97.133, sixteen commenters indicated general opposition to named reporting of HIV infection.

Response: The department recognizes the general opposition, but disagrees that named reporting of HIV should not be implemented. Named reporting of HIV infection will allow information on HIV infection to be used to target resources, profile the epidemic, and prevent new infections without risk of disclosure of the identities of individuals who are reported through this system. No change was made as a result of this comment.

Comment: Concerning §97.133, forty-six commenters suggested that named reporting of HIV will enhance access to care among infected individuals.

Response: The department agrees that HIV named reporting will enhance access to care by ensuring that services resources are appropriately distributed and by ensuring that public health resources are available to link infected individuals into care. Access to care is also enhanced by ensuring that voluntary confidential partner notification services are available to all individuals diagnosed with HIV disease, a practice which will place public health workers in contact with some infected individuals who are not yet aware of their status. No change was made as a result of this comment.

Comment: Concerning §97.133, forty commenters mentioned improved epidemiologic information as a benefit of named reporting of HIV infection.

Response: The department agrees. Improved HIV morbidity data will enable the department and the affected communities to use information on HIV infections in addition to information on AIDS cases to monitor changes in the HIV epidemic, allocate resources, and plan prevention and treatment programs. No change was made as a result of this comment.

Comment: Concerning §97.133, thirty-five commenters supported named reporting of HIV infection as in keeping with the department's public health duty. Twenty-six commenters wrote that the reporting change would allow the department to apply the same public health standards and approaches to HIV as are applied to other communicable diseases.

Response: The department agrees. The department agrees that HIV named reporting is in keeping with good public health practices and standards. No change was made as a result of this comment.

Comment: Concerning §97.133, seventeen commenters remarked that named reporting of HIV offered an opportunity to intervene in disease process and prevent infections, with four commenters including specific reference to arresting disease spread through more effective partner notification.

Response: The department agrees. HIV named reporting will enhance access to care by ensuring that service resources are appropriately distributed and by ensuring that public health resources are available to link infected individuals into care. Access to care is also enhanced by ensuring that voluntary confidential partner notification services are available to all individuals diagnosed with HIV disease, a practice which will place public health workers in contact with some infected individuals who are not yet aware of their status. No change was made as a result of this comment.

Comment: Concerning §97.133, four commenters made supportive remarks about the proposed changes to the HIV surveillance system which mentioned the strong data security and confidentiality measures protecting HIV surveillance data.

Response: The department agrees. Named HIV surveillance information will flow through the same surveillance systems that have protected the names of more than 45,000 AIDS cases without a breach of confidentiality. Named reporting of AIDS cases has been in place since 1983. No change was made as a result of this comment.

Comment: Concerning §97.133, six commenters made supportive remarks about the proposed changes to the HIV surveillance system requiring the reporting of the names of individuals with confirmed HIV infections.

Response: The department agrees. The department agrees that HIV named reporting will enhance access to care by ensuring that service resources are appropriately distributed and by ensuring that public health resources are available to link infected individuals into care. Access to care is also enhanced by ensuring that voluntary confidential partner notification services are available to all individuals diagnosed with HIV disease, a practice which will place public health workers in contact with some infected individuals who are not yet aware of their status. No change was made as a result of this comment. No change was made as a result of this comment.

Comment: Concerning §97.145(b), one commenter suggested that the wording be modified to clarify that the choice of whether an anonymous or confidential HIV test will be performed is the sole province of the client, and that the procedures for each type of test will be fully reviewed with all persons seeking HIV testing at HIV testing sites funded by the department.

Response: The department agrees in part with the commenter. The department disagrees with the suggestion that language be added to reporting rules to require that these two types of tests be fully reviewed with clients of these providers. The department's "Counseling and Testing Guidelines" adequately address the idea of client-driven test decision making, and specifically guide counselors in the explanation to clients of the differences between confidential and anonymous HIV testing. The department feels that guidance of HIV test-decision counselors is best addressed outside reporting rules and is committed to providing this guidance. The department agrees that both confidential and anonymous testing should be available. The department has changed the language referencing the choice of test to read "All HIV testing sites funded by the Texas Department of Health shall offer confidential and anonymous HIV testing on site."

Comment: Concerning the proposal in general, twelve commenters expressed concern about the continued availability of anonymous testing for HIV.

Response: The department agrees with the commenters, and continues to support the widespread availability of anonymous testing. Department policy states that it must be made available at all HIV testing sites that contract with the department, and State law requires that all State-funded clinics must either provide anonymous testing on site, or provide referrals to sites which do. No change was made as a result of this comment.

Comment: Concerning the proposal in general, one commenter urged the department to use a CDC "dual key" encryption technique which would prevent access to the names in surveillance databases without the cooperation of both the department and the CDC.

Response: The department disagrees with the commenter at this time. Although the CDC has discussed such encryption

techniques at a number of public meetings, the technology does not currently exist. The department will examine use of such systems as they become available. No change was made as a result of this comment.

The following associations submitted comments in favor of the proposed rules: AIDS Outreach Center, RHD Memorial Medical Center, Trinity Medical Center, San Antonio Metropolitan Health District, United States Congressman Tom A. Coburn, St. Joseph Services Corporation, AIDS Foundation and Training Center for Texas and Oklahoma, California Department of Health, Texas Medical Association, Texas Society of Infectious Control Practitioners, Baylor College of Medicine, Houston Department of Health and Human Services, Triangle AIDS Network Inc., Dermatology Clinic of Paris, Amarillo Bi-City County Health District, Renaissance III Inc., Wichita Falls-Wichita County Public Health District, State Representative Peggy Hamric, and City of Lubbock Health Department. While the majority of these commenters supported the proposed rules in their entirety, some raised questions, offered comments for clarification purposes, and suggested clarifying language concerning specific provisions in the rules as discussed in the summary of comments. We also received communications from individuals generally supporting the proposed rules.

Comments received from associations which were generally not in favor of the proposed rules: American Civil Liberty Union of Texas, ACT Health Services, Advocacy Incorporated, AIDS Alliance of the Bay Area Inc., AIDS Housing Coalition Houston, AIDS Housing Houston Inc./Milam House, Amigos Volunteers in Education and Services Inc., The Assistance Fund, Bering Community Service Foundation, The BLOCK, Body Positive/ Houston, Career and Recovery Resources, Center for AIDS, Thomas Street Health Center Council, Houston Buyer's Club, Houston Center for Independent Living, Jewish Family Service, Metropolitan Community Church of the Resurrection, Mother's Voices, National Association for the Advancement of Colored People, Over the Hill, Inc., People With AIDS Coalition, Program for Wellness Restoration, SEARCH Homeless Project, Steven's House, Vita-Living, Inc., WAM Foundation, The Parkland Health and Hospital System, Committee to Establish UI in HIV Testing and Reporting, State Representative Debra Danburg, AIDS Resources Center of Dallas, Foundation for Human Understanding, AIDS Services of Dallas, AIDS Foundation of Houston, Houston City Council Member Annise D. Parker, Valley AIDS Council, South Plains AIDS Resources Center, The Montrose Counseling Center, Montrose Clinic, City of Houston Council Member John Castillo, National Latino Lesbian and Gay Organization, and Southwest AIDS Committee Inc. of El Paso. All of these commenters were not against the rules in their entirety, with most expressing concern over named reporting of HIV infection. Some of them expressed concerns, asked questions and suggested recommendations for change as discussed in the summary of comments. We also received communications from individuals generally opposing the portions of the proposed rules addressing HIV reporting.

Two associations commented on the proposed rules that were neither for nor against the rules in their entirety. However, they raised questions and offered comments for clarification purposes. The commenters were: Association of Texas Hospitals and Health Care Organizations and Bering Community Foundation. These comments are also discussed in the summary of comments.

Subchapter A. Control of Communicable Diseases

25 TAC §§971.-97.4, 97.6

The amendments are adopted under the Communicable Disease Prevention and Control Act, Health and Safety Code, Chapter 81: §81.041 which requires the department to obtain reports of AIDS and HIV, and to identify other reportable diseases; §81.044, which requires the board to prescribe the form and method of reporting; and §81.004 which allows the Texas Board of Health (board) to adopt rules as necessary to administer the chapter. Amendments are also adopted under the Human Immunodeficiency Virus Services Act, Health and Safety Code Chapter 85, §85.032 which provides the board with the authority to adopt rules to administer a program of state grants to community organizations. The amendments are adopted under §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the Texas Department of Health, and the Commissioner of Health.

§97.3. What Condition To Report and What Isolates To Report or Submit.

(a) Identification of reportable conditions.

(1) (No change.)

(2) Repetitive test results from the same patient do not need to be reported except for mycobacterial infections.

(b) (No change.)

(c) Minimal reportable information requirements. The minimal information that shall be reported for each disease is as follows:

(1) (No change.)

(2) AIDS, chancroid, *Chlamydia trachomatis* infection, gonorrhea, HIV infection, and syphilis shall be reported in accordance with §§97.132-97.135 of this title (relating to Sexually Transmitted Diseases, including AIDS and HIV infection);

(3) for tuberculosis - name, present address, present telephone number, age, date of birth, sex, race and ethnicity, physician, disease, type of diagnosis, date of onset, antibiotic susceptibility results, initial antibiotic therapy, and any change in antibiotic therapy;

(4) for all other reportable conditions listed in subsection (b)(1) of this section -name, present address, present telephone number, age, date of birth, sex, race and ethnicity, physician, disease, type of diagnosis, date of onset, address, and telephone number;

(5) for all isolates of Enterococcus species and all isolates of Streptococcus pneumoniae regardless of resistance patterns - numeric totals at least quarterly; and

(6) for vancomycin resistant *Enterococcus* species; penicillin resistant *Streptococcus pneumoniae*; vancomycin resistant *Staphylococcus aureus*; vancomycin resistant coagulase negative *Staphylococcus* species, - name, city of submitter, date of birth or age, sex, anatomic site of culture, and date of culture.

(d) (No change.)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 24, 1998.

TRD-9817959
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: January 1, 1999
Proposal publication date: July 31, 1998
For further information, please call: (512) 458–7236

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Subchapter F. Sexually Transmitted Diseases Including Acquired Immunodeficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV)

25 TAC §§97.131–97.134

The repeals are adopted under the Communicable Disease Prevention and Control Act, Health and Safety Code, Chapter 81: §81.041 which requires the department to obtain reports of AIDS and HIV, and to identify other reportable diseases; §81.044, which requires the board to prescribe the form and method of reporting; and §81.004 which allows the Texas Board of Health (board) to adopt rules as necessary to administer the chapter. Amendments are also adopted under the Human Immunodeficiency Virus Services Act, Health and Safety Code Chapter 85, §85.032 which provides the board with the authority to adopt rules to administer a program of state grants to community organizations. The repeals are adopted under §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the Texas Department of Health, and the Commissioner of Health.

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25 TAC §§97.131–97.134, 97.139, 97.145, 97.146

The amendment and new sections are adopted under the Communicable Disease Prevention and Control Act, Health and Safety Code, Chapter 81: §81.041 which requires the department to obtain reports of AIDS and HIV, and to identify other reportable diseases; §81.044, which requires the board to prescribe the form and method of reporting; and §81.004 which allows the Texas Board of Health (board) to adopt rules as necessary to administer the chapter. Amendments are also adopted under the Human Immunodeficiency Virus Services Act, Health and Safety Code Chapter 85, §85.032 which provides the board with the authority to adopt rules to administer a program of state grants to community organizations. The amendments and new sections are adopted under §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the Texas Department of Health, and the Commissioner of Health.

§97.132. Who Shall Report Sexually Transmitted Diseases.

The following shall provide information on cases of AIDS, chancroid, *Chlamydia trachomatis* infection, gonorrhea, HIV infection, or syphilis:

(1) A physician or dentist shall report each patient that is diagnosed or treated for AIDS, chancroid, *Chlamydia trachomatis* infection, gonorrhea, HIV infection, or syphilis. A physician or dentist may designate an employee of the clinic, including a school based clinic or physician's/dentist's office to serve as the reporting officer. A physician or dentist who can assure that a designated or appointed person in their clinic or office is regularly reporting every occurrence of these diseases does not have to submit a duplicate report.

(2) The chief administrative officer of a hospital, a medical facility or a penal institution shall report each patient who is medically attended at the facility and is diagnosed with AIDS, chancroid, *Chlamydia trachomatis* infection, gonorrhea, HIV infection, or syphilis. The chief administrative officer may designate an employee of their institution to serve as the reporting officer. A chief administrative officer who can assure that a designated or appointed person in their institution is regularly reporting every occurrence of these diseases does not have to submit a duplicate report. Hospital laboratories may report through the reporting officer or independently in accordance with the hospital's policies and procedures.

(3) Any person in charge of a clinical laboratory, blood bank, mobile unit, or other facility in which a laboratory examination of a blood specimen or any specimen derived from a human body that yields microscopic, cultural, serological or any other evidence of AIDS, chancroid, *Chlamydia trachomatis* infection, gonorrhea, HIV infection, or syphilis, including a CD4+ T lymphocyte cell count below 200 cells/microliter or a CD4+ T lymphocyte percentage of less than 14%, shall report according to §97.133 of this title (relating to Reporting Information for Sexually Transmitted Diseases).

(4) The medical director or other physician responsible for the medical oversight of a counseling and testing site or a community-based organization shall report each patient that is diagnosed with AIDS, chancroid, *Chlamydia trachomatis* infection, gonorrhea, HIV infection, or syphilis. The medical director or clinic physician may designate an employee of the counseling and testing site or community-based organization to serve as the reporting officer. A medical director or clinic physician who can assure that a designated or appointed person from their counseling and testing site or community-based organization is regularly reporting according to §97.133 of this title every occurrence of these diseases does not have to submit a duplicate report.

(5) School administrators, as defined in §97.1 of this title (relating to Definitions), who are not medical directors meeting the criteria described in this section, are exempt from reporting AIDS, chancroid, *Chlamydia trachomatis* infection, gonorrhea, HIV infection or syphilis.

(6) Failure to report a reportable disease is a Class B misdemeanor under the Texas Health and Safety Code, §81.049.

§97.133. Reporting Information for Sexually Transmitted Diseases.

The following information, at a minimum, shall be reported for any specimen derived from a human body that yields microscopic, cultural, serological or any other evidence of AIDS, chancroid, *Chlamydia trachomatis* infection, gonorrhea, HIV infection or syphilis, in-

cluding a CD4+ T lymphocyte cell count below 200 cells/microliter or a CD4+ T lymphocyte percentage of less than 14%:

(1) laboratories: name, address, city, county and zip code of residence, date of birth (month, day, year), sex, race/ethnicity, date test(s) performed, type(s) of test(s) performed, result of the test(s) or CD4+ T lymphocyte cell count, physician's name, physician's/clinic's address and telephone number. Positive tests and CD4+ T lymphocyte cell counts below 200 cells/microliter or less than 14% shall be reported and;

(2) others as described in §97.132 of this title (relating to Who Shall Report Sexually Transmitted Diseases): name, address, city, county and zip code of residence, date of birth (month, day, year), sex, race/ethnicity, diagnosis, stage of diagnosis for syphilis only, date test(s) performed, type(s) of test(s) performed, and result(s) of test(s) or CD4+ T lymphocyte cell count below 200 cells/microliter or a CD4+ T lymphocyte percentage of less than 14%, treatment provided, physician's name, physician's/clinic's address and telephone number.

§97.139. Fee for Providing Written Notice of a Positive Human Immunodeficiency Virus

(HIV)-Related Test Result to an Applicant for Insurance. An applicant for insurance must be given written notice of a positive HIV-related test result by a physician designated by the applicant, or in the absence of that designation, by the Texas Department of Health (department). If the department is requested to make this notification:

(1) the form designated by the department for this purpose must be used. Copies of the form and other information concerning notification by the department may be requested from: Bureau of HIV and STD Prevention, 1100 West 49th Street, Austin, Texas 78756-3199; and

(2) (No change.)

§97.145. Anonymous and Confidential HIV Testing.

(a) State-funded primary health, women's reproductive health, and sexually transmitted disease clinics shall provide voluntary, and affordable counseling and testing programs, both anonymous and confidential concerning HIV infection or provide referrals to those programs.

(b) All HIV testing sites funded by the Texas Department of Health shall offer confidential and anonymous HIV testing on site.

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TRD-9817961
Susan K. Steeg
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Texas Department of Health
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For further information, please call: (512) 458–7236

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Chapter 100. Immunization Registry

25 TAC §§100.1–100.11

The Texas Department of Health (department) adopts new §§100.1-100.11 concerning the creation of an immunization registry and for reporting requirements. Sections 100.1-100.9 and 100.11 are adopted with changes to the proposed text as published in the August 7, 1998, issue of the *Texas Register* (23 TexReg 8018). Section 100.10 is adopted without change and therefore will not be republished.

These rules will implement House Bill 3054 passed by the 75th Legislature, 1997, which enacted Chapter 900, adding Health and Safety Code §§161.007-161.009 requiring the department to establish an immunization registry. The rules implement the legislative intent to protect the confidentiality of patients, insure that their participation is only with informed consent and permit their withdrawal from the registry. At the same time the registry is designed to implement the legislative intent of establishing a repository of accurate, complete, and current immunization records to be used in aiding, coordinating, and promoting efficient disease prevention efforts. The legislature specifically envisioned use of the registry to provide notices by mail, telephone, personal contact, or other means to parents.

Specifically, the sections define terms used in this chapter; address the criteria for inclusion of information and its confidentiality; the responsibilities of providers and payors; the effect of withdrawing consent; the information to be reported to the registry; data quality assurance; the responsibilities of managed care, health maintenance organizations, and insurance companies; reports back to providers; exchange of information between the department and providers; and use of registry data for school and day care enrollment.

The department is making the following changes due to staff comments to clarify the intent and improve the accuracy of the section.

Change: For clarity the term "shall" is used throughout the rules where action or activity is mandated or required. In §100.3(a) it is used in new language. It is substituted for "will" in §§100.4(a) twice, (b), (c), 100.5(a),(b),(c),(e),(f),(h), 100.7(b), the caption to 100.8, 100.8(a), (b) twice, 100.9(b), 100.11(a),(b),(c). It is substituted for "should" in §100.5(d). It is substituted for "must" in §100.5(d).

Change: Concerning §§100.1, 100.2(b), the age was changed from "21" to "18" to properly reflect the legal age of adulthood. In §100.5(a), the term "21st" was changed to "18th".

Change: Concerning §100.1, the phrase "and are used interchangeably within the rules" was changed in the following definitions: "child", "consent", "immunization history", and "parent" due to clarifications in these definitions and for easier reading of the rules.

Change: Concerning §100.1, the term " patient, client, and child" was changed to "child" for easier reading of the rules. This change occurs in §§100.2(a) twice, and 100.2(a)(4).

Change: Concerning §100.1, the term "consent or parental consent" was changed to "consent" for easier reading of the rules. The phase "parental consent" was shortened to "consent" to conform with the new definition. This change occurs in §§100.1, 100.2(a), 100.2(a)(5) twice, 100.3(e), 100.4(a), 100.5(b), (d), (k) twice, 100.7(b), and 100.8(a).

Change: Concerning §100.1, the definition of the term "consent" was clarified for easier reading of the rules.

Change: Concerning §100.1, the term and definition of "division" was deleted because it was not used.

Change: Concerning §100.1, the term "parent, managing conservator or guardian" was changed to be included in the definition of "Parent" for easier reading of the rules. This change

occurs in §§ 100.1(2), 100.1(8), 100.2(a), 100.2(a)(4), (b) and (d), 100.3(c), 100.4(a),(b) twice, (c), (c)(4), (c)(6), 100.5(g), and 100.6(b), managing conservator or guardian were also deleted.

Change: Concerning §100.1, the term "immunization history and record" was split and redefined as "immunization history" and "immunization record" to distinguish between information going into and being released from the registry and for easier reading of the rules. The term "immunization history" was substituted in the following: for record in §§100.1(2), 100.1(5); for "information" in §§100.2(a), 100.2(a)(4), 100.2(a)(1), 100.2(b), 100.3(d), 100.4(b) four times, 100.5(b) twice,(d), (e), and (k), 100.6(a), 100.7(b), and 100.8(a); in §100.2(a)(1) for "demographic information and immunization record;" in §100.2(a)(3) for "information on my child", in §100.1(7) for "histories;" for "record" or "a record" in §§100.1(2), 100.1(5), 100.5(a), 100.5(c) twice, 100.5(d), 100.5(g)(3)(E) and (j), 100.6(b)(1),(2),and (3), 100.7(a) and (b), and 100.8(a); in §100.5(e) for "vaccine administered;" and in §100.8 caption for "data."

Change: The term "immunization record" was used to signify information released from the registry, to conform with its definition and to be consistent throughout. The term was used in new language in §100.1(2), and as a substitute for the term "information" in §§100.2(a)(2) and (a)(3).

Change: Concerning §100.1, the word "Registry" was made lower case to be consistent with other definitions and for easier reading of the rules.

Change: Concerning §100.1, the definition of the term "immunization registry" was clarified for easier reading of the rules.

Change: Concerning §100.2(a), the word "section" was changed to "subsection" to be more precise and for easier reading of the rules.

Change: Concerning §100.2(a), for consistency, the term "health plan" or "health plans" were used throughout to conform with its definition, in place of lengthier phrases. In §§100.2(a) and 100.5(e) it was used in new language. In the caption to §100.3 it was substituted for "Health Plans and Insurance Companies." In §100.3(b) it was substituted twice for "Insurance companies health maintenance organizations or other organizations." It was substituted in §100.5(k) for "insurance company, health maintenance organization or other organization that pays or reimburses a claim or encounter for administration of an immunization." It was also substituted in §100.5(k) for "third party payor." In the caption to §100.8 it was substituted for "Texas Managed Care organizations, Texas Health Maintenance Organizations and other Texas Insurers." In §100.8(a) it was substituted for "Organizations."

Change: Concerning §100.2(a), the following language: "§100.4 of this title (relating to Withdrawal of Consent)" was substituted for: "paragraph (4) of this section" to be a more precise cross-reference and for easier reading of the rule.

Change: Concerning §100.2(a), the following language: "sent to a health plan or the department to be" was added to be more precise and for easier reading of the rule.

Change: Concerning §100.2(a), grammar change "of a" to "from the" was made. This was due to a change in the definition.

Change: Concerning §100.2(a), "sent to the health plan or the department to be" was added for clarification.

Change: Concerning §100.2(a), the word "subsection" was changed to "section" to be more precise and for easier reading of the rules.

Change: Concerning §100.2(a)(2), the words "Department of Health's" were added to be more precise and for easier reading of the rules.

Change: Concerning §100.2(a)(2), the words "immunization records on my child to a parent of the child" replace "information concerning my child's immunizations to myself" to be more precise and for easier reading of the rules.

Change: Concerning §100.2(a)(4), was renumbered as §100.2(a)(3) due to the deletion of proposed §100.2(a)(3).

Change: Concerning §100.2(a)(4), the last five sentences were deleted since the same information is covered in §100.4.

Change: Concerning §100.2(a)(5), this subsection was added using language from the previous §100.2(a)(4) to separate the information being presented. The words "or if the status of consent is unknown" were added to be more precise.

Change: Concerning §100.2(d) and (e), the words "health care" were removed to match the changed definition of "provider."

Change: Concerning §100.3(a), this was added to clarify provider's responsibility to report if they are not reimburse for an immunization. Subsequent subsections were relettered.

Change: Concerning §100.3(b), the words "After December 31, 1998, an insurance company, a health maintenance organization, or another organization" were removed and replaced with "a health plan" for simplification. The words "an immunization history" were replaced by "immunizations from only the current claim submitted" for clarification. The words "if consent has been obtained" was added. The words "pay" and "reimburse" were made plural to match new wording. This occurred in three places in the paragraph. The words "On or before December 31, 1998, an insurance company, a health maintenance organization, or another organization that pay or reimburse a claim for an immunization of a person younger than 18 years of age may provide an immunization history to the department" were removed to be consistent with definition changes. The words "forward consented immunization information to the registry" was added for simplification and the following was deleted: "must document parental consent for inclusion in the registry before the record is submitted to the department. Insurance companies, health maintenance organizations or other organizations that pay or reimburse a claim will develop a system for documentation of consent status and develop systems or forms necessary to gather required information for the immunization registry. The payor is not required to send the department records where parental consent has been denied." This change was made to allow health plans to establish their own means of assuring that consent exists as required by law.

Change: Concerning §100.3(c), the word "each" was replaced by "a" to simplify the process. The words "their child's" was added to the sentence for clarification.

Change: Concerning §100.4(a), the words "described in §100.2(a)(4) of this title (relating to Inclusion of Information and Confidentiality" were removed and were replaced by the word "consent" to be a more precise definition of consent. Moved the word "entire" from before the word "child's" to after the word for clarification. The words "Immunization Division" were

removed and replaced it with "immunization registry" due to the removal of the term "Division" in §100.1, definitions.

Change: Concerning §100.4(b), the words "history to the department or health plan for inclusion in the immunization registry" were added for clarification.

Change: Concerning §100.4(b) the term "statewide" was deleted as redundant.

Change: Concerning §100.4(c), the words "mailed to the Texas Department of Health, Immunization Registry, 1100 West 49th Street, Austin, Texas 78756 and" were added to replace the previous deletion of the address in §100.2(a)(4).

Change: Concerning §100.4(c)(5), the words "where the parent can receive a confirmation notice" were substituted for clarification, and "for confirmation notice" was deleted.

Change: Concerning §100.5(a), the word "All" was removed and replaced with the word "Information on" for clarification. The words "after the effective date of these rules" was removed since the effective date of the statute is the same as the effective date of the rules (January 1, 1999). The words "for which there is consent shall" were added to emphasize that only consented information be sent to the immunization registry. The words "and archived" were added to reflect accurately the disposition of the records.

Change: Concerning §100.5(b), the words "following: last name, first name, date of birth, gender and address of the child who is immunized; name of parent, guardian, or managing conservator and relationship to child; mothers maiden name for record matching; vaccine administered; dose or series number; vaccine lot number; and, manufacturer of the vaccine administered" were removed and replaced with "information listed in subsections (g)(2) and (3) of this section" to be more precise and for easier reading of the rule.

Change: Concerning §100.5(c), this subsection was added using existing language from §100.5(b). Subsequent subsections have been relettered.

Change: Concerning §100.5(d), the word "the record should" was changed to "immunization shall" for clarification. The second sentence was removed and replaced with the language from the Health and Safety Code §161.007(d).

Change: Concerning §100.5(e), the words "Providers and health plans may contact the department (1100 West 49th Street, Austin, Texas 78756, 1-800-252-9152) to establish a provider number and a system of reporting" were added for clarification.

Change: Concerning §100.5(g), the words "health plan" were added for clarification.

Change: Concerning §100.5(g)(1), (2), and (3) the words "must include" was added for clarification.

Change: Concerning §100.5(g)(3), the words "if know" were added for clarification.

Change: Concerning §100.5(g)(3)(E), the words "has been" was replaced by "is" to change verb tense. The words as "defined as" were changed to is to change verb tense.

Change: Concerning §100.5(h), the words "be reported" were added for clarification.

Change: Concerning §100.5(j), the words "from the parent" were added for clarification. The word "historical" was replaced by "all" for clarification.

Change: Concerning §100.5(k), the words "to the department" were added for clarification.

Change: Concerning §100.5(k) the term "state-wide" was deleted as redundant.

Change: Concerning §100.6(a), the word "was" was replaced by "were" to make it more grammatical.

Change: Concerning §100.6(a)(4), a period was added to the end of the sentence.

Change: Concerning §100.6(b), a colon was replaced by a period.

Change: Concerning §100.6(a), a phone number was provided for the convenience of the public.

Change: Concerning §100.6(b)(3), the words "as specified in §100.4 of this title (relating to Withdrawal of Consent)" was added for clarification.

Change: Concerning §100.7(a), the words "of children whose names appear in the registry" were added for clarification.

Change: Concerning §100.8(a), a period was added to the sentence.

Change: Concerning §100.9(b), the words "The provider, health plan and department" were removed and replaced with "Any user of the immunization registry" for clarification.

Change: Concerning §100.11(c), the abbreviation "ID" was replaced with "identification number" for clarification.

The following comments were received concerning the proposed rules. Following each comment is the departments response and any resulting changes.

Comment: One commenter, regarding the preamble, questions the cost estimate of $1.00 per patient encounter where an immunization is provided and $500 a year of participation for the average insurer. The commenter believes this is an underestimate.

Response: The department agrees in part and disagrees in part. The estimate that the commenter refers to is an estimate based on the amount of time to inform a patient about the registry, receive a signature, and submit consented data. The department recognizes that reporting may cost some organizations more than others depending how, or if, information was collected in the past, and any changes which may be made to existing systems. No change was made as a result of this comment.

Comment: Concerning §100.1, one commenter suggested alphabetizing the definitions.

Response: The department agrees and has alphabetized the definitions.

Comment: Regarding §100.1(3), renumbered as §100.1(9), twenty-six comments stated objections to the department defining all providers as agents for the purposes of the immunization registry.

Response: The department agrees. The suggested language was removed from the rules, which is renumbered as §100.1(9).

Comment: Concerning §100.1(4), renumbered as §100.1(10), one commenter believes that the definition of "user" is lax and appears to intentionally remove government employees from accountability.

Response: The department disagrees. The department allows access to those users defined in the Health and Safety Code, §161.008(c)(2). No change was made as a result of this comment.

Comment: Concerning §100.1(6), renumbered as §100.1(11), one comment was received recommending the definition of "vaccine" needs to be redefined and the commenter suggests listing all vaccines to be tracked.

Response: The department agrees in part. The definition of vaccine has been redefined and changes were made to renumbered §100.1(11). As new vaccines become available and medical standards change accordingly, the registry may be modified. Listing all vaccines in the rules would not allow for the addition of new vaccines without rule making.

Comment: Concerning §100.1(8), now renumbered as §100.1(4), one commenter suggests the definition of a health plan needs to be clarified as to whether or not third party administrators and self funded employers are included within the meaning of "health plan."

Response: The department disagrees and responds that the rules are based on the definition for a health plan from the language used in the Health and Safety Code, §161.007(c), which states that any organization that pays or reimburses a claim for an immunization shall provide information. No change was made as a result of this comment. This term was renumbered §100.1(4)

Comment: Concerning §100.1(5), (9), (10), and (11), one commenter suggested the department end each definition with "...are used interchangeably within the rules."

Response: The department has deleted this phrase from all definitions.

Comment: Concerning §100.2(a) and §100.5(a), twenty-five comments were received with objections to the length of time the department plans to store data.

Response: The department disagrees and responds that the Health and Safety Code, §161.008 states that the registry must contain information on the immunization history on each person younger than 18 years of age. The law does not specify the department destroy the data following the child's 18th birthday. Most universities require proof of immunizations prior to enrollment. The department has numerous requests each year from college students attempting to track down this information. After age 18, the department will remove the record from the immunization registry and archive the data. No change was made as a result of this comment.

Comment: Concerning §100.2(a)(1), one commenter asks under what statutory authority is the department collecting demographic information.

Response: The department disagrees and responds that the statutory authority used for collecting demographic information is found in Health and Safety Code, §161.007(d) which states the report shall be in a format prescribed by the department. It is also implied in the Health and Safety Code, §161.007(e) which states the department may use the registry to provide notices by mail, telephone, personal contact, or other means. This task could not be accomplished without demographic information. Demographic information is also necessary for matching and the avoidance of mistaken identity. No change was made as a result of this comment.

Comment: Concerning §100.2(a), one commenter states that this section does not authorize or allow a parent who did not sign a consent form, access to copies of immunization records. Also, children 18 or older should be authorized to receive copies of their own records.

Response: The department agrees. In §100.2(a)(1), the word "myself" was changed to "the parent" in §100.2(a)(2). Although the statute does not expressly allow for release of information to children in the registry when the child becomes 18 years old or older; under the Open Records Act, Government Code, §552.023 such a person would have a special right of access to their own immunization record.

Comment: Concerning §100.2(a)(2)(C), one commenter suggested the word "to" should be changed to "of."

Response: The department disagrees. The word "to" was used in the Health and Safety Code, §161.008(c)(2). No change was made as a result of this comment.

Comment: Concerning §100.2(a)(2)(D), (E), and (G), twenty-eight comments were received stating objections to release of information to the Commissioner of Health or designee, past or present health plan, and the Texas Department of Health and Human Services.

Response: The department agrees with the comments. The language was deleted from §100.2(a)(2).

Comment: Concerning §100.2(a)(3), twenty-six commenters object to the re-release of data to providers who both administer and promote vaccine.

Response: The department agrees. Proposed §100.2(a)(3) was deleted.

Comment: Concerning §100.2(a)(3), twenty-six comments were received with concerns about the re-release of data to other state registries and concerns that this will allow release of information to a national registry in the event one is created.

Response: The department agrees and responds that the legislation did not address re-release to other state registries, therefore the language in proposed §100.2(a)(3) has been deleted.

Comment: Concerning §100.2(a)(4), renumbered now as §100.2(a)(3), one commenter feels that when a request for withdrawal of a record is received by the department from the parent, it should also be forwarded to the health plan.

Response: The department disagrees. The registry does not track the health plan with whom the child is affiliated. It is the responsibility of the parent to notify the provider that consent has been withdrawn and no further records should be forwarded to the department. No change was made as a result of this comment.

Comment: Concerning §100.2(a)(5) renumbered as §100.2(a)(4), one commenter believes the department can not be trusted to carry out the task of completely deleting a child's entire record upon the request of the parent.

Response: The department disagrees and responds that any parent who suspects that their child's records have not been deleted can verify deletion by asking the department, or any authorized user, to check their child's information in the registry. No change was made as a result of this comment.

Comment: Concerning §100.2(a)(5) renumbered as §100.2(a)(4), one commenter suggested the following words should be added to the end of the paragraph "or if the status of parental consent is unknown."

Response: The department agrees and has added the suggested language to renumbered §100.2(a)(4).

Comment: Concerning §100.2(a)(5) renumbered as §100.2(a)(4), one commenter states there is reference to a signature block, but it is unclear to what document this is referring.

Response: The department disagrees and responds that the context makes clear that the signature block relates to the parental consent statement. Providers may develop their own forms, using the parental consent language defined in the rules, however, the form must include a signature block or place for the parent signature. No change was made as a result of this comment.

Comment: Concerning §100.2(a)(5) renumbered as §100.2(a)(4), one commenter asked how consent will be communicated between the provider and the health plan. The commenter also states that this creates a potential for either duplication or inadvertent lack of reporting.

Response: The department responds that §100.3(d) renumbered as §100.3(e), states that the written consent for inclusion shall be maintained with the provider. If the provider has consent and does not submit the immunization to a health plan, they should indicate that consent has been received when the record is forwarded to the department, see Health and Safety Code, §161.003(c). If the provider submits the immunization history to a health plan it is the responsibility of the health plan and the provider to decide how to communicate the consent status. Section 100.3(a) renumbered as §100.2(b), states that only the consented immunization histories should be forwarded to the department. No change was made as a result of this comment.

Comment: Concerning §100.2(b), twenty-eight comments were received with objections to consent obtained on a child's birth certificate and previous consent procedures utilizing the Vaccine Information Statements (VIS).

Response: The department disagrees with the first comment and agrees with the second comment. Immunizations begin at birth. For those parents that desire for their children to be included in the registry, it is important that we capture as many immunizations as possible. Parents make many important decisions at the time of birth. The department will provide informational materials to obstetricians for dissemination prior to the birth of the child. The consent forms the commenters refer to are the forms used prior to the legislation requiring parental consent. The new forms have the parental consent language for the registry separate from the consent for the immunization. The department has begun distribution of the new forms, with instructions to destroy and recycle outdated forms. The parental consent language is based on the most current consent language at the time of printing. No change was made as a result of this comment.

Comment: Concerning §100.2(b), twenty-six comments were received stating objections to the consent being required "one time only."

Response: The department disagrees. Health and Safety Code, §161.007(a), states that the department by rule shall develop guidelines for requiring the written consent of the parent, managing conservator, or guardian. It does not specify that parents must re-sign consent forms at each immunization visit. Parents have the option to rescind their consent at any time. No change was made as a result of this comment.

Comment: Concerning §100.2(b), one commenter states that gaining consent on the birth certificate is an excellent approach, but it will only benefit the health plan if they have access to the information.

Response: The department disagrees that health plans should have access to the information. The Health and Safety Code §161.008(c)(2) does not allow the department to release consent status to the health plans. No change was made as a result of this comment.

Comment: Concerning §100.2(d), one commenter states that parents who have lawful medical or religious exemptions could be subject to routine warning letters about their child being "past due" for immunizations.

Response: The department disagrees. Private providers who do their own recall will now have the ability to know who has medical or religious exemptions. A contact "yes" or "no" flag is available in the state immunization registry. The flag can be set to "no contact" if the child's parents do not wish to be contacted for recall and reminder and the department is notified of that fact. No change was made as a result of this comment.

Comment: Concerning §100.2(e), two commenters requested that "good faith" be defined.

Response: The department disagrees with the commenter. The law defines "good faith" as an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things an honest belief, the absence of malice and the absence of design to defraud. The definition of "good faith" was not added to §100.1. No change was made as a result of this comment.

Comment: Concerning §100.2(a)(2)(G), one commenter objects to release of immunization data to a health care plan in which a child is or was enrolled.

Response: The department agrees with the comment. The language was deleted from the rules.

Comment: Concerning §100.3(a) renumbered as §100.3(b), one comment was received about the communication process for record transfer between provider and the health plan. The health plans believe the law and the rules create a "broken information loop."

Response: The department disagrees and responds that the information flow the commenter refers to is mandated by the law, Health and Safety Code, §161.007(d). No change was made as a result of this comment.

Comment: Concerning §100.3(a) renumbered as §100.3(b), one commenter suggests "health plan" be used in place of "insurance company."

Response: The department agrees. "Health plan" has been substituted each place an "insurance company, a health maintenance organization or other organization that pays or reimburses a claim" in §§100.3(b), 100.5(d) and (k), and section title of §100.8.

Comment: Concerning §100.3(c) renumbered as §100.3(d), one commenter feels this section, requiring external systems supplying the immunization registry with data to contain a consent flag, is not needed in the rules.

Response: The department disagrees. This rule states that external computer systems supplying immunizations to the department must include a parental consent flag indicating parental consent. Since only records flagged "yes" will be forwarded to the registry, this indicator flag will allow external systems to query their databases and only send the registry records where the indicator flag has been set to "yes." No change was made as a result of this comment.

Comment: Concerning §100.3(a) renumbered as §100.3(b), a commenter believes the paragraph should be modified to read "vaccines must be administered by a licenced health care facility and an individual licensed health care professional."

Response: The department disagrees. The definition of a provider is found in renumbered §100.1(9) and is not necessary in this section of the rules. No change was made as a result of this comment.

Comment: Concerning §100.3(c) renumbered as §100.3(d), one commenter states that maintaining a system to document consent by the health plan could be cost prohibitive.

Response: The department disagrees and responds that a method or system for the documentation consent status is necessary, but the precise method is up to the health plan. The health plans must be able to separate the consented data from the non-consented data. Only the consented data can be forwarded to the registry. No change was made as a result of this comment.

Comment: Concerning §100.3(c) renumbered as §100.3(d), one comment was received about immunization registry linking with other unspecified databases and the need for "external computer systems" to incorporate a computer field that indicates whether or not consent has been obtained. The commenter feels the department should list external computer systems that can be linked to the tracking system.

Response: The department disagrees. Insurance companies, private providers, managed care organization, health maintenance organizations, public health and other billing vendors will be supplying the department with immunization histories. An indicator field will be used by the external systems to only supply the immunization registry with consented records. It is not feasible to list all the external computer systems that will be supplying the immunization registry with data. No change was made as a result of this comment.

Comment: Concerning §100.4(a), one commenter is concerned that only immunization information will be deleted, leaving the department to maintain all other personal information in the files.

Response: The department agrees in part and responds §100.4(a) states the child's entire history, which includes the immunization and identifying demographic information, will be removed from the immunization registry. The wording of this subsection has been changed to clarify this point.

Comment: Concerning §100.4(a), one commenter believes a copy of the confirmation of a withdrawal letter, which is sent to the parent, should also be sent to the health plan.

Response: The department disagrees. The law does not allow the department to release information to the health plans. No change was made as a result of this comment.

Comment: Concerning §100.4(c)(5), one commenter asks if the department intends to issue vaccine notices and how that will affect fiscal implications.

Response: The department may assist providers with recall notices. Recall and reminder reports will, for the most part, be generated by the providers. The provider may or may not choose to use recall and reminder features. The department believes that dollars spent on immunizations and recall are appropriately utilized, and that this use of the registry is authorized by Health and Safety Code, §161.007(e). No change was made as a result of this comment.

Comment: Concerning §100.5, one commenter states that the rules do not appear to request any information regarding negative reactions to specific vaccines.

Response: The department confirms this interpretation of the rules. The rules do not request any information regarding negative reactions to specific vaccines. The registry is not designed to be a medical record, only a database holding a list of vaccines administered to the child. The provider is appropriately responsible to determine any contraindications to vaccinations. The registry does include an "adverse reaction flag" which defaults to "no," but may be changed to yes, if an adverse reaction is reported. The flag produces a reminder notice to the provider to submit an adverse reaction report to the department. No change was made as a result of this comment.

Comment: Concerning §100.5(a), one commenter feels this rule leaves the door open for the department to change or add other required vaccines.

Response: The department confirms this interpretation of the rules. The rules are left flexible allowing the immunization registry the ability to add or change required vaccines as medical standards change. No change was made as a result of this comment.

Comment: Concerning §100.5(b), and (f) renumbered as §100.5(g), one commenter feels the information requested should be compatible with the required information on the Health Care Financing Administration (HCFA) 1500 form.

Response: The department agrees in part with this comment. The information will be compatible with most of the required information on the HCFA 1500, however, this form does not capture some of the required information for the registry. No change was made as a result of this comment.

Comment: Concerning section §100.5(d) renumbered as §100.5(e), one commenter questions why health plans must submit the immunization data within 25 days after the receipt from the provider and when the data are received directly from the immunization provider they are given 30 days to submit their information.

Response: The department responds immunizations are recommended at two month intervals during the first 6 months of life. The insurance companies must forward the information to the department after it is received from the provider. The de-

partment is concerned that the last doses will not be recorded before the next series is due. The provider needs this information to appropriately assess current immunization status. No change was made as a result of this comment.

Comment: Concerning §100.5(f)(2) renumbered as §100.5(g)(2), twenty-seven comments were received stating objections to the amount of data the department is requiring for the registry.

Response: The department disagrees and responds that the Health and Safety Code, §161.008(a) states: an immunization record is part of the immunization registry. "An immunization record contains the: (1) name and date of birth of the person immunized; (2) dates of immunization; (3) types of immunization administered; and (4) name and address of the health care provider administering the immunization." The definition of an immunization record in the Health and Safety Code refers to what a record consists of when released, in hard copy, from the registry. This was never intended to be the only information the registry receives. The information provided in this list is not enough to match records or adequately track a child's immunization history. If the parent consents to participate in the registry, they consent for the tracking of the "required fields". Children could be adversely affected, if decisions were made based on records that are not accurate. No change was made as a result of this comment.

Comment: Concerning §100.5(f)(2)(C) renumbered as §100.5(g)(2)(C), twenty-seven comments were received stating objections to social security number being labeled in the rules as "if available", not "optional."

Response: That department disagrees and responds that a record will be accepted without a social security number for the child if this number is not available to the provider. This information is very important in creating a unique record. The department needs the social security number to assure that immunization records are reliable and matched to the appropriate child. No change was made as a result of this comment.

Comment: Concerning §100.5(f)(3) renumbered as §100.5(g)(3), one commenter asks if the vaccine type, date of vaccine, vaccine lot number, dose or series number and name of manufacturer are included on the immunization records requested by parents.

Response: The department responds that only the vaccine type, date of vaccine and dose and series number are provided on the reports requested by parents. The vaccine lot number and manufacturer are provided only to the provider. No change was made as a result of this comment.

Comment: Concerning §100.5(f)(3)(D) renumbered as §100.5(g)(3)(D), one commenter states that if this section applies to health plans it should be restated to read "dose or series number (if known)."

Response: The department agrees. The language was added to the section.

Comment: Concerning §100.5(f)(3) renumbered as §100.5(g)(3), one commenter questioned the accuracy and availability of data provided by the health plans. The commenter also stated concern about the ability of department to match records. Also, concern that the health plan does not receive much of the "required" information, such as vaccine lot number, dose and series numbers.

Response: In response to this concern, the department utilizes sophisticated software which matches imported records. With all required information listed in §100.5(g)(2) and (3), the registry can accurately match records. The health plan cannot forward consented information to the registry that it does not receive from the provider. No change was made as a result of this comment.

Comment: Concerning §100.5(f) renumbered as §100.5(g), one commenter is concerned that claims billing systems are not set up to automatically capture the level of detailed information required for the registry. Adding fields and modifications to pre-existing programs is expensive and time consuming.

Response: The department responds that the mandate to receive immunization histories from health plan billing systems was determined by the Health and Safety Code, §161.007(c). No change was made as a result of this comment.

Comment: Concerning §100.5(g) renumbered as §100.5(h), one commenter states that the department needs to clarify how to report evidence of immunity to vaccine preventable disease.

Response: The department responds that the registry will be modified to accept evidence of immunity in lieu of immunization. Until the registry is modified, specific guidelines for reporting can not be provided. No change was made as a result of this comment.

Comment: Concerning §100.5(j) renumbered as §100.5(k), one commenter asks if this section pertains to information submitted by providers when the child does not have any type of health coverage.

Response: The department confirms this interpretation of the rules. This section applies to immunizations that are not billed to a health plan. No change was made as a result of this comment.

Comment: Concerning §100.6(a), twenty-seven comments were received with objections to the use of data obtained prior to the effective date of these rules.

Response: The department disagrees. Many parents throughout the state believe, and are expecting, the department to be collecting immunization data for their children. All records, for which consent status could not be determined, obtained through the Bureau of Vital Statistics were deleted in June 1998. No change was made as a result of this comment.

Comment: Concerning §100.6(a), one commenter requests no deleting of any currently loaded public data because the registry is only worthwhile if it is populated.

Response: The department agrees with the commenter on the importance of grandfathering data. No change was made as a result of this comment.

Comment: Regarding §100.7(a), two commenters object to providers being required to permit the inspection of immunization records for quality assurance purposes by the department. One commenter suggests that this may be illegal.

Response: The department disagrees. Chapter 900, §2, Acts of the 75th Legislature, states: "The Texas Department of Health shall evaluate the immunization registry, established under Section 161.007, Health and Safety Code, as added by this Act, two years after its implementation date to determine

if the immunization registry is meeting its stated goals and objectives. The Texas Department of Health shall report to the legislature on February 1 of each odd-numbered year concerning the maintenance and operation of the registry." In order to evaluate the quality of the data, the department must be able to inspect immunization records. For clarification the rules were modified in §100.7(a) to read "records of children whose names appear in the registry" will be inspected.

Comment: Concerning section §100.8(a), one commenter is concerned that 25 business days is not adequate time to provide the immunization information from the health plan unless a consent is received with each immunization.

Response: The department disagrees. It is the responsibility of the provider and the health plan to communicate that consent to participate in the registry has been obtained. Health plans do not have to research consent status. Health plans are only responsible for forwarding records to the department when they are assured that consent has been given. No change was made as a result of this comment.

Comment: Concerning §100.8(a), one commenter proposed changing 25 business days to 60 business days, giving health plans more time to comply.

Response: The department disagrees. Immunizations are recommended at two month intervals during the first 6 months of life. If the health plan waited the full 60 days for reporting, the child would be due for the next series before the first series was received and entered into the registry. The provider needs this to appropriately assess current immunization status. No change was made as a result of this comment.

Comment: Concerning §100.8(a), one commenter asks if the health plan is obligated to confirm consent on each submission to the registry. If so, the statement should be expanded to require a consent modifier on each claim submitted.

Response: The department disagrees and responds that the health plan is under no obligation to confirm consent on each submission. The providers must communicate changes in consent status to the health plans. No change was made as a result of this comment.

Comment: Concerning §100.8(b), twenty-seven comments were received with objections to the use of the Health Level 7 (HL7) data format.

Response: The department disagrees. Health Level 7 (HL7) is a "data standard". It is a common language used for the transfer of data electronically. Completed parts of the HL7 format are being used by other states and countries. The only sharing of data, would be at the request of the parent, to transfer their child's immunization information from our system to another. HL7 will provide a standard format for reporting. No change was made as a result of this comment.

Comment: Concerning §100.9(a), twenty-five comments were received with concerns that no limits are written into the rule for recall and reminder systems.

Response: The department disagrees that limits should be defined by rule. However, currently the immunization registry only has the capacity to recall a child three times. No change was made as a result of this comment.

Comment: Regarding §100.9(b), twenty-seven comments were received stating objections to the department omitting schools and day cares facilities from confidentiality requirements.

Response: The department agrees. The language was rewritten to state that any user of the immunization registry will maintain the confidentiality of all immunization reports. A certain amount of sharing of information may be required by Education Code §38.002(b). No change was made as a result of this comment.

Comment: Concerning section §100.11, one commenter asked if the health plans have access to this information.

Response: The department responds that the Health and Safety Code, §161.008(c)(2), states the information can be released to a public health , a local health department, a physician to the child, or a school or child care facility in which the child is enrolled. This does not include health plans. Release to health plans has been removed from this section of the proposed rules. No change was made as a result of this comment.

Comment: Concerning rules in general, one commenter recommends that our rules include a provision that allows the release of immunization data from the registry for research purposes.

Response: The department responds that the law defines who can have access to the immunization data, and there is no provision for research use. No change was made as a result of this comment.

Comment: Concerning rules in general, twenty-seven comments were received stating objection to the lack of penalties for misuse of the registry.

Response: The department responds that penalties are outlined in the Health and Safety Code 161.009.No change was made as a result of this comment.

Comment: Concerning rules in general, twenty-eight comments were received with objections to the lack of protection against those who choose not to participate.

Response: The department disagrees and responds it is not the practice of immunization providers to pressure parents into entering their children's information into the registry. No change was made as a result of this comment.

The commenters were Belinda Martel, Stacy Shelton, Julie A. Durham, Karen Walters, Debbie Otwell, Mrs. Linda Lowder, Charles Erwin, Trace Carpenter, Mrs. Stacey Burks, Terri Erwin, Kelli Beaty, Angie Wilson, William M. Chop, Jr., M.D., State Senator Jerry Patterson, David L. Tyson, Jon Van Slaars, Angela Nash, Christine Orbin, L.L. Davidson, U.S. Senator Phil Gramm, Randy V. Curtis, M.D., Tina K.King, J. Wilson, Bryan Malatesta, Ms. Joy Rex, Douglas Moore, Nick Curry, M.D., M.P.H.; Texas Medical Association, Tim Nash, Stephanie Marchbanks, Alison Mullins, Francisco Casales, Marcia Cook, Gary Fritzsche; Blue Cross and Blue Shield of Texas, Inc., Roger L. and Sara Moncus, Christine Casales, Candyce B. Hall, Randi Smerud, Larry L. Coffman, Doris M. Brown, Dawn Richardson, Paul Ochoa, Susan Failes, Kathi Seay, Conservative Coalition, Janice Borne, State Representative Jerry Madden, Camellia May, Laurie Smith, T.C. Wascher, M.D., Rebecca Rex, Patricia Zuercher, North Central Texas HEDIS Coalition, Virginia Moore, M.D., Jill Hunt, Jeannine Kline, Mr. & Mrs. R. David Oltrogge, Robert W. Bueker, C.P.A., State Represetative Bob Hunter, Jana Kappel, Denise M. Burgos, M.D. Most com-

menters were opposed to the proposed rules. Some expressed concerns, asked questions and made suggested recommendations for changes as discussed in the summary of comments.

The effective date of the rules is January 1, 1999.

The new sections are adopted under the Health and Safety Code, §§161.007-161.009 requiring the department to establish an immunization registry and by rule develop guidelines; and §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed on the board, the department, and the Commissioner of Health.

§100.1. Definitions.

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

(1) Child-The person or individual under 18 years of age, to whom a vaccine has been administered.

(2) Consent-A statement signed by a parent agreeing that the child's immunization history can be included in the registry, and that the child's immunization record may be released from the registry. Consent must be obtained one time only and is valid until the child attains 18 years of age. Parents may choose to withdraw consent at any time.

(3) Department-The Texas Department of Health.

(4) Health Plan-An insurance company, a health maintenance organization, or another organization that pays or reimburses a provider for immunizations administered.

(5) Immunization history-An accounting of all vaccines that a child has received and other identifying information.

(6) Immunization record- That part of the immunization registry that is released. An immunization record contains the name and date of birth of the person immunized; dates of immunization; types of immunization administered; and name and address of the provider administering the immunization.

(7) Immunization registry-The database or single repository that contains immunization histories which include necessary personal data for identification. This database is confidential, and access to content is limited to authorized users.

(8) Parent-The parent, managing conservator, or guardian from whom consent is obtained.

(9) Provider-Any physician, health care professional, or facility personnel duly licensed or authorized to administer vaccines.

(10) User-An entity or individual authorized by the department to access immunization registry data.

(11) Vaccine-Includes toxoids and other immunologic agents which are administered to children to elicit an immune response and thus protect against an infectious disease.

§100.2. Inclusion of Information and Confidentiality.

(a) The immunization registry shall contain information on the immunization history that is obtained by the department under this section of each person who is younger than 18 years of age and for whom written consent has been obtained in accordance with this section. The department shall remove information from the registry for any person for whom consent has been withdrawn under §100.4 of this title (relating to Withdrawal of Consent). The provider shall obtain the written consent from the parent of a child before any immunization history relating to the child is sent to a health plan or the department to be included in the registry. The consent language should be substantially similar to the text of paragraphs (1), (2) and (3) of this subsection. The department shall prepare appropriate forms to obtain consent and make sure they are available to providers.

(1) "I authorize the placement of my child's immunization history into the Texas Department of Health's Immunization Registry.

(2) "I authorize the Texas Department of Health's Immunization Registry to release past, present, and future immunization records on my child to a parent of the child and any of the following:

(A) public health district;

(B) local health department;

(C) physician to the child;

(D) school in which the child is enrolled; and

(E) child care facility in which the child is enrolled.

(3) "I understand that I may withdraw the consent to place my child's immunization history in the immunization registry and my consent to release my child's immunization record from the immunization registry at any time by written communication to the Texas Department of Health, Immunization Registry, 1100 West 49th Street, Austin, Texas, 78756."

(4) A parent of a child who agrees to the submission of their child's immunization history to the immunization registry should sign a signature block indicating their written consent to participate.

(5) A consent statement must be signed for participation in the immunization registry. No information should be forwarded to the department if consent is denied or if the status of consent is unknown.

(b) At birth, parents will be able to consent for the child's future immunization history to be included in the immunization registry by indicating approval on the birth certificate. This written consent will be valid until age 18 unless the parent notifies the department that consent is withdrawn.

(c) As required by Health and Safety Code, §161.007, all information which identifies individuals shall be protected as medical information in accordance with the Medical Practice Act, Texas Civil Statutes, Article 4495b, §5.08.

(d) As provided in Health and Safety Code, §161.007(e), the department may use the registry to provide notices by mail, telephone, personal contact, or other means to a parent regarding his or her child who is due or overdue for a particular type of immunization according to the department's immunization schedule. The department shall consult with providers to determine the most efficient and cost-effective manner of using the immunization registry to provide these notices.

(e) A provider or health plan which provides information to the immunization registry in good faith pursuant to this section is not subject to civil liability, as described in Health and Safety Code, §161.007(g).

§100.3. Providers and Health Plans.

(a) After December 31, 1998, a provider that administers a vaccine to a person younger than 18 years of age and does not submit a claim for reimbursement to a health plan shall provide an immunization history to the department if consent has been obtained.

(b) A health plan that pays or reimburses a claim for an immunization of a person younger than 18 years of age shall provide the immunizations from only the current claim to the department, if consent has been obtained. A health plan that pays or reimburses a claim may forward consented immunization history to the registry.

(c) A provider shall inform a parent of the child about the immunization registry in writing, and provide them with an opportunity to consent to the inclusion of their child's information in the immunization registry.

(d) External computer systems supplying the immunization registry with immunization history will incorporate an indicator field that records whether written consent for inclusion has been obtained.

(e) If consent for participation in the immunization registry is obtained, the written consent for inclusion shall be maintained with the provider.

§100.4. Withdrawal of Consent.

(a) Upon receipt of a request to withdraw consent, the child's entire history shall be removed from the immunization registry. A written confirmation shall be provided to the parent of removal from the immunization registry within 30 business days of receipt by the immunization registry.

(b) Providers shall forward a child's immunization history to the department or health plan for inclusion in the immunization registry only when the parent has signed a written consent for the immunization history to be included in the immunization registry. The department shall not keep a child's immunization history in the immunization registry or other files when the parent has requested in writing that the immunization history be deleted from the immunization registry.

(c) The department shall prepare appropriate forms to withdraw consent to participate in the immunization registry, and shall make them available to providers. A completed form is not required to refuse to participate in the immunization registry. A parent who consents and wishes to withdraw the consent at a later date, may send a signed request, in lieu of the form prepared by the department. The written request must be mailed to the Texas Department of Health, Immunization Registry, 1100 West 49th Street, Austin, Texas 78756 and contain the following information:

(1) child's name;

(2) child's date of birth;

(3) child's gender;

(4) name of parent;

(5) an address where the parent can receive a confirmation notice;

(6) signature of parent; and

(7) date of signature.

§100.5. Reportable Information.

(a) Information on vaccines administered shall be sent in a manner consistent with these rules and procedures issued by the department. All immunizations for which there is consent shall be reported to the immunization registry until the child's 18th birthday. The immunization history will be purged or removed automatically from the immunization registry and archived on the child's 18th birthday.

(b) After consent is obtained, a provider reporting directly to the immunization registry, shall submit all the immunization history required. Required immunization history consists of the information listed in subsections (g)(2) and (3) of this section.

(c) A child's immunization history shall be accepted without a social security number. However, social security numbers are very important to assure that the immunization histories are complete and adequately match. If available, the social security numbers shall be forwarded to the department. Other information specified on forms and data file layouts as optional should be provided, with the consent of a parent, when available.

(d) Providers receiving notifications from parents requesting that their child's immunization history not be reported to the immunization registry shall maintain documentation of the notice at the provider's office and no information shall be forwarded to the department. A health care provider who administers an immunization to a person younger than 18 years of age shall provide an immunization history to the department unless the immunization history is submitted to a health plan that pays or reimburses a claim for an immunization to a person younger than 18 years of age. If consent for participation in the immunization registry is obtained, the immunization history shall be forwarded to the department by the health plan.

(e) Beginning on January 1, 1999, immunization histories shall be reported to the department by paper forms, electronic transfer, fax, mail, telephone, or direct data entry into the immunization registry within 30 business days of administering a vaccine in a format prescribed or approved by the department. Providers and health plans may contact the department (1100 West 49th Street, Austin, Texas 78756, 1-800-252-9152) to establish a provider number and a system of reporting. Reporting by telephone is limited to providers that administer vaccine to less than 25 children per month.

(f) Reports submitted by electronic transfer shall meet data quality, format, security, and timeliness standards prescribed by the department.

(g) Beginning on January 1, 1999, with written consent from a parent, providers and health plans shall report the following necessary information to identify a child, adequately track the child's immunization status, allow for effective recall and reminder systems and satisfy the required data elements in the immunization registry.

(1) Provider information must include:

(A) the health care provider's name (first, middle initial, last);

(B) business address (street, city, zip code); and

(C) business telephone number (including area code).

(2) Child and parent information must include:

(A) child's name (first, middle initial, last);

(B) child's address;

(C) child's social security number (if available);

(D) gender of the child;

(E) child's date of birth; and

(F) mother's maiden name (if available).

(3) Vaccine information must include:

(A) type of vaccine administered;

(B) date the vaccine was administered (month, day, year);

(C) vaccine lot number (if known);

(D) dose or series number (if known); and

(E) name of vaccine manufacturer (if known). If the immunization history is entered as historical data, the lot number and manufacturer are not required. Historical data are immunizations that were administered prior to the present date and/or administered by a different provider.

(h) Evidence of immunity to vaccine preventable disease shall be reported.

(i) In addition to data required, optional information which aids in the tracking of children in the immunization registry may be supplied at the discretion of the parent.

(j) If written consent is obtained from a parent, providers should enter all immunization history.

(k) Beginning January 1, 1999, with written consent, a provider shall submit immunization history to the immunization registry. The provider is not required to submit immunization information to the department when the immunization information is submitted to a health plan. Providers shall submit evidence of consent when they submit the documentation of services provided to the health plan.

§100.6. Information Included in the Immunization Registry Prior to September 1, 1997.

(a) Immunization histories contained in the immunization registry prior to September 1, 1997 that were obtained from the following sources will remain in the immunization registry and may be released from the immunization registry:

(1) Integrated Client Encounter System (ICES);

(2) Women, Infants and Children (WIC);

(3) Medicaid; and

(4) Texas Health Steps (formerly known as Early and Periodic Screening Diagnosis and Treatment - EPSDT).

(b) The department will develop informational materials for distribution and posting at all provider's offices who have access to the immunization registry and in the provider offices using the Integrated Client Encounter System (ICES), Women, Infants and Children (WIC), Medicaid, Texas Health Steps (formerly known as Early and Periodic Screening Diagnosis and Treatment - EPSDT) that will notify parents about the following.

(1) Their child may already have an immunization history in the immunization registry from the one or more of the sources listed in subsection (a) of this section.

(2) The parent may request that the department search the immunization registry for the possibility of an existing immunization history. They may call the department's toll free number, (800) 252-9152, or make the request in writing.

(3) The parent may request that any existing immunization history be withdrawn and deleted from the immunization registry as specified in §100.4 of this title (relating to Withdrawal of Consent).

§100.7. Data Quality Assurance.

(a) As needed and for the purpose of assuring the quality and accuracy of the consented data submitted to the immunization registry, each provider will allow the department to inspect the immunization history of children whose names appear in the registry stored with the provider.

(b) For immunization history with written consent, a provider shall, upon request of the department, supply missing immunization history, if known, or clarify immunization history submitted to the department.

§100.8. Health Plans Shall Provide Immunization History to the Department.

(a) Health plans to which providers submit a claim or encounter information for an immunization, shall in turn submit the required immunization history to the department within 25 business days from receipt from the provider. The organization must be able to verify the presence of the consent for participation in the immunization registry before the history is forwarded to the department.

(b) Automated data exchange shall conform to standards prescribed by the department. Data exchange shall follow the national standard for data exchange, known as Health Level 7 (HL7), when this format is completed.

§100.9. Reports.

(a) Authorized and registered providers or health plans may request recall and reminder reports from the immunization registry to provide notices of an upcoming or overdue immunization.

(b) Any user of the immunization registry shall maintain the confidentiality of all immunization reports.

§100.11. Confidentiality.

(a) Information contained in the immunization registry is confidential. Registered providers using the immunization registry shall be required to sign a confidentiality disclaimer statement.

(b) The department shall register providers and assign security levels.

(c) Registered providers shall be assigned a user identification number and password. The registered provider will be encouraged to periodically change the assigned password. The password will be displayed on the screen as asterisks.

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General Counsel
Texas Department of Health
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Part II. Texas Department of Mental Health and Mental Retardation

Chapter 406. ICF/MR Programs

Subchapter C. Vendor Payments

25 TAC §406.101

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts amendments to §406.101 of Chapter 406, Subchapter C, governing vendor payments with changes to the text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8339).

The amendment specifies the time allowed for the electronic submission of claims for services provided by intermediate care facilities for the persons with mental retardation (ICF/MR). The amendment will accommodate a new electronic billing system for several Texas human service programs that will be implemented on January 1, 1999.

The proposed language is revised on adoption to clarify that for billing purposes time is calculated using calendar days. Language is added to specify that billing must be received by National Heritage Insurance Company (NHIC) within 180 calendar days from the end of the month of service or within 30 days of notification of Medicaid eligibility, whichever is later. A provision is added specifying that a claim for services for an individual without a valid LOC determination must be received by NHIC within 90 calendar days from the date Medicaid eligibility is re-established or the date a valid determination of LOC is made, whichever is later. The subsection is revised to be consistent in structure and wording with corresponding provisions in rules governing the home and community-based services (HCS) program.

A hearing to accept oral and written testimony from the public was held on September 8, 1998, in Austin. No oral or written testimony was offered. No written comments were received from members of the public.

The amendment is adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate ICF/MR program.

§406.101. Vendor Payments.

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

(c) An Intermediate Care Facility for the Mentally Retarded (ICF/MR) is not entitled to payment if the monthly claim or adjustment for services is not received by the National Heritage Insurance Company (NHIC) within 180 calendar days from the end of the service month or within 30 calendar days of notification of the Medicaid eligibility determination, whichever is later. All claims and adjustments for months prior to January 1, 1999, must be submitted by March 31, 1999. A claim for services regarding an individual without a valid LOC determination must be received by NHIC within 90 calendar days from the date Medicaid eligibility is re-established or the date a valid determination of LOC is made, whichever is later.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818046
Charles Cooper
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: December 20, 1998
Proposal publication date: August 14, 1998
For further information, please call: (512) 206-4516

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Subchapter G. Additional Facility Responsibilities

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts amendments to §406.308 and new §406.311 of Chapter 406, Subchapter G, governing additional facility responsibilities. Section 406.308 is adopted with changes to the text as proposed in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8347). New §406.311 is adopted without changes.

The amendments to §406.308 require a facility in the Texas intermediate care facilities for persons with mental retardation (ICF/MR) program to release copies of records and supporting documents when requested by certain federal and state agencies. New §406.311 requires facilities to ensure the proper fit of durable medical equipment for a child served by the facility, provide instruction regarding the appropriate use of the equipment, and maintain a record of compliance with the requirements.

Section 406.308(a) is changed on adoption to require a facility to produce immediately available records and supporting documents within 24 hours of a request and archived records and supporting documents within 72 hours of a request. When copies of records and supporting documents are requested and the facility does not have ready access to photocopy equipment, the facility is permitted 72 hours after the request to produce the copies. The subsection also is revised on adoption to require the agency requesting and receiving copies of facility records and supporting documents to provide an acknowledgement that the copies were received. The list of agencies which may request access to facility records and supporting documents is revised upon adoption to drop the Texas Department of Health and add the Texas Health and Human Services Commission. TDH does not have oversight responsibilities which require access to facility records, whereas the commission does.

A hearing to accept oral and written testimony from the public was held on September 8, 1998, in Austin. No oral or written testimony was offered. Written comments were received from Concept Six, a provider of ICF/MR services, Austin.

The commenter asked for revisions of §406.308(a) to require that an agency requesting and receiving copies of facility records and supporting documents provide a receipt or acknowledgment for those copies. The commenter also requested the inclusion of language allowing a reasonable length of time for the facility to access requested records and supporting documents that have been archived, and a reasonable length of time for photocoping the records and supporting documents when the facility does not have photocopy equipment on the premises. The department has revised the subsection to incorporate the requested provisions.

25 TAC §406.308

The amendment is adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas

Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate ICF/MR program.

§406.308. Record Retention and Other Related Record Requirements.

(a) Without prior notification or consent, the agencies listed in paragraph (1) of this subsection must be provided prompt access to and copies of facility records and supporting documents.

(1) The agencies which may request access to and copies of facility records and supporting documents are:

(A) the United States Department of Health and Human Services;

(B) the Texas Health and Human Services Commission;

(C) the Texas Department of Mental Health and Mental Retardation;

(D) the Texas Attorney General's Medicaid Fraud Control Unit;

(E) the Texas Department of Human Services; and

(F) the Comptroller General of the United States.

(2) Records and supporting documents which are immediately available must be produced by the facility for review by the requesting agency within 24 hours of the agency's request. If the records and supporting documents have been archived, they must be produced for review within 72 hours of the request. If copies of the records and supporting documents are requested and the facility does not have immediate access to photocopy equipment, the copies must be provided within 72 hours of the request for copies.

(3) When an agency listed in paragraph (1) of this subsection requests and receives copies of facility records and supporting documents, the agency will issue an acknowledgement to the facility for those records and supporting documents.

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

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Charles Cooper
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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25 TAC §406.311

The new section is adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate ICF/MR program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Charles Cooper
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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For further information, please call: (512) 206-4516

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Chapter 409. Medicaid Programs

Subchapter J. Reimbursement for Services in Institutions for Mental Diseases

25 TAC §§409.371-409.376, 409.378-409.380

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeals of §§409.371-409.376 and 409.378-409.380 of Chapter 409, Subchapter J, governing reimbursement for services in institutions for mental diseases, without changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8350-8351). The adoption of new §§419.371-419.379 of Chapter 419, Subchapter J, concerning institutions for mental diseases, which replace the repealed sections, are contemporaneously adopted in this issue of the *Texas Register*.

The repeals accommodate the adoption of new sections governing institutions for mental diseases.

A public hearing was held on September 8, 1998, at which no testimony was offered. Written public comment was received from San Angelo State School, San Angelo; San Antonio State Hospital, San Antonio; and Corpus Christi State School, Corpus Christi. All commenters stated they had no comment.

The repeals are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas MHMR Board with broad rulemaking authority; Human Resource Code, §32.021(a), and Government Code, §531.021, which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer federal medical assistance funds and administer the state's medical assistance program;

Senate Bill 509 of the 74th Texas Legislature, which clarifies THHSC's authority to delegate the operation of all or part of a Medicaid program to a health and human service agency; and Human Resources Code, §32.012(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to TDMHMR the authority to operate the IMD program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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Chapter 409. Medicaid Programs

(Editor's Note: Section 1 of House Bill No. 2913 of the 75th Legislative session amended §531.021 of the Government Code, which designates the Texas Health and Human Services Commission [HHSC] as the agency responsible for administration of the Medicaid program. On September 1, 1997, HHSC also became responsible for adopting reasonable rules and standards to govern the setting of Medicaid rates, fees, and charges. Prior to this date, these functions primarily were performed by three agencies- the Texas Department of Health [TDH], the Texas Department of Human Services [TDHS], and the Texas Department of Mental Health and Mental Retardation [TDMHMR].

The Texas Register is administratively transferring the following rules listed in the conversion chart published in this issue uner the Tables and graphics section. The table lists the old rule numbers and the new rule numbers that corresponds to them.)

Figure: 1 TAC 355

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Chapter 419. Medicaid State Operating Agency Responsibilities

Subchapter J. Institutions for Mental Diseases

25 TAC §§419.371-419.379

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §§419.371-419.379 of Chapter 419, Subchapter J, governing institutions for mental diseases, with changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8355-8358). The repeals of existing §§409.371-409.376 and 409.378-409.380 of Chapter 409, Subchapter J, concerning reimbursement for services in institutions for mental diseases, which the new sections replace, are contemporaneously adopted in this issue of the *Texas Register*.

The new sections describe the criteria used to determine whether an institution for mental diseases (IMD) provider is eligible to receive Medicaid reimbursement for inpatient hospital services to people aged 65 and older in an IMD and describe the methods by which patient and IMD provider eligibility are established and reimbursement for covered services is accomplished.

Throughout the subchapter minor grammatical changes and clarifying language are added. Language in §419.372, concerning application, is modified to clarify that the subchapter is applicable to IMD providers. The term "single state agency" is replaced with "HHSC" in §419.373. Language is added to §419.374 stating that individuals whose eligibility for IMD services is denied or whose IMD services have been terminated, suspended, or reduced have the right to a fair hearing. Language is added to the titles of §419.375 and §419.376 for clarity. Language in §419.376(b) and (d) is modified to clarify that termination relates to the IMD provider's agreement with the department, instead of the provider's reimbursement.

A public hearing was held on September 8, 1998, at which no testimony was offered. Written public comment was received from the parent of a state school resident, Garland; San Angelo State School, San Angelo; San Antonio State Hospital, San Antonio; and Corpus Christi State School, Corpus Christi.

One commenter questioned if the subchapter applied to persons with mental retardation. The department responds that the subchapter does not apply to persons with a sole diagnosis of mental retardation.

Three commenters stated that they had no comment.

The new sections are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas MHMR Board with broad rulemaking authority; Human Resource Code, §32.021(a), and Government Code, §531.021, which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer federal medical assistance funds and administer the state's medical assistance program; Senate Bill 509 of the 74th Texas Legislature, which clarifies THHSC's authority to delegate the operation of all or part of a Medicaid program to a health and human service agency; and Human Resources Code, §32.012(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to TDMHMR the authority to operate the IMD program.

§419.371. Purpose.

The purpose of this subchapter is to describe the criteria used to determine whether an IMD provider is eligible to receive Medicaid reimbursement for inpatient hospital services to people aged 65 and older in an institution for mental diseases (IMD) and to describe the methods by which patient and IMD provider eligibility are established and reimbursement for covered services is accomplished.

§419.372. Application.

This subchapter applies to all IMD providers.

§419.373. Definitions.

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

(1) Department - The Texas Department of Mental Health and Mental Retardation (TDMHMR) or its designee.

(2) HHSC - The Texas Health and Human Services Commission or its designee.

(3) Inpatient hospital services - Services provided under the supervision of a physician in an IMD that meets the requirements for psychiatric hospitals in 42 CFR §482.60(b), (c), and (d) and meets utilization review requirements in 42 CFR §482.30(a), (b), (d), and (e) unless the utilization review requirements have been waived pursuant to §1903(i)(4) of the Social Security Act and 42 CFR Part 456, Subpart H.

(4) Institution for mental diseases (IMD) - A hospital of more than 16 beds that is primarily engaged in providing psychiatric diagnosis, treatment, and care of individuals with mental diseases, including medical care, nursing care, and related services.

(5) IMD provider - An IMD that has an agreement with the department to provide IMD services.

(6) IMD services - Inpatient hospital services provided by an IMD provider for the care and treatment (including room and board) of individuals with mental diseases including, but not limited to:

(A) initiation, titration, or change in medication;

(B) monitoring and assessing by qualified mental health professionals;

(C) suicide precautions;

(D) redirection of inappropriate behaviors and/or reinforcement of appropriate behaviors;

(E) group and individual therapies;

(F) structured skills training activities; and

(G) nursing services.

(7) Mental diseases - Diseases listed as mental disorders in the International Classification of Diseases, Ninth Edition, modified for clinical applications (ICD-9-CM), with the exception of mental retardation and chemical dependency disorders.

(8) Qualified mental health professional - A person acting within the scope of his or her training and licensure or certification, who is a:

(A) licensed social worker, as defined by the Human Resources Code, §50.001;

(B) licensed professional counselor, as defined by the Licensed Professional Counselor Act, Texas Civil Statutes, Article 4512g, §2i;

(C) physician, as defined by the Medical Practice Act, Texas Civil Statutes, Article 4495b §1.03, or a person employed by any agency of the United States having a license to practice medicine in any state of the United States;

(D) registered nurse as defined in the Nurse Practice Act (Texas Civil Statutes, Articles 4513-4528); or

(E) psychologist, as defined by the Psychologists' Certification and Licensing Act, Texas Civil Statutes, Article 4512c, §2.

§419.374. Eligible Population.

(a) Reimbursement for IMD services is limited to individuals:

(1) who are age 65 years or older;

(2) who have one or more mental disease;

(3) who have no acceptable alternate placement as determined by the individual's treatment team;

(4) who are eligible for participation in the Texas Medicaid program;

(5) who are not eligible for medical compensation from other payment sources;

(6) who have been certified by a licensed physician to need inpatient hospitalization for the care and treatment of a mental disease;

(7) who meet all other federal, state, and local regulations applicable to admission to a mental hospital; and

(8) for whom the department has authorized IMD services based on medical necessity.

(A) Requests for initial authorization for IMD services must be submitted to the department's Office of Medicaid Administration within seven calendar days after the first day for which Medicaid reimbursement for the provision of IMD services will be requested.

(B) Request for authorization of continued stay must be submitted no later than seven calendar days prior to the end date of the initial and all subsequent authorizations. Initial and continued stay authorizations are valid for up to 31 calendar days.

(b) Any Medicaid eligible individual whose request for eligibility for IMD services is denied or is not acted upon with reasonable promptness, or whose IMD services have been terminated, suspended, or reduced by TDMHMR is entitled to a fair hearing, conducted by TDHS. A request for a fair hearing must be submitted to the TDMHMR Office of Medicaid Administration and received within 90 days from the date the notice of denial of eligibility for IMD services or notice of termination, suspension, or reduction of IMD services is mailed.

§419.375. IMD Provider Eligibility for Reimbursement.

(a) To be eligible for reimbursement for IMD services, an IMD provider must:

(1) submit an approved application for enrollment through means established by the department's Office of Medicaid Administration to include evidence that the provider:

(A) meets the conditions of participation referenced in 42 CFR §482.60(b);

(B) is accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO);

(C) if applicable, licensed as a mental hospital under the Texas Health and Safety Code, Chapter 577; and

(D) has a consistent historical pattern of accepting persons involuntarily committed for inpatient mental health treatment as evidenced by having provided mental health services to a minimum of 20 persons, 65 years of age or older, involuntarily committed for inpatient mental health treatment under the Texas Health and Safety Code, Chapters 573 and 574, during the two-year period immediately preceding the date of application for participation.

(2) have in effect a written provider agreement with the department which:

(A) describes respective responsibilities of the provider and the department's Office of Medicaid Administration, including arrangements to ensure:

(i) joint planning efforts;

(ii) development of alternative methods of care;

(iii) access by HHSC to the institution, its patients, and patients' records when necessary to carry out the agency's responsibilities;

(iv) recording, reporting, and exchanging medical and social information about the patients; and

(v) other procedures that may be required to achieve the purposes of the agreement;

(B) assures the capacity of the provider to admit, readmit from alternate care, and treat both eligible persons voluntarily seeking services under the Texas Health and Safety Code, Chapter 572, and persons involuntarily committed for inpatient mental health treatment under the Texas Health and Safety Code, Chapters 573 and 574;

(C) assures that the provider is meeting the requirements specified in 42 CFR §440.140(a) pertaining to providers of inpatient hospital services in institutions for mental diseases;

(D) assures that the provider is in compliance with those provisions of the Texas Administrative Code, Title 25, Part II, that relate to patient care and treatment in inpatient mental health facilities;

(E) assures that the provider is serving a patient population in which more than 50% currently require institutionalization because of a mental disease; and

(F) assures that the provider will submit cost reports and audit data in a manner authorized by the department.

(b) An IMD provider's eligibility for reimbursement must be renewed periodically at a time designated by the department's Office of Medicaid Administration, but not to exceed two years.

(c) Evidence of compliance with subsection (a) of this section is validated through reviews by the department's Office of Medicaid Administration. Reviews occur at intervals decided upon by the department. No IMD provider is notified more than 48 hours before the scheduled review. For each Medicaid patient, the department additionally reviews:

(1) the adequacy of services available to meet the patient's current health needs and promote the patient's maximum physical, mental, and psychosocial well-being;

(2) the necessity or desirability of the patient's continued placement in the IMD; and

(3) the feasibility of meeting the patient's mental and physical health care needs through alternative institutional or non-institutional care.

(d) If the IMD provider fails to provide evidence of compliance with subsection (c)(1)-(3) of this section, then the provider must take corrective action, as needed, based on the findings contained in the department's report.

(1) If the IMD provider fails to take corrective action, recoupment of Medicaid funds associated with the finding(s) is initiated as provided for in Chapter 409, Subchapter C, of this title (relating to Fraud and Abuse and Recovery of Funds).

(2) Recoupment is an adverse action for which the IMD provider is entitled to an administrative hearing in accordance with Chapter 409, Subchapter B, of this title (relating to Adverse Actions).

§419.376. IMD Provider Reimbursement.

(a) Reimbursement for IMD services provided to eligible individuals begins on the date established by written notice from the department's Office of Medicaid Administration and is contingent upon validation of evidence of IMD provider eligibility as described in §419.375(c) of this title (relating to IMD Provider Eligibility for Reimbursement).

(b) An IMD provider's agreement with the department is subject to termination with written notice on the date that any of the following occurs:

(1) loss of Medicare and/or JCAHO certification;

(2) if applicable, loss of licensure as a psychiatric hospital;

(3) failure to meet requirements specified in 42 CFR §440.140(a) pertaining to providers of inpatient hospital services in institutions for mental diseases;

(4) demonstrated noncompliance with those provisions of the Texas Administrative Code, Title 25, Part II, that relate to patient care and treatment in inpatient mental health facilities, or with state laws governing admission and treatment of persons with mental illness;

(5) breach of the written provider agreement described in §419.375(a)(2) of this title (relating to IMD Provider Eligibility for Reimbursement); or

(6) termination of participation by HHSC in the reimbursement for services in the IMD Medicaid program.

(c) Failure to submit an acceptable cost report in the required time frame constitutes a contract violation and may result in a hold of vendor payments.

(d) Termination of the IMD provider agreement and vendor hold are adverse actions for which the IMD provider is entitled to an administrative hearing in accordance with Chapter 409, Subchapter B, of this title (relating to Adverse Actions).

(e) IMD providers that receive Medicaid reimbursement for IMD services are governed by Chapter 409, Subchapter C, of this title (relating to Fraud and Abuse and Recovery of Funds).

§419.377. Discharge Criteria.

IMD providers must be in compliance with the following rules, as applicable, regarding discharge of individuals receiving IMD services:

(1) Chapter 402, Subchapter A of this title (relating to Admissions, Transfers, Absences and Discharges–Mental Health Facilities);

(2) Chapter 402, Subchapter B of this title (relating to Continuity of Services–Mental Health Services); and

(3) Chapter 401, Subchapter J of this title (relating to Standards of Care and Treatment in Psychiatric Hospitals).

§419.378. References.

The following laws and rules are referenced in this subchapter:

(1) 42 CFR Part 456, Subpart H, §§482.60, 482.30, 431.620, 440.140, and 431.107;

(2) Social Security Act, §1903(i)(4);

(3) Human Resources Code, §50.001;

(4) Texas Civil Statutes, Articles 4495b, 4512c, 4512g, and 4518, §5;

(5) Texas Health and Safety Code, Chapters 572-574 and 577;

(6) those provisions in the Texas Administrative Code, Title 25, Part II that relate to patient care and treatment in inpatient mental health facilities;

(7) Chapter 409, Subchapter B, of this title (relating to Adverse Actions); and

(8) Chapter 409, Subchapter C, of this title (relating to Fraud and Abuse and Recovery of Funds).

§419.379. Distribution.

This subchapter shall be distributed to:

(1) members of the Texas MHMR Board;

(2) executive, management, and program staff of Central Office;

(3) chief executive officers of all IMD providers; and

(4) advocacy organizations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Charles Cooper
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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Part VIII. Interagency Council for Early Childhood Intervention

Chapter 621. Early Childhood Intervention

(Editor's Note: Section 1 of House Bill No. 2913 of the 75th Legislative session amended §531.021 of the Government Code, which designates the Texas Health and Human Services Commission [HHSC] as the agency responsible for administration of the Medicaid program. On September 1, 1997, HHSC also became responsible for adopting reasonable rules and standards to govern the setting of Medicaid rates, fees, and charges. Prior to this date, these functions primarily were performed by three agencies- the Texas Department of Health [TDH], the Texas Department of Human Services [TDHS], and the Texas Department of Mental Health and Mental Retardation [TDMHMR].

The Texas Register is administratively transferring the following rules listed in the conversion chart published in this issue uner the Tables and graphics section. The table lists the old rule numbers and the new rule numbers that corresponds to them.)

Figure: 1 TAC 355

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TITLE 34. PUBLIC FINANCE

Part X. Texas Public Finance Authority

Chapter 221. Distribution of Bond Proceeds

34 TAC §§221.2-221.6

The Texas Public Finance Authority adopts amendments to §§221.2-221.5 and new §221.6 concerning the distribution of bond proceeds, without changes to the proposed text as published in the July 24, 1998, issue of the *Texas Register* (23 TexReg 7525).

The amendments and new section are necessary to update or delete obsolete provisions and conform the agency's rules to new statutory requirements.

The sections explain the purpose of the rules, provide relevant definitions, set forth the requirements of agencies' requests for financing, and provide procedural and substantive requirements that must be satisfied for the Authority to issue bonds.

No comments were received regarding the amendments and new section.

The amendments and new section are adopted under Texas Civil Statutes, Article 601d, which authorizes the Authority to promulgate rules necessary to the administration of the Article.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-9817993
Judith M. Porras
General Counsel
Texas Public Finance Authority
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For further information, please call: (512) 463-5544

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Chapter 222. Public Records

34 TAC §222.1

The Texas Public Finance Authority adopts the repeal of §222.1 concerning charges for public records without changes to the proposed text as published in the July 24, 1998, *Texas Register* (23TexReg7525).

The repeal deletes obsolete and unnecessary rules.

The section is not necessary because the Authority is required to charge for public information in accordance with administrative rules of the Texas General Services Commission.

No comments were received regarding the repeal.

The repeal is adopted under Texas Civil Statutes, Article 601d, which authorizes the Authority to promulgate rules necessary for the administration of that Article.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-9817992
Judith M. Porras

General Counsel
Texas Public Finance Authority
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Proposal publication date: July 24, 1998
For further information, please call: (512) 463-5544

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Chapter 223. Master Equipment Lease Purchase Program

34 TAC §§223.1, 223.3, 223.5, 223.7

The Texas Public Finance Authority adopts the repeal of §§223.1, 223.3, 223.5, 223.7 concerning the master equipment lease purchase program (MLPP), without changes to the proposed text as published in the July 24, 1998, issue of the *Texas Register*(23 TexReg 7526).

The repeal deletes unnecessary administrative rules.

The repealed sections implemented MLPP, Series A, which is no longer a separate financing program.

No comments were received regarding the repeal.

The repeal is adopted under Texas Civil Statutes, Article 601d, which authorizes the Authority to promulgate rules necessary for the administration of the Article.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Chapter 225. Master Equipment Lease Purchase Program, Series B

34 TAC §§225.1, 225.3, 225.5

The Texas Public Finance Authority adopts amendments to §§225.1, 225.3, and 225.5 concerning the master equipment lease purchase program (MLPP), with changes to the proposed text as published in the July 24, 1998, issue of the *Texas Register* (23TexReg 7526).

The amendments are non-substantive technical amendments to update and clarify requirements of the program.

The sections explain the purpose of the rules, provide definitions of terms, provide procedures for financing equipment, and explain the costs of the MLPP and how such costs may be paid.

No comments were received regarding the amendments, however, the Authority staff charged with the operation of the MLPP suggested further amendments to the text of §225.5 (relating to procedures for financing eligible projects), subsection (d) to require agencies to prepare lease supplements rather than purchase vouchers, to reduce the number of copies of leases supplements that agencies must submit, and to delete the requirement for forwarding a copy of the lease supplement to the Comptroller.

The amendments are adopted under Texas Civil Statutes, Article 601d, which authorizes the Authority to promulgate rules necessary for the administration of the Article.

§225.1. Purpose of the Rules.

The Texas Public Finance Authority proposes these new rules, as Chapter 225, concerning the administration of the State of Texas Master Lease Purchase Program authorized by Texas Civil Statutes, Article 601d §9A. This chapter defines certain terms pertaining to the operation of the Texas Master Lease Purchase Program, identifies the responsibilities of various parties in administering the Texas Master Lease Purchase Program, and establishes basic procedures under which state agencies may participate in the Texas Master Lease Purchase Program.

§225.3. Definitions.

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

(1) Act–The Texas Public Finance Authority Act, Texas Civil Statutes, Article 601d, as amended.

(2) Administrative costs–The reasonable costs incurred by the authority in developing, administering, and monitoring the program, which costs include, but are not limited to fees for the paying agent, the dealer, the servicing agent, and the authority's operational charges.

(3) Amortization schedule–A detailed schedule of principal and interest payments and administrative costs due for each lease payment as required under the master lease agreement and contained in each lease supplement. The principal amount will include the purchase price of the eligible projects and the costs of issuance, which will be separately itemized.

(4) Authority–The Texas Public Finance Authority, or any successors or assignees to its duties and functions.

(5) Authorized representative–That person(s) duly authorized by a client agency and the authority to execute and deliver a master lease agreement and lease supplement(s) and such other documents as are deemed necessary or appropriate to implement the program.

(6) Board–The board of directors of the authority.

(7) Bond Review Board–The board created by Texas Civil Statutes, Article 717k-7, or any successors or assignees to its duties and functions.

(8) Bundled purchases–Those purchases of multiple eligible projects individually valued at a minimum of $500 for and on behalf of one or more client agencies, which are aggregated into one vendor contract for acquisition.

(9) Client agency–Any state agency that wants to use the program to finance eligible projects and has the authority, pursuant to applicable law, to do so.

(10) Comptroller–The Comptroller of Public Accounts of the State of Texas, or any successors or assignees to its duties and functions.

(11) Comptroller's interagency agreement–The provision contained in the master lease agreement and in the lease supplements authorizing the authority to access each client agency's appropriated funds to pay debt service on the program by delivering payment vouchers to the comptroller drawn on the client agency's designated funds.

(12) Costs of issuance–All costs associated with the program, including, but not limited to, printing costs, costs of preparation of documents, and fees to rating agencies, financial advisor, credit and liquidity providers, bond counsel, and underwriters.

(13) Debit memo–The notice provided to each client agency within 30 days after each lease payment. The debit memo will include the name of the client agency, each lease supplement by identifying number, the eligible project, the total amount paid reflected as principal and interest payments, administrative costs, the payment date, credit, if any, and the remaining principal balance.

(14) Eligible project–Any physical structure that has been authorized by the legislature for the authority to finance and is used by a client agency to conduct official state business, together with the land and major equipment or personal property that is functionally related to the physical structure, or any other fixed asset used by a client agency to conduct official state business, including, without limitation, telecommunications devices or systems, automated information systems, computers and computer software, provided, that such property has a useful life of at least three years, and a value of at least $10,000, valued either individually or as a group of individual items of property, each having a minimum value of $500 per item.

(15) Fees–The amount assessed each client agency for participating in the program. Fees include the costs of issuance and administrative costs.

(16) Interim financing–The initial financing source by which eligible project may be financed if it is deemed advisable by the authority. Interim financing will occur when the authority issues its Master Lease Purchase Program Tax-Exempt Commercial Paper Revenue Notes (the notes) in various amounts, not to exceed $300 million outstanding at any one time.

(17) LBB–The Legislative Budget Board of the State of Texas, or any successors or assignees to its duties and functions.

(18) Lease payments–Those amounts specified in the lease supplements and made pursuant to the comptroller's intercept payable semiannually on the first day of February and the first day of August. The term "lease payments' also includes all payments made while the eligible project is in the interim financing and to lease revenue bond holders.

(19) Lease revenue bonds–The long-term bonds issued by the authority either to refinance eligible project that has been initially finance through interim financing, or to fund the purchase of eligible project

(20) Lease supplement–A form promulgated by the authority to be executed by each client agency which incorporates the terms of the master lease agreement and other agreements under the program. The lease supplement shall specifically identify the eligible project to be financed, including the serial number or other state identification number, the exact amount to be paid, the payee, and any updates or corrections to the request for financing.

(21) Master lease agreement–The master lease agreement is the contract executed between the authorized representative of each client agency and the authority, containing such terms and provisions necessary to authorize the client agency to participate in the program and the authority to make payments on behalf of the client agency for the purchase of eligible project as specifically set forth in each lease supplement.

(22) Program–The State of Texas Master Lease Purchase Program described in these rules to be carried out by the authority for the purpose of financing or refinancing of eligible projects.

(23) Progress payments–Periodic payments for eligible projects to be made during installation of and prior to acceptance of such eligible project by the client agency which payments are set out in an agreement with the vendor. The agreement must provide for specific payments corresponding to completion of definitive components sufficient to create identifiable collateral.

(24) Request for financing–A written request from a client agency to the authority to finance the acquisition of an eligible project through the program. Such request for financing shall include an itemized description of the eligible project prepared by the client agency including the estimated cost of acquisition, the estimated useful life of the project, the proposed date(s) of delivery and acceptance of the eligible project, the proposed use of the eligible project, and the source of funds to be used by the client agency to make the payments for the eligible project, and any one of the following documents:

(A) a copy of the purchase order for eligible project;

(B) a copy of the contract prepared and awarded by the Texas Department of Information Resources for an eligible project; or

(C) any awarded contract for an eligible project, or for bundled purchases, a copy of which is sent to and received by the authority and which may be generated by any client agency.

(25) State agency–A board, commission, department, office, agency, institution of higher education or other governmental entity in the executive, judicial, or legislative branch of state government.

(26) State lease fund–The fund by that name created by the Act.

(27) Statement of acceptance–A statement contained in the lease supplement, executed by the client agency, which states that the eligible project has been received, inspected, and found to be in fully acceptable condition by the client agency, that all approvals, if any, have been obtained and that all other requirements of law have been satisfied and authorizing the authority to provide payment to the vendor.

§225.5. Procedures for Financing Eligible Projects.

(a) A client agency shall submit a request for financing when it is prepared to proceed with a program financing. A resolution of the client agency's governing body which authorizes the request for financing and the execution of documents required under the program shall be submitted with the request. Upon receipt of a request for financing the authority will review such request for completeness and compliance with program rules. If the request for financing is found to be complete and in compliance, the authority will accept the request for financing.

(b) Upon acceptance of the request for financing, if the client agency has not previously participated in the program, the authority will forward to the client agency a copy of the master lease agreement to be executed by an authorized representative. The master lease agreement is not subject to revision by the client agency and, when

executed by the client agency's authorized representative and the authority, will serve as the basis for all future purchases of eligible project under the program.

(c) After acceptance of the request for financing by the authority and execution of the master lease agreement, the client agency will proceed to procure the eligible project in compliance with all applicable laws and rules governing such procurement, including obtaining the approval, if any is required, of the Bond Review Board, the Department of Information Resources, the General Services Commission, or other state agency.

(d) After the client agency has taken delivery and acceptance of the eligible project and determined that it meets all requirements for payment in full to the vendor, the client agency will prepare the lease supplement together with all documents required by the comptroller and will execute two copies of the lease supplement which also contains the statement of acceptance of the eligible project and will forward all copies along with the payment voucher and all other documents to the authority. The authority will immediately execute two copies of the lease supplement and return one copy to the client agency.

(e) The authority will make a determination to initially fund the eligible project through the interim financing or through the issuance of lease revenue bonds. Such determination will be within the sole discretion of the authority.

(f) The authority will effect the payment in full to the vendor, or partial payment if the eligible project has been designated for progress payments.

(g) Upon receipt of the lease supplement, the authority and the comptroller will effect the comptroller's intercept to provide for the lease payments.

(h) No later than on or before 48 hours prior to a lease payment, the authority will submit a voucher directing the comptroller to transfer sufficient monies from each client agency into the state lease fund the authority will provide a voucher to the comptroller to effect debt service payment. The treasurer will then transfer monies out of the state lease fund and make lease payments.

(i) Within 30 days following each lease payment, the authority will provide a debit memo to each client agency.

(j) The authority may issue lease revenue bonds in order to refinance the lease supplements initially funded through the interim financing. The final maturity of lease revenue bonds shall not exceed the latest maturity of the lease supplements being financed upon the occurrence of any of the following events:

(1) any date on which the aggregate volume of lease supplements then being financed through the interim financing reaches $75 million; or

(2) 30 days prior to the end of any state biennial appropriation period which is currently August 31 of odd-numbered years.

(k) The authority may adjust the lease payments under a lease supplement as a result of a change in interest rates, or a refinancing, or a change in administrative costs. When such adjustment in lease payments is effected, the authority will, concurrent with establishing the new interest rate, provide an amended amortization schedule reflecting the adjusted lease payments to the comptroller and to each client agency.

(l) At least once during each fiscal year of the state the authority will forward to the Legislative Budget Board (LBB) a schedule, by client agency, of all lease payments. The authority will use its best efforts to ensure that the staff of the LBB will include in its budget recommendation sufficient appropriations to make all lease payments required under the program.

(m) All books and records of the authority will be available to the LBB, the comptroller, the state auditor's office, client agencies, and other interested parties which may, from time to time, request access to information regarding the program.

(n) All issuances of lease revenue bonds under the program will comply with all approvals required for the public issuance of debt by a state agency, including review and approval by the Bond Review Board and the attorney general.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 25, 1998.

TRD-9817990
Judith M. Porras
General Counsel
Texas Public Finance Authority
Effective date: December 15, 1998
Proposal publication date: July 24, 1998
For further information, please call: (512) 463-5544

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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) adopts the repeal of Subchapter OO, §§15.4001 through 15.4023; Subchapter PP, §15.4101; Subchapter QQ, §§15.4201 through 15.4210; Subchapter RR, §§15.4301 through 15.4324; and Subchapter SS, §§15.4401 through 4409, without changes to the proposed text published in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9962).

The justification for the repeals is to delete obsolete rules. These rules were the eligibility requirements for individuals who were in nursing facilities prior to January 1, 1974, when the federal government took over the Old Age Assistance program from the states. Because of increases in their incomes over time, these clients are all now eligible for Medicaid under the current special income limit medical assistance only program.

The repeals will function by deleting obsolete rules from the rule base.

No comments were received regarding adoption of the repeals.

Subchapter OO. Legal Requirements for Type Program 02

40 TAC §§15.4001-15.4023

The repeals are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the

Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals implement the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818024
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 20, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter PP. Needs Allowance for Type Program 02

40 TAC §15.4101

The repeal is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeal implements the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818025
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 20, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter QQ. Resources for Type Program 02

40 TAC §§15.4201-15.4210

The repeals are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals implement the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818026
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 20, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter RR. Income for Type Program 02

40 TAC §§15.4301-15.4324

The repeals are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals implement the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818027
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 20, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 438-3765

♦ ♦ ♦

Subchapter SS. Budgeting for Type Program 02

40 TAC §§15.4401-15.4409

The repeals are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The repeals implement the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818028
Glenn Scott

General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 20, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 438-3765

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Part II. Texas Rehabilitation Commission

Chapter 111. Medicaid Waiver Program for People Who Are Deaf-Blind With Multiple Disabilities

(Editor's Note: Section 1 of House Bill No. 2913 of the 75th Legislative session amended §531.021 of the Government Code, which designates the Texas Health and Human Services Commission [HHSC] as the agency responsible for administration of the Medicaid program. On September 1, 1997, HHSC also became responsible for adopting reasonable rules and standards to govern the setting of Medicaid rates, fees, and charges. Prior to this date, these functions primarily were performed by three agencies- the Texas Department of Health [TDH], the Texas Department of Human Services [TDHS], and the Texas Department of Mental Health and Mental Retardation [TDMHMR].

The Texas Register is administratively transferring the following rules listed in the conversion chart published in this issue uner the Tables and graphics section. The table lists the old rule numbers and the new rule numbers that corresponds to them.)

Figure: 1 TAC 355

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Part XIX. Texas Department of Protective and Regulatory Services

Chapter 708. Medicaid Targeted Case Management Program

(Editor's Note: Section 1 of House Bill No. 2913 of the 75th Legislative session amended §531.021 of the Government Code, which designates the Texas Health and Human Services Commission [HHSC] as the agency responsible for administration of the Medicaid program. On September 1, 1997, HHSC also became responsible for adopting reasonable rules and standards to govern the setting of Medicaid rates, fees, and charges. Prior to this date, these functions primarily were performed by three agencies- the Texas Department of Health [TDH], the Texas Department of Human Services [TDHS], and the Texas Department of Mental Health and Mental Retardation [TDMHMR].

The Texas Register is administratively transferring the following rules listed in the conversion chart published in this issue uner the Tables and graphics section. The table lists the old rule numbers and the new rule numbers that corresponds to them.)

Figure: 1 TAC 355

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Part XX. Texas Workforce Commission

Chapter 800. General Administration

Subchapter A. General Provisions

40 TAC §§800.1, 800.2, 800.4

The Texas Workforce Commission (Commission) adopts new §§800.1, 800.2, and 800.4 concerning general provisions pertaining to short title purpose, definitions, and gifts, without changes to proposed text as published in the September 18, 1998, issue of the *Texas Register* (23 TexReg 9537). The adopted text will not be republished here.

The purpose of the rules is to set forth the title and purpose of the subchapter, the definitions applicable to the chapter, and the ethics rules applicable to the Commission.

New Subchapter A, General Provisions, is adopted as the location for rules pertaining to general provisions applicable to the Commission.

New §800.1 sets forth the short title and purpose of the rules contained in the subchapter.

New §800.2 sets forth the definitions applicable to this chapter.

New §800.4 incorporates by reference the Texas Ethics Commission's rules regarding gifts from persons appearing before or regulated by the Commission. The Texas Ethics Commission's rules are incorporated by reference pursuant to Texas Government Code §571.063, which requires each regulatory agency in the executive branch to develop rules limiting the acceptance of gifts or other benefits from persons appearing before or regulated by the agency, which must be at least as restrictive as the rules of the Texas Ethics Commission.

The Commission received no comments on the proposed rules.

The new rules are adopted under Texas Labor Code, §§301.061 and 302.021, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Commission programs; and Texas Government Code §571.063, which requires each regulatory agency in the executive branch to develop rules limiting the acceptance of gifts or other benefits from persons appearing before or regulated by the agency, which must be at least as restrictive as the rules of the Texas Ethics Commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818008
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: December 20, 1998
Proposal publication date: September 18, 1998
For further information, please call: (512) 463-8812

♦ ♦ ♦

40 TAC §800.3

The Texas Workforce Commission (Commission) adopts new §800.3 concerning historically underutilized businesses, without changes to the proposed test as published in the September 18, 1998, issue of the *Texas Register* (23 TexReg 9537). The adopted text will not be republished here.

The purpose of the rule is to set forth the provisions applicable to historically underutilized businesses. Furthermore, the pur-

pose of the rule is to assist historically underutilized businesses by incorporating by reference the General Services Commission rules regarding historically underutilized businesses as required by the 75th Legislature, Regular Session, House Bill 1 (General Appropriations Act) Art. IX, §124(5).

The Commission received no comments on the proposed rule.

The new rule is adopted under Texas Labor Code, §§301.061 and 302.021, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Commission programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 30, 1998.

TRD-9818007
J. Randel (Jerry) Hill
General Counsel
Texas Workforce Commission
Effective date: December 20, 1998
Proposal publication date: September 18, 1998
For further information, please call: (512) 463-8812

REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by the 75th Legislature, Regular Session, House Bill 1 (General Appropriations Act) Art. IX, Section 167. Included here are: (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Proposed Rule Reviews

Texas Department of Public Safety

Title 37, Part I

The Texas Department of Public Safety (DPS) files this notice of intention to review Chapter 3-Traffic Law Enforcement, Chapter 5-Criminal Law Enforcement, and Chapter 25-Safety Responsibility Regulations pursuant to the Appropriations Act of 1997, House Bill 1, Article IX, §167.

As part of this review process, the DPS is proposing amendments to Chapter 3: §§3.22, 3.24, 3.59, and §3.62. Sections 3.63, 3.71, 3.75, and §3.102 are proposed for repeal with simultaneous filing of new §3.71. Chapter 5 amendments include the repeal of §§5.1-5.3, 5.11, and §5.21 with the simultaneous proposal of new §5.1. Amendments to Chapter 25 are: §§25.1-25.5, 25.13-25.15, 25.17, and §25.18. The proposed amendments may be found in the Proposed Rules section of the *Texas Register*. The DPS will accept comments on the §167 requirement as to whether the reason for adopting the rules continues to exist in the comments filed on the proposed amendments.

The DPS is not proposing any changes to Chapter 3: §§3.1-3.10, 3.21, 3.23, 3.25-3.29, 3.41, 3.42, 3.51-3.58, 3.60, 3.61, 3.72-3.74, 3.76, 3.91, 3.101, 3.111, and §3.121; to Chapter 25: §§25.6-25.12, 25.16, and §§25.19-25.21. The DPS's reason for adopting these sections continues to exist. Comments regarding the §167 requirements as to whether the reason for adopting these sections of Chapters 3, 5, and 25 continues to exist may be submitted to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas, 78773-0140, (512) 424-2890 within 20 days after publication of this notice of intention to review.

Any questions pertaining to this notice of intention to review should be directed to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas, 78773-0140, (512) 424-2890.

TRD-9818053
Dudley M. Thomas
Director
Texas Department of Public Safety
Filed: December 1, 1998

♦ ♦ ♦

Public Utility Commission

Title 16, Part I

The Public Utility Commission of Texas files this notice of intention to review §23.6 relating to Spanish Language Requirements, §23.41 relating to Customer Relations, §23.42 relating to Refusal of Service, §23.43 relating to Applicant and Customer Deposit, §23.44 relating to New Construction, §23.45 relating to Billing, and §23.46 relating to Discontinuance of Service pursuant to the Appropriations Act of 1997, House Bill 1, Article IX, §167 (§167). Project Number 17709 has been assigned to the review of these rule sections.

As part of this review process, the commission is proposing the repeal of §23.6 and §§23.41-23.46. The commission is proposing new customer service rules §§25.21-25.26 and §§25.28-25.31 under Project Number 19513 to replace these sections for electric service providers; and §§26.21-26.31 to replace these sections for telecommunications service providers. The proposed new sections and the proposed repeals may be found in the Proposed Rules section of the *Texas Register*. The commission will accept comments on the §167 requirement in the comments filed on the proposed new sections.

Any questions pertaining to this notice of intention to review should be directed to Rhonda Dempsey, Rules Coordinator, Office of Regulatory Affairs, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas, 78711-3326 or at voice telephone (512) 936-7308.

TRD-9818067
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 1, 1998

♦ ♦ ♦

The Public Utility Commission of Texas files this notice of intention to review §23.92 relating to Expanded Interconnection pursuant to the Appropriations Act of 1997, House Bill 1, Article IX, §167 (§167). Project Number 17709 has been assigned to the review of this section.

As part of this review process, the commission is proposing the repeal of §23.92 and is proposing new §26.271 of this title (relating to Expanded Interconnection) to replace §23.92. The proposed repeal and new section may be found in the Proposed Rules section of

the *Texas Register*. As required by §167, the commission will accept comments regarding whether the reason for adopting the rule continues to exist in the comments filed on the proposed new section.

Any questions pertaining to this notice of intention to review should be directed to Rhonda Dempsey, Rules Coordinator, Office of Regulatory Affairs, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas, 78711-3326 or at voice telephone (512) 936-7308.

16 TAC §23.92. Expanded Interconnection.

TRD-9818049
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: November 30, 1998

♦ ♦ ♦

Adopted Rule Review

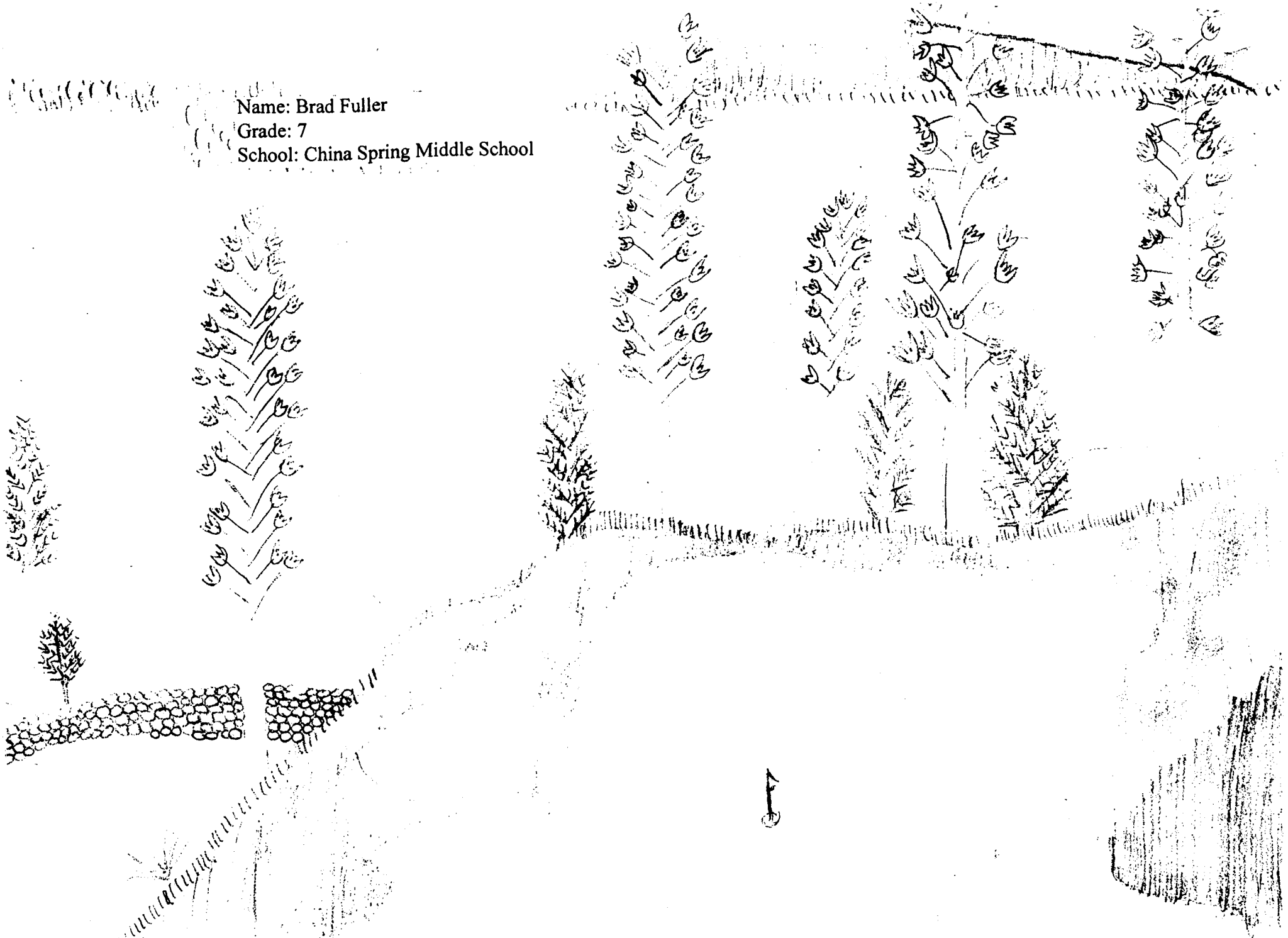
Texas Education Agency

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 161, Advisory Committees, Subchapter AA, Commissioner's Rules, pursuant to the 1998–1999 General Appropriations Act, §167. The TEA proposed the review of 19 TAC Chapter 161, Subchapter AA, in the September 25, 1998, issue of the *Texas Register* (23 TexReg 9800).

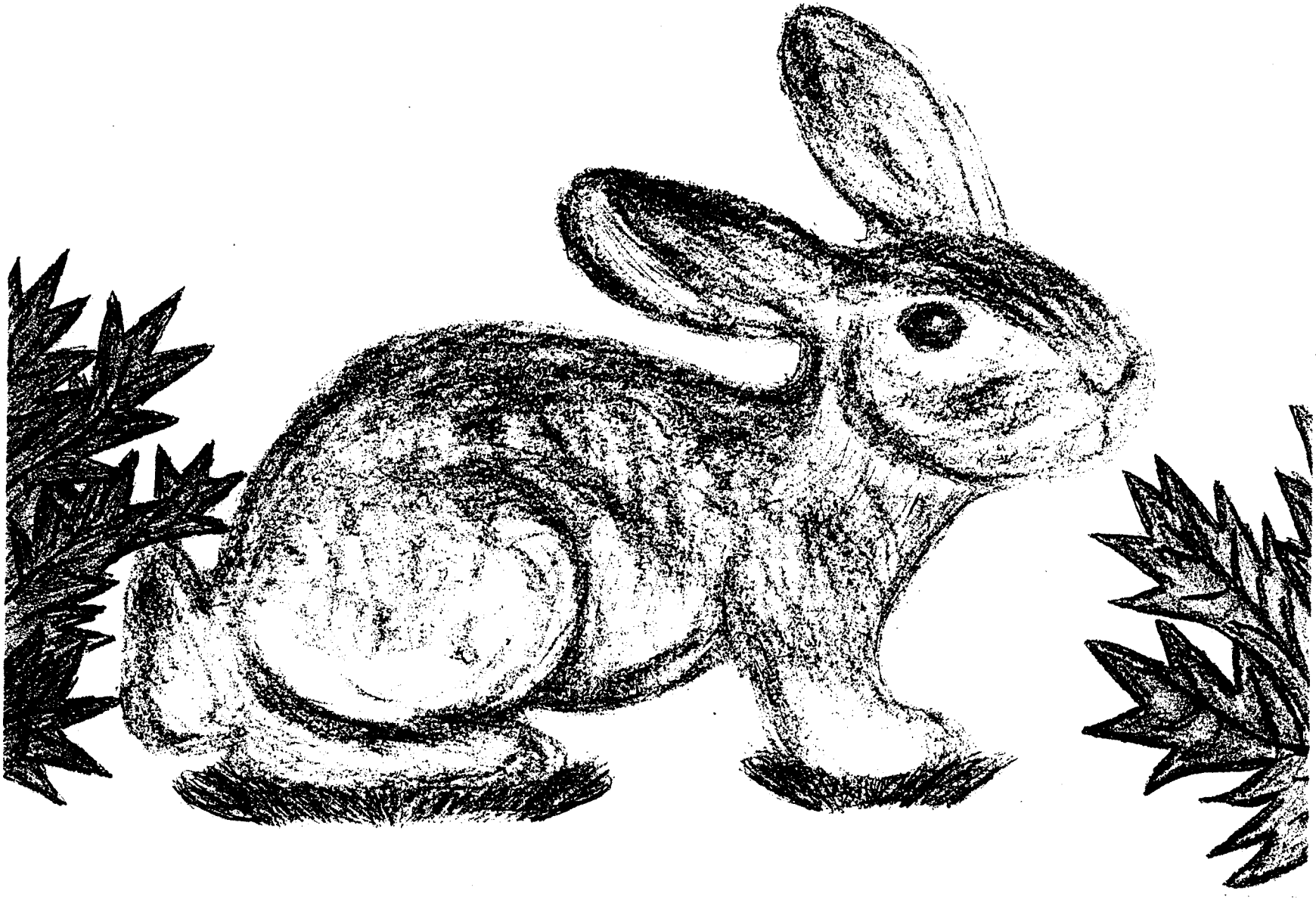
The TEA finds that the reason for adopting continues to exist. The TEA received no comments related to the rule review requirement as to whether the reason for adopting the rules continues to exist. As part of the review, the TEA is proposing an amendment to 19 TAC §161.1003, which may be found in the Proposed Rules section of this issue.

TRD-9818004
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Filed: November 30, 1998

Name: Brad Fuller
Grade: 7
School: China Spring Middle School



Name: Joslyn Miller
Grade: 10
School: China Spring High School



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How to Use the Texas Register

Information Available: The 13 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.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

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.

Review of Agency Rules - notices of state agency rules review.

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 23 (1998) is cited as follows: 23 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 "23 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 23 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.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in a plain text version as well as a .pdf (portable document format) version through the Internet. In addition to the Internet version, the ***Texas Register*** is available online through a dialup bulletin board and as ASCII files on diskettte. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

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.

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 9, April 10, July 10, and October 9, 1998). 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),

November - December 1998 Publication Schedule

Filing deadlines for publication in the *Texas Register* are 12 noon Monday for rules and 12 noon Wednesday for miscellaneous documents and meeting notices. These deadlines are for publication. ***They are not related to posting requirements for open meeting notices.*** Because of printing and mailing schedules, documents received after the deadline for an issue cannot be published until the next issue. An asterisk beside a publication date indicates that the deadlines are early due to state holidays.

Issue date	**Rules: 12 Noon**	**Other Documents: 12 Noon**
45 Friday, November 6	Monday, October 26	Wednesday, October 28
46 Friday, November 13	Monday, November 2	Wednesday, November 4
47 Friday, November 20	Monday, November 9	*Tuesday, November 10
48 Friday, November 27	Monday, November 16	Wednesday, November 18
49 Friday, December 4	Monday, November 23	Wednesday, November 25
50 Friday, December 11	Monday, November 30	Wednesday, December 2
51 Friday, December 18	Monday, December 7	Wednesday, December 9
52 Friday, December 25	Monday, December 14	Wednesday, December 16

January - September 1999 Publication Schedule

Filing deadlines for publication in the *Texas Register* are 12 noon Monday for rules and 12 noon Wednesday for miscellaneous documents. These deadlines are for publication. ***They are not related to posting requirements for open meeting notices.*** Because of printing and mailing schedules, documents received after the deadline for an issue cannot be published until the next issue. An asterisk beside a publication date indicates that the deadlines are early due to state holidays.

Issue date	**Rules: 12 Noon**	**Other Documents: 12 Noon**
1 Friday, January 1	Monday, December 21	Wednesday, December 23
2 Friday, January 8	Monday, December 28	Wednesday, December 30
3 Friday, January 15 *Annual Index*	Monday, January 4	Wednesday, January 6
4 Friday, January 22	Monday, January 11	Wednesday, January 13
5 Friday, January 29	**Friday, January 15*	Wednesday, January 20
6 Friday, February 5	Monday, January 25	Wednesday, January 27
7 Friday, February 12	Monday, February 1	Wednesday, February 3
8 Friday, February 19	Monday, February 8	Wednesday, February 10
9 Friday, February 26	**Friday, February 12*	Wednesday, February 17
10 Friday, March 5	Monday, February 22	Wednesday, February 24
11 Friday, March 12	Monday, March 1	Wednesday, March 3
12 Friday, March 19	Monday, March 8	Wednesday, March 10
13 Friday, March 26	Monday, March 15	Wednesday, March 17
14 Friday, April 2	Monday, March 22	Wednesday, March 24
15 Friday, April 9 *First Quarterly Index*	Monday, March 29	Wednesday, March 31
16 Friday, April 16	Monday, April 5	Wednesday, April 7
17 Friday, April 23	Monday, April 12	Wednesday, April 14
18 Friday, April 30	Monday, April 19	Wednesday, April 21
19 Friday, May 7	Monday, April 26	Wednesday, April 28

Issue date	Rules: 12 Noon	Other Documents: 12 Noon
20 Friday, May 14	Monday, May 3	Wednesday, May 5
21 Friday, May 21	Monday, May 10	Wednesday, May 12
22 Friday, May 28	Monday, May 17	Wednesday, May 19
23 Friday, June 4	Monday, May 24	Wednesday, May 26
24 Friday, June 11	**Friday, May 28*	Wednesday, June 2
25 Friday, June 18	Monday, June 7	Wednesday, June 9
26 Friday, June 25	Monday, June 14	Wednesday, June 16
27 Friday, July 2	Monday, June 21	Wednesday, June 23
28 Friday, July 9 *Second Quarterly Index*	Monday, June 28	Wednesday, June 30
29 Friday, July 16	Monday, July 5	Wednesday, July 7
30 Friday, July 23	Monday, July 12	Wednesday, July 14
31 Friday, July 30	Monday, July 19	Wednesday, July 21
32 Friday, August 6	Monday, July 26	Wednesday, July 28
33 Friday, August 13	Monday, August 2	Wednesday, August 4
34 Friday, August 20	Monday, August 9	Wednesday, August 11
35 Friday, August 27	Monday, August 16	Wednesday, August 18
36 Friday, September 3	Monday, August 23	Wednesday, August 25
37 Friday, September 10	Monday, August 30	Wednesday, September 1
38 Friday, September 17	**Friday, September 3*	Wednesday, September 8
39 Friday, September 24	Monday, September 13	Wednesday, September 15

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