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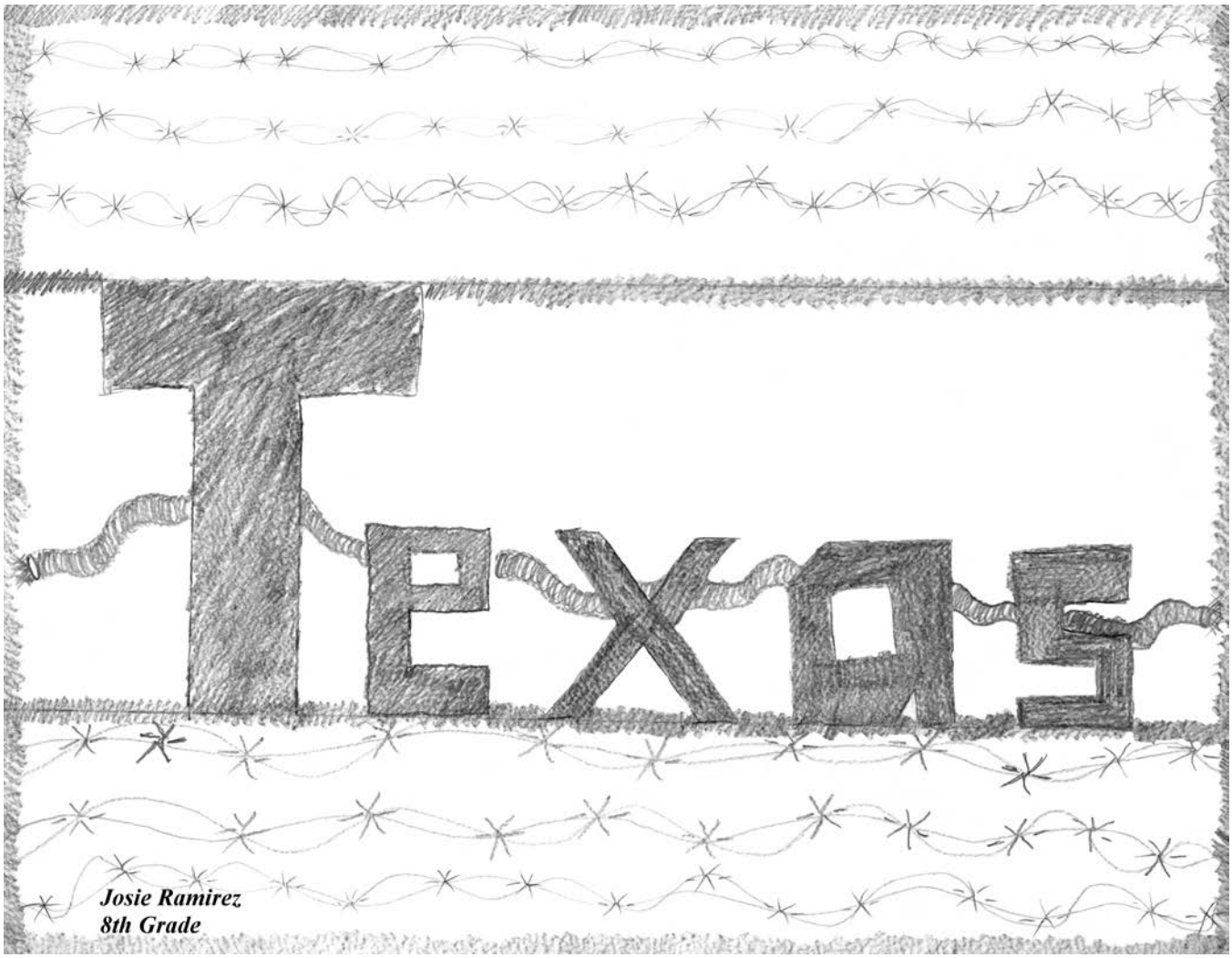

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but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

The artwork featured on the front cover is chosen at random. Inside each issue, 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*.

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Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.texas.gov.

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/open/index.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
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. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Proclamation 41-3378

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of the State of Texas, issued an Emergency Disaster Proclamation on July 5, 2011, certifying that exceptional drought conditions posed a threat of imminent disaster in specified counties in Texas.

WHEREAS, significantly low rainfall has resulted in declining reservoir and aquifer levels, threatening water supplies and delivery systems in many parts of the state; and

WHEREAS, prolonged dry conditions continue to increase the threat of wildfire across many portions of the state; and

WHEREAS, these drought conditions have reached historic levels and continue to pose an imminent threat to public health, property and the economy; and

WHEREAS, this state of disaster includes the counties of Archer, Armstrong, Bailey, Bandera, Baylor, Bell, Bexar, Blanco, Borden, Bosque, Brazoria, Brewster, Briscoe, Brown, Burnet, Calhoun, Callahan, Carson, Castro, Chambers, Childress, Clay, Cochran, Coke, Coleman, Collin, Collingsworth, Colorado, Comal, Comanche, Concho, Cooke, Coryell, Cottle, Crockett, Crosby, Dallam, Dallas, Dawson, Deaf Smith, Delta, Denton, DeWitt, Dickens, Donley, Eastland, Edwards, Ellis, El Paso, Erath, Fannin, Fisher, Floyd, Foard, Frio, Gaines, Galveston, Garza, Gillespie, Glasscock, Goliad, Gray, Grayson, Hale, Hall, Hamilton, Hansford, Hardeman, Hartley, Haskell, Hays, Hemphill, Hidalgo, Hill, Hockley, Hood, Howard, Hudspeth, Hunt, Hutchinson, Irion, Jack, Jackson, Jefferson, Johnson, Jones, Kames, Kaufman, Kendall, Kent, Kerr, Kimble, King, Kinney, Knox, Lamar, Lamb, Lampasas, Lipscomb, Llano, Lubbock, Lynn, Martin, Mason, Matagorda, Maverick, McCulloch, McLennan, Medina, Menard, Mills, Mitchell, Montague, Moore, Motley, Navarro, Nolan, Ochiltree, Oldham, Orange, Palo Pinto, Parker, Parmer, Pecos, Potter, Presidio, Randall, Reagan, Real, Red River, Roberts, Rockwall, Runnels, San Saba, Schleicher, Scurry, Shackelford, Sherman, Somervell, Stephens, Sterling, Stonewall, Sutton, Swisher, Tarrant, Taylor, Terrell, Terry, Throckmorton, Tom Green, Travis, Upton, Uvalde, Val Verde, Victoria, Wharton, Wheeler, Wichita, Wilbarger, Willacy, Williamson, Wise, Yoakum, Young and Zavala.

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation and direct that all necessary measures, both public and private as authorized under Section 418.017 of the code, be implemented to meet that threat.

As provided in Section 418.016 of the code, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the state of disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 6th day of June, 2014.

Rick Perry, Governor

TRD-201403101

♦ ♦ ♦

Lupe Vasquez
6th Grade

THE ATTORNEY GENERAL

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

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

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

Opinions

Opinion No. GA-1069

The Honorable Kenda Culpepper

Rockwall County Criminal District Attorney

Rockwall County Courthouse

1111 East Yellowjacket Lane, Suite 201

Rockwall, Texas 75087

Re: Authority of the Rockwall County Juvenile Board over policy matters of the juvenile probation department, including the adoption of a personnel manual (RQ-1178-GA)

S U M M A R Y

The Rockwall County Juvenile Board possesses authority to adopt written department policy and to adopt a personnel policy manual for use by the juvenile probation department.

Opinion No. GA-1070

The Honorable Judith Zaffirini

Chair, Committee on Government Organization

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether a municipality that has a current tax rate of zero is subject to a rollback election under section 26.07 of the Tax Code or an ad valorem tax-freeze election under article VIII, section 1-b(h) of the Texas Constitution. (RQ-1179-GA)

S U M M A R Y

Under section 26.07 of the Tax Code, if a municipality's ad valorem rollback rate is zero and it adopts a tax rate above zero, the qualified voters of the municipality by petition may require that an election be held to determine whether or not to reduce the ad valorem tax rate back to zero.

Article VIII, section 1-b(h) of the Texas Constitution requires a municipality with an ad valorem tax rate of zero, upon receiving a properly filed petition from five percent of authorized voters, to hold an election to determine whether to freeze the total amount of ad valorem taxes imposed on property that is subject to a residence homestead exemption owned by a person that is disabled or is 65 years of age or older.

For further information, please access the website at www.texasattorneygeneral.gov or call the Opinion Committee at (512) 463-2110.

TRD-201403118
Katherine Cary
General Counsel
Office of the Attorney General
Filed: July 7, 2014

♦ ♦ ♦

Guadalupe Gutierrez
7th Grade

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

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 352. MEDICAID AND CHILDREN'S HEALTH INSURANCE PROGRAM PROVIDER ENROLLMENT

1 TAC §352.17

The Texas Health and Human Services Commission (HHSC) proposes to amend §352.17, concerning Out-of-State Medicaid Provider Eligibility.

Background and Justification

HHSC proposes to amend the provider enrollment criteria to include provisions allowing the enrollment of out-of-state Medicaid providers who provide a medically necessary service that is otherwise unavailable or has limited availability within the state of Texas. The proposed amendment also allows the enrollment of out-of-state providers for limited exceptions for good cause. Section references have been appropriately updated.

Section-by-Section Summary

Proposed amended §352.17(b) adds new paragraph (7) to allow the enrollment of an out-of-state provider who provides a medically necessary service that is otherwise unavailable or has limited availability within the state of Texas. Proposed new paragraph (10) adds the specific good cause exceptions for which an out-of-state provider who provides medically necessary services can enroll. Proposed amended §352.17(e) revises paragraph (2)(B) to update a section reference. Proposed amended §352.17(f) revises paragraph (3) to add specificity to existing language.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the amended rule is in effect, there will be no fiscal impact to state or local governments. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no adverse effect on small businesses or micro businesses, as the rule makes no change to the current business practices.

Public Benefit

Chris Traylor, Chief Deputy Commissioner, has determined that for each year of the first five years the section is in effect, the public will benefit from the adoption of the rule. The proposed amendment will ensure appropriate access to medically necessary services provided by out-of-state providers.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Robert Perez, Senior Policy Analyst, Office of Medicaid Policy, Medicaid and CHIP, 4900 N. Lamar Blvd., Austin, Texas, 78751, by fax to (512) 730-7472; or by e-mail to robert.perez@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Statutory Authority

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

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

§352.17. Out-of-State Medicaid Provider Eligibility.

(a) This section applies only to an out-of-state Medicaid applicant or re-enrolling provider. An applicant or re-enrolling provider is considered out-of-state if:

(1) the physical address where services are or will be rendered is located outside the Texas state border and within the United States;

(2) the physical address where the services or products originate or will originate is located outside the Texas state border

and within the United States when providing services, products, equipment, or supplies to a Medicaid recipient in the state of Texas; or

(3) the physical address where services are or will be rendered is located within the Texas state border, but:

(A) the applicant or re-enrolling provider maintains all patient records, billing records, or both, outside the Texas state border; and

(B) the applicant or re-enrolling provider is unable to produce the originals or exact copies of the patient records or billing records, or both, from the location within the Texas state border where services are rendered.

(b) An applicant or re-enrolling provider that is considered out-of-state under subsection (a) of this section is ineligible to participate in Medicaid unless HHSC or its designee approves the applicant or re-enrolling provider for enrollment on the basis of a determination that the applicant or re-enrolling provider has provided, is providing, or will provide services under one or more of the following criteria:

(1) The services are medically necessary emergency services provided to a recipient who is located outside the Texas state border, in which case the enrollment will be time-limited for an appropriate period as determined by HHSC or its designee, not to exceed one year.

(2) The services are medically necessary services provided to a recipient who is located outside the Texas state border, and in the expert opinion of the recipient's attending physician or other provider, the recipient's health would be or would have been endangered if the recipient were required to travel to Texas, in which case the enrollment will be time-limited for an appropriate period as determined by HHSC or its designee, not to exceed one year.

(3) The services are medically necessary services that are more readily available to a recipient in the state where the recipient is located, in which case the enrollment will be time-limited for an appropriate period as determined by HHSC or its designee.

(4) The services are medically necessary to a recipient who is eligible on the basis of participation in an adoption assistance or foster care program administered by the Texas Department of Family and Protective Services under Title IV-E of the Social Security Act, in which case the enrollment may be time-limited for an appropriate period as determined by HHSC or its designee.

(5) The services are medically necessary and have been prior authorized by HHSC or its designee, and documented medical justification indicating the reasons the recipient must obtain medical care outside Texas is furnished to HHSC or its designee before providing the services and before payment, in which case the enrollment may be time-limited for an appropriate period as determined by HHSC or its designee.

(6) The services are medically necessary and it is the customary or general practice of recipients in a particular locality within Texas to obtain services from the out-of-state provider, if the provider is located in the United States and within 50 miles driving distance from the Texas state border, or as otherwise demonstrated on a case-by-case basis.

(A) Enrollment under this paragraph may be time-limited for an appropriate period as determined by HHSC or its designee.

(B) An out-of-state provider does not meet the criterion in this paragraph merely on the basis of having established business relationships with one or more providers that participate in Medicaid.

(7) The services are medically necessary and the nature of the service is such that providers for this service are limited or not readily available within the state of Texas.

(8) [~~(7)~~] The services are medically necessary services to one or more dually eligible recipients (i.e., recipients who are enrolled in both Medicare and Medicaid) and the out-of-state provider may be considered for reimbursement of co-payments, deductibles, and co-insurance, in which case the enrollment may be time-limited for an appropriate period as determined by HHSC or its designee, and the enrollment will be restricted to receiving reimbursement only for the Medicaid-covered portion of Medicare crossover claims.

(9) [~~(8)~~] The services are provided by a pharmacy that is a distributor of a drug that is classified by the U.S. Food and Drug Administration (FDA) as a limited distribution drug.

(10) The services are medically necessary and one or more of the following exceptions for good cause exist and can be documented:

(A) Texas Medicaid enrolled providers rely on the services provided by the applicant.

(B) Applicant maintains existing agreements as a participating provider through one or more Medicaid managed care organizations (MCO) and enrollment of the applicant leads to more cost-effective delivery of Medicaid services.

(c) An out-of-state provider that applies for enrollment in Medicaid must submit documentation along with the enrollment application to demonstrate that the provider meets one or more of the criteria in subsection (b) of this section. The provider must submit any additional requested information to HHSC or its designee before enrollment may be approved.

(d) If HHSC or its designee determines that an out-of-state provider meets one or more of the criteria in subsection (b) of this section, the provider must meet all other applicable enrollment eligibility requirements, including those specified in Chapter 371 of this title (relating to Medicaid and Other Health and Human Services Fraud and Abuse Program Integrity) before enrollment may be approved.

(e) Other applicable requirements.

(1) An out-of-state provider that is enrolled pursuant to subsections (b) - (d) of this section must follow all other applicable Medicaid participation requirements identified by HHSC or its designee for each service provided. Other applicable requirements that must be followed may include:

(A) service benefits and limitations;

(B) documentation procedures;

(C) obtaining prior authorization for the service whenever required; and

(D) claims filing deadlines as specified in §354.1003 of this title (relating to Time Limits for Submitted Claims).

(2) Certain out-of-state providers are not entitled to utilize the extended 365-day claim filing deadline provided in §354.1003(a)(5)(H) of this title that is otherwise available to out-of-state providers, and must comply with the same claims filing deadlines that apply to in-state providers under that section. Those out-of-state providers are:

(A) providers that are approved for enrollment under the criterion specified in subsection (b)(6) of this section, where the specific basis for approval is that the provider is located within 50 miles driving distance from the Texas state border; and

(B) providers that are approved for enrollment under the criterion specified in subsection (b)(8) [~~(b)(7)~~] of this section regarding dually eligible recipients.

(f) An out-of-state provider that is enrolled pursuant to subsections (b) - (d) of this section must:

(1) comply with the terms of the Medicaid provider agreement;

(2) provide services in compliance with all applicable federal, state, and local laws and regulations related to licensure and certification in the state where the out-of-state provider is located; and

(3) comply with all state and federal laws and regulations relating to Medicaid in the state of Texas.

(g) HHSC or its designee determines the basis and amount of reimbursement for medical services provided outside Texas and within the United States in accordance with Chapter 355 of this title (relating to Reimbursement Rates).

(h) A laboratory may participate as an in-state provider under any program administered by a health and human services agency, including HHSC, that involves laboratory services, regardless of the location where any specific service is performed or where the laboratory's facilities are located if:

(1) the laboratory or an entity that is a parent, subsidiary, or other affiliate of the laboratory maintains laboratory operations in Texas;

(2) the laboratory and each entity that is a parent, subsidiary, or other affiliate of the laboratory, individually or collectively, employ at least 1,000 persons at places of employment located in this state; and

(3) the laboratory is otherwise qualified to provide the services under the program and is not prohibited from participating as a provider under any benefits programs administered by a health and human services agency, including HHSC, based on conduct that constitutes fraud, waste, or abuse.

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

Filed with the Office of the Secretary of State on July 7, 2014.

TRD-201403103
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 424-6900

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CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 6. HOSPITAL SERVICES

1 TAC §354.1072

The Texas Health and Human Services Commission (HHSC) proposes to amend §354.1072, concerning Authorized Inpatient Hospital Services, to remove the exemption from compliance with the three-day payment window for children's hospitals.

Background and Justification

The 2012-2013 General Appropriations Act, H.B. 1, 82nd Legislature, Regular Session, 2011 (Article II, Health and Human Services Commission, Rider 61(b)(23)), authorized HHSC to implement the Medicare billing prohibition, known as the three-day payment window, as a cost containment measure. The three-day payment window refers to Medicare's policy for payment of services provided in hospital outpatient departments on the day of or during the three days preceding the date of an inpatient admission. A hospital subject to the three-day payment window must include in its charges for an inpatient stay all diagnostic services and non-diagnostic services related to the inpatient stay during the three-day payment window.

Effective September 1, 2012, the Medicaid/CHIP Division amended §354.1072 to implement the three-day payment window. The rule exempted certain hospitals that were not "subsection (d)" hospitals (those described in Social Security Act §1886(d), e.g., children's hospitals, psychiatric hospitals, and rehabilitation hospitals) and instead subjected the exempt hospitals to a one-day payment window.

The 2014-2015 General Appropriations Act, S.B. 1, 83rd Legislature, Regular Session, 2013 (Article II, HHSC, Rider 71) required HHSC to implement an all patient diagnosis-related group (APR-DRG) prospective payment system for inpatient services provided by a children's hospital to patients served in the Medicaid fee-for-service program, effective September 1, 2013. The switch to the APR-DRG prospective payment system for children's hospitals necessitates the change to the three-day payment window to children's hospitals.

The state legislative direction given to HHSC in the 83rd Legislature aligns Medicaid policy with the Medicare three-day payment window policy for children's hospitals subject to the APR-DRG prospective payment system. The corresponding rate rule (§355.8052) to implement the new payment methodology for children's hospitals required by Rider 71 went into effect September 1, 2013. This proposal aligns the program rule regarding children's hospitals and the three-day payment window with the reimbursement rule (§355.8052) already in effect.

Section-by-Section Summary

Proposed amended §354.1072(a)(4) updates the title of Division 35 of the subchapter.

Proposed amended §354.1072(b)(2) applies the three-day payment window to children's hospitals rather than the one-day payment window.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the proposed amended rule is in effect, there will be no fiscal impact to state or local governments. There are no anticipated economic costs to persons who are required to comply with the proposed amendment. There is no anticipated negative impact on local employment.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro businesses to comply with the proposed amendment as the entities impacted are children's hospi-

tals. These entities are not considered to be small businesses or micro-businesses.

Public Benefit

Chris Traylor, Chief Deputy Commissioner, has determined that, for each year of the first five years the proposal is in effect, the anticipated public benefit expected as a result of enforcing the amended section is that the language of the rule will more accurately reflect the actual methodology used to calculate hospital inpatient reimbursement rates.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Kami Geoffray, Policy Advisor, Office of Medicaid/CHIP Policy Development, Mail Code H310, 4900 N. Lamar Boulevard, Austin, Texas 78751; by fax to (512) 730-7472; or by e-mail to kami.geoffray@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Statutory Authority

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

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

§354.1072. Authorized Inpatient Hospital Services.

(a) Inpatient hospital services. Inpatient hospital services include those items and services that are ordinarily furnished by the hospital for the care and treatment of inpatients and are provided under the direction of a physician in a Title XIX hospital or a Title XVIII or XIX out-of-state hospital approved for participation. Except as otherwise specified, and subject to the qualifications, limitations, and exclusions set forth, benefits are provided for hospital services set forth as follows when provided to eligible recipients.

(1) Duration of care. Except as otherwise specified in §354.1175 of this subchapter (relating to Organ Transplants), when an eligible recipient is confined as an inpatient in a Title XIX hospital, or a Title XVIII or XIX out-of-state hospital approved for participation, the Health and Human Services Commission (HHSC) or its designee pays for medically necessary inpatient hospital services actually furnished to the recipient during the first 30 days of each Title XIX spell of illness. The Title XIX spell-of-illness limitations are waived for medically necessary inpatient services provided to recipients less than age twenty one. The services are subject to the utilization review requirements of the Texas Medical Assistance (Medicaid) Program.

(2) Benefits for inpatient hospital care. The hospital services for which benefits are provided under paragraph (1) of this subsection consist of the following:

(A) bed and board in semiprivate accommodations or in an intensive or coronary care unit, including meals, special diets, and general nursing services; or an allowance for bed and board in private accommodations, including meals, special diets, and general nursing service, to the extent of the hospital's charge for its most prevalent semiprivate accommodations, except that bed and board in private accommodations are provided in full if required for medical reasons;

(B) all other care in the nature of usual hospital services; and

(C) maternity care, including the usual and customary care for female recipients.

(3) HHSC will impose reimbursement denials or reductions for potentially preventable events and preventable adverse events as defined in §354.1070 of this division (relating to Definitions).

(4) HHSC will categorize patients based on severity of illness, risk of mortality and other criteria defined by HHSC or its designee to identify potentially preventable events as defined in §354.1070 of this division and apply corresponding reimbursement adjustments as described in Division 35 of this subchapter (relating to Reimbursement Adjustments [~~Adjustment~~] for Potentially Preventable Events).

(b) Charges for hospital services provided before admission.

(1) Except as provided in paragraph (2) of this subsection, a hospital or any entity that is wholly owned or wholly operated by a hospital must include in its inpatient charges the cost of all reimbursable services provided by the hospital to a patient on the date of admission and during the three calendar days immediately preceding the date of the patient's admission, if the services are:

(A) diagnostic services, including clinical diagnostic lab tests; or

(B) non-diagnostic services related to the inpatient stay, except ambulance and maintenance renal dialysis services.

(2) A hospital receiving reimbursement under the methodologies described in §355.8056 of this title (relating to State-Owned Teaching Hospital Reimbursement Methodology) or §355.8060 of this title (relating to Reimbursement Methodology for Freestanding Psychiatric Facilities) may not [~~that is not a "subsection (d) hospital" as defined in Social Security Act §1886(d)(1)(B) (42 U.S.C. 1396ww(d)(1)(B)) must~~] include in its charges the cost of services described in paragraph (1) of this subsection provided by the hospital to a patient during the one calendar day immediately preceding the date of admission. [~~Hospitals that are not "subsection (d) hospitals" include children's, psychiatric, and rehabilitation hospitals.~~]

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

Filed with the Office of the Secretary of State on July 2, 2014.

TRD-201403095

Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 424-6900

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CHAPTER 370. STATE CHILDREN'S HEALTH INSURANCE PROGRAM

The Texas Health and Human Services Commission (HHSC) proposes to amend §370.4, concerning Definitions, and §370.453, concerning Balance Billing, to clarify that balance billing is prohibited in the Children's Health Insurance Program (CHIP) by any network or non-network provider who provides covered medical or dental services to a CHIP member.

Background and Justification

Balance billing is the practice of charging managed care plan members for costs of covered services that are in excess of authorized cost-sharing and program reimbursement rates. The current HHSC rule at §370.453 prohibits providers from balance billing CHIP members. Federal law also limits the amounts providers may charge CHIP members for covered services to the cost sharing amounts authorized in a State Children's Health Insurance Program (SCHIP) State Plan (see Sections 2103(e)(1)(A) and 2103(f) of the Social Security Act; and 42 C.F.R. §457, Subpart E).

In August 2013, the federal Centers for Medicare and Medicaid Services (CMS) clarified that the practice of balance billing CHIP members by out-of-network providers is impermissible under federal law. The proposed changes clarify current policy by aligning the rule with current federal law. Although the intent of the current rule is to prohibit all balance billing, the specific wording of the rule has been misinterpreted by some providers, who currently balance bill CHIP members and their families.

HHSC proposes to amend the balance billing rules to clarify that balance billing is prohibited by any network or non-network provider who provides covered medical or dental services to a CHIP member. The proposed amendment to §370.453 clarifies that a network or non-network provider may only seek reimbursement from a CHIP managed care organization for a covered medical or dental service provided to a CHIP member, and prohibits a network or non-network provider from billing a CHIP member, the CHIP member's family, or the CHIP member's guardian for a covered medical or dental service in excess of authorized co-payments. The proposed amendment to §370.453 includes balance billing exceptions for covered CHIP services with a co-payment or capped benefit level, and non-covered services.

The proposed rule changes are intended to prevent the unauthorized billing of CHIP members and their families for covered services. As a result, the proposal will help ensure that CHIP remains affordable for families.

Section-by-Section Summary

Proposed amended §370.4 adds definitions for "Emergency behavioral health condition," "Emergency Service," and "Emergency Medical Condition." These terms have the meanings assigned by §353.2 of this title (relating to Definitions).

Proposed amended §370.453(a) clarifies that a provider may only seek reimbursement from a participating managed care organization for covered services provided to a CHIP member, and prohibits a provider from seeking reimbursement or attempting to obtain payment from a CHIP member, the CHIP member's family, or the CHIP member's guardian for covered services.

Proposed new §370.453(b) applies the balance billing prohibition to all covered services provided to a CHIP member, including to emergency services provided to a CHIP member by an out-of-network provider.

Proposed amended §370.453(c) lists exceptions to the unauthorized billing practices. Unauthorized billing practices do not include billing for authorized co-payments, covered CHIP services beyond the benefit cap, and non-covered services.

Proposed amended §370.453(d) prohibits all providers, not just eligible providers, from billing or taking recourse against CHIP members, their family, or their guardians for claims denied due to processing error.

Proposed new §370.453(e) specifies that the rules on unauthorized billing practices apply to network and out-of-network providers.

Fiscal Note

Greta Rymal, Deputy Commissioner for Financial Services, has determined that during the first five-year period the amended rules are in effect there will be no fiscal impact to state or local governments.

There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated negative impact on local employment.

Small and Micro-business Impact Analysis

Ms. Rymal has also determined that there will be no effect on small businesses or micro businesses to comply with the amendments as they will not be required to alter their business practices. CHIP balance billing is already prohibited and this rule merely makes that prohibition more explicit.

Public Benefit

Chris Traylor, Chief Deputy Commissioner, has determined that for each year of the first five years the rules are in effect, the public will benefit from the adoption of the rules. The anticipated public benefit, as a result of enforcing the sections, will be that the CHIP program will remain affordable for families. The proposed rule amendments will help clarify the longstanding prohibition on balance billing CHIP members and their families for covered services, and therefore prevent such practices. CHIP families will be able to maintain affordable health care coverage without receiving additional bills from CHIP health care providers.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Brian Dees, Senior Policy Analyst, Medicaid and CHIP Division, Health and Human Services Commission at 4900 North Lamar Boulevard, MC H-310, Austin, Texas 78751; by fax to (512) 491-1953; or by e-mail to brian.dees@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for September 2, 2014 from 9:00 a.m. to 10:00 a.m.(central time) in the Brown-Heatly Building, Public Hearing Room, located at 4900 North Lamar Boulevard, Austin, Texas 78751 Persons requiring further information, special assistance, or accommodations should contact Sallie Allen at (512) 424-6969.

SUBCHAPTER A. PROGRAM ADMINISTRATION

1 TAC §370.4

Statutory Authority

The amendment is proposed under the authority granted to HHSC by Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed amendment affects Texas Health and Safety Code, Chapter 62, and Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by the proposed amendment.

§370.4. Definitions.

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

(1) Action--

(A) In the context of an eligibility or disenrollment determination by HHSC or its designee, action is defined as:

(i) denial of Children's Health Insurance Program (CHIP) eligibility;

(ii) disenrollment from CHIP; or

(iii) the failure of HHSC or its designee to act within 45 days on an applicant's request for CHIP eligibility determination.

(B) "Action" does not include expiration of a time-limited service.

(2) Acute care--Preventive care, primary care, and other medical or behavioral health care provided for a condition having a relatively short duration.

(3) Acute care hospital--A hospital that provides acute care services.

(4) Adverse determination--A determination by a managed care organization (MCO) that the health care services or dental services furnished, or proposed to be furnished, to a patient are not medically necessary or appropriate.

(5) Agreement or Contract--The formal, written, and legally enforceable contract and amendments thereto between HHSC and an MCO.

(6) Alien--A person who is not a native born or naturalized citizen of the United States of America.

(7) Allowable revenue--All managed care revenue received by the MCO pursuant to the contract during the contract period, including retroactive adjustments made by HHSC. This would include any revenue earned on CHIP managed care funds such as investment income, earned interest, or third party administrator earnings from services to delegated networks.

(8) Appeal--The formal process by which a member or his or her representative requests a review of the MCO's action.

(9) Applicant--An individual who applies for health and dental care coverage on behalf of the child. An applicant can only be:

(A) a child's parent, whether biological or adoptive;

(B) a child's grandparent, relative or other adult who provides care for the child;

(C) a minor not living with an adult applying for himself/herself;

(D) a child's step-parent; or

(E) a taxpayer who expects to claim the child on a federal income tax return for the taxable year in which CHIP eligibility is requested

(10) Application--The standardized, written document that an applicant must complete to apply for health and dental care coverage through CHIP.

(11) Behavioral health service--A covered service for the treatment of mental, emotional, or chemical dependency disorders.

(12) Capitation rate--A fixed, predetermined fee paid by HHSC to the MCO each month, in accordance with the contract, for each enrolled member in exchange for which the MCO arranges for or provides a defined set of covered services to the member, regardless of the amount of covered services used by the enrolled member.

(13) Child--An adoptive, step, or natural child who is under the age of 19.

(14) Children's Health Insurance Program or CHIP or Program--The Texas State Children's Health Insurance Program established under Title XXI of the federal Social Security Act (42 U.S.C. §§1397aa, et seq.) the Texas Health and Safety Code, Chapters 62 (relating to Child Health Plan For Certain Low-Income Children) and 63 (relating to Health Benefits Plan for Certain Children).

(15) CHIP Dental Services--The dental services provided through a dental MCO to a CHIP member.

(16) Claims processing entity--The MCO or its subcontractor that processes claims for CHIP.

(17) CMS--The Centers for Medicare and Medicaid Services, which is the federal agency responsible for administering Medicare and overseeing state administration of Medicaid and CHIP.

(18) HHSC--The Texas Health and Human Services Commission.

(19) Complainant--A member, or a treating provider or other individual designated to act on behalf of the member, who files a complaint.

(20) Complaint--Any dissatisfaction, expressed by a complainant, orally or in writing, to the MCO, with any aspect of the MCO's operation, including dissatisfaction with plan administration; procedures related to review or appeal of an adverse determination, as set forth in Texas Insurance Code, Chapter 843, Subchapter G (relating to Dispute Resolution); the denial, reduction, or termination of a service for reasons not related to medical necessity; the way a service is provided; or disenrollment decisions. The term does not include misinformation that is resolved promptly by supplying the appropriate information or clearing up the misunderstanding to the satisfaction of the member.

(21) Cost Sharing--Any enrollment fees or co-payments the member is responsible for paying.

(22) Covered service--A health care service or a dental service or item that the MCO must arrange to provide and pay for on a member's behalf under the terms of the contract executed between the MCO and HHSC. This includes all covered services and benefits identified in the Texas CHIP State Plan, and all value-added services approved by HHSC

(23) Cultural competency--The ability of individuals and systems to provide services effectively to people of various cultures, races, ethnic backgrounds, and religions in a manner that recognizes, values, affirms, and respects the worth of the individuals and protects and preserves their dignity.

(24) Day--Calendar day, unless otherwise specified.

(25) Default enrollment--The process established by HHSC to assign a CHIP managed care enrollee to an MCO when the enrollee has not selected an MCO.

(26) Dental contractor--A dental MCO that is under contract with HHSC for the delivery of dental services.

(27) Dental home--A provider who has contracted with a dental MCO to serve as a dental home to a member and who is responsible for providing routine preventive, diagnostic, urgent, therapeutic, initial, and primary care to patients, maintaining the continuity of patient care, and initiating referral for care. Provider types that can serve as dental homes are federally qualified health centers and individuals who are general dentists or pediatric dentists.

(28) Dental managed care organization (dental MCO)--A dental indemnity insurance provider or dental health maintenance organization licensed or approved by the Texas Department of Insurance.

(29) Dental service--The routine preventive, diagnostic, urgent, therapeutic, initial, and primary care provided to a member and included within the scope of HHSC's agreement with a dental contractor. For purposes of this chapter, "dental service" does not include dental devices for craniofacial anomalies; treatment rendered in a hospital, urgent care center, or ambulatory surgical center setting for craniofacial anomalies; or emergency services provided in a hospital, urgent care center, or ambulatory surgical center setting involving dental trauma. These types of emergency services are treated as health care services in this chapter.

(30) Designee--A contractor of HHSC authorized to act on behalf of HHSC under this chapter.

(31) Disability--A physical or mental impairment that substantially limits one or more of an individual's major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, socializing, or working.

(32) Eligible provider--A network provider who provides medical services to a member or a non-network provider who agrees with an MCO to see a member for an agreed-upon rate on a case-by-case basis.

(33) Emergency behavioral health condition--Any condition, without regard to the nature or cause of the condition, that in the opinion of a prudent layperson possessing an average knowledge of health and medicine:

(A) requires immediate intervention and/or medical attention without which the client would present an immediate danger to themselves or others; or

(B) renders the client incapable of controlling, knowing, or understanding the consequences of his or her actions.

(34) Emergency Medical Condition--A medical condition manifesting itself by acute symptoms of recent onset and sufficient severity (including severe pain), such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical care could result in:

(A) placing the patient's health in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part;

(D) serious disfigurement; or

(E) serious jeopardy to the health of a pregnant woman or her unborn child.

(35) Emergency Service--A covered inpatient and outpatient service, furnished by a network provider or out-of-network provider that is qualified to furnish such service, that is needed to evaluate or stabilize an emergency medical condition and/or an emergency behavioral health condition. For health care MCOs, the term "emergency service" includes post-stabilization care services.

(36) [~~(33)~~] Enrollment--The process by which a child determined to be eligible for CHIP is enrolled in a CHIP MCO serving the service area in which the child resides.

(37) [~~(34)~~] Exclusive provider benefit plan (EPBP)--An MCO that complies with 28 TAC §§3.9201 - 3.9212 (relating to the Texas Department of Insurance's requirements for EPBPs), and contracts with HHSC to provide CHIP coverage.

(38) [~~(35)~~] Experience rebate--The portion of the MCO's net income before taxes that is returned to the State in accordance with the MCO's contract with HHSC.

(39) [~~(36)~~] Federal Poverty Level (FPL)--The income guidelines issued annually and published in the *Federal Register* by the United States Department of Health and Human Services.

(40) [~~(37)~~] Health care managed care organization (health care MCO)--An entity that is licensed or approved by the Texas Department of Insurance to operate as a health maintenance organization or to issue an EPBP.

(41) [~~(38)~~] Health care services--The acute care, behavioral health care, and health-related services that an enrolled population might reasonably require in order to be maintained in good health, including, at a minimum, emergency services and inpatient and outpatient services.

(42) [~~(39)~~] Health maintenance organization (HMO)--An organization that holds a certificate of authority from the Texas Department of Insurance to operate as an HMO under Chapter 843 of the Texas Insurance Code, or a certified Approved Non-Profit Health Corporation formed in compliance with Chapter 844 of the Texas Insurance Code (relating to Certification of Nonprofit Health Corporations).

(43) [~~(40)~~] Hospital--A licensed public or private institution as defined in the Texas Health and Safety Code at Chapter 241 (relating to Hospitals), or Chapter 261 (relating to Municipal Hospitals).

(44) [~~(41)~~] Household composition--The group of individuals who are considered in determining eligibility for an applicant or recipient for certain medical programs based on tax status, tax relationships, living arrangements, and family relationships, referenced in 42 CFR §435.603(f) as "household."

(45) [~~(42)~~] Main dental home provider--See definition of "dental home" in this section.

(46) [~~(43)~~] Main dentist--See definition of "dental home" in this section.

(47) [~~(44)~~] Managed care--A health care delivery system or dental services delivery system in which the overall care of a patient is coordinated by or through a single provider or organization.

(48) [~~(45)~~] Managed care organization (MCO)--A dental MCO or a health care MCO.

(49) [~~(46)~~] Marketing--Any communication from an MCO to a client who is not enrolled with the MCO that can reasonably be interpreted as intended to influence the client's decision to enroll, not to enroll, or to disenroll from a particular MCO.

(50) [~~(47)~~] Marketing materials--Materials that are produced in any medium by or on behalf of the MCO that can reasonably be interpreted as intending to market to potential members. Materials relating to the prevention, diagnosis or treatment of a medical or dental condition are not marketing materials.

(51) [~~(48)~~] Medical home--A primary care provider (PCP) or specialty care provider who has accepted the responsibility for providing accessible, continuous, comprehensive, and coordinated care to members participating in an MCO contracted with HHSC.

(52) [~~(49)~~] Medically necessary health care services--Means:

(A) Dental services and non-behavioral health services that are:

(i) reasonable and necessary to prevent illnesses or medical conditions, or provide early screening, interventions, or treatments for conditions that cause suffering or pain, cause physical deformity or limitations in function, threaten to cause or worsen a disability, cause illness or infirmity of a member, or endanger life;

(ii) provided at appropriate facilities and at the appropriate levels of care for the treatment of a member's health conditions;

(iii) consistent with health care practice guidelines and standards that are endorsed by professionally recognized health care organizations or governmental agencies;

(iv) consistent with the member's diagnoses;

(v) no more intrusive or restrictive than necessary to provide a proper balance of safety, effectiveness, and efficiency;

(vi) not experimental or investigative; and

(vii) not primarily for the convenience of the member or provider.

(B) Behavioral health services that:

(i) are reasonable and necessary for the diagnosis or treatment of a mental health or chemical dependency disorder, or to improve, maintain, or prevent deterioration of functioning resulting from such a disorder;

(ii) are in accordance with professionally accepted clinical guidelines and standards of practice in behavioral health care;

(iii) are furnished in the most appropriate and least restrictive setting in which services can be safely provided;

(iv) are the most appropriate level or supply of service that can safely be provided;

(v) could not be omitted without adversely affecting the member's mental and/or physical health or the quality of care rendered;

(vi) are not experimental or investigative; and

(vii) are not primarily for the convenience of the member or provider.

(53) [~~(50)~~] Member education program--A planned program of education:

(A) concerning access to health care services or dental services through the MCO and about specific health or dental topics;

(B) that is approved by HHSC; and

(C) that is provided to members through a variety of mechanisms that must include, at a minimum, written materials and face-to-face or audiovisual communications.

(54) [~~(51)~~] Member materials--All written materials produced or authorized by the MCO and distributed to members or potential members containing information concerning the managed care program. Member materials include member ID cards, member handbooks, provider directories, and marketing materials.

(55) [~~(52)~~] Member--A child enrolled in a CHIP MCO.

(56) [~~(53)~~] Participating MCO--An MCO that has a contract with HHSC to provide services to members.

(57) [~~(54)~~] Primary care provider (PCP)--A physician or other provider who has agreed with the health care MCO to provide a medical home to members and who is responsible for providing initial and primary care to patients, maintaining the continuity of patient care, and initiating referral for care.

(58) [~~(55)~~] Provider--A credentialed and licensed individual, facility, agency, institution, organization or other entity, and its employees and subcontractors, that has a contract with the MCO for the delivery of covered services to the MCO's members.

(59) [~~(56)~~] Provider education program--Program of education about the CHIP managed care program and about specific health or dental care issues presented by the MCO to its providers through written materials and training events.

(60) [~~(57)~~] Provider network or network--All providers that have contracted with the MCO for the CHIP program.

(61) [~~(58)~~] Quality improvement--A system to continuously examine, monitor, and revise processes and systems that support and improve administrative and clinical functions.

(62) [~~(59)~~] Recipient--An individual receiving CHIP services, including a person who is renewing eligibility for CHIP.

(63) [~~(60)~~] Risk--The potential for loss as a result of expenses and costs of the MCO exceeding payments made by HHSC under the contract.

(64) [~~(61)~~] Service area--The counties included in any HHSC-defined service area as applicable to each MCO.

(65) [~~(62)~~] Qualified Alien--An alien who, at the time of application, satisfies the criteria established under 8 U.S.C. §1641(b).

(66) [~~(63)~~] Significant traditional provider (STP)--A provider identified by HHSC as having provided a significant level of care to the target population.

(67) [~~(64)~~] SSI--Supplemental Security Income.

(68) [~~(65)~~] State Fiscal Year--The 12-month period beginning September 1 of each calendar year and ending August 31 of the following calendar year.

(69) [~~(66)~~] State Plan--The plan permitted under federal law and approved by CMS that allows the state to implement the CHIP program.

(70) [~~(67)~~] Value-added service--A service provided by an MCO that is in addition to the covered services included within the scope of the CHIP State Plan and the MCO's contract with HHSC.

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

Filed with the Office of the Secretary of State on July 7, 2014.

TRD-201403104
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 424-6900

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SUBCHAPTER E. PROVIDER REQUIREMENTS

1 TAC §370.453

Statutory Authority

The amendment is proposed under the authority granted to HHSC by Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The proposed amendment affects Texas Health and Safety Code, Chapter 62, and Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by the proposed amendment.

§370.453. Balance Billing.

(a) A provider may only seek reimbursement from a CHIP managed care organization for a covered service provided to a CHIP member. A provider may not seek reimbursement or attempt to obtain payment from a CHIP member, the CHIP member's family, or the CHIP member's guardian for a covered service. [~~Eligible provider must agree that payment received for covered services will be accepted as payment in full and must agree that they will not bill the member or the member's guardian for any remaining balance for covered services rendered.~~]

(b) The provisions of subsection (a) of this section apply to all covered services provided to a CHIP member, including emergency services provided by an out-of-network provider, in compliance with federal regulations (42 C.F.R. §457.515(f)). [~~The prohibition in subsection (a) of this section does not apply to unauthorized out-of-network services, or to services that are not a covered benefit.~~]

(c) The provisions of subsection (a) of this section do not apply to:

(1) co-payment authorized under Subchapter C, Division 2 of this title (relating to Cost-Sharing Requirements);

(2) a covered service of CHIP with a capped benefit level, once the CHIP member exceeds the benefit cap; or

(3) services that are not covered services under CHIP.

(d) [~~(c)~~] Providers [~~Eligible providers~~] may not bill or take other recourse against the CHIP member, the CHIP member's family, or the CHIP member's guardian for claims denied as a result of error attributed to the [~~eligible~~] provider or Claims Processing Entity.

(e) This rule applies to providers that participate in a CHIP managed care organization's network and out-of-network providers.

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

Filed with the Office of the Secretary of State on July 7, 2014.

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Jack Stick
Chief Counsel
Texas Health and Human Services Commission
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TITLE 7. BANKING AND SECURITIES

PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER E. DIRECTION OF AFFAIRS

7 TAC §91.502

The Credit Union Commission (the Commission) proposes amendments to §91.502, concerning Director/Committee Member Fees, Insurance, Reimbursable Expenses, and Other Authorized Expenditures. The proposal addresses unofficial comments received on prior proposed amendments published in the March 7, 2014, issue of the *Texas Register* (39 TexReg 1590). The earlier proposal was withdrawn in the July 4, 2014, issue of the *Texas Register* (39 TexReg 5139). The amendments clarify that meeting fees which are not excessive may be paid to directors, honorary directors, advisory directors, and committee members. The amendments require annual disclosure of fees to the membership. The amendments grant

enforcement authority to the Credit Union Department to limit or prohibit meeting fees.

The earlier proposed amendments were withdrawn, then modified and reproposed for publication in response to unofficial comments received on the withdrawn proposal, as well as to ensure that director fees are appropriate for the institution and transparent to the members.

Stacey McLarty, General Counsel, has determined that for the first five-year period the amended rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Ms. McLarty has also determined that for each year of the first five years the amended rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Stacey McLarty, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under the provision of the Texas Finance Code §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §122.062, which limits the compensation a director may receive for services.

The specific section affected by the proposed amended rule is Texas Finance Code §122.062.

§91.502. Director/Committee Member Fees, Insurance, Reimbursable Expenses, and Other Authorized Expenditures.

(a) Expense reimbursement. A credit union may reimburse out-of-pocket travel and related expenses that are reasonable and appropriate for the business activity undertaken. A credit union shall adopt a written board policy to administer and control travel expenses paid or incurred in connection with directors or committee members carrying out official credit union business.

(b) Payment of fees. Subject to the provisions of this rule, a credit union may pay a reasonable meeting fee to any of its directors, honorary directors, advisory directors, (hereafter referred to as directors) or [~~Directors and~~] committee members [~~may be paid reasonable fees, in accordance with written board policy,~~] for attending duly called meetings at which [~~for conducting~~] appropriate credit union business is conducted. Any credit union electing to pay any type of meeting fee shall annually disclose to the membership the fees paid in the prior calendar year and scheduled to be paid in the current calendar year. This disclosure may be provided to the members as part of the credit union's annual report as prescribed in §91.310 of this title (relating to annual report to membership). A credit union, however, may not pay any [~~a~~] meeting fees [~~fee~~] to a director or committee member if the credit union is operating under a Net Worth Restoration Plan; or an order issued under Finance Code §122.257 or §122.258.

(c) Enforcement Authority; Prohibition. The commissioner may prohibit or otherwise limit or restrict the payment of meeting fees to directors or committee members if, in the opinion of the commissioner, the credit union has paid, is paying, or is about to pay meeting fees that are excessive as defined in subsection (f) of this section. [~~Advance Notice of Payment of Fees. A credit union shall provide written notice to the Department of its intent to pay or modify director or committee member meeting fees at least 30 days prior to commencing the new or modified program. The written notice shall include a copy of the board policy, the proposed or revised fee schedule, and a description of the anticipated cost and the credit union's ability to absorb the increase in operating costs. The credit union shall provide any additional information requested by the commissioner.~~]

(d) Use of credit union equipment. A credit union may provide personal computers, access to electronic mail, and other electronic conveniences to directors during their terms of office provided:

(1) the board of directors determines that the equipment and the electronic means are necessary and appropriate for the directors to fulfill their duties and responsibilities;

(2) the board of directors develops and maintains written policies and procedures regarding this matter; and

(3) the arrangement ceases immediately upon the person's leaving office.

(e) Insurance. A credit union may, in accordance with written board policy, provide health, life, accident, liability, or similar personal insurance protection for directors and committee members. The kind and amount of these insurance protections must be reasonable given the credit union's size, financial condition, and the duties of the director or committee member. The insurance protection must cease upon the director or committee member's leaving office, without providing residual benefits beyond those earned during the individual's term on the board or committee.

(f) Review by board. A credit union shall implement and maintain appropriate controls and other safeguards to prevent the payment of fees or expenses that are excessive or that could lead to material financial loss to the institution. At least annually, the board, in good faith, shall review the director/committee member fees and director/committee member-related expenses incurred, paid or reimbursed by the credit union and determine whether its policy continues to be in the best interest of the credit union. The Board's review shall be included as part of the minutes of the meeting at which the policy and the fees and expenses were studied. Fees and expenses shall be considered excessive when amounts paid are disproportionate to the services performed by a director or committee member, or unreasonable considering the financial condition of the institution and similar practices at credit unions of a comparable asset size, geographic location, and/or operational complexity.

(g) Guest travel. A credit union's board may authorize the payment of travel expenses that are reasonable in relation to the credit union's financial condition and resources for one guest accompanying a director or committee member to an approved conference or educational program. The payment will not be considered compensation for purposes of Finance Code §122.062 if:

(1) it is determined by the board to be necessary or appropriate in order to carry out the official business of the credit union; and

(2) it is in accordance with written board policies and procedures.

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

Filed with the Office of the Secretary of State on July 7, 2014.

TRD-201403106

Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 837-9236

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 100. CHARTERS
SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING OPEN-ENROLLMENT CHARTER SCHOOLS

The Texas Education Agency (TEA) proposes new §§100.1001-100.1007, 100.1010, 100.1021, 100.1022, 100.1026, 100.1031, 100.1032, 100.1050, and 100.1052; amendments to §§100.1015, 100.1017, 100.1023, 100.1025, 100.1033, 100.1035, 100.1041, 100.1043, 100.1045, 100.1047, 100.1051, 100.1063, 100.1067, 100.1071, 100.1073, 100.1102-100.1105, 100.1111, 100.1112, 100.1131, 100.1133, 100.1151, 100.1155, 100.1205, 100.1207, 100.1211, 100.1213, 100.1215, and 100.1217; and the repeal of §§100.1011, 100.1021, 100.1022, 100.1031, and 100.1037, concerning charters. The sections establish requirements for open-enrollment charter schools. The proposed actions would modify the existing rules to reflect changes in law made by Senate Bill (SB) 2, 83rd Texas Legislature, Regular Session, 2013, and to more closely match other existing statutory provisions.

From 1995 until September 1, 2013, the State Board of Education (SBOE) had the authority to adopt the charter guidelines and application documents and to grant open-enrollment charters, public senior college or university charters, and public junior college charters. Additionally, the SBOE had the authority to approve the annual charter school governance reporting form and optional charter provisions for purchasing and contracting.

SB 2, 83rd Texas Legislature, Regular Session, 2013, granted the commissioner of education the authority to approve the annual charter school governance reporting form and optional charter provisions for purchasing and contracting, as well as to establish and approve the contents of the request for application and the criteria by which charter schools would be awarded. Additionally, SB 2 gave the commissioner the authority to award up to 305 open-enrollment charters on a graduated basis by the year 2019 to eligible entities that are considered capable of carrying out the responsibilities of the charter, are likely to operate a school of high quality, have been nominated by the commissioner, and are not rejected by a majority of the members of the SBOE present and voting. SB 2 specifies that a member of the SBOE designated by the SBOE chair will work in coordination with the commissioner to investigate and evaluate charter applicant(s). Texas Education Code, §12.101, gives the SBOE the authority to veto or take no action on the charter(s) the commissioner has recommended for award.

The existing commissioner's rules in 19 TAC Chapter 100, Subchapter AA, adopted effective November 6, 2001, and last amended effective September 12, 2002, cover a wide range of issues related to open-enrollment charter schools. The rules are organized in divisions addressing related subject matter, as follows: Division 1, General Provisions; Division 2, Commissioner Action and Intervention; Division 3, Charter School Funding and Financial Operations; Division 4, Property of Open-Enrollment Charter Schools; Division 5, Charter School Governance; and Division 6, Charter School Operations.

The proposed revisions to 19 TAC Chapter 100, Subchapter AA, would incorporate the requirements of SB 2 by adding new rules that include provisions relating to the application and selection procedures and criteria, optional provisions for contracting and purchasing, annual reports on open-enrollment charter governance, and performance frameworks. The proposed revisions would also update and add new rules relating to standards for and the revocation and modification of the governance of an open-enrollment charter as well as the management of charter campuses following revocation, surrender, or expiration.

Additionally, the proposed revisions to 19 TAC Chapter 100, Subchapter AA, would amend, repeal, and add new rules relating to charter renewals and amendments; compliance records on nepotism, conflicts of interest, and restrictions on serving; charter school funding and financial operations; property of open-enrollment charter schools; charter school governance; and charter school operations.

The proposed rule actions would have procedural and reporting requirements for charters. Charters are required to post the names of the members of the governing body of an open-enrollment charter and the salary of the charter superintendent or the chief operating officer on the school's Internet home page and submit evidence thereof to the TEA on the governance reporting form. Charters must also submit to the TEA an accounting of all employees employed by the school as of September 1, 2013, including the declaration of any nepotistic relationships. Pending the adoption of the Charter School Performance Framework Manual, charters may have nominal data to report annually.

The proposed rule actions may have additional locally maintained paperwork requirements. If not already maintained, additional reporting requirements may result in the need for charters to maintain additional personnel information.

Heather Mauze, director of charter school administration, has determined that for the first five-year period the rule actions are in effect there would be no additional costs for local government required to comply with the proposed rule actions. There will, however, be fiscal implications for state government.

The proposed revisions include the provision for an annual performance framework report for all charters. The performance framework aims to measure the academic, financial, and organizational performance of charters using a myriad of indicators. While the state currently has indicators and performance measures in the areas of student accountability and financial accountability, there is not a systemic way of measuring a charter's organizational or operational structure, nor is there a system that interfaces with each universe to pull the appropriate data. A new system is required that will be designed with TEA login security, administrative functionality to set values, indicator calculation definitions, rating/indicator reports, controls to set the viewing level of the charter performance framework rating results or reports, and systems data rollout from one school year to the next.

For the initial year development of the web system and associated supports, the total cost in fiscal year 2015 is estimated to be as much as $919,456. The annual operating budget for fiscal years 2016-2019 is estimated at $227,896 each year. The es-

timated costs include $691,560 for operating expenses for development in fiscal year 2015 in addition to $175,000 for personnel and $52,896 for equipment for each year of fiscal years 2015-2019. Development of a system to meet these requirements is pending fiscal approval.

Ms. Mauze has determined that for each year of the first five years the rule actions are in effect the public benefit anticipated as a result of enforcing the rule actions will be to ensure that rules governing the selection and operation of open-enrollment charter schools are aligned with current law. There is no anticipated economic cost to persons who are required to comply with the proposed rule actions.

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

The public comment period on the proposal begins July 11, 2014, and ends August 11, 2014. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-5337.

A public hearing on the proposed revisions has been scheduled for 9 a.m. to 3 p.m. on Friday, July 25, 2014, in Room 1-111, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Questions about the scheduled public hearing on the proposed revisions to 19 TAC Chapter 100, Charters, Subchapter AA, Commissioner's Rules Concerning Open-Enrollment Charter Schools, should be directed to the TEA Division of Charter School Administration at (512) 463-9575. Public comments on the proposed revisions to 19 TAC Chapter 157, Hearings and Appeals, Subchapter EE, Review by State Office of Administrative Hearings: Certain Accreditation Sanctions, will also be heard at the July 25, 2014, public hearing.

DIVISION 1. GENERAL PROVISIONS

19 TAC §§100.1001 - 100.1007, 100.1010, 100.1015, 100.1017

The new sections and amendments are proposed under the Texas Education Code (TEC), §12.101, which authorizes the commissioner to grant a charter on the application of an eligible entity for an open-enrollment charter school, including the adoption of rules to modify criteria for granting a charter to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.1011, which authorizes the commissioner to adopt rules to modify criteria for granting charters for high-performing entities to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.102, which requires schools to operate and govern in accordance with its charter; TEC, §12.103, which authorizes that schools are subject to federal and state laws and rules adopted as applicable to charters; TEC, §12.104, which authorizes the commissioner to adopt rules relating to the applicability of public education law to charter schools; TEC, §12.1053, which authorizes the commissioner to approve procedures for contracting and purchasing or subject schools to rules of governmental entity; TEC, §12.1054, which authorizes the commissioner to enforce state law and rules relating to conflict of interest; TEC, §12.1055, which authorizes the commissioner to enforce state law and rules relating to nepotism; TEC, §12.1059, which authorizes the agency to approve certain employees for positions in schools; TEC, §12.110, which authorizes the commissioner to adopt an application form and procedures to be used in applying for an open enrollment charter; TEC, §12.1101, which authorizes the commissioner to adopt rules for the procedure for providing notice to boards of trustees of a school district and members of the legislature of charter applications that may impact them; TEC, §12.111, which authorizes what a charter must include in order to be granted; TEC, §12.113, which authorizes that a successful charter must satisfy all of TEC, Chapter 12, Subchapter D, and requirements of the application and any required modifications; TEC, §12.114, which authorizes the commissioner to adopt rules for the process to be used to request a revision of a charter of an open-enrollment charter school; TEC, §12.117, which authorizes how the admissions process of an open-enrollment charter school shall occur; TEC, §12.1181, which authorizes the commissioner to develop performance frameworks and adopt rules to implement the performance frameworks that establish standards by which to measure the performance of an open-enrollment charter school; TEC, §12.119, which authorizes the commissioner to require the annual filing of the charter's articles of incorporation, bylaws, and governance reporting information with the agency; TEC, §12.120, which mandates under which circumstances an individual may or may not serve on a governing body of a charter holder or charter school or serve as an employee; TEC, §12.1202, which authorizes that a majority of the governing body of a charter holder or charter school must be qualified voters; TEC, §12.121, which requires the governing body of a charter holder to be responsible for and to retain control of the management, operation, and accountability of the school; TEC, §12.1211, which requires an open-enrollment charter school to maintain on the home page of its Internet website the names of its governing body; TEC, §12.123, which authorizes the commissioner to adopt rules necessary for prescribing and implementing the required training for members of the governing bodies of charter schools and officers of charter schools; TEC, §12.126, which authorizes under what circumstances the commissioner may prohibit, deny renewal of or revoke a contract for management services; TEC, §12.129, which requires all teachers and principals employed in an open-enrollment charter school hold a baccalaureate degree; TEC, §12.152, which authorizes the commissioner to grant charters on application of a public senior college or university or public junior college; TEC, §12.153, which authorizes the commissioner to adopt rules to implement colleges and university or junior college charter schools; TEC, §12.154, which authorizes the commissioner to establish criteria that must be satisfied for the granting of a charter to a public senior college or university or public junior college; Local Government Code, §140.006, which requires an open-enrollment charter school to post its annual financial statement on the school's Internet website; and Local Government Code, §171.004, which authorizes how all local public officials with a substantial interest in a business entity or real property shall conduct their affairs.

The new sections and amendments implement the TEC, §§12.101, 12.1011, 12.102, 12.103, 12.104, 12.1053, 12.1054, 12.1055, 12.1059, 12.110, 12.1101, 12.111, 12.113, 12.114, 12.117, 12.1181, 12.119, 12.120, 12.1202, 12.121, 12.1211, 12.123, 12.126, 12.129, 12.152, 12.153, and 12.154 and Local Government Code, §140.006 and §171.004.

§100.1001. Definitions.

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

(1) Charter holder, governing body of a charter holder, and governing body of a charter school--The definitions of these terms are assigned in Texas Education Code (TEC), §12.1012.

(2) Former charter holder--An entity that is or was a charter holder, but that has ceased to operate a charter school because its open-enrollment charter has been revoked, surrendered, abandoned, or denied renewal, or because all programs have been ordered closed under TEC, Chapter 39.

(A) A charter holder whose authority to operate has been suspended under TEC, §12.1162, is not a former charter holder.

(B) A charter holder with more than one open-enrollment charter is a former charter holder only with respect to the open-enrollment charter that authorizes a charter school that has ceased to operate. The charter holder is not a former charter holder with respect to an open-enrollment charter that authorizes a charter school that continues to operate.

(3) Charter school--A Texas public school operated by a charter holder under an open-enrollment charter granted either by the State Board of Education (SBOE) or commissioner of education, whichever is applicable, pursuant to TEC, §12.101, identified with its own county district number.

(A) An "employee of a charter school," as used in this subchapter, means a person paid to work at a charter school under the direction and control of an officer of a charter school, regardless of whether the person is on the payroll of the charter holder, a charter school operated by the charter holder, a management company providing management services to the charter holder, or any other person.

(B) An "employee of a charter holder," as used in this subchapter, means a charter holder employee who engages in no charter school activity and is not an officer of any charter school.

(C) A charter school "campus," as used in this subchapter, means an organizational unit of a charter school, serving 50% or more students in tested grades unless waived by the commissioner and identified with its own county district campus number, determined by the Texas Education Agency (TEA) to be an instructional campus for purposes of data collection and reporting. A campus may be a single site or may include multiple sites as described in subparagraph (D) of this paragraph.

(D) A charter school "site," as used in this subchapter, means an organizational unit of a charter school with administrative personnel identified by a separate street address within 25 miles of the campus with which it is associated and fully described in the open-enrollment charter. A "site" must be approved for instructional use either in the original open-enrollment charter as granted by the SBOE or commissioner or in an amendment granted under §100.1033(c)(8) of this title (relating to Charter Amendment).

(E) A charter school "facility," as used in this subchapter, means a building located on the same contiguous land as the campus with which it is associated or within one mile of the campus. The facility and its associated address must be approved for instructional use through the submission of a certificate of occupancy (COO) to the commissioner prior to serving students in said facility.

(4) Real estate--An interest, including a lease interest, in real property recognized by Texas law, or in improvements such as buildings, fixtures, utilities, landscaping, construction in progress, or other improvements.

(5) Lease interest--The legal rights obtained under a capital or operating lease. These include the right to occupy, use, and enjoy the real estate given by the property owner in exchange for rental payments or other consideration specified in the lease, together with any associated rights that the lease confers on the tenant under the lease or other law.

(6) Personal property--An interest in personal property recognized by Texas law, including:

(A) furniture, equipment, supplies, and other goods;

(B) computer hardware and software;

(C) contract rights, intellectual property such as patents, and other intangible property;

(D) cash, currency, funds, bank accounts, securities, and other investment instruments;

(E) the right to repayment of a loan, advance, or prepayment or to the payment of other receivables; and

(F) any other form of personal property recognized by Texas law.

(7) Capitalized personal property, fixed assets, ownership interest, cost basis, accumulated depreciation, loan, debt, credit, and fair market valuation--The definitions of these terms are as assigned either by §109.41 of this title (relating to Financial Accountability System Resource Guide) and/or by generally accepted accounting principles.

(8) State funds--Funds received by the charter holder under TEC, §12.106, and any grant or discretionary funds received through or administered by the TEA, including all federal funds. The rules in this division apply to property acquired, improved, or maintained with federal funds to the extent that such application is consistent with applicable federal law or regulations.

(9) State funds received on or after September 1, 2001--State funds are received on or after September 1, 2001, if the Texas Comptroller of Public Accounts issues a warrant for such funds on or after that date, or if an electronic transfer of such funds is made on or after that date.

(10) State funds received before September 1, 2001--State funds are received before September 1, 2001, if the Texas Comptroller of Public Accounts issued a warrant for such funds before that date, or if an electronic transfer of such funds was made before that date.

(11) Property acquired, improved, or maintained using state funds--Property for which the title, control over the property, use of the property, or benefit from the property is obtained directly or indirectly through expenditure of or control over state funds. This includes property acquired, improved, or maintained through a management company under a contract for management services, and includes the proceeds of loans, credit, or other financing that:

(A) is secured with state funds, or with property acquired, improved, or maintained using state funds; or

(B) is extended, in whole or part, based on the charter holder's control over state funds.

(12) Misuse or misapplication of funds or property--A use of state funds or public property that is contrary to:

(A) the open-enrollment charter under which a charter holder holds the funds or property;

(B) an agreement under which an employee or contractor holds the funds or property;

(C) a law, regulation, or rule that prescribes the manner of acquisition, sale, lease, custody, or disposition of the funds or property, including, but not limited to, violations of Local Government Code, §§171.002-171.007; Local Government Code, Chapter 271, Subchapter B; and TEC, §12.1053 and §12.1054, unless otherwise stated in the charter contract;

(D) a limited purpose for which the funds or property is delivered or received; or

(E) the use authorized by the governing body of the charter holder.

(13) Management services--Services related to the management or operation of a charter school. Management services include any of the following:

(A) planning, operating, supervising, or evaluating a charter school's educational programs, services, or facilities;

(B) making recommendations to the governing body of a charter holder or charter school relating to the selection of school personnel;

(C) managing a charter school's day-to-day operations as its administrative manager;

(D) preparing a proposed budget or submitting it to the governing body of a charter holder or charter school;

(E) recommending policies to be adopted by the governing body of a charter holder or charter school, except that legal services provided by an attorney licensed to practice law in this state, and public accountancy services provided by a certified public accountant licensed to practice public accountancy services in this state, are not management services, notwithstanding that such services may include recommending policies to be adopted by the governing body of a charter holder or charter school;

(F) developing procedures or practices to implement policies adopted by the governing body of a charter holder or charter school, except that legal services by an attorney licensed to practice law in this state, and public accountancy services provided by a certified public accountant licensed to practice public accountancy services in this state, are not management services, notwithstanding that such services may include developing procedures or practices to implement policies adopted by the governing body of a charter holder or charter school;

(G) overseeing the implementation of policies adopted by the governing body of a charter holder or charter school; or

(H) providing leadership for the attainment of student performance at a charter school based on the indicators adopted under TEC, §39.053 and §39.054, or adopted by the governing body of a charter holder or charter school.

(14) Management company--A natural person or a corporation, partnership, sole proprietor, association, agency, or other legal entity that provides any management services to a charter holder or charter school, except that:

(A) a charter holder and its employees may provide management services to a charter school that is under the charter holder's supervision and control pursuant to the open-enrollment charter, and such charter holder is not thereby a management company;

(B) a non-profit corporation that is exempt from taxation under 26 United States Code (USC), §501(c)(3), may donate management services to a charter holder, and the donor corporation is not thereby a management company if the donee charter holder is a subsidiary corporation controlled by the donor corporation under the articles of incorporation and bylaws of the donee charter holder;

(C) a regional education service center providing services to a charter school under TEC, Chapter 8, is not a management company;

(D) the fiscal agent of a shared services cooperative providing services to a member of the shared services cooperative is not a management company; and

(E) a non-profit corporation that is exempt from taxation under 26 USC, §115, is not a management company if it performs management services exclusively for a charter holder that is an eligible entity under TEC, §12.101(a)(1) or (4) or TEC, §12.152, and if:

(i) its articles of incorporation and bylaws, and any changes thereto, must be approved by such charter holder;

(ii) its board of directors must be appointed by such charter holder; and

(iii) its assets become the property of such charter holder upon dissolution.

(15) Open-enrollment charter--A charter holder's authorization to operate a publicly funded charter school consistent with TEC, §12.102 (Authority Under Charter). The terms of an open-enrollment charter include:

(A) the applicable contract for charter between the charter holder and the SBOE or commissioner of education;

(B) all applicable state and federal laws, rules, and regulations;

(C) the request for application issued by the TEA to which the charter holder's application for open-enrollment charter responds;

(D) any condition, amendment, modification, revision, or other change to the open-enrollment charter adopted or ratified by the SBOE or the commissioner; and

(E) to the extent they are consistent with subparagraphs (A)-(D) of this paragraph, all statements, assurances, commitments, and/or representations made by the charter holder in writing in its application for charter, attachments, or related documents or orally during its interview with the commissioner or commissioner's designee or orally at a public meeting of the SBOE or any of its committees.

(16) Officer of a charter school--A person charged with the duties of, or acting as, a chief executive officer, a central administration officer, a campus administration officer, or a business manager, regardless whether the person is an employee or contractor of a charter holder, charter school, management company, or any other person; or a volunteer working under the direction of a charter holder, charter school, or management company. A charter holder employee or independent contractor engaged solely in non-charter activities for the charter holder is not an "officer of a charter school."

(17) Chief executive officer--A person (or persons) directly responsible to the governing body of the charter holder for supervising one or more central administration officers, campus administration officers, and/or business managers.

(18) Central administration officer--A person charged with the duties of, or acting as, a chief operating officer, director, or assistant director of a charter holder or charter school, including one or more of the following functions:

(A) assuming administrative responsibility and leadership for the planning, operation, supervision, or evaluation of the education programs, services, or facilities of a charter holder or charter school, or for appraising the performance of the charter holder's or charter school's staff;

(B) assuming administrative authority or responsibility for the assignment or evaluation of any of the personnel of the charter holder or charter school, including those employed by a management company;

(C) making recommendations to the governing body of the charter holder or the charter school regarding the selection of personnel of the charter holder or charter school, including those employed by a management company;

(D) recommending the termination, non-renewal, or suspension of an employee or officer of the charter holder or charter school, including those employed by a management company; or recommending the termination, non-renewal, suspension, or other action affecting a management contract;

(E) managing the day-to-day operations of the charter holder or charter school as its administrative manager;

(F) preparing or submitting a proposed budget to the governing body of the charter holder or charter school (except for developing budgets for a charter school campus, if this is a function performed by a campus administration officer under the terms of the open-enrollment charter);

(G) preparing recommendations for policies to be adopted by the governing body of the charter holder or charter school, or overseeing the implementation of adopted policies, except for legal services provided by an attorney licensed to practice law in this state or public accountancy services provided by a certified public accountant licensed to practice public accountancy services in this state;

(H) developing or causing to be developed appropriate administrative regulations to implement policies established by the governing body of the charter holder or charter school, except for legal services provided by an attorney licensed to practice law in this state or public accountancy services provided by a certified public accountant licensed to practice public accountancy services in this state;

(I) providing leadership for the attainment of student performance in a charter school operated by the charter holder, based on the indicators adopted under TEC, §39.053 and §39.054, or other indicators adopted by the charter holder in its open-enrollment charter; or

(J) organizing the central administration of the charter holder or charter school.

(19) Campus administration officer--A person charged with the duties of, or acting as, a principal or assistant principal of a charter school campus, including one or more of the following functions:

(A) approving teacher or staff appointments for a charter school campus, unless this function is performed by a central administration officer under the terms of the open-enrollment charter;

(B) setting specific education objectives for a charter school campus, unless this function is performed by a central administration officer under the terms of the open-enrollment charter;

(C) developing budgets for a charter school campus, unless this function is performed by a central administration officer under the terms of the open-enrollment charter;

(D) assuming the administrative responsibility or instructional leadership, under the supervision of a central administration officer, for discipline at a charter school campus;

(E) assigning, evaluating, or promoting personnel assigned to a charter school campus, unless this function is performed by a central administration officer under the terms of the open-enrollment charter; or

(F) recommending to a central administration officer the termination or suspension of an employee assigned to a charter school campus, or recommending the non-renewal of a term contract of such an employee.

(20) Business manager--A person charged with managing the finances of a charter holder or charter school.

(21) Donate--Services are donated if:

(A) given free of any charge, cost, fee, compensation, reimbursement, remuneration, or any other thing of value or consideration, whether direct or indirect, from the donee to the donor, or from any other person or entity to the donor on behalf of the donee;

(B) given free of any condition, stipulation, promise, requirement, or any other obligation, whether direct or indirect, enforceable by the donor or by any other person or entity; and

(C) separately and clearly recorded in the accounting, auditing, budgeting, reporting, and recordkeeping systems for the management and operation of the charter school.

(22) Material charter violation--An action or failure to act by a charter holder that is contrary to the terms of its open-enrollment charter and constitutes sufficient grounds for action against the charter holder under §100.1021 of this title (relating to Revocation and Modification of Governance of an Open-Enrollment Charter), §100.1023 of this title (relating to Intervention Based on Charter Violations), §100.1025 of this title (relating to Intervention Based on Health, Safety, or Welfare of Students), and/or §100.1031 of this title (relating to Renewal of an Open-Enrollment Charter).

(23) Management company breach--An action or failure to act by a management company that is contrary to a duty owed under a management contract, a rule adopted under TEC, Chapter 12, Subchapter D, or any other legal obligation, and constitutes sufficient grounds for action against the management company under TEC, §12.127 (Liability of Management Company), and/or §100.1155 of this title (relating to Procedures for Prohibiting a Management Contract). Where a provision in this subchapter uses this term, such use is for clarity and emphasis only and does not:

(A) establish that any breach of a duty occurred in a given case or what sanction is appropriate under the facts of that case; or

(B) imply that any other provision where the term is not used is not material or less important, or that the breach of a duty imposed by the provision is not grounds for action against the management company.

(24) Shared services cooperative--A contractual arrangement among charter holders through which one member of the cooperative, acting as the fiscal and administrative agent for the other members, provides educational services and/or management services to member charter holders under a written contract executed by each member. A contract establishing a shared services cooperative must at a minimum:

(A) establish clear procedures for administering services under the direction and control of the cooperative and for

assigning responsibility for all costs and liabilities associated with services provided under the contract;

(B) establish the duties, responsibilities, and accountability of the fiscal agent and of each member for services provided under the contract;

(C) establish clear procedures for withdrawal of a member from the agreement and for the dissolution and winding up of the affairs of the cooperative;

(D) if the cooperative may provide special education services, comply with TEC, §29.007; and

(E) be approved in writing by the commissioner before any services are provided.

(25) High-performing charter--A charter holder that receives the highest or second highest performance rating in each state the charter operates for the most recent rating years available.

(26) Determination of academic accountability--The process used to determine the applicable year's accountability ratings to measure the academic performance of a charter.

(A) For the purposes of this chapter, the term "academically acceptable" for the following rating years shall mean:

(i) 2004-2011: the category of acceptable performance shall include a rating of Exemplary, Recognized, Academically Acceptable, and alternative education accountability (AEA): Academically Acceptable.

(ii) 2013-2016: the category of acceptable performance shall include a rating of Met Standard and Met Alternative Standard.

(iii) 2017 and beyond: the category of acceptable performance shall include a grade of A, B, or C, or as otherwise indicated in the applicable year's academic accountability manual.

(B) For purposes of determination, an academic performance rating during the 2011-2012 school year will not be considered.

(C) For the purposes of this chapter, the term "academically unacceptable" performance means a rating of Academically Unacceptable, AEA: Academically Unacceptable, Improvement Required, or Unacceptable Performance or as otherwise indicated in the applicable year's academic accountability manual.

(27) Determination of financial accountability--The process used to determine the applicable year's Financial Integrity Rating System of Texas (FIRST) rating to measure the financial performance of a charter.

(A) For purposes of this chapter, a satisfactory rating shall mean: Superior Achievement, Above Standard Achievement, or Standard Achievement.

(B) For the purposes of this chapter, a lower than satisfactory financial performance rating shall mean a FIRST rating of Substandard Achievement, Suspended: Data Integrity, or as otherwise indicated in the applicable year's financial accountability manual.

§100.1002. Application and Selection Procedures and Criteria.

(a) Prior to each selection cycle, the commissioner of education shall approve an application form for submission by applicants seeking to operate a high quality open-enrollment charter school. The application form shall address the content requirements specified in Texas Education Code (TEC), §12.111, and contain the following:

(1) the timeline for selection;

(2) required applicant conferences and training prerequisites;

(3) scoring criteria and procedures for use by the review panel selected under subsection (d) of this section;

(4) selection criteria, including the minimum score necessary for an application to be eligible for selection; and

(5) the earliest date an open-enrollment charter school selected in the cycle may open.

(b) The Texas Education Agency (TEA) shall review applications submitted under this section. If the TEA determines that an application is not complete and/or does not meet the standards in TEC, §12.101, and §100.1015 of this title (relating to Applicants for an Open-Enrollment Charter, Public Senior College or University Charter, or Public Junior College Charter), the TEA shall remove the application without further processing and notify the applicant. The TEA shall establish procedures and schedules for returning applications without further processing. Failure of the TEA to identify any deficiency, or notify an applicant thereof, does not constitute a waiver of the requirement and does not bind the commissioner.

(c) Upon written notice to the TEA, an applicant may withdraw an application.

(d) Applications that are determined to meet the standards established under TEC, §12.101, and §100.1015 of this title shall be reviewed and scored by an external application review panel selected by the commissioner from a pool of qualified candidates identified through a request for qualification (RFQ) process. The panel shall review and score applications in accordance with the procedures and criteria established in the application form. Review panel members shall not discuss applications with anyone except the TEA staff. Review panel members shall not accept meals, entertainment, gifts, or gratuities in any form from any person or organization with an interest in the results of the selection process for open-enrollment charters. Members of the review panel shall disclose to the TEA immediately the discovery of any past or present relationship with an open-enrollment charter applicant, including any current or prospective employee, agent, officer, or director of the sponsoring entity, an affiliated entity, or other party with an interest in the selection of the application.

(e) Applications that are not scored at or above the minimum score established in the application form are not eligible for commissioner selection during that cycle. The commissioner may, at the commissioner's sole discretion, decline to grant an open-enrollment charter to an applicant whose application was scored at or above the minimum score. No recommendation, ranking, or other type of endorsement by a member or members of the review panel is binding on the commissioner.

(f) All parts of the application are releasable to the public under the Texas Public Information Act and will be posted to the TEA website; therefore, the following must be excluded or redacted:

(1) personal email addresses;

(2) proprietary material;

(3) copyrighted material;

(4) documents that could violate the Family Educational Rights and Privacy Act (FERPA) by identifying potential students of the charter school, including, but not limited to, sign-in lists at public meetings about the school, photographs of existing students if the school is currently operating or photographs of prospective students, and/or letters of support from potential charter school parents and/or students; and

(5) any other information or documentation that cannot be released in accordance with Texas Government Code, Chapter 552.

(g) The commissioner or the commissioner's designee(s) in coordination with the TEA staff shall interview applicants whose applications received the minimum score established in the application form. The commissioner may specify individuals required to attend the interview and may require the submission of additional information and documentation prior or subsequent to an interview.

(h) The commissioner may consider criteria that include, but are not limited to, the following when determining whether to grant an open-enrollment charter:

(1) indications that the charter school will improve student performance;

(2) innovation evident in the program(s) proposed for the charter school;

(3) impact statements from any school district whose enrollment is likely to be affected by the proposed charter school, including information relating to any financial difficulty that a loss in enrollment may have on a district;

(4) evidence of parental and community support for the proposed charter school;

(5) the qualifications, backgrounds, and histories of individuals and entities who will be involved in the management and educational leadership of the proposed charter school;

(6) the history of the sponsoring entity of the proposed charter school, as defined in the application form;

(7) indications that the governance structure proposed for the charter school is conducive to sound fiscal and administrative practices; and

(8) indications that the proposed charter school would expand the variety of charter schools in operation with respect to the following:

(A) representation in urban, suburban, and rural communities;

(B) instructional settings;

(C) types of eligible entities;

(D) types of innovative programs;

(E) student populations and programs; and

(F) geographic regions.

(i) In addition to the criteria specified in subsection (h) of this section, the commissioner shall approve or deny an application based on:

(1) documented evidence gathered through the application review process;

(2) merit; and

(3) other criteria, including:

(A) criteria related to capability of carrying out the responsibilities as provided in the charter; and

(B) the likelihood of operating a high-quality charter, including previous experience operating a public school(s).

(j) Priority shall be given to an applicant that proposes a school in an attendance zone of a school district campus assigned an "academically unacceptable" performance rating under TEC, §39.054, for two preceding years as defined by §100.1001(26) of this title (relating to Definitions).

(k) An applicant or any person or entity acting on behalf of an applicant for an open-enrollment charter shall not knowingly communicate with any member of an external application review panel concerning a charter school application beginning on the date the application is submitted and ending 90 days after the commissioner's proposal. State Board of Education (SBOE) members and/or the TEA staff may initiate communications with an applicant. On finding a material violation of the no-contact period, the commissioner shall reject the application and deem it ineligible for award.

(l) The commissioner shall notify the SBOE of each charter the commissioner proposes to grant under this subchapter. The charter(s) proposed by the commissioner will be granted on the 90th day after the date on which the SBOE receives the notice from the commissioner unless:

(1) a majority of the members of the SBOE present and voting vote against the grant of the charter; or

(2) the commissioner withdraws the proposal.

(m) The SBOE, or a committee of the SBOE, may not deliberate or vote on any grant of a charter that is not proposed by the commissioner.

(n) The commissioner may defer granting an open-enrollment charter subject to contingencies and shall require fulfillment of such contingencies before the charter school is issued a contract. Such conditions must be fulfilled by the awardee, as determined by the commissioner, no later than two months after the date of the notification of contingencies by the commissioner or the proposal of the charter is withdrawn. The commissioner may establish timelines for submission by the awardee of any documentation to be considered by the commissioner in determining whether contingencies have been met. An applicant that is not granted a charter may reapply.

(o) The commissioner may decline to finally grant or award a charter based on misrepresentations during the application process or failure to comply with commissioner rules, application requirements, or SBOE rules.

(p) An open-enrollment charter shall be in the form and substance of a written contract signed by the commissioner, the chair of the charter holder, and the chief operating officer of the school, but is not a contract for goods or services within the meaning of Texas Government Code, Chapter 2260. The chief operating officer of the school shall mean the chief executive officer of the open-enrollment charter holder under TEC, §12.1012.

(q) The charter contract shall be for an initial term of five years beginning August 1 following the granting of the initial charter contract.

(r) The charter must open and serve students within one school year of the awarding of the charter contract. The commissioner, in the commissioner's discretion, may grant a single-year extension. Failure to operate within one year, or two years if an extension is granted, constitutes an automatic abandonment of the charter contract and the charter is automatically forfeited.

§100.1003. Application to Drop-out Recovery Charters.

A charter granted under Texas Education Code, §12.101(b-7), for a drop-out recovery school shall not be considered for the purposes of the limit on the number of charters for open enrollment under the cap. Such charter, however, shall expire at the end of ay school year in which the school does not meet the statutory definition of drop-out recovery as determined by the Texas Education Agency from the applicable Public

Education Information Management System (PEIMS) report. A dropout recovery school shall be defined as a school that:

(1) serves students in Grades 9-12;

(2) has an enrollment of which 50% of students are 17 years of age or older as of September 1 of the school year as reported for the fall semester PEIMS submission; and

(3) meets eligibility requirements for and is registered under alternative education accountability (AEA) procedures.

§100.1004. Application to Public Senior College or University Charters and Public Junior College Charters.

The following provisions of this subchapter apply as indicated in this section to a public senior college or university charter school or a public junior college charter school as though the public senior college or university charter school or the public junior college charter school were granted a charter under Texas Education Code, Chapter 12, Subchapter D.

(1) Section 100.1002(a) of this title (relating to Application and Selection Procedures and Criteria) applies, except that the commissioner of education may adopt a separate application form for applicants seeking a charter to operate a public senior college or university charter school or a public junior college charter school, which need not be similar to the application form adopted under that subsection for other charter applicants. The commissioner may approve or amend this separate application form without regard to the selection cycle referenced in that subsection.

(2) Section 100.1002(c), (h)(1)-(5) and (8), (n), and (p) of this title apply unless provided otherwise in the charter contract.

(3) Except as provided in this section, this subchapter does not apply to a public senior college or university charter school or a public junior college charter school.

§100.1005. Notification of Charter Application.

Prior to an application for an open-enrollment charter being submitted to the commissioner of education, the applicant shall provide notification via certified mail, return receipt requested, to:

(1) the board of trustees and superintendent of each school district from the proposed geographic boundary as described in the open-enrollment charter application;

(2) the governing board and superintendent of each charter school from the proposed geographic boundary as described in the open-enrollment charter application; and

(3) each member of the legislature and State Board of Education member that represent the geographic area to be served by the proposed charter school.

§100.1006. Optional Open-Enrollment Charter Provisions for Contracting and Purchasing.

Improvements to real property. Section 100.1073 of this title (relating to Improvements to Real Property) applies to a charter holder unless the charter holder amends its open-enrollment charter to include a statement expressly adopting the provisions of Texas Education Code (TEC), Chapter 44, Subchapter B, as the charter holder's process for awarding a contract for the construction, repair, or renovation of a structure, road, highway, or other improvement or addition to real property. If such a statement is included in the open-enrollment charter, then the provisions of TEC, Chapter 44, Subchapter B, control in lieu of §100.1073 of this title. Nothing in this section shall require a charter holder to comply with TEC, Chapter 44, Subchapter B, except when awarding a contract for the construction, repair, or renovation of a structure, road, highway, or other improvement or addition to real property.

§100.1007. Annual Report on Open-Enrollment Charter Governance.

(a) No later than December 1 of each year, each open-enrollment charter holder shall file under §100.1013 of this title (relating to Filing of Documents), the following information on a charter school governance reporting form approved by the commissioner of education:

(1) identifying information for and compensation of each officer and member of the governing body of the open-enrollment charter holder;

(2) identifying information for and compensation of each officer of the charter school;

(3) identifying information for and compensation of each member of the governing body of the charter school, if the charter holder has established a governing body for the charter school;

(4) identifying information for and compensation of all family members, within the third degree of consanguinity or third degree of affinity, of each board member, chief executive officer/superintendent, and chief financial officer for purposes of conflict of interest; and

(5) identifying information for and compensation of all family members, within the third degree of consanguinity or second degree of affinity, of each board member and chief executive officer/superintendent for purposes of nepotism.

(b) The identifying information required for each member of the governing body of the open-enrollment charter holder, each member of the governing body of the charter school, and each chief executive officer/superintendent shall include:

(1) the title of each position held or function performed by the individual;

(2) the specific powers and duties that the governing body of the charter holder or charter school have delegated to the individual, as described by the powers and duties listed in the charter;

(3) the legal name of the individual;

(4) any aliases or names formerly used by the individual, including maiden name;

(5) a mailing address for the individual, if an officer, and the street address of the individual's primary residence, if a governing body member;

(6) telephone numbers and electronic mail address for the individual;

(7) the county and state in which the individual is registered to vote, if a governing body member of the charter holder or charter school;

(8) assurance that criminal records history check has been made and reported to the Texas Education Agency pursuant to §100.1151 of this title (relating to Criminal History; Restrictions on Serving).

(c) The compensation information required for an individual under subsection (a) of this section shall include all compensation, remuneration, and benefits received by the individual in any capacity from the charter holder or the charter school, or from any contractor or management company doing business with the charter holder or charter school. The compensation reported shall include without limitation:

(1) all salary, bonuses, benefits, or other compensation received pursuant to an employment relationship;

(2) all compensation received for goods or services under contract, agreement, informal arrangement, or otherwise;

(3) all payment of or reimbursement for personal expenses;

(4) all credit extended to the individual by the charter holder or charter school;

(5) the fair market value of all personal use of property paid for by the charter holder or charter school;

(6) the fair market value of all in-kind transfers of property;

(7) all compensation for goods or services provided to the charter holder through transactions unrelated to the charter school;

(8) all other forms of compensation or remuneration received by the individual from the charter holder or charter school;

(9) all forms of compensation received from a business in which a person under subsection (a) of this section has a significant interest in, pursuant to Texas Government Code, Chapter 171; and

(10) any payment or form of compensation to an individual under subsection (a) of this section by any and all family members, within the third degree of consanguinity or third degree of affinity.

(d) No later than December 1 of each year, each open-enrollment charter holder shall file under §100.1013 of this title:

(1) a copy of any amendments or changes to the articles of incorporation and bylaws, or comparable document; and

(2) a screenshot of the names of the governing body as listed on the home page of the school's internet website, along with a screen shot of the posting of the school's superintendent's salary or, as applicable, the administrator serving as educational leader or chief executive officer.

§100.1010. Performance Frameworks.

The performance of an open-enrollment charter school will be measured annually against a set of criteria set forth in the Charter School Performance Framework (CSPF) Manual established under Texas Education Code, §12.1181. The CSPF Manual will include measures for charters registered under the standard system and measures for charters registered under the alternative education accountability system as adopted under §97.1001 of this title (relating to Accountability Rating System).

§100.1015. Applicants for an Open-Enrollment Charter, Public Senior College or University Charter, or Public Junior College Charter.

(a) No applicant will be considered that has, within the preceding 10 years, had a charter under Texas law or similar charter under the laws of another state surrendered under a settlement agreement, revoked, denied renewal, or returned or that is considered to be a corporate affiliate of, or substantially related to, an entity that, within the preceding 10 years, had a charter under Texas law or similar charter under the laws of another state surrendered under a settlement agreement, revoked, denied renewal, or returned. The commissioner of education may not grant more than one charter for an open-enrollment charter school to any charter holder.

(b) Notwithstanding any other provisions in this chapter, the following provisions apply to open-enrollment charter applicants and successful charter awardees authorized by the commissioner [~~State Board of Education (SBOE)~~] under requests for applications adopted after November 1, 2012.

(1) Financial standards. An applicant for an open-enrollment charter, a public senior college or university charter, or a public junior college charter shall meet each of the following financial standards, as determined by the commissioner [~~of education~~] or the commissioner's designee, prior to being considered for award of a charter and must understand that any failure to maintain ongoing compliance with these requirements, if awarded a charter, will be considered a material violation of the charter contract and may be grounds for revocation.

(A) Any existing entity applying for the charter must be in good standing with the Internal Revenue Service (IRS), the Texas Secretary of State, and the Texas Comptroller of Public Accounts. An existing entity must also be in good standing with all regulatory agencies in its home state.

(B) Each entity must provide evidence of financial competency and sustainability by providing evidence of an appropriate business plan that includes each of the following:

(i) a succinct long-term vision for the proposed school;

(ii) three to five core values or beliefs, with succinct explanations, for the operation of the proposed school;

(iii) a brief analysis of the target location(s) for the proposed school with a succinct explanation of the reasons for choosing the location(s);

(iv) a brief analysis of the competition in the area(s) for the same students and the methods that the proposed school will use to recruit and retain students;

(v) a brief narrative of the growth plan for the first five years of operation of the proposed school that matches all projections included in the budget and considers the potential expansion of competition in the area for the same student population;

(vi) a list of risk factors, with brief explanations, that could jeopardize the viability of the proposed school;

(vii) a list of success factors, with brief explanations, that the proposed school founders have analyzed and determined will outweigh the risks;

(viii) an unqualified opinion as provided in the most recent audited financial statements of the applicant if the entity has been in existence at least a year;

(ix) a five-year budget projection of revenue and expenditures for the proposed charter using the template that will be provided in the request for applications (RFA);

(x) a narrative response, based on the revenue and expenditures provided in the template that will be provided in the RFA, detailing the ways in which the budget projections were derived, including any assumptions used; and

(xi) support documentation for budget projections as detailed in the budget template that will be provided with the RFA.

(C) Loans and lines of credit are liabilities that must be repaid and will be [~~are not~~] considered as available funding. Loans [~~Funds from loans~~] or lines of credit that are irrevocable for a period of at least one year can [~~cannot~~] be characterized [~~calculated~~] as assets and [~~or considered~~] as cash on hand unless the funds have been drawn down. The applicant must identify in the template provided in the RFA available funding for start-up costs, as documented by current assets listed in the balance sheet and/or pledges for donations that do not require repayment, meeting or exceeding the following amounts:

(i) the total amount of funds available;

(ii) the amount per student proposed to be served in the first year of operation; and

(iii) the amount of days of operation funded by the amount in this subparagraph, defined by the total annual budget divided by 180 days.

~~*[(i)* the greater of $50,000 per charter school location or $500 times the number of students that the charter proposes to serve for the first year of operation; and]~~

~~*[(ii)* at least 30 days cash on hand in the amount required in clause (i) of this subparagraph must be available as cash reserves.]~~

(D) To ensure financial viability, the entity must serve [~~commit to serving~~] a minimum of 100 students and must reach a minimum of 500 students by the first renewal date of the charter contract unless a lower amount is declared and approved in the charter contract. Failure to meet the standard set in this subparagraph will be grounds for non-renewal of the charter contract. [~~at all times or shall explain fully why such a number is not optimum and/or attainable.~~]

(E) The entity applying for the charter must have liabilities that are less than 80% of its assets.

(F) The aggregate of projected budgeted expenses must be less than the aggregate of projected total revenues by the end of the first year of operation provided that:

(i) projected revenues are documented and use the amount per student designated in the RFA when calculating Foundation School Program (FSP) funding that will begin during the first year of operation, or the applicant provides compelling evidence as to the reasons that its FSP will be higher than the rate designated in the RFA; and

(ii) all reasonable start-up and first-year expenditures are included in the budgets or an explanation for not needing to include them is included in the budget narratives.

(G) No more than 27% of the budget may be allocated for administrative costs for charters with an anticipated first-year enrollment of 500 or fewer students, or no more than 16% of the budget may be allocated for administrative costs for charters with an anticipated first-year enrollment of more than 500 students. Administrative costs are those costs identified as such in Texas Education Agency (TEA) financial publications for charter schools.

(2) Governing standards. An applicant for an open-enrollment charter, a public senior college or university charter, or a public junior college charter shall meet each of the following governing standards, as determined by the commissioner or the commissioner's designee, prior to being considered for award of a charter and must understand that any failure to maintain ongoing compliance with these requirements, if awarded a charter, will be considered a material violation of the charter contract and may be grounds for revocation, except as provided by Texas Education Code (TEC), §12.1054(a)(2) [~~and §12.1055(b)~~].

(A) To qualify as an eligible entity in accordance with TEC, §12.101(a)(3), as an organization that is exempt under 26 United States Code (USC), §501(c)(3), the applicant must have its own 501(c)(3) exemption in its own name, as evidenced by a 501(c)(3) letter of determination issued by the IRS. Thus, an applicant cannot attain status as an eligible entity that is exempt under 26 USC, §501(c)(3), as a disregarded entity, a supporting organization, or a member of a group exemption of a currently recognized 501(c)(3) tax-exempt organization. A religious organization, sectarian school, or religious institution that applies must have an established separate non-sectarian entity that is exempt under 26 USC, §501(c)(3), to be considered an eligible entity. Entities that have applied for 501(c)(3) status, but have yet to receive the exemption from the IRS, must provide the letter of determination of the 501(c)(3) status issued by the IRS prior to consideration for interview. Failure to secure 501(c)(3) status deems an entity ineligible.

(B) The articles of incorporation, the Certificate of Filing, the Certificate of Formation, and the bylaws of the applicant must vest the management of the corporate affairs in the board of directors. The management of the corporate affairs shall not be vested in any member or members nor shall the corporate charter or bylaws confer on or reserve to any other entity the ability to overrule, remove, replace, or name the members of the board of the charter holder during the duration of the charter's existence. However, if the applicant or its affiliate is a high performing entity as evidenced by performance at a level of performance comparable to performance at the highest or second highest performance rating under TEC, Chapter 39, Subchapter C, then it may vest management in a member provided that the entity may change the members of the governing body of the charter holder prior to the expiration of a member's term only with commissioner's written approval. An academic performance rating that is below acceptable in another state, as determined by the commissioner, does not satisfy this section. Any other change in the aforementioned governance documents pursuant to the management of the corporate affairs of the nonprofit entity may only occur with the approval of the commissioner in accordance with §100.1033(c) of this title (relating to Charter Amendment) or in accordance with any other power granted to the commissioner in state law or rule.

(C) If the sponsoring entity is a 501(c)(3) nonprofit corporation, its bylaws must clearly state that the charter holder and charter school will comply with the Texas Open Meetings Act and will appropriately respond to Texas Public Information Act requests.

(D) No family members within the third degree of consanguinity or second [~~third~~] degree of affinity shall serve [~~together~~] on the charter holder or charter school board.

(E) No family member within the third degree of consanguinity or third degree of affinity of any charter holder board member, charter school board member, or superintendent [~~school officer~~] shall receive compensation in any form from the charter school, the charter holder, or any management company that operates the charter school.

(F) The applicant shall specify that the governing body accepts and will not delegate ultimate responsibility for the school, including academic performance and financial and operational viability, and is responsible for overseeing any management company providing management services for the school.

(3) Educational and operational [~~Operational~~] standards. An applicant for an open-enrollment charter, a public senior college or university charter, or a public junior college charter shall successfully meet each of the following operational standards, as determined by the commissioner or the commissioner's designee, prior to being considered for award of a charter and must understand that any failure to maintain ongoing compliance with these requirements, if awarded a charter, will be considered a material violation of the charter contract and may be grounds for revocation.

(A) The charter applicant must clearly explain the overall educational philosophy to be promoted at the school, if authorized.

(B) The charter applicant must clearly explain in succinct terms the specific curricular programs that the school, if authorized, will provide to students and the ways in which the charter staff, board members, and others will use these programs to maintain high expectations for and the continuous improvement of student performance.

(C) The charter applicant must clearly explain in succinct terms the ways in which the school, if authorized, will differ from the traditional neighborhood schools or charter schools that currently operate in the area where the school or schools would be located.

(D) The charter applicant must clearly explain how classroom practices will reflect the connections among curriculum, instruction, and assessment.

(E) The charter applicant must describe in succinct terms the specific ways in which the school, if authorized, will:

(i) address the instructional needs of students performing both below and above grade levels in major content areas;

(ii) differentiate instruction to meet the needs of diverse learners;

(iii) provide a continuum of services in the least restrictive environment for students with special needs as required by state and federal law;

(iv) provide bilingual and/or English as a second language instruction to English language learners as required by state law; and

(v) implement an educational program that supports the enrichment curriculum, including fine arts, health education, physical education, technology applications, and, to the extent possible, languages other than English.

(F) As evidenced in required documentation, the charter applicant must commit to hiring personnel with appropriate qualifications as follows.

(i) Teachers in all core subjects must be degreed and have demonstrated competency in the subjects in which they will be assigned to teach as required in federal law.

(ii) All teachers, regardless of subject matter taught, must have a baccalaureate degree.

(iii) [~~(ii)~~] Special education teachers, bilingual teachers, and teachers of English as a second language must be certified in the fields in which they are assigned to teach as required in state and/or federal law.

(iv) [~~(iii)~~] Paraprofessionals must be certified as required to meet state and/or federal law.

(G) The charter applicant must commit to serving, by its fifth year of operation, at least as many students in grades assessed for state accountability purposes as those served in grades not assessed for state accountability purposes.

(H) The charter applicant must provide a final copy of any management contract, if applicable, that will be entered into by the charter holder that will provide any management services, including the monetary amount that will be paid to the management company for providing school services.

(4) Additional requirements. An applicant for a competitive open-enrollment charter to be considered for award, as authorized by TEC, Chapter 12, Subchapter D, must ensure that each of the following occur or the application will be disqualified.

(A) The application is complete and meets all of the requirements set forth in paragraphs (1)-(3) of this subsection [~~section~~], as determined by the commissioner or the commissioner's designee.

(i) The commissioner or the commissioner's designee may conclude the review of an application once it is apparent that the application is incomplete or that the application fails to meet one or more of the requirements set forth in paragraphs (1)-(3) of this subsection [~~section~~].

(ii) Any applicant who submits an incomplete application, an application that fails to meet one or more of the requirements as set forth in paragraphs (1)-(3) of this subsection [~~section~~], or an application that contains information referenced in subparagraph (D)(i)-(iii) [~~(C) (i)-(iii)~~] of this paragraph will be notified pursuant to §100.1002(b) of this title (relating to Application and Selection Procedures and Criteria) by the TEA division responsible for charter schools that the application has been removed from consideration of award and will not be sent forward for scoring by the external review panel.

(I) An applicant that [~~who~~] is notified that the application has been removed from consideration of award by the commissioner or the commissioner's designee will have five business days to respond in writing and direct TEA staff responsible for charter schools to the specific parts of the application, which was received by the application deadline, that address the identified issue or issues, or to submit missing attachments.

(II) Once any additional review is complete, the decision of the commissioner or the commissioner's designee is final and may not be appealed.

(B) A representative of any applicant must not initiate contact with any employee of the TEA, other than the commissioner or commissioner's designee, regarding the content of its application from the time the application is submitted until the time of [~~that~~] the commissioner award of [~~SBOE awards~~] charters in the applicable application cycle is final, following the 90-day State Board of Education (SBOE) veto period.

(C) An applicant or person or entity acting on behalf of the applicant may not provide any item of value, directly or indirectly, to the commissioner, any employee of the TEA, or member of the SBOE during the no-contact period as defined in §100.1002(k) of this title.

(D) [~~(C)~~] All parts of the application are releasable to the public under the Texas Public Information Act and will be posted to the TEA website. Therefore, the following must be excluded from all applications:

(i) personal email addresses;

(ii) proprietary material;

(iii) copyrighted material;

(iv) documents that could violate the Family Educational Rights and Privacy Act (FERPA) by identifying potential students of the charter school, including, but not limited to, sign-in lists at public meetings about the school, photographs of existing students if the school is currently operating or photographs of prospective students, and/or letters of support from potential charter school parents and/or students; and

(v) any other information or documentation that cannot be released in accordance with Texas Government Code, Chapter 552.

(E) [~~(D)~~] Any application that includes material referenced in subparagraph (D)(iv) [~~(C)(iv)~~] and (v) of this paragraph will

be removed from consideration without any further opportunity for review as described in subparagraph (A)(ii)(I) of this paragraph.

§100.1017. Application of Law and Rules to Public Senior College or University Charters and Public Junior College Charters.

(a) Except as expressly provided in the rules in this subchapter, or where required by Texas Education Code (TEC), Chapter 12, Subchapter E (College or University or Junior College Charter School), a provision of the rules in this subchapter applies to a public senior college or university charter school or junior college charter school as though the public senior college or university charter school or junior college charter school were granted a charter under TEC, Chapter 12, Subchapter D (Open-Enrollment Charter School).

(b) The following provisions of this subchapter do not apply to a public senior college or university charter school or a public junior college charter school:

(1) §100.1033(c)(10) [~~§100.1033(c)(7)~~] and §100.1101 of this title, relating to delegation of powers and duties, except as authorized in the charter contract upon written request of the governing body of the university, college, or junior college;

(2) §100.1035 of this title, relating to compliance records;

(3) §100.1073 of this title, relating to improvements to real property;

(4) §§100.1111-100.1116 of this title, relating to nepotism;

(5) §§100.1131-100.1135 of this title, relating to conflicts of interest;

(6) §100.1203(a) of this title, relating to retention of government records; and

(7) §100.1205 of this title, relating to procurement of professional services.

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

Filed with the Office of the Secretary of State on July 2, 2014.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 475-1497

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19 TAC §100.1011

(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 Education Agency or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed under the Texas Education Code (TEC), §12.101, which authorizes the commissioner to grant a charter on the application of an eligible entity for an open-enrollment charter school, including the adoption of rules to modify criteria for granting a charter to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.1011, which authorizes the commissioner to adopt rules to modify criteria for granting charters for high-performing entities to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.102, which requires schools to operate and govern in accordance with its charter; TEC, §12.103, which authorizes that schools are subject to federal and state laws and rules adopted as applicable to charters; TEC, §12.104, which authorizes the commissioner to adopt rules relating to the applicability of public education law to charter schools; TEC, §12.1053, which authorizes the commissioner to approve procedures for contracting and purchasing or subject schools to rules of governmental entity; TEC, §12.1054, which authorizes the commissioner to enforce state law and rules relating to conflict of interest; TEC, §12.1055, which authorizes the commissioner to enforce state law and rules relating to nepotism; TEC, §12.1059, which authorizes the agency to approve certain employees for positions in schools; TEC, §12.110, which authorizes the commissioner to adopt an application form and procedures to be used in applying for an open enrollment charter; TEC, §12.1101, which authorizes the commissioner to adopt rules for the procedure for providing notice to boards of trustees of a school district and members of the legislature of charter applications that may impact them; TEC, §12.111, which authorizes what a charter must include in order to be granted; TEC, §12.113, which authorizes that a successful charter must satisfy all of TEC, Chapter 12, Subchapter D, and requirements of the application and any required modifications; TEC, §12.114, which authorizes the commissioner to adopt rules for the process to be used to request a revision of a charter of an open-enrollment charter school; TEC, §12.117, which authorizes how the admissions process of an open-enrollment charter school shall occur; TEC, §12.1181, which authorizes the commissioner to develop performance frameworks and adopt rules to implement the performance frameworks that establish standards by which to measure the performance of an open-enrollment charter school; TEC, §12.119, which authorizes the commissioner to require the annual filing of the charter's articles of incorporation, bylaws, and governance reporting information with the agency; TEC, §12.120, which mandates under which circumstances an individual may or may not serve on a governing body of a charter holder or charter school or serve as an employee; TEC, §12.1202, which authorizes that a majority of the governing body of a charter holder or charter school must be qualified voters; TEC, §12.121, which requires the governing body of a charter holder to be responsible for and to retain control of the management, operation, and accountability of the school; TEC, §12.1211, which requires an open-enrollment charter school to maintain on the home page of its Internet website the names of its governing body; TEC, §12.123, which authorizes the commissioner to adopt rules necessary for prescribing and implementing the required training for members of the governing bodies of charter schools and officers of charter schools; TEC, §12.126, which authorizes under what circumstances the commissioner may prohibit, deny renewal of or revoke a contract for management services; TEC, §12.129, which requires all teachers and principals employed in an open-enrollment charter school hold a baccalaureate degree; TEC, §12.152, which authorizes the commissioner to grant charters on application of a public senior college or university or public junior college; TEC, §12.153, which authorizes the commissioner to adopt rules to implement colleges and university or junior college charter schools; TEC, §12.154, which authorizes the commissioner to establish criteria that must be satisfied for the granting of a charter to a public senior college or university or public junior college; Local Government Code, §140.006, which requires an open-enrollment charter school to post its annual financial statement on the school's Internet website; and Local Government Code,

§171.004, which authorizes how all local public officials with a substantial interest in a business entity or real property shall conduct their affairs.

The repeal implements the implement the TEC, §§12.101, 12.1011, 12.102, 12.103, 12.104, 12.1053, 12.1054, 12.1055, 12.1059, 12.110, 12.1101, 12.111, 12.113, 12.114, 12.117, 12.1181, 12.119, 12.120, 12.1202, 12.121, 12.1211, 12.123, 12.126, 12.129, 12.152, 12.153, and 12.154 and Local Government Code, §140.006 and §171.004.

§100.1011. Definitions.

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

Filed with the Office of the Secretary of State on July 2, 2014.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 475-1497

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DIVISION 2. COMMISSIONER ACTION AND INTERVENTION

19 TAC §§100.1021, 100.1022, 100.1031, 100.1037

(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 Education Agency or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under the Texas Education Code (TEC), §12.101, which authorizes the commissioner to grant a charter on the application of an eligible entity for an open-enrollment charter school, including the adoption of rules to modify criteria for granting a charter to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.1011, which authorizes the commissioner to adopt rules to modify criteria for granting charters for high-performing entities to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.102, which requires schools to operate and govern in accordance with its charter; TEC, §12.103, which authorizes that schools are subject to federal and state laws and rules adopted as applicable to charters; TEC, §12.104, which authorizes the commissioner to adopt rules relating to the applicability of public education law to charter schools; TEC, §12.1054, which authorizes the commissioner to enforce state law and rules relating to conflict of interest; TEC, §12.1055, which authorizes the commissioner to enforce state law and rules relating to nepotism; TEC, §12.1059, which authorizes the agency to approve certain employees for positions in schools; TEC, §12.106, which authorizes the commissioner to adopt rules to provide and account for the state funding of charter schools; TEC, §12.1061, which addresses circumstances in which the commissioner may or may not recover certain state funds paid to an open-enrollment charter school; TEC, §12.107, which requires that schools hold in trust for benefit of students all state funds and declares that these funds are considered to be public funds for all purposes under state law; TEC, §12.113, which authorizes that a successful charter must satisfy all of TEC, Chapter 12, Subchapter D, and requirements of the application and any required modifications; TEC, §12.114, which authorizes the commissioner to adopt rules for the process to be used to request a revision of a charter of an open-enrollment charter school; TEC, §12.1141, which authorizes the commissioner to adopt rules for the procedure and criteria for renewal, denial of renewal, or expiration of a charter of an open-enrollment charter school; TEC, §12.115, which authorizes the commissioner to adopt rules necessary for the administration of the basis for charter revocation or modification of governance; TEC, §12.116, which authorizes the commissioner to adopt an informal procedure to be used for revoking the charter of an open-enrollment charter school or for reconstituting the governing body of the charter holder; TEC, §12.1161, which authorizes how a revoked, nonrenewed, or surrendered charter shall be treated; TEC, §12.1162, which authorizes the commissioner to adopt rules to implement sanctions against an open-enrollment charter school based on violations of Texas law; TEC, §12.1163, which authorizes the commissioner to audit the records of an open-enrollment charter school, charter holder, and a management company; TEC, §12.1181, which authorizes the commissioner to develop performance frameworks and adopt rules to implement the performance frameworks that establish standards by which to measure the performance of an open-enrollment charter school; TEC, §12.1202, which authorizes that a majority of the governing body of a charter holder or charter school must be qualified voters; TEC, §12.121, which requires the governing body of a charter holder to be responsible for and to retain control of the management, operation, and accountability of the school; TEC, §12.1211, which requires an open-enrollment charter school to maintain on the home page of its Internet website the names of its governing body; TEC, §12.123, which authorizes the commissioner to adopt rules necessary for prescribing and implementing the required training for members of the governing bodies of charter schools and officers of charter schools; TEC, §12.126, which authorizes under what circumstances the commissioner may prohibit, deny renewal of or revoke a contract for management services; TEC, §39.102, which authorizes the commissioner to impose interventions and sanctions, or take other action, if a school district or open-enrollment charter school does not satisfy accreditation criteria, academic accountability standards, or financial accountability standards; TEC, §39.103, which authorizes the commissioner to impose interventions and sanctions, or take other action, for campuses; and TEC, §39.104, which authorizes the commissioner to adopt rules to implement procedures to impose interventions and sanctions under the TEC, Chapter 39, relating to open-enrollment charter schools.

The repeals implement the TEC, §§12.101, 12.1011, 12.102, 12.103, 12.104, 12.1054, 12.1055, 12.1059, 12.106, 12.1061, 12.107, 12.113, 12.114, 12.1141, 12.115, 12.116, 12.1161, 12.1162, 12.1163, 12.1181, 12.1202, 12.121, 12.1211, 12.123, 12.126, 39.102, 39.103, and 39.104.

§100.1021. Adverse Action on an Open-Enrollment Charter.

§100.1022. Standards for Adverse Action on an Open-Enrollment Charter.

§100.1031. Charter Renewal.

§100.1037. Notification of Charter Application.

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

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Cristina De La Fuente-Valadez
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Texas Education Agency
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19 TAC §§100.1021 - 100.1023, 100.1025, 100.1026, 100.1031 - 100.1033, 100.1035

The new sections and amendments are proposed under the Texas Education Code (TEC), §12.101, which authorizes the commissioner to grant a charter on the application of an eligible entity for an open-enrollment charter school, including the adoption of rules to modify criteria for granting a charter to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.1011, which authorizes the commissioner to adopt rules to modify criteria for granting charters for high-performing entities to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.102, which requires schools to operate and govern in accordance with its charter; TEC, §12.103, which authorizes that schools are subject to federal and state laws and rules adopted as applicable to charters; TEC, §12.104, which authorizes the commissioner to adopt rules relating to the applicability of public education law to charter schools; TEC, §12.1054, which authorizes the commissioner to enforce state law and rules relating to conflict of interest; TEC, §12.1055, which authorizes the commissioner to enforce state law and rules relating to nepotism; TEC, §12.1059, which authorizes the agency to approve certain employees for positions in schools; TEC, §12.106, which authorizes the commissioner to adopt rules to provide and account for the state funding of charter schools; TEC, §12.1061, which addresses circumstances in which the commissioner may or may not recover certain state funds paid to an open-enrollment charter school; TEC, §12.107, which requires that schools hold in trust for benefit of students all state funds and declares that these funds are considered to be public funds for all purposes under state law; TEC, §12.113, which authorizes that a successful charter must satisfy all of TEC, Chapter 12, Subchapter D, and requirements of the application and any required modifications; TEC, §12.114, which authorizes the commissioner to adopt rules for the process to be used to request a revision of a charter of an open-enrollment charter school; TEC, §12.1141, which authorizes the commissioner to adopt rules for the procedure and criteria for renewal, denial of renewal, or expiration of a charter of an open-enrollment charter school; TEC, §12.115, which authorizes the commissioner to adopt rules necessary for the administration of the basis for charter revocation or modification of governance; TEC, §12.116, which authorizes the commissioner to adopt an informal procedure to be used for revoking the charter of an open-enrollment charter school or for reconstituting the governing body of the charter holder; TEC, §12.1161, which authorizes how a revoked, nonrenewed, or surrendered charter shall be treated; TEC, §12.1162, which authorizes the commissioner to adopt rules to implement sanctions against an open-enrollment charter school based on violations of Texas law; TEC, §12.1163, which authorizes the commissioner to audit the records of an open-enrollment charter school, charter holder, and a management company; TEC, §12.1181, which authorizes the commissioner to develop performance frameworks and adopt rules to implement the performance frameworks that establish standards by which to measure the performance of an open-enrollment charter school; TEC, §12.1202, which authorizes that a majority of the governing body of a charter holder or charter school must be qualified voters; TEC, §12.121, which requires the governing body of a charter holder to be responsible for and to retain control of the management, operation, and accountability of the school; TEC, §12.1211, which requires an open-enrollment charter school to maintain on the home page of its Internet website the names of its governing body; TEC, §12.123, which authorizes the commissioner to adopt rules necessary for prescribing and implementing the required training for members of the governing bodies of charter schools and officers of charter schools; TEC, §12.126, which authorizes under what circumstances the commissioner may prohibit, deny renewal of or revoke a contract for management services; TEC, §39.102, which authorizes the commissioner to impose interventions and sanctions, or take other action, if a school district or open-enrollment charter school does not satisfy accreditation criteria, academic accountability standards, or financial accountability standards; TEC, §39.103, which authorizes the commissioner to impose interventions and sanctions, or take other action, for campuses; and TEC, §39.104, which authorizes the commissioner to adopt rules to implement procedures to impose interventions and sanctions under the TEC, Chapter 39, relating to open-enrollment charter schools.

The new sections and amendments implement the TEC, §§12.101, 12.1011, 12.102, 12.103, 12.104, 12.1054, 12.1055, 12.1059, 12.106, 12.1061, 12.107, 12.113, 12.114, 12.1141, 12.115, 12.116, 12.1161, 12.1162, 12.1163, 12.1181, 12.1202, 12.121, 12.1211, 12.123, 12.126, 39.102, 39.103, and 39.104.

§100.1021. Revocation and Modification of Governance of an Open-Enrollment Charter.

(a) Mandatory revocation or reconstitution. Except as provided by subsection (b) of this section, the commissioner of education shall either revoke the charter of an open-enrollment charter school or reconstitute the governing body of the charter holder if the commissioner determines that the charter holder:

(1) committed a material violation of the charter, including failure to satisfy accountability provisions prescribed by the charter;

(2) failed to satisfy generally accepted accounting standards of fiscal management;

(3) failed to protect the health, safety, or welfare of the students enrolled at the school;

(4) failed to comply with this subchapter or another applicable law or rule;

(5) failed to satisfy the performance framework standards as set forth in the Charter School Performance Framework Manual established under Texas Education Code (TEC), §12.1181; or

(6) is imminently insolvent as determined by the commissioner in accordance with §100.1022(h) of this title (relating to Standards to Revoke and Modify the Governance of an Open-Enrollment Charter).

(b) Mandatory revocation.

(1) Use of criteria. Notwithstanding §100.1022 of this title, the commissioner shall revoke the charter of an open-enrollment charter school if for the three preceding school years:

(A) the charter holder has been assigned an "academically unacceptable" performance rating under TEC, Chapter 39, Subchapter C;

(B) the charter holder has been assigned a financial accountability performance rating under TEC, Chapter 39, Subchapter D, indicating financial performance lower than satisfactory; or

(C) the charter holder has been assigned any combination of an academic performance rating of "academically unacceptable" under TEC, Chapter 39, Subchapter C, and/or a financial performance rating lower than satisfactory under TEC, Chapter 39, Subchapter D.

(2) Use of determinations and data. The following provisions apply to a mandatory revocation under this section.

(A) If a rating is not issued during one or more of the preceding school years, then the term "three preceding school years" means the most recent three school years during which a rating was issued.

(B) For purposes of revocation under paragraph (1)(A) of this subsection, the term "unacceptable performance" means an academic accountability rating that is unacceptable as defined in §100.1001(26) of this title (relating to Definitions).

(C) For purposes of revocation under paragraph (1)(B) of this subsection, the term "financial performance lower than satisfactory" means a financial accountability rating that is lower than satisfactory as defined in §100.1001(27) of this title.

(D) For purposes of revocation under paragraph (1)(A) of this subsection, the initial three school years for which performance ratings under TEC, Chapter 39, Subchapter C, shall be considered are the 2009-2010, 2010-2011, and 2012-2013 school years.

(E) For purposes of revocation under paragraph (1)(B) of this subsection, the initial three school years for which financial accountability performance ratings under TEC, Chapter 39, Subchapter D, shall be considered are the 2010-2011, 2011-2012, and 2012-2013 school years.

(F) The provisions in subparagraphs (D) and (E) of this paragraph and this subparagraph expire on September 1, 2016.

(c) Notice and content of decision to revoke or modify. The commissioner shall provide written notice to the charter holder of the commissioner's decision to revoke or modify the governance of a charter. The notice shall include an explanation of the factual and legal basis for the decision, a description of the legally relevant factors considered, an explanation of why the result reached is reasonable, and a description of the procedures to seek a review of the decision.

(d) State Office of Administrative Hearing (SOAH) review of revocation. A decision by the commissioner to revoke the charter of an open-enrollment charter school under TEC, §12.115, is subject to review by the SOAH under an arbitrary and capricious or clearly erroneous standard as described by Chapter 157, Subchapter EE, Division 4, of this title (relating to State Office of Administrative Hearing Arbitrary and Capricious or Clearly Erroneous Review).

(e) Reconstitution of governing body of charter holder and/or creation of a new 501(c)(3) organization. With the exception of revocation actions taken under subsection (b) of this section, the commissioner may choose to reconstitute the governing board of a charter holder and/or require the creation of a new 501(c)(3) organization if it is determined that the charter holder committed any violation under subsection (a) of this section.

(1) To reconstitute the board, the commissioner shall appoint members to the governing body and shall consider local input from community members and parents as well as appropriate credentials and expertise for membership, including financial expertise, residency, and educational background. The commissioner may reappoint current members of the governing body.

(2) The commissioner may also require the charter holder board to create a new single purpose organization that is exempt from taxation under 501(c)(3), Internal Revenue Code of 1986, if the governing body of a charter holder subject to reconstitution governs enterprises other than the open-enrollment charter school. The commissioner shall appoint the members of the governing body of the newly created organization.

(3) The commissioner may require the charter holder to surrender the charter to the commissioner for transfer to the newly created organization.

(4) A decision by the commissioner to reconstitute the governing body of the charter of an open-enrollment charter school or to create a new 501(c)(3) organization under Internal Revenue Code of 1986 under TEC, §12.115, is subject to a formal review as described by Chapter 157, Subchapter EE, Division 2, of this title (relating to Formal Review).

§100.1022. Standards to Revoke and Modify the Governance of an Open-Enrollment Charter.

(a) Criteria for taking action. The action the commissioner of education takes under §100.1021(a) of this title (relating to Revocation and Modification of Governance of an Open-Enrollment Charter) to either revoke or modify the governance of a charter shall be based on the best interest of the charter school's students as it relates to the violation charged in the notice, the severity of the violation, and any previous violation the school has committed.

(1) These criteria are not listed in order of importance. Rather, the commissioner shall assign weight to each criterion as indicated by the facts of the case presented. For example, serious or persistent charter violations may warrant revocation or non-renewal even if the violations benefited or had neutral effect on the students enrolled in the charter school. The state's interest in legal compliance is sufficient basis for action.

(2) The "best interest of the charter school's students" is not a decisional criterion independent of the violation charged in the notice. Rather, the commissioner shall consider the best interests of students only as this criterion relates to the violation charged in the notice. For example, evidence of serious and persistent violations in one area of performance may not be offset or excused by evidence of benefit to students in an area of performance that is unrelated to the violation charged in the notice.

(b) Minimum academic performance required. Continuation of an open-enrollment charter is contingent on satisfactory academic performance as measured by the academic accountability ratings and accreditation statuses assigned under the Texas Education Code (TEC), Chapter 39, as well as any supplemental accountability requirements in the open-enrollment charter pursuant to TEC, §12.111(a)(3) and (4). Such supplemental requirements are in addition to, and may not supplant, satisfactory academic performance as measured by the ratings assigned under TEC, Chapter 39.

(1) Consideration of campus ratings. The commissioner shall revoke an open-enrollment charter of a charter holder if all of

the campuses operated under that charter have been closed under TEC, Chapter 39.

(2) Determination of academic performance. For purposes of this subsection, required minimum academic performance shall be determined as follows.

(A) An "unsatisfactory rating" shall mean an academic accountability rating that is "academically unacceptable" as defined in §100.1001(26) of this title (relating to Definitions). For any school year, if the Texas Education Agency (TEA) assigns no district-level ratings to open-enrollment charter schools generally, but does assign campus-level ratings in that year, then unsatisfactory ratings for a majority of the campuses operated by the charter holder in such year shall constitute an unsatisfactory rating for the charter holder at the "district" level.

(B) A "satisfactory rating" shall mean an academic accountability rating that is "academically acceptable" as defined in §100.1001(26) of this title.

(C) Ratings are "consecutive" if they are not separated by a rating period in which the TEA assigned accountability ratings to charter schools. For example, the TEA did not assign academic accountability ratings to charter schools for the 2011-2012 school year. Thus, the ratings for the 2010-2011 and 2012-2013 school years are consecutive both for charter holders registered under the standard accountability system as well as charter holders registered under the alternative education accountability (AEA) system.

(D) If the performance of an applicant for renewal under §100.1031 of this title (relating to Renewal of an Open-Enrollment Charter) cannot be determined because the applicant's charter school has not received accountability ratings and/or accreditation statuses for a sufficient number of years to support a judgment on its student performance:

(i) the commissioner shall make a decision on student performance under the discretionary review process under §100.1031(d) of this title; and

(ii) the commissioner's review under this subparagraph shall include the charter's annual evaluation under the Charter School Performance Framework Manual established under TEC, §12.1181, and the criteria described in §100.1032 of this title (relating to Standards for Discretionary Renewal).

(E) If the performance of a charter holder cannot be determined because the small numbers of students or the grade levels served by the program prevented, limited, or significantly impacted the application of the TEA's standard ratings and/or accreditation criteria, then the commissioner may evaluate substitute data chosen by the commissioner in taking action under this section.

(i) Based on evaluation under this subparagraph, the commissioner shall determine whether the applicant has demonstrated a history of unsatisfactory academic performance. Any appeal under §100.1021 of this title of a determination under this clause may include the question whether the campus has had unsatisfactory academic performance.

(ii) Regardless of whether the campus has satisfactory student performance, the commissioner may modify the open-enrollment charter to require the charter holder to serve additional students or grade levels that will cause the campus to receive academic ratings and/or statuses in the future.

(F) If the performance of a charter holder cannot be determined because a high proportion of students served are in prekindergarten-Grade 2 or another grade for which an assessment instrument is not administered under TEC, §39.023, then the commissioner may evaluate the performance of the charter holder.

(3) Finality of ratings.

(A) Any appeal to a specific rating must be brought using the appeals procedures in the relevant accountability manual, which includes alternative education accountability, adopted under Chapter 97, Subchapter AA, of this title (relating to Accountability and Performance Monitoring).

(B) Any challenge to a TEA rule, ratings standard, or process must be brought using the procedures outlined in Texas Government Code, Chapter 2001, for requesting agency rulemaking or challenging agency rules.

(c) Minimum financial performance required. Continuation of an open-enrollment charter is contingent on the charter holder satisfying generally accepted accounting standards of fiscal management.

(1) Determination. For purposes of this subsection, generally accepted standards of fiscal management shall be determined as follows.

(A) Any of the following constitutes failure to comply with generally accepted standards of fiscal management.

(i) Payment is made in excess of bonafide compensation agreements. The payment of compensation to an individual in excess of the fair market value of the services provided is a serious unsatisfactory financial performance. For purposes of this subsection, the fair market value of the services rendered shall be based on the individual's education, experience, prior salary history, the job duties actually performed, and what a typical person with similar skills, experience, and job duties would earn.

(ii) Rental or purchase of property is in excess of its fair market value.

(iii) The charter school received a significant overallocation from the Foundation School Program based on data reported by the charter holder.

(iv) The charter school becomes imminently insolvent as determined in subsection (h) of this section.

(v) The charter school's financial auditor issues an adverse opinion regarding the school's financial statements or the school's financial auditor disclaims an opinion on the financial statements, and the issue resulting in the adverse or disclaimed opinion involves a significant amount of financial resources that were not properly documented or a material weakness that led to the misallocation of financial resources.

(vi) The charter holder exhibits other instances of fiscal mismanagement, including, but not limited to, the loss of financial records or a material non-compliance with §109.41 of this title (relating to Financial Accountability System Resource Guide) or related supplement resulting in a significant wasting of financial resources.

(vii) A final investigative report issued by the TEA finds material noncompliance with the standards of this subsection.

(viii) The annual audit report required by TEC, §44.008, is more than 180 days delinquent.

(ix) The charter holder's property is subject to a lien, levy, or other garnishment and that lien, levy, or other garnishment is not removed within 30 days.

(x) The charter holder is subject to a warrant hold and that warrant hold is not removed within 30 days.

(xi) The charter holder loses its eligibility to participate in child nutrition programs for a period of more than 30 days.

(xii) The charter holder has received an audit containing an adverse or disclaimed opinion, and based on the opinion is assigned a financial accountability rating that is less than satisfactory.

(B) Charter holder financial performance will be evaluated in accordance with the following standards.

(i) Step transactions. The commissioner may view the transaction as a whole and may disregard any nonsubstantive intervening transaction taken to achieve the final results.

(ii) Arm's length transaction. A transaction that is described in subparagraph (A) of this paragraph that is the result of an arm's length transaction between completely unrelated parties is only a serious unsatisfactory financial performance if the transaction resulted in a significant wasting of financial resources.

(2) Finality of audits and reports.

(A) Any review of a specific audited financial statement or investigative report must be brought using the procedures provided in the notice of the statement or report.

(B) Any challenge to a TEA rule, financial standard, or audit procedure must be brought using the procedures outlined in Texas Government Code, Chapter 2001, for requesting agency rulemaking or challenging agency rules.

(d) Minimum compliance performance required. Continuation of an open-enrollment charter is contingent on the charter holder's compliance with TEC, Chapter 12, Subchapter D; federal and state laws and rules; financial accountability standards, including student attendance accounting and grant requirements; and data integrity standards as demonstrated by monitoring reports under TEC, §7.028, final investigative reports issued by the TEA, and other evidence.

(1) Standard of required performance. The open-enrollment charter authorizing a charter school that has unsatisfactory compliance performance for three consecutive school years will be revoked.

(2) Determination of performance. For purposes of this subsection, required minimum compliance performance shall be determined as follows. A charter holder's compliance with TEC, Chapter 12, Subchapter D; federal and state laws and rules; financial accountability standards, including student attendance accounting and grant requirements; or data integrity standards may be determined by applying the applicable standards to the facts as found by the TEA monitoring reports under TEC, §7.028, or final investigative reports issued by the TEA. Such reports establish non-compliance if the facts found therein are not in compliance with the standards set forth in this subsection. Other evidence may be considered.

(3) Finality of compliance reports.

(A) Any review of a specific monitoring report or investigative report must be brought using the procedures described in the notice of the report.

(B) Any challenge to a TEA rule or compliance standard must be brought using the procedures outlined in Texas Government Code, Chapter 2001, for requesting agency rulemaking or challenging agency rules.

(e) Minimum health and safety performance required. Continuation of an open-enrollment charter is contingent on the charter holder protecting the health, safety, and welfare of the students enrolled at the school, as determined by the commissioner under §100.1025 of this title (relating to Intervention Based on Health, Safety, or Welfare of Students) and this subsection or by an official report issued by a federal, state, or local authority with jurisdiction to issue the report.

(1) Standard of required performance. The open-enrollment charter authorizing a charter school that fails to protect the health, safety, or welfare of the students enrolled at its school while on school property, while at school-related events, or at any time while under the supervision of school personnel shall be revoked effective immediately.

(2) Determination of performance. For purposes of this subsection, required minimum health and safety performance shall be determined as follows.

(A) A final investigative report issued by the TEA is admissible to prove whether the charter holder failed to protect the health, safety, or welfare of the students enrolled at its school.

(B) An official report issued by a federal, state, or local authority acting within its jurisdiction, as well as hearsay evidence and telephone testimony offered by officials from such authority, are admissible to prove whether the charter holder failed to protect the health, safety, or welfare of the students enrolled at its school.

(C) Documents and testimony considered by the commissioner in making a determination under §100.1025 of this title are admissible to prove whether the charter holder failed to protect the health, safety, or welfare of the students enrolled at its school.

(3) Finality of health and safety reports.

(A) Any appeal to a specific official report issued by a federal, state, or local authority acting within its jurisdiction must be brought using the procedures provided in law for the review of such findings.

(B) Any challenge to a TEA rule or compliance standard must be brought using the procedures outlined in Texas Government Code, Chapter 2001, for requesting agency rulemaking or challenging agency rules.

(f) Minimum charter performance required. Continuation of an open-enrollment charter is contingent on the charter holder's implementation of and compliance with the terms of its open-enrollment charter as defined by §100.1001(15) of this title (relating to Definitions).

(1) Standard of required performance. The open-enrollment charter authorizing a charter school that commits a material violation of its open-enrollment charter shall be revoked.

(2) Determination of performance. For purposes of this subsection, required minimum charter performance shall be determined as follows.

(A) A charter holder's compliance with its open-enrollment charter may be determined by applying the charter terms to the facts as found by the TEA monitoring reports under TEC, §7.028, or final investigative reports issued by the TEA. Such reports establish non-compliance if the facts found therein are not in compliance with these terms. Other evidence may be considered.

(B) A violation of the contract for charter, request for applications (RFA), or other document approved by the State Board of Education (SBOE) or of a condition, amendment, modification, or revision of a charter approved by the commissioner is material if it directly violates the purpose of the contract, the RFA, or other documents approved by the SBOE or a condition, amendment, modification, or revision of the contract.

(C) An open-enrollment charter as defined by §100.1001(15) of this title includes all applicable state and federal

laws, rules, and regulations. A violation of such laws, rules, or regulations may be considered both under this subsection and under subsections (b)-(e) of this section, as appropriate.

(3) Finality of charter violation reports.

(A) Any review of a specific investigative report must be brought using the procedures set forth in the notice of the report.

(B) Any challenge to a TEA rule or compliance standard must be brought using the procedures outlined in Texas Government Code, Chapter 2001, for requesting agency rulemaking or challenging agency rules.

(g) Performance frameworks. Continuation of an open-enrollment charter is contingent upon the charter holder's satisfaction of standards set forth in the Charter School Performance Framework Manual established under TEC, §12.1181.

(h) Imminently insolvent. For purposes of this section "imminently insolvent" means that the charter holder:

(1) has incurred liabilities in excess of net assets;

(2) is unable to pay its debts or financial obligations within 90 days of the date they become due;

(3) has declared bankruptcy;

(4) has otherwise sought the protection of bankruptcy laws;

(5) had a lien or warrant hold placed against it by the Internal Revenue Service;

(6) had a warrant hold placed against it by the Teacher Retirement System; or

(7) has a judgment lien placed against it.

§100.1023. Intervention Based on Charter Violations.

(a) The commissioner of education shall temporarily withhold state funds, suspend the authority of an open-enrollment charter school to operate, impose any sanction under Texas Education Code, Chapter 39, Subchapter E, and/or take any other reasonable action the commissioner determines necessary, if the commissioner determines that a charter holder:

(1) committed a material violation of the school's charter;

(2) failed to satisfy generally accepted accounting standards of fiscal management; or

(3) failed to comply with this subchapter or another applicable rule or law.

(b) A determination under this section shall be made through a final investigative report issued by the Texas Education Agency. [~~under Chapter 97, Subchapter DD, of this title (relating to Investigative Reports, Sanctions, and Record Reviews).~~]

(c) The commissioner shall notify the open-enrollment charter school in writing of the action taken under this section. The notice must state the legal and factual basis for the action.

§100.1025. Intervention Based on Health, Safety, or Welfare of Students.

(a) The commissioner of education may temporarily withhold state funds, suspend the authority of an open-enrollment charter school to operate in its entirety or at one or more locations, and/or take any other reasonable action the commissioner determines necessary to protect the health, safety, or welfare of students enrolled at the school based on evidence that conditions at the school present a danger to the health, safety, or welfare of the students.

(b) The commissioner must notify the charter holder in writing of the action taken in subsection (a) of this section.

(c) If the commissioner's actions under subsection (a) of this section relate to circumstances that present an imminent danger of material harm to the health, safety, or welfare of students, the open-enrollment charter school may not receive state funds and may not resume operating until a determination is made that:

(1) despite initial evidence, the conditions at the school do not present an imminent danger of material harm to the health, safety, or welfare of students; or

(2) the conditions at the school that presented an imminent danger of material harm to the health, safety, or welfare of students have been corrected.

(d) Not later than the third business day after the date the commissioner acts under subsection (a) of this section to address circumstances that present an imminent danger of material harm to the health, safety, or welfare of students, the commissioner shall provide the charter holder an opportunity for a hearing.

(e) The hearing under this section shall be conducted under the procedures governing informal review of a preliminary investigative report specified in Chapter 157, Subchapter EE, Division 1, of this title (relating to Informal Review) [~~§97.1033 of this title (relating to Informal Review of Preliminary Investigative Report; Final Investigative Report)~~].

(f) An action under subsection (a) of this section to address circumstances that present an imminent danger of material harm to the health, safety, or welfare of students remains in effect until a determination under subsection (e) of this section becomes final.

(1) If the determination is in favor of the charter holder, the commissioner must cease the action under subsection (a) of this section immediately and restore all funds to which the charter holder would be entitled but for such action.

(2) If the determination is against the charter holder, the commissioner must initiate adverse action against the charter under §100.1021 of this title (relating to Revocation and Modification of Governance of [~~Adverse Action on~~] an Open-Enrollment Charter). The action under subsection (a) of this section then remains in effect until the final decision under §100.1021 of this title.

§100.1026. Management of Charter Campus(es) Following Revocation, Surrender, or Expiration.

Upon revocation, surrender, or expiration of a charter, the commissioner of education or the commissioner's designee may:

(1) assign one or more campuses to a consenting charter holder that meets the minimum qualifications for a campus expansion amendment approval as designated in §100.1033(c)(1)-(8) of this title (relating to Charter Amendment); or

(2) provide for the management of the day-to-day operations of the campus(es) until alternative arrangements have been made.

§100.1031. Renewal of an Open-Enrollment Charter.

(a) Petition for renewal.

(1) A charter holder of an open-enrollment charter may submit, as described by this section, a petition for:

(A) expedited renewal; or

(B) discretionary renewal.

(2) A petition for renewal of the charter must be submitted on the date provided by the Texas Education Agency (TEA) annually, prior to the expiration of the charter contract.

(3) A petition for renewal must be in the form provided by the TEA and shall include all information and documentation required by the form.

(4) If a charter holder fails to submit a timely and sufficient petition for renewal of an open-enrollment charter, the existing charter may expire at the end of its term.

(b) Expedited renewal. If a charter holder submits the petition for expedited renewal, the commissioner of education will approve or deny the expedited renewal not later than the 30th day after the date of the charter holder submission. A charter holder may submit a petition for expedited renewal if:

(1) the charter holder has been assigned the highest or second highest performance rating under Texas Education Code (TEC), Chapter 39, Subchapter C, for the three preceding school years;

(2) the charter holder has been assigned a financial performance accountability rating under TEC, Chapter 39, Subchapter D, indicating financial performance that is satisfactory or better for the three preceding school years; and

(3) no campus operating under the charter has been assigned the lowest performance rating under TEC, Chapter 39, Subchapter C, for the three preceding school years or such a campus has been closed.

(c) Expiration. Notwithstanding any other law, a determination by the commissioner under this subsection is final and may not be appealed. The commissioner may not renew the charter and must allow the charter to expire if:

(1) the charter holder has been assigned the lowest performance rating under TEC, Chapter 39, Subchapter C, for any three of the five preceding school years;

(2) the charter holder has been assigned a financial accountability performance rating under TEC, Chapter 39, Subchapter D, indicating financial performance that is lower than satisfactory for any three of the five preceding school years;

(3) the charter holder has been assigned any combination of the ratings described by paragraph (1) or (2) of this subsection for any three of the five preceding school years; or

(4) any campus operating under the charter has been assigned the lowest performance rating under TEC, Chapter 39, Subchapter C, for the three preceding school years and such a campus, and if applicable, all sites associated with the campus, has not been closed.

(d) Discretionary renewal.

(1) A charter holder may submit a petition for discretionary renewal if it:

(A) does not qualify to submit the petition for expedited renewal; or

(B) is not subject to an expiration under subsection (c) of this section.

(2) In evaluating the petition for discretionary renewal, the commissioner shall consider the following:

(A) the results of the charter's annual evaluation under the performance framework set forth in the Charter School Performance Framework Manual established under TEC, §12.1181; and

(B) the criteria described under §100.1032 of this title (relating to Standards for Discretionary Renewal).

(e) Special rules for alternative education accountability (AEA) charters. The following provisions apply to the renewal of the charter of an open-enrollment charter school that is registered under the TEA AEA procedures for evaluation under TEC, Chapter 39.

(1) Discretionary renewal of AEA charters. An AEA charter may submit the petition for discretionary renewal and the petition must be considered under the discretionary renewal process. An AEA charter may not submit a petition for expedited renewal.

(2) Academic criteria for discretionary renewal of AEA charters.

(A) In considering a petition for discretionary renewal by an AEA charter such as a drop-out recovery school or a school providing education within a residential treatment facility, the commissioner shall use academic criteria as outlined in the Charter School Performance Framework Manual established under TEC, §12.1181, that is appropriate to measure the specific goals of the school.

(B) For purposes of this subsection, the commissioner shall designate as a drop-out recovery school an open-enrollment charter school or a campus of an open-enrollment charter school:

(i) that serves students in Grades 9-12 and has an enrollment of which at least 50 percent of the students are 17 years of age or older as of September 1 of the school year as reported for the fall semester Public Education Information Management System (PEIMS) submission; and

(ii) that meets the eligibility requirements for and is registered under AEA procedures adopted by the commissioner.

(3) Expiration of AEA charters. The commissioner may not renew and must allow an AEA charter to expire if the charter holder has been assigned a financial accountability performance rating under TEC, Chapter 39, Subchapter D, indicating financial performance that is lower than satisfactory for any three of the five preceding school years.

(f) Notice and content of renewal decision or determination.

(1) Expedited renewal decision. Not later than the 30th day after the submission of a petition for expedited renewal, the commissioner shall provide written notice to the charter holder of the commissioner's decision to grant or deny the petition. If the expedited renewal is denied, the notice shall include an explanation of the factual and legal basis for the decision, a description of the legally relevant factors considered, an explanation of why the result reached is reasonable, and a description of the procedures to seek a review of the decision.

(2) Discretionary renewal decision. Not later than the 90th day after the submission of a petition for discretionary renewal, the commissioner shall provide written notice to the charter holder of the commissioner's decision to grant or deny the petition. If the discretionary renewal is denied, the notice shall include an explanation of the factual and legal basis for the decision, a description of the legally relevant factors considered, an explanation of why the result reached is reasonable, and a description of the procedures to seek a review of the determination.

(3) Expiration determination. The commissioner shall provide written notice to the charter holder of the commissioner's determination that the charter must expire. In the event a charter holder that meets the criteria for expiration submits a petition for renewal, the commissioner, not later than the 90th day after the submission, shall provide written notice to the charter holder of the commissioner's decision to

deny the petition. Determinations made by the commissioner are final and may not be appealed. The notice shall include an explanation of the factual and legal basis for the determination, a description of the legally relevant factors considered, and an explanation of why the result reached is reasonable.

(4) Delivery and effective date of notice. The commissioner shall provide written notice to the charter holder by regular mail. Notice is effective as of the date of the postmark.

(g) Appeal of renewal decisions and determinations. A decision by the commissioner to deny the petition for an expedited renewal or the petition for a discretionary renewal is subject to review by the State Office of Administrative Hearings under an arbitrary and capricious or clearly erroneous standard as described under Chapter 157, Subchapter EE, Division 4, of this title (relating to State Office of Administrative Hearings Arbitrary and Capricious or Clearly Erroneous Review).

(h) Use of ratings and data. The following provisions apply to the petition for renewal or expiration under this section.

(1) If a rating is not issued during one or more of the preceding school years, then the term "three preceding school years" means the most recent three school years during which a rating was issued, and the term "three of the five preceding school years" means three out of the most recent five school years during which a rating was issued.

(2) A rating that does not meet the criteria for "academically acceptable" as defined by §100.1001(26) of this title (relating to Definitions) shall not be considered the highest or second highest academic performance rating for purposes of this section.

(3) For purposes of renewal or expiration under this section, the term "unacceptable performance" means an unacceptable academic performance rating as defined by §100.1001(26) of this title.

(4) For purposes of renewal under this section, the term "financial performance lower than satisfactory" means a financial performance rating as defined by §100.1001(27) of this title.

(5) For purposes of determination of renewal or expiration, the academic accountability performance rating for the 2011-2012 school year may not be considered.

(6) For purposes of determination of renewal or expiration, the earliest three school years for which performance ratings under TEC, Chapter 39, Subchapter C, shall be considered are the 2009-2010, 2010-2011, and 2012-2013 school years.

(7) For purposes of determination of renewal, the earliest school year for which financial accountability performance ratings under TEC, Chapter 39, Subchapter D, may be considered is the 2010-2011 school year.

(8) The provisions in paragraphs (5)-(7) of this subsection and this paragraph expire on September 1, 2016.

(i) Conflict of rule. Except as provided by subsection (c) of this section, a contract term that conflicts with any rule in Part 2 of this title is superseded by the rule to the extent that the rule conflicts with the contract term.

(j) Conditional approval. Notwithstanding any other rule in Part 2 of this title, the commissioner may require, as a condition of renewal, that the charter holder amend a contract under TEC, §12.114(a), to correct any ambiguities, defects, or other infirmities.

§100.1032. Standards for Discretionary Renewal.

Criteria for discretionary renewal. The following criteria shall be considered by the commissioner of education during the discretionary renewal process. The commissioner may non-renew a charter contract based on any of the following:

(1) Academic:

(A) assignment of an "academically unacceptable" rating as defined in §100.1001(26) of this title (relating to Definitions);

(B) failure to meet academic performance standards for students not measured in the accountability system;

(C) academic performance of subpopulations; and

(D) failure to meet program requirements for special populations, including, but not limited to, special education, bilingual/English as a second language, and career and technical education;

(2) Financial:

(A) failure to use state funds for purposes for which a school district may use local funds under Texas Education Code (TEC), §45.105(e);

(B) failure to hold state funds in trust for the benefit of the students of the charter school;

(C) failure to satisfy generally acceptable accounting standards of fiscal management;

(D) failure to resolve a lien, levy, or other garnishment within 30 days;

(E) existence of a Foundation School Program (FSP) allotment subject to a warrant hold and that warrant has not been removed within 30 days;

(F) failure to timely file annual financial report required under TEC, §44.008;

(G) existence of an annual financial report containing adverse, qualified, or disclaimed opinion(s);

(H) assignment of a lower than satisfactory financial performance rating as defined in §100.1001(27) of this title;

(I) submission of attendance accounting data resulting in an overallocation from the FSP;

(J) existence of the following interested transactions:

(i) failure to comply with Local Government Code, Chapter 171;

(ii) failure to record and report on the governance reporting forms all financial transactions between charter school and non-charter activities of charter holder; and

(iii) failure to timely and accurately record and report on the governance reporting forms all financial transactions required in the governance reporting form;

(K) failure to post all financial information, including the salary of the chief executive officer (CEO), annual financial statements, most current annual financial report, and approved budget, on the charter school's website;

(L) payment of salaries of the CEO and/or other administrative position(s) that exceed reasonable fair market value for the services provided. Fair market value shall be based on size of school, individual's education, prior salary history, job duties actually performed, and what a typical person with similar skills, experience, and job duties would earn;

(M) renting or purchasing property for amounts in excess of fair market value;

(N) loss of eligibility to participate in the child nutrition program for more than 30 days;

(O) charter holder being imminently insolvent as defined by this chapter;

(P) failure to conduct fiscal mismanagement, including, but not limited to, the loss of financial records or a material non-compliance with State Board of Education or commissioner accounting requirements and failure to comply with the Financial Accountability System Resource Guide adopted under §109.41 of this title (relating to Financial Accountability System Resource Guide); and

(Q) failure to comply with applicable purchasing requirements, including Local Government Code, Chapter 271, if applicable; and

(3) Operational:

(A) Governance:

(i) failure to timely file accurate and complete governance reporting forms;

(ii) non-compliance with required charter board training;

(iii) failure to timely and accurately report board training in the annual financial report;

(iv) failure to maintain verification of criminal history check/fingerprinting;

(v) failure to maintain verification of compliance with reporting requirements of the Secretary of State, the Family Code, Open Meetings and Public Information Act, government and local records, applicability of public purchasing and contracting, and conflicts of interest and nepotism;

(vi) allowing a person with a criminal record to be employed or serve as a volunteer, officer, or board member in violation of TEC, Chapter 12 and Chapter 22;

(vii) failure of an employee or officer of the charter school to report child abuse or neglect as required by the Family Code, Chapter 261;

(viii) failure to disclose and report all conflict of interest and nepotistic relationships to the Texas Education Agency (TEA) in the applicable minutes of the charter holder's corporate records;

(ix) failure to submit to the Secretary of State a listing of all current members of the charter holder, the articles of incorporation, the by-laws, assumed name, and any other matter of the corporate business required to be reported to the Secretary of State; and

(x) failure to maintain the 501(c)(3) status of the charter holder at all times;

(B) Complaints: failure to timely respond to and correct any complaints as directed by the TEA;

(C) Property and campus operations:

(i) operation of any sites that do not meet the definition of a site according to §100.1001(3)(D) of this title and that do not serve a minimum of 100 students;

(ii) failure to operate a campus at which at least 50 percent of students are in tested grades;

(iii) failure of the charter holder to serve a minimum of 500 students, unless a lower number is declared and approved in the charter contract or approved by the commissioner;

(iv) failure to account for all property owned by the charter that is state property pursuant to §100.1071(C) of this title (relating to Real Property Held in Trust);

(v) failure to document and fully disclose any step transactions in the purchase or sale of property; and

(vi) failure to ensure that all charter holder buildings used for educational purposes have a valid certificate of occupancy for educating children;

(D) Activity fees and volunteer requirements:

(i) requiring any activity fees or any compulsory fees that are not authorized by TEC, §11.158, or other law; and

(ii) requiring any parental involvement, donation, or volunteerism as a condition of enrollment or continued enrollment;

(E) Management contracts:

(i) charter holder board allowing any entity to exercise control or ultimate responsibility for the school, including the academic performance, financial accountability, or operational viability;

(ii) charter holder board not retaining or exercising ultimate responsibility for the management of the charter school without regard to execution of a management contract with a charter management organization (CMO);

(iii) failure to timely file a current copy of the executed management contract, including any and all amendments, with the TEA;

(iv) failure of the board of directors of the charter holder to ensure that both the charter holder and CMO are compliant with all the rules applicable to charter schools, including, but not limited to:

(I) financial accounting;

(II) record retention;

(III) health, safety, and welfare of students;

(IV) educational program accountability;

(V) Texas Open Meetings Act;

(VI) Texas Public Information Act; and

(VII) policies, procedures, and legal requirements found in state and federal laws/guidelines and the charter contract; and

(v) failure to comply with requirements in §100.1153 of this title (relating to Substantial Interest in Management Company; Restrictions on Serving) prohibiting a board member from having a substantial interest in the CMO; and

(F) Charter school performance framework: failure to satisfy applicable performance framework measures as prescribed in the Charter School Performance Framework Manual established under TEC, §12.1181.

§100.1033. Charter Amendment.

(a) Amendments in writing. Subject to the requirements of this section, the terms of an open-enrollment charter may be revised with the consent of the charter holder by written amendment approved by the commissioner of education in writing.

(b) Non-substantive amendment. A non-substantive amendment is any change to the terms of an open-enrollment charter that is not a substantive amendment under subsection (c) of this section.

(1) Before implementing a non-substantive amendment, the charter holder shall file with the Texas Education Agency (TEA) division responsible for charter schools a notice, clearly labeled "notice of non-substantive amendment," setting forth the text and page references [~~reference~~], or a photocopy, of the current open-enrollment charter language to be changed, and the text proposed as the new open-enrollment charter language. A notice of non-substantive amendment must be filed separately from any other type of amendment request.

(2) Within 15 business days of receiving the notice of non-substantive amendment, the commissioner may in the commissioner's sole discretion determine that the amendment will be processed under subsection (c) of this section (governing substantive amendments), and, in such event, subsection (c) of this section shall govern the amendment.

(3) Absent action by the commissioner under paragraph (2) of this subsection, the notice of non-substantive amendment shall be effective after the expiration of 15 business days following receipt of the notice by the TEA division responsible for charter schools.

(c) Substantive amendment. A substantive amendment includes all expansion amendments under paragraph (8) of this subsection as well as any other change [~~is any change~~] to the terms of an open-enrollment charter that relates to the following [~~subjects~~]: grade levels, maximum enrollment, geographic boundaries, approved campus(es), approved sites, relocation of campus, [~~school name,~~] charter holder name, charter school (district) name, charter campus name, charter holder governance, articles of incorporation, corporate bylaws, management company, admission policy, or the educational program of the school. For purposes of this section, educational program means the educational philosophy or mission of the school or curriculum models or whole-school designs that are inconsistent with those specified in the school's charter. A substantive amendment must be approved by the commissioner under this subsection. Expanding prior to receiving the commissioner's approval will have financial consequences as outlined in §100.1041(d)(1) of this title (relating to State Funding).

(1) Charter amendment request. Prior to implementation, [~~Before implementing a substantive amendment,~~] the charter holder shall file with the TEA division responsible for charter schools a request, clearly labeled "charter amendment request ." As applicable, the request shall set [~~," setting~~] forth the text and page references [~~reference~~], or a photocopy, of the current open-enrollment charter language to be changed, and the text proposed as the new open-enrollment charter language. The request must be made in or attached to a written resolution adopted by the governing body of the charter holder and signed by a majority of the members indicating approval of the requested amendment. [~~the members voting in favor of it.~~]

(2) Relevant information considered. As directed by the commissioner, a charter holder requesting a substantive amendment shall submit current information required by the current amendment form, [~~relevant portions of the last application form approved by the State Board of Education,~~] as well as any other information requested by the commissioner. In considering the amendment request, the commissioner may consider any relevant information concerning the charter holder, including its student and other performance; compliance, staff, financial, and organizational data; and other information.

(3) Best interest of students. The commissioner may approve a substantive amendment only if the charter holder meets all applicable requirements, and only if the commissioner determines that the amendment is in the best interest of the students enrolled in the charter school. The commissioner may consider the performance of all charters operated by the same charter holder in the decision to finally grant or deny a substantive amendment.

(4) Conditional approval. The commissioner may grant the amendment without condition, or may require compliance with such conditions and/or requirements as may be in the best interest of the students enrolled in the charter school. An amendment receiving conditional approval shall not be effective until a written resolution accepting all conditions and/or requirements, adopted by the governing body of the charter holder and signed by the members voting in favor, is filed with the TEA division responsible for charter schools.

(5) Ineligibility. The commissioner will not consider any amendment that is submitted by a charter holder that has been notified by the commissioner of the intent to revoke the charter under Texas Education Code (TEC), §12.115(c).

(6) Amendment determination. The commissioner's decision on an amendment request shall be final and may not be appealed. The same or substantially similar amendment request may not be submitted prior to the first anniversary of the original submitted amendment.

(7) [~~(5)~~] Expansion amendment standards. An expansion amendment is a substantive amendment that permits a charter school to extend the grade levels it serves, add a campus, add a site, [~~the site of an instructional facility~~], change its geographic boundaries, or increase its maximum allowable enrollment.

(A) In addition to the requirements of this subsection, the [~~The~~] commissioner may approve an expansion amendment only if:

(i) the expansion will be effective no earlier than the start of the fourth full school year at the affected charter school. This restriction does not apply if the affected charter school has as its most recent rating "academically acceptable" [~~Acceptable~~] or higher, as defined by §100.1001(26) of this title (relating to Definitions), and is operated by a charter holder that operates other charter campuses and all of that charter holder's most recent campus ratings are "academically acceptable" [~~Acceptable~~] or higher, as defined by §100.1001(26) of this title, under the relevant accountability manual;

(ii) the amendment request under paragraph (1) of this subsection is received no earlier than the first day of February or after the submission of the annual financial report for the immediately preceding fiscal year, and no later than the first day of April [~~February~~] preceding the school year in which the expansion will be effective;

(iii) the most recent rating for 90% of the campuses [~~each campus~~] operated under the charter are "academically acceptable" [~~is Acceptable~~] or higher, as defined by §100.1001(26) of this title, under the relevant accountability manual;

(iv) the charter holder has provided evidence that each school district affected by the expansion was sent a notice of the expansion amendment and was given an opportunity to submit a statement regarding the impact of the amendment on the district;

(v) the commissioner determines that the amendment is in the best interest of the students of Texas; and

(vi) the charter holder meets all other requirements applicable to expansion amendment requests and substantive amendments.

(B) Notice of the approval or disapproval of campus expansion amendments will be made by the commissioner within 60 days of the date the charter holder submits a completed campus expansion amendment request. The commissioner may provide notice electronically. The commissioner shall specify the earliest effective date for implementation of the expansion. In addition, the commissioner may require compliance with such conditions and/or requirements as may be in the best interest of the students of Texas.

(8) Expansion amendments.

(A) [~~(C)~~] Maximum enrollment. In addition to the requirements of paragraph (7)(A) of this subsection [~~subparagraph (A) of this paragraph~~], the commissioner may approve an expansion amendment request seeking to increase maximum allowable enrollment only if:

(i) within the calendar year preceding the request, the charter holder has not requested another expansion amendment seeking to increase maximum allowable enrollment;

(ii) before voting to request the enrollment increase, the charter holder governing body has considered a business plan comprised of the following components:

(I) a statement discussing the need for an increase in the maximum enrollment;

(II) a statement discussing the current and projected financial condition of the charter holder and charter school;

(III) an unaudited statement of financial position for the current fiscal year;

(IV) an unaudited statement of financial activities for the current fiscal year;

(V) an unaudited statement of cash flows for the current fiscal year;

(VI) a pro forma budget that includes the costs of operating the charter school, including the implementation of the expansion amendment;

(VII) a statement or schedule that identifies the assumptions used to calculate the charter school's estimated Foundation School Program revenues;

(VIII) a statement discussing the use of debt instruments to finance part or all of the charter school's incremental costs;

(IX) a statement discussing the incremental cost of acquiring additional facilities, furniture, and equipment to accommodate the anticipated increase in student enrollment; and

(X) a statement discussing the incremental cost of additional on-site personnel and identifying the additional number of full-time equivalents that will be employed;

(iii) the board resolution required by paragraph (1) of this subsection includes a statement that the charter holder board has considered the business plan required by clause (ii) of this subparagraph and has determined by majority vote of the board that the enrollment growth proposed in the business plan is prudent;

(iv) the charter holder submits, for the most recent three years of operation, copies of the compliance information on file as required in §100.1035 of this title (relating to Compliance Records on Nepotism, Conflicts of Interest, and Restrictions on Serving) to include documents such as affidavits identifying a board member's substantial interest in a business entity or in real property, documentation of a board member's abstention from voting in the case of potential conflicts of interest, and affidavits or other documents identifying other family members within the third degree of affinity or consanguinity who serve as board members and/or employees; and

(v) on request, the charter holder files the business plan required by clause (ii) of this subparagraph with the TEA division responsible for charters schools within ten business days.

(B) [~~(D)~~] Grade span. In addition to the requirements of paragraph (7)(A) of this subsection [~~subparagraph (A) of this paragraph~~], the commissioner may approve an expansion amendment request seeking to extend the grade levels it serves only if it is accompanied by appropriate educational plans for the additional grade levels.

(C) Geographic boundary. In addition to the requirements of paragraph (7)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to expand the geographic boundaries of the charter school only if it is accompanied by the relevant letters of notification of impact of the surrounding districts and evidence of mailing.

(D) Additional campus. In addition to the requirements of paragraph (7)(A) of this subsection, the commissioner may approve an expansion amendment request seeking to add a new campus, within 60 days of the date the charter holder submits a completed request, only if it meets the following criteria:

(i) the charter holder has operated at least one charter school in Texas for a minimum of three consecutive years; and

(ii) the charter has been evaluated under the accountability rating system established in §97.1001 of this title (relating to Accountability Rating System) and meets the following:

(I) has at least 50% of the student population in tested grades, unless waived by the commissioner;

(II) has an accreditation status of Accredited; and

(III) is currently evaluated under the standard accountability procedures and received a district rating of highest or second highest rating for three of the last five years with at least 75% of the campuses rated under the charter also having the highest or second highest rating and no campus with the lowest performance rating in the most recent state accountability ratings;

(iii) the newly proposed campus must have 50% of its students in tested grades, unless waived by the commissioner; and

(iv) an amendment to relocate an existing campus/site, while still serving the same students and grade levels, is not an expansion amendment subject to paragraphs (9)(A) and (10)(D) of this subsection. An amendment to relocate solely permits an existing campus to relocate to an alternate address while serving the same students and grade levels without a significant disruption to the delivery of the educational services.

[~~(E) Exempt from subparagraphs (A)-(D) of this paragraph are requests by charter holders eligible under Texas Education Code (TEC), §12.101(a)(4), that provide instructional services within residential detention, treatment, or adjudication facilities.~~]

[~~(F) The commissioner may exempt from subparagraphs (A)-(D) of this paragraph charter holders eligible for new school amendments as outlined in paragraph (6) of this subsection. Charter holders seeking this exemption must apply for and be granted waivers requesting the exemption. A waiver granted under this provision shall be considered effective until such time as the charter holder fails to meet or exceed one or more standards outlined in paragraph (6) of this subsection.~~]

(9) [~~(6)~~] New school designation [~~school amendment~~]. A new school designation [~~amendment~~] is an expansion amendment that permits a charter holder to establish an additional charter school under an existing open-enrollment charter pursuant to federal non-regulatory guidance in the Elementary and Secondary Education Act (ESEA), Section 5202(d)(1), as amended. Charter holders of charter schools that receive new school designations from the commissioner will be eligible to participate in the charter school program competitive grant process when federal funding for the Texas charter school program is available.

(A) The commissioner may approve a new school designation [~~amendment~~] for a charter only if:

(i) the charter holder meets all requirements applicable to an expansion amendment and a substantive amendment set forth in this section and has operated at least one charter school in Texas for a minimum of five consecutive years;

(ii) the charter has been evaluated under the accountability rating system established in §97.1001 of this title [~~(relating to Accountability Rating System)~~] with at least 50% of the student population in grades assessed by the state accountability system, has an accreditation status of Accredited, and meets the following:

(I) is currently evaluated under the standard accountability procedures and received the highest or second highest [~~a~~] district rating [~~of Exemplary or Recognized~~] for three of the last five years with at least 75% of the campuses rated under the charter also receiving the highest or second highest rating [~~being rated Exemplary or Recognized~~] and no campus with an "academically unacceptable" [~~unacceptable~~] rating, as defined by §100.1001(26) of this title, in the most recent state accountability ratings. A rating that does not meet the criteria for "academically acceptable" as defined in §100.1001(26) of this title shall not be considered the highest or second highest academic performance rating for purposes of this section; or

(II) is currently evaluated under the alternative education accountability (AEA) procedures and received the highest or second highest AEA [~~a~~] district rating [~~of AEA: Academically Acceptable or a standard rating of Academically Acceptable or higher~~] for five of the last five years with:

(-a-) in the most recent applicable state accountability ratings, all rated campuses under the charter receiving an "academically acceptable" [~~acceptable~~] or higher rating, as defined by §100.1001(26) of this title; and

(-b-) if evaluated using AEA procedures, the district-level assessment data corresponding to the most recent accountability ratings demonstrate that at least 30% of the students in each of the following student groups (if evaluated) met the standard as reported by the sum of all grades tested on the standard accountability indicator in each subject area assessed: African American, Hispanic, white, special education, economically disadvantaged, limited English proficient, and at risk;

(iii) no charter campus has been placed in Stages 2-5 in the No Child Left Behind school improvement program for failure to meet Adequate Yearly Progress in the most current report;

(iv) the charter is not under any sanction imposed by TEA authorized under TEC, Chapter 39; Chapter 97, Subchapter EE, of this title (relating to Accreditation Status, Standards, and Sanctions); or federal requirements;

(v) the charter holder completes an application approved by the commissioner;

(vi) the new charter school will serve at least 100 [~~50~~] students;

(vii) the amendment complies with all requirements of this paragraph; and

(viii) the commissioner determines that the designation [~~amendment~~] is in the best interest of the students of Texas.

(B) In addition to the requirements of subparagraph (A) of this paragraph, the commissioner may approve a new school designation [~~amendment~~] only on making the following written findings:

(i) the proposed school satisfies each element of the definition of a public charter school as set forth in the ESEA, Section 5210(1);

(ii) the proposed school is not merely an extension of an existing charter school;

(iii) the proposed school is separate and distinct from the existing charter school(s) established under the open-enrollment charter; and

(iv) the open-enrollment charter, as amended, includes a separate written performance agreement for the proposed school that meets the requirements of the ESEA, Section 5210(1)(L), and TEC, §12.111(a)(3) and (4).

(C) In making the findings required by subparagraph (B)(i) and (iii) of this paragraph, the commissioner shall consider:

(i) the terms of the open-enrollment charter as a whole, as modified by the new school designation [~~amendment~~]; and

(ii) whether the proposed school shall be established and recognized as a separate school under Texas law.

(D) In making the findings required by subparagraph (B)(ii) and (iii) of this paragraph, the commissioner shall consider whether the proposed school and the existing charter school(s) have separate sites, employees, student populations, and governing bodies and whether their day-to-day operations are carried out by different officers. The presence or absence of any one of these elements, by itself, does not determine whether the proposed school will be found to be separate or part of an existing school. However, the presence or absence of several elements will inform the commissioner's decision.

(E) In making the finding required by subparagraph (B)(iv) of this paragraph, the commissioner shall consider:

(i) whether the proposed school and the existing charter school(s) have distinctly different requirements in their respective written performance agreements; and

(ii) the extent to which the performance agreement for the proposed school imposes higher standards than those imposed by TEC, §12.104(b)(2)(L).

(F) Failure to meet any standard or requirement outlined in this paragraph or agreed to in a performance agreement under subparagraph (B)(iv) of this paragraph shall mean the immediate termination of any federal charter school program grant and/or any waiver exempting a charter from some of the expansion amendment requirements that may have been granted to a charter holder as a result of the new school designation.

(10) [~~(7)~~] Delegation amendment. A delegation amendment is a substantive amendment that permits a charter holder to delegate, pursuant to §100.1101(c) of this title (relating to Delegation of Powers and Duties), the powers or duties of the governing body of the charter holder to any other person or entity.

(A) The commissioner may approve a delegation amendment only if:

(i) the charter holder meets all requirements applicable to delegation amendments and substantive amendments generally;

(ii) the amendment complies with all requirements of Chapter 100, Subchapter AA, Division 5, of this title (relating to Charter School Governance); and

(iii) the commissioner determines that the amendment is in the best interest of the students enrolled in the charter school.

(B) The commissioner may grant the amendment without condition or may require compliance with such conditions and/or requirements as may be in the best interest of the students enrolled in the charter school.

(C) The following powers and duties must generally be exercised by the governing body of the charter holder itself, acting as a body corporate in meetings posted in compliance with Texas Government Code, Chapter 551. Absent a specific written exception of this subparagraph, setting forth good cause why a specific function listed in clauses (i)-(vi) of this subparagraph cannot reasonably be carried out by the charter holder governing body, the commissioner may not grant an amendment delegating such functions to any person or entity through a contract for management services or otherwise. An amendment that is not authorized by such a specific written exception is not effective for any purpose. Absent such exception, the governing body of the charter holder shall not delegate:

(i) final authority to hear or decide employee grievances, citizen complaints, or parental concerns;

(ii) final authority to adopt or amend the budget of the charter holder or the charter school, or to authorize the expenditure or obligation of state funds or the use of public property;

(iii) final authority to direct the disposition or safekeeping of public records, except that the governing body may delegate this function to any person, subject to the governing body's superior right of immediate access to, control over, and possession of such records;

(iv) final authority to adopt policies governing charter school operations;

(v) final authority to approve audit reports under TEC, §44.008(d); or

(vi) initial or final authority to select, employ, direct, evaluate, renew, non-renew, terminate, or set compensation for a chief executive officer.

(D) The following powers and duties must [~~generally~~] be exercised by the chief executive officer of the charter holder. Absent a specific written exception of this subparagraph, setting forth good cause why a specific function listed in clauses (i)-(iii) of this subparagraph cannot reasonably be carried out by the chief executive officer of the charter holder, the commissioner may not grant an amendment permitting the chief executive officer to delegate such function through a contract for management services or otherwise. An amendment that is not authorized by such a specific written exception is not effective for any purpose. Absent such exception, the chief executive officer of the charter holder shall not delegate final authority:

(i) to organize the charter school's central administration;

(ii) to approve reports or data submissions required by law; or

(iii) to select and terminate charter school employees or officers.

(d) Required forms and formats. The TEA division responsible for charter schools may develop and promulgate, from time to time, forms or formats for requesting charter amendments under this section. If a form or format is promulgated for a particular type of amendment, it must be used to request an amendment of that type.

§100.1035. Compliance Records on Nepotism, Conflicts of Interest, and Restrictions on Serving.

(a) A charter holder shall collect, maintain, and make available on request for inspection under this division, the following information on a form or in a format approved by the commissioner of education:

(1) information identifying each member of the governing body of the charter holder and related compliance information as required by subsection (b) of this section;

(2) information identifying each chief executive officer and chief financial officer of the charter school and related compliance information as required by subsection (b) of this section;

(3) information identifying each member of the governing body of the charter school, if the charter holder has established a governing body for the charter school, and related compliance information as required by subsection (b) of this section; and

(4) information identifying each employee of the charter school and related compliance information as required by subsection (b) of this section.

(b) The compliance information recorded for each individual identified under subsection (a) of this section shall include:

(1) the title of each position held or function performed by the individual;

(2) the specific powers and duties that the governing body of the charter holder or charter school have delegated to the individual, if any, as described by the powers and duties listed in the charter pursuant to §100.1101 of this title (relating to Delegation of Powers and Duties);

(3) the legal name of the individual;

(4) any aliases or names formerly used by the individual, including maiden name;

(5) a complete criminal history record of convictions for the individual, issued by the Texas Department of Public Safety within three years of the date of the compliance record;

(6) a list of all relatives of the individual, within the third degree of consanguinity or affinity, under Government Code, Chapter 573, that:

(A) are employed by the charter holder or the charter school;

(B) conduct business transactions with the charter holder or the charter school;

(C) serve on the governing body of the charter holder or the charter school; or

(D) have a substantial interest in a management company under Texas Education Code, §12.120; and

(7) a full and complete list of the individual's business interests in, or transactions with, any charter holder, charter school, or management company.

(c) Not later than 30 days following any change in the information recorded under this section, a charter holder shall make corrections to its most recent charter school compliance record.

(d) A charter holder shall file the information with the Texas Education Agency division responsible for charter schools within ten business days of receiving a written request from the agency.

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

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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DIVISION 3. CHARTER SCHOOL FUNDING AND FINANCIAL OPERATIONS

19 TAC §§100.1041, 100.1043, 100.1045, 100.1047, 100.1050 - 100.1052

The amendments and new sections are proposed under the Texas Education Code (TEC), §12.101, which authorizes the commissioner to grant a charter on the application of an eligible entity for an open-enrollment charter school, including the adoption of rules to modify criteria for granting a charter to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.1011, which authorizes the commissioner to adopt rules to modify criteria for granting charters for high-performing entities to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.102, which requires schools to operate and govern in accordance with its charter; TEC, §12.103, which authorizes that schools are subject to federal and state laws and rules adopted as applicable to charters; TEC, §12.104, which authorizes the commissioner to adopt rules relating to the applicability of public education law to charter schools; TEC, §12.1053, which authorizes the commissioner to approve procedures for contracting and purchasing or subject schools to rules of governmental entity; TEC, §12.1054, which authorizes the commissioner to enforce state law and rules relating to conflict of interest; TEC, §12.106, which authorizes the commissioner to adopt rules to provide and account for the state funding of charter schools; TEC, §12.1061, which addresses circumstances in which the commissioner may or may not recover certain state funds paid to an open-enrollment charter school; TEC, §12.107, which requires that schools hold in trust for benefit of students all state funds and declares that these funds are considered to be public funds for all purposes under state law; TEC, §12.1162, which authorizes the commissioner to adopt rules to implement sanctions against an open-enrollment charter school based on violations of Texas law; TEC, §12.1163, which authorizes the commissioner to audit the records of an open-enrollment charter school, charter holder, and a management company; TEC, §12.121, which requires the governing body of a charter holder to be responsible for and to retain control of the management, operation, and accountability of the school; TEC, §12.128, which authorizes the commissioner to adopt rules necessary to insure that all property purchased or leased with state funds considered to be public property for all purposes under state law held in trust for the benefit of students of the open-enrollment school is returned to the state when the open-enrollment charter school ceases to operate; TEC, §12.136, which requires an open-enrollment charter school to post on the school's Internet website the salary of the superintendent or the administrator serving as the educational leader and chief executive officer; Local Government Code, §140.006, which requires an open-enrollment charter school to post its annual financial statement on the school's Internet website; and Local Government Code, §171.004, which authorizes how all local public officials with a substantial interest in a business entity or real property shall conduct their affairs.

The amendments and new sections implement the TEC, §§12.101, 12.1011, 12.102, 12.103, 12.104, 12.1053, 12.1054, 12.106, 12.1061, 12.107, 12.1162, 12.1163, 12.121, 12.128, and 12.136 and Local Government Code, §140.006 and §171.004.

§100.1041. State Funding.

(a) Funding formula elements. A charter school is entitled to funding from both tiers of the Foundation School Program (FSP) in accordance with the funding formulas for school districts pursuant to Texas Education Code (TEC), Chapter 42.

(1) Tier I program allocations are determined by substituting the statewide average adjusted allotment in place of the district's calculated adjusted allotment. The state average adjusted allotment takes into account the cost of education index and the small, mid-size, and sparsity adjustments specified in TEC, §§42.102, 42.103, 42.104, and 42.105. The state average adjusted allotment is computed by averaging the adjusted allotment for each independent school district (ISD) in the state for the relevant school year. [~~It is computed by dividing the state total cost for the regular education program by the number of students in the state counted in attendance in a regular education program in accordance with TEC, §42.101.~~]

(2) An allocation for the guaranteed yield allotment for Tier II of the FSP is determined by substituting a statewide average enrichment tax rate in place of the district's calculated enrichment tax rate (DTR) pursuant to TEC, §42.302. The state average tax rate is computed by averaging the DTR for each component of Tier II for each ISD in the state for the relevant school year. [~~The state average tax rate is computed by first summing the Maintenance and Operations tax collections up to its DTR maximum limit for each district in the state and then dividing that result by the sum of all district property values as defined in TEC, §42.252.~~]

(b) Implementation schedule. The [~~new~~] formula elements described in subsection (a) of this section will take effect for charter schools that begin operation in the 2001-2002 school year or later. Charter schools that report attendance that occurs prior to September 2, 2001, are considered to be in operation on September 1, 2001, and will be funded as described in House Bill 6, Section 40(b), 77th Texas Legislature, 2001. Charter schools that report no attendance that occurs prior to September 2, 2001, are considered to begin operation in the 2001-2002 school year or later, and will be funded according to subsection (a) of this section and TEC, §12.106.

(c) Tuition and fees. A charter school shall not charge tuition and shall not charge a fee except:

(1) a charter school may charge a fee listed in TEC, §11.158(a); [~~and~~]

(2) if authorized under §100.1201(6) of this title (relating to Voluntary Participation in State Programs), a charter holder may charge tuition for certain prekindergarten classes in compliance with TEC, §29.1531 and §29.1532; and[.]

(3) a charter school shall accept tuition for students holding certain student visas as described in TEC, §25.0031(a).

(d) Eligibility for state funding. A charter holder is not eligible to receive state funds, including grant funds, prior to execution of its contract by the chair and the commissioner of education [~~of the State Board of Education~~].

(1) If a charter holder, before or without approval for an expansion amendment under §100.1033 of this title (relating to Charter Amendment), extends the grade levels it serves, adds or changes the address of a campus, facility, or site [~~of an instructional facility~~], expands its geographic boundaries, or exceeds its maximum allowable enrollment, then the charter holder is not eligible to receive state funds for the activities of the unapproved expansion of its charter school operations.

(2) A former charter holder is not eligible to receive state funds.

(e) Return of overallocated funds.

(1) Within 30 days of receiving notice of an overallocation and a request for refund under TEC, §42.258, a charter holder shall transmit to the Texas Education Agency (TEA) an amount equal to the requested refund. Failure to comply with a request for refund under this subsection is a material charter violation and a management company breach. Funds allocated for student attendance in a program affected by an unapproved expansion under subsection (d)(1) of this section are overallocated within the meaning of this subsection.

(2) If the charter holder fails to make the requested refund, the TEA may recover the overallocation by any means permitted by law, including, but not limited to, the process set forth in TEC, §42.258.

(3) Notwithstanding paragraph (2) of this subsection, the TEA may not garnish or otherwise recover funds actually paid to and received by a charter holder under TEC, §12.106, if:

(A) the basis of the garnishment or recovery is that:

(i) the number of students enrolled in the school during a school year exceeded the student enrollment described by the school's charter during that period; and

(ii) the school received the funds under TEC, §12.106, based on an accurate report of the school's actual student enrollment; and

(B) the school:

(i) submits to the commissioner a timely request to revise the maximum student enrollment described by the school's charter and the commissioner does not notify the school in writing of an objection to the proposed revision before the 90th day after the date on which the commissioner received the request, provided that the number of students enrolled at the school does not exceed the enrollment described by the school's request; or

(ii) exceeds the maximum student enrollment described by the school's charter only because a court mandated that a specific child enroll in that school; and

(iii) used all funds received under TEC, §12.106, to provide education services to students.

(4) Nothing in paragraph (3) of this subsection requires the agency to fund activities that are ineligible for state funding under subsection (d)(1) of this section.

§100.1043. Status and Use of State Funds; Depository Contract.

(a) Status and use of state funds.

(1) State funds received by a charter holder are public funds for all purposes under state law, and may be used only for a purpose for which a school district may use local funds under Texas Education Code (TEC), §45.105(c). Any other use or application of such funds constitutes misuse and misapplication of public funds and is subject to the civil and criminal laws governing misuse or misapplication of Texas public funds.

(2) State funds received by a charter holder are held by the charter holder in trust for the benefit of the students of the charter school. In their use of public funds, the governing body of a charter holder, and the governing body and officers of a charter school, shall be held to the standard of care and fiduciary duties that a trustee owes a beneficiary under Texas law.

(3) A charter school shall accept tuition for students holding certain student visas as described in TEC, §25.0031(a).

(b) Depository contract. Pending their use, state funds received by a charter holder must be deposited into a bank with which the charter holder has entered into a depository contract. Each year within the period prescribed by §100.1007 [~~§100.101~~] of this title (relating to Annual Report on Open-Enrollment Charter Governance) for filing articles of incorporation, the charter holder must file a copy of the depository contract with the Texas Education Agency division responsible for school financial audits; however, if there has been no change since the last filing, the charter holder may file a statement to this effect in lieu of a copy of the depository contract.

(1) State funds received by a charter holder must be deposited into an account owned and controlled exclusively by the charter holder pending their use. Once properly deposited, the charter holder may immediately use the funds for any purpose described in subsection (a)(1) of this section, subject to the standard of care and fiduciary duties described in subsection (a)(2) of this section.

(2) A "bank" is defined by TEC, §45.201. Although the term excludes a bank the deposits of which are not insured by the Federal Deposit Insurance Corporation (FDIC), deposits exceeding FDIC-insured amounts need not be collateralized for the institution to constitute a "bank" under this subsection.

(3) Notwithstanding this subsection, if required by a contract executed prior to September 1, 2001, state funds may be deposited into an account managed by a bond trustee acting on behalf of a charter holder for the sole purpose of complying with debt service obligations of the charter holder on a bond issued under TEC, Chapter 53.

§100.1045. Investment of State Funds.

(a) This section applies to a charter holder unless alternative requirements for investing state funds have been approved by the commissioner of education [~~State Board of Education~~] under §100.1006 [~~§100.103~~] of this title (relating to Optional Open-Enrollment Charter Provisions for Contracting and Purchasing), and the open-enrollment charter has been amended by the commissioner [~~of education~~] to adopt the approved procedures.

(b) A charter holder shall invest state funds in accordance with Government Code, §§2256.009-2256.016.

(1) A requirement in those sections that applies to a school district or the board of trustees of a school district applies to a charter

school, the governing body of a charter holder, or the governing body of a charter school.

(2) State funds invested by a charter holder shall be maintained in a discrete charter investment account, separate and distinct from the operating accounts for the charter school and separate and distinct from any investment accounts related to non-charter activities.

(3) A charter holder shall invest state funds in accordance with any applicable provision or covenant contained in a debt instrument, bond indenture, or similar agreement.

(4) Nothing in this subsection shall authorize the investment of state or federal grant funds, unless investment of such funds is expressly authorized under the terms of the grant.

(c) Investment of state funds shall be made with judgment and care, under prevailing circumstances, that a person of prudence, discretion, and intelligence would exercise in the management of the person's own affairs, not for speculation, but for investment, considering the probable safety of capital and the probable income to be derived.

(1) Investment of state funds shall be governed by the following investment objectives, in order of priority:

(A) preservation and safety of principal;

(B) liquidity; and

(C) yield.

(2) In determining whether a charter holder, or its employee or agent, has exercised prudence with respect to an investment decision respecting state funds, the determination shall be made taking into consideration:

(A) the investment of all funds, or funds under the entity's control, over which the officer had responsibility rather than a consideration as to the prudence of a single investment; and

(B) whether the investment decision was consistent with the written investment policy of the entity.

§100.1047. Accounting for State and Federal Funds.

(a) Fiscal year. A charter holder shall adopt a fiscal year consistent with Texas Education Code (TEC), §44.0011.

(b) Financial accounting. A charter holder shall comply fully with:

(1) Generally Accepted Accounting Principles (GAAP);

(2) the Financial Accountability System Resource Guide, as adopted by reference in §109.41 of this title (relating to Financial Accountability System Resource Guide);

(3) the federal standards for financial management systems, 34 Code of Federal Regulations §80.20, Office of Management and Budget Circular A-87, and/or other applicable federal standards; and

(4) the financial accountability rating system (School FIRST for Charter Schools) specified in Chapter 109, Subchapter AA, of this title (relating to Commissioner's Rules Concerning Financial Accountability [~~Rating System~~]).

(c) Annual audit. A charter holder shall at its own expense have the financial and programmatic operations of the charter school audited annually by a certified public accountant licensed by the Texas State Board of Public Accountancy and registered as a provider of public accounting services.

(1) The charter holder shall file a copy of the annual audit report, approved by a charter holder, with the Texas Education Agency (TEA) division responsible for school financial audits not later than the deadline specified by TEC, §44.008.

(2) The audit must comply with Generally Accepted Auditing Standards and must include an audit of the accuracy of the fiscal information provided by the charter school through the Public Education Information Management System (PEIMS).

(3) Financial statements in the audit must comply with Government Auditing Standards and the Office of Management and Budget Circular A-133 or its successor.

(d) Attendance accounting. A charter holder shall comply with the Student Attendance Accounting Handbook, as adopted by reference in §129.1025 of this title (relating to Adoption by [~~By~~] Reference: Student Attendance Accounting Handbook); TEC, §25.002; and Chapter 129 of this title (relating to Student Attendance), except that a charter school shall report its actual student attendance data to the TEA at six-week intervals, or as directed by the TEA.

(e) Non-charter activities. A charter holder shall keep separate and distinct accounting, auditing, budgeting, reporting, and recordkeeping systems for the management and operation of the charter school.

(1) Any business activities of a charter holder not directly related to the management and operation of the program described in the open-enrollment charter shall be kept in separate and distinct accounting, auditing, budgeting, reporting, and recordkeeping systems from those recording the business activities of the charter school.

(2) Any commingling of charter and non-charter business in the accounting, auditing, budgeting, reporting, and recordkeeping systems of the charter school shall be a material charter violation.

(f) Interested transactions. A charter holder shall comply with Local Government Code, Chapter 171, in the manner provided by the conflict of interest provisions described in §§100.1131-100.1135 of this title. In addition, the following shall be discretely and clearly recorded in the accounting, auditing, budgeting, reporting, and recordkeeping systems for the management and operation of the charter school:

(1) financial transactions between the charter school and the non-charter activities of the charter holder;

(2) financial transactions between the charter school and an officer or employee of the charter holder or the charter school;

(3) financial transactions between the charter school and a member of the governing body of the charter holder or the charter school;

(4) financial transactions between the charter school and a management company charged with managing the finances of a charter school; and

(5) financial transactions between the charter school and any other person or entity in a position of influence over the charter holder or the charter school.

(g) Position of influence. A person or entity is in a position of influence over the charter holder or the charter school, within the meaning of subsection (f)(5) of this section, if:

(1) the charter holder or charter school is a subsidiary of, or shares governing body members, officers, or employees with, another organization, and:

(A) the person or entity is a shareholder, partner, administrator, official, or employee of the other organization; or

(B) the person or entity by any other means participates in the business decisions of the affiliate or parent organization; or

(2) a relative of the person is in a position of influence over the charter holder or the charter school under this section, within the third degree by consanguinity or affinity, as determined under Texas Government Code, §§573.021-573.025, and §100.1113 of this title (relating to Relationships By Consanguinity or By Affinity).

§100.1050. Disclosure of Financial Information.

The governing board of an open-enrollment charter school shall continuously post on the school's internet website the following information:

(1) the salary of the school's superintendent or, as applicable, the administrator serving as the educational leader and chief executive officer; and

(2) the school's annual financial statements, including, but not limited to:

(A) most current annual audit report; and

(B) current year board approved budget.

§100.1051. Audit by Commissioner; Records in the Possession of a Management Company.

(a) Commissioner authority. To the extent consistent with subsection (b) of this section, the commissioner of education may audit the records of:

(1) a charter school;

(2) a charter holder; or

(3) a management company that has provided management services to a charter school or a charter holder.

(b) Scope of audit.

(1) An audit under subsection (a) of this section must be limited to matters directly related to the management or operation of a charter school, including the allocation of costs shared between the charter school and any non-charter business activity. The audit may examine any financial or administrative records related to the charter school that are in the possession of a management company or a former management company, including records related to the allocation of shared costs.

(2) Unless the commissioner has specific cause to conduct an additional audit, the commissioner may not conduct more than one on-site audit under this section during any fiscal year, including any financial and administrative records. For purposes of this subsection, an audit of a charter holder or management company associated with a charter school is not considered an audit of the school.

(c) Charter holder cooperation. A charter holder and its employees and agents shall fully cooperate with an audit under subsection (a) of this section, and shall take all actions necessary to secure the cooperation of a management company. Failure to comply timely with a request for access to records or other cooperation from the charter holder constitutes a material charter violation.

(d) Management company cooperation. A management company and its employees and agents shall fully cooperate with an audit under subsection (a) of this section. Failure to timely comply with a request for access to records or other cooperation from the management company constitutes a management company breach, which may result in the commissioner taking action to prohibit, deny renewal of, suspend, or revoke the management contract as provided in Texas Education Code, §12.126.

§100.1052. Final Audit Upon Revocation, Surrender, or Closure of an Open-Enrollment Charter.

(a) Upon closure of a charter, the charter holder governing board must at their expense conduct a final audit.

(b) The commissioner of education will assign a conservator to oversee the winding down of charter operations, protection of school assets, and recovery of any overallocation of state funds.

(c) Revocation, surrender, or closure of a charter does not terminate the authority of the commissioner over the charter holder to ensure compliance of this section or applicable laws.

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

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DIVISION 4. PROPERTY OF OPEN-ENROLLMENT CHARTER SCHOOLS

19 TAC §§100.1063, 100.1067, 100.1071, 100.1073

The amendments are proposed under the Texas Education Code (TEC), §12.101, which authorizes the commissioner to grant a charter on the application of an eligible entity for an open-enrollment charter school, including the adoption of rules to modify criteria for granting a charter to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.1011, which authorizes the commissioner to adopt rules to modify criteria for granting charters for high-performing entities to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.102, which requires schools to operate and govern in accordance with its charter; TEC, §12.103, which authorizes that schools are subject to federal and state laws and rules adopted as applicable to charters; TEC, §12.104, which authorizes the commissioner to adopt rules relating to the applicability of public education law to charter schools; TEC, §12.1053, which authorizes the commissioner to approve procedures for contracting and purchasing or subject schools to rules of governmental entity; TEC, §12.106, which authorizes the commissioner to adopt rules to provide and account for the state funding of charter schools; TEC, §12.1061, which addresses circumstances in which the commissioner may or may not recover certain state funds paid to an open-enrollment charter school; TEC, §12.107, which requires that schools hold in trust for benefit of students all state funds and declares that these funds are considered to be public funds for all purposes under state law; TEC, §12.1162, which authorizes the commissioner to adopt rules to implement sanctions against an open-enrollment charter school based on violations of Texas law; TEC, §12.121, which requires the governing body of a charter holder to be responsible for and to retain control of the management, operation, and accountability of the school; and TEC, §12.128, which authorizes the commissioner to adopt rules necessary

to insure that all property purchased or leased with state funds considered to be public property for all purposes under state law held in trust for the benefit of students of the open-enrollment school is returned to the state when the open-enrollment charter school ceases to operate.

The amendments implement the TEC, §§12.101, 12.1011, 12.102, 12.103, 12.104, 12.1053, 12.106, 12.1061, 12.107, 12.1162, 12.121, and 12.128.

§100.1063. Use of Public Property by a Charter Holder.

(a) Public property. Public property is owned by this state and is held in trust by the charter holder for the benefit of the students of the open-enrollment charter school. An interest in real estate or personal property acquired, improved, or maintained using state funds that were received by the charter holder on or after September 1, 2001, is public property for all purposes under state law. The date on which the property was acquired, improved, or maintained is not determinative. An interest in real estate acquired, improved, or maintained using state funds that were received by the charter holder before September 1, 2001, is public property only to the extent specified by §100.1065 of this title (relating to Property Acquired with State Funds Received Before September 1, 2001--Special Rules). Where the property is acquired with federal funds, federal law may preempt this section in whole or part.

(b) Fiduciary duty respecting public property. Public property is held by the charter holder in trust for the benefit of the students of the charter school. With respect to the public property they manage, the members of the governing body of a charter holder, and the members of the governing body and officers of a charter school, are trustees under Texas law; and the students enrolled in the school are beneficiaries of a trust. Each trustee shall be held to the standard of care and fiduciary duties that a trustee owes the beneficiary of a trust under Texas law. A breach of fiduciary duty is a material violation for the charter contract.

(c) Use of public property. Public property may be used only for a purpose for which a school district may use school district property and only to implement a program that is described in the open-enrollment charter and is consistent with Texas Education Code (TEC), §12.107.

(1) Any use or application of public property for a purpose other than implementing a program that is described in the open-enrollment charter and is consistent with TEC, §12.107, constitutes misuse and misapplication of such property, and is subject to Texas law governing misuse or misapplication of public property.

(2) The governing body of a charter holder shall adopt and enforce local policies governing the use and application of public property by its employees, agents, contractors, and management companies. The policies shall prohibit the use or application of public property for any purpose but a program described in the open-enrollment charter, except that the policies may authorize charter holder employees to use local telephone service, cellular phones, electronic mail, Internet connections, and similar public property for incidental personal use, if the policies:

(A) do not result in any direct cost paid with state funds, or the charter holder is reimbursed for any direct cost incurred;

(B) do not impede charter school functions;

(C) do not authorize incidental personal use of public property for private commercial purposes; and

(D) authorize only incidental amounts of employee time--time periods comparable to reasonable coffee breaks during the day--for personal matters.

(3) The governing body of a charter holder shall by separate vote approve any joint use of real property for charter and non-charter activities. In the minutes of the vote approving the joint use, the governing body of a charter holder shall set forth the methodology used to allocate shared costs and the percentage allocation basis between charter and non-charter activities.

(4) The members of the governing body of a charter holder, and the members of the governing body and officers of a charter school, shall authorize all uses and applications of the public property under their control, and shall not authorize any use or application that is inconsistent with the policy required by paragraph (2) of this subsection.

(5) If pursuant to TEC, §12.111(9), the daily management of public property is delegated to any person, including a management company, the members of the governing body of the charter holder, and the members of the governing body and officers of the charter school, shall remain fully responsible to authorize all uses and applications of public property and enforce the policy required by paragraph (2) of this subsection.

(6) Nothing in this section prevents a charter holder from authorizing the use of its public property by a contractor for the purpose of providing goods or services under the contract, if such use is an express contract term, factored into the price of the contract, and the contract is duly authorized by the governing body of the charter holder under this section.

(d) Acquisition and use of public property. Public property is owned by this state and is held in trust by the charter holder for the benefit of the students of the open-enrollment charter school. A charter holder may purchase, lease, and use public property, subject to the limitations and requirements of this division and other state law. [~~Ownership of public property. Public property is owned by the charter holder, regardless of the funds used to acquire it. Subject to the requirements of §100.1067 of this title (relating to Possession and Control of the Public Property of a Former Charter Holder) and this section, a charter holder retains all title to the property, exercises complete control over the property, and is entitled to all use and benefit from the property.~~]

(e) Public property mixed with private property. Property acquired, improved, or maintained partly using state funds and partly using other funds is mixed public and private property, and is subject to all requirements of this section.

(f) Accounting for public property. Each charter holder shall include in its annual audit report an exhibit identifying the fixed assets of the charter holder and the ownership interest of all parties for all real estate and capitalized personal property presently held by the charter holder or acquired, improved, or maintained by the charter holder during the term of the open-enrollment charter.

(1) Pursuant to the requirements in §109.41 of this title (relating to Financial Accountability System Resource Guide), the annual audit report must separately disclose the cost basis and accumulated depreciation of all public property as determined by this division, and all other property held, acquired, improved, or maintained by the charter holder.

(2) Alternatively, the charter holder may omit the exhibit required by paragraph (1) of this subsection and substitute a statement, in accordance with the requirements in §109.41 of this title, that all property acquired, improved, or maintained during the term of the open-enrollment charter, and all property presently held by the charter holder, is public property under this division.

(3) All property held, acquired, improved, or maintained by the charter holder is subject to this subsection regardless whether it is public or private property.

(g) Upon revocation, surrender, or any other form of termination of the charter for any reason, the charter holder shall immediately surrender all public property, including, but not limited to, real estate, wherever located and in whatever form, to the commissioner of education.

§100.1067. Possession and Control of the Public Property of a Former Charter Holder.

(a) Disposition of audited property. If the exhibits to the annual audit reports filed by a former charter holder are in substantial compliance with §100.1063(f) of this title (relating to Use of Public Property by a Charter Holder), the commissioner of education shall take possession, assume control, and supervise the disposition of the public property disclosed by those exhibits as provided by subsection (c) of this section.

(b) Disposition of property--defective audit. If the exhibits to the annual audit reports filed by a former charter holder are not in substantial compliance with §100.1063(f) of this title [~~(relating to Use of Public Property by a Charter Holder)~~], the commissioner shall use such legal process as may be available under Texas law to take possession and assume control of all property of the former charter holder and, using such legal process, supervise the disposition of such property in accordance with law.

(1) At any time prior to taking possession and assuming control of the affected property, the commissioner may determine whether the exhibits to the annual audit reports filed by a former charter holder substantially comply with §100.1063(f) of this title.

(2) At the commissioner's sole discretion, the commissioner may cure any defects in the filed exhibits by securing, at the former charter holder's expense, such professional services as may be required to create and/or audit the necessary exhibits to the annual audit reports.

(3) If successful in curing all defects in such exhibits, the commissioner may, at the commissioner's sole discretion, take possession, assume control, and supervise the disposition of the public property disclosed by those exhibits as provided by subsection (c) of this section.

(c) Method for audited property. In taking possession, assuming control, and supervising the disposition of property that has been properly recorded by a former charter holder under §100.1063(f) of this title [~~(relating to Use of Public Property by a Charter Holder)~~], the commissioner:

(1) shall accept and rely on the cost basis disclosure of all public property and all other property acquired by the former charter holder disclosed by the annual audit reports already on file with the agency and, if needed, by the annual audit report for the fiscal year in which the charter holder ceased operations;

(2) shall take possession and assume control over all public property disclosed by the annual audit reports or any audit conducted under subsection (b) or this section;

(3) shall permit the former charter holder to designate the property to be used by the commissioner to satisfy the amount required by paragraph (2) of this subsection, and defer to the reasonable wishes of the former charter holder in this respect;

(4) may liquidate property designated by the former charter holder and, if the commissioner determines it to be necessary, liquidate other property; and

(5) shall return to the possession and control of the former charter holder any property in excess of the ownership interest of the State of Texas and/or federal grant or funding agencies of all public property disclosed by the annual audit reports or any audit conducted under subsection (b) of this section, in accordance with current fair market valuation of the property.

(d) Use of legal process. Notwithstanding subsection (c) of this section, the commissioner [~~of education~~] may use such legal process as may be available under Texas law to take possession and assume control over the public property disclosed by the annual audit reports and, using such legal process, supervise the disposition of such property in accordance with law.

§100.1071. Real Property Held in Trust.

(a) This section applies to a charter holder unless alternative procedures for purchasing and selling real property held in trust have been approved by the commissioner of education [~~State Board of Education~~] under §100.1006 of this title [~~§100.103~~] (relating to Optional Open-Enrollment Charter Provisions for Contracting and Purchasing), and the open-enrollment charter has been amended by the commissioner [~~of education~~] to adopt the approved procedures.

(b) A requirement in Government Code, Chapter 2252, Subchapter D, that applies to a school district or the board of trustees of a school district applies to a charter school, the governing body of a charter holder, or the governing body of a charter school.

(1) A charter holder may not purchase real property held in trust until the trustee submits to the governing body of the charter holder a copy of the trust agreement identifying the true owner of the property. The trustee shall identify the true owner of the property to the charter holder.

(2) A charter holder may not sell real property to a trustee until the charter holder receives from the trustee a copy of the trust agreement identifying the person who will be the true owner of the property. The trustee shall identify the person who will be the true owner of the property to the charter holder.

(3) A conveyance of property subject to this section is void if a charter holder fails to comply with this section.

(4) A trust agreement submitted to the governing body of the charter holder is confidential information excepted from the requirements of Government Code, §552.021, but must be disclosed to the Texas Education Agency under §100.1029 (relating to Agency Audits, Monitoring, and Investigations).

(c) If the charter holder purchases or leases real property that is public property as defined under §100.1063 of this title (relating to Use of Public Property by a Charter Holder) and §100.1065 of this title (relating to Property Acquired with State Funds Received Before September 1, 2001--Special Rules), then it must file in the real property records of the county in which the real property is located a notice containing the following:

(1) the legal description and physical address of the real property;

(2) the identity of the charter holder;

(3) a description of the legal instrument creating the charter holder's interest in the real property;

(4) a statement that, pursuant to section Texas Education Code (TEC), §12.128, the real property:

(A) is considered to be public property for all purposes under state law;

(B) is property of this state held in trust by the charter holder for the benefit of the students of the open-enrollment charter school; and

(C) may be used only for a purpose for which a school district may use school district property;

(5) a statement that, pursuant to TEC, §12.128, the commissioner may:

(A) take possession and assume control of the property identified in this subsection if the open-enrollment charter school ceases to operate; and

(B) supervise the disposition of the property in accordance with law;

(6) a statement that TEC, §12.128, does not affect a security interest in or lien on the property identified in this subsection established by a creditor in compliance with law if the security interest or lien arose in connection with the sale or lease of the property to the charter holder; and

(7) an acknowledgment executed by an authorized officer or director of the charter holder in conformity with the Texas Civil Practice and Remedies Code, Chapter 121.

§100.1073. Improvements to Real Property.

(a) This section applies to a charter holder unless alternative procedures for awarding a contract for the construction, repair, or renovation of a structure, road, highway, or other improvement or addition to real property have been approved by the commissioner of education [~~State Board of Education~~] under §100.1006 of this title [~~§100.103~~] (relating to Optional Open-Enrollment Charter Provisions for Contracting and Purchasing) and the open-enrollment charter has been amended by the commissioner [~~of education~~] to adopt the approved procedures.

(b) A charter holder shall comply with Local Government Code, Chapter 271, Subchapter B, in awarding any contract for the construction, repair, or renovation of a structure, road, highway, or other improvement or addition to real property if the contract requires the expenditure of public funds in the amount specified by Local Government Code, §271.024. A requirement in that subchapter applies to a school district or the board of trustees of a school district applies to a charter school, the governing body of a charter holder, or the governing body of a charter school.

(c) Local Government Code, Chapter 271, Subchapter B, does not apply to a contract executed prior to September 1, 2001.

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

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DIVISION 5. CHARTER SCHOOL GOVERNANCE

19 TAC §§100.1102 - 100.1105, 100.1111, 100.1112, 100.1131, 100.1133, 100.1151, 100.1155

The amendments are proposed under the Texas Education Code (TEC), §12.101, which authorizes the commissioner to grant a charter on the application of an eligible entity for an open-enrollment charter school, including the adoption of rules to modify criteria for granting a charter to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.1011, which authorizes the commissioner to adopt rules to modify criteria for granting charters for high-performing entities to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.102, which requires schools to operate and govern in accordance with its charter; TEC, §12.103, which authorizes that schools are subject to federal and state laws and rules adopted as applicable to charters; TEC, §12.104, which authorizes the commissioner to adopt rules relating to the applicability of public education law to charter schools; TEC, §12.1053, which authorizes the commissioner to approve procedures for contracting and purchasing or subject schools to rules of governmental entity; TEC, §12.1054, which authorizes the commissioner to enforce state law and rules relating to conflict of interest; TEC, §12.1055, which authorizes the commissioner to enforce state law and rules relating to nepotism; TEC, §12.1059, which authorizes the agency to approve certain employees for positions in schools; TEC, §12.106, which authorizes the commissioner to adopt rules to provide and account for the state funding of charter schools; TEC, §12.107, which requires that schools hold in trust for benefit of students all state funds and declares that these funds are considered to be public funds for all purposes under state law; TEC, §12.1162, which authorizes the commissioner to adopt rules to implement sanctions against an open-enrollment charter school based on violations of Texas law; TEC, §12.1163, which authorizes the commissioner to audit the records of an open-enrollment charter school, charter holder, and a management company; TEC, §12.120, which mandates under which circumstances an individual may or may not serve on a governing body of a charter holder or charter school or serve as an employee; TEC, §12.121, which requires the governing body of a charter holder to be responsible for and to retain control of the management, operation, and accountability of the school; TEC, §12.123, which authorizes the commissioner to adopt rules necessary for prescribing and implementing the required training for members of the governing bodies of charter schools and officers of charter schools; TEC, §12.126, which authorizes under what circumstances the commissioner may prohibit, deny renewal of or revoke a contract for management services; TEC, §12.128, which authorizes the commissioner to adopt rules necessary to insure that all property purchased or leased with state funds considered to be public property for all purposes under state law held in trust for the benefit of students of the open-enrollment school is returned to the state when the open-enrollment charter school ceases to operate; and Local Government Code, §171.004, which authorizes how all local public officials with a substantial interest in a business entity or real property shall conduct their affairs.

The amendments implement the TEC, §§12.101, 12.1011, 12.102, 12.103, 12.104, 12.1053, 12.1054, 12.1055, 12.1059, 12.106, 12.107, 12.1162, 12.1163, 12.120, 12.121, 12.123, 12.126, and 12.128 and Local Government Code, §171.004.

§100.1102. Training for Members of Governing Bodies of Charter Holder and School.

(a) Training required. Unless exempted under subsection (g) or (h) of this section, a member of the governing body of a charter holder or a member of the governing body of a charter school must complete a training course consisting of 12 instructional hours, excluding breaks, administrative tasks, and other non-instructional time, delivered by a course provider registered under §100.1107 of this title (relating to Course Providers). The training course may not use self-instructional materials, unless as otherwise provided.

(b) Timeline for completing training. Except as provided in subsection (c) of this section, a member of the governing body of a charter holder or a member of the governing body of a charter school must complete the training course required by this section within one calendar year of appointment or election to such governing body.

(c) Transition timeline. A member serving on the governing body of a charter holder or the governing body of a charter school on the effective date of this section must complete at least the first six hours of the training course required by this section within six months of the effective date of the curriculum outline approved under subsection (e) of this section, and must complete the remaining six hours of such training within one year of the effective date of the approved curriculum outline. Training completed prior to the effective date of this section and after September 1, 2001, may be counted toward the first six hours of the training course required by this section if it meets the requirements of the curriculum outline approved under subsection (e) of this section.

(d) Course content. The training course required by this section shall include the following modules, which accounts for 540 minutes (nine hours) of the required 12 hours. The remaining 180 minutes (three hours) of the required 12 hours may be selected from any of these modules:

(1) a module consisting of at least 150 minutes of instruction in basic school law, with special emphasis on corporate director duties and liabilities, non-delegable duties, nepotism, conflicts of interest, management companies, appropriate roles concerning internal and external audits, and the legal requirements specific to members of the governing body of a charter holder;

(2) a module consisting of at least 60 minutes of instruction in basic school finance, with special emphasis on accounting for public funds and property, student attendance accounting, fiduciary duties related to state and federal funding, federal funds and property management, grant administration, audit requirements, and the financial duties specific to the members of the governing body of a charter holder;

(3) a module consisting of at least 30 minutes of instruction in health and safety issues, with special emphasis on health and safety codes, ordinances, and other laws applicable to operating a Texas public school; student discipline; [~~and~~] safe schools; required reporting of child abuse; and criminal background checks;

(4) a module consisting of at least 120 minutes of instruction in accountability requirements related to the use of public funds, with special emphasis on the duties and liabilities of a trustee under Texas law, the shared use of real property for charter and non-charter business, bank depository contracts, capital financing, incidental use of public property by charter holder personnel, and recovery by the commissioner of education of the public property held by a former charter holder;

(5) a module consisting of at least 60 minutes of instruction in other requirements relating to accountability to the public, with special emphasis on the administration of statewide assessments; student, staff, financial, and organizational data reporting; dropout reporting; statewide standards for acceptable student performance; charter-specific standards for acceptable student performance; accountability ratings and sanctions under Texas Education Code (TEC), Chapter 39; and the role of student performance in [~~adverse~~] actions under TEC, §12.116 and §12.1162;

(6) a module consisting of at least 60 minutes of instruction in open meetings requirements under Government Code, Chapter 551, with special emphasis on posting the agenda, executive sessions, accessibility of the meeting location to the public, employee board members, and civil and criminal sanctions; and

(7) a module consisting of at least 60 minutes of instruction in requirements relating to public records, with special emphasis on the Public Information Act, the Records Retention Act, confidential student records, records in the possession of a management company, and other duties respecting public records.

(e) Required course curriculum outline. The commissioner shall approve and disseminate a curriculum outline that is consistent with the module topics and minimum durations identified in subsection (d) of this section. Training that does not conform to the curriculum outline does not satisfy the training requirements of this section. The entire duration of the training course must be dedicated to topics identified in the curriculum outline. The curriculum outline will be available on the Texas Education Agency (TEA) website. The process for the development and/or revision of a curriculum outline under this section must include an opportunity for stakeholder comment.

(f) Continuing training. A member serving on the governing body of a charter holder or the governing body of a charter school who has completed the 12-hour training course required by this section must annually thereafter receive six hours of training, excluding breaks, administrative tasks, and other non-instructional time, delivered by a course provider registered under §100.1107 of this title. However, a member of the governing body of a charter holder whose organization has operated charters that are all rated with an "academically acceptable" rating [~~"Acceptable"~~] or higher, as defined in §100.1001(26) of this title (relating to Definitions), for at least two out of three of the most recent ratings or a member of the governing body of a charter school whose school has been rated with an "academically acceptable" rating [~~"Acceptable"~~] or higher for at least two out of three of the most recent ratings may take any training that is documented by the provider and that applies to the achievement of the charter's academic mission and/or fulfillment of its responsibilities and/or accountabilities under the law. Furthermore, a board chair or vice chair may opt to train the remaining board members in such subjects as best fits the needs of the school or schools, provided the chair or vice chair has taken the initial 12 hours otherwise required under these rules. Continuing training under this subsection shall fulfill assessed training needs, including any training needs identified by TEA monitoring, and address update items identified in the curriculum outline approved under subsection (e) of this section as well as additional topics selected from the curriculum outline. Selected topics must be covered in greater depth than the curriculum outline indicates for initial training on those topics. With the exception of members of the governing body of a charter holder whose organization has operated campuses that are all rated with an "academically acceptable" rating [~~"Acceptable"~~] or higher for at least two out of three of the most recent ratings, or a member of the governing body of a charter school whose school has been rated with an "academically acceptable" rating [~~"Acceptable"~~] or higher for at least two out of three of the most recent ratings, no individual may use self-instructional materials for more than one hour of continuing training. Twenty-five percent of hours earned in excess of the requirements set forth in this subsection by a member serving on the governing body of a charter holder or the governing body of a charter school may be carried over to meet the following year's requirement under this section.

(g) Exemptions. A member of the governing body of a charter holder who serves on the governing body of a governmental entity or an institution of higher education as defined under TEC, §61.003, is exempt from the training required by this section if, by virtue of such service, the member is subject to other mandatory training and the members of the governing body of the charter school operated by the charter holder comply with this section.

(h) Limited exemptions. A member of the governing body of a charter holder whose organization has operated campuses that are all rated the highest or second highest ratings [~~"Acceptable" or higher~~] for at least two out of three of the most recent ratings, or a member of the governing body of a charter school whose campuses have all been rated the highest or second highest ratings [~~"Acceptable" or higher~~] for at least two out of three of the most recent ratings shall be subject to the requirements in paragraphs (1)-(5) of this subsection in lieu of those specified in subsections (a) and (d) of this section. A rating that does not meet the criteria for "academically acceptable" as defined by §100.1001(26) of this title shall not be considered the highest or second highest academic performance rating for purposes of this section. For organizations that meet the requirements for this exception, the required amount of training is eight hours. The training courses required by this section shall include the following modules as provided in paragraphs (1)-(5) of this subsection, which account for 360 minutes (six hours) of the required eight hours. The remaining 120 minutes (two hours) of the required eight hours may be selected from any of the following modules, and can consist of self study:

(1) a module consisting of at least 60 minutes of instruction in basic school law, with special emphasis on corporate director duties and liabilities, non-delegable duties, nepotism, conflicts of interest, management companies, appropriate roles concerning internal and external audits, and the legal requirements specific to members of the governing body of a charter holder;

(2) a module consisting of at least 60 minutes of instruction in basic school finance, with special emphasis on accounting for public funds and property, student attendance accounting, fiduciary duties related to state and federal funding, federal funds and property management, grant administration, audit requirements, and the financial duties specific to the members of the governing body of a charter holder;

(3) a module consisting of at least 30 minutes of instruction in health and safety issues, with special emphasis on health and safety codes, ordinances, and other laws applicable to operating a Texas public school; student discipline; [~~and~~] safe schools; required reporting of child abuse; and criminal background checks;

(4) a module consisting of at least 90 minutes of instruction in accountability requirements related to the use of public funds, with special emphasis on the duties and liabilities of a trustee under Texas law, the shared use of real property for charter and non-charter business, bank depository contracts, capital financing, incidental use of public property by charter holder personnel, and recovery by the commissioner of education of the public property held by a former charter holder;

(5) a module consisting of at least 120 combined minutes of instruction in the following:

(A) other requirements relating to accountability to the public, with special emphasis on the administration of statewide assessments; student, staff, financial, and organizational data reporting; dropout reporting; statewide standards for acceptable student performance; charter-specific standards for acceptable student performance; accountability ratings and sanctions under Texas Education Code (TEC), Chapter 39; and the role of student performance in [~~adverse~~] actions under TEC, §12.116 and §12.1162;

(B) instruction in open meetings requirements under Government Code, Chapter 551, with special emphasis on posting the agenda, executive sessions, accessibility of the meeting location to the public, employee board members, and civil and criminal sanctions; and

(C) instruction in requirements relating to public records, with special emphasis on the Public Information Act, the Records Retention Act, confidential student records, records in the possession of a management company, and other duties respecting public records.

§100.1103. Training for Chief Executive and Central Administrative Officers.

(a) Training required. Unless exempted under subsection (g) or (h) of this section, a chief executive officer or a central administrative officer, including persons providing management services that include the functions of a chief executive officer or central administrative officer, must complete a training course consisting of 30 instructional hours, excluding breaks, administrative tasks, and other non-instructional time, delivered by a course provider registered under §100.1107 of this title (relating to Course Providers). The training course may not use self-instructional materials, unless as otherwise provided.

(b) Timeline for completing training. Except as provided in subsection (c) of this section, a chief executive officer or a central administrative officer must complete the training course required by this section within one calendar year of beginning service in that capacity.

(c) Transition timeline. A person serving as a chief executive officer or central administrative officer on the effective date of this section must complete at least the first 15 hours of the training course required by this section within six months of the effective date of the curriculum outline approved under subsection (e) of this section, and must complete the remaining 15 hours of such training within one year of the effective date of the approved curriculum outline. Training completed prior to the effective date of this section and after September 1, 2001, may be counted toward the first 15 hours of the training course required by this section if it meets the requirements of the curriculum outline approved under subsection (e) of this section.

(d) Course content. The training course required by this section shall include the following modules, which accounts for 1,260 minutes (21 hours) of the required 30 hours. The remaining 540 minutes (nine hours) of the required 30 hours may be selected from any of these modules:

(1) a module consisting of at least 240 minutes of instruction in school law, with special emphasis on Texas Education Code (TEC) [~~TEC~~], Chapter 12, Subchapter D, and this subchapter;

(2) a module consisting of at least 240 minutes of instruction in school finance, with special emphasis on accounting for public funds and property, student attendance accounting, fiduciary duties related to state and federal funding, federal funds and property management, grant administration, audit requirements, and capital financing;

(3) a module consisting of at least 120 minutes of instruction in health and safety issues, with special emphasis on health and safety codes, ordinances, and other laws applicable to operating a Texas public school; student discipline; [~~and~~] safe schools; required reporting of child abuse; and criminal background checks;

(4) a module consisting of at least 240 minutes of instruction in accountability requirements related to the use of public funds, with special emphasis on the duties and liabilities of a trustee under Texas law, the shared use of real property for charter and non-charter business, bank depository contracts, capital financing, incidental use of public property by charter holder personnel, and recovery by the com-

missioner of education of the public property held by a former charter holder;

(5) a module consisting of at least 240 minutes of instruction in other requirements relating to accountability to the public, with special emphasis on the administration of statewide assessments; student, staff, financial, and organizational data reporting; dropout reporting; statewide standards for acceptable student performance; charter-specific standards for acceptable student performance; accountability ratings and sanctions under TEC, Chapter 39; and the role of student performance in [~~adverse~~] actions under TEC, §12.116 and §12.1162;

(6) a module consisting of at least 60 minutes of instruction in open meetings requirements under Government Code, Chapter 551, with special emphasis on posting the agenda, executive sessions, accessibility of the meeting location to the public, employee board members, and civil and criminal sanctions; and

(7) a module consisting of at least 120 minutes of instruction in requirements relating to public records, with special emphasis on the Public Information Act, the Records Retention Act, confidential student records, records in the possession of a management company, and other duties respecting public records.

(e) Required course curriculum outline. The commissioner shall approve and disseminate a curriculum outline that is consistent with the module topics and minimum durations identified in subsection (d) of this section. Training that does not conform to the curriculum outline does not satisfy the training requirements of this section. The entire duration of the training course must be dedicated to topics identified in the curriculum outline. The curriculum outline will be available on the Texas Education Agency (TEA) website. The process for the development and/or revision of a curriculum outline under this section must include an opportunity for stakeholder comment.

(f) Continuing training. A chief executive officer or a central administrative officer who has completed the 30-hour training course required by this section must annually thereafter receive 15 hours of training, excluding breaks, administrative tasks, and other non-instructional time, delivered by a course provider registered under §100.1107 of this title. However, a chief executive or central administrative officer whose organization has operated charters that are all rated with an "academically acceptable" rating [~~"Acceptable"~~] or higher, as defined in §100.1001(26) of this title (relating to Definitions), for at least two out of three of the most recent ratings may take any training that is documented by the provider and that applies to the achievement of the charter's academic mission and/or fulfillment of its responsibilities and/or accountabilities under the law. Continuing training under this subsection shall fulfill assessed training needs, including any training needs identified by TEA monitoring, and address update items identified in the curriculum outline approved under subsection (e) of this section as well as additional topics selected from the curriculum outline. Selected topics must be covered in greater depth than the curriculum outline indicates for initial training on those topics. With the exception of the chief executive or central administrative officers of a charter holder whose organization has operated campuses that are all rated with an "academically acceptable" rating [~~"Acceptable"~~] or higher for at least two out of three of the most recent ratings, no individual may use self-instructional materials for more than three hours of continuing training. Twenty-five percent of hours earned by a chief executive officer or a central administrative officer in excess of the requirements set forth in this subsection may be carried over to meet the following year's requirement under this section.

(g) Exemptions. A central administrative officer is exempt from the training required by this section if the person is the holder in good standing of a Standard Superintendent Certificate, or its lifetime equivalent, issued by the State Board for Educator Certification and all other officers of the charter school comply with this division.

(h) Limited exemptions. A chief executive or central administrative officer whose organization has operated campuses that are all rated with an "academically acceptable" rating [~~"Acceptable"~~] or higher for at least two out of three of the most recent ratings shall be subject to the requirements in paragraphs (1)-(5) of this subsection in lieu of those specified in subsections (a) and (d) of this section. For organizations that meet the requirements for this exception, the required amount of training is 21 hours. The training course required by this section shall include the following modules, which accounts for 1,140 minutes (19 hours) of the required 21 hours. The remaining 120 minutes (two hours) of the required 21 hours may be selected from any of the following modules, and can consist of self-study:

(1) a module consisting of at least 210 minutes of instruction in school law, with special emphasis on TEC, Chapter 12, Subchapter D, and this subchapter;

(2) a module consisting of at least 210 minutes of instruction in school finance, with special emphasis on accounting for public funds and property, student attendance accounting, fiduciary duties related to state and federal funding, federal funds and property management, grant administration, audit requirements, and capital financing;

(3) a module consisting of at least 270 combined minutes of instruction in the following:

(A) health and safety issues, with special emphasis on health and safety codes, ordinances, and other laws applicable to operating a Texas public school; student discipline; and safe schools;

(B) open meetings requirements under Government Code, Chapter 551, with special emphasis on posting the agenda, executive sessions, accessibility of the meeting location to the public, employee board members, and civil and criminal sanctions; and

(C) requirements relating to public records, with special emphasis on the Public Information Act, the Records Retention Act, confidential student records, records in the possession of a management company, and other duties respecting public records;

(4) a module consisting of at least 210 minutes of instruction in accountability requirements related to the use of public funds, with special emphasis on the duties and liabilities of a trustee under Texas law, the shared use of real property for charter and non-charter business, bank depository contracts, capital financing, incidental use of public property by charter holder personnel, and recovery by the commissioner of education of the public property held by a former charter holder; and

(5) a module consisting of at least 240 minutes of instruction in other requirements relating to accountability to the public, with special emphasis on the administration of statewide assessments; student, staff, financial, and organizational data reporting; dropout reporting; statewide standards for acceptable student performance; charter-specific standards for acceptable student performance; accountability ratings and sanctions under TEC, Chapter 39; and the role of student performance in [~~adverse~~] actions under TEC, §12.116 and §12.1162.

§100.1104. Training for Campus Administrative Officers.

(a) Training required. Unless exempted under subsection (g) of this section, a campus administrative officer, including persons providing management services that include the functions of a campus administrative officer, must complete a training course consisting of 10 instructional hours, excluding breaks, administrative tasks, and other non-instructional time, delivered by a course provider registered un-

der §100.1107 of this title (relating to Course Providers). The training course may not use self-instructional materials.

(b) Timeline for completing training. Except as provided in subsection (c) of this section, a campus administrative officer must complete the training course required by this section within one calendar year of beginning service in that capacity.

(c) Transition timeline. A person serving as a campus administrative officer on the effective date of this section must complete at least the first five hours of the training course required by this section within six months of the effective date of the curriculum outline approved under subsection (e) of this section, and must complete the remaining five hours of such training within one year of the effective date of the approved curriculum outline. Training completed prior to the effective date of this section and after September 1, 2001, may be counted toward the first five hours of the training course required by this section if it meets the requirements of the curriculum outline approved under subsection (e) of this section.

(d) Course content. The training course required by this section shall include the following modules (120 minutes (two hours) of the required 10 hours may be selected from any of these modules):

(1) a module consisting of at least 90 minutes of instruction in school law, with special emphasis on Texas Education Code (TEC) [~~TEC~~], Chapter 12, Subchapter D; this subchapter; students with disabilities; student records; student admissions; geographic boundaries; and residency;

(2) a module consisting of at least 60 minutes of instruction in school finance, with special emphasis on student attendance accounting, fiduciary duties related to state and federal funding, federal funds and property management, and grant administration;

(3) a module consisting of at least 90 minutes of instruction in health and safety issues, with special emphasis on health and safety codes, ordinances, and other laws applicable to operating a Texas public school; student discipline; [~~and~~] safe schools; required reporting of child abuse; and criminal background checks;

(4) a module consisting of at least 30 minutes of instruction in accountability requirements related to the use of public funds, with special emphasis on incidental use of public property by charter holder personnel;

(5) a module consisting of at least 120 minutes of instruction in other requirements relating to accountability to the public, with special emphasis on the administration of statewide assessments; student, staff, financial, and organizational data reporting; and dropout reporting;

(6) a module consisting of at least 30 minutes of instruction in open meetings requirements under Government Code, Chapter 551, with special emphasis on employee board members; and

(7) a module consisting of at least 60 minutes of instruction in requirements relating to public records, with special emphasis on confidential student records.

(e) Required course curriculum outline. The commissioner of education shall approve and disseminate a curriculum outline that is consistent with the module topics and minimum durations identified in subsection (d) of this section. Training that does not conform to the curriculum outline does not satisfy the training requirements of this section. The entire duration of the training course must be dedicated to topics identified in the curriculum outline. The curriculum outline will be available on the Texas Education Agency (TEA) website. The process for the development and/or revision of a curriculum outline under this section must include an opportunity for stakeholder comment.

(f) Continuing training. A campus administrative officer who has completed the 10-hour training course required by this section must annually thereafter receive five hours of training, excluding breaks, administrative tasks, and other non-instructional time, delivered by a course provider registered under §100.1107 of this title. However, a school officer whose school has been rated with an "academically acceptable" rating [~~"Acceptable"~~] or higher, as defined in §100.1001(26) of this title (relating to Definitions), for at least two out of three of the most recent ratings may take any training that is documented by the provider and that applies to the achievement of the charter's academic mission and/or fulfillment of its responsibilities and/or accountabilities under the law. Continuing training under this subsection shall fulfill assessed training needs, including any training needs identified by TEA monitoring, and address update items identified in the curriculum outline approved under subsection (e) of this section as well as additional topics selected from the curriculum outline. Selected topics must be covered in greater depth than the curriculum outline indicates for initial training on those topics. With the exception of campus administrative officers of a charter holder whose organization has operated campuses that are all rated with an "academically acceptable" rating [~~"Acceptable"~~] or higher for at least two out of three of the most recent ratings, no individual may use self-instructional materials for more than 30 minutes of continuing training. Twenty-five percent of hours earned in excess of the requirements set forth in this subsection by a campus administrative officer may be carried over to meet the following year's requirement under this section.

(g) Exemptions. A campus administrative officer is exempt from the training required by this section if the person is the holder in good standing of a Standard Principal Certificate, or its lifetime equivalent, issued by the State Board for Educator Certification, and all other officers of the charter school comply with this division.

§100.1105. Training for Business Managers.

(a) Training required. Unless exempted under subsection (g) of this section, a business manager, including persons providing management services that include the functions of a business manager, must complete a training course consisting of 30 instructional hours, excluding breaks, administrative tasks, and other non-instructional time, delivered by a course provider registered under §100.1107 of this title (relating to Course Providers). The training course may not use self-instructional materials.

(b) Timeline for completing training. Except as provided in subsection (c) of this section, a business manager must complete the training course required by this section within one calendar year of beginning service in that capacity.

(c) Transition timeline. A person serving as a business manager on the effective date of this section must complete at least the first 15 hours of the training course required by this section within six months of the effective date of the curriculum outline approved under subsection (e) of this section, and must complete the remaining 15 hours of such training within one year of the effective date of the approved curriculum outline. Training completed prior to the effective date of this section and after September 1, 2001, may be counted toward the first 15 hours of the training course required by this section if it meets the requirements of the curriculum outline approved under subsection (e) of this section.

(d) Course content. The training course required by this section shall include the following modules:

(1) a module consisting of at least 240 minutes of instruction in school law, with special emphasis on Texas Education Code (TEC) [~~TEC~~], Chapter 12, Subchapter D; this subchapter; and the Financial Accountability System Resource Guide, as adopted by reference in §109.41 of this title (relating to Financial Accountability System Resource Guide);

(2) a module consisting of at least 480 minutes of instruction in school finance, with special emphasis on the Financial Accountability System Resource Guide, generally accepted accounting principles, student attendance accounting, federal funds and property management, purchasing, grant administration, audit requirements, and capital financing;

(3) a module consisting of at least 20 minutes of instruction in health and safety issues, with special emphasis on health and safety codes, ordinances, and other laws applicable to operating a Texas public school;

(4) a module consisting of at least 240 minutes of instruction in accountability requirements related to the use of public funds, with special emphasis on the fiduciary responsibility of duties and liabilities of a trustee under Texas law, the shared use of real property for charter and non-charter business, bank depository contracts, capital financing, incidental use of public property by charter holder personnel, and recovery by the commissioner of education of the public property held by a former charter holder;

(5) a module consisting of at least 160 minutes of instruction in other requirements relating to accountability to the public, with special emphasis on PEIMS reporting, internal management controls, and audit requirements;

(6) a module consisting of at least 20 minutes of instruction in open meetings requirements under Government Code, Chapter 551, with special emphasis on adopting and amending the budget; and

(7) a module consisting of at least 40 minutes of instruction in requirements relating to public records, with special emphasis on recordkeeping required by generally accepted accounting principles and applicable law.

(e) Required course curriculum outline. The commissioner shall approve and disseminate a curriculum outline that is consistent with the module topics and minimum durations identified in subsection (d) of this section. Training that does not conform to the curriculum outline does not satisfy the training requirements of this section. The entire duration of the training course must be dedicated to topics identified in the curriculum outline. The curriculum outline will be available on the Texas Education Agency (TEA) website. The process for the development and/or revision of a curriculum outline under this section must include an opportunity for stakeholder comment.

(f) Continuing training. A business manager who has completed the 30-hour training course required by this section must annually thereafter receive 15 hours of training, excluding breaks, administrative tasks, and other non-instructional time, delivered by a course provider registered under §100.1107 of this title. Continuing training under this subsection shall fulfill assessed training needs, including any training needs identified by TEA monitoring, and address update items identified in the curriculum outline approved under subsection (e) as well as additional topics selected from the curriculum outline. Selected topics must be covered in greater depth than the curriculum outline indicates for initial training on those topics. No more than three hours of continuing training may use self-instructional materials.

(g) Exemptions. A business manager is exempt from:

(1) [~~A business manager is exempt from~~] the training required by this section if the person is the holder in good standing of one or more of the following credentials issued by the Texas Association of School Business Officials or the Texas Charter School Association, and if all other officers of the charter school comply with this division:

(A) Registered Texas School Business Administrator;

(B) Certified Texas School Business Official;

(C) Certified Texas School Business Specialist; [~~or~~]

(D) Certified Texas School Business Administrator; or [~~and~~]

(E) Charter School Business Officer Certification; and

(2) [~~A business manager is exempt from~~] a module of required training, if:

(A) the business manager is a certified public accountant (CPA) registered in good standing with the Texas State Board of Public Accountancy; and

(B) the subject matter of the module of required training is covered by the Uniform CPA Examination administered by the Texas State Board of Public Accountancy.

§100.1111. Applicability of Nepotism Provisions; Exception for Acceptable Performance.

(a) Nepotism laws generally apply. Except as provided by this section, a member of the governing body of a charter holder, a member of the governing body of a charter school, and an officer of a charter school who retain final authority to select and terminate charter school employees shall comply with Government Code, Chapter 573, in the manner provided by the nepotism provisions, prohibitions, and exceptions described in §§100.1111-100.1116 of this division.

(b) Existing charter holders partly grandfathered. A person who was not restricted or prohibited under Texas Education Code (TEC), §12.1055, before September 1, 2013, from being employed by an open-enrollment charter school and who was lawfully employed by an open-enrollment charter school before September 1, 2013, is considered to have been in continuous employment as provided by Government Code, §573.062(a), and is not prohibited from continuing employment with the school. Any break in service, however, shall render the eligibility under this subsection null and void. Continuous employment for the purposes of this subsection applies only to relationships that existed on September 1, 2013, and does not exempt relationships created after September 1, 2013.

(c) Employment status. This section only applies to the employment of those charter employees reported to the Texas Workforce Commission (TWC) as being employees of the charter on September 1, 2013. The charter holder must supply to the Texas Education Agency (TEA) the TWC list that includes each employee's name, position held, and relationship, if any, to officer and/or board member(s). This list will serve as a baseline for determination of those individuals grandfathered under this section.

(d) Submission requirement. The list referenced in subsection (c) of this section shall be received by the TEA division of charter schools no later than December 1, 2014. Failure to comply with this subsection constitutes a material charter violation.

[~~(b) Satisfactory student performance. If each charter school operated by a charter holder has received a satisfactory rating, as defined by §100.1022(b)(2)(B) of this title (relating to Standards for Adverse Action on an Open-Enrollment Charter), for at least two of the preceding three school years, then that charter holder may comply with~~

subsection (e) of this section in lieu of complying with §§100.1111-100.1116 of this division.]

[(c) Existing charter holders partly grandfathered. If a charter holder has operated at least one charter school which reported attendance that occurred prior to September 2, 2001, but no charter school operated by the charter holder has received a sufficient number of substantive ratings to determine whether it has received a satisfactory rating for at least two of the preceding three school years, then the charter holder may comply with subsection (e) of this section in lieu of compliance with §§100.1111-100.1116 of this division.]

[(1) For purposes of this subsection, a "substantive rating" is defined by §100.1022(b)(2).]

[(2) For purposes of this subsection, a charter school has received a sufficient number of substantive ratings to determine whether it has received a satisfactory rating for at least two of the preceding three school years if:]

[(A) the charter school has received two consecutive substantive ratings, and neither rating meets the criteria set forth in subsection (b) of this section; or]

[(B) the charter school has received three substantive ratings.]

[(3) If a charter holder operates charter schools that have received a sufficient number of substantive ratings to determine whether it has received a satisfactory rating for at least two of the preceding three school years, but also operates charter schools that have not received a sufficient number of substantive ratings, then its eligibility to comply with subsection (e) of this section is determined by applying the criteria in subsection (b) of this section only to those schools with a sufficient number of substantive ratings.]

[(d) No annual ratings assigned. For purposes of this section, two substantive ratings are "consecutive" as determined by §100.1022(b)(2).]

[(e) Exception to nepotism. A member of the governing body of a charter holder subject to this subsection, and a member of the governing body or officer of each charter school operated by such charter holder, shall comply with §100.1133 of this title (relating to Conflicts Requiring Affidavit and Abstention From Voting) and §100.1134 of this title (relating to Conflicts Requiring Separate Vote on Budget), with respect to a personnel matter concerning a person related to the member or officer within the third degree by consanguinity or within the second degree by affinity, as if the personnel matter were a transaction with a business entity requiring compliance with §100.1133 and §100.1134.]

(e) [(f)] No quorum of relatives. Notwithstanding any other provision of this section, persons related to one another within the third degree by consanguinity or within the second degree by affinity, as determined under §100.1113 of this title (relating to Relationships by Consanguinity or by Affinity), shall not constitute a quorum of the governing body or any committee of the governing body of the charter holder or charter school.

[(g) Compliance following ratings change. Notwithstanding this section, a charter holder must comply with the nepotism provisions, prohibitions, and exceptions described in §§100.1111-100.1116 of this division within 60 days after it is assigned a rating that causes it to become ineligible for the exception provided by subsection (e) of this section.]

[(1) Subject to paragraph (2) of this subsection, if a ratings appeal is provided in the applicable accountability manual, and if a timely and sufficient appeal is filed by the charter holder, then the time for compliance provided by this subsection is extended until 30 days after the date on which the appeal is finally determined.]

[(2) Notwithstanding any other deadline, an appeal is "timely" for purposes of the extension of time provided in paragraph (1) of this subsection if it is received by the appeals deadline specified in the relevant Accountability Manual, or under the alternative education accountability ratings procedures, if applicable.]

§100.1112. General Nepotism Provisions.

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

(1) Public official--a member of the governing body of a charter holder, a member of the governing body of a charter school, or an officer of a charter school who retains final authority to select and terminate charter school employees.

(2) Candidate--a person who applies for, seeks, is nominated for, or is considered for selection, appointment, employment or in any other manner to be made a member of the governing body of a charter holder, a member of the governing body of a charter school, or an officer of an open-enrollment charter school.

(3) Charter Position:

(A) an office, employment, function, or duty that is to be directly or indirectly compensated from state funds received by a charter holder after September 1, 2001; or

(B) a member of the governing body of a charter holder that receives state funds after September 1, 2001, or a member of the governing body or an officer of a charter school operated by such charter holder.

(b) Degrees of relationship. Except as specifically provided by these rules, §§100.1111-100.1116 of this division apply to relationships within the third degree by consanguinity or within the second degree by affinity.

§100.1131. Conflicts of Interest and Board Member Compensation; Exception.

(a) Process governing conflicts of interest. A member of the governing body of a charter holder, a member of the governing body of a charter school, and an officer of a charter school shall comply with Local Government Code, Chapter 171, in the manner provided by the conflict of interest provisions described in §§100.1131-100.1135 of this division.

(b) Compensated board members generally prohibited. Except as provided by this section, a person who receives compensation or remuneration from a nonprofit corporation holding an open-enrollment charter may not serve on the governing body of the charter holder. As used in this subsection, compensation or remuneration includes, without limitation:

(1) salary, bonuses, benefits, or other compensation received by the local public official pursuant to an employment relationship;

(2) payment of or reimbursement for personal expenses of the local public official, excluding reimbursement for allowable travel expenses;

(3) credit extended to the local public official by the charter holder or charter school;

(4) the local public official's personal use of property paid for by the charter holder or charter school;

(5) in-kind transfers of property to the local public official; and

(6) all other forms of compensation or remuneration to the local public official.

(c) Satisfactory student performance. If each charter school operated by a charter holder has received a satisfactory rating, as defined by §100.1022(b)(2)(B) of this title (relating to Standards to Revoke and Modify the Governance of [~~for Adverse Action on~~] an Open-Enrollment Charter), for at least two of the preceding three school years, then charter school employees may serve on the governing body of the charter holder in accordance with subsection (f) of this section.

(d) Existing charter holders partly grandfathered. If a charter holder has operated at least one charter school which reported attendance that occurred prior to September 2, 2001, but no charter school operated by the charter holder has received a sufficient number of academic or financial [~~substantive~~] ratings to determine whether it has received a satisfactory rating for at least two of the preceding three school years, then charter school employees may serve on the governing body of the charter holder in accordance with subsection (f) of this section.

~~[(1) For purposes of this subsection, a "substantive rating" is defined by §100.1022(b)(2).]~~

(1) [~~(2)~~] For purposes of this subsection, a charter school has a sufficient number of substantive ratings to determine whether it has received a satisfactory rating for at least two of the preceding three school years if:

(A) the charter school has received two consecutive academic [~~substantive~~] ratings, and neither rating meets the criteria set forth in subsection (c) of this section; or

(B) the charter school has received three academic [~~substantive~~] ratings.

(2) [~~(3)~~] If a charter holder operates charter schools that have received a sufficient number of academic [~~substantive~~] ratings to determine whether it has received a satisfactory rating for at least two of the preceding three school years, but also operates charter schools that have not received a sufficient number of academic [~~substantive~~] ratings, then its eligibility to comply with subsection (f) of this section is determined by applying the criteria in subsection (c) of this section only to those schools with a sufficient number of substantive ratings.

(e) No annual ratings assigned. For purposes of this section, two academic accountability [~~substantive~~] ratings are "consecutive" as determined by §100.1022(b)(2)(C) of this title [~~§100.1022(b)(2)~~].

(f) Exception to prohibition on compensated board members. Notwithstanding subsection (b) of this section, an employee of a charter school subject to this subsection may serve as a member of the governing body of the charter holder if:

(1) only employees of the charter school, and not employees of the charter holder, serve on the governing body of the charter holder;

(2) the only compensation or remuneration received by the board member is salary, bonuses, benefits, or other compensation received pursuant to the employment relationship with the charter school;

(3) charter school employees do not constitute a quorum of the governing body or any committee of the governing body; and

(4) all charter school employees serving on the governing body comply with all conflict of interest provisions referenced in subsection (a) of this section.

(g) Accounting for interested transactions. Notwithstanding compliance with this section, a charter holder shall comply fully with the requirements of §100.1047(f) of this title (relating to Accounting for State and Federal Funds).

(h) Compliance following ratings change. Notwithstanding this section, a charter holder must comply with the prohibition on compensated board members described in subsection (b) of this section within 30 days after it is assigned a rating that causes it to become ineligible for the exception provided by subsection (f) of this section.

(1) Subject to paragraph (2) of this subsection, if a ratings appeal is provided in the applicable accountability manual, and if a timely and sufficient appeal is filed by the charter holder, then the time for compliance provided by this subsection is extended until 30 days after the date on which the appeal is finally determined.

(2) Notwithstanding any other deadline, an appeal is "timely" for purposes of the extension of time provided in paragraph (1) of this subsection if it is received by the appeals deadline specified in the relevant Accountability Manual, or under the alternative education accountability ratings procedures, if applicable.

§100.1133. Conflicts Requiring Affidavit and Abstention From Voting.

(a) Affidavit and abstention required. If a local public official has a substantial interest in a business entity or in real property, the official must [~~shall~~] file, before a vote, decision, or other action on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and must [~~shall~~] abstain from further participation in the matter if:

(1) in the case of a substantial interest in a business entity, the vote, decision, or other action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or

(2) in the case of a substantial interest in real property, it is reasonably foreseeable that a vote, decision, or other action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.

(b) Affidavit filed. The affidavit described in subsection (a) of this section must be filed with the official recordkeeper of the charter holder.

(c) Abstention excused. If a local public official is required to file and does file an affidavit under subsection (a) of this section, the local public official is not required to abstain from further participation in the matter requiring the affidavit if:

(1) the local public official is a member of the governing body of the charter holder or the charter school, and

(2) a majority of the members of the governing body of which the local public official is a member is composed of persons who are likewise required to file and who do file affidavits of similar interests on the same official action.

(d) Local public official. A member of a governing body of a charter holder, a member of the governing body of an open-enrollment charter school, or an officer of an open-enrollment charter school is considered to be a local public official for purposes of this section.

(e) Minutes. The minutes of a meeting during which a matter subject to this section is discussed or decided must clearly identify each

person participating, each person abstaining, each person voting, and the vote of each person.

(f) Resolution. A matter subject to this section must be approved through a written resolution adopted by the governing board of the charter holder and signed by the members voting in favor of it.

(g) Violation. A violation of this section or Local Government Code, Chapter 171, constitutes a material violation of charter contract.

§100.1151. Criminal History; Restrictions on Serving.

(a) Restrictions on serving. A person may not serve as a member of the governing body of a charter holder, as a member of the governing body of a charter school, or as an officer or employee of a charter school[,] if the person has been convicted of:

(1) a misdemeanor involving moral turpitude or any felony;

(2) an offense listed in Texas Education Code (TEC), §37.007(a); or

(3) an offense listed in Code of Criminal Procedure, Article 62.01(5).

(b) Exception. Notwithstanding subsection (a) of this section, a person may be employed in any position by an open-enrollment charter school if a school district could employ the person in that position and the Texas Education Agency (TEA) approves of the employment pursuant to TEC, §12.1059.

(c) [~~(b)~~] Required criminal history checks--generally. Before the person begins service, and every third year thereafter, a charter holder shall obtain from the Texas Department of Public Safety (DPS) all criminal history record information that relates to:

(1) an employee or a person whom the charter school intends to employ in any capacity, or whom the charter holder intends to employ in any capacity relating to its charter school activities;

(2) a member of the governing body of the charter holder or charter school or a person who has agreed to serve as a member of the governing body of the charter holder or charter school; and

(3) a person who files, in writing, an intention to serve as a volunteer at the charter school, if the duties are or will be performed on school property or at another location where students are regularly present.

(d) [~~(c)~~] Required criminal history checks--transportation. Except as provided by paragraphs (3) and (4) of this subsection, a charter holder that contracts with a person for transportation services shall obtain from the DPS all criminal history record information that relates to a person employed by the person as a bus driver or a person the person intends to employ as a bus driver.

(1) Except as provided by paragraphs (3) and (4) of this subsection, a person or management company that contracts with a charter holder to provide transportation services shall submit to the charter holder the name and other identification data required to obtain criminal history record information of each person described by this section.

(2) If the charter holder obtains information that a person described by this section has been convicted of a felony or a misdemeanor involving moral turpitude, the charter holder shall inform the chief personnel officer of the person or management company with whom the charter holder has contracted, and the person or management company may not employ that person to drive a bus on which students are transported without the permission of the governing body of the charter holder.

(3) A commercial transportation company that contracts with a charter holder to provide transportation services may obtain from any law enforcement or criminal justice agency all criminal history record information that relates to a person employed by the commercial transportation company, or to a person it intends to employ, as a bus driver, bus monitor, or bus aide.

(4) If the commercial transportation company obtains information that a person employed or to be employed by the company has been convicted of a felony or a misdemeanor involving moral turpitude, the company may not employ that person to drive or to serve as a bus monitor or bus aide on a bus on which students are transported without the permission of the governing body of the charter holder. Paragraphs (1) and (2) of this subsection do not apply if information is obtained as provided by paragraph (3) of this subsection.

(e) [~~(d)~~] Permissive criminal history checks. A charter holder may obtain from any law enforcement or criminal justice agency, including the DPS, all criminal history record information that relates to:

(1) a volunteer, employee, or member of a governing body under subsection (c) [~~(b)~~] of this section;

(2) an employee of or an applicant for employment with a public or commercial transportation company that contracts with the charter holder to provide transportation services if the employee drives or the applicant will drive a bus in which students are transported or is employed or is seeking employment as a bus monitor or bus aide on a bus in which students are transported, under subsection (d) [~~(c)~~] of this section; and

(3) an employee of or applicant for employment by a management company or other person that contracts with the charter school to provide management services or other services, if:

(A) the employee or applicant has or will have continuing duties related to the contracted services; and

(B) the duties are or will be performed on school property or at another location where students are regularly present.

(f) [~~(e)~~] Entitlement to criminal history checks. A charter holder is entitled to obtain, no more than twice each year, from the DPS all criminal history record information maintained by the DPS that the charter holder is required or authorized to obtain under this section.

(g) [~~(f)~~] Reduced fees for criminal history checks. In accordance with Government Code, §411.097, if a regional education service center or commercial transportation company that receives criminal history record information from the DPS under this section requests the information by providing to the DPS a list, including the name, date of birth, and any other personal descriptive information required by the DPS for each person, through electronic means, magnetic tape, or disk, as specified by the DPS, the DPS may not charge the service center or commercial transportation company more than the lesser of:

(1) the DPS's cost for providing the information; or

(2) the amount prescribed by another law.

(h) [~~(g)~~] Disclosure prohibited. Criminal history record information obtained by a charter holder under this section may not be released or disclosed to any person, other than the individual who is the subject of the information, the TEA [~~Texas Education Agency~~], the State Board for Educator Certification (SBEC), or the chief personnel officer of the transportation company, if the information is obtained under subsection (d) [~~(c)~~] of this section.

(i) [~~(h)~~] Removal by charter holder. If a person is prohibited by this section from serving as a member of the governing body of a charter holder, as a member of the governing body of a charter school,

or as an officer or employee of a charter school, the charter holder shall remove the individual from such position immediately.

(1) The removal must be made in accordance with the removal provisions in the articles of incorporation and bylaws of the corporation, if applicable, the terms of the open-enrollment charter, any applicable local policies, and state and federal law.

(2) The governing body of the charter holder may not approve an account or draw or authorize the drawing of a warrant or order to pay the compensation of a person if the person is prohibited by this section from serving in the capacity for which compensation is due.

(j) [~~(i)~~] Teaching certificate applicant or holder. A charter holder shall promptly notify the SBEC in writing if it obtains or has knowledge of information showing that an applicant for or holder of a certificate issued under TEC, Chapter 21, Subchapter B, has a reported criminal history.

(k) [~~(j)~~] Implementation schedule and transition. Notwithstanding this section:

(1) beginning September 1, 2001, a charter holder shall obtain, in compliance with this section, criminal history record information relating to each person identified in subsections (c) and (d) [~~(b) and (c)~~] of this section; and

(2) if a person is prohibited by this section from serving as a member of the governing body of a charter holder, as a member of the governing body of a charter school, or as an officer or employee of a charter school, and if removing such person would violate an employment or other written contract that was executed prior to September 1, 2001, then the employment or other contract may continue in effect past September 1, 2001, if each of the following conditions is met:

(A) no state funds are used to pay any amounts due the person under the employment or other contract, and all such amounts are paid from a clearly identified source of non-state funds;

(B) the terms of the employment or other contract have not been renewed, modified, or otherwise altered since September 1, 2001; and

(C) the person does not perform, and is not charged with performing, any charter school functions.

§100.1155. Procedures for Prohibiting a Management Contract.

(a) Action prohibiting management contract. The commissioner of education may prohibit, deny renewal of, suspend, or revoke a contract between an open-enrollment charter school and a management company providing management services to the school if the commissioner determines that the management company has:

(1) failed to provide educational or related services in compliance with the company's contractual or other legal obligation to any open-enrollment charter school in Texas or to any other similar school in another state;

(2) failed to protect the health, safety, or welfare of the students enrolled at an open-enrollment charter school served by the company;

(3) violated this subchapter or a rule adopted under this subchapter; or

(4) otherwise failed to comply with any contractual or other legal obligation to provide services to the school.

(b) Procedures for making determination. A determination under subsection (a) of this section shall be made through a final investigative report issued by the Texas Education Agency (TEA). [~~under Chapter 97, Subchapter DD, of this title (relating to Investigative Reports, Sanctions, and Record Reviews).~~] In making this determination:

(1) the commissioner may rely on one or more of the following:

(A) any finding or determination made by a court or other tribunal of competent jurisdiction, whether in Texas or in any other state, or by the United States, if the order or judgment is final under the rules governing such proceedings;

(B) any finding or determination made by the commissioner under §§100.1021 of this title (relating to Revocation and Modification of Governance of [~~Adverse Action on~~] an Open-Enrollment Charter), 100.1023 of this title (relating to Intervention Based on Charter Violations), 100.1025 of this title (relating to Intervention Based on Health, Safety, or Welfare of Students), 100.1027 of this title (relating to Accountability Ratings and Sanctions), or 100.1031 of this title (relating to Renewal of an Open-Enrollment Charter [~~Renewal~~]), if the finding or determination is final under the rules governing such proceedings; or

(C) any finding or determination made by a court in an action for declaratory judgment or other action pertaining to the commissioner's determination under this section, if the order or judgment is final under the rules governing such proceedings; and

(2) to the extent that a finding or determination under paragraph (1) of this subsection pertains to a charter holder or charter school served by a management company, but does not directly pertain to the management company, the focus shall be on [~~proceedings under Chapter 97, Subchapter DD, shall be limited to~~] the question of whether the relevant contract for management services creates a legal duty for the management company to provide services to the charter school in areas of performance that are the subject of the finding or determination against the charter holder or charter school.

(c) Review of proposed management contract. At least 30 calendar days prior to any performance or payments under the contract, a charter holder must file a copy of each contract for management services, and each amendment, renewal or extension thereto, with the TEA [~~Texas Education Agency (TEA)~~] division responsible for legal services for review under this section.

(1) A contract for management services is unenforceable, void, and of no force or effect until the expiration of 30 calendar days following the date on which it is filed with the TEA division responsible for legal services for review under this section. In addition, performance under the contract prior to the expiration of 30 calendar days following the date on which it is filed for review under this section is a material charter violation.

(2) Following the expiration of 30 calendar days after it is filed with the TEA division responsible for legal services for review under this section, if the commissioner takes no action [~~under Chapter 97, Subchapter DD,~~] within 30 days, then the parties may begin performance under the contract.

(3) The absence of action by the commissioner [~~under Chapter 97, Subchapter DD,~~] does not constitute a finding of compliance under this section, nor waive or in any other manner prevent the commissioner from acting at a later time under this section.

(d) Implementation schedule and transition.

(1) Notwithstanding this section:

(A) a copy of a contract for management services in effect during school year 2001-2002 shall be filed with the TEA division

responsible for legal services on or before the expiration of 30 calendar days following the effective date of this section; and

(B) if a contract for management services is timely filed with the TEA division responsible for legal services for review under subparagraph (A) of this paragraph [~~subsection (d)(1)(A) of this section~~], then the parties may continue or immediately begin performance under the contract unless or until the commissioner takes action [~~under Chapter 97, Subchapter DD~~].

(2) Notwithstanding this section, if an affected contract for management services was executed prior to September 1, 2001, then the management contract may continue in effect past September 1, 2001, if each of the following conditions is met:

(A) no state funds are used to pay any amounts due the management company under the management contract, and all such amounts are paid from a clearly identified source of non-state funds; and

(B) the terms of the management contract have not been renewed, modified, or otherwise altered since September 1, 2001.

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

Filed with the Office of the Secretary of State on July 2, 2014.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 475-1497

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DIVISION 6. CHARTER SCHOOL OPERATIONS

19 TAC §§100.1205, 100.1207, 100.1211, 100.1213, 100.1215, 100.1217

The amendments are proposed under the Texas Education Code (TEC), §12.101, which authorizes the commissioner to grant a charter on the application of an eligible entity for an open-enrollment charter school, including the adoption of rules to modify criteria for granting a charter to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.1011, which authorizes the commissioner to adopt rules to modify criteria for granting charters for high-performing entities to the extent necessary to address changes in performance rating categories or in the financial accountability system under TEC, Chapter 39; TEC, §12.102, which requires schools to operate and govern in accordance with its charter; TEC, §12.103, which authorizes that schools are subject to federal and state laws and rules adopted as applicable to charters; TEC, §12.104, which authorizes the commissioner to adopt rules relating to the applicability of public education law to charter schools; TEC, §12.1053, which authorizes the commissioner to approve procedures for contracting and purchasing or subject schools to rules of governmental entity; TEC, §12.117, which authorizes how the admissions process of an open-enrollment charter school shall occur; TEC, §12.120, which mandates under which circumstances an individual may or may not serve on a governing body of a charter holder or charter school or serve as an employee; TEC, §12.121, which requires the governing body of a charter holder to be responsible for and to retain control of the management, operation, and accountability of the school; TEC, §12.128, which authorizes the commissioner to adopt rules necessary to insure that all property purchased or leased with state funds considered to be public property for all purposes under state law held in trust for the benefit of students of the open-enrollment school is returned to the state when the open-enrollment charter school ceases to operate; and Local Government Code, §171.004, which authorizes how all local public officials with a substantial interest in a business entity or real property shall conduct their affairs.

The amendments implement the TEC, §§12.101, 12.1011, 12.102, 12.103, 12.104, 12.1053, 12.117, 12.120, 12.121, and 12.128 and Local Government Code, §171.004.

§100.1205. Procurement of Professional Services.

(a) Applicability of section. This section applies to a charter holder unless alternative procedures for selecting a provider of professional services or a group or association of providers, or awarding a contract for professional services, have been approved by the commissioner of education [~~State Board of Education~~] under §100.1006 [~~§100.103~~] of this title (relating to Optional Open-Enrollment Charter Provisions for Contracting and Purchasing) and the open-enrollment charter has been amended by the commissioner [~~of education~~] to adopt the approved procedures.

(b) Selecting professional services. A charter holder shall select a provider of professional services or a group or association of providers, and award a contract for professional services, in accordance with Government Code, Chapter 2254, Subchapter A. A requirement in that subchapter that applies to a school district or the board of trustees of a school district applies to a charter school, the governing body of a charter holder, or the governing body of a charter school.

(c) Definition. For purposes of this section, professional services are services:

(1) within the scope of the practice, as defined by state law, of accounting; architecture; landscape architecture; land surveying; medicine; optometry; professional engineering; real estate appraising; or professional nursing; or

(2) provided in connection with the professional employment or practice of a person who is licensed or registered as a certified public accountant; an architect; a landscape architect; a land surveyor; a physician, including a surgeon; an optometrist; a professional engineer; a state certified or state licensed real estate appraiser; or a registered nurse.

(d) Implementation schedule and transition. Government Code, Chapter 2254, Subchapter A, does not apply to a contract executed prior to September 1, 2001.

§100.1207. Student Admission.

(a) Application deadline. For admission to a charter school, a charter holder shall:

(1) require the applicant to complete and submit an application not later than a reasonable deadline the charter holder establishes; and

(2) on receipt of more acceptable applications for admission under this section than available positions in the school:

(A) except as permitted by subsection (b) of this section, fill the available positions by lottery; or

(B) subject to subsection (c) of this section, fill the available positions in the order in which all timely applications were received.

(b) Lottery exemption. The charter holder may exempt students from the lottery required by subsection (a) of this section to the extent this is consistent with the definition of a "public charter school" under the No Child Left Behind Act of 2001, P.L. 107-110, §5210 (NCLB), as interpreted by the United States Department of Education (USDE).

(c) Newspaper publication. To the extent this is consistent with the definition of a "public charter school" under the NCLB, as interpreted by the USDE, a charter holder may fill applications for admission under subsection (a)(2)(B) of this section only if it published a notice of the opportunity to apply for admission to the charter school. A notice published under this subsection must:

(1) state the application deadline; and

(2) be published in a newspaper of general circulation in the community in which the school is located not later than the seventh day before the application deadline. For purposes of this chapter, a newspaper of general circulation is defined as one that has more than a minimum number of subscribers among a particular geographic region, that has a diverse subscribership, and that publishes some news items of general interest to the community.

(d) Student admission and enrollment. Except as provided by this section, the governing body of the charter holder must adopt a student admission and enrollment policy that:

(1) prohibits discrimination on the basis of sex; national origin; ethnicity; religion; disability; academic, artistic, or athletic ability; or the district the child would otherwise attend under state law; and

(2) specifies any type of non-discriminatory enrollment criteria to be used at each charter school operated by the charter holder. Such non-discriminatory enrollment criteria may make the student ineligible for enrollment based on a history of a criminal offense, a juvenile court adjudication, or discipline problems under Texas Education Code (TEC), Chapter 37, Subchapter A, documented as provided by local policy.

(e) Student admission and enrollment at charter schools specializing in performing arts. In accordance with the TEC, §12.111 and §12.1171, a charter school specializing in performing arts, as defined in this subsection, may adopt a student admission and enrollment policy that complies with this subsection in lieu of compliance with subsections (a)-(d) of this section.

(1) A charter school specializing in performing arts as used in this subsection means a school whose open-enrollment charter includes an educational program that, in addition to the required academic curriculum, has an emphasis in one or more of the performing arts, which include music, theatre, and dance. A program with an emphasis in the performing arts may include the following components:

(A) a core academic curriculum that is integrated with performing arts instruction;

(B) a wider array of performing arts courses than are typically offered at public schools;

(C) frequent opportunities for students to demonstrate their artistic talents;

(D) cooperative programs with other organizations or individuals in the performing arts community; or

(E) other innovative methods for offering performing arts learning opportunities.

(2) To the extent this is consistent with the definition of a "public charter school" under the NCLB, as interpreted by the USDE, the governing body of a charter holder that operates a charter school specializing in performing arts may adopt an admission policy that requires a student to demonstrate an interest or ability in the performing arts or to audition for admission to the school.

(3) The governing body of a charter holder that operates a charter school specializing in performing arts must adopt a student admission and enrollment policy that prohibits discrimination on the basis of sex, national origin, ethnicity, religion, disability, academic or athletic ability, or the district the child would otherwise attend under state law.

(4) The governing body of a charter holder that operates a charter school specializing in performing arts must adopt a student admission and enrollment policy that specifies any type of non-discriminatory enrollment criteria to be used at the charter school. Such non-discriminatory enrollment criteria may make the student ineligible for enrollment based on a history of a criminal offense, a juvenile court adjudication, or discipline problems under TEC, Chapter 37, Subchapter A, documented as provided by local policy.

(f) Maximum enrollment; transfers. Total enrollment shall not exceed the maximum number of students approved in the open-enrollment charter. Students who reside outside the geographic boundaries stated in the open-enrollment charter shall not be admitted to the charter school until all eligible applicants that [~~who~~] reside within the boundaries and have submitted a timely application have been enrolled. Then, if the open-enrollment charter so provides for a secondary boundary, the charter holder may admit transfer students to the charter school in accordance with the terms of the open-enrollment charter.

§100.1211. Students.

(a) Student performance. Notwithstanding any provision in an open-enrollment charter, acceptable student performance under Texas Education Code, §12.111(3), shall at a minimum require student performance meeting the standards for an "academically acceptable" [~~"Acceptable"~~] rating as defined by §100.1001(26) of this title (relating to Definitions). [~~determined by the commissioner of education under the relevant Accountability Manual, or under the alternative education accountability rating procedures, if applicable.~~]

(b) Reporting child abuse or neglect. A charter holder shall adopt and disseminate to all charter school staff and volunteers a policy governing child abuse reports required by Texas Family Code, Chapter 261. The policy shall require that employees, volunteers, or agents of the charter holder and the charter school report child abuse or neglect directly to an appropriate entity listed in Texas Family Code, Chapter 261.

(c) Notice of expulsion or withdrawal. A charter holder shall notify the school district in which the student resides within three business days of any action expelling or withdrawing a student from the charter school.

(d) Data reporting. A charter holder shall report timely and accurate information required by the commissioner of education to the Texas Education Agency, except as expressly waived by the commissioner.

(e) Scholastic year. A charter holder shall adopt a school year for the charter school, with fixed beginning and ending dates.

(f) Minimum [~~teacher~~] qualifications. A person employed as a principal or a teacher by an open-enrollment charter school must hold a baccalaureate degree. To the extent that federal law applies, a person employed as a principal or teacher [~~an educator~~] by a charter school must meet requirements of federal law. If federal law defers to state standards, then the standard set out in Texas Education Code, §12.129, applies. [~~A high school equivalency certificate is not a high school diploma for purposes of Texas Education Code, §12.129; however, a person who has a high school equivalency certificate and also holds a college degree satisfies the requirement of Texas Education Code, §12.129.~~]

§100.1213. Failure to Operate.

(a) Continuous operation. Except as provided in this section, a charter holder shall operate the program as described in the open-enrollment charter for the full school term described in the open-enrollment charter during each year that the open-enrollment charter is in effect.

(b) Dormant open-enrollment charter. A charter holder may not delay opening or suspend operation for longer than 21 days without an amendment to its open-enrollment charter, approved [~~adopted~~] by the commissioner of education, stating that the charter school is dormant and setting forth the date on which operations shall resume and any applicable conditions for resuming operation that may be imposed by the commissioner.

(c) Written notice. A charter holder may not suspend operation of the charter school, or any campus or site of the charter school, for a period of more than three days without mailing written notice to the parent or guardian of each student and filing such notice with the Texas Education Agency (TEA) division responsible for charter schools at least 14 days in advance of the suspension, except that in an emergency the charter holder shall notify the TEA division responsible for charter schools by telephone or other means within 24 hours of suspending operations.

(d) Abandonment. Delay of opening or suspension [~~Suspension~~] of operations in violation of this section constitutes abandonment of the open-enrollment charter and constitutes a material violation of the charter contract.

§100.1215. Instructional Facilities.

(a) Right to occupy facilities. A charter holder shall have and maintain throughout the term of the open-enrollment charter legally enforceable lease agreements, titles, or other legal instruments conferring on it the right to occupy and use one or more facilities suitable for use as the classrooms and other instructional facilities described in the open-enrollment charter.

(1) The enforceable legal instruments must confer on the charter holder the right to occupy and use suitable instructional facilities for the entire school year adopted by the charter school.

(2) During any period of dormancy, an amendment granting the period of dormancy may waive this requirement.

(b) Occupancy certificate. A charter holder shall comply with all state and local laws and ordinances applicable to the occupation and use of the facilities it occupies, including any special standards applicable to the instruction of public school students in the facilities.

(1) A charter school shall not change the site of its instructional facilities or administrative offices from those listed in the open-enrollment charter without prior approval of the commissioner of education through an amendment to the open-enrollment charter.

(2) When approved for a new site under paragraph (1) of this subsection, the charter holder shall, prior to commencing any operations at that site, file with the Texas Education Agency division responsible for charter schools a certificate of occupancy or equivalent certificate appropriate for the proposed use of the facility at the new site.

(c) Compliance. Failure to comply with this section will adversely affect funding and may constitute a material violation of the charter contract.

§100.1217. Eligible Entity; Change in Status or Revocation.

(a) A charter holder shall take and refrain from all acts necessary to maintain its status as an "eligible entity" within the meaning of Texas Education Code, §12.101(a), and shall notify the commissioner of education immediately in writing of any change in such status.

(b) If a charter holder's exemption from taxation under 26 United States Code, §501(c)(3), is ever revoked by action of the Internal Revenue Service [~~for any period of time~~], for any reason, the charter shall be null and void and shall return to the commissioner [~~State Board of Education (SBOE)~~] without any further action on the part of the commissioner [~~or the SBOE~~].

(c) Failure to act in accordance with subsections (a) and (b) of this section shall not only affect eligibility for state funding as outlined in §100.1041(d)(1) of this title (relating to State Funding), it will also constitute a material violation of the charter contract.

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

Filed with the Office of the Secretary of State on July 2, 2014.

TRD-201403065
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 475-1497

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CHAPTER 157. HEARINGS AND APPEALS
SUBCHAPTER EE. INFORMAL REVIEW, FORMAL REVIEW, AND REVIEW BY STATE OFFICE OF ADMINISTRATIVE HEARINGS

The Texas Education Agency (TEA) proposes new §§157.1121-157.1123, 157.1131-157.1137, 157.1151, 157.1153, 157.1181-157.1189, and 157.1191; amendments to §§157.1155, 157.1157, 157.1165, 157.1167, 157.1169, and 157.1173; and the repeal of §§157.1151, 157.1153, 157.1159, 157.1161, and 157.1163, concerning hearings and appeals. The sections establish provisions relating to the review of certain accreditation sanctions by the State Office of Administrative Hearings (SOAH). The proposed actions would modify these rules to increase the efficiency of the processes and to reflect changes in law made by Senate Bill (SB) 2, 83rd Texas Legislature, Regular Session, 2013. The proposed rule actions would also transfer and consolidate certain review processes currently found under 19 TAC Chapter 97, Planning and Accountability, Subchapter DD, Investigative Reports, Sanctions, and Record Reviews, and modify these rules to increase the efficiency of the processes and to reflect changes in law made by SB 2, 83rd Texas Legislature, Regular Session, 2013.

The rules in 19 TAC Chapter 157, Subchapter EE, adopted effective January 6, 2008, and last amended effective December 22, 2010, implement requirements that an opportunity for challenging the record review of accreditation sanctions be available in specified circumstances and provided by the SOAH.

The 83rd Texas Legislature, Regular Session, 2013, passed SB 2, effective September 1, 2013. SB 2 made several significant changes to the regulation of charter schools. The proposed revisions to 19 TAC Chapter 157, Subchapter EE, would clarify the procedures to be used when taking action set forth in SB 2.

In addition, the proposed rule actions would modify the processes found under the current rules to increase efficiency and effectiveness. The proposed rule actions would also transfer and consolidate certain review processes currently found under 19 TAC Chapter 97, Planning and Accountability, Subchapter DD, Investigative Reports, Sanctions, and Record Reviews. The provisions transferred from 19 TAC Chapter 97, Subchapter DD, to 19 TAC Chapter 157, Subchapter EE, would be modified to increase the efficiency of the processes and to reflect changes in law made by SB 2.

The proposed revisions to 19 TAC Chapter 157, Subchapter EE, would organize the rules into separate divisions relating to informal review, formal review, SOAH substantial evidence de novo review, SOAH arbitrary and capricious or clearly erroneous review, and conflicts. In addition, the subchapter title would be revised to read, "Informal Review, Formal Review, and Review by State Office of Administrative Hearings."

The proposed rule actions would have no procedural or reporting implications.

The proposed rule actions would have no locally maintained paperwork requirements.

Michael Rigby, associate deputy counsel for legal services, has determined that for the first five-year period the rule actions are in effect there would be no additional costs to persons or entities required to comply with the proposed rule actions.

Mr. Rigby has determined that for each year of the first five years the rule actions are in effect the public benefit anticipated as a result of enforcing the rule actions will be to ensure that school districts and charter schools are provided notice and opportunity to obtain a review of certain reports, assignments, determinations, and decisions. The proposed rule actions would also ensure students are provided educational opportunities through public schools that meet minimum standards of academic performance. The proposed revisions would also ensure public funds are protected and used for their designated purpose by school districts and charter schools that meet minimum standards of financial performance. There is no anticipated economic cost to persons who are required to comply with the proposed rule actions.

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

The public comment period on the proposal begins July 11, 2014, and ends August 11, 2014. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-5337.

A public hearing on the proposed revisions has been scheduled for 9 a.m. to 3 p.m. on Friday, July 25, 2014, in Room 1-111, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Questions about the scheduled public hearing on the proposed revisions to 19 TAC Chapter 157, Hearings and Appeals, Subchapter EE, Review by State Office of Administrative Hearings: Certain Accreditation Sanctions, should be directed to the TEA Division of Legal Services at (512) 463-9720. Public comments on the proposed revisions to 19 TAC Chapter 100, Charters, Subchapter AA, Commissioner's Rules Concerning Open-Enrollment Charter Schools, will also be heard at the July 25, 2014, public hearing.

DIVISION 1. INFORMAL REVIEW

19 TAC §§157.1121 - 157.1123

The new sections are proposed under the Texas Education Code (TEC), §12.104, which makes applicable to charter schools certain rules relating to public education law; TEC, §12.1141, which authorizes the commissioner to adopt rules for the procedure and criteria for renewal, denial of renewal, or expiration of a charter of an open-enrollment charter school; TEC, §12.115, which authorizes the commissioner to adopt rules necessary for the administration of the basis for charter revocation and the reconstitution of the charter holder's governing body; TEC, §12.116, which authorizes the commissioner to adopt an informal procedure to be used for revoking the charter of an open-enrollment charter school or for reconstituting the governing body of the charter holder; TEC, §12.1162, which authorizes the commissioner to adopt rules to implement sanctions against an open-enrollment charter school based on violations of Texas law; TEC, §39.058, which requires the agency to provide an informal review of preliminary findings after completion of an on-site investigation; TEC, §39.102, which authorizes the commissioner to impose interventions and sanctions, or take other action, if a school district or open-enrollment charter school does not satisfy accreditation criteria, academic accountability standards, or financial accountability standards; TEC, §39.103, which authorizes the commissioner to impose interventions and sanctions, or take other action, for campuses; TEC, §39.104, which authorizes the commissioner to adopt rules to implement procedures to impose interventions and sanctions under the TEC, Chapter 39, relating to open-enrollment charter schools; TEC, §39.152, which authorizes the commissioner to adopt procedural rules for a State Office of Administrative Hearings review of a challenge to the commissioner's decision to close a district, campus or charter school, or to pursue alternative management of a district campus or charter school; and TEC, §42.258, which authorizes the agency to recover overallocated funds.

The new sections implement the TEC, §§12.104, 12.1141, 12.115, 12.116, 12.1162, 39.058, 39.102, 39.103, 39.104, 39.152, and 42.258.

§157.1121. Applicability.

This division applies to:

(1) an investigation under the Texas Education Code (TEC), Chapter 39, Subchapter C;

(2) an assignment of a monitor, conservator, or management team under the TEC, Chapter 39;

(3) an over-allocation to an open-enrollment charter school described under §100.1041(e) of this title (relating to State Funding);

(4) a determination to deny a petition for renewal and allow a charter of an open-enrollment charter school to expire pursuant to the TEC, §12.1141(d);

(5) a decision subject to review by the State Office of Administrative Hearings under Division 3 of this subchapter (relating to State Office of Administrative Hearings Substantial Evidence De Novo Review) or Division 4 of this subchapter (relating to State Office of Administrative Hearings Arbitrary and Capricious or Clearly Erroneous Review); and

(6) an investigation made subject to this division at the sole discretion of Texas Education Agency staff.

§157.1122. Notice.

(a) Findings resulting from an investigation subject to this division must be presented in a preliminary investigative report. The report must be provided to a school district, an open-enrollment charter school, or any person the Texas Education Agency (TEA) finds has violated a law, rule, or policy and must:

(1) describe the factual and legal basis for each violation;

(2) identify the action to be taken as a result of the accreditation investigation;

(3) describe the procedures for obtaining an informal review of the findings in the preliminary investigative report;

(4) identify the TEA representative to whom the request for an informal review may be addressed; and

(5) set a deadline for requesting and submitting items and information to be considered during an informal review.

(b) An assignment, determination, or decision subject to this division must be presented in writing to the school district or open-enrollment charter school the TEA finds has violated a law, rule, or policy and must:

(1) describe the factual and legal basis for each violation;

(2) identify the action to be taken as a result of the accreditation investigation;

(3) describe the procedures for obtaining an informal review of the findings in the preliminary investigative report;

(4) identify the TEA representative to whom the request for an informal review may be addressed; and

(5) set a deadline for requesting and submitting items and information to be considered during an informal review.

§157.1123. Informal Review.

(a) A school district, an open-enrollment charter school, or any person who is subject to an investigation, assignment, determination, or decision identified in §157.1121 of this title (relating to Applicability) may request, in writing, an informal review under this section.

(b) A written request for informal review must be addressed to the designated Texas Education Agency (TEA) representative. The written request must be received by the TEA representative on or before the deadline identified in the notice issued under §157.1122 of this title (relating to Notice).

(c) A school district, an open-enrollment charter school, or any person requesting the informal review may submit written information to the TEA representative by the deadline set forth in the notice issued under §157.1122 of this title. In addition, the TEA representative may require attendance at a meeting at the TEA headquarters in Austin, Texas, or by telephone, to discuss the findings and/or provide additional information for review.

(d) If no informal review is requested by the deadline, a final report, assignment, determination, or decision may be issued without informal review.

(e) An informal review is not governed by the Texas Education Code, §7.057, or by the Texas Government Code, Chapter 2001.

(f) Following the informal review by the TEA representative, a final report, assignment, determination, or decision will be issued. The final report, assignment, determination, or decision may include changes or additions to the preliminary report or action, and such modifications are not subject to another informal review procedure. A final report, assignment, determination or decision issued following an informal review is final and may not be appealed, except as provided by law or rule.

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

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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DIVISION 2. FORMAL REVIEW

19 TAC §§157.1131 - 157.1137

The new sections are proposed under the Texas Education Code (TEC), §39.102, which authorizes the commissioner to impose interventions and sanctions, or take other action, if a school district or open-enrollment charter school does not satisfy accreditation criteria, academic accountability standards, or financial accountability standards; and TEC, §39.104, which authorizes the commissioner to adopt rules to implement procedures to impose interventions and sanctions under the TEC, Chapter 39, relating to open-enrollment charter schools.

The new sections implement the TEC, §39.102 and §39.104.

§157.1131. Applicability.

This division applies only to a commissioner of education decision to:

(1) assign an accreditation status of Accredited-Warned or Accredited-Probation to a school district or an open-enrollment charter school; and

(2) assign a board of managers to a school district under the Texas Education Code, Chapter 39.

§157.1132. Notice.

The commissioner of education shall provide a school district or an open-enrollment charter school with written notice of an action subject to this division. The notice shall include an explanation of the factual and legal basis for the decision, documentation supporting the decision, and a description of the procedures to seek a review of the decision.

§157.1133. Request.

The superintendent of the school district or chief executive officer of the open-enrollment charter school may request, in writing, a formal review under this division.

(1) The request must be properly addressed to the Texas Education Agency (TEA) representative identified in the notice issued

under §157.1132 of this title (relating to Notice) and must be received by the TEA representative on or before the deadline specified in the notice.

(2) The request must include a summary of all arguments and documentation supporting the position of the school district or open-enrollment charter school.

(3) The summary of arguments must not exceed 20 single-spaced pages and must contain citations to specific pages in the supporting documentation. The summary must concisely state, in numbered paragraphs:

(A) if alleging the decision was made in violation of a statutory provision, the statutory provision violated and the specific facts supporting a conclusion that the statute was violated by the decision;

(B) if alleging the decision was made in excess of the TEA's statutory authority, the TEA's statutory authority and the specific facts supporting a conclusion that the decision was made in excess of this authority;

(C) if alleging the decision was made through unlawful procedure, the lawful procedure and the specific facts supporting a conclusion that the decision was made through unlawful procedure;

(D) if alleging the decision was affected by other error of law, the law violated and the specific facts supporting a conclusion that the decision violated that law;

(E) if alleging the decision was not reasonably supported by substantial evidence considering the reliable and probative evidence as a whole, each finding, inference, conclusion, or decision that was unsupported by substantial evidence;

(F) if alleging the decision was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, each finding, inference, conclusion, or decision affected and the specific facts supporting a conclusion that each was so affected;

(G) for each violation, error, or defect alleged under subparagraphs (A)-(F) of this paragraph, the substantial rights of the school district or open-enrollment charter school that were prejudiced by such violation, error, or defect;

(H) a concise statement of the relief sought by the requestor; and

(I) the name, mailing address, telephone number, and facsimile number of the requestor's representative.

(4) Supporting documentation must be "bates stamped" numbered consecutively on each page.

(5) If no formal review is requested by the deadline specified in the notice, a final order may be issued without formal review.

§157.1134. Procedures.

(a) The Texas Education Agency (TEA) representative may require the school district or open-enrollment charter school to meet at the TEA headquarters in Austin, Texas, or by telephone to discuss the findings and/or provide additional information for review.

(b) The county district or campus identification number of the affected entity must be included in all written correspondence on the formal review, as well as the date the notice was issued under §157.1132 of this title (relating to Notice).

(c) All deadlines under this division shall be calculated from the date of actual receipt. No mailbox rule applies.

§157.1135. Formal Review.

(a) The Texas Education Agency (TEA) shall review the notice issued under §157.1132 of this title (relating to Notice) and supporting documents; the request for review, summary of arguments, and supporting documents; and other relevant items and information.

(b) Formal review is an executive function conducted by the TEA staff. Formal review is not a contested case hearing, and rules prohibiting ex parte communications do not apply. The rules of civil procedure and evidence do not apply.

(c) The TEA shall consider the matters set forth in the notice and shall not consider items or information that are irrelevant, immaterial, or unduly repetitious.

(d) The TEA may take official notice of generally recognized information within the TEA's area of specialized knowledge.

(e) The special skills and knowledge of the TEA staff shall be used in evaluating all information presented during the formal review.

(f) The TEA may present, incorporate, or request additional briefing, findings, and documentation regarding relevant issues and may set limitations on and deadlines to respond to such requests at any time before the final order is issued.

§157.1136. Final Order and Appeal.

Following the formal review, a final order will be issued. The final order may include changes or additions to the proposed order and such modifications are not subject to another formal review procedure. A final order issued following a formal review is final and may not be appealed.

§157.1137. Other Law.

The Texas Government Code, Chapter 2001, and the Texas Education Code, §7.057, do not apply to a formal review under this division.

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

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Cristina De La Fuente-Valadez
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DIVISION 3. STATE OFFICE OF ADMINISTRATIVE HEARINGS SUBSTANTIAL EVIDENCE DE NOVO REVIEW

19 TAC §§157.1151, 157.1153, 157.1155, 157.1157, 157.1165, 157.1167, 157.1169, 157.1173

The new sections and amendments are proposed under the Texas Education Code (TEC), §12.104, which makes applicable to charter schools certain rules relating to public education law; TEC, §39.102, which authorizes the commissioner to impose interventions and sanctions, or take other action, if a school district or open-enrollment charter school does not satisfy accreditation criteria, academic accountability standards, or financial accountability standards; TEC, §39.103, which authorizes the commissioner to impose interventions and sanctions, or take other action, for campuses; TEC, §39.104, which authorizes the

commissioner to adopt rules to implement procedures to impose interventions and sanctions under the TEC, Chapter 39, relating to open-enrollment charter schools; TEC, §39.107, authorizes the commissioner to close, reconstitute, repurpose or order alternative management of a campus, and to adopt necessary rules; and TEC, §39.152, which authorizes the commissioner to adopt procedural rules for a State Office of Administrative Hearings review of a challenge to the Commissioner's decision to close a district, campus or charter school, or to pursue alternative management of a district campus or charter school.

The new sections and amendments implement the TEC, §§12.104, 39.102, 39.103, 39.104, 39.107, and 39.152.

§157.1151. Applicability.

This division applies only to review of a commissioner of education decision to:

(1) close a school district under the Texas Education Code (TEC), Chapter 39;

(2) close an open-enrollment charter school under the TEC, Chapter 39;

(3) close a school district campus under the TEC, Chapter 39;

(4) close an open-enrollment charter school campus under the TEC, Chapter 39;

(5) order alternative management of a school district campus under the TEC, Chapter 39; and

(6) order alternative management of an open-enrollment charter school under the TEC, Chapter 39.

§157.1153. Applicability of Other Law.

(a) A review under this division shall be governed by the procedures provided by this division and is not subject to the Texas Government Code, Chapter 2001, except as provided by the Texas Education Code, §39.152.

(b) A review conducted by the State Office of Administrative Hearings (SOAH) under this division is governed by Chapter 155 of Title 1 (relating to Rules of Procedure), except as modified herein.

(c) To the extent that a provision of this division conflicts with a rule or practice of the SOAH, this division shall prevail.

§157.1155. Petition for Review.

(a) A school district or an open-enrollment charter school subject to a decision defined by §157.1151 of this title (relating to Applicability) (petitioner) may file with the Texas Education Agency (TEA) [~~division responsible for hearings and appeals~~] a petition for review of the decision or determination under this division. The petition must be received by the TEA [~~subchapter~~] not later than the 15th calendar day after the notice is sent to the petitioner [~~date the decision complained of is first communicated to the school district or charter school~~].

(1) The petition for review shall include a copy of the challenged decision and any attachments or exhibits to the decision.

(2) The petition for review shall concisely state, in numbered paragraphs:

(A) if alleging the decision was made in violation of a statutory provision, the statutory provision violated and the specific facts supporting a conclusion that the statute was violated by the decision;

(B) if alleging the decision was made in excess of the TEA's statutory authority, the TEA's statutory authority and the specific facts supporting a conclusion that the decision was made in excess of this authority;

(C) if alleging the decision was made through unlawful procedure, the lawful procedure and the specific facts supporting a conclusion that the decision was made through unlawful procedure;

(D) if alleging the decision was affected by other error of law, the law violated and the specific facts supporting a conclusion that the decision violated that law;

(E) if alleging the decision was not reasonably supported by substantial evidence considering the reliable and probative evidence [~~in the record as a whole~~], each finding, inference, conclusion, or decision that was unsupported by substantial evidence [~~in the record~~];

(F) if alleging the decision was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, each finding, inference, conclusion, or decision affected and the specific facts supporting a conclusion that each was so affected; and

(G) for each violation, error, or defect alleged under subparagraphs (A)-(F) of this paragraph, the substantial rights of the school district or charter school that were prejudiced by such violation, error, or defect.

(3) A petition for review shall further contain:

(A) a concise statement of the relief sought by the petitioner; and

(B) the name, mailing address, telephone number, and facsimile number of the petitioner's representative.

(4) A request for relief in a review under this division [~~subchapter~~] may not be made orally or as part of the record at a prehearing conference or hearing.

(b) Failure to comply with the requirements of subsection (a) of this section shall result in dismissal of the petition for review and final action without further review.

(c) The TEA [~~division responsible for hearings and appeals~~] shall transmit the petition for review to the State Office of Administrative Hearings with a request that it be docketed.

(d) The TEA shall file a notice of hearing, present evidence and arguments, and otherwise fully participate as a party in the contested case proceeding.

[~~(d) If the TEA chooses to file an answer, the answer must be filed by the date the record is filed under §157.1163 of this title (relating to Proceedings Regarding Agency Record).~~]

§157.1157. Standard of Review.

(a) In response to a challenge to a commissioner of education decision under the Texas Education Code (TEC), §39.152, the administrative law judge shall conduct a de novo hearing to consider evidence and arguments regarding the decision. Based on the evidence and arguments presented, the administrative law judge shall review the commissioner's decision under [~~A challenge under this subchapter shall be governed by~~] the substantial evidence rule as provided by Government Code, §2001.174 and §2001.175, and judicial case precedents construing those provisions.

(b) The State Office of Administrative Hearings (SOAH) may not substitute its judgment for the judgment of the commissioner [~~of education~~] on questions committed to the commissioner's discretion. Questions committed to the commissioner's discretion include, but are not limited to, the following:

(1) any questions arising under a statute, rule, or other legal standard that requires or permits the commissioner to make a decision within general legal guidelines that do not mandate a specific result under the circumstances; and

(2) the execution of any act authorized or required to be taken by the commissioner [~~of education~~].

(c) The SOAH may not substitute its judgment for the judgment of the commissioner on the weight to be assigned the evidence before the commissioner.

(d) The SOAH may affirm the commissioner decision in whole or in part.

(e) The SOAH shall reverse and remand the decision for further proceedings if substantial rights of the school district or open-enrollment charter school have been prejudiced because the administrative findings, inferences, conclusions, or decisions of the commissioner are:

(1) in violation of a statutory provision;

(2) in excess of the commissioner's authority;

(3) made through unlawful procedure;

(4) affected by other error of law;

(5) not reasonably supported by substantial evidence considering the reliable and probative evidence [~~in the record~~] as a whole; or

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(f) An order of remand may not direct or control the commissioner's exercise of discretion on a matter committed to the commissioner's discretion by §157.1171(b) of this title (relating to Final Decision) and TEC, Chapter 39.

(g) On remand, the commissioner shall apply the facts and law as determined by the SOAH to reach a new decision in light of all the circumstances of the case.

(h) The commissioner shall continue on remand to exercise discretion over the accreditation decision as required by §157.1171(b) of this title and TEC, Chapter 39.

§157.1165. Enforcement of Decision Pending Review.

The pendency of a review under this division [~~subchapter~~] does not stay or otherwise affect the enforcement of the commissioner of education decision challenged under this division [~~subchapter~~].

§157.1167. Expedited Review.

(a) The State Office of Administrative Hearings (SOAH) shall expedite its review of a challenge under this division [~~subchapter~~] in order to meet the requirements of this section.

(b) The administrative law judge shall issue a pre-hearing order initially setting a date for closure of the record that is not later than the 30th calendar day after the date the petition for review is filed.

(c) The administrative law judge may grant a continuance of the date set in subsection (b) of this section only for good cause shown.

(d) The administrative law judge may not order a settlement conference, mediation, or other form of alternative dispute resolution.

(e) The administrative law judge shall issue a final order not later than the 30th calendar day after the date on which the record is finally closed.

(f) In all cases where the matter is docketed at the SOAH [~~commissioner of education initially assigns an accreditation status of Not Accredited-Revoked~~] on or before March 15, the administrative law judge shall issue a final order not later than [~~the~~] May 31 of the same year [~~immediately following the final order issued under §97.1037(f) of this title (relating to Record Review of Certain Decisions)~~].

§157.1169. Conduct of Review During a Ratings Appeal.

[~~(a) A decision is final within the meaning of §157.1151(a) of this title (relating to Applicability) even if based, in part, on a rating that may yet be appealed under Texas Education Code (TEC), §39.151. In the commissioner of education's sole discretion, the decision may be delayed or withdrawn pending the outcome of a ratings appeal under TEC, §39.151, that is timely and sufficient under applicable rules.~~]

(a) [~~(b)~~] The administrative law judge shall proceed with an expedited review under this division [~~subchapter~~] during any ratings appeal under the Texas Education Code (TEC) [~~TEC~~], §39.151, and shall presume for purposes of such review that the rating will not change by reason of the appeal, unless the commissioner of education:

(1) withdraws the rating [~~decision under subsection (a) of this section~~]; or

(2) requests that review of the final decision be abated pending the outcome of the ratings appeal.

(b) [~~(c)~~] If a rating is adjusted by the commissioner following an appeal under TEC, §39.151, the administrative law judge shall order that the adjusted rating be substituted for the original rating [~~treated as additional evidence to be taken before the Texas Education Agency (TEA) under §157.1163 of this title (relating to Proceedings Regarding Agency Record)~~]. The Texas Education Agency [~~TEA~~] may change its findings and/or decision by reason of the additional evidence and shall file the additional evidence and any changes, new findings, or decisions with the administrative law judge.

§157.1173. Application to Charter Schools.

(a) The charter of an open-enrollment charter school is automatically:

(1) revoked, void, and of no further force or effect on the effective date of a final decision by the commissioner of education ordering the charter school closed under this division [~~subchapter~~]; and

(2) modified to remove authorization for an individual campus on the effective date of a final decision by the commissioner ordering the campus closed under this division [~~subchapter~~].

(b) If sanctions are imposed on an open-enrollment charter school under the procedures provided by this division [~~subchapter~~], a charter school is not entitled to an additional hearing relating to the modification, placement on probation, revocation, or denial of renewal of a charter as provided by Texas Education Code, Chapter 12, Subchapter D.

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

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DIVISION 4. STATE OFFICE OF ADMINISTRATIVE HEARINGS ARBITRARY AND CAPRICIOUS OR CLEARLY ERRONEOUS REVIEW

19 TAC §§157.1181 - 157.1189

The new sections are proposed under the Texas Education Code (TEC), §12.1141, which authorizes the commissioner to adopt rules for the procedure and criteria for renewal, denial of renewal, or expiration of a charter of an open-enrollment charter school; TEC, §12.115, which authorizes the commissioner to adopt rules necessary for the administration of the basis for charter revocation and the reconstitution of the charter holder's governing body; TEC, §12.116, which authorizes the commissioner to adopt an informal procedure to be used for revoking the charter of an open-enrollment charter school or for reconstituting the governing body of the charter holder; and TEC, §12.1162, which authorizes the commissioner to adopt rules to implement sanctions against an open-enrollment charter school based on violations of Texas law.

The new sections implement the TEC, §§12.1141, 12.115, 12.116, and 12.1162.

§157.1181. Applicability.

This division applies only to review of a commissioner of education decision to:

(1) revoke the charter of an open-enrollment charter school under the Texas Education Code (TEC), Chapter 12;

(2) reconstitute the governing body of the charter holder of an open-enrollment charter school under the TEC, Chapter 12;

(3) deny a petition for a discretionary renewal of an open-enrollment charter school under the TEC, Chapter 12; and

(4) deny a petition for an expedited renewal of an open-enrollment charter school under the TEC, Chapter 12.

§157.1182. Applicability of Other Law.

(a) A review under this division shall be governed by the contested case procedures provided by this division and is not subject to the Texas Government Code, Chapter 2001, except as provided by the Texas Education Code, §39.152.

(b) A review conducted by the State Office of Administrative Hearings (SOAH) under this division is governed by Chapter 155 of Title 1 (relating to Rules of Procedure), except as modified herein.

(c) To the extent that a provision of this division conflicts with a rule or practice of the SOAH, this division shall prevail.

§157.1183. Petition for Review.

(a) An open-enrollment charter school subject to a decision defined by §157.1181 of this title (relating to Applicability) (petitioner) may file with the Texas Education Agency (TEA) a petition for review of the decision or determination under this division. The petition must be received by the TEA not later than the 15th calendar day after the notice is sent to the petitioner.

(1) The petition for review shall include a copy of the challenged decision and any attachments or exhibits to the decision.

(2) The petition for review shall concisely state, in numbered paragraphs:

(A) if alleging the decision was arbitrary or capricious, each finding, inference, conclusion, or decision affected and the specific facts supporting a conclusion that each was so affected;

(B) if alleging the decision was clearly erroneous, each finding, inference, conclusion, or decision affected and the specific facts supporting a conclusion that each was so affected; and

(C) for each violation, error, or defect alleged under subparagraphs (A) and (B) of this paragraph, the substantial rights of the school district or charter school that were prejudiced by such violation, error, or defect.

(3) A petition for review shall further contain:

(A) a concise statement of the relief sought by the petitioner; and

(B) the name, mailing address, telephone number, and facsimile number of the petitioner's representative.

(4) A request for relief in a review under this division may not be made orally or as part of the record at a prehearing conference or hearing.

(b) Failure to comply with the requirements of subsection (a) of this section shall result in dismissal of the petition for review and final action without further review.

(c) The TEA shall transmit the petition for review to the State Office of Administrative Hearings with a request that it be docketed.

(d) The TEA shall file a notice of hearing, present evidence and arguments, and otherwise fully participate as a party in the contested case proceeding.

§157.1184. Standard of Review.

(a) In response to a challenge to a commissioner of education decision under or subject to the Texas Education Code, §§12.1141, 12.115, or 12.116, the administrative law judge shall conduct a de novo hearing to consider evidence and arguments regarding the decision. Based on the evidence and arguments presented, the administrative law judge shall review the commissioner's decision. The administrative law judge shall uphold a decision by the commissioner unless the judge finds the decision is arbitrary and capricious or clearly erroneous.

(b) A decision of the administrative law judge is final and may not be appealed.

§157.1185. Enforcement of Decision Pending Review.

The pendency of a review under this division does not stay or otherwise affect the enforcement of the commissioner of education decision challenged under this division.

§157.1186. Expedited Review.

(a) The State Office of Administrative Hearings (SOAH) shall expedite its review of a challenge under this division in order to meet the requirements of this section.

(b) The administrative law judge shall issue a pre-hearing order initially setting a date for closure of the record that is not later than the 30th calendar day after the date the petition for review is filed.

(c) The administrative law judge may grant a continuance of the date set in subsection (b) of this section only for good cause shown.

(d) The administrative law judge may not order a settlement conference, mediation, or other form of alternative dispute resolution.

(e) The administrative law judge shall issue a final order not later than the 30th calendar day after the date on which the record is finally closed.

(f) In all cases where the matter is docketed at SOAH on or before March 15, the administrative law judge shall issue a final order not later than May 31 of the same year.

§157.1187. Conduct of Review During a Ratings Appeal.

(a) The administrative law judge shall proceed with an expedited review under this division during any ratings appeal under Texas Education Code (TEC), §39.151, and shall presume for purposes of such review that the rating will not change by reason of the appeal, unless the commissioner of education:

(1) withdraws the rating; or

(2) requests that review of the final decision be abated pending the outcome of the ratings appeal.

(b) If a rating is adjusted by the commissioner following an appeal under TEC, §39.151, the administrative law judge shall order that the adjusted rating be substituted for the original rating. The Texas Education Agency may change its findings and/or decision by reason of the additional evidence and shall file the additional evidence and any changes, new findings, or decisions with the administrative law judge.

§157.1188. Final Decision.

The decision of the administrative law judge is final and may not be appealed.

§157.1189. Application to Charter Schools.

(a) The charter of an open-enrollment charter school is automatically:

(1) revoked, void, and of no further force or effect on the effective date of a final decision by the commissioner of education ordering the charter school closed under this division; and

(2) modified to remove authorization for an individual campus on the effective date of a final decision by the commissioner ordering the campus closed under this division.

(b) If sanctions are imposed on an open-enrollment charter school under the procedures provided by this division, a charter school is not entitled to an additional hearing relating to the modification, placement on probation, revocation, or denial of renewal of a charter as provided by the Texas Education Code, Chapter 12, Subchapter D.

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DIVISION 5. CONFLICTS

19 TAC §157.1191

The new section is proposed under the Texas Education Code (TEC), §12.104, which makes applicable to charter schools certain rules relating to public education law; TEC, §12.1141, which authorizes the commissioner to adopt rules for the procedure and criteria for renewal, denial of renewal, or expiration of a charter of an open-enrollment charter school; TEC, §12.115, which authorizes the commissioner to adopt rules necessary for the administration of the basis for charter revocation and the reconstitution of the charter holder's governing body; TEC, §12.116, which authorizes the commissioner to adopt an informal procedure to be used for revoking the charter of an open-enrollment charter school or for reconstituting the governing body of the charter holder; TEC, §12.1162, which authorizes the commissioner to adopt rules to implement sanctions against an open-enrollment charter school based on violations of Texas law; TEC, §39.058, which requires the agency to provide an informal review of preliminary findings after completion of an on-site investigation; TEC, §39.102, which authorizes the commissioner to impose interventions and sanctions, or take other action, if a school district or open-enrollment charter school does not satisfy accreditation criteria, academic accountability standards, or financial accountability standards; TEC, §39.103, which authorizes the commissioner to impose interventions and sanctions, or take other action, for campuses; TEC, §39.104, which authorizes the commissioner to adopt rules to implement procedures to impose interventions and sanctions under the TEC, Chapter 39, relating to open-enrollment charter schools; TEC, §39.107, authorizes the commissioner to close, reconstitute, repurpose or order alternative management of a campus, and to adopt necessary rules; TEC, §39.152, which authorizes the commissioner to adopt procedural rules for a State Office of Administrative Hearings review of a challenge to the Commissioner's decision to close a district, campus or charter school, or to pursue alternative management of a district campus or charter school; and TEC, §42.258, which authorizes the agency to recover overallocated funds.

The new section implements the TEC, §§12.104, 12.1141, 12.115, 12.116, 12.1162, 39.058, 39.102, 39.103, 39.104, 39.107, 39.152, and 42.258.

§157.1191. Conflicts.

This subchapter prevails in the event of a conflict between this subchapter and any other rule adopted by the commissioner of education.

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

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

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SUBCHAPTER EE. REVIEW BY STATE OFFICE OF ADMINISTRATIVE HEARINGS: CERTAIN ACCREDITATION SANCTIONS

19 TAC §§157.1151, 157.1153, 157.1159, 157.1161, 157.1163

(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 Education Agency or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed under the Texas Education Code (TEC), §12.104, which makes applicable to charter schools

certain rules relating to public education law; TEC, §39.102, which authorizes the commissioner to impose interventions and sanctions, or take other action, if a school district or open-enrollment charter school does not satisfy accreditation criteria, academic accountability standards, or financial accountability standards; TEC, §39.103, which authorizes the commissioner to impose interventions and sanctions, or take other action, for campuses; TEC, §39.104, which authorizes the commissioner to adopt rules to implement procedures to impose interventions and sanctions under the TEC, Chapter 39, relating to open-enrollment charter schools; TEC, §39.107, authorizes the commissioner to close, reconstitute, repurpose or order alternative management of a campus, and to adopt necessary rules; and TEC, §39.152, which authorizes the commissioner to adopt procedural rules for a State Office of Administrative Hearings review of a challenge to the Commissioner's decision to close a district, campus or charter school, or to pursue alternative management of a district campus or charter school.

The repeals implement the TEC, §§12.104, 39.102, 39.103, 39.104, 39.107, and 39.152.

§157.1151. Applicability.

§157.1153. Applicability of Other Law.

§157.1159. Scope of Review; Additional Evidence.

§157.1161. Components of Agency Record.

§157.1163. Proceedings Regarding Agency Record.

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

Filed with the Office of the Secretary of State on July 2, 2014.

TRD-201403068
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 475-1497

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 51. EXECUTIVE

SUBCHAPTER O. ADVISORY COMMITTEES

31 TAC §§51.606 - 51.611, 51.631, 51.671, 51.672

The Texas Parks and Wildlife Department (the department) proposes amendments to §§51.606 - 51.611, 51.631, 51.671, and 51.672, concerning advisory committees. The proposed amendments would establish an expiration date of October 1, 2018 for the following advisory committees: White-tailed Deer Advisory Committee (WTDAC), Migratory Game Bird Advisory Committee (MGBAC), Upland Game Bird Advisory Committee (UGBAC), Private Lands Advisory Committee (PLAC), Bighorn Sheep Advisory Committee (BSAC), Wildlife Diversity Advisory Committee (WDAC), Freshwater Fisheries Advisory Committee (FFAC), State Parks Advisory Committee (SPAC), and Coastal Resources Advisory Committee (CRAC). Unless extended, these advisory committees will expire October 1, 2014. The department believes that these advisory committees continue to perform a valuable service for the department. Therefore, the department wishes to continue these advisory committees for another four years.

The proposed amendment also would remove the division designations currently in effect. The department's advisory committee rules are located in 31 TAC Chapter 51, Subchapter O. Subchapter O is currently divided into divisions based on the type of advisory committee. However, as a result of changes to the advisory committee structure over the years, the department has determined that these divisions are no longer necessary and that the sections can simply be listed in consecutive order.

Parks and Wildlife Code, §11.0162, authorizes the Chairman of the Texas Parks and Wildlife Commission (the Commission) to "appoint committees to advise the commission on issues under its jurisdiction." Government Code, Chapter 2110, requires that rules be adopted regarding each state agency advisory committee. Unless otherwise provided by specific statute, the rules must: (1) state the purpose of the committee; (2) describe the manner in which the committee will report to the agency; and (3) establish the date on which the committee will automatically be abolished, unless the advisory committee has a specific duration established by statute.

Ann Bright, General Counsel, has determined that for each year of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the amended rules.

Ms. Bright also has determined that for each year of the first five years the amendments as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the amended rules will be to ensure proper management and effective use of department advisory committees.

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

The department has determined that small or micro-businesses will not be affected by the proposed amendments. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not filed a local impact statement with the Texas Workforce Commission as required by the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the amendments 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 amendments.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules) does not apply to the proposed amendments.

Comments on the proposed amendments may be submitted to Ann Bright, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8558; or ann.bright@tpwd.texas.gov.

The amendments are proposed under the authority of Parks and Wildlife Code, §11.0162; and Government Code, §2110.005 and §2110.008.

The proposed amendments affect Parks and Wildlife Code, §11.0162.

§51.606. White-tailed Deer Advisory Committee (WTDAC).

(a) The WTDAC is created to advise the department on issues relevant to white-tailed deer and all programs involving white-tailed deer management in Texas, including problems, options, goals and planning regarding white-tailed deer.

(b) The WTDAC membership shall represent, at a minimum:

(1) the ecological range of white-tailed deer in Texas;

(2) landowners;

(3) conservation and management organizations; and

(4) hunters.

(c) The WTDAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The WTDAC shall expire on October 1, 2018 [~~2014~~].

§51.607. Migratory Game Bird Advisory Committee (MGBAC).

(a) The MGBAC is created to advise the department regarding the following:

(1) the management, research and habitat acquisition needs of migratory game birds;[~~,~~]

(2) development and implementation of migratory game bird regulations, research, and management; and[~~,~~]

(3) education and communications with various constituent groups and individuals interested in migratory game birds.

(b) The MGBAC consists of members selected from members of the general public with an interest in migratory game bird management.

(c) The MGBAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The MGBAC shall expire on October 1, 2018 [~~2014~~].

§51.608. Upland Game Bird Advisory Committee (UGBAC)

(a) The UGBAC is created to advise the department on matters pertaining to the following:

(1) regulation, management, research, and funding needs regarding upland game bird species that occur in Texas;

(2) management, research and habitat acquisition needs of upland game birds; and

(3) education and communications with various constituent groups and individuals interested in upland game bird species of Texas.

(b) The composition of the UGBAC shall represent:

(1) the ecological range of upland game bird species in Texas;

(2) landowners;

(3) conservation organizations;

(4) representatives of appropriate state and federal agencies; and

(5) upland game bird hunters.

(c) The UGBAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The UGBAC shall expire on October 1, 2018 [~~2014~~].

§51.609. Private Lands Advisory Committee (PLAC).

(a) The PLAC is created to advise the department on all matters pertaining to wildlife programs, management, and research on private lands in Texas, including the following:

(1) the development of an ecosystem approach to management of habitats;

(2) financing options for private lands programs;

(3) development and dissemination of information regarding management and research of wildlife habitat and ecosystems; and

(4) any other matters at the request of the chairman.

(b) The PLAC shall be composed of not fewer than 5 members representing private landowners from the various ecological regions of the state.

(c) The PLAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The PLAC shall expire on October 1, 2018 [~~2014~~].

§51.610. Bighorn Sheep Advisory Committee (BSAC).

(a) The BSAC is created to advise the department about problems, alternatives, solutions, and goals regarding the restoration of desert bighorn sheep to Texas.

(b) The composition of the BSAC will be comprised of the following:

(1) at least two members of the Texas Bighorn Society;

(2) at least two persons who own land in the historic range of desert bighorn sheep;

(3) university faculty and staff as necessary and appropriate; and

(4) representatives of government agencies as necessary and appropriate.

(c) The BSAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The BSAC shall expire on October 1, 2018 [~~2014~~].

§51.611. Wildlife Diversity Advisory Committee (WDAC).

(a) The WDAC shall advise the department on matters pertaining to management, research, and outreach activities related to nongame and rare species in Texas, including the following:

(1) development and implementation of the wildlife diversity related projects, grants, and policy;

(2) wildlife diversity conservation and regulations; and

(3) education and communications with various constituent groups and individuals interested in wildlife diversity in Texas.

(b) The composition of the WDAC shall represent landowner and conservation organizations in Texas.

(c) The WDAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The WDAC shall expire on October 1, 2018 [~~2014~~].

§51.631. Freshwater Fisheries Advisory Committee (FFAC).

(a) The FFAC is created for the purpose of advising the department regarding all matters pertaining to freshwater fisheries man-

agement and research in the state. The FFAC shall also advise the department regarding the following:

(1) the development and implementation of freshwater fisheries management programs throughout the state;

(2) the development of management and research priorities;

(3) the development of priorities for expenditures of angler financed programs; and

(4) the dissemination of information regarding freshwater fisheries management and research.

(b) The FFAC shall consist of individuals representing the state's freshwater angling public, the aquaculture industry, the freshwater fishing industry, fisheries educators, and conservation groups. Each member shall serve two-year or four-year terms as designated by the chairman, and terms may be staggered to ensure continuity.

(c) The FFAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The FFAC shall expire on October 1, 2018 [~~2014~~].

§51.671. State Parks Advisory Committee (SPAC).

(a) The SPAC is appointed to advise the chairman and the commission regarding state parks.

(b) The SPAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(c) The SPAC shall expire on October 1, 2018 [~~2014~~].

§51.672. Coastal Resources Advisory Committee (CRAC).

(a) The CRAC is created to advise the chairman and the commission on issues that cross fishery and geographic boundaries on the coast of Texas.

(b) The CRAC shall consist of members in the public who have an interest in coastal resources issues.

(c) The CRAC shall comply with the requirements of §51.601 of this title (relating to General Requirements).

(d) The CRAC shall expire on October 1, 2018 [~~2014~~].

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

Filed with the Office of the Secretary of State on July 2, 2014.

TRD-201403094
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 389-4775

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TITLE 34. PUBLIC FINANCE

PART 6. TEXAS MUNICIPAL RETIREMENT SYSTEM

CHAPTER 123. ACTUARIAL TABLES AND BENEFIT REQUIREMENTS

34 TAC §123.1

The Board of Trustees ("Board") of the Texas Municipal Retirement System ("TMRS" or "System") proposes amendments to 34 TAC §123.1, Actuarial Tables. The section contains provisions relating to the calculation of service retirement and disability retirement benefits and the mortality tables used for purposes of such calculations. The proposed amendments would modify subsection (c) of the section.

Effective December 26, 2013, §123.1 was amended, in part, to add subsection (c) to specify the new mortality tables to be used for purposes of calculating service retirement and disability retirement benefits effective beginning January 1, 2015. The current proposed amendments to subsection (c) are to clarify that, when the new mortality tables go into effect January 1, 2015, the actuarial calculations of benefits for retired members and disabled annuitants will be based on a 70%/30% male/female blend of the mortality tables named in §123.1(c), and the actuarial calculations of benefits for beneficiaries of retired members and for beneficiaries of disabled annuitants will be based on a 30%/70% male/female blend of the mortality tables.

Title 8, Subtitle G, Chapters 851 through 855 of the Texas Government Code (the "TMRS Act") applies to TMRS. Texas Government Code §855.102 of the TMRS Act allows the Board to adopt rules it finds necessary or desirable for the efficient administration of TMRS. Additionally, Texas Government Code §855.110 of the TMRS Act authorizes the Board to adopt rates and tables that the Board considers necessary for TMRS after considering the results of the actuary's investigation of the mortality and service experience of the System's members and annuitants. Further, Texas Government Code §855.607 of the TMRS Act provides that the TMRS Act is to be construed and administered in a manner that the TMRS retirement benefit plan will be considered a tax-qualified plan under IRC §401(a), and allows the Board to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a qualified plan.

In 2013, Gabriel, Roeder, Smith & Company, TMRS' consulting actuary, conducted a retiree mortality study for TMRS. The December 26, 2013 amendments of 34 TAC §123.1 implemented the authority granted to the Board in Texas Government Code §§855.102, 855.110, and 855.607 to adopt rules as described above. After the December 26, 2013 amendments, TMRS became aware that there were differences in how the System's actuaries and other TMRS staff members were interpreting §123.1(c) with regard to the use of the male/female blend of the base mortality table for calculating benefits of members and beneficiaries. Since the new mortality tables have not yet gone into effect and to prevent any disputes regarding future interpretations as to the calculation of benefits, TMRS is proposing that §123.1(c) be further amended to clarify the provision as described above.

Effective December 26, 2013, 34 TAC §129.12 was also amended to conform §129.12 to reflect the amendments being made to §123.1 at that time. Section 129.12 contains rules that specify, among other things, the mortality assumptions to be used for determining the payments to alternate payees pursuant to qualified domestic relations orders. No further amendments to §129.12 are being proposed at this time. Based on the language of §129.12 and the proposed amendments to §123.1, an alternate payee's retirement benefits will be calculated using the 30%/70% male/female blend beginning effective January 1, 2015.

At its meeting on May 15, 2014, the Board approved the publication of this §123.1 rule amendment proposal for comment.

David Gavia, Executive Director of TMRS, estimates that, for the first five-year period the amendments are in effect, there will be no fiscal implications for state government or local governments participating in TMRS, as a result of enforcing or administering the amendments as proposed.

Mr. Gavia also has determined that for each of the first five years that the proposed amendments would be in effect the public benefit anticipated as a result of enforcing and administering the amended rule would be a more clear description of the use of the male/female blend of the base mortality table for purposes of calculating benefits of TMRS members and beneficiaries. Individuals who might be affected by the amendments are TMRS members who retire in the future and their beneficiaries and alternate payees. Mr. Gavia has determined that there will be no effect on a local economy because of the proposed amendments to the rule, and therefore no local employment impact statement is required under §2001.022 of the Texas Government Code. Mr. Gavia has also determined that there will be no direct adverse economic effect on small businesses or micro-businesses within TMRS' regulatory authority as a result of the proposed amended rule; therefore neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Texas Government Code.

Comments may be submitted in writing to Christine M. Sweeney, General Counsel, TMRS, P.O. Box 149153, Austin, Texas 78714-9153, faxed to (512) 225-3786, or submitted electronically to Ms. Sweeney at *csweeney@tmrs.com.* Written comments must be received by TMRS no later than 30 days from the date of publication of the proposed amendment in the *Texas Register.*

Statutory Authority: The amendments are proposed under Texas Government Code §855.110, which authorizes the Board to adopt rates and tables that the Board considers necessary for TMRS after considering the results of the actuary's investigation of the mortality and service experience of the System's members and annuitants; under Texas Government Code §855.102, which grants the Board authority to adopt rules necessary or desirable for the efficient administration of the retirement system; and under Texas Government Code §855.607, which authorizes the Board to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a tax-qualified plan.

Cross-reference to Statutes: The proposed amendments implements (i) Texas Government Code §855.110, which provides that the Board shall adopt rules and tables that the Board considers necessary for the retirement system after considering the results of the actuary's investigation of the mortality and service experience of the system's members and annuitants, (ii) Texas Government Code §855.607, which provides that the TMRS Act is to be construed and administered in a manner that the TMRS benefit plan will be considered a tax-qualified plan under IRC §401(a), and allows the Board to adopt rules that modify the plan to the extent the Board considers necessary for TMRS to be considered a qualified plan, and (iii) Texas Government Code §855.102 which provides that the Board shall adopt rules and perform reasonable activities it finds necessary or desirable for the efficient administration of the retirement system.

§123.1. Actuarial Tables.

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

(c) Effective beginning January 1, 2015, service retirement benefits for retired members [~~and for beneficiaries of retired members~~], and disability retirement benefits on disability retirements for disabled annuitants [~~and for beneficiaries of disabled annuitants~~], shall be calculated on the basis of a 70%/30% male/female blend of the RP-2000 Blue Collar Table with 107.5% load, and with a fully generational Scale BB projection. Effective beginning January 1, 2015, service retirement benefits for beneficiaries of retired members, and disability retirement benefits on disability retirements for beneficiaries of disabled annuitants, shall be calculated on the basis of a 30%/70% male/female blend of the RP-2000 Blue Collar Table with 107.5% load, and with a fully generational Scale BB projection.

(d) (No change.)

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

Filed with the Office of the Secretary of State on July 2, 2014.

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David Gavia
Executive Director
Texas Municipal Retirement System
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 225-3754

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 10. GUARDIANSHIP SERVICES

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §10.101, concerning introduction; §10.103, concerning definitions; §10.201, concerning eligibility for services; §10.203, concerning assessment; §10.205, concerning annual review of ward's status; §10.301, concerning introduction; §10.305, concerning eligibility to be a guardianship contractor; §10.307, concerning acceptance of referrals from DADS; §10.311, concerning qualifications and training requirements for contractor employees; §10.313, concerning qualifications and training requirements for volunteers of contractors; §10.315, concerning criminal background checks; §10.317, concerning quality assurance plan; §10.319, concerning fiscal management; §10.321, concerning roles and responsibilities of case managers; §10.325, concerning compliance with probate court local rules in service area; §10.327, concerning responsibilities of the guardian of the person; §10.329, concerning responsibilities of guardian of the estate; §10.331, concerning service plans for wards; §10.401, concerning confidentiality of records; §10.403, concerning documentation requirements; §10.405, concerning maintenance of records; §10.501, concerning monitoring reviews; §10.503, concerning complaint investigations; and §10.507, concerning sanctions; and the repeal of §10.303, concerning compliance with DADS contracting rules, in Chapter 10, Guardianship Services.

BACKGROUND AND PURPOSE

The proposed amendments are, in part, in response to the codification of the Texas Probate Code into the Texas Estates Code. Throughout the chapter, references to the Texas Probate Code are changed to the applicable provisions of the Texas Estates Code. In addition, the proposed amendments reflect the creation of the Judicial Branch Certification Commission, which is scheduled to begin operation on September 1, 2014, by Senate Bill 966, 83rd Legislature, Regular Session, 2013. As a result, the proposed amendments change references from the "Guardianship Certification Board" to the "Judicial Branch Certification Commission." The proposed amendments also correct references to the DADS Guardianship Program using the program's correct title, DADS Guardianship Services Program.

The proposed amendments change the term "determination of mental retardation" to "determination of intellectual disability" to reflect person-first respectful language and amend the definition of that term to include an update of a prior examination. This change is consistent with Senate Bill 1235, 83rd Legislature, Regular Session, 2013.

The proposed amendments revise the eligibility criteria for guardianship services for individuals referred from Child Protective Services of the Department of Family and Protective Services. The proposed amendments also allow the DADS Guardianship Services Program to file an application to resign or close a guardianship if the guardianship does not effectively remedy the issues of a ward or meet the needs of a ward. The proposed amendments require a contractor to accept all referrals from DADS and apply for guardianship or successor guardianship if the contractor serves the county in which the incapacitated individual resides and the individual qualifies for the contractor's guardianship program. The proposed amendments provide that if a contractor that receives a referral has reached the maximum service authorization level provided in its contract, DADS offers the contractor an opportunity to apply for guardianship and provide services through other sources of funds. The proposed amendments also provide that if a contractor believes DADS has assigned an individual for guardianship or successor guardianship who does not fit the eligibility criteria, the contractor may request the DADS Guardianship Services Program management and the appropriate guardianship supervisor to reconsider the referral. The referral may be withdrawn at the discretion of the DADS Guardianship Services Program management and the guardianship supervisor.

The proposed amendments add qualifications and training requirements for case managers who are employed by a contractor. The proposed amendments also prohibit an employee or volunteer from working in any capacity with a DADS ward if, based on a criminal history, the employee's or volunteer's certification as a guardian is not approved by the Judicial Branch Certification Commission. The proposed amendments also require a contractor to conduct a background check through the National Sex Offenders Registry website on a person who requests an unsupervised visit with a DADS ward and maintain documentation of the search query in the ward's file. The proposed amendments allow a contractor to approve an unsupervised visit if it determines the visit is in the best interest of the ward. The proposed amendments require a contractor to document the reasons for the determination.

The proposed amendments require a contractor to make a quality assurance plan available to DADS contract monitoring staff if DADS requests a copy of the plan and before an annual contract monitoring review. The proposed amendments also require a contractor to provide updates to its quality assurance plan to the DADS contract manager if updates are made. The proposed amendments require the primary case manager, who is a certified guardian, to make the required monthly contact with a ward to the extent possible. If the primary case manager cannot make the monthly contact, another certified guardian must make the monthly contact.

The proposed amendments require a contractor to assign a certified guardian to supervise and review the work of a volunteer who is not a certified guardian. The proposed amendments prohibit a contractor's volunteer who is not a certified guardian from providing guardianship services, but allow the volunteer to perform the same services a DADS volunteer may perform under Texas Human Resources Code, §161.114(c). The proposed amendments also prohibit a contractor, the contractor's agent, employee or volunteer, or an immediate family member or friend of the contractor, agent, employee, or volunteer, from purchasing a ward's property through another person. The proposed amendments delete the provision that allows a bona fide purchase for value from a person not associated with the original buyer of property and without knowledge, request, or agreement of the buyer.

The proposed amendments require a contractor to provide read-only access to data to the DADS contract manager during contract reviews. The proposed amendments add trust fund statements, ward status updates, and a photograph of the ward to the list of items that must be included in a contractor's records. The proposed amendments delete the requirement to maintain records in accordance with Texas Administrative Code, Title 40, Chapter 69 because that chapter is proposed for repeal. The proposed amendments specify how long records must be maintained by a contractor and require a contractor to take certain actions with respect to records when a contract is terminated. The proposed amendments require a contractor to allow federal and state governments, including DADS, to perform reviews and audits and have access to records.

The proposed amendments make minor editorial changes throughout the chapter to improve clarity and consistency.

The proposed repeal of §10.303 is necessary because it requires compliance with Title 40, Chapter 69, which is being proposed for repeal. As a result, the section is no longer necessary.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §10.101 changes statutory references to Texas Estates Code and corrects the program title of DADS Guardianship Services Program.

The proposed amendment to §10.103 amends the defined term "agency or entity" to "agency," which is defined as a state or local government or private not-for-profit organization that operates a guardianship program as defined by Texas Estates Code, §1002.016 because two terms are not needed for a single concept. The proposed amendment also amends the definition of "contractor" to eliminate the unnecessary reference to an "entity." The proposed amendment also changes the term "determination of mental retardation" to "determination of intellectual disability" to reflect respectful person-first language. The proposed amendment changes the reference to the "Guardianship Certification Board" to the "Judicial Branch Certification Commission," and references the enabling legislation for the new commission. The proposed amendment also changes statutory references to Texas Estates Code.

The proposed amendment to §10.201 adds that an individual who is at least 18 years of age; was in conservatorship of Child Protective Services (CPS) of the Department of Family and Protective Services on the day before the individual turned 18 years of age; and is in extended foster home placement may be referred for guardianship by CPS. This change reflects current practice. The proposed amendment changes statutory references to Texas Estates Code and corrects the program title of DADS Guardianship Services Program. The proposed amendment also makes minor editorial corrections.

The proposed amendment to §10.203 deletes subsection (c) because it does not reflect the current process used by DADS for referral to a contractor. The proposed amendment also deletes subsection (e), relating to the requirements for a contractor to accept a referral, because it restates the requirements in §10.307(b). The proposed amendment also changes "mental retardation" to "intellectual disability," changes statutory references to Texas Estates Code, and corrects the program title of DADS Guardianship Services Program.

The proposed amendment to §10.205 adds that, as part of the annual evaluation of a ward, the DADS Guardianship Services Program must determine if guardianship continues to effectively remedy the issues of the ward and meet the needs of the ward. The proposed amendment provides that if guardianship does not effectively remedy the issues of the ward or meet the needs of the ward, DADS Guardianship Services Program files an application to resign or close the guardianship. The proposed amendment also corrects the program title of DADS Guardianship Services Program.

The proposed amendment to §10.301 prohibits a contractor from billing a ward for any services. The proposed amendment also changes statutory references to Texas Estates Code and corrects the program title of DADS Guardianship Services Program.

The proposed repeal of §10.303, which requires compliance with 40 TAC Chapter 69, is necessary because Chapter 69 is proposed for repeal.

The proposed amendment to §10.305 changes statutory references to Texas Estates Code, corrects the program title of DADS Guardianship Services Program, and references the Judicial Branch Certification Commission. A reference to "the program" is also changed to "DADS" to clarify that a contractor provides guardianship services on behalf of DADS.

The proposed amendment to §10.307 requires a contractor to accept all referrals from DADS and apply for guardianship or successor guardianship if the contractor serves the county in which the incapacitated individual resides and the individual qualifies for the contractor's guardianship program. The proposed amendment also provides that if a contractor that receives a referral has reached the maximum service authorization level provided in its contract, DADS offers the contractor an opportunity to apply for guardianship and provide services through other sources of funds. The proposed amendment provides that if a contractor believes DADS has assigned an individual for guardianship or successor guardianship who does not fit the eligibility criteria, the contractor may request the DADS Guardianship Services Program management and the appropriate guardianship supervisor to reconsider the referral. The referral may be withdrawn at the discretion of the DADS Guardianship Services Program management and the guardianship supervisor. The proposed amendment also corrects the program title of DADS Guardianship Services Program.

The proposed amendment to §10.311 adds qualifications and training requirements for a contractor's employees who are case managers. A case manager must be at least 21 years of age; be a high school graduate or equivalent; and have relevant work experience, education, or training. The proposed amendment replaces "mental retardation" with "intellectual disability," changes statutory references to the Texas Estates Code, and references the Judicial Branch Certification Commission.

The proposed amendment to §10.313 provides that a contractor must assign a certified guardian to supervise and review the work of a volunteer who is not a certified guardian. The proposed amendment also prohibits a volunteer who is not a certified guardian from providing guardianship services, but allows a volunteer to perform the same services a DADS volunteer may perform under Texas Human Resources Code, §161.114(c). Those services are life enrichment activities, companionship, transportation services, and other services that do not require the volunteer to be certified under Texas Government Code, §111.041. The proposed amendment reformats and clarifies the provisions relating to volunteers generally and adds a requirement that a contractor document training provided to volunteers.

The proposed amendment to §10.315 clarifies that a contractor's employee or volunteer who has contact with a DADS ward is subject to the section. The proposed amendment also prohibits an employee or volunteer from working in any capacity with a DADS ward if the employee's or volunteer's certification as a guardian is not approved by the Judicial Branch Certification Commission based on a criminal history. The proposed amendment requires a contractor to conduct a background check through the National Sex Offenders Registry website on a person requesting an unsupervised visit with a DADS ward and maintain documentation of the search query in the ward's file. The amendment allows a contractor to approve an unsupervised visit if the contractor determines the visit is in the best interest of the ward. If the contractor approves an unsupervised visit with a person listed on the registry, the contractor must document the reasons for the approval. The proposed amendment also changes statutory references to Texas Estates Code and corrects the program title of the DADS Guardianship Services Program.

The proposed amendment to §10.317 requires a contractor to make a quality assurance plan available to DADS contract monitoring staff at the request of DADS staff and before an annual contract monitoring review. The proposed amendment also requires a contractor to provide updates to its quality assurance plan to the DADS contract manager if updates are made. The proposed amendment changes a statutory reference to Texas Estates Code and makes a minor editorial correction.

The proposed amendment to §10.319 changes a statutory reference to Texas Estates Code.

The proposed amendment to §10.321 deletes subsection (a) because it restates requirements in §10.311. The proposed amendment also makes minor editorial corrections.

The proposed amendment to §10.325 changes statutory references to Texas Estates Code.

The proposed amendment to §10.327 provides that the primary case manager, who is a certified guardian, makes the required monthly contact with a ward to the extent possible. The proposed amendment requires another certified guardian to make the monthly contact if the primary certified guardian cannot do so. The proposed amendment changes a statutory reference to Texas Estates Code and makes a minor editorial correction.

The proposed amendment to §10.329 deletes subsection (b) related to appointment as temporary guardian of the estate because DADS no longer makes referrals to contractors for temporary guardianships. The proposed amendment also prohibits a contractor, the contractor's agent, employee, volunteer, or an immediate family member or friend of the contractor, agent, employee or volunteer, from purchasing a ward's property through another person, regardless of whether the purchase is made to circumvent the requirements of the subsection. The proposed amendment deletes the provision that allows a bona fide purchase for value from a person not associated with the original buyer of property and without knowledge, request, or agreement of the buyer. The proposed amendment changes a statutory reference to Texas Estates Code.

The proposed amendment to §10.331 changes "mental retardation" to "intellectual disability" and makes minor editorial corrections.

The proposed amendment to §10.401 references the federally mandated protection and advocacy system by its new name, Disability Rights Texas, rather than Advocacy, Inc. The proposed amendment adds a copy of the most recent photograph of the ward on file to the list of items DADS provides to a contractor upon referral. The proposed amendment changes "mental retardation" to "intellectual disability" and corrects the program title of the DADS Guardianship Services Program.

The proposed amendment to §10.403 requires a contractor to provide to the DADS contract manager read-only access to data during contract reviews. The amendment adds trust fund statements, ward status updates, and a photograph of the ward to the list of items that must be included in a contractor's records. The amendment requires the photograph to be updated within 90 days after the contractor's initial qualification as guardian and every two years thereafter.

The proposed amendment to §10.405 deletes a reference to Texas Administrative Code, Title 40, Chapter 69, for maintenance of records because Chapter 69 is proposed for repeal. The proposed amendment specifies how long records must be maintained by a contractor and requires a contractor to take certain actions with respect to records when a contract is terminated.

The proposed amendment to §10.501 requires a contractor to allow federal and state governments, including DADS, to perform reviews and audits and have access to records. The proposed amendment updates terminology related to contract monitoring by changing "deficiencies" to "findings," and "standards" to "guardianship principles."

The proposed amendment to §10.503 provides that DADS conducts a complaint investigation of a contractor's services if DADS receives a complaint related to staff. The proposed amendment also changes the term "deficiencies" to "findings" in the context of a complaint investigation.

The proposed amendment to §10.507 adds a description of the process DADS follows if DADS terminates a contract, including the process for the contractor to reimburse DADS for any overpayment and to request an appeal. The proposed amendment changes "corrective action plan" to "plan of correction," and "deficiency" to "finding," to reflect current terminology used in the DADS Guardianship Services Program.

FISCAL NOTE

James Jenkins, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and repeal are in effect, enforcing or administering the amendments and repeal does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and repeal will not have an adverse economic effect on small businesses or micro-businesses, because compliance with new requirements imposed by the rules do not require a program provider to incur a cost.

PUBLIC BENEFIT AND COSTS

Elisa Garza, DADS Assistant Commissioner for Access and Intake, has determined that, for each year of the first five years the amendments and repeal are in effect, the public benefit expected as a result of enforcing the amendments and repeal is a rule that cites correct statutory provisions, uses current terminology, and sets forth current practices of the DADS Guardianship Services Program.

Ms. Garza anticipates that there will not be an economic cost to persons who are required to comply with the amendments and repeal. The amendments and repeal will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Barb Scobey at (512) 438-4890 in DADS Access & Intake Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-12R13, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 12R31" in the subject line.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §10.101, §10.103

STATUTORY AUTHORITY

The amendments are proposed under Texas Human Resources Code, §§161.101 - 161.114, which authorize DADS to provide guardianship services; Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make

recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendments implement Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021 and §§161.101 - 161.114.

§10.101. Introduction.

(a) The purpose of the DADS Guardianship Services Program is to accept referrals for individuals from DFPS as defined in Texas Human Resources Code, §48.209; assess the individuals for capacity; apply for guardianship if determined appropriate; and serve as guardians of the individuals for as long as guardianship services are required. An individual referred by DFPS must have been found to be in a state of abuse, neglect, or exploitation.

(b) DFPS makes a referral directly to the DADS Guardianship Services Program, or, if requested by the court with probate jurisdiction for the county in which an individual being referred resides, DFPS may also make a referral to the court in addition to the referral to the DADS Guardianship Services Program.

(c) The DADS Guardianship Services Program files an application to be appointed as guardian or otherwise agrees to be appointed as guardian if the DADS Guardianship Services Program determines that:

(1) DFPS found the individual to be in a state of abuse, neglect, or exploitation or the individual is a minor in the conservatorship of DFPS;

(2) there is no less restrictive alternative to guardianship;

(3) there is no other willing, able, and suitable person or program to serve as guardian;

(4) the individual is eligible for the DADS Guardianship Services Program; and

(5) the court finds the individual is an incapacitated person as defined in Texas Estates [~~Probate~~] Code, §1002.017 [~~§601(14)(B)~~] and makes all other findings required by Texas Estates [~~Probate~~] Code, §1101.101 [~~§684~~].

(d) As provided by Texas Human Resources Code, §161.101(d), a court may not appoint DADS as permanent guardian unless DADS files an application with a court with probate jurisdiction or otherwise agrees to be appointed as permanent guardian.

(e) The DADS Guardianship Services Program complies with the requirements of Texas Estates [~~Probate~~] Code, Title 3 [~~Chapter XIII~~] in performing its responsibilities as guardian of its wards.

§10.103. Definitions.

(a) A term used in this chapter that is defined in Texas Estates [~~Probate~~] Code, Chapter 1002 [~~§601~~] has the same meaning as defined in that section of the code.

(b) In addition, the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Agency [~~or entity~~]--A state or local government or private not-for-profit organization that operates a guardianship program as defined by Texas Estates [~~Probate~~] Code, §1002.016 [~~§601~~].

(2) Assessment--The process of establishing whether DADS guardianship is appropriate for an individual referred by DFPS. The assessment includes a determination of whether the individual appears to meet the definition of an incapacitated person as defined by Texas Estates [~~Probate~~] Code, §1002.017(2) [~~§601(14)(B)~~], whether there is a less restrictive alternative to guardianship, and whether the individual meets the eligibility criteria for the DADS Guardianship Services Program.

(3) Certificate of Medical Examination (CME)--A statement by a qualified physician attesting to whether, in the physician's medical opinion, an individual has capacity that complies with Texas Estates [~~Probate~~] Code, §1101.103 [~~§687(a)~~].

(4) Contractor--An agency [~~that operates a guardianship program as defined by Texas Probate Code, §601~~] with which DADS has a contract to provide guardianship services for a fee.

(5) DADS--The Department of Aging and Disability Services.

(6) DADS Guardianship Services Program--The program operated by DADS that provides guardianship and related services to persons with diminished capacity.

(7) Determination of intellectual disability (DID) [~~mental retardation (DMR)~~]--An examination, or an update or endorsement of a prior examination, that complies with Chapter 5, Subchapter D of this title (relating to Diagnostic Eligibility for Services and Supports--Intellectual Disability [~~Mental Retardation~~] Priority Population and Related Conditions) and with Texas Estates [~~Probate~~] Code, §1101.104 [~~§687(c)~~].

(8) DFPS--The Department of Family and Protective Services.

(9) Diminished capacity--Some loss of an individual's ability due to a physical or mental condition to provide food, clothing, or shelter for the individual, to care for the individual's own physical health, or to manage the individual's own financial affairs. An individual referred to the DADS Guardianship Services Program has diminished capacity, but may or may not meet the legal definition of an incapacitated person.

(10) Judicial Branch Certification Commission [~~Guardianship Certification Board~~]--The commission [~~board~~] established under Texas Government Code, Chapter 152 [~~111~~].

(11) Person-directed planning--A process that empowers an individual and the legally authorized representative (LAR) on the individual's behalf to direct the development of a service plan for a ward that meets the individual's personal outcomes. The service plan must identify existing supports and services necessary to achieve the individual's outcomes, identify natural supports available to the individual and negotiate needed service system supports, occur with the support of a group of people chosen by the individual and the guardian as LAR on the individual's behalf, and accommodate the individual's style of interaction and preferences regarding time and setting.

(12) Quality assurance plan--A written plan that describes a contractor's system of self-monitoring to ensure consistency and quality of care provided to a ward and ensure compliance with the Texas Estates [~~Probate~~] Code, other requirements imposed by the courts, and other program policies, rules, and standards.

(13) Reporter--A person who makes a referral to DFPS staff about a situation of alleged abuse, neglect, or exploitation of an elderly person or adult with a disability.

(14) Service plan--A plan of care for a ward that ensures appropriate habilitation and rehabilitation services, including therapy, counseling, education, and training to the extent permitted by the ward's estate.

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

Filed with the Office of the Secretary of State on July 2, 2014.

TRD-201403084
Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 438-4162

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SUBCHAPTER B. ELIGIBILITY AND ASSESSMENT OF INDIVIDUALS FOR GUARDIANSHIP SERVICES

40 TAC §§10.201, 10.203, 10.205

STATUTORY AUTHORITY

The amendments are proposed under Texas Human Resources Code, §§161.101 - 161.114, which authorize DADS to provide guardianship services; Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendments implement Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021 and §§161.101 - 161.114.

§10.201. Eligibility for Services.

(a) To determine eligibility for services, the DADS Guardianship Services Program conducts an assessment of an individual referred [~~to it~~] by DFPS under Texas Human Resources Code, §48.209. The assessment may include identifying and arranging for services that do not require guardianship. An individual must meet the requirements of subsections (b) - (f) of this section, or DADS must agree to serve as guardian under subsection (g) of this section, for the individual to be eligible for the DADS Guardianship Services Program.

(b) DADS [~~DADS'~~] authority under Texas Human Resources Code, §161.071 to be appointed by the court to serve as permanent guardian of the person or permanent guardian of the estate is limited to an individual referred to the DADS Guardianship Services Program by DFPS under Texas Human Resources Code, §48.209 or an individual for whom DADS otherwise agrees to serve as permanent guardian under Texas Human Resources Code, §161.101(d).

(c) For the Child Protective Services Division (CPS) of DFPS to refer an [~~An~~] individual [~~referred~~] for guardianship: [~~required after the individual is no longer a minor by the Child Protective Services Division (CPS) of DFPS must be a minor in a conservatorship of DFPS and be at least 16 years of age, and CPS must have reason to believe that the individual will be substantially unable to provide for the individual's own food, clothing, or shelter, to care for the individual's own physical health, or to manage the individual's own financial affairs when the individual becomes an adult. The guardianship of an individual meeting the criteria in this subsection may not take effect before the individual's 18th birthday.~~]

(1) the individual must:

(A) be at least 16 years of age and be in a conservatorship of DFPS; or

(B) be at least 18 years of age, have been in CPS conservatorship on the day before turning 18 years of age, and in extended foster home placement after turning 18 years of age; and

(2) CPS must have reason to believe that the individual will be substantially unable to provide for the individual's own food, clothing, or shelter, or to care for the individual's own health needs, or to manage the individual's own financial affairs when the individual becomes an adult.

(d) The guardianship of an individual meeting the criteria in subsection (c) of this section, may not take effect before the individual's 18th birthday.

(e) [~~(d)~~] An individual referred by the Adult Protective Services Division (APS) of DFPS must be age 65 years of age or older, or [~~age~~] 18 to 65 years of age and disabled. APS must also have reason to believe the individual is an incapacitated person, as defined by Texas Estates [~~Probate~~] Code, §1002.017(2) [~~§601(14)(B)~~] and must have been determined to be in a state of abuse, neglect, or exploitation.

(f) [~~(e)~~] In order for DADS to serve as guardian, an individual must have private assets available to meet the expenses of day-to-day living, or be eligible for government benefits (for example, Medicaid, Social Security, or veteran [~~veterans~~] benefits) that are sufficient to provide [~~such~~] support. The DADS Guardianship Services Program is not liable for, and cannot provide, financial support for services provided to wards, including the cost of long-term care or burial expenses.

(g) [~~(f)~~] DADS must determine that becoming guardian of an individual referred by APS will provide an effective remedy for the abuse, neglect, or exploitation validated by APS. DADS must determine that becoming a guardian of an individual referred by CPS will enable DADS to effectively serve the needs of that ward.

(h) [~~(g)~~] In its sole discretion, DADS may otherwise agree to serve as permanent guardian of an individual under Texas Human Resources Code, §161.101(d). In deciding whether to serve as permanent guardian, DADS considers the following additional factors:

(1) the risk of serious and imminent harm to the individual or the individual's estate if a guardian is not appointed;

(2) the likelihood that guardianship will provide an effective remedy for the risk of serious harm to the individual and that DADS [~~DADS'~~] appointment will effectively serve the needs of the individual;

(3) the availability to the individual in the local community of less restrictive alternatives and other persons or agencies to serve as guardian;

(4) the history of investigations conducted by APS of the individual as an alleged victim of abuse, neglect, or exploitation and the likelihood of future investigations by APS; and

(5) the availability of private assets or government benefits to pay for the needs of the ward.

§10.203. Assessment.

(a) An assessment begins with the referral of an individual from either the Child Protective Services Division or the Adult Protective Services Division of DFPS.

(b) The DADS Guardianship Services Program considers the conditions and circumstances of the elderly or disabled individual, as documented by DFPS and through DADS [~~DADS'~~] own review process, to determine whether a less restrictive alternative to guardianship is appropriate and available. If an appropriate, less restrictive alternative is identified and available, the DADS Guardianship Services Program either arranges for this alternative or provides a recommendation to DFPS to pursue the alternative.

(c) If a less restrictive alternative is not appropriate and available, the DADS Guardianship Services Program conducts an assessment to determine if the individual appears to lack capacity. If the DADS Guardianship Services Program's assessment concludes [~~is~~] that the individual appears to lack capacity, the DADS Guardianship Services Program arranges for a qualified physician to examine the individual and provide a Certificate of Medical Examination (CME). If the basis of the alleged incapacity is intellectual disability [~~mental retardation~~], the DADS Guardianship Services Program arranges for a determination of intellectual disability (DID) [~~mental retardation (DMR)~~].

(d) If the CME states that the individual is incapacitated and guardianship is appropriate, or the DID [~~DMR~~] states that the individual meets the criteria for a diagnosis of intellectual disability as [~~is a person with mental retardation that is~~] the basis of incapacity and guardianship is appropriate, the DADS Guardianship Services Program attempts to identify a person or a guardianship program who is willing, able, and suitable to serve as guardian and requests that the person or guardianship program file an application for guardianship. If no such person or program can be identified, the DADS Guardianship Services Program files an application with the court that has probate jurisdiction in the county in which the individual resides. Only a court with probate jurisdiction may make the legal finding that an individual is an incapacitated person.

[~~(e) If there is a contractor that serves the county in which the incapacitated individual resides, if the contractor is under the number of wards it is authorized to serve through the contract, and if the individual qualifies for the contractor's guardianship program, the DADS Guardianship Program directs the contractor to file an application for guardianship. If there are no openings in the contract, the contractor is offered an opportunity to apply for guardianship and provide services through other sources of funds.~~]

(e) [~~(f)~~] At the completion of the assessment, the DADS Guardianship Services Program notifies DFPS, or the court if the assessment was done in response to the court's request, of the outcome of the assessment.

(f) [~~(g)~~] If DFPS makes a referral to a probate court or the court appoints DADS as guardian through a court-initiated guardianship proceeding under Texas Estates [~~Probate~~] Code, §1102.001 [~~§683~~], or both, the DADS Guardianship Services Program conducts an abbreviated assessment to determine if the individual is eligible for the DADS Guardianship Services Program. If the individual is not eligible for the DADS Guardianship Services Program, the DADS Guardianship Services Program files appropriate pleadings to rescind or reverse the appointment that state the reasons that DADS may not be appointed guardian.

§10.205. Annual Review of a Ward's Status.

(a) At least annually after the DADS Guardianship Services Program's appointment as guardian for a ward, the DADS Guardianship Services Program evaluates the [~~ward's~~] status of the ward to determine if:

(1) the ward is still an incapacitated person and continues to need a guardian;

(2) an alternate person or guardianship program is willing, able, and suitable to serve as successor guardian; [~~or~~]

(3) a less restrictive alternative to guardianship is now available and the ward can be restored to capacity; or[~~.~~]

(4) guardianship continues to effectively remedy the issues of the ward or meet the needs of the ward.

(b) If the DADS Guardianship Services Program determines that the ward is still an incapacitated person and an alternate guardian can be identified, the DADS Guardianship Services Program notifies the appropriate court with probate jurisdiction and files an application to resign and have a successor guardian appointed.

(c) If the DADS Guardianship Services Program determines that the ward is no longer an incapacitated person and no longer needs a guardian, the DADS Guardianship Services Program files an application with the court to have the ward restored to capacity. If a less restrictive alternative is appropriate and available, the DADS Guardianship Services Program refers the restored individual for the appropriate services.

(d) At any time, if the DADS Guardianship Services Program becomes aware of another guardianship program or private professional guardian who is willing, able, and suitable to serve as a ward's successor guardian, and there is no family member or friend of the ward or other interested person who is willing, able, and suitable to serve as guardian, the DADS Guardianship Services Program notifies the appropriate court with probate jurisdiction of the other guardianship program or private professional guardian's willingness and ability to serve. DADS then files an application to resign and have a successor guardian appointed.

(e) If the DADS Guardianship Services Program determines guardianship does not effectively remedy the issues of the ward or meet the needs of the ward, the DADS Guardianship Services Program files an application to resign or close the guardianship.

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

Filed with the Office of the Secretary of State on July 2, 2014.

TRD-201403085
Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: August 17, 2014
For further information, please call: (512) 438-4162

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SUBCHAPTER C. CONTRACTOR REQUIREMENTS

40 TAC §§10.301, 10.305, 10.307, 10.311, 10.313, 10.315, 10.317, 10.319, 10.321, 10.325, 10.327, 10.329, 10.331

STATUTORY AUTHORITY

The amendments are proposed under Texas Human Resources Code, §§161.101 - 161.114, which authorize DADS to provide guardianship services; Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that

the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendments implement Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021 and §§161.101 - 161.114.

§10.301. Guardianship Contracts [~~Introduction~~].

(a) Texas Human Resources Code, §161.103 gives DADS the authority to contract with an agency or a political subdivision of the state[~~, a guardianship program as defined by Texas Probate Code, §601, a private agency, or another state agency~~] for the provision of guardianship services.

(b) To the extent funds are appropriated by the legislature or made available by DADS, the DADS Guardianship Services Program contracts with one or more contractors [~~guardianship programs (contractors)~~] to file an application with the probate courts and to serve as guardian of the person or guardian of the estate or both. The contractor must be able and willing to serve as guardian at a cost equal to or less than the cost of providing comparable guardianship services by the DADS Guardianship Services Program.

(c) To be eligible for guardianship services through a contractor, an individual must be eligible to be a ward of the DADS Guardianship Services Program. [~~An individual who is not referred to DADS directly by DFPS or indirectly through a DFPS referral to the probate court may not be served through its contract with DADS.~~]

(d) Funding from DADS guardianship contracts is intended to offset the contractor's cost of providing guardianship services. A contractor must not use DADS funds for a ward's daily living expenses or bill a ward for any other services.

(e) A contractor must comply with the requirements in this subchapter and in Subchapters D - E of this chapter (relating to Records Management, and Contract Monitoring and Compliance). If a [~~its~~] contract with the DADS Guardianship Services Program is terminated or is not renewed, a contractor may continue providing services through an alternate source of funds or apply to the courts to resign as guardian and have a successor guardian appointed.

§10.305. Eligibility To Be a Guardianship Contractor.

(a) To be eligible to apply for a guardianship contract with DADS, an agency must meet the definition of a guardianship program in Texas Estates [~~Probate~~] Code, §1002.016 [~~§601~~].

(b) An agency must agree to comply with the minimum standards for guardianship services established by the Judicial Branch Certification Commission [~~Guardianship Certification Board~~] under Texas Government Code, §155.101 [~~§111.041~~].

(c) An agency must agree to comply with the certification requirements of the Judicial Branch Certification Commission [~~Guardianship Certification Board~~] as authorized in Texas Government Code, §155.102 [~~§111.042~~] for all individuals[~~, other than volunteers,~~] who will provide guardianship services to a ward of the program on behalf of DADS [~~the program~~].

(d) An agency must agree to terminate an employee who commits an action that results in the agency being removed as guardian by the courts. If the agency fails to take action against an employee or has demonstrated a pattern of activity resulting in removal as guardian by the courts within the previous five years, the agency may become ineligible to contract with the DADS Guardianship Services Program.

(e) If an agency is held in contempt, fined, surcharged, removed as guardian, or found not suitable to serve as guardian by the courts, the DADS Guardianship Services Program may consider these actions in determining present and future eligibility and the agency may become ineligible to contract with the DADS Guardianship Services Program.

§10.307. Acceptance of Referrals from DADS.

(a) An agency, in its application for a contract with DADS, must identify the population groups for whom it provides services, in terms of age, mobility, or other factors. The application must also specify the geographic areas within which it provides services.

(b) A contractor must accept all referrals from DADS and apply for guardianship or successor guardianship if a contractor serves the county in which the incapacitated individual resides, and if the individual qualifies for the contractor's guardianship program, provided that the contractor is under the maximum service authorization level provided [~~for~~] in the contract. If the contractor has reached the maximum service authorization level provided in the contract, DADS may offer the contractor an opportunity to apply for guardianship and provide services through other sources of funds.

(c) If a contractor believes that DADS has assigned an individual for guardianship or successor guardianship who does not fit the guardianship program's eligibility criteria, the contractor may request that the DADS Guardianship Services Program management and the appropriate [~~regional~~] guardianship supervisor to reconsider the referral. The DADS Guardianship Services Program management or the appropriate [~~regional~~] guardianship supervisor may, at the management's or supervisor's discretion, withdraw the referral to the contractor [~~and serve the individual directly~~].

§10.311. Qualifications and Training Requirements for Contractor Employees.

(a) A contractor must:

(1) provide an adequate number of qualified employees to meet the needs of wards that DADS refers to the contractor;

(2) employ case managers who have the following qualifications:

(A) be at least 21 years of age;

(B) be a high school graduate or possess the general education development equivalent; and

(C) have:

(i) at least two years of relevant work experience related to guardianship; or

(ii) the following educational or training requirements:

(I) a minimum of a bachelor's degree conferred by a college or university accredited by an organization recognized by the Texas Higher Education Coordinating Board in a field related to guardianship, including but not limited to medical, mental health and intellectual disability, law, business, accounting, social work, sociology, psychology, human services, protective services, and criminal justice fields; or

(II) completion of a course curriculum or training specifically related to guardianship approved by the Judicial Branch Certification Commission; and

(D) [~~(2)~~] [~~employ case managers who~~] are certified as a guardian by the Judicial Branch Certification Commission [~~Guardianship Certification Board, as authorized in Texas Government Code, §111.042~~];

(3) provide an orientation program that explains:

(A) the responsibilities associated with each new employee's position;

(B) the responsibilities of the guardianship program to the ward;

(C) the relationship of the ward to the guardianship program and to DADS;

(D) an overview of the Texas Estates [~~Probate~~] Code and the program's responsibilities per the code;

(E) an overview of any rules or regulations that affect the guardianship program;

(F) an overview of aging and disability; medical issues, including medical treatment and medication; and end-of-life decisions; and

(G) the principles of person-directed planning;

(4) maintain a copy of the information presented at the orientation for each employee and have signed documentation of attendance at the orientation; and

(5) provide ongoing training based upon the needs of the ward as described in subsections (b) and (c) of this section and any changes in rules or state law.

(b) Ongoing training as required in subsection (a)(5) of this section must be documented and each participant must sign that the participant attended the training. At a minimum, training must include:

(1) recognizing and reporting abuse, neglect, and exploitation to the appropriate investigating agency;

(2) cultural sensitivity and ethics;

(3) financial management, including budgeting, record keeping, and bill paying;

(4) case management, including service planning, service delivery, and an overview of guardianship;

(5) housing and placement alternatives;

(6) community resources; and

(7) recognition of the social needs of wards, such as recognition of birthdays, holidays, and the need for contact with family and friends.

(c) In addition to the orientation and training specified in subsections (a)(3) and (b) of this section, a contractor must provide training to case managers in the following areas:

(1) aging and disability, including mental illness, intellectual disability [~~mental retardation~~], related conditions, physical disabilities, and other diagnoses that affect the population being served;

(2) legal issues, including civil commitment of persons with intellectual disability [~~mental retardation~~] and mental illness, courtroom testimony, protocol, etiquette in the courtroom and other venues, and local court policies and procedures; and

(3) estate management, including money management alternatives, record keeping, and completion of documents that will be filed with the court.

§10.313. Qualifications and Training Requirements for Volunteers of Contractors.

(a) A contractor that uses a volunteer who is not a certified guardian [~~volunteers to perform guardianship duties~~] must:

(1) assign a certified guardian [~~an employee~~] to supervise the [~~each~~] volunteer;

(2) ensure that the volunteer does not perform guardianship duties, but the volunteer may provide services that a DADS volunteer may provide under Texas Human Resources Code §161.114(c); and [~~provide and document training based upon what the volunteer will be doing;~~]

(3) ensure that a certified guardian reviews all work completed by the volunteer. [~~ensure that the volunteer is supervised and does not take responsibility for a DADS ward until documentation and observation indicate the volunteer is qualified to work with the ward;~~]

[~~(4) have all work completed by a volunteer reviewed by an employee and any documentation countersigned by the volunteer's supervisor;~~]

[~~(5) document monthly supervision sessions with the volunteer;~~]

[~~(6) ensure that the volunteer protects the health and safety of the ward; and~~]

[~~(7) provide additional training on skills needed to perform job duties at least annually.~~]

(b) A contractor that uses a volunteer must:

(1) provide training that is relevant to the services the volunteer will provide;

(2) ensure that an employee of the contractor supervises the volunteer;

(3) ensure that the volunteer does not provide services to a DADS ward until documentation and observation indicate the volunteer is qualified to work with the ward;

(4) ensure that an employee of the contractor reviews all work completed by the volunteer;

(5) ensure that the volunteer's supervisor countersigns all documentation completed by the volunteer;

(6) ensure that the volunteer's supervisor meets with the volunteer at least once per month and documents the meeting;

(7) ensure that the volunteer protects the health and safety of the ward;

(8) provide additional training to the volunteer on skills needed to provide services at least annually; and

(9) document training provided to the volunteer.

§10.315. Criminal Background Checks.

(a) A contractor must ensure that each employee and volunteer of the contractor who has contact with a DADS ward or with the estate or benefits of a ward:

(1) has not been convicted of any crimes outlined in Texas Estates [~~Probate~~] Code, §1104.353 [~~§678, Presumption Concerning Best Interest~~];

(2) is not a person meeting the specifications in Texas Estates [~~Probate~~] Code, §§1104.351 - 1104.357 [~~§681, Persons Disqualified to Serve as Guardians~~];

(3) does not have charges pending from, has not admitted guilt for, or has not been found guilty of the offenses under the Texas Penal Code in subsection (b) of this section or any like offense under the law of another state or federal law, even if probation was granted, if deferred adjudication was granted on a plea of guilty, or if deferred

adjudication was granted on a plea of no contest and no record exists, but the contractor has independent knowledge of these facts; and

(4) does not have an interest that is adverse to a ward of the DADS Guardianship Services Program or any of its contractors under Texas Estates [~~Probate~~] Code, §1055.001 [~~§642~~], including:

(A) being an actual or potential creditor or debtor of the ward;

(B) being an opposing party to a ward in a lawsuit;

(C) being the guarantor of a ward's promissory note;

(D) having a duty to account to a ward other than the normal duty to account arising from guardianships under its contract; or

(E) having any other financial or other interest adverse to a ward.

(b) To ensure compliance with subsection (a) of this section, DADS obtains criminal history record information (a criminal background check) relating to a prospective employee or volunteer of a contractor who will have access to a DADS ward, the estate of a DADS ward, or the benefits of a ward referred by the DADS Guardianship Services Program. Based on the criminal history record information, DADS notifies the contractor of the prospective employee's or volunteer's eligibility to be employed or to volunteer with a DADS ward. A contractor must not make an offer of employment to a prospective employee or allow a prospective employee or volunteer to have access to a DADS ward, the estate of a DADS ward, or the benefits of a DADS ward referred by the DADS Guardianship Services Program before DADS notifies the contractor of the person's eligibility for employment or volunteering. On an annual basis, DADS obtains criminal history record information related to an employee or volunteer of a contractor who has access to a DADS ward, the estate of a ward, or the benefits of a DADS ward referred by the DADS Guardianship Services Program.

(1) The following offenses under the Texas Penal Code permanently bar an individual from employment or from volunteering with a contractor:

(A) sexual offenses under Chapter 21;

(B) §22.011, Sexual Assault;

(C) §22.02, Aggravated Assault;

(D) §22.021, Aggravated Sexual Assault;

(E) §22.04, Injury to a Child, Elderly Individual, or Disabled Individual;

(F) §22.041, Abandoning or Endangering a Child;

(G) §22.05, Deadly Conduct;

(H) §22.07, Terroristic Threat;

(I) §22.08, Aiding Suicide;

(J) §22.09, Tampering with Consumer Product;

(K) offenses against the family under Title 6;

(L) criminal homicide under Chapter 19;

(M) kidnapping and unlawful restraint under Chapter 20, and trafficking of persons under Chapter 20A;

(N) §28.02, Arson;

(O) robbery under Chapter 29;

(P) burglary and criminal trespass under Chapter 30;

(Q) theft under Chapter 31; and

(R) fraud under Chapter 32.

(2) All other offenses under the Texas Penal Code or the Texas Health and Safety Code, Chapter 481 (Texas Controlled Substances Act) are a bar to employment or volunteering with a contractor but may be waived as described in subsection (c) of this section.

(c) If an employee or volunteer has successfully fulfilled all requirements and conditions imposed by the court for an offense described in subsection (b)(2) of this section and if there are extenuating circumstances that [~~would~~] justify the individual's employment or volunteering with the contractor, the contractor may make a written request to the director of the DADS Guardianship Services Program for a waiver of subsection (b)(2) of this section. The director will not waive the requirement for any offense described in subsection (b)(1) of this section. If the Judicial Branch Certification Commission does not approve certification of an employee or volunteer as a guardian based on a criminal history, the contractor may not assign the individual to work in any capacity with a DADS ward.

(d) A contractor must conduct a background check through the National Sex Offenders Registry website on a person who requests an unsupervised visit with a DADS ward. The contractor must maintain documentation of a search query in the ward's file. The contractor may approve an unsupervised visit, regardless of whether the person is listed on the registry, if the contractor determines the unsupervised visit is in the best interest of the ward. If the contractor approves an unsupervised visit with a person who is listed on the registry, the contractor must document the reasons why the visit was approved.

§10.317. Quality Assurance Plan.

(a) A contractor must develop a quality assurance plan that describes the contractor's system of self-monitoring to ensure:

(1) consistency and quality of care provided to wards of the guardianship program; and

(2) compliance with:

(A) the Texas Estates [~~Probate~~] Code;

(B) other requirements imposed by the courts; and

(C) the guardianship provider handbook, other program policies, rules, and standards.

(b) A contractor must make a copy of its quality assurance plan available to DADS [~~DADS'~~] contract monitoring staff at the request of DADS staff and before an annual contract monitoring review.

(c) A contractor must review its quality assurance plan annually and update it as necessary. The contractor must provide a copy of an updated plan to the DADS contract manager if the plan is updated.

§10.319. Fiscal Management.

(a) A contractor must establish policies and procedures that describe:

(1) an accounting system to ensure that payment is made by DADS to the contractor only if services provided have been rendered;

(2) a tracking system that includes receipts and a description of the goods or services provided for all fiscal matters for wards served by the guardianship program;

(3) a system to refund monies to DADS or to a ward if needed;

(4) compliance with state and federal laws and regulations regarding sound accounting practices for the contractor; and

(5) internal and external audits to be performed on a regular basis.

(b) A contractor must accept payment from DADS as payment in full for services rendered. The contractor must not duplicate billing or receipt of other funds.

(c) A contractor must not seek or accept reimbursement from a DADS ward to whom it provides purchased services.

(d) A contractor must not collect:

(1) payment from a ward;

(2) a percentage of the Social Security or Supplemental Security Income check specified in the Omnibus Reconciliation Act of 1990; or

(3) payment authorized by the court in accordance with Texas Estates [~~Probate~~] Code, §1155.002 and §1155.003 [~~§665~~].

(e) A contractor must not use DADS funds or DADS reimbursed staff time to provide guardianship or other services to an individual who has not been referred by DADS.

(f) A contractor must provide all legal support necessary for the guardianship services contracted by DADS, including contested applications for guardianship.

(g) A contractor must provide DADS staff access to the results of audits performed on DADS wards.

§10.321. Roles and Responsibilities of Case Managers.

[~~(a) A contractor must ensure that its case managers meet the qualifications as specified in §10.311(a)(2) of this chapter (related to Qualifications and Training Requirements for Contractor Employees).~~]

(a) [~~(b)~~] Upon receipt of a referral from DADS, a case manager monitors the filing of legal documents, accountings, reports, notifications, and taxes as required by state law.

(b) [~~(c)~~] A case manager performs the following duties in accordance with the other duties and responsibilities outlined in the order granting guardianship:

(1) locates, secures, and manages a ward's estate;

(2) ensures that a ward has access to adequate care, protection, and services based upon identified needs and the service plan;

(3) makes decisions on medical issues such as major surgery, life-threatening illness, treatment options, and, if guardian of the estate, makes decisions regarding the ward's estate other than routine expenditures for maintenance and education;

(4) monitors to ensure inventory, appraisement, list of claims, and annual accountings have been completed;

(5) completes annual reports of the guardian of the person;

(6) hires professionals, including accountants, providers, repair persons, or realtors, with the funds of a ward's estate to perform services for the ward;

(7) resolves issues or problems that affect [~~impact~~] a ward;

(8) as much as possible, considers a ward's wishes and choices when decisions are being made about the ward;

(9) maintains documentation of face-to-face visits;

(10) informs the appropriate DADS and contractor staff concerning major issues involving a ward and documents all actions in the ward's record; and

(11) ensures that cases that are closed or transferred, or if [~~in which~~] the guardianship is transferred to another case manager, has [~~have~~] documentation that is complete and up-to-date [~~up to date~~].

§10.325. Compliance with Probate Court Local Rules in Service Area.

A contractor must comply with all requirements of Texas Estates [~~Probate~~] Code, Title 3 [~~Chapter XIII~~]. In addition, if a court with probate jurisdiction within a contractor's service area has specific local rules in addition to the requirements of the Texas Estates [~~Probate~~] Code, the contractor must comply with those rules to the best of its ability, to the extent that the court's local rules do not conflict with provisions of the Texas Estates [~~Probate~~] Code.

§10.327. Responsibilities of the Guardian of the Person.

(a) A contractor, rather than the contractor's employee or volunteer, is appointed by the court as guardian. A contractor must assign a primary case manager who meets the requirements described in §10.311(a)(2) of this subchapter, to each ward served under its contract with DADS. To ensure the ability to respond in a timely fashion in the event of an emergency, a contractor must assign back-up staff for when the primary case manager is unavailable.

(b) If a contractor is appointed guardian of the person, the contractor must manage the ward's person according to the order appointing guardian of the person. This responsibility may include:

(1) having physical possession of the ward;

(2) caring for, supervising, and protecting the ward;

(3) providing food, clothing, and shelter to the extent permitted by the ward's estate or government benefits;

(4) consenting to medical, surgical, and psychiatric care, except for in-patient psychiatric commitment;

(5) developing an annual service plan that ensures appropriate habilitation and rehabilitation services, including therapy, counseling, education, and training to the extent permitted by the ward's estate;

(6) encouraging the ward to participate in the development of the service plan to the extent that the ward is capable;

(7) building an adequate support system for the ward, including family, friends, and other appropriate collaterals;

(8) ensuring monthly status contacts with the ward as described;

(9) consulting with service providers periodically;

(10) documenting case actions in files maintained for each ward; and

(11) complying with all of the requirements of Texas Estates [~~Probate~~] Code, Title 3 [~~Chapter XIII~~], regarding guardianship of the person.

(c) A contractor arranges care and services for the ward based on the identified needs of the ward to [~~and that~~] enhance the ward's quality of life. The contractor ensures that the ward has access to basic care and services, including:

(1) a safe, clean environment;

(2) assistance in performing basic life functions;

(3) regular, nutritious meals;

(4) any needed medical, psychiatric, habilitative, or other services; and

(5) adequate supervision.

(d) The contractor must have a face-to-face contact at least once a month with each ward served through the contract with DADS. To the extent possible, the primary case manager makes the monthly contacts. If the primary case manager is unable to make a monthly contact, the contact must be made by another certified guardian. If the ward's place of residence prevents face-to-face contact (for example, incarceration in a correctional facility), the contractor may substitute a phone contact with the ward or a person knowledgeable of the ward's current condition (for example a jailer, an attorney, a judge, a probation or parole officer, or a medical doctor). The case manager or other certified guardian must document the monthly contacts in the ward's file.

§10.329. Responsibilities of Guardian of the Estate.

(a) If a contractor is appointed as permanent guardian of the estate, the contractor must manage the ward's finances and assets according to the order appointing guardian of the estate. This responsibility may include:

(1) locating and taking possession of the ward's assets;

(2) securing the ward's property;

(3) preparing the initial inventory, appraisement, and list of claims;

(4) paying the ward's bills;

(5) investing any money not needed for the care and maintenance of the ward;

(6) ensuring that the ward is receiving all the income and benefits to which the ward is entitled;

(7) selling the ward's property if it is in the ward's best interests;

(8) filing annual accountings to courts and to government agencies administering benefits;

(9) filing tax returns; and

(10) complying with all requirements of Texas Estates [~~Probate~~] Code, Title 3 [~~Chapter XIII~~], regarding guardianship of the estate.

[~~(b) If a contractor is appointed as temporary guardian of the estate, the contractor performs the duties specified by the court order appointing the contractor as temporary guardian of the estate.~~]

(b) [~~(c)~~] A contractor, its agents, employees or volunteers or their immediate family members or friends must not directly or indirectly purchase property of the ward. A contractor, a contractor's agent, employee, volunteer, or an [~~its agents, employees or volunteers or their~~] immediate family member or friend of the contractor, agent, employee, or volunteer [~~or friends~~] may not purchase the ward's property through another person [~~to circumvent the requirements of this subsection. A bona fide purchase for value from a person not associated with the buyer in any manner that originally purchased the property from the ward without the knowledge, request, or agreement of buyer is not a violation of this subsection~~].

§10.331. Service Plans for Wards.

(a) A contractor must develop and update at least annually a service plan for each ward for which it is appointed as guardian of the person. The service plan establishes a structured and systematic approach for delivery of services to a ward that maximizes quality of care, quality of life, and overall functioning of the ward.

(b) A contractor must develop the initial service plan within three months after taking and filing the oath of guardianship and must update the service plan annually by the due date of the annual report required by the court.

(c) A contractor may develop its own format for the service plan or may use a format provided by DADS. The service plan must include at least the following information:

(1) a brief description of the current status of the ward;

(2) a description of the needs of the ward in each of the following areas:

(A) living arrangements and basic care;

(B) medical, dental, vision, mental health, and intellectual disability [~~medical/dental/vision/mental health/mental retardation~~] services;

(C) family, social, and recreational [~~family/social/recreational~~] needs;

(D) financial and legal services; and

(E) diet and clothing preferences;

(3) the plan or strategy for meeting the needs of the ward in the areas listed in paragraph (2) of this subsection; and

(4) actions taken to date to accomplish the plan.

(d) A service plan must be developed using the principles of person-directed planning and be developed in a culturally competent manner, to meet the ward's needs within the ward's cultural context. Resources such as family systems, natural helping networks, formal institutions within the ward's community, churches, and social organizations are used to resolve the ward's problems whenever possible and appropriate.

(e) A contractor must ensure that services are provided by persons who can adequately communicate with the ward. The contractor may facilitate communication by using a translator or by other means if the contractor's employees do not speak the ward's language. A non-English speaking ward and the ward's family who attempt to communicate in English may require accommodation. Whenever possible, the contractor must offer the ward the option of communicating in the ward's preferred language, even if the ward can communicate adequately in English.

(f) Whenever possible the ward's diet and clothing must reflect cultural preferences.

(g) The service plan for the religious needs of the ward must reflect any lifelong pattern of religious affiliation. Funeral planning for the ward must reflect the cultural and religious values of the ward and the ward's family whenever possible.

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

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Department of Aging and Disability Services
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40 TAC §10.303

(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 Department of Aging and Disability Services or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Human Resources Code, §§161.101 - 161.114, which authorize DADS to provide guardianship services; Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The repeal implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021 and §§161.101 - 161.114.

§10.303. Compliance with DADS Contracting Rules.

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

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SUBCHAPTER D. RECORDS MANAGEMENT

40 TAC §§10.401, 10.403, 10.405

STATUTORY AUTHORITY

The amendments are proposed under Texas Human Resources Code, §§161.101 - 161.114, which authorize DADS to provide guardianship services; Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendments implement Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021 and §§161.101 - 161.114.

§10.401. Confidentiality of Records.

(a) A contractor must not disclose information from the case record on a ward served under the contract with the DADS Guardianship Services Program in a manner that identifies the ward unless the disclosure is necessary to carry out the duties of the contractor, as described in subsection (b) of this section. Texas Human Resources Code, §161.111 makes information about a DADS guardianship case confidential, and this extends to the case record of DADS wards served through contracts with DADS. All records, reports, or working papers related to the case are confidential and are exempt from public disclosure under the Texas Open Records Act (Chapter 552, Government Code). DFPS [~~DFPS'~~] Adult Protective Services Division records are also confidential under Texas Human Resources Code, §48.101.

(b) Examples of situations that might require pertinent case information to be disclosed include:

(1) arranging for the provision of services;

(2) facilitating involuntary mental health or intellectual disability [~~mental retardation~~] commitment;

(3) cooperating with law enforcement during the criminal investigation of abuse, neglect, or exploitation; and

(4) responding to a court order for disclosure.

(c) If a contractor shares information about a ward, the contractor must advise the recipient of the information that the information is confidential and must not be further shared without permission.

(d) DADS does not disclose to a contractor the name of a reporter who makes a complaint of abuse, neglect, or exploitation to DFPS. If a contractor learns the reporter's name or other identifying information, the contractor must not share this information with any other agency [~~or entity~~].

(e) DADS guardianship staff may orally release the reporter's name to the courts, the district or county attorney, or law enforcement agencies if directed to do so by the judge trying the guardianship case. In the event a contractor learns a reporter's name or other identifying information, the contractor must not share this information with any other agency [~~or entity~~].

(f) Upon written request to a contractor, the contractor may provide a copy of guardianship case information, except the name and other identifying information about a reporter, on a ward served under a DADS guardianship contract to the following:

(1) the ward or the ward's guardian;

(2) a court-appointed executor or administrator of a deceased ward's estate;

(3) the ward's private attorney;

(4) a guardian ad litem;

(5) the attorney representing the proposed guardian in a guardianship proceeding initiated by the contractor;

(6) a court investigator or court visitor appointed by the court in a guardianship proceeding;

(7) Disability Rights Texas [~~Advocacy, Inc.~~], the federally mandated protection and advocacy system; and

(8) out-of-state protective agencies.

(g) Upon oral request to a contractor, the contractor may release a copy of the guardianship case information, except the name and other identifying information about a reporter, to the attorney ad litem. If the attorney ad litem requests the name of the reporter and asserts this information is necessary to the attorney's ability to adequately represent the client, the contractor must notify the DADS Guardianship Services Program and request approval to release the information to the attorney ad litem. The contractor must not release information about the reporter to the attorney ad litem without written approval from the DADS Guardianship Services Program.

(h) Upon oral or written request, a contractor must release a copy of the entire case record, including the name of the reporter and information from other agencies, to a law enforcement agency or prosecuting attorney requesting a case under current criminal investigation, prosecution, or litigation against the contractor or DADS. A law enforcement agency must provide proof of identity before the contractor may release the requested information.

(i) If a contractor releases information to an individual or entity as allowed under this section, the contractor must record the following information in the ward's case record;

(1) the name of the requestor;

(2) the information that the contractor provided;

(3) the date the contractor provided the information; and

(4) a dated copy of the written request or date of the oral request.

(j) When the DADS Guardianship Services Program makes a referral to a contractor, DADS does not provide the entire case record unless the contractor is awarded guardianship and submits a written request for this information. Upon referral to a contractor, DADS provides only the following information:

(1) oral case record information, except the name and other identifying information about a reporter; and

(2) written information, including the Client Assessment completed by the DADS guardianship specialist, medical and psychological information, names and addresses of relatives, financial information and documents, [~~and~~] personal data (for example, Social Security number, Medicaid number, and date of birth) pertaining to the proposed ward, and a copy of the most recent photograph on file.

(k) A contractor must comply with federally mandated restrictions concerning the sharing of the AIDS/HIV positive status of a ward or proposed ward with a proposed guardian.

(l) If a contractor's case files contain confidential reports from other professional individuals or agencies (for example, physicians, psychologists, law enforcement, the Department of Assistive and Rehabilitative Services, or DFPS), the contractor must not release this information to anyone other than the ward or the ward's guardian without first contacting the issuing professional individual or agency for consent to release the information. If the professional individual or agency does not agree in writing to the request, the contractor must not release the information. If the ward or the ward's guardian requests confidential reports from a professional individual or agency, a contractor may release the information, except a police report.

(m) A contractor may orally share case information, except the name and other identifying information about a reporter and the AIDS/HIV positive status of a ward or a proposed ward, with authorized personnel of a social services or medical agency working with the ward or the proposed ward to the extent this information is necessary for the agency to provide services to the ward or the proposed ward.

(n) A contractor may release written case information, except the name and other identifying information about a reporter, to a social services or medical agency working with a ward or a proposed ward only if the proposed ward or the current guardian has authorized the release in writing. The social services or medical agency receiving the information must agree to keep the information confidential.

§10.403. Documentation Requirements.

(a) A contractor must maintain all financial and contract-related records:

(1) according to recognized fiscal and accounting practices; and

(2) in accordance with DADS contract requirements.

(b) A contractor must document interactions with a ward as soon as possible after the interaction. If the contractor cannot document at the time of an interaction, the documentation must:

(1) be dated the day that it is written;

(2) indicate the date of the interaction; and

(3) be signed by or otherwise identify the individual who [~~that~~] had the contact.

(c) A contractor must sign all printed service delivery records in ink. White-out may not be used in any documentation. If there is a mistake, it must be crossed through, dated, and initialed.

(d) Documentation stored via electronic means must include the name of the person who delivered the services, the date performed, and the date the entry was made.

(e) Data must be readily accessible, read-only access must be provided to the DADS contract manager during contract reviews, and there must be a means to retrieve the data in case of electrical outage or equipment failure.

(f) A contractor must not preprint or pre-enter any record of time on a form used to document all required elements of the services delivered, as provided in the program specific rules.

(g) Records must include:

(1) copies of all legal documents related to the ward, preferably file-stamped copies if documents are file-stamped by the court in the local area when submitted;

(2) financial documents, including receipts of disbursements, bank account statements, trust fund statements, and investment statements;

(3) documentation of all case actions, including monthly status updates;

(4) case actions, including the monthly status update, which must be documented within 10 working days after the activity:

(5) significant incidents regarding progress, illness, and accidents that may be used as part of the service plan for the ward;

(6) termination records and transfer summaries; [~~and~~]

(7) ward status updates identifying abuse, neglect, or exploitation incidents referred to the appropriate investigative authority; and[~~.~~]

(8) a photograph of the ward updated within 90 calendar days after the contractor's initial qualification as guardian and every two years thereafter.

(h) A contractor must maintain personnel records on every employee and volunteer, and must also maintain records on subcontractors if utilized.

§10.405. Maintenance of Records.

(a) A contractor must maintain all records until the later of the following occurs: [~~according to Chapter 69 of this title (relating to Contract Administration).~~]

(1) seven years elapse from the expiration or termination date of the records; or

(2) all litigation, claims, and audit findings involving the records are resolved.

(b) Upon termination of a contract, the contractor must ensure the following:

(1) records are stored and are accessible;

(2) someone is responsible for adequately maintaining the records;

(3) the DADS contract manager is notified in writing regarding the location of the records and who DADS may contact to access the records; and

(4) if there is a change in the location of the records or a change in the person assigned to provide access to the records, the DADS contract manager is provided the updated information in writing within 10 calendar days after the change.

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

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SUBCHAPTER E. CONTRACT MONITORING AND COMPLIANCE

40 TAC §§10.501, 10.503, 10.507

STATUTORY AUTHORITY

The amendments are proposed under Texas Human Resources Code, §§161.101 - 161.114, which authorize DADS to provide guardianship services; Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The amendments implement Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021 and §§161.101 - 161.114.

§10.501. Monitoring Reviews.

(a) When a contractor accepts funds, it also accepts the authority of federal and state governments, including DADS as an agency of a state government, to perform reviews and audits and to have access to records.

(b) [~~(a)~~] DADS conducts monitoring reviews of a contractor's services to determine if the contractor is in compliance with the contract and program rules and requirements. A monitoring review is conducted at the location where the contractor is providing the services unless DADS specifies a different location.

(c) [~~(b)~~] At the conclusion of the review, DADS determines the level of compliance on each guardianship principle [~~standard~~] reviewed. If DADS considers the contractor substantially out of [~~substantial~~] compliance with the contract and with the program rules and requirements, the contractor is subject to corrective action and may be subject to sanctions.

(d) [~~(c)~~] During the monitoring review, the contractor must provide:

(1) adequate working space for reviewing the records; and

(2) all records DADS requests for review.

(e) [~~(d)~~] During the monitoring review, DADS may:

(1) review a sample of wards' records to determine the contractor's compliance with contract requirements;

(2) interview wards and staff;

(3) observe wards and staff;

(4) interview individuals with whom agency staff interact on a regular basis, such as individuals associated with the probate courts; and

(5) conduct other activities as appropriate.

(f) [~~(e)~~] DADS may conduct a follow-up monitoring review to determine if the contractor [~~agency~~] has corrected the findings [~~deficiencies~~] identified at a preceding monitoring review. A follow-up monitoring review may:

(1) be a focused review using targeted samples; and

(2) focus only on those guardianship principles [~~standards~~] that DADS determined to be out of compliance at the immediately preceding monitoring review.

(g) [~~(f)~~] DADS may expand a monitoring review period or the review sample at any time.

§10.503. Complaint Investigations.

(a) DADS conducts a complaint investigation of a contractor's services if DADS receives complaints that relate to program rules or procedures, or the contractor's employees or volunteers.

(b) DADS may conduct a complaint investigation at any time without notice to the contractor.

(c) DADS does not disclose the name of the individual who made the complaint unless specifically ordered to by a court of law or requested by law enforcement to disclose to law enforcement.

(d) During the complaint investigation, the contractor must provide:

(1) adequate working space for reviewing the records; and

(2) all records DADS requests for the review.

(e) DADS may conduct a follow-up to the complaint investigation to determine if the contractor has corrected the findings [~~deficiencies~~] identified during the complaint investigation. A follow-up complaint investigation may include:

(1) a review of a sample of wards' records to determine if the allegations are valid and if the complaint affects more than the ward whom the complaint concerned;

(2) interviews with wards and staff;

(3) observation of wards and staff;

(4) consultation with others, as appropriate; and

(5) other activities, as appropriate.

(f) DADS may conduct a follow-up complaint investigation to determine if the contractor has corrected the findings [~~deficiencies~~] identified during the complaint investigation. A follow-up complaint investigation may:

(1) be a focused review using targeted samples; and

(2) focus only on those standards that DADS determined to be out of compliance at the immediately preceding complaint investigation.

(g) DADS may expand the review period or the review sample for a complaint investigation or follow-up complaint investigation at any time.

§10.507. Sanctions.

(a) DADS may impose a sanction if DADS determines that the contractor failed to follow the terms of the contract or the contractor failed to comply with program rules, policies, and procedures. Examples of these failures include:

(1) jeopardizing a ward's health and safety;

(2) failing to comply with a plan of correction [~~corrective action plan~~];

(3) failing to follow an agreed-upon audit resolution payment plan;

(4) failing to provide services according to the contract or program requirements; or

(5) a validated report of abuse, neglect, or exploitation when the perpetrator is an owner, employee, or volunteer who has contact with a ward or with the estate or benefits of a ward.

(b) DADS may impose a sanction described in this subsection. [~~Types of sanctions include the following:~~]

(1) Plan of correction [~~Corrective action plan~~]. DADS may require a [~~requires the~~] contractor to submit a plan of correction that includes [~~of action with~~] the date the findings [~~deficiency~~] will be corrected.

(2) Protective action plan. DADS may require a [~~requires the~~] contractor to take immediate action and put into place an abbreviated and immediate protective [~~corrective~~] action plan if DADS identifies health or safety issues [~~are identified~~]. The plan must address the contractor's actions to be taken to ensure the health and safety of the ward.

(3) Recoupment. DADS may collect [~~collects~~] money the contractor owes as the result of overpayments or other billing irregularities or both.

(4) Ward referral hold. DADS may stop referring [~~does not refer~~] new wards to the contractor. The ward referral hold is released when DADS determines the contractor has resolved the reason for the hold.

(5) Contractor hold. DADS may withhold a [~~withholds the~~] contractor's payments. The contractor hold is released when DADS determines the contractor has resolved the reason for the hold.

(6) Involuntary contract termination. DADS may terminate a [~~the~~] contractor's contract for cause by citing the contractor's failure to comply with the terms of the contract or with DADS program rules, policies, and procedures. If DADS terminates a contract, DADS conducts a review to determine any overpayment or underpayment and makes a final review to determine if the contractor has met the terms of the contract. If the account is overpaid, the contractor must reimburse DADS within 30 calendar days after receiving written notice from DADS. If the account balance is not paid in full by that time, DADS may charge interest on all unpaid debts starting on the 31st day after the contractor received the written notice from DADS. Interest is computed on a simple interest basis in accordance with the Texas Finance Code, Chapter 304, on the unpaid balance due. DADS may charge and collect interest on installment payments. If an appeal is made, interest continues to accrue during any administrative appeal process extending beyond the 31st day after notice of a balance due. If any part of an appeal is found in the contractor's favor, the interest that accrued against the part of the appeal found in the contractor's favor is dismissed.

(7) Suspension. DADS may temporarily suspend the contractor's right to conduct business with DADS. The causes for and conditions of suspension are described in subsection (a) of this section. A suspension is in effect until an investigation, hearing, or trial is concluded and DADS can make a determination about the agency's future right to contract. DADS may impute the conduct of an individual, corporation, partnership, or other association to the contractor.

(c) A contractor may appeal an adverse action DADS takes against its contract. To appeal an action, the contractor must request the appeal in writing in accordance with 1 TAC Chapter 357, Subchapter I.

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

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Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §92.15, concerning renewal procedures and qualifications; the repeal of §92.82, concerning determinations and actions pursuant to inspections; and new §92.82, concerning determinations and actions, §92.83, concerning informal dispute resolution, and §92.601, concerning arbitration, in Chapter 92, Licensing Standards for Assisted Living Facilities.

BACKGROUND AND PURPOSE

The purpose of the proposed amendment, repeal, and new sections is to implement House Bill (HB) 33, 83rd Legislature, Regular Session, 2013. HB 33 amended Texas Health and Safety Code (THSC) §247.051, relating to informal dispute resolution (IDR) of disputes between an assisted living facility (ALF) and DADS regarding a statement of violations prepared by DADS. The amendments reflect that the IDR process will be conducted by HHSC in accordance with THSC §247.051 and HHSC procedures. HB 33 also amended THSC Chapter 247 to add a new Subchapter E, regarding the arbitration of certain disputes between an ALF and DADS. The amendment to §92.15 and

new §92.601 identify the disputes an ALF may elect to resolve through binding arbitration.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §92.15 adds binding arbitration as an option for appealing denial of an application for renewal of a license to operate an ALF. The proposed amendment also deletes subsection (b), which was adopted in 2008 to transition from one-year to two-year licenses. This transition is complete and licenses are valid for two years. Minor editorial changes have been made for consistency with other DADS rules.

New §92.82 clarifies the determinations and actions that may result from an inspection, survey, investigation, or on-site visit. The section has been redrafted to clarify the content and update terminology. The information regarding IDR has been included in new §92.83. New §92.82 states that DADS determines if an ALF meets DADS licensing rules by conducting inspections, surveys, investigations, and on-site visits; that DADS conducts an exit conference with an ALF after an inspection, survey, investigation, or on-site visit and provides a copy of the report of contact at the exit conference; and that DADS provides a statement of violations within 10 working days after an exit conference.

New §92.83 specifies that, if an ALF and the DADS surveyor cannot resolve a dispute regarding a violation of a licensing rule, the ALF is entitled to an IDR in accordance with THSC §247.051.

New §92.601 specifies the types of disputes with DADS that a facility may elect to resolve through binding arbitration.

The repeal of §92.82 is necessary because the content has been redrafted and proposed as new §92.82 and §92.83.

FISCAL NOTE

James Jenkins, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment, repeal, and new sections are in effect, enforcing or administering the amendment, repeal, and new sections do not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment, repeal, and new sections will not have an adverse economic effect on small businesses or micro-businesses because the proposal does not add new costs to ALFs.

PUBLIC BENEFIT AND COSTS

Mary Henderson, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the proposed amendment, repeal, and new sections are in effect, the public will benefit from the proposal by clarifying that the IDR process for an ALF is conducted by HHSC in accordance with its procedures and that binding arbitration may be elected by an ALF to resolve certain disputes with DADS.

Ms. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the proposed amendment, repeal, and new sections. The amendment, repeal, and new sections will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Lorraine Brady at (512) 438-2235 in DADS Regulatory Services/PRC. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-13R25, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 13R25" in the subject line.

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §92.15

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §247.025, which requires the adoption of rules related to the licensure of assisted living facilities.

The amendment affects Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §247.025.

§92.15. Renewal Procedures and Qualifications.

(a) A license issued under this chapter:

(1) expires two years after the date issued[, ~~except as provided by subsection (b) of this section~~];

(2) must be renewed before the license expiration date; and

(3) is not automatically renewed.

[~~(b) A facility must submit an application for license renewal and a renewal license will be valid as follows:~~]

[~~(1) For two years beginning September 1, 2008, a facility with a facility identification number that ends in an odd number (1, 3, 5, 7, or 9) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's first renewal license issued beginning September 1, 2008, is valid for one year, and subsequent renewal licenses are valid for two years.~~]

[~~(2) A facility with a facility identification number that ends in an even number (0, 2, 4, 6, or 8) must submit an application to renew its license before the expiration date on the license in accor-~~

dance with this section. The facility's renewal licenses are valid for two years.]

(b) [(c)] An application for renewal must comply with the requirements of §92.12 of this subchapter (relating to General Application Requirements) and §92.13 of this subchapter (relating to Time Periods for Processing All Types of License Applications). The submission of a license fee alone does not constitute an application for renewal.

(c) [(d)] To renew a license, a license holder must submit an application for renewal with DADS before the expiration date. DADS considers the license holder has met the renewal application submission deadline if the license holder submits to DADS:

(1) a complete application for renewal no later than 45 days before the expiration of the current license;

(2) an incomplete application for renewal, with a letter explaining the circumstances that prevented the inclusion of the missing information, and DADS receives the incomplete application and the letter no later than 45 days before the expiration of the current license; or

(3) a complete application or an incomplete application with a letter explaining the circumstances that [which] prevented the inclusion of the missing information to DADS, and DADS receives the application during the 45-day period ending on the date the current license expires, and the license holder pays the late fee established in §92.4(b) of this chapter (relating to License Fees) in addition to the basic renewal fee.

(d) [(e)] If the application is postmarked on or before the submission deadline, the application is considered to be timely if it is received in DADS [DADS'] Licensing and Credentialing Section, Regulatory Services Division, within 15 days after the date of the postmark, or within 30 days after the date of the postmark and the license holder proves to the satisfaction of DADS that the delay was due to the shipper. It is the license holder's responsibility to ensure that the application is timely received by DADS.

(e) [(f)] For purposes of Texas Government Code, §2001.054, DADS considers that an individual has submitted a timely and sufficient application for the renewal of a license if the license holder's application has met the submission deadlines in subsections (c) and (d) [and (e)] of this section. Failure to submit a timely and sufficient application will result in the expiration of the license.

(f) [(g)] An application for renewal submitted after the expiration date of the license is considered to be an application for an initial license and must comply with the requirements for an initial license in §92.14 of this subchapter (relating to Initial License Application Procedures and Requirements).

(g) [(h)] DADS reviews an application for a renewal license within 30 days after the date DADS [DADS'] Licensing and Credentialing Section receives the application and notifies the applicant if additional information is needed to complete the application.

(h) [(i)] A license holder applying for a license renewal must affirmatively show that the facility meets DADS licensing standards based on an on-site inspection by DADS, which must include an observation of the care of a resident.

(i) [(j)] If an applicant is relying on §92.11(c)(2) of this subchapter (relating to Criteria for Licensing) to comply with the requirements for licensure, the application for the renewal of a license must include a copy of the license holder's required accreditation report from the accreditation commission.

(j) [(k)] DADS may pend action on an application for the renewal of a license for up to six months if the facility has not met licensure requirements during an on-site inspection.

(k) [(l)] The issuance of a license constitutes DADS [DADS'] official written notice to the facility of the approval of the application.

(l) [(m)] DADS may deny an application for the renewal of a license if the applicant, controlling person, or any person required to submit background and qualification information fails to meet the criteria for a license established in §92.11 of this subchapter.

(m) [(n)] Before denying an application for renewal of a license, DADS gives the license holder:

(1) notice by personal service or by registered or certified mail of the facts or conduct alleged to warrant the proposed action; and

(2) an opportunity to show compliance with all requirements of law for the retention of the license.

(n) [(o)] To request an opportunity to show compliance, the license holder must send its written request to the director of the Enforcement Section, Regulatory Services Division. The request must:

(1) be postmarked within 10 days after the date of DADS [DADS'] notice and be received in the office of the director of the Enforcement Section, Regulatory Services Division, within 10 days after the date of the postmark; and

(2) contain specific documentation refuting DADS [DADS'] allegations.

(o) [(p)] The opportunity to show compliance is limited to a review of documentation submitted by the license holder and information DADS used as the basis for its proposed action and is not conducted as an adversary hearing. DADS gives the license holder a written affirmation or reversal of the proposed action.

(p) [(q)] If DADS denies an application for the renewal of a license, the applicant may request:

(1) an informal reconsideration by the Health and Human Services Commission; and

(2) an administrative hearing or binding arbitration, as described in §92.601 of this chapter (relating to Arbitration), to appeal the denial.

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

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Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
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SUBCHAPTER E. INSPECTIONS, SURVEYS, AND VISITS

40 TAC §92.82

(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

Department of Aging and Disability Services or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §247.025, which requires the adoption of rules related to the licensure of assisted living facilities.

The repeal affects Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §247.025.

§92.82. Determinations and Actions Pursuant to Inspections.

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

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Department of Aging and Disability Services
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40 TAC §92.82, §92.83

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §247.025, which requires the adoption of rules related to the licensure of assisted living facilities.

The new sections affect Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §247.025.

§92.82. Determinations and Actions.

(a) DADS determines if a facility meets DADS licensing rules, including physical plant and facility operation requirements, by conducting inspections, surveys, investigations, and on-site visits.

(b) DADS lists violations of licensing rules on a report of contact. The report of contact includes a specific reference to a licensing rule that has been violated.

(c) At the conclusion of an inspection, survey, investigation, or on-site visit, a DADS surveyor conducts an exit conference to advise the facility of the findings resulting from the inspection, survey, investigation, or on-site visit.

(d) At the exit conference, the surveyor provides a copy of the report of contact described in subsection (b) of this section to the facility.

(e) If, after the initial exit conference, a DADS surveyor cites an additional licensing rule violation, the surveyor conducts another exit conference regarding the newly identified violations, and updates the report of contact with a specific reference to the licensing rule that has been violated.

(f) DADS provides to the facility a written statement of violations from an inspection, survey, investigation, or on-site visit on DADS Form 3724 within 10 days after the final exit conference. The statement of violations includes a clear and concise summary in non-technical language of each licensing rule violation. The statement of violations does not include names of residents or staff, statements that identify a resident, or other prohibited information.

(g) A facility must submit an acceptable plan of correction to the DADS regional director within 10 days after receiving the statement of violations described in subsection (f) of this section. An acceptable plan of correction must address:

(1) how corrective action will be accomplished for a resident affected by a violation of a licensing rule;

(2) how the facility will identify other residents who may be affected by the violation of the licensing rule;

(3) how the corrective action the facility implements will ensure the violation does not reoccur;

(4) how the facility will monitor its corrective action to ensure the violation is being corrected and will not reoccur; and

(5) dates when corrective action will be completed.

§92.83. Informal Dispute Resolution.

If a facility and DADS cannot resolve a dispute regarding a violation of a licensing rule, the facility is entitled to an informal dispute resolution (IDR) conducted by the Texas Health and Human Services Commission (HHSC) in accordance with Texas Health and Safety Code §247.051.

(1) Within 10 days after the facility receives the statement of violations described in §92.82(f) of this subchapter (relating to Determinations and Actions), the facility must submit a written request for an IDR using the form and in accordance with procedures on the HHSC website at www.hhsc.state.tx.us.

(2) The facility must provide a copy of its request for an IDR to the DADS regional office for the region in which the facility is located and notify HHSC that the regional office was provided a copy of the IDR request.

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

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SUBCHAPTER H. ENFORCEMENT
DIVISION 10. ARBITRATION

40 TAC §92.601

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §247.025, which requires the adoption of rules related to the licensure of assisted living facilities.

The new section affects Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §247.025.

§92.601. Arbitration.

A facility may elect binding arbitration in accordance with Texas Health and Safety Code (THSC) §247.082. Arbitration is conducted in accordance with THSC §§247.083 - 247.098 and may be used to resolve a dispute between the facility and DADS relating to:

(1) renewal of a license;

(2) suspension, revocation, or denial of a license;

(3) assessment of a civil penalty; or

(4) assessment of an administrative penalty.

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

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SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §92.20

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §92.20, concerning provisional license, in Chapter 92, Licensing Standards for Assisted Living Facilities.

BACKGROUND AND PURPOSE

The purpose of the proposed amendment is to implement House Bill (HB) 3729, 83rd Legislature, Regular Session, 2013, which amended Texas Health and Safety Code §247.021, regarding licensure of assisted living facilities (ALFs). The proposed amendment requires DADS to issue a six-month provisional license before conducting a Life Safety Code Inspection (NFPA 101) under the circumstances described in the rule.

SECTION-BY-SECTION SUMMARY

The amendment to §92.20 requires DADS to issue a six-month provisional license before conducting an NFPA 101 inspection under the circumstances described in the rule, which include the applicant submitting working drawings and specifications before construction of an ALF begins; the applicant, or a person who is a controlling person and an owner of the applicant having constructed another ALF in this state that complies with the NFPA 101; and the applicant being in compliance with resident-care standards based on an on-site inspection.

FISCAL NOTE

James Jenkins, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses, because the amendment does not impose any new requirements or costs on ALFs.

PUBLIC BENEFIT AND COSTS

Mary Henderson, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is having new ALFs open more quickly and serve individuals in need of an assisted living arrangement.

Ms. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Lorraine Brady at (512) 438-2235 in DADS Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-13R29, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us.* To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing com-

ments, please indicate "Comments on Proposed Rule 13R29" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

The amendment implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§247.001 - 247.069.

§92.20. Provisional License.

(a) DADS may issue a six-month provisional license in the case of a corporate change of ownership.

(b) DADS must issue a six-month provisional license for a newly constructed facility without conducting an NFPA 101 inspection if:

(1) an applicant makes a request in writing for a provisional license; [~~and:~~]

(2) the applicant submits working drawings and specifications to DADS for review in accordance with §92.64 of this chapter (relating to Plans, Approvals, and Construction Procedures) before facility construction begins;

[~~(1) the facility is in compliance with resident care standards;~~]

(3) [~~(2)~~] the applicant obtains all approvals, including a certificate of occupancy in a jurisdiction that requires one, from local authorities having jurisdiction in the area in which the facility is located, such as[~~, including~~] the fire marshal, health department and building inspector[~~, have been obtained~~];

(4) [~~(3)~~] the applicant submits a complete license application [~~is submitted~~] within 30 days after receipt of all local approvals described [~~referenced~~] in paragraph (3) [~~(2)~~] of this subsection;

(5) [~~(4)~~] the applicant pays the license fee required by §92.4 [~~referenced in §92.4(a)(1)~~] of this chapter (relating to License Fees) [~~has been paid~~];

[~~(5) before facility construction begins, the license applicant submits working drawings and specifications to DADS for review; and~~]

(6) [~~DADS verifies that~~] the applicant, or a person who is a controlling person and an owner of the applicant, has constructed another facility in this state that complies with the NFPA 101; and [~~Life Safety Code standards.~~]

(7) the applicant is in compliance with resident-care standards for licensure required by Subchapter C of this chapter (relating to Standards for Licensure) based on an on-site inspection conducted in accordance with §92.81 of this chapter (relating to Inspections and Surveys).

(c) DADS considers the date facility construction begins to be the date the building construction permit for the facility was approved by local authorities.

(d) A provisional license expires on the earlier of:

(1) the 180th day after the effective date of the provisional license or the end of any extension period granted by DADS; or

(2) the date a two-year license is issued to the provisional license holder.

(e) DADS conducts an NFPA 101 [~~a Life Safety Code~~] inspection of a facility as soon as reasonably possible after DADS issues a provisional license to the facility.

(f) After conducting an NFPA 101 [~~a Life Safety Code~~] inspection, DADS issues a license in accordance with Texas Health and Safety Code §247.023 to the provisional license holder if the facility passes the inspection and the applicant meets all requirements for a license.

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

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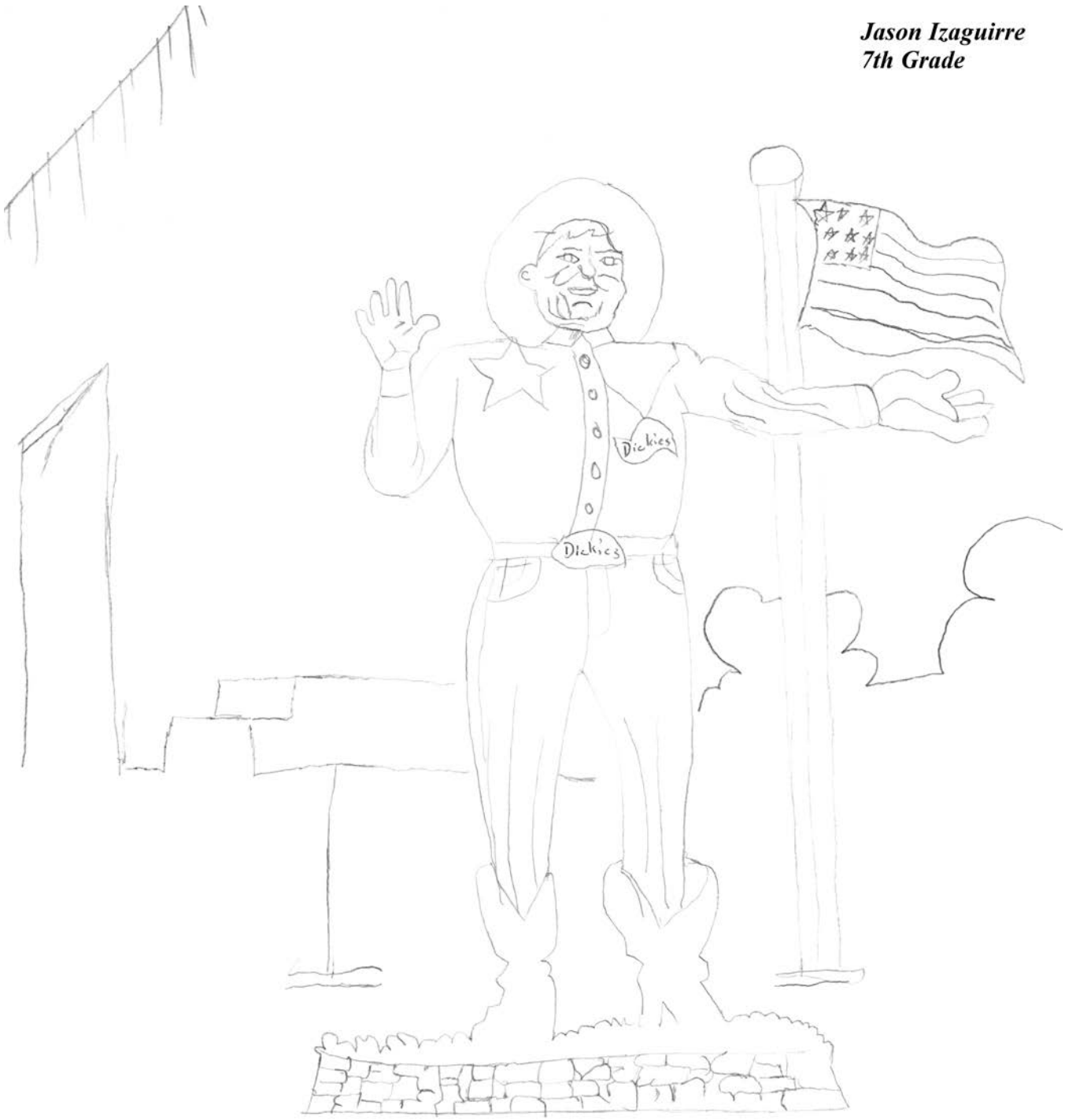
Jason Izaguirre
7th Grade



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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 5. PHYSICIAN AND PHYSICIAN ASSISTANT SERVICES

1 TAC §354.1064, §354.1065

The Health and Human Service Commission (HHSC) adopts new §354.1064, concerning Anesthesiologist Assistant Conditions of Participation, and new §354.1065, concerning Anesthesiologist Assistant Benefits and Limitations, with changes to the proposed text as published in the May 2, 2014, issue of the *Texas Register* (39 TexReg 3521). The text of the rules will be republished.

Background and Justification

The new rules allow anesthesiologist assistants to become a provider in the Texas Medicaid Program and receive reimbursement under the Texas Medicaid Program for services provided, in accordance with the conditions, requirements, and limitations described in the state plan amendment approved by the Centers for Medicare and Medicaid Services (CMS) on August 19, 2013. The state plan amendment added services provided by anesthesiologist assistants to the fee schedule and had an effective date of June 1, 2013.

Comments

The 30-day comment period ended June 1, 2014. During this period, HHSC received comments regarding the new rules from Anesthesiologists for Children, the Texas Academy of Anesthesiologist Assistants, the Texas Association of Nurse Anesthetists, and the Texas Society of Anesthesiologists. A summary of comments relating to the rules and HHSC's responses follows.

Section 354.1064, Anesthesiologist Assistant Conditions of Participation

Comment: A commenter noted that, while it did not object to the inclusion of educational requirements in §354.1064(1), the certification requirement included in §354.1064(2) could stand on its own without the inclusion of §354.1064(1).

Response: HHSC acknowledges that the National Commission for Certification of Anesthesiologist Assistants requires anesthesiologist assistants to complete the educational requirements included in §354.1064(1) prior to becoming certified. However, HHSC declines to amend the rule at this time.

Comment: A commenter requested that the educational requirements included in §354.1064(1) be amended to include a reference to the Committee on Allied Health Education and Accreditation (CAHEA), the predecessor agency to the Commission on Accreditation of Allied Health Education Programs (CAAHEP), as well as a reference to CAAHEP's successor agencies.

Response: HHSC concurs in part with this request and has amended §354.1064(1) to include a reference to CAAHEP's predecessor organization; however, HHSC declines to amend the rule to include a reference to a successor organization at this time.

Comment: A commenter requested that the certification requirement included in §354.1064(2) be amended to include a reference to successor agencies.

Response: HHSC declines to amend §354.1064(2) to include a reference to the successor organization of the National Commission for Certification of Anesthesiologist Assistants at this time.

Comment: A commenter requested that the requirements included in §354.1064 be amended to add a new section requiring anesthesiologist assistants to complete Continued Demonstration of Qualifications (CDQ) and continuing education activities, as required to maintain certification by the National Commission for Certification of Anesthesiologist Assistants.

Response: Because the National Commission for Certification of Anesthesiologist Assistants requires anesthesiologist assistants to complete Continued Demonstration of Qualifications (CDQ) and continuing education activities to maintain certification, the additional requirements proposed by the commenter are incorporated in the certification requirement included §354.1064(2). HHSC declines to amend the rule at this time.

Section 354.1065, Anesthesiologist Assistant Benefits and Limitations

Comment: A commenter questioned the use of the phrase "direct or personal supervision" in §354.1065(a)(1), stating that there are no definitions in Texas regulation regarding what constitutes "direct or personal supervision."

Response: HHSC disagrees with this comment. "Direct supervision" and "personal supervision" are defined in §354.1060 for use in this division. "Direct supervision" means the supervising physician "must be in the same office, building, or facility when and where the service is provided and must be immediately available to furnish assistance and direction." "Personal supervision" means the supervising physician "must be physically present in the room when and where the service is being provided." HHSC did not change the rule in response to this comment.

Comment: Multiple commenters requested that §354.1065(a)(2) be revised, as anesthesiologist assistants have no statutorily defined scope of practice.

Response: HHSC concurs with this request and has amended §354.1065(a)(2) to remove the phrase "scope of practice for an anesthesiologist assistant."

Comment: Multiple commenters requested that HHSC clarify §354.1065(a)(3) to indicate that anesthesiologist assistants provide services under the general delegation authority described in the Medical Practice Act, as the Texas Medical Board has no rules which directly regulate anesthesiologist assistants.

Response: HHSC concurs with this request and has amended §354.1065(a)(3) to include a reference to the rules "for physician delegation and supervision" promulgated by the Texas Medical Board.

Comment: A commenter requested that all references to "physician anesthesiologists" be replaced with "anesthesiologist," as the commenter noted that the term "physician anesthesiologists" is redundant and possibly confusing because all anesthesiologists are physicians.

Response: HHSC concurs with this request and has amended §354.1065(a)(1) and §354.1065(a)(3) to remove references to "physician anesthesiologist."

Comment: Multiple commenters requested clarification of §354.1065(c), regarding the billing methodology for anesthesiologist assistants. The commenters were concerned that, as written, §354.1065(c) only allowed reimbursement to the anesthesiologist assistant directly.

Response: While HHSC believes that the use of "may" in §354.1065(c) allows for reimbursement to either the anesthesiologist assistant or to another provider, such as hospitals or physicians, that the anesthesiologist assistant has an employment or contractual relationship, the rule has been amended to explicitly state that reimbursement may be allowed to either provider.

Comment: A commenter objected to HHSC's reliance upon the state plan amendment as a justification for the adoption of the proposed rule, noting that the submission of the state plan amendment is not a process that is subject to public comment.

Response: HHSC disagrees with this comment. A public notice of intent to submit an amendment to the state plan, adding Anesthesiologist Assistants to the fee schedule, was published in the April 24, 2013, issue of the *Texas Register* (38 TexReg 3382). HHSC also held a public hearing to receive comments regarding the proposed Medicaid rates for Anesthesiologist Assistants on May 15, 2013.

Comment: A commenter questioned why HHSC adopted different criteria from those adopted by CMS for determining whether AAs are qualified providers.

Response: The Medicare Claims Processing Manual (Pub. 100-04) defines an anesthesiologist assistant as "a person who is permitted by State law to administer anesthesia; and who has successfully completed a six-year program for AAs of which two years consist of specialized academic and clinical training in anesthesia." HHSC reviewed the Medicare Claims Processing Manual when developing this rule and did incorporate the educational requirements, along with the additional certification requirement. HHSC also determined that the phrase "permitted by State law to administer anesthesia" required further clarification, which is provided in §354.1065(a).

Comment: A commenter noted that the administration of anesthesia often requires the administration of controlled substances, and that the Texas Controlled Substances Act provides that controlled substances may only be administered by a "practitioner or an agent of the practitioner in the presence of the practitioner." The commenter stated that because an anesthesiologist assistant is not defined as a "practitioner" in the act, an anesthesiologist assistant is an "agent" of a practitioner and may only administer in the presence of a practitioner such as a physician.

Response: HHSC did not change the rules in response to this comment. HHSC acknowledges that the Texas Controlled Substances Act provides that controlled substances may only be administered by a practitioner or an agent of the practitioner in the presence of the practitioner. However, HHSC defers to the agency that implements rules relating to the Texas Controlled Substances Act, the Department of Public Safety, on whether an anesthesiologist assistant is a "practitioner" or an "agent" under the Act. Under §354.1064, the anesthesiologist assistant must comply with all applicable federal and state law and policy governing the service provided.

Comment: A commenter objected to the inclusion of anesthesiologist assistants as Medicaid providers because anesthesiologists are not licensed by the state of Texas.

Response: HHSC did not change the rules in response to this comment. HHSC acknowledges that anesthesiologist assistants are not licensed by the state of Texas. However, anesthesiologist assistants are permitted to practice in Texas under the general delegated authority rules of the Texas Medical Board. HHSC sought guidance from CMS related to enrolling anesthesiologist assistants as Medicaid providers in Texas. Although Medicaid limits non-physician practitioners to those professionals as defined by state law, CMS clarified that Medicaid providers do not have to be licensed in order to participate in the Medicaid program, but can be covered and reimbursed under the physician benefit as described in the Social Security Act §1905(a)(5). CMS approved a state plan amendment adding anesthesiologist assistants to the fee schedule as a Medicaid provider with an effective date of June 1, 2013.

Comment: A commenter requested that the rules authorizing anesthesiologist assistants as Medicaid providers be withdrawn.

Response: HHSC declines to withdraw the rules. CMS approved a state plan amendment adding anesthesiologist assistants to the fee schedule with an effective date of June 1, 2013. HHSC provided public notice for the rate change and state plan amendment in accordance with state law. HHSC implemented the state plan amendment under existing rules regarding the payment of physicians' services and adjusted physician reimbursement accordingly. The adopted rules incorporate the conditions, requirements, and limitations described in the approved state plan amendment and will allow anesthesiologist assistants to enroll in the Texas Medicaid Program as Medicaid providers.

Statutory Authority

The new rules are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021(a),

which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

§354.1064. Anesthesiologist Assistant Conditions of Participation.

To be a provider of Medicaid covered services, an anesthesiologist assistant must:

(1) be a graduate of a medical school-based anesthesiologist assistant educational program that:

(A) is accredited by the Commission on Accreditation of Allied Health Education Programs (CAAHEP) or CAAHEP's predecessor organization, the Committee on Allied Health Education and Accreditation (CAHEA); and

(B) includes approximately two years of specialized basic science and clinical education in anesthesia at a level that builds on a premedical undergraduate science background;

(2) be certified by the National Commission for Certification of Anesthesiologist Assistants (NCCAA);

(3) comply with all applicable federal and state law and policy governing the service provided;

(4) be enrolled and approved for participation in the Texas Medicaid Program;

(5) sign a written provider agreement with the Health and Human Services Commission or its designee (HHSC);

(6) comply with the terms of the provider agreement and all requirements of the Texas Medicaid Program, including federal and state rules, manuals, standards, and guidelines published by HHSC; and

(7) bill for services covered by the Texas Medicaid Program in the manner and format prescribed by HHSC.

§354.1065. Anesthesiologist Assistant Benefits and Limitations.

(a) Subject to the specifications, conditions, requirements, and limitations established by the Health and Human Services Commission or its designee (HHSC), services performed by an anesthesiologist assistant are considered for reimbursement if the services:

(1) are performed under the personal or direct supervision of a licensed anesthesiologist in accordance with state law;

(2) are consistent with rules for physician delegation and supervision promulgated by the Texas Medical Board; and

(3) would be covered by the Texas Medicaid Program if provided by a licensed anesthesiologist.

(b) Services must be reasonable and medically necessary as determined by HHSC to be considered for reimbursement.

(c) Covered services provided by an anesthesiologist assistant may be billed under the anesthesiologist assistant's Texas Medicaid Program provider number. Reimbursement for covered services provided by an anesthesiologist assistant may be made to the anesthesiologist assistant actually performing the services or, provided that federal requirements related to reassignment of claims are met, to a hospital, physician, group practice, or other provider with which the anesthesiologist assistant has an employment or contractual relationship.

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

Filed with the Office of the Secretary of State on July 7, 2014.

TRD-201403102

Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Effective date: July 27, 2014
Proposal publication date: May 2, 2014
For further information, please call: (512) 424-6900

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER EE. COMMISSIONER'S RULES ON REPORTING CHILD ABUSE AND NEGLECT

19 TAC §61.1051

The Texas Education Agency (TEA) adopts an amendment to §61.1051, concerning school district reporting. The amendment is adopted with changes to the proposed text as published in the April 25, 2014, issue of the *Texas Register* (39 TexReg 3357). The section establishes requirements for local school district policies for reporting child abuse and neglect. The adopted amendment incorporates new statutory requirements made by Senate Bill 939, 83rd Texas Legislature, Regular Session, 2013.

The commissioner of education adopted 19 TAC §61.1051, Reporting Child Abuse and Neglect, effective December 5, 1999, to develop a policy governing the child abuse reports required of school districts and their employees by the Texas Family Code, Chapter 261.

The existing 19 TAC §61.1051 requires the board of trustees of a school district to establish and annually review policies requiring reporting by employees, agents, and contractors of child abuse or neglect. The rule enumerates categories of information relating to child abuse reporting that must be included in school district policies for the purpose of providing notification to school personnel of elements of the law related to reporting child abuse and neglect. The rule also requires distribution of the policies to all school personnel and the inclusion of the policies in staff development programs at regular intervals.

The adopted amendment to 19 TAC §61.1051 requires districts and open-enrollment charter schools to provide child maltreatment and sexual abuse training as required by the Texas Education Code (TEC), §38.0041, to all currently employed district and open-enrollment charter school staff in the 2014-2015 school year. The adopted amendment also requires that for each subsequent year, as a part of new employee orientation, district and open-enrollment charter schools must provide training as required by the TEC, §38.0041, to all new school district and open-enrollment charter school employees.

In addition, the adopted amendment modifies the rule to comply with the TEC, §38.0042, requiring districts and open-enrollment charter schools to post, in English and in Spanish, the Texas Department of Family and Protective Services (DFPS) toll-free abuse hotline telephone number. The adopted amendment also requires the posting to include instructions to call 911 and directions for accessing the DFPS website for more information and addresses the size and location of the sign.

The adopted amendment also includes technical edits updating references to the DFPS.

In response to public comment, the following changes were made at adoption.

Subsection (c) was modified to extend the training period through the 2014-2015 school year to provide districts more time to complete the training and prioritizes training for kindergarten-Grade 5 staff. Specifically, kindergarten-Grade 5 teachers, campus principals, and bus drivers must complete the training on or by September 30, 2014; all remaining teachers, campus principals, and bus drivers must complete the training on or by December 31, 2014; and all remaining school staff must complete the training on or by May 31, 2015. Additionally, bus drivers were added as a priority group for the first two cohorts of trainings.

Subsection (f) was modified to add language that the Texas DFPS abuse hotline telephone number should be in bold print. Additionally, language was added to clarify the requirement that the sign be posted at eye-level to the student in a high-traffic area.

The adopted rule action has no procedural or reporting implications for data collection from districts to the TEA.

The adopted rule action has locally maintained paperwork requirements. In accordance with the TEC, §38.0041(d), school districts and open-enrollment charters are required to maintain records to document that staff members have completed the training requirement.

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

The public comment period on the proposal began April 25, 2014, and ended May 27, 2014. Following is a summary of the public comments received and corresponding agency responses regarding the proposed amendment to 19 TAC Chapter 61, School Districts, Subchapter EE, Commissioner's Rules on Reporting Child Abuse and Neglect, §61.1051, Reporting Child Abuse and Neglect.

Comment: Children's Advocacy Centers of Texas (CACTX) commented that the September 30, 2014, training deadline for all teachers and campus principals may not allow enough time for all schools to adequately train their teachers and principals with quality training. Additionally, CACTX commented that TEA should prioritize training within the training timeline to target elementary and middle school teachers and principals because of the vulnerability of younger children, the likely ages when abuse occurs, and the high number of reports that occur for students in this age range.

Agency Response: The agency agrees and recognizes the difficulty of a short training timeline. The rule was modified at adoption to require that training be completed by all staff within the 2014-2015 school year. Specifically, §61.1051(c)(1), (2), and (3) were modified to specify the following training deadlines: "(1) September 30, 2014, for all kindergarten-Grade 5 teachers, campus principals, and bus drivers; (2) December 31, 2014, for all remaining teachers, campus principals, and bus drivers; and (3) May 31, 2015, for all remaining school staff."

Comment: The Texas Director of the Child Sexual Abuse Training Program for Darkness to Light, Inc., recommended that bus drivers be trained with the first cohort because of the important role bus drivers play in child abuse reporting. The commenter stated that bus drivers may observe aspects of the child's day and life that are not seen otherwise. The commenter also suggested that elementary school campuses and high schools be prioritized if TEA develops a tiered training schedule.

Agency Response: The agency agrees and has modified the rule at adoption to include bus drivers in the first cohort. Specifically, §61.1051(c)(1), (2), and (3) were modified to specify the following training deadlines: "(1) September 30, 2014, for all kindergarten-Grade 5 teachers, campus principals, and bus drivers; (2) December 31, 2014, for all remaining teachers, campus principals, and bus drivers; and (3) May 31, 2015, for all remaining school staff."

Comment: Five individuals commented that the toll-free Texas DFPS abuse hotline telephone number should be in bold and that the sign should be placed at students' eye level. In addition, one individual also commented that the sign should be posted in a high-traffic area for students.

Agency Response: The agency agrees and has modified §61.1051(f) to read as follows: "School districts and open-enrollment charter schools shall post the information specified in subsection (e) of this section at each school campus in at least one high-traffic, highly and clearly visible, public area that is readily accessible to and widely used by students. The information must be on a poster (11x17 inches or larger) in large print and placed at eye-level to the student for easy viewing. Additionally, the current toll-free Texas Department of Family and Protective Services Abuse Hotline telephone number should be in bold print."

Comment: The Texas Association of School Boards stated that it supports the proposed changes and asked if TEA planned to post a list of approved sources for required training.

Agency Response: The agency provides the following clarification. TEA staff is working to identify training that meets the statutory requirements as well as other training and resource materials that will be provided on the TEA website.

The amendment is adopted under the Texas Education Code (TEC), §38.004, which authorizes the agency to adopt a policy governing the child abuse reports required by the Texas Family Code, Chapter 261; TEC, §38.0041, which authorizes the agency to adopt by rule a schedule for existing district and open-enrollment charter school employees to take training concerning prevention techniques for and recognition of sexual abuse and all other maltreatment of children; and TEC, §38.0042, which authorizes the commissioner to adopt rules relating to the size and location of the required posting of the child abuse hotline telephone number.

The amendment implements the TEC, §§38.004, 38.0041, and 38.0042.

§61.1051. Reporting Child Abuse and Neglect.

(a) The board of trustees of a school district or governing body of an open-enrollment charter school shall adopt and annually review policies for reporting child abuse and neglect. The policies shall follow the requirements outlined in the Family Code, Chapter 261.

(1) The policies must require that every school employee, agent, or contractor who suspects child abuse or neglect submit a written or oral report to at least one of the following authorities within 48 hours or less, as determined by the board of trustees, after learning of facts giving rise to the suspicion:

(A) a local or state law enforcement agency;

(B) the Texas Department of Family and Protective Services, Child Protective Services Division;

(C) a local office of Child Protective Services, where available; or

(D) the state agency that operates, licenses, certifies, or registers the facility in which the alleged child abuse or neglect occurred.

(2) The policies must notify school personnel of the following:

(A) penalties under the Penal Code, §39.06, Family Code, §261.109, and Chapter 249 of this title (relating to Disciplinary Proceedings, Sanctions, and Contested Cases) for failure to submit a required report of child abuse or neglect;

(B) applicable prohibitions against interference with an investigation of a report of child abuse or neglect, including the following:

(i) Family Code, §261.302 and §261.303, prohibiting school officials from denying an investigator's request to interview a student at school; and

(ii) Family Code, §261.302, prohibiting school officials from requiring the presence of a parent or school administrator during an interview by an investigator;

(C) immunity provisions applicable to a person who reports child abuse or neglect or otherwise assists an investigation in good faith;

(D) confidentiality provisions relating to reports of suspected child abuse or neglect;

(E) any disciplinary action that may result from noncompliance with the district's reporting policy; and

(F) the prohibition under the Texas Education Code (TEC), §26.0091, against using or threatening to use the refusal to consent to administration of a psychotropic drug to a child or to any other psychiatric or psychological testing or treatment of a child as the sole basis for making a report of neglect, except as authorized by the TEC, §26.0091.

(3) The policies must be consistent with the Family Code, Chapter 261, and 40 TAC Chapter 700 (relating to Child Protective Services) regarding investigations by the Texas Department of Family and Protective Services, including regulations governing investigation of abuse by school personnel and volunteers.

(4) The policies may not require that school personnel report suspicions of child abuse or neglect to a school administrator prior to making a report to one of the agencies identified in subsection (a)(1) of this section.

(5) The policies must include the current toll-free telephone number of the Texas Department of Family and Protective Services.

(b) The policies required by this section and adopted by the board of trustees shall be distributed to all school personnel at the beginning of each school year. The policies shall be addressed in staff development programs at regular intervals determined by the board of trustees.

(c) For the 2014-2015 school year, school districts and open-enrollment charter schools shall provide training as required by the TEC, §38.0041, to all currently employed school district and open-enrollment charter school employees on or by the following dates:

(1) September 30, 2014, for all kindergarten-Grade 5 teachers, campus principals, and bus drivers;

(2) December 31, 2014, for all remaining teachers, campus principals, and bus drivers; and

(3) May 31, 2015, for all remaining school staff.

(d) Each subsequent school year, as a part of new employee orientation, school districts and open-enrollment charter schools shall provide training as required by the TEC, §38.0041, to all new school district and open-enrollment charter school employees.

(e) Using a format and language that is clear, simple, and understandable to students, each public school and open-enrollment charter school shall post, in English and in Spanish:

(1) the current toll-free Texas Department of Family and Protective Services Abuse Hotline telephone number;

(2) instructions to call 911 for emergencies; and

(3) directions for accessing the Texas Department of Family and Protective Services website (www.txabusehotline.org) for more information on reporting abuse, neglect, and exploitation.

(f) School districts and open-enrollment charter schools shall post the information specified in subsection (e) of this section at each school campus in at least one high-traffic, highly and clearly visible public area that is readily accessible to and widely used by students. The information must be on a poster (11x17 inches or larger) in large print and placed at eye-level to the student for easy viewing. Additionally, the current toll-free Texas Department of Family and Protective Services Abuse Hotline telephone number should be in bold print.

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

Filed with the Office of the Secretary of State on July 2, 2014.

TRD-201403072
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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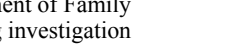
For further information, please call: (512) 475-1497



CHAPTER 75. CURRICULUM
SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING DRIVER EDUCATION STANDARDS OF OPERATION FOR PUBLIC SCHOOLS, EDUCATION SERVICE CENTERS, AND COLLEGES OR UNIVERSITIES

19 TAC §75.1005

The Texas Education Agency (TEA) adopts an amendment to §75.1005, concerning driver education. The amendment is adopted without changes to the proposed text as published in the May 9, 2014, issue of the *Texas Register* (39 TexReg 3660) and will not be republished. The section establishes course requirements for a driver education course for minors and adults conducted by public schools, education service centers, and colleges or universities. The adopted amendment adds the requirement for water safety education and increases the number of hours of behind-the-wheel instruction from 20 to 30.

House Bill (HB) 673, 82nd Texas Legislature, Regular Session, 2011, required the Texas Parks and Wildlife Department to create a driver training video for water safety education. HB 673 also required that the training video be incorporated into a driver training curriculum module for driver education instruction. Additionally, HB 3483, 83rd Texas Legislature, Regular Session, 2013, increased the required number of hours of behind-the-wheel instruction from 20 to 30.

The adopted amendment to 19 TAC §75.1005, Course Requirements, adds recreational water safety as an instructional objective that must be provided to every student enrolled in a minor and adult driver education course and included in Module Eleven: Consumer Responsibilities. The adopted amendment also increases the number of hours required from 20 to 30 for behind-the-wheel instruction in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2).

In a separate adoption, the TEA adopts an amendment to 19 TAC §176.1007, Courses of Instruction, making corresponding changes to the driver education course for minors and adults found in 19 TAC Chapter 176, Driver Training Schools, Subchapter AA, Commissioner's Rules on Minimum Standards for Operation of Licensed Texas Driver Education Schools.

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

The adopted rule action has no procedural or reporting implications. The adopted rule action has no locally maintained paperwork requirements.

The public comment period on the proposal began May 9, 2014, and ended June 9, 2014. No public comments were received.

The amendment is adopted under the Texas Education Code (TEC), §29.9021, which authorizes the agency to incorporate by rule a curriculum module on recreational water safety into driver education instruction, and the TEC, §1001.101, which authorizes the commissioner to establish or approve by rule the curriculum to be used in a driver education course for minors and adults, which must include the requirement that students complete specified hours of behind-the-wheel instruction.

The amendment implements the TEC, §29.9021 and §1001.101.

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

Filed with the Office of the Secretary of State on July 2, 2014.

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Cristina De La Fuente-Valadez
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Effective date: July 22, 2014
Proposal publication date: May 9, 2014
For further information, please call: (512) 475-1497

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CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

19 TAC §97.1005

The Texas Education Agency (TEA) adopts an amendment to §97.1005, concerning accountability and performance monitoring. The amendment is adopted without changes to the proposed text as published in the May 2, 2014, issue of the *Texas Register* (39 TexReg 3540) and will not be republished. The section describes the purpose of the Performance-Based Monitoring Analysis System (PBMAS) and manner in which school districts and charter school performance is reported. The section also adopts the most recently published PBMAS Manual. The amendment adopts the PBMAS 2014 Manual. Earlier versions of the manual will remain in effect with respect to the school years for which they were developed.

House Bill (HB) 3459, 78th Texas Legislature, 2003, added the Texas Education Code (TEC), §7.027, limiting and redirecting monitoring done by the TEA to that required to ensure school district and charter school compliance with federal law and regulations; financial accountability, including compliance with grant requirements; and data integrity for purposes of the Public Education Information Management System (PEIMS) and accountability under TEC, Chapter 39. Legislation passed in 2005 renumbered TEC, §7.027, to TEC, §7.028. To meet this monitoring requirement, the agency developed the PBMAS, which is used in conjunction with other evaluation systems, to monitor performance and program effectiveness of special programs in school districts and charter schools.

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

The amendment to 19 TAC §97.1005 updates the current rule by adopting the PBMAS 2014 Manual, which describes the specific criteria and calculations that will be used to assign 2014 PBMAS performance levels.

The 2014 PBMAS includes several key changes from the 2013 system. The State of Texas Assessments of Academic Readiness (STAAR®) end-of-course (EOC) subject-area indicators have been modified to reflect the provisions of HB 5, 83rd Texas Legislature, Regular Session, 2013. New standards and/or cut-points were adopted for several 2014 PBMAS indicators, including the STAAR® Grades 3-8 social studies indicators, the annual dropout rate indicators, the Texas English Language Proficiency Assessment System (TELPAS) composite rating indicator, and the Career and Technical Education (CTE) male nontraditional course completion indicator. Performance levels will be assigned for the first time on four indicators in the special education program area: Regular Class ≥80% Rate (Ages 6-11), Regular Class <40% Rate (Ages 6-11), Regular Class ≥80% Rate (Ages 12-21), and Regular Class <40% Rate (Ages 12-21). A new performance level structure was adopted for the STAAR® Alternate Participation Rate.

Two indicators were deleted: the Placements in Instructional Settings 40/41 Rate (Ages 6-11) and the Placements in Instructional Settings 40/41 Rate (Ages 12-21). In addition, one indicator was adopted for Report Only: the Special Education Regular Early Childhood Program Rate (Ages 3-5). Changes to the PBMAS indicators for 2014 are marked in the manual as *"New!"* for easy reference.

The adopted amendment also modifies subsection (d) to specify that the PBMAS Manual adopted for prior school years will remain in effect with respect to those school years.

The adopted amendment establishes in rule the PBMAS procedures for assigning the 2014 PBMAS performance levels. Applicable procedures will be adopted each year as annual versions of the PBMAS Manual are published.

The adopted amendment has no locally maintained paperwork requirements.

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

The public comment period on the proposal began May 2, 2014, and ended June 2, 2014. Following is a summary of the public comments received and corresponding agency responses regarding the proposed amendment to 19 TAC Chapter 97, Planning and Accountability, Subchapter AA, Accountability and Performance Monitoring, §97.1005, Performance-Based Monitoring Analysis System.

Comment: The Texas Council of Administrators of Special Education (TCASE) and 11 district special education administrators recommended that the 3 separate special education systems (State Performance Plan (SPP), the PBMAS, and the Residential Facilities (RF) Monitoring and Tracker System) be combined into a single, integrated, non-duplicative monitoring system with a single reporting schedule such that an area is only addressed once.

TCASE and five district special education administrators recommended aligning and integrating the special education monitoring systems with the state accountability system, the self-assessment process introduced by HB 5, 83rd Texas Legislature, Regular Session, 2013, and the community engagement report card.

Agency Response: These comments are outside the scope of the proposed rulemaking. The agency notes that Senate Bill 1, General Appropriations Act, Rider 70, 83rd Texas Legislature, Regular Session, 2013, requires the agency to issue a legislative report no later than January 12, 2015, regarding the agency's efforts to ensure all accountability, monitoring, and compliance systems related to special education are non-duplicative and unified and focus on positive results for students. As required by Rider 70, the report will include recommendations from stakeholders, whether those recommendations were adopted, and the reasons any recommendations were rejected.

Comment: TCASE and five district special education administrators recommended adding PEIMS specific codes for students the state identifies as RF students.

Agency Response: The comment is outside the scope of the proposed rulemaking.

Comment: TCASE and three district special education directors recommended developing systems to increase transparency for greater understanding by all stakeholders (families and districts), with user-friendly communication tools, templates, and a single website.

Agency Response: The comment is outside the scope of the proposed rulemaking.

Comment: TCASE and nine district special education administrators commented that data reported should be no more than one year old if used to determine districts' monitoring status, staging status, or required improvement activities.

Agency Response: The comment on staging statuses and required improvement activities is outside the scope of the proposed rulemaking.

To the extent the comment is suggesting there are more current data the PBMAS could use in assigning annual performance levels, the agency disagrees. Each year's PBMAS uses the most current data available.

Comment: TCASE and four district special education administrators recommended that, for the collection of graduation data for 2013-2014 and beyond, the PBMAS should be modified to align with changing graduation requirements resulting from HB 5 (foundation high school program and distinguished achievement high school program).

Agency Response: The agency agrees in part and disagrees in part. The agency agrees that the PBMAS will continue to evolve based on changes to assessments and/or student graduation requirements. The agency disagrees, however, that it would be appropriate to modify any of the PBMAS graduation indicators beginning in 2013-2014 since it would be prior to the first class graduating under the new HB 5 requirements.

Comment: TCASE and seven special education administrators recommended using a consistent data analysis formula in PBMAS and SPP if an indicator is reported in both systems.

Agency Response: The comment on the SPP is outside the scope of the proposed rulemaking. The agency has determined that the data analysis formulas used in the PBMAS are appropriately aligned with state and federal requirements and priorities.

Comment: TCASE and three special education administrators recommended eliminating Indicator #7 in favor of Indicator #8 while assuring Indicator #8 is collected similarly to its corresponding SPP indicator.

Agency Response: The comment on the SPP is outside the scope of the proposed rulemaking. In the absence of a non-Report Only indicator to take its place, the agency disagrees with the recommendation to eliminate Indicator #7 in the 2014 PBMAS since it would eliminate any PBMAS monitoring of instructional settings 40 and 41 for students ages 3-5. The agency will consider this recommendation for the 2015 PBMAS and beyond, after a performance level structure has been developed for Indicator #8.

Comment: TCASE commented on the Texas Accountability Intervention System (TAIS) and its continued use.

Agency Response: The comment is outside the scope of the proposed rulemaking.

Comment: TCASE recommended the continued use of Required Improvement in PBMAS.

Agency Response: The agency agrees, and the use of Required Improvement is noted throughout the 2014 PBMAS Manual.

Comment: A special education administrator and a curriculum and instruction director provided comments on streamlining the current accountability process. The commenters indicated that small rural schools do not have the resources to employ staff to oversee the vast numbers of systems they are asked to address each year and that committees, made up of teachers and administrators, are required to spend valuable time away from educating children to meet for half days to full days to engage in the planning and discussion related to each area they are asked to address. The commenters stated this is an extremely time-consuming and costly process and that even though data are helpful and used for improvement, they are often required to provide duplicative data for the various accountability systems.

The commenters further stated that the many state and federal level reports are never deeply reviewed by campus level staff and that campuses never really understand what the target result should be or even how or why they missed. If the reviews happen primarily at the central office level, then the challenge is even greater. The commenters stated that there is value in the TAIS process, but it still commands too much of a finite amount of time.

Agency Response: The comments on streamlining the current accountability process and the TAIS are outside the scope of the proposed rulemaking. To the extent the comment suggests the PBMAS requires districts to provide duplicative data, the agency disagrees. The PBMAS does not require any unique or additional reporting beyond the standard reporting districts complete as part of their PEIMS submissions and the student assessment submissions they provide to the state's testing contractor.

Comment: A special education administrator commented on being placed in a Stage 3 level of intervention for RF Tracker due to continued non-compliance on SPP Indicator #11.

Agency Response: The comment is outside the scope of the proposed rulemaking.

Comment: A special education administrator recommended that there be consistent training for all TEA monitors as they provide technical assistance and monitoring supervision to districts and that it is very challenging when different TEA monitors are used over a period of years for the same indicator or issue, and the supervision or technical support is inconsistent.

Agency Response: The comment is outside the scope of the proposed rulemaking.

Comment: A special education administrator commented that the PBMAS does not appear to be guided by state or federal mandates and recommended the PBMAS be discontinued.

Agency Response: The agency disagrees. By continuing to implement the PBMAS annually, the agency ensures it meets a number of state requirements, including the state laws referenced in this rule adoption: Texas Education Code, §§7.028(a), 29.001(5), 29.010(a), 29.062, 39.051, 39.052, 39.054(b-1), 39.056-39.058, 39.102, and 39.104, as well as a number of federal laws and regulations, including the Americans with Disabilities Act of 1990 and the implementation of 28 Code of Federal Regulations (CFR), Part 35; Office of Special Education and Rehabilitative Services Regulations, Subpart F, Monitoring, Enforcement, Confidentiality, and Program Information, §300.149, SEA Responsibility for General Supervision, and §300.600, State Monitoring and Enforcement; Public Law 109-270, the Carl D. Perkins Career and Technical Education Improvement Act of 2006; 20 United States Code 2322, §112(a)(2)(B-D), Reviewing Local Plans, Monitoring and Evaluating Program Effectiveness, and Assuring Compliance with all applicable Federal Laws; Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs, March 21, 1979 (34 CFR, Part 100, Appendix B); Elementary and Secondary Education Act, Title I, Parts A and C, and Title III; Civil Rights Act of 1964, Title VI, and implementing regulations (34 CFR, Part 100); Education Amendments of 1972, Title IX, and the implementation of 34 CFR, Part 106; and Rehabilitation Act of 1973, §504, and implementing regulations (34 CFR, Part 104).

Comment: A special education administrator stated that the PBMAS process needs to be presented to districts sooner in the school year and with more time to allow districts to come up with a cohesive plan. The commenter also requested explanation of how TEA has arrived at the standards and cut-points for the PBMAS indicators.

Agency Response: The agency agrees that releasing PBMAS as soon as possible in the school year is important and as a result has typically released each year's PBMAS within the first month of school. To the extent the comment is related to the timeline for improvement planning, that process is outside the scope of the proposed rulemaking. The factors that are used to determine PBMAS standards and cut-points are delineated in Section II of the 2014 PBMAS Manual in the section entitled *Changes to PBMAS Standards and Cut-Points.*

Comment: A special education administrator commented that her district spends multiple hours over many weeks completing reports and corrective action plans. The commenter also stated that this process was required because the PBMAS indicator inappropriately assigned a performance level (PL) of 3 to the district for its rate of students taking the STAAR® Modified and having too few students graduating with the Recommended High School Program or Distinguished Achievement Program (RHSP/DAP) diplomas.

Agency Response: To the extent the comment concerns completing reports and required corrective action plans, those processes are outside the scope of the proposed rulemaking.

The agency disagrees that PL 3 assignments are inappropriately designated for the STAAR® Modified Participation Rate and the Special Education RHSP/DAP indicators in PBMAS. Districts assigned a PL 3 on the STAAR® Modified Participation Rate indicator reported 45% or more of their students with disabilities as tested students on the STAAR® Modified for all subjects. Given that, statewide, districts only reported 30% of their students with disabilities as tested on STAAR® Modified for all subjects and that the 2013-2014 school year is the last year the STAAR® Modified will be administered, the agency has determined that districts with STAAR® Modified participation rates far above the state rate are appropriately assigned a PL 3 in the PBMAS.

Districts assigned a PL 3 on the Special Education RHSP/DAP indicator in the PBMAS reported fewer than 3.5% of their special education graduates earning the RHSP/DAP diploma. Given that, statewide, districts reported more than 25% of their special education graduates earning the RHSP/DAP diploma and considering that rate has doubled in the last 10 years, the agency has determined that districts with RHSP/DAP diploma rates for students with disabilities that are more than seven times lower than the state rate are appropriately assigned a PL 3 in the PBMAS.

Comment: Disability Rights Texas (DRTX), joined by the Texas Council on Developmental Disabilities and the Arc of Texas, commented that the PBMAS has served as a key mechanism for TEA to fulfill its monitoring responsibilities in public education since its inception in 2004. They also commented on Indicator #16 in the special education (SPED) program area (SPED Representation) and stated that every school district and charter school is expected to identify no more than 8.5% of its enrollment as children with disabilities, and the larger the score the more scrutiny the school district or charter school is subject to by TEA.

The commenters further stated that they have witnessed an accelerating gap in the trend between school population and students with disabilities in Texas during the past decade and that the continuing fall in the proportion of students with disabilities appears inconsistent with Census Bureau and Centers for Disease Control and Prevention data, which do not suggest a drop in the incidence of physical, intellectual, and mental and emotional disabilities in the school-age population.

Finally, the commenters noted that Texas school districts and charter schools, regardless of their TEA score relative to the performance level for the SPED Representation indicator, have a duty to strictly adhere to the child find duty under the Individuals with Disabilities Education Act (IDEA) and that all children with disabilities who are in need of special education, regardless of the severity of their disability, must be identified, located, and evaluated.

Agency Response: The agency agrees that the PBMAS serves as a key mechanism for TEA to fulfill its monitoring responsibilities in public education, but it disagrees that every school district and charter school is expected to identify no more than 8.5% of its enrollment as students with disabilities. As a value that has been either at, or very near, the state rate since 2010-2011, 8.5% continues to serve as an appropriate starting point for the range of PL assignments used in the SPED Representation indicator, but the PL assignment process also recognizes the range of rates that exist on this indicator across a diverse set of Texas districts.

The comment on Census Bureau and Centers for Disease Control and Prevention data is outside the scope of the current rule proposal.

The agency notes, however, that in Texas the predominant disability category reported for students with disabilities is learning disability, which has historically accounted for nearly half of all students with disabilities. It is this category, rather than physical, intellectual, and emotional disability, that has accounted for the most significant decrease in the numbers reported in the PBMAS SPED Representation indicator. Specifically, the number of students reported with a learning disability decreased from 255,522 based on 2002-2003 reporting data to 163,662 based on 2013-2014 reporting data.

The agency further notes that this 10-year decrease in students identified as having learning disabilities corresponds with a period of time in which the state of Texas implemented a comprehensive and sustained set of strategies designed to increase the learning and achievement of all students, with a particular focus on those students who struggle to master basic skills in reading and mathematics. These strategies included providing research-based, high-quality professional development to teachers; implementing effective programs to promote reading proficiency by Grade 3; developing quality screening tools and early assessments to identify and monitor students' learning challenges as early as possible; and an emphasis on Response to Intervention (RTI), Positive Behavior Interventions and Support (PBIS), as well as other effective strategies for intensive and specialized instruction to address the needs of all students.

The agency agrees that all Texas school districts and charter schools are required to adhere to the requirements of applicable state and federal laws, including the IDEA.

Comment: The Texas Charter Schools Association (TCSA) commented that the proposed passing standards in the 2014 PBMAS Manual are higher than the system safeguards in the state's current academic accountability system and do not recognize that the state of Texas remains in a transition period for the new STAAR® assessment. TCSA also commented that, while the state's academic accountability system has been designed to phase in student performance on the STAAR® assessment, the proposed PBMAS standards do not.

TCSA further commented that the PL 0 of 8.5% for Indicator #16 (SPED Representation) fails to recognize the growing percentage of students in the state of Texas who have bona fide needs for special education services and does not make allowances for schools that might enroll a higher percentage of SPED students for legitimate reasons. TCSA stated that a distinction should be drawn between SPED representation and SPED identification because a student's current charter school is held accountable for his or her SPED representation even though the student could have been identified for SPED services by the student's prior school system.

Finally, TCSA commented that continued poor performance on PBMAS can negatively impact a charter school's (or a school district's) accreditation status.

Agency Response: The comment on the state accountability system is outside the scope of the proposed rulemaking. The agency disagrees that the PBMAS standards are too high, do not recognize that the state of Texas remains in a transition period for the new STAAR® assessment, and do not include a phase-in of student performance standards on the STAAR® assessment.

A critical distinction to note is that, contrary to the comment submitted, a single-standard, pass/fail system cannot be compared to a multi-level performance level system such as PBMAS. Unlike a single standard approach, the PBMAS' wide range of performance level cut-points allows for significant variation from the performance level starting point while a single-standard, pass/fail system does not.

Because of this fundamental difference between a single-standard system and a range of performance level assignments in PBMAS, the agency disagrees that the values associated with assigning PBMAS performance levels for the STAAR® student assessment indicators are too high. For example, in the 2014 PBMAS, the starting point PL 0 designation for the STAAR® 3-8 mathematics, reading, and writing passing rate indicators is 70%, while the lowest designation (PL 3) is more than 20 percentage points below the PL 0 designation, or a STAAR® 3-8 passing rate of less than 50%. For the STAAR® 3-8 science and social studies passing rate indicators the PL 0 designation is 65%, while the lowest designation (PL 3) is more than 20 percentage points lower, or a STAAR® 3-8 passing rate of less than 45%. In the 2014 PBMAS, the starting point PL 0 designation for the STAAR® end-of-course (EOC) mathematics and science passing rate indicators is 50%, while the lowest designation (PL

3) is more than 20 percentage points lower, or a STAAR® EOC passing rate of less than 30%.

The agency further disagrees that the PBMAS does not recognize that the state of Texas remains in a transition period for the new STAAR® assessment or include a phase-in of student performance standards on the STAAR® assessment. In addition to the 2014 PBMAS aligning with the commissioner of education's decision to maintain the Phase-In 1 STAAR® performance standards for the 2013-2014 school year, all districts will receive a PL of Report Only for all 2014 PBMAS STAAR® EOC social studies (U.S. History) and English Language Arts (English I and English II) passing rate indicators. Additionally, the agency has determined that both the state- and district-level performance level data from the PBMAS, which are publicly available on the agency's website, indicate the PBMAS PL assignments are appropriate and in line with the system's guiding principles as well as state and federal priorities related to improving student performance and program effectiveness.

Regarding SPED Representation Indicator #16, the agency cannot respond to the suggestion that there is a "growing percentage of students in the State of Texas who have bona fide needs for special education services," since current data show consistent decreases in special education representation over the last 10 years. The agency disagrees that the PL 0 rate of 8.5% fails to make allowances for schools that might enroll a higher percentage of SPED students or that a distinction should be drawn in the indicator between SPED representation and SPED identification. As a value that has been either at, or very near, the state rate since 2010-2011, 8.5% continues to serve as an appropriate starting point for the range of PL assignments used in the SPED Representation indicator, but the PL assignment process also recognizes the range of rates that exist on this indicator across a diverse set of Texas districts. Additionally, the PBMAS special education representation indicator is appropriately aligned with the IDEA authorizing statute and with the requirements that apply to all districts serving students in special education programs, irrespective of district type or mission. The agency continues to maintain that the PBMAS includes components, such as varied PL assignments, that recognize and effectively accommodate the diversity of the state's districts, including charter schools. To the extent there may be other considerations specific to a particular charter school or district that cannot be captured in a large-scale, standardized data analysis system such as the PBMAS, those are more appropriately addressed in systems and processes that are outside the scope of the proposed rulemaking, including interventions determinations.

The comment on accreditation statuses is outside the scope of the proposed rulemaking.

The amendment is adopted under the Texas Education Code (TEC), §7.028(a), which authorizes the agency to monitor as necessary to ensure school district and charter school compliance with state and federal law and regulations; TEC, §29.001(5), which authorizes the agency to effectively monitor all local educational agencies (LEAs) to ensure that rules relating to the delivery of services to children with disabilities are applied in a consistent and uniform manner, to ensure that LEAs are complying with those rules, and to ensure that specific reports filed by LEAs are accurate and complete; TEC, §29.010(a), which authorizes the agency to adopt and implement a comprehensive system for monitoring LEA compliance with federal and state laws relating to special education, including ongoing analysis of LEA special education data; TEC, §29.062, which authorizes the agency to monitor the effectiveness of LEA programs concerning students with limited English proficiency; TEC, §39.051 and §39.052, which authorize the commissioner to determine criteria for accreditation statuses and to determine the accreditation status of each school district and open-enrollment charter school; TEC, §39.054(b-1), which authorizes the agency to consider the effectiveness of district programs for special populations, including career and technical education programs, when determining accreditation statuses; TEC, §§39.056-39.058, which authorize the commissioner to adopt procedures relating to on-site and special accreditation investigations; and TEC, §39.102 and §39.104, which authorize the commissioner to implement procedures to impose interventions and sanctions for districts and open-enrollment charter schools.

The amendment implements the TEC, §§7.028(a), 29.001(5), 29.010(a), 29.062, 39.051, 39.052, 39.054(b-1), 39.056-39.058, 39.102, and 39.104.

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

Filed with the Office of the Secretary of State on July 3, 2014.

TRD-201403098
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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Proposal publication date: May 2, 2014
For further information, please call: (512) 475-1497

CHAPTER 176. DRIVER TRAINING SCHOOLS
SUBCHAPTER AA. COMMISSIONER'S RULES ON MINIMUM STANDARDS FOR OPERATION OF LICENSED TEXAS DRIVER EDUCATION SCHOOLS

19 TAC §176.1007

The Texas Education Agency (TEA) adopts an amendment to §176.1007, concerning driver training schools. The amendment is adopted without changes to the proposed text as published in the May 9, 2014, issue of the *Texas Register* (39 TexReg 3661) and will not be republished. The section establishes requirements for courses of instruction conducted by licensed Texas driver education schools, including a driver education course for minors and adults. The adopted amendment adds the requirement for water safety education and increases the number of hours of behind-the-wheel instruction from 20 to 30.

House Bill (HB) 673, 82nd Texas Legislature, Regular Session, 2011, required the Texas Parks and Wildlife Department to create a driver training video for water safety education. HB 673 also required that the training video be incorporated into a driver training curriculum module for driver education instruction. Additionally, HB 3483, 83rd Texas Legislature, Regular Session, 2013, increased the required number of hours of behind-the-wheel instruction from 20 to 30.

The adopted amendment to 19 TAC §176.1007, Courses of Instruction, adds recreational water safety as an educational ob-

jective that must be provided to every student enrolled in a minor and adult driver education course. The adopted amendment also increases from 20 to 30 the number of hours required for behind-the-wheel instruction in the presence of an adult who meets the requirements of Texas Transportation Code, §521.222(d)(2). In addition, the adopted amendment makes a technical edit to update a statutory cross reference.

In a separate adoption, the TEA adopts an amendment to 19 TAC §75.1005, Course Requirements, to make corresponding changes to the driver education course for minors and adults found in 19 TAC Chapter 75, Curriculum, Subchapter AA, Commissioner's Rules Concerning Driver Education Standards of Operation for Public Schools, Education Service Centers, and Colleges or Universities.

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

The adopted rule action has no procedural or reporting implications. The adopted rule action has no locally maintained paperwork requirements.

The public comment period on the proposal began May 9, 2014, and ended June 9, 2014. No public comments were received.

The amendment is adopted under the Texas Education Code (TEC), §29.9021, which authorizes the agency to incorporate by rule a curriculum module on recreational water safety into driver education instruction, and the TEC, §1001.101, which authorizes the commissioner to establish or approve by rule the curriculum to be used in a driver education course for minors and adults, which must include the requirement that students complete specified hours of behind-the-wheel instruction.

The amendment implements the TEC, §29.9021 and §1001.101.

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

Filed with the Office of the Secretary of State on July 2, 2014.

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Cristina De La Fuente-Valadez
Director, Rulemaking
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For further information, please call: (512) 475-1497

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 415. PROVIDER CLINICAL RESPONSIBILITIES--MENTAL HEALTH SERVICES

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (DSHS), adopts the repeal of §§415.251 - 415.257, 415.261 - 415.274, 415.285, 415.290 - 415.292, 415.299 and 415.300, and new §§415.251 - 415.276, concerning interventions in mental health programs. The new §§415.251 - 415.261, 415.263 - 415.266, 415.268, 415.270 - 415.273, and 415.276 are adopted with changes to the proposed text as published in the January 3, 2014, issue of the *Texas Register* (39 TexReg 33). The repeal of §§415.251 - 415.257, 415.261 - 415.274, 415.285, 415.290 - 415.292, 415.299 and 415.300, and new §§415.262, 415.267, 415.269, 415.274, and 415.275 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The purpose of this subchapter is to describe requirements for ensuring the safe and effective use of restraint and seclusion in certain types of facilities in which mental health services are provided, consistent with the provisions of Health and Safety Code, Chapter 322, concerning Use of Restraint or Seclusion in Certain Health Care Facilities, as amended by Senate Bill (SB) 325, 79th Legislature, Regular Session, 2005, and as amended by SB 1842, 83rd Legislature, Regular Session, 2013. In addition, the new subchapter as proposed incorporates certain changes in terminology and other changes in federal requirements governing the use of restraint and seclusion in hospitals, including psychiatric hospitals. These federal requirements are set forth at 42 Code of Federal Regulations (CFR) §482.13, Conditions of Participation: Patients' Rights (CMS COPs).

Collectively, the statutory revisions to Health and Safety Code, Chapter 322, require the department to implement, through rules, best practices and procedures intended to reduce, and to ensure the safe use of, restraint and seclusion occurring within facilities subject to the department's jurisdiction; authorize registered nurses to conduct the one hour face-to-face following a restraint or seclusion; require a physician to evaluate the individual face-to-face when an order for restraint or seclusion is renewed; and require facilities to file with the department a quarterly report regarding hospital-based inpatient psychiatric services measures related to the use of restraint and seclusion that is required by the federal Centers for Medicare and Medicaid Services (CMS).

After the adoption of this subchapter the department intends to resume its broader review of the rules contained in this subchapter, to address input it has previously received from the stakeholder community and from others, regarding certain aspects of the rules that are not being changed at this time, due to the legislative requirement that the current rule revisions be made effective no later than January 2014.

SECTION-BY-SECTION SUMMARY

Changes made throughout the subchapter include various nonsubstantive grammatical, punctuation, wording, and formatting changes intended to promote clarity and better readability. The name of the Subchapter F has been revised from Interventions in Mental Health Programs to Interventions in Mental Health Services. Also, any references to the "Texas Department of Mental and Mental Retardation" or "TDMHMR" have been changed to the "Department of State Health Services (DSHS)" in the rule text as applicable. Any reference to the term, "patient," has been replaced with the term, "individual." A change was made to the definition of the term, "staff," changing it to "staff member," and all other references in the subchapter to "staff" have been replaced with the term, "staff member." Sections within the subchapter have been reorganized to promote clarity, and division designations are deleted. In addition to these overall changes,

more specific changes included in the new subchapter are described as follows.

Section 415.251 states the purpose of the subchapter; incorporates the new CMS COPs terminology concerning the use of restraint or seclusion for the management of violent, self-destructive behavior and non-violent, non-self-destructive behavior; and emphasizes the need to reduce the use of restraint and seclusion as much as possible, to ensure that the least restrictive methods of intervention are used, and to ensure that, wherever possible, alternatives are first attempted and determined ineffective. Although this language is not included in current §415.251, relating to "Purpose," similar language is included in §415.261(a) of the current rules and is now moved to new §415.251 related to "Purpose," as a more logical placement of DSHS's stated intentions in connection with the use of restraint and seclusion. A change was made to §415.251(2), by deleting subparagraphs (A) and (B), which referenced the terms, "behavioral emergency" and "non-violent, non-self-destructive behavior." The language was deleted in response to public comment, which indicated that their use in this section caused confusion, and because the language is unnecessary in this section.

Section 415.252 identifies the types of facilities to which the new subchapter applies. As proposed, §415.252 provided that this new subchapter applies not only to an "identifiable mental health service unit" of a hospital licensed under Health and Safety Code, Chapter 241, but also to such a facility regardless of where in the facility mental health services are provided, to the extent and as provided by Chapter 133 of this title (relating to Hospital Licensing). In addition, the Texas Center for Infectious Disease was added, to the extent that mental health services are provided in that facility. However, changes were made to the section in response to public comments noting that the section as proposed was overly broad and potentially confusing in its application to a hospital licensed pursuant to Health and Safety Code Chapter 241, based on whether or not "mental health services" were being provided. As a result, changes made to the section include the deletion of the language, "providing mental health services," from §415.252(3); and the addition of language providing for a narrower application of the subchapter to an identifiable mental health services unit within a hospital licensed pursuant to Chapter 241, and, for all other areas within such a hospital (including an emergency department), only to the extent that the requirements of this subchapter are consistent with, and not more stringent than, the CMS COPs requirements; 42 CFR §489.20 (relating to Essentials of Provider Agreements); and §133.44 of this title (relating to Hospital Patient Transfer Policy). Other minor wording or grammatical changes were made to the section to promote clarity or for better readability.

Section 415.253 sets forth definitions of terms used throughout the subchapter. Definitions are added for the terms, "declaration for mental health treatment," "face-to-face," "initiate," "PRN," "seclusion room," and "treatment team." In addition, the term, "advanced practice nurse," is replaced with the term, "advance practice registered nurse or APRN," consistent with the terminology used by the Texas Board of Nursing in its rules found at 22 TAC Part 11. Upon adoption, definitions for the following terms are added, "emergency medication," "mental health services," "non-violent non-self-destructive behavior," and "serious injury."

Consistent with CMS COPs, the definition of the term "behavioral emergency" is revised to clarify that a behavioral emergency situation involves an individual who is behaving in a violent or self-destructive manner and in which preventive, de-escalative, or verbal techniques have been attempted and determined to be ineffective or clearly would be ineffective. Upon adoption, the term "behavioral emergency" has been revised based on public comment by deleting "attempted" and "or clearly would be ineffective" to better track the standards set forth in CMS COPs. The term, "clinically competent registered nurse," is replaced with the term, "registered nurse," and the requirement for clinical competency is added to the definition.

Clarifying language is added to the terms "chief executive officer," "clinical timeout," "continuous face-to-face observation," "emergency medical condition," "personal restraint," "physician assistant," "protective device," "staff member," and "treating physician." Consistent with 42 CFR §482.13, revisions are made to the definitions for the terms "mechanical restraint," "personal restraint, and "restraint," except that the use of drugs or medications (chemical restraint) continues to be excluded from the definition of restraint. Upon adoption clarifying language was added to the terms "legally authorized representative (LAR), "personal restraint," "protective device," "restraint," and "staff member." Finally, a definition of the term, "non-violent non-self-destructive behavior," was added to §415.253 (Definitions), to clarify that the term, where used in this subchapter.

Section 415.254 sets forth the general prohibition that restraint or seclusion may not be used, except as provided by this subchapter, and identifies, in subsection (b), the circumstances in which personal or mechanical restraint or seclusion are permissible. Upon adoption, §415.254(b) was revised to clarify that only personal or mechanical restraint could be used during transportation. The general requirements in subsection (b) were reorganized. Proposed paragraph (7) is adopted as paragraph (2), and the remaining requirements are renumbered accordingly. Proposed paragraph (6) adopted as paragraph (7), was reorganized to promote clarity.

Subsection (c) further prohibits the use of restraint or seclusion unless a facility develops, implements, and enforces written policies and procedures, as well as a staff training program, that are consistent with this subchapter. Additionally, subsection (c)(3) prohibits a facility's use of restraint or seclusion unless staff members of the facility are trained and have demonstrated competence in the use of restraint and seclusion in accordance with the facility's written policies and procedures and training program before assuming direct care duties and before performing restraint and seclusion on the individual.

Subsection (d) requires that a facility notify an individual or the individual's LAR of the facility's policies related to the use of restraint and seclusion. This new language is required by Health and Safety Code, §322.053, enacted by SB 325. Upon adoption, language is added to clarify that the policy notification may consist of a summary of the facility's policy, and that if an LAR cannot be notified, the facility shall document the reason in the individual's medical record.

Subsection (e) states that it represents minimum standards and that a facility may, through its written policies and procedures, adopt more stringent standards that are consistent with this subchapter and do not conflict with department rules, state or federal law, or applicable accreditation standards. This language, revised somewhat, is currently found in §415.261(b) of this subchapter.

Section 415.255 describes the prohibited and restricted practices associated with the use of restraint or seclusion. Chemical restraint continues to be a prohibited practice. Language

in subsection (b), which relates to the use of a prone or supine hold, is revised from the language found in current §415.254(i) of this subchapter, and is more restrictive than the current language in that it explicitly prohibits the use of either a prone or supine hold during a restraint. The revised language further states that, should an individual become prone or supine during a restraint, then any staff member involved in administering the restraint shall immediately transition the individual to a side lying or other appropriate position. Upon adoption, subsection (d) is revised to provide that the use of seclusion is prohibited except in a behavioral emergency.

Section 415.256 addresses the use of mechanical restraints, and the language of this new section is largely the same as the language of the current §415.256. In subsection (c), added to the list of prohibited devices, regardless of their commercial availability, is a new paragraph (6), regarding spit hoods, or anything that obstructs an individual's airway, including a device that places anything in, on, or over the individual's mouth or nose. In subsection (e), strait jackets are removed from the list of approved mechanical devices. Upon adoption subsection (a)(2) was revised to delete the language "without exception" because public comment suggested the language was awkward and unnecessary. Subsection (a)(4) was revised to require that a photograph accompany the description for any alteration or independent development of any device submitted for approval. Subsection (c) lists the prohibited restraint devices, and strait jackets were added to the list because of their potential to cause injury to the individual being restrained. In subsections (d) and (e), the term "restraint" was added to the term "mechanical device" consistent with the section title. Subsection (e) lists the approved mechanical devices, in paragraph (7) concerning the description of a helmet language clarifying that a helmet may not include a spit guard that interferes with breathing or obstructs the airway. In paragraph (12) concerning a restraint chair or gurney, the language "who must remain restrained during transport" was deleted because it is unnecessary.

Section 415.257 requires facilities to ensure that all staff members are informed of their roles and responsibilities under this subchapter and that they be trained and demonstrate competence accordingly. Subsection (b) identifies the required elements of a facility's training program, including the requirement that it be standardized throughout the facility; emphasize the importance of reducing and preventing the unnecessary use of restraint or seclusion; be evaluated annually; incorporate evidence-based and best practices; and provide information about declarations for mental health treatment.

In addition to requirements already identified in subsections (c) and (d) of the current §415.257, subsections (c) and (d) include a number of new required elements that must be included in training for all staff members, and in which staff members must demonstrated their competence before assuming job duties involving direct care responsibilities (and before initiating any restraint or seclusion), and at least annually thereafter. The new requirements place a greater emphasis on knowledge and demonstrated competency in skills intended to reduce the number of preventable incidences of restraint and seclusion, such as the use of team work; identifying underlying medical, physical, emotional, cultural, and other factors that may contribute to an incidence of a behavioral emergency; use of de-escalation, mediation, problem solving and other nonphysical interventions such as clinical timeout and quiet time; recognition and response to signs of physical distress during restraint or seclusion, including asphyxiation, aspiration, and trauma; and use of restraint or seclusion only as a last resort in a behavioral emergency.

Similarly, language in subsection (e)(1)(F), regarding annual training for registered nurses, is changed to require that such training (and demonstrated competency) address providing assistance to individuals in de-escalating a behavioral emergency, including through identification and removal of any known stimuli that may be contributing to the circumstances surrounding the behavioral emergency. This proposed new language substitution eliminates current rule language that arguably places greater responsibility on the individual to demonstrate that they meet certain criteria for discontinuing a restraint or seclusion, rather than the development of staff members' knowledge and skills that enable them to assist the individual.

Upon adoption §415.257(b) concerning the staff member training program, language was added to require that the facility's training program be consistent with the requirements in this subchapter. Further, the language proposed in paragraph (1) has been replaced with "target the specific needs of each patient population being served" based on public comment that indicated the language "be standardized throughout each facility" was unclear. The new requirement that the training program be "tailored to the competency levels of the staff members being trained" was added as paragraph (2) and the remaining paragraphs were renumbered. Regarding proposed paragraph (2) (adopted as paragraph (3)), the term "unnecessary" has been deleted from the requirement based on public comment that the term inferred restraint or seclusion might be used when it was not necessary. Subsection (c) has been revised to clarify that direct care staff members "other than physicians" must receive training and demonstrate competence in the training requirements listed in the subsection before assuming job duties and annually thereafter. In subsection (c)(3) and (5), the requirements have been revised to also require that an individual's cognitive functioning be considered before using restraint or seclusion. In paragraph (6), language has been added to require that training explain how the psychological consequences of restraint or seclusion may affect an individual's behavior. In paragraph (7), language has been added to require knowledge use of communication strategies during early intervention and de-escalation. The unnecessary language "and effective methods" has been deleted throughout subsection (d). Subsection (e) has been revised to include a physician assistant in the training required for registered nurses who conduct assessments and evaluations of individuals in restraint or seclusion. Upon adoption subsection (e) was revised by moving the requirements proposed subsection (g)(1) - (4) (adopted as subsection (e)(2)) to address training requirements for conducting face-to-face evaluations. In subsection (f) language requiring a demonstration of ongoing competence has been deleted based on public comment that the requirement was confusing as to how often competency would have to be demonstrated. Concerning training proposed in subsection (g) for physicians, a new subsection (g) has added the requirement indicating physicians who may order restraint or seclusion demonstrate competence, be trained, and receive refresher training as part of the facility's credentialing and privileging processes.

Section 415.258 sets forth the actions to be taken to release an individual from restraint or seclusion in a medical or environmental emergency. The section addresses how staff members must respond when an individual experiences an emergency medical condition while in restraint or seclusion, as well as how staff members must respond when an emergency evac-

uation or evacuation drill occurs while an individual is in restraint or seclusion. A change was made to subsection (a), to require that the medical condition be assessed and treated. Based on public comment, §415.258 has been revised to include actions taken to release an individual from restraint or seclusion because of an emergency medical condition or evacuation emergency. Subsection (b) has been changed to require that the staff member providing face-to-face observation of the individual or other staff member must release the individual from restraint or seclusion as soon as possible, as indicated by the circumstances that prompted the emergency evacuation or the evacuation drill. This qualifying language makes it clear that the particular circumstances of the emergency evacuation or the evacuation drill must be considered in determining when and under what circumstances an individual may be released from a restraint or seclusion in the event of an emergency evacuation or evacuation drill.

Section 415.259 relates to subsection (a) special considerations a physician must consider before ordering the use of restraint or seclusion for a particular individual; subsection (b) certain staff member responsibilities while an individual is in restraint or seclusion; subsection (c) alternative strategies that must be reviewed, implemented, and documented by an individual's treatment team when an individual's behavior has necessitated the use of a restraint or seclusion at a particular frequency of occurrence or duration; and subsection (d) modification of an individual's treatment plan, after consultation with the facility's medical director or designee, to address alternative treatment strategies. The language in subsections (a) - (c) is largely unchanged from the language in current §415.261(a)(3) - (12), and includes an additional circumstance in which alternative strategies must be considered by the individual's treatment plan: when an episode of restraint or seclusion has continued for more than the maximum time permitted under new §415.261(b), which specifies certain time limitations on orders for restraint or seclusion initiated in response to a behavioral emergency.

Subsection (d), relating to modification of an individual's treatment plan, is new, and requires that an individual's treatment team consult with the facility's medical director (or designee) to explore alternative treatment strategies and a written modification to the individual's treatment plan, in the event that the frequency of occurrence or duration of episodes of restraint or seclusion recurs or continues even after the treatment team has, in accordance with subsection (c), already attempted to identify alternative strategies for dealing with an individual's behaviors that necessitate the use of restraint or seclusion. The addition of subsection (d) is intended to ensure that a facility exhausts all possible avenues, including consultation with the facility's medical director, for identifying alternative strategies and alternative treatment strategies for dealing with an individual's behaviors that necessitate the use of restraint or seclusion, thereby reducing the number of restraints and seclusions at facilities subject to the requirements of this subchapter. Upon adoption, clarifying language related to cognitive functioning, previous restraint or seclusion, and replacing "an advance directive" with "a declaration" has been added to subsection (a) concerning special considerations. In response to public comment, the language in subsection (c)(3) "continued for more than" has been replaced with "reached" to clarify that an episode ends when the maximum time limit is met because. The commenter believed the proposed language suggested that a restrain or seclusion could continue after the maximum. In subsection (d), the term "medical director" has been replaced with the more specific term "chief medical physician administrator" or designee because within a hospital there may be many medical directors.

Section 415.260 sets forth the process and responsibilities of staff members for initiating a restraint or seclusion. Much of the language of this section is unchanged from the current language found in §415.262 of this subchapter. However, new language included in this new section, consistent with amendments to Health and Safety Code, Chapter 322 (the addition of a new §322.052, pursuant to SB 1842), authorizes the face-to-face evaluation required in subsection (c) to be conducted not only by a physician, as provided in the current rule, but also by a registered nurse who is trained to assess medical and psychiatric stability with demonstrated competence, other than the registered nurse who initiated the use of restraint or seclusion. In addition, reference to an "advanced practice nurse" is not included in paragraph (4) of subsection (c), as registered nurses are now permitted to conduct a face-to-face assessment without delegation from a physician, and the term, "advanced practice nurse," is included within the broader term, "registered nurse" under the Texas Board of Nursing rules found at 22 TAC §221.1. Finally, paragraphs (3), (5) and (6) of subsection (c) are new. Paragraph (3) states what must be assessed during a face-to-face evaluation. Paragraph (5) requires a physician assistant or registered nurse who has conducted the face-to-face evaluation to contact a physician and request that the physician perform a face-to-face evaluation of the individual when, in his or her professional judgment, the physician assistant or registered nurse determines that there are circumstances outside the physician assistant's or registered nurse's scope of practice or expertise. Paragraph (6) requires the registered nurse or physician assistant to consult the physician who is responsible for the care of the individual as soon as possible after the completion of the one hour face-to-face evaluation, and to document the consultation in the individual's medical record. Upon adoption subsection (a)(2) is revised based on public comment to allow a physician assistant in accordance with a physician's delegated authority, in addition to a physician or registered nurse to initiate mechanical restraint or seclusion. Regarding subsection (b)(1) concerning physicians order, proposed subparagraph (D) has been deleted because the requirement to "describe the less restrictive interventions attempted and the reasons they were determined to be ineffective and/or unlikely to protect the individual or other from harm" is unnecessary because the requirement is also in §415.272(a)(6) relating to Documenting, Reporting and Analyzing Restraint or Seclusion. Subsection (c) is reorganized to improve clarity. Proposed paragraph (1) is adopted as an implied subsection (a) with revisions that authorize a physician assistant who is properly trained and has demonstrated competence in assessing medical and psychiatric stability may conduct the one hour face-to-face. Proposed paragraph (3) is adopted as paragraph (1) and language clarifying that the assessment required in this paragraph relates to the one hour face-to-face evaluation and the remaining paragraphs were renumbered. In proposed paragraph (6) which is adopted as paragraph (5), language clarifying that the registered nurse or physician assistant conducting the one hour face-to-face evaluation shall consult the treating physician or physician designee as soon as possible after the completion of the one hour face-to-face evaluation.

Section 415.261 sets forth the time limitations for original orders and renewed orders for restraint or seclusion. These time limits are not changed from those in the current §415.263, and are consistent with those required by 42 CFR §482.13. This section

is revised to incorporate new requirements established by SB 1842, relating to a physician's renewal of such orders that have not yet expired. A physician is required to conduct a face-to-face evaluation before issuing or renewing an order that continues the use of a restraint or seclusion. In addition, the physician is required to document the clinical justification for continuing the restraint or seclusion before issuing a renewal order. Upon adoption, language clarifying that the original order for restraint or seclusion described in subsection (a) may only be issued in response to a behavioral emergency has been added. For the purpose of clarification, the proposed title of subsection (b) "Renewed order" has been adopted with the title "Order continuing use of restraint or seclusion." Language has been added to paragraphs (1) - (4) to clarify that the maximum time limit set forth in each paragraph begins at the time the original order for restraint or seclusion is initiated.

Section 415.262 requires that the chief executive office (CEO) or CEO's designee notify the individual's LAR or an authorized family member of each episode of restraint or seclusion. A new requirement is added to this section, that such notification be provided as soon as possible, but no later than 12 hours following the initiation of the restraint or seclusion, when the restraint or seclusion has involved an individual who is a minor under age 18 and who is not or has not been married. The CMS Conditions of Participation, 42 CFR §483.366(a), require that this notification occur "as soon as possible." The current rule reflects this requirement; however, the department has determined that an outside limit of no more than 12 hours from the initiation of the restraint or seclusion is reasonable and accounts for instances that occur in the middle of the night, when it may be inconvenient for an individual's LAR or authorized family member to be contacted. The new language does not require a facility to refrain from contacting the LAR or authorized family member immediately, but it does allow for an agreed upon time frame, within the 12-hour limitation, to be arranged between the facility and the LAR or authorized family member. The current rule language in §415.264 could be interpreted as not allowing such an agreement to be made. Subsection (b) contains a new requirement that the documentation of such notification include any unsuccessful attempts, the phone number called, and the name(s) of person(s) with whom the staff member spoke. This ensures that the documentation is sufficient to meet the standards set forth in the CMS Conditions of Participation, found at 42 CFR §483.366(b), and better assures DSHS, in its regulatory capacity, that facilities are in fact attempting to notify an LAR or authorized family member by documenting those attempts.

Section 415.263 explains that an individual's right to retain personal possessions and personal articles of clothing may be suspended during mechanical restraint or seclusion. It also describes a process for inventorying, storing, and returning individuals' possessions and clothing. A new requirement, found in subsection (e) of this section, requires that if the individual is unwilling to sign the documentation, a staff member shall document the refusal in the individual's medical record and list the items that were returned to the individual, the time they were returned, and the staff member who returned the items. Upon adoption the documentation requirements described in subsection (e) are expanded to include not only when an individual is unwilling to sign documentation concerning the return of person possessions after a restraint or seclusion, but also when an individual is unable to sign the documentation.

Section 415.264 describes the procedures for responding to behavioral emergencies during off-premises transport, excursions off facility premises, restraint initiated prior to transport, or restraint initiated during transport. Subsection (c) of this section clarifies that it applies to a restraint initiated prior to transportation of any sort, not just to transportation to another facility and also recognizes that a restraint can be used not only when criteria for a behavioral emergency are present but also when an individual has been determined to be manifestly dangerous within one month prior to transporting the individual. This change reflects a need to ensure the safety of individuals and staff members involved in such transportation. Concerning comfort during transportation, subsection (c) is changed by deleting reference to the need to provide reasonable opportunities for food, water, and to use the bathroom, and now refers to §415.266(c) of this title (relating to Observation, Monitoring, and Care of the Individual in Restraint or Seclusion Initiated in Response to a Behavioral Emergency), which includes not only those requirements but also provides for additional requirements for the care of individuals in a restraint or seclusion initiated in response to a behavioral emergency, thus making all of these requirements applicable to transportation of an individual as well. Upon adoption, the language "there is reason to believe" has been replaced with the language "it has been clinically determined" in subsection (a) to clarify that the decision to restrain during transport has a clinical basis. In subsection (c) the reference to Chapter 415, Subchapter G has been corrected consistent with Texas Register format and style requirements.

Section 415.265 describes how to communicate with an individual in restraint or seclusion initiated in response to a behavioral emergency. The section has been changed by adding a requirement that a staff member shall refer to the individual's declaration for mental health treatment (if any) in determining and implementing an individual's preferences. The section is also changed by requiring the staff member to communicate reassurance and commitment to the individual's safety on an ongoing basis, including inquiring how the staff member can assist the individual in de-escalating. This new language, and the deletion of the current language in §415.267, emphasizes a more positive and therapeutically appropriate interaction between staff members and individuals in a restraint or seclusion, as well as a more effective means of managing the circumstances surrounding a restraint or seclusion. Upon adoption, subsection (b) is further revised to clarify that communication with an individual in restraint or seclusion must not only be in a language or by a method understood by the individual but also conducted using developmentally appropriate language for that individual.

Section 415.266 sets forth the requirements for observing, monitoring and caring for individuals while in restraint or seclusion. This rule replaces §415.268. A staff member is required to maintain continuous face-to-face observation while an individual is in seclusion for at least one hour. After one hour, the staff member may monitor the individual continuously using simultaneous video and audio equipment in close proximity to the individual. In addition to certain changes intended to clarify subsection (c), new language in that subsection describes more specifically the circumstances in which certain care must be provided. Upon adoption, subsection (c) has been revised by adding language clarifying that an individual has an opportunity to bathe at least once daily in response to a public comment.

Section 415.267 describes the requirements for the facility to develop and implement policies and procedures to ensure that appropriate techniques are used and the environment is safe when initiating restraint or seclusion. Paragraphs (2) and (3) of subsection (a) include new proposed language that clarifies that the

environment in which an individual is restrained to be observable by other staff members and is away from other individuals. A new subsection (b) requires a facility to develop and implement policies and procedures to ensure that it is in compliance with the requirements of this section.

Section 415.268 describes the actions to be taken when an individual falls asleep in restraint or seclusion, which include releasing the individual immediately. This new rule replaces §415.270.

Section 415.269 describes the process for transferring primary responsibility between staff members for an individual in restraint or seclusion, including such a transfer at the time of a shift change. This rule replaces §415.271. Language added in subsection (a) of this section requires a staff member to monitor the individual during the transfer process. This new language makes it clear that there must be no gap in the responsibility to maintain continuous face-to-face monitoring and the other requirements of a staff member under §415.266 of this title. Language added in subsection (b) requires documentation of the nature of the circumstances requiring restraint or seclusion.

Section 415.270 describes the steps to be taken for the release of an individual from a restraint or seclusion. This new rule, which replaces §415.272 of this title, provides additional detail regarding the procedures to be taken for a personal restraint and those to be taken for a mechanical restraint or seclusion. The changes distinguish between a personal restraint and a mechanical restraint or seclusion, in that it requires a staff member to release the individual as soon as the unsafe condition has ended, when a personal restraint has been used, but requires that only a physician, physician's assistant, or registered nurse evaluate the individual before a staff member can release the individual who is in a mechanical restraint or seclusion. These changes are consistent with the requirements of SB 325, which requires DSHS to adopt rules to define acceptable restraint holds that minimize the risk of harm to a facility resident, as well as the requirements of the CMS Conditions of Participation. Upon adoption, subsection (b) the basis for determining "whether the unsafe situation continues" has been replaced with "whether the unsafe situation has resolved" as a result of public comment.

Section 415.271 describes the actions to be taken following the release of an individual from restraint or seclusion; e.g., facilitating the individual's reentry into the social milieu, observing and documenting the individual's behavior, and debriefing the individual and staff members who are involved. This rule replaces §415.273. Language is added to paragraph (3) of subsection (a) requiring that documentation be included in the individual's medical record not only of observations made but also of steps taken by the staff member during this transition period. Language is added to paragraph (5) of subsection (b) to require that appropriate modifications be made not only to the treatment plan of an individual who has been restrained or secluded, but also to the treatment plans of other individuals, when indicated. New subsections (c) and (d) require that debriefings with the individual and staff members be conducted following restraint or seclusion, and to specify what must be addressed in the debriefing as well as a timeframe within which the documentation must be completed (within 24 hours after the debriefing is conducted or attempted).

Based on public comment the following revision has been made to §415.271. The timeframes for conducting debriefings in subsection (c)(1) - (3) have been deleted. Accordingly, in subsection (c)(1) language authorizing the facility to determine which staff members should participate in the debriefing and added language requiring that the debriefing occur as soon as practicable in light of facility operations. Further, in subsection (c)(2) language directing that an individual's debriefing be conducted when clinically indicated, when the individual has cognitive capacity to understand what he or she could have done differently to avoid restraint or seclusion. Regarding subsection (c)(3) language clarifying that if the episode was a restraint staff members, when clinically indicated, may have a private discussion with individuals who witnessed the restraint. A new subsection (d) has been added to address situations when an individual has been discharged or does not have the cognitive capacity to understand what he or she could have done differently, the facility need not conduct a debriefing. But, the facility shall document in the individual's medical record the reason for not conducting the debriefing. Proposed subsection (d), adopted as subsection (e), has been revised to require that debriefings conducted under subsection (c)(2) or (3) occur in a timely manner. Further, regarding subsection (e), debriefings conducted under subsection (c)(1) shall be documented in accordance with facility policy. The last sentence of proposed subsection (d), adopted as subsection (e) has been deleted because the documentation requirements are otherwise adequately described in subsections (d) and (e).

Section 415.272 establishes requirements for facilities to document use of restraint and seclusion and to report restraint and seclusion data to the department. This rule replaces §415.274. Subsection (a) requires additional information in the medical record including signatures and identification of roles of staff members present during initiation; the name of the individual and type of restraint or seclusion used; the time and results of observations and monitoring; and other documentation relating to an episode of restraint and seclusion otherwise required under the rule. This subsection as proposed contains a number of new requirements for information that must be documented. Also, certain language has been deleted from this subsection (a), including the deletion of paragraph (4)(B), which requires that an individual's medical record include documentation of other generally accepted less intrusive forms of intervention, if any that the physician evaluated but rejected, and the reasons those interventions were rejected. This documentation requirement has been moved to new §415.260(b)(1) of this title, which describes the types of information that must be documented in the physician's order.

New requirements in subsection (b) include a report to the facility's CEO to address use of restraint or seclusion that is determined or suspected of being improper at the time it occurs; as well as the types and dosages of emergency medications administered during the restraint or seclusion. Subsection (b)(1) includes a new requirement that the CEO or designee take appropriate action to identify and correct unusual or unwarranted utilization patterns on a systemic basis, and to address each specific use of restraint or seclusion that is determined or suspected of being improper at the time it occurs. This will allow the facility to identify and evaluate systemic issues arising from the use of restraint and seclusion, thereby ensuring proper use of restraint and seclusion as well as a reduction of their use. Subsection (b)(2)(D) is also added, requiring that the facility's central file contain the types and dosage of emergency medications administered during the restraint or seclusion, if any. This additional data will better inform the CEO's evaluation of systemic issues arising from the use of restraint and seclusion, as required by subsection (b)(1).

Subsection (c) requires facilities to report data on serious injuries as well as deaths that occur during or after restraint or seclusion.

Subsection (c) also adds new provisions defining which deaths to report, including a death that occurs 24 hours after the individual has been removed from restraint or seclusion; and each death known to the facility that occurs within one week after restraint or seclusion where it is reasonable to assume that use of restraint or placement in seclusion contributed directly or indirectly to the patient's death.

Subsection (d) identifies the various entities to which a facility must submit the reports required by subsection (c). This subsection replaces current subsection (c) and also adds a new reporting requirement for facilities licensed under Chapter 133 or Chapter 134 of this title, that a death or serious injury be reported to the Patient Quality Care Unit of the department's Division for Regulatory Services.

Subsections (e) and (f) are new provisions. Subsection (e) specifies the review and analysis required by each facility of the data required in subsection (b)(2). Subsection (f) requires the facility to use the data analysis to continually to improve its practices to minimize the use of restraint and seclusion and to ensure the safety of individuals and staff members. These two new subsections require that the facility review and analyze, at least quarterly, the data that is required by subsection (b)(2), and that the facility use this data continuously to ensure a positive environment, the safety of individuals and staff members, the use of restraint and seclusion is done in accordance with the requirements of this subchapter, reduction of the risks of injury and other negative effects to individuals and staff members, and that policies and training curriculum incorporate the requirements of this subchapter.

Subsections (g) and (h), relating to reporting requirements, are also new and implement the reporting requirements of SB 325 and SB 1842. Subsection (g) requires a facility that is a Medicare or Medicaid provider to submit, on or before November 1, 2014, and quarterly thereafter, the data required by Centers for Medicare and Medicaid Services for hospital-based inpatient psychiatric service measures related to the use of restraint or seclusion. Subsection (h) requires a facility to prepare and submit to the department, consistent with the *Department of State Health Services Behavioral Interventions Reporting Guidelines,* certain data related to interventions used during the immediately preceding quarter, including data regarding the rate (per 1,000 bed days) of seclusions, personal restraints, mechanical restraints, and emergency medication orders; the number of serious injuries related to an intervention used in a behavioral emergency; number of deaths related to an intervention used in a behavioral emergency; and a description of the types of de-escalation techniques commonly used by that facility in connection with any of the emergency interventions used. Changes made to subsection (h), upon adoption, include replacing "previous period" with "immediately preceding quarter," to clarify the time period covered by the reporting requirements; deletion of the word "emergency" from §415.272(h)(1), to address certain public comments received, which noted that "emergency intervention" was not a defined term; adding the language, "used during a behavioral emergency," to §415.272(h)(1) (and adding a definition of the term, "behavioral emergency," to §415.253) to address certain public comments received, which noted that it was unclear what was being requested be reported; deleting a number of required reporting data elements that were included in the section as proposed, but are eliminated in favor of receiving the data in terms of rate per 1,000 bed days for each such data element; deletion of the word, "emergency," from the references to seclusion, personal restraints, and mechanical restraints, for consistency with other similar changes made to the section; deletion of "involuntary" from the reference to emergency medication orders; and the enumeration of two other required reporting data elements (numbers of serious injuries and deaths related to an intervention used in a behavioral emergency) that are contemplated by SB 325 but were stated differently (numbers of various interventions resulting in serious injury or death) in the section as proposed.

Implementation of these reporting requirements allows data regarding the use of restraint and seclusion to be collected and analyzed at the state level, in order to identify trends and any systemic issues that may be impeding the reduction of these interventions within the facilities subject to this subchapter, as recognized by the statement of intent within the Senate Research Center's bill analysis for SB 325. The reporting requirement of SB 1842 also recognizes the value in collecting this data at the state level, and the need to reduce the number of restraints and seclusions occurring within these facilities, in that the Senate Research Center's bill analysis for SB 1842 acknowledges that use of these interventions jeopardizes the immediate physical safety of individuals, staff members, and others. While SB 1842 focuses specifically on reporting requirements for facilities that are Medicare or Medicaid providers, the additional reporting requirements of new subsection (h) allow data to be reported and analyzed at the state level for all facilities subject to this subchapter, regardless of whether the facility is a Medicare or Medicaid provider.

Section 415.273, consistent with terminology used in CMS COPs, describes the use of restraint for the management of non-violent, non-self-destructive behavior. This new rule replaces §415.285. This terminology replaces, at various places within this section, as the terminology, "during medical, dental, diagnostic, or surgical procedures," to make the provisions more inclusive of situations that do not constitute a behavioral emergency, not just those involving a medical, dental, diagnostic, or surgical procedure. This section also makes clear that a restraint used during a medical, dental, diagnostic, or surgical procedure may be required to follow the requirements of restraint in a behavioral emergency described in new §415.266, rather than those described in this section, if the reason for the restraint is to manage an individual's violent, self-destructive behavior. Thus, in determining whether to follow the observation, monitoring, and care requirements of §415.266, the analysis should focus on whether or not the restraint is being used to manage violent or self-destructive behavior, when warranted, due to a behavioral emergency, not strictly on whether or not it is being used during a medical, dental, diagnostic, or surgical procedure. Regarding subsection (a), the proposed language "a non-psychiatric medical condition or symptom that indicates the need for an intervention or protect the individual from harm" was deleted and moved to the definition for the term "non-violent, non-self-destructive behavior," which was added on adoption.

The addition of language in paragraph (4) of subsection (a) also broadens this section to include situations in which a less restrictive intervention has been attempted and determined ineffective; this change is consistent with other similar changes made throughout this new subchapter.

Subsection (d) addresses the physician's renewal of an order for restraint, which may be done as frequently as determined by facility policy. Language requiring that the time period covered by an order be no longer than 24 hours has been removed from subsection (d), in response to public comment. The resulting

language is consistent with the requirements of the CMS COPs regarding the renewal of orders for restraint used to ensure the physical safety of a non-violent, non-self-destructive individual consistent with 42 CFR §482.13(e) of the CMS COPs, time limits for renewing orders for use restraint for managing non-violent, non-self-destructive behavior.

Subsection (f), which replaces subsection (e) of the current rule, includes among the criteria to be assessed in a facility's policies and procedures an additional physical status (cardiac function) that must be assessed in an individual who is being restrained.

Subsection (g) replaces subsection (f) of the current rule, and adds clarifying language to indicate that it applies to any contractor providing dental services on the facility premises. In addition, it requires that the dentist maintain a copy of the order in the individual's medical record and shall ensure compliance with the requirements of the order.

Section 415.274 describes permitted practices that may occur and that are not considered restraint (i.e., escort or brief physical prompt; activities of daily living; immobilization during medical, dental, diagnostic, or surgical procedures). This rule replaces §415.290. Subsection (c) is added to allow a staff member to escort, prompt, or move an individual who is unable to respond in the affirmative or negative or is unable to move due to his or her psychiatric or medical condition if there is an imminent danger of harm to the individual because of a circumstance in the individual's immediate environment. This new language ensures an individual's safety and well-being while balancing the individual's independence with their right to be reasonably protected from harm.

Language is added to subsection (d) to require the individual's consent for use of any positioning or securing device used during medical, dental, diagnostic, or surgical procedures that are not a standard part of the procedure. Section 415.290(d) of the current rule, relating to the administration of psychoactive medication under court order or in an emergency, is deleted. This change brings the rule into conformity with the CMS Conditions of Participation, which explicitly define a "personal restraint" to not include a "brief physical hold."

Section 415.275 establishes criteria for the use of clinical timeout and requires that the facility develop and implement policies and procedures that are consistent with the criteria. This rule replaces §415.291. Language is added to subsection (b)(2)(A) and (B), providing that when a staff member requires an individual to remain in quiet time after the individual has indicated a desire to terminate any self-initiated quiet time, the situation becomes a restraint and/or seclusion, as applicable, and becomes subject to the requirements for restraint described in this subchapter. Paragraph (2)(B) of the subsection is further modified by the addition of language explicitly stating that under no circumstances, except for clinical reasons, may a facility staff member coerce or force a client out of quiet time. These changes make it clearer that quiet time is a voluntary step taken by an individual, and that any so-called quiet time that is imposed by a staff member is not voluntary, and therefore constitutes a restraint and/or seclusion. The changes also bring the language of subsection (b)(2), concerning quiet time, into conformity with the language of subsection (b)(1), concerning clinical timeout.

Section 415.276 describes the proper use of protective and supportive devices. Changes in the language of this section, which is currently found in §415.292 are proposed for better readability and clarification purposes. Based on public comment that the 24 hour time limit for a physician to countersign an order is too short, §415.276(a)(3) has been revised by deleting the requirement that "if an order is given by physician's assistant or advanced practice registered nurse, the use of protective or supportive device must have been anticipate in the individual's treatment plan and the physician must countersign the order within 24 hours."

COMMENTS

The department on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the public comment period, which the commission has reviewed and accepts. Comments were received from the following individuals, associations, legislators, and organizations: Jack Ainsworth, LPC MLS LNFA, of Mount Pleasant; Children's Hospital Association, of Austin; Childress County Hospital District dba Childress Regional Medical Center, of Childress; CHRISTUS Health Plan, of Dallas; State Representative Garnet F. Coleman, of District 147; Council for Advising and Planning for the Prevention and Treatment of Mental and Substance Use Disorders, of Austin; Disability Rights Texas, of Austin; Doctors Hospital at Renaissance, of Edinburg; Harris Health System, of Houston; State Senator Juan "Chuy" Hinojosa, of District 20; Mitchell County Hospital, of Colorado City; Rolling Plains Memorial Hospital, of Sweetwater; Texas Academy of Physician Assistants, of Austin; Texas Hospital Association, of Austin; Texas Medical Association, of Austin; Texas College of Emergency Physicians, of Austin; Federation of Texas Psychiatry, of Austin; Texas Organization of Rural & Community Hospitals, of Austin; State Representative Sylvester Turner, of District 139; and Universal Health Services, of Edinburg. The comments received from the Texas Medical Association, the Texas College of Emergency Physicians, and the Federation of Texas Psychiatry, were submitted as a jointly submitted set of comments; therefore, these three organizations will be referred to as a single commenter in the comment summaries and department responses thereto, in this adoption preamble.

None of the commenters opposed the rules in their entirety, and some were in favor of the proposed rules; most, if not all, of the commenters suggested various changes to the rules, as more specifically discussed in the comment summaries and responses.

Comment: Regarding the overall content of the proposed rules, a commenter expressed concern that the rules are far more detailed, complex, burdensome, and restrictive than the legislative intent of SB 1842, and belief that the rules are overly unrealistic in a Texas rural hospital.

Response: The department responds that it is also adopting these rules to implement additional requirements precipitated by legislative changes made through SB 325.

Comment: Regarding §415.251(2)(B), two commenters asked for clarification of the language, "non-violent, non-self-destructive behavior," as it is used in that section. In addition, one of the commenters asked for an explanation as to why non-violent, non-self-destructive behavior would require restraint or seclusion.

Response: The department responds that §415.251(2), as adopted, is changed to remove the references to "behavioral emergency" and "non-violent, non-self-destructive behavior," in subparagraphs (A) and (B) respectively, as the language is unnecessary verbiage that does not contribute to a better

understanding of the stated purpose of the subchapter, and is potentially confusing (as evidenced by the comments received). In addition, a definition of the term, "non-violent, non-self-destructive behavior," has been added in §415.253, and certain language is moved from §415.273 to define this new term. Similarly, §415.273 has been changed to reflect the use of the term, "non-violent, non-self-destructive," and the deletion of the language now used to define the term.

In response to the question as to why non-violent, non-self-destructive behavior would require restraint or seclusion, the department responds that restraint (but not seclusion) is sometimes used in certain situations involving non-violent, non-self-destructive behavior. These types of situations are addressed in adopted §415.273, which replaces current §415.285 (relating to Restraint as Part of a Medical, Dental, Diagnostic, or Surgical Procedure), in effect immediately prior to the adoption of this new subchapter. In such situations, while there is no behavioral emergency, the rule contemplates a non-psychiatric medical condition or symptom indicating a need for intervention to protect the individual from harm, including, among others, situations involving a medical, dental, diagnostic, or surgical procedure. However, as noted in the discussion of §415.273 in the section-by-section summary of this adoption preamble, the language, "non-violent, non-self-destructive behavior," replaces the terminology, "during medical, dental, diagnostic, or surgical procedures," thus broadening the scope of §415.273 to include situations that do not constitute a behavioral emergency but go beyond those involving a medical, dental, diagnostic, or surgical procedure.

Comment: Regarding §415.252, Application, a commenter asserted that a clear differentiation should be made between what is required in assisted living facilities, nursing facilities, and state facilities, due to differences in funding and staffing levels between state facilities and community based programs.

Response: The department responds that this subchapter does not explicitly apply to assisted living facilities or to nursing facilities; however, to the extent that either of these types of facilities is providing mental health services as a community mental health services provider governed by Chapter 412, Subchapter G, the department has made the determination that any restraint or seclusion used within such facility comply with the requirements of this subchapter.

Comment: A commenter asserted that it is not practical to require smaller, rural hospitals to comply with all of the provisions of this subchapter. The commenter also requested that the department reconsider the sections as currently drafted, as well as the timeframe for implementation.

Response: The department responds that some of the commenter's concerns may be addressed to the commenter's satisfaction, insofar as §415.252 (relating to Application) has been changed to reflect that this subchapter applies only to an identifiable mental health unit within a hospital licensed under Health and Safety Code Chapter 241 and, for all other areas within the hospital, only to the extent that the requirements of this subchapter are consistent with, and not more stringent than, the requirements of 42 CFR §482.13, 42 CFR §489.20, and §133.44 of this title (relating to Hospital Patient Transfer Policy).

Comment: Regarding §415.252(3), Application, a commenter asked that a definition for "mental health services" be added to clarify when a general hospital would need to employ the department's more stringent procedures for use of restraint or seclusion.

Response: The department responds that it has revised §415.253 by adding a definition of mental health services, which is found in Texas Health and Safety Code §531.002.

Comment: Regarding §415.253(2) the definition of the term "behavioral emergency," several commenters requested that the language "or clearly would be ineffective" be removed from the definition because the language is subjective and would be difficult to implement and enforce.

Response: The department responds by removing the language "or clearly would be ineffective."

Comment: Several commenters requested that the word, "attempted," be removed from the definition of behavioral emergency in §415.253, while another commenter argued against deletion of this word, maintaining that less restrictive measures *must* be attempted before a restraint or seclusion occurs.

Response: The department concurs with the commenters who requested that the word be deleted, recognizing that the phrase, "determined to be ineffective," encompasses attempting other less restrictive measures, and recognizing that it is not always realistic for staff members to first attempt less restrictive alternatives (such as verbal intervention or de-escalation) when patient safety is imminently at risk.

Comment: Regarding §415.253, several commenters requested that the department add a definition for "emergency medication" to facilitate the reporting processes required by §415.272(h).

Response: The department agrees with the commenters and has added a definition for "emergency medication," which is defined as a "psychoactive medication that is used to treat the signs and symptoms of mental illness in a psychiatric emergency, as that term is defined in Chapter 415, Subchapter A of this title (relating to Psychoactive Medications) when other interventions are ineffective or inappropriate."

Comment: In §415.253 concerning the definition of LAR, a commenter asked that the department revise the language "guardian of an adult individual" to "guardian of the person of an adult individual."

Response: The department concurs and has made the requested language.

Comment: In §415.253 concerning the definition of restraint, a commenter asked that the definition be revised to include not only "mechanical devices" but also "material or equipment."

Response: The department disagrees with the commenter's suggestion because the definition of a "restraint" includes a mechanical restraint, which is defined in §415.253 as including any "device, material or equipment;" it would be redundant and, therefore, unnecessary to repeat this verbiage in the definition of "restraint." For this same reason, the department has also deleted the word, "device" from the definition of "restraint."

Comment: In §415.253, concerning the definition of seclusion, several commenters asked that in addition to the separation of an individual alone that language be added to include a group of individuals in seclusion.

Response: The department responds that the definition as proposed is consistent with the definition of seclusion in the CMS COPs and declines to make the suggested revision.

Comment: Concerning the definition of seclusion room, several commenters asked that the definition be expanded to include a group of individuals.

Response: The department responds that the definition is consistent with the CMS COPs definition of seclusion and declines to make the suggested revision.

Comment: A commenter requested a definition for the term "serious injury" be added.

Response: The department agrees with the commenters' suggestion to add a definition and adds that defining the term would facilitate consistent reporting of any serious injury related to the use of restraint or seclusion. Serious injury is defined as "an injury resulting in the need for medical treatment by a licensed medical professional (e.g., physician, osteopath, dentist, physician's assistant, or advance practice nurse), or requires medical treatment in an emergency department or licensed hospital." The definition is based on the categories describing the severity of injuries from the *Behavioral Healthcare Performance Measurement System Implementation Guide* (ver 5.1), published by the National Association of State Mental Health Program Directors Research Institute, Inc.

Comment: Regarding the definition of "staff member," two commenters requested that the definition be revised. One commenter asked that physician assistants be excluded from the definition because they are credentialed and granted privileges to practice in the hospital and further requested that any credentialed staff member be excluded from the definition. The other commenter asked that physicians be excluded from the definition for the same reason.

Response: In response to the comments, the department has revised §415.257(g) to provide that, for physicians who may order restraint or seclusion, the facility's credentialing and re-credentialing process must require that they demonstrate competency in ordering restraint and seclusion and that they receive related training. In addition, subsection (c) has been clarified to provide that it applies to staff members other than physicians, and subsection (e) has been revised to clarify that it applies to registered nurses (which include APRNs) and physician assistants. However, the department declines to revise the definition of "staff member" to exclude those providers who have been granted privileges by a facility, and has revised the definition to clarify that a staff member includes professionals who are credentialed and granted privileges by the facility.

Comment: Regarding the definition of "treatment team," two commenters asked that the clarifying language "if any" follow each reference to "legally authorized representative" or "LAR" in this definition and throughout the subchapter.

Response: The department concurs and has incorporated the recommended language throughout the subchapter.

Comment: Regarding §415.254(b), a commenter asked that the subsection be revised to require that training occur prior to a staff member performing any restraint or seclusion.

Response: The department declines to add the recommended language because the requirement is implied in paragraph (3) of the subsection as proposed (adopted as paragraph (4)) as well as explicitly stated in §415.257, Staff Member Training.

Comment: Regarding §415.254(d), several commenters expressed concern that restraint and seclusion policy notification was problematic in emergency departments because often individuals are released or if a person is admitted the LAR is unavailable before the notification can take place.

Further, the commenters expressed concern for the amount of information that would need to be provided as part of the policy notification.

Response: The department responds that it has revised §415.252 (relating to Application) to provide that the subchapter applies to emergency departments only to the extent that the requirements of the subchapter are consistent with, and not more stringent than the CMS COPs. Therefore, the concerns raised by commenters will, generally speaking, not be realized by non-psychiatric emergency departments. Further, for those remaining entities that are required to comply with this subchapter, the department has added language in subsection (d) to clarify that the notification may consist of a summary of the facility's policy and that if the LAR cannot be notified the reason shall be documented in the individual's medical record.

Comment: Regarding §415.256(a)(2), which requires consideration of medical and psychiatric contraindications, including without exception any history of physical or sexual abuse, a commenter asked that the language "including without exception" be deleted because it is awkward and unnecessary.

Response: The department concurs and has made the requested deletion.

Comment: Concerning §415.256(d), two commenters suggest that in this subsection the term "mechanical device" be changed to "mechanical restraint" because the term "mechanical device" is not defined in the subchapter.

Response: The department responds by changing the term to "mechanical restraint devise" throughout the subchapter consistent with the section title, which is "Mechanical Restraint Devices."

Comment: Concerning §415.257(b)(1), several commenters requested clarification of the meaning and the department's intent in using the term "standardized" throughout the facility. Further, the commenters suggested that training should be targeted to the specific needs of the patient populations being served or types of services offered within a facility, as well as to the competency level of staff members.

Response: The department agrees with the commenters' suggested revision and has revised subsection (b)(1) by replacing the language "be standardized throughout each facility" with the language "target the specific needs of each patient population being served" to clarify the department's intent that some populations, for example, children and geriatric patients may require a different approach in using restraint or seclusion. To further clarify the department's intent by use of the term "standardized," a new paragraph (2) has been added to require that training be tailored to the competency levels of the staff members being trained.

Comment: Concerning §415.257(d), (e), (f), and (g), a commenter expressed concern that the requirement for staff members to "demonstrate ongoing competency" could be construed to require that staff members' competence be assessed every day to comply with the requirement to demonstrate "ongoing competence" particularly when considered with other provisions of that section. The commenter recommended revising the language as proposed by removing the reference to "ongoing competence."

Response: The department agrees and has revised subsections (d), (e), and (f) by removing the requirement that affected staff members demonstrate "ongoing competence," to remove this ambiguity from these provisions.

Comment: Another commenter strongly objected to the inclusion of physicians in §415.257(g), asserting that a licensed physician with privileges at a facility has already demonstrated competence.

Response: The department has revised subsection (g) to require physicians who may order restraint or seclusion to demonstrate competency and receive related training as part of the facility's credentialing and privileging processes. This permits each facility to determine what is required of a physician privileged to order restraint or seclusion to demonstrate competency in the use of such interventions, rather than requiring the more discrete training elements specified in this subsection as proposed.

Comment: Yet another commenter objected to physician assistants being subject to the proposed training and asked that the definition of staff member be revised to exclude physician assistants. This commenter argued that physician assistants are like physicians, who, by virtue of their education, training, and licensure and hospital/facility credentialing standards, have already demonstrated competence and should not be subjected to additional training requirements and competency assessments not required by law.

Response: The department declines to revise the definition of staff member in the manner requested, and has revised §415.257(e) to require that both registered nurses (which includes advance practice registered nurses) and physician assistants receive training and demonstrate competence as provided in that subsection. Because physician assistants may only conduct assessments or evaluations of an individual if a physician delegates this responsibility to the physician assistant, the training requirements for physician assistants should be consistent with the training requirements for registered nurses (including advance practice registered nurses).

Comment: Regarding §415.257(e)(5), a commenter stated that addressing physical and psychological status and comfort is not sufficient to provide proper care for the individual and asked that the term "addressing" be change to the terms "identifying and responding to."

Response: The department concurs and replaces the term "addressing" physical and psychological status with the language "identifying and responding to" as suggested by the commenter.

Comment: Regarding §415.257(g)(4), according to the commenter the term "contraindication" means to make a treatment or procedure inadvisable. The commenter explained that use of the term implies that restraint or seclusion should not be used for patients with psychological injuries, but didn't believe that was the department's intent. The commenter asked that the term "contraindications" be replaced with the phrase "factors that should be considered when using restraint or seclusion."

Response: The department responds that entire subsection (g) has been revised and no longer uses the term "contraindications."

Comment: Regarding §415.260(a)(2), a commenter pointed out that physician assistants are not authorized to initiate mechanical restraint or seclusion as are physicians and registered nurses. According to the commenter, physician assistants practice in emergency rooms across the state and further indicated that they are credentialed by and privileged to practice in Texas hospitals. Because there is no state law which prevent physician assistants from initiating mechanical restraints and the Physician Assistant Practice Act authorizes physicians to delegate to physician assistants any and all medical acts which the physician believes the physician assistant is qualified to perform, the commenter requests that physician assistants be authorized to initiate mechanical restraint and seclusion.

Response: The department agrees that a physician assistant under delegated authority should be able to initiate mechanical restraint or seclusion as do certain physicians and registered nurses and has revised the subsection accordingly. The department notes that the subchapter will apply to emergency departments only to the extent that the requirement of the subchapter are consistent with, and not more stringent than the CMS COP requirements.

Comment: Regarding §415.259(c), a commenter expressed significant concerns with proposed language that authorizes the consideration and implementation of alternative strategies when an episode of restraint or seclusion has continued for more than the maximum time permitted under proposed §415.261(b). The commenter asked that the rule be revised to clarify that continued restraint or seclusion is never authorized beyond these time limits, rather than implicitly condoning episodes that continue beyond the maximum time by requiring a review of alternatives. Similarly, another commenter asked that §415.259(c)(3), be deleted and suggested that this provision violates CMS COPs and leaves room for people to use this section when they have not managed their time wisely.

Response: The department responds that §415.259(c) does not implicitly condone episodes that would continue beyond the maximum times provided for in §415.261(b), nor does it authorize immediate use of alternative strategies to extend an episode of restraint or seclusion beyond the time limits. Rather it requires that the treatment team identify alternative strategies for dealing with an individual's behaviors that necessitated use of restraint or seclusion, for implementation should it become necessary to anticipate or respond to any future occurrences of similar behavior by that individual.

Comment: Regarding §415.260, a commenter asked that the requirement for registered nurses to receive and implement orders for restraint in community settings be removed. Further, the commenter explained that the proposed language would require the addition of at least two registered nurses on every shift, multiplying the state's cost and providing no better assessment than what is currently in process.

The same commenter also requested the deletion of the requirement for the one hour face-to-face because it is not required in community settings such as supported housing, or assisted living facilities because they may not have a physician or a registered nurse on duty or assessable for several hours at a time. The commenter states the proposed rules require that two registered nurses be available, one for the face-to-face who initiated the restraint and another registered nurse for the one hour face-to-face evaluation. Most community-based facilities have no registered nurses on duty because they have a home health agency providing nursing oversight or may, in an assisted living environment may employ licensed vocational nurses for night and weekend shifts. Further, the commenter expressed that the requirement of a physician face-to-face prior to initiating or continuing restraint is certainly do able in state hospitals and institutions; however, community-based facilities do not have a physi-

cian nor numerous registered nurses on duty 24 hours per day to meet this requirement. As more living options for those with a mental diagnosis are created, this rule could prove dangerous for the person receiving services, others receiving services in that environment, as well as the caregiving staff.

Response: The department understands the commenters concerns, however, declines to make the suggested revisions because the rules implement and are consistent with applicable state law and CMS COPs.

Comment: Regarding §415.260(b), a commenter objects to the strict 24-hour timeframe imposed by the proposed language as well as the requirement that only the ordering physician may sign to order, no exception. The commenter explained that, while the 24 hour timeframe is in the current rule, it is in conflict with 25 TAC Chapter 133, Subchapter C (Operational Requirements), §133.44(j) (relating to Medical Record Services) that requires all verbal orders be signed, timed, and authenticated with 48 hours by the prescriber or another prescriber. Further, the commenter offered that the licensing regulations for psychiatric facilities do not establish a timeframe for authenticating a verbal order nor do the CMS COPs. The CMS COPs defer to the state regulations and The Joint Commission also provides a 48 hour timeframe for authenticating verbal orders.

Response: The department agrees with the commenter and responds by revising the timeframe for signing verbal orders to 48 hours, which is consistent with state licensing regulations and The Joint Commission requirement.

Comment: Regarding §415.260(c), a commenter expressed concern regarding the proposed requirement that the one hour face-to-face evaluation be conducted by a registered nurse who initiated the use of restraint or seclusion, asserting that this requirement would place a burden on a small rural facility. The commenter asserted that this would require cross-training registered nurses and increased financial implications for the facility.

Response: The department declines to make the requested revisions, as Health and Safety Code, §322.052(b-1)(1), adopted by the 83rd Legislature through SB 1842, does not give the department discretion to modify this requirement.

Comment: Regarding §415.262(c), the commenter disagrees that Health and Safety Code, §611.0045(b) allows for the withholding of information from a legally authorized representative. The commenter explained that while there are narrow circumstances under which certain information can be withheld from the patient (release of the information would cause harm to the patient's physical, mental, or emotional health), the legally authorized representative should always be able to access information.

Response: The department declines to revise §415.262(c) because, though rare, there are certain circumstances in which a professional may withhold information from a legally authorized representative pursuant to Health and Safety Code §611.0045(b). For instance, there may be times when a professional would deny access to certain patient information requested by a legally authorized representative, such as when in their professional opinion it would not be in the best interest of the patient or that it would be harmful to the patient to release such information to a parent or other person acting in the capacity of a legally authorized representative. This statutory interpretation is supported by Texas case law, including Abrams v. Jones, 35 S.W.3d 620 (Tex. 2000).

Comment: Regarding §415.264(a), Restraint Off Facility Premises or for Transportation, the proposed rules require an registered nurse or physician assistant to accompany the staff member transporting an individual off premises when there is reason to believe that during the time away from the facility the individual may require medical attention, administration of medication, or restraint. Two commenters asked for either clarification of the term "reason to believe" or that another term be used, such as "when it has been medically determined," so it is clear this is a decision that must be made by a clinician.

Response: The department agrees with the commenters and responds by replacing the term "reason to believe" with the term "when it has been clinically determined."

Comment: Regarding §415.264(c), several commenters expressed concerns regarding restraints initiated prior to transportation when an individual is found manifestly dangerous. One commenter observed that the rule as proposed requires no contemporaneous analysis of dangerousness or risk and the individual could be restrained based only on their patient classification. The commenter also asserted that the proposed change would not comply with the CMS COPs as no behavioral emergency would be required, and that this change is unnecessary as the current language would in no way preclude initiation of restraint prior to transport for a person found manifestly dangerous. We strongly object to this change and believe that the current language in the rule provides sufficient latitude for an order ensuring safety during transport.

Response: The department disagrees with the commenters for several reasons. While the rule does not require a contemporaneous analysis of dangerousness or risk, there is an inherent risk in transporting an individual who has been determined "manifestly dangerous," defined in §415.303 of this title as "the term used to describe an individual who, despite receiving appropriate treatment, including treatment targeted to the individuals dangerousness, remains likely to endanger others and requires a maximum security environment in order to continue treatment and to protect public safety." The procedures for determining an individual manifestly dangerous are set forth in Chapter 415, Subchapter G of this title, and provide numerous due process and other safeguards to ensure that an individual is only determined manifestly dangerous after a hearing is conducted and an opportunity for appeal is provided to the individual, the individual's LAR, or the facility's chief executive officer. Furthermore, contrary to the commenter's assertion that a behavioral emergency would be required, the CMS COPs permit restraint in broader circumstances; the CMS COPS standard found at 41 CFR §482.13(e) states that a restraint may not be imposed as a means of coercion, discipline, convenience, or retaliation by staff, and that a restraint may only be imposed to ensure the immediate physical safety of the patient, a staff member, or others. Because an individual who is determined to be manifestly dangerous necessarily must receive treatment in a maximum security environment, it is a logical extension that an individual who has been determined manifestly dangerous within one month prior to transportation be restrained during transportation in accordance with this section. The department believes the language as adopted strikes a balance between the rights of individuals receiving mental health services in a facility operated by the department and the department's responsibility to ensure the safety of all individuals, staff members, and members of the public.

Comment: Regarding §415.266(c)(3), the commenter asked that the phrase a bath at least daily (or more frequently, if clin-

ically indicated or in the presence of incontinence)" be revised by deleting the phrase "at least daily." The comments suggested that the requirement assumes a person would spend multiple days in restraint or seclusion.

Response: The department declines to make the requested change. However, the language "a bath" has been changed to "an opportunity to bathe." Section 415.266(c) ensures that certain basic needs of an individual in restraint or seclusion are met. The language as proposed does not presume that an individual would spend multiple days in restraint or seclusion. Instead, it recognizes that as a result of being restrained or secluded for some length of time, whether for a maximum timeframe provided in §415.261, or whether several episodes of restraint or seclusion have occurred on a particular day without an individual having the opportunity to bathe in between such episodes, an individual's hygienic needs should not be overlooked by staff members involved in the individual's care.

Comment: Regarding §415.267(a)(1) and (2), a commenter agrees that when personal restraint is used, the patient's privacy should be respected as much as possible. Further, the commenter agrees that if subsequent use of mechanical restraint is necessary the patient is moved to a protected environment as soon as possible. However, the commenter expressed concern that compliance with these provisions may not be achievable in an emergency department and requests that surveyors be flexible when considering compliance with these provisions in such areas.

Response: The department responds that the subchapter has been revised to clarify that these rules apply to emergency departments only to the extent that the requirements of this subchapter are consistent with, and not more stringent than, the requirements of 42 CFR §482.13, 42 CFR §489.20, and §133.44 of this title (relating to Hospital Patient Transfer Policy).

Comment: Regarding §415.270(b), a commenter recommended replacing the word "continues" to "has resolved" so that it requires the physician, physician assistant, or registered nurse to evaluate the individual for release based on a determination as to whether the unsafe situation has resolved.

Response: The department agrees with the commenter and has replaced the language as suggested.

Comment: Regarding §415.271(b) - (c), a commenter asked that the requirements for debriefing be deleted from the rule, noting that it is not required by the CMS COPs.

Response: The department responds that, while the CMS COPs may not require debriefing, this is a standard of The Joint Commission, for hospitals that are accredited by The Joint Commission but do not rely on such accreditation for "deemed status" purposes (that is, deemed certified by CMS through accreditation by The Joint Commission). The department declines to make the requested change. The department notes, however, that to the extent that a hospital licensed pursuant to Health and Safety Code, Chapter 241 is subject to the requirements of the CMS COPs, and does not have deemed status through accreditation by The Joint Commission, the debriefing requirements will not apply to those areas of the hospital that are not an identifiable mental health services unit within the hospital.

Comment: Regarding §415.271(d), a commenter indicated approval of the language but recommended that one particular sentence (requiring documentation of the reasons a debriefing is not conducted) be moved to the end of that subsection, while another commenter requested that the sentence be deleted.

Response: The department declines to delete the sentence, and agrees with moving the sentence to the end of the subsection. In addition, the department has added clarifying language to require that the reasons for not completing the debriefing be documented in the individual's medical record.

Comment: Several other commenters objected to the debriefing requirements set forth in §415.271(c) and (d), asserting that to require a debriefing in every instance in which restrain or seclusion is initiated is unnecessary and unduly burdensome, and citing the fact that the CMS COPs do not require debriefings. Another commenter indicated that the debriefing requirements would be particularly burdensome in busy hospital emergency departments and general hospital inpatient units where use of restraint and seclusion is limited.

One of the commenters added that timeframes in §415.271(c) - (d) as proposed are overly prescriptive. This commenter offered alternative language for consideration by the department, including a new subsection (d) to address certain scenarios in which it may not be practicable to conduct a debriefing, such as when an individual has already been discharged from a facility or does not have the cognitive capacity to understand what he or she could have done differently to avoid restraint or seclusion, or where, in certain circumstances, a debriefing has not been requested.

Response: The department agrees with the comments and for the most part has incorporated the new and revised language suggested by one of the commenters. However, in response to the comment regarding the heightened burdens associated with emergency room or general hospital inpatient settings, the department notes that §415.252 (relating to Application) has been revised so that the debriefing provisions would only apply to such settings in a more limited manner, if at all. For this reason, it is unnecessary to revise the rule to include the additional scenarios requested by one of the commenters.

Comment: Several comments were received regarding §415.272. One commenter indicated approval of the reporting requirements in subsections (g) and (h), but urged the department to revise the timeframe within which facilities must begin reporting the data required by subsection (h). Section 415.272(h) provides for a deadline of November 1, 2015, and quarterly thereafter, for a facility to begin reporting to the department certain data related to the use of restraint and seclusion. The commenter suggested that the rule be revised to establish an earlier initial compliance deadline of "no more than a few months after the rule is finalized."

Response; The department declines to shorten the timeframe provided for in subsection (h), as facilities may need such time to develop or make necessary changes to electronic medical record systems and other data collection methods, thereby enabling the facilities to report the data required by subsection (h).

Comment: The same commenter also requested that the department add the language, "and any medical attention requested or provided," to §415.272(b)(2)(B).

Response: The department declines to add the suggested language to §415.272(b)(2)(B), recognizing that the information requested by the commenter may be information that a facility determines would be more appropriately maintained, for example, in an individual's medical record or in documentation pertaining to peer review or other privileged processes. The department

opts, instead, to allow each facility to determine, in accordance with its own policies and procedures how, and in which records, this information will be maintained by the facility.

Comment: Several commenters requested adding a definition of the term, "serious injury," to clarify what is meant by this term in connection with the reporting requirements of §415.272(h).

Response: The department agrees with the suggestion to provide a definition of "serious injury," and has done so in §415.253 (relating to Definitions).

Comment: Another commenter indicated that the requirement to submit a quarterly report would be especially burdensome for the commenter, a small, rural hospital, because the facility sees few patients that meet the reporting criteria, and could easily overlook this responsibility.

Response: The department responds that §415.252 (relating to Application), has been revised to no longer provide that this subchapter applies to emergency departments of hospitals licensed pursuant to Health and Safety Code Chapter 241, except to the extent that the requirements of this subchapter are consistent with, and not more stringent than, the requirements of 42 CFR §482.13, 42 CFR §489.20, and §133.44 of this title (relating to Hospital Patient Transfer Policy). Therefore, emergency departments of such hospitals would not typically, if ever, be expected to conduct a one hour face-to-face evaluation or comply with the quarterly reporting requirements contemplated by this subchapter.

The department further notes that the quarterly reporting requirements in §415.272(g) should not be burdensome to a facility that is otherwise required to report the information to CMS in compliance with 42 CFR §482.13. And, to the extent that there are relatively few patients who may require restraint or seclusion in a given year at a small, rural hospital such as the facility that commented on the reporting requirements, compliance with §415.272(g) should not be unduly burdensome to the facility.

Comment: Two commenters objected to the requirement of §415.272(a)(2), that the facility document in an individual's medical record the signatures of any staff members present at the initiation of an intervention, pointing out that electronic medical records used by many hospitals do not permit insertion of staff signatures within the record. Asserting that these hospitals cannot comply with the requirement, the commenters indicated that identifying the staff members in the medical record should be sufficient.

Response: The department agrees with the requested change, and has revised the language accordingly. While including electronic signatures or authentication within an individual's electronic medical record may become more practicable in the future, the department recognizes that current technological capabilities, and costs associated therewith, may, at this time, make compliance with the proposed language prohibitive for a number of facilities.

Comment: Several commenters requested that subsection (h) be deleted in its entirety, noting that the department's Behavioral Interventions Reporting Guidelines, referenced in that subsection, were not made available at the time the proposed rules were published. The commenters asserted that they were not provided an opportunity to comment on the guidelines and, therefore (and for other reasons already addressed previously in connection with proposed §415.272), they urged the department to delete subsection (h) from the rules upon adoption.

Response: The department declines to delete §415.272(h), noting that, as proposed, subsection (h) explicitly identified the types of data that facilities would be required to report; consequently, the commenters had adequate notice of the categories of the data that would be collected and analyzed by the agency. Whether the reporting guidelines were made available for comment during the public comment period should not dictate whether or not the reporting requirements contemplated by SB 325 should be retained in the rules upon adoption.

Furthermore, subsection (h), as adopted, has been revised in response to comments received, not only through clarifying language and the defining of several terms used, but also through reasonable modifications made to the specific data elements that facilities will be required to report not prevent the department from collecting and analyzing data relevant to the policies and goals underlying the requirements of SB 325. Finally, the department responds that it intends to publish the Behavioral Intervention Reporting Guidelines soon after publication of the adopted rules, and these will reflect the revised data elements adopted as a result of the comments received by the department during the public comment period. Because the initial deadline to comply with these reporting requirements will not be until November 1, 2015, facilities will have sufficient time to develop or make necessary changes to electronic medical record systems or other internal processes in anticipation of the required reporting in late 2015.

Comments: The commenters also asserted that the SB 325 workgroup's recommendations, including the reporting requirements of subsection (h), do not have the force of law and, to the extent that the proposed rules impose reporting requirements in addition to those specified by SB 1842, they are inconsistent with the plain language of SB 1842 and should be removed.

Response: The department disagrees with the commenters' position that the reporting requirements of subsection (h) do not have the force of law; these reporting requirements were developed in response to SB 325, which remains in effect, and contemplates that a comprehensive reporting system be developed that collects and analyzes data related to the use of de-escalation interventions and emergency medications; complies with federal reporting requirements; documents the death or serious injury of a facility resident related to a restraint, including the administration of a medication, by an employee; and documents the death or serious injury of an employee during a physical intervention, seclusion, or restraint. The requirements of SB 325 do not conflict with the requirements of SB 1842; therefore, DSHS is responsible for implementing, through these rules, the requirements of both SB 325 and SB 1842.

Moreover, the department notes that the commenters' stated concerns regarding §415.272(h) should be substantially mitigated to the extent that §415.252 (related to Application) is now changed to provide that the subchapter does not apply to emergency departments or to licensed hospitals except to the extent that the requirements of this subchapter are consistent with, and not more stringent than, the requirements of 42 CFR §482.13, 42 CFR §489.20, and §133.44 of this title (relating to Hospital Patient Transfer Policy).

Comment: Concerning §415.273(h), a commenter objected to the time limit of 24 hours when using restraint for non-violent, non-self-destructive behavior and suggested that the time limit be established by facility policy with the outside time limit of 30 hours.

Response: The department concurs and consistent with CMS COPs, the 24-hour time limit has been deleted, and the section as adopted allows each facility to set policy concerning time limits for using restraint to manage non-violent, non-self-destructive behavior. However, it should be noted that, as required in §415.254(b)(9) (relating to General Requirements for Use of Restraint or Seclusion), a restraint should be discontinued at the earliest possible time, regardless of the length of time identified in a physician's order.

Comment: Concerning §415.276(a)(3), a commenter objected to the required 24-hour time period within which a physician must countersign an order made by a physician assistant or advance practice registered nurse (APRN) for the use of a protective or supportive device. The commenter asserted that 24 hours is an unreasonably short period of time, and suggested, instead, that the time period be extended to 48 hours, the timeframe allowed for authentication of verbal orders (presumably referring to §133.41(j)(7) of this title, within the DSHS hospital licensing rules).

Response: The department concurs, and has revised the section as adopted by deleting the referenced sentence in its entirety. This change to the rule as adopted recognizes that (1) the use of protective and supportive devices is generally not considered to be a restraint; (2) the 24-hour time period was, in fact, rather short; (3) the countersigning requirement language was unnecessary, as §415.276(a)(4) already requires that use of a protective or supportive device be specified in the individualized treatment plan; and (4) the issue of a physician countersigning a prior order of a physician assistant or APRN is already adequately addressed by other applicable rules and standards, including the scope of practice and related licensure rules applicable to physician assistants and APRNs, DSHS hospital licensing rules, and by a facility's medical staff bylaws adopted in accordance with standards of The Joint Commission and/or CMS.

LEGAL CERTIFICATION

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

SUBCHAPTER F. INTERVENTIONS IN MENTAL HEALTH PROGRAMS

DIVISION 1. GENERAL PROVISIONS

25 TAC §§415.251 - 415.257

STATUTORY AUTHORITY

The repeals are authorized by Texas Health and Safety Code, Chapter 322, governing the use of restrain and seclusion in certain health care facilities; Texas Health and Safety Code, §577.010, concerning rules and standards for the proper care and treatment of patients in private psychiatric hospitals or mental health facilities; Texas Health and Safety Code §13.004, which authorizes the department to transfer to the Texas Center for Infectious Disease an individual who is mentally ill and who is infected with tuberculosis; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 776-6972

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DIVISION 2. RESTRAINT OR SECLUSION INITIATED IN RESPONSE TO A BEHAVIORAL EMERGENCY

25 TAC §§415.261 - 415.274

STATUTORY AUTHORITY

The repeals are authorized by Texas Health and Safety Code, Chapter 322, governing the use of restrain and seclusion in certain health care facilities; Texas Health and Safety Code, §577.010, concerning rules and standards for the proper care and treatment of patients in private psychiatric hospitals or mental health facilities; Texas Health and Safety Code §13.004, which authorizes the department to transfer to the Texas Center for Infectious Disease an individual who is mentally ill and who is infected with tuberculosis; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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DIVISION 3. RESTRAINT DURING CERTAIN PROCEDURES

25 TAC §415.285

STATUTORY AUTHORITY

The repeal is authorized by Texas Health and Safety Code, Chapter 322, governing the use of restrain and seclusion in certain health care facilities; Texas Health and Safety Code, §577.010, concerning rules and standards for the proper care

and treatment of patients in private psychiatric hospitals or mental health facilities; Texas Health and Safety Code §13.004, which authorizes the department to transfer to the Texas Center for Infectious Disease an individual who is mentally ill and who is infected with tuberculosis; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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DIVISION 4. PROCEDURES THAT ARE NOT RESTRAINT OR SECLUSION

25 TAC §§415.290 - 415.292

STATUTORY AUTHORITY

The repeals are authorized by Texas Health and Safety Code, Chapter 322, governing the use of restrain and seclusion in certain health care facilities; Texas Health and Safety Code, §577.010, concerning rules and standards for the proper care and treatment of patients in private psychiatric hospitals or mental health facilities; Texas Health and Safety Code §13.004, which authorizes the department to transfer to the Texas Center for Infectious Disease an individual who is mentally ill and who is infected with tuberculosis; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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DIVISION 5. REFERENCES AND DISTRIBUTION

25 TAC §415.299, §415.300

STATUTORY AUTHORITY

The repeals are authorized by Texas Health and Safety Code, Chapter 322, governing the use of restrain and seclusion in certain health care facilities; Texas Health and Safety Code, §577.010, concerning rules and standards for the proper care and treatment of patients in private psychiatric hospitals or mental health facilities; Texas Health and Safety Code §13.004, which authorizes the department to transfer to the Texas Center for Infectious Disease an individual who is mentally ill and who is infected with tuberculosis; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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

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SUBCHAPTER F. INTERVENTIONS IN MENTAL HEALTH SERVICES

25 TAC §§415.251 - 415.276

STATUTORY AUTHORITY

The new rules are authorized by Texas Health and Safety Code, Chapter 322, governing the use of restrain and seclusion in certain health care facilities; Texas Health and Safety Code, §577.010, concerning rules and standards for the proper care and treatment of patients in private psychiatric hospitals or mental health facilities; Texas Health and Safety Code §13.004, which authorizes the department to transfer to the Texas Center for Infectious Disease an individual who is mentally ill and who is infected with tuberculosis; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§415.251. Purpose.

The purpose of this subchapter is to reduce the use of restraint and seclusion as much as possible and to ensure that:

(1) the least restrictive methods of intervention are used and that, wherever possible, alternatives are first attempted and determined ineffective; and

(2) the rights and well-being of individuals are protected during the use of restraint or seclusion.

§415.252. Application.

This subchapter applies to the following types of facilities:

(1) a state hospital or a state center operated by the Department of State Health Services;

(2) a psychiatric hospital licensed pursuant to Texas Health and Safety Code, Chapter 577 (relating to Private Mental Hospitals and Other Mental Health Facilities) to the extent and as provided by Chapter 134 of this title (relating to Private Psychiatric Hospitals and Crisis Stabilization Units);

(3) a hospital that is licensed pursuant to Texas Health and Safety Code, Chapter 241 (relating to Hospitals) to the extent and as provided by Chapter 133 of this title (relating to Hospital Licensing), as follows:

(A) an identifiable mental health services unit within the hospital; and

(B) for all other areas within the hospital (including an emergency department), only to the extent that the requirements of this subchapter are consistent with, and not more stringent than, the requirements of the 42 CFR §482.13 (relating to Medicare Conditions of Participation); 42 CFR §489.20 (relating to Essentials of Provider Agreements); and §133.44 of this title (relating to Hospital Patient Transfer Policy).

(4) a crisis stabilization unit licensed pursuant to Texas Health and Safety Code, Chapter 577 and Chapter 134 of this title;

(5) the Waco Center for Youth;

(6) a community mental health service provider governed by Chapter 412, Subchapter G of this title (relating to Mental Health Community Services Standards); and

(7) the Texas Center for Infectious Disease, to the extent that mental health services are provided by that facility pursuant to its authority, under Texas Health and Safety Code, §13.004, to receive an individual who is mentally ill and who is infected with tuberculosis.

§415.253. Definitions.

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

(1) Advanced practice registered nurse or APRN--A registered nurse authorized by the Texas Board of Nursing to practice as an advanced practice registered nurse.

(2) Behavioral emergency--A situation involving an individual who is behaving in a violent or self-destructive manner and in which preventive, de-escalative, or verbal techniques have been determined to be ineffective and it is immediately necessary to restrain or seclude the individual to prevent:

(A) imminent probable death or substantial bodily harm to the individual because the individual is attempting to commit suicide or inflict serious bodily harm; or

(B) imminent physical harm to others because of acts the individual commits.

(3) Chemical restraint--The use of any chemical, including pharmaceuticals, through topical application, oral administration, injection, or other means, for purposes of restraining an individual and which is not a standard treatment for the individual's medical or psychiatric condition.

(4) Chief executive officer (CEO)--The highest ranking administrator of a facility or such person's designee.

(5) Clinical timeout--A procedure in which an individual, in response to verbal suggestion from a staff member, voluntarily enters and remains for a period of time in a designated area from which the individual is not prevented from leaving.

(6) Competence--Demonstrated knowledge, skill, and ability.

(7) Continuous face-to-face observation--An in-person line of sight that is maintained in an uninterrupted manner and is free of distraction.

(8) Declaration for mental health treatment--A document making a statement of preferences or instructions for mental health treatment as set forth in Texas Civil Practice and Remedies Code, Chapter 137.

(9) DSHS--The Department of State Health Services.

(10) Emergency medical condition--A non-psychiatric medical condition manifesting itself by acute symptoms, including severe pain, of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in serious impairment to bodily functions, serious dysfunction of any bodily organ or part, or a threat to the health or safety of a pregnant woman or her unborn child.

(11) Emergency medication--A psychoactive medication that is used to treat the signs and symptoms of mental illness in a psychiatric emergency, as that term is defined in Chapter 415, Subchapter A of this title (relating to Prescribing of Psychoactive Medication), when other interventions are ineffective or inappropriate.

(12) Episode--The time period from the initiation of restraint or seclusion until the release of the individual.

(13) Face-to-face--Describes a contact with an individual that occurs in person. Face-to-face does not include a contact made through the use of video or telecommunication conferencing or technologies, including telemedicine.

(14) Facility--An entity to which this subchapter applies as identified in §415.252 of this title (relating to Application).

(15) Individual--Any person receiving mental health services from a facility.

(16) Initiate--The first overt act to restrain or seclude an individual.

(17) Legally authorized representative (LAR)--A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, and who may include a parent, guardian, or managing conservator of a minor individual; guardian of the person of an adult individual; or person with activated power of attorney for health care decisions.

(18) Mechanical restraint--Any device, material, or equipment that immobilizes or reduces the ability of the individual to move his or her arms, legs, body, or head freely.

(19) Mental health services--All services concerned with research, prevention, and detection of mental disorders and disabilities, and all services necessary to treat, care for, control, supervise, and rehabilitate persons who have a mental disorder or disability, including

persons whose mental disorders or disabilities result from alcoholism or drug addiction.

(20) Non-violent, non-self-destructive behavior--Behavior related to a non-psychiatric medical condition or symptom that indicates the need for an intervention to protect the individual from harm.

(21) Personal restraint--Any manual method by which a person holds or otherwise bodily applies physical pressure that immobilizes or reduces the ability of the individual to move his or her body or a portion of his or her body.

(22) Physician assistant--A person who is licensed under Texas Occupations Code, Chapter 204.

(23) PRN--As needed (pro re nata).

(24) Protective device--A device used to prevent injury or to permit wounds to heal.

(25) Quiet time--A procedure in which an individual, on the individual's own initiative, enters and remains for a period of time in a designated area from which the individual is not prevented from leaving.

(26) Registered nurse--A person who is licensed under Texas Occupations Code, Chapter 301, and who has demonstrated the clinical competencies required by this subchapter.

(27) Restraint--The use of any personal restraint or mechanical restraint that immobilizes or reduces the ability of the individual to move his or her arms, legs, body, or head freely.

(28) Seclusion--The involuntary separation of an individual from other individuals for any period of time and or the placement of the individual alone in an area from which the individual is prevented from leaving.

(29) Seclusion room--A hazard-free room or other area in which direct observation of an individual can be maintained and from which the individual is prevented from leaving.

(30) Serious injury--An injury determined by a physician to require medical treatment by a licensed medical professional (e.g., physician, osteopath, dentist, physician's assistant, or advance practice nurse), or requires medical treatment in an emergency department or licensed hospital.

(31) Staff member--A person directly involved in an individual's care, including professionals who are credentialed and granted privileges by the facility, full-time and part-time employees, and contractors.

(32) Supportive device--A device voluntarily used by an individual to posturally support the individual or to assist the individual who cannot obtain or maintain normal bodily functioning.

(33) Treating physician--The physician assigned by the facility and designated in the individual's medical record as the physician responsible for the coordination and oversight of the implementation of an individual's comprehensive treatment plan and who is:

(A) licensed as a physician by the Texas Medical Board in accordance with Texas Occupations Code, Chapter 155; or

(B) authorized to perform medical acts under an institutional permit at a Texas postgraduate training program approved by the Accreditation Council for Graduate Medical Education, the American Osteopathic Association, or the Texas Medical Board.

(34) Treatment team--A group of staff members, the individual, and LAR (if any) who work together in a coordinated manner for the purpose of providing comprehensive mental health services to an individual.

§415.254. General Requirements for Use of Restraint or Seclusion.

(a) Prohibition. Except as provided by this subchapter, the use of restraint or seclusion is prohibited.

(b) Use of personal or mechanical restraint or seclusion. The use of personal or mechanical restraint or seclusion is permissible on the facility's premises, and personal or mechanical restraint is permissible for transportation of an individual only if implemented:

(1) in accordance with this subchapter;

(2) when less restrictive interventions (such as those listed in the safety plan if there is one) are determined ineffective to protect other individuals, the individual, staff members, or others from harm;

(3) in accordance with, and using only those safe and appropriate techniques as determined by the facility's written policies or procedures and training program as specified in subsection (e) of this section;

(4) by staff members who have been trained in accordance with the applicable requirements specified in §415.257 of this title (relating to Staff Member Training);

(5) in connection with the applicable evaluation and monitoring requirements specified in §415.266 of this title (relating to Observation, Monitoring, and Care of the Individual in Restraint or Seclusion Initiated in Response to a Behavioral Emergency);

(6) in accordance with the applicable initiation and physician order requirements specified in §415.260 of this title (relating to Initiation of Restraint or Seclusion in a Behavioral Emergency);

(7) in accordance with any alternative strategies and special considerations documented in the treatment plan pursuant to §415.259(c) of this title (relating to Special Considerations, Responsibilities, and Alternative Strategies);

(8) when the type or technique of restraint or seclusion used is the least restrictive intervention that will be effective to protect the other individuals, the individual, staff members, or others from harm; and

(9) is discontinued at the earliest possible time, regardless of the length of time identified in a physician's order.

(c) Facility requirements. A facility's use of restraint and seclusion is prohibited unless:

(1) the facility adopts, implements, and enforces written policies and procedures, in accordance with this subchapter, governing the use of restraint and seclusion;

(2) the facility adopts, implements, and enforces a staff member training program that meets the requirements of §415.257 of this title; and

(3) staff members of the facility are trained and have demonstrated competence in the use of restraint and seclusion in accordance with the facility's written policies and procedures and training program before assuming direct care duties and before performing restraint and seclusion on the individual.

(d) Policy notification. Upon admission of an individual, or as soon as possible thereafter, the facility shall notify each individual and each individual's legally authorized representative (LAR), if any, of the facility's policies related to the use of restraint and seclusion. The policy notification may be a summary of the facility's policy. If an

LAR cannot be notified, the facility shall document the reason in the individual's medical record.

(e) This subchapter represents minimum standards. The facility may, through its written policies and procedures, adopt more stringent standards that are consistent with this subchapter and do not conflict with:

(1) DSHS rules;

(2) state or federal laws; and

(3) applicable accreditation standards.

§415.255. Prohibited and Restricted Practices.

(a) The following practices are prohibited:

(1) a personal or mechanical restraint shall not be used that:

(A) obstructs the individual's airway, including a procedure that places anything in, on, or over the individual's mouth or nose;

(B) impairs the individual's breathing, including applying pressure to the individual's torso or neck;

(C) restricts circulation;

(D) secures an individual to a stationary object while the individual is in a standing position;

(E) causes pain to restrict an individual's movement (pressure points or joint locks); and

(F) inhibits, reduces, or hinders the individual's ability to communicate; and

(2) a chemical restraint.

(b) A prone or supine hold shall not be used during a personal restraint. Should an individual become prone or supine during a restraint, then any staff member involved in administering the restraint shall immediately transition the individual to a side lying or other appropriate position.

(c) Neither restraint nor seclusion shall be used:

(1) as a means of discipline, retaliation, punishment, or coercion;

(2) for the purpose of convenience of staff members or other individuals; or

(3) as a substitute for effective treatment or habilitation.

(d) The use of seclusion is prohibited except in a behavioral emergency.

§415.256. Mechanical Restraint Devices.

(a) If a facility's policies and procedures permit the use of mechanical restraint, only commercially available or DSHS-approved devices specifically designed for the safe and comfortable restraint of humans shall be used. Any alteration of commercially available devices or independent development of devices must:

(1) be based on the individual's special physical needs, if any (e.g., obesity or physical impairment);

(2) take into consideration any potential medical (including psychiatric) contraindications, including any history of physical or sexual abuse;

(3) be approved by a committee whose membership and functions are specified in the bylaws of medical staff members of the facility; and

(4) be described fully in writing, with a copy of the description and a photograph forwarded to the DSHS medical director for behavioral health for review. Such altered or independently developed device may not be used by the facility unless and until its use is approved, in writing, by the DSHS medical director for behavioral health.

(b) A staff member shall inspect a device before and after each use to ensure that it is clean, in good repair, and is free from tears or protrusions that may cause injury. Damaged devices shall not be used to restrain an individual and shall be repaired or discarded.

(c) Regardless of their commercial availability, the following types of devices shall not be used to implement a restraint:

(1) those with metal wrist or ankle cuffs;

(2) those with rubber bands, rope, cord, or padlocks or key locks as fastening devices;

(3) long ties (e.g., leashes);

(4) bed sheets;

(5) gags;

(6) spit hoods, or anything that obstructs an individual's airway, including a device that places anything in, on, or over the individual's mouth or nose; and

(7) strait jackets.

(d) Except as otherwise permitted in this subsection, all forms of restraint, as well as a form of restraint in conjunction with seclusion, are intended to be used independently of one another. The physician shall document the clinical justification in the individual's medical record for the simultaneous use of more than one mechanical restraint device, a mechanical restraint device and personal restraint, a mechanical restraint device and seclusion, or personal restraint and seclusion.

(e) The following are approved mechanical restraint devices.

(1) Anklets--Padded bands of cloth or leather that are secured around the individual's ankles or legs using hook-and-loop (e.g., Velcro®) or buckle fasteners and attached to a stationary object (e.g., bed or chair frame). The device shall not be secured so tightly as to interfere with circulation, or so loosely as to permit chafing of the skin.

(2) Arm splints or elbow immobilizers--Strips of any material with padding that extend from below to above the elbow and which are secured around the arm with ties or hook-and-loop (e.g., Velcro®) tabs. If appropriate under the circumstances, they shall be secured so that the individual has full use of the hands. The device shall not be secured so tightly as to interfere with circulation, or so loosely as to permit chafing of the skin.

(3) Belts--A cloth or leather band that is fastened around the waist and secured to a stationary object (e.g., chair frame) or used for securing the arms to the sides of the body. The device shall not be secured so tightly as to interfere with breathing or circulation.

(4) Camisole--A sleeveless cloth jacket that covers the arms and upper trunk and is secured behind the individual's back. The device shall not be secured so tightly as to interfere with breathing or circulation or to cause muscle strain. Staff members shall exercise caution when using this device, if at all, because it may impair balance and the individual's ability to break a fall.

(5) Chair restraint--A padded stabilized chair that supports all body parts and prevents the individual's voluntary egress from the chair without assistance (e.g., tabletop chair, Geri-chair). When wristlets or anklets are used to restrict movement from the chair, the

devices must not be secured so tightly as to interfere with breathing or circulation.

(6) Enclosed bed--A bed with high side rails or another type of side enclosure and, in some cases, an enclosure (e.g., mesh or rails) over the bed that prevents the individual's voluntary egress from the bed without assistance.

(7) Helmet--A plastic, foam rubber, or leather head covering, such as a sports helmet, that may include an attached face guard but does not include a spit guard that interferes with breathing or obstructs the airway. The device shall be the proper size and the chinstrap shall not be so tight as to interfere with breathing or circulation.

(8) Mittens--A cloth, plastic, foam rubber, or leather hand covering such as boxing and other types of sport gloves that are secured around the wrist or lower arm with elastic, hook-and-loop (e.g., Velcro®) tabs, ties, paper tape, pull strings, buttons, or snaps. The device shall not be secured so tightly as to interfere with circulation.

(9) Restraining net--Mesh fabric that is placed over an individual's upper and lower trunk with the head, arms, and lower legs exposed; the net shall be secured over a mattress to a bed frame and shall never be placed over the individual's head. The restraining net shall be loose enough to allow some movement. The device shall not be secured so tightly as to interfere with breathing or circulation.

(10) Restraint bed--A stretcher of steel frame construction with a fabric cover. The restraint bed shall have an adjustable backrest and a padded mat which shall be used under the individual's head and upper body to prevent injury. Approved wristlets, anklets, and belts shall be used to safely and securely limit the individual's physical activity.

(11) Restraint board--A padded, rigid board to which an individual is secured face-up, unless that position is clinically contraindicated for that individual, in which case a clinically indicated position will be used and documented. This device shall not be used to restrain an individual in a behavioral emergency except when necessary to promptly transport an individual to another location.

(12) Restraint chair or gurney--A chair or gurney manufactured for the purpose of transporting or restraining an individual.

(13) Ties--A length of cloth or leather used to secure approved mechanical restraints (e.g., mittens, wristlets, arm splints, belts, anklets, vests) to a stationary object (e.g., bed or wheelchair frame) or to another approved mechanical restraint. Ties shall not be secured so tightly as to interfere with breathing or circulation.

(14) Transport jacket--A heavy canvas sleeveless jacket that encases the arms and upper trunk, fastens with hook-and-loop (e.g., Velcro®) tabs and roller buckles, and is held in place with a strap between the legs. The device shall be used only as a temporary measure during transport.

(15) Vest--A sleeveless cloth jacket that covers the upper trunk and is fastened in the back or front with ties or hook-and-loop tabs (e.g., Velcro®). The vest may be secured to a stationary object (e.g., bed or chair frame). The vest and ties shall not be secured so tightly as to interfere with breathing or circulation.

(16) Wristlets--Padded cloth or leather bands that are secured around the individual's wrists or arms using hook-and-loop (e.g., Velcro®) or buckle fasteners and attached to a stationary object (e.g., bed frame, chair frame, or waist belt). The device shall not be secured so tightly as to interfere with circulation or so loosely as to permit chafing of the skin.

§415.257. Staff Member Training.

(a) The facilities to which this subchapter applies shall ensure that staff members are informed of their roles and responsibilities under this subchapter and are trained and demonstrate competence accordingly.

(b) The training program shall be consistent with the requirements of this subchapter and shall:

(1) target the specific needs of each patient population being served;

(2) be tailored to the competency levels of the staff members being trained;

(3) emphasize the importance of reducing and preventing the use of restraint and seclusion;

(4) be evaluated annually, which shall include evaluation to ensure that the training program, as planned and as implemented, complies with the requirement of this section;

(5) incorporate evidence-based best practices;

(6) provide information about declarations for mental health treatment, including:

(A) the right of individuals to execute declarations for mental health treatment; and

(B) the duty of staff members and other health care providers to act in accordance with declarations for mental health treatment to the fullest extent possible.

(c) Before assuming job duties involving direct care responsibilities, and at least annually thereafter, staff members other than physicians must receive training and demonstrate competence in at least the following knowledge and applied skills that shall be specific and appropriate to the population(s) the facility serves:

(1) using team work, including team roles and techniques for facilitating team communication and cohesion;

(2) identifying the causes of aggressive or threatening behaviors of individuals who need mental health services, including behavior that may be related to an individual's non-psychiatric medical condition;

(3) identifying underlying cognitive functioning and medical, physical, and emotional conditions;

(4) identifying medications and their potential effects;

(5) identifying how age, weight, cognitive functioning, developmental level or functioning, gender, culture, ethnicity, and elements of trauma-informed care, including history of abuse or trauma and prior experience with restraint or seclusion, may influence behavioral emergencies and affect the individual's response to physical contact and behavioral interventions;

(6) explaining how the psychological consequences of restraint or seclusion and the behavior of staff members can affect an individual's behavior, and how the behavior of individuals can affect a staff member;

(7) applying knowledge and effective use of communication strategies and a range of early intervention, de-escalation, mediation, problem-solving, and other non-physical interventions, such as clinical timeout and quiet time; and

(8) recognizing and appropriately responding to signs of physical distress in individuals who are restrained or secluded, including the risks of asphyxiation, aspiration, and trauma.

(d) Before any staff member may initiate any restraint or seclusion the staff member shall receive training and demonstrate competence in:

(1) safe and appropriate initiation and use of seclusion as a last resort in a behavioral emergency;

(2) safe and appropriate initiation and application, and use of personal restraint as a last resort in a behavioral emergency;

(3) safe and appropriate initiation and application, and use of mechanical restraint devices as a last resort in a behavioral emergency or as a protective or supportive device, and knowledge of the mechanical restraint devices permitted under §415.256 of this title (relating to Mechanical Restraint Devices) and approved by the facility; and

(4) management of emergency medical conditions in accordance with the facility's policies and procedures and other applicable requirements for:

(A) obtaining emergency medical assistance; and

(B) obtaining training in and using techniques for cardiopulmonary respiration and removal of airway obstructions.

(e) Before assuming job duties, and at least annually thereafter, a registered nurse or a physician assistant who is authorized to:

(1) perform assessments of individuals who are in restraint or seclusion shall receive training, which shall include a demonstration of competence in:

(A) monitoring cardiac and respiratory status and interpreting their relevance to the physical safety of the individual in restraint or seclusion;

(B) recognizing and responding to nutritional and hydration needs;

(C) checking circulation in, and range of motion of, the extremities;

(D) providing for hygiene and elimination;

(E) identifying and responding to physical and psychological status and comfort, including signs of distress;

(F) assisting individuals in de-escalating, including through identification and removal of stimuli, that meet the criteria for a behavioral emergency if known;

(G) recognizing when continuation of restraint or seclusion is no longer justified by a behavioral emergency; and

(H) recognizing when to contact emergency medical services to evaluate and/or treat an individual for an emergency medical condition.

(2) conduct evaluations of individuals, including face-to-face evaluations pursuant to §415.260(c) of this title (relating to Initiation of Restraint or Seclusion in a Behavioral Emergency) of individuals who are in restraint or seclusion, shall receive training, which shall include a demonstration of competence in:

(A) identifying restraints that are permitted by the facility, by this subchapter, and by other applicable law;

(B) identifying stimuli that trigger behaviors;

(C) identifying medical contraindications to restraint and seclusion;

(D) recognizing psychological factors to be considered when using restraint and seclusion, such as sexual abuse, physical abuse, neglect, and trauma.

(f) Before assuming job duties, and at least annually thereafter, staff members who are authorized to monitor, under the supervision of a registered nurse, individuals during restraint or seclusion shall receive training, which shall include a demonstration of competence in:

(1) monitoring respiratory status;

(2) recognizing nutritional and hydration needs;

(3) checking circulation in, and range of motion of, the extremities;

(4) providing for hygiene and elimination;

(5) addressing physical and psychological status and comfort, including signs of distress;

(6) assisting individuals in de-escalating, including through identification and removal of stimuli, if known.

(7) recognizing when continuation of restraint or seclusion is no longer justified by a behavioral emergency; and

(8) recognizing when to contact a registered nurse.

(g) For physicians who may order restraint or seclusion, the facility's credentialing and privileging processes must require that such physicians:

(1) demonstrate competency in ordering restraint or seclusion; and

(2) receive training and refresher training in:

(A) the use of alternatives to restraint or seclusion; and

(B) how to reduce the physical and emotional harm caused by restraint or seclusion.

(h) When a staff member's duties change, the facility shall reassess the staff member's training and competence and require and ensure the staff member's retraining, as required under this subchapter, based upon the facility's reassessment and the staff member's new duties.

(i) The facility shall maintain documentation of training for each staff member. Documentation shall include the date that training was completed, the name of the instructor, a list of successfully demonstrated competencies, the date competencies were assessed, and the name of the person who assessed competence.

§415.258. Actions to be Taken to Release from Restraint or Seclusion for an Emergency Medical Condition or Evacuation Emergency.

(a) Emergency medical condition. If an individual experiences an emergency medical condition while in restraint or seclusion, the staff member providing continuous face-to-face observation of the individual or other staff member must release the individual from restraint or seclusion as soon as possible, as indicated by the emergency medical condition, and the medical condition shall be assessed and treated.

(1) The facility shall ensure that the individual's emergency medical condition is promptly addressed and that aid is rendered to the extent possible in accordance with the facility's policies and procedures for management of emergency medical conditions.

(2) Unlocking the seclusion room door or fully releasing the restraints ends the episode.

(3) If the situation continues to meet the criteria for a behavioral emergency after the individual's emergency medical condition is addressed, a staff member must obtain a new order for restraint or seclusion.

(b) Emergency evacuation. If an emergency evacuation or evacuation drill occurs while an individual is in restraint or seclusion, the staff member providing continuous face-to-face observation of the individual or other staff member must release the individual from restraint or seclusion as soon as possible, as indicated by the circumstances that prompted the emergency evacuation or the evacuation drill, and staff members shall implement the facility's established procedures to ensure the individual's safety.

§415.259. Special Considerations, Responsibilities, and Alternative Strategies.

(a) Special considerations. Before ordering restraint or seclusion, the physician shall take the following into consideration:

(1) information about the individual that could contraindicate or otherwise affect the use of restraint or seclusion;

(2) information obtained during the initial assessment of each individual at the time of admission or intake, including, but not limited to:

(A) pre-existing medical conditions or any physical disabilities and limitations, including, without limitation, cognitive functioning, substance use disorders, obesity, or pregnancy, that would place the individual at greater risk during restraint or seclusion;

(B) any history of sexual abuse, physical abuse, neglect, trauma, or previous restraint or seclusion that would place the individual at greater psychological risk during restraint or seclusion;

(C) any history or trauma that would contraindicate seclusion, the type of restraint (personal or mechanical), or a particular type of restraint device for the individual;

(D) cultural factors; and

(E) information contained in a declaration for mental health treatment, if there is one.

(b) Staff member responsibilities. Staff members shall:

(1) respect and preserve the rights of an individual during restraint or seclusion. Rights of individuals are described in Chapter 404, Subchapter E of this title (relating to Rights of Persons Receiving Mental Health Services);

(2) provide an environment that is protected and private from other individuals and that safeguards the personal dignity and well-being of an individual placed in restraint or seclusion;

(3) ensure that undue physical discomfort, harm or pain to the individual does not occur when initiating or using restraint or seclusion;

(4) use only the amount of physical force that is reasonable and necessary to implement a particular restraint or seclusion; and

(5) use psychoactive medication in an emergency only in accordance with Chapter 414, Subchapter I of this title (relating to Consent to Treatment with Psychoactive Medication--Mental Health Services). Physically holding an individual during a forced administration of a psychoactive medication, including for court-ordered medication, constitutes personal restraint.

(c) Alternative strategies. The treatment team shall review and, when appropriate, implement and document alternative strategies for dealing with behaviors in each of the following circumstances:

(1) in any case in which behaviors have necessitated the use of restraint or seclusion for the same individual more than two times during the individual's facility or program admission, or within any 30-day period, whichever period is shorter;

(2) when two or more separate episodes of restraint or seclusion of any duration have occurred within the same 12 hour period; and

(3) when an episode of restraint or seclusion has reached the maximum time permitted under §415.261(b) of this title (relating to Time Limitation on an Order for Restraint or Seclusion Initiated in Response to a Behavioral Emergency).

(d) Treatment plan modification. If the circumstances described in subsection (c)(1) - (3) of this section recur or continue after treatment team review of alternative strategies under subsection (c) of this section, the treatment team shall consult with the facility's chief medical physician administrator or designee to explore alternative treatment strategies and a written modification of the individual's treatment plan.

§415.260. Initiation of Restraint or Seclusion in a Behavioral Emergency.

(a) Initiation.

(1) Only staff authorized by the facility's policies and procedures and who have met the training requirements of §415.257 of this title (relating to Staff Member Training) and demonstrated competency in the facility's restraint and seclusion training program, may initiate personal restraint in a behavioral emergency.

(2) Only a physician, registered nurse, or physician assistant in accordance with a physician's delegated authority, may initiate mechanical restraint or seclusion.

(b) Physician's order. Only a physician member of the facility's medical staff may order restraint or seclusion.

(1) The physician's order for restraint or seclusion shall:

(A) designate the specific intervention and procedures authorized, including any specific measures for ensuring the individual's safety, health, and well-being;

(B) specify the date, time of day, and maximum length of time the intervention and procedures may be used, consistent with the time limitations provided for under §415.261 of this title (relating to Time Limitation on an Order for Restraint or Seclusion Initiated in Response to a Behavioral Emergency);

(C) describe the specific behaviors which constituted the behavioral emergency which resulted in the need for restraint or seclusion;

(D) be signed and dated, including the time of the order, by the physician or the registered nurse who accepted the prescribing physician's telephone order.

(2) If restraint or seclusion was ordered by telephone, the ordering physician shall personally sign and date the telephone order, including the time of the order, within 48 hours of the time the order was originally issued.

(3) If the physician who ordered the intervention is not the treating physician, the physician ordering the intervention shall consult with the treating physician or physician designee as soon as possible. The physician who ordered the intervention shall document the consultation in the individual's medical record.

(c) Face-to-face evaluation. A physician, physician assistant as provided in paragraph (3) of this subsection, or a registered nurse

who is trained and has demonstrated competence in assessing medical and psychiatric stability, other than the registered nurse who initiated the use of restraint or seclusion, shall conduct a face-to-face evaluation of the individual within one hour following the initiation of restraint or seclusion to personally verify the need for restraint or seclusion.

(1) The face-to-face evaluation required by this subsection includes, but is not limited to, an assessment of the:

(A) individual's immediate situation;

(B) individual's reaction to the restraint or seclusion;

(C) individual's medical and behavioral condition; and

(D) need to continue or terminate the restraint or seclusion.

(2) The Waco Center for Youth, a facility accredited as a residential treatment program, a physician or a registered nurse who is trained and has demonstrated competence to assess medical and psychiatric stability other than the registered nurse who initiated the use of restraint or seclusion shall conduct the face-to-face evaluation within two hours following the initiation of restraint or seclusion unless the individual is released prior to the expiration of the original order. If the individual is released prior to the expiration of the original order, the physician or registered nurse, shall conduct the face-to-face evaluation within 24 hours.

(3) A physician may delegate the face-to-face evaluation to a physician assistant who is:

(A) privileged to practice in the facility or that portion of the facility to which this subchapter applies; and

(B) under the clinical supervision of a physician appointed by the facility's medical staff and privileged to practice in the facility or that portion of the facility.

(4) If a physician assistant to whom the physician has delegated the face-to-face evaluation or a registered nurse who has conducted the face-to-face evaluation, in his or her professional judgment determines that the physician should evaluate the individual due to circumstances that are outside the physician assistant's or registered nurse's scope of practice or expertise, the physician assistant or registered nurse shall contact a physician and request that the physician perform a face-to-face evaluation of the individual. The physician assistant or registered nurse shall document the determination in the individual's medical record.

(5) If the face-to-face evaluation is conducted by a registered nurse or physician assistant, the registered nurse or physician assistant shall consult the treating physician or physician designee who is responsible for the care of the individual as soon as possible after the completion of the one hour face-to-face evaluation and document the consultation in the individual's medical record.

§415.261. Time Limitation on an Order for Restraint or Seclusion Initiated in Response to a Behavioral Emergency.

(a) Original order. A physician may order restraint or seclusion in response to a behavioral emergency for a period of time not to exceed:

(1) 15 minutes for personal restraint;

(2) one hour for mechanical restraint or seclusion for individuals under the age of 9;

(3) two hours for mechanical restraint or seclusion for individuals ages 9 - 17; and

(4) four hours for mechanical restraint or seclusion for individuals age 18 and older.

(b) Order continuing use of restraint or seclusion. If the original order has not yet expired and the registered nurse has evaluated the individual face-to-face and determined the continuing existence of a behavioral emergency, the registered nurse must contact the physician. The physician shall conduct a face-to-face evaluation before issuing an order that continues the use of the restraint or seclusion. A physician may renew the original order provided it would not result in the use of:

(1) personal restraint beyond 15 minutes total from the time of initiation of the original personal restraint;

(2) mechanical restraint or seclusion beyond two hours total from the time of initiation of the original mechanical restraint or seclusion, for individuals under age 9;

(3) mechanical restraint or seclusion beyond four hours total from the time of initiation of the original mechanical restraint or seclusion, for individuals ages 9 - 17; or

(4) mechanical restraint or seclusion beyond eight hours total from the time of initiation of the original mechanical restraint or seclusion, for individuals age 18 and older.

(c) Issuing and renewal documentation. The physician shall document the clinical justification for continuing the restraint or seclusion before issuing or renewing an order that continues the use of restraint or seclusion.

§415.263. Safekeeping of Personal Possessions During Mechanical Restraint or Seclusion.

(a) The individual's right to retain personal possessions and personal articles of clothing may be suspended during mechanical restraint or seclusion when necessary to ensure the safety of the individual or others as described in Chapter 404, Subchapter E of this title (relating to Rights of Persons Receiving Mental Health Services).

(b) An inventory of any personal possessions or personal articles of clothing temporarily taken from the individual shall be listed in the individual's medical record. The inventory shall be witnessed by two staff members who shall sign or authenticate this list in individual's medical record. If personal articles of clothing are taken from the individual, appropriate other clothing shall be issued.

(c) The items shall be kept in a locked place.

(d) Upon release of the individual from a restraint, seclusion, or combination of the two, the individual, if willing, and two staff members shall be asked to sign documentation in the individual's medical record indicating the status of items returned and the date and time the items were returned.

(e) If the individual is unwilling or unable to sign the documentation, a staff member shall document the refusal in the individual's medical record and list the items that were returned to the individual, the time they were returned, and the staff member who returned the items.

§415.264. Restraint Off Facility Premises or for Transportation.

(a) All off-premises transport. A registered nurse or physician assistant, as appropriate to the individual's clinical condition and the requirements of this subchapter, shall accompany the staff member(s) transporting an individual off premises when it has been clinically determined that during the time away from the facility the individual may require:

(1) medical attention;

(2) administration of medication; or

(3) restraint.

(b) Excursion off facility premises. A staff member may not restrain an individual being transported off facility premises unless the individual meets the criteria for a behavioral emergency, a physician orders the restraint, and transport is medically necessary with documented clinical justification.

(1) If restraint is required while an individual is on an excursion off facility premises, the staff member initiating the restraint shall contact a registered nurse to assist in obtaining a physician's order for the restraint as soon as feasible within the applicable timeframes prescribed in this subchapter.

(2) The staff members on the excursion shall implement, monitor, document, and report, in accordance with the requirements of this subchapter, any episode of restraint that occurs off premises.

(c) Restraint initiated prior to transportation. A staff member may not restrain an individual being transported prior to departure unless the situation meets the criteria for a behavioral emergency or the individual has been determined and documented manifestly dangerous in accordance with Chapter 415, Subchapter G of this title (relating to Determination of Manifest Dangerousness) within one month prior to transportation, a physician orders the restraint, and transport is medically necessary with documented clinical justification.

(1) If a behavioral emergency exists and a physician orders restraint prior to departure, at least one of the staff members accompanying the individual to the destination facility shall be a registered nurse.

(2) A female staff member shall accompany a female individual.

(3) If the duration of transport exceeds the maximum allowable duration of restraint on the original order, and a behavioral emergency continues to exist, or the person has been determined manifestly dangerous within one month prior to transportation, the registered nurse may either obtain a physician's telephone order to renew the restraint or obtain a new order for restraint, and renewal, as soon as feasible but within the applicable timeframes prescribed in this subchapter.

(4) Staff members accompanying the individual from the originating facility shall implement, monitor, document, and report, in accordance with the requirements of this subchapter, a restraint that is ordered and implemented prior to transportation. If transportation is for the purposes of transfer to another facility, staff members at the originating facility must fax the required documentation to the destination facility on the day of transport. Staff members at the destination facility are responsible for filing the documentation in the individual's medical record at the destination facility.

(d) Restraint initiated during transportation. If restraint is required following departure, a registered nurse shall obtain a physician's order from the originating facility for any restraint as soon as feasible within the applicable timeframes prescribed in this subchapter. If a registered nurse is not present during transportation, the staff member initiating any restraint shall contact a registered nurse to obtain a physician's order for the restraint as soon as possible within the applicable timeframes prescribed in this subchapter.

(1) If an individual is restrained during transportation, the staff member accompanying the individual shall implement, monitor, document, and report the episode of restraint in accordance with the requirements of this subchapter, and shall ensure that all documentation required under this subchapter relating to the restraint, including the physician's order, is transmitted to the destination facility within 24 hours following the time the individual is delivered to the destination facility.

(2) Staff members at the originating facility shall document and report restraint that is ordered and implemented during transportation. Staff members at the destination facility shall maintain documentation of the restraint at the destination facility.

(e) Comfort during transportation. The staff members shall provide an individual in restraint during transport the care required under §415.266(c) of this title (relating to Observation, Monitoring, and Care of the Individual in Restraint or Seclusion Initiated in Response to a Behavioral Emergency).

§415.265. Communicating with the Individual During Restraint or Seclusion Initiated in Response to a Behavioral Emergency.

(a) As soon as feasible after restraint or seclusion has been implemented in response to a behavioral emergency, the staff member shall refer to the individual's declaration for mental health treatment, if any, as a reference in determining and implementing an individual's preferences. The staff member shall communicate reassurance and commitment to the individual's safety on an ongoing basis, including inquiring as to how the staff member can assist the individual to de-escalate.

(b) Communication with the individual shall be conducted in developmentally appropriate language and by a method that is understandable to the individual (e.g., American Sign Language, Spanish, Vietnamese) and that accommodates the individual's method of communication (e.g., releasing a hand of an individual who communicates using American Sign Language).

(c) A staff member shall document in the individual's medical record all attempts to communicate with the individual and the individual's response to these attempts.

§415.266. Observation, Monitoring, and Care of the Individual in Restraint or Seclusion Initiated in Response to a Behavioral Emergency.

(a) Observation.

(1) A staff member of the same gender as the individual shall maintain continuous face-to-face observation of an individual in mechanical restraint, unless the individual's history or other factors indicate this would be contraindicated (e.g., sexual or physical abuse perpetrated by someone of the same gender, in which case a staff member of the opposite gender may be used).

(2) A staff member who is not physically applying personal restraint shall maintain continuous face-to-face observation of an individual in personal restraint.

(3) A staff member shall maintain continuous face-to-face observation of an individual in seclusion for at least one hour. After one hour, the staff member may monitor the individual continuously using simultaneous video and audio equipment in close proximity to the individual.

(b) Monitoring. A staff member shall ensure adequate respiration and circulation of the individual in restraint at all times.

(1) Respiratory status, circulation, and skin integrity must be monitored continuously and documented every 15 minutes (or more often if deemed necessary by the ordering physician). Cardiac status must be monitored and documented hourly (or more often if deemed necessary by the ordering physician).

(2) An assigned staff member must perform range of motion exercises for each extremity, one extremity at a time, for at least

five minutes no less frequently than every 60 minutes that an individual is in mechanical restraint.

(c) Care. A staff member must provide for the hygiene, hydration, nutrition, elimination needs, and safety of an individual in restraint or seclusion. The individual in restraint or seclusion shall be provided:

(1) bathroom privileges at least once every two hours (or more frequently, if requested and not contraindicated, or otherwise required by the individual's circumstances and physical or medical needs);

(2) an opportunity to drink water or other appropriate liquids every two hours (or more frequently, if requested and not contraindicated, or otherwise required by the individual's circumstances and physical or medical needs);

(3) an opportunity to bathe at least once daily (or more frequently, if clinically indicated or in the presence of incontinence);

(4) medications and medical equipment as ordered;

(5) regularly scheduled meals and snacks served on dishes that are appropriate for safety; and

(6) an environment that is free of safety hazards, adequately ventilated during warm weather, adequately heated during cold weather, and appropriately lighted.

§415.268. Actions to be Taken when an Individual Falls Asleep in Restraint or Seclusion Initiated in Response to a Behavioral Emergency.

(a) If the individual appears to fall asleep while in mechanical restraint or seclusion, the registered nurse shall assess the individual to determine if the individual is asleep.

(b) If the individual is determined to be asleep, the registered nurse shall instruct an authorized staff member to immediately release the individual from restraint or unlock the seclusion room door. Authorized staff members shall maintain continuous face-to-face observation until the individual is awake and re-evaluated by the registered nurse.

(c) The registered nurse shall assess the individual upon awakening.

(d) If the individual exhibits behaviors requiring restraint or seclusion upon awakening, the registered nurse shall obtain a new physician's order for any new initiation of restraint or seclusion.

§415.270. Release of an Individual From Restraint or Seclusion.

(a) Personal restraint. When a personal restraint has been initiated by a staff member, but the individual has not yet been evaluated by a physician, a physician's assistant, or a registered nurse, and the staff member determines that the individual's behavior has changed sufficiently to no longer require the personal restraint, the staff member must immediately release the individual from the restraint but shall remain with the individual until a physician, physician's assistant, or registered nurse has evaluated the individual for release based on a determination that the individual no longer requires the restraint or seclusion.

(b) Mechanical restraint or seclusion. When a mechanical restraint or seclusion has been initiated, and the unsafe situation ends, a staff member shall contact a physician, a physician's assistant, or a registered nurse. The physician, physician's assistant, or registered nurse must evaluate the individual for release based on a determination as to whether the unsafe situation has resolved. A staff member must immediately release an individual whose behavior has been evaluated by a physician, physician's assistant, or registered nurse and determined to no longer require the restraint or seclusion.

§415.271. Actions to be Taken Following Release of an Individual from Restraint or Seclusion Initiated in Response to a Behavioral Emergency.

(a) Immediately following the release of an individual from restraint or seclusion, a staff member shall:

(1) take action, if appropriate, to facilitate the individual's reentry into the social milieu by providing the individual with transition activities and an opportunity to return to ongoing activities;

(2) observe the individual for at least 15 minutes; and

(3) document in the individual's medical record the steps taken and observations made of the individual's behavior during this transition period.

(b) The facility shall conduct or attempt to conduct debriefings based on the following:

(1) identify what led to the episode and what could have been handled differently;

(2) identify strategies to prevent future restraint or seclusion of the individual, taking into consideration suggestions from the individual and the individual's declaration for mental health treatment, if any;

(3) ascertain whether the individual's physical well-being, psychological comfort, including trauma, and right to privacy were protected or otherwise addressed, as applicable;

(4) counsel the individual(s) in relation to any trauma that may have resulted from the episode; and

(5) when indicated, make appropriate modifications to the individual's treatment plan and/or the treatment plans of other individuals.

(c) Following an episode of restraint or seclusion, the facility shall conduct, or attempt to conduct, the following debriefings.

(1) Staff members who were involved in the episode, other staff members who the facility determine are appropriate, and supervisors shall debrief together as a support mechanism and to identify successes, problems, or necessary modifications as soon after the episode as is practicable in light of facility operations.

(2) When clinically indicated and at a time when the individual has cognitive capacity to understand what could have been done differently to avoid restraint or seclusion, a staff member or members shall conduct a private discussion with the individual, the individual's LAR, if practicable, and family members, if clinically appropriate and available, with the consent of the individual.

(3) If the episode was a restraint, when clinically indicated or upon request of individuals who witnessed the restraint, a staff member or members shall have a private discussion with individuals who witnessed the restraint.

(d) If an individual has been discharged from the facility, does not have the cognitive capacity to understand what he or she could have done differently to avoid restraint or seclusion, where clinically inappropriate, or where not requested pursuant to subsection (c)(3) of this section, the facility does not need to attempt the debriefings described in subsection (c)(2) and (3) of this section. The facility shall document in the individual's medical record the reason for not conducting the debriefing described in subsection (c)(2) of this section.

(e) Any debriefings conducted under subsection (c)(2) or (3) of this section shall be documented in the individual's medical record in a timely manner. Any debriefing conducted pursuant to subsection (c)(1) of this section shall be documented in accordance with facility

policy. If debriefing is not conducted, the reasons for not completing the debriefing shall be documented in the individual's medical record.

§415.272. Documenting, Reporting, and Analyzing Restraint or Seclusion.

(a) Facility documentation. The facility shall document the assessment, monitoring, and evaluation of an individual in restraint or seclusion on a facility approved form. Documentation in an individual's medical record shall include:

(1) the date and time the intervention began and ended;

(2) the name, title, and credentials of any staff members present at the initiation of the intervention, with identification of the staff member's role in the intervention, including as an observer, or status as an uninvolved witness, as applicable;

(3) the name of the individual restrained or secluded and the type of restraint or seclusion used;

(4) the time and results of any assessments, observation, monitoring, and evaluations, including those required under this subchapter, and attention given to personal needs;

(5) the physician's documentation of the order authorizing restraint or seclusion in accordance with the requirements of §415.260 of this title (relating to Initiation of Restraint or Seclusion in a Behavioral Emergency);

(6) any specific alternatives and less restrictive interventions, including preventive or de-escalatory interventions that were attempted by any staff member prior to the initiation of restraint or seclusion, and the individual's response to any such intervention;

(7) the individual's response to the use of restraint or seclusion; and

(8) other documentation relating to an episode of restraint or seclusion otherwise required under this subchapter.

(b) Report to CEO. Staff members shall report daily to the facility CEO or designee any use of a restraint or seclusion.

(1) The CEO or designee shall take appropriate action to identify and correct unusual or unwarranted utilization patterns on a systemic basis, and shall address each specific use of restraint or seclusion that is determined or suspected of being improper at the time it occurs.

(2) The CEO or designee shall maintain a central file containing the following information:

(A) age, gender, and race of the individual;

(B) deaths or injuries to the individual or staff members;

(C) length of time the restraint or seclusion was used;

(D) types and dosage of emergency medications administered during the restraint or seclusion, if any;

(E) type of intervention, including each type of restraint used;

(F) name of staff members who were present for the initiation of the restraint or seclusion; and

(G) date, day of the week, and time the intervention was initiated.

(c) Additional reporting in the case of death or serious injury. By the next business day following an individual's death or serious injury, facilities shall report the following information to the appropriate entity designated in subsection (d) of this section.

(1) Each death or serious injury that occurs while an individual is in restraint or seclusion;

(2) Each death that occurs within 24 hours after the individual has been removed from restraint or seclusion; and

(3) Each death known to the facility that occurs within one week after restraint or seclusion where it is reasonable to assume that use of restraint or placement in seclusion contributed directly or indirectly to a individual's death. "Reasonable to assume" in this context includes, but is not limited to, deaths related to restrictions of movement for prolonged periods of time, or death related to chest compression, restriction of breathing, or asphyxiation.

(d) Reporting deaths or serious injury. Facilities shall report the deaths or serious injuries of individuals in restraint or seclusion as follows.

(1) Medicare- or Medicaid-certified facilities shall report a death to the appropriate office for the Center for Medicare and Medicaid Services in accordance with the federal death reporting requirements relating to restraint and seclusion.

(2) Facilities that are neither Medicare- nor Medicaid-certified shall report a death or serious injury to DSHS's medical director for behavioral health.

(3) In addition to reporting in accordance with paragraphs (1) and (2) of this subsection, all facilities licensed under Chapter 133 of this title (relating to Hospital Licensing) or Chapter 134 of this title (relating to Private Psychiatric Hospitals and Crisis Stabilization Units) shall report a death or serious injury to the Patient Quality Care Unit of DSHS's Division for Regulatory Services.

(4) Facilities shall comply with any additional reporting requirements relating to restraint or seclusion to which they are subject, including any applicable reporting requirements under The Children's Health Act of 2000 and federal regulations promulgated pursuant to the Act.

(e) Facility review of data. The facility shall review and analyze, at least quarterly, the data that is required by subsection (b)(2) of this section to identify and correct trends and patterns that may contribute to the use of restraint or seclusion (e.g., disproportionate use of restraint or seclusion with specific populations or shifts).

(f) Continuous improvement. The facility shall use the data continuously to improve and ensure:

(1) a positive environment that minimizes the use of an involuntary intervention;

(2) the safety of every individual and staff member;

(3) the use of restraint and seclusion is implemented in accordance with the requirements of this subchapter;

(4) that the risks of injury and other negative effects to individuals and staff members are reduced; and

(5) that policies and training curriculum incorporate the requirements of this subchapter.

(g) On or before November 1, 2014, and quarterly thereafter, any facility that is a Medicare or Medicaid provider shall submit to DSHS the data required by Centers for Medicare and Medicaid Services for hospital-based inpatient psychiatric service measures related to the use of restraint or seclusion.

(h) On or before November 1, 2015, and quarterly thereafter, a facility to which this subchapter applies shall prepare and submit to DSHS a report, consistent with the *Department of State Health*

Services Behavioral Interventions Reporting Guidelines (guidelines) available at: http://www.dshs.state.tx.us/Licensing-Facilities.shtm, of the following data from the immediately preceding quarter:

(1) interventions used during a behavioral emergency, including:

(A) rate of seclusions (per 1,000 bed days);

(B) rate of personal restraints (per 1,000 bed days);

(C) rate of mechanical restraints (per 1,000 bed days); and

(D) rate of emergency medication orders (per 1,000 bed days).

(2) number of serious injuries related to an intervention used in a behavioral emergency.

(3) number of deaths related to an intervention used in a behavioral emergency.

(4) de-escalation techniques--description of all de-escalation techniques commonly used by the facility in connection with any of the emergency interventions described in paragraph (1) of this subsection.

§415.273. Use of Restraint in Situations Involving Non-violent, Non-self-destructive Behavior.

(a) If an assessment reveals non-violent, non-self-destructive behavior, as defined in §415.253 of this title (relating to Definitions), the facility shall use the least restrictive intervention that effectively protects the individual from harm. If the intervention is a restraint as defined in this subchapter, it shall only be used in the following circumstances:

(1) medically necessary;

(2) ordered by a physician;

(3) needed to ensure the individual's safety; and

(4) used only after less restrictive interventions have been considered, or attempted and determined to be ineffective, or are judged to be unlikely to protect the individual or others from harm.

(b) Prior to the application of a restraint for the management of non-violent, non-self-destructive behavior, an assessment of the individual shall be done to determine that the risks associated with the use of the restraint are outweighed by the risks of not using it.

(c) The physician's order for the restraint shall specify:

(1) a time limit on the use of the restraint;

(2) any special considerations for the use of restraint;

(3) the specific type of restraint to be used;

(4) who is responsible for implementing the restraint; and

(5) instructions for monitoring the individual.

(d) The physician shall renew the order as frequently as determined by facility policy.

(e) The order for the restraint shall be followed by consultation with the individual's treating physician if the restraint was not ordered by the individual's treating physician. The consultation shall be documented in the individual's medical record no later than the next business day, except that it shall be done sooner, when an earlier consultation is clinically indicated.

(f) The care of the individual shall be based on a rationale that reflects consideration of the individual's medical needs and health status.

(1) If the facility has made a clinical determination that its use of restraint for the management of non-violent, non-self-destructive behavior requires a frequency of assessment or an aspect of care or treatment that differs from the provisions of this subchapter governing restraint in a behavioral emergency, facility policies and procedures on the use of restraint for the management of non-violent, non-self-destructive behavior shall address:

(A) the facility's required frequency of assessment of the individual during restraint; and

(B) how the individual's circulation, hydration, elimination, level of distress and agitation, mental status, cognitive functioning, cardiac functioning, skin integrity, nutrition, exercise, and range of motion of extremities are to be assessed and addressed during restraint.

(2) The plan for monitoring the individual and the rationale for the frequency of monitoring shall be documented in the individual's medical record.

(g) A dentist at a facility, including any contractor providing dental services on the facility premises shall not restrain an individual for dental care or rehabilitation unless the restraint is ordered by the individual's physician. The dentist shall maintain a copy of the order in the individual's medical record and shall ensure compliance with the requirements of the order.

(h) Whenever a restraint is ordered by a physician, the ordering physician shall prescribe the frequency of assessment required for the individual during restraint and how the individual's circulation, hydration, elimination needs, level of distress and agitation, mental status, cognitive functioning, cardiac functioning, skin integrity, nutrition, exercise, and range of motion of extremities are to be assessed and addressed during restraint.

§415.276. Protective and Supportive Devices.

(a) Voluntary use of protective and supportive devices. A protective or supportive device that is easily removable by the individual without a staff member's assistance is not restraint.

(1) A protective or supportive device may only be used with the consent of the individual.

(2) A supportive device must allow greater freedom of mobility than would be possible without the use of the device.

(3) Use of a protective or supportive device shall be based upon a prior order of a physician, physician's assistant, or advanced practice registered nurse.

(4) If an individual uses a protective or supportive device, the individual's treatment team shall include an occupational or physical therapist and the individualized treatment plan shall specify that a protective or supportive device is to be used and shall:

(A) include any special considerations for the use of the device based on the findings of the comprehensive initial assessment performed at admission or intake;

(B) include an outcome oriented goal;

(C) describe the specific type of device to be used;

(D) specify who is responsible for applying the device;

(E) describe the plan for monitoring the individual; and

(F) reflect periodic assessment, intervention, and evaluation by the treatment team, including the physical therapist, on an ongoing basis.

(5) The facility shall have written policies and procedures that address the proper implementation of this subsection and monitoring requirements with reference to individuals with particular types of protective and supportive devices.

(b) Involuntary use of protective and supportive devices. A protective or supportive device that is not easily removable by the individual without a staff member's assistance constitutes a restraint, and becomes subject to the requirements for restraint or seclusion, as applicable, described in this subchapter.

(c) Protective devices for wound healing. After a wound has healed, the continued use of a protective device constitutes a mechanical restraint and becomes subject to the requirements for restraint or seclusion, as applicable, described in this subchapter.

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

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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 148. HEARINGS CONDUCTED BY THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

28 TAC §§148.1 - 148.8, 148.10, 148.11, 148.13 - 148.17, 148.19 - 148.24

The Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to 28 TAC §148.1, concerning Definitions; §148.2, concerning Scope and Applicability; §148.6, concerning Venue; §148.7, concerning Representation; §148.8, concerning Withdrawal of Hearing Request; §148.10, concerning Hearings Subpoenas to Compel Attendance and Subpoenas Duces Tecum; §148.11, concerning Commissions to Compel Attendance for Deposition; §148.13, concerning Recording the Hearing, §148.14, concerning Burden of Proof; §148.15, concerning Final Decision by the ALJ; §148.16, concerning Proposal for Decision or Order by the ALJ; §148.17, concerning Special Provisions for Administrative Penalties; §148.19, concerning Transcript or Duplicate of the Hearing Audiotape or Videotape; §148.20, concerning Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents; §148.21, concerning Expenses to be Paid by Party Seeking Judicial Review; §148.22, concerning Failure to Appear or Comply with Order or Decision, Administrative Violation; and §148.23, concerning Division Enforcement of Orders.

The Division adopts new §148.3, concerning Requesting a Hearing; new §148.4, concerning Correction of Clerical Error; new §148.5, concerning Notice of Hearing; and new §148.24, concerning Confidentiality of Records.

These sections are adopted with changes to the proposed text published in the March 28, 2014, issue of the *Texas Register* (39 TexReg 2235). There was not a request for a public hearing submitted to the Division. The public comment period closed on April 28, 2014, and the Division received three written comments. The Division made changes to §148.3(d)(3) and (6), and §148.3(h) in response to written comments. In addition to the changes made as a result of comments, the Division made nonsubstantive amendments to Chapter 148 to delete the section titles for each Labor Code and Government Code citation. None of the changes made in this adoption to the proposed text materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In a separate, simultaneous adoption, the Division is adopting the repeal of §148.3, concerning Requesting a Hearing; §148.4, concerning Correction of Clerical Error in Medical Review Division Decisions or Orders Absent a Request for Hearing; §148.5, concerning Notice of Hearing; §148.9, concerning Informal Disposition; §148.12, concerning Ex Parte Communications; and §148.18, concerning Record of the Hearing, which is also published in this issue of the *Texas Register.*

In a separate, simultaneous adoption, the Division is adopting the repeal of §149.1, concerning Definitions; §149.2, concerning General Statement, §149.3, concerning Referral of Contested Cases to SOAH; §149.4, concerning Notice of Hearing; §149.5, concerning Hearings; §149.6, concerning Confidentiality of Records; §149.7, concerning Action Upon Withdrawal of Decision; §149.8, concerning Final Orders in Accordance with the Act §§411.049, 413.031, 413.055, and 415.034; §149.9, concerning Proposals for Decision in Accordance with the Act, §§402.072, 407.046, and 408.0231; and §149.10, concerning Custody of the Hearing Record.

The adopted new sections and amendments are necessary to implement House Bill (HB) 2605, 82nd Legislature, Regular Session, effective September 1, 2011. The entire adoption order is part of the reasoned justification for the new and amended sections. HB 2605, in part, amended Labor Code §§402.073, 413.0311, 415.033, 415.034, and 415.036; and added Labor Code §§413.0312, 415.0211, and 504.055. Labor Code §402.073, in part, requires the State Office of Administrative Hearings (SOAH) to enter a final decision in medical fee disputes and interlocutory orders and to propose a decision to the Commissioner in all other cases. Labor Code §413.0312, in part, provides that SOAH shall conduct medical fee disputes. Labor Code §413.0311 provides that the Division shall conduct contested case hearings of independent review organization (IRO) decisions regarding medical necessity disputes, rather than SOAH. Labor Code §415.0211 provides procedures for emergency cease and desist orders, including a hearing before SOAH and a 30-day filing deadline. Labor Code §415.033 requires the Division to initiate enforcement proceedings if a charged party fails to respond to the notice of possible administrative violation. Labor Code §415.034 requires SOAH to set a hearing on a possible administrative violation if requested by either the charged party or the Division. Labor Code §415.036 provides for a Commissioner's order to be reviewed under the

substantial evidence rule. Labor Code §504.055 provides for expedited procedures for emergency first responders, including expedited contested case hearings regarding denial of a claim for medical benefits.

HB 2605 also adopted new provisions on cease and desist orders and motions for rehearing in certain cases, clarified procedures for default judgments, and deleted provisions concerning IRO medical necessity disputes and the hazardous employer program.

The Labor Code was amended by HB 7, 79th Legislature, Regular Session, effective September 1, 2005. Article 7, Section 7.01(24) of HB 7 repealed Labor Code §§411.041 - 411.050, the Hazardous Employer Program. The Division subsequently repealed its rules for the Hazardous Employer Program in 2009 *(34 TexReg 7314).* Amendments to Chapter 148 correspondingly delete references to the Hazardous Employer Program.

Section 148.1 addresses Definitions. Amended §148.1(2) deletes "Administrative Law Judge" from the defined term, and deletes the acronyms "(ALJ)" and "(SOAH)" to remove redundancies and for clarity.

Amended §148.1(4) defines the term "Chief Clerk of Proceedings." This definition includes the elements of the definition of "TWCC Chief Clerk" in existing §148.1(13), concerning Definitions, which is deleted.

The definition of "Commission Representative" in existing §148.1(5) is deleted because the definition is redesignated as "Division Representative" in new §148.1(6) to maintain the alphabetical order in the section.

Existing §148.1(6) is redesignated as amended §148.1(5) and defines the term "contested case." The existing phrase "subject, however, to the provisions of the Act as codified in the Texas Labor Code, Title 5, Subtitle A, including §§401.021(1), 411.049, 413.031, 413.055, 415.034, 402.073, 407.046, and 408.0231, 408.023, 408.024 and the rules adopted by the commission, in particular this chapter" was deleted to make the adopted definition mirror the definition of "contested case" in Government Code §2001.003(1). The Labor Code citations in existing §148.1(6) are redundant and therefore deleted. Also, the deletion of the reference to Labor Code §411.049 is necessary because that section was repealed in HB 7, 79th Legislature, Regular Session, effective September 1, 2005.

New §148.1(6) defines "Division Representative" as "the attorney or any representative that may be designated by the Commissioner or his designee to represent the division" and is necessary to conform to the proper name of the agency under Labor Code §402.001(b).

Existing §148.1(10) is redesignated as amended §148.1(9) and defines the term "Petitioner." The amended definition of "petitioner" is necessary to clarify which party has the burden of proof at SOAH. Under amended §148.1(9), the Division is the petitioner when it seeks to impose a sanction or has issued an emergency cease and desist order, and, in all other cases, the petitioner is the party who filed a written request for a hearing.

Existing §148.1(11) is redesignated as amended §148.1(10) and defines the term "Respondent." The definition of "Respondent" in amended §148.1(10) is necessary to clarify that the respondent is the opposing party when the Division seeks to impose a sanction or has issued an emergency cease and desist order in a contested case. In all other cases the respondent is the person responding to the petitioner's request for a hearing.

The definition in existing §148.1(13) of "TWCC Chief Clerk" is deleted because the term is updated to conform to current agency terminology. The new term, "Chief Clerk of Proceedings," is redesignated as new §148.1(4).

Section 148.2 addresses Scope and Applicability. Amended §148.2 is reorganized for clarification and consistency with Labor Code §402.073, as revised by HB 2605, 82nd Legislature, Regular Session, effective September 1, 2011.

Amended §148.2(a) clarifies that Chapter 148 governs contested case hearings before SOAH as authorized by the Texas Workers' Compensation Act. The phrase "Except for benefit disputes, governed by chapters 140, 142, and 143 of this title (concerning Dispute Resolution-General Provisions; Dispute Resolution-Benefit Contested Case Hearing; and Dispute Resolution-Review by the Appeals Panel), these rules govern all" is deleted those disputes are heard by the division. Laws concerning benefit dispute resolution are found elsewhere in Labor Code including Chapter 410 and 28 TAC Chapters 140, 141,142, 143, 144, and 147. Inclusion of the citations in the adopted rules would be repetitive and are therefore deleted. The phrase "This chapter governs" is added to clarify the scope of the chapter. The replacement of the word "to" with the word "which," the deletion of the word "the," and the replacement of the word "arising" with the phrase "as authorized," are clarifying changes.

Amended §148.2(b) adds the phrase "This chapter governs" to replace the phrase "The procedural rules of the commission govern" for clarity, adds the word "provides" to replace "provide," and adds "division on the following" to replace "commission" for clarity.

New §148.2(c)(1) is necessary to clarify that Government Code, Chapter 2001 applies to contested case hearings under Labor Code §§407.046, 407A.007, 413.031, 413.0312, 413.055, 415.0211, and 415.034.

Amended §148.2(c)(2) provides that Labor Code §401.021(1) applies to contested case hearings that are not specified in adopted §148.2(c)(1). The phrase "all other contested case" is added after "apply to" for clarity. The references to Labor Code §§402.072, 407.046, 408.0231, and 402.073(b) are deleted because they are unnecessary as the amended provision explains the applicability.

New §148.2(c)(3) clarifies that the Administrative Law Judge renders the final decision in medical fee disputes and interlocutory orders, as required by Labor Code §402.073(b).

Amended §148.2(c)(4) clarifies that the Commissioner renders the final decision in all other cases not covered by §148.2(c)(3). This provision is necessary to clarify the division of responsibilities and authority between the Division and SOAH.

Section 148.3 addresses Requesting a Hearing. Section 148.3 is reorganized into subsections for hearings requested by the Division, hearings requested by other parties, determining the date filed or received by the Chief Clerk of Proceedings, deadlines for filing, special requirements for filing medical fee disputes, special provisions for enforcement actions (notices of violation), late filings, and delivering the request for hearing to SOAH.

New §148.3(a) contains the requirements of existing §148.3(i), concerning Commission Request for Hearing, and deletes the references to Labor Code §407.046(b) and §411.0415(c). Labor Code §411.0415(c) is deleted because it was repealed in HB 7, 79th Legislature, Regular Session, effective September 1, 2005.

The reference to Labor Code §407.046(b) is included in the reference to "the Act," so it is redundant and therefore deleted.

New §148.3(b) provides that other parties may request a hearing before SOAH and includes the requirements in existing §148.3(a), in part, with updated terminology. The requirement in existing §148.3(a) that a person requesting a hearing before SOAH follow the instructions in the notice letter regarding submission of an appeal is deleted because requirements are set forth in Labor Code statutes, including §§413.0312, 413.055, 415.032, and 415.034. The requirements in existing §148.3(a) are also in Division rules including §§148.3, concerning Requesting a Hearing; 133.306, concerning Interlocutory Orders for Medical Benefits; 133.307, concerning MDR of Fee Disputes; 180.8, concerning Notices of Violation; Notices of Hearing; Default Judgments; and 180.10, concerning Ex Parte Emergency Cease and Desist Orders.

New §148.3(c) contains the requirements of existing §148.3(b). The sentence "The request for hearing will be forwarded to the division's Chief Clerk of Proceedings, but this may result in delay of processing the request" is added. The sentence was added to clarify that not properly addressing the request for a hearing may result in a processing delay because of the time required for the request to be delivered to the Chief Clerk of Proceedings.

New §148.3(d)(1) contains the 20-day deadline in existing §148.3(a)(1) for a medical fee dispute and adds a reference to Labor Code §413.0312. Labor Code §413.031 and §413.0312 are cited together and jointly referred to throughout the rule text because they are both related to medical fee disputes.

New §148.3(d)(2) contains the 20-day deadline in existing §148.3(a)(5) for an administrative violation and adds a reference to §180.8, adopted effective February 14, 2013. The addition of the reference to §180.8 is necessary because it is the rule governing procedures for notices of violation.

New §148.3(d)(3) contains a 20-day deadline for an interlocutory order. In response to comments, the Division changed the timeframe in the proposal from 30 days back to the existing timeframe of 20 days after receipt of an interlocutory order for consistency with other deadlines in the section and to conform to *Commercial Life Ins. Co. v. Tex. State Bd. Of Ins., 774 S.W.2d 650, 651 and 652 (Tex.1989) and Frank v. Lib. Ins. Corp.,* 255 S.W.3d 314, 317-18 and 325-26 (Tex. App. - Austin, 2008, pet. den.). *Commercial Life* held that the time period for filing a motion for rehearing does not commence until the agency complies with its statutory duty to notify the parties of the order or decision. *Frank* held that the time period for filing a request for review with the appeals panel does not commence until both a party and their attorney have been notified of a decision.

New §148.3(d)(4) adds a 30-day deadline for filing a request for hearing on an emergency cease and desist order to conform to the requirements of Labor Code §415.0211(c).

New §148.3(d)(5) contains the 20-day deadline in existing §148.3(a)(3) for requesting a hearing on a refund order issued pursuant to a Division audit or review.

New §148.3(d)(6) requires requests for a hearing to be filed 20 days after receipt of notice of the action unless specified in other law or specified under §148.3(d). In response to comments, the Division changed the phrase "date of the action" to "receipt of notice of the action." The change was necessary for consistency with other deadlines in the section and to conform to *Commercial Life Ins. Co. v. Tex. State Bd. Of Ins., and Frank v. Lib. Ins. Corp.,* discussed above. Twenty days after receipt of notice is the standard deadline for all types of hearings under §148.3(d) other than for emergency cease and desist orders, and if a different specific deadline exists in another statute or rule, that more specific deadline would prevail.

The deadlines in existing §148.3(a)(2) and (6), regarding notice of identification as a hazardous employer and receipt of an IRO decision, are deleted. This is necessary because 28 TAC §§164.1 - 164.18, concerning the Hazardous Employer Program, were repealed in 2009 due to the repeal of Labor Code §§411.041 - 411.050 in HB 7, 79th Legislature, Regular Session, effective September 1, 2005. Appeals of IRO decisions regarding determination of medical necessity are heard by TDI hearing officers, not SOAH, as required by Labor Code §413.0311, which was amended by HB 2605, 82nd Legislature, Regular Session, effective September 1, 2011.

New §148.3(e) mirrors the requirements in existing §148.3(c) for requests for hearing under Labor Code §413.031 and §413.0312. The request for hearing must (1) contain a statement indicating that it is a request for hearing; (2) include a copy of the findings and decision on which a hearing is being requested; (3) include a verification of the date of the conclusion of the Benefit Review Conference; (4) be signed by a requestor, respondent, or its representative; and (5) include a certificate of service.

New §148.3(f)(1) mirrors the requirements in existing §148.3(h) regarding notices of violation and states that if a person receives a notice of violation, they must either file an answer and pay the amount of the sanction or file an answer and ask for a hearing. The word "alleged" is deleted before the word "violation" in the title, and the word "penalty" is replaced with "sanction" to more closely track statutory language in Labor Code §415.032 and §415.0215.

New §148.3(f)(2) provides that if the person charged with an administrative violation does not file an answer to the notice of violation, the Division will schedule a hearing at SOAH. New §148.3(f)(2) is necessary to conform to 28 TAC §180.8, concerning Notices of Violation; Notices of Hearing; Default Judgments.

New §148.3(g) includes the requirements of existing §148.3(d) and adds a good cause exception to the dismissal of a late filing. New §148.3(g) provides that the Division shall send a letter to the requestor informing the requestor that the untimely request will be dismissed unless the requestor provides information of timely filing or good cause for untimely filing within 10 working days of the date of the letter. Title 28 TAC §102.3(b), concerning Computation of Time, defines "working day." New §148.3(g) provides that if the requestor responds with information about timely filing or good cause, the Chief Clerk of Proceedings will send the request for a hearing and the additional filing or good cause information to SOAH. If the requestor does not respond to the first letter within the time required, the Division will send a dismissal letter to the requestor. The SOAH ALJ will dismiss a request for hearing if the ALJ determines it to have been filed later than the deadline date without good cause. New §148.3(g) was revised in response to an informal comment and is necessary to provide procedures to resolve late filing disputes. It is anticipated that the procedures of §148.3(g) will be utilized in a small number of cases.

New §148.3(h) provides the reasons the Division will not deliver a request for a hearing to SOAH. New §148.3(h) includes the requirements of existing §148.3(g). The request will not be deliv-

ered if it has been withdrawn, dismissed for late filing under new §148.3(g), or if additional time is necessary to correct a clerical error discovered by the Division or a party.

New §148.4 addresses Correction of Clerical Error. New §148.4 combines existing §148.3(e), concerning Request for Correction of Clerical Error, and existing §148.4, concerning Correction of Clerical Error in Medical Review Division Decisions or Orders Absent a Request for Hearing, into a single section. The Division determined that two separate corrections of clerical error sections in the existing rules are unnecessary because they are redundant.

New §148.4(a) includes the requirements of existing §148.4(a) and (e), in part, and provides that the Division may correct clerical errors that it discovers at any time. New §148.4(a) adds the requirement that the Division notify the parties of a clerical error and give the parties an opportunity to object, which is necessary to give the opposing party due process and to ensure fairness and accuracy. New §148.4(a) also adds that the Division may enter a nunc pro tunc order after a decision has become final, which is necessary to clarify that the Division has the authority to correct its own mistakes at any time. New §148.4(a) removes the requirement from existing §148.3(f) that the Division may only revise an order or decision to correct a clerical error prior to delivery of the request for a hearing to SOAH because new §148.4(a) provides that the Division may enter a nunc pro tunc order after an order or decision has become final and existing §148.3(f) would be in conflict with new §148.4(a).

New §148.4(b) includes the requirements of existing §148.4(a) that authorizes a party to request correction of a clerical error and adds a requirement that the request be made before an order or decision becomes final. A request must be made before the decision becomes final because parties need finality to (1) be able to appeal an order or decision or comply with the order or decision, (2) pay administrative penalties, or (3) modify their practices. The requirements in existing §148.4(b) for a request for correction of clerical error is not included in new §148.4(b) because a specific format is not necessary for the Division to correct a clerical error in a decision or order.

New §148.4(c) outlines the information that must be included in the notification letter the Division sends to the parties when a clerical correction is made. The letter must include the date of the original order, the erroneous part as originally stated, the corrected portion as it reads corrected, and the signature of the authorized Division personnel. This letter notifies the parties that a correction has been made and gives them notice in case there is further error. The letter thus completes the correction process, is a record that a specified correction has been made, and ensures accuracy in case further correction needs to be made.

The requirement in existing §148.4(f)(1) that any party affected by the order or decision may file a response with the medical review decision no later than 10 days after receipt of notice, is not included in new §148.4 because the order or decision may become final in less than 10 days by the time an error is discovered.

The requirement in existing §148.4(f)(2)(A) and (B) that the Commissioner either issue a corrected order or decision, advise the parties by verifiable means that the original order was correct, or advise the parties by verifiable means that the order cannot be corrected is not included in new §148.4. Removal of the requirement that the Commissioner advise the parties by verifiable means is deleted because it restricts the ability for the Division to call parties for clarification and is unnecessary because the parties already receive notice. The parties receive notice of the possible error, are given the opportunity to object, and receive notice of a correction after it is made under new §148.4.

The requirement in existing §148.4(g), that a request to correct clerical error shall not be deemed a request for hearing unless it complies with the requirements specified in existing §148.3(e), concerning Requesting a Hearing, is not included in new §148.4 because the requirements to request a hearing are set forth in new §148.3.

Section 148.5 addresses Notice of Hearing. New §148.5(a) includes the requirements in existing §148.5, concerning Notice of Hearing, and is reorganized for clarity.

New §148.5(a) requires the Chief Clerk of Proceedings to notify the parties of a hearing by verifiable means at least 10 days before the hearing at SOAH. This is consistent with Government Code §2001.051(1). New §148.5(a) also requires SOAH to send notice of a hearing to revoke a certificate of self-insurance not later than 30 days before the hearing date, as required by Labor Code §407.046(c).

New §148.5(b) provides the contents of a notice of hearing. It mirrors the requirements of existing §148.5(a).

New §148.5(c) allows some of the information required by new §148.5(b) to be provided by a Division representative, in lieu of the Chief Clerk of Proceedings. The same authorization is in existing §148.5(a).

New §148.5(d) provides that a person who receives a notice of a hearing on an administrative violation must file a written response within 20 days of receipt, as required by Labor Code §415.032(b) and 28 TAC §180.8(c).

New §148.5(e) includes the requirements of existing §148.5(b) concerning Notice of Hearing under Labor Code §407.046(b). Labor Code §407.046(b), existing §148.5(b) and new §148.5(e) all require SOAH to give 30 days notice of a hearing to revoke a certificate of authority to self-insure.

Section 148.6 addresses Venue. Amended §148.6 clarifies that hearings held under Chapter 148 are held in Austin, Travis County, Texas.

Section 148.7 addresses Representation. Amended §148.7(d) clarifies that nothing in the rules limits assistance available under Labor Code §404.105. Further, amendments to subsection (d) correct the reference to the ombudsman program from Labor Code, Chapter 409, Subchapter C, to Labor Code §404.105 because Subchapter C was redesignated to Subchapter D, Chapter 404, Labor Code, in HB 7, 79th Legislature, Regular Session, effective September 1, 2005.

Amended §148.7(e) deletes the phrase "a violation of this section shall be deemed a violation of a commission rule" in existing §148.7(e) because it is redundant.

Section 148.8 addresses Withdrawal of Hearing Request. Amended §148.8(a) clarifies that the petitioner may withdraw its request for a hearing by sending the request to both the Chief Clerk of Proceedings and to SOAH. This change is necessary to clarify that a requesting party must submit the request to the Chief Clerk of Proceedings and to SOAH in order to assure the correct party receives the withdrawal. It is anticipated that the procedures of §148.8 will be used in a small number of cases.

Amended §148.8(b) deletes references to SOAH appeals of IRO decisions because Labor Code §413.0311 provides that a Division Hearings Officer, and not SOAH, hears appeals of IRO decisions.

Section 148.10 addresses Hearings Subpoenas to Compel Attendance and Subpoenas Duces Tecum. Amended §148.10 contains nonsubstantive editorial revisions which are discussed in the early part of this introduction. Section 148.10 outlines subpoena issuance and requests and remedies for failing to comply with a subpoena.

Amended §148.11 addresses Commissions to Compel Attendance for Deposition. Amended §148.11(d) adds the phrase "made by" before "certified check" for clarity.

Amended §148.11(d)(4) changes the word "should" to "shall" to add the requirement that the party seeking the commission requiring deposition coordinate the location and time of attendance for witnesses. "Should" is replaced by "shall" in this adoption to eliminate any ambiguity because coordinating the time and location for witnesses is already required under existing §148.11(d)(4) and is consistent with the Division's reasoned justification for the adoption of existing §148.11(d)(4) in the June 3, 2005, issue of the *Texas Register* (30 TexReg 3240). Coordination with the opposing party promotes efficiency and prevents unnecessary conflicts.

Amended §148.11(d)(4) substitutes the phrase "by mutual agreement with the parties and witness" with "by mutual agreement of the parties and witness" for clarity.

Amended §148.13 addresses Recording the Hearing. Nonsubstantive editorial revisions which are discussed in the early part of this introduction are adopted in §148.13, which outlines the procedures for arranging for court reporters and recording by a party.

Amended §148.14 addresses Burden of Proof. Nonsubstantive editorial revisions which are discussed in the early part of this introduction, are adopted in §148.14. Adopted §148.14(a) is formatted into subsections (a) - (d) for purposes of clarity. The phrase in previous §148.14(a) that states "pursuant to the Act §§402.072, 408.0231, 411.0415, 411.049, 415.021, 415.023, 415.032, and 415.034, (except issues under §120.2(g) and (h) of this title, concerning Employer's First Report of Injury)" is deleted because it references existing law, and is, therefore, unnecessary.

Amended §148.14(a) includes the requirements of existing §148.14(a) and clarifies that the Division has the burden of proof in a contested case in which the Division seeks to impose a sanction or has issued an emergency cease and desist order. This clarification is necessary because the Division is the party seeking sanctions and changes in behavior from the other party. To put the burden of proof on the other party would require them to prove a negative, in other words, to prove that they weren't doing something they were accused of doing.

Amended §148.14(b) includes the requirements of existing §148.14(a) and adds a citation to Labor Code §413.0312.

Amended §148.14(c) includes the requirements of existing §148.14(a) and adds a reference to Labor Code §407.043 to clarify who has the burden of proof in a hearing on the denial of an application for a certificate of authority to self-insure.

Amended §148.14(e) includes the requirements of existing §148.14(b) and deletes the existing phrase "except in cases of appeals pursuant to §133.308 of this title (concerning Medical Dispute Resolution by Independent Review Organization) in which case the decision of the IRO shall be given presumptive weight." Section 148.14(e) is necessary because IRO hearings are not heard by SOAH under Labor Code §413.0311.

Section 148.15 addresses Final Decision by the ALJ. Amended §148.15(a) includes the requirements of existing §148.15(a) and adds the requirement that "The ALJ shall adjourn the hearing after all evidence has been received." Existing §148.15(a) provides that "after all evidence has been heard, the ALJ shall adjourn the hearing." "Received" is a more accurate term than "heard" because evidence can be presented orally, in writing, by demonstrable evidence, and by other means. Amended §148.15(a) concerns medical fee disputes and interlocutory orders, as required by Labor Code §402.073(b) and (c). References in existing §148.15(a) to Labor Code §411.049 and §415.034 are deleted because §411.049 was repealed in 2005 and §415.034 concerns hearing procedures on notices of violation, which are addressed in §148.16, concerning Proposal for Decision or Order by the ALJ.

Amended §148.15(b) adds a new heading "Decision or Order that May Become Final," deletes the previous heading "Entry of orders" and provides that the ALJ shall issue a decision or order that may become final as required by Labor Code §402.073(b). The requirements in existing §148.15(b) are included in amended §148.15(c).

Amended §148.15(c) adds the heading "Contents of Decision or Order that May Become Final," and clarifies the requirements for a decision or order that may become final. The requirements in existing §148.15(b) regarding an administrative penalty is deleted because sanctions are addressed in amended §148.16. The reference to

28 TAC §102.5, concerning General Rules for Written Communications To and From the Commission, in existing §148.15(c) is deleted because 28 TAC §102.5 applies to all communications to and from the Division except as otherwise provided.

Amended §148.15(d) adds "Decision or Order that May Become Final" to the heading, deletes "decision," and adds the phrase "decision or order that may become final" to be consistent with the language of the APA, Government Code §§2001.141 - 2001.146, concerning motions for rehearing.

Amended §148.15(e) addresses procedures for motion for rehearing. Amended §148.15(e) provides that Government Code, Chapter 2001, Subchapter F, governs motions for rehearing and prerequisites for appealing a decision or order.

Amended §148.15(f) includes the requirements of existing §148.15(d) but provides that the finality of a decision or order is determined by the factors in Government Code §2001.144. The reference to 28 TAC §102.5, concerning General Rules for Written Communications To and From the Commission in existing §148.15(d) is deleted because the finality of an order or decision is determined by the factors in Government Code §2001.144(a)(1) - (4), not by receipt of notice. Title 28 TAC §102.5 applies to all communications to and from the Division. Text was added to provide an exception to Government Code §2001.144 "except as provided by Labor Code §413.031 and 28 TAC §133.307 (concerning MDR of Fee Disputes)," because a different procedure is provided by Labor Code §413.031 and 28 TAC §133.307 for appeals of medical fee disputes. A party seeking judicial review of a medical fee dispute must file suit no later than the 45th day after the date SOAH mailed the party the

notice of the decision. Government Code §2001.176 requires a party seeking judicial review of a contested case to file suit no later than the 30th day after the date on which the decision that is the subject of the complaint is final and appealable.

Amended §148.15(g) provides that the notification to a party of the ALJ's decision or order that has become final under Government Code §2001.144 constitutes exhaustion of administrative remedies, except as provided by Labor Code §413.031 and 28 TAC §133.307 (relating to MDR of Fee Disputes). The exception was added because of the different procedure provided by Labor Code §413.031 and 28 TAC §133.307 for appeals of medical fee disputes and discussed in the paragraph on §148.15(f). The provision that "a motion for rehearing will not be entertained" was deleted because a motion for rehearing is required for cases under Labor Code §§413.031, 413.0312, and 413.055.

Amended §148.15(h) provides that a party dissatisfied with a final decision or order of the ALJ may seek judicial review as provided by the Act and the APA and in accordance with Labor Code §413.031 and 28 TAC §133.307 (relating to MDR of Fee Disputes). The references to Labor Code §413.031 and 28 TAC §133.307 (relating to MDR of Fee Disputes) were added because of the different procedure provided by Labor Code §413.031 and 28 TAC §133.307 for appeals of medical fee disputes and discussed in the paragraph on §148.15(f).

Section 148.16 addresses the Proposal for Decision or Order by the ALJ. Amended §148.16(a) conforms to Labor Code §402.073(b) and (c). The references to "§§402.072, 407.046, and 408.0231, and in other cases not subject to §402.073(b) of the Act (relating to Cooperation with SOAH)" in existing §148.16(a) are deleted because they are included in cases not governed by §148.15 as stated in amended §148.16(a). Amended §148.16(a) provides that the ALJ shall adjourn the hearing after all evidence has been received to replace the requirement that the hearing be adjourned after all evidence is "heard" in existing §148.16(a). "Received" is a more accurate term than "heard" because evidence can be presented orally, in writing, by demonstrable evidence, and by other means.

Amended §148.16(b) includes the requirements for a proposal or order in existing §149.9, concerning Proposals for Decision in Accordance with the Act, §§402.072, 407.046, and 408.0231. Amended §148.16(b) adds the requirement that the ALJ make findings of fact on the ability of a party to pay a proposed sanction or bonding amount, if evidence is presented on that issue. Such findings of fact give the Commissioner the ability to consider the indigence of a respondent in a case. This does not create any new factors for the Commissioner to consider in addition to the criteria and requirements of Labor Code §415.021 or 28 TAC §180.26.

Amended §148.16(c) includes the requirements of existing §148.16(c) but deletes the requirement that the Chief of Staff and General Counsel receive notice of a proposal for decision from the TWCC Chief Clerk because it is not necessary to outline the Division's internal communication processes by rule.

Amended §148.16(d) adds the requirement that any briefs or exceptions or replies to such filed with SOAH must also be filed with the Chief Clerk of Proceedings. Amended §148.16(d) deletes procedures for filing briefs and exceptions because procedures for filing briefs and exceptions are in the SOAH rules, 1 TAC §155.507. The reference to 28 TAC §102.5, concerning General Rules for Written Communication To and From the Commission, in existing §148.16(d), is deleted because 28 TAC §102.5 already generally applies to all Division communication, and inclusion of the citation would be redundant.

Amended §148.16(e) adds a process for a party to submit a request for a Commissioner hearing to consider arguments within 10 days after SOAH issues the proposal for decision or order. The Commissioner may decide to hold a hearing to consider arguments because the Commissioner may need to more fully understand the position of the parties in a case. Subsections 148.16(e)(1), (2), and (3) provide the procedures for the hearing. It is anticipated that the Commissioner will convene a hearing to consider oral arguments in only a small percentage of cases.

Existing §148.16(e) concerning replies to a brief and exceptions is deleted because procedures for replying to briefs and exceptions are in the SOAH rules, 1 TAC §155.507, and inclusion of the requirement in these rules would be redundant.

Amended §148.16(f) provides that the Commissioner shall issue a decision or order that may become final in cases involving a revocation of authority to self-insure, a hearing on group self-insurance coverage, emergency cease and desist orders, and administrative violations. Amended §148.16(f) provides that in all other cases the Commissioner shall issue a final decision or order. Amended §148.16(f) is necessary to conform to the requirements in Labor Code §§407.046, 407A.007, 415.0211, and 415.034; and Government Code §2001.144.

Amended §148.16(g) provides that a motion for rehearing is a prerequisite for filing an appeal in cases under §148.16(f), as required by Government Code §2001.145.

Amended §148.16(h) requires the Chief Clerk of Proceedings to notify the parties by verifiable means of the final decision or order of the Commissioner and is necessary because notification is the essential element of the exhaustion of administrative remedies in amended §148.16(i). This requirement is in existing §148.16(f).

Requirements in existing §148.16(f) for a decision by the Commission in an open meeting within 120 days after the SOAH proposal for decision is delivered is deleted to conform to current agency procedure under Labor Code §402.00115. Existing §148.16(f) requires the "commission" to decide all cases at a posted meeting of the "commission." This was the procedure of the Texas Workers' Compensation Commission, which had six Commissioners and had to make decisions in an open meeting under the Open Meetings Act.

Amended §148.16(i) deletes the phrase "no motion for rehearing will be considered" because it conflicts with new §148.16(g). New §148.16(g) provides, in part, that a motion for rehearing may be filed in contested cases under §148.16. New §148.16(g) further provides, in part, that a motion for rehearing is a prerequisite for filing an appeal of a decision or order under Labor Code §§407.046, 407A.007, 415.0211, or 415.034.

Section 148.17 addresses Special Provisions for Administrative Penalties. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.17, which outlines the procedures for a party to respond to an assessment of a sanction to either pay the amount of the sanction or post a bond.

Section 148.19 addresses Transcript or Duplicate of the Hearing Audiotape or Videotape. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.19, which outlines the procedures for a party to obtain a transcript, audio, or video recording of the hearing.

Section 148.20 addresses Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.20, which outlines the procedures for reimbursement, payment of travel expenses, and payment of fees for witnesses and deponents.

Section 148.21 addresses Expenses to be Paid by Party Seeking Judicial Review. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.21, which outlines the procedures for the Division to send a certified copy of the record of a proceeding to a reviewing court and for the assessment of the cost of preparing the record to the party seeking judicial review.

Section 148.22 addresses Failure to Appear or Comply with Order or Decision, Administrative Violation. Adopted §148.22 deletes the sentence "Failure to comply with such order or decision shall be deemed a violation of a commission rule" because the first sentence of the section already states that "A person commits an administrative violation if that person...fails to comply with an order of the ALJ...." Inclusion of the sentence is redundant, and therefore the sentence is deleted.

Section 148.23 addresses Division Enforcement of Orders. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.23, which outlines the procedures for the enforcement of a final order of SOAH.

New §148.24 addresses Confidentiality of Records. Section 148.24 includes the requirements of existing §149.6 (concerning Confidentiality of Records), which is being repealed. Nonsubstantive editorial revisions discussed in the early part of this introduction are adopted in §148.24, which outlines the protection of confidential information by SOAH, requests for open hearings, the Division remaining the custodian of records, and the responsibilities of SOAH and the Division under the Texas Public Information Act, Government Code, Chapter 552.

Section 148.1 addresses Definitions of words and terms as used in Chapter 148, unless the context clearly indicates otherwise.

Section 148.2 provides that the ALJ renders the final decision in medical interlocutory orders and medical fee dispute resolution and provides that the commissioner renders the final decision in all other cases.

Section 148.3 addresses Requesting a Hearing. Subsection (a) provides that the division may request a hearing before SOAH as provided by Government Code, Chapter 2001, Labor Code §§401.001 et. Seq., and division rules.

Subsection (b) provides that other parties may file requests for hearing before SOAH as provided in the Labor Code and division rules.

Subsection (c) updates the nomenclature for the rules providing when a request for hearing is deemed filed or received and clarifies what happens when a request for hearing is sent to an office other than the Chief Clerk of Proceedings.

Subsection (d) provides deadlines for filing a request for hearing before SOAH. It includes a 30-day filing deadline for emergency cease and desist orders as required by Labor Code §415.0211(c) and a 20-day deadline for medical fee disputes, administrative violations, interlocutory orders, division audit or reviews, and requests for hearing on matters unspecified in this section.

Subsection (e) requires specific information in a request for hearing on a medical fee dispute.

Subsection (f) contains procedures for notices of violation as required by Labor Code, Chapter 415, Subchapter C and §180.8 of this title (relating to Notices of Violation; Notices of Hearing; Default Judgments).

Subsection (g) provides that the Chief Clerk of Proceedings will dismiss a request for hearing filed later than the deadline date, except for good cause and except for a request for hearing on a notice of violation.

Subsection (h) provides for the Chief Clerk of Proceedings to deliver a request for hearing to SOAH within 20 days of receipt, except when withdrawn, dismissed, or held for correction of clerical error.

Section 148.4 addresses correction of clerical error. The section provides that the division may correct clerical errors that it discovers on its own as well as errors that are brought to its attention by a party and provides that the division may enter a nunc pro tunc order after a decision has become final. The section requires the division to provide notice and an opportunity to respond.

Section 148.5 addresses Notice of Hearing. Section 148.5 requires the Chief Clerk of Proceedings to give at least 10-days notice of a hearing at SOAH, as required by Government Code §2001.051(1). The section requires SOAH to send notice of a hearing to revoke a certificate of self-insurance not later than 30 days before the hearing date, as required by Labor Code §407.046(c). It provides that a person who receives a notice of hearing on an administrative violation must file a written response within 20 days of receipt.

Section 148.6 addresses venue. The amendment adds the clarification that hearings held under Chapter 148 are held in Austin, Travis County, Texas.

Section 148.7 addresses representation of parties in cases before SOAH. It provides that only attorneys or adjusters may receive a fee for representing an injured employee before SOAH.

Section 148.8 addresses withdrawal of hearing request. Subsection (a) provides that the petitioner may withdraw its request for a hearing by sending the request to both the Chief Clerk of Proceedings and to SOAH.

Section 148.10 provides the procedures for obtaining a subpoena to compel attendance and a subpoena duces tecum.

Section 148.11 provides procedures to obtain a commission to compel attendance for a deposition.

Section 148.13 provides for the Division to arrange for a court reporter when required and for a party to record a hearing.

Section 148.14 addresses burden of proof. Subsection (a) clarifies that the division has the burden of proof in a contested case in which the division seeks to impose a sanction or has issued an emergency cease and desist order.

Subsection (b) provides that the party seeking relief has the burden of proof in hearings on noncompliance with selection requirements, medical dispute resolution, and interlocutory orders.

Subsection (c) provides that the certified self-insurer has the burden of proof in hearings on denial of application, revocation of certificate of authority, suspension or revocation of certificate for failure to pay assessment, and challenging the position of the division.

Subsection (d) provides that the employer has the burden of proof in a contested case involving the timely filing of the employer's first report of injury.

Subsection (e) provides that the standard of proof is preponderance of the evidence.

Section 148.15. concerns final decision by the ALJ. Subsection (a) provides that this section concerns medical fee disputes and interlocutory orders.

Subsection (b) provides that the ALJ shall issue a decision or order that may become final under this section.

Subsection (c) provides that when a decision or order requires any action, it must contain a period of time for such action to be completed.

Subsection (d) provides that the decision or order will be sent immediately to the parties or their representatives.

Subsection (e) provides that Government Code, Chapter 2001, Subchapter F governs post decision procedures, including motions for rehearing and prerequisites for appealing a decision or order.

Subsection (f) provides that the finality of a decision or order is determined by Government Code §2001.144.

Subsection (g) provides that notification that a decision of order has become final constitutes exhaustion of administrative remedies.

Subsection (h) provides that a party may seek judicial review.

Section 148.16 addresses proposal for decision by the ALJ.

Subsection (a) provides that this section applies to all cases not covered by §148.15.

Subsection (b) provides the required elements of a proposal for decision or order. Subsection (c) provides that SOAH shall furnish the proposal for decision or order to the Chief Clerk of Proceedings and the parties.

Subsection (d) provides for the filing of briefs and exceptions to the proposal for decision.

Subsection (e) provides that the commissioner may decide to hold a hearing to consider arguments to allow the commissioner to more fully understand the position of the parties in a case.

Subsection (f) provides that the commissioner shall issue a decision or order that may become final in cases involving a revocation of authority to self-insure, a hearing on group self-insurance coverage, emergency cease and desist orders, and administrative violations. In all other cases the commissioner shall issue a final decision or order.

Subsection (g) provides the procedures for a motion for rehearing and provides that a motion for rehearing is a prerequisite for filing an appeal in cases under subsection (f).

Subsection (h) provides for the Chief Clerk of Proceedings to notify the parties of the final decision or order of the commission in their case.

Subsection (i) provides that notification to a party of the commissioner's final decision constitutes exhaustion of administrative remedies.

Subsection (j) provides for judicial review of a decision or order.

Section 148.17 requires parties who have been assessed a sanction to pay the sanction or post a bond within 30 days after notification of the assessment of the sanction.

Section 148.19 provides for a party to obtain a transcript or tape of the hearing upon request and payment.

Section 148.20 provides for reimbursement of expenses and payment of fees for witnesses and deponents.

Section 148.21 provides for payment of expenses by a party of the cost of preparing a certified record of a proceeding.

Section 148.22 provides that a party or witness commits an administrative violation if they fail to comply with an order of the ALJ.

Section 148.23 provides that a final order of SOAH is a final order of the Division and may be enforced accordingly.

Section 148.24 provides for the confidentiality of records and proceedings at SOAH.

SUMMARY OF COMMENTS AND AGENCY RESPONSES

General

COMMENT: A commenter stated that they are generally supportive of the proposed changes to the SOAH rules.

RESPONSE: The Division appreciates the supportive comment.

28 TAC §148.3(c)

COMMENT: A commenter stated that §148.3(c) should be changed to remove the distinction between a request addressed to the Chief Clerk of Proceedings and one not addressed to the Chief Clerk that is filed in an office other than the Chief Clerk's office.

RESPONSE: The Division disagrees and declines to make the suggested change. Section 148.3(c) mirrors existing §148.3(b). The terminology is updated, but no substantive changes have been made. The specific provisions are necessary to efficiently process requests for hearings within the time limits to request a SOAH hearing.

28 TAC §148.3(d)(1) and (e)

COMMENT: A commenter stated that §148.3(d)(1) and (e) should not require a request for hearing to be filed with the Chief Clerk of Proceedings to proceed to a hearing at SOAH. The parties will have been in a benefit review conference and should be able to proceed directly to a hearing without the need to file a request with the Chief Clerk of Proceedings. Since the Division will need to send SOAH a statement of matters asserted, the benefit review officer could have the parties agree on the undisputed facts and the Chief Clerk of Proceedings could submit this information as part of the statement of matters asserted when the Division requests the SOAH setting.

RESPONSE: The Division disagrees and declines to make the suggested change. The Division needs a request for a hearing in writing to be filed with the Chief Clerk. (1) Parties do not always know at the time of a BRC that they want a SOAH hearing. (2) The Division is required by Labor Code §413.002 to monitor participants in the workers' compensation system for compliance with rules and quality and timeliness of decisions. In some cases, such as provided by Labor Code §412.0312, the Division may participate in a contested case hearing if the hearing involves interpretation of fee guidelines. Central filing with the Chief Clerk allows closer tracking of request for hearing activity

for monitoring and participation. (3) Title 1 TAC §155.51 provides that only the agency can refer a case to SOAH. (4) SOAH rules, Title 1 TAC §155.51 and §155.53, have very specific requirements in order for it to acquire jurisdiction. Section 155.51 of the SOAH rules provides that SOAH acquires jurisdiction when a referring agency files a Request to Docket Case form and the necessary documents. Those requirements can be handled more efficiently by one Chief Clerk of Proceedings than it can by many separate benefit review officers.

28 TAC §148.3(d)(1) and (e)

COMMENT: A commenter proposed that §148.3(d)(1) and (e) should allow a request for hearing when the parties receive the copy of the findings and decision of the medical fee dispute rather than the conclusion of the benefit review conference. The commenter stated that the Division often takes a long time to issue the findings and decision. The commenter stated that the amount of time between the Division's request to set a hearing with SOAH and the initial SOAH set date is normally a minimum of 60 days. The commenter stated that the dispute resolution process is unnecessarily lengthened by the extra step of requiring the parties to file a written request for hearing after a benefit review conference.

RESPONSE: The Division disagrees and declines to make the suggested change. The commenter's proposal conflicts with the Labor Code procedure for resolving medical fee disputes. The findings and decision of the medical fee dispute is the documentation required to initiate a benefit review conference. The procedure required by Labor Code §413.031 and §413.0312 is to conduct a benefit review conference and then, if issues remain unresolved, to request a hearing with SOAH. Many issues are resolved in benefit review conferences.

28 TAC §148.3(d)(3) and (6)

COMMENT: A commenter stated that §148.3(d)(3) and (6) are inconsistent with the request for hearing deadlines for the rest of the rule. Most of the deadlines are tied to receipt of notification of the action appealed. The deadline in §148.3(d)(3) is tied to the date the interlocutory order is issued. The commenter stated that §148.3(d)(3) should be revised to provide that the time for requesting a hearing begins after the date of receipt of notice that the interlocutory order has been issued. The commenter further stated that the deadline in §148.3(d)(6) should be revised to provide that the time for requesting a hearing begins after the date of receipt of notice of the action that the party is requesting a hearing on.

RESPONSE: The Division agrees. The deadline in §148.3(d)(3) is revised to 20 days after receipt of an interlocutory order. The deadline in §148.3(d)(6) is revised to 20 days after receipt of a notice of the action that the party is requesting a hearing on.

28 TAC §148.3(h)

COMMENT: A commenter stated that the proposed increase from 20 days to 30 days for the Chief Clerk of Proceedings to request a hearing from SOAH is excessive and would cause unnecessary delay in the dispute resolution process. The commenter suggests that at most the Chief Clerk of Proceedings should be given 10 business days to request the hearing.

RESPONSE: The Division agrees not to lengthen the time period for the Chief Clerk of Proceedings to request a hearing from SOAH. The adopted text retains the current 20-day time period.

28 TAC §148.5(a)

COMMENT: A commenter stated that they do not understand why the Division's Chief Clerk of Proceedings is sending out a notice of setting of a SOAH proceeding, instead of SOAH.

RESPONSE: SOAH rules, Title 1 TAC §155.401, require the referring agency to send the notice of hearing to all parties. See also previous responses to similar comments.

28 TAC §148.5(a)

COMMENT: A commenter stated that §148.5(a) requires that the parties be given a minimum of 10 calendar days notice of a hearing. The commenter stated that parties need more than 10 calendar days notice to exchange evidence, conduct additional discovery, as necessary, and to schedule witnesses. The commenter stated that additional notice is of particular importance to permit the parties to schedule the expert witnesses that are essential to the resolution of a fee dispute. The commenter suggests that these cases should be set along the lines of indemnity contested case hearings (40 days for regular hearings and 20 days for expedited hearings).

RESPONSE: The Division declines to make the suggested change. The ten-day minimum notice is required by Government Code §2001.051(1). SOAH notifies the Division of a hearing date, and the Division notifies the parties. Normally, SOAH sets cases 60 days in advance. The 10 day minimum notice requirement is in existing §148.5(a). Some cases, such as those involving first responders, can be set in an expedited manner requiring shorter notice. Title 1 TAC §155.251 provides that discovery begins when SOAH acquires jurisdiction. Title 1 TAC §155.153(b)(4) provides that the SOAH judge has the power to rule on discovery issues. Title 1 TAC §155.155 provides that the SOAH ALJ has the authority to control the conduct and scope of a proceeding, rule on motions, establish deadlines, and take other steps conducive to a fair and efficient contested case process. Therefore, problems with discovery time, witnesses, etc. can be addressed and resolved fairly at SOAH.

28 TAC §148.10(b)

COMMENT: A commenter stated that §148.10(b) should provide a mechanism for review of the Chief Clerk of Proceedings' denial of a party's subpoena request.

RESPONSE: The Division declines to make the suggested change. There is a mechanism for review. The aggrieved Party can file a motion to compel with SOAH to the extent provided by Title 1 TAC §155.251.

28 TAC §148.10(b)(3)

COMMENT: A commenter stated that an injured employee should not be required by §148.10(b)(3) to make a deposit and any fees or expenses incurred by an injured employee for a subpoenaed witness should be paid by the carrier. The commenter stated that this is consistent with other provisions that require the carrier to pay the costs of going to a SOAH hearing for the injured employee.

RESPONSE: The Division disagrees and declines to make the suggested change. Government Code §2001.089(2) requires the deposit of an amount that will reasonably ensure payment of the expenses of a witness or deponent. No statutory exception exists for the person requesting the subpoena not to pay the expenses of a witness. The language in §148.10(b)(3) has been in the rule since 2005, as found in *(30 TexReg 3247).*

28 TAC §148.11(d)

COMMENT: A commenter stated that §148.11(d) should provide a mechanism for review of the Chief Clerk of Proceedings' denial of a party's request for a deposition.

RESPONSE: The Division declines to make the suggested change. There is a mechanism for review. An aggrieved Party can file a motion to compel with SOAH to the extent provided by Title 1 TAC §155.251.

28 TAC §148.24(d), §148.5(a)

COMMENT: A commenter stated that the combination of (1) the requirement in §148.24(d) that a party request that a hearing be open to the public seven days prior to the hearing and (2) the requirement in §148.5(a) that the parties be given at least 10 days notice of the hearing, could result in a party having only three days to request that a hearing be open to the public. The commenter submits that this problem could be easily resolved by amending §148.5(a) to require that the parties be given more than 10 calendar days notice of a hearing.

RESPONSE: The Division disagrees and declines to make a change. The Division gives notice of a hearing when notified of a hearing date by SOAH. The ten day minimum notice requirement is set by Government Code §2001.051. In the experience of the Division, 60 days notice is typical. Lesser notice would normally occur with an expedited hearing. The seven day deadline to request an open hearing has been in 28 TAC §149.6(d) since 2005 as found in *(30 TexReg 3250)*.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

Texas Mutual Insurance Company - For

Property Casualty Insurers (PCI) - For, with changes

Office of Injured Employee Counsel (OIEC) - For, with changes

The amendments and new rules are adopted under the authority of Labor Code §§402.00111, 402.00128, and 402.061.

Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under Title 5 of the Labor Code.

Labor Code §402.00128 grants various powers to the Commissioner including the power to hold hearings.

Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

§148.1. 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 Workers' Compensation Act, Labor Code, §§401.001 et seq.

(2) ALJ--The administrative law judge designated by the State Office of Administrative Hearings to preside over the hearing.

(3) APA--The Administrative Procedure Act, as specified in the Government Code, Chapter 2001.

(4) Chief Clerk of Proceedings--The Chief Clerk of Proceedings within the hearings section in the central office of the Texas Department of Insurance, Division of Workers' Compensation.

(5) Contested Case--A proceeding held by the State Office of Administrative Hearings in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing as defined in Government Code, §2001.003.

(6) Division Representative--The attorney or any representative that may be designated by the commissioner or his designee to represent the division.

(7) Party--A person or state agency named or admitted as a party.

(8) Person--An individual, partnership, corporation, association, governmental subdivision, or public or private organization that is not a state agency as defined in the APA.

(9) Petitioner--

(A) The division is the petitioner in a contested case in which the division seeks to impose a sanction or has issued an emergency cease and desist order.

(B) In all other cases, the petitioner is the person who has filed a written request for a hearing in accordance with these procedures.

(10) Respondent--

(A) The respondent is the opposing party to the division in a contested case in which the division seeks to impose a sanction or has issued an emergency cease and desist order.

(B) In all other cases, the respondent is the person responding to the petitioner's request for a hearing.

(11) SOAH--The State Office of Administrative Hearings.

§148.2. Scope and Applicability.

(a) Scope. This chapter governs contested case hearings, which adjudicate disputes before SOAH as authorized under the Act.

(b) Coordination with SOAH's Procedural Rules. This chapter governs the following procedural matters and also provides related policies of the division on the following:

(1) matters arising before a case is transferred by the division to SOAH;

(2) matters arising after a proposal for decision or after the entire case is received from SOAH;

(3) requests for the issuance of a subpoena and related matters; and

(4) requests for issuance of a commission requiring deposition and related matters.

(c) Applicability of the APA.

(1) The entire APA applies to contested case hearings under Labor Code §§407.046, 407A.007, 413.031, 413.0312, 413.055, 415.0211, and 415.034.

(2) The sections of the APA enumerated in Labor Code §401.021(1) apply to all other contested case hearings governed by this chapter.

(3) The ALJ renders the final decision in hearings conducted pursuant to Labor Code §§413.031, 413.0312, and 413.055.

(4) The commissioner renders the final decision in all other cases not specified in paragraph (3) of this subsection pursuant to Government Code §2001.062.

§148.3. Requesting a Hearing.

(a) Hearings Requested by the Division. The division may request a hearing before SOAH as permitted by the APA, the Act, and division rules.

(b) Requests for Hearing by Other Parties. Other Parties may file requests for hearings before SOAH as permitted by the APA, the Act, and division rules. The request for hearing must be in writing. The request for hearing must be filed with the Chief Clerk of Proceedings.

(c) Date Deemed Filed or Received. When a request for a hearing is addressed to the Chief Clerk of Proceedings but is sent to an office other than the Chief Clerk of Proceedings, the date filed or received shall be the date the request is received by the division. The request for hearing will be forwarded to the division's Chief Clerk of Proceedings, but this may result in delay of processing the request. When a request for a hearing is not addressed to the Chief Clerk of Proceedings, it will not be considered filed or received by the division unless it is actually received by the Chief Clerk of Proceedings. Otherwise, a request for a hearing is deemed filed as of the date of the division date stamp placed on the document or other evidence of receipt.

(d) Deadlines for Filing. A request for hearing before SOAH must be filed with the Chief Clerk of Proceedings within the following time periods:

(1) medical fee dispute under Labor Code §413.031 and §413.0312: 20 days after the conclusion of the benefit review conference under Chapter 141 of this title (concerning Dispute Resolution--Benefit Review Conference);

(2) administrative violation: 20 days after receipt of a notice of possible administrative violation under Labor Code §415.032 and §180.8 of this title (concerning Notices of Violation; Notices of Hearing; Default Judgments);

(3) interlocutory order: 20 days after receipt of an interlocutory order for payment under Labor Code §413.055;

(4) emergency cease and desist order: not later than the 30th day after the date the affected person receives the order;

(5) division audit or review: 20 days after receipt of a division refund order issued pursuant to a division audit or review; or

(6) requests for hearing not specified in this subsection: the time for filing a request for hearing before SOAH is 20 days after receipt of a notice of the action that the party is requesting a hearing on, unless specified in other law.

(e) Requests for Hearing Under Labor Code §413.031 and §413.0312. If the request for hearing is based on Labor Code §413.031 and §413.0312, the request must be in the form and manner specified by the division and must:

(1) contain a statement indicating that it is a request for hearing;

(2) include a copy of the findings and decision on which a hearing is being requested;

(3) include verification of the date of the conclusion of the Benefit Review Conference;

(4) be signed by a requestor or respondent as defined by §133.305 of this title (concerning MDR--General), or its representative; and

(5) include a certificate of service demonstrating that the request has been sent to the other party in accordance with the requirements of §133.307 of this title (concerning MDR of Fee Disputes), in substance as follows: "I hereby certify that I have on this ___ day of _____, 20 __, served a copy of the attached instrument on (state the name of the other parties on whom a copy was served) by (state the manner of service.)"

(f) Notice of Violation.

(1) If a person receives a notice of violation, the person charged must file an answer not later than the 20th day after the date of receipt of the notice. The answer must either:

(A) remit the amount of the sanction to the division or otherwise consent to the imposed sanction; or

(B) request a hearing.

(2) If the person charged does not file an answer to the notice of violation, the division shall schedule a hearing at SOAH, pursuant to §180.8(c) of this title (concerning Notices of Violation; Notices of Hearing; Default Judgments).

(g) Dismissal of Late Filings. The division, or the ALJ pursuant to paragraph (3) of this subsection, shall dismiss a request for hearing filed later than the deadline date. This subsection does not apply to requests for hearing submitted in response to a Notice of Violation pursuant to §180.8 of this title.

(1) The division shall send a letter to the requestor informing the requestor that the untimely request will be dismissed unless the requestor provides information about timely filing or good cause for untimely filing within 10 working days of the date of the letter.

(2) If the requestor responds with information about timely filing or good cause, the Chief Clerk of Proceedings will send the request for hearing and the additional filing or good cause information to SOAH.

(3) The SOAH ALJ will dismiss a request for hearing that the ALJ determines to be filed later than the deadline date without good cause.

(h) Division Delivery of Request for Hearing to SOAH. The Chief Clerk of Proceedings shall send the request for a hearing to SOAH within 20 working days of receipt, unless:

(1) the decision has been withdrawn under the provisions contained in §148.8 of this title (concerning Withdrawal of Hearing Request);

(2) the request for hearing has been dismissed under subsection (g) of this section;

(3) the division has notified the parties of a proposed clerical correction to the order or decision; or

(4) a party has requested a correction of clerical error with the division.

§148.4. Correction of Clerical Error.

(a) Correction of Clerical Error Discovered by the Division. The division may at any time revise an order or decision to correct a clerical error. The division may enter a nunc pro tunc order after an order or decision has become final. To initiate the correction, the division will notify the parties to the order or decision of the proposed correction. If a party objects to the proposed clerical correction, it must do so by the date and time specified by the division. The date and time specified by the division may not exceed the point at which the order or decision becomes final.

(b) Request for Correction of Clerical Error Discovered by a Party.

(1) A party to an order or decision may request the correction of a clerical error from the division prior to the point at which the order or decision becomes final.

(2) To initiate the correction, the division will notify the parties of the proposed correction. If a party objects to the proposed clerical correction, it must do so by the date and time specified by the division. The date and time specified by the division may not exceed the point at which the order or decision becomes final.

(c) Notification. The division will notify the parties to an order or decision that a clerical correction was made by issuing a letter that includes the:

(1) date of the original order or decision;

(2) erroneous portion as originally stated;

(3) corrected portion as it reads; and

(4) signature of the authorized division personnel.

§148.5. Notice of Hearing.

(a) Notice of Hearing. The Chief Clerk of Proceedings shall notify the parties in writing, by verifiable means, of the date, time, place, and nature of the hearing no later than 10 days before the hearing date. SOAH shall notify the parties of a hearing no later than 30 days before the hearing date for a hearing under Labor Code §407.046(b).

(b) Contents. The notice of hearing must include:

(1) a statement of the time, place, and nature of the hearing;

(2) the docket number;

(3) the legal authority and jurisdiction under which the hearing will be held;

(4) a reference to the particular sections of the statutes and any rules involved;

(5) a notice regarding failure to appear and default judgments; and

(6) a short, plain statement of the matters asserted.

(c) Alternative Submission. In lieu of the Chief Clerk of Proceedings, the division's representative may provide the reference to the statutes and any rules involved, nature of the hearing, and the short, plain statement of the matters asserted.

(d) Administrative Violation Notice of Hearing; Default.

(1) A person who receives a notice of hearing under §180.8(c) of this title (relating to Notices of Violation; Notices of Hearing; Default Judgments) must file a written answer or other responsive pleading with the Chief Clerk of Proceedings within 20 days of receipt of the notice as required by §180.8(c) of this title.

(2) Failure to file the required answer or pleading constitutes a default, and the division may seek informal disposition by default under §180.8(f) and (g) of this title.

(e) Notice of Hearing under Labor Code §407.046(b) from SOAH.

(1) SOAH shall notify, in writing, a certified self-insurer and the Chief Clerk of Proceedings of the date, time, place, and nature of a hearing concerning the intent of the division to revoke a certificate of self-insurance under Labor Code §407.046.

(2) The notice must be sent no later than 30 days before the hearing date.

(3) The notice must include:

(A) the notice required under Government Code §2001.052, and

(B) a notice regarding failure to appear and default judgment.

§148.6. Venue.

Hearings under this chapter are held in Austin, Travis County, Texas.

§148.7. Representation.

(a) Representation of Injured Employees or Insurance Carriers. Pursuant to Labor Code §402.071 and §150.3 of this title (relating to Representatives: Written Authorization Required), a person representing an injured employee or insurance carrier in a contested case hearing shall not receive a fee for providing representation under this subtitle unless the person is an adjuster representing an insurance carrier or licensed to practice law.

(b) Fee Defined. For the purposes of this section, "fee" means any remuneration received directly or indirectly, in cash or in kind. It includes voluntary contributions. The provision of representation before SOAH as an extension of, or in addition to, other services for which a fee was paid shall be considered receipt of a fee for providing representation as specified in Labor Code §401.011(37) and §402.071 and §150.3 of this title.

(c) Representation by Employee. The prohibitions in subsections (a) and (b) of this section do not preclude representation by a person who receives a salary as an employee of the person represented to perform services in the usual course and scope of the employer's business.

(1) For the purposes of this subsection, "employee" means a person in the service of another under a contract of hire, whether express or implied, or oral or written.

(2) The term "employee" does not include:

(A) an independent contractor or the employee of an independent contractor; or

(B) a person whose employment is not in the usual course and scope of the employer's business.

(d) Ombudsman Program. Nothing in this subsection shall be construed to limit assistance pursuant to Labor Code §404.105.

(e) Administrative violation. A person commits an administrative violation if that person receives a fee for providing representation under circumstances prohibited by this section.

§148.8. Withdrawal of Hearing Request.

(a) The petitioner may, at any time before the decision or order is signed, submit a written request to withdraw the request for a hearing. The request must be sent to the Chief Clerk of Proceedings and to SOAH in accordance with its procedural rules in Title 1 TAC Chapter 155 (relating to Rules of Procedure).

(b) Notwithstanding the provisions of subsection (a) of this section, a decision of the division's medical fee dispute resolution section in a review of a medical fee under the Act may be withdrawn by the division within 15 working days after the division receives the request for hearing before SOAH if the request has not yet been delivered to SOAH.

§148.10. Hearings Subpoenas to Compel Attendance and Subpoenas Duces Tecum.

(a) Issuance of Subpoena. A request for issuance of a subpoena shall be directed to the Chief Clerk of Proceedings in the division's central office. On the written request of any party in compliance with the requirements set forth below and upon a showing of

good cause, the division shall issue a subpoena addressed to the sheriff or any constable to require the attendance of a witness and production of books, records, paper, or other objects that may be necessary and proper for the purpose of the proceedings. The determination of good cause under this section shall include consideration of whether the issuance of the subpoena would cause undue burden or expense to the person served.

(b) Request for Subpoena. A request for issuance of a subpoena must be in writing, addressed to the Chief Clerk of Proceedings, contain a showing of good cause, and comply with the following:

(1) The request must include the subpoena sought to be issued and be prepared for the signature of the Chief Clerk of Proceedings.

(2) The subpoena must be addressed to a sheriff or constable for service in accordance with Government Code §2001.089. The request must contain the name and address of the applicable sheriff or constable.

(3) The request must include a good faith, itemized estimate of the amount likely to accrue under §148.20 of this title (relating to Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents) and include a deposit of the same amount as required by Government Code §2001.089(2) (relating to Issuance of Subpoena). The deposit must be made by certified check, money order, or other negotiable instrument satisfactory to the division.

(4) If the subpoena is for the attendance of a witness, the written request and accompanying subpoena must contain:

(A) the name, address, and title, if any, of the witness;

(B) the date, time and place where the person is to appear and give testimony;

(C) the docket number of the SOAH proceeding; and

(D) a statement showing date of execution and return of the subpoena to the Chief Clerk of Proceedings.

(5) If the subpoena is for the production of books, records, writings, or other tangible items, the written request and accompanying subpoena sought must contain:

(A) a specific, detailed description of the items sought to be produced;

(B) the date, time, and place where the person is to appear and give testimony and produce the requested items;

(C) the docket number of the proceeding; and

(D) a statement showing date of execution and return of the subpoena duces tecum to the Chief Clerk of Proceedings.

(6) The request must contain a description of the reasonable steps taken to avoid imposing undue burden or expense on the person served.

(c) Failure to Comply with Subpoena. If a person fails to comply with a subpoena, the division, acting through the attorney general, or the party requesting the subpoena, may bring suit to enforce the subpoena in a district court in Travis County. This remedy is not exclusive. The division may enforce the subpoena in any manner permitted by the Act, the APA, or division rules.

§148.11. Commissions to Compel Attendance for Deposition.

(a) Issuance of Commission Requiring Deposition. A request for issuance of a commission requiring deposition must be directed to the Chief Clerk of Proceedings in the division's central office. On the written request of any party in compliance with the requirements set forth below, the division must issue a commission addressed to the several officers authorized by statute to take depositions in accordance with the requirements of Government Code §2001.094. On the written request of any party in compliance with the requirements set forth below the Chief Clerk of Proceedings shall issue a commission to require that the witness appear and produce, at the time the deposition is taken, books, records, papers, or other objects that may be necessary and proper for the purpose of the proceeding.

(b) Commission Not Required for a Party. The issuance of a commission requiring deposition is not required if the witness is a party or is retained by, employed by, or otherwise subject to the control of a party. Service of the notice of oral deposition upon the party or the party's representative is sufficient.

(c) Deposition of a Member of an Agency, Board, or Division. A member of an agency, board, or division shall not be deposed after a hearing date has been set.

(d) Requests for Commissions Requiring Deposition. A request for a commission requiring deposition must be in writing addressed to the Chief Clerk of Proceedings and comply with the following:

(1) The request must include the commission requiring deposition sought to be issued prepared for the signature of the Chief Clerk of Proceedings.

(2) The commission requiring deposition must be addressed to an officer authorized by statute to take a deposition in accordance with Government Code §2001.094. The request must contain the name and address of the applicable officer authorized to take the deposition, the date, time and place where either the witness is to appear and give testimony or where the written deposition responses are to be sent, a detailed description of any items the witness will be required to produce, and a statement showing date of execution and return of the commission requiring deposition to the Chief Clerk of Proceedings.

(3) The request must include a good faith itemized estimate of the amount likely to accrue under §148.20 of this title (relating to Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents) and include a deposit of the same amount as required by Government Code §2001.094(a). The deposit must be made by certified check, money order, or other negotiable instrument satisfactory to the division.

(4) The party seeking the commission requiring deposition shall coordinate with the other party or parties and with the witness to determine a mutually agreeable location and time for the attendance of the witness. The request for commission requiring deposition must state whether such coordination has been made and whether the proposed location and time is by mutual agreement of the parties and witness.

(5) The party seeking the commission requiring deposition that includes a requirement for production should coordinate with the other party or parties, and with the person from whom production is sought, to determine a mutually agreeable location and time for the requested production. The request for the commission requiring deposition must state whether such coordination has been made and whether the proposed location and time is by mutual agreement with the parties and the person from whom production is sought.

(e) Application of the APA. Matters related to deposition conduct, use, opening, and any other matters relating to depositions not covered by these rules shall be in accordance with the requirements of the APA.

(f) Failure to Comply with Commission Requiring Deposition. If a person fails to comply with a commission requiring deposition, the division acting through the attorney general, or the party requesting the subpoena or commission, may bring suit to enforce the subpoena or commission in a district court in Travis County. This remedy is not exclusive. The division may enforce the subpoena or commission requiring deposition in any manner permitted by the Act, the APA, or division rules.

§148.13. Recording the Hearing.

(a) Arrangement for Court Reporter and Costs. In cases in which a court reporter is required, on the division's initiative, at the request of a party, or when required by SOAH rules or the ALJ of a case, the division will arrange for a court reporter. The Petitioner is responsible for all associated costs including the costs of the court reporter at the hearing and the costs associated with preparation of a verbatim record if one is required. In cases in which more than one party is seeking affirmative relief, the costs will be assessed equally. Nothing in this section precludes the parties from entering into their own agreement regarding arrangements for a court reporter or allocation of associated costs.

(b) Recording by a Party. A party electing to use a means of making a record that is in addition to the means specified in SOAH's rules or by the ALJ is responsible for all associated costs. If a verbatim record is made, the party shall provide the division and SOAH with a copy of the audiotape or videotape free of charge. If a transcript is made, the party shall provide the division with the original of the transcript free of charge.

§148.14. Burden of Proof.

(a) Burden of Proof on the Division. The division has the burden of proof in a contested case in which the division seeks to impose a sanction or has issued an emergency cease and desist order.

(b) Burden of Proof on Party Seeking Relief. The burden of proof rests with the party seeking relief in hearings conducted pursuant to Labor Code §§408.024, 413.031, 413.0312, and 413.055.

(c) Burden of Proof on the Certified Self-Insurer. The burden of proof rests with the certified self-insurer in hearings conducted pursuant to the following sections of the Labor Code:

(1) Section 407.043;

(2) Section 407.046;

(3) Section 407.133; and

(4) Section 407.066. The certified self-insurer has the burden of proof if they request the hearing to challenge the position of the division.

(d) Burden of Proof on the Employer. The burden of proof of showing timely filing or good cause when an allegation of untimely filing has been made rests with the employer in issues under §120.2 of this title (relating to Employer's First Report of Injury).

(e) Standard of Proof. The standard of proof in a contested case is preponderance of the evidence.

§148.15. Final Decision by the ALJ.

(a) Decision or Order. The ALJ shall adjourn the hearing after all evidence has been received in contested cases held under Labor Code §§413.031, 413.0312, and 413.055.

(b) Decision or Order that May Become Final. The ALJ shall issue a decision or order that may become final.

(c) Contents of Decision or Order that May Become Final. The decision or order that may become final must include orders that are necessary to implement the decision or order. When the decision or order requires any action or compliance, it must contain a period of time for such action to be completed, normally not to exceed 30 days from the date the decision or order is received, for such action or compliance to be completed.

(d) Furnishing the Decision or Order that May Become Final.

(1) The decision or order that may become final will be sent immediately to the parties or their representatives by verifiable means that shall be documented in the hearing file.

(2) If the decision or order that may become final is furnished by personal delivery, a receipt verifying personal delivery and containing the date of delivery and the person, any business title, and person's business address that received the delivery shall be made by the person who makes the personal delivery, and shall be date-stamped and placed in the hearing file.

(e) Procedures for Motion for Rehearing. The decision or order that may become final will become final if a motion for rehearing is not filed with SOAH within 20 days after receipt of the decision or order. The procedures for a motion for rehearing are governed by the Government Code, Chapter 2001, Subchapter F, and a motion for rehearing is a prerequisite for appealing a decision or order under this section.

(f) Finality of Decision or Order. The finality of the ALJ's decision or order is determined by Government Code §2001.144, except as provided by Labor Code §413.031 and §133.307 of this title (relating to MDR of Fee Disputes).

(g) Exhaustion of Administrative Remedies. The notification to a party of the ALJ's decision or order that has become final under Government Code §2001.144 constitutes exhaustion of all administrative remedies, except as provided by Labor Code §413.031 and §133.307 of this title.

(h) Judicial Review. A party dissatisfied with a final decision or order of the ALJ may seek judicial review as provided by the Act in accordance with the Government Code, Chapter 2001, Subchapter G, Labor Code §413.031 and §133.307 of this title.

§148.16. Proposal for Decision or Order by the ALJ.

(a) Proposal for Decision or Order. The ALJ shall adjourn the hearing after all evidence has been received in contested cases held under the Act not governed by §148.15 of this title (relating to Final Decision by ALJ).

(b) Description of Proposal for Decision or Order. The proposal for decision or order must be based solely upon the record of the individual case. It must be in writing and include:

(1) a statement of the reasons upon which the decision is based;

(2) findings of fact based on the evidence presented and matters officially noticed. If there is evidence presented regarding the ability of a party to pay the amount of a proposed sanction or bonding amount in a hearing involving assessment of sanctions under Labor Code §415.021, the ALJ shall make findings of fact on those issues;

(3) conclusions of law based on the findings of fact and other legal requirements of the law;

(4) the sanction or order recommended by the ALJ;

(5) a conclusion of whether the division is authorized by the Act or division rules to take disciplinary or sanction action against the petitioner; and

(6) the proposal for decision or order may also contain:

(A) a summary of the evidence presented by each party; and

(B) a list of all mitigating circumstances and a list of all aggravating circumstances, separately stated, which are necessary for the commissioner to have a complete understanding of the case.

(c) Furnishing Proposal for Decision or Order. SOAH shall furnish the proposal for decision or order to:

(1) the Chief Clerk of Proceedings; and

(2) the parties of the hearing. SOAH shall furnish the proposal for decision or order by verifiable means and retain information on the date, address, person or entity served, and the means of service

(d) Filing of Briefs and Exceptions. If a party files a brief or exception to the proposal for decision or order or replies to the exceptions or brief with SOAH, it must also file a copy with the Chief Clerk of Proceedings.

(e) Commissioner's Hearing on the Proposal for Decision or Order.

(1) A party may submit a request for a commissioner's hearing to consider arguments with the Chief Clerk of Proceedings within 10 days after SOAH issues the proposal for decision or order.

(2) The commissioner may determine if a hearing is necessary to consider arguments, whether or not a request for a hearing has been filed. If such a determination is made, the commissioner shall consider the case at a posted hearing of the division, no later than 120 days after:

(A) SOAH provides the division with the proposal for decision or order;

(B) the date of the ALJ's comments or response to any exceptions or briefs and any replies to such exceptions or briefs; or

(C) the expiration of the ALJ's deadline for such response in accordance with Title 1 TAC §155.507 (relating to Proposal for Decision).

(3) If the commissioner determines that a hearing is not necessary, the division will notify any requestors and the commissioner shall consider the case after the later of:

(A) the issuance of the proposal for decision or order;

(B) the date of the expiration of the ALJ's comments or response to any exceptions or briefs and any replies to such exceptions or briefs; or

(C) the expiration of the ALJ's deadline for such response in accordance with Title 1 TAC §155.507.

(f) Issuance of Decision or Order That May Become Final. The commissioner shall issue a decision or order that may become final in contested cases under this section pursuant to Labor Code §§407.046, 407A.007, 415.0211, and 415.034. A decision or order that may become final will become final in accordance with Government Code §2001.144. In all other cases, the commissioner shall issue a final decision or order and no motion for rehearing will be considered.

(g) Motion for Rehearing. A motion for rehearing may be filed in contested cases under this section pursuant to Labor Code §§407.046, 407A.007, 415.0211, and 415.034. The procedures of the Government Code, Chapter 2001, Subchapter F govern a motion for rehearing under this section. A motion for rehearing is a prerequisite for filing an appeal of a decision or order under Labor Code §§407.046, 407A.007, 415.0211, or 415.034.

(h) Notification. The Chief Clerk of Proceedings shall notify the parties to a contested case of the final decision or order of the commissioner by verifiable means.

(i) Exhaustion of Administrative Remedies. The notification to a party of the commissioner's final decision or order constitutes exhaustion of all administrative remedies.

(j) Judicial Review. A party dissatisfied with a decision or order of the commissioner may seek judicial review as provided in the Act in accordance with the APA. Judicial review will be in accordance with the Act and the Government Code §§2001.171, 2001.172, and 2001.174.

§148.17. Special Provisions for Administrative Penalties.

Required Response to Assessment of Sanctions. Not later than the 30th day after a party receives notification of an assessment of a sanction, the charged party shall file with the Chief Clerk of Proceedings:

(1) the amount of the sanction, in the form of a cashier's check, a certified check, or a certified draft; or

(2) a bond for the amount of the sanction. The bond must be:

(A) executed by a licensed surety company authorized to do business in Texas;

(B) approved by the division;

(C) made payable to the Texas Department of Insurance; and

(D) must be effective until all judicial review is final.

§148.19. Transcript or Duplicate of the Hearing Audiotape or Videotape.

(a) A party may submit a request to the division for a transcript of the hearing audiotape or videotape. The requestor shall pay the cost of the transcript, as established by the division.

(b) A party may submit a request to the division for a duplicate of the hearing audiotape or videotape. The requestor shall pay the cost of the duplication, as established by the division.

§148.20. Reimbursement, Travel Expenses, and Fees for Witnesses and Deponents.

(a) Reimbursement of Witness or Deponent. A witness or deponent who is not a party and who is served with a subpoena or otherwise compelled to attend any hearing or proceeding to give a deposition or to produce books, records, papers, or other objects that are necessary for the proceeding is entitled to receive reimbursement for travel, meals, lodging, and other amounts as specified and limited in the Government Code §2001.103.

(b) Reasonable and Necessary Expenses and Service. The party requesting the subpoena or commission or otherwise compelling the attendance of a witness at any hearing or proceeding to give a deposition or produce books, records, papers, or other objects shall be responsible for the payment, of any expense, incurred in serving the subpoena, as well as reasonable and necessary expenses incurred by a nonparty witness who appears in response to the subpoena.

(c) Failure to Pay Expenses. The party requesting the subpoena or commission or otherwise compelling the attendance of a witness at any hearing or proceeding to give a deposition or produce books, records, papers, or other objects shall pay the witness the amount accrued under this section. Failure to pay the witness the amount accrued when sought is an administrative violation.

(d) Return of Deposit. After the Chief Clerk of Proceedings has received, from the party requesting the subpoena or commission

to take deposition, sufficient documentation of all requests by the witness for payment of witness expenses and sufficient proof of payment of all amounts due to the non-party witness or deponent, the division will return the amount of any deposit required under §148.10(b)(3) and §148.11(d)(3) of this title (relating to Hearings Subpoenas To Compel Attendance and Subpoenas Duces Tecum and Commissions To Compel Attendance For Deposition), respectively.

§148.21. Expenses to be Paid by Party Seeking Judicial Review.

(a) Upon receiving a copy of a petition filed in district court which seeks judicial review of a final decision in a contested case decided under this chapter, the division shall prepare a certified copy of the entire record of the proceeding under review, including a transcript of the hearing audiotape, and transmit it to the reviewing court.

(b) The division shall assess to the party seeking judicial review, expenses incurred by the division in preparing this copy, including transcription costs, in accordance with the Government Code §2001.177. Upon request, the division shall consider the financial ability of the party to pay the costs or any other factor that is relevant to a just and reasonable assessment of costs. If the party seeking judicial review is an injured employee, the division shall not charge for duplicating the record.

§148.22. Failure to Appear or Comply with Order or Decision, Administrative Violation.

A person commits an administrative violation if that person in the status of a party, or otherwise within the jurisdiction of SOAH (for example, a witness), in a contested case hearing or proceeding before SOAH, fails to comply with an order of the ALJ to include any final decisions issued.

§148.23. Division Enforcement of Orders.

Any final order of SOAH is a final order of the division and may be enforced by the division in any manner permitted by the Act, the APA, or division rules. After conclusion of the administrative process, any SOAH order which survives the entry of a final order, the sending of a proposal for decision to the division, or the dismissal or withdrawal of the case from the SOAH docket, regardless of upon whose motion the dismissal or withdrawal was granted, is an order of the commissioner and may be enforced by the division in any manner permitted by the Act, the APA, or division rules. Examples of enforceable orders include, but are not limited to, orders to reimburse, orders to pay reasonable and necessary medical costs, orders to pay administrative fines, orders to refund, orders assessing attorney fees, orders assessing costs, and orders imposing discovery sanctions.

§148.24. Confidentiality of Records.

(a) SOAH shall ensure that the confidentiality provisions of Labor Code, §§402.082 - 402.092, 411.034, 413.0513, and 413.0514 and the Code of Federal Regulations, Title 20, §603.6 and §603.7 (for information obtained from the Texas Workforce Commission or its successor agencies) will be followed, including requests for release of documents or information made confidential under the Act or other applicable law.

(b) Unless authorized by law, SOAH will not identify the name of a claimant for workers' compensation coverage under the Act or other information contained in or derived from the division's claim file for such a claimant in listings of docketed cases or in other documents distributed to persons other than to the division and the parties to a contested case involving that claimant.

(c) If a party or a member of the public files a written request with the Chief Clerk of Proceedings and with SOAH that a hearing be conducted as a hearing open to the public, the ALJ shall consider that request and issue a ruling prior to the opening of the hearing to the public.

(d) Any request for a hearing open to the public shall be filed with the Chief Clerk of Proceedings and with SOAH at least seven days prior to the first day of the hearing unless the ALJ allows a shorter filing period upon a showing of good cause.

(e) When considering a request that a hearing be open to the public, the ALJ's considerations shall include, but are not limited to, whether the hearing would contain information made confidential under the Act or other applicable laws. If confidential information would be included, then the ALJ may consider whether any procedure could be devised and utilized which would allow a hearing to be open to the public without violating the confidentiality provisions of the Act, other applicable laws, other applicable regulations, and agreements required by those laws or regulations or without causing an undue burden on the division or the parties to the hearing.

(f) While SOAH will have temporary custody of the hearing records, the commissioner retains statutory authority as custodian of records and is ultimately responsible, as the originating agency, for the release or non-release of the information. Therefore, should any information, which may be confidential under the Act, division rules, or other law, be requested from SOAH by any person or entity, SOAH shall follow all legal requirements necessary to ensure that the confidential information or document is not released, unless specifically required by law, and shall provide such request to the commissioner immediately upon receipt.

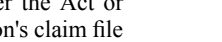
(g) Pursuant to Labor Code §413.031(c), the division shall be responsible for publishing any SOAH decisions required to be published by that section on the department's website. SOAH shall as soon as practicable deliver to the division a version of the decision in an electronic format.

(h) SOAH and the division have responsibilities for compliance with the Texas Public Information Act, Government Code, Chapter 552. Each agency maintains information that may be considered confidential or exempt from disclosure under laws administered by that agency. To the extent required by law, each agency is responsible for replying to all public information requests for information maintained by that agency. Each agency will promptly notify the other agency of the receipt of a Texas Public Information Act request relating to confidential or exempt records obtained from the other agency and will coordinate responses as necessary.

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

Filed with the Office of the Secretary of State on July 7, 2014.

TRD-201403109
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: July 27, 2014
Proposal publication date: March 28, 2014
For further information, please call: (512) 804-4703



28 TAC §§148.3 - 148.5, 148.9, 148.12, 148.18

The Texas Department of Insurance, Division of Workers' Compensation (Division) adopts the repeal of §148.3, concerning Requesting a Hearing; §148.4, concerning Correction of Clerical Error in Medical Review Division Decisions or Orders Absent a Request for Hearing; §148.5, concerning Notice of Hearing; §148.9, concerning Informal Disposition; §148.12, concerning Ex Parte

Communications; and §148.18, concerning Record of the Hearing.

The repeals of §§148.3 - 148.5, 148.9, 148.12, and 148.18, are adopted without changes to the proposed text as published in the March 28, 2014, issue of the *Texas Register* (39 TexReg 2250). No request for a public hearing was submitted to the Division. The public comment period closed on April 28, 2014, and the Division received no written comments.

In conjunction with this adoption, the Division is adopting amended §§148.1, 148.2, 148.6 - 148.8, 148.10, 148.11, 148.13 - 148.17, and 148.19 - 148.23 and new §§148.3 - 148.5 and 148.24, also published in this issue of the *Texas Register.*

The repeal of §§148.3, 148.4, and 148.5 is necessary because the Division is adopting new §§148.3, 148.4, and 148.5, and the simultaneous repeal of a numbered section is necessary to adopt a new section with the same TAC number as required by 1 TAC §91.32, concerning Rule Numbers.

The repeal of §§148.9, 148.12, and 148.18 is necessary because the requirements already exist in Government Code §§2001.056, 2001.061, and 2001.060, and repeating the requirements in the rules would be redundant.

SUMMARY OF COMMENTS AND AGENCY RESPONSES.

None.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

None

The repeals are adopted under Labor Code §402.00111 and §402.061.

Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rule-making authority, under Title 5, Labor Code.

Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

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

Filed with the Office of the Secretary of State on July 7, 2014.

TRD-201403110
Dirk Johnson
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Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4703

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CHAPTER 149. MEMORANDUM OF UNDERSTANDING WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

28 TAC §§149.1 - 149.10

The Texas Department of Insurance, Division of Workers' Compensation (Division) adopts the repeal of §149.1, concerning Definitions; §149.2, concerning General Statement; §149.3, concerning Referral of Contested Cases to SOAH; §149.4, concerning Notice of Hearing; §149.5, concerning Hearings; §149.6, concerning Confidentiality of Records; §149.7, concerning Action Upon Withdrawal of Decision; §149.8, concerning Final Orders in Accordance with the Act, §§411.049, 413.031, 413.055, and 415.034; §149.9, concerning Proposals for Decision in Accordance with the Act, §§402.072, 407.046 and 408.0231; and §149.10, concerning Custody of the Hearing Record.

The repeals of §§149.1 - 149.10 are adopted without changes to the proposed text as published in the March 28, 2014, issue of the *Texas Register* (39 TexReg 2251). There was not a request for a public hearing submitted to the Division. The public comment period closed on April 28, 2014, and the Division received no written comments.

In conjunction with this adoption, the Division is adopting amended §§148.1, 148.2, 148.6 - 148.8, 148.10, 148.11, 148.13 - 148.17, and 148.19 - 148.23 and new §§148.3 - 148.5 and 148.24 concerning Hearings Conducted by the State Office of Administrative Hearings, also published in this issue of the *Texas Register.*

The repeal of §§149.1 - 149.5 and 149.7 - 149.10 is necessary because the memorandum of understanding with the State Office of Administrative Hearings is no longer required to be adopted by rule under Labor Code §402.073(a). The repeal of §149.6 is necessary to incorporate the requirements into adopted new 28 Texas Administrative Code (TAC) §148.24, concerning Confidentiality of Records.

SUMMARY OF COMMENTS AND AGENCY RESPONSES.

None.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

None.

The repeal is adopted under Labor Code §§402.00111, 402.061, and 402.073. Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rule-making authority, under Title 5, Labor Code.

Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act.

Labor Code §402.073 requires the Commissioner of Workers' Compensation and the Chief Administrative Law Judge of the State Office of Administrative Hearings to adopt a memorandum of understanding governing administrative procedure for law hearings under the Act conducted by SOAH in the manner provided for a contested case hearing under the APA, but does not require it to be adopted by rule.

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

Filed with the Office of the Secretary of State on July 7, 2014.

TRD-201403111

Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: July 27, 2014
Proposal publication date: March 28, 2014
For further information, please call: (512) 804-4703

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TITLE 34. PUBLIC FINANCE

PART 11. TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

CHAPTER 310. ADMINISTRATION OF THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §310.6

The State Board of Trustees (Board) of the Texas Emergency Services Retirement System (System) adopts an amendment to §310.6, regarding local contributions to the System, without changes to the proposed text as published in the May 9, 2014, issue of the *Texas Register* (39 TexReg 3687).

Background and Summary of the Factual Basis for the Adopted Rule

Like many pension systems in Texas and around the country, the Trustees of the Texas Emergency Services Retirement System are immediately compelled to address the unfunded liabilities of the System, which were found by its 2012 Actuarial Valuation Report to have an inadequate contribution arrangement, with an amortization period of infinity. This is compared to an amortization period of no more than 30 years, which is recommended by the Governmental Standards Accounting Board as the benchmark for actuarial soundness and an amortization period of no more than 40 years, which is the minimum number of years acceptable by the Texas Pension Review Board.

Current existing System remedies to achieve an adequate contribution arrangement for actuarial soundness involve reductions to retiree benefits. Given the importance of volunteer firefighters and first responders to this state and the fact that the program is a valuable recruiting and retention tool, the Trustees opted to use existing statutory authority in §862.002 of the Government Code, which authorizes the System to adopt rules for a contribution formula that may include additional contributions in order to reduce the unfunded accrued actuarial liabilities of the System.

Discussion and Purpose of the Adopted Amendment

The purpose of the amendment is to create a mechanism within the existing local contribution that does not directly affect the amount of retiree annuities to be paid, but rather assists the System in maintaining an adequate contribution arrangement. The System adopts amended §310.6 in order to create a mechanism to assist the System in maintaining a pension fund that is actuarially sound.

No changes were made to the proposed rule either as a result of written comments received during the comment period or as a result of oral comments made during a meeting in Lubbock, Texas on June 11, 2014.

Public Comment

The public comment period on the proposed amendment opened on May 9, 2014 and extended through June 9, 2014. In addition to the formal comment period, the Board of Trustees elected to accept comments on the proposed amendment in Lubbock on June 11th at 1:30 p.m. as part of its Board meeting, where it heard department comments, which were taken into consideration prior to adoption of the amendment. Representatives of the following entities provided written comments during the public comment period which closed on June 9, 2014: Cuero Fire Department, City of Giddings, Schulenburg Fire Department, Seabrook Volunteer Fire Department, Brenham Fire Department, Llano Fire Department, and Pasadena Fire Department. In all cases, written comments were sent to the agency via email.

A representative from the Cuero Volunteer Fire Department asked, with two-thirds of contributors being at the minimum amount of $36/month, why are we not just raising the minimum contribution by 15%? They went on to express that the Part Two contribution seems unfair and extremely hard to budget, especially for the top 10% that contribute $100 or more each month for members. The Schulenburg Volunteer Fire Department had a similar comment on large contributors to the system, commenting that there should be a cap on the amount departments will be required to contribute under the Part Two contribution. The Executive Director spoke to Cuero over the phone and Schulenburg via email, explaining that the Part Two contribution must be proportionate to membership contributions since the liabilities of the system are proportional to membership contributions. Departments that pay the majority of contributions also represent the majority of liabilities in the System. To not have the Part Two contribution be proportionate for all contributors would be inequitable for other members of the System.

In reference to the question by Cuero on raising the minimum contribution by 15%, it was explained that this would only create additional liabilities for the system to increase the Part One or "Member Contribution" since the existing "Member" contributions are directly tied to annuities.

The representative from the Cuero Volunteer Fire Department asked if the only public hearing was in Lubbock, and the Executive Director replied to him via email saying yes, that the hearing was set in Lubbock to enable the maximum number of departments to attend, since the Annual State Firemen's and Fire Marshals' Association's annual conference was being held there.

The Board respectfully declines to make any changes to the proposed rule amendment based on the written comments of Cuero and Schulenburg.

A representative from the City of Giddings asked for clarification on what the rule change would mean to cities. The Executive Director responded by explaining that should the rule be approved by the Board, that the Actuarial Valuation will be complete in December 2014 and then any Part Two contribution would go into effect in September 2015, based on the results of that report. The amount of the Part Two contribution will be conveyed to departments immediately following the December 2014 Board meeting so that cities and applicable political subdivisions have time to plan for the new contribution. The Executive Director explained how any additional contribution might be computed, along with background on the need for the Part Two contribution. The Board respectfully declines to make any changes to the proposed rule amendment based on the written comments of Giddings.

A representative from the Seabrook Volunteer Fire Department asked what will happen if a department cannot afford the extra resources that will be required. The Executive Director answered, explaining that according to current rules, a department may choose to lower their existing "Membership" contributions by the amount of the new Part Two contribution. This would effectively reduce benefits for members in a department, but would enable one with limited resources to remain in the program. The Board respectfully declines to make any changes to the proposed rule amendment based on the written comments of Seabrook.

A representative from the Brenham Volunteer Fire Department asked several questions, including 1) will the change affect monthly payments to retirees, 2) if the change would affect the contribution statement, and 3) if the change was across the Board without regard to whether or not a department contributes just the minimum $36/month. The Executive Director explained that the change would not affect monthly payments to retirees. The new contribution would apply to all departments as a percentage of their current Part One contribution, whatever amount that might be. Finally, she let him know that contribution statements will likely change, as departments will be billed quarterly for the Part Two contribution in addition to the existing Part One contribution. Over the telephone, they spoke in detail on the background of why the change was being proposed. The Board respectfully declines to make any changes to the proposed rule amendment based on the written comments of Brenham.

A representative from the Llano Volunteer Fire Department asked several questions, all relating to whether or not the Part Two contributions will impact retiree annuities. The Executive Director explained that previously, all contributions increased annuities. The Part Two contribution is being created as a way for the Board to direct some contributions towards the unfunded liabilities of the System without creating additional liabilities. She stated that none of the new Part Two contribution will increase benefits and that the purpose of the new contribution is to make the system actuarially sound. The Board respectfully declines to make any changes to the proposed rule amendment based on the written comments of Llano.

The local Pension Board for the Pasadena Volunteer Fire Department emailed a letter in response, stating that the proposed changes in the contribution structure would be harmful to the department, asserting that the shortfall of the System is due to untimely contributions made by the State of Texas. They express further that assessment of the Part Two contribution will diminish the program's effectiveness as a recruiting and retention tool by lowering the actual amount contributed to an individual's account. Their suggestion was that if the new contribution must be assessed, then it should be on a per member basis and not by a percentage of contribution, so all members share equally. Finally, they stated that the Part Two contribution should only be used to cover actuarial shortfalls and not administrative expenses. The Executive Director spoke with the department to let them know that an analysis was done for the last five biennia in total; based on that analysis, the State of Texas has contributed the statutorily required amount during that period. We agree that the program is an effective recruiting and retention tool and want to preserve the program for this reason. Any possible and voluntary reduction in the Part One contributions by a department in order to fund their Part Two contributions would be a lesser reduction than the alternative cuts to plan benefits that would be required to address the System's unfunded liability. Currently, there are no planned administrative expenses to be spent out of the Pension Fund or for use by the Part Two contribution. The Board respectfully declines to make any changes to the proposed rule amendment based on the written comments of Pasadena.

In addition to considering comments received during the written comment period, the Board received and considered oral comments at its meeting on June 11, 2014.

A representative from the Pasadena Volunteer Fire Department reiterated the comments contained in its written comments as discussed above. The Board respectfully declines to make any changes to the proposed rule amendment based on the oral presentation made by Pasadena.

A representative from the Rosenburg Volunteer Fire Department made oral comments and stated that they had also been asked to provide comment on behalf of the Alvin Volunteer Fire Department. They stated that while they were not extremely opposed to the rule change, they were concerned about the new contribution structure. Because Alvin's contribution is larger than the minimum contribution of $36/month per member, the increase will be larger. For Rosenburg, the increase may impact how much the department may contribute towards the Part One contribution. He asked several questions of the System's actuary, including whether or not the Board had considered raising the retirement age. The Board respectfully declines to make any changes to the proposed rule amendment based on the oral presentation made by Rosenburg.

A representative of the Sante Fe Volunteer Fire Department stated in his oral comments that he understood the problem, but that it is difficult to convey to members what the money will be used for in the Part Two contribution, if it does not impact their benefits. He suggested that the Board consider increasing the vesting period as an alternative to the Part Two contribution. He urged the Board to exhaust all alternatives to the Part Two contribution prior to adopting the rule change. The Board respectfully declines to make any changes to the proposed rule amendment based on the oral presentation made by the representative from Santa Fe.

Statutory Authority

The rule is proposed to be adopted under the statutory authority of Government Code, Title 8, Subtitle H, Texas Emergency Services Retirement System, §862.002, which authorizes the System to adopt rules for a contribution formula that may include additional contributions in order to reduce the unfunded accrued actuarial liability of the System.

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

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

Filed with the Office of the Secretary of State on July 7, 2014.

TRD-201403107
Michelle Jordan
Executive Director
Texas Emergency Services Retirement System
Effective date: July 27, 2014
Proposal publication date: May 9, 2014
For further information, please call: (512) 936-3372

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The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/14/14 - 07/20/14 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 07/14/14 - 07/20/14 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-201403129
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: July 8, 2014

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Employees Retirement System of Texas

Request for Proposal to Provide Flexible Benefits Claims Administrative Services and/or a Qualified Transportation Fringe Benefit Program to the Flexible Benefits Program Under the Texas Employees Group Benefits Program

In accordance with Texas Insurance Code ("TIC"), Chapter 1551, the Employees Retirement System of Texas ("ERS") is issuing a Request for Proposal ("RFP") seeking a qualified Vendor ("Vendor") to provide any or all of the following programs and/or services: a) flexible benefits claims administrative services for a Health Care Reimbursement Account ("HCRA") and Dependent Care Reimbursement Account ("DCRA") and/or b) a Qualified Transportation Fringe Benefit Program ("QTFB") to the flexible benefits program ("TexFlex Program") under the Texas Employees Group Benefits Program ("GBP") for a four (4) year period beginning September 1, 2015 through August 31, 2019. The Vendor shall provide administrative services for the level of benefits required in the RFP and meet other requirements that are in the best interests of ERS, the GBP, its Employees (as that term is defined in §1551.003, TIC) and the state of Texas. The Vendor will also be required to execute a Contractual Agreement ("Contract") provided by, and satisfactory to, ERS.

The Vendor may offer a Proposal on any or all of the TexFlex programs.

A Vendor wishing to respond to this request and quote a HCRA and DCRA program(s) shall provide the following:

1) Certificate. The Vendor shall be authorized to do business in Texas by the Secretary of State at the time of the Proposal submission and have a valid Certificate of Authority and/or current license to do business in Texas.

2) Services. The Vendor shall have been providing claims administrative services to flexible benefits programs for at least three (3) years to organizations with no less than 25,000 **eligible** employees, actual participating employees may be less, or in aggregate, 500,000 employees for three (3) years.

3) Debit Card Services. The Vendor shall have been providing electronic debit card services to at least one (1) client for a minimum of three (3) years who has a minimum of 5,000 active debit card employees.

4) Net Worth. The Vendor shall have a current net worth of $5 million with $2.5 million in cash and cash equivalents as demonstrated by an audited financial statement as of the close of the Vendor's most recent fiscal year.

A Vendor wishing to respond to this request and quote a QTFB program shall provide the following:

1) Certificate. The Vendor shall be authorized to do business in Texas by the Secretary of State at the time of the Proposal submission and have a valid Certificate of Authority and/or current license to do business in Texas.

2) Services. The Vendor shall have been providing QTFB services to employers for at least two (2) years to organizations with a minimum of 25,000 **eligible** employees.

3) Debit Card Services. The Vendor shall have been providing electronic debit card services to at least one (1) client for a minimum of three (3) years who has a minimum of 5,000 active debit card employees.

4) Net Worth. The Vendor shall have a current net worth of $3 million with $1 million in cash and cash equivalents as demonstrated by an audited financial statement as of the close of the Vendor's most recent fiscal year.

The RFP will be available on or after July 24, 2014 from ERS' website and will include documents for the Vendor's review and response. To access the secured portion of the RFP website, interested Vendors shall email their request to the attention of the iVendor Mailbox at: **ivendorquestions@ers.state.tx.us.** The email request shall reflect: 1) The Vendor's legal name; and 2) the full name, physical street address, phone and facsimile numbers and email address for Vendor's direct point of contact. Upon receipt of this information, a user ID and password will be issued to the requesting organization that will permit access to the secured RFP.

General questions concerning the RFP and/or ancillary bid materials should be sent to the iVendor Mailbox where the responses, if applicable, are updated frequently. The submission deadline for all RFP questions submitted to the iVendor Mailbox is August 11, 2014 at 4:00 p.m. CT.

To be eligible for consideration, the Vendor is required to submit its Proposal in accordance with the instructions set forth in the RFP. All materials shall be received by ERS no later than 12:00 Noon CT on September 18, 2014.

ERS will base its evaluation and selection of a Vendor on factors including, but not limited to the following, which are not necessarily listed in order of priority: compliance with the RFP, experience servicing public or governmental health benefit programs, Debit Card Systems, Administrative and Technological capabilities, financial strength and stability, operating requirements, references, site visits and other relevant criteria. Each Proposal will be evaluated both individually and relative to the Proposal of other qualified Vendors. Complete specifications will be included in the RFP.

ERS reserves the right to reject any and/or all Proposals and/or call for new Proposals if deemed by ERS to be in the best interests of ERS, the GBP, its Employees and the state of Texas. ERS also reserves the right to reject any Proposal submitted that does not fully comply with the RFP's instructions and criteria. ERS is under no legal requirement to execute a Contract on the basis of this notice or upon issuance of the RFP and will not pay any costs incurred by any entity in responding to this notice or in connection with the preparation thereof. ERS reserves the right to vary all provisions set forth at any time prior to execution of a Contract where ERS deems it to be in the best interests of ERS, the GBP, its Employees and the state of Texas.

TRD-201403122
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: July 8, 2014

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 18, 2014.** TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 18, 2014.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: 4 Way Land & Cattle, LLC dba Sanctuary Oaks Addition; DOCKET NUMBER: 2014-0570-WQ-E; IDENTIFIER: RN107147035; LOCATION: Parker County; TYPE OF FACILITY: a single-family residential construction; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge stormwater associated with construction activities; PENALTY: $938; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Anheuser-Busch, LLC; DOCKET NUMBER: 2014-0454-AIR-E; IDENTIFIER: RN100211697; LOCATION: Houston, Harris County; TYPE OF FACILITY: brewery; RULE VIOLATED: 30 TAC §116.110(a) and Texas Health and Safety Code (THSC), §382.0518(a) and §382.085(b), by failing to obtain authorization prior to constructing and operating a source of air emissions; 30 TAC §122.210(a) and THSC, §382.085(b), by failing to submit a permit revision to include the Malt Surge Bin bag filter vent, Emission Point Number (EPN) GH-N3, and the Rice Surge Bin bag filter vent, EPN GH-N4, in Federal Operating Permit (FOP) Number O1066; 30 TAC §122.143(4) and §122.145(2)(B), THSC, §382.085(b), and FOP Number O1066, General Terms and Conditions (GTC), by failing to submit a semi-annual deviation report; and 30 TAC §122.143(4) and §122.145(2)(A), THSC, §382.085(b), and FOP Number O1066, GTC, by failing to report all instances of deviations, the failure to include EPNs GH-N3 and GH-N4 in the FOP, and the failure to submit a semi-annual deviation report for the July 14, 2012 - January 13, 2013 reporting period; PENALTY: $17,100; ENFORCEMENT COORDINATOR: Rachel Bekowies, (512) 239-2608; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Aqua Texas, Incorporated; DOCKET NUMBER: 2014-0297-MWD-E; IDENTIFIER: RN102343217; LOCATION: Houston, Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013433001, Interim Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; TWC, §26.121(a)(1), 30 TAC §305.125(1), and TPDES Permit Number WQ0013433001, Interim Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $19,012; ENFORCEMENT COORDINATOR: Katelyn Samples, (512) 239-4728; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: Cities of Waco, Woodway, Bellmead, Lacy-Lakeview, Robinson, Hewitt, and Lorena; DOCKET NUMBER: 2014-0483-MWD-E; IDENTIFIER: RN102097235; LOCATION: McLennan County; TYPE OF FACILITY: wastewater treatment facility; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0011071001, Final Effluent Limitations and Monitoring Requirements Numbers 1, 2, and 6, by failing to comply with permitted effluent limits; PENALTY: $21,750; ENFORCEMENT COORDINATOR: Had Darling, (512) 239-2520; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: City of Gustine; DOCKET NUMBER: 2013-0253-MWD-E; IDENTIFIER: RN102178654; LOCATION: Gustine, Comanche County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010841001, Effluent Limitations and Monitoring Re-

quirements Numbers 1 and 6, by failing to comply with permitted effluent limitations; TWC, §26.121(a)(1), 30 TAC §305.125(1), and TPDES Permit Number WQ0010841001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; 30 TAC §305.125(1) and (17) and §319.7(d), and TPDES Permit Number WQ0010841001, Monitoring and Reporting Requirements Number 1, by failing to submit effluent monitoring results at the intervals specified in the permit; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0010841001, Sludge Provisions, by failing to submit the annual sludge report for the monitoring period ending July 31, 2012, by September 1, 2012; PENALTY: $40,000; ENFORCEMENT COORDINATOR: Jacquelyn Green, (512) 239-2587; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 655-9479.

(6) COMPANY: City of Riesel; DOCKET NUMBER: 2014-0478-PWS-E; IDENTIFIER: RN101386043; LOCATION: Riesel, McLennan County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(f)(3) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.010 milligrams per liter for arsenic based on a running annual average. PENALTY: $1,092; ENFORCEMENT COORDINATOR: Michaelle Garza, (210)403-4076; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(7) COMPANY: City of Skellytown; DOCKET NUMBER: 2012-2619-MLM-E; IDENTIFIER: RN102796968 and RN102675006; LOCATION: Skellytown, Carson County; TYPE OF FACILITY: wastewater treatment plant and municipal water system; RULE VIOLATED: 30 TAC §305.125(1) and (17), and §319.7(d), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010283001, Monitoring and Reporting Requirements Number 1, by failing to timely submit monitoring results at the intervals specified in the permit; 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0010283001, Sludge Provisions, by failing to timely submit the annual sludge report for the monitoring period ending July 31, 2011 by September 1, 2011; 30 TAC §305.125(1) and §30.350(d), and TPDES Permit Number WQ0010283001, Other Requirements Number 1, by failing to employ or contract one or more licensed wastewater treatment facility operators or wastewater system operations companies holding a valid license or registration; and 30 TAC §290.46(e)(4)(A) and Texas Health and Safety Code, §341.033(a), by failing to operate the facility under the direct supervision of a water works operator who holds a Class D or higher license; PENALTY: $13,552; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3034; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 796-7092.

(8) COMPANY: DCP Midstream, LP; DOCKET NUMBER: 2014-0640-AIR-E; IDENTIFIER: RN100219955; LOCATION: Gruver, Hansford County; TYPE OF FACILITY: natural gas processing plant; RULE VIOLATED: 30 TAC §§101.20(2), 113.1090, 116.115(c), and 122.143(4), Federal Operating Permit Number O2569, Special Terms and Conditions Number 8, New Source Review Permit Number 73394, Special Condition Number 3.B., 40 Code of Federal Regulations §63.6600(a), and Texas Health and Safety Code, §382.085(b), by failing to maintain the temperature of the stationary reciprocating internal combustion engine exhaust so that the catalyst inlet temperature is greater than or equal to 750 degrees Fahrenheit; PENALTY: $18,562; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 796-7092.

(9) COMPANY: Gulf Coast Waste Disposal Authority; DOCKET NUMBER: 2014-0052-MWD-E; IDENTIFIER: RN102183340; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1) and (5) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0011571001, Operational Requirements Number 1, by failing to ensure all systems of collection, treatment, and disposal are properly operated and maintained. TWC, §26.121(a)(1), 30 TAC §305.125(4), and TPDES Permit Number WQ0011571001, Permit Conditions Number 2.g, by failing to prevent unauthorized discharges into or adjacent to water in the state; TWC, §26.121(a)(1), 30 TAC §305.125(1), and TPDES Permit Number WQ0011571001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; TWC, §26.121(a)(1), 30 TAC §305.125(1), and TPDES Permit Number WQ0011571001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; 30 TAC §305.125(1) and TPDES Permit Number WQ0011571001, Other Requirements Number 6, by failing to provide required notification prior to entering into the Interim II Phase of TPDES Permit Number WQ0011571001; and 30 TAC §305.125(1) and §319.7(c) and TPDES Permit Number WQ0011571001, Monitoring and Reporting Requirements Number 3.b, by failing to maintain all monitoring and reporting records at the facility; PENALTY: $108,139; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: Harris County Fresh Water Supply District 1B; DOCKET NUMBER: 2014-0591-PWS-E; IDENTIFIER: RN102944147; LOCATION: Highlands, Harris County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.117(i)(5) and (k), by failing to deliver the public education materials in the event of an exceedance of the lead action level and to continue the delivery of the public education materials for as long as the lead action level was not met; and 30 TAC §290.117(i)(6) and (j), by failing to mail consumer notification of lead tap water monitoring results to persons served at the locations that were sampled and failed to submit to the TCEQ a copy of the consumer notification and certification that the consumer notification has been distributed to the persons served at the locations in a manner consistent with TCEQ requirements; PENALTY: $180; ENFORCEMENT COORDINATOR: Sam Keller, (512) 239-2678; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Lonzo J. Gale dba Shelby Water; DOCKET NUMBER: 2014-0072-PWS-E; IDENTIFIER: RN105878870; LOCATION: Shelby County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.41(c)(1)(F), by failing to obtain a sanitary control easement that covers the land within 150 feet of Well Number 1; 30 TAC §290.39(e)(1) and (h)(1) and Texas Health and Safety Code (THSC), §341.035(a), by failing to submit as-built plans and specifications to the executive director for review and approval prior to the establishment of a new public water supply; 30 TAC §290.46(f)(2) and (3)(A)(iv), by failing to provide facility records to Commission personnel at the time of an investigation; 30 TAC §290.46(d)(2)(A) and §290.110(b)(4) and THSC, §341.0315(c), by failing to maintain a disinfectant residual concentration of at least 0.2 milligrams per liter free chlorine in the water within the distribution system at all times; 30 TAC §290.41(c)(3)(O) and §290.43(e), by failing to provide an intruder-resistant fence to protect the facility's well and pressure tank; 30 TAC §290.41(c)(3)(J), by failing to provide a concrete sealing block that extends at least three feet from the well casing in all directions, is at least six inches thick and is sloped to drain away from the easement at not less than 0.25 inches per foot; 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the facility and its equipment; 30 TAC §290.45(b)(1)(A)(i) and

THSC, §341.0315(c), by failing to provide a well capacity of 1.5 gallons per minute per connection; 30 TAC §290.42(l), by failing to maintain a thorough and up-to-date plant operations manual for operator review and reference; and 30 TAC §290.46(n)(2), by failing to provide an accurate and up-to-date map of the distribution system so that valves and mains can be easily located during emergencies; PENALTY: $1,747; ENFORCEMENT COORDINATOR: Katy Montgomery, (210) 403-4016; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(12) COMPANY: Lyle B. Murphey dba Highway 71 Storage and Mobile Home Park; DOCKET NUMBER: 2014-0333-PWS-E; IDENTIFIER: RN101250322; LOCATION: Austin, Travis County; TYPE OF FACILITY: public water supply system; RULE VIOLATED: 30 TAC §290.117(c)(2) and (i)(1), by failing to collect lead and copper tap samples at the required five sample sites, have the samples analyzed at an approved laboratory, and submit the results to the executive director by the tenth day of the month following the end of the monitoring period; and 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following the end of the quarter; PENALTY: $2,061; ENFORCEMENT COORDINATOR: Jacquelyn Green, (512) 239-2587; REGIONAL OFFICE: P.O. Box 13087, Austin, Texas 78711-3087, (512) 339-2929.

(13) COMPANY: NEW PROGRESS WATER SUPPLY CORPORATION; DOCKET NUMBER: 2014-0427-PWS-E; IDENTIFIER: RN101277630; LOCATION: Parker County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.117(i)(5) and (k), by failing to deliver the public education materials in the event of an exceedance of the lead action level and to continue the delivery of the public education materials for as long as the lead action level was not met; 30 TAC §290.117(i)(1), by failing to timely provide the results of lead and copper tap sampling to the executive director for the January 1, 2013 - June 30, 2013 monitoring period; 30 TAC §290.117(c)(2) and (i)(1), by failing to collect lead and copper tap samples at the required five sample sites, have the samples analyzed at an approved laboratory, and submit the results to the executive director; and 30 TAC §290.122(c)(2)(A), by failing to provide public notification regarding the failure to submit Disinfectant Level Quarterly Operating Reports for the first quarter of 2013 and the second quarter of 2013, and failed to provide public notification regarding the failure to conduct routine coliform monitoring for the month of February 2013; PENALTY: $458; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: SOUTHBOUND INCORPORATED dba Leon Springs Business Park; DOCKET NUMBER: 2014-0403-PWS-E; IDENTIFIER: RN101252492; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following the end of the quarter; and 30 TAC §290.117(i)(6) and (j), by failing to mail consumer notification of lead tap water monitoring results to persons served at the locations that were sampled and failed to submit to the TCEQ a copy of the consumer notification and certification that the consumer notification has been distributed to the persons served at the locations in a manner consistent with TCEQ requirements. PENALTY: $1,504; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(15) COMPANY: Stolt-Nielsen USA Incorporated; DOCKET NUMBER: 2014-0373-AIR-E; IDENTIFIER: RN102562063; LOCATION: Channelview, Harris County; TYPE OF FACILITY: tank container cleaning facility; RULE VIOLATED: 30 TAC §§106.261(a)(3), 116.115(c), and 122.143(4), Texas Health and Safety Code (THSC), §382.085(b), Federal Operating Permit (FOP) Number O3016, Special Terms and Conditions (STC) Number 8, and New Source Review (NSR) Permit Number 23405, Special Conditions (SC) Number 7, by failing to comply with the conditions regarding the number of containers cleaned per hour; 30 TAC §115.421(a)(9)(A)(iii) and §122.143(4), THSC, §382.085(b), and FOP Number O3016, STC Number 1A, by failing to comply with the volatile organic compound emissions specifications for surface coating; 30 TAC §116.115(c) and §122.143(4), THSC, §382.085(b), FOP Number O3016, STC Number 8, and NSR Permit Number 23405, SC Number 5, by failing to route emissions from container cleaning operations to the flare; and 30 TAC §116.115(c) and §122.143(4), THSC, §382.085(b), FOP Number O3016, STC Number 8, and NSR Permit Number 23405, SC Numbers 6 and 10, by failing to prevent prohibited chemicals from being vented to the flare; PENALTY: $20,251; ENFORCEMENT COORDINATOR: Amancio R. Gutierrez, (512) 239-3921; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Tarkington-Safari Investments, Incorporated dba Tarkington Country Mart; DOCKET NUMBER: 2014-0448-PST-E; IDENTIFIER: RN101842490; LOCATION: Cleveland, Liberty County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.244(1) and (3) and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that each current employee received in-house Stage II vapor recovery training regarding the purpose and correct operating procedure of the vapor recovery system; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months and the Stage II vapor space manifolding and dynamic back pressure at least once every 36 months or upon major system replacement or modification, whichever occurs first; PENALTY: $4,772; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: Uplifting Properties, LP; DOCKET NUMBER: 2014-0400-PWS-E; IDENTIFIER: RN101174910; LOCATION: Travis County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report (DLQOR) to the executive director each quarter by the tenth day of the month following the end of the quarter; 30 TAC §290.110(e)(4)(A) and (f)(3) and §290.122(c)(2)(A), by failing to submit a DLQOR to the executive director each quarter by the tenth day of the month following the end of the quarter and failed to provide public notification regarding the failure to submit a DLQOR; 30 TAC §290.117(c)(2) and (i)(1), by failing to collect lead and copper tap samples at the required five sample sites, have the samples analyzed by an approved laboratory, and provide the results to the executive director. PENALTY: $1,529; ENFORCEMENT COORDINATOR: Michaelle Garza, (210) 403-4076; REGIONAL OFFICE: P.O. Box 13087, Austin, Texas 78711-3087, (512) 339-2929.

(18) COMPANY: Virginia Franklin Fuller dba Franklin Water Systems 3; DOCKET NUMBER: 2014-0105-PWS-E; IDENTIFIER: RN101264372; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.117(c)(2) and (i)(1), by failing to collect lead and copper tap samples at the required five sample sites, have the samples analyzed at an approved laboratory and provide the results to the executive

director; 30 TAC §§290.272, 290.273 and 290.274(a), by failing to meet the adequacy, availability, and/or content requirements for the Consumer Confidence Report for the year of 2012; and 30 TAC §290.122(a)(3)(B), by failing to provide public notification regarding the acute maximum contaminant level exceedances for nitrate for the fourth quarter 2011 - the second quarter 2013; PENALTY: $1,899; ENFORCEMENT COORDINATOR: Katy Montgomery, (210) 403-4016; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 353-9251.

TRD-201403126
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 8, 2014

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Correction of Error

The Texas Commission on Environmental Quality proposed amendments to 30 TAC §311.61 and §311.62 and new §311.67 in the July 4, 2014, issue of the *Texas Register* (39 TexReg 5102).

On page 5102, first column, the name of Chapter 311, Subchapter G was published in error as "LAKES WORTH, EAGLE MOUNTAIN, BRIDGEPORT, CEDAR CREEK, BENBROOK AND RICHLAND-CHAMBERS". The correct name of Subchapter G is "LAKES WORTH, EAGLE MOUNTAIN, BRIDGEPORT, CEDAR CREEK, ARLINGTON, BENBROOK, AND RICHLAND-CHAMBERS".

TRD-201403131

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Notice of a Public Meeting to Receive Comments on Five Total Maximum Daily Loads and an Implementation Plan to Address Bacteria in Four Austin Streams

The Texas Commission on Environmental Quality (TCEQ or commission) has made available for public comment five DRAFT Total Maximum Daily Loads (TMDLs) for Indicator Bacteria in four Austin streams (Segments 1403J, 1403K, 1428B, and 1429C) of four Austin watersheds in Travis County and a draft Implementation Plan concerning the five total maximum daily loads (TMDLs) for bacteria for the same named segments. The TCEQ will conduct a public meeting to receive comments on the five TMDLs and the draft Implementation Plan.

TMDLs: The four Austin streams (Segments 1403J, 1403K, 1428B, and 1429C) are included in the State of Texas Clean Water Act, §303(d) list of impaired water bodies. As required by the federal Clean Water Act, §303(d), five TMDLs were developed for bacteria. A TMDL is a detailed water quality assessment that provides the scientific foundation to allocate pollutant loads in a certain body of water in order to restore and maintain designated uses.

The TCEQ will conduct a public meeting on the draft TMDLs for bacteria in the four Austin streams (Segments 1403J, 1403K, 1428B, and 1429C). The purpose of the public meeting is to provide the public an opportunity to comment on the draft TMDLs. The commission requests comment on each of the major components of the TMDLs: problem definition, endpoint identification, source analysis, seasonal variation, linkage between sources and receiving waters, margin of safety, pollutant loading allocation, public participation, and implementation and reasonable assurances. After the public comment period, the TCEQ may revise the TMDLs, if appropriate. A request will then be made that the final TMDLs be considered by the commission for adoption. Upon adoption of the TMDLs by the commission, the final TMDLs and a response to all comments received will be made available on the TCEQ website. The TMDLs will then be submitted to the EPA Region 6 office for final action by the EPA. Upon approval by the EPA, the TMDLs will be certified as an update to the State of Texas Water Quality Management Plan.

IMPLEMENTATION PLAN: The TCEQ is also taking public comment on the draft Implementation Plan for bacteria in four Austin streams (Segments 1403J, 1403K, 1428B, and 1429C). The Implementation Plan is a flexible tool that the governmental and non-governmental agencies involved in TMDL implementation will use to guide their program management. The purpose of the public meeting is to provide the public an opportunity to comment on the draft Implementation Plan. The commission requests comment on each of the major components of the Implementation Plan: description of control actions and management measures, implementation strategy and tracking, review strategy, and communication strategy. After the public comment period, the TCEQ may revise the draft Implementation Plan, if appropriate. The final Implementation Plan will then be considered for approval by the commission. Upon approval of the Implementation Plan by the commission, the Implementation Plan will be made available on the TCEQ website.

The public comment meeting for the five draft TMDLs and Implementation Plan will be held on August 7, 2014, at 7:30 p.m. at **One Texas Center, Room 325 (large conference room), 505 Barton Springs Road, Austin, Texas 78704. Parking is available on site in the garage or adjacent to the building.** At this meeting, individuals have the opportunity to present oral statements when called upon in order of registration. An agency staff member will give a brief presentation at the start of the meeting and will be available to answer questions before and after all public comments have been received.

Written comments on the TMDL should be submitted to Jim Neece, Water Quality Planning Division, Texas Commission on Environmental Quality, MC 203, P.O. Box 13087, Austin, Texas, 78711-3087 or faxed to (512) 239-1414. Written comments on the Implementation Plan should be submitted to Chip Morris, Water Quality Planning Division, Texas Commission on Environmental Quality, MC 203, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-1414. Comments may be submitted electronically to *www.tceq.texas.gov/rules/ecomments* by midnight on August 18, 2014, and should either reference the *Five Total Maximum Daily Loads for the Four Austin Streams for Segment Numbers 1403J, 1403K, 1428B, and 1429C* or *Implementation Plan for Five Total Maximum Daily Loads for Bacteria in the Four Austin Streams, Segments Number 1403J, 1403K, 1428B, and 1429C.* Please be specific if you are commenting on the draft TMDLs or the Implementation Plan.

For further information regarding the proposed TMDLs, please contact Jim Neece at (512) 239-1524 or *Jim.Neece@tceq.texas.gov.* For further information regarding the proposed Implementation Plan, please contact Chip Morris at (512) 239-6686 or *Chip.Morris@tceq.texas.gov.* Copies of the draft TMDLs and the draft Implementation Plan will be available and can be obtained via the commission's website at: *www.tceq.texas.gov/implementation/water/tmdl/tmdlnews.html* or by calling (512) 239-6682.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the commission at (512) 239-6682. Requests should be made as far in advance as possible.

TRD-201403113

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: July 7, 2014

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Notice of Intent to Perform a Removal Action at the Ballard Pits State Superfund Site, Robstown, Nueces County, Texas

The executive director of the Texas Commission on Environmental Quality (TCEQ or commission) hereby issues public notice of intent to perform a removal action, as provided by Texas Health and Safety Code (THSC), §361.133, at the Ballard Pits state Superfund site (the site), which was proposed for listing in 2006 under THSC, Chapter 361, Subchapter F, (see January 13, 2006, issue of the *Texas Register* (31 TexReg 316)). The site, including all land, structures, appurtenances, and other improvements, is approximately 297 acres located at the end of Ballard Lane, west of its intersection with County Road 73, approximately 5.8 miles north of Robstown in Nueces County, Texas. The site also includes any areas where hazardous substances have come to be located as a result, either directly or indirectly, of releases of hazardous substances from the site.

The Ballard Pits site is a former sand and gravel mining location that was used in the late 1960s for storage and disposal of oil field drilling mud and refinery waste as well as possible unknown waste types. During 2008 and 2009, TCEQ remediated two pits (the "East Pit" and "West Pit"). There remains a third pit in the North area of the property (the "North Pit"), which is a surface impoundment with a surface area of approximately 12,000 square feet, and an estimated volume of approximately 9,000 cubic yards. The waste contains volatile and semi-volatile organic compounds and metals. The removal action will consist of excavation of contaminated soils and waste materials and is appropriate to protect human health and the environment.

A portion of the records for this site is available for review during regular business hours at the Corpus Christi Public Library, Northwest Branch, 3202 McKinzie Road, Corpus Christi, Texas, (361) 241-9329. Copies of the complete public record file may be obtained during business hours at the commission's Records Management Center, Building E, First Floor, Records Customer Service, MC 199, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920, or *cfrreq@tceq.texas.gov.* Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

For further information, please contact James Haley, TCEQ Project Manager, Remediation Division, at (361) 825-3420, or Crystal Taylor, TCEQ Community Relations Liaison, at (512) 239-3844.

TRD-201403120
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 8, 2014

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Notice of Intent to Perform a Removal Action at the Rogers Delinted Cottonseed Company Proposed State Superfund Site in Colorado City, Mitchell County, Texas

The executive director of the Texas Commission on Environmental Quality (TCEQ) hereby issues public notice of intent to perform a removal action, as provided by Texas Health and Safety Code (THSC), §361.133, for the Rogers Delinted Cottonseed Company proposed state Superfund site (the site). The 49.1 acre site, including all land, structures, attachments, and other improvements, is located near the intersection of Interstate Highway 20 (I-20) and State Highway 208 in Colorado City, Mitchell County, Texas. Records indicate that Rogers Delinted Cottonseed Company processed cotton seed at the site from 1965 to 1984. The 9.1-acre operations area contains two storage buildings, a process building, and two surface impoundments. A small office building was destroyed by fire in 2012. The remaining 40 acres was used to dispose of waste waters from processing activities via crop irrigation. The site also includes any areas where hazardous substances have come to be located as a result, either directly or indirectly, of releases of hazardous substances from the site. The site is proposed for listing under THSC, Chapter 361, Subchapter F.

The site is currently inactive, but bags of dried cotton seed, debris and deteriorating drums, including waste pesticide containers, remain on-site. The surfaces of the site's buildings are contaminated with dust from stored materials and processing activities. The unauthorized removal of building materials from the site has occurred.

Seed processing involved using sulfuric acid solution to remove cotton fibers and then coating the seeds with pesticides, including, Carboxin, Phorate, and Thiram. Phorate and tetramethyl-thioperoxydicarbonic diamide, the active ingredient in Thiram, are hazardous substances listed in 40 Code of Federal Regulations §302.4(a) and, therefore, are hazardous substances under the Texas Solid Waste Disposal Act. Hundreds of bags of processed, pesticide-coated cotton seeds remain at the site. The bags of seeds, located in dilapidated buildings, are deteriorating and dispersing the pesticide-coated seeds. Cotton seeds are strewn on the buildings' floors and soils outside of the buildings. Soil in the processing building floor has elevated concentrations of Carboxin and Thiram.

The cotton seed, contaminated soils, drums, debris, and contaminated building surfaces are potential sources for additional on-site and off-site releases. The removal action will consist of the characterization and proper off-site disposal of containerized and uncontained waste at the site, including cotton seed, debris, and deteriorating drums. The site's buildings surfaces will be decontaminated. Removal of these potential sources of additional contamination is an integral strategy to protect human health and the environment. This removal action can be completed without extensive investigation and planning and will achieve a significant cost reduction for the future remediation and restoration of the site.

A portion of the records for this site is available for review at the Mitchell County Public Library, 340 Oak Street, Colorado City, Texas, (915) 728-3968, during regular business hours. Copies of the complete public record file may be obtained during regular business hours at the TCEQ's Central File Room, Building E, First Floor, 12100 Park 35 Circle, Austin, Texas 78753. Contact the Central File Room at (512) 239-2900 or *cfrreq@tceq.texas.gov* for additional information on the public record file. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

For further site information, please contact Sugam Shrestha, TCEQ Project Manager, Superfund Section, at (512) 239-4136, or John Flores, TCEQ Community Relations Coordinator, at (800) 633-9363.

TRD-201403123
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 8, 2014

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 18, 2014.** TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 18, 2014.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, TWC, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: ANCAR WATER SYSTEM, INC. and Lester A. Saucier Jr. d/b/a Ancar Water System; DOCKET NUMBER: 2013-1514-PWS-E; TCEQ ID NUMBER: RN105234819; LOCATION: 3333 Ancar Street, Orange, Orange County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.117(c)(2) and (i)(1), by failing to collect semiannual lead and copper samples at the required five sample sites and provide the results to the executive director for the January 1 - June 30, 2011, July 1 - December 31, 2011, July 1 - December 31, 2012, and January 1 - June 30, 2013 monitoring periods; 30 TAC §290.271(b) and §290.274(a) and (c), by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) for the year 2011 to each bill paying customer by July 1, 2012, and by failing to submit to the executive director by July 1, 2012, a copy of the CCR and certification that the CCR has been distributed to the customers of the facility and that the information in the CCR is correct and consistent with compliance monitoring data; 30 TAC §290.106(e), by failing to timely provide the results of annual nitrate sampling to the executive director for the 2011 and 2012 monitoring periods; 30 TAC §290.113(e), by failing to timely provide the results of annual Stage 1 disinfectant by-product sampling to the executive director for the 2011 and 2012 monitoring periods; and 30 TAC §290.107(e), by failing to timely provide the results of triennial synthetic organic chemical Group 5 contaminants sampling to the executive director for the January 1, 2009 - December 31, 2011 monitoring period; PENALTY: $1,955; STAFF ATTORNEY: Jess Robinson, Litigation Division, MC 175, (512) 239-0455; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: Catherine Ann Wagner; DOCKET NUMBER: 2012-2315-MSW-E; TCEQ ID NUMBER: RN106343395; LOCATION: 611 North First Street, Mertzon, Irion County; TYPE OF FACILITY: unauthorized municipal solid waste (MSW) disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; PENALTY: $0; STAFF ATTORNEY: David A. Terry, Litigation Division, MC 175, (512) 239-0619; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(3) COMPANY: Cresson Crossroads, LLC; DOCKET NUMBER: 2013-1291-WR-E; TCEQ ID NUMBER: RN105371843; LOCATION: 919 East Highway 377, Granbury, Hood County; TYPE OF FACILITY: unauthorized use of state water from an on-channel impoundment; RULES VIOLATED: TWC, §11.121 and 30 TAC §297.11, by failing to obtain authorization to impound, divert, or use state water; PENALTY: $550; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201403133
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 8, 2014

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 18, 2014.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 18, 2014.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers;

however, TWC, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: ALL L SAVER FOOD INC d/b/a SUPER FOOD MART 37; DOCKET NUMBER: 2013-0843-PST-E; TCEQ ID NUMBER: RN101382042; LOCATION: 20894 Farm-to-Market Road 3079, Chandler, Henderson County; TYPE OF FACILITY: underground storage tank (UST) system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and TWC, §26.3475(a) and 30 TAC §334.50(b)(2), by failing to provide release detection for the piping associated with the UST system; PENALTY: $2,943; STAFF ATTORNEY: J. Amber Ahmed, Litigation Division, MC175, (512) 239-1204; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(2) COMPANY: Ismael Gamboa d/b/a Chico's Expert Collision; DOCKET NUMBER: 2013-2214-AIR-E; TCEQ ID NUMBER: RN105743348; LOCATION: 5415 Highway 59 North, Lufkin, Angelina County; TYPE OF FACILITY: auto body refinishing shop; RULES VIOLATED: Texas Health and Safety Code, §382.0518(a) and §382.085(b) and 30 TAC §116.110(a), by failing to obtain authorization prior to operation of a facility that emits air contaminants; PENALTY: $1,312; STAFF ATTORNEY: Jess Robinson, Litigation Division, MC 175, (512) 239-0455; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: Omar Salinas; DOCKET NUMBER: 2013-2185-OSS-E; TCEQ ID NUMBER: RN106097876; LOCATION: 1033 Pearson, Freer, Duval County; TYPE OF FACILITY: on-site sewage facility (OSSF); RULES VIOLATED: 30 TAC §285.3(b)(1) and TCEQ DO Docket Number 2011-1724-OSS-E, Ordering Provisions Numbers 3.c. - 3.e., by failing to obtain authorization to construct an OSSF; and TWC, §26.121(a)(1), 30 TAC §285.81(d). and TCEQ DO Docket Number 2011-1724-OSS-E, Ordering Provisions Numbers 3.a. and 3.b., by failing to prevent an unauthorized discharge of graywater; PENALTY: $6,250; STAFF ATTORNEY: Meaghan M. Bailey, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(4) COMPANY: Steve Jones; DOCKET NUMBER: 2013-1461-MSW-E; TCEQ ID NUMBER: RN106568181; LOCATION: northwest of the intersection of North Opedyke Gin Road and State Highway 114, Levelland, Hockley County; TYPE OF FACILITY: tank cleaning facility; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $1,312; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(5) COMPANY: Wayne Lee and Paula Lee d/b/a The Pines Mobile Home Park; DOCKET NUMBER: 2013-1991-WQ-E; TCEQ ID NUMBER: RN103098919; LOCATION: 1320 West Walton Road, Lumberton, Hardin County; TYPE OF FACILITY: mobile home park with collection system and associated lift station; RULES VIOLATED: TWC, §26.039(b), by failing to notify the commission of a discharge within 24 hours after the discharge occurred; and TWC, §26.121(a)(1) and (c), by failing to prevent an unauthorized discharge of sewage from the facility's collection system into or adjacent to water in the state; PENALTY: $24,937; STAFF ATTORNEY: Jake Marx, Litigation Division, MC 175, (512) 239-5111; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

TRD-201403134
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 8, 2014

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Notice of Opportunity to Comment on Shutdown/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Orders (S/DOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **August 18, 2014.** The commission will consider any written comments received and the commission may withdraw or withhold approval of an S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on August 18, 2014.** Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing.**

(1) COMPANY: DEVELOPMENT II PARTNERS, INC. d/b/a Katy Exxon; DOCKET NUMBER: 2014-0224-PST-E; TCEQ ID NUMBER: RN101889301; LOCATION: 5505 Highway Boulevard, Katy, Harris County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii) and TCEQ Agreed Order Docket Number 2012-0379-PST-E, Ordering Provisions Numbers 2.a.i. and

2.c., by failing to renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; TWC, §26.3467(a), 30 TAC §334.8(c)(5)(A)(i), and TCEQ Agreed Order Docket Number 2012-0379-PST-E, Ordering Provisions Numbers 2.a.i. and 2.c., by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; TWC, §26.3475(a) and (c)(1), 30 TAC §334.50(b)(1)(A) and (2), and TCEQ Agreed Order Docket Number 2012-0379-PST-E, Ordering Provisions Numbers 2.b.i., 2.b.ii., and 2.c., by failing to monitor the USTs for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring) and by failing to provide proper release detection for the pressurized piping associated with the USTs; TWC, §26.3475(d), 30 TAC §334.49(a)(1), and TCEQ Agreed Order Docket Number 2012-0379-PST-E, Ordering Provisions Numbers 2.b.iii. and 2.c., by failing to provide proper corrosion protection for the UST system; and 30 TAC §334.10(b) and TCEQ Agreed Order Docket Number 2012-0379-PST-E, Ordering Provisions Numbers 2.a.ii. and 2.c., by failing to maintain the required UST records and make them immediately available for inspection at the request of agency personnel; PENALTY: $94,032; STAFF ATTORNEY: Steven M. Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: HAIDER A., INC. d/b/a Stop N Drive; DOCKET NUMBER: 2013-1707-PST-E; TCEQ ID NUMBER: RN102253036; LOCATION: 8227 Highway 6, Hitchcock, Galveston County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(d) and 30 TAC §334.49(c)(2)(C), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly; TWC, §26.3475(d) and 30 TAC §334.49(c)(4), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years; TWC, §26.3475(c)(1) and 30 TAC §334.50(a)(1)(A), by failing to provide a method of release detection capable of detecting a release from any portion of the UST system which contains regulated substances; 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers, or catchment basins associated with a UST system at least once every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid-tight and free of liquid and debris; and Texas Health and Safety Code, §382.085(b) and 30 TAC §115.242(3), by failing to maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable California Air Resources Board Executive Order, and free of defects that would impair the effectiveness of the system; PENALTY: $10,808; STAFF ATTORNEY: Jess Robinson, Litigation Division, MC 175, (512) 239-0455; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: S.R.R. INVESTMENTS, INC. d/b/a Elroy Country Corner; DOCKET NUMBER: 2013-1960-PST-E; TCEQ ID NUMBER: RN101488880; LOCATION: 13912 Farm-to-Market Road 812, Del Valle, Travis County; TYPE OF FACILITY: UST system and convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A) and TCEQ Agreed Order Docket Number 2011-1011-PST-E, Ordering Provision Number 2.a.ii., by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $90,000; STAFF ATTORNEY: Steven M. Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Austin Regional Office, P.O. Box 13087, MC R-11, Austin, Texas 78711, (512) 339-2929.

TRD-201403132
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: July 8, 2014

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Notice of Rate Change to the Low-Level Radioactive Waste Maximum Disposal Rates and Opportunity for a Contested Case Hearing

Waste Control Specialists LLC (WCS) has submitted a volume adjustment request, which was assigned tracking number RDR002, to the Texas Commission on Environmental Quality (TCEQ or commission) to calculate the annual volume adjustment to the low-level radioactive waste (LLRW) disposal rates charged at the Compact Waste Disposal Facility in Andrews County, Texas. The land disposal facility for LLRW disposal is located at 9998 State Highway 176 West in Andrews County, Texas. The following link to an electronic map of the facility's general location is provided as a public courtesy and is not part of the request: *http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=32.4425&lng=-103.063055&zoom=13&type=*.

WCS' volume adjustment proposes to reduce the disposal rate for "Class A Low-Level Waste (LLW) - Shielded" waste from $250 per cubic foot to $180 per cubic foot. The TCEQ Executive Director (ED) agrees that this change in rate is necessary in order to reflect material changes to the volume of waste expected to be received at the Compact Waste Disposal Facility in 2014. The ED has initiated a rate revision to lower the maximum disposal rate for "Class A LLW - Shielded" waste to $180 per cubic foot. There will be no other changes to the maximum disposal rates established in 30 TAC §336.1310 as a result of this rate revision.

OPPORTUNITY FOR A CONTESTED CASE HEARING. A contested case hearing is a legal proceeding similar to a civil trial in a state district court. The TCEQ may grant a contested case hearing regarding this revised rate if a written hearing request is timely submitted by the licensee or a party state compact generator. If the commission receives a hearing request from the licensee or a party state compact generator by **August 18, 2014,** which is at least 30 days after this notice was published in the *Texas Register,* a public hearing will be scheduled to determine if the revised rate is fair, just, and reasonable.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, mailing address, phone number, applicant's name and tracking number; a clear and concise statement that you are requesting a contested case hearing; and if you are a compact generator, provide the generator's licensing numbers indicating the location or locations where the compact waste is generated. Hearing requests should be mailed to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087 and received by **August 18, 2014,** which is at least 30 days after this notice was published in the *Texas Register.* Generators must initiate a request for a contested case hearing by filing individual requests rather than joint requests. Following the close of all applicable request periods, if the ED receives a hearing request, the ED will directly refer the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

EXECUTIVE DIRECTOR ACTION. Unless a hearing request is received from the licensee or an eligible generator, no hearing will be held and the ED will issue final approval of the revised rate. Upon the

commissioners' approval for rulemaking, the final approved rate will be established by rule as the maximum rate for disposal of "Class A LLW - Shielded" waste. If a timely hearing request is filed, the ED will not adopt the revised rate and will forward the matter to SOAH for a hearing.

MAILING LIST. If you submit a request for a contested case hearing, you will be added to the mailing list for this specific matter to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: 1) the permanent mailing list for a specific applicant name and application number; and/or 2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below. All written requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087.

AGENCY CONTACTS AND INFORMATION. If you need more information about this volume adjustment request or the rate change process, please call the TCEQ Public Education Program, Toll Free, at 1-(800) 687-4040. General information about the TCEQ can be found at our Web site at *www.tceq.texas.gov.* Si desea información en español, puede llamar al 1-(800) 687-4040. Further information may also be obtained from the TCEQ Radioactive Materials Division, MC 233, P.O. Box 13087, Austin, Texas 78711-3087 or by calling Mr. Bobby Janecka, Radioactive Material Section Manager, at (512) 239-6415.

TRD-201403121
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: July 8, 2014

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Notice of Water Quality Applications

The following notices were issued on June 27, 2014, through July 03, 2014.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

WHARTON COUNTY GENERATION LLC which operates Newgulf Power Facility, an electric power peaking facility, has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0003891000, which authorizes the discharge of low volume wastewater (water softener regenerative waste, water from floor drainage, and condensate from the combustion turbine evaporative cooler) and utility wastewater (boiler blowdown, laboratory and sampling wastewater, and air conditioning condensate) at a daily average flow not to exceed 250,000 gallons per day. The facility is located at 206 Vat Road, off of Farm-to-Market Road 1301, approximately 3.8 miles east of the intersection of Farm-to-Market Road 1301 and Farm-to-Market Road 442, in Boling, Wharton County, Texas 77420.

INGENIA POLYMERS INC which operates a facility that processes thermoplastics and engineered products, has applied for new TPDES Permit No. WQ0005026000 to authorize the discharge of stormwater associated with industrial activity on an intermittent and flow variable basis via Outfall 001 and stormwater on an intermittent and flow variable basis via Outfalls 002 and 003. The facility is located at 2222 Appelt Drive, Houston, Harris County, Texas 77015. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the General Land Office, and has determined that the action is consistent with the applicable CMP goals and policies.

AQUA WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0014561001 which authorizes the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 16,000 gallons per day. The facility is located 750 feet south of US Highway 290 from a point approximately 2.0 miles west of the intersection of US Highway 290 and County Road 360, on the Dube Lane access road in Bastrop County, Texas 78650.

SI GROUP INC which operates SI Group - TX Operations, an alkyl phenol/petrochemical plant, has applied for a renewal of TPDES Permit No. WQ0001961000, which authorizes the discharge of utility wastewater (boiler blowdown, cooling tower blowdown, and water treatment wastewater), stormwater runoff, and previously monitored effluents (process wastewater and process area stormwater runoff) at a daily average flow not to exceed 1,400,000 gallons per day. The facility is located at 702 Farm-to-Market Road 523, approximately 0.5 mile southwest of the intersection of Farm-to-Market Road 523 and State Highway 332 in the City of Freeport, Brazoria County, Texas 77541.

TEXAS A&M UNIVERSITY 1584 TAMU College Station, Texas 77843, which operates Texas A&M University Central Utility Plant, a steam electric power generating and thermal supply plant, and cyclotron, has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0004002000, which authorizes the discharge of cooling tower blowdown, low volume wastes, stormwater runoff, and water treatment wastes at a daily average flow not to exceed 930,000 gallons per day via Outfall 001. The steam electric power generating station and thermal supply plant is located at 222 Ireland Street, immediately west of the intersection of Ireland Street and Ross Street, and the cyclotron is located on Spence Street, at the intersection of Spence Street and University Drive, on the Texas A&M University main campus, College Station, Brazos County, Texas 77843.

SHIN ETSU SILICONES OF AMERICA INC which operates an organic chemical manufacturing plant that produces carbon functional silane, has applied to for a renewal of TPDES Permit No. WQ0004362000, which authorizes the discharge of process wastewater, process area stormwater, utility waters (cooling tower and boiler blowdown), water treatment waste (caustic soda dilution and softener regenerate), and treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day. This facility is located at 5650 East Highway 332, Freeport, TX 77541, at a point equidistant between Chubb Lake and the portion of the railroad tracks running southeast of Chubb Lake, approximately one (1) mile west of the Village of Oyster Creek and approximately 2.5 miles north of the City of Freeport, Brazoria County, Texas.

CITY OF STINNETT has applied for a renewal of TCEQ Permit No. WQ0010291001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day via surface irrigation of 160 acres of non-public access land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located 1.2 miles north-northwest of the intersection of Farm-to-Market Road 2277 and State Highway 136, and approximately 0.65 mile south of the intersection of State Highway 136 and State Highway 152. The irrigation site is located approximately 1.0 mile north of the intersection of Farm-to-Market Road 2277 and State Highway 136, south of Stinnett in Hutchinson County, Texas 79083.

CITY OF UVALDE has applied for a renewal of TPDES Permit No. WQ0010306001 which authorize: the discharge of treated wastewater at a volume not to exceed an annual average flow of 970,000 gallons per day via Outfall 001; the discharge of treated wastewater at a volume not to exceed an annual average flow of 500,000 gallons per day via Outfall 002; and the discharge of treated wastewater at a volume not to exceed an annual average flow of 970,000 gallons per day via Outfall 003. The facility is located approximately 1.3 miles southwest of the intersection of Farm-to-Market Road 117 and U.S. Highway 83 in Uvalde County, Texas 78801.

CITY OF BELLVILLE has applied for a renewal of TPDES Permit No. WQ0010385002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day. The facility is located at 307 West Hickory Street, approximately 4,500 feet southwest of the Austin County Courthouse and approximately 1 mile south-southwest of the intersection of State Highway 36 and State Highway 159 with Farm-to-Market Road 1456 in the City of Bellville in Austin County, Texas 77418.

CITY OF YOAKUM has applied for a renewal of TPDES Permit No. WQ0010463001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 950,000 gallons per day. The facility is located on the west side of Dunn Street and approximately one mile southwest of its intersection with State Highway 111 in Dewitt County, Texas 77995.

CITY OF WICHITA FALLS has applied for a major amendment to TPDES Permit No. WQ0010509001 to authorize a second outfall. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 19,910,000 gallons per day. The facility is located at 1005 River Road immediately south of River Road and approximately 1,000 feet northeast of the intersection of River Road and Rosewood Street in the City of Wichita Falls in Wichita County, Texas 76305.

WADSWORTH WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0012618001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 75,000 gallons per day. The facility is located at 111 Private Road 623, approximately 400 feet east of State Highway 60 and approximately 1,100 feet south of Laird Road in Matagorda County, Texas 77483.

CITY OF NEW DEAL has applied for a renewal of TCEQ Permit No. WQ0012740001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 105,000 gallons per day via surface irrigation of 8.71 acres of non-public access agricultural land. The wastewater treatment facility and disposal site are located approximately one mile east of the City of New Deal on County Road 57 on the northwest corner of the intersection of County Roads 57 and 25 in Lubbock County, Texas 79350.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 167 has applied for a major amendment to TPDES Permit No. WQ0012834001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 1,500,000 gallons per day to an annual average flow not to exceed 1,600,000 gallons per day. Additionally, discharge via Outfall 001 will be discontinued in the Final phase and all discharges will be via Outfall 002. The facility is located at 4950 Old Greenhouse Road, 1.25 miles north of the intersection of Barker-Cypress Road and Clay Road and approximately one mile southwest of the intersection of Gummert Road and Barker-Cypress Road in Harris County, Texas 77449.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO 81 has applied for a renewal of TPDES Permit No. WQ0013051002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 325,000 gallons per day. The facility is located at 32765 Whitburn Trail, Fulshear, approximately 1.75 miles south and 0.6 mile east of the intersection of Farm-to-Market Road 1093 and Weston Drive, approximately 3 miles southwest of the City of Fulshear in Fort Bend County, Texas 77441.

MONTGOMERY COUNTY MUNICIPAL UTILITY DISTRICT NO 24 has applied for a major amendment to TPDES Permit No. WQ0014116001 to authorize a variance to the buffer zone requirement. The current permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located at 4003 Ricewood Drive, approximately 0.5 mile northwest of the point where White Creek leaves Montgomery County and approximately 2.5 miles east of U.S. Highway 59 in Montgomery County, Texas 77365.

DTT LLC has applied for a new permit, proposed TPDES Permit No. WQ0015096001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 90,000 gallons per day. The facility is located at approximately 2.5 miles north northwest of the intersection of Farm-to-Market Road 279 and Farm-to-Market Road 2632, approximately 6 miles northwest of Brownwood in Brown County, Texas 76801.

RYLAND HOMES OF TEXAS INC has applied for a new permit, draft TPDES Permit No. WQ0015218001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 240,000 gallons per day. The facility will be located approximately 3 miles north of the intersection of Highway 290 and Mueschke Road and 0.25 mile west of Mueschke Road in Harris County, Texas 77429.

If you need more information about these permit applications or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.texas.gov. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-201403145
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: July 8, 2014

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Texas Facilities Commission

Request for Proposals #303-6-20461

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Public Safety (DPS), announces the issuance of Request for Proposals (RFP) #303-6-20461. TFC seeks a five (5) or ten (10) year lease of approximately 1,156 square feet of office space in Gregory, Portland, Ingleside or Aransas Pass, Texas.

The deadline for questions is July 28, 2014 and the deadline for proposals is August 4, 2014 at 3:00 p.m. The award date is September 3, 2014. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=112426.*

TRD-201403099

Kay Molina
General Counsel
Texas Facilities Commission
Filed: July 3, 2014

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Department of Family and Protective Services

Notice of Consultant Contract Amendment

In accordance with Texas Government Code, Chapter 2254, the Health and Human Services Commission (HHSC), on behalf of the Texas Department of Family and Protective Services (DFPS) announces this notice of intent to amend a consultant contract for an operational review of its Child Protective Services (CPS) Division.

The notice of request for proposals (DFPS RFP No. 530-14-84910) was published in the September 13, 2013, issue of the *Texas Register* (38 TexReg 6059), which provided that the awarded consultant could be requested, at the option of DFPS, to assist the agency with implementing approved recommendations. The notice of award was published in the March 7, 2014, issue of the *Texas Register* (39 TexReg 1761). Unless a better offer for the provision of the consulting services is received not later than thirty (30) days from the date of this publication, DFPS will execute the following amendment to add additional services.

CPS Operational Review Consultant Contract

Contractor Name: The Stephen Group, LLC

Contract #: 530-14-7777-00085

Amendment #: 14-01

Article I. PURPOSE, AUTHORITY AND OBJECTIVES

SECTION 1.01 Purpose.

The Texas Department of Family and Protective Services, hereinafter referred to as the Department, and The Stephen Group, LLC, hereinafter referred to as the Contractor, entered into the CPS Operational Review Agreement between the Department and Contractor dated February 2, 2014 (the "CPS Operations Review Agreement"). This Amendment ("Amendment") of DFPS Contract No. 530-14-7777-00085 is entered into to authorize the continued performance of services by Contractor that are within the scope of work outlined in Section 2 of DFPS solicitation No. 530-14- 84910 (Sept. 3, 2013).

SECTION 1.02 Authority.

This Amendment is entered into in accordance with Section 8 of the DFPS Uniform Terms and Conditions, which are incorporated by reference in the CPS Operational Review Agreement.

SECTION 1.03 Objectives.

The objective of this Amendment is to ensure the continued technical assistance from the Contractor for the coordination and implementation of recommendations from the CPS Operational Review, and to authorize payment for those services.

SECTION 1.04 Effective Date.

This Amendment is effective upon the date of execution by both Parties; or, if signed by the parties on different dates, upon the date of execution by the latter of the two Parties.

Article II. AMENDMENT TO THE OBLIGATIONS OF THE PARTIES

Section 2.01 Effect of Amendment on Contract.

Unless otherwise modified, the terms and conditions of the CPS Operational Review Agreement (DFPS Contract No. 530-14-7777-00085) shall remain in full force and effect.

Section 2.02 Contract Amount.

Section 5 of the CPS Operational Review Agreement is deleted in its entirety and the following provision substituted for same:

The total sum of all payments under this contract will not exceed $1,750,000 for the term of this contract.

Section 2.03 Additional Services.

Section 6 of the CPS Operational Review Agreement is amended by adding the following additional services:

Upon completion of the services and deliverables set forth in Exhibit B, the Contractor will perform technical assistance for the coordination and implementation of recommendations from the CPS Operational Review, along with recommendations from the Sunset Commission and the Casey Family Study. The Contractor will help prioritize the work, structure and manage the work for success, provide subject matter expertise, and monitor the work to verify the schedule is met and the benefits are achieved.

Section 2.04 Payment for Services.

Section 7 of the CPS Operational Review Agreement is deleted in its entirety and the following provision substituted for same:

The Contractor shall be paid from available funds for services rendered in accordance with the terms of this Amendment upon the receipt of a properly completed invoice, approval of any deliverables as applicable, and documentation of billable hours worked. The invoice shall be submitted by the Contractor to the DFPS Contract Manager no later than the 15th day of the month. Contractor shall submit a signed and dated Form 4116Xe, State of Texas Purchase Voucher, and any other supporting documentation requested by the Department.

For the submission of offers or information concerning this proposed amendment, please contact: Claire Hall, Project Manager at (512) 438-5257 or email Claire.Hall@dfps.state.tx.us.

TRD-201403151
Cynthia O'Keeffe
General Counsel
Department of Family and Protective Services
Filed: July 9, 2014

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General Land Office

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of May 5, 2014, through July 16, 2014. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period extends 30 days from the date published on the Texas General Land Office web site. The notice was published on the web site on Friday, July 11, 2014.

The public comment period for this project will close at 5:00 p.m. on Monday, August 11, 2014.

FEDERAL AGENCY ACTIONS:

Applicant: Port of Port Arthur;

Location: The project is located in the Sabine-Neches Canal and wetlands adjacent to the Sabine-Neches Canal, at 221 Houston Avenue (Port of Port Arthur), in Port Arthur, Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Arthur South, Texas. LATITUDE & LONGITUDE (NAD 83): Latitude: 29.856 North; Longitude: 93.942 West. Project Description: The applicant proposes to construct improvements to the shoreline of the Sabine-Neches Canal and to upgrade the port facility structures within the boundaries of the Port of Port Arthur. The applicant proposes to discharge fill material into 3.26 acres of open waters and 0.08 acres of wetlands to expand the port facilities and convey drainage with new concrete box outfall culverts and pipes. The applicant will install one new breasting dolphin and one new mooring dolphin to replace structures removed during construction of the new port facilities. The applicant will construct a new 600-foot-long by 63-foot-wide wharf with driven concrete pile supports that will incorporate an existing rail bridge and two newly constructed additional railroad spurs. The applicant will mechanically and/or hydraulically dredge 18.31 acres to 3:1 slopes within the Sabine-Neches Canal to a depth of -48 feet mean low tide plus 2 feet overdredge plus 1 foot advanced maintenance removing 454,300 cubic yards of material. The dredged material will be piped by placement of a pipe across the Sabine-Neches Canal from the dredge areas into Corps Dredged Material Placement Area #8. Beneath the proposed wharf, the applicant proposes to construct a 398-foot-long sheet pile bulkhead. The applicant proposes to straighten and armor 1,198 linear feet of shoreline beginning at the end of the proposed bulkhead and ending near the State Highway 82 Bridge. The shoreline beneath the proposed wharf and subsequent 1,198 linear feet will be contoured to a 3:1 slope and be overlaid with a total of 10.38 acres of articulated concrete matting. Some areas along the shoreline will also have stone riprap installed at the slope toe. The applicant does not propose maintenance dredging. CMP Project No: 14-1591-F1. Type of Application: U.S.A.C.E. permit application #SWG-2011-00303. This application will be reviewed pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. **Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).**

Applicant: Texas Dock and Rail;

Location: The project site is located in the Tule Lake Turning Basin, at 7002 Marvin Berry Road, in Corpus Christi, Nueces County, Texas. The project can be located on the U.S.G.S. quadrangle map titled: Corpus Christi, Texas. LATITUDE & LONGITUDE (NAD 83): Latitude: 27.827396 North; Longitude: 97.496565 West. Project Description: The applicant proposes to amend the existing permit to construct a new ship dock (Ship Dock 1) consisting of a 90-foot-long by 60-foot-wide pile-supported platform, a pile-supported access trestle and pipe rack, 14 mooring and berthing dolphins, and initial dredging at the facility to a depth of -45 feet using both mechanical and hydraulic methods. The project would also include a new barge dock consisting of a 60- by 40-foot pile supported platform with a full-face fender system, a pile-supported access trestle and pipe rack, four barge mooring and berthing dolphin monopoles. Also, two new mooring and berthing dolphin monopoles would be installed at the existing Ship Dock 2. Approximately 150,000 cubic yards of material would be dredged for Ship Dock 1 under this action. No dredging is proposed at the barge dock. The proposed dredge disposal areas are the Tule Lake and/or Suntide Dredge disposal areas. The purpose of the project is to expand the terminal in order to handle deeper draft ships and barges, and to be able to load and unload larger numbers of vessels utilizing the facility. CMP Project No: 14-1839-F1. Type of Application: U.S.A.C.E. permit application #SWG-2008-00904. This application will be reviewed pursuant to Section 10 of the Rivers and Harbors Act of 1899.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action or activity is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Land Commissioner for review.

Further information on the applications listed above, including a copy of the consistency certifications or consistency determinations for inspection may be obtained from Mr. Ray Newby, P.O. Box 12873, Austin, Texas 78711-2873 or via email at federal.consistency@glo.texas.gov. Comments should be sent to Mr. Newby at the above address or by email.

TRD-201403164
Larry L. Laine
Chief Clerk/Deputy Land Commissioner
General Land Office
Filed: July 9, 2014

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Attendant Compensation Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on Monday, August 7, 2014, at 8:00 a.m. to receive public comment on proposed base rate increases for attendant services provided under the following programs operated by the Department of Aging and Disability Services (DADS): Primary Home Care; Community Attendant Services; Family Care; Community Based Alternatives - Home and Community Support Services; Residential Care; Day Activity and Health Services; Medically Dependent Children Program; and Consumer Directed Services.

The hearing will be held in compliance with Texas Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.105(g), which require public notice and hearings on proposed Medicaid reimbursements before such rates are approved by HHSC. The public hearing will be held in the Public Hearing Room of the John H. Winters Building, located at 701 West 51st Street, Austin, Texas. Entry is through Security at the front of the building facing 51st Street. Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Rate Analysis by calling (512) 730-7401 at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. HHSC proposes to increase the base rates for Primary Home Care, Community Attendant Services, and Family Care Non-Priority Personal Attendant Services; Community Based Alternatives - Home and Community Support Services, Personal Assistance Services, Day Activity and Health Services; Residential Care; Medical Dependent Children Program Attendant Services; and all associated Consumer Directed Services. The proposed rates will be effective September 1, 2014, and were determined in accordance with the rate setting methodologies listed below under "Methodology and Justification."

Methodology and Justification. The proposed payment rates incorporate provisions in the 2014-2015 General Appropriations Act that included funds to support increases in the base wages of personal attendants to $7.50 per hour in fiscal year 2014 and $7.86 per hour in fiscal

year 2015. See General Appropriations Act, 83d Leg., R.S., ch. 1411, art. II, at II-137, 2013 Tex. Gen. Laws 3743, 3988 (Health and Human Services Section, Special Provisions for all Health and Human Services Agencies, §61(b)). HHSC calculated the proposed payment rates in accordance with the rate setting methodologies codified at 1 TAC §355.112, relating to Attendant Compensation Rate Enhancement.

Briefing Package. A briefing package describing the proposed payment rates will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on July 24, 2014. Interested parties may also obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 730-7401; by fax at (512) 730-7475; or by e-mail at sarah.hambrick@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the Texas Health and Human Services Commission, Rate Analysis Department, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Rate Analysis at (512)730-7475; or by e-mail to sarah.hambrick@hhsc.state.tx.us. In addition, written comment may be sent by overnight mail or hand delivered to the Texas Health and Human Services Commission, Rate Analysis Department, Mail Code H-400, 4900 North Lamar, Austin, Texas 78751-2316.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 730-7401 at least 72 hours before the hearing so appropriate arrangements can be made.

TRD-201403115
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 7, 2014

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Notice of Public Hearing on Proposed Medicaid Payment Rate for Truman W. Smith Children's Care Center

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on Thursday, August 7, 2014, at 10:30 a.m. to receive public comment on the proposed rate for the Truman W. Smith Children's Care Center, a nursing facility that is a member of the pediatric care facility special reimbursement class of the Nursing Facility Program operated by the Department of Aging and Disability Services. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.105(g), which require public notice and hearings on proposed Medicaid reimbursements before such rates are approved by HHSC.

The public hearing will be held in the Public Hearing Room of the John H. Winters Building, located at 701 West 51st Street, Austin, Texas. Entry is through Security at the front of the building facing 51st Street. Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Rate Analysis by calling (512) 730-7401 at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. HHSC proposes to increase the rate for the nursing facility pediatric care facility special reimbursement class for Truman W. Smith Children's Care Center from $238.50 a day to $251.22 a day. The proposed rate will be effective September 1, 2014, and was determined in accordance with the rate setting methodology listed below under "Methodology and Justification."

Methodology and Justification. The proposed rate was determined in accordance with the rate setting methodology codified at 1 TAC §355.307, Reimbursement Setting Methodology.

Briefing Package. A briefing package describing the proposed payment rate will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on July 24, 2014. Interested parties may also obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 730-7401; by fax at (512) 730-7475; or by e-mail at Sarah.Hambrick@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to, Health and Human Services Commission, Rate Analysis Department, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Rate Analysis at (512) 730-7475; or by e-mail to Sarah.Hambrick@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to the Health and Human Services Commission, Rate Analysis Department, Mail Code H-400, Brown Heatly Building, 4900 North Lamar, Austin, Texas 78751-2316.

TRD-201403150
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 9, 2014

♦ ♦ ♦

Notice of Public Hearing on Proposed Nursing Facility and Hospice-Nursing Facility Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on Thursday, August 7, 2014, at 9:00 a.m. to receive public comment on Nursing Facility (NF) and Hospice-NF Medicaid payment rates. The hearing will be held in compliance with Human Resources Code §32.0282; 1 Texas Administrative Code ("TAC") Chapter 355, Subchapter B, §355.201 (relating to Establishment and Adjustment of Reimbursement Rates by the Health and Human Services Commission); and 1 TAC Chapter 355, Subchapter A, §355.105(g), which require public notice and a hearing on proposed Medicaid reimbursements.

The public hearing will be held in the Public Hearing Room of the John H. Winters Building, located at 701 West 51st Street, Austin, Texas. Entry is through Security at the front of the building facing 51st Street. Persons requiring Americans with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Rate Analysis by calling (512) 730-7401 at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. HHSC proposes to increase NF and Hospice-NF payment rates by six percent as compared to rates in effect on August 31, 2013. The proposed new rates will be effective September 1, 2014, and were determined in accordance with the rate setting methodologies listed below under "Methodology and Justification."

Methodology and Justification. The proposed Medicaid payment rates incorporate appropriations provisions from the 2014-15 General Appropriations Act, S.B. 1, 83rd Legislature, Regular Session, 2013 (Article II, Department of Aging and Disability Services, Rider 40), which appropriated funds to provide for a six percent increase for NF and Hospice-NF payment rates, calculated based on the rates in effect on August 31, 2013.

HHSC's proposed payment rates were calculated in accordance with the rate setting methodology in 1 TAC Chapter 355, Subchapter C,

§355.307 (relating to Reimbursement Setting Methodology); §355.308 (relating to Direct Care Staff Rate Component); and §355.312 (relating to Reimbursement Setting Methodology-Liability Insurance Costs). These rates and associated minute requirements were subsequently adjusted in accordance with 1 TAC Chapter 355, Subchapter A, §355.101 (relating to Introduction) and §355.109 (relating to Adjusting Reimbursement When New Legislation, Regulations or Economic Factors Affect Costs); and 1 TAC Chapter 355, Subchapter B, §355.201 (relating to Establishment and Adjustment of Reimbursement Rates by the Health and Human Services Commission).

Briefing Package. A briefing package describing the proposed payment rates will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on July 24, 2014. Interested parties may also obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 730-7401; by fax at (512) 730-7475; or by e-mail at Sarah.Hambrick@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to Health and Human Services Commission, Rate Analysis Department, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Rate Analysis at (512) 730-7475; or by e-mail to Sarah.Hambrick@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to the Health and Human Services Commission, Rate Analysis Department, Mail Code H-400, 4900 North Lamar Boulevard, Austin, Texas 78751-2316.

TRD-201403152
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 9, 2014

♦ ♦ ♦

Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 14-014 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The purpose of this amendment is to establish the Home and Community-based Services - Adult Mental Health (HCBS-AMH) program under the authority of Section 1915(i) of the Social Security Act. The proposed amendment is estimated to be effective October 1, 2014.

The proposed amendment is estimated to result in an additional annual aggregate expenditure of $1,714,198 for federal fiscal year (FFY) 2015, consisting of $520,862 in federal funds and $1,193,336 in state general revenue. For FFY 2016, the estimated additional annual expenditure is $7,816,046, consisting of $3,081,027 in federal funds and $4,735,019 in state general revenue.

To obtain copies of the proposed amendment, interested parties may contact Marcus Denton, State Plan Coordinator, by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 730-7413; by facsimile at (512) 730-7472; or by e-mail at marcus.denton@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201403141
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 8, 2014

♦ ♦ ♦

Public Notice

The Centers for Medicare & Medicaid Services (CMS) issued a final rule for home and community-based setting, effective March 17, 2014. Under 42 CFR 441.301, States must meet new requirements for home and community-based services and supports. The new requirements define the settings in which it is permissible for states to provide 1915(c) waiver services. The purpose of these regulations is to ensure that individuals receive 1915(c) waiver services in the most integrated settings and that the services support full access to the greater community including opportunities to seek competitive employment and work in an integrated settings, engage in community life, and control personal resources in a manner similar to individuals who do not receive 1915(c) waiver services.

The rule also provides for a transitional period for States to come into compliance with the new waiver program requirements. States are required to develop a transition plan to assess compliance, develop remediation strategies, and establish timelines for meeting the requirements of the new rule.

The Texas Health and Human Services Commission (HHSC) is submitting to the Centers for Medicare and Medicaid Services (CMS) the following information regarding the transition plan to comply with the new HCBS regulations for the Community Based Alternatives (CBA) waiver program, a waiver implemented under the authority of §1915(c) of the Social Security Act, to implement the new HCBS regulations.

Public Input. During the period of July 2014 - August 2014, HHSC will: a) Release public notice of the CBA settings transition plan which will inform the public that the HCB setting requirements will be addressed under the receiving Texas Healthcare Transformation and Quality Improvement Program 1115 demonstration waiver transition plan, pending guidance from CMS, since CBA individuals will transfer to the STAR+PLUS waiver on September 1, 2014. b) Allow for public input on the settings transition plan. c) Review and include appropriate revisions to the CBA settings transition plan based on public input and submit the settings transition plan in the waiver amendment.

Remediation Activities. The CBA waiver program settings transition plan will not include remediation activities as the waiver program will not be in effect after September 1, 2014. Any required remediation activities will be addressed under the receiving 1115 demonstration waiver pending guidance from CMS.

The CBA waiver program provides home and community-based services to individuals age 21 and older who meet the requirements for nursing facility care living in their own home, a contracted adult foster care home, or a licensed assisted living facility.

To obtain copies of information relating to the matter for which notice was published, interested parties may contact Beth Rider by mail at Texas Health and Human Services Commission, P.O. Box 13247, Mail Code H-370, Austin, Texas 78711-3247, phone (512) 730-7421, fax (512) 730-7472, or by email at TX_Medicaid_Waivers@hhsc.state.tx.us.

TRD-201403142

Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 8, 2014

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Public Notice

The Texas Health and Human Services Commission (HHSC) is submitting to the Centers for Medicare and Medicaid Services (CMS) a request for an amendment of the Home and Community-based Services (HCS) waiver program, a waiver implemented under the authority of §1915(c) of the Social Security Act. CMS has approved this waiver through August 31, 2018. The proposed effective date for the amendment is August 31, 2014, with no changes to cost neutrality.

This amendment request proposes to make the following changes:

1. Increase the number of individuals that can be enrolled in the waiver at any point in time based on the 83rd Legislature appropriations.

2. Increase the maximum number of unduplicated individuals that can be served from September 1, 2013, through August 31, 2014, based on the 83rd Legislature appropriations.

The HCS waiver provides services and supports to persons with intellectual disabilities who live in their own home or family home, or in a community setting such as a small group home. To be eligible for the waiver, individuals must meet financial eligibility criteria as well as level of care for admission to an intermediate care facility for individuals with intellectual disabilities.

To obtain copies of the proposed waiver amendment, interested parties may contact Kathy Cordova by mail at Texas Health and Human Services Commission, P.O. Box 13247, Mail Code H-370, Austin, Texas 78711-3247, phone (512) 487-3402, fax (512) 730-7472, or by e-mail at TX_Medicaid_Waivers@hhsc.state.tx.us.

TRD-201403144
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 8, 2014

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Public Notice

The Texas Health and Human Services Commission (HHSC) is submitting to the Centers for Medicare and Medicaid Services (CMS) a request for an amendment to the Medically Dependent Children's Program (MDCP) waiver, implemented under the authority of §1915(c) of the Social Security Act. CMS has approved this waiver through August 31, 2017. The proposed effective date for the amendment is August 31, 2014, with no changes to cost neutrality.

This amendment request proposes to make the following changes:

1. Increase the number of individuals that can be enrolled in the waiver at any point in time based on the 83rd Legislature appropriations.

2. Increase the maximum number of unduplicated individuals that can be served from September 1, 2013, through August 31, 2014, based on the 83rd Legislature appropriations.

MDCP provides home and community-based services to people under age 21 who are medically fragile and meet the requirements for nursing facility care. Services include respite, adaptive aids, minor home modifications, financial management services, transition assistance services, and adjunct support services. Texas uses the MDCP waiver to provide services to Texans in the least restrictive environment possible. These environments include the individual's or a family member's home, a foster care home, or an assisted living facility.

To obtain copies of the proposed waiver amendment, interested parties may contact Beth Rider by mail at Texas Health and Human Services Commission, P.O. Box 13247, Mail Code H-370, Austin, Texas 78711-3247, phone (512) 730-7421, fax (512) 730-7472, or by email at TX_Medicaid_Waivers@hhsc.state.tx.us.

TRD-201403146
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 9, 2014

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Public Notice

The Texas Health and Human Services Commission (HHSC) is submitting to the Centers for Medicare and Medicaid Services (CMS) a request for an amendment of the Home and Community-based Services (HCS) waiver program, a waiver implemented under the authority of §1915(c) of the Social Security Act. CMS has approved this waiver through August 31, 2018. The proposed effective date for the amendment is March 4, 2014, with no changes to cost neutrality.

This amendment request proposes to make the following changes:

1. Add former foster care youth Medicaid eligibility group to the waiver as a Medicaid group eligible for the HCS waiver. The Affordable Care Act established eligibility for children who have aged-out of the foster care system at 18 or older and had previously received Medicaid while in foster care, until they turn 26. The State added this eligibility group to the Medicaid State Plan, effective December 31, 2013.

2. In addition to existing transition assistance (TAS) providers, add HCS program providers as qualified to provide TAS services.

The HCS waiver provides services and supports to persons with intellectual disabilities who live in their own home or family home, or in a community setting such as a small group home. To be eligible for the waiver, individuals must meet financial eligibility criteria as well as level of care for admission to an intermediate care facility for individuals with intellectual disabilities.

To obtain copies of the proposed waiver amendment, interested parties may contact Elizabeth Reekers by mail at Texas Health and Human Services Commission, P.O. Box 13247, Mail Code H-370, Austin, Texas 78711-3247, phone (512) 462-6291, fax (512) 730-7472, or by email at TX_Medicaid_Waivers@hhsc.state.tx.us.

TRD-201403147
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 9, 2014

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Public Notice

The Centers for Medicare & Medicaid Services (CMS) issued a final rule for home and community-based settings, effective March 17, 2014. Under 42 CFR §441.301, States must meet new requirements for home and community-based services and supports. The new requirements define the settings in which it is permissible for states to provide in 1915(c) waiver services. The purpose of these regulations is to ensure

that individuals receive 1915(c) waiver services in the most integrated settings and that the services support full access to the greater community including opportunities to seek competitive employment and work in an integrated setting, engage in community life, and control personal resources in a manner similar to individuals who do not receive 1915(c) waiver services.

The rule also provides for a transitional period for States to come into compliance with the new waiver program requirements. States are required to develop a transition plan to assess compliance, develop remediation strategies, and establish timelines for meeting the requirements of the new rule.

The Texas Health and Human Services Commission is submitting to CMS a timeline that outlines the transition plan to comply with the new HCBS regulations for the Home and Community-based Services (HCS) waiver program, a waiver implemented under the authority of §1915(c) of the Social Security Act.

Assessment and Public Input

1. March 2014 - October 2014: Conduct assessment of settings in the HCS waiver to ensure compliance with new HCBS rules.

2. June 2014 - July 2014: Develop high level settings transition plan with timeline for remediation of any HCS settings not already in compliance.

3. July 2014: Release public notice for review of the HCS settings transition plan.

4. July 2014 - August 2014: Period for public input on transition plan.

5. August 2014: Review and include appropriate revisions to the HCS settings transition plan based on public input and submit settings transition plan in waiver amendment.

6. November 2014 - December 2014: Public input of assessment results and full transition plan which will be incorporated into the full transition plan.

7. December 2014: Submit full transition plan to CMS.

Remediation Activities

1. November 2014 - November 2015: If determined necessary based on assessment and public input, amend HCS program rules, Chapter 49 contracting rules, and other necessary policies to ensure the services comply with the new HCBS guidelines.

2. November 2014 - January 2015: If changes to existing waiver policies are required based on assessment and public input, deliver educational webinars for HCS providers about new HCBS guidelines.

3. April 2015 - November 2015: If determined necessary based on assessment and public input, revise the HCS manual to further outline HCBS requirements.

4. November 2015: If changes to existing waiver policies are required based on assessment and public input, submit HCS amendment updating the settings transition plan.

The HCS waiver provides services and supports to persons with intellectual disabilities who live in their own home or family home, or in a community setting such as a small group home. To be eligible for the waiver, individuals must meet financial eligibility criteria as well as level of care for admission to an intermediate care facility for individuals with intellectual disabilities.

To obtain copies of information relating to the matter for which notice was published, interested parties may contact Elizabeth Reekers by mail at Texas Health and Human Services Commission, P.O. Box 13247, Mail Code H-370, Austin, Texas 78711-3247, phone (512) 462-6291, fax (512) 730-7472, or by email at TX_Medicaid_Waivers@hhsc.state.tx.us.

TRD-201403161
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 9, 2014

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Public Notice

The Centers for Medicare & Medicaid Services (CMS) issued a final rule for home and community-based setting, effective March 17, 2014. Under 42 CFR 441.301, States must meet new requirements for home and community-based services and supports. The new requirements define the settings in which it is permissible for states to provide 1915(c) waiver services. The purpose of these regulations is to ensure that individuals receive 1915(c) waiver services in the most integrated settings and that the services support full access to the greater community including opportunities to seek competitive employment and work in an integrated setting, engage in community life, and control personal resources in a manner similar to individuals who do not receive 1915(c) waiver services.

The rule also provides for a transitional period for States to come into compliance with the new waiver program requirements. States are required to develop a transition plan to assess compliance, develop remediation strategies, and establish timelines for meeting the requirements of the new rule.

The Texas Health and Human Services Commission (HHSC) is submitting to the Centers for Medicare and Medicaid Services (CMS) the following information regarding the transition plan to comply with the new HCBS regulations for the Community Based Alternatives (CBA) waiver program, a waiver implemented under the authority of §1915(c) of the Social Security Act, to implement the new HCBS regulations.

Public Input. During the period of July 2014 - August 2014, HHSC will: a) Release public notice of the CBA settings transition plan which will inform the public that the HCB setting requirements will be addressed under the receiving Texas Healthcare Transformation and Quality Improvement Program 1115 demonstration waiver transition plan, pending guidance from CMS, since CBA individuals will transfer to the STAR+PLUS waiver on September 1, 2014. b) Allow for public input on the settings transition plan. c) Review and include appropriate revisions to the CBA settings transition plan based on public input and submit the settings transition plan in the waiver amendment.

Remediation Activities. The CBA waiver program settings transition plan will not include remediation activities as the waiver program will not be in effect after September 1, 2014. Any required remediation activities will be addressed under the receiving 1115 demonstration waiver pending guidance from CMS.

The CBA waiver program provides home and community-based services to individuals age 21 and older who meet the requirements for nursing facility care living in their own home, a contracted adult foster care home, or a licensed assisted living facility.

To obtain copies of information relating to the matter for which notice was published, interested parties may contact Beth Rider by mail at Texas Health and Human Services Commission, P.O. Box 13247, Mail Code H-370, Austin, Texas 78711-3247, phone (512) 730-7421, fax (512) 730-7472, or by email at TX_Medicaid_Waivers@hhsc.state.tx.us.

TRD-201403162

Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 9, 2014

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Public Notice

The Centers for Medicare & Medicaid Services (CMS) issued a final rule for home and community-based settings, effective March 17, 2014. Under 42 CFR §441.301, states must meet new requirements for home and community-based services (HCBS) and supports. The new requirements define the settings in which it is permissible for states to provide 1915(c) waiver services. The purpose of these regulations is to ensure that individuals receive 1915(c) waiver services in the most integrated settings and that the services support full access to the greater community including opportunities to seek competitive employment and work in an integrated setting, engage in community life, and control personal resources in a manner similar to individuals who do not receive 1915(c) waiver services.

The rule also provides for a transitional period for states to come into compliance with the new waiver program requirements. States are required to develop a transition plan to assess compliance, develop remediation strategies, and establish timelines for meeting the requirements of the new rule.

The Texas Health and Human Services Commission is submitting to CMS a timeline that outlines the transition plan to comply with the new HCBS regulations for the Medically Dependent Children's Program (MDCP) waiver, a waiver implemented under the authority of §1915(c) of the Social Security Act.

Assessment and Public Input

1. March 2014 - October 2014: Conduct assessment of settings in the MDCP waiver to ensure compliance with new HCBS rules.

2. June 2014 - July 2014: Develop high level settings transition plan with timeline for remediation of any MDCP settings not already in compliance.

3. July 2014: Release public notice for review of the MDCP settings transition plan.

4. July 2014 - August 2014: Period for public input on transition plan.

5. August 2014: Review and include appropriate revisions to the MDCP settings transition plan based on public input and submit settings transition plan in waiver amendment.

6. November 2014 - December 2014: Public input of assessment results and full transition plan which will be incorporated into the full transition plan.

7. December 2014: Submit full transition plan to CMS.

Remediation Activities

1. November 2014 - November 2015: If determined necessary based on assessment and public input, amend the MDCP program rules, DADS contracting rules, and other necessary policies to ensure the services comply with the new HCBS guidelines.

2. November 2014 - January 2015: If changes to existing waiver policies are required based on assessment and public input, deliver educational webinars for MDCP providers about new HCBS guidelines.

3. April 2015 - November 2015: If determined necessary based on assessment and public input, revise the MDCP manual to further outline HCBS requirements.

4. November 2015: If changes to existing waiver policies are required based on assessment and public input, submit MDCP amendment updating the settings transition plan.

The MDCP waiver provides home and community-based services to people under age 21 who are medically fragile and meet the requirements for nursing facility care. Services include respite, adaptive aids, minor home modifications, financial management services, transition assistance services, and adjunct support services. Texas uses the MDCP waiver to provide services to Texans in the least restrictive environment possible. These environments include the individual's or a family member's home, a foster care home, or an assisted living facility.

To obtain copies of information relating to the matter for which notice was published, interested parties may contact Beth Rider by mail at Texas Health and Human Services Commission, P.O. Box 13247, Mail Code H-370, Austin, Texas 78711-3247, phone (512) 730-7421, fax (512) 730-7472, or by email at TX_Medicaid_Waivers@hhsc.state.tx.us.

TRD-201403163
Jack Stick
Chief Counsel
Texas Health and Human Services Commission
Filed: July 9, 2014

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Texas Lottery Commission

Instant Game Number 1593 "Diamond Dollars"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1593 is "DIAMOND DOLLARS". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1593 shall be $50.00 per Ticket.

1.2 Definitions in Instant Game No. 1593.

A. Display Printing - That area of the Instant Game Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the Instant Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: $50.00, $70.00, $100, $200, $500, $1,000, $2,000, $10,000, $7,500,000, 01, 02, 03, 04, 05, 06, 07, 08, 09, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, STACK OF CASH SYMBOL, RING SYMBOL and TEN TIMES SYMBOL.

D. Play Symbols caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1593 - 1.2D

PLAY SYMBOL	CAPTION
$50.00	FIFTY
$70.00	SVTY
$100	ONE HUND
$200	TWO HUN
$500	FIV HUN
$1,000	ONE THOU
$2,000	TWO THOU
$10,000	10 THOU
$7,500,000	7.5 MILL
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SVN
08	EGT
09	NIN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV

36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
41	FRON
42	FRTO
43	FRTH
44	FRFR
45	FRFV
46	FRSX
47	FRSV
48	FRET
49	FRNI
50	FFTY
STACK OF CASH SYMBOL	WINALL
RING SYMBOL	DBL
TEN TIMES SYMBOL	WIN10X

E. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Mid-Tier Prize - A prize of $50.00, $70.00, $100, $150, $200 or $500.

G. High-Tier Prize - A prize of $1,000, $1,250, $1,750, $2,000, $2,500, $10,000 or $7,500,000.

H. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

I. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1593), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 020 within each Pack. The format will be: 1593-0000001-001.

J. Pack - A Pack of "DIAMOND DOLLARS" Instant Game Tickets contains 020 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The back of Ticket 001 will be shown on the front of the Pack; the back of Ticket 020 will be revealed on the back of the Pack. All Packs will be tightly shrink-wrapped. There will be no breaks between the Tickets in a Pack.

K. Non-Winning Ticket - A Ticket which is not programmed to be a winning Ticket or a Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

L. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "DIAMOND DOLLARS" Instant Game No. 1593 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Instant Ticket. A prize winner in the "DIAMOND DOLLARS" Instant Game is determined once the latex on the Ticket is scratched off to expose 55 (fifty-five) Play Symbols. If a player matches any of YOUR NUMBERS Play Symbols to any of the WINNING NUMBERS Play Symbols, the player wins the PRIZE for that number. If a player reveals a "RING" Play Symbol, the player wins DOUBLE the PRIZE for that symbol. If a player reveals a "TEN TIMES" Play Symbol, the player wins 10 TIMES the PRIZE for that symbol. If a player reveals a "STACK OF CASH" Play Symbol, the player WINS ALL 25 PRIZES INSTANTLY! No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 55 (fifty-five) Play Symbols must appear under the Latex Overprint on the front portion of the Ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Ticket;

8. The Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Ticket must not be counterfeit in whole or in part;

10. The Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Ticket must not have been stolen, nor appear on any list of omitted Tickets or non-activated Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Ticket must be complete and not miscut and have exactly 55 (fifty-five) Play Symbols under the Latex Overprint on the front portion of the Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the Ticket;

14. The Serial Number of an apparent winning Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Tickets, and a Ticket with that Serial Number shall not have been paid previously;

15. The Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 55 (fifty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 55 (fifty-five) Play Symbols on the Ticket must be printed in the symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Ticket Serial Numbers must be printed in the serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Ticket. In the event a defective Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Ticket with another unplayed Ticket in that Instant Game (or a Ticket of equivalent sales price from any other current Texas Lottery Instant Game) or refund the retail sales price of the Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets within a Pack will not have identical patterns of either Play Symbols or Prize Symbols.

B. A Ticket will win as indicated by the prize structure.

C. A Ticket can win up to twenty-five (25) times.

D. On winning and Non-Winning Tickets, the top cash prizes of $7,500,000 and $10,000 will each appear at least once, except on Tickets winning twenty-five (25) times or on Tickets winning with a "STACK OF CASH" Play Symbol.

E. The play area consists of twenty-five (25) YOUR NUMBERS Play Symbols, twenty-five (25) Prize Symbols and five (5) WINNING NUMBERS Play Symbols.

F. Tickets winning more than one (1) time will use as many WINNING NUMBERS Play Symbols as possible to create matches.

G. On winning Tickets, a non-winning Prize Symbol will not match a winning Prize Symbol.

H. On all Tickets, a Prize Symbol will not appear more than 5 times, except as required by the prize structure to create multiple wins.

I. On Non-Winning Tickets, a WINNING NUMBERS Play Symbol will never match a YOUR NUMBERS Play Symbol.

J. The five (5) WINNING NUMBERS Play Symbols will always be different from each other.

K. All YOUR NUMBERS Play Symbols on a Ticket will be different from each other, except as required by the prize structure to create multiple wins.

L. The "RING" Play Symbol will never appear as a WINNING NUMBERS Play Symbol.

M. The "RING" Play Symbol will never appear on Non-Winning Tickets.

N. The "RING" Play Symbol will win DOUBLE the PRIZE shown as per the prize structure.

O. The "TEN TIMES" Play Symbol will never appear as a WINNING NUMBERS Play Symbol.

P. The "TEN TIMES" Play Symbol will never appear on Non-Winning Tickets.

Q. The "TEN TIMES" Play Symbol will win ten (10) times the Prize amount shown as per the prize structure.

R. The "STACK OF CASH" Play Symbol will never appear as a WINNING NUMBERS Play Symbol.

S. The "STACK OF CASH" Play Symbol will never appear on Non-Winning Tickets.

T. The "STACK OF CASH" Play Symbol wins all twenty-five (25) Prizes on a Ticket and all wins will be only as per the prize structure.

U. On Tickets that win with a "STACK OF CASH" Play Symbol, all other YOUR NUMBERS Play Symbols will not match any WINNING NUMBERS Play Symbols.

2.3 Procedure for Claiming Prizes.

A. To claim a "DIAMOND DOLLARS" Instant Game prize of $50.00, $70.00, $100, $150, $200 or $500, a claimant shall sign the back of the Ticket in the space designated on the Ticket and present the winning Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $70.00, $100, $150, $200 or $500 Ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.D of these Game Procedures.

B. To claim a "DIAMOND DOLLARS" Instant Game prize of $1,000, $1,250, $1,750, $2,000, $2,500 or $10,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Cen-

ters. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. To claim a "DIAMOND DOLLARS" top level prize of $7,500,000, the claimant must sign the winning Ticket and present it at Texas Lottery Commission headquarters in Austin, Texas. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. As an alternative method of claiming a "DIAMOND DOLLARS" Instant Game prize, the claimant must sign the winning Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

E. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

F. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "DIAMOND DOLLARS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "DIAMOND DOLLARS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Tickets ordered. The number of actual prizes available in a game may vary based on number of Tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a Ticket shall be owned by the physical possessor of said Ticket. When a signature is placed on the back of the Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Ticket in the space designated. If more than one name appears on the back of the Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 3,600,000 Tickets in the Instant Game No. 1593. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1593 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$50	720,000	5.00
$70	450,000	8.00
$100	201,000	17.91
$150	19,500	184.62
$200	12,000	300.00
$500	14,550	247.42
$1,000	6,510	553.00
$1,250	1,320	2,727.27
$1,750	1,170	3,076.92
$2,000	2,400	1,500.00
$2,500	600	6,000.00
$10,000	120	30,000.00
$7,500,000	3	1,200,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 2.52. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1593 without advance notice, at which point no further Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Instant Game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1593, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201403138
Bob Biard
General Counsel
Texas Lottery Commission
Filed: July 8, 2014

♦ ♦ ♦

Instant Game Number 1618 "Triple Dynamite"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1618 is "TRIPLE DYNAMITE". The play style is "other".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1618 shall be $2.00 per Ticket.

1.2 Definitions in Instant Game No. 1618.

A. Display Printing - That area of the Instant Game Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the Instant Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 9 SYMBOL, 999 SYMBOL, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000 and $25,000.

D. Play Symbols caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1618 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
20	TWY
9 SYMBOL	WIN
999 SYMBOL	TRIPLE
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$1,000	ONE THOU
$25,000	25 THOU

E. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000 or $25,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1618), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 125 within each Pack. The format will be: 1618-0000001-001.

K. Pack - A Pack of "TRIPLE DYNAMITE" Instant Game Tickets contains 125 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One Ticket will be folded over to expose a front and back of one Ticket on each Pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A Ticket which is not programmed to be a winning Ticket or a Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TRIPLE DYNAMITE" Instant Game No. 1618 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Instant Ticket. A prize winner in the "TRIPLE DYNAMITE" Instant Game is deter-

mined once the latex on the Ticket is scratched off to expose 20 (twenty) Play Symbols. If a player reveals a "9" Play Symbol, the player wins the PRIZE for that symbol. If a player reveals a "999" Play Symbol, the player wins TRIPLE the PRIZE for that symbol. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 20 (twenty) Play Symbols must appear under the Latex Overprint on the front portion of the Ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Ticket;

8. The Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Ticket must not be counterfeit in whole or in part;

10. The Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Ticket must not have been stolen, nor appear on any list of omitted Tickets or non-activated Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Ticket must be complete and not miscut and have exactly 20 (twenty) Play Symbols under the Latex Overprint on the front portion of the Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the Ticket;

14. The Serial Number of an apparent winning Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Tickets, and a Ticket with that Serial Number shall not have been paid previously;

15. The Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 20 (twenty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 20 (twenty) Play Symbols on the Ticket must be printed in the symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Ticket Serial Numbers must be printed in the serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Ticket. In the event a defective Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Ticket with another unplayed Ticket in that Instant Game (or a Ticket of equivalent sales price from any other current Texas Lottery Instant Game) or refund the retail sales price of the Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Players can win up to ten (10) times on a Ticket in accordance with the approved prize structure.

B. Adjacent Non-Winning Tickets within a Pack will not have identical Play and Prize Symbol patterns. Two (2) Tickets have identical Play and Prize Symbol patterns if they have the same Play and Prize Symbols in the same positions.

C. The top Prize Symbol will appear on every Ticket unless restricted by other parameters, play action or prize structure.

D. Non-winning Play Symbols will all be different.

E. No Ticket will ever contain more than two (2) matching non-winning Prize Symbols.

F. Non-winning Prize Symbol(s) will never be the same as the winning Prize Symbol(s).

G. The "999" (tripler) Play Symbol will only appear as dictated by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE DYNAMITE" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, a claimant shall sign the back of the Ticket in the space designated on the Ticket and present the winning Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00 or $100 Ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "TRIPLE DYNAMITE" Instant Game prize of $1,000 or $25,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas

Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TRIPLE DYNAMITE" Instant Game prize, the claimant must sign the winning Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "TRIPLE DYNAMITE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "TRIPLE DYNAMITE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Tickets ordered. The number of actual prizes available in a game may vary based on number of Tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a Ticket shall be owned by the physical possessor of said Ticket. When a signature is placed on the back of the Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Ticket in the space designated. If more than one name appears on the back of the Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 9,120,000 Tickets in the Instant Game No. 1618. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1618 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$2	875,520	10.42
$4	802,560	11.36
$5	218,880	41.67
$10	109,440	83.33
$20	72,960	125.00
$50	42,446	214.86
$100	7,600	1,200.00
$1,000	114	80,000.00
$25,000	10	912,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.28. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1618 without advance notice, at which point no further Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Instant Game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1618, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201403108
Bob Biard
General Counsel
Texas Lottery Commission
Filed: July 7, 2014

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Instant Game Number 1651 "Ultimate Crossword"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1651 is "ULTIMATE CROSSWORD". The play style is "crossword".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1651 shall be $10.00 per Ticket.

1.2 Definitions in Instant Game No. 1651.

A. Display Printing - That area of the Instant Game Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z and BLACKENED SQUARE SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. Crossword and Bingo style games do not typically have Play Symbol Captions. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1651 – 1.2D

PLAY SYMBOL	CAPTION
A	
B	
C	
D	
E	
F	
G	
H	
I	
J	
K	
L	
M	
N	
O	
P	
Q	
R	
S	
T	
U	
V	
W	
X	
Y	
Z	
▓ SYMBOL	

E. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $200.

H. High-Tier Prize - A prize of $1,000, $25,000 or $250,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1651), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 050 within each Pack. The format will be: 1651-0000001-001.

K. Pack - A Pack of "ULTIMATE CROSSWORD" Instant Game Tickets contains 050 Tickets, packed in plastic shrink-wrapping and fan-folded in pages of one (1). Ticket back 001 and 050 will both be exposed.

L. Non-Winning Ticket - A Ticket which is not programmed to be a winning Ticket or a Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "ULTIMATE CROSSWORD" Instant Game No. 1651 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Instant Ticket. A prize winner in the "ULTIMATE CROSSWORD" Instant Game is determined once the latex on the Ticket is scratched off to expose 311 (three hundred eleven) Play Symbols. How to Play: The player must scratch all of the 20 YOUR LETTERS; then the player must scratch all of the letters found in GAME 1, GAME 2 and GAME 3 that exactly match the YOUR LETTERS. How to Win: If a player has scratched at least 3 complete "words" within a GAME, the player wins the corresponding prize found in the PRIZE LEGEND. EACH GAME IS PLAYED SEPARATELY. ADDITIONAL ULTIMATE CROSSWORD DETAILS: Only one prize paid per GAME. Letters

combined to form a complete "word" must be revealed in an unbroken horizontal (left to right) sequence or vertical (top to bottom) sequence of letters within the same GAME. Only letters within the same GAME that are matched with the YOUR LETTERS can be used to form a complete "word". In each GAME, every lettered square within an unbroken horizontal or vertical sequence must be matched with YOUR LETTERS to be considered a complete "word". Words within words are not eligible for a prize. (For example, if in a GAME there is the following sequence: all of the YOUR LETTERS "S, T, O, N, E" must be revealed in order for this to count as one complete "word". "TON," "ONE" or any other portion of the sequence of "S, T, O, N, E" would not count as a complete "word". A complete "word" must contain at least three letters. GAME 1 and GAME 2 can win by revealing 3 to 9 complete words on each GAME. GAME 3 can win by revealing 3 to 6 complete words. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 311 (three hundred eleven) Play Symbols must appear under the Latex Overprint on the front portion of the Ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption; Crossword and Bingo style games do not typically have Play Symbol Captions;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Ticket;

8. The Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Ticket must not be counterfeit in whole or in part;

10. The Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Ticket must not have been stolen, nor appear on any list of omitted Tickets or non-activated Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Ticket must be complete and not miscut and have exactly 311 (three hundred eleven) Play Symbols under the Latex Overprint on the front portion of the Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the Ticket;

14. The Serial Number of an apparent winning Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Tickets, and a Ticket with that Serial Number shall not have been paid previously;

15. The Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 311 (three hundred eleven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 311 (three hundred eleven) Play Symbols on the Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Ticket. In the event a defective Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Ticket with another unplayed Ticket in that Instant Game (or a Ticket of equivalent sales price from any other current Texas Lottery Instant Game) or refund the retail sales price of the Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets in a Pack will not have identical play data, spot for spot.

B. There is no correlation between any exposed data on a Ticket and its status as a winner or non-winner.

C. Each grid from GAME 1 and GAME 2 will contain exactly the same amount of letters.

D. Each grid from GAME 1 and GAME 2 will contain exactly the same amount of words.

E. No duplicate words on a Ticket.

F. All words used will be from the TEXAS APPROVED WORD LIST CASHWORD/CROSSWORD v.1.0.

G. All words will contain a minimum of 3 letters.

H. All words will contain a maximum of 9 letters.

I. No consonant will appear more than nine (9) times, and no vowel will appear more than fourteen (14) times in GAME 1 and GAME 2.

J. No consonant will appear more than seven (7) times, no vowel will appear more than ten (10) times in GAME 3.

K. No matching Play Symbols in the YOUR LETTERS play area.

L. There will be a minimum of three (3) vowels in the YOUR LETTERS play area. Vowels are considered to be A, E, I, O, U.

M. At least fifteen (15) of the letters in the YOUR LETTERS play area will open at least one letter in the (7x7) and (11x11) crossword grid combinations.

N. All vowels being used in the YOUR LETTERS will all appear at the beginning of the YOUR LETTERS (starting top row from left to right) play area to avoid creating inappropriate words in the play area.

O. The presence or absence of any letter or combination of letters in the YOUR LETTERS play area will not be indicative of a winning or Non-Winning Ticket.

P. Words from the TEXAS REJECTED WORD LIST v.2.0 will not appear horizontally in the twenty (20) YOUR LETTERS play area when read left to right or right to left.

Q. On Non-Winning Tickets, there will be at least 2 completed words in GAME 1 and GAME 2.

R. GAME 1 and GAME 2 will not have more than 9 complete words combined.

S. GAME 3 will not have more than 6 complete words.

2.3 Procedure for Claiming Prizes.

A. To claim a "ULTIMATE CROSSWORD" Instant Game prize of $10.00, $20.00, $50.00, $100 or $200, a claimant shall sign the back of the Ticket in the space designated on the Ticket and present the winning Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100 or $200 Ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "ULTIMATE CROSSWORD" Instant Game prize of $1,000, $25,000 or $250,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "ULTIMATE CROSSWORD" Instant Game prize, the claimant must sign the winning Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. a sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "ULTIMATE CROSSWORD" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "ULTIMATE CROSSWORD" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Tickets ordered. The number of actual prizes available in a game may vary based on number of Tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a Ticket shall be owned by the physical possessor of said Ticket. When a signature is placed on the back of the Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Ticket in the space designated. If more than one name appears on the back of the Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 Tickets in the Instant Game No. 1651. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1651– 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$10	960,000	6.25
$20	720,000	8.33
$50	73,750	81.36
$100	66,250	90.57
$200	16,000	375.00
$1,000	1,150	5,217.39
$25,000	75	80,000.00
$250,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.27. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1651 without advance notice, at which point no further Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Instant Game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1651, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201403139
Bob Biard
General Counsel
Texas Lottery Commission
Filed: July 8, 2014

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Texas Low-Level Radioactive Waste Disposal Compact Commission

Notice of Receipt of Application for Importation of Waste and Import Agreement

Please take notice that, pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule 31 TAC §675.23, the Compact Commission has received an application for and a proposed agreement for import for disposal of low-level radioactive waste from:

San Onofre Nuclear Generation Station ("SONGS") (TLLRWDCC #1-0071-00)

5000 Pacific Coast Highway

San Clemente, California 92672

The application will be placed on the Compact Commission web site, www.tllrwdcc.org, where it will be available for inspection and copying.

Comments on the application are due to be received by July 28, 2014. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission

Attn: Leigh Ing, Executive Director

333 Guadalupe St., #3-240

Austin, Texas 78701

Comments may also be submitted via email to: administration@tllrwdcc.org.

TRD-201403096
Audrey Ferrell
Administrator
Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: July 2, 2014

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Notice of Receipt of Application for Importation of Waste and Import Agreement

Please take notice that, pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule 31 TAC §675.23, the Compact Commission has received an application for and a proposed agreement for import for disposal of low-level radioactive waste from:

Florida Power and Light - Turkey Point Nuclear (TLLRWDCC #1-0072-00)

9760 SW 344th St.

Homestead, Florida 33035

The application will be placed on the Compact Commission web site, www.tllrwdcc.org, where it will be available for inspection and copying.

Comments on the application are due to be received by July 28, 2014. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission

Attn: Leigh Ing, Executive Director

333 Guadalupe St., #3-240

Austin, Texas 78701

Comments may also be submitted via email to: administration@tllrwdcc.org.

TRD-201403097
Audrey Ferrell
Administrator
Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: July 2, 2014

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Notice of Receipt of Application for Importation of Waste and Import Agreement

Please take notice that, pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule 31 TAC §675.23, the Compact Commission has received an application for and a proposed agreement for import for disposal of low-level radioactive waste from:

Xcel Energy-Prairie Island Nuclear Plant (TLLRWDCC #1-0073-00)

1717 Wakonade Drive East

Welch, Minnesota 55089-9642

The application will be placed on the Compact Commission web site, www.tllrwdcc.org, where it will be available for inspection and copying.

Comments on the application are due to be received by August 1, 2014. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission

Attn: Leigh Ing, Executive Director

333 Guadalupe St., #3-240

Austin, Texas 78701

Comments may also be submitted via email to: administration@tllrwdcc.org.

TRD-201403119
Audrey Ferrell
Administrator
Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: July 8, 2014

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions

Acceptance of Land Donation - Nueces County

Approximately 700 Acres at Mustang Island State Park

In a meeting on August 21, 2014 the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acceptance of a tract of land of approximately 700 acres in Calhoun County for addition to Mustang Island State Park. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Houston Museum of Natural Science, Moran Lecture Hall, 5800 Caroline Street, Houston, Texas 77030. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.texas.gov or through the TPWD web site at tpwd.texas.gov.

Acceptance of Land Donation - Presidio County

Approximately 200 Acres at Chinati Mountains State Park

In a meeting on August 21, 2014 the Texas Parks and Wildlife Commission (the Commission) will consider authorizing the acceptance of a tract of land of approximately 200 acres in Presidio County for addition to Chinati Mountains State Park. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Houston Museum of Natural Science, Moran Lecture Hall, 5800 Caroline Street, Houston, Texas 77030. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.texas.gov or through the TPWD web site at tpwd.texas.gov.

Grant of a Pipeline Easement - Brazoria County

Approximately 6 Acres at Justin Hurst Wildlife Management Area

In a meeting on August 21, 2014 the Texas Parks and Wildlife Commission (the Commission) will consider granting an easement of approximately 6 acres for the installation of a 10" Syngas pipeline across the Justin Hurst Wildlife Management Area. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Houston Museum of Natural Science, Moran Lecture Hall, 5800 Caroline Street, Houston, Texas 77030. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at ted.hollingsworth@tpwd.texas.gov or through the TPWD web site at tpwd.texas.gov.

TRD-201403148
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: July 9, 2014

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Notice of Request for Proposals

Pursuant to Government Code, Chapter 2254, the Texas Parks and Wildlife Department ("TPWD") announces Request for Proposals No. 802-14-26558 ("RFP") for desktop alternatives analysis of restoration methodologies for large scale impacts to oyster reef habitats in Galveston Bay, Texas.

RFP Package: The RFP will be available electronically on the Electronic State Business Daily ("ESBD") at: http://esbd.cpa.state.tx.us on Friday, July 18, 2014, after 10:00 a.m. CT. The RFP may also be obtained by contacting the designated TPWD contact for this solicitation.

Contact: All requests, questions, or other communications about this solicitation shall be made in writing to: Mary Hardin, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; or by fax or e-mail to (512) 389-4677 or mary.hardin@tpwd.texas.gov.

Questions: All written questions must be received at the above-referenced address no later than 2:00 p.m. CST on Friday, August 1, 2014. Questions received after this time and date will not be considered. Prospective respondents are encouraged to fax or e-mail questions to the contact listed above to ensure timely receipt. TPWD expects to post responses to questions on the ESBD as a RFP Addendum on or about Friday, August 6, 2014.

Closing Date: Proposals must be delivered to the Issuing Office no later than 2:00 p.m. CT, on Tuesday, August 19, 2014. Proposals received in the Issuing Office after this time and date will not be considered. Respondents shall be solely responsible for ensuring the timely receipt of Proposals in the Issuing Office.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. TPWD will make the final decision on award. TPWD reserves the right to accept or reject any or all proposals submitted. TPWD is not obligated to execute a contract on the basis of this notice or the distribution of any RFP. TPWD will not pay for any costs incurred by any entity in responding to this Notice or the RFP.

Anticipated Schedule of Events: Issuance of RFP - July 18, 2014, after 10:00 a.m. CT; Questions Due - August 1, 2014, 2:00 p.m. CT; Official Responses to Questions posted - August 6, 2014, or as soon thereafter as practical; Proposals Due - August 19, 2014, 2:00 p.m. CT; Contract Execution - August 26, 2014, or as soon thereafter as practical; and Commencement of Work - beginning on or after August 26, 2014. Successful respondent, if any, will be expected to complete work within six months from contract award. TPWD reserves the right, in its sole discretion, to change the dates listed for the anticipated schedule of events. Any amendment to this solicitation will be posted on the ESBD as a RFP Addendum. It is the responsibility of interested parties to periodically check the ESBD for updates to the RFP prior to submitting a Response.

TRD-201403149
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: July 9, 2014

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Texas Department of Public Safety

Request for Applications from Local Emergency Planning Committees for Hazardous Materials Emergency Preparedness Grants

INTRODUCTION: The Texas Department of Public Safety - Texas Division of Emergency Management (TDEM), acting on behalf of the State Emergency Response Commission (SERC), is requesting applications from Local Emergency Planning Committees (LEPCs) for Hazardous Materials Emergency Preparedness (HMEP) grants to be awarded to cities/counties/regions represented by LEPCs or authorities to further their work in hazardous materials transportation emergency planning.

DESCRIPTION OF ACTIVITIES: LEPCs are mandated by the federal Emergency Planning and Community Right-to-Know Act (EPCRA) to provide planning and information for communities relating to the use, storage and/or transit of hazardous chemicals. The U.S. Department of Transportation has made grant money available to enhance communities' readiness for responding to hazardous materials transportation incidents. A grant may be used by an LEPC or authority in various ways depending upon needs.

ELIGIBLE APPLICANTS: Each application must be developed by an LEPC or authority in cooperation with county and/or city governments or regional authority. LEPC membership and regional authority standing must be recognized by the SERC. The LEPC application must be approved by an LEPC vote. Each LEPC or authority shall arrange for a city or county to serve as its fiscal agent for the management of any and all money awarded under this grant.

CERTIFICATION: The fiscal agent must provide appropriate certification to commit funds for this project. The certification must be in the form of an enabling resolution from the county or an authorization to commit funds from the city.

LIMITATIONS: Total funding for these grants is dependent on the amount granted to the state from the U.S. Department of Transportation. Grants will be awarded based upon project, population, hazardous materials risk, need, and cost-effectiveness as determined by the SERC. TDEM will fund a maximum of eighty percent of the total project amount approved by the SERC and the remaining costs must be borne by the grantee. Approved in-kind contributions may be used to satisfy this twenty percent minimum requirement. In addition to the grant, LEPCs or authorities must maintain the same level of spending for planning as an average of the past two years.

EXAMPLES OF PROPOSALS:

(a) Development, improvement, and implementation of emergency plans required under the Emergency Planning and Community Right-to-Know Act (EPCRA), as well as exercises, which test the emergency plan. Improvement of emergency plans may include hazard analysis or risk assessment as well as response procedures for emergencies involving transportation of hazardous materials including radioactive materials.

(b) An assessment to determine flow patterns of hazardous materials within a State, between a State and another State, Territory or Native American Land, and development and maintenance of a system to keep such information current.

(c) An assessment of the need for regional hazardous materials emergency response teams or to assess local response capabilities.

(d) Conducting emergency response drills and exercises associated with transportation-related emergency response plans.

(e) Temporary technical staff to support the planning effort. (Staff funding under planning grants cannot be diverted to support other requirements of EPCRA.)

(f) Any other planning project related to the transportation of hazardous materials approved by TDEM, using U.S. DOT approved projects as a reference base.

CONTRACT PERIOD: Grant contracts begin as early as October 1, 2014, and end no later than September 30, 2015.

FINAL SELECTION: TDEM will review the applications and the SERC Subcommittee on Planning will make the final selections. The State is under no obligation to award grants to any or all applicants.

APPLICATION FORMS AND DEADLINE: You can obtain a "Request for Application" package by downloading the documents from the TDEM website at http://www.dps.texas.gov/dem/GrantsResources/index.htm or by requesting a copy from Hazards Unit Supervisor Gabriela Stermolle, or by calling her at (512) 424-5989. The completed (original) "Request for Application" package may be sent via email to Ms. Stermolle but the executed hard copy must be sent via certified/registered mail, or other private mail delivery service requiring a signature, to the Texas Division of Emergency Management, Preparedness Section, Technological Hazards Unit, P.O. Box 4087, Austin, Texas 78773-0223. The application(s) must be received by 5:00 p.m. on August 20, 2014.

TRD-201403112
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Filed: July 7, 2014

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on July 7, 2014, to amend a state-issued certificate of franchise authority, pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of CoBridge Broadband, LLC for Amendment to its State-Issued Certificate of Franchise Authority, Project Number 42654.

The requested amendment is to expand the service area footprint to include the municipal boundaries of the City of Marshall, Texas and addition of d/b/a to the name "CoBridge Broadband, LLC d/b/a Fidelity Communications."

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All inquiries should reference Project Number 42654.

TRD-201403143
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 8, 2014

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On July 7, 2014, tw telecom of texas llc (Applicant) filed an application to amend service provider certificate of operating authority (SPCOA) Number 60124. Applicant seeks approval of a change in ownership/control whereby Level 3 Communications, Inc. will acquire indirect control of Applicant.

The Application: Application of tw telecom of texas llc for Amendment to a Service Provider Certificate of Operating Authority, Docket Number 42653.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than July 25, 2014. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 42653.

TRD-201403140
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 8, 2014

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Notice of Petition for Adjustment to Support from Universal Service Plan

Notice is given to the public of a petition filed with the Public Utility Commission of Texas (commission) on June 30, 2014.

Docket Style and Number: Annual Adjustment to Support from the Small and Rural Incumbent Local Exchange Company Universal Service Plan Pursuant to Public Utility Regulatory Act §56.032(d), Docket Number 42625.

The Application: Commission Staff filed a petition for adjustment to support from the Small and Rural Incumbent Local Exchange Company Universal Service Plan (the plan) to small and rural incumbent local exchange companies (SRILECs) pursuant to Public Utility Regulatory Act §56.032.

In Docket Number 39643, *Adjustments to Support from the Small and Rural Incumbent Local Exchange Company Universal Service Plan Pursuant to PURA §56.032* (October 3, 2011), the commission established a procedure for calculation of the initial monthly support amounts from the plan. This docket is an annual update to the amounts established in Docket Number 39643 pursuant to Public Utility Regulatory Act §56.032(d)(2). The purpose of this petition is to update the amount of support for eligible SRILECs for the 12-month period following the 12-month period established in Docket Number 41793.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. The deadline to file comments and to request to intervene is August 8, 2014. All correspondence should refer to Docket Number 42625.

TRD-201403117
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 7, 2014

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Public Notice of Workshop

Staff of the Public Utility Commission of Texas will conduct a workshop on Project Number 42636, *Commission Comments on Proposed EPA Rule on Greenhouse Gas Emissions for Existing Generating Units,* on Friday, August 15, 2014, at 9:00 a.m. The workshop will be conducted in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas.

Questions concerning the workshop or this notice should be referred to Kristin Whitley, Competitive Markets Division, at (512) 936-7459 or at kristin.whitley@puc.texas.gov. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1.

TRD-201403100
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 3, 2014

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Texas Department of Transportation

Aviation Division - Request for Qualifications for Professional Services

The City of Temple through its agent, the Texas Department of Transportation (TxDOT), intends to engage an Aviation Professional Services Firm for services pursuant to Chapter 2254, Subchapter A, of the Government Code. TxDOT Aviation Division will solicit and receive qualifications for professional services as described below:

Airport Sponsor: City of Temple, TxDOT CSJ No. 15MPTMPLE. Scope: Prepare an Airport Master Plan which includes, but is not limited to information regarding existing and future conditions, proposed facility development to meet existing and future demand, constraints to develop, anticipated capital needs, financial considerations, management structure and options, as well as an updated Airport Layout Plan. The Airport Master Plan should be tailored to the individual needs of the airport.

The HUB goal is set at 0%. The TxDOT Project Manager is Michelle Hannah.

Interested firms shall utilize the Form AVN-551, titled "Qualifications for Aviation Planning Services". The form may be requested from TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/inside-txdot/division/aviation/projects.html. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Qualifications shall not exceed the number of pages in the AVN-551 template. The AVN-551 format consists of eight 8 1/2" x 11" pages of data plus one optional illustration page. The optional illustration page shall be no larger than 11" x 17" and may be folded to an 8 1/2" x 11" size. A prime provider may only submit one AVN-551. If a prime provider submits more than one AVN-551, that provider will be disqualified. AVN-551s shall be stapled but not bound or folded in any other fashion. AVN-551s WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-551, firms are encouraged to download Form AVN-551 from the TxDOT website as addressed above. Utilization of Form AVN-551 from a previous download may not be the exact same format. Form AVN-551 is a PDF Template.

Please note:

SEVEN completed copies of Form AVN-551 **must be received** by TxDOT, Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than August 12, 2014, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Beverly Longfellow.

The consultant selection committee will be composed of local government representatives. The final selection by the committee will generally be made following the completion of review of AVN-551s. The committee will review all AVN-551s and rate and rank each. The evaluation criteria for airport planning projects can be found at http://www.txdot.gov/inside-txdot/division/aviation/projects.html. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Beverly Longfellow, Grant Manager, or Michelle Hannah, Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-201403156
Angie Parker
Associate General Counsel
Texas Department of Transportation
Filed: July 9, 2014

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Public Hearing Notice - Unified Transportation Program

The Texas Department of Transportation (department) will hold a public hearing on Tuesday, August 12, 2014 at 10:00 a.m. at 118 East Riverside Drive, First Floor ENV Conference Room, in Austin, Texas to receive public comments on the development of the 2015 Unified Transportation Program (UTP), including the highway project selection process related to the UTP.

Transportation Code, §201.991 provides that the department shall develop a UTP covering a period of 10 years to guide the development and authorize construction of transportation projects. Transportation Code, §201.602 requires the Texas Transportation Commission (commission) to annually conduct a hearing on its highway project selection process and the relative importance of the various criteria on which the commission bases its project selection decisions. The commission has adopted rules located in Title 43, Texas Administrative Code, Chapter 16, governing the planning and development of transportation projects, which include guidance regarding public involvement related to the project selection process and the development of the UTP.

Information regarding the proposed 2015 UTP and highway project selection process will be available at each of the department's district offices, at the department's Transportation Planning and Programming Division offices located in Building 118, Second Floor, 118 East Riverside Drive, Austin, Texas, or (512) 486-5038, and on the department's website at: http://www.txdot.gov/public_involvement/utp.htm

Persons wishing to speak at the hearing may register in advance by notifying the Transportation Planning and Programming Division, at (512) 486-5038 not later than Monday, August 11, 2014, or they may register at the hearing location beginning at 9:00 a.m. on the day of the hearing. Speakers will be taken in the order registered. Any interested person may appear and offer comments or testimony, either orally or in writing; however, questioning of witnesses will be reserved exclusively to the presiding authority as may be necessary to ensure a complete record. While any persons with pertinent comments or testimony will be granted an opportunity to present them during the course of the hearing, the presiding authority reserves the right to restrict testimony in terms of time or repetitive content. Groups, organizations, or associations should be represented by only one speaker. Speakers are requested to refrain from repeating previously presented testimony. Persons with disabilities who have special communication or accommodation needs or who plan to attend the hearing may contact the Transportation Planning and Programming Division, at 118 East Riverside Drive Austin, Texas 78704-1205, (512) 486-5038. Requests should be made no later than three days prior to the hearing. Every reasonable effort will be made to accommodate the needs.

Interested parties who are unable to attend the hearing may submit comments regarding the proposed 2015 UTP to James W. Koch, Director of the Transportation Planning and Programming Division, P.O. Box 149217, Austin, Texas 78714-9217. Interested parties may also submit comments regarding the proposed 2015 UTP by phone at (800) 687-8108. In order to be considered, all comments must be received at

the Transportation Planning and Programming office by 4:00 p.m. on Tuesday, August 19, 2014.

TRD-201403157
Angie Parker
Associate General Counsel
Texas Department of Transportation
Filed: July 9, 2014

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Texas Water Development Board

Applications for July 10, 2014

Pursuant to Texas Water Code §6.195, the Texas Water Development Board provides notice of the following applications:

Project ID #62634, a request from the City of El Campo, 315 E. Jackson, El Campo, Texas 77437, received February 10, 2014, for a loan in the amount of $375,000 from the Drinking Water State Revolving Fund to finance planning, acquisition and design for water system improvements, including a new storage tank and replacement of deteriorated lines.

Project ID #21741, a request from the City of Iraan, P.O. Box 457, Iraan, Texas 79744-0457, received February 28, 2014, for a $2,375,000 loan from the Texas Water Development Fund to finance the planning, acquisition, design and construction of a new wastewater treatment plant and water system improvements.

Project ID #62640, a request from the City of O'Brien, P.O. Box 38, O'Brien, Texas 79539-0038, received April 8, 2014, for financial assistance in the amount of $170,000 in loan forgiveness from the Drinking Water State Revolving Fund to finance planning, design and construction for capacity buy-in and to rehabilitate the drinking water system.

TRD-201403093
Les Trobman
General Counsel
Texas Water Development Board
Filed: July 2, 2014

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How to Use the Texas Register

Information Available: The 14 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 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.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

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 39 (2014) is cited as follows: 39 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 "39 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 39 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 at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (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 ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 ***(P)***

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Note**: Back issues of the ***Texas Register, published before September 9, 2005, must be ordered through the Texas Register Section of the Office of the Secretary of State at (512) 463-5561.

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