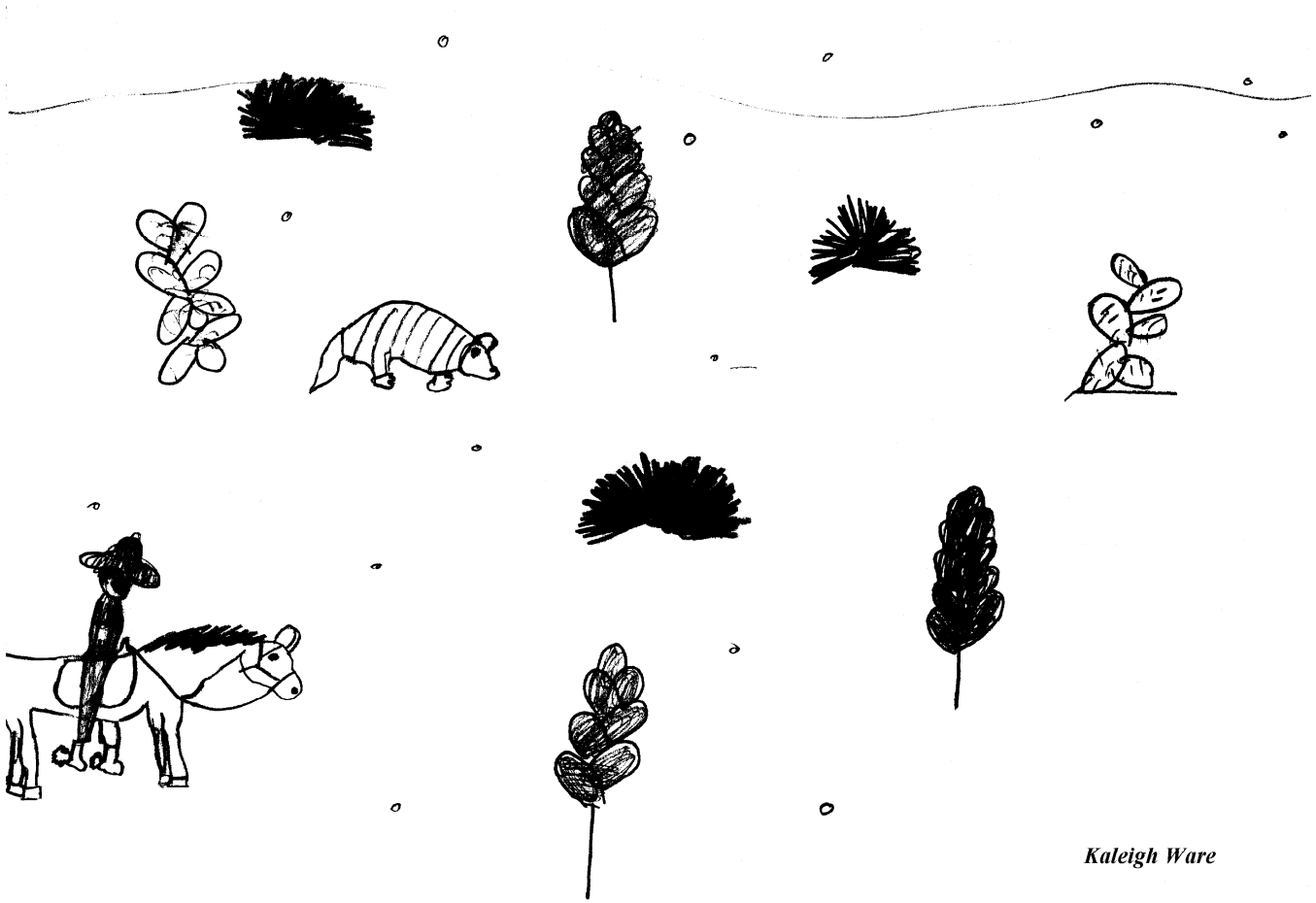

TEXAS REGISTER

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Kaleigh Ware

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IN THIS ISSUE

ATTORNEY GENERAL

Request for Opinion.....5451

PROPOSED RULES

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

MEDICAID HEALTH SERVICES

1 TAC §354.1149.....5453

REIMBURSEMENT RATES

1 TAC §355.9060.....5456

PUBLIC UTILITY COMMISSION OF TEXAS

SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

16 TAC §25.25.....5458

16 TAC §25.479.....5459

16 TAC §25.475.....5461

SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

16 TAC §26.25.....5462

TEXAS HIGHER EDUCATION COORDINATING BOARD

RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

19 TAC §§4.101 - 4.108.....5464

PROGRAM DEVELOPMENT IN PUBLIC TWO-YEAR COLLEGES

19 TAC §9.144.....5465

TEXAS FUNERAL SERVICE COMMISSION

LICENSING AND ENFORCEMENT--SPECIFIC SUBSTANTIVE RULES

22 TAC §203.6.....5465

DEPARTMENT OF STATE HEALTH SERVICES

MATERNAL AND INFANT HEALTH SERVICES

25 TAC §§37.301 - 37.306.....5466

CHRONIC DISEASES

25 TAC §§61.1 - 61.4, 61.6 - 61.9, 61.13, 61.14.....5469

25 TAC §§61.1 - 61.11.....5470

FOOD AND DRUG

25 TAC §229.172, §229.176.....5478

25 TAC §229.172, §229.176.....5478

TEXAS DEPARTMENT OF INSURANCE

AGENTS' LICENSING

28 TAC §19.1722.....5485

TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.10.....5488

TEXAS WORKFORCE COMMISSION

UNEMPLOYMENT INSURANCE

40 TAC §§815.170 - 815.174.....5490

TEXAS DEPARTMENT OF TRANSPORTATION

AVIATION

43 TAC §§30.101 - 30.104.....5492

WITHDRAWN RULES

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

COMMUNITY AFFAIRS PROGRAMS

10 TAC §5.203.....5495

TEXAS HIGHER EDUCATION COORDINATING BOARD

RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

19 TAC §4.105.....5495

PROGRAM DEVELOPMENT IN PUBLIC TWO-YEAR COLLEGES

19 TAC §9.144.....5495

ADOPTED RULES

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

MEDICAID ELIGIBILITY

1 TAC §358.100, §358.105.....5499

1 TAC §§358.200 - 358.205, 358.210, 358.215, 358.220.....5499

1 TAC §§358.300, 358.301, 358.305, 358.310, 358.315, 358.316, 358.320, 358.325.....5499

1 TAC §§358.400, 358.401, 358.405, 358.410, 358.415 - 358.417, 358.420, 358.425, 358.430 - 358.433, 358.435, 358.440 - 358.444.....5499

1 TAC §§358.450 - 358.455, 358.460, 358.461, 358.465, 358.466, 358.470, 358.475.....5499

1 TAC §§358.500 - 358.506, 358.510, 358.515.....5500

1 TAC §§358.600, 358.601, 358.603 - 358.605, 358.607, 358.609 - 358.612, 358.615, 358.617, 358.619 - 358.621, 358.623.....5500

1 TAC §§358.700, 358.701, 358.705, 358.710, 358.715, 358.720, 358.725.....5500

1 TAC §§358.801, 358.803, 358.805, 358.807, 358.809, 358.811, 358.813, 358.815, 358.817, 358.819.....5500

MEDICAID ELIGIBILITY FOR THE ELDERLY AND PEOPLE WITH DISABILITIES

1 TAC §§358.101, 358.103, 358.105, 358.107.....5501
1 TAC §§358.201, 358.203, 358.205, 358.207, 358.209, 358.211, 358.213, 358.215, 358.217, 358.2195505
1 TAC §358.301.....5506
1 TAC §§358.321 - 358.327, 358.331, 358.333 - 358.339, 358.345 - 358.355, 358.3715506
1 TAC §§358.381 - 358.387, 358.3915506
1 TAC §358.401, §358.402.....5507
1 TAC §§358.411 - 358.423.....5514
1 TAC §§358.431 - 358.4415515
1 TAC §§358.501, 358.505, 358.510, 358.515, 358.520, 358.525, 358.530, 358.535, 358.540, 358.5455516
1 TAC §§358.601 - 358.6055516

MEDICARE SAVINGS PROGRAM

1 TAC §§359.101, 359.103, 359.105, 359.107, 359.109.....5516

MEDICAID BUY-IN PROGRAM

1 TAC §§360.101, 360.103, 360.105, 360.107, 360.109, 360.111, 360.113, 360.115, 360.117, 360.1195517

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

COLONIA SELF-HELP CENTER PROGRAM

10 TAC §§3.1 - 3.185517
10 TAC §§3.1 - 3.85518

COMMUNITY AFFAIRS PROGRAMS

10 TAC §5.3, §5.20.....5523
10 TAC §5.407, §5.422.....5523

TEXAS BOARD OF NURSING

CONTINUING EDUCATION

22 TAC §§216.1 - 216.11.....5523

CONTINUING COMPETENCY

22 TAC §§216.1 - 216.11.....5524

TEXAS STATE BOARD OF EXAMINERS OF PROFESSIONAL COUNSELORS

PROFESSIONAL COUNSELORS

22 TAC §681.45, §681.495535
22 TAC §681.72.....5536
22 TAC §681.91, §681.93.....5536

TEXAS STATE BOARD OF EXAMINERS OF DIETITIANS

DIETITIANS

22 TAC §§711.1 - 711.22.....5537
22 TAC §§711.1 - 711.22.....5537

TEXAS YOUTH COMMISSION

ADMISSION, PLACEMENT, AND PROGRAM COMPLETION

37 TAC §85.1.....5538
37 TAC §85.21, §85.23.....5538
37 TAC §85.41, §85.45.....5538
37 TAC §§85.51, 85.55, 85.59, 85.61, 85.65, 85.69.....5539
37 TAC §85.95.....5539

ADMISSION, PLACEMENT, RELEASE, AND DISCHARGE

37 TAC §§85.1 - 85.3, 85.55541
37 TAC §85.21, §85.25.....5541
37 TAC §85.45.....5542
37 TAC §§85.55, 85.59, 85.65, 85.69.....5542
37 TAC §85.95.....5542

TREATMENT

37 TAC §§87.1 - 87.45543
37 TAC §87.51, §87.55.....5543

TREATMENT

37 TAC §§87.1 - 87.35544
37 TAC §87.51.....5548
37 TAC §87.67.....5551

PROGRAM SERVICES

37 TAC §91.98.....5551

YOUTH RIGHTS AND REMEDIES

37 TAC §93.31, §93.53.....5553

BEHAVIOR MANAGEMENT AND YOUTH DISCIPLINE

37 TAC §§95.1, 95.3, 95.7, 95.9, 95.11, 95.13, 95.15 - 95.17, 95.215554
37 TAC §§95.51, 95.55, 95.57, 95.59, 95.71.....5554

BEHAVIOR MANAGEMENT AND YOUTH DISCIPLINE

37 TAC §§95.1 - 95.4, 95.17, 95.205557
37 TAC §§95.50, 95.51, 95.55, 95.57, 95.59, 95.61, 95.715562

SECURITY AND CONTROL

37 TAC §97.23.....5570
37 TAC §97.23.....5570
37 TAC §§97.35 - 97.37, 97.40, 97.41, 97.435573

37 TAC §97.40.....	5573	Notice of Rate Ceilings.....	5597
DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES		Commission on State Emergency Communications	
DIVISION FOR EARLY CHILDHOOD INTERVENTION SERVICES		Notice of Workshop	
40 TAC §§108.21, 108.23, 108.25, 108.27, 108.29, 108.31, 108.33, 108.35, 108.37, 108.39, 108.43, 108.47, 108.48	5578	5597	
40 TAC §§108.55, 108.57, 108.59, 108.61.....	5579	Texas Commission on Environmental Quality	
40 TAC §§108.221, 108.223, 108.225, 108.227, 108.229, 108.231, 108.233, 108.235	5579	Agreed Orders.....	
40 TAC §§108.261, 108.263, 108.265.....	5579	5598	
40 TAC §§108.291, 108.293, 108.295.....	5579	Notice of Correction to Default Order Number 7.....	
40 TAC §§108.1, 108.3, 108.5, 108.7, 108.9, 108.11, 108.13, 108.15, 108.17, 108.19, 108.71, 108.73, 108.75, 108.77	5580	5601	
40 TAC §§108.101, 108.103, 108.105, 108.107, 108.109, 108.111, 108.113, 108.115, 108.117, 108.119, 108.121, 108.123, 108.125, 108.127, 108.129, 108.131, 108.133, 108.135, 108.137, 108.139	5583	5601	
40 TAC §§108.301, 108.303, 108.305, 108.307, 108.309, 108.311, 108.313, 108.315, 108.317, 108.319, 108.321	5584	5602	
40 TAC §§108.401, 108.403, 108.405, 108.407, 108.409, 108.411, 108.413, 108.415	5584	5603	
40 TAC §§108.501, 108.503, 108.505.....	5585	5603	
40 TAC §108.601, §108.603.....	5586	Texas Facilities Commission	
40 TAC §§108.701, 108.703, 108.705, 108.707, 108.709, 108.711.....	5589	Request for Proposals #303-9-12002.....	
TEXAS WORKFORCE COMMISSION		Request for Proposals #303-9-12301.....	
SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM EMPLOYMENT AND TRAINING		5604	
40 TAC §§813.1 - 813.5	5591	General Land Office	
40 TAC §§813.11 - 813.14.....	5591	Notice of Invitation for Offer for Renewal of Major Consulting Services	
40 TAC §813.22.....	5592	5604	
40 TAC §§813.31 - 813.34	5592	Texas Health and Human Services Commission	
40 TAC §813.41.....	5592	Notice of Public Hearing on Proposed Medicaid Payment Rates..	
TEXAS DEPARTMENT OF TRANSPORTATION		Public Notice.....	
CONTRACT MANAGEMENT		5605	
43 TAC §9.114.....	5592	Texas Department of Housing and Community Affairs	
RULE REVIEW		Notice of Public Hearing on Section 8 Program 5-Year and 2010 Annual Plan	
Proposed Rule Reviews		5606	
Public Utility Commission of Texas	5595	Houston-Galveston Area Council	
IN ADDITION		Request for Proposals	
Comptroller of Public Accounts		5606	
Notice of Contract Award	5597	Texas Department of Insurance	
Office of Consumer Credit Commissioner		Third Party Administrator Applications	
		5606	
		Texas Lottery Commission	
		Notice of Public Comment Hearing.....	
		5606	
		North Central Texas Council of Governments	
		Notice of Consultant Contract Award.....	
		5606	
		Texas Parks and Wildlife Department	
		Pre-Solicitation Notice.....	
		5607	
		Public Utility Commission of Texas	
		Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority	
		5607	
		Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority	
		5608	
		Announcement of Application for State-Issued Certificate of Franchise Authority	
		5608	
		Announcement of Application for State-Issued Certificate of Franchise Authority	
		5608	

Notice of Application for Amendment to Certificated Service Area Boundary.....5608

Notice of Application for Amendment to Service Provider Certificate of Operating Authority5608

Notice of Application for Amendment to Service Provider Certificate of Operating Authority5609

Notice of Application for Authority to Recover Lost Revenues and Costs of Implementing Expanded Local Calling Service5609

Notice of Application for Sale, Transfer, or Merger.....5609

Notice of Application for Sale, Transfer, or Merger5610

Notice of Application for Sale, Transfer, or Merger5610

Notice of Application for Sale, Transfer, or Merger.....5610

Notice of Application for Service Provider Certificate of Operating Authority5610

Notice of Application for Service Provider Certificate of Operating Authority5611

Office of Rural Community Affairs

Hurricanes Dolly/Ike Action Plan Amendment for Additional Disaster Funding5611

Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services5612

The Texas A&M University System

Award Notification.....5612

Texas Water Development Board

Request for Applications for the Geomorphic Study of the Guadalupe River, Texas, from Kerr County to San Antonio Bay.....5612

Workforce Solutions Brazos Valley Board

Request for Proposals for Printing Services5613

THE ATTORNEY GENERAL

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Request for Opinion

RQ-0813-GA

Requestor:

The Honorable Veronica Gonzales

Chair, Committee on Border & Intergovernmental Affairs

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether a member of the board of directors of the Agua Special Utility District may simultaneously serve as a member of the board of trustees of South Texas College (RQ-0813-GA)

Briefs requested by August 31, 2009

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200903350

Stacey Napier

Deputy Attorney General

Office of the Attorney General

Filed: August 5, 2009



PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 11. GENERAL ADMINISTRATION

1 TAC §354.1149

The Texas Health and Human Services Commission (HHSC) proposes amendments to §354.1149, relating to Medicaid benefit exclusions and limitations.

Background and Justification

Currently, adults in Medicaid managed care plans receive annual preventive well exams as a Medicaid benefit; however, this is not a benefit for adults receiving Medicaid through fee-for-service or Primary Care Case Management. HHSC proposes to add adult preventive services as a benefit for all eligible adults. This requires amending §354.1149 to remove adult preventive services from the list of Medicaid excluded services. The benefit will include preventive services recommended by the U.S. Preventive Services Task Force. The rule conforms with legislative emphasis on preventive health services.

The amendments also update the rule to reflect current HHSC policies and procedures regarding a number of other Medicaid benefit exclusions and limitations.

Additional changes are proposed to update terms, remove obsolete language, clarify language, and re-format the rule.

Section-by-Section Summary

Section 354.1149(a) describes a number of services that are not Medicaid benefits. Subsections (b), (c) and (d) describe other Medicaid benefit exclusions and limitations.

HHSC proposes to make the following changes to §354.1149(a) to reflect the new adult preventive services benefit:

Remove the exclusion of most immunizations from subsection (a)(2) and move revised immunization benefit information to re-numbered subsection (a)(9).

Revise re-numbered subsection (a)(9) to remove the reference to services and supplies provided in connection with routine physical exams because these services and supplies will be covered as part of the adult preventive services benefit. Insert new language in subsection (a)(9) to exclude from benefits im-

munizations for foreign travel or immunizations that are not part of a routine preventive immunization schedule. Immunizations that are part of a routine preventive immunization schedule will be covered under the new adult preventive services benefit, unless specifically excluded by HHSC.

HHSC proposes to make the following additional changes to §354.1149 to reflect current HHSC policies and procedures regarding Medicaid benefit exclusions and limitations:

Revise subsection (a) to clarify that Medicaid reimbursement is only available for service and supplies that are medically necessary; that the listed benefit exclusions and limitations are only applicable for services or supplies provided under Subchapter A related to Medicaid purchased health services; that the listed exclusions and limitations are not applicable when the services or supplies are benefits in the Texas Health Steps Comprehensive Care Program; and that additional exclusions and limitations are listed in the Texas Medicaid Provider Procedures Manual.

Revise subsection (a)(1) to clarify that benefits do not include services provided to a recipient between the ages of 22 and 64 in an institution for mental disease.

Remove from subsection (a)(2) the reference to occupational therapy because occupational therapy is a benefit.

Remove from subsection (a)(5) extraneous language related to providers of dental services and a description of these services. Remove an obsolete reference to another rule. Remove a reference to services authorized under the Early and Periodic Screening, Diagnosis, and Treatment Program (EPSDT) because this reference was added to the top of subsection (a) (referenced in subsection (a) as the Texas Health Steps Comprehensive Care Program).

Remove subsection (a)(6) relating to eyeglasses and exams because these are benefits. Subsequent paragraphs are re-numbered.

Clarify in re-numbered subsection (a)(7) that orthodontic services that are authorized and initiated while a recipient is Medicaid eligible may be continued for a limited time after a recipient is no longer Medicaid eligible.

Revise re-numbered subsection (a)(8) to match the corresponding paragraph in the Social Security Act, Section 1862(a)(10) related to cosmetic surgery.

Revise re-numbered subsection (a)(10) to clarify that certain immediate family members may provide personal care services as described in Title 42 Code of Federal Regulations §488.303.

Delete subsection (a)(12) related to services or supplies that are not reasonable and necessary because a reference was added to the top of subsection (a) regarding services and supplies that are not medically necessary. Also, delete the reference in sub-

section (a)(12) to cosmetic surgery because it duplicates language in re-numbered subsection (a)(8).

Delete subsection (a)(14) related to utilization review findings and services that are not medically necessary because it is redundant with the revised language at the top of subsection (a).

Delete subsection (a)(15) related to whole blood or packed red cells because these products are a benefit when medically necessary.

Delete subsection (a)(19) related to the prior authorization requirement for parenteral hyperalimentation because the many Medicaid benefits that require prior authorization are not listed in this rule.

Revise re-numbered subsection (a)(15) relating to the annual inpatient limit of \$200,000 per recipient to clarify current policy, remove an exemption for recipients less than age one because this rule does not apply to Medicaid services provided through the Texas Health Steps Comprehensive Care Program, remove extraneous language, update references, and re-format.

Revise re-numbered subsection (a)(16) relating to services or supplies that are experimental or investigational, to remove extraneous language.

Revise subsection (c) to clarify rule language.

Additional changes are proposed throughout the rule to update terms, remove obsolete language, clarify language, and re-format the rule.

Fiscal Note

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the amended rule is in effect there will be a fiscal impact of \$8,772,506 (SFY 2010); \$9,431,080 (SFY 2011); \$10,171,179 (SFY 2012); \$10,974,702 (SFY 2013); \$11,852,679 (SFY 2014) to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-Business Impact Analysis

Mr. Suehs has also determined that there will be no effect on small businesses or micro-businesses to comply with the new or amended requirements, as they will not be required to alter their business practices as a result of the rule. The new and amended requirements update the rule to conform to current policies and practices, and add a new adult well exam benefit that is not expected to alter business practices.

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.

Public Benefit

Chris Traylor, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the proposed amendments are in effect, the public will benefit from the adoption of the amended rule. The anticipated public benefit of enforcing the proposed amendments will be improved access to and quality of health care services.

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 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. Under §2007.003(b) of the Texas Government Code, HHSC has determined that Chapter 2007 of the Texas Government Code does not apply to this rule. The changes this rule makes do not implicate a recognized interest in private real property. Accordingly, HHSC is not required to complete a takings impact assessment regarding this rule.

Public Comment

Written comments on the proposed amendments may be submitted to Garry Walsh, Senior Policy Analyst, Medicaid/CHIP Division, Texas Health and Human Services Commission, P.O. Box 13247, H390, Austin, Texas 78711; by fax to (512) 249-3731; or by e-mail to garry.walsh@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for August 20, 2009, from 2:00 to 3:00 p.m. at the John H. Winters Building, Public Hearing Room, 125-E, located at 701 W. 51st Street, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Mary Haifley at (512) 491-5605.

Statutory Authority

The amendments are proposed 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.

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

§354.1149. Exclusions and Limitations.

(a) Notwithstanding any other provision of this subchapter, Medicaid services or supplies that are not medically necessary will not be considered for Medicaid reimbursement. The following benefit exclusions and limitations are applicable under the Medicaid program for services provided under this subchapter. They do not apply to Medicaid services provided through the Texas Health Steps Comprehensive Care Program. Additional exclusions and limitations are listed in the Texas Medicaid Provider Procedures Manual. The following benefits are not included in the Texas Medicaid Program [Benefits do not extend to]:

(1) services provided to any individual who is an inmate in a public institution (except as a patient in a medical institution approved for participation in the Medicaid program [~~Texas Medical Assistance Program~~]), or is a patient in:

(A) an institution for tuberculosis;~~;~~ ~~in a mental institution, or in~~

(B) the hospital or nursing sections of institutions for the mentally retarded; ~~or~~

(C) an institution for mental disease if the patient is between the ages of 22 and 64;

(2) special shoes or other supportive devices for the feet ~~and~~~~;~~ ambulation aids (except as provided for in the home health services program)~~;~~ immunizations (except for influenza and pneumonia immunizations determined to be medically necessary by the department or its designee); or occupational therapy (except as provided for under other rules in this chapter);

(3) any services provided by military medical facilities, except: ~~[for]~~

(A) those military hospitals enrolled to provide inpatient emergency services;~~;~~

(B) Veterans Administration facilities;~~;~~ or

(C) United States Public Health Service hospitals;

(4) care and treatment related to any condition covered by ~~[for which benefits are provided or available under the]~~ workmen's compensation laws;

(5) care, treatment, or other services by a doctor of dentistry unless: ~~[dental surgery, doctor of medical dentistry, or doctor of dental medicine, including services related to teeth or structures directly supporting the teeth or other services provided by a dentist:]~~

(A) the recipient's dental diagnosis is causally related to a life-threatening medical condition; ~~or [except as described and limited under §29.1402 of this title (relating to Authorized Dentists' Services):]~~

(B) the treatment is ~~[unless]~~ specifically authorized by the Health and Human Services Commission (HHSC) ~~[department]~~ or its designee; ~~[or]~~

~~[(C) unless services are specifically authorized under the Early and Periodic Screening, Diagnosis, and Treatment Program (EPSDT):]~~

~~[(6) eyeglasses and examinations for the prescription and fitting thereof, except as provided in this chapter:]~~

(6) ~~[(7)]~~ any care or services to the extent that a benefit is paid or payable under Medicare;

(7) ~~[(8)]~~ any services or supplies provided ~~[delivered]~~ to an individual before the effective date of designation by HHSC ~~[the department]~~ as an eligible recipient or after the effective date of denial as an eligible recipient except orthodontic services that are authorized and initiated while the recipient is eligible for Medicaid may be continued for 36 months after a recipient is no longer Medicaid eligible;

(8) ~~[(9)]~~ any services or supplies provided in connection with cosmetic surgery except as required for the prompt repair of accidental injury or for improvement of the functioning of a malformed body member ~~[or when specially authorized by the department];~~

(9) immunizations specifically for travel to or from foreign countries. Immunizations included on the immunization schedule approved by the Advisory Committee on Immunization Practices (ACIP) are a benefit unless an immunization is specifically excluded by HHSC;

~~[(10) any services or supplies provided in connection with a routine physical examination except as otherwise provided in this chapter:]~~

(10) ~~[(11)]~~ any services provided by an immediate relative of the eligible recipient or member of the eligible recipient's household except for personal care services;

~~[(12) any services or supplies which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member, except cosmetic surgery, when specially authorized by the department, unless otherwise specifically provided in this chapter:]~~

(11) ~~[(13)]~~ custodial care;

~~[(14) any services or supplies provided to an individual after a finding under utilization review procedure that such services or supplies are not medically necessary:]~~

~~[(15) whole blood or packed red cells, except as provided in this chapter:]~~

(12) ~~[(16)]~~ any services or supplies provided outside of the United States, except for deductible and coinsurance portions of Medicare benefits as provided for in this chapter;

(13) ~~[(17)]~~ any services or supplies not provided for in this chapter;

(14) ~~[(18)]~~ any services or supplies not provided for in this chapter for:

(A) the treatment of flat foot conditions and the prescription of supportive devices therefor;

(B) the treatment of subluxations of the foot; or

(C) routine foot care (including the cutting or removal of corns, warts, or calluses, the trimming of nails, and other routine hygiene care);

~~[(19) any parenteral hyperalimentation provided on an outpatient hospital basis or as an in-home service without prior authorization from the department's health insuring agent, nor to any outpatient hyperalimentation administered as a nutritional supplement:]~~

(15) ~~[(20)]~~ any medical and remedial care, services, and supplies provided to a hospital inpatient ~~[by practitioners, providers, or suppliers]~~ after total hospitalization-related expenditures under the Medicaid ~~[Texas Medical Assistance]~~ Program reach \$200,000 per recipient, per 12-month benefit period unless the services are exempted by subparagraphs (A) - (C) of this paragraph. ~~;~~ except as specified in §29.1125 of this title (relating to Organ Transplants); or except as otherwise specified by the department as directed by the department's board. This limit does not apply to medically necessary services provided to an inpatient less than age one (including inpatients under age one who are admitted to and remain in a hospital past their first birthday). This limit also does not apply to physician (MD or DO) services as defined in Title XIX laws and regulations and state law.] For the purposes of this limit, "12-month benefit period" means 12 consecutive months beginning November 1 of each year and ending October 31 of the next year. The limit applies to hospitalization-related services while the recipient is a hospital inpatient regardless of where the services are provided,~~;~~ regardless of how soon~~;~~ within the 12-month period~~;~~ the limit is reached,~~;~~ and ~~[regardless of]~~ how many hospital stays are involved. For the purposes of this limit, HHSC or its designee ~~[the department's agent]~~ processes and pays claims, if payable, in order of receipt. The services exempted from the \$200,000 limit are: ~~;~~

(A) covered benefits under §354.1175 of this title (relating to Organ Transplants);

(B) care, services, and supplies otherwise authorized by HHSC; and

(C) physician services as allowed by Title XIX laws and regulations and state law;

(16) [(24)] any services or supplies that are experimental or investigational [services, supplies, or procedures as determined by the United States Public Health Service; a state organization; or other medical authority, including the department].

(b) Outpatient Behavioral Health Services. Benefits to an individual for the diagnosis or treatment of mental disease, psychoneurotic, and personality disorders while not confined as an inpatient in a hospital are limited to 30 visits to enrolled practitioners per calendar year. This utilization control limitation may be exceeded when prior authorized on a case-by-case basis.

(c) Private Room Facilities. Private room facilities are not a benefit unless a facility submits [considered medically necessary except when on the basis of medical opinion critical or contagious illness exists; or when the eligible recipient's condition results in undue disturbance to other patients; or the need for care is emergent and lower cost facilities are not immediately available. The health insuring agent requires hospitals to file with the health insuring agent] a physician's certification of [such] medical necessity to HHSC or its designee certifying that one of the following conditions is met: [-]

(1) the recipient, based on a medical opinion, has a critical or contagious illness;

(2) the eligible recipient's condition results in undue disturbance to other patients; or

(3) the need for care is emergent and lower cost facilities are not immediately available.

(d) Institutional Care. Separate payments are not made for services and supplies in an institution where the reimbursement formula and vendor payment include such services or supplies as a part of the institutional care.

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

Filed with the Office of the Secretary of State on July 30, 2009.

TRD-200903222

Steve Aragón

Chief Counsel

Texas Health and Human Services Commission

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



CHAPTER 355. REIMBURSEMENT RATES
SUBCHAPTER M. MISCELLANEOUS
MEDICAID PROGRAMS
DIVISION 4. YOUTH EMPOWERMENT
SERVICES WAIVER PROGRAM
1 TAC §355.9060

The Texas Health and Human Services Commission (HHSC) proposes to add new §355.9060, Reimbursement Methodology for the Youth Empowerment Services Waiver Program, to Title 1, Part 15, Chapter 355, Subchapter M, Division 4, Reimbursement Methodology for the Youth Empowerment Services Waiver Program.

Background and Justification

The Department of State Health Services (DSHS) has developed the Youth Empowerment Services (YES) waiver to provide intensive, community-based services to children and youth who meet the criteria for inpatient psychiatric hospitalization. The waiver will implement a pilot program to provide certain services to children and adolescents in Bexar and Travis counties. The goals of the proposed waiver include:

providing a more complete continuum of community-based services and supports for children with severe emotional disturbances;

preventing or reducing inpatient psychiatric admissions for children with severe emotional disturbances;

preventing entry and recidivism into the foster care system;

reducing out-of-home placements by all child-serving agencies; and

improving the clinical and functional outcomes of youth and their families.

The Centers for Medicare and Medicaid Services approved the YES waiver effective September 1, 2009.

This proposed rule describes the rate methodology for the YES waiver.

Section-by-Section Summary

Subsection (a) establishes that the rates for the YES waiver are developed based on rates determined for other programs that provide similar services. If payment rates are not available from other programs that provide similar services, HHSC will model rates based a pro forma analysis. A pro-forma analysis makes assumptions about staff salaries and service requirements and estimates the basic types and costs of products and services necessary to deliver services that meet federal and state requirements.

Subsection (b) establishes that YES waiver rate development is governed by 1 TAC §355.101 (relating to Introduction) and §355.105 (relating to General Reporting and Documentation Requirements, Methods and Procedures).

Fiscal Note

Machelle Pharr, Chief Financial Officer for the Department of State Health Services, has determined that, for each year of the first five-year period that the proposed rule is in effect, there are positive fiscal implications for state government as a result of enforcing or administering this rule. The proposed rule will not result in fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing and administering the section.

The effect on state government for the first five years the proposed rule is in effect is an estimated decrease in cost of \$1,141,260 in fiscal year (FY) 2010; \$839,742 in FY 2011; \$823,056 in FY 2010; \$823,056 in FY 2011; and \$823,056 in FY 2012. The decrease is due to the cost savings associated with waiver programs.

Small Business and Micro-business Impact Analysis

Ms. Pharr, as required by Government Code §2006.002, Agency Actions Affecting Small Businesses, Adoption of Rules with Adverse Economic Effect, has also determined that the proposed rule will not have an adverse economic effect on small or micro-businesses. The program does not impose a regulatory burden on businesses of any size. There will be an "open enrollment" process for providers who wish to participate in the program. Any qualified provider may participate. Information about the program, including reimbursement rates, will be made available to the public prior to the enrollment process. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each of the first five years the rule is in effect, the expected public benefit is that the rule will describe the reimbursement methodology used to develop rates for this program.

Takings Impact Assessment

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

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 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.

Public Comment

Questions about the content of this proposal may be directed to Sarah Hambrick in the HHSC Rate Analysis Department by telephone at (512) 491-1431. Written comments on the proposal may be submitted to Ms. Hambrick by facsimile at (512) 491-1998, by e-mail to sarah.hambrick@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The new rule is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resource 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 rule affects the Human Resources Code Chapter 32, and the Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.9060. Reimbursement Methodology for the Youth Empowerment Services Waiver Program.

(a) Payment rate determination. Payment rates are developed based on rates determined for other programs that provide similar ser-

vices. If payment rates are not available from other programs that provide similar services, payment rates are determined using a pro forma approach in accordance with §355.105(h) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(b) Related information. The information in §355.101 of this title (relating to Introduction) and §355.105(g) of this title also applies.

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

Filed with the Office of the Secretary of State on July 29, 2009.

TRD-200903218

Steve Aragón

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: September 13, 2009

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

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes an amendment to §25.25, relating to Issuance and Format of Bills and §25.479, relating to Issuance and Format of Bills. The amendments will implement certain provisions of Texas House Bill 1822 (HB 1822), 81st Leg. (2009), Public Utilities Regulatory Act (PURA) §§17.003(c), 17.004(a), and 17.102, pertaining to a list of defined terms common to the electric industry and Texas House Bill 1799 (HB 1799), 81st Leg. (2009), PURA §39.116 pertaining to notice regarding customer choice information. The proposed rules, if adopted, would require electric service providers to use specific defined terms in billing their customers and require that information concerning the customer-information website operated by the commission be included on customer bills. The defined terms in this amendment use "charge" to define amounts applied at the discretion of the electric utility and the retail electric provider, "fee" to define amounts that are designated by a governmental agency to be used for a specific, and "tax" to define amounts that are designated by a governmental agency without a designated purpose. The amendments are to competition rules subject to judicial review as specified in PURA §39.001(e). Project Number 37070 is assigned to this proceeding.

Ernest Garcia, Retail Market Analyst, Competitive Markets Division has determined that for each year of the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments.

Mr. Garcia has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be that electric customers will have a clearer understanding of charges on their bills.

The amendments are also proposed to implement certain provisions of HB 1822 and HB 1799. There may be economic costs to persons who are required to comply with the amendments. These costs are associated with the modifications to company billing systems and are likely to vary from business to business and are difficult to ascertain but, they are not anticipated to be significant. However, it is believed that the benefits accruing from implementation of the amendments will outweigh these costs. These costs may result in an adverse economic effect on approximately thirty small businesses or micro-business that are retail electric providers (REPs). The commission considered proposing a more extensive list of required terms, but concluded that benefits to customers of requiring a more extensive list would probably be greater than the implementation costs to electric service providers. HB 1822 includes a deadline for adoption of a rule of December 1, 2009, so the commission has not had time to conduct an extensive evaluation of the costs and benefits of various alternatives. It requests that parties that comment on the proposed rules address the question of costs and benefits of this proposal and any alternatives that are recommended in their comments.

Ernest Garcia, Retail Markets Analyst, Competitive Markets Division has also determined that for each year of the first five years the amendments are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rule-making, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Wednesday, October 7, 2009. The request for a public hearing must be received within 30 days after publication.

Initial comments on the amendments may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 31 days after publication and reply comments may be submitted within 45 days after publication. Sixteen copies of comments on the amendments are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the amended rules. All comments should refer to Project Number 37070.

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.25

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2008) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §17.001, which directs the commission to adopt and enforce customer protection rules; §17.003(c), which requires the commission to require electric service providers to give clear and understandable information to customers about rates and to use a list of defined terms; §17.004(a), which provides that customers are entitled to bills that are presented in clear, readable and easy-to-understand language that uses terms defined in the rules adopted under §17.003; §17.102, which directs the commission to adopt and enforce rules requiring that charges on an electric service provider's bill be clearly and easily identified,

using terms defined in the rules adopted under §17.003; and §39.101, which authorizes the commission to adopt and enforce rules to ensure that REPs' bills are presented in a clear format and in understandable language.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.001 17.003(c), 17.004(a), 17.102 and 39.101.

§25.25. Issuance and Format of Bills.

(a) Frequency of bills. An [The] electric utility [or retail electric provider] shall issue bills monthly, unless otherwise authorized by the Public Utility Commission [commission], or unless service is provided for a period less than one month. Bills shall be issued as promptly as possible after reading meters.

(b) (No change.)

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

(1) - (8) (No change.)

(9) To the extent that a utility applies a charge to the customer's bill that is consistent with one of the terms set out in this paragraph, the term shall be used in identifying charges on customer's bills, and the definitions in this paragraph shall be easily located on the utility's website. A utility may not use a different term for a charge that is defined in this paragraph.

(A) Advanced metering charge--A charge to recover the costs of an advanced metering system;

(B) Energy Charge--Any charge, other than a tax or other fee, that is assessed on the basis of the customer's energy consumption.

(C) Energy Efficiency Cost Recovery Factor--A charge approved by the Public Utility Commission to recover the electric utility's cost of providing energy efficiency programs.

(D) Fuel Charge--A charge approved by the Public Utility Commission for the recovery of the utility's costs for the fuel used to generate electricity.

(E) Meter Number--The number assigned by the utility to the customer's meter.

(F) Meter Charge--A charge approved by the Public Utility Commission for metering a customer's consumption.

(G) Miscellaneous Gross Receipts Fee--A fee assessed to recover the miscellaneous gross receipts tax imposed on utilities operating in an incorporated city or town having a population of more than 1,000.

(H) Municipal Franchise Fee--A fee assessed to compensate municipalities for the utility's use of public rights-of-way.

(I) Nuclear Decommissioning Fee--A charge approved by the Public Utility Commission to provide funds for decommissioning of nuclear generating sites.

(J) PUC Assessment--A fee assessed to recover the statutory fee for administering the Public Utility Regulatory Act.

(K) Sales tax--Sales tax collected by a customer's city;

(10) To the extent that a utility uses the concepts identified in this paragraph in a customer's bill, it shall use the term set out in this paragraph, and the definitions in this paragraph shall be easily located on the utility's website. A utility may not use a different term for a charge that is defined in this paragraph.

(A) Current Meter Read--The meter reading at the end of the period for which the customer is being billed;

(B) kW--Kilowatt, the standard unit for measuring electricity demand, equal to 1,000 watts;

(C) kWh--Kilowatt-hour, the standard unit for measuring electricity energy consumption, equal to 1,000 watt-hours; and

(D) Previous Meter Read--The reading on the beginning the period for which the customer is being billed.

(d) - (f) (No change.)

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

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Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Earliest possible date of adoption: September 13, 2009

For further information, please call: (512) 936-7223



SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

16 TAC §25.479

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2008) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §17.001, which directs the commission to adopt and enforce customer protection rules; §17.003(c), which requires the commission to require electric service providers to give clear and understandable information to customers about rates and to use a list of defined terms; §17.004(a), which provides that customers are entitled to bills that are presented in clear, readable and easy-to-understand language that uses terms defined in the rules adopted under §17.003; §17.102, which directs the commission to adopt and enforce rules requiring that charges on an electric service provider's bill be clearly and easily identified, using terms defined in the rules adopted under §17.003; and §39.101, which authorizes the commission to adopt and enforce rules to ensure that REPs' bills are presented in a clear format and in understandable language.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.001 17.003(c), 17.004(a), 17.102 and 39.101.

§25.479. *Issuance and Format of Bills.*

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

(c) Bill content.

(1) Each customer's bill shall include the following information:

(A) The certified name and address of the REP and the number of the license issued to the REP by the Public Utility Commission[~~commission~~];

(B) - (G) (No change.)

(H) The current charges for electric service as disclosed in the customer's terms of service document, including applicable taxes, and fees labeled "total current charges";

(I) A [exclusive of applicable taxes, and a separate] calculation of the average unit price of the current charge for electric service for the current billing period, labeled, "The average price you paid for electric service this month." This calculation shall reflect all fixed and variable recurring charges, but not include any nonrecurring charges or credits, which is expressed as a cents per kilowatt-hour amount rounded to the nearest one-tenth of one cent. If the customer is on a level or average payment plan, the level or average payment should be clearly shown in addition to the usage-based rate;

(J) [~~(H)~~] The identification and itemization of charges other than for electric service as disclosed in the customer's terms of service document;

(K) [~~(J)~~] The itemization and amount included in the amount due for any non-recurring charge, including late fees, returned check fees, restoration of service fees, or other fees disclosed in the REP's terms of service document provided to the customer;

(L) [~~(K)~~] The [~~total current charges,~~] balances from the preceding bill, payments made by the customer since the preceding bill and[-] the total amount due labeled "amount due";

(M) A [and a] notice that the customer has the opportunity to voluntarily donate money to the bill payment assistance program, pursuant to §25.480(g)(2) of this title (relating to Bill Payment and Adjustments);

(N) [~~(L)~~] If available to the REP on a standard electronic transaction, the current beginning and ending meter readings of non-interval demand recorder meters, if the bill is based on actual kilowatt-hour (kWh) usage, including kWh, actual kilowatts (kW) or kilovolt ampere (kVa), and billed kW or kVa, the kind and number of units measured, whether the bill was issued based on estimated usage, and any conversions from meter reading units to billing units, or any other calculations to determine billing units from recording or other devices, or any other factors used in determining the bill, unless the customer is provided conversion charts;

(O) [~~(M)~~] Any amount owed under a written guarantee agreement, provided the guarantor was previously notified in writing by the REP of an obligation on a guarantee or as required by §25.478 of this title (relating to Credit Requirements and Deposits);

(P) [~~(N)~~] A conspicuous notice of any services or products being provided to the customer that have been added since the previous bill;

(Q) [~~(O)~~] Notification of any changes in the customer's prices or charges due to the operation of a variable rate feature previously disclosed by the REP in the customer's terms of service document; [~~and~~]

(R) [~~(P)~~] The notice required by §25.481(d) of this title (relating to Unauthorized Charges);[-]

(S) The date and reading of the meter at the beginning and at the end of the billing period; and

(T) On the first page of the bill in at least 12-point font the phrase, "for more information about residential electric service please visit www.powertochoose.com.";

(2) If the REP presents [~~has presented~~] its electric service charges in an unbundled fashion, it shall use the following terms, if applicable to the customer's bill: "demand charge," "energy charge," "monthly charge," "transmission and distribution service charge," and

"taxes and other fees." These terms shall have the following definitions: [as defined by the commission: "transmission and distribution service," "generation service," "System Benefit Fund," and, where applicable, "transition charge," "nuclear decommissioning fee," and "municipal franchise fee."]

(A) Demand charge--any charge, other than a tax or other fee or a transmission and distribution service charge, that is assessed on the basis of the customer's demand;

(B) Energy charge--any charge, other than a tax or other fee or a transmission and distribution service charge, that is assessed on the basis of the customer's energy consumption;

(C) Monthly charge--any charge, other than a tax or other fee or a transmission and distribution service charge that is assessed on a monthly basis without regard to the customer's demand or energy consumption;

(D) Transmission and distribution charge--any charge that is assessed to recover solely the charges assessed by a transmission and distribution utility (TDU) for the delivery of electricity to customer over poles and wires and other TDU facilities; and

(E) Taxes and other fees--any charge that is assessed to recover taxes or fees assessed by a unit of government in connection with the provision of service to the customer.

(3) To the extent that a REP applies a charge as a separate line item on a customer's bill that is consistent with one of the terms set out in this paragraph, the term shall be used in identifying charges on customers' bills (and the definitions in this paragraph shall be easily located on the REP's website). To the extent a REP uses on a customer's bill one of the terms set out in this paragraph, the amount charged shall be consistent with the definition. To the extent a REP unbundles on a customer's bill TDU delivery charge(s) included in subparagraphs (A) - (K) of this paragraph it shall use the applicable term(s) listed in subparagraphs (A) - (K) of this paragraph and shall not include any markup in the corresponding charge. A REP may not use a different term for a charge that is defined in this paragraph. Such a charge may be shown as a sub-item for any item from paragraph (2) of this subsection or as an additional item.

(A) Advanced metering charge--A charge assessed to recover a TDU's charges for Advanced Metering Systems, to the extent that they are not recovered in a TDU's standard metering charge.

(B) Competition Transition Charge--A charge assessed to recover a TDU's charges for non-securitized costs associated with the transition to competition.

(C) Energy Efficiency Cost Recovery Factor--A charge assessed to recover a TDU's charges for energy efficiency programs, to the extent that the TDU charge is a separate charge exclusively for that purpose that is approved by the Public Utility Commission.

(D) Late Payment Penalty--A charge assessed in accordance with Public Utility Commission rules.

(E) Meter Charge--A charge assessed to recover a TDU's charges for metering a customer's consumption, to the extent that the TDU charge is a separate charge exclusively for that purpose that is approved by the Public Utility Commission.

(F) Meter re-read charge--A charge assessed to recover a TDU's charges for a customer-requested meter read.

(G) Miscellaneous Gross Receipts Tax Reimbursement--A fee assessed to recover the miscellaneous gross receipts tax imposed on retail electric providers operating in an incorporated city or town having a population of more than 1000.

(H) Nuclear Decommissioning Fee--A charge assessed to recover a TDU's charges for decommissioning of nuclear generating sites.

(I) PUC Assessment Reimbursement--A fee assessed to recover the statutory fee for administering the Public Utility Regulatory Act.

(J) Sales tax--Sales tax collected by authorized taxing authorities, such as the state, cities and special purpose districts.

(K) Transition Charge(s)--A charge assessed to recover a TDU's charges for securitized costs associated with the transition to competition.

(4) [(3)] A REP shall provide an itemization of charges, including non-bypassable charges, to the customer upon the customer's request. [In lieu of providing a specific quantification of "generation service," an affiliated REP may indicate to customers that the remainder of the bill is related to generation services; after the itemization of non-bypassable charges is deducted from the total bill.]

(5) [(4)] A customer's electric bill shall not contain charges for electric service from a service provider other than the customer's designated REP.

(6) A REP shall include on each billing statement the date that a fixed rate product will expire. If the exact date is not known, the REP may estimate the expiration date by reference to the billing cycle and month or approximate date of expiration.

(7) To the extent that a REP uses the concepts identified in this paragraph in a customer's bill, it shall use the term set out in this paragraph, and the definitions in this paragraph shall be easily located on the REP's website. A REP may not use a different term for a charge that is defined in this paragraph.

(A) Current Meter Read--The meter reading at the end of the period for which the customer is being billed;

(B) kW--Kilowatt, the standard unit for measuring electricity demand, equal to 1000 watts;

(C) kWh--Kilowatt-hour, the standard unit for measuring electricity energy consumption, equal to 1000 watt-hours; and

(D) Previous Meter Read--The reading on the beginning the period for which the customer is being billed.

(8) Notice of contract expiration may be provided in a bill in accordance with §25.475 (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers).

(d) - (h) (No change.)

[(i) This section is effective June 1, 2004.]

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

Filed with the Office of the Secretary of State on July 31, 2009.

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Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

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For further information, please call: (512) 936-7223



16 TAC §25.475

The Public Utility Commission of Texas (commission) proposes an amendment to §25.475, relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers. The amendment will implement certain provisions of Texas House Bill 1822, 81st Leg. (2009) (HB 1822) and will address customer notice of contract expiration. This rule is a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). Project Number 37214 is assigned to this proceeding.

Shawnee Claiborn-Pinto, Retail Markets Director, Competitive Markets Division has determined that for each year of the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Ms. Claiborn-Pinto has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be the implementation of certain provisions of HB 1822 and that retail electric providers (REPs) will be required to provide to follow a consistent definition of a fixed rate product and that customers will benefit from being notified in advance of the expiration of the fixed rate product contract so that they can make informed decisions in a timely manner regarding selection of a REP for their electric service. It has been determined that implementation of this rule may have an adverse economic effect on approximately thirty small businesses or micro-businesses who are Retail Electric Providers. There may be economic costs to persons who are required to comply with the proposed section. The REPs will be required to make changes to their billing systems to include the end date of the fixed rate product on each billing statement and provide additional notice in a timely manner to residential customers prior to actual contract expiration. Currently residential customers of REPs may elect to receive REP notifications by e-mail only but this rule will require REPs to change its practices to additionally send a direct mail to these residential customers. Additionally, the REPs will incur costs to print special envelopes, separate pages, and possibly separate mailings to notify the residential customer of contract expiration. The majority of these costs are associated with the modifications to company billing systems and, are likely to vary from business to business, and are difficult to ascertain. However, it is believed that the benefits accruing from implementation of the proposed section will outweigh these costs. The commission did not consider alternatives to the rule as the rule is implementing the statute that was recently enacted.

Ms. Claiborn-Pinto has also determined that for each year of the first five years the amendment is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act, Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rule-making, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Wednesday, October 7, 2009. The request for a public hearing must be received within 30 days after publication.

Comments on the amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress

Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 31 days after publication and reply comments within 45 days after publication. Sixteen copies of comments on the amendment are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the rule as amended. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the amendment. The commission will consider the costs and benefits in deciding whether to adopt the amendment. All comments should refer to Project Number 37214.

This amendment is proposed under the Public Utility Regulatory Act, Tex. Util. Code Ann. §14.002 (Vernon 2007 & Supp. 2008) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, PURA §39.112, effective September 1, 2009, which requires a REP to provide a residential customer who has a fixed rate product with at least one written notice of the date the fixed rate product will expire; and HB 1822 §6, which requires the commission to adopt rules consistent with HB 1822.

Cross Reference to Statutes: Public Utility Regulatory Act §17.003 and 39.112.

§25.475. *General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers.*

(a) *Applicability.* The requirements of this section apply to retail electric providers (REPs) and aggregators, when specifically stated, in connection with the provision of service and marketing to residential and small commercial customers. ~~[Not later than five months after the effective date of this section, REPs shall conform all electricity products and contract documents to the requirements of this section. If a term contract is in effect on the date that this section becomes effective, the REP is required only to provide the notice of expiration required by subsection (e) of this section beginning no later than five months from the effective date of this section if the contract is still in effect at that time and is not otherwise required to conform such contracts.]~~

(b) (No change.)

(c) General Retail Electric Provider requirements.

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

(3) Specific contract requirements.

(A) (No change.)

(B) The start and end dates of the contract shall be available to the customer upon request. The end date for a fixed rate product for a residential customer shall be included on each billing statement. If the REP cannot determine the start and end date of the contract, the REP may estimate these dates by reference to the billing cycle and month or approximate date. After the start date is known, the REP's estimate of the end date shall be [The start and end dates may be estimated if the REP cannot determine these dates. After the start date is known, the end date may be estimated] consistent with the TDU meter reading schedule for the customer during the month of expiration.

(4) (No change.)

(d) (No change.)

(e) Contract expiration and renewal offers. The REP shall send a written notice of contract expiration at least 30 days or one billing cycle [14 days] prior to the date of contract expiration, but no more than 60 days or two billing cycles [45 days] in advance of contract expiration for a residential customer, and at least 14 days but no

more than 60 days or two billing cycles in advance of contract expiration for a small commercial customer. The REP shall send the notice by mail to a residential customer and shall also send the required notice to a customer's e-mail address if available to the REP and if the customer has agreed to send notices electronically. The REP shall send the notice to a small commercial customer by mail or may send the notice to the customer's e-mail address if available to the REP and, if the customer has agreed to receive notices electronically. Nothing in this section shall preclude a REP from offering a new contract to the customer at any other time during the contract term.

(1) Contract Expiration.

(A) (No change.)

(B) Written notice of contract expiration shall be provided in or with the customer's bill, or in a separate document.

(i) If notice is provided with a residential customer's bill, the notice shall be printed on a separate page. A statement shall be included on the outside of the envelope sent to a residential customer's billing address by mail and in the subject line on the e-mail (if the REP sends the notice by e-mail) that states, "Contract Expiration Notice. See Enclosed."

(ii) ~~[(i)]~~ If the notice is provided in or with a small commercial ~~[the]~~ customer's bill, the REP must either:

(I) include a statement on the outside of the billing envelope or in the subject line of an electronic bill that states, "Contract Expiration Notice~~;~~" or "Contract Expiration Notice. See Enclosed."; or

(II) provide on each bill the ~~[the last three bills the approximate]~~ date or the billing cycle and month that the existing contract will expire. This notice shall be conspicuous (either by font or color) and in a location close to the "amount due." In this case the bill rendered ~~30-60 days (or one to two billing cycles)~~ [14-45 days] before the contract expires shall contain the notice of contract expiration requirements in subparagraph (C) of this paragraph; ~~or[-]~~

(iii) ~~[(ii)]~~ If notice is provided in a separate document, a statement shall be included on the outside of the envelope and ~~[or]~~ in the subject line of the e-mail (if customer has agreed to receive official documents by e-mail) that states, "Contract Expiration Notice. See Enclosed" for residential customers or for small commercial customers, "Contract Expiration Notice" or "Contract Expiration Notice. See Enclosed.~~;~~"

(C) A written notice of contract expiration (whether with the bill or in a separate envelope) shall set out:

(i) (No change.)

(ii) A statement in bold lettering no smaller than 12 point font that no termination penalty shall apply 14 days prior to the date stated as the expiration date in the notice. A description and amount of any fees or charges associated with the early termination of a residential customer's fixed rate product that would apply before 14 days prior to the date stated as the expiration date in the notice. No such statements are required if there is no termination fee. ~~[No such statement is required if the customer would not be subject to a termination penalty under any circumstances.]~~

(iii) (No change.)

(iv) A copy of the EFL for the default renewal product if the customer takes no action, or if the EFL is not included with the contract expiration notice, the REP must provide the EFL to the customer at least 14 days before the expiration of the contract using the same delivery method as was used for the notice. The contract expira-

tion notice must specify how and when the EFL will be made available to the customer.

(v) - (vi) (No change.)

(2) (No change.)

(f) Terms of service document. The following information shall be conspicuously contained in the TOS:

(1) - (6) (No change.)

(7) Contract expiration notice. For a term contract, the TOS shall contain a statement informing the customer that a contract expiration notice will be sent ~~[at least 14 days]~~ prior to the end of the initial contract term. The TOS shall also state that if the customer fails to take action to ensure the continued receipt of retail electric service upon the contract's expiration, the customer will continue to be served by the REP automatically pursuant to a default renewal product, which shall be a month-to-month product.

(8) - (9) (No change.)

(g) - (i) (No change.)

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

Filed with the Office of the Secretary of State on July 30, 2009.

TRD-200903231

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Earliest possible date of adoption: September 13, 2009

For further information, please call: (512) 936-7223



CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §26.25

The Public Utility Commission of Texas (commission) proposes an amendment to §26.25, relating to Issuance and Format of Bills. The amendment will implement certain provisions of Texas House Bill 1822, 81st Leg. (2009) (HB1822), Public Utilities Regulatory Act (PURA) §§17.003(c), 17.004(a), and 17.102, pertaining to a list of defined terms common to the telecommunications industry. The proposed rule, if adopted, would require certificated telecommunications utilities (CTUs) to use specific defined terms in billing their customers. The defined terms in this amendment use "charge" to define amounts applied at the discretion of the CTU, "fee" to define amounts that are designated by a governmental agency to be used for a specific purpose, and "tax" to define amounts that are designated by a governmental agency without a designated purpose. Project Number 37215 is assigned to this proceeding.

Cliff Crouch, Retail Market Analyst, has determined that for each year of the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. Crouch has determined that for each year of the first five-year period the amendment is in effect the public benefit anticipated as a result of enforcing or administering the amendment will be that customers of CTUs will have a clearer understanding of charges on their bills. The amendment is also proposed to implement certain provisions of HB 1822. There may be economic costs to persons who are required to comply with the amendment. These costs are associated with the modifications to company billing systems and are likely to vary from business to business and are difficult to ascertain, but they are not expected to be significant. However, it is believed that the benefits accruing from the implementation of the amendment will outweigh these costs. These costs may result in an adverse economic effect on approximately 36 small businesses or micro-businesses that are incumbent local exchange companies. Additionally, there are approximately 500 competitive local exchange companies (CLECs) certificated in Texas. It is not known if all of these CLECs provide services and how many of them meet the definition of a small or micro-business, but it is expected that some of them are small or micro-businesses and will experience an adverse economic impact as a result of the amendment. The commission considered proposing a more extensive list of required terms, but concluded that benefits to customers of requiring a more extensive list would probably be outweighed by the increased implementation costs to CTUs. HB 1822 includes a deadline for adoption of rule of December 1, 2009, so the commission has not had time to conduct an extensive evaluation of the costs and benefits of various alternatives. It requests that parties that comment on the proposed rule address the question of costs and benefits of this proposal and any alternatives that are recommended in their comments.

Mr. Crouch has also determined that for each year of the first five years the amendment is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act, Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rule-making, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Wednesday, October 7, 2009. The request for a public hearing must be received within 30 days after publication.

Initial comments on the amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 31 days after publication, and reply comments may be submitted within 45 days after publication. Sixteen copies of comments on the amendment are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the rule as amended. All comments should refer to Project Number 37215.

The amendment is proposed under the Public Utility Regulatory Act, Tex. Util. Code Ann. §14.002 (Vernon 2007 & Supp. 2008) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §17.001, which directs the commission to adopt and enforce customer protection rules; §17.003(c), which requires the commission to require CTUs to give clear and understandable information to customers about rates and to use a list of defined terms; §17.004(a), which provides that customers are entitled to bills

that are presented in clear, readable and easy-to-understand language that uses terms defined in the rules adopted under §17.003; §17.102, which directs the commission to adopt and enforce rules requiring that charges on a CTU's bill be clearly and easily identified, using terms defined in the rules adopted under §17.003; and §55.016, which authorizes the commission to enforce a requirement bills for telecommunications services provide sufficient information for customers to understand the basis and source of the charges and identify all charges.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.001, 17.003(c), 17.004(a), 17.102, and 55.016.

§26.25. *Issuance and Format of Bills.*

(a) Application. The provisions of this section apply to residential-customer bills issued by all certificated telecommunications utilities (CTUs). ~~[CTUs shall comply with the changes required by this section within six months of the effective date of the section.]~~

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

(e) Bill content requirements. The following requirements apply to bills sent via the U.S. mail, or other mail service. Bills rendered via the Internet shall provide the information specified in this subsection in a readily discernible manner.

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

(3) Charges must be accompanied by a brief, clear, non-misleading, plain-language description of the service being rendered. The description must be sufficiently clear in presentation and specific enough in content to enable customers to accurately assess the services for which they are being billed. Additionally, explanations shall be provided for any non-obvious abbreviations, symbols, or acronyms used to identify specific charges. The CTU shall use the terms and definitions in paragraph (7) of this subsection to the extent they apply to the customer's bill.

(4) - (6) (No change.)

(7) Defined terms.

(A) Federal excise tax--Federal tax assessed on non-usage sensitive basic local service that is billed separately from long distance service.

(B) Federal subscriber line charge--A charge that the Federal Communications Commission (FCC) allows a CTU to impose on its customers to recover costs associated with interstate access to the local telecommunications networks. The FCC does not require a CTU company to impose this charge and the CTU does not remit the charge to the federal government. The charge may be used by the CTU to pay for a part of the cost of lines, wires, poles, conduit, equipment and facilities that provide interstate access to the local telecommunications network.

(C) Federal universal service fee--A federal fee for a fund that supports affordable basic phone service to all Americans, including schools, libraries, and rural health care providers. CTUs impose this fee to cover their required support for the fund. The fee is set by the FCC.

(D) Late payment charge--A charge assessed by a CTU when payment is not received by the due date.

(E) Municipal right-of-way fee--A fee used to compensate municipalities for the use of their rights-of-way.

(F) Municipal sales tax--Sales tax assessed by a customer's city.

(G) PUC fee--A fee assessed on the gross receipts of certain telecommunications companies to defray costs incurred in the administration of the Public Utility Regulatory Act.

(H) Texas universal service fee--A state fee for a fund that supports affordable service to customers in high-cost rural areas, funds the Relay Texas service and related assistance for the hearing-disabled, and funds telecommunications services discounts for low-income customers (Tel-Assistance and Lifeline). The fee is set by the Public Utility Commission.

(I) 9-1-1 fee--A fee used to fund the 9-1-1 telephone network that allows callers to reach a public safety agency when they dial the digits "9-1-1". The amount of the fee varies by region and is set by the Texas Commission on State Emergency Communications.

(J) 9-1-1 equalization fee--A fee used to provide financial support for regions where the 9-1-1 fee does not fully offset the of 9-1-1 service. The fee is imposed on each customer receiving intrastate long-distance service. The fee is set by the Texas Commission on State Emergency Communications.

(f) (No change.)

(g) Effective date. The amendments to this section adopted in 2009 are effective (90 days after adopted by the commission).

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

Filed with the Office of the Secretary of State on July 30, 2009.

TRD-200903227

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Earliest possible date of adoption: September 13, 2009

For further information, please call: (512) 936-7223



TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER E. APPROVAL OF DISTANCE EDUCATION, OFF-CAMPUS, AND EXTENSION COURSES AND PROGRAMS FOR PUBLIC INSTITUTIONS

19 TAC §§4.101 - 4.108

(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 Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of §§4.101 - 4.108, concerning Approval of Distance Education, Off-Campus, and Extension Courses and Programs for Public Institutions. Specifically, this repeal will allow Board staff to revise and divide information from Subchapter E in order to clarify requirements Texas institutions of higher education must meet in order to deliver distance education courses and programs, and to deliver off-campus and on-campus self-supporting courses and programs.

Dr. MacGregor M. Stephenson, Assistant Commissioner for Academic Affairs and Research, has determined that for each year of the first five years the repeal is in effect, there will be no fiscal implications to state or local government as a result of the repeal as proposed.

Dr. Stephenson has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of administering the sections will be negligible. There will be no anticipated effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There will be no impact on local employment.

Comments on the proposed repeal may be submitted to Dr. MacGregor M. Stephenson, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or macgregor.stephenson@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The repeal is proposed under the Texas Education Code, Chapter 61, Subchapter C, §61.051, which provides the Coordinating Board with the authority to coordinate institutions of higher education.

The repeal affects implementation of Texas Education Code, Subchapter C, §61.051(j).

§4.101. *Purpose.*

§4.102. *Authority.*

§4.103. *Definitions.*

§4.104. *General Provisions.*

§4.105. *Functions of Regional Councils*

§4.106. *Institutional Report for Distance Education, Off-Campus Instruction, and On-Campus Extension Programs.*

§4.107. *Standards and Criteria for Distance Education, Off-Campus Instruction, and On-Campus Extension Courses and Programs.*

§4.108. *Non-Formula-Funded (Extension) Course and Program General Provisions.*

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

Filed with the Office of the Secretary of State on August 3, 2009.

TRD-200903268

Bill Franz

General Counsel

Texas Higher Education Coordinating Board

Proposed date of adoption: October 29, 2009

For further information, please call: (512) 427-6114

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CHAPTER 9. PROGRAM DEVELOPMENT IN
PUBLIC TWO-YEAR COLLEGES
SUBCHAPTER H. PARTNERSHIPS BETWEEN
SECONDARY SCHOOLS AND PUBLIC
TWO-YEAR COLLEGES

19 TAC §9.144

The Texas Higher Education Coordinating Board proposes amendments to §9.144, concerning Partnership Agreements for the purpose of complying with Texas Education Code §130.008(d) and (d-1). Passage of House Bill 2480 during the regular session of the 81st Texas Legislature amended Texas Education Code §130.008(d) and (d-1) by adding language that permits a public community college to enter into an agreement with a high school located in the service area of another public community college to offer a dual credit course only if the local public community college is unable to provide the requested course to the satisfaction of the school district and has been invited to do so by the ISD.

Dr. MacGregor M. Stephenson, Assistant Commissioner for Academic Affairs and Research, has determined that for each year of the first five years the amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Dr. Stephenson has also determined that for each year of the first five years the amendments are in effect, the high schools desiring to enter into agreements with public community colleges for the provision of dual credit courses will be able to partner with colleges regardless of the college area in which the high school is located. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposed rule amendments may be submitted to Dr. MacGregor M. Stephenson, Assistant Commissioner, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711 or macgregor.stephenson@thehb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the provisions of Texas Education Code, §§61.027, 61.061, and 61.062(c) and Chapter 61, Subchapter G, which provides the Coordinating Board with the authority to regulate the awarding or offering of degrees, credit toward degrees, and the use of certain terms.

The proposed amendments affect implementation of Texas Education Code, Chapter 130, Subchapter A, §130.008 (d) and (d-1).

§9.144. *Partnership Agreements.*

(a) A public community college may enter into an agreement to offer only a dual credit course with a high school located in the service area of another public community college only if the other public community college is unable to provide the requested course to the satisfaction of the school district and the school district has explicitly invited the institution to do so.

(b) ~~(a)~~ Need For Partnership Agreement. For any instructional partnership between a secondary school and a public two-year college, an agreement must be approved by the governing boards or

designated authorities of both the public school district or private secondary school and the public two-year college.

(c) ~~(b)~~ Elements of Partnership Agreements. Any partnership agreement as described in §9.143 of this title (relating to Types of Partnerships) must address the following elements:

- (1) student eligibility requirements;
- (2) faculty qualifications;
- (3) location and student composition of classes;
- (4) provision of student learning and support services;
- (5) eligible courses;
- (6) grading criteria;
- (7) transcribing of credit; and
- (8) funding provisions.

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

Filed with the Office of the Secretary of State on August 3, 2009.

TRD-200903269

Bill Franz

General Counsel

Texas Higher Education Coordinating Board

Proposed date of adoption: October 29, 2009

For further information, please call: (512) 427-6114

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TITLE 22. EXAMINING BOARDS

**PART 10. TEXAS FUNERAL SERVICE
COMMISSION**

**CHAPTER 203. LICENSING AND
ENFORCEMENT--SPECIFIC SUBSTANTIVE
RULES**

22 TAC §203.6

The Texas Funeral Service Commission (Commission) proposes an amendment §203.6, concerning Provisional Licensees. The Commission is adding a new subsection (o) to the section.

A college of mortuary sciences ("college") in the State of Texas has been threatened with the loss of accreditation. Section 651.253(a)(3), Texas Occupations Code specifically states that for a person to be eligible to receive a funeral director's license or an embalmer's license from the Texas Funeral Service Commission, the person must have graduated from an accredited school or college of mortuary science. Therefore, pursuant to current law, if the college loses its accreditation, a person who graduates during the period after the college loses its accreditation but before accreditation is regained will not be eligible to receive a funeral director's license or an embalmer's license from the state of Texas. However, under the provisions of §651.302, Texas Occupations Code, the Commission believes that it does have the flexibility to continue to issue provisional licenses for embalming and funeral directing to students at the college during the time that the college's accreditation has lapsed (if it does) and is proposing new subsection (o) to

assist students at the college by exercising that flexibility. On the other hand, so that there is no misunderstanding that the requirements of §651.253, Texas Occupations Code cannot be changed by rule of the Commission, the Commission is requiring any student who applies for the provisional program under these circumstances to acknowledge prior to entering the provisional program that the student understands that she or he may not be licensed as a funeral director or embalmer if the college does not regain its accreditation during an appropriate period of time.

O. C. "Chet" Robbins, Executive Director, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implication for the state or local governments as a result of enforcing or administering the amended rule.

Mr. Robbins has determined that for each year of the first five years the proposed amendment is in effect, the public benefit will be to allow some students who might otherwise have been disadvantaged by the loss of accreditation by the college they are attending to enter provisional license status. There will be no effect on small or micro businesses. There are no anticipated costs to individuals for compliance with this amended rule.

Mr. Robbins 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, Texas Government Code.

Mr. Robbins has determined that this proposal is not a "major environmental rule" as defined by §2001.0225, 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 environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of the state or a sector of the state.

Mr. Robbins has determined that a local employment impact statement is not required because the proposal does not adversely affect any local economy in a material way.

Comments on the proposal may be submitted to Mr. Robbins at P.O. Box 12217, Capitol Station, Austin, Texas 78711-1440; by fax to (512) 479-5064; or electronically to chet.rob-bins@tjsc.state.tx.us.

The amendment to §203.6 is proposed under Texas Occupations Code, §651.152. The Commission interprets Texas Occupations Code, §651.152 as authorizing it to adopt rules and forms as necessary to administer Chapter 651.

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

§203.6. *Provisional Licensees.*

(a) - (n) (No change.)

(o) While, pursuant to §651.253, Texas Occupations Code, a person is not eligible for a funeral director's or embalmer's license from the commission unless the person shall have graduated from an accredited school or college of mortuary science, the commission may, pursuant to §651.302, Texas Occupations Code, issue a provisional license to practice funeral directing or embalming to a person who is enrolled in a school or college of mortuary science that has lost its accreditation if the school or college or mortuary science was accredited at the time the student enrolled. The commission will not issue such a provisional license to practice funeral directing or embalming unless the person signs an acknowledgement that the person understands that the person

is not eligible for a funeral director's or embalmer's license unless the school or college of mortuary science regains its accreditation during the maximum 24 consecutive months provided by subsection (c) of this section.

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

Filed with the Office of the Secretary of State on July 30, 2009.

TRD-200903223

O. C. "Chet" Robbins

Executive Director

Texas Funeral Service Commission

Earliest possible date of adoption: September 13, 2009

For further information, please call: (512) 936-2466



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER P. SURVEILLANCE AND CONTROL OF BIRTH DEFECTS

25 TAC §§37.301 - 37.306

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§37.301 - 37.306, concerning the surveillance and control of birth defects.

BACKGROUND AND PURPOSE

The birth defects program was established by Health and Safety Code, Chapter 87, to monitor birth defects; to collect reports of and maintain a registry of birth defects; and to conduct "investigations to determine the nature and extent of the disease, or the known or suspected cause of the birth defect and to formulate and evaluate control measures to protect the public health."

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 37.301 - 37.306 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Amendments to §§37.301, 37.302, 37.304, and 37.306 clarify and improve the rule language in order to strengthen the requirements of the program. The amendment to §37.303(10)(I) adds "a clinical or medical laboratory" to the types of health facility definitions. Amendments to §37.303(14) and §37.305(d) add new language to provide guidance for remote electronic access active data collection.

FISCAL NOTE

Lucina Suarez, Ph.D., Director, Environmental Epidemiology and Disease Registries Section, has determined that for the first

five-year period the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed, because there is no cost impact to state or local government.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO-BUSINESSES

Dr. Suarez has also determined that there will be no adverse economic impact on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. An economic impact statement and regulatory flexibility analysis are not required.

ECONOMIC IMPACT TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

PUBLIC BENEFIT

In addition, Dr. Suarez has also determined that for each year of the first five years the sections are in effect, the public will benefit by added clarity to the definitions. The amendments allow the department to collect data in a more efficient and convenient manner. The amendments clarify the department's policies and procedures regarding access to data and the allowed research use of the data.

In adopting the rules which cover this program, the department has considered the known incidence and prevalence rates of birth defects in the state; the known incidence and prevalence rates of particular birth defects in specific population groups who live in the state or portions of the state; the morbidity and mortality resulting from these birth defects; and the existence, cost, and availability of a strategy to prevent and treat these birth defects.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from 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 environmental exposure.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Mark Canfield, Ph.D., Department of State Health Services, MC 1964, P.O. Box 149347, 1100 West 49th Street, Austin, Texas 78714-9347, telephone (512) 458-7232, fax (512) 458-7330. Comments will be

accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §87.001, which allows the department to specify which health facilities are required to report information on birth defects; §87.021(d), which requires the department to adopt rules to govern the operation of the program and carry out the intent of the statute; §87.022(b) and (c), which requires the department to adopt rules on how information is made available to the department; §87.063(a), which requires the department to adopt rules to establish criteria to be used in deciding if research which proposes to use birth defect data should be approved; and the Government Code, §531.0055, and 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. Review of the rules implements Government Code, §2001.039.

The amendments affect Health and Safety Code, Chapters 87 and 1001; and Government Code, Chapter 531.

§37.301. Purpose.

These sections implement the provisions of Health and Safety Code, Chapter 87, [to the Health and Safety Code. Chapter 87] that provides [the Texas Board of Health with] the authority to adopt rules relating to the surveillance and control of birth defects. The legislation directs the Texas Department of Health to develop a statewide surveillance program. The Texas Department of Health and the Texas Board of Health were abolished by Chapter 198, §§1.18 and 1.26, 78th Legislature, Regular Session, 2003. Health and Safety Code, Chapter 1001, establishes the Department of State Health Services (department), which now administers these programs. Government Code, §531.0055, provides authority to the Executive Commissioner of the Health and Human Services Commission to adopt rules for the department.

§37.302. Policy.

(a) The department, recognizing the sensitive and confidential nature of information collected regarding birth defects and their possible causes, expects [shall expect] all staff to carry out all duties in a professional, compassionate, and culturally sensitive manner.

(b) The department shall [It is the policy of the program to] limit medical researcher contact with individuals and families identified by the central registry to only those studies with high scientific merit with no feasible alternate means of conducting the study.

(c) The department shall [It is also the policy of the program to] protect patient information from disclosure through the legal process and Government Code, Chapter 552.

§37.303. Definitions.

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

(1) - (9) (No change.)

(10) Health facility--Any of the following types of facility:

(A) - (F) (No change.)

(G) a physician peer review organization; [ø]

(H) a birthing center; or [-]

(I) a clinical or medical laboratory.

(11) - (13) (No change.)

(14) Surveillance--The systematic collection, analysis, interpretation, and dissemination of health data on an ongoing basis.

(A) Active surveillance--program staff regularly contact or visit data sources, or use remote electronic access, to find and collect data on cases.

(B) (No change.)

(15) (No change.)

§37.304. Confidentiality of Information Provided to the Department.

(a) (No change.)

(b) The department may release demographic, medical, epidemiological, or toxicological information:

(1) (No change.)

[~~2~~] ~~to the case management program of the department for guidance in applying for financial or medical assistance available through existing state and federal programs, if appropriate;~~

[~~2~~] [~~3~~] with the consent of each person identified in the information or, if the person is unable to consent or is a minor, the minor's parents, managing conservator, guardian, or other person who is legally authorized to consent;

[~~3~~] [~~4~~] to medical personnel, appropriate state agencies, health authorities, regional directors, and public officers of counties and municipalities relating to the identification, monitoring, and referral of children with birth defects;

[~~4~~] [~~5~~] to appropriate federal agencies such as the Centers for Disease Control and Prevention of the United States Public Health Service;

[~~5~~] [~~6~~] to medical personnel to the extent necessary to protect the health or life of the child identified in the information; or

[~~6~~] [~~7~~] to medical researchers conducting bona fide medical research under the conditions described in §37.306 of this title (relating to Access to Information in the Central Registry), and Health and Safety Code, §87.063.

§37.305. Surveillance of Birth Defects: Central Registry.

(a) - (c) (No change.)

(d) Interaction between department staff and health facility staff [at facilities] is detailed below:

(1) The chief operating officer, administrator, manager, director, and/or person in charge of each facility or office or center shall appoint one staff member as the contact person for the central registry surveillance activities. That staff member will coordinate scheduled visits and/or remote electronic access by central registry staff to review logs, discharge indices and other case-finding sources, and will be responsible for arranging visits and/or remote electronic access for medical records review [visits] and providing the needed records at the time [øf the] scheduled [visit].

(2) (No change.)

(3) Central registry staff and the contact individual shall establish a general schedule of visits and/or remote electronic access

for case-finding and record review [visits]. This schedule shall take into account the capabilities of the health care facility in responding to requests, as well as the expected needs of the central registry workload.

(e) (No change.)

§37.306. Access to Information in the Central Registry.

(a) (No change.)

(b) After the program manager receives the completed request for information, the protocol will be reviewed by a program review panel. The panel shall consist of the program manager, the unit manager, and a departmental epidemiologist. Upon approval by the program panel, the protocol shall be evaluated and judged by the department's institutional review board. Final approval of the protocol shall require the approval of both the program panel and the institutional review board and shall be based on an evaluation of the criteria listed in subsection (c) of this section. The department's institutional review board shall evaluate the research based on federal regulations found in Title 45, Code of Federal Regulations, Chapter 46.

(c) - (i) (No change.)

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

Filed with the Office of the Secretary of State on July 30, 2009.

TRD-200903219

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: September 13, 2009

For further information, please call: (512) 458-7111 x6972



CHAPTER 61. CHRONIC DISEASES

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§61.1 - 61.4, 61.6 - 61.9, 61.13, and 61.14, and new §§61.1 - 61.11 concerning Kidney Health Care (KHC).

BACKGROUND AND PURPOSE

The program for KHC serves Texas residents with end-stage renal disease (ERSD) diagnosis, who are not Medicaid eligible. The program contracts with providers to deliver covered services, including Medicare Part D premiums, deductibles, and co-insurance, travel reimbursement for ESRD related services, and allowable dialysis and access surgery benefits.

The proposed repeals and new rules strengthen eligibility requirements for benefits, reorganize and update information, delete and revise language, and make grammatical corrections to improve flow, accuracy, and clarity.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 61.1 - 61.4, 61.6 - 61.9, 61.13, and 61.14 have been reviewed, and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

New §61.1 groups the terms "purpose," "confidentiality of information," and "forms" together.

New §61.2 includes new definitions for terms used in this subchapter which include administrative review; client; date of service; denial; effective date; filing deadline; KHC formulary; low income subsidy; medical benefit; Medicare advantage plan; Medicare Part A; Medicare Part B; Medicare Part D; Medicare Prescription Drug Plan; Medigap plan; modification; program; qualified individual and Medicare beneficiary; reimbursement; specified low income Medicare beneficiary, and termination.

New §61.3 clarifies client eligibility requirements, financial criteria, and residency requirements.

New §61.4 clarifies the client application process and eligibility dates requirements.

New §61.5 clarifies existing language, includes new language regarding access to benefits by Veterans Administration clients, and sets out conditions for KHC benefits and limitations.

New §61.6 clarifies provider enrollment criteria and effective dates.

New §61.7 includes language regarding claims submission and payment rates.

New §61.8 includes language regarding claims filing deadlines.

New §61.9 includes language regarding rights and responsibilities for applicants, clients, and providers.

New §61.10 includes language regarding modifications, suspensions, denials, and terminations for applicants, clients, and providers.

New §61.11 restores language regarding the appeal process and describes the process for administrative reviews and fair hearing requests.

FISCAL NOTE

Jann Melton-Kissel, RN, MBA, Director, Specialized Health Services Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal impact to state or local governments as a result of enforcing and administering the sections as proposed. The repeals and new sections are intended to clarify, update, and strengthen the subchapter, and are not anticipated to be controversial or have significant fiscal impact to the department or local government.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO-BUSINESSES

Ms. Melton-Kissel has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed, because neither small businesses nor micro-businesses that are providers of the KHC program will be required to alter their business practices in order to comply with the sections, and an economic impact statement and regulatory flexibility analysis are not required.

ECONOMIC COST TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

PUBLIC BENEFIT

Ms. Melton-Kissel has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is improved accuracy and consistency in the rules, and more accurate interpretation of their intent. In addition, the new rules will allow the program to function more efficiently and effectively.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted by mail to Kathleen Ford, Purchased Health Services Unit, MC 1938, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347; by telephone at (512) 458-7111, extension 6836; or by email to kathleen.ford@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER A. KIDNEY HEALTH CARE PROGRAM

25 TAC §§61.1 - 61.4, 61.6 - 61.9, 61.13, 61.14

(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 Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §42.003(c), which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules necessary to carry out Chapter 42 and to provide adequate kidney care and treatment for the citizens of this state; and Government Code, §531.0055(e), and the 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. Review of the sections implements Government Code, §2001.039.

The repeals affect Government Code, Chapter 531; and Health and Safety Code, Chapters 42 and 1001.

§61.1. *General.*

§61.2. *Recipient Requirements.*

§61.3. *Residency and Residency Documentation Requirements.*

§61.4. *Applications.*

§61.6. *Limitations and Benefits Provided.*

§61.7. *Claims Submission and Payment Rates.*

§61.8. *Claim Filing Deadlines.*

§61.9. *Participating Providers.*

§61.13. *Forms.*

§61.14. *Confidentiality of Information.*

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

Filed with the Office of the Secretary of State on July 30, 2009.

TRD-200903220

Lisa Hernandez

General Counsel

Department of State Health Services

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For further information, please call: (512) 458-7111 x6972



SUBCHAPTER A. KIDNEY HEALTH CARE

25 TAC §§61.1 - 61.11

The new rules are authorized by Health and Safety Code, §42.003(c), which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules necessary to carry out Chapter 42 and to provide adequate kidney care and treatment for the citizens of this state; and Government Code, §531.0055(e), and the 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. Review of the sections implements Government Code, §2001.039.

The new rules affect Government Code, Chapter 531; and Health and Safety Code, Chapters 42 and 1001.

§61.1. *General.*

(a) Purpose. The purpose of this subchapter is to establish rules for the Kidney Health Care (KHC) program. The authority for these rules is granted in the Texas Health and Safety Code, Chapter 42.

(b) Confidentiality of Information.

(1) All information submitted, as required by this subchapter, may be verified at the discretion of the Department of State Health Services (department) with or without notice to applicants, clients, or

providers of KHC benefits or services. This information is confidential to the extent authorized by law.

(2) Information may be disclosed in summary, statistical, or other forms that do not identify particular individuals.

(c) Forms. The program provides approved forms to applicants, clients, and providers.

§61.2. *Definitions.*

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

(1) Access surgery--The surgical procedure which creates or maintains the access site necessary to perform dialysis.

(2) Action--A suspension, modification, denial, or termination of KHC eligibility, benefits, or participation.

(3) Administrative review--A process that allows applicants, clients, or providers the opportunity to request an informal review of any intended program action that would suspend, modify, deny, or terminate their eligibility, benefits or participation in the program.

(4) Allowable amount--The maximum amount that the program will pay or reimburse for a covered benefit or service.

(5) Applicant--An individual who has submitted an application for KHC benefits and has not received a final determination of eligibility.

(6) Claim--A request for payment or reimbursement of services.

(7) Client--A person who has applied for program services and who meets all KHC eligibility requirements and is determined to be eligible for program services.

(8) CMS--The Centers for Medicare and Medicaid Services.

(9) Co-insurance--A cost-sharing arrangement in which a covered person is responsible for paying a specified percentage of the charge for a covered service or product.

(10) Commissioner--The commissioner of the Department of State Health Services.

(11) Co-pay/Co-payment--A cost-sharing arrangement in which a covered person is responsible for paying a specified or fixed charge for a covered service or product.

(12) CRNA--Certified registered nurse anesthetist.

(13) Date of service (DOS)--The date a service is rendered.

(14) Denial--An action by the program that disallows program eligibility, benefits, or administrative review requests.

(15) Department--Department of State Health Services.

(16) Effective date--The initial date of eligibility for a KHC client or provider.

(17) End-Stage Renal Disease (ESRD)--The final stage of renal impairment that requires dialysis and/or kidney transplant to reduce uremic symptoms and/or prevent the death of the patient.

(18) EOB--A form, in paper or electronic format, which provides an explanation of benefits. It is used to explain a payment or denial of a claim.

(19) Fair hearing--The informal hearing process the department follows under §§1.51 - 1.55 of this title (relating to Fair Hearing Procedures).

(20) Filing deadline--The last date that a claim may be received by the program and still be considered eligible for benefit.

(21) Final decision--A decision that is made by a decision maker after conducting a fair hearing under §§1.51 - 1.55 of this title.

(22) Interim approval--The status given by the program to an outpatient dialysis facility, free-standing or hospital-based, which has applied for participation as a KHC provider but has not executed an agreement with the program.

(23) KHC--Kidney Health Care.

(24) KHC formulary--A list of general therapeutic categories of drugs, over-the-counter products, and limited diabetic supplies that are covered for reimbursement by the program.

(25) Low Income Subsidy (LIS)--The subsidy provided under the Medicare Prescription Drug, Improvement and Modernization Act (MMA) of 2003 for Medicare Part D plan premiums and related costs, at varying levels, for some low-income Medicare beneficiaries.

(26) Medical benefit--Any medical treatment or procedure approved by the program as a covered service.

(27) Medicare Advantage Plan--A Medicare health plan that is similar to a health maintenance organization, participating provider organization, or other Medicare health plan, and includes medical, drug coverage and other benefits.

(28) Medicare Part A--Hospital insurance for people age 65 or older, or under age 65 with certain disabilities, that helps cover inpatient hospital stays, care in a skilled nursing facility, hospice care, and some home health care.

(29) Medicare Part B--Health insurance for people age 65 or older, or under age 65 with certain disabilities, and any age with ESRD, that helps cover medically necessary services, such as doctors' services and outpatient care, and some preventive services.

(30) Medicare Part D--Established by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), it provides members with prescription drug coverage, expanded health plan options, improved health care access for rural Americans, and preventive care services.

(31) Medicare Part D out-of-pocket expenses--Include premiums, deductibles, and co-insurance amounts.

(32) Medicare Part D Premium--The amount paid monthly under a Medicare Part D contract to insure coverage.

(33) Medicare Prescription Drug Plan (PDP)--A stand-alone drug plan offered by insurers and other private companies to individuals eligible for Medicare Part D.

(34) Medigap plan--A Medicare supplement insurance policy sold by private insurance companies to fill "gaps" in Medicare coverage.

(35) Modification--A change made to a client's record that affects a program benefit or eligibility status.

(36) Program--Kidney Health Care Program.

(37) Provider--Any individual or entity approved by the program to furnish covered services to KHC clients including:

(A) outpatient dialysis facilities;

(B) out-of-state outpatient dialysis facilities;

(C) hospitals and ambulatory surgical centers (ASCs) located in Texas and operating in compliance with applicable law;

(D) out-of-state hospitals and ASCs;

(E) military or Veterans Administration hospitals located in Texas which have a renal unit approved by the Joint Commission on Accreditation of Healthcare Organizations or the American Osteopathic Association;

(F) pharmacies approved as Texas Medicaid providers and licensed to operate within the United States and its territories, including mail order pharmacies;

(G) physicians and certified registered nurse anesthetists (CRNAs) licensed in Texas;

(H) out-of-state physicians and CRNAs; and

(I) Medicare Prescription Drug Plan (PDP) and Medicare Advantage Plan (MA-PD) providers.

(38) Qualified Individual (QI)--A Medicaid program for beneficiaries who need help in paying for Medicare Part B premiums. The beneficiary must have Medicare Part A and limited income and resources and not be otherwise eligible for Medicaid. For those who qualify, the Medicaid program pays full Medicare Part B premiums only.

(39) Qualified Medicare Beneficiary (QMB)--A Medicaid program for beneficiaries who need help in paying for Medicare services. The beneficiary must have Medicare Part A and limited income and resources. For those who qualify, the Medicaid program pays Medicare Part A premiums, Part B premiums, and Medicare deductibles and coinsurance amounts for Medicare services.

(40) Reimbursement--Payment of a claim for allowable services or transportation.

(41) Reimbursement rate--The KHC payment rate for allowable products, services, and transportation determined annually for the following fiscal year.

(42) Specified Low Income Medicare Beneficiary (SLMB)--A Medicaid program that pays for Medicare Part B premiums for individuals who have Medicare Part A, a low monthly income, and limited resources.

(43) Suspension--Eligibility for benefits which is held without final action pending satisfaction of a program request or requirement.

(44) Termination--A final action by the program, which ends client or provider participation in the KHC program.

§61.3. Client Eligibility Requirements.

(a) A person shall meet all of the following requirements to be eligible for KHC benefits:

(1) have a diagnosis of ESRD; and

(A) require a regular course of chronic renal dialysis treatments; or

(B) have received a kidney transplant;

(2) satisfy the Texas residency criteria as specified in subsection (b) of this section and not be:

(A) in the custody of or incarcerated by a city, county, state, or federal entity; or

(B) a ward of the state;

(3) not be eligible for drug, transportation, and medical benefits under the Texas Medicaid Program;

(4) submit a complete application for benefits; and

(5) satisfy the financial criteria as specified in subsection (c) of this section.

(b) Residency Requirements.

(1) The following conditions must be met by an applicant and maintained by a client to satisfy the residency requirements in this section:

(A) physically reside within the state; and

(B) maintain a home or dwelling within the state.

(2) If the applicant is residing with a person establishing residency on behalf of the applicant (such as a parent, legal guardian, managing conservator, sibling, adult child, or spouse), then that person must meet all of the requirements of paragraph (1) of this subsection.

(3) All documents acceptable to meet residency requirements, as specified by the program, must be in the applicant's name, or in the name of the person establishing residency for the applicant, provide some verification of a Texas address or domicile, and be in English or be accompanied by an accurate English translation.

(c) Financial Criteria. The applicant or the person(s) who has a legal obligation, as defined by state law, to support the applicant must have an annual gross income of less than \$60,000. Income reported as "joint income" is considered as one income.

(d) Maintenance of Benefits Eligibility.

(1) A client must meet the following requirements within the first 3 months of KHC eligibility:

(A) apply for medical, drug, and transportation benefits and Medicare Savings Plans (QMB, SLMB and QI) under Title XIX, Social Security Act (Medicaid);

(B) apply for Medicare hospital and medical benefits under Title XVIII, Social Security Act (Medicare);

(C) enroll in Medicare Part D benefits and apply for Low Income Subsidy under the Medicare Prescription Drug Improvement and Modernization Act of 2003, if Medicare eligible;

(D) provide authorization for Medicare premium payments by the program as specified in §61.5 of this title (relating to Benefits and Limitations), if obligated to pay the Part A premium.

(2) A client must meet the following requirements to continue benefit eligibility:

(A) continue premium payments on health insurance plans under Medicare, individual or group health insurance plans, and prepaid medical plans, where enrollment was effective prior to KHC eligibility;

(B) re-apply for LIS annually;

(C) re-apply for Medicaid annually;

(D) re-apply for Medicare hospital and medical benefits as requested by the program if there are changes in the client's status that would make the client potentially eligible for Medicare benefits; and

(E) notify the program within 30 days of changes in the following:

(i) permanent home address;

(ii) treatment status;

(iii) insurance coverage; and

(iv) location of treatment.

§61.4. Applications.

Persons meeting the eligibility requirements set forth in §61.3(a) - (c) of this title (relating to Client Eligibility Requirements) must make a complete application for benefits.

(1) A complete application must include all of the following:

(A) a complete and notarized Application for Benefits, with the applicant's, or the applicant's representative's, original signature or "mark;"

(B) a copy of the completed, signed and dated Centers for Medicare and Medicaid Services (CMS) End-Stage Renal Disease Medical Evidence Report;

(C) documentation of Texas residency as required by §61.3 of this title;

(D) a copy of the applicant's social security card issued by the Social Security Administration (SSA), or an allowable substitute, as follows:

(i) a copy of a SSA document which verifies the social security number; or

(ii) a copy of a valid Medicare card, if the Medicare account is established in the applicant's own social security number and the social security number is printed on the Medicare card.

(E) applicant's financial data. The applicant or the person(s) legally obligated to support the applicant must verify income by providing one of the following:

(i) a copy of the first page of the federal individual income tax return for the most recent tax year; or

(ii) a statement of estimated or declared income for the current tax year, and supporting documentation, if requested.

(2) Incomplete application. An application which does not meet all of the requirements of paragraph (1) of this section is incomplete. Incomplete applications may be returned to the submitting person or entity for correction or completion.

(3) Eligibility date for KHC benefits. The KHC eligibility date is the date the program receives a complete application.

(4) If KHC benefits are terminated, the eligibility date for any subsequent benefit period is the date the program receives a subsequent complete application for KHC benefits.

(5) An applicant whose eligibility for benefits is denied may appeal under §61.11 of this title (relating to Rights of Appeal).

§61.5. Benefits and Limitations.

(a) Benefits.

(1) Outpatient drugs and drug products listed on the current KHC formulary.

(2) Transportation reimbursement for ESRD-related medical services.

(3) Medical benefits, including:

(A) access surgery-related services; and

(B) chronic maintenance dialysis.

(4) Medicare Part A and B premium payment. To qualify for this benefit, clients must:

- (A) be 65 years of age or older;
- (B) be accepted for Medicare hospital and medical insurance;
- (C) be obligated to pay the Part A premium;
- (D) not be eligible for the following types of Medicare savings programs:

- (i) QMB;
- (ii) SLMB; or
- (iii) QI; and

(E) promptly submit all Medicare premium due notice statements to the program for payment.

(5) Medicare Part B immunosuppressive drug co-insurance amounts. To qualify for this benefit, clients must:

- (A) be eligible for KHC drug benefits;
- (B) be accepted for Medicare hospital and medical insurance;
- (C) enroll in a Texas Medicare Part D Stand-Alone Plan;
- (D) not be enrolled in a Medigap plan;
- (E) not be enrolled in a Medicare Advantage Plan with drug coverage; and

(F) not be eligible for the following types of Medicare Savings Programs:

- (i) QMB;
- (ii) SLMB; or
- (iii) QI.

(6) Limited Medicare Part D out-of-pocket expenses. To qualify for this benefit, clients must:

- (A) be eligible for KHC drug benefits;
- (B) be accepted for Medicare Part D benefits;
- (C) enroll in a Texas Medicare Part D stand-alone plan;
- (D) not be eligible for LIS from Medicare that covers full premium and deductible amounts; and
- (E) not be enrolled in a Medicare Advantage Plan with drug coverage.

(7) Benefits are payable beyond the qualifying period for eligible clients who have applied for and have been denied Medicare coverage based on ESRD. Clients must submit a copy of the official Social Security Administration Medicare denial notification (based on chronic renal disease) to the department.

(b) Limitations.

(1) Only out-of-state providers approved by the program may provide covered services and KHC allowable drugs.

(2) Covered services are limited to a maximum allowable amount per client based upon:

- (A) available funds;

(B) established limits for covered services by type or category;

(C) an agreement between the department and the client's provider;

(D) the reimbursement rates established by the department;

(E) any co-payment or co-insurance applied to client service benefits; and

(F) any third-party liability.

(3) Clients eligible for drug coverage under an individual or group health insurance plan are not eligible to receive KHC drug benefits. A client that has exhausted drug coverage under an individual or group health insurance plan may be eligible to receive drug benefits from the program.

(4) Access surgery benefits are payable only if the services are performed on or after the date Texas residency is established and not more than 180 days prior to the client's KHC eligibility effective date.

(5) KHC medical benefits are payable during the Medicare three-month qualifying period. Benefits are payable for services received on or after the client's KHC eligibility effective date. The three-month qualifying period is calculated from the first day of the month the client begins chronic maintenance dialysis. When a client becomes eligible for Medicare during the three-month period, KHC medical benefits are not payable from the date of Medicare eligibility.

(6) Transportation reimbursement is available from the first day of the month following the KHC eligibility effective date for in-center dialysis clients or from the KHC effective date for transplant and home peritoneal dialysis clients.

(7) Clients eligible for hospital and medical benefits from Medicare, or other government programs which cover the treatment of ESRD are not eligible to receive KHC medical benefits.

(8) Clients receiving services, including access surgery, dialysis, or drug benefits through the Veterans Administration (VA) or the military may not be eligible to receive these services through the program, depending on the client's access to VA or military services.

(9) Clients eligible for hospital and medical benefits from private/group health insurance which covers the treatment of ESRD are not eligible for KHC medical benefits.

(10) The program is the payor of last resort. All third parties must be billed prior to the program. The Commissioner may waive this requirement in individually considered cases where its enforcement will deny services to a class of ESRD patients because of conflicting state or federal laws or regulations, under the Texas Health and Safety Code, §42.009.

(11) If budgetary limitations exist, the department may:

(A) restrict or categorize covered services. Categories will be prioritized based upon medical necessity, other third party eligibility and projected third party payments for the different treatment modalities, caseloads, and demands for services. Caseloads and demands for services may be based on current and/or projected data. In the event covered services must be reduced, they will be reduced in a manner that takes into consideration medical necessity and other third party coverage. The department may change covered services by adding or deleting specific services, entire categories or by making changes proportionally across a category or categories, or by a combination of these methods; or

(B) establish a waiting list of eligible applicants. Information will be collected from each applicant who is placed on a waiting list to facilitate contacting the applicant when benefits become available and to allow efficient enrollment of the applicant for benefits.

§61.6. Provider Requirements and Effective Dates.

(a) Requirements.

(1) Outpatient dialysis facilities must:

(A) execute an agreement with the program;

(B) have Medicare certification and a Medicare ESRD provider number;

(C) be a current Texas Medicaid provider;

(D) be licensed by the department as an ESRD facility;

(E) reimburse the program for any overpayments upon request; and

(F) not be on suspension as a KHC provider, as a Texas Medicaid provider, as a Medicare certified ESRD facility, or as a licensed Texas ESRD facility.

(2) An out-of-state outpatient dialysis facility must:

(A) meet all the requirements in paragraph (1)(A) - (C) and (E) of this subsection;

(B) be licensed by its state, if applicable;

(C) be a Medicaid provider in its state; and

(D) not be on suspension as a KHC provider, as a Texas Medicaid provider, as a Medicaid provider in its state, as a Medicare-certified ESRD facility, or by the ESRD licensing authority of its state.

(3) Any outpatient dialysis facility may be given interim approval according to the following:

(A) client applications for KHC benefits may be submitted by the facility during the period of interim approval.

(B) interim approval extends no longer than six months from the date the program mails the agreement to the facility.

(C) if interim approval lapses, the unexecuted agreement is nullified and a new agreement with term dates and the period of interim approval may be initiated by the program.

(D) claims for outpatient dialysis services shall not be considered for payment by the program until the program has a fully executed agreement with the facility.

(E) claim filing deadlines apply, as contained in §61.8 of this title (relating to Claim Filing Deadlines).

(4) A pharmacy, including a mail order pharmacy, must execute an agreement as a KHC provider through the Health and Human Services Commission Pharmacy Contracts and Rebates unit or designated contractor.

(5) A physician or CRNA must:

(A) execute an agreement with the program;

(B) be licensed to practice medicine in the State of Texas, if a physician;

(C) be certified to practice within the scope of his or her certification in the State of Texas, if a CRNA;

(D) be a Texas Medicaid provider;

(E) not be on suspension as a KHC provider, as a physician licensed to practice medicine in the State of Texas, as a CRNA certified to practice within the scope of the certification in the State of Texas, or as a Texas Medicaid provider; and

(F) reimburse the program for any overpayments upon request.

(6) An out-of-state physician and a CRNA must:

(A) meet all the requirements in paragraph (5)(A), (D) and (F) of this subsection;

(B) be licensed to practice medicine in the state in which services are provided, if a physician; or

(C) be certified to practice within the scope of his or her certification in the state in which services are provided, if a CRNA; and

(D) not be on suspension as a KHC provider, as a Texas Medicaid provider, as a physician licensed to practice medicine in the state in which services are provided, as a CRNA certified to practice within the scope of the certification in the state in which services are provided.

(7) A hospital or ambulatory surgical center (ASC) must:

(A) execute an agreement with the program;

(B) be in compliance with all applicable laws to provide hospital or ASC services in the State of Texas;

(C) be a current Texas Medicaid provider;

(D) have Medicare certification;

(E) not be on suspension as a KHC provider, as a hospital authorized under applicable law to provide hospital services in the State of Texas, as an ASC licensed to provide ASC services in the State of Texas, as a Texas Medicaid provider, or as a Medicare certified hospital or ASC; and

(F) reimburse the program for any overpayments upon request.

(8) An out-of-state hospital or ASC must:

(A) meet all the requirements in paragraph (7)(A), (C), (D) and (F) of this subsection;

(B) be licensed to provide hospital or ASC services in the state in which services are provided;

(C) not be on suspension as a KHC provider, as a Texas Medicaid provider, as a Medicaid provider in its state, as a hospital licensed to provide hospital services in the state in which services are provided, as an ASC licensed to provide ASC services in the state in which services are to be provided, or as a Medicare certified hospital or ASC;

(9) A Medicare Prescription Drug Plan (PDP) must:

(A) execute an agreement with the program;

(B) be Medicare approved as a PDP and maintain approval;

(C) share and exchange data in an acceptable format with the program for the coordination of drug benefits under the Medicare PDP (Part D);

(D) accept a program payment for premiums; and

(E) reimburse the program for any overpayments upon request.

(b) Effective dates.

(1) The effective date of all outpatient dialysis facility agreements shall be on or after the Medicare ESRD certification date.

(2) The effective date of all pharmacy agreements shall be determined by the Health and Human Services Commission Pharmacy Contracts and Rebates unit or its designated contractor.

(3) The effective date of all other provider agreements, listed in subsection (a)(5) - (9) of this section, shall be the first day of the sixth month prior to the program's receipt of the completed and signed provider agreement.

§61.7. Claims Submission and Payment Rates.

(a) Drug benefit claims must be submitted electronically by the pharmacy to the designated claims processor for the program, except when paper submissions are allowed or required.

(b) Medical benefit claims must be submitted to the program by the provider who rendered the service(s) to the KHC client.

(c) Transportation benefit claims must be submitted to the program by the client or the provider performing outpatient dialysis services. Claims must be submitted electronically through the Automated System for Kidney Information Tracking (ASKIT), or any other designated claims payment system, except when the program allows or requires paper submissions.

(d) Payments are made using the rates in effect on the date the service is rendered, and not prospectively.

(e) Incomplete or incorrect claims will not be considered for payment. Claims which are not received by the program within the deadlines established in §61.8 of this title (relating to Claim Filing Deadlines) will be denied payment.

§61.8. Claim Filing Deadlines.

(a) The program must receive all claims for transportation reimbursement, hospital, out-patient dialysis, and access surgery services, within the claim filing deadlines established in this section.

(1) Claims must be received no later than 95 days from the last day of the month in which services were provided.

(2) Claims must be received no later than 60 days from the date on the program's notice of eligibility for newly approved clients.

(b) In addition to the requirements in subsection (a) of this section, the program must receive claims for out-patient dialysis and access surgery services within 60 days from the date on the agreement approval letter for newly approved providers, but no later than 180 days from the date of service.

(c) The program must receive all billing statements for Medicare Part D premium benefits from eligible PDPs within 95 days from the last day of each month for which the premium coverage applies.

(d) The program must receive resubmitted claims within the deadlines established under subsections (a) - (c) of this section, or within 30 days from the date of the program's return letter or the program's EOB, whichever is later. Resubmitted claims must:

(1) be resubmitted with a copy of the program's return letter or the program's EOB, if applicable;

(2) be resubmitted on the original claim form, if applicable; and

(3) contain no new or additional charges for service.

(e) Pharmacies must submit claims for drug charges to the designated claims processor for the program in accordance with claim fil-

ing deadlines contained in 1 Texas Administrative Code, §354.1901, (relating to Pharmacy Claims).

§61.9. Rights and Responsibilities.

(a) The applicant and client shall have the right to:

(1) apply for eligibility determination;

(2) choose providers subject to KHC limitations;

(3) be notified of the program's decisions relating to modifications, suspensions, denials, or terminations;

(4) appeal the program's decisions and receive a response within the deadline as described in §61.11 of this title (relating to Rights of Appeal); and

(5) assurance that all information concerning his or her status as an applicant or client shall be confidential in the manner and to the extent authorized by law.

(b) Providers shall have the right to:

(1) be notified of the program's decision relating to modifications, suspensions, denials, or terminations; and

(2) assurance that all information concerning the provider's program status shall be confidential in the manner and to the extent authorized by law.

(c) The applicant and client shall have the responsibility to:

(1) provide accurate medical information to providers and notify providers of KHC eligibility prior to delivery of services;

(2) abide by KHC rules and policies; and

(3) notify the program of any lawsuit(s) contemplated or filed concerning the cause of the medical condition for which the program has made payment.

(d) The provider shall have the responsibility to:

(1) enroll as a KHC provider and submit a completed application to the program, including all documents requested;

(2) abide by the program rules and policies;

(3) not discriminate against applicants or clients based on source of payment; and

(4) notify the program of any lawsuit(s) contemplated or filed concerning the cause of the medical condition for which the program has made payment.

§61.10. Modifications, Suspensions, Denials, and Terminations.

(a) An applicant's or client's eligibility for benefits may be modified, suspended, or denied for failing to comply with the applicant and client responsibilities listed in §61.3 of this title (relating to Client Eligibility Requirements) and §61.9(c) of this title (relating to Rights and Responsibilities).

(b) A provider's participation may be modified, suspended or denied for failing to comply with the provider responsibilities listed in §61.6(a) of this title (relating to Provider Requirements and Effective Dates) and §61.9(d) of this title.

(c) A client's eligibility may be terminated for any of the following reasons:

(1) failing to maintain Texas residency or to furnish evidence upon demand of residency using the criteria in §61.3 of this title;

(2) failing to continue to meet the income requirements for eligibility or to provide income data as requested by the department to determine continued KHC eligibility;

(3) failing to reimburse the department as requested for overpayments made to the client;

(4) failing to apply for medical, drug, and transportation benefits under Title XIX, Social Security Act (Medicaid);

(5) becoming eligible for drug, transportation, and medical benefits under the Medicaid Program;

(6) regaining native kidney function;

(7) voluntarily discontinuing treatment for ESRD;

(8) becoming incarcerated by or in the custody of a city, county, state, or federal entity;

(9) becoming a ward of the state;

(10) determination by the program that the client made a material misstatement or misrepresentation on their application or any document required to support their application;

(11) determination by the program that the client submitted false claim(s); or

(12) lack of a claim for benefits paid by the program on behalf of the client for a minimum period of 12 consecutive months.

(d) Any action taken under subsections (a) or (c) of this section does not relieve the client, or the person(s) with legal obligation to support the client, of any financial obligation owed to the program.

(e) An applicant must reapply for KHC benefits when eligibility for KHC benefits is terminated.

(f) A client who loses eligibility will not be reinstated until all outstanding debts owed to the program by the client are paid or arrangements acceptable to the program are made for payment.

(g) A client whose benefits are modified or suspended, or whose eligibility is terminated, may appeal the program's decision under §61.11 of this title (relating to Rights of Appeal).

(h) A provider's participation may be terminated or suspended for any of the following reasons:

(1) loss of approval or exclusion from participation in the Medicare program;

(2) exclusion from participation in the Medicaid program;

(3) providing false or misleading information regarding any participation criteria;

(4) material breach of any contract or agreement with the program;

(5) filing false or fraudulent information or claims for KHC benefits;

(6) failure to submit a payable claim to the program during a minimum period of 12 consecutive months; or

(7) failure to maintain the participation criteria contained in §61.6(a) of this title.

(i) Providers may appeal a termination or suspension under §61.11 of this title.

§61.11. Rights of Appeal.

(a) Administrative Review.

(1) When the program modifies, suspends, denies, or terminates eligibility or benefits, the program shall give written notice of and the reason for the action. Applicants, clients, and providers have

the right to request an administrative review of the action within 30 days of the notice date.

(2) If the program does not receive a written request for administrative review within 30 days of the notice date, applicants, clients, and providers waive the right to the administrative review process.

(3) If a written request for administrative review is received within 30 days of the notice date, the program conducts an administrative review of the circumstances surrounding the action. The program must give written notice of the decision including the supporting reasons, within 30 days of receiving all information required to make a determination regarding the request for an administrative review.

(4) The department establishes the KHC reimbursement rates. Clients and providers may not request an administrative review of reimbursement amounts for claims that are paid in accordance with the reimbursement rates as described in §61.5 of this title (relating to Benefits and Limitations).

(b) Fair Hearing.

(1) Applicants, clients, and providers who disagree with a program administrative review decision may request a fair hearing in writing addressed to Kidney Health Care, Purchased Health Services Unit, MC 1938, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, within 20 calendar days following the date of receipt of the administrative review decision notice.

(2) If the fair hearing request is not received within 20 calendar days following the date of the receipt of the administrative review decision notice, the program will presume the fair hearing process has been waived, and the program may take final action.

(3) A fair hearing shall be conducted in accordance with §§1.51 - 1.55 of this title (relating to Fair Hearing Procedures).

(4) The program may not terminate KHC participation until a final decision is rendered under the department's fair hearings process.

(5) The program may withhold claims payment pending final decision under the department's fair hearings process.

(6) The program must release any withheld payments and reinstate participation if the final determination is in favor of the provider.

(7) The program shall not enter into, extend, or renew an agreement with a provider until a final decision is rendered under the department's fair hearings process.

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

Filed with the Office of the Secretary of State on July 30, 2009.

TRD-200903221

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: September 13, 2009

For further information, please call: (512) 458-7111 x6972



CHAPTER 229. FOOD AND DRUG

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes the repeal of §229.172 and new §229.172 concerning the accreditation of certified food management programs, and the repeal of §229.176 and new §229.176 concerning the certification of food managers.

BACKGROUND AND PURPOSE

The purpose of the repeals and new §229.172 and §229.176 is to reflect the decision to remove the department as one of the approved certified food manager examination providers. Neither the statutes nor the repealed rules require the department to provide an examination. The department's decision not to provide examinations required changes to the rules. The repeal and new rules are also a result of the Certified Food Managers (CFM) Program utilizing the recommendations of the Sunset Occupational Licensing Model (model). Through its history of reviewing occupational licensing agencies dating back to 1977, the Sunset Commission has observed standard practices that guide such matters as agency structure, the oversight they receive, and their approach to licensing and enforcement. The compilation of these standard practices provides a model for evaluating occupational licensing agencies to see if they are efficient, effective, fair, and accountable in their mission to protect the public. The model states that for any written exam, an agency should use a national or regional testing service and not prepare its own test. A testing service eliminates bias and uses validated questions. It also promotes standardization of licensing requirements nationwide and helps simplify the movement of licensees from state to state.

The Conference for Food Protection (CFP) has developed the essential components of a nationally recognized food manager certification examination. The components outline the criteria for the development of food safety certification examinations, which includes psychometric standards, job analysis, internal security, periodic review and examination administration. The American National Standards Institute (ANSI) is the reviewing organization for companies that choose to achieve ANSI-CFP accreditation. At this time, the department licenses three companies that meet ANSI-CFP accreditation standards. The department also licenses two Internet certification examination providers that meet department rule requirements.

SECTION-BY-SECTION SUMMARY

The repeal and new §229.172 concern the accreditation of food management programs, to reflect the decision that the department will no longer be an examination provider in Texas. References in the new section have been updated throughout to reflect this change.

Concerning new §229.172(b), the following definitions are deleted as a result of the department not being one of the approved Certified Food Manager examination providers, so these terms are no longer necessary: "Examination administrator," "Proctor," "Psychometric," "Secure," and "Traceable means." The following definition is added for clarification, "On-site examination." Minor grammatical changes are made for clarification.

The repeal and new §229.176 concern the certification of food managers, to reflect the decision that the department will no longer be an examination provider in Texas, and adds new §229.176(g) concerning Internet examination development and additional reporting requirements for Internet examination providers. References in the new section reflect these changes.

Concerning new §229.176(b), the following definitions are deleted as a result of the department not being one of the approved Certified Food Manager examination providers, so these terms are no longer necessary: "Examination administrator," "Nonprofit organization," "Proctor," "Psychometric," "Secure," and "Traceable means." The following definitions are added, "Internet examination," and "On-site examination." Minor grammatical changes are made for clarification.

FISCAL NOTE

Susan Tennyson, Section Director, Environmental and Consumer Safety Section, has determined that for the first five-year period that the rules are in effect, there will be no fiscal implications to the state or local governments as a result of implementing the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Tennyson has also determined that there will not be adverse impacts to small businesses or micro-businesses that elect to voluntarily comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. The proposed rules address the licensing requirements for accredited training programs and examination sites. The repeals and new §229.172 and §229.176 remove obsolete rule provisions and clarify existing provisions without imposing new requirements. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

The purpose of these rules is to provide the framework for accrediting food manager food safety programs in accordance with the Health and Safety Code, Chapter 438, Subchapters D and G. A uniform standard governing the accreditation of food safety programs enhances the recognition of reciprocity among regulatory agencies and reduces the expense of duplicate education incurred when food establishment managers work in multiple regulatory jurisdictions. New §229.172 and §229.176 establish the standards for the education or the demonstration of knowledge for food establishment managers. This provides more qualified personnel, thereby reducing the risk of foodborne illness outbreaks caused by improper food preparation and handling techniques. The state accreditation of a program or test site is voluntary.

Ms. Tennyson has determined that some small businesses and micro-businesses are subject to regulation under the proposed rules. However, no additional economic burden is associated with the proposed rules so no adverse economic impact to small businesses or micro-businesses is anticipated. Therefore, an economic impact statement and regulatory flexibility analysis for small businesses and micro-businesses are not required.

PUBLIC BENEFIT

In addition, Ms. Tennyson has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of these sections. The public benefit anticipated as a result of administering the sections as proposed is improved practices and increased knowledge of food safety within the food service industry, resulting in a lesser risk of contracting a foodborne illness due to training of food service workers in nationally recognized principles and standards.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed repeals and new rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Deborah Marlow, Food Establishments Group, Policy/Standards/Quality Assurance Unit, Division for Regulatory Services, Environmental and Consumer Safety Section, Department of State Health Services, Mail Code 1987, P.O. Box 149347, Austin, Texas 78714-9347 (512) 834-6753, extension 2023, or by email to ione.wenzel@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled after publication in the *Texas Register*, and will be held at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas 78754. The meeting date will be posted on the Food Establishments Group website (www.dshs.state.tx.us/foodestablishments). Please contact Ione Wenzel at (512) 834-6753, extension 2138, or ione.wenzel@dshs.state.tx.us if you have questions.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

SUBCHAPTER K. TEXAS FOOD ESTABLISHMENTS

25 TAC §229.172, §229.176

(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 Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, Chapter 438, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules and guidelines relating to §438.042, food service programs, §438.102, certification of food managers, §438.043, basic food safety accreditation, and §437.0076(b), certified food manager; and Government Code, §531.0055(e), and 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 repeals affect the Health and Safety Code, Chapters 437, 438, and 1001; and Government Code, Chapter 531.

§229.172. *Accreditation of Certified Food Management Programs.*

§229.176. *Certification of Food Managers.*

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

Filed with the Office of the Secretary of State on July 29, 2009.

TRD-200903210

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: September 13, 2009

For further information, please call: (512) 458-7111 x6972



25 TAC §229.172, §229.176

STATUTORY AUTHORITY

The new rules are authorized by Health and Safety Code, Chapter 438, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules and guidelines relating to §438.042, food service programs, §438.102, certification of food managers, §438.043, basic food safety accreditation, and §437.0076(b), certified food manager; and Government Code, §531.0055(e), and 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 new rules affect the Health and Safety Code, Chapters 437, 438, and 1001; and Government Code, Chapter 531.

§229.172. *Accreditation of Certified Food Management Programs.*

(a) Purpose. This section is intended to provide the framework for accrediting manager level food safety training programs in accordance with the Health and Safety Code, Chapter 438, Subchapter D, Food Service Programs. A uniform standard governing the accreditation of food safety programs enhances the recognition of reciprocity among regulatory agencies and reduces the expense of duplicate education incurred when food establishment managers work in multiple regulatory jurisdictions. Education of the food establishment manager provides more qualified personnel, thereby reducing the risk of food-borne illness outbreaks caused by improper food preparation and handling techniques.

(b) Definitions. The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise.

(1) Accredited certified food manager training program--A certified food manager training and testing program approved by the department that meets the standards set forth in this section.

(2) Alternative training methods--Training other than classroom, including but not limited to distance learning, computerized training programs, and correspondence courses.

(3) ANSI-CFP Program Accreditation--Accreditation by the American National Standard Institute (ANSI) and the Conference for Food Protection (CFP), which accredit programs as outlined in the CFP: Standards for Accreditation of Food Protection Manager Certification Programs.

(4) Certificate--The documentation issued by a department-approved ANSI-CFP Program examination licensee verifying that an individual has complied with the requirements of this section.

(5) Certification--The process whereby a certified food manager certificate is issued.

(6) Certified food manager--A person who has demonstrated that he or she has the knowledge, skills and abilities required to protect the public from foodborne illness by means of successfully completing a certified food manager examination and becoming certified as described in this section.

(7) Certified food manager examination--A department-approved ANSI-CFP Program accredited on-site examination for food manager certification.

(8) Certified food manager program; certified food management program--A training program accredited by the department that provides food safety education for food establishment managers and administers a certified food manager examination for certification or recertification purposes.

(A) Certification program--A certified food manager program whose course work consists of a minimum of 14 hours of instruction on food safety topics which may include traditional or alternative methods of training, including distance education, and at least a one-hour certified food manager examination.

(B) Recertification program--A certified food manager program whose course work consists of a minimum of six hours of instruction on food safety topics, which may include traditional or alternative methods of training, including distance education, and a certified food manager examination.

(9) Continuing education--Documented professional education or activities that provide for the continued proficiency of a certified food management program instructor.

(10) Department--Department of State Health Services.

(11) Food--A raw, cooked, or processed edible substance, ice, beverage or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(12) Food establishment--

(A) Food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

(i) such as a restaurant; retail food store; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

(ii) that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(B) Food establishment includes:

(i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending lo-

cation or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; and

(ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(C) Food establishment does not include:

(i) an establishment that offers only prepackaged foods that are not potentially hazardous;

(ii) a produce stand that only offers whole, uncut fresh fruits and vegetables;

(iii) a food processing plant;

(iv) a kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by law;

(v) an area where food that is prepared as specified in clause (iv) of this subparagraph is sold or offered for human consumption;

(vi) a Bed and Breakfast Limited facility as defined in these rules; or

(vii) a private home that receives catered or home-delivered food.

(13) Law--Applicable local, state and federal statutes, regulations and ordinances.

(14) Licensee--The individual, corporation or company that is licensed by the department to operate certified food management programs.

(15) On-site examination--An ANSI-CFP Program accredited paper and computer-based examination for food manager certification administered by a certified food manager program.

(16) Person--An association, corporation, partnership, individual, or other legal entity, government or governmental subdivision or agency.

(17) Qualified instructor--An individual whose educational background and work experience meet the requirements for approval as a qualified food management program instructor as described in this section.

(18) Reciprocity--Acceptance by state and local regulatory authorities of a department-approved certified food manager certificate.

(19) Regulatory authority--The local, state, or federal enforcement body or authorized representative having jurisdiction over the food establishment.

(20) Single entity--A corporation that educates only its own employees.

(21) Sponsor--An individual designated in writing to the department, by the licensee, as the person responsible for administrative management of the certified food manager program.

(22) Two-Year Renewal Certificate--The certificate issued by the department from May 6, 2004 to April 24, 2008, verifying that a certified food manager has completed the application and submission of fees for renewal of a department-issued certificate.

(c) Certified food manager.

(1) Certified food manager responsibilities. Responsibilities of a certified food manager include:

(A) identifying hazards in the day-to-day operation of a food establishment that provides food for human consumption;

(B) developing or implementing specific policies, procedures or standards aimed at preventing foodborne illness;

(C) coordinating, training, supervising or directing food preparation activities, and taking corrective action as needed to protect the health of the consumer;

(D) training the food establishment employees on the principles of food safety; and

(E) conducting in-house self-inspections of daily operations on a periodic basis to ensure that policies and procedures concerning food safety are being followed.

(2) Certification by training and food safety examination. To be certified, a food manager shall complete an accredited certified food management certification or recertification program and pass a certified food manager examination.

(3) Certificate reciprocity. Department-approved food manager certificates shall be recognized statewide by regulatory authorities as the only valid proof of successful completion of a department-accredited certified food management program.

(4) Certificate availability. The original certified food manager certificate shall be posted in a location in the food establishment that is conspicuous to consumers.

(d) Certification program course curriculum. A certification program shall include a minimum of 14 hours of food safety training utilizing the training and time requirements in Health and Safety Code, §438.043(a).

(e) Recertification program course curriculum. A recertification training program shall include a minimum of six hours of food safety training.

(f) Requirements for qualification of instructors. The instructors for all certified food management programs shall be department-qualified prior to teaching a class. The instructors for all certified food management programs shall meet the qualifications in these rules. Instructors meeting these qualifications shall be approved for the two-year permit term of the certified food management program licensee. The completed application form shall be submitted to the department through the accredited certified food management program licensee.

(1) New instructors. A completed application for new instructors shall be submitted by the program licensee to the department with the following documentation:

(A) the completed and signed application form;

(B) a copy of a valid food management certificate; and

(C) verification of education or experience in food safety documented by one of the following:

(i) an associate or higher college degree from an accredited institution in a major related to food safety or environmental health, evidenced by a copy of the candidate's diploma or transcript;

(ii) five years of food establishment work experience as a food manager verified in an attached resume; or

(iii) two years of regulatory food inspection experience verified in an attached resume.

(2) Nationally accredited program instructors. Nationally accredited program instructors who have met the minimum standards as set forth by this section shall be given reciprocity when instructing and administering an ANSI-CFP Program Accreditation examination.

(g) Responsibilities of qualified instructors.

(1) Compliance with certified food management program laws and rules. All qualified instructors are responsible for compliance with applicable certified food management program laws and rules.

(2) Training requirements. All qualified instructors are responsible for instructing the course content as specified in subsection (o)(3) of this section, and meeting the training time requirements as specified in subsection (n)(6) of this section.

(h) Requirements for the renewal of qualified instructors. In order to renew an instructor's qualification, the program licensee shall comply with the requirements of this subsection.

(1) Contact hours for continuing education. Certified food management programs shall submit a renewal application and documentation of five contact hours of continuing education for each instructor during the two-year certified food manager program license period to maintain qualification as a certified food manager program instructor.

(2) Accepted continuing education topics. Continuing education topics may include areas in food safety or instruction enhancement.

(3) Verification of continuing education. The following may be used for continuing education:

(A) a certificate of completion for a course or seminar with the participant's name, course name, date and number of contact hours earned;

(B) a college transcript with course description; or

(C) other documentation of attendance as approved by the department.

(i) On-site examination. ANSI-CFP Program accredited food safety certification examinations shall be the only department-approved paper and computer-based certified food manager examinations.

(j) Certified food manager certificates.

(1) General certificate issuance. Certificates shall be issued by the department-approved examination provider. Candidates whose certificates are issued after successful passage of a department-approved examination shall be deemed to meet the requirements for food manager certification.

(2) Certificate period. A certified food manager certificate issued by a department-approved examination provider under this section shall comply with the *CFP Standards for Accreditation of Food Protection Manager Certification Programs*, §7.3, Effective Date of Certificate, as amended, 2008, at <http://www.foodprotect.org/managers-certification/>.

(3) Recertification. Candidates may become recertified by taking a recertification class and passing a department-approved examination, or by passing an examination as described in §229.176(i)(3) of this title (relating to Certification of Food Managers).

(4) Certification through single entity corporations. Candidates from accredited single entity corporations may receive food manager certificates as described in this section, except that the food manager certificate shall:

(A) clearly indicate that the certificate is valid for food manager duties performed for the single entity only;

(B) be recognized by regulatory authorities for only that single entity; and

(C) not receive reciprocity or recertification.

(k) Department certificate.

(1) Two-year renewal certificate. Certified food manager certificates issued by the department from May 6, 2004 to April 24, 2008, shall be renewed every two years and may be renewed two times.

(2) Department certificate replacement. An individual requesting a certified food manager certificate replacement shall submit a completed written application to the department with the appropriate non-refundable fee. Replacement certificates will bear the same expiration date as the original certificate.

(l) Department certificate fees.

(1) Two-year renewal certificate fee. The fee for renewal of a two-year certificate issued shall be \$10.

(2) Replacement certificate fee. A replacement certificate fee for the department examination shall be \$15.

(3) Texas Online Authority fee. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

(m) Licensing of single entity certified food management programs. In addition to the licensing requirements as specified in subsection (n) of this section, a corporation wishing to use a single entity option, which offers course length and topic requirements as specified in Health and Safety Code, §438.043(a), shall submit to the department:

(1) a copy of the course syllabus; and

(2) a copy of the course curriculum.

(n) Licensing of certified food management program licensee. The department shall issue a license of accreditation to each certified food management program licensee who has demonstrated compliance with this section. A license issued under these rules shall expire two years from the date of issuance. This license is not transferable on change of ownership, name, or site location.

(1) Application. A person wishing to apply for a certification or recertification certified food management program license shall submit a completed application to the department.

(2) Security agreement. The licensee shall submit a signed security agreement that individual examination items, examination item banks, certified food manager certification examinations, examination answer sheets, and candidate scores shall be secure at all times, and during administration that the examinations shall remain secure.

(3) Certified food management program license fee. The completed license application shall include the appropriate non-refundable fee as specified in subsection (p)(1) of this section.

(4) Sponsor. The licensee may designate a certified food manager program sponsor as the person responsible for the administrative management of the program.

(5) Qualified instructor. The licensee shall provide a list of all qualified food management program instructors who plan to teach an accredited certification or recertification course to the department.

A completed instructor application, along with other necessary documentation shall be submitted for all non-qualified instructors.

(6) Course syllabus. The licensee shall provide a course syllabus to the department verifying the minimum of 14 hours of training for a certification program as specified in subsection (d) of this section and a minimum of six hours of training for a recertification program as specified in subsection (e) of this section. The training methods shall be designated on the application. A course curriculum shall be available for review to verify the course syllabus.

(7) Certification examination. Department-approved examination(s) utilized by the certified food management programs shall be designated on the completed application.

(o) Responsibilities of a licensee.

(1) Compliance with certified food management program laws and rules. The licensee is responsible for compliance with applicable certified food management program laws and rules.

(2) Payment of fees. All fees shall be non-refundable and paid as specified in subsection (p) of this section.

(3) Certified food management program course content. All certified food management programs shall be taught utilizing the training and time requirements in Health and Safety Code, §438.043(a).

(4) Change of sponsor. The licensee shall notify the department in writing of the name of the new program sponsor.

(5) Change of qualified instructor. The licensee shall ensure that only a department-qualified instructor serves as the instructor for the certified food management program. All new instructors shall complete the application for new instructors that shall be submitted by the licensee to the department with the applicable documentation. Licensees shall instruct all new instructors on the applicable laws and rules and administrative responsibilities.

(p) Required fees. All fees are payable to the Department of State Health Services and are non-refundable. Licensees shall submit fees with the appropriate form that relates to the fee category. A current license shall only be issued when all past due fees and late fees are paid for all years of operation in Texas. The fees shall be:

(1) Certified food manager program license fee for initial, renewal, or change of ownership. The certified food manager program license fee shall be \$600 for a two-year license for each certification or recertification program.

(2) Certified food manager program amended license fee. Program amendment fees shall be \$300 for each certification or recertification program.

(3) Late fee. Certified food manager licensees submitting a completed renewal application to the department after the expiration date shall pay an additional \$100 as a late fee.

(4) Texas Online Authority fee. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

(q) Certified food management program registry. The department shall maintain a program registry of all accredited certification and recertification programs. The registry shall be made available on the department website.

(r) Department audits. Audits of examination and classroom may be conducted to assess program compliance. Audits may be based

on analysis of data compiled by the department. The licensee shall allow personnel authorized by the department access for the purposes of an audit.

(s) Denial, suspension and revocation of program accreditation. An accredited food manager program license may be denied, suspended or revoked for the following reasons:

- (1) breach of the security agreement;
- (2) delinquency in payment of fees as described in this section; or
- (3) violation of the provisions of this section.

(t) Denial, suspension and revocation procedures. Denial, suspension and revocation procedures under this section shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.

(u) Suspension of License Relating to Child Support and Child Custody.

(1) On receipt of a final court order or attorney general's order suspending a license due to failure to pay child support or for failure to comply with the terms of a court order providing for the possession of or access to a child, the department shall immediately determine if a license has been issued to the obligator named and:

- (A) record the suspension of the license in the department's records;
- (B) report the suspension as appropriate; and
- (C) demand surrender of the suspended license.

(2) The department shall implement the terms of a final court or attorney general's order suspending a license without additional review or hearing. The board will provide notice as appropriate to the licensee or to others concerned with the license.

(3) The department may not modify, remand, reverse, vacate, or stay a court or attorney general's order suspending a license issued under the Family Code, Chapter 232, and may not review, vacate, or reconsider the terms of an order.

(4) A licensee who is the subject of a final court or attorney general's order suspending his or her license is not entitled to a refund for any fee paid to the department.

(5) If a suspension overlaps a license renewal period, an individual with a license suspended under this section shall comply with the normal renewal procedures in the Act and this chapter; however, the license will not be renewed until subsections (l) and (m) of this section are met.

§229.176. Certification of Food Managers.

(a) Purpose. This section is intended to provide the framework of certification requirements for food managers in accordance with Health and Safety Code, Chapter 438, Subchapter G, Certification of Food Managers, supports demonstration of food safety knowledge, thereby reducing the risk of foodborne illness outbreaks caused by improper food preparation and handling techniques.

(b) Definitions. The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise.

(1) ANSI-CFP Program Accreditation--Accreditation by the American National Standards Institute (ANSI) and the Conference for Food Protection (CFP), which accredit programs as outlined in the CFP: Standards for Accreditation of Food Protection Manager Certification Programs.

(2) Certificate--The documentation issued by a department-approved Internet examination provider licensee or an ANSI-CFP Program examination licensee verifying that an individual has complied with the requirements of this section.

(3) Certification--The process whereby a certified food manager certificate is issued.

(4) Certified food manager--A person who has demonstrated that he or she has the knowledge, skills and abilities required to protect the public from foodborne illness by means of successfully completing a certified food manager examination and becoming certified as described in this section.

(5) Certified food manager examination--A department-approved Internet examination or an ANSI-CFP Program accredited on-site examination for food manager certification.

(6) Department--Department of State Health Services.

(7) Examination site--The physical location at which the department-approved examination is administered.

(8) Food--A raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(9) Food establishment--

(A) Food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

(i) such as a restaurant; retail food store; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

(ii) that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(B) Food establishment includes:

(i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; and

(ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(C) Food establishment does not include:

(i) an establishment that offers only prepackaged foods that are not potentially hazardous;

(ii) a produce stand that only offers whole, uncut fresh fruits and vegetables;

(iii) a food processing plant;

(iv) a kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by law;

(v) an area where food that is prepared as specified in clause (iv) of this subparagraph is sold or offered for human consumption;

(vi) a Bed and Breakfast Limited facility as defined in these rules; or

(vii) a private home that receives catered or home-delivered food.

(10) Internet examination--A department-approved examination delivery system utilizing the Internet for food manager certification.

(11) Law--Applicable local, state and federal statutes, regulations and ordinances.

(12) Licensee--The individual, corporation, or company that is licensed by the department to administer a department-approved examination for food manager certification.

(13) On-site examination--An ANSI-CFP Program accredited paper and computer-based examination for food manager certification administered by a certified food manager program.

(14) Person--An association, corporation, partnership, individual or other legal entity, government or governmental subdivision or agency.

(15) Personal validation question--A question designed to establish the identity of the candidate taking a certified food manager examination by requiring an answer related to the candidate's personal information such as a driver's license number, address, date of birth, or other similar information that is unique to the candidate.

(16) Reciprocity--Acceptance by state and local regulatory authorities of a department-approved certified food manager certificate.

(17) Regulatory authority--The local, state, or federal enforcement body or authorized representative having jurisdiction over the food establishment.

(18) Two-Year Renewal Certificate--The certificate issued by the department from May 6, 2004 to April 24, 2008, verifying that a certified food manager has completed the application and submission of fees for renewal of a department-issued certificate.

(c) Certified food manager.

(1) Certified food manager responsibilities. Responsibilities of a certified food manager include:

(A) identifying hazards in the day-to-day operation of a food establishment that provides food for human consumption;

(B) developing or implementing specific policies, procedures or standards aimed at preventing foodborne illness;

(C) coordinating training, supervising or directing food preparation activities and taking corrective action as needed to protect the health of the consumer;

(D) training the food establishment employees on the principles of food safety; and

(E) conducting in-house self-inspection of daily operations on a periodic basis to ensure that policies and procedures concerning food safety are being followed.

(2) Certification by a food safety examination. To be certified, a food manager shall pass a department-approved Internet examination or an accredited ANSI-CFP Program on-site examination.

(3) Certificate reciprocity. A certificate issued to an individual who successfully completes a department-approved examination shall be accepted as meeting the training and examination requirements under Health and Safety Code, §438.046(b).

(4) Certificate availability. The original food manager certificate shall be posted in a location in the food establishment that is conspicuous to consumers.

(d) On-site examination. ANSI-CFP Program accredited food safety certification examinations shall be the only department-approved paper and computer-based examinations.

(e) Internet examinations. A department-approved examination utilizing the Internet for delivery shall meet the examination criteria outlined in this section.

(f) Responsibilities for Internet examination providers.

(1) Compliance with food manager laws and rules. Internet examination providers are responsible for compliance with food manager laws and rules applicable to Internet examinations in this section.

(2) Examination Security Agreement. Internet examination providers shall submit the department security agreement signed by the certified food manager Internet examination provider licensee.

(3) Examination security. Candidates taking Internet examinations shall be advised on the application that outside training materials or assistance shall not be used during administration of the examination and that appropriate measures shall be taken to assure that the examination is not compromised.

(g) Internet examination development. Internet examination development shall meet the criteria established by the *CFP Standards for Accreditation of Food Manager Certification Programs*, §4.0, Food Safety Certification Examination Development, as amended, 2008, at <http://www.foodprotect.org/managers-certification/>.

(1) Examination questions. Internet examinations shall consist of a minimum of 75 statistically valid questions that are administered at one time following any voluntary training that may precede the examination.

(2) Examination forms. Each candidate shall receive a unique form of the examination with regard to question sequence.

(3) Time allotment for non-proctored Internet examination providers. Time allotted for administration of non-proctored examinations shall not exceed 90 minutes.

(h) Internet examination administration.

(1) Registration requirements for Internet examinations. The licensee shall register the candidates and require the candidates to:

(A) verify their identity;

(B) provide responses to ten personal validation questions; and

(C) maintain examination security.

(2) Licensee examination disclosure information. The licensee shall inform the candidate that:

(A) reference materials shall not be used during the examination;

(B) the candidate shall not receive assistance from anyone during the examination; and

(C) examination questions shall not be replicated in any fashion.

(3) Personal validation questions. The licensee shall verify a candidate's identity throughout the examination. The personal validation process shall include the following elements:

(A) a minimum of five personal validation questions selected from the ten questions provided during registration shall be incorporated at various times during the examination;

(B) the personal validation questions shall be randomly generated with respect to time and order;

(C) the same personal validation questions shall not be asked more than once during the same examination; and

(D) the examination session shall cease and the candidate shall be automatically exited from the examination if a candidate answers a personal validation question incorrectly.

(4) System support. The Internet examination provider licensee shall include the following Internet examination system capabilities and security measures:

(A) capability to browse or review previously completed examination questions;

(B) capability to navigate logically and systematically through the examination;

(C) technical support personnel for Internet examination issues;

(D) security of personal candidate information in transit and at rest;

(E) a back-up and disaster recovery system capability; and

(F) assurance that examination data is maintained in a secure and safe environment and readily available to the department.

(5) Reporting requirements for non-proctored Internet examination administrators. Internet examination administrators who administer examinations in non-proctored locations shall submit a semi-annual report to enable the department to evaluate examination security and system performance for each language in which the examination is offered. The report shall include:

(A) statistical data to enable measurement of central tendency, ranges of examination scores, standard deviation, standard error of measurement, and examination cut score;

(B) number of examinations administered;

(C) number and percentage of candidates passing the examination;

(D) number of personal validation questions used;

(E) number of examinations discontinued due to incorrect responses to personal validation questions; and

(F) statistics describing the performance of each item used on the examinations administered during the six-month period.

(i) Certified food manager certificates.

(1) General certificate issuance. Certificates shall be issued by the department-approved examination provider. Candidates whose certificates are issued after successful passage of a department-approved examination shall be deemed to meet the requirements for food manager certification.

(2) Certificate period. A certified food manager certificate issued by a department-approved examination provider under this section shall comply with the CFP Standards for Accreditation of Food Protection Manager Certification Programs, §7.3, Effective Date of Certificate, as amended, 2008, at <http://www.foodprotect.org/managers-certification/>.

(3) Recertification. Candidates may become recertified by passing a department-approved examination.

(j) Department certificates.

(1) Two-year renewal certificate. Food manager certificates issued by the department from May 6, 2004 to April 24, 2008, shall be renewed every two years and may be renewed two times.

(2) Department certificate replacement. An individual requesting a certified food manager certificate replacement shall submit a completed written application to the department with the appropriate non-refundable fee. Replacement certificates will bear the same expiration date as the original certificate.

(k) Department certificate fees. All fees are payable to the Department of State Health Services and are non-refundable. Fees shall be submitted with the appropriate form that relates to the fee category. A current license shall only be issued when all past due fees and late fees are paid for all years of operation in Texas. Fees shall be:

(1) Two-year renewal certificate fee. The fee for a two-year renewal certificate shall be \$10.

(2) Replacement certificate fee. A replacement certificate fee for the department examination shall be \$15.

(3) Texas Online Authority fee. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

(l) Licensing of certified food manager licensee. The department shall issue a license to a certified food manager licensee meeting the requirements of this section. A license issued under these rules shall expire two years from the date of issuance. A license is not transferable on change of ownership, name, or examination site location.

(1) Application. Persons wishing to apply for a certified food manager license shall submit a completed application to the department.

(2) Security agreement. The licensee shall submit a signed security agreement stating that individual examination items, examination item banks, certified food manager certification examinations, examination answer sheets, and candidate scores shall be secure at all times, and during administration the examinations shall remain secure.

(3) Certified food manager licensee fee. The completed license application shall include the appropriate non-refundable fee as specified in subsection (n)(1) of this section.

(4) Certification examination. Department-approved examination(s) utilized by the certified food manager licensee shall be designated on the application.

(5) Number of examination sites utilized. The license application shall indicate the number of examination sites to be utilized under the certified food manager license.

(m) Responsibilities of licensee.

(1) Compliance with food manager laws and rules. The licensee is responsible for compliance with applicable food manager laws and rules.

(2) Payment of fees. All fees shall be non-refundable and paid as specified in subsection (n) of this section.

(n) Required fees. All fees are payable to the Department of State Health Services and are non-refundable. Fees shall be submitted with the appropriate form that relates to the fee category. A current

license shall only be issued when all past due fees and late fees are paid for all years of operation in Texas. Fees shall be:

(1) Certified food manager licensee fee. Certified food manager licenses shall be valid for a two-year period and fees shall be based on the number of examination sites at which the licensee administers the examinations based on the following scale:

(A) one site:

(i) the two-year license fee for initial, renewal, or change of ownership shall be \$400; and

(ii) a license fee for a program amendment during the current licensure period shall be \$200;

(B) two to ten sites:

(i) the two-year license fee for initial, renewal, or change of ownership shall be \$1,000; and

(ii) a license fee for a program amendment during the current licensure period shall be \$500;

(C) over ten sites:

(i) the two-year license fee for initial, renewal, or change of ownership shall be \$2,000; and

(ii) a license fee for a program amendment during the current licensure period shall be \$1,000.

(2) Late fee. A certified food manager licensee submitting a completed renewal application to the department after the expiration date shall pay an additional \$100 as a late fee.

(3) Texas Online Authority fee. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

(o) Certified food manager licensee registry. The department shall maintain a registry of all certified food manager licensees. The registry shall be made available on the department website.

(p) Department audits. Audits of certified food manager licensees may be conducted to assess compliance with these rules. Audits may be based on analysis of data compiled by the department. Licensees shall allow personnel authorized by the department access for the purposes of an audit.

(q) Denial, suspension and revocation of certified food manager license. A certified food manager license may be denied, suspended or revoked for the following reasons:

(1) breach of the security agreement;

(2) delinquency in payment of fees as described in this section; or

(3) violation of the provisions of this section.

(r) Denial, suspension and revocation procedures. Denial, suspension and revocation procedures under this section shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.

(s) Suspension of License Relating to Child Support and Child Custody.

(1) On receipt of a final court order or attorney general's order suspending a license due to failure to pay child support or for failure to comply with the terms of a court order providing for the possession

of or access to a child, the department shall immediately determine if a license has been issued to the obligator named and:

(A) record the suspension of the license in the department's records;

(B) report the suspension as appropriate; and

(C) demand surrender of the suspended license.

(2) The department shall implement the terms of a final court or attorney general's order suspending a license without additional review or hearing. The board will provide notice as appropriate to the licensee or to others concerned with the license.

(3) The department may not modify, remand, reverse, vacate, or stay a court or attorney general's order suspending a license issued under the Family Code, Chapter 232, and may not review, vacate, or reconsider the terms of an order.

(4) A licensee who is the subject of a final court or attorney general's order suspending his or her license is not entitled to a refund for any fee paid to the department.

(5) If a suspension overlaps a license renewal period, an individual with a license suspended under this section shall comply with the normal renewal procedures in the Act and this chapter; however, the license will not be renewed until subsections (j) and (k) of this section are met.

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

Filed with the Office of the Secretary of State on July 29, 2009.

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Lisa Hernandez
General Counsel

Department of State Health Services

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For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

**CHAPTER 19. AGENTS' LICENSING
SUBCHAPTER R. UTILIZATION REVIEW
AGENTS**

28 TAC §19.1722

The Texas Department of Insurance proposes amendments to §19.1722, relating to the Utilization Review Advisory Committee. The proposed amendments are necessary to re-establish a Utilization Review Advisory Committee pursuant to the Insurance Code §4201.003. Section 4201.003 requires the Commissioner to appoint an advisory committee to advise the Commissioner on development of rules regarding the administration of Chapter 4201, as authorized by the Government Code §2001.031. The Utilization Review Advisory Committee previously established and operated pursuant to existing §19.1722 automatically terminated on December 31, 1998, pursuant to §19.1722(e). It is necessary to establish a new committee because of the enact-

ment of House Bill (HB) 4290, 81st Legislature, Regular Session, effective September 1, 2009. HB 4290 enacts changes to the Insurance Code Chapter 4201 that result in the need to substantively revise 28 TAC Chapter 19, Subchapter R, relating to the regulation of utilization review agents. HB 4290 expands the definition of "utilization review" in the Insurance Code Chapter 4201 to include retrospective reviews for medical necessity and to include reviews to determine the experimental or investigational nature of health care services. Rules are necessary to implement this expanded definition of "utilization review" as well as the other changes to the Insurance Code Chapter 4201 enacted by HB 4290 to address and implement the expanded definition of "utilization review." In addition, the Department may determine that other changes and additions are needed to the existing rules regulating utilization review.

The Government Code, Chapter 2110 specifies the requirements and procedures for state agency advisory committees. The Government Code §2110.0012 provides that a state agency has established an advisory committee if state or federal law has specifically created the committee to advise the agency or the agency has, under state or federal law, created the committee to advise the agency. The Government Code §2110.005 requires a state agency that establishes an advisory committee to, by rule, state the purpose and tasks of the committee and describe the manner in which the committee will report to the agency. The Government Code §2110.008 authorizes a state agency that has established an advisory committee to designate the date on which the committee will automatically be abolished and requires that the designation be by rule.

The following amendments are proposed to §19.1722. A proposed amendment to §19.1722(a) is necessary to clarify that the use of the term "advisory committee" throughout the section is a reference to the Utilization Review Advisory Committee.

Amendments are proposed to update obsolete statutory references in §19.1722(a), and (d) as a result of the adoption of the non-substantive Insurance Code revision. The Insurance Code Article 21.58A, which is referenced in §19.1722(a), was repealed in the non-substantive Insurance Code revision, Acts 2005, 79th Leg., Ch. 727, §4, effective April 1, 2007. The Insurance Code Article 21.58A was readopted without substantive change as the Insurance Code Chapter 4201 in the same non-substantive Insurance Code revision. The Insurance Code Article 21.58A, §13, which is cited in §19.1722(d), was readopted as the Insurance Code §4201.003 as part of the non-substantive Insurance Code revision. Additionally, amendments are proposed to change references to "Insurance Code" to "the Insurance Code" throughout the section to reflect current agency style.

A proposed amendment to §19.1722(b)(1) establishes that the purpose of the advisory committee is to: (i) advise the Commissioner on the development of rules determined by the Department as necessary to implement HB 4290, 81st Legislature, Regular Session, effective September 1, 2009, that amends the Insurance Code Chapter 4201; and (ii) to advise the Commissioner on other changes and additions to the existing rules regulating utilization review that the Department determines are needed to administer the Insurance Code Chapter 4201.

A proposed amendment to §19.1722(c)(1) is necessary to provide that the advisory committee shall review and evaluate proposed changes and additions to the current utilization review. A proposed amendment to §19.1722(c)(2) is necessary to provide that the advisory committee shall advise and consult with

the Commissioner or the Commissioner's representative during its review and evaluation made pursuant to §19.1722(c)(1). Proposed amendments also delete §19.1722(c)(3), which is no longer needed, and redesignate existing §19.1722(c)(4) as §19.1722(c)(3). Another proposed amendment to newly designated §19.1722(c)(3) is necessary to provide that the advisory committee shall perform other tasks related to the development of rules as provided by §19.1722(c)(1) and as requested by the Commissioner pursuant to the Insurance Code Chapter 4201 and the Government Code Chapter 2110.

Proposed amendments to §19.1722(d) and §19.1722(d)(1) are necessary to add two additional representatives to the utilization review advisory committee. The additional representatives are: (i) a representative for a workers' compensation carrier and (ii) a representative for injured employees. The addition of these two representatives is necessary because when §4201.003 of the Insurance Code was first enacted as Article 21.58A §13 in 1991, workers' compensation coverage was not subject to the utilization review requirements in the Insurance Code. In 1997, the Texas Legislature required workers' compensation coverage to be subject to the utilization review requirements of the Insurance Code Article 21.58A (HB 3197, 75th Legislature, Regular Session, effective September 1, 1997). As previously indicated, the Insurance Code Article 21.58A was repealed in the non-substantive Insurance Code revision, Acts 2005, 79th Leg., Ch. 727, §4, effective April 1, 2007, and was readopted without substantive change as the Insurance Code Chapter 4201 in the same non-substantive Insurance Code revision. Pursuant to the Insurance Code §4201.054, the Insurance Code Chapter 4201 applies to utilization review of a health care service provided to a person eligible for workers' compensation medical benefits under Title 5, Labor Code. These additions are also consistent with the Government Code §2110.002(b), which provides that the composition of an advisory committee that advises a state agency regarding an industry or occupation regulated or directly affected by the agency must provide a balanced representation between the industry or occupation and consumers of services provided by the agency, industry, or occupation. The addition of these two representatives is permissible under the Insurance Code §4201.003, which provides that the utilization review advisory committee "includes" the representatives named within the section. Pursuant to the Government Code §311.005(13), the term "includes" is a term of enlargement and not of limitation or exclusive enumeration, and use of the term does not create a presumption that components not expressed are excluded. Therefore, the Insurance Code §4201.003 does not prohibit the inclusion of necessary industry and consumer representatives in the utilization review advisory committee merely because they are not expressly listed in the Insurance Code §4201.003. Additionally, it is necessary to amend §19.1722(d)(1) to clarify that the reference in existing §19.1722(d)(1) to one representative for a "consumer group" is actually referring to one representative for a "health coverage consumer group." This reference in existing §19.1722(d)(1) could result in confusion because it does not specify the type of consumer group.

Proposed new §19.1722(e) addresses reporting requirements of the committee. The subsection provides that after completion of review and evaluation of proposed changes and additions to the current utilization review rules in 28 TAC Chapter 19, Subchapter R, or completion of any other tasks in accordance with §19.1722(c)(3), the advisory committee shall submit a report of its recommendations to the Commissioner. Existing §19.1722(e) is redesignated as §19.1722(f).

Under the proposed amendment to newly designated §19.1722(f), the advisory committee shall automatically terminate on December 31, 2010, unless, before its termination, the Commissioner extends its duration by rule.

FISCAL NOTE. Debra Diaz-Lara, Deputy Commissioner, Health and Workers' Compensation Network Certification and Quality Assurance Division, has determined that for each year of the first five years the proposed amendments to §19.1722 are in effect, there will be no fiscal implications to state and local governments as a result of the enforcement or administration of the proposed amendments. There will be no measurable effect on local employment or the local economy as a result of this proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Diaz-Lara also has determined that for each year of the first five years the proposed amendments to §19.1722 are in effect, the anticipated public benefit will be agency compliance with (i) the Insurance Code §4201.003, which requires the Commissioner to appoint an advisory committee to advise the Commissioner on development of rules regarding the administration of Chapter 4201; and (ii) the Government Code Chapter 2011, which specifies the requirements and procedures for state agency advisory committees. Other public benefits include the availability of an advisory committee (i) to advise the Commissioner on the development of rules to implement HB 4290, 81st Legislature, Regular Session, effective September 1, 2009, that amends the Insurance Code Chapter 4201; and (ii) to perform such other functions related to the development of these rules as requested by the Commissioner pursuant to the Insurance Code Chapter 4201 and the Government Code Chapter 2110. There are no persons required to comply with the proposed amendments because participation on the advisory committee is voluntary. Therefore, there are no costs for required compliance with the proposed amendments. Although participation on the advisory committee is voluntary, committee members who must travel to attend meetings will incur some out-of-pocket costs that will not be reimbursed by the Department. These costs will vary depending on how far the member must travel to attend meetings, what type of transportation is used, whether lodging is needed, and what choice of lodging is made.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with the Government Code §2006.002(c), the Department has determined that the proposed amendments to §19.1722, relating to the Utilization Review Advisory Committee, will not have an adverse economic effect on small and micro businesses because participation on the advisory committee is voluntary, and a representative of a small business or micro business can opt to participate or not participate based on the representative's analysis of estimated costs for travel and lodging. In accordance with the Government Code §2006.002(c), the Department has, therefore, determined that because the proposal will not have an adverse impact on small or micro businesses, a regulatory flexibility analysis is not required.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than

5:00 p.m. on September 14, 2009, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Debra Diaz-Lara, Deputy Commissioner, Health and Workers' Compensation Network Certification and Quality Assurance Division, Mail Code 103-6A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The amendments are proposed under the Government Code §§2110.002, 2110.005, 2110.008, and 2110.0012, and the Insurance Code §4201.003 and §36.001. The Government Code §2110.002(b) provides that the composition of an advisory committee that advises a state agency regarding an industry or occupation regulated or directly affected by the agency must provide a balanced representation between the industry or occupation and consumers of services provided by the agency, industry, or occupation. The Government Code §2110.005 requires a state agency, when it establishes an advisory committee, to adopt rules that state the purpose and tasks of the advisory committee and that describe the manner in which the advisory committee will report to the agency. Section 2110.008(a) provides that a state agency that has established an advisory committee may designate the date on which the committee will automatically be abolished, that the designation must be by rule, and that the committee may continue in existence after that date only if the agency amends the rule to provide for a different abolishment date. The Government Code §2110.0012 provides that a state agency has established an advisory committee if state or federal law has specifically created the committee to advise the agency or if the agency has, under state or federal law, created the committee to advise the agency. The Insurance Code §4201.003(a) authorizes the Commissioner to adopt rules to implement Insurance Code Chapter 4201. The Insurance Code §4201.003(c) requires the Commissioner to appoint an advisory committee to advise the Commissioner on development of rules regarding the administration of Chapter 4201 and specifies the duties and composition of the advisory committee. The Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §4201.003 and Government Code Chapter 2110

§19.1722. Utilization Review Advisory Committee.

(a) Purpose and Scope. The purpose of this section is to set out the responsibilities of the Utilization Review Advisory Committee (advisory committee); define its tasks and the manner in which it will report to the commissioner [~~department~~]; specify its membership; and set its duration. The advisory committee is established pursuant to the Insurance Code §4201.003(c); ~~Article 21.58A, §13~~.

(b) Purpose of the Advisory Committee. The purpose of the advisory committee is to:

(1) advise the commissioner on the development of rules determined by the department as necessary to implement HB 4290, 81st Legislature, Regular Session, effective September 1, 2009, that

amends the Insurance Code Chapter 4201; and [in developing rules and regulations for utilization review.]

(2) advise the commissioner on other changes and additions to the existing rules regulating utilization review that the department determines are needed to administer the Insurance Code Chapter 4201.

(c) Tasks. The tasks of the advisory committee include those tasks specified in the following paragraphs:

(1) The advisory committee shall review and evaluate proposed changes and additions to the current utilization review rules in this subchapter [statutes to determine and develop any necessary changes to the current utilization review regulations], and the advisory committee shall make recommendations to the commissioner regarding such proposed changes and additions;

(2) The advisory committee shall advise and consult with the commissioner or the commissioner's representative during its review and evaluation made pursuant to paragraph (1) of this subsection; and [of current utilization review statutes;]

~~(3) The advisory committee may advise the commissioner on the need for subcommittees or workgroups to fulfill its tasks;~~

(3) ~~[(4)]~~ The advisory committee shall perform other tasks related to the development of rules as provided by paragraph (1) of this subsection and as requested by the commissioner pursuant to the Insurance Code Chapter 4201 and the Government Code Chapter 2110[Article 21.58A].

(d) Membership. Pursuant to the Insurance Code §4201.003, [Article 21.58A, §13,] the membership of the advisory committee shall include [consist of]:

(1) One representative for each of the following: the Office of Public Insurance Counsel, an insurance company, a health maintenance organization, a group hospital service corporation, a workers' compensation insurance carrier, a utilization review agent, a health coverage consumer group, injured employees, an employer, a physician, a dentist, a hospital, a registered nurse, and other health care providers; and

(2) (No change.)

(e) Reporting Requirements. After completion of review and evaluation of proposed changes and additions to the current utilization review rules in this subchapter, or completion of any other tasks in accordance with subsection (c)(3) of this section, the advisory committee shall submit a report of its recommendations to the commissioner.

(f) ~~[(e)]~~ Duration. The advisory committee shall automatically terminate on December 31, 2010 [1998], unless, before its termination, the commissioner extends its duration by rule.

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

Filed with the Office of the Secretary of State on July 29, 2009.

TRD-200903212

Brenda Caldwell

Assistant General Counsel

Texas Department of Insurance

Earliest possible date of adoption: September 13, 2009

For further information, please call: (512) 463-6327



TITLE 34. PUBLIC FINANCE

PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 103. CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.10

The Texas County and District Retirement System proposes an amendment to §103.10, concerning the distribution of a survivor benefit under Government Code, §844.407. House Bill 1587, as enacted in the 2007 Regular Session of the 80th Legislature, changed the benefit to be actuarially equivalent to the deceased member's accrued benefit and authorized the board to prescribe the forms and manner in which the benefit may be paid. Under this authority the board authorized certain payments to be made as lump sums.

Employer provided benefits are funded over time with the expectation that those benefits would be paid out over time. Although the vast majority of subdivision plans would be unaffected by infrequent and occasional single sum payments, with the decrease in the value of trust assets because of the current worldwide economic downturn, an immediate lump-sum payment from the subdivision's account can in certain instances deplete the subdivision's account below a prudently maintained balance.

In accordance with the statutory authority of the board to prescribe payment forms, the proposed amendment changes the regular form of payment to an estate from a single sum to an installment payment arrangement not extending beyond the last day of the calendar year containing the fifth anniversary of the member's death. This is in compliance with the distribution requirements of the Internal Revenue Code. The installment payment arrangement would be equivalent in value to payment as a single sum as interest (payable from the subdivision's account) would be accruing on unpaid balances. The system is authorized to allow lump-sum payments of the total accrued benefit or the remaining unpaid balance if it determines at that time that a lump sum payment will not harm or injure the funded status of the subdivision's plan.

In addition, the proposed amendment will now allow a designated beneficiary to disclaim their portion of the benefit provided the disclaimer does not cause the benefit to default to the estate. The original rule was adopted to discourage a single designated beneficiary from thwarting the decedent's intent to have the benefit paid in the form of an annuity by disclaiming the benefit as a beneficiary and taking the benefit as the heir to the estate. As proposed, the amendment would permit the remaining designated beneficiaries to share in the disclaimed benefit and still receive their benefits as annuities.

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

Mr. Nabholz has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the preservation and protection of accrued benefits. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to W. James Nabholz, III, General Counsel, Texas County and District Retirement System, P.O. Box 2034, Austin, TX 78768-2034.

The rule is proposed under the Government Code, §845.102, which provides the board of trustees with the authority to adopt rules necessary or desirable for efficient administration of the system, and Government Code, §844.407(d) which gives the board authority to specify the form and manner in which a survivor annuity may be paid.

The Government Code, §844.407 is affected by this proposed rule.

§103.10. Survivor Annuity.

(a) The beneficiary of a deceased member who had accumulated at least four years of credited service in the system is eligible to apply for and receive a survivor annuity as described in this section.

(b) The annuity payable under this section to an individual beneficiary shall be the actuarial equivalent, as defined in §841.001(1) of the Act, of the allocated shares of the member's individual account balance and total service credit standing to the credit of the member computed as of the last day of the month preceding the member's death.

(c) An individual designated as beneficiary by the member, or an individual designated as beneficiary under the Act, may elect an annuity to be paid in the form of a life annuity for the beneficiary's life but actuarially reduced to provide a guarantee that the total of all payments will equal or exceed:

- (1) the beneficiary's allocated share of the decedent's individual account balance; or
- (2) the equivalent of 120 monthly payments; or
- (3) the equivalent of 180 monthly payments.

(d) In lieu of an annuity, the beneficiary may elect a refund of the beneficiary's allocated share of the deceased member's individual account.

(e) The annuity shall be calculated using the beneficiary's age on the last day of the month preceding the member's death and computed on the beneficiary's allocated shares of the deceased member's individual account balance and total service credit standing to the credit of the member as of the last day of the month preceding the member's death.

(f) An individual designated as beneficiary by the member, or an individual designated as beneficiary under the Act, may not renounce, repudiate, or disclaim the benefit provided under this section if in doing so the benefit would then become payable to the estate of the deceased member by default rather than by designation, except that in lieu of an annuity, an individual beneficiary may apply for a refund of that beneficiary's share of the deceased member's individual account balance.

(g) In the event that multiple persons are designated as beneficiaries by the member, the deceased member's individual account balance and total service credit shall be prorated among all beneficiaries, and each individual beneficiary may select any payment form described in subsection (c) of this section, above computed on the shares allocated to that individual. A beneficiary designated by the member or designated under the Act that is not an individual will receive installment payments [a single payment] as described in subsection (h) of this section.

(h) A designated beneficiary that is not an individual shall receive an amount [a single payment] equal to the allocated shares of the member's individual account balance and total service credit standing

to the credit of the member as of the last day of the month preceding the member's death. The board authorizes the director, subject to the determination made in subsection (l) of this section, to cause the amount to be paid in up to sixty (60) monthly installments, with the final payment made on or before the last day of the calendar year containing the fifth anniversary of the member's death. Notwithstanding subsection (k) of this section, interest shall accrue on unpaid amounts at the rate provided under the plan beginning from the last day of the month in which all necessary documents and applications have been filed with and approved by the system. A distribution payable under this subsection is not considered to be a service retirement and therefore is not subject to the immediate transfer requirements of Government Code, §845.316.

(i) A trustee of a trust having a single primary beneficiary may elect with the system, that the beneficiary of the trust be considered as a named beneficiary for purposes of selecting an annuity but such election shall be effective only if the beneficiary of the trust would be considered a named beneficiary for purposes of the rules and regulations of the Internal Revenue Code relating to required minimum distributions.

(j) An individual beneficiary who dies before filing an application for benefits or who fails to file an application within 90 days following notice from the system that a benefit is payable shall be deemed to have selected the life annuity with the guarantee that the total of all payments will equal or exceed the share of the deceased member's individual account balance allocable to the beneficiary.

(k) No interest shall accrue on any benefit payable under this section.

(l) If the director determines that the payment under subsection (h) of this section, of the total accrued benefit or of the unpaid balance of the benefit as a single sum will not harm or injure the funded status of the subdivision's account or jeopardize its ability to pay all benefits as benefits become due, the board authorizes the director to cause the distribution of the total accrued benefit or the remaining unpaid balance as the case may be, to be paid as a single sum in full satisfaction of all amounts due under the plan.

(m) All distributions under this section must comply with the laws and regulations of the Internal Revenue Code.

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

Filed with the Office of the Secretary of State on August 3, 2009.

TRD-200903277

W. James Nabholz, III

General Counsel

Texas County and District Retirement System

Earliest possible date of adoption: September 13, 2009

For further information, please call: (512) 637-3355

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 815. UNEMPLOYMENT INSURANCE

SUBCHAPTER F. EXTENDED BENEFITS

40 TAC §§815.170 - 815.174

The Texas Workforce Commission (Commission) proposes the following new subchapter to Chapter 815 concerning Unemployment Insurance:

Subchapter F, Extended Benefits, §§815.170 - 815.174

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 815 rule changes is to adjust unemployment eligibility periods, as necessary, to maximize receipt of 100 percent federally shared extended unemployment benefits in accordance with the American Recovery and Reinvestment Act of 2009, enacted February 17, 2009 (P.L. 111-5), Division B, Title II, relating to Assistance for Unemployed Workers and Struggling Families, §2005. This authority was granted to the Commission under House Bill (HB) 4586, 81st Texas Legislature, Regular Session (2009).

The Commission must take this action in order to pay unemployed individuals who are exhausting their regular and emergency unemployment benefits. During this period of high, sustained unemployment, these 100 percent federally shared extended benefits are vital to out-of-work Texans who are struggling to pay their bills while seeking work. These benefits also serve as a much-needed stabilizing factor in local economies.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER F. EXTENDED BENEFITS

The Commission proposes new Subchapter F, as follows:

§815.170. State "On" and "Off" Indicator Weeks: Conditional Trigger.

New §815.170 adds a new, conditional trigger under which Texas could enter into an extended benefit eligibility period, allowing the state to receive 100 percent federally shared extended benefits as authorized under P.L. 111-5.

There are two methods under which a state may trigger on to an extended benefit period:

--(1) a specified threshold under the Insured Unemployment Rate (IUR) methodology; and

--(2) a specified threshold under the Total Unemployment Rate (TUR) methodology.

Texas Labor Code, Chapter 209, provides for the use of the IUR methodology. However, its threshold is so high that Texas would have to have substantial levels of chronic unemployment before triggering on to an extended benefit period. The U.S. Department of Labor (DOL) has advised states that they may enact a temporary, conditional TUR trigger in order to take advantage of 100 percent federally shared extended benefits. The TUR trigger described in this section is conditional upon 100 percent federal sharing of extended benefits as recommended and approved by DOL.

§815.171. High Unemployment Period: Maximum Total Extended Benefit Amount.

New §815.171 adds a definition of "high unemployment period" and provides a different methodology for calculating an individual's maximum total extended benefit amount if the state has triggered on to a "high unemployment period."

The Federal-State Extended Unemployment Compensation Act of 1970 (Federal EB Law) *et seq.*, requires that if a state has opted to enact the optional TUR trigger, it must also provide for increased benefits under a "high unemployment period."

§815.172. Concurrent Emergency Unemployment Compensation Programs.

New §815.172 stipulates that Texas will pay extended unemployment benefits after all regular and emergency unemployment compensation has been exhausted. There are additional administrative requirements associated with implementing extended benefits that are not applicable to other 100 percent federally funded emergency unemployment compensation programs. Ordering payment of extended benefits after all other types of unemployment benefits have been exhausted helps the Agency make better use of the resources available to serve claimants. This ordering of benefits is allowable under P.L. 111-5.

§815.173. Eligibility Requirements during a Period of 100 Percent Federally Shared Benefits.

New §815.173 provides that individuals who exhaust emergency unemployment compensation are otherwise eligible for extended unemployment benefits even if their benefit year for regular benefits has exhausted. This provision is intended to consider individuals eligible for extended benefits if they exhaust emergency unemployment compensation after their benefit year ends.

§815.174. Financing of Extended Benefits.

New §815.174 clarifies that the benefit charging provisions of Texas Labor Code, Chapter 209, Subchapter E relating to taxed employers, do not apply to circumstances in which 100 percent of extended benefits are shared by the federal government. The charging provisions are intended to account for the 50 percent of benefits that would be funded from the state's share under the standard provisions of the Federal EB Law. Because there is no state sharing under this subchapter, the taxed employer charging provisions are not necessary.

This section further clarifies that charges to governmental employers (§209.084 of the Act) and Indian tribes (§209.0845 of the Act) shall apply.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are additional estimated costs to the state and local governments expected as a result of enforcing or administering the rules, as outlined below.

There are no estimated reductions in costs to the state and local governments as a result of enforcing or administering the rules.

There are no estimated losses in revenue to the state and local governments as a result of enforcing or administering the rules. We cannot estimate what the increase in revenue to the state and local governments would total, as a result of enforcing or administering the rules, although it is indicated that there would be an increase because of increased economic activity and probable tax revenue resulting from an estimated \$335 million in UI

extended benefits being paid (most or all of which would subsequently be expended by unemployment claimants).

There are implications relating to the costs (described below) or revenues (described above) of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to persons required to comply with the rules.

There is no estimated adverse economic effect on small businesses as a result of enforcing or administering the rules.

The Commission estimates that \$335 million in these UI extended benefits, as authorized by the American Recovery and Reinvestment Act of 2009 and HB 4586, 81st Texas Legislature, will be expended (i.e., for individuals who will have exhausted emergency unemployment compensation and are otherwise eligible for UI extended benefits even if their benefit year for regular benefits has expired). Total expenditures of emergency unemployment compensation during the most recent 33 weeks in Texas (i.e., from November 27, 2008, through July 15, 2009) have been analyzed in the context of proportions of benefit expenditures attributed to certain base period employers. As directed by DOL, federal unemployment compensation statute requires "conforming legislation" on the part of states, and as a result of this, Texas Labor Code, §209.084, was earlier enacted to provide that the total amount of extended benefit payments shall be charged to the employer (i.e., and not included in the federal share) if the payments are based on benefit wage credits earned from: (1) a state; (2) any political subdivision of a state; or (3) any instrumentality of any one or more states or political subdivisions that is wholly owned by one or more states or political subdivisions. The assumption is being made that expenditures of UI extended benefits will occur among base period employers largely in the proportion that they occurred for emergency unemployment compensation during the most recent 33-week period in Texas. During this period, 2.6 percent of emergency unemployment compensation benefits were attributed to former employees for which local governments in Texas had been their base employer, and 1.1 percent of emergency unemployment compensation benefits were attributed to former employees for which state government in Texas (including state agencies and state universities and hospitals) had been their base employer. Applying these percentages to the estimated \$335 million in UI extended benefits, the estimated cost impact for local governments in Texas is \$8.7 million, and the estimated cost impact for state government in Texas (including state agencies and state universities and hospitals) is \$3.7 million.

Economic Impact Statement and Regulatory Flexibility Analysis

The Agency has determined that the proposed rules will not have an adverse economic impact on small businesses as these proposed rules place no requirements on small businesses.

Mark Hughes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

LaSha Lenzy, Director of the Unemployment Insurance Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to provide long-term unemployed Texans with up to 13 weeks of additional unemployment compensation benefits.

PART IV. COORDINATION ACTIVITIES

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Texas Labor Code, Title 4.

§815.170. State "On" and "Off" Indicator Weeks: Conditional Trigger.

(a) In addition to the state "on" indicator provisions for extended benefits in the Act, and with respect to weeks of unemployment beginning on or after February 17, 2009, a week is a state "on" indicator week if:

(1) the average rate of total unemployment in Texas (seasonally adjusted), as determined by the U.S. Secretary of Labor, for the period consisting of the most recent three months for which data for all states are published before the close of such week equals or exceeds 6.5 percent; and

(2) the average rate of total unemployment in Texas (seasonally adjusted), as determined by the U.S. Secretary of Labor, for the three-month period referred to in paragraph (1) of this subsection, equals or exceeds 110 percent of such average for either or both of the corresponding three-month periods ending in the two preceding calendar years.

(b) In addition to the state "off" indicator provisions for extended benefits in the Act, there is a state "off" indicator for only a week if, for the period consisting of such week and the immediately preceding twelve weeks, none of the options specified in subsection (a) of this section result in an "on" indicator.

(c) This section continues in effect until the week ending four weeks prior to the last week of unemployment for which 100 percent federal sharing is available under P.L. 111-5, Division B, Title II, §2005(a), without regard to the extension of federal sharing for certain claims as provided under §2005(c) of such law.

§815.171. High Unemployment Period: Maximum Total Extended Benefit Amount.

(a) If the conditions under §815.170(a) of this subchapter are met except that the average rate of total unemployment equals or exceeds 8 percent, a high unemployment period shall exist.

(b) Effective with respect to weeks beginning in a high unemployment period, the total extended benefit amount payable to an eligible individual for the individual's eligibility period is 80 percent of the total amount of regular benefits that were payable to the individual under the Act in the individual's benefit year.

(c) This section applies as long as §815.170 of this subchapter is in effect.

§815.172. Concurrent Emergency Unemployment Compensation Programs.

The Agency shall pay unemployment compensation benefits under other emergency unemployment compensation programs that may be in effect prior to paying extended benefits under this subchapter.

§815.173. Eligibility Requirements during a Period of 100 Percent Federally Shared Benefits.

(a) Notwithstanding other eligibility provisions for extended benefits in the Act, an individual's eligibility period shall include any eligibility period provided for in P.L. 111-5, Division B, Title II, §2005(b).

(b) This section applies as long as §815.170 of this subchapter is in effect.

§815.174. Financing of Extended Benefits.

(a) If there is 100 percent federal sharing for extended benefits pursuant to P.L. 111-5, Division B, Title II, §2005, the provisions of Subchapter E, Chapter 209 of the Act relating to taxed employers shall not apply.

(b) The provisions of §209.084, regarding Charges to Governmental Employer, and §209.0845, regarding Charges to Indian Tribe, of the Act shall continue to apply.

(c) This section applies as long as §815.170 of this subchapter is in effect.

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

Filed with the Office of the Secretary of State on July 28, 2009.

TRD-200903184

Reagan Miller

Deputy Division Director, Workforce Policy and Service Delivery

Texas Workforce Commission

Earliest possible date of adoption: September 13, 2009

For further information, please call: (512) 475-0829



TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 30. AVIATION

SUBCHAPTER B. AIR CARRIERS

43 TAC §§30.101 - 30.104

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

The Texas Department of Transportation (department) proposes the repeal of §30.101, Scheduled Intrastate Air Passenger Carriers, §30.102, United States Certificated Air Carriers, §30.103, Nonscheduled Air Carriers, and §30.104, All-Cargo Air Carriers, all concerning air carriers.

EXPLANATION OF PROPOSED REPEALS

Article 46c-6, Vernon's Texas Civil Statutes purports to authorize the department to regulate air carriers and requires the department to adopt rules providing for the safety of air carriers. Under

that article, an air carrier may not operate in the state unless the carrier has obtained a certificate of public convenience and necessity or a certificate of operating authority from the department.

Federal law preempts a state's economic regulation of air carriers. Senate Bill 334, Acts of the 81st Legislature, Regular Session, 2009, repealed Article 46c-6.

The repeal of §30.101, Scheduled Intrastate Air Passenger Carriers, §30.102, United States Certificated Air Carriers, §30.103, Nonscheduled Air Carriers, and §30.104, All-Cargo Air Carriers, removes the rules that were previously adopted under Article 46c-6 and for which, after the repeal of that article, there is no statutory authority.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

David Fulton, Director, Aviation Division has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT AND COST

Mr. Fulton has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeals will be to clarify that federal law has preempted state law concerning regulation of air carriers and to remove unnecessary rules. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §§30.101 - 30.104 may be submitted to David Fulton, Director, Aviation Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on September 14, 2009.

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§30.101. *Scheduled Intrastate Air Passenger Carriers.*

§30.102. *United States Certificated Air Carriers.*

§30.103. *Nonscheduled Air Carriers.*

§30.104. *All-Cargo Air Carriers.*

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

Filed with the Office of the Secretary of State on July 31, 2009.

TRD-200903238

Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: September 13, 2009
For further information, please call: (512) 463-8683



WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS

SUBCHAPTER B. COMMUNITY SERVICES BLOCK GRANT (CSBG)

10 TAC §5.203

The Texas Department of Housing and Community Affairs withdraws the proposed amendments to §5.203 which appeared in the June 5, 2009, issue of the *Texas Register* (34 TexReg 3485).

Filed with the Office of the Secretary of State on August 3, 2009.

TRD-200903310

Michael Gerber

Executive Director

Texas Department of Housing and Community Affairs

Effective date: August 3, 2009

For further information, please call: (512) 475-3916



TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER E. APPROVAL OF DISTANCE EDUCATION, OFF-CAMPUS, AND EXTENSION COURSES AND PROGRAMS FOR PUBLIC INSTITUTIONS

19 TAC §4.105

The Texas Higher Education Coordinating Board withdraws the proposed amendments to §4.105 which appeared in the June 26, 2009, issue of the *Texas Register* (34 TexReg 4245).

Filed with the Office of the Secretary of State on July 31, 2009.

TRD-200903232

Bill Franz

General Counsel

Texas Higher Education Coordinating Board

Effective date: July 31, 2009

For further information, please call: (512) 427-6114



CHAPTER 9. PROGRAM DEVELOPMENT IN PUBLIC TWO-YEAR COLLEGES SUBCHAPTER H. PARTNERSHIPS BETWEEN SECONDARY SCHOOLS AND PUBLIC TWO-YEAR COLLEGES

19 TAC §9.144

The Texas Higher Education Coordinating Board withdraws the proposed amendments to §9.144 which appeared in the June 26, 2009, issue of the *Texas Register* (34 TexReg 4247).

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TRD-200903233

Bill Franz

General Counsel

Texas Higher Education Coordinating Board

Effective date: July 31, 2009

For further information, please call: (512) 427-6114



ADOPTED RULES

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 358. MEDICAID ELIGIBILITY

The Health and Human Services Commission (HHSC) adopts the repeal of Chapter 358, Medicaid Eligibility, consisting of §§358.100, 358.105, 358.200 - 358.205, 358.210, 358.215, 358.220, 358.300, 358.301, 358.305, 358.310, 358.315, 358.316, 358.320, 358.325, 358.400, 358.401, 358.405, 358.410, 358.415 - 358.417, 358.420, 358.425, 358.430 - 358.433, 358.435, 358.440 - 358.444, 358.450 - 358.455, 358.460, 358.461, 358.465, 358.466, 358.470, 358.475, 358.500 - 358.506, 358.510, 358.515, 358.600, 358.601, 358.603 - 358.605, 358.607, 358.609 - 358.612, 358.615, 358.617, 358.619 - 358.621, 358.623, 358.700, 358.701, 358.705, 358.710, 358.715, 358.720, 358.725, 358.801, 358.803, 358.805, 358.807, 358.809, 358.811, 358.813, 358.815, 358.817, and 358.819, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3047) and will not be republished.

HHSC concurrently adopts new Chapter 358, Medicaid Eligibility for the Elderly and People with Disabilities, consisting of §§358.101, 358.103, 358.105, 358.107, 358.201, 358.203, 358.205, 358.207, 358.209, 358.211, 358.213, 358.215, 358.217, 358.219, 358.301, 358.321 - 358.327, 358.331, 358.333 - 358.339, 358.345 - 358.355, 358.371, 358.381 - 358.387, 358.391, 358.401, 358.402, 358.411 - 358.423, 358.431 - 358.441, 358.501, 358.505, 358.510, 358.515, 358.520, 358.525, 358.530, 358.535, 358.540, 358.545, and 358.601 - 358.605. New §§358.103, 358.107, 358.207, 358.336, 358.337, 358.381, 358.386, 358.401, 358.402, 358.416 - 358.418, 358.421, 358.422, 358.433, 358.435, and 358.440 are adopted with changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3047). The text of the rules will be republished. New §§358.101, 358.105, 358.201, 358.203, 358.205, 358.209, 358.211, 358.213, 358.215, 358.217, 358.219, 358.301, 358.321 - 358.327, 358.331, 358.333 - 358.335, 358.338, 358.339, 358.345 - 358.355, 358.371, 358.382 - 358.385, 358.387, 358.391, 358.411 - 358.415, 358.419, 358.420, 358.423, 358.431, 358.432, 358.434, 358.436 - 358.439, 358.441, 358.501, 358.505, 358.510, 358.515, 358.520, 358.525, 358.530, 358.535, 358.540, 358.545, and 358.601 - 358.605 are adopted without changes to the proposed text and will not be republished.

Background and Justification

The rules in Chapter 358 provide financial and nonfinancial eligibility criteria HHSC uses to determine a person eligible for a Med-

icaid-funded program for the elderly and people with disabilities (MEPD). The repeals and new sections are adopted to allow for a complete rewrite of Chapter 358. The new rules are adopted to update agency names and rule cross-references made obsolete during the consolidation of health and human services agencies in 2004; to delete unnecessary language; to revise or eliminate obsolete terminology; to provide better and more helpful organization; and, where possible, to cite the federal law or regulation governing the MEPD policy and explain that HHSC follows the federal law or regulation.

New §358.440 is adopted to broaden the current policy concerning dependent allowances. Former policy allowed for the deduction of a dependent allowance (in accordance with spousal impoverishment provisions) from the countable income of an institutionalized person's dependent relative if the institutionalized person has a community spouse. New §358.440 incorporates the former policy but also allows for the deduction of a dependent allowance (in the amount of the Social Security Income federal benefit rate) from the countable income of an institutionalized person's dependent relative even if the person has no community spouse. With the exception of new §358.440, the new rules do not substantially change current MEPD policy. Existing rules that contain procedures for HHSC staff or explanatory material that does not apply to eligibility (for example, explanations of Medicare or Social Security policy) were not included in the rewrite of Chapter 358.

The repeals of rules in Subchapter B governing the Medicaid Savings Program (MSP) and in Subchapter I governing the Medicaid Buy-In Program (MBI) are adopted to allow for reorganization of those rules in new chapters 359 and 360, respectively. New Chapter 359 governing MSP and new Chapter 360 governing MBI are adopted elsewhere in this issue of the *Texas Register*.

The repeals of §358.315 and §358.316, governing the Preadmission Screening and Resident Review (PASARR) and risk assessment criteria, are adopted to remove rules from HHSC's rule base that are not applicable to financial eligibility for MEPD. PASARR and risk assessment criteria are completed by other agencies or entities.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (the Administrative Procedure Act). HHSC has reviewed all sections in Chapter 358 and has determined that, although the reasons for adopting rules governing Medicaid eligibility for the elderly and people with disabilities continue to exist, some of the rules in Chapter 358 are obsolete or unnecessary and others need updating. As a result of this review, HHSC is adopting these repeals and new sections.

Comments

HHSC received no comments at a public hearing held in Austin on June 22, 2009.

HHSC received written comments from one individual. A summary of the comments and HHSC's responses follow.

Comment: The commenter expressed appreciation for the incorporation of federal law citations into the state rules.

Response: HHSC thanks the commenter for his comment. No rule language was changed in response to this comment.

Comment: Regarding proposed §358.416(c), the commenter stated that the requirement to reduce the resources of the institutionalized spouse to \$2,000 as a condition of establishing eligibility is new to the Texas rules and that it is a violation of the federal requirement in §1924(c)(2) of the Social Security Act (42 U.S.C. §1396r-5(c)(2)). The commenter requested that the following sentence be deleted from the subsection: "To be eligible for Medicaid, the institutionalized spouse must have countable resources that do not exceed the individual resource limit described in 20 CFR §416.1205 and meet all other eligibility criteria." The commenter stated that the rule, as proposed, limits the institutionalized spouse's resources to \$2,000 at the time of the institutionalized spouse's application for Medicaid; however, the commenter believes that the \$2,000 resource limit should be applied at the time of annual review, not at the time of application.

Response: HHSC agrees that the specific language in §358.416(c) was not in the previous rule; however, HHSC disagrees that it is new policy and disagrees that it is in violation of federal requirements. In response to the comment and in order to clarify the rule, HHSC has replaced the second sentence of subsection (c) with the following: "HHSC follows §1924(a)(3) and §1924(c)(2) of the Social Security Act (42 U.S.C. §1396r-5(a)(3) and 42 U.S.C. §1396r-5(c)(2)) when determining resource eligibility of the institutionalized spouse at the initial eligibility determination."

Comment: Regarding proposed §358.417(a), the commenter requested that the phrase "After the initial eligibility period . . ." be replaced with "After the eligibility of the institutionalized spouse is determined . . .". The commenter stated that the rule, as proposed, implies that during the initial eligibility period, the community spouse is limited to the amount of resources set by the spousal protected resource amount (SPRA); however, the commenter believes that the resources of the community spouse should not be limited after eligibility is established.

Response: HHSC disagrees with the commenter, because the intent of the rule is the treatment of resources of the institutionalized spouse after the initial eligibility period. "Initial eligibility period" is defined in §358.103(41) as "the time from a person's certification date to the person's first annual review." In response to the comment, in order to clarify the intent of the rule, HHSC has added "of the institutionalized spouse" when referring to resources in the section.

Comment: Regarding proposed §358.417(b), the commenter requested that the subsection be deleted, because exclusions to an institutionalized spouse's resources are not limited to a home and an automobile. Other exclusions allowed by 20 CFR §§416.1210 - 416.2176 should also be allowed.

Response: HHSC agrees with the commenter that subsection (b) is not necessary and has deleted subsection (b) from the adopted rule.

Comment: Regarding §358.336(3), the commenter noted that the phrase "medical and social services" is unclear and appears to place restrictions on distributions from trusts that would not apply to distributions by individuals, contrary to federal law and policy regarding trusts.

Response: HHSC agrees that the phrase is unclear. Income used to purchase medical or social services is just one example of payment from a trust made to or for the benefit of a person that would not be counted as income. HHSC has changed §358.336(3) in response to the comment to include the federal regulation that governs what is counted as income and to delete the example concerning medical and social services.

HHSC made minor editorial changes to the text of the following to clarify and improve the accuracy of the sections:

(1) In §§358.103(1), 358.107(c)(3), and §358.401, HHSC changed the word "section" to the "§" symbol to ensure consistent formatting of the term throughout the chapter.

(2) HHSC reversed the order of definitions in proposed §358.103(29) and (30) to place the definitions in alphabetical order.

(3) To reflect the amendment made to Texas Health and Safety Code, §531.0021(a) in Senate Bill 643, 81st Legislature, Regular Session, 2009, concerning the change in name from "state school" to "state supported living center," HHSC deleted the proposed definition of "state mental retardation facility," added definitions for "state supported living center" and "state center," and made conforming changes to the rule language in §358.103(47), proposed §358.103(85) (adopted §358.103(86)), §358.402(a)(2) and (3), and §358.402(e)(4). The additional definitions in §358.103 required HHSC to renumber the paragraphs of subsequent definitions.

(4) In §358.103(84), HHSC changed the word "legislation" to "provision" to provide a more accurate description of the defined term.

(5) In proposed §§358.103(87) (adopted §358.103(88)), 358.381, 358.433, 358.435, and 358.440, HHSC changed the term "Supplemental Security Income (SSI) benefit rate" to "Supplemental Security Income (SSI) federal benefit rate" to more accurately reflect the term used in the federal regulations.

(6) In §358.107, HHSC made minor editorial changes to clarify the designation of mandatory coverage groups and the optional coverage groups.

(7) In §358.207(a), HHSC added the federal citation for the U.S. residence requirement and made conforming changes in subsection (b).

(8) In §358.337(b)(3)(B), HHSC added the phrase "only if the payments would ordinarily be counted as income in accordance with 20 CFR §416.1102" to be consistent with the change made to §358.336 in response to a public comment.

(9) In §358.386, HHSC changed the parenthetical phrase "for example" to "that is" and made changes in paragraph (2)(C) to conform to similar language in paragraph (2)(A) and (B).

(10) HHSC added subsection (g) to §358.416 to provide clarification regarding the treatment of a community spouse's resources after eligibility is established for the institutionalized spouse.

(11) In §358.418, HHSC clarified that subsection (a) governs a spousal resource assessment made prior to an application for

Medicaid and corrected the spelling of the HHSC acronym in subsection (c).

(12) In §358.421(b) and §358.422, HHSC deleted an unnecessary acronym.

(13) In §358.433(1)(B), HHSC changed "the Texas Department of Aging and Disability Services" to "a Texas health and human services agency" to make it clear that approval to receive services under a §1915(c) waiver program may come from any agency in the health and human services system that operates that particular §1915(c) waiver program.

(14) In §358.401(d)(2)(B)(iii) and (iv), HHSC replaced an inaccurate reference to §358.452(e)(2) with the correct reference to §358.402(e)(2).

SUBCHAPTER A. GENERAL INFORMATION

1 TAC §358.100, §358.105

The repeals are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200903244

Steve Aragón
Chief Counsel

Texas Health and Human Services Commission

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



SUBCHAPTER B. MEDICARE AND THIRD-PARTY RESOURCES

1 TAC §§358.200 - 358.205, 358.210, 358.215, 358.220

The repeals are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. BASIC PROGRAM REQUIREMENTS

1 TAC §§358.300, 358.301, 358.305, 358.310, 358.315, 358.316, 358.320, 358.325

The repeals are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. RESOURCES

1 TAC §§358.400, 358.401, 358.405, 358.410, 358.415 - 358.417, 358.420, 358.425, 358.430 - 358.433, 358.435, 358.440 - 358.444

The repeals are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. INCOME

1 TAC §§358.450 - 358.455, 358.460, 358.461, 358.465, 358.466, 358.470, 358.475

The repeals are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. BUDGETS AND PAYMENT PLANS

1 TAC §§358.500 - 358.506, 358.510, 358.515

The repeals are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. APPLICATION FOR MEDICAID

1 TAC §§358.600, 358.601, 358.603 - 358.605, 358.607, 358.609 - 358.612, 358.615, 358.617, 358.619 - 358.621, 358.623

The repeals are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Chief Counsel

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SUBCHAPTER H. CLIENT RIGHTS AND RESPONSIBILITIES

1 TAC §§358.700, 358.701, 358.705, 358.710, 358.715, 358.720, 358.725

The repeals are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Chief Counsel

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SUBCHAPTER I. MEDICAID BUY-IN PROGRAM

1 TAC §§358.801, 358.803, 358.805, 358.807, 358.809, 358.811, 358.813, 358.815, 358.817, 358.819

The repeals are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 358. MEDICAID ELIGIBILITY FOR THE ELDERLY AND PEOPLE WITH DISABILITIES

SUBCHAPTER A. GENERAL INFORMATION

1 TAC §§358.101, 358.103, 358.105, 358.107

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§358.103. *Definitions.*

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

(1) §1915(c) waiver program--A home or community-based service authorized for use in Texas by the Centers for Medicare and Medicaid Services in accordance with §1915(c) of the Social Security Act.

(2) Adverse action--A termination, suspension, or reduction of Medicaid eligibility or covered services.

(3) Annual review--The process of redetermining a person's continued eligibility for Medicaid.

(4) Appeal--A request for a review of an action or failure to act by the Texas Health and Human Services Commission (HHSC) that may result in a fair hearing.

(5) Applicant--A person seeking benefits under a Medicaid-funded program for the elderly and people with disabilities (MEPD) who is not currently receiving MEPD services.

(6) Application for assistance--A form prescribed by HHSC that a person uses to apply for MEPD or to have MEPD eligibility redetermined.

(7) Assets--All items a person owns that have monetary value. Assets include both income and resources.

(8) Authorized representative--An individual:

(A) who assists and represents a person in the application or eligibility redetermination process, and who is familiar with that person and that person's financial affairs; or

(B) who is a representative payee for an applicant or recipient for another federal benefit.

(9) Benefits office--A local HHSC office.

(10) Blind--A person who meets Supplemental Security Income (SSI) program requirements for blindness, as defined in 42 U.S.C. §1382c(a)(2).

(11) Budgeting--The process of determining a person's financial eligibility for MEPD or for calculating a co-payment.

(12) Burial space--A burial plot, grave site, crypt, mausoleum, urn, casket, niche, or other repository customarily and traditionally used for a deceased person's bodily remains. The term also includes necessary and reasonable improvements or additions to these spaces, including vaults, headstones, markers, or plaques; burial containers; arrangements for opening and closing the grave site; and contracts for care and maintenance of the grave site. Contracts for care and maintenance are sometimes referred to as endowment or perpetual care.

(13) Certification--HHSC's official authorization of an eligibility determination.

(14) CFR--Code of Federal Regulations.

(15) Community spouse--See Subchapter C, Division 5, §358.412 of this chapter (relating to Definitions).

(16) Co-payment--The amount of personal income a person must pay toward the cost of his or her care. Co-payment was formerly known as applied income.

(17) Countable income--The amount of a person's income that is not exempt or excluded.

(18) Countable resource--A resource owned by and accessible to a person that is not exempt or excluded.

(19) Coverage group--A group of people who are categorically eligible for MEPD under the Texas State Plan for Medical Assistance.

(20) Current market value--The amount of money an item would bring if sold in the current local market.

(21) Date of application--See §358.520 of this chapter (relating to Date of Application).

(22) Deeming--Counting all or part of the income or resources of another person (for example, a parent or spouse) as income or resources available to an applicant or recipient.

(23) Disabled--A person who meets SSI program requirements as defined in 42 U.S.C. §1382c(a)(3).

(24) Earned income--Income a person receives for services performed as an employee or from self-employment.

(25) Earned income tax credit--A special tax credit that reduces the federal tax liability of certain low-income working taxpayers.

(26) Eligibility determination--A decision made by HHSC concerning a person's initial eligibility for MEPD. This term does not include any functional or other assessment required for some MEPD services, unless the context clearly indicates otherwise.

(27) Eligibility redetermination--A decision made by HHSC concerning a person's continued eligibility for MEPD. This term does not include any functional or other assessment required for some MEPD services, unless the context clearly indicates otherwise.

(28) Equity value--The value of a resource based on its fair market value or current market value minus all money owed on the resources and, if sold, any costs usually associated with the sale.

(29) Excluded--Income or resources not counted for the purpose of determining eligibility only.

(30) Exempt--Income or resources not counted for the purpose of determining eligibility or calculating a co-payment.

(31) Fair hearing--An informal proceeding held before an impartial hearings officer in which a person or the person's representative appeals an action taken on the person's case.

(32) Fair market value--The current market value of a resource at the time of its sale or transfer.

(33) Family member--An applicant's or recipient's spouse, minor child, adult child, stepchild, adopted child, brother, sister, parent, or adoptive parent; or a spouse of the applicant's or recipient's minor child, adult child, stepchild, adopted child, brother, sister, parent, or adoptive parent.

(34) **Fiduciary agent**--A person or organization acting on behalf of or with the authorization of another person under circumstances that involve a high degree of confidence, good faith, and honesty. The term applies to anyone who acts in a financial capacity, whether formal or informal, regardless of title, such as representative payee, guardian, or conservator.

(35) **Fraud**--Deliberate misrepresentation or willful withholding of information for the purpose of obtaining public assistance, either for self or another person.

(36) **Health Insurance Premium Payment Program**--A Medicaid program that pays for the cost of medical premiums. The program reimburses recipients or employers for private health insurance payments for Medicaid-eligible persons when it is cost effective to do so.

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

(38) **Home**--A structure in which a person lives (including a mobile home, a houseboat, and a motor home), other buildings on the home property, and all adjacent land (including land separated by a road, river, or stream), in which the person has an ownership interest and that serves as his or her principal place of residence.

(39) **Income**--Any item a person receives in cash or in kind that can be used to meet his or her need for food or shelter. For purposes of determining MEPD financial eligibility, income includes the receipt of any item that can be applied, either directly or by sale or conversion, to meet the basic needs of food or shelter.

(40) **Inheritance**--Cash, other liquid resources, noncash items, or any right in real or personal property received as the result of someone's death. A person may not have access to his or her inheritance pending legal action or the discovery of the inheritance.

(41) **Initial eligibility period**--The time from a person's certification date to the person's first annual review.

(42) **In-kind**--Consisting of something (such as food, shelter, or replacement of a resource) that is not cash.

(43) **Institution for mental diseases (IMD)**--A hospital, nursing facility, or other institutional setting of more than 16 beds that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical attention, nursing care, and related services. An IMD includes a state mental health facility operated by the Texas Department of State Health Services.

(44) **Institutional care**--Long-term nursing care, treatment, or services received in a Medicaid-certified long-term care facility.

(45) **Institutional setting**--A living arrangement in which a person applying for or receiving Medicaid lives in a Medicaid-certified long-term care facility or receives services under a §1915(c) waiver program.

(46) **Insurance**--The following terms apply to the definition of insurance:

(A) "The insured" means the person named in a life insurance policy whose death affects the proceeds and distribution of the policy.

(B) "The beneficiary" means the person or entity named in a contract to receive the proceeds of the policy upon the death of the insured.

(C) "The owner" means the person with the right to change the policy as the person sees fit. The owner is the only person who can receive the cash surrender value of the policy.

(D) "The insurer" is the company that contracts with the owner.

(E) "Cash surrender value" means the amount that the insurer pays the owner if the policy is cancelled before death or before it has matured. The cash surrender value usually increases with the age of the policy.

(F) A "participating life insurance policy" is one in which dividends are distributed to the policyholder.

(G) "Term life insurance" means life insurance that has no cash, loan, or dividend value, nor the potential for cash, loan, or dividend value.

(H) "Dividend" means a share of surplus funds allocated to the policyholders of a participating insurance policy. A dividend generally represents a previous overpayment of premiums.

(47) **Intermediate care facility for persons with mental retardation or related conditions (ICF/MR)**--A Medicaid-certified facility that provides care in a 24-hour specialized residential setting for persons with mental retardation or a related condition. An ICF/MR includes a state supported living center and a state center.

(48) **Inter vivos trust**--A trust established while the person creating the trust is still living.

(49) **Level of care**--The type of care a person is eligible to receive in an ICF/MR based upon an assessment of the person's need for care.

(50) **Level of care determination**--A determination made by the Texas Department of Aging and Disability Services that determines a person's level of care.

(51) **Life estate**--A right to real property conferred in a legal instrument on a person (beneficiary). The right is conferred for the duration of the beneficiary's lifetime or the lifetime of another person. The beneficiary usually has the right to possess, use, and receive profits from the real property during his or her possession.

(52) **Liquid resource**--Cash or other property that can be converted to cash within 20 working days.

(53) **Long-term care facility**--A nursing facility, ICF/MR, or IMD in which medical services are provided.

(54) **Look-back period**--The period of time HHSC considers to determine if a person transferred, gave away, disposed of, or otherwise reduced his or her countable resources and income without receiving equal value in return and with the intent to give away resources in order to qualify for MEPD.

(55) **Medicaid**--A state and federal cooperative program, authorized under Title XIX of the Social Security Act and the Texas Human Resources Code, that pays for certain medical and health care costs for people who qualify. Also known as the medical assistance program.

(56) **Medical effective date**--The date a person's Medicaid coverage begins.

(57) **Medical necessity**--The determination that a person requires the services of a licensed nurse in an institutional setting to carry out a physician's planned regimen for total care.

(58) **Medical services**--Services that are directed toward diagnostic, preventive, therapeutic, or palliative treatment of a medical condition and that are performed, directed, or supervised by a state-licensed health professional.

(59) Medicare--Medical coverage available under Title XVIII of the Social Security Act to people 65 years of age or older and to certain disabled people under 65 years of age.

(60) MEPD--A Medicaid-funded program for the elderly and people with disabilities. A public assistance program providing institutional and community-based health-related care for the elderly and people with disabilities. MEPD does not provide cash assistance. Examples of MEPD services and programs are:

(A) primary home care services;

(B) §1915(c) waiver programs, which provide community-based care as an alternative to institutional care;

(C) care in a Medicaid-certified long-term care facility; and

(D) the Program of All-Inclusive Care for the Elderly (PACE).

(61) Mineral rights--Ownership interest in the oil, gas, or minerals beneath the surface of a piece of property.

(62) Month of application--The month in which the date of application falls.

(63) Noninstitutional setting--A living arrangement in which a person applying for or receiving Medicaid does not live in a long-term care facility or receive services under a §1915(c) waiver program.

(64) Nursing facility--An entity that provides organized and structured nursing care and services, and is subject to licensure under Texas Health and Safety Code, Chapter 242.

(65) Parent--A child's natural or adoptive parent or the spouse of the natural or adoptive parent.

(66) Pension funds--Monies held in a retirement fund under a plan administered by an employer or union, or an individual retirement account (IRA) or Keogh account as described in the Internal Revenue Code.

(67) Personal needs allowance--An amount of the recipient's income that a recipient in an institutional setting may retain for personal use.

(68) Primary home care services--Medicaid-funded, in-home attendant services provided to a person with a medical need for specific tasks to delay or prevent the person's need for institutional care.

(69) Principal place of residence--The home where a person resides, occupies, and lives.

(70) Provider--A person, group, or agency contracted to provide a Medicaid-funded service to a person for a fee.

(71) Public institution--An institution defined in 20 CFR §416.201.

(72) Real property--Land and improvements, including buildings and structures. Real property may also include a mine or quarry, standing timber, or minerals.

(73) Recipient--A person receiving benefits under MEPD, including a person whose Medicaid eligibility is being redetermined.

(74) Representative payee--A person or an organization selected to receive benefits on behalf of a recipient, if the recipient is not able to manage or direct the management of benefit payments in his or her own interest.

(75) Resources--Cash, other liquid assets, or any real or personal property, that a person (or spouse or parent, as appropriate):

(A) owns;

(B) has the right, authority, or power to convert to cash (if not already cash); and

(C) is not legally restricted from using for his or her support and maintenance.

(76) Restitution--Securing payment from a recipient when fraud is not indicated or pursued and when the recipient's co-payment has been undercharged because of previously unreported or underreported monthly income or resources.

(77) Retirement, Survivors, and Disability Insurance (RSDI)--Benefits provided under Title II of the Social Security Act.

(78) Retroactive coverage--Payment for Medicaid-reimbursable medical services received up to three months before the month of application.

(79) Social Security--A federal system of retirement and disability insurance for various categories of employed and dependent persons, funded through dedicated payroll taxes.

(80) Social Security Act--The federal statute that provides the authority for various programs referenced in this chapter, including Medicare and Medicaid. See also the definition in this section for certain titles in the Social Security Act.

(81) Social Security Administration (SSA)--The federal agency that issues Social Security numbers, administers Social Security benefit programs, and manages the SSI program.

(82) Social service--A service, other than a medical service, that is intended to assist a person with a physical disability or social disadvantage to function in society on a level comparable to that of a person who does not have such a disability or disadvantage. No in-kind items are expressly identified as social services.

(83) Special income limit--The income limit used to test MEPD eligibility for a person or couple in an institutional setting in accordance with §358.433 of this chapter (relating to Special Income Limit).

(84) Spousal impoverishment--Provision implemented under §1924 of the Social Security Act (42 U.S.C. §1396r-5) designed to prevent the impoverishment of a family, usually a couple, when one spouse needs care in an institutional setting.

(85) State center--A facility operated by the Texas Department of State Health Services with which the Texas Department of Aging and Disability Services contracts to provide services to persons with mental retardation who reside in the facility.

(86) State mental health facility--A facility operated by the Texas Department of State Health Services that provides care for people with mental illness who need the safety, structure, and resources of an in-patient setting.

(87) State supported living center--A facility operated by the Texas Department of Aging and Disability Services that provides residential services and 24-hour supervision and active treatments to assist people with mental retardation.

(88) Supplemental Security Income (SSI) federal benefit rate--Standard payment amount in the SSI program.

(89) Supplemental Security Income (SSI) program--A federal income supplement program, funded by general tax revenues and

managed by the SSA, that provides monthly income to people who are aged, blind, or disabled and have limited income and resources.

(90) Support and maintenance--The value of food and shelter that a person receives.

(91) Temporary Assistance for Needy Families--A program that provides temporary benefits (cash assistance) and work opportunities to families with needy dependent children, authorized under Title IV of the Social Security Act.

(92) Testamentary trust--A trust established by a will.

(93) Texas State Plan for Medical Assistance--Document describing the Medicaid-funded services provided in Texas, in accordance with §1902 of the Social Security Act (42 U.S.C. §1396a).

(94) Third-party resource--A source of payment for medical expenses other than Medicaid.

(95) Three months prior--The three calendar months before the month of application.

(96) Titles to Social Security Act--Divisions of the Social Security Act. Titles referenced in this chapter are:

- (A) Title II, which governs RSDI benefits;
- (B) Title XVI, which governs the SSI program;
- (C) Title XVIII, which governs Medicare; and
- (D) Title XIX, which governs Medicaid.

(97) Trust--A trust includes any legal instrument, device, or arrangement which may not be called a trust under state law, but which is similar to a trust. That is, it involves a grantor who transfers property to an individual or entity with fiduciary obligations with the intention that it be held, managed, or administered by the individual or entity for the benefit of the grantor or others. This can include (but is not limited to) escrow accounts, investment accounts, pension funds, irrevocable burial trusts, limited partnerships, and other similar entities managed by an individual or entity with the fiduciary obligations.

(98) Unearned income--Income that is not earned.

(99) U.S.C.--United States Code.

(100) Working day--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

§358.107. Coverage Groups.

(a) General. This section describes the groups of people who are categorically eligible for a Medicaid-funded program for the elderly and people with disabilities (MEPD) under the Texas State Plan for Medical Assistance.

(b) Mandatory coverage groups. In accordance with 42 CFR Part 435, Subpart B, the Texas Health and Human Services Commission (HHSC) determines eligibility for MEPD for a person who falls into at least one of the following mandatory coverage groups:

(1) Supplemental Security Income (SSI) eligible. In accordance with 42 CFR §435.120, this mandatory coverage group covers a person who is aged, blind, or disabled and is receiving SSI or deemed to be receiving SSI. The Social Security Administration (SSA) determines eligibility for SSI under Title XVI of the Social Security Act. If SSA determines that a person is eligible for SSI, HHSC accepts SSA's determination as an automatic determination of eligibility for Medicaid.

(2) Coverage for certain aliens. In accordance with 42 CFR §435.139, an alien, as defined in 42 CFR §435.406, is provided services

necessary for the treatment of an emergency medical condition, as defined in 42 CFR §440.255.

(3) Disabled adult child. In accordance with §1634(c) of the Social Security Act (42 U.S.C. §1383c), this mandatory coverage group covers a person who:

(A) is at least 18 years of age;

(B) became disabled before 22 years of age;

(C) is denied SSI because of receipt of or an increase in Retirement, Survivors, and Disability Insurance (RSDI) disabled children's benefits received on or after July 1, 1987, and any subsequent increase; and

(D) meets current SSI criteria, excluding the RSDI benefit described in subparagraph (C) of this paragraph.

(4) Historical 1972 income disregard. In accordance with 42 CFR §435.134, this mandatory coverage group covers a person who:

(A) was receiving both public assistance and Social Security benefits in August 1972; and

(B) meets current SSI eligibility criteria, excluding from income the October 1972 cost-of-living adjustment (COLA) increase in Social Security benefits but not excluding subsequent COLA increases in Social Security benefits.

(5) Title II COLA disregard (Pickle). In accordance with 42 CFR §435.135(a) - (b), this mandatory coverage group covers a person who:

(A) has been denied SSI for any reason since April 1977; and

(B) meets current SSI eligibility criteria, excluding from countable income any Social Security COLA increases received after the person last received both SSI and Social Security benefits in the same month.

(6) Disabled widow's or widower's COLA disregard. In accordance with 42 CFR §435.137, this mandatory coverage group covers a person who:

(A) is 50 to 60 years of age;

(B) is ineligible for Medicare;

(C) was denied SSI due to an increase in a disabled widow's or widower's and surviving divorced spouse's RSDI; and

(D) meets SSI eligibility criteria, excluding from countable income the RSDI benefit and any subsequent COLA increases in RSDI.

(7) Early age widow's or widower's COLA disregard. In accordance with 42 CFR §435.138, this mandatory coverage group covers a disabled person who was denied SSI due to early receipt of Social Security widow's or widower's benefits and:

(A) is at least 60 years of age;

(B) is not eligible for Medicare; and

(C) meets current SSI eligibility criteria, excluding from countable income the RSDI benefit and any subsequent COLA increases in RSDI.

(8) SSI denied children. In accordance with §1902(a)(10)(A)(i)(II) of the Social Security Act (42 U.S.C. §1396a(a)(10)(A)(i)(II)), this mandatory coverage group covers a person who:

(A) is under 18 years of age;

(B) was receiving SSI on August 22, 1996;

(C) was subsequently denied SSI because of the change in disability criteria implemented by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Public Law 104-193); and

(D) meets SSI eligibility criteria, including the disability criteria in effect before August 22, 1996.

(c) Optional coverage groups. In accordance with 42 CFR Part 435, Subpart C, HHSC determines Medicaid eligibility for MEPD for a person who falls into an optional coverage group described in this subsection. Although federal regulations may allow other optional coverage groups, HHSC does not provide benefits to a member of an optional coverage group unless the group is included in the Texas State Plan for Medical Assistance.

(1) Institutional. In accordance with 42 CFR §435.211, this optional coverage group covers a person who would be eligible for SSI, as specified in 42 CFR §435.230, if the person were not in an institutional setting.

(2) Institutional special income limit. In accordance with 42 CFR §435.236, this optional coverage group covers a person who has lived in an institutional setting for at least 30 consecutive days, as described in §358.433 of this chapter (relating to Special Income Limit), and is eligible under the special income limit.

(3) §1915(c) waiver program. In accordance with 42 CFR §435.217, this optional coverage group covers a person who would be eligible for Medicaid if institutionalized, but is living in the community and receiving services under a §1915(c) waiver program.

(d) Other. In accordance with the Texas State Plan for Medical Assistance, HHSC determines Medicaid eligibility for MEPD for a person who meets the criteria for one of the following services:

(1) Primary home care services. This is a person who needs primary home care services and meets the criteria established in §1929(b)(2)(B) of the Social Security Act (42 U.S.C. §1396t(b)(2)(B)) but is not otherwise eligible for Medicaid.

(2) Program of All-Inclusive Care for the Elderly (PACE). In accordance with 42 CFR Part 460, this is a person who is enrolled in a PACE program under a PACE program agreement.

(3) *Susan Walker v. Bayer Corporation* services. A person who has received payments from the class action settlement of *Susan Walker v. Bayer Corporation* may be eligible for Medicaid as a result of excluding from countable resources the payments from the settlement.

(e) Retroactive coverage. In accordance with 42 CFR §435.914, HHSC may determine eligibility for retroactive coverage:

(1) for up to three months before the date of application for:

(A) an applicant;

(B) a person who has been denied SSI;

(C) a deceased person, if a representative for the deceased person requests that HHSC determine eligibility for retroactive coverage; and

(D) a person eligible under the SSI-denied-children coverage group in subsection (b)(8) of this section; and

(2) for up to two months before the month in which an SSI recipient's Medicaid coverage automatically begins.

(f) Medicare Savings Program. In accordance with 42 U.S.C. §1396a(a)(10)(E) for this mandatory coverage group, HHSC may determine eligibility for a person who meets the criteria in Chapter 359 of this title (relating to Medicare Savings Program) for a Medicare Savings Program, which uses Medicaid funds to help the person pay for all or some of the person's out-of-pocket Medicare expenses, such as premiums, deductibles, or coinsurance.

(g) Medicaid Buy-In Program. In accordance with §1902(a)(10)(A)(ii)(XIII) of the Social Security Act (42 U.S.C. §1396a(a)(10)(A)(ii)(XIII)) for this optional coverage group, HHSC may determine eligibility for a person with a disability who is working and earning income and meets the criteria established in Chapter 360 of this title (relating to Medicaid Buy-In Program).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. NONFINANCIAL REQUIREMENTS

1 TAC §§358.201, 358.203, 358.205, 358.207, 358.209, 358.211, 358.213, 358.215, 358.217, 358.219

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§358.207. *Residence.*

To be eligible for a Medicaid-funded program for the elderly and people with disabilities, a person must be a resident of the United States (U.S.) and the state of Texas.

(1) U.S. residence. The Texas Health and Human Services Commission (HHSC) follows 20 CFR §416.1603 in determining a person's U.S. residence.

(A) The U.S. residence requirement does not apply to:

(i) a child who is a citizen and is living with a parent who is a member of the U.S. Armed Forces assigned to permanent duty ashore outside the U.S.; or

(ii) to certain persons temporarily abroad for study.

(B) Once eligible for benefits, a person must maintain a presence in the U.S. in accordance with 42 U.S.C. §1382(f)(1). If a person has been outside the U.S. for 30 consecutive days, the person is not eligible for benefits until the person has been in the U.S. for 30 consecutive days.

(2) Texas residence. HHSC follows 42 CFR §435.403 in determining a person's state residence.

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SUBCHAPTER C. FINANCIAL REQUIREMENTS

DIVISION 1. INTRODUCTION

1 TAC §358.301

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

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DIVISION 2. RESOURCES

1 TAC §§358.321 - 358.327, 358.331, 358.333 - 358.339, 358.345 - 358.355, 358.371

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§358.336. *Treatment of Testamentary or Inter Vivos Trusts.*

(a) In this section, the following words have the following meanings, unless the context clearly indicates otherwise.

(1) Testamentary trust--A trust established by will.

(2) Inter vivos trust--A trust established while the person creating the trust is still living.

(b) Resources in a testamentary or inter vivos trust are countable to a person if the person is the trustee and has the legal right to revoke the trust and use the money for the person's own benefit.

(1) If a person does not have access to the trust, then the trust is not counted as a resource.

(2) If a person's access to a trust is restricted (that is, only the trustee (other than the person) or the court may withdraw the principal), then the value of the trust as a resource is not counted, even if:

(A) the person's legal guardian is the trustee;

(B) the trust provides a regular, specified payment to the person; or

(C) the trust provides for discretionary withdrawals by the trustee.

(3) If a trust is not counted as a resource, payments from the trust made to or for the benefit of the person may be counted as income only if the payments would ordinarily be counted as income in accordance with 20 CFR §416.1102.

§358.337. *Treatment of a Medicaid-qualifying Trust.*

(a) A Medicaid-qualifying trust (MQT) is a trust that a recipient, the recipient's spouse or guardian, or anyone holding the recipient's power of attorney establishes using the recipient's money. The recipient is the beneficiary of an MQT. A trust meeting this definition that was established between June 1, 1986, and August 10, 1993, is an MQT. A trust meeting this definition that was established before June 1, 1986, is treated as a standard inter vivos trust.

(b) Except as described in §358.338 of this division (relating to Treatment of a Trust Established with *Zebley v. Sullivan* Settlement Funds), the Texas Health and Human Services Commission (HHSC) counts potential distributions from an MQT as resources available to a person, whether or not distributions are actually made.

(1) The amount available to the person is the maximum amount the trustee could distribute under the terms of the trust.

(2) If distribution is not made, the maximum amount the trustee may distribute under terms of the trust is considered an available resource.

(3) If a trust does not specify an amount for distribution, and if the trustee has access to and use of the principal, then HHSC counts:

(A) the corpus of the trust as a resource; and

(B) payments from the trust to or for the benefit of the person as income only if the payments would ordinarily be counted as income in accordance with 20 CFR §416.1102.

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DIVISION 3. INCOME

1 TAC §§358.381 - 358.387, 358.391

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§358.381. *General Treatment of Income.*

(a) The Texas Health and Human Services Commission (HHSC) follows §1612 of the Social Security Act (42 U.S.C. §1382a) and 20 CFR §§416.1101 - 416.1104 regarding the definition and general treatment of income for the purpose of determining financial eligibility and calculating a co-payment.

(b) A lump sum payment is countable income in the month of receipt and is a resource thereafter.

(c) A person in an institutional setting may retain a personal needs allowance (PNA) in an amount set by the HHSC executive commissioner in accordance with Chapter 32 of the Texas Human Resources Code.

(1) The PNA is not applied toward the cost of medical assistance furnished in an institutional setting.

(2) For a person receiving the reduced SSI federal benefit rate, HHSC issues a supplement to give the person a PNA at the minimum level set by the HHSC executive commissioner.

(d) An action by a fiduciary agent is the same as an action by the person for whom the fiduciary agent acts.

(1) Monies received by a fiduciary agent for another person are not income to the fiduciary agent. If the fiduciary agent is authorized to keep part of the money as compensation for services rendered, the compensation for services rendered is unearned income to the fiduciary agent.

(2) Monies received by a fiduciary agent for another person are charged as income to the person when the monies are received by the fiduciary agent.

§358.386. *Reduction of Pension and Benefit Checks for Recoupment of Overpayments.*

If a person's pension or benefit checks are reduced because of recovery of overpayments, the following apply:

(1) All overpayments except Retirement, Survivors, and Disability Insurance (RSDI).

(A) If a person was receiving Supplemental Security Income (SSI) or assistance under a Medicaid-funded program for the elderly and people with disabilities (MEPD) at the time of overpayment, the Texas Health and Human Services Commission (HHSC) disregards as income the amount being recovered. HHSC counts the net amount of the benefit (that is, the gross benefit minus the amount being recouped) for the purpose of determining eligibility and calculating a co-payment.

(B) If a person was not receiving SSI or assistance under MEPD at the time of overpayment, HHSC counts the recovered amount as income. HHSC counts the gross amount of the benefit for the purpose of determining eligibility and calculating a co-payment.

(2) RSDI overpayments.

(A) If a person receives an overpayment of Social Security (RSDI or Title II) benefits, recoupment is not voluntary. HHSC counts the net amount of the RSDI benefit (that is, the gross RSDI minus the amount being recouped) for the purpose of determining eligibility and calculating a co-payment.

(B) If a person receives an overpayment of SSI benefits and the person is still eligible for SSI, the recoupment is voluntary.

HHSC determines if the person signed a voluntary agreement for recoupment. If there is a signed agreement, HHSC counts the gross RSDI for the purpose of determining eligibility and calculating a co-payment. If there is no signed agreement, there should be no recoupment from RSDI benefits.

(C) If a person receives an overpayment of SSI benefits and the person is no longer eligible for SSI, recoupment of any RSDI or Title II benefits is not voluntary. HHSC counts the net amount of the RSDI benefit (that is, the gross RSDI minus the amount being recouped) for the purpose of determining eligibility and calculating a co-payment.

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DIVISION 4. TRANSFER OF ASSETS

1 TAC §358.401, §358.402

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§358.401. *Transfer of Assets on or after February 8, 2006.*

(a) This section applies to a person in an institutional setting whose date of application or program transfer request date is on or after October 1, 2006, and who takes an action defined by this section to be a transfer of assets on or after February 8, 2006.

(b) The Texas Health and Human Services Commission (HHSC) uses the definitions under the provisions of §1917(e) of the Social Security Act (42 U.S.C. §1396p(h)).

(1) Assets include all income and resources of a person and of the person's spouse, including any income or resources that the person or the person's spouse is entitled to but does not receive because of action:

(A) by the person or the person's spouse;

(B) by an individual, including a court or administrative body, with legal authority to act in place of or on behalf of the person or the person's spouse; or

(C) by any individual, including any court or administrative body, acting at the direction or upon the request of the person or the person's spouse.

(2) The term "income" has the meaning given such term in §1612 of the Social Security Act (42 U.S.C. §1382a).

(3) The term "resources" has the meaning given such term in §1613 of the Social Security Act (42 U.S.C. §1382b), without regard (in the case of a person in an institutional setting) to the exclusion of the home.

(c) In this section, "person" includes the applicant or recipient as well as:

(1) the person's spouse;

(2) an individual, including a court or administrative body, with legal authority to act in place of or on behalf of the person or person's spouse; and

(3) any individual, including a court or administrative body, acting at the direction or upon the request of the person or the person's spouse.

(d) HHSC applies the penalty for transfers of assets under the provisions of §1917(c)(1) of the Social Security Act (42 U.S.C. §1396p(c)(1)). The provisions of §358.402 of this division (relating to Transfer of Assets before February 8, 2006) continue in effect for transfers on or after February 8, 2006, except to the extent that they are inconsistent with this section.

(1) This paragraph establishes HHSC's treatment of transfers made on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005.

(A) Disposing of assets. If a person in an institutional setting or the spouse of such a person disposes of assets for less than fair market value on or after the look-back date specified in subparagraph (B) of this paragraph, the person is ineligible for medical assistance for services described in subparagraph (C) of this paragraph during the period beginning on the date specified in subparagraph (D) of this paragraph and equal to the number of months specified in subparagraph (E) of this paragraph.

(B) Look-back period.

(i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments involving a trust or portions of a trust that are treated as assets disposed of by the person pursuant to §358.402(e)(2) of this division or in the case of any other disposal of assets made on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005, 60 months) before the date specified in clause (ii) of this subparagraph.

(ii) The date specified in this clause, with respect to:

(I) a person in an institutional setting, except a person receiving services under a §1915(c) waiver program, is the first date as of which the person both is in an institutional setting and has applied for medical assistance under the Texas State Plan for Medical Assistance; or

(II) a person receiving services under a §1915(c) waiver program, is the date on which the person applies for medical assistance under the Texas State Plan for Medical Assistance or, if later, the date on which the person disposes of assets for less than fair market value.

(C) Ineligible for medical assistance for services. A person in an institutional setting who disposes of assets as described in subparagraph (A) of this paragraph is ineligible for the following services:

(i) nursing facility services;

(ii) a level of care in any institution equivalent to that of nursing facility services; and

(iii) §1915(c) waiver program services.

(D) Beginning date of penalty.

(i) In the case of a transfer of asset made before February 8, 2006, the date of enactment of the Deficit Reduction Act of

2005, the beginning date of penalty, specified in this subparagraph, is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection.

(ii) In the case of a transfer of asset made on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005, the beginning date of penalty, specified in this subparagraph, is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the person is eligible for medical assistance under the Texas State Plan for Medical Assistance and would otherwise be receiving institutional level of care described in subparagraph (C) of this paragraph based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.

(E) Length of ineligibility period.

(i) With respect to a person in an institutional setting, except a person receiving services under a §1915(c) waiver program, the number of months of ineligibility under this subparagraph for such person is equal to the total, cumulative uncompensated value of all assets transferred by the person (or person's spouse) on or after the look-back date specified in subparagraph (B)(i) of this paragraph, divided by the average monthly cost to a private patient of nursing facility services in the state at the time of application.

(ii) With respect to a person receiving services under a §1915(c) waiver program, the number of months of ineligibility under this subparagraph for such person must not be greater than a number equal to the total, cumulative uncompensated value of all assets transferred by the person (or person's spouse) on or after the look-back date specified in subparagraph (B)(i) of this paragraph, divided by the average monthly cost to a private patient of nursing facility services in the state at the time of application.

(iii) The number of months of ineligibility otherwise determined under clause (i) of this subparagraph with respect to the disposal of an asset shall be reduced:

(I) in the case of periods of ineligibility determined under clause (i) of this subparagraph, by the number of months of ineligibility applicable to the person under clause (ii) of this subparagraph has a result of such disposal; and

(II) in the case of periods of ineligibility determined under clause (ii) of this subparagraph, by the number of months of ineligibility applicable to the person under clause (i) of this subparagraph as a result of such disposal.

(iv) HHSC does not round down, or otherwise disregard any fractional period of ineligibility determined under clause (i) or (ii) of this subparagraph with respect to the disposal of assets.

(F) Annuity. The purchase of an annuity made on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005, is treated as the disposal of an asset for less than fair market value unless:

(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant under this title; or

(ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

(G) Annuity exceptions. With respect to a transfer of assets, the term "assets" includes an annuity purchased on or after February 8, 2006, the date of enactment of the Deficit Reduction Act of 2005, by or on behalf of an annuitant who has applied for medical assistance with respect to services in an institutional setting unless:

(i) the annuity is:

(I) an annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986; or

(II) purchased with proceeds from:

(-a-) an account or trust described in subsection (a), (c), or (p) of section 408 of such Code;

(-b-) a simplified employee pension (within the meaning of section 408(k) of such Code); or

(-c-) a Roth IRA described in section 408A of such Code; or

(ii) the annuity:

(I) is irrevocable and nonassignable;

(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the United States Department of Health and Human Services); and

(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

(H) Promissory note, loan, or mortgage. In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of clauses (i) through (iii) of this subparagraph, the value of such note, loan, or mortgage is the outstanding balance due as of the date of the person's application for medical assistance for services described in subparagraph (C) of this paragraph and this amount would be used to determine the length of ineligibility. For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes funds used to purchase, on or after April 1, 2006, a promissory note, loan, or mortgage unless such note, loan, or mortgage:

(i) has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

(ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

(iii) prohibits the cancellation of the balance upon the death of the lender.

(I) Life estate. For purposes of this paragraph with respect to a transfer of assets, the term "assets" includes the purchase of a life estate interest in another individual's home made on or after April 1, 2006, unless the purchaser resides in the home for a period of at least one year after the date of the purchase.

(2) HHSC allows exceptions to transfers of assets under the provisions of §1917(c)(2) of the Social Security Act (42 U.S.C. §1396p(c)(2)), if:

(A) the assets transferred were a home, and title to the home was transferred to:

(i) the spouse of such person;

(ii) a child of such person who:

(I) is under 21 years of age; or

(II) is blind or disabled as defined in §1614 of the Social Security Act (42 U.S.C. §1382c);

(iii) a sibling of such person who has an equity interest in such home and who was residing in such person's home for at least one year immediately before the date the person transferred to an institutional setting; or

(iv) a son or daughter of such person (other than a child described in clause (ii) of this subparagraph) who was residing in such person's home for a period of at least two years immediately before the date the person transferred to an institutional setting and who, as determined by the State, provided care to such person which permitted such person to reside at home rather than in such an institution or facility;

(B) the assets:

(i) were transferred to the person's spouse or to another for the sole benefit of the person's spouse;

(ii) were transferred from the person's spouse to another for the sole benefit of the person's spouse;

(iii) were transferred to a trust (including a trust described in §358.402(e)(2) of this division) established solely for the benefit of the person's child described in subparagraph (A)(ii)(II) of this paragraph; or

(iv) were transferred to a trust (including a trust described in §358.402(e)(2) of this division) established solely for the benefit of a person under 65 years of age who is disabled as defined in §1614(a)(3) of the Social Security Act (42 U.S.C. §1382c(a)(3));

(C) a satisfactory showing is made to the State that:

(i) the person intended to dispose of the assets either at fair market value, or for other valuable consideration;

(ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance; or

(iii) all assets transferred for less than fair market value have been returned to the person; or

(D) HHSC:

(i) determines that the denial of eligibility would work an undue hardship when application of the transfer of assets provision would deprive the person:

(I) of medical care such that the person's health or life would be endangered; or

(II) of food, clothing, shelter, or other necessities of life; and

(ii) provides for:

(I) notice to recipients that an undue hardship exception exists;

(II) a timely process for determining whether an undue hardship waiver will be granted; and

(III) a process under which an adverse determination can be appealed.

(3) Under paragraph (2)(D) of this subsection, a facility in which the person in an institutional setting is residing may file an undue hardship waiver application on behalf of the person with the consent of the person or the person's authorized representative.

(4) For purposes of this subsection effective on or after February 8, 2006, the date of enactment of the Deficit Reduction Act

of 2005, in the case of an asset held by a person in common with another individual or individuals in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) is considered to be transferred by such person when any action is taken, either by such person or by any other individual, that reduces or eliminates such person's ownership or control of such asset.

(5) HHSC does not provide for any period of ineligibility for a person due to transfer of resources for less than fair market value except in accordance with this subsection. In the case of a transfer by the spouse of a person which results in a period of ineligibility for medical assistance for such person, HHSC apportions such period of ineligibility (or any portion of such period) among the person and the person's spouse if the spouse otherwise becomes eligible for medical assistance.

(6) In this subsection, the term "resources" has the meaning given such term in §1613 of the Social Security Act (42 U.S.C. §1382b), without regard (in the case of a person in an institutional setting) to the exclusion of the home.

(e) Impact on spousal protected resource amount. In spousal situations, if assets are transferred to a third party before institutionalization or by the community spouse, HHSC does not include the uncompensated amount of the transfer in calculating the spousal protected resource amount or countable resources upon application for Medicaid.

(f) Transfer of income.

(1) A person may incur a transfer penalty by transferring income. Transfers of income include:

(A) waiving the right to receive an inheritance even in the month of receipt;

(B) giving away a lump sum payment even in the month of receipt; or

(C) irrevocably waiving all or part of federal, state, or private pensions or annuities.

(2) The date of transfer is the date of the actual change in income. Interspousal transfers of income are permitted (for example, obtaining a court order to have community property pension income paid to a community spouse).

(3) Because revocable waivers of pension benefits can be revoked and the benefits reinstated, no uncompensated value is developed, and no transfer-of-assets penalty is incurred. Such waivers are subject to the utilization-of-benefits policy, and the person must apply for reinstatement of the full pension amount or the person is ineligible for all Medicaid benefits.

(g) Disclosure and treatment of annuities. HHSC, under the provisions of §1902(a)(18) of the Social Security Act (42 U.S.C. §1396a(18)), requires the following as a condition for the provision of medical assistance for services described in subsection (d)(1)(C) of this section:

(1) An application for assistance (including any recertification of eligibility for such assistance) must disclose a description of any interest the person or community spouse has in an annuity (or similar financial instrument as directed by the United States Department of Health and Human Services), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or recertification form must include a statement that under paragraph (2) of this subsection the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

(2) In the case of disclosure concerning an annuity under subsection (d)(1)(F) of this section, HHSC notifies the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the person. Nothing in this paragraph shall be construed as preventing such an issuer from notifying persons with any other remainder interest of the State's remainder interest under such subsection.

(3) HHSC establishes categories of transactions that may be treated as a transfer of asset for less than fair market value as the United States Department of Health and Human Services provides guidance.

(4) Nothing in this subsection shall be construed as preventing HHSC from denying eligibility for medical assistance for a person based on the income or resources derived from an annuity described in paragraph (1) of this subsection.

§358.402. *Transfer of Assets before February 8, 2006.*

(a) Introduction.

(1) The Omnibus Budget Reconciliation Act of 1993 (OBRA 1993) (P.L. 103-66) revised policy for transfers of assets that occur on or after August 11, 1993, when an uncompensated value remains.

(2) The penalty for transfers of assets affects payments for institutional facility services (nursing facility (NF) care, intermediate care facility for persons with mental retardation or related conditions (ICF/MR) provider services, care in state supported living centers and state centers, and care in institutions for mental diseases (IMD)) and eligibility for §1915(c) waiver program services. Both the recipient and the service provider are notified of the penalty period.

(3) Except for residents of state supported living centers and state centers, persons in an institutional setting remain eligible for all other Medicaid benefits and continue to receive monthly identification forms for the length of the penalty period. For residents of state supported living centers and state centers, Medicaid eligibility is denied for any penalty period resulting from an uncompensated transfer of assets. This is because the only Medicaid benefit a resident of a state supported living center or state center receives is provider payments.

(4) If the Medicaid eligibility of a person receiving services under a §1915(c) waiver program requires receipt of waiver services, then the person is ineligible for all Medicaid benefits for the length of the penalty period. Denial of §1915(c) waiver program services based on an uncompensated transfer of assets does not disqualify the person for pure Qualified Medicare Beneficiary (QMB) or Specified Low-Income Medicare Beneficiary (SLMB) benefits, as described in Chapter 359 of this title (relating to Medicare Savings Program).

(5) A person in a noninstitutional setting who is eligible for Medicaid may transfer assets without penalty, provided the person does not become institutionalized or apply for §1915(c) waiver program services. A transfer of assets does not affect eligibility for QMB or SLMB benefits.

(6) In spousal situations, if assets are transferred to a third party before institutionalization or by the community spouse, the Texas Health and Human Services Commission (HHSC) does not include the uncompensated amount of the transfer in calculating the spousal protected resource amount or countable resources upon application for Medicaid.

(b) Definitions. The following words and terms, when used in this section, have the following meanings unless the context clearly indicates otherwise.

(1) Person--"Person" includes the applicant or recipient, as well as:

(A) the person's spouse;

(B) an individual, including a court or administrative body, with legal authority to act in place of or on behalf of the person or person's spouse; and

(C) any individual, including a court or administrative body, acting at the direction or upon the request of the person or the person's spouse.

(2) Assets--

(A) Assets include all income and resources of a person and of the person's spouse, including any income or resources that the person or the person's spouse is entitled to but does not receive because of action:

(i) by the person or the person's spouse;

(ii) by an individual, including a court or administrative body, with legal authority to act in place of or on behalf of the person or the person's spouse; or

(iii) by any individual, including a court or administrative body, acting at the direction or upon the request of the person or the person's spouse.

(B) Actions that would cause income or resources not to be received include:

(i) irrevocably waiving pension income;

(ii) waiving the right to receive an inheritance;

(iii) not accepting or accessing injury settlements; and

(iv) a defendant diverting tort settlements into a trust or similar device to be held for the benefit of the plaintiff.

(c) Transfer of income.

(1) A person may incur a transfer penalty by transferring income on or after August 11, 1993. Transfers of income include:

(A) waiving the right to receive an inheritance even in the month of receipt;

(B) giving away a lump sum payment even in the month of receipt; or

(C) irrevocably waiving all or part of federal, state, or private pensions or annuities.

(2) The date of transfer is the date of the actual change in income, if on or after August 11, 1993. Interspousal transfers of income are permitted (for example, obtaining a court order to have community property pension income paid to a community spouse).

(3) Because revocable waivers of pension benefits can be revoked and the benefits reinstated, no uncompensated value is developed, and no transfer-of-assets penalty is incurred. Such waivers are subject to the utilization-of-benefits policy, and the person must apply for reinstatement of the full pension amount or the person is ineligible for all Medicaid benefits.

(d) Exceptions to transfers of assets.

(1) Transfer of the person's home does not result in a penalty when the title is transferred to the person's:

(A) spouse, who lives in the home (the transfer penalty applies when the community spouse transfers the home without full compensation);

(B) minor or disabled child (a disabled child must meet Social Security Administration disability criteria; there is no age limit for a disabled child for transfer of assets purposes);

(C) sibling who has equity interest in the home and has lived there for at least one year before the person transferred to an institutional setting; or

(D) son or daughter (other than a disabled or minor child) who lived in the home for at least two years before the person transferred to an institutional setting and provided care that prevented institutionalization. To substantiate this claim, there must be a written statement from the person's attending physician or a professional social worker familiar with the case documenting the care provided by the son or daughter.

(2) Assets, including the person's home, may be transferred without resulting in a penalty when:

(A) transferred to the person's spouse or to another for the sole benefit of that spouse, or from the person's spouse to another for the sole benefit of that spouse;

(B) transferred to the person's child or to a trust, including an exception trust described in §1917(d)(4) of the Social Security Act (42 U.S.C. §1396p(d)(4)), established solely for the benefit of the person's child. The child must meet Social Security Administration disability criteria. There is no age limit for a disabled child for transfer of assets purposes;

(C) transferred to a trust, including an exception trust as specified in §1917(d)(4) of the Social Security Act (42 U.S.C. §1396p(d)(4)), established for the sole benefit of a person under 65 years of age who meets Social Security Administration disability criteria;

(D) satisfactory evidence exists that the person intended to dispose of the resource at fair market value;

(E) satisfactory evidence exists that the transfer was exclusively for some purpose other than to qualify for Medicaid;

(F) imposition of a penalty would cause undue hardship;

(G) a person changes a joint bank account to establish separate accounts to reflect correct ownership of and access to funds; or

(H) a person purchases an irrevocable funeral arrangement or assigns ownership of an irrevocable funeral arrangement to a third party.

(3) In determining whether an asset was transferred for the sole benefit of a spouse, child, or person with a disability, there must be a written instrument of transfer, such as a trust document, which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. The instrument or document must provide for the spending of the funds involved for the benefit of the person on a basis that is actuarially sound based on the life expectancy of the person involved. When the instrument or document does not so provide, there can be no exemption from the penalty. Exception trusts created under §1917(d)(4) of the Social Security Act (42 U.S.C. §1396p(d)(4)) are exempt from the actuarially sound distribution provisions of this section.

(4) The situations in paragraphs (1) - (3) of this subsection are the only situations in which an uncompensated transfer does not result in a penalty for care in an institutional setting. Under the transfer provisions of OBRA 1993, the home is not an excluded resource for a person in an institutional setting. Therefore, if the home of a person in an institutional setting is transferred, unless the transfer meets one of the criteria in paragraphs (1) - (3) of this subsection, it could affect payment for the person's care in an institutional setting.

(e) Look-back period.

(1) Penalties may be assessed for transfers occurring on or after the look-back date. Penalties cannot be assessed for time frames prior to the look-back period.

(2) The law prescribes a 36-month look-back period for most uncompensated transfers. However, there is a 60-month look-back period for certain transfers involving trusts. The look-back periods for trusts and distributions from trusts are defined in subparagraphs (A) and (B) of this paragraph.

(A) Revocable trusts.

(i) Payments from a revocable trust to or for the benefit of someone other than an applicant or recipient have a 60-month look-back period.

(ii) Making a revocable trust irrevocable with payments from corpus/income foreclosed to the applicant or recipient is a transfer of assets and has a 60-month look-back period.

(B) Irrevocable trusts.

(i) Payments from an irrevocable trust (where trustee distributions are not foreclosed to the applicant or recipient) which are made to (or for the benefit of) someone other than the applicant or recipient have a 36-month look-back period.

(ii) Creating an irrevocable trust where trustee payments are foreclosed to the applicant or recipient is a transfer of assets with a 60-month look-back period.

(iii) Creating an irrevocable trust where the trustee initially has discretion to make payments to the applicant or recipient (or for the applicant's or recipient's benefit), but where payments are foreclosed to the applicant or recipient at a later date is a transfer of assets as of the date payments are foreclosed to the applicant or recipient. The look-back period is 60 months.

(3) The look-back period is 36 months (or 60 months) from the later of the date of:

(A) institutionalization; or

(B) Medicaid application.

(4) When a person is already a Medicaid recipient before entering an NF, an ICF/MR, a state supported living center, a state center, or an IMD, the look-back period begins with institutional entry.

(5) When a person applies and is certified for Medicaid more than once because of multiple institutional stays or periods of ineligibility, the look-back date is based on the later of the earliest application for Medicaid or the initial entry into the facility.

(6) When a person applies for a §1915(c) waiver program, the look-back period is 36 months or 60 months from the later of the date:

(A) of application for waiver services (completed, signed application form is received in HHSC office); or

(B) after application that the person transfers assets.

(7) When a person applies for services in an institutional setting but is not certified and then reapplies, a new look-back period is based on the latest application.

(8) When a person applies and is certified for a §1915(c) waiver program, subsequently is denied, and reapplies for waiver services, the initial look-back period is still in effect.

(9) When a look-back period is established, the person is certified, and then moves from a Medicaid-certified long-term care facility to a §1915(c) waiver program or vice versa, the initial look-back period is still in effect. This is true even when there is a gap in eligibility periods.

(10) Any additional transfers of assets that occur after the person is certified for Medicaid may be assessed a penalty.

(f) Calculation of penalty period.

(1) There is no limit to the penalty period under OBRA 1993. The penalty period is determined by dividing the uncompensated value of all assets transferred by the average monthly cost of nursing facility care for a private-pay patient.

(2) The penalty period calculation applies to the transfer of both income and resources.

(3) The same penalty period calculation is used for a person who applies for a §1915(c) waiver program. Penalty periods continue to run if a person moves from a Medicaid-certified long-term care facility to a §1915(c) waiver program or vice versa.

(4) The penalty period begins the month of transfer. However, a new penalty period cannot be imposed while a previous penalty period is still in effect. Therefore, the penalty periods assessed under OBRA 1993 rules for multiple transfers that overlap run separately but consecutively.

(5) If a penalty period ends and a subsequent transfer occurs, a new penalty period is established effective the month of the subsequent transfer. This means there may be a gap between penalty periods.

(6) When multiple transfers occur during the look-back period in such a way that the penalty periods for each overlap, the transfers are treated as a single event. The uncompensated values are lumped together and divided by the average monthly rate for a private-pay patient in a nursing facility. If multiple transfers occur in such a way that the penalty periods do not overlap, then the transfers are treated as separate events and the penalty periods are calculated separately.

(g) Apportioning penalty periods between spouses.

(1) When a person's spouse transfers an asset that results in a penalty for the person, the penalty period must, in certain instances, be apportioned between the spouses. Both spouses must be eligible for Medicaid in an institutional setting during the same time period for apportionment to occur. Apportionment occurs when:

(A) the spouse:

(i) is institutionalized and is Medicaid eligible; or

(ii) would be eligible for a §1915(c) waiver program; and

(B) some portion of the penalty against the person remains at the time the conditions in this paragraph are met.

(2) When one spouse is no longer subject to a penalty (for example, the spouse is no longer in an institutional setting, or the

spouse dies), the remaining penalty period applicable to both spouses must be served by the remaining spouse.

(h) Return of transferred asset.

(1) For transfers occurring on or after August 11, 1993, if the transferred asset is subsequently returned to the person, the transfer is nullified and the penalty period is erased retroactive to the month of transfer. The asset is treated as though never transferred, and is excluded or counted, as appropriate, in determining the person's eligibility for those months in which the asset was in someone else's possession. In spousal cases, if the person or the person's spouse transferred an asset before the person entered the nursing facility and the asset is returned after institutionalization, the spousal protected resource amount must also be recalculated.

(2) For a penalty period to be nullified, all of the asset in question or its fair market value must be returned to the person. When only part of an asset or its equivalent value is returned, the penalty period can be reduced but not eliminated. For example, if only half the value of the asset is returned, the penalty period can be reduced by one-half. Payment on the principal of a note is the return of a transferred asset and reduces the penalty accordingly.

(i) Spouse-to-spouse transfers under spousal impoverishment provisions.

(1) There are no restrictions on interspousal transfers occurring from the date of institutionalization to the date of application; the reason is that at application and throughout the initial eligibility period (12 full months following the medical effective date), the combined countable resources of the couple are considered in determining eligibility. For the same reason, interspousal transfers are also permitted before institutionalization. A penalty can result when the community spouse transfers assets to a third party, not for the sole benefit of either spouse.

(2) To remain eligible at the end of the initial eligibility period, the person in an institutional setting must reduce resources to which the person has access at least to the resource limit. If the person chooses, the person may, during the initial eligibility period, transfer resources from his or her name to the community spouse's name with no penalty applied to the transfer. The transfer-of-assets policy applies only to transfer of assets for less than fair market value to someone other than the community spouse if not for the sole benefit of that spouse.

(3) Transfer penalties apply when the community spouse transfers his or her separate property before institutionalization, or after institutionalization but before certification. Transfer penalties apply when the community spouse transfers community property both before and after institutionalization, if not for the sole benefit of the spouse.

(j) Compensation. Compensation, in the form of funds, real property, or services, must actually have been provided to a person. Future compensation does not satisfy the compensation requirement except for annuities which are actuarially sound. Compensation, however, may be in the form of payment or assumption of a legal debt owed by the individual making the transfer. Compensation is not allowed for services that would be normally provided by a family member (such as house painting or repairs, mowing lawns, grocery shopping, cleaning, laundry, preparing meals, transportation to medical care). The person must provide valid receipts for financial expenditures or written statements from the individuals who were paid to provide the services. If the person receives additional cash compensation that was not a part of the transfer agreement from the party who received the transferred asset, the uncompensated value of the transferred asset must be reduced by the amount of the additional compensation and as of the date the com-

ensation is received. Cash compensation includes direct payments to a third party to meet the person's food, shelter, or medical expenses, including nursing facility bills, incurred after the date of the transfer. Compensation for a transferred asset must be provided according to terms of an agreement established on or before the date of transfer. This agreement must have been established exclusively for purposes other than obtaining or retaining eligibility for Medicaid services.

(k) Participation in transfers. Any action by a person's co-owner(s) to eliminate the person's ownership interest or control of a joint asset, with or without the person's consent, is a transfer of assets. Placing another person's name on an account or other asset that results in limiting the person's control of an asset (right to dispose) is a transfer of assets.

(l) Rebuttal procedures.

(1) Notification of opportunity for rebuttal. If any amount of uncompensated value exists, HHSC advises the person or authorized representative of the amount of uncompensated value and the length of the penalty period. The penalty period applies unless the person provides convincing evidence that the disposal was solely for some purpose other than to obtain Medicaid services. If, within the periods specified in this paragraph, the person or authorized representative makes no effort to rebut the presumption that the transfer was solely to obtain Medicaid services, HHSC assumes that the presumption is valid. The rebuttal period is five working days after oral notification (by HHSC to the person) and seven working days after written notification.

(2) Rebuttal of the presumption. Transfer-of-assets statutes presume that all transfers for less than fair market value are to obtain Medicaid services. The person or authorized representative is responsible for providing convincing evidence that the transaction in question was exclusively for some other purpose. To rebut the presumption, the person or authorized representative must provide a written statement and any relevant documentation to substantiate his or her statement. The statement, oral or written, must include at least the following:

- (A) purpose for transferring the asset;
- (B) attempts to dispose of the asset at fair market value;
- (C) reason for accepting less than fair market value for the asset;
- (D) means of or plan for self-support after the transfer; and
- (E) relationship to the person to whom the asset was transferred.

(m) Undue hardship.

(1) A person may claim undue hardship when imposition of a transfer penalty would result in discharge to the community and/or inability to obtain necessary medical services so that the person's life is endangered. Undue hardship also exists when imposition of a transfer penalty would deprive the person of food, clothing, shelter, or other necessities of life. Undue hardship relates to hardship to the person, not the relatives or responsible parties of the person. Undue hardship does not exist when imposition of the transfer penalty merely causes the person inconvenience or when imposition might restrict his lifestyle but would not put him at risk of serious deprivation.

(2) Undue hardship may exist when any one of the following conditions specified in subparagraphs (A) - (C) of this paragraph exists:

- (A) location of the receiver of the asset is unknown to the person, or other family members, or other interested parties, and

the person has no place to return in the community and/or receive the care required to meet his or her needs;

(B) the person can show that physical harm may come as a result of pursuing the return of the asset, and the person has no place to return in the community and/or receive the care required to meet his or her needs; or

(C) receiver of the asset is unwilling to cooperate with the person and HHSC, and the person has no place to return in the community and/or receive the care required to meet his or her needs.

(3) If a person claims undue hardship, HHSC makes a decision on the situation as soon as possible but within 30 days after receipt of the request for a waiver of the penalty. The person has the right to appeal an adverse decision on undue hardship.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón

Chief Counsel

Texas Health and Human Services Commission

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DIVISION 5. SPOUSAL IMPOVERISHMENT

1 TAC §§358.411 - 358.423

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§358.416. *Initial Application and the Spousal Protected Resource Amount.*

(a) Upon receiving an application for Medicaid, the Texas Health and Human Services Commission (HHSC) calculates the couple's combined countable resources, without regard to community or separate property laws or the spouses' respective ownership interests, as of 12:01 a.m. on the first day of the month in which eligibility is being determined. HHSC follows the resource exclusions for an automobile and a home, regardless of value, as described in §358.415 of this division (relating to Calculation of the Spousal Protected Resource Amount).

(b) If an assessment of resources to determine the spousal protected resource amount (SPRA) has not previously been completed, HHSC determines the SPRA at initial application, in accordance with §358.415 of this division.

(c) HHSC deducts the SPRA from the couple's combined countable resources calculated in subsection (a) of this section. HHSC follows §1924(a)(3) and §1924(c)(2) of the Social Security Act (42 U.S.C. §1396r-5(a)(3) and 42 U.S.C. §1396r-5(c)(2)) when determining resource eligibility of the institutionalized spouse at the initial eligibility determination.

(d) If the SPRA determined at assessment is either the federal minimum or maximum resource amount, and the federal minimum or maximum resource amount increases before completion of the initial

application for Medicaid, HHSC uses the federal minimum and maximum resource amounts in effect at the time of completion of the initial application.

(e) If the institutionalized spouse is found ineligible for Medicaid at the initial application and reapplies, HHSC deducts the same SPRA for subsequent applications.

(f) If an institutionalized spouse, after having been certified, is subsequently denied and reapplies for Medicaid:

(1) if the institutionalized spouse should never have been certified and was denied because of unreported resources, HHSC calculates a new SPRA at reapplication, taking into account the previously unreported resources; and

(2) if the institutionalized spouse was denied for any other reason, HHSC does not deduct the SPRA and counts only the institutionalized spouse's resources at reapplication.

(g) After eligibility is established for the institutionalized spouse, HHSC follows §1924(c)(4) of the Social Security Act (42 U.S.C. §1396r-5(c)(4)) in the separate treatment of resources.

§358.417. *Treatment of Resources of the Institutionalized Spouse after the Initial Eligibility Period.*

After the initial eligibility period of the institutionalized spouse, the Texas Health and Human Services Commission does not apply the spousal protected resource amount and counts only the institutionalized spouse's resources for the purpose of eligibility redetermination, in accordance with Division 2 of this subchapter (relating to Resources).

§358.418. *Refusal of a Community Spouse to Cooperate.*

(a) If a community spouse refuses to cooperate in providing information to establish a spousal protected resource amount (SPRA) during an assessment as described in §358.414(b) of this division (relating to Assessment of Resources to Determine a Spousal Protected Resource Amount), the Texas Health and Human Services Commission (HHSC) does not complete the assessment and takes no further action.

(b) If an assessment is undertaken in conjunction with an eligibility determination at the initial application, and a community spouse refuses to furnish information, HHSC determines the living arrangement before the continuous period in an institutional setting began.

(1) If the couple was living in the same household, HHSC denies the application based on the couple's failure to furnish information. Living in the same household includes temporary separations.

(2) If the couple was not living in the same household, HHSC determines the purpose of separation, the length of separation, and resources or income commingled or managed jointly by one spouse or a third party.

(c) If the community spouse refuses to cooperate in providing information, and circumstances indicate possible abuse or neglect by the community spouse, HHSC considers the institutionalized spouse as an individual for purposes of determining eligibility and calculating the co-payment.

§358.421. *Treatment of Income for Eligibility and Co-payment.*

(a) To be eligible for Medicaid, an institutionalized spouse must have countable income that does not exceed the special income limit for an individual and meet all other eligibility criteria.

(b) In determining the income of an institutionalized spouse or community spouse for purposes of determining a co-payment, the Texas Health and Human Services Commission follows §1924(b)(2) and (d) of the Social Security Act (42 U.S.C. §1396r-5(b)(2) and (d)).

See also Division 6 of this subchapter (relating to Budgeting for Eligibility and Co-payment).

§358.422. *Notice and Fair Hearing.*

The Texas Health and Human Services Commission follows §1924(e) of the Social Security Act (42 U.S.C. §1396r-5(e)) concerning notices and fair hearings for matters relating to spousal impoverishment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón

Chief Counsel

Texas Health and Human Services Commission

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DIVISION 6. BUDGETING FOR ELIGIBILITY AND CO-PAYMENT

1 TAC §§358.431 - 358.441

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§358.433. *Special Income Limit.*

The Texas Health and Human Services Commission uses a special income limit to determine income eligibility under circumstances established in this section. The special income limit for a person is equal to or less than 300 percent of the full individual Supplemental Security Income (SSI) federal benefit rate. The special income limit for a couple is twice the special income limit for an individual.

(1) To qualify for the special income limit, a person or couple must have countable income that exceeds the reduced SSI federal benefit rate; and

(A) must:

(i) reside in:

(I) a Medicaid-certified long-term care facility for 30 consecutive days; or

(II) a Medicaid-certified institution for mental diseases for 30 consecutive days, if the person is 65 years of age or older; and

(ii) receive a level of care or medical necessity determination that qualifies the person or couple for Medicaid; or

(B) must be approved by a Texas health and human services agency to receive services under a §1915(c) waiver program and receive the services within one month after approval.

(2) The 30 consecutive days described in paragraph (1)(A) of this section are not disrupted if the person:

(A) makes a three-day therapeutic home visit with a planned return to the facility;

(B) is admitted to a hospital with a planned return to the facility; or

(C) moves from a facility described in paragraph (1)(A)(i) of this section:

(i) to a §1915(c) waiver program; or

(ii) to another Medicaid-certified facility.

(3) If a person dies before meeting the 30-consecutive-day requirement without moving to a noninstitutional setting, the person is considered to have met the requirement for application of the special income limit.

§358.435. *Noninstitutional Eligibility Budgets.*

(a) Scope. The Texas Health and Human Services Commission (HHSC) prepares a noninstitutional eligibility budget to determine financial eligibility for a person or couple in a noninstitutional setting, if the person or couple:

(1) applies for retroactive coverage;

(2) applies for or has eligibility redetermined under a federally mandated Medicaid-funded program for the elderly and people with disabilities as described in §358.107 of this chapter (relating to Coverage Groups); or

(3) applies for or has eligibility redetermined under §1929(b)(2)(B) of the Social Security Act.

(b) Individual budget. In preparing an eligibility budget for a person who meets the criteria in §358.434(a) of this division (relating to Budget Types for a Noninstitutional Setting), HHSC:

(1) counts the person's income in accordance with §1612 of the Social Security Act (42 U.S.C. §1382a);

(2) counts the person's resources in accordance with §1613 of the Social Security Act (42 U.S.C. §1382b);

(3) applies the individual resource limit in accordance with 20 CFR §416.1205; and

(4) applies the appropriate income limit, effective the month of eligibility determination, as follows:

(A) for a person who meets the criterion in subsection (a)(1) or (2) of this section, the income limit is the full individual Supplemental Security Income (SSI) federal benefit rate; and

(B) for a person who meets the criterion in subsection (a)(3) of this section, the income limit is the special income limit based on 300 percent of the full individual SSI federal benefit rate.

(c) Couple budget. In preparing an eligibility budget for a couple who meets the criteria in §358.434(b) of this division, HHSC:

(1) counts the income of both spouses in accordance with §1612 of the Social Security Act;

(2) counts the resources of both spouses in accordance with §1613 of the Social Security Act;

(3) applies the couple resource limit in accordance with 20 CFR §416.1205; and

(4) applies the appropriate income limit, effective the month of eligibility determination, as follows:

(A) for a couple who meets the criterion in subsection (a)(1) or (2) of this section, the income limit is the full couple SSI federal benefit rate; and

(B) for a couple who meets the criterion in subsection (a)(3) of this section, the income limit is twice the special income limit based on 300 percent of the full individual SSI federal benefit rate.

(d) Companion budget. In preparing an eligibility budget for a person who meets the criteria in §358.434(c) of this division, HHSC:

(1) counts the income of both spouses in accordance with §1612 of the Social Security Act;

(2) counts the resources of both spouses in accordance with §1613 of the Social Security Act;

(3) deems the ineligible spouse's income and resources;

(4) applies the couple resource limit in accordance with 20 CFR §416.1205; and

(5) applies the appropriate income limit, effective the month of eligibility determination, as follows:

(A) for a person who meets the criterion in subsection (a)(1) or (2) of this section, the income limit is the full individual SSI federal benefit rate; and

(B) for a person who meets the criterion in subsection (a)(3) of this section, the income limit is the special income limit based on 300 percent of the full individual SSI federal benefit rate.

§358.440. *Dependent Allowance.*

(a) In determining a person's co-payment, the Texas Health and Human Services Commission (HHSC) may deduct a dependent allowance from a person's total countable income.

(1) For a person with at least one dependent relative at home, HHSC allows the individual Social Security Income (SSI) federal benefit rate for each dependent relative and deducts the individual SSI federal benefit rate from the dependent relative's countable income.

(2) For a person with a spouse and a least one dependent relative at home, when spousal impoverishment provisions apply, HHSC determines the dependent allowance in accordance with 42 U.S.C. §1396r-5.

(b) The amount of the dependent allowance may be appealed based on undue hardship caused by financial duress as determined by HHSC, in accordance with HHSC's fair hearing rules in Chapter 357 of this title (relating to Hearings).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Steve Aragón

Chief Counsel

Texas Health and Human Services Commission

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SUBCHAPTER D. APPLICATION AND ELIGIBILITY DETERMINATION

1 TAC §§358.501, 358.505, 358.510, 358.515, 358.520, 358.525, 358.530, 358.535, 358.540, 358.545

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. RIGHTS AND RESPONSIBILITIES OF APPLICANTS AND RECIPIENTS

1 TAC §§358.601 - 358.605

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

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CHAPTER 359. MEDICARE SAVINGS PROGRAM

1 TAC §§359.101, 359.103, 359.105, 359.107, 359.109

The Health and Human Services Commission (HHSC) adopts new Chapter 359, Medicare Savings Program, consisting of §§359.101, 359.103, 359.105, 359.107, and 359.109, without changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3080) and will not be republished.

Background and Justification

Through the Medicare Savings Program (MSP), HHSC uses Medicaid funds to help eligible persons pay for all or some of their out-of-pocket Medicare expenses, such as premiums,

deductibles, or coinsurance. The new sections in Chapter 359 are adopted to place rules governing the Medicare Savings Program (MSP) in their own chapter to give the program greater visibility and to provide the public with easier access to the rules. The repeals of former MSP rules in Chapter 358 are adopted elsewhere in this issue of the *Texas Register*. There are no substantive changes between the former MSP rules in Chapter 358 and the new MSP rules in Chapter 359.

Comments

HHSC received no comments regarding adoption of the new sections, including at a public hearing held in Austin on June 22, 2009.

Legal Authority

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 360. MEDICAID BUY-IN PROGRAM

1 TAC §§360.101, 360.103, 360.105, 360.107, 360.109, 360.111, 360.113, 360.115, 360.117, 360.119

The Health and Human Services Commission (HHSC) adopts new Chapter 360, Medicaid Buy-In Program, consisting of §§360.101, 360.103, 360.105, 360.107, 360.109, 360.111, 360.113, 360.115, 360.117, and 360.119. New §360.107 is adopted with changes to the proposed text as published in the May 22, 2009, issue of the *Texas Register* (34 TexReg 3082). The text of the rule will be republished. New §§360.101, 360.103, 360.105, 360.109, 360.111, 360.113, 360.115, 360.117, and 360.119 are adopted without changes to the proposed text and will not be republished.

Background and Justification

Through the Medicaid Buy-In Program (MBI), HHSC provides Medicaid benefits to working persons with disabilities, regardless of age, who apply for Medicaid and meet the MBI eligibility criteria. The new sections in Chapter 360 are adopted to place rules governing MBI in their own chapter to give the program greater visibility and to provide the public with easier access to the rules. The repeals of former MBI rules in Chapter 358 are adopted elsewhere in this issue of the *Texas Register*.

New §360.109 is adopted to replace specific requirements for an MBI recipient to earn income with a requirement that the recipient must prove that he or she is working and earning income.

New §360.117 is adopted to specify the calculations used to determine the monthly earned income premiums for the MBI program and to cap the upper premium limit (earned income premiums plus unearned income premiums) at \$500.

Comments

HHSC received no comments regarding adoption of the new sections, including at a public hearing held in Austin on June 22, 2009.

HHSC made a minor change to the text of §360.107 to more appropriately state that a person must meet the Social Security Administration's definition of disabled.

Legal Authority

The new sections are adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; §531.021, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas; and §531.02444, which authorizes HHSC to administer a Medicaid Buy-In Program and to adopt rules to govern it.

§360.107. Disability.

To be eligible for MBI, a person must meet the definition of disabled as defined by the Social Security Administration for purposes of the federal Supplemental Security Income program, as explained in 20 CFR §416.905 and §416.906, except the requirement that the person be unable to engage in any substantial gainful activity does not apply.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 3. COLONIA SELF-HELP CENTER PROGRAM

10 TAC §§3.1 - 3.18

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of 10 TAC Chapter 3, §§3.1 - 3.18, concerning the Colonia Self Help Center Program, without changes to the proposed text as published in the June 5, 2009, issue of the *Texas Register* (34 TexReg 3478) and will not be republished.

The adopted repeal will allow the Department to make changes to the existing rule to ensure compliance with all statutory requirements, formalize existing policy and guidelines and include revisions of necessary policy and administrative changes to further enhance operations.

No comments were received regarding the proposed repeal.

The Board approved the final order adopting this repeal on July 30, 2009.

The repealed sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Michael Gerber

Executive Director

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-3916



10 TAC §§3.1 - 3.8

The Texas Department of Housing and Community Affairs (the Department) adopts new 10 TAC Chapter 3, §§3.1 - 3.8, concerning the 2009 Self Help Center Program Rules. Sections 3.2, 3.4 - 3.6 are adopted with changes to the proposed text as published in the June 5, 2009, issue of the *Texas Register* (34 TexReg 7854). Sections 3.1, 3.3, 3.7, and 3.8 are adopted without changes and will not be republished.

The new chapter implements changes that will improve the Colonia Self Help Center Program and implement changes that are consistent with other program rules.

Written comments on the proposed rule were accepted by mail, e-mail, and facsimile through July 8, 2009.

SUMMARY OF COMMENTS, STAFF RESPONSE AND BOARD ACTION

Public comments and the Department's responses were presented in the order in which the sections appear in the proposed Chapter 3. Following the identification of the related commenter is a summary of the comment and staff's response, including the reasons why the agency agreed or disagreed with the comment and a statement of the factual basis for the new chapter.

Public comments on the proposed amendments were received by: Reliable Real Estate Inspection Service.

§3.6(h). Colonia Self Help Center Contract Operation and Implementation.

COMMENT: The commentator stated that three of the four individuals allowed to conduct home inspections are not qualified to do so. Engineers and architects are design professionals who typically work on large commercial and infrastructure projects. Furthermore, they are not knowledgeable or trained in home construction or residential building codes and standards

and would therefore not be qualified to identify deficiencies. A third-party inspector registered with the Texas Residential Construction Commission is not a licensed home inspector but is similar to a city building inspector. However, these individuals are not required to carry liability insurance nor required to get recertified as professional licensed real estate inspectors are.

STAFF RESPONSE: Staff concurs and recommends that §3.6(h) be revised to allow only professional licensed real estate inspectors to conduct the required home inspections. However, it should be noted that the Attorney General has been asked to issue an opinion on whether the Texas Real Estate Commission has jurisdiction over those inspectors when they are performing inspections other than in the context of a purchase or sale of real estate (RQ-0804-GA). Depending on any opinion that is ultimately issued, these rules may need to be reviewed and changes considered. Because of this question, a person requesting and obtaining the services of a professional inspector to provide inspection services in a context other than a purchase or sale of real estate should not rely on these rules to create any presumption that the Texas Real Estate Commission has any jurisdiction over such professional inspections or that any required insurance required to be obtained by such professional inspectors provides any added protection or coverage for the person engaging the professional inspector.

The Board approved the final order adopting the new sections, as amended, as well as administrative changes as needed for consistency within this chapter, on July 30, 2009.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provide the Department the authority to adopt rules governing the administration of the Department and its programs.

§3.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Common definitions used under the Community Development Block Grant (CDBG) are incorporated herein by reference.

(1) Applicant--A unit of general local government who is preparing to submit or has submitted a Proposal for Colonia Self-Help Center funds.

(2) Beneficiary--A person or family benefiting from the activities of a Self-Help Center Contract.

(3) Board--The governing board of the Texas Department of Housing and Community Affairs.

(4) C-RAC--Colonia Residents Advisory Committee. Advises the Department's Governing Board and evaluate the needs of colonia residents, review programs that are proposed or operated through the Colonia Self-Help Centers and activities that may be undertaken through the Colonia Self-Help Centers to better serve the needs of colonia residents.

(5) Colonia--A geographic area located in a county some part of which is within one hundred-fifty (150) miles of the international border of this state that consists of eleven (11) or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that: Has a majority population composed of individuals and families of low income and very low income, based on the Federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed area under §17.921, Texas Water Code, and has the physical and economic characteristics of a colonia, as determined by the Department.

(6) Colonia Self-Help Center Provider--An organization with which the Contractor has an executed Contract to administer Colonia Self-Help Center activities.

(7) Community Action Agency--A political subdivision, combination of political subdivisions, or nonprofit organization that qualifies as an eligible entity under 42 U.S.C. §9902.

(8) Community Development Block Grant (CDBG) nonentitlement area funds--Funds awarded to the State of Texas pursuant to the Housing and Community Development Act of 1974, Title I, as amended, (42 U.S.C §§5301, et seq.) and the regulations promulgated thereunder in 24 CFR Part 570.

(9) Contract--A written agreement including all amendments thereto, executed by the Department and Contractor.

(10) Contract Budget--An exhibit in the Contract which specifies in detail the Contract funds by budget category, which is used in the drawdown processes. The budget also includes all other funds involved that are necessary to complete the performance statement specifics of the Contract.

(11) Contractor--A Unit of General Local Government with which the Department has executed a Contract.

(12) Department--The Texas Department of Housing and Community Affairs.

(13) HUD--The United States Department of Housing and Urban Development.

(14) Implementation Manual--A set of guidelines designed to be an implementation tool for the Contractor and Colonia Self-Help Center Providers that have been awarded Community Development Block Grant Funds and allows the Contractor to search for terms, regulations, procedures, forms and attachments.

(15) Income Eligible Families (includes both Low and Very low-income families)--

(A) Low-income families--families whose annual incomes do not exceed 80% of the median income of the area as determined by HUD and published by the Department, with adjustments for family size; and

(B) Very low-income families--families whose annual incomes do not exceed 60% of the median family income for the area, as determined by HUD and published by the Department, with adjustments for family size.

(16) Needs assessment--A demographic and characteristics study of the colonias residing in the target area and the housing needs that the Colonia Self-Help Center is designed to address, using qualitative and quantitative information and other source documentation that is required as a part of a Proposal.

(17) Nonentitlement area--An area which is not a metropolitan city or part of an urban county as defined in 42 U.S.C. §5302.

(18) Nonprofit organization--A public or private organization that:

(A) Is organized under state or local laws;

(B) Has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual;

(C) Has a current tax exemption ruling from the Internal Revenue Service (IRS) under §501(c)(3), a charitable, nonprofit corporation, or §501(c)(4), a community or civic organization, of the Internal Revenue Code of 1986, as amended, as evidenced by a certifi-

cate from the IRS that is dated 1986 or later. The exemption ruling or classification as a subordinate of a central organization nonprofit under the Internal Revenue Code, as evidenced by a current group exemption letter, that is dated 1986 or later, from the IRS, must be effective throughout the length of the Contract.

(19) Performance Statement--An Exhibit in the Contract which specifies in detail the scope of work to be performed.

(20) Proposal--A written request for Colonia Self-Help funds in the format required by the Department.

(21) Self-Help--Housing programs which allow low and very low income families to build or rehabilitate their homes through their own labor or volunteers.

(22) TDRA--Texas Department of Rural Affairs.

(23) Unit of General Local Government (UGLG)--A city, town, county, or other general purpose political subdivision of the state; a consortium of such subdivisions recognized by HUD in accordance with 24 CFR §92.101 and any agency or instrumentality thereof that is established pursuant to legislation and designated by the chief executive to act on behalf of the jurisdiction. A county is considered a unit of general local government under the Colonia Self-Help Center Program.

§3.4. Allocation and the Colonia Self Help Center Proposal Requirements.

(a) The Department distributes Colonia Self-Help Center funds to Unit of General Local Governments (UGLG) from the 2.5% set-aside of the annual Community Development Block Grant (CDBG) allocation to the State of Texas.

(b) The Department shall allocate no more than \$1.2 million per Colonia Self-Help Center award except as provided by §3.6(i)(2) of this chapter (relating to Colonia Self Help Center Contract Operation and Implementation). If there are insufficient funds available from any specific program year to fund a proposal fully, the awarded Contractor may accept the amount available at that time and wait for the remaining funds to be committed upon the Department's receipt of the CDBG set-aside allocation from the next program year.

(c) With a baseline award beginning at \$700,000, the Department will add an additional \$100,000 for each expenditure threshold, as defined in §3.8 of this chapter (relating to Expenditure Thresholds and Closeout Requirements) (6-month, 18-month, 30-month, and 42-month), met on the previous Self Help Center Contract, and an additional \$100,000 for an accepted proposal submitted by the deadline. If a Contractor can demonstrate that any violation of an Expenditure Threshold was beyond the control of the Contractor, it may request of the Board that an individual violation be waived for the purpose of future funding. The Board, in its discretion and within the limits of federal and state law, may waive any one or more of the expenditure threshold requirements if the Board finds the waiver is appropriate to fulfill the purposes or policies, of the Texas Government Code, or for good cause, as determined by the Board.

(d) The Contractor shall submit its proposal no later than three (3) months before the expiration of its current Contract, or when 90% of the funds under the current Contract have been expended, whichever comes first. If this requirement is not met, the Department will apply the options outlined in subsection (c) of this section and may result in delayed funding.

(e) Proposal reviews are conducted on a first-come first-serve basis until all Self Help Center funds for the current program year and deobligated Self Help Center funds are committed. Each complete pro-

posals will be assigned a "received date" based on the date and time it is received by the Department.

(f) In order to be accepted, each proposal must include the following:

(1) Evidence of the submission of the Contractor's current annual single audit;

(2) A comprehensive needs assessment not older than three (3) years, for each of the five (5) colonias identified to receive concentrated attention from that center;

(3) A description of the five colonias to be served. Information should present an accurate picture of the areas to be served to include the number of houses, the number of platted and unplatted lots, water and wastewater services, utilities, housing conditions and number of residents;

(4) A boundary map for each of the five colonias;

(5) A description of the scope of work. Based on the results obtained by the needs assessments, the Contractor shall develop a scope of work for each colonia based on the activities as listed in §3.1(c) of this chapter (relating to Purpose and Services). In order to provide these services, the Contractor may be required to leverage funds, coordinate with financial institutions, prepare grant applications and coordinate with their contracted partners;

(6) A description of the method of implementation. For each colonia to be served by the Colonia Self Help Center, the Contractor shall describe the services and activities to be delivered. The Proposal must identify:

(A) The percentage and scope of work that will be performed using self-help methodologies;

(B) The estimated percentage or services that will be contracted to the Colonia Self Help Center Provider; and

(C) The activities that the Contractor will be administering.

(7) Evidence that the contracted Colonia Self-Help Center provider selected by the Contractor has the capacity to administer and manage financial resources and provided documentation and auditable programmatic compliance, as evidenced by previous experience in any of the following:

(A) implementation of a CDBG contract;

(B) affordable housing, including new construction; and housing rehabilitation, reconstruction, small repair; and experience in homebuyer and down payment assistance programs;

(C) grantsmanship, project planning and development in housing and infrastructure, and project management;

(D) home ownership counseling, home loan processing and coordinating with private financial institutions;

(E) property development, including experience in processes related to surveying, platting, and recording of property records;

(F) self-help programs related to housing or infrastructure, including operation of a tool library; and

(G) managing state/federally funded projects or projects funded under private foundations and not have major outstanding monitoring or audit issues.

(8) The proposed Performance Statement. The Contractor must include the number of colonia residents to be assisted from each

colonia, the activities to be performed (including all sub-activities under each budget line item), and corresponding budget;

(9) The proposed Contract Budget must address the following:

(A) The Administration line item may not exceed 15% of the total budget;

(B) The Public Service line item may not exceed more than 15% of the total budget;

(C) The proposal must identify at least 15% of the budget that will be allocated for direct Self-Help activities;

(D) The amount of leveraged funding; and

(E) Direct Delivery Costs (soft costs) for all contractual activities cannot exceed 10% of each budget line item. Direct Delivery Costs (soft costs) are costs related to and identified with a specific housing unit or public service other than construction costs. Eligible direct delivery costs include:

(i) preparation of work write-ups, work specifications, and cost estimates;

(ii) architectural, engineering, or professional services required to prepare plans, drawings or specifications directly attributable to a particular housing unit or public service;

(iii) home inspections, inspections for lead-based paint, asbestos, termites, and interim inspections; and

(iv) other costs as approved by the Department's executive director.

(10) Proposed housing guidelines (includes small repair, rehabilitation, reconstruction, new construction and all other housing activities).

(11) Pre-agreement costs request, if applicable.

(12) Evidence of model subdivision rules adopted by the Contractor.

(13) Written policies and procedures for the following, as applicable:

(A) solid waste removal;

(B) construction skill classes;

(C) homeownership classes;

(D) technology access;

(E) homeownership assistance; and/or

(F) tool lending library. All Colonia Self Help Centers are required to operate a tool lending library.

(14) Authorized signatory form and accompanying UGLG resolution and direct deposit authorization.

(15) Unit of General Local Government resolution authorizing the submission of the proposal and appointing the primary signator for all Contract documents.

(16) Acquisition report (even if there is no acquisition activity).

(17) Certification of exemption for HUD funded projects.

(18) Initial disclosure report.

(g) Upon receipt of the Proposal, the Department will perform an initial review to determine whether the Proposal is complete and

that each activity meets a national objective as required by §104(b)(3) of the Housing and Community Development Act of 1974 (42 U.S.C. §5304(b)(3)).

(h) The Department may reduce the funding amount requested in the proposal in accordance to subsection (c) of this section. Should this occur, the Department shall notify the appropriate Contractor within ten (10) working days before the proposal is submitted to C-RAC for review, comments and approval. The Department and the Contractor will work together to jointly agree on the performance measures and proposed funding amounts for each activity.

(i) If applicable, the Department shall coordinate with the Texas Water Development Board and TDRA to eliminate delay in water and wastewater hookups.

(j) The Department shall execute a four (4) year Contract with Contractor. No Contract extensions will be allowed. If the Contractor requirements are completed prior to the end of the four (4) year contract period, the Contractor may submit a new proposal.

(k) Decline to Fund. The Department may decline to fund any proposal if the activities do not, in the Department's sole determination, represent a prudent use of Colonia Self Help Center funds. The Department is not obligated to proceed with any action pertaining to any proposal which is received, and may decide it is in the Department's best interest to refrain from pursuing any selection process. The Department through its executive director or its designee reserves the right to negotiate individual elements of any proposal.

§3.5. Colonia Residents Advisory Committee Duties and Awarding Contracts.

(a) The Board shall appoint not fewer than five persons who are residents of colonias to serve on the Colonia Residents Advisory Committee. The members of the Colonia Residents Advisory Committee shall be selected from lists of candidates submitted to the Department by local nonprofit organizations and the commissioner's court of a county in which a Colonia Self-Help Center is located.

(b) The Colonia Resident Advisory Committee members' terms will expire every four (4) years. Colonia Resident Advisory Committee members may be reappointed by the Board; however, the Board shall review and approve all members at least every four (4) years.

(c) The Board shall appoint one committee member to represent each of the counties in which a Colonia Self-Help Center is located. Each committee member:

(1) must be a resident of a colonia in the county the member represents; and

(2) may not be a board member, contractor, or employee of or have any ownership interest in an entity that is awarded a Contract under this chapter and cannot be in default on any Department obligation.

(3) The Department will conduct a compliance check on all members.

(d) The Department may also select to have an alternate member from the list for each county in the event that the primary member is unable to attend meetings.

(e) The Colonia Resident Advisory Committee shall advise the Board regarding:

(1) the housing needs of colonia residents;

(2) appropriate and effective programs that are proposed or are operated through the Colonia Self-Help Centers; and

(3) activities that might be undertaken through the Colonia Self-Help Centers to serve the needs of colonia residents better.

(f) The Colonia Resident Advisory Committee shall advise the colonia initiatives coordinator as provided by §775.005 of the Texas Government Code.

(g) Awarding Contracts:

(1) Upon reaching an agreement with the Contractor, the Department will set the date for the Colonia Resident Advisory Committee meeting. The Colonia Resident Advisory Committee shall meet before the 30th calendar day preceding the date on which a contract is scheduled to be awarded by the Board for the operation of a Colonia Self-Help Center and may meet at other times.

(2) The Contractor shall be present at the Colonia Resident Advisory Committee if its Proposal is being considered to answer questions that the Colonia Resident Advisory Committee may have.

(3) After the Colonia Resident Advisory Committee makes a recommendation on a proposal, the recommendation will undergo the Department's award process.

(4) The Contractor whose Proposal is being presented to the Board shall be invited to attend the Board Meeting in which the award is an agenda item.

(h) Reimbursement of Colonia Resident Advisory Committee members for their reasonable travel expenses in the manner provided by §3.6(l) of this chapter (relating to Colonia Self Help Center Contract Operation and Implementation) is allowable and shall be paid by the Contractor.

§3.6. Colonia Self Help Center Contract Operation and Implementation.

(a) The Department shall contract with a Unit of General Local Government (UGLG) for the operation of a Colonia Self-Help Center. The UGLG shall subcontract with a local nonprofit organization, local community action agency, or local housing authority that has demonstrated the ability to carry out all or part of the functions of a Colonia Self-Help Center.

(b) Upon award of Colonia Self-Help Center funds by the Board, the Department shall deliver a Contract based on the scope of work to be performed within thirty (30) days of the award date. Any activity funded under the Colonia Self Help Center Program will be governed by a written Contract that identifies the terms and conditions related to the awarded funds. The Contract will not be effective until executed by all parties to the Contract.

(c) Environmental. Contractors are required to complete their environmental reviews in accordance with 24 CFR Part 58 and receive the Authority to Use Grant Funds from the Department before:

(1) Any commitment of Community Development Block Grant (CDBG) funds (i.e., execution of a legally binding agreement and expenditure of CDBG funds) for activities other than those that are specifically exempt from environmental review.

(2) Any commitment of non-CDBG funds associated with the scope of work in the Contract that would have an adverse environmental impact (i.e. demolition, excavating, etc.) or limit the choice of alternatives (i.e. acquisition of real property, rehabilitation of buildings or structures, etc.).

(d) All housing rehabilitation, reconstruction, and new construction contractor/builders, including Self Help Center Provider(s) performing any housing activities, as defined by the Texas Residential Construction Commission, making improvements to or reconstructing

an existing home at a cost exceeding \$10,000 must be registered with the Texas Residential Construction Commission.

(e) All reconstruction and new construction activities must meet the accessibility requirements pursuant to §2306.514 of the Texas Government Code.

(f) Request for Payments. The Contractor shall submit a properly completed request for reimbursement, as specified by the Department, at a minimum on a quarterly basis; however the Department reserves the right to request more frequent reimbursement requests as it deems appropriate. The Department shall determine the reasonableness of each amount requested and shall not make disbursement of any such payment request until the Department has reviewed and approved such request. Payments under the Contract are contingent upon the Contractor's full and satisfactory performance of its obligations under the Contract.

(1) \$2,500 is the minimum amount for a draw to be processed. Exceptions to this rule are as follows:

(A) The draw request exceeds 25% of a budgeted line item but less than \$2,500 and the Contractor is requesting funds only for that line item.

(B) The draw request is for the final retainage of a construction contract.

(C) The Contractor received prior approval from the Department.

(D) The request is the final draw.

(2) Draw requests will be reviewed to comply with all applicable laws, rules and regulations. The Contractor is responsible for maintaining a complete record of all costs incurred in carrying out the activities of the Contract.

(3) Draw requests for all housing activities will only be reimbursed upon satisfactory completion of types of activities (i.e., all plumbing completed, entire roof is completed, etc.), consistent with the work write-up and subsequent construction contract.

(4) The Contractor will be the principal contact responsible for reporting to the Department and submitting draw requests.

(g) Reporting. The Contractor shall submit to the Department reports on the operation and performance of the Contract on forms as prescribed by the Department. Quarterly Reports shall be due no later than the twentieth (20th) calendar day of the month after the end of each calendar quarter. The Contractor shall maintain and submit to the Department up-to-date accomplishments in quarterly reports identifying quantity and cumulative data including the expended funds, activities completed and total number of Beneficiaries.

(h) Inspections. At a minimum, inspections will be required for all housing rehabilitation (initial and final), small home repair (initial only), reconstruction (initial and final) and new construction (final only) activities and must be inspected by a professional inspector licensed by the Texas Real Estate Commission.

(1) The final inspections for housing rehabilitation must ensure that the construction on the house is complete, that the home is safe and that it meets at a minimum, Colonia Housing Standards. A copy of the final inspection report must be given to the homeowner.

(2) The final inspections for reconstruction and new construction must ensure that the construction on the home is complete, that the home is safe, and that it meets, at a minimum, International Residential Code (IRC). IRC is a comprehensive residential code which establishes minimum construction requirements with plumbing, mechan-

ical, energy, and electrical provisions. A copy of the final inspection report must be given to the homeowner.

(3) The initial inspections for small home repair will identify and prioritize areas in need of repair. Only the area being repaired under the small home repair activity must meet, at a minimum, Colonia Housing Standards. A copy of the initial inspection report must be given to the homeowner.

(4) Homes receiving only first-time water connections are not required to meet Colonia Housing Standards or have a third-party inspection.

(5) The Department will only reimburse for two inspection reports for housing rehabilitation and reconstruction, and one inspection report for new construction and small home repair.

(6) The Contractor must ensure and verify that each construction contractor performing activities in the amount of \$10,000 or more under the Contract is registered and maintains good standing with the Texas Residential Construction Commission.

(7) The Contractor must ensure and verify that each housing unit being rehabilitated in the amount of \$10,000 or more under the Contract is registered with the Texas Residential Construction Commission.

(i) Amendments. Any alterations, additions, or deletions to the terms of the Contract shall be submitted in writing to the Department. Reduced Beneficiaries or activities, due to extenuating or unforeseeable circumstances, may be allowed as approved by the Department. The Department's executive director or its designee, may authorize, execute, and deliver amendments to any Contract:

(1) Contract Time Extensions beyond the four (4) year contract period will not be allowed for Self-Help Center contracts.

(2) The Department, at its discretion and in coordination with a Contractor, may increase a contract budget amount and the number of activities and beneficiaries based on the availability of Self Help Center funds, the exemplary performance in the implementation of a Contractor's current contract, and the time available in the four (4) year contract period. Upon Board approval, the cap on the maximum contract amount may be exceeded if the terms of this paragraph are met by a Contractor.

(j) If the Contractor fails to meet a Contract requirement the awarded funds related to the lack of performance may be entirely or partially deobligated at the Department's sole discretion.

(k) Waiver. The Board, in its discretion and within the limits of federal and state law, may waive any one or more of the requirements of this chapter if the Board finds that waiver is appropriate to fulfill the purposes or policies, Chapter 2306 of the Texas Government Code, or for good cause, as determined by the Board.

(l) Travel. Costs incurred by Colonia Self Help Center employees and officers for travel, including costs of lodging, other subsistence, and incidental expenses, shall be considered reasonable and allowable only to the extent such costs do not exceed charges normally allowed by the State Comptroller's Travel Allowance Guide.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 3, 2009.

TRD-200903265

Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: August 23, 2009
Proposal publication date: June 5, 2009
For further information, please call: (512) 475-3916



CHAPTER 5. COMMUNITY AFFAIRS PROGRAMS SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §5.3, §5.20

The Texas Department of Housing and Community Affairs (Department) adopts amendments to 10 TAC Chapter 5, Subchapter A, §5.3, concerning Definitions and §5.20, concerning Income Eligibility, without changes to the text as published in the June 5, 2009, issue of the *Texas Register* (34 TexReg 3485), and will not be republished.

This amendment is in response to grant guidance for implementing the American Recovery and Reinvestment Act (ARRA) to increase the eligibility requirements for Community Services Block Grant (CSBG), Comprehensive Energy Assistance Program (CEAP) and Weatherization Assistance Program (WAP) from 125% to 200% of Federal poverty level.

Public comments were received concerning the proposed amendments from the Texas Association of Community Action Agencies (TACAA) and Community Services, Inc. both indicating their support for the amendments to 10 TAC Chapter 5.

The Board approved the final order adopting the amendments on July 30, 2009.

The amended sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200903308
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916



SUBCHAPTER D. COMPREHENSIVE ENERGY ASSISTANCE PROGRAM

10 TAC §5.407, §5.422

The Texas Department of Housing and Community Affairs (Department) adopts amendments to 10 TAC Chapter 5, Subchapter D, §5.407, concerning Eligible Households and Client Eligibility Criteria and §5.422, concerning Assistance and Benefit Levels,

without changes to the text as published in the June 5, 2009, issue of the *Texas Register* (34 TexReg 3486), and will not be republished.

This amendment is in response to grant guidance for implementing the American Recovery and Reinvestment Act (ARRA) to increase the eligibility requirements for Comprehensive Energy Assistance Program (CEAP) from 125% to 200% of Federal poverty level.

Public comments were received concerning the proposed amendments from the Texas Association of Community Action Agencies (TACAA) and Community Services, Inc. both indicating their support for the amendments to 10 TAC Chapter 5.

The Board approved the final order adopting the amendments on July 30, 2009.

The amended sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 216. CONTINUING EDUCATION

22 TAC §§216.1 - 216.11

The Texas Board of Nursing (Board) adopts the repeal of Chapter 216, §§216.1 - 216.11, concerning Continuing Education. The repeal is adopted without changes to the proposed text published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2864) and will not be re-published.

This repeal is necessary because the Board is simultaneously adopting a new chapter that promotes a comprehensive approach to continuing competency in nursing. Traditionally, nurses have primarily demonstrated continuing competency through the completion of continuing education courses. The requirements of the adopted new chapter, however, permit nurses to demonstrate continuing competency through other means. It is anticipated that this new approach to continuing competency will provide necessary flexibility to nurses while ensuring the ongoing delivery of safe nursing care in Texas. The adopted new chapter is also published in this edition of the *Texas Register*.

The adoption of the repeal will result in the promotion of a more comprehensive approach to continuing competency in nursing in Texas.

The Board did not receive any comments on the proposed repeal.

The repeal of §§216.1 - 216.11 is adopted pursuant to the Occupations Code §301.303 and §301.151. The Occupations Code §301.303(a) provides that the Board may recognize, prepare, or implement continuing competency programs for license holders under Chapter 301 and may require participation in continuing competency programs as a condition of renewal of a license. Further, §301.303(a) provides that the programs may allow a license holder to demonstrate competency through various methods, including completion of targeted continuing education programs and consideration of a license holder's professional portfolio, including certifications held by the license holder. Section 301.303(b) provides that the Board may not require participation in more than a total of 20 hours of continuing education in a two-year licensing period. Section 301.303(c) authorizes the Board by rule to establish a system for the approval of programs and providers of continuing education if the Board requires participation in continuing education programs as a condition of license renewal. Section 301.303(e) authorizes the Board to adopt rules as necessary to implement §301.303. Section 301.303(f) states that the Board may assess each program and provider under §301.303 a fee in an amount that is reasonable and necessary to defray the costs incurred in approving programs and providers. Section 301.303(g) provides that the Board by rule may establish guidelines for targeted continuing education required under Chapter 301. Further, §301.303(g) requires the rules adopted under §301.303(g) to address (i) the nurses who are required to complete the targeted continuing education program; (ii) the type of courses that satisfy the targeted continuing education requirement; (iii) the time in which a nurse is required to complete the targeted continuing education; (iv) the frequency with which a nurse is required to meet the targeted continuing education requirement; and (v) any other requirement considered necessary by the Board. The Occupations Code §301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to perform its duties and conduct proceedings before the Board; regulate the practice of professional nursing and vocational nursing; establish standards of professional conduct for license holders under Chapter 301; and determine whether an act constitutes the practice of professional nursing or vocational nursing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 27, 2009.

TRD-200903176

James W. Johnston

General Counsel

Texas Board of Nursing

Effective date: August 16, 2009

Proposal publication date: May 15, 2009

For further information, please call: (512) 305-6811



CHAPTER 216. CONTINUING COMPETENCY

22 TAC §§216.1 - 216.11

The Texas Board of Nursing (Board) adopts new Chapter 216, §§216.1 - 216.11, concerning Continuing Competency. New §§216.1 - 216.4, 216.6, and §216.8 are adopted with changes

to the proposed text published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2865). New §§216.5, 216.7, and 216.9 - 216.11 are adopted without changes to the proposed text and will not be re-published.

The new sections are adopted under the Occupations Code §§301.152, 301.303, and 301.306, which authorize targeted continuing competency requirements for license holders, and are necessary to implement a comprehensive approach to continuing competency in nursing.

The Board is simultaneously adopting the repeal of existing §216.1 (relating to Definitions); §216.2 (relating to Purpose); §216.3 (relating to Requirements); §216.4 (relating to Criteria for Acceptable Continuing Education Activity); §216.5 (relating to Additional Criteria for Specific Continuing Education Programs); §216.6 (relating to Activities Which are not Acceptable as Continuing Education); §216.7 (relating to Responsibilities of Individual Licensee); §216.8 (relating to Relicensure Process); §216.9 (relating to Audit Process); §216.10 (relating to Appeals); and §216.11 (relating to Consequences of Non-Compliance). The adopted repeal of these sections is also published in this issue of the *Texas Register*. This adoption includes new sections to replace the repealed sections.

The Board formally proposed the new sections in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2865). A public hearing on the rule proposal was held on July 9, 2009. In response to written comments on the published proposal and comments received during the public hearing, the Board has changed some of the proposed language in the text of the rule as adopted. The changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

The Board has made changes to §§216.1 - 216.4, 216.6, and 216.8 as adopted in response to comments that the proposed rules indirectly require a nurse to practice nursing in order to renew his or her license. Commenters state that Texas law does not impose a practice requirement on non-advanced practice nurses who renew a license, and the Board lacks authority to require a nurse to actively practice nursing in order to renew a license. Further, while the commenters generally agree that the proposed rules do not adequately address the effect of an "area of practice" requirement on nurses who do not actively practice nursing, the commenters propose different solutions to address the perceived problem. The Board continues to support the demonstration of continuing competency through the completion of continuing education in a nurse's area of practice. However, the Board agrees that there may be unanticipated or unintended consequences of the rule as proposed. This may be especially true with regard to nurses who are not actively practicing nursing or who work in non-traditional nursing occupations. As a result, changes have been made to §§216.1 - 216.4, 216.6, and 216.8 as adopted to provide necessary clarification, increase readability of the new sections, and eliminate the requirement that a nurse complete continuing education in his or her area of practice. The Board believes that the revisions to these sections as adopted address the commenter's stated concerns.

The proposed requirement that nurses participate in continuing education courses that relate to their practice area has been eliminated from §216.2 as adopted, and a new sentence has been added to §216.2 that states: "The board encourages nurses to choose continuing education courses that relate to their work setting and area of practice or to attain, maintain, or

renew an approved national nursing certification in their practice area, which benefits the public welfare." Although the Board is not requiring a nurse to complete continuing education in a specific area of practice in this rule adoption, the Board anticipates adopting such a requirement at some point in the future. As such, the Board is committed to encouraging nurses to choose to complete their continuing education in their specific areas of practice, even though they are not required to do so under the adopted rules. The proposed requirement that continuing education hours be obtained in the nurse's area of practice has also been eliminated from §216.3(a) and (e)(1) as adopted, and a new sentence has been added to §216.3(a) that states: "These hours shall be obtained by participation in programs approved by a credentialing agency recognized by the board." Further, the phrase "as defined in this chapter" has been added to §216.3(e)(1) for clarity, readability, and consistency with adopted §216.3(e)(2). The proposed requirement that continuing education programs must be in the nurse's area of practice has also been removed from §216.4 as adopted. The proposed statement that continuing education that is not in the nurse's area of practice will not meet the Board's continuing education requirements for licensure renewal has been removed from §216.6 as adopted. Also, the word "professional" has been changed to "nursing" in §216.6(3) as adopted to clarify Board intent that §216.6(3) applies to entry level competencies in both registered nursing practice and vocational nursing practice. The proposed requirements that a licensee must submit evidence of having completed 20 contact hours in his or her current or prior area of practice have been eliminated from §216.8(d)(1) and (e)(1) as adopted.

Finally, the proposed definition of *area of practice* has been changed in §216.1(4) as adopted. The revised definition defines *area of practice* as: "Any activity, assignment, or task in which the nurse utilized nursing knowledge, judgment, or skills during the licensure renewal cycle." Although the Board has eliminated the requirement that a nurse must obtain continuing education in his or her area of practice from the adopted rules, the Board is adopting §216.3(b) as proposed, without changes. Proposed §216.3(b) provides nurses the option of satisfying their continuing competency requirements by demonstrating the achievement, maintenance, or renewal of an approved national nursing certification in the nurse's area of practice. The revised definition of *area of practice* in §216.1(4) as adopted more closely aligns with the definition of *professional nursing* and *vocational nursing* found in the Occupations Code §301.002(2) and (5) and provides guidance to nurses in determining their specific area of practice for national nursing certification purposes.

The following paragraphs provide a brief summary and analysis of the reasons for the adopted rules, including a history of the methodologies and initiatives supporting a comprehensive approach to continuing competency in Texas. Staff began actively studying and analyzing national and local continuing competency initiatives in October, 2005, and routinely presented the data, observations, findings, and recommendations from these initiatives to the Board at the January, 2006; April, 2006; July, 2006; October, 2006; January, 2007; April, 2007; July, 2007; October, 2007; January, 2008; April, 2008; July, 2008; October, 2008; January, 2009; and April, 2009 Board meetings. At the April 2009, Board meeting, based upon a comprehensive study of the subject, Staff recommended, and the Board approved, adopting a comprehensive approach to continuing competency in Texas.

The concept of implementing and evaluating continuing competency requirements in nursing is not new. In fact, nursing boards, commissions, and organizations have been developing continuing competency programs since the early 1990s. The Board began actively evaluating and testing models of continuing nursing competency after SB 617 (effective September 1, 1997) was enacted by the 75th Texas Legislature. SB 617 authorized the Board to conduct pilot programs to evaluate the continued competency of nurses in Texas. Pursuant to SB 617, the Board approved and funded six pilot studies, including: (i) evaluation of a mandatory competency evaluation program of an urban county hospital and the validity and reliability of a 360 degree performance appraisal system in an urban specialty hospital; (ii) delineation of competencies for nurses working in rural health care settings; (iii) the use of vignettes for targeted continuing education in psychiatric nursing; (iv) assessment of certification in ACLS and PALs as a valid indication of competence; (v) identification and assessment of competencies of nurses in long-term care; and (vi) development of reliable and validity information for assessing home health nurse competencies. Various recommendations resulted from these studies, including a recommendation from the Competency Advisory Committee that acceptable components of competency maintenance should not be limited solely to continuing education hours. The Board reported its findings and recommendations regarding continuing competency in a 2000 publication, *Ensuring Professional Nursing Competency*. Shortly thereafter, ongoing competency evaluation began receiving further national attention and review. For example, the National Council of State Boards of Nursing (NCSBN) formed a special task force to survey over 20,000 licensed vocational nurses and 20,000 registered nurses with at least one year of practice experience to determine competencies that were required in their work environments. The NCSBN also compiled state-by-state information about continued competency processes using the APPLE criteria (Administratively feasible, Publicly credible, Professionally acceptable, Legally defensible, and Economically feasible) for an analysis of best practices among states. Around the same time, the following groups in Texas began evaluating and testing competency models: The Alliance for Innovation in Nursing Education; North Texas Consortium School of Nursing; Texas Higher Education Coordinating Board Nursing Innovative Grant Program - Midwestern State University High Fidelity Clinical Simulation; and Texas Nurses Association Competency Task Force. In February, 2006, these groups formed the Texas Competency Consortium to share information and coordinate competency development in the state of Texas.

Board staff actively participated in the Texas Nurses Association Competency Task Force (Task Force) during this time period and routinely reported the activities and initiatives of the Task Force to the Board. The Task Force focused on two specific approaches to continuing competency: (i) whether competencies should be developed that are related to a nurse's specific role/practice in his or her work environment; or (ii) whether broad-based competencies for all nurses should be developed. The NCSBN also considered these approaches on a national level, opting to develop and test a core set of broad-based competencies for all nurses. Ultimately, this approach was also adopted by the Task Force. The Task Force spent five years evaluating and testing different approaches to continuing competency. In July 2008, the Task Force issued *Continuing Competency: Movement Toward Assurance in Nursing*, in which the Task Force outlined its recommendations for continuing competency requirements in Texas. Specifically, the Task

Force recommended allowing nurses to meet their continuing competency requirements through either the completion of 20 hours of continuing education in their area of practice or through national certification in their area of practice.

The requirements of the adopted new chapter are patterned after the studies, findings, and recommendations of the aforementioned national and local groups. Traditionally, continuing competency has been demonstrated primarily through the completion of continuing education courses. However, based upon the recommendations of the Task Force and the Texas Competency Consortium and the studies conducted by the NCSBN over the last five to ten years, the Board is departing from this approach by authorizing nurses to utilize other methods of demonstrating continuing competency. Under the adopted new chapter, a nurse is authorized to demonstrate continuing competency through the achievement, maintenance, or renewal of an approved national nursing certification in the nurse's area of practice, as well as through the completion of continuing education courses. Recognizing this additional method of compliance provides nurses with the option of pursuing and maintaining a certification in a specific area of practice. The additional education and training associated with obtaining and maintaining such a certification serves the purpose of the adopted new chapter, which is to protect the public health, safety, and welfare by ensuring that nurses stay abreast of current industry practices, enhance their professional competence, learn about new technology and treatment regimens, and update their clinical skills. This additional method of compliance is also consistent with the Occupations Code §301.303(a), which authorizes the demonstration of competency through various methods, including consideration of a license holder's professional portfolio and certifications held by the license holder.

The adopted new chapter also provides nurses with the option of demonstrating continuing competency through the completion of continuing education courses. Although the adopted new chapter does not require a nurse to complete continuing education courses in a specific area of practice, the Board encourages nurses to choose continuing education courses that relate to their work setting and area of practice. The Board recognizes that there is benefit in continuing education activities that generally apply to all nursing practice. However, the Board believes that a nurse is able to provide a better quality of care in the area of practice in which he or she has received specified, targeted training and is most knowledgeable. As a result, the Board remains committed to emphasizing the benefit of completing continuing education courses in a specific area of practice even though the completion of such courses is not a requirement of this rule adoption.

The following paragraphs summarize the intended purpose of the adopted new sections.

Adopted new §216.1 is necessary to define the terms used in the new chapter. In particular, adopted new §216.1(4) defines the term *area of practice*, which more closely aligns with the definition of *professional nursing* and *vocational nursing* found in the Occupations Code §301.002(2) and (5) and provides guidance to nurses in determining their specific area of practice for national nursing certification purposes.

Adopted new §216.2 is necessary to define the purpose of the new chapter, which is to ensure that nurses maintain and enhance their professional competence through activities, courses, and programs that promote and enrich their knowledge and skills.

Adopted new §216.3(a) and (b) are necessary to implement the continuing competency requirements under the Occupations Code §301.303(a) and (b). The Occupations Code §301.303(a) authorizes the Board to recognize, prepare, and implement continuing competency programs for license holders under Chapter 301 and to require participation in continuing competency as a condition of renewal of a license. Section 301.303(b) states that the Board may not require participation in more than a total of 20 hours of continuing education in a two-year licensing period. Adopted new §216.3(a) and (b) prescribe the continuing competency requirements applicable to nurses for each two-year licensing period and authorize two acceptable methods of satisfying those requirements. Under adopted new §216.3(a) and (b), a nurse must either complete (i) 20 contact hours of continuing education within the two years immediately preceding renewal of registration; or (ii) achieve, maintain, or renew an approved national nursing certification in the nurse's area of practice. These adopted new requirements emphasize the adopted new chapter's comprehensive approach to continuing competency by authorizing a viable alternative to completing traditional continuing education courses.

Adopted new §216.3(c), (d), and (e) address specific continuing competency requirements applicable to advanced practice registered nurses; advanced practice registered nurses holding prescriptive authority; nurses working in emergency room settings; and volunteer retired registered nurses. These adopted new requirements are necessary to implement the Occupations Code §301.152(b) and (c) and §301.306. The Occupations Code §301.152(b) authorizes the Board to adopt rules to approve registered nurses as advanced practice nurses and advanced practice nurses with prescriptive authority. Further, §301.152(b) authorizes the Board to adopt rules to establish specialized training, including pharmacology, that a registered nurse must have to carry out a prescription drug order. Section 301.152(c) requires the rules adopted under §301.152(b) to require continuing education in clinical pharmacology and related pathology, in addition to any continuing education otherwise required under §301.303. Consistent with the requirements of §301.152(b) and (c), adopted new §216.3(c) specifies the continuing competency requirements for advanced practice registered nurses and advanced practice registered nurses holding prescriptive authority and the methods that may be utilized to achieve compliance. The adopted new continuing competency requirements for advanced practice registered nurses do not differ significantly from the adopted new continuing competency requirements for registered or vocational nurses. Adopted new §216.3(c) generally requires an advanced practice registered nurse to either obtain 20 contact hours of continuing education appropriate to the advanced specialty area and role recognized by the Board or to attain, maintain, or renew a national certification recognized by the Board. However, additional continuing competency requirements apply to an advanced practice registered nurse holding prescriptive authority. Adopted new §216.3(c)(3) requires an advanced practice registered nurse holding prescriptive authority to complete at least five contact hours of continuing education in pharmacotherapeutics, in addition to satisfying the continuing competency requirements in adopted new §216.3(c). This adopted new requirement is particularly important because advanced practice registered nurses holding prescriptive authority are authorized to prescribe medications for their patients. It is important for these nurses to stay abreast of any changes in medication and treatment regimens so they may continue to safely prescribe medications and treatments for their patients.

The Occupations Code §301.306(a) requires a license holder who is employed to work in an emergency room setting to complete at least two hours of continuing education relating to forensic evidence collection. Further, §301.306(c) requires the Board to adopt rules to identify which license holders are required to comply with the requirements of §301.306(a) and to establish the content of the continuing education required under §301.306(a). Pursuant to §301.306, adopted new §216.3(d) clarifies that each nurse licensed in Texas and employed in an emergency room setting on or after September 1, 2006 shall complete a minimum of two hours of continuing education relating to forensic evidence collection. Adopted new §216.3(d) also defines the types of emergency room settings that are implicated by the adopted new requirements and specifies the information that must be addressed in continuing education courses focusing on forensic evidence collection. In addition to implementing the statutory requirements of the Occupations Code, adopted new §216.3(d) also helps ensure the preservation of valuable evidence. Persons who are the victims of crimes, such as sexual assault, assault, or abuse, often seek treatment in emergency rooms. In such situations, it may be necessary for an emergency room nurse to collect evidence of such crimes from the patient. While some institutions have a trained and certified Sexual Assault Nurse Examiner (SANE) on site to collect such evidence, not every institution will be able to provide a SANE nurse for evidence collection at certain times or locations. Adopted new §216.3(d) requires all nurses working in an emergency room setting to maintain competency in forensic evidence collection so that evidence may be appropriately preserved and collected from a patient at any time. This adopted new requirement furthers the public interest by ensuring the preservation of valuable evidence necessary for the prosecution of violent crimes.

Lastly, adopted new §216.3(e) addresses the continuing competency of retired nurses over the age of 65 who choose to volunteer their nursing services. The Board recognizes that these nurses are not compensated for providing volunteer nursing services and are generally not practicing nursing full time. However, these nurses are still providing patient care, and must comply with the requirements of the Nursing Practice Act. Further, because these nurses are providing patient care, it is important that they maintain their competency and clinical skills, stay abreast of current industry practices, and learn about new technology and treatment regimens. The Board recognizes that it may be inappropriate and financially burdensome to require a retired nurse who volunteers his or her nursing services on a part time basis to complete the same number of continuing education hours as a nurse who is not retired and practices nursing on a full time basis. As such, adopted new §216.3(e) requires a volunteer retired nurse to complete at least 10 contact hours of continuing education. In this way, adopted new §216.3(e) appropriately balances the need for retired volunteer nurses to demonstrate an acceptable level of continuing competency, while reducing the financial burden associated with completing continuing education courses.

Adopted new §216.4 and §216.5 address the criteria that a continuing education program must meet under the adopted new requirements. Adopted new §216.4 requires all continuing education programs to be approved by a credentialing agency, or an affiliated entity of such an agency, recognized by the Board. A credentialing agency must meet nationally, pre-determined criteria to approve programs and providers of continuing education in order to be recognized by the Board. Further, the Board recognizes that some nurses will choose to further their formal ed-

ucation and training and encourages those nurses to do so. As such, adopted new §216.5 permits certain, qualifying academic courses to satisfy all or a portion of a nurse's continuing competency requirements under the adopted new chapter. In order to qualify under adopted new §216.5, an academic course must either be included within the framework of a curriculum that leads to an academic degree in nursing or be relevant to nursing practice. Further, a nurse must be able to demonstrate that he or she completed the course with a grade of "C" or better or with a "Pass" on a "Pass/Fail" grading system. Adopted new §216.5 is intended to encourage nurses to further their nursing education through academic courses and to authorize the completion of these academic courses as an additional method of demonstrating continuing competency.

Adopted new §216.6 prohibits 10 categories of programs, activities, and courses from satisfying the adopted new continuing competency requirements. The Board recognizes that some continuing education programs, activities, and courses that are prohibited under adopted new §216.6 may provide nurses with helpful or valuable knowledge or may refresh a nurse's basic skills. While the Board recognizes that such knowledge is of value, the Board has determined that these programs, activities, and courses are not sufficient to advance or improve a nurse's knowledge or skill level or to develop a nurse's attitude for the enhancement of nursing practice. As such, while these programs, activities, and courses may provide helpful information, they cannot be used to satisfy the continuing competency requirements of the adopted new chapter.

Adopted new §216.7 is necessary to clarify a nurse's responsibility for satisfying the continuing competency requirements of the adopted new chapter. Adopted new §216.7 specifically requires each nurse to select, participate in, and maintain a record of qualifying continuing education programs, activities, and courses. Further, adopted new §216.7 prescribes the specific amount of time that a nurse must maintain a record of the completion of continuing education programs, activities, and courses. Not only do these adopted new requirements clearly delineate a nurse's compliance obligations under the adopted new chapter, but they also provide important information regarding compliance with adopted new §216.9. Adopted new §216.9 prescribes the audit process through which the Board will monitor a nurse's compliance with the adopted new continuing competency requirements. A nurse who is audited pursuant to adopted new §216.9 may be required to produce documentation to verify his or her continuing competency compliance for a specific period of licensure. If a nurse maintains records of the completion of continuing education programs, activities, and courses in compliance with adopted new §216.7, the nurse should also be able to provide the documentation necessary to prove his or her compliance during an audit conducted under adopted new §216.9.

Adopted new §216.8 clarifies the continuing competency requirements applicable to: licensees seeking renewal of their license; persons licensed by examination or endorsement; persons whose license is delinquent or inactive; and persons whose license has been revoked. These adopted new requirements provide important guidance to nurses regarding their responsibilities in meeting continuing competency requirements upon initial licensure and renewal and upon their license being returned to current or active status.

Adopted new §216.9 prescribes the process the Board will utilize in auditing and monitoring a nurse's compliance with the

requirements of the adopted new chapter. The Board considers a nurse's compliance with the adopted new continuing competency requirements to be of utmost importance because a nurse's continuing competency directly affects the ongoing delivery of safe nursing care. Adopted new §216.9 implements an audit system, by which nurses will be randomly selected for a compliance audit 90 days prior to each renewal month. If a nurse is selected to be audited, the Board will review the nurse's continuing competency activities to determine compliance. To the extent that an audit reveals a nurse's non-compliance with any of the adopted new continuing competency requirements, it is anticipated that the Board will be able to take corrective action in a timely manner in order to prevent the nurse from providing potentially unsafe or incompetent care.

Adopted new §216.10 affords a nurse an opportunity to appeal a Board determination of continuing competency non-compliance. This adopted new section serves an important purpose. Under adopted new §216.9, the Board seeks to monitor and enforce compliance with its adopted new continuing competency requirements. However, the Board recognizes that incorrect compliance determinations may be made at times, due to human error. In such situations, it is important for a nurse to be afforded an opportunity to dispute the incorrect compliance determination. Adopted new §216.10 affords each nurse an opportunity to appeal a non-compliance determination and provide the Board with evidence of continuing competency compliance. The Board's goal in monitoring compliance with the adopted new continuing competency requirements is to identify non-compliant nurses so that corrective action may be taken as appropriate. However, corrective action is not necessary or appropriate in situations where a compliant nurse has been identified in error as non-compliant. Adopted new §216.10 seeks to minimize this risk by providing nurses the opportunity to challenge a determination of non-compliance and prove their compliance so that inappropriate corrective action may be timely avoided.

Finally, adopted new §216.11 clearly identifies the Board's expectations with regard to compliance with the adopted new continuing competency requirements. Adopted new §216.11 clearly states that a nurse's failure to comply with the continuing competency requirements will result in denial of renewal by the Board. Nurses are entrusted with the care of those most vulnerable by virtue of illness or injury. As such, their level of competence is of utmost importance in creating safe environments for patients. Because a nurse's continuing competency is such an integral part of providing safe nursing care to the public, the Board considers the denial of renewal one of the appropriate sanctions for non-compliance with the adopted new continuing competency requirements.

Adopted new §216.1 defines the terms to be used in the adopted new chapter. Adopted new §216.2 states that the purpose of continuing competency is to ensure that nurses stay abreast of current industry practices, enhance their professional competence, learn about new technology and treatment regimens, and update their clinical skills. Further, adopted new §216.2 makes clear that continuing education in nursing includes programs beyond the basic preparation which are designed to promote and enrich knowledge, improve skills, and develop attitudes for the enhancement of nursing practice, thus improving health care to the public. Additionally, adopted new §216.2 recognizes that nursing certification is another method of demonstrating continuing competence. Adopted new §216.2 also states that, pursuant to authority set forth in the Occupations Code §301.303, the Board requires participation in continuing competency activ-

ities for license renewal. Further, the procedures set forth in the adopted new chapter provide guidance to fulfilling the continuing competency requirement. Finally, although not required to do so, nurses are encouraged to participate in continuing education courses that relate to their work setting or area of practice or to attain, maintain, or renew an approved national nursing certification in their practice area, which benefits the public welfare. Adopted new §216.3(a) and (b) require a nurse to either (i) complete 20 contact hours of continuing education within the two years immediately preceding renewal of registration or (ii) demonstrate the achievement, maintenance, or renewal of an approved national nursing certification in the nurse's area of practice. Adopted new §216.3(a) further requires the 20 contact hours of continuing education to be obtained by participation in programs approved by a credentialing agency recognized by the board. Further, adopted new §216.3(a) states that a list of the credentialing agencies/organizations may be obtained from the Board's office or web site. Adopted new §216.3(b) states that a list of approved national nursing certification criteria may also be obtained from the Board's office or web site. Adopted new §216.3(c) states that a licensee authorized by the Board as an advanced practice registered nurse (APRN) is required to obtain 20 contact hours of continuing education or attain, maintain or renew the national certification recognized by the Board as meeting the certification requirement for the advanced practice registered nurse's role and population focus area of licensure within the previous two years of licensure. Further, adopted new §216.3(c) provides that national certification will only meet the requirement for licensure renewal. Additionally, adopted new §216.3(c)(1) states that the required hours are not in addition to the requirements of §216.3(a) or (b). Adopted new §216.3(c)(2) provides that the 20 contact hours of continuing education must be appropriate to the advanced specialty area and role recognized by the Board. Adopted new §216.3(c)(3) provides that the APRN who holds prescriptive authority must complete, in addition to the required continuing competency requirements in §216.3(c), at least five contact hours of continuing education in pharmacotherapeutics. Adopted new §216.3(c)(4) states that Category I Continuing Medical Education (CME) contact hours will meet requirements as described in the adopted new chapter. Adopted new §216.3(d)(1) requires each nurse licensed in Texas and employed in an emergency room setting on or after September 1, 2006 to complete a minimum of two hours of continuing education relating to forensic evidence collection, as required by the Occupations Code §301.306 and adopted new §216.3(d) by (i) September 1, 2008 for nurses to whom this requirement applies who are employed in an emergency room setting on or before September 1, 2006; or (ii) within two years of the initial date of employment in an emergency room setting. This requirement may be met through completion of approved continuing education activities, as set forth in §216.4 (relating to Criteria for Acceptable Continuing Education Activity). Further, adopted new §216.3(d)(2) provides that this requirement applies to nurses who work in an emergency room setting that is: (i) the nurse's home unit; (ii) an ER unit to which the nurse "floats" or schedules shifts; or (iii) a nurse employed under contractual, temporary, per diem, agency, traveling, or other employment relationship whose duties include working in an emergency room. Additionally, adopted new §216.3(d)(3) states that a licensed nurse in Texas who would otherwise be exempt from continuing education requirements during the nurse's initial licensure or first renewal periods under §216.8(b) or (c) (relating to Relicensure Process) shall comply with the requirements of §216.3. This is a one time requirement for each nurse employed in an emergency

room setting. In compliance with §216.7(b) (relating to Responsibilities of Individual Licensee), each licensee is responsible for maintaining records of continuing education attendance. Validation of course completion in Forensic Evidence Collection should be retained by the nurse indefinitely, even if a nurse changes employment. Further, adopted new §216.3(d)(4) provides that the minimum two hours of continuing education requirement shall include information relevant to forensic evidence collection and age or population-specific nursing interventions that may be required by other laws and/or are necessary in order to assure evidence collection that meets requirements under the Government Code §420.031 regarding use of a service-approved evidence collection kit and protocol. The content may also include, but is not limited to: documentation, history-taking skills, use of sexual assault kit, survivor symptoms, and emotional and psychological support interventions for victims. Lastly, adopted new §216.3(d)(5) provides that the required hours under adopted new §216.3(d) are included in the continuing education requirements for nurses. Adopted new §216.3(e)(1) provides that a nurse who is 65 years old or older and who holds or is seeking to hold a valid volunteer retired nurse authorization in compliance with the Occupations Code §112.051 and §217.9(d) (relating to Inactive Status) must have completed at least 10 hours of continuing education during the previous biennium, unless the nurse also holds valid recognition as an advanced practice registered nurse or is a Volunteer Retired Registered Nurse with advanced practice authorization in a given role and specialty in the State of Texas. Further, adopted new §216.3(e)(2) provides that a nurse who is 65 years old or older and who holds or is seeking to hold a valid volunteer retired nurse authorization in compliance with the Occupations Code §112.051 and §217.9(d) must have completed at least 20 hours of continuing education as defined in the adopted new chapter if authorized by the Board in a specific advanced practice role and specialty. The 20 hours of continuing education must meet the same criteria as advanced practice registered nurse continuing education defined under §216.3(c). An advanced practice registered nurse authorized as a volunteer retired registered nurse with advanced practice registered nurse authorization may not hold prescriptive authority. This does not preclude a registered nurse from placing his/her advanced practice registered nurse authorization on inactive status and applying for authorization only as a volunteer retired registered nurse. Finally, adopted new §216.3(e)(3) provides that a nurse who is 65 years old or older and who holds or is seeking to hold a valid volunteer retired nurse authorization in compliance with the Occupations Code §112.051 and §217.9(d) is exempt from fulfilling targeted continuing education requirements except as required for volunteer retired advanced practice registered nurses. Adopted new §216.4 states that continuing education programs must be approved by a credentialing agency or an affiliated entity of one of these agencies. Proof of successful completion shall contain the name of the provider; the program title, date, and location; number of contact hours; provider number; and credentialing agency. Adopted new §216.5 states that in addition to those programs reviewed by a Board-approved entity, a licensee may attend an academic course that meets certain criteria. First, the course shall be within the framework of a curriculum that leads to an academic degree in nursing or any academic course relevant to nursing practice. Second, participants, upon audit by the Board, shall be able to present an official transcript indicating completion of the course with a grade of "C" or better, or a "Pass" on a Pass/Fail grading system. Adopted new §216.6 enumerates the following list of activities that do not meet continuing education requirements for licensure renewal: Basic Life Support

or cardiopulmonary resuscitation courses; in-service programs; nursing refresher courses; orientation programs; courses which focus upon self-improvement, changes in attitude, self-therapy, self-awareness, weight loss, and yoga; economic courses for financial gain, e.g., investments, retirement, preparing resumes, and techniques for job interview; courses which focus on personal appearance in nursing; liberal art courses in music, art, philosophy, and others when unrelated to patient/client care; and courses designed for lay people; self-directed study. Adopted new §216.7(a) provides that it shall be the licensee's responsibility to select and participate in continuing competency activities that will meet the criteria listed in the adopted new chapter. Adopted new §216.7(b) provides that the licensee shall be responsible for maintaining a record of continuing education activities. These records shall document attendance as evidenced by original certificates of attendance, contact hour certificates, academic transcripts, or grade slips and copies of these shall be submitted to the Board upon audit. Adopted new §216.7(c) provides that these records shall be maintained by the licensee for a minimum of two consecutive renewal periods or four years. Adopted new §216.8(a) provides that, upon renewal of the license, the licensee shall sign a statement attesting that the continuing education or approved national nursing certification requirements have been met. The contact hours must have been completed in the biennium immediately preceding the license renewal. Continuing education contact hours from a previous renewal period will not be accepted. Additional contact hours earned may not be used for subsequent renewal periods. Adopted new §216.8(b) states that a candidate licensed by examination shall be exempt from the continuing education or approved national nursing certification requirement for issuance of the initial license and for the immediate renewal period following licensure. Adopted new §216.8(c) states that an applicant licensed by endorsement shall be exempt from the continuing education or approved national nursing certification requirement for the issuance of the initial Texas license and for the immediate renewal period following initial Texas licensure. Adopted new §216.8(d)(1) provides that a license that has been delinquent for less than four years may be renewed by the licensee showing evidence of having completed 20 contact hours of acceptable continuing education or an approved national nursing certification within two years immediately preceding the application for relicensure and by meeting all other Board requirements. A licensee shall be exempt from the continuing education requirement for the immediate renewal period following renewal of the delinquent license. Further, adopted new §216.8(d)(2) provides a license that has been delinquent for four or more years may be renewed upon completion of requirements listed in §217.6 (relating to Failure to Renew License). Adopted new §216.8(e)(1) provides that a license that has been inactive for less than four years may be reactivated by the licensee submitting verification of having completed at least 20 contact hours of continuing education or a current approved national nursing certification in their current or prior area of practice within the past two years immediately prior to application for reactivation. Adopted new §216.8(e)(2) provides that a license that has been inactive for four or more years may be reactivated upon completion of requirements in §217.9. Adopted new §216.8(f) states that a licensee whose license has been revoked and subsequently applies for reinstatement must show evidence that the continuing competency requirement and other Board requirements have been met prior to reinstatement of the license by the Board. Adopted new §216.9(1) provides that the Board shall select a random sample of licensees 90 days prior to each renewal month. Audit forms shall be sent to selected li-

censees to substantiate compliance with the continuing competency requirements. Within 30 days following notification of audit, these selected licensees shall submit an audit form and documentation as specified in adopted §216.4 and §216.5 and any additional documentation the Board deems necessary to verify compliance with continuing education requirements for the period of licensure being audited or a copy of the current approved national nursing certification and any additional documentation the Board deems necessary to verify compliance with continuing competency requirements for the period of licensure being audited. Further, adopted new §216.9(2) provides that failure to notify the Board of a current mailing address will not absolve the licensee from audit requirements. Additionally, adopted new §216.9(3) provides that an audit shall be automatic for a licensee who has been found noncompliant in an immediately preceding audit. Finally, adopted new §216.9(4) states that failure to complete the audit satisfactorily or falsification of records shall constitute unprofessional conduct and provide grounds for disciplinary action. Adopted new §216.10 states that any individual who wishes to appeal a determination of non-compliance with continuing competency requirements must submit a letter of appeal within 20 days of notification of the audit results. The Board or its designee shall conduct a review in which the appellant may appear in person to present reasons why the audit decision should be set aside or modified. Further, the decision of the Board after the appeal shall be considered final and binding. Finally, adopted new §216.11 provides that failure to comply with the Board's continuing competency requirements will result in the denial of renewal.

Area of Practice Requirements

Comment: An individual commenter states that she does not consider it to be a good "best practice" policy to require any practicing RN to limit continuing education hours to only their "field of practice". Further, the commenter states that some fields of nursing do not see regular continuing education opportunities and to limit what areas an RN can seek their hours in is going to make completion of the hours very difficult to obtain.

A commenter representing an organization states that the organization supports and applauds the Board's efforts to ensure competency in nursing practice and does not want anything to demean the nursing practice. However, the commenter is concerned that those nurses who do not have a clinical practice or an area of practice may lose their license as a result of the proposed rules. The commenter states that Texas law does not impose a practice requirement on non-advanced practice nurses who renew a license. Further, the commenter states that the proposed rules would indirectly require licensed nurses to engage in the practice of nursing by requiring all nurses who renew their licenses to have a practice area. The commenter states that there are many nurses in Texas who renew their licenses every two years and do not practice nursing. The commenter gives examples of nurses who do not practice nursing, such as nurse attorneys who do not represent nurses or have health care-related legal practices, the Board's own nurse investigators, and the Board's Executive Director. The commenter states that the Nursing Practice Act does not require a registered or licensed vocational nurse to maintain a nursing practice in order to maintain professional nursing licensure. Further, the commenter states that a nurse may submit a written request to the Board to request to be placed on inactive status. The commenter also argues that the Board cannot place a nurse on inactive status absent such a request, pursuant to the Occupations Code §301.261. The commenter states that although the Nursing Practice Act does

not require continuing education as a condition of licensure or for renewal of a license, the Board has the discretion to require continuing education as a condition of licensure and as a condition for renewal of a license. However, the commenter states that the Board may not exercise this discretion in a way that deprives a nurse of the right to maintain an active license by indirectly requiring a nurse to be engaged in the practice of nursing. Further, the commenter states that the Board does not have the authority to condition a nurse's licensure on ambiguous continuing education requirements that could be interpreted to require the nurse to practice nursing.

Further, the commenter states that an indirect result of the proposed rule would make a dramatic change in nursing practice in Texas. The commenter also states that as long as there has been a Nursing Practice Act, a nurse has been able to renew his or her license without having an area of practice.

The commenter also states that the Board should be concerned about the indirect impact of the proposed rule on the shortage of nurses. In the Board's strategic plan published for 2009-2013, the Board largely focused on the shortage of nurses. The commenter points out that an entire section of that plan focused on how to retain nurses in practice. The commenter further states that, if a nurse were to have to lose his or license to take time off to have a family, to take time out for a hiatus, or if the nurse didn't have an area of practice to do continuing education in, that would be a barrier to nurses coming back to nursing practice and exacerbate the nursing shortage we have.

The commenter further states that she has reviewed the documents supporting the rules, including the Texas Nurses Association (TNA) Task Force Report, and has come to the conclusion that the Board didn't really intend for nurses to lose their licenses. The commenter bases this conclusion on the fact that the reports primarily focused on patient safety issues and clinical settings and that there was nothing in the reports regarding nurses who did not have practice areas. The commenter states that although the Board contends that the new requirements will not impose such a practice requirement on all nurses, that contention is not evident from the proposed rule as written. The commenter states that both the TNA paper and the preamble to the proposed rule indicate that general application of continuing education is an appropriate mechanism for demonstrating competency, but the Board has come to the conclusion as a result of its studies that it might be better if a nurse did continuing education in the nurse's specific area of practice if the nurse had one.

The commenter states that her organization's proposed solution would further the goal of patient safety and would be consistent with the rule's preamble and the TNA report. The commenter states that the Board can further its goals of competency in the practice of nursing without indirectly requiring a nurse to be actively engaged in the practice of nursing. The commenter suggests that the Board require a nurse to complete continuing education in his or her area of clinical practice if they have one and require nurses who do not have one to complete 20 approved contact hours every two years.

The commenter believes that the proposed alternative allowing certification by a national organization will be helpful to many nurses. The commenter also states that the members of her organization do not object to a nurse having to do continuing education for the renewal of a license, and that if a nurse who did not have a practice area decided to reenter nursing practice, they would not object to having to do a major refresher course because it would be required in order for that nurse to

be competent. Further, the commenter states that her organization would be very supportive of stronger rules with regard to refresher courses for nurses re-entering practice in clinical settings.

A commenter representing another organization states that the organization supports the Board's decision to permit nurses to demonstrate competency through means other than continuing education. The commenter states that the proposed rules permit a nurse to demonstrate continued competency through continuing education in the nurse's area of practice; national certification in the nurse's area of practice; or completion of an academic course in the nurse's area of practice. The commenter's organization supports this model because implementing it should be the Board's and nursing's goal. The commenter states that her organization has studied this issue for over five years and has compiled a short and long version. Her organization believes nursing has taken, like other health professions, a very long time in addressing competency. For that reason, her organization encourages the Board to move forward with the rule it proposed, but she states that her organization is quick to say it does not have all the answers with regard to area of practice and would recommend that the Board put into place all aspects of the proposed rules, but delete that section to see if, after a short period of time of study (3-6 months), her organization and others can come up with answers to questions that nurses are just beginning to ask. The commenter states that this is a very complex issue and she believes an agreement can be reached, but at this point in time, there are more questions arising than can be answered.

The commenter states that, while the concept of "area of practice" is one that nurses intuitively understand, it is a concept that is difficult to define with the precision needed for this rule. The commenter states that if area of practice is defined too broadly, it becomes diluted as being a measure of true competency and fails to achieve the desired objective that continuing education enhance a nurse's competency in the specific knowledge and skills needed by the nurse in the nurse's area of practice. However, the commenter states that if it is defined too narrowly, there will be many outliers in the nursing profession that don't fit into the mainstream and it precludes the use of general continuing education, such as jurisprudence from being used to fulfill the continuing education requirement.

The commenter states that, before area of practice can be satisfactorily defined, nursing needs to try to reach consensus on some questions, such as:

Should a nurse be permitted to use continuing education (e.g., jurisprudence) applicable to all areas of practice to satisfy the continuing education component of the new model? If so, to satisfy the entire continuing education requirement or only some of it? If only some, how much?

If a nurse primarily practices in one area of practice but infrequently practices in several others, can the nurse take continuing education in any of these areas? Should the nurse have to take at least some continuing education in the nurse's primary area of practice?

What if the nurse does not engage in any nursing during the license renewal period, e.g., takes three years off to raise a family?

Does it make any difference in the type of continuing education a nurse should take if he or she is involved in direct patient care?

The commenter states that her organization does not believe the continuing education component of the new model can be satisfactorily addressed until more thought is devoted to these questions and some consensus is achieved. The commenter notes that TNA's Competency Task Force did not work through all of the implications of these questions.

The commenter also suggests coming up with a broad base. The commenter suggests utilizing the four modalities outlined in TNA's original paper on the subject. As an example, the commenter states that a nurse in clinical practice could select from the first and second domain, while other areas could utilize domains three and four.

The commenter's organization recommends that the continuing education component in the proposed rules be modified to delete the requirement that the continuing education be in the nurse's area of practice. However, the commenter's organization also recommends that the Board announce that its intent is to add such a requirement in the near future and immediately appoint a work group to begin working out the details of how some of the previously identified questions should be answered and how area of practice should be defined.

The commenter's organization believes that any questions that may arise about area of practice as applied to national certification problems do not present the same level of difficulty and supports retaining the requirement that national certification be in the nurse's area of practice.

Finally, the commenter states that if the Board decides to proceed with immediately requiring that continuing education be in the nurse's area of practice, her organization believes that the rules need to incorporate some type of transition to the new requirement. One possibility would be to provide that nurses get credit for any continuing education taken prior to the rules' effective date or some other time certain.

Agency Response: The Board is committed to protecting and promoting the welfare of the people of Texas by ensuring that each person holding a license as a nurse in the State of Texas is competent to practice safely. The Board believes that enacting rules that promote competency in a nurse's area of practice is one way to support this mission. While the Board continues to support the demonstration of continuing competency in a nurse's specific area of practice, the Board agrees that there may be unanticipated or unintended consequences of the rule as proposed, specifically regarding those nurses working in non-traditional nursing occupations or those nurses who are not actively practicing nursing. The Board recognizes the complexities that have been raised by various commenters and that are associated with requiring a nurse to obtain continuing education in his or her area of practice. While the Board agrees that the rules as proposed do not adequately address the particular complexities associated with an "area of practice" competency requirement, the Board feels that an "area of practice" component should be incorporated into the continuing competency requirements at some point in the future. The Board considers the completion of appropriate continuing education to be an essential method in demonstrating a nurse's ability to safely practice nursing. However, in response to comments received, the Board has modified the rules as proposed to eliminate the requirement that a nurse must obtain continuing education in his or her area of practice. Further, because the Board continues to believe that there is value in requiring nurses to obtain continuing education in their specific area of practice, the Board has assigned a working group to study the issue in depth, paying

particular attention to those nurses who work in non-traditional nursing occupations and those nurses who do not actively practice nursing. The Board has further charged the work group with making recommendations to the Board regarding the enactment of a rule that would incorporate an "area of practice" component for all individuals seeking to renew a nursing license. The Board will consider any recommendations made by the working group in a separate rule proposal.

The Board agrees that any questions that may arise regarding a nurse's "area of practice" in regards to national certification will not present the same types of difficulties or complexities and, therefore, adopts the requirement that national certification be in a nurse's area of practice, as proposed.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: None.

Against: One individual.

For, with changes: The Texas Nurses Association; The American Association of Nurse Attorneys, Texas Chapter.

Neither for nor against, with changes: None.

The new rules are adopted under the Occupations Code §§301.152, 301.303, 301.306, and 301.151. The Occupations Code §301.152(a) defines *advanced practice nurse* as a registered nurse approved by the Board to practice as an advanced practice nurse on the basis of completion of an advanced educational program. The term includes a nurse practitioner, nurse midwife, nurse anesthetist, and clinical nurse specialist. The term is synonymous with *advanced nurse practitioner*. Section 301.152(b) authorizes the Board to adopt rules to: (i) establish any specialized education or training, including pharmacology, that a registered nurse must have to carry out a prescription drug order and a system for assigning an identification number to a registered nurse who provides the Board with evidence of completing the required specialized education and training requirement; (ii) approve a registered nurse as an advanced practice nurse; and (iii) initially approve and biennially renew an advanced practice nurse's authority to carry out or sign a prescription drug order. Section 301.152(c) requires the rules adopted under §301.152(b) to (i) require completion of pharmacology and related pathology education for initial approval; (ii) require continuing education in clinical pharmacology and related pathology in addition to any continuing education otherwise required under §301.303; and (iii) provide for the issuance of a prescription authorization number to an advanced practice nurse approved under §301.152. Section 301.152(d) provides that the signature of an advanced practice nurse attesting to the provision of a legally authorized service by the advanced practice nurse satisfies any documentation requirement for that service established by a state agency. Section 301.303(a) authorizes the Board to recognize, prepare, or implement continuing competency programs for license holders under Chapter 301 and to require participation in continuing competency programs as a condition of renewal of a license. The programs may allow a license holder to demonstrate competency through various methods, including completion of targeted continuing education programs and consideration of a license holder's professional portfolio, including certifications held by the license holder. Section 301.303(b) provides that the Board may not require participation in more than a total of 20 hours of continuing education in a two-year licensing period. Section 301.303(c) authorizes the Board by rule to establish a system for the approval

of programs and providers of continuing education if the Board requires participation in continuing education programs as a condition of license renewal. Section 301.303(e) authorizes the Board to adopt other rules as necessary to implement §301.303. Section 301.303(f) states that the Board may assess each program and provider under this section a fee in an amount that is reasonable and necessary to defray the costs incurred in approving programs and providers. Section 301.303(g) authorizes the Board by rule to establish guidelines for targeted continuing education required under Chapter 301. The rules adopted under §301.303(g) must address: (i) the nurses who are required to complete the targeted continuing education program; (ii) the type of courses that satisfy the targeted continuing education requirement; (iii) the time in which a nurse is required to complete the targeted continuing education; (iv) the frequency with which a nurse is required to meet the targeted continuing education requirement; and (v) any other requirement considered necessary by the Board. Section 301.306(a) provides that, as part of continuing education requirements under §301.303, a license holder who is employed to work in an emergency room setting and who is required under Board rules to comply with §301.303 shall complete at least two hours of continuing education relating to forensic evidence collection not later than September 1, 2008 or the second anniversary of the initial issuance of a license under this chapter to the license holder. Section 301.303(b) states that the continuing education required under §301.303(a) must be part of a program approved under §301.303(c). Section 301.303(c) authorizes the Board to adopt rules to identify the license holders who are required to complete continuing education under §301.303(a) and to establish the content of that continuing education. Further, the Board may adopt other rules to implement §301.303, including rules under Section 301.303(c) for the approval of education programs and providers. Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders under this chapter; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

§216.1. Definitions.

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

(1) Academic course--A specific set of learning experiences offered in an accredited school, college or university. Academic credit will convert on the following basis: One academic quarter hour = 10 contact hours; one academic semester hour = 15 contact hours.

(2) Advanced Practice Registered Nurse (APRN)--A nurse anesthetist, nurse practitioner, nurse midwife, or clinical nurse specialist approved by the board to practice as an advanced practice registered nurse based on completion of an advanced educational program acceptable to the board.

(3) Approved--Recognized as having met established standards and predetermined criteria of the:

(A) credentialing agencies recognized by the board (applies to providers and programs); and

(B) certifying bodies accredited by a national certification accreditation body recognized by the board.

(4) Area of Practice--Any activity, assignment, or task in which the nurse utilized nursing knowledge, judgment, or skills during the licensure renewal cycle.

(5) Audit--A random sample of licensees taken to verify satisfactory completion of the board's requirements for continuing competency during a biennial license renewal period.

(6) Authorship--Development and publication of a manuscript related to nursing and health care.

(7) Certification--Nursing certification from an approved certifying body accredited by a national accreditation body recognized by the board.

(8) Classroom instruction--Workshops, seminars, institutes, conferences or short term courses which the individual attends which may be acceptable for continuing education credit.

(9) Clinical learning experiences--Faculty-planned and guided learning experiences designed to assist students to meet the course objectives and to apply nursing knowledge and skills in the direct care of patients/clients. This includes laboratories, acute care facilities, extended care facilities, and other community resources.

(10) Competency--The application of knowledge and the interpersonal decision making, and psychomotor skills expected for the nurse's practice role, within the context of public health, safety, and welfare.

(11) Contact hour--Sixty consecutive minutes of participation in a learning activity.

(12) Continuing Education (CE)--Programs beyond the basic preparation which are designed to promote and enrich knowledge, improve skills, and develop attitudes for the enhancement of nursing practice, thus improving health care to the public.

(13) Continuing education program--An organized educational activity, e.g. self paced (online), classroom, approved through an external review process based on a predetermined set of criteria. The review is conducted by an organization(s) recognized by the board to approve programs and providers.

(14) Credentialing agency--An organization recognized by the board as having met nationally predetermined criteria to approve programs and providers of CE.

(15) Prescriptive Authority--Authorization granted to an advanced practice registered nurse who meets the requirements to carry out or sign a prescription drug order.

(16) Program number--A unique number assigned to a program upon approval which shall identify it regardless of the number of times it is presented.

(17) Provider--An individual, partnership, organization, agency or institution approved by an organization recognized by the board which offers continuing education programs.

(18) Provider number--A unique number assigned to the provider upon approval by the credentialing agency or organization.

§216.2. Purpose.

The purpose of continuing competency is to ensure that nurses stay abreast of current industry practices, enhance their professional competence, learn about new technology and treatment regimens, and update their clinical skills. Continuing education in nursing includes programs beyond the basic preparation which are designed to promote and enrich knowledge, improve skills and develop attitudes for the enhancement of nursing practice, thus improving health care to the public. Nursing certification is another method of demonstrating continuing

competence. Pursuant to authority set forth in the Occupations Code §301.303, the board requires participation in continuing competency activities for license renewal. The procedures set forth in these rules provide guidance to fulfilling the continuing competency requirement. The board encourages nurses to choose continuing education courses that relate to their work setting and area of practice or to attain, maintain, or renew an approved national nursing certification in their practice area, which benefits the public welfare.

§216.3. Requirements.

(a) A nurse must meet either the requirements of this subsection or subsection (b) of this section. A nurse may choose to complete 20 contact hours of continuing education within the two years immediately preceding renewal of registration. These hours shall be obtained by participation in programs approved by a credentialing agency recognized by the board. A list of these agencies/organizations may be obtained from the board's office or web site.

(b) A nurse must meet either the requirements of this subsection or subsection (a) of this section. A nurse may choose to demonstrate the achievement, maintenance, or renewal of an approved national nursing certification in the nurse's area of practice. A list of approved national nursing certification criteria may be obtained from the board's office or web site.

(c) Requirements for the Advanced Practice Registered Nurse. The licensee authorized by the board as an advanced practice registered nurse (APRN) is required to obtain 20 contact hours of continuing education or attain, maintain or renew the national certification recognized by the board as meeting the certification requirement for the advanced practice registered nurse's role and population focus area of licensure within the previous two years of licensure. National certification as discussed in this section will only meet the requirement for licensure renewal.

(1) The required hours are not in addition to the requirements of subsection (a) or (b) of this section.

(2) The 20 contact hours of continuing education must be appropriate to the advanced specialty area and role recognized by the board.

(3) The APRN who holds prescriptive authority must complete, in addition to the requirements of this subsection, at least five additional contact hours of continuing education in pharmacotherapeutics.

(4) Category I Continuing Medical Education (CME) contact hours will meet requirements as described in this chapter.

(d) Forensic Evidence Collection.

(1) Each nurse licensed in Texas and employed in an emergency room (ER) setting on or after September 1, 2006 shall complete a minimum of two hours of continuing education relating to forensic evidence collection, as required by the Occupations Code §301.306 and this subsection:

(A) by September 1, 2008 for nurses to whom this requirement applies who are employed in an ER setting on or before September 1, 2006; or

(B) within two years of the initial date of employment in an ER setting. This requirement may be met through completion of approved continuing education activities, as set forth in §216.4 of this chapter (relating to Criteria for Acceptable Continuing Education Activity).

(2) This requirement shall apply to nurses who work in an ER setting that is:

- (A) the nurse's home unit;
- (B) an ER unit to which the nurse "floats" or schedules shifts; or
- (C) a nurse employed under contractual, temporary, per diem, agency, traveling, or other employment relationship whose duties include working in an ER.

(3) A licensed nurse in Texas who would otherwise be exempt from CE requirements during the nurse's initial licensure or first renewal periods under §216.8(b) or (c) of this chapter (relating to Relicensure Process) shall comply with the requirements of this section. This is a one-time requirement for each nurse employed in an ER setting. In compliance with §216.7(b) of this chapter (relating to Responsibilities of Individual Licensee), each licensee is responsible for maintaining records of CE attendance. Validation of course completion in Forensic Evidence Collection should be retained by the nurse indefinitely, even if a nurse changes employment.

(4) The minimum 2 hours of continuing education requirement shall include information relevant to forensic evidence collection and age or population-specific nursing interventions that may be required by other laws and/or are necessary in order to assure evidence collection that meets requirements under the Government Code §420.031 regarding use of a service-approved evidence collection kit and protocol. Content may also include but is not limited to documentation, history-taking skills, use of sexual assault kit, survivor symptoms, and emotional and psychological support interventions for victims.

(5) The required hours under this subsection are included in the continuing education requirements for nurses.

(e) A nurse who is 65 years old or older and who holds or is seeking to hold a valid volunteer retired (VR) nurse authorization in compliance with the Occupations Code §112.051 and §217.9(d) of this title (relating to Inactive Status):

(1) Must have completed at least 10 hours of continuing education as defined in this chapter during the previous biennium, unless the nurse also holds valid recognition as an advanced practice registered nurse or is a Volunteer Retired Registered Nurse (VR-RN) with advanced practice authorization in a given role and specialty in the State of Texas.

(2) Must have completed at least 20 hours of CE as defined in this chapter if authorized by the board in a specific advanced practice role and specialty. The 20 hours of CE must meet the same criteria as APRN CE defined under subsection (c) of this section. An APRN authorized as a VR-RN with APRN authorization may not hold prescriptive authority. This does not preclude a registered nurse from placing his/her APRN authorization on inactive status and applying for authorization only as a VR-RN.

(3) Is exempt from fulfilling targeted CE requirements except as required for volunteer retired advanced practice registered nurses.

§216.4. Criteria for Acceptable Continuing Education Activity.

Continuing Education programs must be approved by a credentialing agency or an affiliated entity of one of these agencies. Proof of successful completion shall contain the name of the provider; the program title, date, and location; number of contact hours; provider number; and credentialing agency.

§216.6. Activities Which are not Acceptable as Continuing Education.

The following activities do not meet continuing education requirements for licensure renewal.

(1) Basic Life Support (BLS) or cardiopulmonary resuscitation (CPR) courses.

(2) In service programs. Programs sponsored by the employing agency to provide specific information about the work setting and orientation or other programs which address the institution's philosophy, policies and procedures; on-the-job training; basic CPR; and equipment demonstration are not acceptable for CE credit.

(3) Nursing refresher courses. Programs designed to update knowledge or current nursing theory and clinical practice, which consist of a didactic and clinical component to ensure entry level competencies into nursing practice are not accepted for CE credit.

(4) Orientation programs. A program designed to introduce employees to the philosophy, goals, policies, procedures, role expectations and physical facilities of a specific work place are not acceptable for CE credit.

(5) Courses which focus upon self-improvement, changes in attitude, self therapy, self-awareness, weight loss, and yoga.

(6) Economic courses for financial gain, e.g., investments, retirement, preparing resumes, and techniques for job interview.

(7) Courses which focus on personal appearance in nursing.

(8) Liberal art courses in music, art, philosophy, and others when unrelated to patient/client care.

(9) Courses designed for lay people.

(10) Self-directed study--An educational activity wherein the learner takes the initiative and the responsibility for assessing, planning, implementing and evaluating the activity including, but not limited to:

(A) academic courses that are audited, or that are healthcare-related courses but not part of a nursing degree program, or that are prerequisite courses such as mathematics, physiology, biology, government, or other similar courses are not acceptable;

(B) authorship; and

(C) program development and presentation.

§216.8. Relicensure Process.

(a) Renewal of license.

(1) Upon renewal of the license, the licensee shall sign a statement attesting that the CE or approved national nursing certification requirements have been met.

(2) The contact hours must have been completed in the biennium immediately preceding the license renewal. CE contact hours from a previous renewal period will not be accepted. Additional contact hours earned may not be used for subsequent renewal periods.

(b) Persons licensed by examination. A candidate licensed by examination shall be exempt from the CE or approved national nursing certification requirement for issuance of the initial license and for the immediate renewal period following licensure.

(c) Persons licensed by endorsement. An applicant licensed by endorsement shall be exempt from the CE or approved national nursing certification requirement for the issuance of the initial Texas license and for the immediate renewal period following initial Texas licensure.

(d) Delinquent license.

(1) A license that has been delinquent for less than four years may be renewed by the licensee showing evidence of having completed 20 contact hours of acceptable continuing education or an

approved national nursing certification within two years immediately preceding the application for relicensure and by meeting all other board requirements. A licensee shall be exempt from the continuing education requirement for the immediate renewal period following renewal of the delinquent license.

(2) A license that has been delinquent for four or more years may be renewed upon completion of requirements listed in §217.6 of this title (relating to Failure to Renew License).

(e) Reactivation of a license.

(1) A license that has been inactive for less than four years may be reactivated by the licensee submitting verification of having completed at least 20 contact hours of continuing education or a current approved national nursing certification in their current or prior area of practice within the past two years immediately prior to application for reactivation.

(2) A license that has been inactive for four or more years may be reactivated upon completion of requirements in §217.9 of this title (relating to Inactive Status).

(f) Reinstatement of a license. A licensee whose license has been revoked and subsequently applies for reinstatement must show evidence that the continuing competency requirement and other board requirements have been met prior to reinstatement of the license by the board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 27, 2009.

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James W. Johnston

General Counsel

Texas Board of Nursing

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Proposal publication date: May 15, 2009

For further information, please call: (512) 305-6811



PART 30. TEXAS STATE BOARD OF EXAMINERS OF PROFESSIONAL COUNSELORS

CHAPTER 681. PROFESSIONAL COUNSELORS

The Texas State Board of Examiners of Professional Counselors (board) adopts amendments to §§681.45, 681.49, 681.72, 681.91, and 681.93, concerning the licensing and regulation of professional counselors without changes to the proposed text as published in the June 5, 2009, issue of the *Texas Register* (34 TexReg 3491), and the sections will not be republished.

The amendments are adopted to ensure that the rules are updated to reflect current legal, policy, and operational considerations; to improve draftsmanship; and to make the rules more accessible, understandable, and usable. The amendments are also necessary to clarify supervision requirements and duties of supervisors; to make the term of supervisor approval begin and end on the same date as license renewal; and to provide penal-

ties for continuing to act as a supervisor after approval has expired.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 681.45, 681.49, 681.72, 681.91, and 681.93 have been reviewed and the board has determined that the reasons for adopting the sections continue to exist in that rules concerning the licensing and regulation of professional counselors are still needed.

SECTION-BY-SECTION SUMMARY

Section 681.45(e) is added to require the licensee to report any arrests, convictions, or disciplinary actions within 30 days to the board.

Section 681.49(i) is amended to allow a licensed professional counselor who carries the supervisor status to use the designation "LPC-S."

Section 681.72(d) is amended to require a current copy of the supervisor's license to be attached to the supervisory agreement form.

Section 681.91(e) is amended to change the length of time a temporary license is issued.

Section 681.91(f) describes what happens if the required supervised experience hours needed for licensure are not met within the time period of a temporary license.

Section 681.93(c) is amended to change the supervisor renewal from one year to two years.

Section 681.93(f) is amended to allow for the board to decide if supervisory hours can count if the supervisor's status has been denied, revoked, or suspended.

Section 681.93(k) is added to require the supervisor to refund all monies paid by the intern if the supervisor status expires during the supervision and is not renewed.

Section 681.93(l) is added to allow for disciplinary action to be taken against the supervisor for allowing the supervisor status to expire.

COMMENTS

The board received two comments regarding the proposed rules during the comment period. Both commenters agreed with the proposed changes, and therefore, no action is necessary.

SUBCHAPTER C. CODE OF ETHICS

22 TAC §681.45. §681.49

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 3, 2009.

TRD-200903311

Glynda Corley
Chair
Texas State Board of Examiners of Professional Counselors
Effective date: September 1, 2009
Proposal publication date: June 5, 2009
For further information, please call: (512) 458-7111 x6972



SUBCHAPTER D. APPLICATION PROCEDURES

22 TAC §681.72

STATUTORY AUTHORITY

The amendment is authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Glynda Corley

Chair

Texas State Board of Examiners of Professional Counselors

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SUBCHAPTER F. EXPERIENCE REQUIREMENTS FOR LICENSURE

22 TAC §681.91, §681.93

STATUTORY AUTHORITY

The amendments are authorized by Occupations Code, §503.203, which authorizes the board to adopt rules necessary for the performance of the board's duties. The review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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PART 31. TEXAS STATE BOARD OF EXAMINERS OF DIETITIANS

CHAPTER 711. DIETITIANS

The Texas State Board of Examiners of Dietitians (board) adopts the repeal of §§711.1 - 711.22 and new §§711.1 - 711.22, concerning the licensing and regulation of dietitians without changes to the proposed text as published in the February 27, 2009, issue of the *Texas Register* (34 TexReg 1374).

BACKGROUND AND PURPOSE

Government Code, §2001.039 requires that each state agency review and consider for re adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 711.1 - 711.22 have been reviewed and the board has determined that the reasons for adopting the sections continue to exist in that rules concerning the licensure and regulation of dietitians still needed; however, the rules are repealed and adopted as new rules as described in this preamble. The adopted repeals and new sections are the result of the comprehensive rule review undertaken by the board and the board's staff.

SECTION-BY-SECTION SUMMARY

In addition to the changes specifically outlined, the rules have been revised and reorganized as new rules to ensure appropriate section, subsection, and paragraph organization and captioning; to ensure clarity; to improve spelling, grammar, and punctuation; to improve agency-wide consistency between programs, as appropriate; to ensure that the rules reflect current legal, policy, and operational considerations; to ensure accuracy of legal citations; to delete repetitive, obsolete, or unnecessary language; to improve draftsmanship; and to make the rules more accessible, understandable, and usable, to the extent possible.

The following changes are adopted relating to the repeal and re adoption of §711.1 (Definitions). The definition of "formal hearing" was deleted as not necessary.

The following changes are adopted relating to the repeal and re adoption of §711.2 (The Board's Operation) and §711.3 (Fees). Section 711.2 was reorganized for ease of use and the subsection that formerly related to licensing fees was moved to a separate section, the new §711.3 (Fees).

The following changes are adopted relating to the repeal of §711.3 and was adopted as new §711.4 (The Profession of Dietetics and Code of Ethics). The section was renamed. New provisions were added at §711.4(c)(1)(P) that require a license holder to report child abuse or neglect and abuse or neglect of the elderly or disabled, in accordance with existing laws.

The following changes are adopted relating to the repeal of §711.8 and renumbered as new §711.9 (Determination of Eligibility for Licensure). The provision requiring that the board ratify applications approved by staff was deleted as obsolete and unnecessary.

The following changes are adopted relating to the repeal of §711.17 and new §711.16 (Continuing Education Requirements). The board adopts requiring the Texas jurisprudence examination as an ongoing condition of license renewal and allows license holders one hour of continuing education credit for its completion. The rules formerly provided that the jurisprudence exam would be required only for licenses renewed between January 1, 2007, and December 31, 2008. Additionally, the board adopts deletion of the provision allowing a license holder who is not in active practice and is more than 60 years

of age to be exempt from continuing education requirements. The board finds that the public interest is best served by requiring licensed dietitians to maintain licenses in active status and regularly complete continuing education and the Texas jurisprudence examination.

The following changes are adopted relating to the repeal of §711.16 (Inactive Status). The board adopts deletion of the provisions relating to inactive status as unnecessary. The statute does not require that inactive status be an option for licensees and few licensees avail themselves of the option. The board finds that the public interest is best served by requiring licensed dietitians to maintain licenses in active status and regularly complete continuing education and the Texas jurisprudence examination.

PUBLIC COMMENT

The board has prepared the following responses to comments received regarding the proposed rules. The commenters were individuals who were not against the rules in their entirety; however, the commenters suggested recommendations for changes, which are addressed in the summary of comments.

Comment: Concerning the rules in general, one commenter stated that the board needs to do a better job of communicating rule changes to its licensees.

Response: While the board appreciates that it can always do a better job of communicating information to its licensees, the board would disagree with the commenter in this instance that appropriate communication of the board's rule changes was made. First, the board placed the rule proposal on the board's website. The board believes that it is each licensee's responsibility to periodically review the website for information governing the profession of dietetics. Secondly, the board legally complied with the requirements of the Administrative Procedure Act by publishing its proposed rules in the *Texas Register* for a thirty-day comment period. Third, a representative of the Texas Dietetics Association attends each board meeting and was fully aware of the proposed rules being published. No change was made as a result of this comment.

Comment: Concerning §711.16(i)(1), a commenter commented that the board's jurisprudence examination should not have to be taken every two years.

Response: The board disagrees with the commenter as the board believes that its role in regulating dietitians involves ensuring Texas consumers that its licensees are well-versed in the practice of dietetics, and that by taking the jurisprudence examination every two years, the consuming public in Texas will be protected. Additionally, the commenter commented about the perceived high cost of taking the jurisprudence examination. While the board remains concerned about fees and costs for its licensees, the cost of the jurisprudence examination, which is \$40, is established by the contracted examination company and the board does not find the cost to be excessive. No change was made as a result of this comment.

Comment: Concerning §711.16(f)(7), a commenter suggested that the board's continuing education requirements should mirror that of the American Dietetic Association, particularly as it relates to the allowance of "self-study" credit hours.

Response: The board was created by the Texas Legislature to regulate Texas dietitians and was given the authority to determine the number, type, and content of continuing education courses that would be required of said licensees. The board is

not bound by the decisions made by the American Dietetic Association as they relate to self-study hours involving continuing education credit hours. No change was made as a result of this comment.

22 TAC §§711.1 - 711.22

STATUTORY AUTHORITY

The repeals are authorized by Texas Occupations Code, §701.151(2), which requires the board to adopt a code of ethics; by Texas Occupations Code, §701.152, which authorizes the board to adopt rules consistent with the chapter; by Texas Occupations Code, §701.1535(a), which requires the board to adopt rules on consequences of criminal conviction; and by Texas Occupations Code, §701.154(a), which requires the board to set fees by rule. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 30, 2009.

TRD-200903225

Janet Hall

Chair

Texas State Board of Examiners of Dietitians

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Proposal publication date: February 27, 2009

For further information, please call: (512) 458-7111 x6972



SUBCHAPTER A. LICENSED DIETITIANS

22 TAC §§711.1 - 711.22

The new rules are authorized by Texas Occupations Code, §701.151(2), which requires the board to adopt a code of ethics; by Texas Occupations Code, §701.152, which authorizes the board to adopt rules consistent with the chapter; by Texas Occupations Code, §701.1535(a), which requires the board to adopt rules on consequences of criminal conviction; and by Texas Occupations Code, §701.154(a), which requires the board to set fees by rule. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION, PLACEMENT, AND PROGRAM COMPLETION

The Texas Youth Commission (TYC) adopts the repeal of §85.1, concerning legal requirements for admission, §85.21, concerning program assignment system, §85.23, concerning classification, §85.41, concerning maximum length of stay, §85.45, concerning movement without program completion, §85.55, concerning program completion for other than sentenced offenders, §85.59, concerning program completion for sentenced offenders under age 19, §85.61, concerning program completion for sentenced offenders age 19 or older, §85.65, concerning discharge of sentenced offenders upon transfer to TDCJ or expiration of sentence, §85.69, concerning program completion for sentenced offenders adjudicated for capital murder, and §85.95, concerning parole completion and discharge. The repealed rules are adopted without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2882).

TYC also adopts the repeal of §85.51, concerning definitions without changes to the proposed text as published in the June 5, 2009, issue of the *Texas Register* (34 TexReg 3507).

The justification for the repeals is the availability of accurate and up-to-date information concerning TYC programming and operations.

The repeal of §85.1 allows for a new section to be published with this number. The new section establishes definitions used throughout Chapter 85, and is adopted in this issue of the *Texas Register*.

The repeal of §85.21 allows for a significantly revised rule to be published in its place. The revised rule is adopted as a new rule in this issue of the *Texas Register*.

The repeal of §85.23 allows for new rules to establish TYC's new processes for classifying youth. Section 85.23 had previously classified youth according to only one factor -- the youth's most serious adjudicated offense. This rule is replaced by §85.24 and §85.25. These rules establish a classification system that takes into account many additional factors, such as a risk assessment instrument that addresses risk to re-offend, youth age, size, gang affiliation, treatment needs, and other factors when determining appropriate minimum lengths of stay and housing assignments.

The repeal of §85.41 reflects reforms enacted by SB103, 80th Texas Legislature. This legislation created a Release Review Panel as the only means by which a non-sentenced offender's length of stay may be extended. The need for §85.41 no longer exists, as the purpose for this rule is now served by the statutorily created Review Panel, and several components that serve as the basis for determinations made under §85.41 are no longer used within TYC. The repeal of §85.51 allows for the adoption of new §85.1, which establishes definitions used throughout Chapter 85. Section 85.51 had only defined terms used in Subchapter D.

The repeal of §§85.45, 85.55, 85.59, 85.61, 85.65, 85.69, and 85.95 allows for significantly revised rules to be published in their place. The revised rules are adopted as new rules in this issue of the *Texas Register*.

No comments were received regarding adoption of the repealed rules.

SUBCHAPTER A. COMMITMENT AND RECEPTION

37 TAC §85.1

The repeal is adopted under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cheryl K. Townsend

Executive Commissioner

Texas Youth Commission

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For further information, please call: (512) 424-6014



SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §85.21, §85.23

The repeals are adopted under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cheryl K. Townsend

Executive Commissioner

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For further information, please call: (512) 424-6014



SUBCHAPTER C. MOVEMENT WITHOUT PROGRAM COMPLETION

37 TAC §85.41, §85.45

The repeals are adopted under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cheryl K. Townsend
Executive Commissioner
Texas Youth Commission
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SUBCHAPTER D. PROGRAM COMPLETION

37 TAC §§85.51, 85.55, 85.59, 85.61, 85.65, 85.69

The repeals are adopted under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cheryl K. Townsend
Executive Commissioner
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For further information, please call: (512) 424-6014



SUBCHAPTER E. PAROLE PLACEMENT AND DISCHARGE

37 TAC §85.95

The repeal is adopted under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Youth Commission

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CHAPTER 85. ADMISSION, PLACEMENT, RELEASE, AND DISCHARGE

The Texas Youth Commission (TYC or commission) adopts amendments to §85.3 (concerning admission process), §85.5 (concerning assessment/evaluation), and §85.25 (concerning minimum length of stay/minimum period of confinement). TYC also adopts new §85.1 (concerning definitions), §85.2 (concerning legal requirements for admission), §85.21 (concerning

placement assignment system), §85.45 (concerning movement prior to program completion), §85.55 (concerning program completion for non-sentenced offenders), §85.59 (concerning program completion for sentenced offenders), §85.65 (concerning discharge of sentenced offenders upon transfer to TDCJ or expiration of sentence), §85.69 (concerning transfer of sentenced offenders adjudicated for capital murder), and §85.95 (concerning parole completion and discharge).

The new and amended rules are adopted without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2884).

The justification for the new and amended rules is the operation of an evidence-based system for assessing, placing, and releasing youth, compliance with enacted legislation, as well as the availability of accurate and up-to-date information concerning TYC programming and operations.

New §85.1 establishes definitions for terms commonly used throughout Chapter 85.

New §85.2 republishes the text of §85.1 with a new section number.

The amended §85.3 clarifies that the requirement for youth to provide a blood sample for the Department of Public Safety DNA database as part of the routine admission process applies to all youth committed to TYC.

The amended §85.5 includes several additional assessments to be conducted during the admission process. Specifically, the amended rule requires that prior to assigning a youth to a room at the intake unit, staff must conduct a safe housing assessment, a suicide risk screening, and a screening for vulnerability to sexual victimization or aggression. The amended rule also requires that TYC conduct a comprehensive psychological evaluation for all youth upon admission, and a comprehensive psychiatric evaluation for all youth assigned a minimum length of stay of 12 months or longer.

New §85.21 establishes TYC's process for determining the most appropriate residential facility for individual youth placements. The new rule describes in much greater detail than the previous rule how gender, treatment needs, risk assessment, and proximity to home are used in making placement determinations.

The amended §85.25 no longer includes a definitions section. The definitions are included in new §85.1.

New §85.45 establishes the eligibility criteria for youth to transition to a facility of lesser restriction, establishes procedures for releasing youth due to an overpopulation condition, and addresses other types of release or transfer that may occur prior to completion of required programming.

New §85.55 establishes the eligibility criteria for non-sentenced offenders to qualify for release from a residential facility and placement on parole.

New §85.59 establishes the eligibility criteria for sentenced offenders to qualify for release from a residential facility and placement on parole.

New §85.65 establishes the criteria and process for requesting court approval to transfer sentenced offenders to the adult prison system, and for discharging sentenced offenders whose sentences have expired, or who have not qualified for release or transfer based on completing required programming.

New §85.69 establishes the criteria and process for transferring sentenced offenders adjudicated for capital murder to the Parole Division or Institutions Division of the Texas Department of Criminal Justice to complete their sentences.

New §85.95 establishes the criteria for discharging non-sentenced offenders from the legal custody of TYC.

Comments regarding adoption of several of the rules were received from Advocacy Incorporated and Texas Appleseed. The comments are summarized below, along with the commission's responses.

§85.1.

Comment: The definition of administrative transfer should include disability. Often youth are transferred to new programs or facilities solely because of their need to receive treatment or accommodations for their disability.

Response: The definition does not contain an exhaustive list of reasons a youth may be transferred administratively. The definition does provide several examples, including transfers based on treatment need, which would encompass disability related issues. No changes were made to the proposed text as a result of the comment.

§85.2.

Comment: The proposed rule should specify that the following special education records must be provided prior to admission to TYC: the most recent Full Individual Evaluation and/or reevaluation, the current individualized education program, behavior intervention plans and/or functional behavioral assessments, assistive technology and any records related to the provision of related services including individual counseling, psychological services, occupational therapy, physical therapy, speech therapy, etc.

Response: The rule specifically addresses records that are required to be submitted by a court pursuant to Human Resources Code §61.065 and §61.0651. Any other educational documentation relating to special education records needed for TYC to provide educational services will be obtained from the transferring school district pursuant to the Memorandum of Understanding documented at 19 TAC §89.1115. No changes were made to the proposed text as a result of the comment.

Comment: Information related to a youth's medical and/or dental orthoses or prostheses and other aids should be noted as part of the medical or dental records of a youth so the facility can provide resources to accommodate the youth's needs.

Response: The rule requires the committing county to provide all available medical and dental records. These records should include an indication of whether the youth requires orthotic or prosthetic devices. If this information is not present in the records received from the committing county, a youth's specialized needs will be identified through TYC's intake health screening process. No changes were made to the proposed text as a result of the comment.

Comment: Due to the delay in providing educational services and the additional costs of administering educational evaluations upon admission to TYC, this rule should mandate that a youth would not be admitted to TYC unless his or her current educational records are provided upon admission. Also, if a youth is on medication, a youth should be provided with a reasonable supply of medication as well as information about the dosages so

there is continuity in the provision of his or her medication upon admission to TYC.

Response: Texas Family Code §54.04(e) requires TYC to accept any person properly committed to it. There are no provisions in the Family Code or in the Human Resources Code §61.065 or §61.0651 that give TYC the authority to deny admission due to the failure of the court to provide certain documents or items. No changes were made to the proposed text as a result of the comment.

§85.5.

Comment: This subsection should be amended to require an assessment to determine if a youth has a medical or psychological condition that could be aggravated if the youth is exposed to a physical restraint by a member of the opposite sex or pepper spray.

Response: The rule requires TYC to conduct a medical examination which would include identification of any medical issues that would contraindicate the use of pepper spray. Issues relating to physical restraint are addressed separately in 37 TAC §97.23. No changes were made to the proposed text as a result of the comment.

Comment: The proposed rule should include a full individual evaluation under the Individuals with Disabilities Education Act (IDEA) for youth with disabilities. If these evaluations are provided with the admission packet, it may not be necessary to conduct a full evaluation.

Response: The rule requires an educational assessment which would include any assessments needed to comply with IDEA. The language in the rule is broad enough to include the recommended assessment. No changes were made to the proposed text as a result of the comment.

Comment: The rule should include procedures and practices for identifying youth who are declared eligible for special education and §504 in a prior placement or in the home school district from which they came. If TYC does not require the provision of these educational records upon admission, the procedures should include prompt requests for school records from the youth's prior school district about the youth's eligibility so that TYC can learn what services the youth was receiving prior to placement.

Response: The recommended procedures and practices are contained in the operations manual TYC maintains for delivery of special education services. Such detailed procedures should not be included in this rule, which reflects TYC's broad duties relating to the admission process. No changes were made to the proposed text as a result of the comment.

§85.21.

Comment: The rule should require facility placements that ensure that youth receive accommodations for their disabilities.

Response: The proposed rule text requires that a youth's individual treatment needs, which could include a youth's disability, be considered in determining an appropriate facility assignment. Additionally, 37 TAC §93.1 establishes TYC youths' right to be free of all discrimination, including discrimination based on disability. No changes were made to the proposed text as a result of the comment.

§85.45.

Comment: The rule should include procedures for how youth will receive information about how and when they can request a level II hearing prior to a transition.

Response: Transitions are defined in §85.1 as movements to programs of equal or lesser restriction for the purpose of facilitating a youth's re-entry to the community when the youth has demonstrated progress in rehabilitation. If a youth were to object to a transition, a request to any staff member would suffice to trigger the requirement to hold the hearing. Formal procedures are not necessary for such requests. No changes were made to the proposed text as a result of the comment.

Comment: The rule should include procedures for informing youth over age 18 how and when they can give consent to their parent or guardian about being transferred.

Response: TYC has published a separate rule, 37 TAC §87.5, that establishes the process for youth 18 years of age and older to give consent for TYC to provide certain information to their parents. No changes were made to the proposed text as a result of the comment.

§85.55.

Comment: There should be a provision that requires a determination of whether a youth's failure to make progress in the program is due to TYC's failure to provide accommodations for the youth's disability.

Response: TYC's recently proposed rules establish a framework in which individualized goals, strategies, and progress assessments, based on individual abilities, needs, and strengths, are built into the process for determining whether a youth has completed all required programming. This approach applies to all youth, including those with disabilities. Additionally, 37 TAC §93.1, establishes TYC youths' right to be free of all discrimination, including discrimination based on disability. No changes were made to the proposed text as a result of the comment.

Comment: The rule should include procedures for informing youth over age 18 how and when they can give consent to their parent or guardian about being moved.

Response: TYC has published a separate rule, 37 TAC §87.5, that establishes the process for youth 18 years of age and older to give consent for TYC to provide certain information to their parents. No changes were made to the proposed text as a result of the comment.

§85.59.

Comment: The rule should include procedures for informing youth over age 18 how and when they can give consent to their parent or guardian about being released.

Response: TYC has published a separate rule, 37 TAC §87.5, that establishes the process for youth 18 years of age and older to give consent for TYC to provide certain information to their parents. No changes were made to the proposed text as a result of the comment.

Comment: The rule should include provisions to address when a youth has not completed an assigned specialized treatment program because TYC lacks the capacity for the youth to complete the program and also should include special provisions for youth with disabilities.

Response: TYC has published a separate rule, 37 TAC §87.51, that addresses the requirements for certain youth to participate in or complete specialized treatment. That rule allows for desig-

nated administrators to waive the completion requirement when a youth's medical, mental health, or mental retardation condition prevents participation in the program. Section 87.51 also requires each youth's individual circumstances to be considered when assigning specialized programming, which may include the youth's ability to complete specialized programming in the time remaining on his/her minimum length of stay. No changes were made to the proposed text as a result of the comment.

Comment: There must be a provision that requires a determination of whether the reason a sentenced offender has not successfully completed the program is due to TYC's failure to provide accommodations for the youth's disability.

Response: TYC's recently proposed rules establish a framework in which individualized goals, strategies, and progress assessments, based on individual abilities, needs, and strengths, are built into the process for determining whether a youth has completed all required programming. This approach applies to all youth, including those with disabilities. Additionally, 37 TAC §93.1, establishes TYC youths' right to be free of all discrimination, including discrimination based on disability. No changes were made to the proposed text as a result of the comment.

SUBCHAPTER A. DEFINITIONS; COMMITMENT AND RECEPTION

37 TAC §§85.1 - 85.3, 85.5

The new rules are adopted under: (1) Human Resources Code §61.034, which provides the commission with the authority to adopt rules appropriate to the proper accomplishment of its functions; (2) Texas Government Code §411.148, which requires a juvenile who is, after an adjudication for conduct constituting a felony, confined in a facility operated by or under contract with the commission to provide one or more DNA samples for the purpose of creating a DNA record; and (3) Human Resources Code §61.071, which requires the commission to examine and make a study of each child committed to it as soon as possible after commitment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cheryl K. Townsend

Executive Commissioner

Texas Youth Commission

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SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §§85.21, 85.25

The new rules are adopted under: (1) Human Resources Code §61.061, which requires the commission to consider the proximity of the residence of a child's family in determining the appropriate commission facility in which to place a child; (2) Human Resources Code §61.075, which provides the commission with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the

interests of the public; and (3) Human Resources Code §61.062, which requires the commission to establish a minimum length of stay for each youth committed to the commission without a determinate sentence that considers the nature and seriousness of the conduct engaged in by the child, and the danger the child poses to the community.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. MOVEMENT PRIOR TO PROGRAM COMPLETION

37 TAC §85.45

The new rule is adopted under Human Resources Code §61.075, which provides the commission with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public and permit the child liberty under supervision and on conditions it believes conducive to acceptable behavior. The rule is also proposed under §61.081, which provides the commission to release under supervision any child in its custody and place the child in his or her home or in any situation or family approved by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Youth Commission

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SUBCHAPTER D. PROGRAM COMPLETION AND RELEASE

37 TAC §§85.55, 85.59, 85.65, 85.69

The new rules are adopted under: (1) Human Resources Code §61.075, which provides the commission with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public and permit the child liberty under supervision and on conditions it believes conducive to acceptable behavior; (2) Human Resources Code §61.081, which provides the commission

to release under supervision any child in its custody and place the child in his or her home or in any situation or family approved by the commission; (3) Human Resources Code §61.084, which requires the commission to transfer a person who has been sentenced under a determinate sentence to the custody of the Texas Department of Criminal Justice on the person's 19th birthday, if the person has not already been discharged or transferred, to serve the remainder of the person's sentence on parole, and which requires the commission to discharge without a court hearing a person committed to it for a determinate sentence who has not been transferred to the institutional division of the Texas Department of Criminal Justice under a court order on the date that the time spent by the person in detention in connection with the committing case plus the time spent at the Texas Youth Commission under the order of commitment equals the period of the sentence, and to transfer to the institutional division of the Texas Department of Criminal Justice a person who is the subject of an order under §54.11(i)(2), Family Code, transferring the person to the custody of the institutional division of the Texas Department of Criminal Justice for the completion of the person's sentence.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Executive Commissioner

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SUBCHAPTER E. PAROLE PLACEMENT AND DISCHARGE

37 TAC §85.95

The new rule is adopted under Human Resources Code §61.075, which provides the commission with the authority to discharge a child from control when it is satisfied that discharge will best serve the child's welfare and the protection of the public, and §61.084, which requires the commission to discharge from its custody a person not already discharged on the person's 19th birthday.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 87. TREATMENT

The Texas Youth Commission (TYC) adopts the repeal of §87.1, concerning case planning, §87.2, concerning resocialization program, §87.3, concerning resocialization phase requirements and assessment, §87.4, concerning resocialization earned privilege system, and §87.51, concerning special needs offenders without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2899).

TYC also adopts the repeal of §87.55, concerning waivers from certain specialized treatment programs without changes to the proposed text as published in the June 5, 2009, issue of the *Texas Register* (34 TexReg 3507).

The justification for repealing the rules is the availability of accurate and up-to-date information concerning TYC programming and operations.

The repeal of §§87.1, 87.2, 87.3, and 87.51 allows for significantly revised rules to be published in their place. The revised rules are adopted in this issue of the *Texas Register*.

The repeal of §87.4 allows for a new rule concerning youth privileges to be published as new §95.2. The new rule is adopted in this issue of the *Texas Register*.

The repeal of §87.55 allows for the new process established in §87.51 for requesting and approving waivers of the requirement for certain youth to complete specialized treatment programs to supersede the process described in §87.55.

No comments were received regarding adoption of the proposed repeals.

SUBCHAPTER A. PROGRAM PLANNING

37 TAC §§87.1 - 87.4

The repeals are adopted under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. SPECIAL NEEDS OFFENDER PROGRAMS

37 TAC §87.51, §87.55

The repeals are adopted under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 87. TREATMENT

The Texas Youth Commission (TYC) adopts new §87.1, concerning case planning, §87.2, concerning rehabilitation program overview, §87.3, concerning rehabilitation program stage requirements and assessment, and §87.51, concerning special needs offenders, with changes to the proposed text as published in the May 15, 2009 issue of the *Texas Register* (34 TexReg 2899). Changes to the proposed text include minor grammatical corrections. Additional changes to the proposed text are outlined below, as described in the responses to public comments received.

The justification for the new rules is the establishment of an individualized juvenile delinquency rehabilitation strategy based on evidence-based techniques, as well as establishment of a system of specialized treatment programming that more appropriately matches the level of specialized treatment intervention with each youth's assessed treatment need.

New §87.1 makes several changes from the previous version of this rule. Updates to individual case plan objectives will be provided every 30 days for all youth in residential facilities, regardless of the committing offense or facility restriction level. The new rule also reflects that individual case plans will be developed with the goal of reducing individual risk factors and increasing individual protective factors, which is one of the foundational principles of TYC's rehabilitative strategy as described in new §87.2 and §87.3.

New §87.2 provides an overview of TYC's general rehabilitation program. The rehabilitative strategy focuses on helping each youth learn how to reduce the individual factors that make him/her more likely to engage in future delinquent conduct, and to increase the individual factors that help to keep him/her away from delinquent conduct.

New §87.3 establishes the system for assessing youth progress through the rehabilitation program. The new rule also provides an outline of the basic areas in which a youth must demonstrate progress in order to successfully complete each stage of the rehabilitation program.

New §87.51 establishes TYC's process for assessing youth for specialized treatment needs and providing youth with treatment programs and interventions that are best suited to address those needs.

Comments regarding the rules were received from Advocacy Incorporated and Texas Appleseed. The comments are summarized below, along with TYC's responses.

§87.1.

Comment: The rule should be amended to require that the individual case plan must be developed in accordance with an as-

assessment of the youth's disability and any accommodations that are necessary to enable the youth to complete the program.

Response: Although the rule requires case plans to include individualized strategies to help youth progress through the program, TYC agrees that more emphasis should be placed on addressing a youth's abilities during the case planning process. Subsection (a) and subsection (c)(2) of the adopted text have been amended to reflect that a youth's abilities are a primary factor in case planning.

§87.2.

Comment: The general provisions should be amended to require all aspects of the TYC rehabilitation program to provide reasonable accommodations for a youth's disability.

Response: Although the rule requires all aspects of the rehabilitation program to be individualized, TYC agrees that more emphasis should be placed on a youth's abilities when assessing youth progress through the program. Subsection (c)(4) of the adopted text has been amended to reflect that a youth's individual abilities are a primary component in assessing his/her progress in rehabilitation programming.

Comment: The rule should include provision of special education services and Section 504 services for youth with disabilities.

Response: This rule is intended to provide a broad statement of TYC's responsibilities in delivering general rehabilitative programming. Details regarding specific educational programming and service delivery are addressed in TYC's program operations manuals and are not appropriate for inclusion in this rule. However, to ensure the rule conveys that TYC will provide individual assistance to youth requiring special education services, subsection (c)(7) of the adopted text has been amended to reflect that appropriate individual supports will be provided as part of the education program.

§87.3.

Comment: The rule should include provisions to address when a youth has not completed an assigned specialized treatment program because TYC lacks the capacity for the youth to complete the program and also should include special provisions for youth with disabilities.

Response: TYC has published a separate rule, 37 TAC §87.51, that addresses the requirements for certain youth to participate in or complete specialized treatment. That rule allows for designated administrators to waive the completion requirement when a youth's medical, mental health, or mental retardation condition prevents participation in the program. Section 87.51 also requires each youth's individual circumstances to be considered when assigning specialized programming, which may include the youth's ability to complete specialized programming in the time remaining on his/her minimum length of stay. No changes were made to the proposed text as a result of the comment.

Comment: The rule should include policies and procedures that are specific to appropriate accommodations for the special needs of youth with mental illness, significant cognitive impairments or other disabilities that may impair a youth's ability to comply with the stated objectives. Without certain accommodations, many youth with disabilities may not be able to pass through the various stages listed in the rule.

Response: All elements of the rehabilitation program are designed to be individualized and to take into account each youth's abilities. To clarify this requirement, subsection (e)(2) of

the adopted text has been amended to reflect that the youth's individual abilities are a significant factor considered by the youth's treatment team when determining progress through the program stages. Specific procedures relating to identified mental illnesses and significant cognitive impairments are better addressed in TYC's program operations manuals. No changes were made to the proposed text as a result of the comment.

Comment: The proposed rule should require the multi-disciplinary team (MDT) to be responsible for determining the reasonable accommodations that a youth with disabilities would need in order to successfully complete the program. If the MDT does not possess the expertise in determining the accommodations for a youth, there must be a process where a qualified expert is consulted in arriving at the accommodations for a youth with disabilities.

Response: The composition of the MDT is addressed in TYC's program operations manuals. The MDT is designed to include input from subject matter experts in all relevant areas. However, to clarify the responsibility for ensuring that appropriate expertise is included, subsection (g)(1) of the adopted text has been amended to require the youth's case manager to contact additional professional resources for assistance in formulating strategies to assist the youth to progress.

Comment: The rule should state that a youth may appeal the results of a stage assessment if the youth believes that his or her lack of progress was due to the failure to provide accommodations for his or her disability.

Response: The proposed rule text allows a youth to appeal a stage assessment for any reason, including a youth's belief that his/her disability has not been appropriately accommodated. No changes were made to the proposed text as a result of the comment.

§87.51.

Comment: As an accommodation, certain requirements of a specialized treatment program should be revised or waived because a youth may not be able to complete them because of his/her disability.

Response: A core principle of all TYC programs is that goals and expectations are individualized based on the youth's unique abilities, needs, and strengths. Due to the highly individualized nature of TYC programming, revisions or waivers for pre-set achievement levels should not be necessary. For cases where the program cannot be adequately tailored to the youth's abilities, the proposed rule includes a provision which allows for waivers of the requirement to complete an assigned specialized treatment program when the youth's medical, mental health, or mental retardation condition prevents the youth from participating in the program. It should also be noted that the proposed rule no longer makes completion of specialized treatment a mandatory requirement for certain youth. Participation or completion is only required if the specialized treatment program is assigned. There is no completion requirement for treatment that is not assigned. For specialized treatment that is assigned, the rule provides for continuation of treatment in community settings in certain situations. No changes were made to the proposed text as a result of the comment.

SUBCHAPTER A. PROGRAM PLANNING

37 TAC §§87.1 - 87.3

The new rules are adopted under Human Resources Code §61.076, which provides the commission with the authority to require children committed to its care to participate in academic, vocational, physical, and correctional training and activities.

§87.1. Case Planning.

(a) Purpose. The purpose of this rule is to ensure the case management of each youth is individualized and flexible, and is based on the youth's risk and protective factors, abilities, and need for services. Risk and protective factors are identified and correspond to long and short-term objectives that are developed to facilitate the youth's progress in the rehabilitation program. The resulting case plan is reviewed regularly and revised when necessary.

(b) Definitions. Definitions for terms used in this rule are under §85.1 of this title.

(c) Case Planning.

(1) An Individual Case Plan (ICP) will be developed with and for each youth by the case manager in consultation with the multi-disciplinary team. The ICP will be individualized for each youth and will identify objectives with specific strategies to address development of skills to reduce individual risk factors and increase individual protective factors.

(2) The ICP will be developed in accordance with the assessment of the youth's risk and protective factors, abilities, and progress in the rehabilitation program.

(3) The ICP will specify measurable objectives, expected outcomes and a means to evaluate progress.

(4) ICP objectives will be updated every 30 days to reflect adjustments as the youth progresses or as new needs are identified.

(5) The ICP will be developed with individualized strategies to facilitate youth progress through the rehabilitation program.

(6) The ICP will be initiated during the assessment process.

(7) ICP development will include a review of youth progress and objectives and will be developed with the youth and family when possible.

§87.2. Rehabilitation Program Overview.

(a) Purpose. The purpose of this rule is to identify the agency's philosophy and approach to rehabilitation of juvenile delinquents in order to reduce future delinquent behavior and increase youth accountability.

(b) Definitions. See §85.1 of this title for definitions of terms used in this rule.

(c) General Provisions.

(1) Each Texas Youth Commission (TYC) operated residential facility will utilize an integrated, system-wide rehabilitative strategy that offers a menu of therapeutic techniques, tools, and program components to help individual TYC youth increase their ability to be productive citizens and avoid re-offending.

(2) To the extent possible, TYC's rehabilitative strategy will offer programs in an adequate manner so that youth receive appropriate rehabilitation services recommended by the committing court.

(3) All aspects of the TYC rehabilitation program will be individualized and performance-based with clearly defined expectations as set forth in §87.3 of this title.

(4) Individual progress will be measured monthly and be based on all identified risk and protective factors and individual abilities. Youth in residential placements will be assessed by a multi-disciplinary team.

Youth on parole in the community will be assessed by the assigned parole officer.

(5) As youth progress in the rehabilitation program, there are increased expectations for demonstrating developed skills and social responsibility, a decreased need for direct staff supervision, and an increase in earned privileges as set forth in §95.2 of this title.

(6) TYC facilities shall maintain a structured, 16-hour day for all youth. During each day, the youth will work on components of the rehabilitation program.

(7) TYC facilities shall provide for and youth will participate in a structured, individually appropriate educational program or equivalent, with appropriate supports.

(8) TYC facilities shall provide and eligible youth may participate in work experiences.

(9) TYC facilities shall provide and youth will participate in regular physical training programs.

(10) TYC facilities shall provide and youth will participate in skills development groups.

(11) Staff will receive appropriate training and certification related to their role in the rehabilitation program and the type of services they provide.

§87.3. Rehabilitation Program Stage Requirements and Assessment.

(a) Purpose. Texas Youth Commission (TYC) youth earn release from high and medium restriction placements by progressing through a stage system that measures progress in the rehabilitation program. The purpose of this rule is to provide a general outline of the areas in which a youth must demonstrate progress and to describe the process for how progress is assessed.

(b) Applicability. This rule applies to all residential facilities operated by the TYC. This rule does not apply to youth in contract care programs that are not required to provide the TYC rehabilitation program.

(c) Definitions. See §85.1 of this title for definitions of terms used in this rule.

(d) General Themes in the Rehabilitation Program. In each stage, there are objectives for the youth to complete which will:

(1) demonstrate an understanding of risk and protective factors and show a decrease in risk factors and an increase in protective factors over the course of the rehabilitation program;

(2) demonstrate a youth's increased understanding of how those personal risk factors relate to success/lack of success in the community and assist the youth in understanding how his/her committing offense was related to risk factors;

(3) move the youth toward developing a concrete community reintegration plan from the time of admission; and

(4) engage the youth's family in programming.

(e) General Process for Stage Assessment.

(1) For each stage, a youth completes objectives around the four general themes. Once those objectives are completed, the youth presents and discusses stage-related indicators with the multi-disciplinary team (MDT).

(2) The MDT assesses whether the youth has adequately completed the required indicators, taking into account the youth's individual abilities. The MDT is the primary decision authority regarding whether a youth earns stage promotion.

(3) If the MDT determines the stage objectives have been met, the MDT also evaluates whether the youth has consistently participated in the following other areas of programming:

(A) participation in development and completion of case plan objectives;

(B) participation in groups and individual counseling sessions;

(C) participation in specialized treatment programs (if applicable);

(D) participation in academic and workforce development programs; and

(E) application of learned skills in daily behavior, as defined in the positive behavior change system.

(4) If the MDT determines that a youth meets the required indicators for the stage and has consistently participated in the other areas of programming, the youth will be promoted to the next stage.

(5) If the MDT determines the youth has not met the indicators required for the stage or has not consistently participated in the other areas of programming, the youth remains on his/her current stage until the next MDT review (28-35 days).

(6) Youth may not be demoted in stage.

(7) The MDT gives the youth specific feedback on his/her areas of positive progress and assists the youth in focusing on what needs to be improved for the next review period.

(f) Stage Requirements for Promotion.

(1) Stage 1--this stage is completed when the MDT determines that the youth has demonstrated basic knowledge of the stage objectives. The youth attends the foundational skills development groups and participates in individual sessions with his/her case manager to develop an assessment of risk and protective factors. In order to complete stage 1, the youth must:

(A) complete the following objectives in accordance with the specified indicators for each objective:

(i) understand the definition of risk and protective factors;

(ii) explore risk factors related to TYC commitment;

(iii) attempt to involve a family member or an adult mentor in coordination with the family liaison and case manager; and

(iv) establish a personal goal and identify strategies to achieve that goal;

(B) present and discuss his/her progress with the MDT as specified in the stage indicators; and

(C) consistently participate in other areas of programming as described in subsection (e)(3) of this section.

(2) Stage 2--this stage is completed when the MDT determines that the youth has identified and discussed his/her personal risk and protective factors, has identified patterns in his/her thoughts, feelings, attitudes, values and beliefs that relate to TYC commitment and ongoing behaviors, has created an initial community re-integration plan, and has participated with the MDT in targeting specific skills for development related to his/her risk and protective factors. In order to complete stage 2, the youth must:

(A) complete the following objectives in accordance with the specified indicators for each objective:

(i) explore personal risk and protective factors;

(ii) share identified risk and protective factors with his/her family or adult mentor;

(iii) identify patterns in thoughts, feeling, attitudes, beliefs and values;

(iv) create an initial community re-integration plan;

(B) present and discuss his/her progress with the MDT as specified in the stage indicators; and

(C) consistently participate in other areas of programming as described in subsection (e)(3) of this section.

(3) Stage 3--this stage is completed when the MDT determines that the youth has completed skill lessons assigned by the case manager and MDT necessary to reduce risks and enhance protective factors. The youth is expected to take responsibility for the committing offense, identify patterns in thinking, and be able to discuss the impact of the offense on direct and indirect victims. The youth is expected to incorporate the new skills learned while in the facility into daily living situations and into a community re-integration plan. In order to complete stage 3, the youth must:

(A) complete the following objectives in accordance with the specified indicators for each objective:

(i) show a reduction of risk factors and an increase in protective factors;

(ii) take responsibility for the committing offense;

(iii) share progress on reducing risk factors and increasing protective factors with his/her family member or adult mentor;

(iv) complete the community re-integration plan;

(B) present and discuss his/her progress with the MDT as specified in the stage indicators; and

(C) consistently participate in other areas of programming as described in subsection (e)(3) of this section.

(4) Stage 4--this stage is completed when the MDT determines that the youth demonstrates and practices skills learned in skills groups through daily application in situations that present increased risk for the youth. Youth are expected to engage in responsible behaviors that are consistent with identified protective factors on a regular basis. Additional skills are learned as assigned and the community re-integration plan is revised as needed and reviewed. The community re-integration plan is considered complete when the case manager, youth and the youth's parent/guardian/adult mentor approve the document. In order to complete stage 4, the youth must:

(A) complete the following objectives in accordance with the specified indicators for each objective:

(i) show a reduction of risk factors and an increase in protective factors;

(ii) identify new thoughts, feelings, attitudes, beliefs and values that might increase success in the community;

(iii) share the community re-integration plan with his/her family or adult mentor;

(iv) finalize the community re-integration plan;

(B) present and discuss his/her progress with the MDT as specified in the stage indicators; and

(C) consistently participate in other areas of programming as described in subsection (e)(3) of this section.

(5) Stage 5--youth who have completed stage 4 in a high or medium restriction facility and remain in a medium restriction facility are assigned to stage 5. The youth updates the community re-integration plan as he/she encounters real situations and influences in the community. The youth reviews risk and protective factors and completes thinking reports on specific situations, identifying patterns in thinking. In order to complete stage 5, the youth must:

(A) complete the following objectives in accordance with the specified indicators for each objective:

(i) review any changes to risk factors and protective factors in the halfway house environment;

(ii) review thoughts, feelings, attitudes, values, and beliefs related to community re-integration;

(iii) comply with, review, and revise the community re-integration plan;

(iv) share the revised community re-integration plan with his/her family or adult mentor;

(B) present and discuss his/her progress with the MDT as specified in the stage indicators; and

(C) consistently participate in other areas of programming as described in subsection (e)(3) of this section.

(6) Youth Empowerment Status--youth who complete stage 4 and remain in a high restriction facility or who complete stage 5 and remain in a medium restriction facility are assigned to Youth Empowerment Status. This status ensures that youth continue to work in the program to maintain their gains, continue to reduce risk factors and increase protective factors, continue their skills development, update their community re-integration plan as circumstances change, and contribute positively to their living environment. If the MDT determines that the youth has met all objectives, the youth is placed on "active" status. If the MDT determines that the youth has not met all objectives, the youth is placed on "inactive" status. The objectives are:

(A) youth shows a reduction of risk factors and an increase in protective factors;

(B) youth reviews and revises the community re-integration plan;

(C) youth participates in the development and completion of the case plan;

(D) youth attends all scheduled groups;

(E) youth participates in specialized treatment program(s) or supplemental groups, if applicable;

(F) youth participates in academic and workforce development programs commensurate with abilities; and

(G) youth consistently applies learned skills in daily behavior.

(g) Roles and Responsibilities for Multi-Disciplinary Team Meetings.

(1) Members of the MDT make stage decisions collaboratively, providing input in their areas of expertise. The MDT facilitates and confirms stage progression by reviewing progress and interviewing the youth. The youth's case manager serves as the MDT facilitator, and is responsible for contacting additional professional resources as appropriate to discuss the youth's individualized needs and abilities, and to provide information regarding strategies to assist the youth to progress in the program.

(2) The multi-disciplinary team for each dormitory or living unit meets weekly to discuss each youth's weekly performance ratings and other living unit issues.

(A) Based on each youth's weekly performance status rating (demonstration of skills relative to assigned stage), the MDT may adjust a youth's standard privileges for the week, and may reduce or remove consequences imposed for prior major or minor rule violations if the youth's improved behavior warrants it.

(B) On a weekly basis, the MDT makes decisions about youth participation in campus programs, participation in leisure skills building groups or extracurricular activities, approves various youth requests/suggestions, and makes recommendations to facility administration regarding youth movement due to specialized program need, program completion, or lack of progress in the assigned program.

(3) The MDT meets monthly for an integrated and comprehensive assessment of each youth's progress in the rehabilitation program.

(A) Prior to the meeting, assigned staff members are responsible for collecting specific information in their area of expertise and making it available for the meeting.

(B) The case manager is responsible for contacting the family to invite them to the meeting and ensuring their input into the process.

(C) The youth is responsible for being prepared to discuss information related to his/her program and preparing any information to present relative to stage progression.

(D) During the monthly assessment, the youth's general progress in the program and on specific case plan objectives is reviewed, risk and protective factors are reviewed, medical and mental health information is discussed (where applicable), feedback is provided to the youth on areas of strength and areas needing improvement, interventions to assist the youth's progress are discussed and developed, community re-entry planning is discussed and the youth's stage is assigned.

(E) An updated individual case plan is developed for youth following the meeting.

(F) Every 90 days the youth's assessment of risk and protective factors is reviewed and updated, and a progress report is provided to the parent following the MDT meeting.

(4) The MDT will address and make rehabilitation recommendations that also reflect:

(A) specialized treatment needs of the youth to include chemical dependency, mental health, cognitive, aggressive, sexual behavior and language proficiency;

(B) any other relevant specialized needs not identified specifically in this policy; and

(C) individualized strategies to facilitate youth progress based on the youth's strengths, needs, and abilities.

(h) Documentation and Youth Interview. A stage assessment is conducted on the basis of documentation related to the youth's performance during the previous 30-day period. The MDT conducts a face-to-face interview with the youth:

(1) monthly at the stage assessment;

(2) weekly if the youth's behavior indicates that a loss of privilege or privilege adjustment may be necessary (see §95.2 of this title for more information on the youth privilege system); and

(3) prior to movement to a less restrictive placement;

(i) Opportunity to Demonstrate Completion of Requirements.

(1) Some objectives may be completed in a single month. Completion of all stage requirements for promotion are demonstrated primarily through consistent participation in scheduled activities and development of skills to address risk factors, which will generally take longer than one month to achieve. The stage requirements are generally sequential.

(2) During each monthly assessment period, the youth is provided an equal opportunity, as the youth's behavior warrants, to participate in the scheduled activities needed to progress. With reasonable effort by the youth, the requirements of the highest stage will be completed by the youth's minimum length of stay or minimum period of confinement. For youth whose minimum length of stay or minimum period of confinement exceeds 12 months, the schedule must provide an opportunity for completion of the highest stage within one year.

(j) Documentation and Youth Notification of Results of Stage Assessment. The following activities are required of the primary service worker (PSW) after a stage assessment:

(1) within two workdays of the stage assessment, the PSW meets with the youth to review the results of the assessment. The PSW discusses with the youth the strengths and specific areas needing improvement;

(2) within three workdays, the PSW enters the stage assessment results into the automated data entry system; and

(3) within seven calendar days, the PSW attempts to contact the youth's family by telephone to share the outcome of the stage assessment.

(k) Development of the Individual Case Plan. The following case planning activities are required of the PSW after a stage assessment:

(1) within seven calendar days of the stage assessment, the PSW completes the monthly Individual Case Plan (ICP) with and for the youth, reviews its content and obtains the youth's signature; and

(2) youth who have completed stage 3 and who are within 90 days of their minimum length of stay or minimum period of confinement will have a transition ICP initiated. The plan will be developed based upon the youth's individualized risk factors, strengths, and needs.

(l) Stage Assessment Upon Return to a High Restriction Facility.

(1) Youth who are returned to high restriction from a medium restriction facility as a result of a due process hearing (other than parole revocation hearing) are placed on stage 3, or are retained on the current stage if currently assigned to stage 1 or 2.

(2) Youth who are returned to high restriction as a result of a parole revocation hearing or who are recommitted to TYC are placed on stage 1.

(m) Appeal of Assessment. The youth may appeal the results of a stage assessment, or of the lack of opportunity to demonstrate completion of requirements, by filing a grievance in accordance with §93.31 of this title. The person assigned to respond to the grievance must not be a member of the MDT or a staff member who has been involved in the youth's current assessment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 424-6014



SUBCHAPTER B. SPECIAL NEEDS OFFENDER PROGRAMS

37 TAC §87.51

The new rule is adopted under Human Resources Code §61.0315, which requires the commission to offer or make available certain specialized treatment programs in an adequate manner so that a child in the custody of the commission receives appropriate rehabilitation services recommended for the child by the committing court, and §61.076, which provides the commission with the authority to require children committed to its care to participate in academic, vocational, physical, and correctional training and activities.

§87.51. *Special Needs Offenders.*

(a) Purpose. The purpose of this rule is to identify the process by which youth committed to the Texas Youth Commission (TYC) are assessed for specialized treatment needs and determined eligible for specialized treatment programs. The purpose of all provisions in this rule is to promote successful youth re-entry and reduce risk to the community by addressing individual specialized treatment needs through programs that are shown to reduce risk to re-offend.

(b) Applicability. This rule applies only to youth admitted to TYC on or after September 1, 2009.

(c) Definitions. Except as indicated in this rule, definitions for terms used in this rule are found in §85.1 of this title.

(1) Psychoeducational Curriculum--a short term education program delivered by appropriately trained staff to address youth with a low need for specialized treatment. These programs are provided to youth who are participating in the general rehabilitation program. Youth are temporarily pulled out of general rehabilitation programming to participate in specialized groups, and return to general rehabilitation programming upon completion of the curriculum.

(2) Short-Term Treatment Program--a treatment program delivered by a licensed or appropriately trained staff that addresses youth with a medium need for specialized treatment. These programs are provided to youth who are participating in the general rehabilitation program. Youth are temporarily pulled out of general rehabilitation programming to participate in specialized groups and individual counseling, and return to general rehabilitation programming upon completion of the short-term program.

(3) Sex Offense--a reportable adjudication as defined in Article 62.001 of the Code of Criminal Procedure.

(4) Sexual Misbehavior--a documented report of conduct which meets the elements of a sex offense but did not result in an adjudication for a sex offense or any diagnosis of Paraphilia as defined in the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

(d) General Provisions.

(1) Upon admission to TYC, various assessments are conducted to determine whether youth have certain specialized treatment needs and to identify the type of specialized program that is best suited to address those needs. Specialized treatment needs may be re-assessed at any time during a youth's stay in TYC. Re-assessment may also be conducted following a youth's return to a high restriction facility upon request of a parole officer, case manager, psychologist, or placement unit staff.

(2) Each youth assessed as having a specialized treatment need will be provided specialized programming. If, due to program resources, a youth cannot be provided the type of specialized treatment program designated herein for his/her assessed need level in his/her highest priority treatment area, the youth will be provided with the most appropriate alternate form of specialized intervention for that treatment need.

(3) Youth with multiple specialized needs will have these needs addressed while under TYC jurisdiction. Some specialized treatments may be provided concurrently and others successively. Youth may have specialized needs addressed while in a high or medium restriction facility or on parole based on assessment results and treatment team recommendations.

(e) Specialized Treatment Needs. The areas of specialized treatment need are set forth in paragraphs (1) - (6) of this subsection, with each area given priority for placement and treatment in the order listed. These rankings are designed to reflect a hierarchy based on urgency of need, ability to meaningfully participate in the program, and duration of the treatment programs.

(1) Medical. Each youth is provided comprehensive medical and dental examinations. Based on the results of these examinations, each youth is assigned a need level for medical or dental services.

(A) High Need--includes youth who have an acute illness, an exacerbation of a chronic medical/dental condition, a serious injury, and/or a need for hospitalization. These youth generally have unstable or unpredictable conditions, and require 24-hour nursing care or supervision beyond the scope of normal infirmary services. Examples include the need for extensive surgery or a complex or invasive treatment necessary to stabilize an acute or chronic condition (e.g., chemotherapy, HIV treatment, late stage or complicated pregnancy, severe systemic infection, or complex bone fracture). The medical needs, until resolved, take precedence over other therapeutic interventions and may temporarily prevent active participation in the agency's delinquency rehabilitation program. High need youth will be assigned to a placement providing readily available intensive in-patient services and specialty medical resources.

(B) Medium Need--includes youth who have a diagnosed serious medical or dental condition that will likely require frequent access to off-site clinical services and potential access to hospital services for symptom exacerbation. Examples include uncontrolled diabetes, seizure disorder, hypertension, hernia repair, or a functional disability requiring ongoing evaluation or rehabilitation. Functional impairment may require adaptations to the agency's delinquency rehabilitation program on a short or long-term basis. Medium need youth will be assigned to a placement providing readily available specialty medical resources.

(C) Low Need--includes youth diagnosed with a condition that is mild- moderate in severity and does not require ongoing off-site treatment or monitoring. Low need youth are able to participate meaningfully in the agency's delinquency rehabilitation program but may be temporarily restricted from an activity due to an accident, injury, or illness of mild- moderate severity. Low need youth will be assigned to a placement with access to routine medical care.

(D) None--includes youth with no medical or dental diagnosis requiring ongoing attention.

(2) Mental Health. The mental health assessment is provided by psychology and psychiatry staff through comprehensive psychological and psychiatric evaluations, using the most current edition of the Diagnostic and Statistical Manual of Mental Disorders. Based on this assessment, each youth is assigned a need level for mental health treatment services.

(A) High Need--includes any youth with a diagnosed mental disorder (other than a singly diagnosed behavioral or chemical use disorder) who, because of the signs or symptoms of the disorder, is suffering significant impairment in reality testing or communication or major impairment in two or more of the following areas: school, interpersonal relationships, staff relationships, judgment, thinking, or mood. High need youth will be assigned to a TYC-operated stabilization unit or a psychiatric hospital.

(B) Medium Need--includes youth who have a diagnosed mental disorder (other than a singly diagnosed behavioral or chemical use disorder) with moderate to serious signs or symptoms of that disorder, and who is having moderate to serious impairment in daily living expectations, interpersonal and staff relationships, judgment, thinking, or mood. Youth with a medium need for mental health treatment are assigned to a mental health treatment program.

(C) Low Need--includes youth who have a diagnosed mental disorder (other than a singly diagnosed behavioral or chemical use disorder) but who are able to adequately function in the areas of daily living, interpersonal and staff relationships, judgment, thinking, and mood with supportive psychiatric and psychological services. Low need youth will be assigned to any TYC placement offering appropriate psychological and psychiatric services.

(D) None--includes youth who have no diagnosed condition(s) that meet the criteria listed in subparagraphs (A) - (C) of this paragraph.

(3) Mental Retardation. The diagnosis of mental retardation is made by a psychologist based on the results of an assessment of cognitive functioning and adaptive behavior as defined in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders. Based on this diagnosis, each youth is assigned a need level for mental retardation services.

(A) High Need--includes youth who have a diagnosis of Moderate Mental Retardation on Axis II. High need youth will be assigned to a placement offering individualized mental retardation services.

(B) Medium Need--includes youth who have a diagnosis of Mild Mental Retardation on Axis II and a mental health treatment need rating of medium or low. Medium need youth will be assigned to a mental health treatment program for specialized services.

(C) Low Need--includes youth who have a diagnosis of Mild Mental Retardation on Axis II of the Diagnostic and Statistical Manual of Mental Disorders. Low need youth may be assigned to any placement.

(D) None--includes youth who have no diagnosis of Mental Retardation on Axis II of the Diagnostic and Statistical Manual of Mental Disorders.

(4) Sexual Behavior. The sexual behavior treatment assessment is provided by a psychologist, associate psychologist, or licensed sex offender treatment provider through a clinical interview and the agency-approved juvenile sexual offender assessment instrument. The assessment is provided for youth who have been adjudicated for

a sex offense or have a credible, documented history of sexual misbehavior. Based on this assessment, each youth is assigned a need level for sexual behavior treatment services.

(A) High Need--includes youth who have an adjudicated sex offense and received an assessment rating of high need for sexual behavior treatment, based on the results of the clinical interview and the agency-approved juvenile sexual offender assessment instrument. High need youth will be assigned to participate in a residential sexual behavior treatment program.

(B) Medium Need--includes youth who have an adjudicated sex offense and received an assessment rating of medium need for sexual behavior treatment based on the results of the clinical interview and the agency-approved juvenile sexual offender assessment instrument. Medium need youth will be assigned to participate in a short-term sexual behavior treatment program.

(C) Low Need--includes youth who have a history of sexual misbehavior and receive an assessment rating of low need for sexual behavior treatment based on the results of the clinical interview and the agency-approved juvenile sexual offender assessment instrument. Low need youth will be assigned to participate in a psychosexual education curriculum.

(D) None--includes youth who have no history of sexual misbehavior or adjudicated sex offenses.

(5) Capital and Serious Violent Offender. A psychologist or associate psychologist makes a determination of need for capital and serious violent offender treatment for any youth who was found by a court or TYC administrative law judge to have engaged in conduct that resulted in the death of a person, resulted in serious bodily injury to a person, involved using or exhibiting a deadly weapon, and any youth referred by a psychologist based on a reasonable belief the youth is need of capital serious violent offender treatment. The determination is based on the youth's offense history and psychological assessment of the youth's need for specialized treatment intervention.

(A) High Need--will be assigned to participate in a residential capital and serious violent offender program.

(B) Medium Need--will be assigned to participate in a short-term program to address aggression and violent behavior issues.

(C) Low Need--will be assigned to participate in a psychoeducational anger management supplemental curriculum.

(D) None--includes youth who are assessed as not having a need for capital and serious violent offender treatment.

(6) Alcohol or Other Drug Treatment. Youth identified through a screening process as needing further alcohol or other drug (AOD) assessment will be assessed and diagnosed by a psychologist or associate psychologist using the latest edition of the Diagnostic and Statistical Manual of Mental Disorders. Based on a clinical interview and the results of an agency-approved comprehensive assessment instrument, each youth is assigned a need level for AOD programming.

(A) High Need--includes youth with diagnoses of substance abuse or dependency and who require a residential AOD treatment program based on the results of the agency-approved comprehensive assessment. High need youth will be assigned to participate in a residential AOD program.

(B) Medium Need--includes youth with diagnoses of substance abuse or dependency and who do not require residential treatment based on the results of the agency-approved comprehensive assessment. Medium need youth will be assigned to participate in a short-term AOD program.

(C) Low Need--includes youth without a formal diagnosis of chemical dependency or substance abuse disorders, but who have a risk of drug abuse or dependency based on a history of experimentation, family use, or history of abuse. Low need youth will be assigned to participate in a psychoeducational AOD curriculum.

(D) None--includes youth who have no history of substance abuse or risk of use.

(f) Requirement to Complete Specialized Treatment.

(1) This subsection applies only to youth assessed as having a high or medium treatment need in the following treatment areas: Sexual Behavior; Capital and Serious Violent Offender; or Alcohol or Other Drug Treatment. This subsection does not apply to youth assigned to complete psychoeducational supplemental curricula in these treatment areas.

(2) This subsection does not apply to decisions made by the Release Review Panel under §85.57 of this title.

(3) In order to qualify for transition to a medium restriction placement under §85.45 of this title or to earn release to parole under §§85.55, 85.59, or 85.69 of this title, a youth who has been assessed as having a high or medium need must:

(A) complete the assigned specialized treatment program while in a high restriction facility; or

(B) as recommended by the youth's treatment team and determined by the final decision authority in consultation with the division director over treatment programming or designee, make sufficient progress in the assigned specialized treatment program with a corresponding reduction in risk in order to allow for the youth to continue the specialized treatment in a less restrictive setting. Risk reduction will be assessed by appropriate assessment instruments. Requirements to continue or complete treatment will be included in the youth's conditions of placement or conditions of parole, as appropriate.

(g) Individual Exceptions.

(1) The requirement to complete specialized treatment as described in subsection (e) of this section may be waived if the division director over treatment programming or designee determines that the youth is unable to participate in the assigned specialized treatment program or curriculum due to a medical, mental health, or mental retardation condition.

(2) Each youth's individual circumstances will be considered when determining the most appropriate type of specialized treatment intervention to assign. A youth may be assigned to a specialized program or curriculum designated herein for a higher or lower need level than the youth's assessed need level for any reason deemed appropriate by the division director over treatment programming or designee.

(h) Specialized Aftercare. Youth who successfully complete one of the following specialized treatment programs, or who otherwise need specialized aftercare as determined by the youth's treatment team, will receive specialized aftercare on an outpatient basis as needed, recommended by the treatment team, and available:

(1) mental health treatment program;

(2) residential or short-term sexual behavior treatment program; or

(3) residential or short-term alcohol or other drug treatment program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cheryl K. Townsend

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37 TAC §87.67

The Texas Youth Commission (TYC) adopts an amendment to §87.67, concerning Corsicana Stabilization Unit, without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2907).

The justification for amending the rule is increased legal protections for youth admitted to the Corsicana Stabilization unit as a result of more frequent hearings to prove admission criteria continue to exist.

The amended rule requires that a due process hearing to extend a youth's stay in the unit a second time must be held within 90 days of the first extension hearing, rather than within 12 months of the first extension hearing. The amended rule also specifies that a Level II due process hearing (as described in §95.55 of this title) is the required level of due process in order to extend a parole-status youth in the unit.

No comments were received regarding adoption of the amended rule.

The amendment is adopted under the Human Resources Code, §61.075, which provides TYC with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public, and §61.076, which provides TYC with the responsibility and authority to provide any medical or psychiatric treatment that is necessary.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 91. PROGRAM SERVICES SUBCHAPTER D. HEALTH CARE SERVICES

37 TAC §91.98

The Texas Youth Commission (TYC) adopts new §91.98, concerning therapeutic restraints, with changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2908). Changes to the proposed text consist of minor grammatical corrections, as well as changes described below in the responses to public comments received. Additional changes to the proposed text of this rule are detailed in the notice of adoption for §97.23, which is also published in this issue of the *Texas Register*.

The justification for the new rule is the protection of youth from serious harm caused by self-injury or refusal of medical treatment. The new rule contains provisions for administering restraints when clinically indicated for medical or mental health purposes.

Comments regarding the rule were received from Advocacy Incorporated and Texas Appleseed. The comments are summarized below, along with TYC's responses.

Comment: Subsection (f)(3)(C) should comply with the National Commission on Correctional Health Care standards for the order of a clinical restraint, which state that generally an order for a clinical restraint is not to exceed an hour and that health monitoring consists of checks for circulation and nerve damage, airway obstruction, and psychological trauma.

Response: TYC agrees that therapeutic restraints should be applied no longer than is absolutely necessary. Subsection (f)(3)(D) has been added to the adopted text to require the medical provider's approval to continue a medical restraint beyond one hour, and every four hours thereafter. The rule already contains a provision which requires a healthcare professional to monitor a youth's condition for the duration of the medical restraint.

Comment: The rule should include a requirement for health care staff to document the 15-minute checks during medical restraints.

Response: Subsection (f)(4)(B) of the adopted text has been amended to require documentation of the checks in the youth's medical record.

Comment: The rule should include provisions related to the types of mechanical restraints that are approved for use, annual inspections, removal from use of any defective equipment, requirements for proper application, and prohibitions on restraining youth in a prone, supine, or lateral position with arms and legs secured behind the youth's back.

Response: The types of approved restraint equipment, guidelines for proper application of mechanical restraint, and prohibited restraint techniques are addressed in 37 TAC §97.23. No changes were made to the proposed text as a result of the comment.

The new section is adopted under the Human Resources Code, §61.076, which provides TYC with the authority to provide any medical or psychiatric treatment that is necessary for a child committed to the commission.

§91.98. Therapeutic Restraints

(a) Purpose. This rule establishes the criteria, procedures, and limitations for use of therapeutic restraints when clinically indicated for medical or mental health purposes.

(b) Applicability. This rule applies to all Texas Youth Commission (TYC) residential facilities.

(c) Additional References.

(1) For criteria and procedures relating to use of force, see §97.23 of this title.

(2) For criteria and procedures on administering a psychotropic drug in a psychiatric emergency when a youth will not give consent for the administration, see §91.92 of this title.

(d) Definitions.

(1) Mental Health Professional--has the meaning assigned by §91.87 of this title.

(2) Therapeutic Restraint--a restraint used solely for medical or mental health purposes.

(3) Medical Provider--a:

(A) physician; or

(B) mid-level practitioner, such as a nurse practitioner or physician's assistant, acting under the direction of a physician.

(4) Psychiatric Provider--a:

(A) psychiatrist, or

(B) psychiatric physician's assistant or psychiatric nurse practitioner acting under the direction of a psychiatrist.

(e) General Provisions.

(1) Therapeutic restraint equipment must be used only in a manner consistent with its intended design and purpose.

(2) Only therapeutic restraint equipment approved by the executive commissioner or designee may be used in TYC facilities.

(3) TYC staff who may be expected to participate in application of therapeutic restraints or monitoring, managing, or approving of the restraint must receive special training and will not participate in its implementation until the training has been received. The training will include proper use and application of restraint devices and applicable TYC policies and guidelines regarding the implementation, documentation, and possible continuation of the restraint.

(4) If facility resources are not sufficient to support the procedural requirements as specified in this rule, therapeutic restraint must not be employed.

(5) Prior to placing a youth in any therapeutic restraint device designed to secure a person in a face-upward position, a medical provider shall be consulted if the youth is pregnant or has a seizure disorder or any other medical condition that contraindicates such restraint.

(6) The facility administrator or designee will ensure that the parent/guardian of a youth placed in therapeutic restraint is notified within 24 hours after the restraint is initiated.

(f) Therapeutic Restraints for Medical Purposes.

(1) Authorized Facilities. Medical restraints are authorized only at high restriction facilities that operate an on-site infirmary.

(2) Criteria for Use. Medical restraints may be used only to administer medical treatment to a resistant youth when failure to administer the treatment could have serious health implications.

(3) Authorization for Use.

(A) Only a medical provider may authorize a medical restraint. The authorization must be based on a determination that all appropriate less restrictive interventions have proved unsuccessful in controlling the youth's behavior.

(B) An order for medical restraint must specify the type of restraint to be used, duration of the restraint, any special instructions, and justification for the restraint.

(C) No order for medical restraint may exceed 12 hours in duration.

(D) A nurse must contact the medical provider prior to the expiration of the first hour and every four hours thereafter to obtain approval to continue the restraint.

(4) Procedural Requirements.

(A) A medical provider or nurse must be present during the application of restraints.

(B) Health care staff must check the youth every 15 minutes and assess the youth's condition, including circulation, position, and open airway if wrist and/or ankle soft restraints are used. Such checks will be documented in the youth's medical record.

(C) A nurse will perform range-of-motion exercises at least every 30 minutes for a period of at least five minutes if wrist and/or ankle soft restraints are used.

(D) Regularly scheduled meals and drinks are served on appropriate food ware for safety.

(E) As soon as possible, but no later than 12 hours after application of restraints, the medical provider will consult with the facility administrator or designee to develop and implement a less restrictive treatment plan.

(F) Staff will provide continuous visual supervision of the youth while in restraints.

(G) Staff will provide an opportunity for elimination of bodily waste at least every two hours.

(H) A medical restraint must be terminated upon the earlier of:

(i) a determination by the medical provider that the youth's behavior no longer justifies application of medical restraints; or

(ii) expiration of the provider's order.

(I) If the restraint was not ordered by the youth's treating medical provider, the medical provider ordering the restraint must consult with the youth's treating medical provider and document the contact in the youth's medical record.

(g) Therapeutic Restraints for Mental Health Purposes.

(1) Authorized Facilities. Mental health restraints are authorized only at facilities designated by the executive commissioner or designee.

(2) Criteria for Use. Therapeutic restraints for mental health purposes are authorized for use only when the restraint is necessary to prevent serious self-injury.

(3) Authorization for Use.

(A) Only a licensed doctoral psychologist or psychiatric provider may authorize a mental health restraint. The authorization must be based on a determination that all appropriate less restrictive interventions have proven unsuccessful in controlling the youth's self-injurious behavior.

(B) At least one staff trained specifically in mental health restraint techniques must be involved in any mental health

restraint procedure. If at least one trained staff is not available to supervise, the restraint shall not be employed.

(C) Prior to the expiration of the first hour of restraint, the youth shall be evaluated face-to-face by a mental health professional who may recommend approval to continue the restraint.

(D) In order to recommend continuation of the restraint, the mental health assessment will verify that the current use of the restraint is not having a psychologically damaging effect and that the need for the restraint is not due to an immediate psychiatric crisis which requires alternative interventions.

(E) Approval from a psychiatric provider or a licensed doctoral psychologist must be obtained to continue the restraint beyond one hour. If a determination is made that the behavior is due to a mental health problem, the youth shall be provided appropriate mental health services, including referral to the Corsicana Stabilization Unit or state hospital if he/she meets the admission criteria under §87.67 or §87.69 of this title.

(F) Additional face-to-face assessment by a mental health professional is required to extend the restraint beyond four hours and at least every four hours thereafter if the restraint continues. Only a psychiatric provider or licensed doctoral psychologist may approve a recommended extension.

(G) The facility administrator or designee may direct additional mental health assessment at any time.

(H) The restraint shall be terminated as soon as the youth's behavior indicates the threat of imminent self-injury is absent, as determined by a psychiatric provider or licensed doctoral psychologist.

(I) No order or approval for mental health restraint may be in force for longer than 12 hours. If the restraint is still required for the youth's safety, a psychiatric provider must directly observe the youth and provide written orders, which may include psychotropic medication when clinically indicated.

(4) Procedural Requirements.

(A) The only approved mental health restraint method is full-body restraint, face-upward, on a bed equipped with cloth or leather mechanical restraint straps/devices.

(B) Staff shall ensure the youth's personal dignity by providing a protected environment and as much privacy as possible.

(C) Youth shall be provided:

(i) regular checks, performed by a nurse, of the physical condition of the youth and the placement of the restraints within the first 30 minutes and every hour during the restraint;

(ii) an assessment of circulation, position, and open airway checks at least every 15 minutes by trained staff;

(iii) opportunity for range of motion exercises at least every 30 minutes for a period of at least five minutes;

(iv) regularly scheduled meals and drinks served on appropriate food ware for safety;

(v) opportunity for elimination of bodily waste at least every two hours; and

(vi) continuous visual supervision by staff.

(D) A psychiatric provider or licensed doctoral psychologist must develop a detailed plan for clinical follow-up.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 93. YOUTH RIGHTS AND REMEDIES

37 TAC §93.31, §93.53

The Texas Youth Commission (TYC) adopts amendments to §93.31, concerning youth grievance system and §93.53, concerning appeals to the executive commissioner, without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2910).

The justification for amending the sections is the operation of a more effective and responsive youth grievance system and the availability of accurate and current policies concerning TYC operations and programming.

The amended §93.31 requires that grievances involving health-care issues must be assigned for resolution to an individual with the appropriate clinical expertise and credentials to properly resolve the grievance. The amended rule also establishes that appeals of responses to grievances involving healthcare issues will be routed to the executive commissioner's office for resolution. There is no local-level appeal for such issues.

The amended §93.53 contains a corresponding revision to reflect the change in §93.31 which requires direct appeal to the executive commissioner for appeals involving healthcare grievance resolutions. The amended rule also contains corresponding revisions to reflect the changes in Chapter 95 and Chapter 97, which are also adopted in this issue of the *Texas Register*.

No comments were received regarding adoption of the amended rules.

The amendments are adopted under the Human Resources Code §61.034, which provides TYC with the authority to make rules appropriate to the proper accomplishment of its functions, and §61.0422, which requires the TYC to keep information about each written complaint filed with TYC by a child receiving services from TYC or the child's parent or guardian.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 95. BEHAVIOR MANAGEMENT AND YOUTH DISCIPLINE

The Texas Youth Commission (TYC) adopts the repeal of §95.1 (concerning discipline system overview), §95.3 (concerning rules of conduct), §95.7 (concerning reclassification consequence), §95.9 (concerning parole revocation consequence), §95.11 (concerning disciplinary consequences), §95.13 (concerning on-site disciplinary consequences), §95.15 (concerning parole minor disciplinary consequences), §95.16 (concerning primary intervention program), §95.17 (concerning behavior management program), §95.21 (concerning aggression management program), §95.51 (concerning level I hearing procedure), §95.55 (concerning level II hearing procedure), §95.57 (concerning level III hearing procedure), §95.59 (concerning level IV hearing procedure), and §95.71 (concerning mental health status review hearing procedures) without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2915).

The justification for repealing the rules is the availability of accurate and up-to-date information concerning TYC programming and operations.

The repeal of §95.1 and §95.3 allows for significantly revised rules to be published in their place. The revised rules are adopted as new rules in this issue of the *Texas Register*.

The repeal of §95.7 reflects that TYC no longer reclassifies youth as a disciplinary consequence. Youth may be reclassified as result of changes in any number of individual factors, but not directly as a consequence for violating facility rules.

The repeal of §95.9 and §95.15 allows for content relating to disciplinary consequences for youth on parole to be moved to new §95.4, which is adopted in this issue of the *Texas Register*.

The repeal of §95.11 and §95.13 allows for content relating to disciplinary consequences for youth in residential facilities to be moved to new §95.3, which is adopted in this issue of the *Texas Register*.

The repeal of §§95.16, 95.17, and 95.21 reflects that TYC no longer operates these programs at its facilities.

The repeal of §§95.51, 95.55, 95.57, and 95.71 allows for significantly revised rules to be published in their place. The revised rules are adopted as new rules in this issue of the *Texas Register*.

The repeal of §95.59 will allow for content relating to detention review hearings to be moved to new §95.59 and new §95.61, which are adopted in this issue of the *Texas Register*.

No comments were received regarding adoption of the repealed rules.

SUBCHAPTER A. BEHAVIOR MANAGEMENT

37 TAC §§95.1, 95.3, 95.7, 95.9, 95.11, 95.13, 95.15 - 95.17, 95.21

The repeals are adopted under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. DUE PROCESS HEARINGS PROCEDURES

37 TAC §§95.51, 95.55, 95.57, 95.59, 95.71

The repeals are adopted under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 95. BEHAVIOR MANAGEMENT AND YOUTH DISCIPLINE

The Texas Youth Commission (TYC) adopts new §95.1 (concerning behavior management system overview), §95.2 (concerning youth privilege system), §95.4 (concerning rules and consequences for youth on parole), §95.20 (concerning cooling off period for youth out of control), §95.57 (concerning level III hearing procedure), §95.59 (concerning detention for youth with pending charges), §95.61 (detention for youth pending level I or II hearings), and §95.71 (concerning mental health status review hearings), without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2916).

The Texas Youth Commission (TYC) also adopts new §95.3 (concerning rules and consequences for residential facilities), §95.17 (concerning Redirect program), §95.50 (concerning definitions for due process hearings), §95.51 (concerning level I hearing procedure), and §95.55 (concerning level II hearing

procedure), with changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2916).

Changes to the proposed text of §95.3 consist of clarification that the requirement to provide youth with a copy of an incident report applies any time an incident report is written for a rule violation, not just for major rule violations.

Changes to the proposed text of §95.17 include clarification to show that a Manifestation Determination Review does not need to occur before the administrator approves the request to hold a Level II hearing. However, the review must be conducted before the youth is admitted to the Redirect program. Additional changes to the proposed text are outlined below, as described in the responses to public comments received.

Changes to the proposed text of §95.50 consist of correcting minor typographical errors in paragraph (6)(B) and paragraph (9).

Changes to the proposed text of §95.51 include clarification to show that in cases where a youth on parole has pending adult charges for a felony offense, TYC can defer a revocation hearing only if there is a written request from the local authorities to do so. Minor typographical errors were also corrected.

Changes to the proposed text of §95.55 include clarification that the requirement to hold an accelerated Level II hearing for youth being held in the security unit only applies in cases where the youth is being held due to potential interference with a pending hearing. Additional minor changes were made to correct references to certain TYC staff titles.

The justification for the new rules is the establishment of a more effective system for managing youth behavior, as well as the availability of accurate and up-to-date information concerning TYC programming and operations.

New §95.1 establishes the framework for TYC's new behavior management system. The system places increased emphasis on incentives for positive behavior and non-disciplinary interventions to manage youth misbehavior.

New §95.2 establishes a rating system for youth behavior and a privilege system that provides positive reinforcement for complying with behavioral objectives.

New §95.3 defines major and minor rule violations for youth in residential facilities, the possible consequences for rule violations, and the required level of due process.

New §95.4 defines rule violations for youth on parole, the possible consequences for rule violations, and the required level of due process.

New §95.17 establishes the Redirect program as a means of delivering intensive interventions in a structured environment for youth who have engaged in certain serious rule violations.

New §95.20 republishes the content of §97.35 under a new section number. §97.35 is repealed in this issue of the *Texas Register*.

New §95.50 consolidates definitions used throughout the subchapter pertaining to due process hearings into one rule.

New §95.51 establishes the requirements of Level I due hearings, which are the highest level of due process available to TYC youth.

New §95.55 establishes the requirements of Level II due process hearings.

New §95.57 contains establishes the requirements of Level III due process hearings.

New §95.59 establishes the requirements for detaining youth in TYC security units and holding detention review hearings while criminal or delinquent charges are pending or when awaiting a court hearing or trial.

New §95.61 establishes the requirements for detaining youth in TYC security units or community detention facilities and holding detention review hearings when a Level I or II hearing is scheduled.

New §95.71 establishes the requirements for conducting a Level II hearing for the purpose of admission or extension in the Corsicana Stabilization Unit.

Comments regarding adoption of several of the rules were received from Advocacy Incorporated and Texas Appleseed. The comments are summarized below, along with the commission's responses.

§95.17.

Comment: Program eligibility currently includes "sexual misconduct." This is too inclusive, since the Re-Direct Program is meant to address aggressive behavior and the definition of "sexual misconduct" included in proposed §95.3(i)(21) includes behavior that is not aggressive. We propose excluding proposed §95.3(i)(21)(D)(exposure) and (E)(masturbation) in addition to §95.3(g)(21)(C)(kissing) from the eligibility criteria.

Response: While many of the Redirect-eligible rule violations listed in the rule are related to aggressive behavior, the stated purpose of the program is to address certain "serious" rule violations. Conduct such as masturbating in an open and obvious way or exposing oneself knowing the act is likely to be observed by another person could subject other youth and staff to sexual harassment. These are serious rule violations that may warrant temporary placement in a restricted setting that provides for more intensive treatment interventions. No changes were made to the proposed text as a result of the comment.

Comment: The proposed rule should be amended to require that the manifestation determination review be held by the youth's Admission, Review, and Dismissal (ARD) committee.

Response: The definition provided in subsection (c)(5) states that the manifestation determination review is conducted by the youth's ARD committee. No changes were made to the proposed text as a result of the comment.

Comment: The proposed rule allows a parent to consent to the placement of youth in the Redirect program even if the ARD committee determines that the conduct was a manifestation of the youth's disability. Parental consent to a disciplinary placement, when the youth's conduct is determined to be a manifestation of the youth's disability, is not allowed under the Individuals with Disabilities Act (IDEA). TYC is confusing placement with a behavioral intervention plan under IDEA. Under IDEA, the ARD committee could offer the student the positive behavioral supports offered in the Redirect program, but could not change the student's placement by moving them to the special unit designated for the Redirect Program.

Response: Subsection (f)(1)(B) of the proposed rule text provides that when the conduct is determined to be a manifestation

of the youth's disability, placement in the Redirect program with parental approval is allowable only when the change in placement is a part of the youth's behavioral intervention plan. No changes were made to the proposed text as a result of the comment.

Comment: The proposed rule states that a manifestation determination review is not required if the rule violation includes possession of a weapon or the infliction of serious bodily injury. This does not comply with IDEA. The ARD committee is still required to conduct a manifestation determination. However, if the ARD committee finds the conduct is a manifestation of the youth's disability, the youth may be placed in an alternative educational setting for up to 45 days.

Response: TYC agrees with the comment. Subsection (f) of the adopted rule text has been amended to require a manifestation determination review for all youth receiving special education services. The amended text will also reflect that in such cases, a youth may be placed in the Redirect program regardless of whether the ARD committee finds that the conduct is a manifestation of a disability.

Comment: Subsection (h) should be amended to require weekly meetings with a psychologist.

Response: TYC agrees with the recommendation. New subsection (h)(12) has been added to the adopted text which requires a psychologist to conduct weekly mental health status exams.

Comment: The rule should describe the additional program requirements for each step of Redirect. This very important component of the program - increasing level of counseling and time spent out of their cells - distinguishes the Redirect Program from the Behavior Management Program.

Response: The steps of the program referred to in the comment are intended to serve as guidelines to implement provisions of the rule. These steps provide greater detail concerning levels of counseling, time out of room, and other reintegration activities. The youth's individual treatment plan may adjust the number of steps and durations/locations of programming activities based on the youth's current behavior and progress. Because these activities are to a large degree individualized, they are not appropriate for codification by rule. However, the program activities generally associated with each step will be documented in management procedures which will be publicly available. No changes were made to the proposed text as a result of the comment.

Comment: The rule should require that the multi-disciplinary team conduct a review of the youth's written, individual plan each time the youth is referred to security. The multi-disciplinary team should consider whether the youth's repeated referrals to security are related to a disability, and whether the youth would be better served in a specialized treatment program that will address the youth's disability.

Response: As established under 37 TAC §97.51, levels of need for specialized treatment programs are generally assessed by psychologists. The Redirect Program requires weekly meetings with a psychologist. The program also requires a psychologist to serve on the youth's multi-disciplinary team, which meets at least weekly to discuss the youth's progress or lack thereof. As provided in the adopted rule text, the psychologist will have ample information concerning the youth to determine whether a re-assessment for placement in a specialized treatment program is

warranted. No changes were made to the proposed text as a result of the comment.

Comment: A new criterion for release should be added reflecting that a youth should be considered inappropriate for the Redirect Program if the youth has been referred to security three times during a stay in Redirect.

Response: TYC disagrees that repeated referrals to the Security Program would indicate the Redirect Program is an inappropriate placement. The dangerous or disruptive behaviors that result in placement in Redirect may continue for a time, and must be appropriately managed without adversely affecting other youth in the program. Often, security referrals do not result in admission to the Security Program, and may serve as an opportunity for a youth to gain control of his/her behavior. Instituting an arbitrary limit on the number of security referrals which would constitute grounds for release from the Redirect Program could result in youth intentionally committing rule violations for the sole purpose of release from the program. No changes were made to the proposed text as a result of the comment.

Comment: There should be a cap on the number of times (no more than twice in a 12 month period, except with central office review and approval) a youth can be admitted into the Redirect Program.

Response: As part of its management procedures for implementing this rule, TYC includes a similar restriction. These procedures require that prior to placing a youth in the Redirect Program for the third time at any one facility, the facility must provide justification to and receive approval from the regional director. No changes were made to the proposed text as a result of the comment.

Comment: This section should include a timeframe for appeal. Appeal should be expedited. It should be completed no later than the youth's first seven days in the Redirect program.

Response: While TYC agrees that such appeals should be expedited, appeals of placement in the Redirect program are addressed in a separate rule, 37 TAC §95.53, which provides a 30-day response timeframe for all appeals to the executive commissioner. However, TYC maintains internal management processes for prioritizing all appeals to the executive commissioner. Generally, appeals where a youth's confinement is at issue (such as community detention, extensions in the Security Program, etc.) are given the highest priority. No changes were made to the proposed text as a result of the comment.

Comment: A youth's parent or guardian should be notified within 24 hours after referral to the Redirect program, rather than 24 hours after the due process hearing. Early notification is necessary, particularly for youth receiving special education because their parents must be given an opportunity to participate in the ARD.

Response: Notification to the parent/guardian of an admission to the Redirect program is in addition to earlier notifications required under ARD committee procedures and due process hearing procedures. Procedures for conducting ARD committee meetings and due process hearings are not appropriate for inclusion in this rule. No changes were made to the proposed text as a result of the comment.

§§95.51, 95.55, and 95.57.

Comment: The rules should include provisions for whether or not youth were provided accommodations for their disabilities

prior to the level I, II, III hearings and whether or not the alleged violation was a result of the youth's disability.

Response: While TYC agrees that certain administrative actions require a formal determination of whether a youth's disability was appropriately accommodated and whether the youth's misbehavior was caused by a disability, TYC does not agree that these due process hearing rules are the appropriate placement for such provisions. The nature of the pending administrative action determines whether or not a review of a youth's disability and accommodations is legally required. TYC publishes separate rules that describe specific administrative actions and the post-hearing process for implementing these actions. It is in these rules that any legally required reviews of a youth's disability should be addressed. Though TYC does not agree that the due process rules should contain the recommended provisions, it should be noted that during any of these hearings, youth are entitled to present any defenses and information related to extenuating circumstances. This allows for any matters related to a youth's disability to be presented when the youth (or advocate or attorney) believes such is relevant to the alleged rule violation, even if the recommended review is not legally required. No changes were made to the proposed text as a result of the comment.

SUBCHAPTER A. BEHAVIOR MANAGEMENT

37 TAC §§95.1 - 95.4, 95.17, 95.20

The new rules are adopted under Human Resources Code §61.045, which assigns TYC the responsibility for the welfare, custody, and rehabilitation of the children in a school, facility, or program operated or funded by TYC, and §61.075, which provides TYC with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public. The new rules are also adopted under Human Resources Code §61.076, which provides TYC with the authority to require a committed child to participate in moral, academic, vocational, physical, and correctional training and activities, and to require the modes of life and conduct that seem best adapted to fit the child for return to full liberty without danger to the public.

§95.3. *Rules and Consequences for Residential Facilities.*

(a) Purpose. The purpose of this rule is to establish the actions that constitute violations of the rules of conduct youth will be expected to follow while in residential facilities. Violations of the rules may result in disciplinary consequences that are proportional to the severity and extent of the violation. Appropriate due process must be followed before imposing consequences.

(b) Applicability. This rule applies to youth assigned to a residential facility.

(c) Definitions. The following terms, as used in this rule, have the following meanings.

(1) Bodily Injury--physical pain, illness, or impairment of physical condition. Fleeting pain or minor discomfort does not constitute bodily injury.

(2) Multi-Disciplinary Team--has the meaning assigned by §85.1 of this title.

(3) Residential Facility--includes both high and medium restriction residential placements.

(4) Attempting to Commit--engaging in conduct that amounts to more than mere planning, but failing to commit the intended rule violation.

(d) General Provisions.

(1) Rules in this policy may be restated or otherwise adapted to accommodate a particular program to help clarify expected behavior in that program. All adapted or restated rules shall remain consistent with the general rules of conduct.

(2) The rules of conduct must be posted in a visible area accessible to youth in each facility and program.

(3) Repeated violations of any rule of conduct may result in more serious disciplinary consequences.

(4) Youth may be issued more than one disciplinary consequence for a rule violation proven in a Level II or III due process hearing held in accordance with §95.55 or §95.57 of this title, respectively.

(5) Major rule violations require the completion of a formal incident report.

(6) A youth's disciplinary record shall consist only of rule violations that are proven through a Level I or II due process hearing in accordance with §95.51 or §95.55 of this title, respectively.

(7) Within 24 hours after a report of a major rule violation or a minor rule violation resulting in a security referral, a case worker, program specialist, or other appropriate non-involved staff member will review the incident and assess whether to request a Level II due process hearing in order to pursue major consequences and/or placement of the violation on the youth's disciplinary record. The facility administrator or designee will determine whether or not to hold a Level II due process hearing. When a youth is found to be in possession of prohibited money as defined in this rule, a Level II due process hearing is required to seize the money. Seized money will be placed in the student benefit fund in accordance with §95.55 of this title.

(8) Except as noted in paragraph (9) of this subsection, minor rule violations will be documented on the appropriate activity log. A formal incident report is not required.

(9) A minor rule violation that escalates to the point that the current program/activity cannot continue due to the disruption, or that poses a substantial risk to personal safety or facility security, must be documented on a formal incident report. In high restriction facilities, this type of minor rule violation will also include a referral to the security unit.

(10) Any time a formal incident report is prepared for an alleged rule violation, a copy of the incident report must be given to the youth within 24 hours after the alleged violation.

(11) Although certain rule violations may not result in immediate disciplinary consequences, a rule violation proven through a Level II due process hearing may be considered upon expiration of the youth's minimum length of stay in determining whether a youth is in need of additional rehabilitation.

(12) Each multi-disciplinary team will review all privilege suspensions for youth on its caseload at least once per week. The multi-disciplinary team may:

(A) lessen the duration of the suspension or allow the youth to accrue certain privileges for use after the period of suspension is complete as an incentive to display positive behavior; or

(B) extend (one time only) or modify an on-site privilege suspension issued by direct care staff if warranted by the youth's behavior.

(e) Consequences for High Restriction Facilities.

(1) Major Disciplinary Consequences.

(A) Major Suspension of Privileges--a youth has all privileges suspended for 30 calendar days from the date of the hearing. This consequence may be issued only for minor rule violations resulting in a referral to the security unit or major rule violations, and only if the rule violation is proven through a Level II due process hearing in accordance with §95.55 of this title.

(B) Loss of Transition Eligibility--a youth who has not completed the minimum length of stay will serve an additional month in high restriction facilities prior to becoming eligible for transition to a medium restriction facility under §85.45 of this title. This consequence may only be issued if it is proven through a Level II due process hearing that the youth committed:

(i) assault causing bodily injury to youth or staff, as defined in subsection (i)(3) - (4) of this section; or

(ii) sexual misconduct as defined in subsection (i)(21)(A) - (B) of this section.

(2) Minor Disciplinary Consequences.

(A) Suspension of Privileges by Multi-Disciplinary Team. A youth has one or more privileges removed for up to 14 calendar days from the date of the multi-disciplinary team meeting, or has his/her privileges adjusted to those associated with a lower stage until the next scheduled meeting. This consequence may be issued for major or minor rule violations. In order to issue this consequence, the multi-disciplinary team must:

(i) meet with the youth to discuss the youth's behavior and potential consequences;

(ii) consider any on-site suspension of privileges already imposed for the behavior; and

(iii) document the discussion of the youth's conduct and consequence imposed.

(B) On-Site Suspension of Privileges. A youth has one specific privilege removed for up to seven calendar days from the date of the violation or all privileges removed for up to three calendar days. This consequence may be issued by a staff member with direct supervisory responsibility for the youth after witnessing a major or minor rule violation. This consequence should be issued only after non-disciplinary interventions have been attempted. The staff member must document the conduct and consequence and discuss the consequence and the reasons for it with the youth.

(f) Consequences for Medium Restriction Facilities.

(1) Major Consequences.

(A) Disciplinary Transfer--a youth assigned to a medium restriction facility is transferred to a high restriction facility. Disciplinary transfer may be issued only for major rule violations that are proven through a Level II due process hearing in accordance with §95.55 of this title. This consequence does not apply to youth who are on parole status and who are currently assigned to a medium restriction facility.

(B) Major Suspension of Privileges--a youth has all privileges suspended for 30 calendar days from the date of the hearing.

This consequence may be issued only for major rule violations that are proven through a Level II due process hearing.

(2) Minor Consequences. Minor disciplinary consequences include but are not limited to consequences described herein. Minor consequences may only be imposed following a Level III due process hearing held in accordance with §95.57 of this title.

(A) Privilege Suspension--a suspension of one or more privileges for no more than 14 calendar days.

(B) Community Service Hours--disciplinary assignment of up to 40 hours in an approved community service assignment.

(C) Trust Fund Restriction--youth is restricted from accessing his/her accrued personal funds for up to seven calendar days.

(D) Facility Restriction--youth is restricted for up to 48 hours from participating in any activity outside the assigned placement other than the approved constructive activities.

(g) Review and Appeal of Consequences.

(1) All minor disciplinary consequences issued by staff other than the youth's multi-disciplinary team will be reviewed for policy compliance by the youth's assigned case worker or dorm supervisor within one workday of issuance. All minor consequences issued by the youth's multi-disciplinary team will be reviewed for policy compliance and consistency by the facility administrator or designee.

(2) The facility administrator or designee:

(A) must review any minor consequence issued for longer than 24 hours within 24 hours after issuance of the consequence; and

(B) may overturn or modify any privilege suspension determined to be excessive or not validly related to the nature or seriousness of the conduct.

(3) Youth may appeal major disciplinary consequences by filing an appeal in accordance with §95.51 or §95.55 of this title.

(h) Placement Disposition Options. In accordance with §95.17 of this title, youth in high restriction facilities may be placed in the Redirect program when the youth is found to have engaged in certain major rule violations. Placement in the Redirect program is not a disciplinary consequence.

(i) Major Rule Violations. It is a violation to knowingly violate, attempt to violate, or help someone else violate any of the following:

(1) Assault--Unauthorized Physical Contact with another Youth (No Injury)--making unauthorized physical contact with another youth that does not result in bodily injury, such as, but not limited to, pushing, poking, and grabbing.

(2) Assault--Unauthorized Physical Contact with Staff (No Injury)--intentionally making unauthorized physical contact with a staff member, contract employee, or volunteer that does not result in bodily injury, such as, but not limited to, pushing, poking, and grabbing.

(3) Assault Causing Bodily Injury to Another Youth--intentionally and knowingly or recklessly engaging in conduct that causes another youth to suffer bodily injury.

(4) Assault Causing Bodily Injury to Staff--intentionally and knowingly or recklessly engaging in conduct that causes a staff member, contract employee, or volunteer to suffer bodily injury.

(5) Attempted Escape--committing an act that amounts to more than mere planning but that fails to effect an escape.

(6) Chunking Bodily Fluids--causing a person to contact the blood, seminal fluid, vaginal fluid, saliva, urine, and/or feces of another with the intent to harass, alarm, or annoy another person.

(7) Distribution of Prohibited Substances--distributing or selling any prohibited substances or items.

(8) Escape--leaving a high or medium restriction residential placement without permission or failing to return from an authorized leave.

(9) Extortion or Blackmail--demanding or receiving favors, money, actions, or anything of value from another in return for protection against others, to avoid bodily harm, or in exchange for not reporting a violation.

(10) Fighting Not Resulting in Bodily Injury--engaging in a mutually instigated physical altercation with another person or persons that does not result in bodily injury.

(11) Fighting that Results in Bodily Injury--engaging in a mutually instigated physical altercation with another person or persons that results in bodily injury.

(12) Fleeing Apprehension--running from or refusing to come to staff when called and such act results in disruption of facility operations.

(13) Two or More Failures to Comply with Written Reasonable Request (for Youth in Medium Restriction Residential Placement)--failing on two or more occasions to comply with a written reasonable request of staff. If the expectation is daily or weekly, the two failures to comply must be within a 30-day period. If the expectation is monthly, the two failures to comply must be within a 90-day period.

(14) Misuse of Medication--using medication provided to the juvenile by authorized personnel in a manner inconsistent with specific instructions for use, including removing the medication from the dispensing area.

(15) Participating in a Major Disruption of Facility Operations--intentionally participating with two (2) or more persons in conduct that poses a threat to persons or property and substantially disrupts the performance of facility operations or programs.

(16) Possession of Prohibited Items--possessing the following prohibited items:

- (A) cellular telephone;
- (B) matches or lighters;
- (C) jewelry, unless allowed by facility rules;
- (D) money in excess of the amount or in a form not permitted by facility rules (see §95.55 of this title for procedures concerning seizure of such money);
- (E) pornography;
- (F) items which have been fashioned to produce tattoos or body piercing;
- (G) cleaning products when the youth is not using them for a legitimate purpose; or
- (H) other items that are being used inappropriately in a way that poses a danger to persons or property or threatens facility security.

(17) Possession of a Weapon--possessing a weapon or item(s) which has been made or adapted for use as a weapon.

(18) Possession or Use of Prohibited Substances and Paraphernalia--possessing or using any unauthorized substance, including controlled substances or intoxicants (including alcohol and tobacco), medications not prescribed for the juvenile by authorized medical or dental staff, tobacco products, similar intoxicants, or related paraphernalia such as that used to deliver or make any prohibited substance.

(19) Refusing a Drug Screen--refusing to take a drug screen when requested to do so by staff or tampering with or contaminating the urine sample provided for a drug screen. (Note: If the youth says he/she cannot provide a sample, the youth must be given water to drink and two hours to provide the sample.)

(20) Refusing a Search--refusing to submit to an authorized search of person or area.

(21) Sexual Misconduct--intentionally and knowingly engaging in any of the following:

- (A) causing contact, including penetration (however slight), between the penis and the vagina or anus; between the mouth and penis, vagina or anus; or penetration (however slight) of the anal or genital opening of another person by hand, finger or other object;
- (B) touching or fondling, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person;
- (C) kissing for sexual stimulation;
- (D) exposing the anus, buttocks, breasts, or genitals to another or exposing oneself knowing the act is likely to be observed by another person;
- (E) masturbating in an open and obvious way, whether or not the genitals are exposed.

(22) Stealing--intentionally taking property from another without permission and the property has an estimated value of \$100 or more.

(23) Tampering with Safety Equipment--intentionally tampering with, damaging, or blocking any device used for safety or security of the facility. This includes, but is not limited to, any locking device or item that provides security access or clearance, any fire alarm or fire suppression system or device, video camera, radio, telephone (when the tampering prevents it from being used as necessary for safety and/or security), handcuffs, or shackles.

(24) Tattooing/Body Piercing--engaging in tattooing or body piercing of self or others. Tattooing is defined as making a mark on the body by inserting pigment into the skin.

(25) Threatening another with a Weapon--intentionally and knowingly threatening another with a weapon. A weapon is something that is capable of inflicting bodily injury in the manner in which it is being used.

(26) Vandalism--intentionally causing \$100 or more in damage to state or personal property of another.

(27) Violation of any Law--violating a Texas or federal law that is not already defined as a major or minor rule violation.

(j) Minor Rule Violations. It is a violation to knowingly violate, attempt to violate, or help someone else violate any of the following:

(1) Breaching Group Confidentiality--disclosing or discussing information provided in a group session to another person not present in that group session.

(2) Disruption of Program--engaging in behavior that requires intervention to the extent that the current program of the youth and/or others is disrupted. This includes, but is not limited to:

(A) disrupting a scheduled activity;

(B) being loud or disruptive without staff permission;

(C) using profanity or engaging in disrespectful behavior toward staff or peers; or

(D) refusing to participate in a scheduled activity or abide by program rules.

(3) Failure to Abide by Dress Code--failing to follow the rules of dress and appearance as provided by facility rules.

(4) Failure to do Proper Housekeeping--failing to complete the daily chores of cleaning the living environment to the expected standard.

(5) Gang Activity--participating in an activity or behavior that promotes the interests of a gang or possessing or exhibiting anything related to or signifying a gang, such as, but not limited to, gang-related literature, symbols, or signs.

(6) Gambling or Possession of Gambling Paraphernalia--engaging in a bet or wager with another person or possessing paraphernalia that may be used for gambling.

(7) Horseplay--engaging in wrestling, roughhousing, or playful interaction with another person or persons that does not rise to the level of an assault. Horseplay does not result in any party getting upset or causing injury to another.

(8) Improper Use of Telephone/Mail/Computer--using the mail, a computer, or the telephone system for communication that is prohibited by facility rules, at a time prohibited by facility rules, or to inappropriately access information.

(9) Lending/Borrowing/Trading Items--lending or giving to another youth, borrowing from another youth, or trading with another youth possessions, including food items, without permission from staff.

(10) Lying/Falsifying Documentation/Cheating--lying or withholding information from staff, falsifying a document, and/or cheating on an assignment or test.

(11) Possession of an Unauthorized Item--possessing an item the youth is not authorized to have (possession of which is not a major rule violation), including items not listed on the youth's personal property inventory. This does not include personal letters or photographs.

(12) Refusal to Follow Staff Verbal Instructions--deliberately failing to comply with a specific reasonable verbal instruction made by a staff member.

(13) Stealing--intentionally taking property from another without permission and the property has an estimated value of less than \$100.

(14) Threatening Others--making verbal or physical threats toward another person or persons.

(15) Undesignated Area--being in any area without the appropriate permission to be in that area.

(16) Vandalism--intentionally causing less than \$100 in damage to state or personal property.

§95.17. *Redirect Program.*

(a) Purpose. The Redirect program functions as a means for delivering intensive interventions in a structured environment for youth who have engaged in certain serious rule violations. This rule sets forth eligibility criteria, program completion requirements, and services to be provided to youth in the program.

(b) Applicability. This rule applies only to high restriction facilities operated by the Texas Youth Commission.

(c) Explanation of Terms Used.

(1) Admission, Review, and Dismissal (ARD) Committee--a committee that makes decisions on educational matters relating to special education-eligible youth.

(2) Behavior Intervention Plan--a written plan developed as a result of a functional behavioral assessment to address specific behavioral concerns that are impeding a youth's learning or the learning of others. The plan is part of a youth's individualized education program and includes positive behavioral interventions and supports and other strategies to address the behavior.

(3) Functional Behavioral Assessment--a process for observing and collecting data on specific behaviors that are impeding a youth's progress and determining the function the behavior plays for a youth (e.g., seeking attention, peer acceptance, avoidance, etc.).

(4) Individualized Education Program (IEP)--the program of special education and related services developed by a youth's ARD committee.

(5) Manifestation Determination Review--a review conducted by a youth's ARD committee when a decision has been made to change a special education-eligible youth's school placement due to a violation of the code of conduct. The committee determines whether a youth's conduct is a manifestation of the youth's disability and whether the youth's IEP was fully implemented.

(6) Multi-Disciplinary Team--a team which assesses youth progress through the steps of the Redirect program. At a minimum, the team must include representatives from the following departments: psychology, case management, education, and dorm supervision.

(d) Program Eligibility. A youth who engages in one or more of the following rule violations as defined in §95.3 of this title meets criteria for placement in the Redirect program:

(1) assault or fighting resulting in bodily injury;

(2) assault--unauthorized physical contact with staff (no injury);

(3) escape or attempted escape;

(4) vandalism (major rule violation only);

(5) sexual misconduct (excluding kissing);

(6) possessing or threatening others with a weapon or item which could be used as a weapon;

(7) chunking bodily fluids; or

(8) tampering with safety equipment.

(e) Request to Pursue Placement in Redirect Program. The facility administrator or designee may approve a request to pursue placement of a youth in the Redirect program only when it is determined that:

(1) the youth poses a continuing risk for the admitting behavior(s);

(2) less restrictive methods of documented intervention have been attempted when appropriate; and

(3) the mental status of the youth has been assessed by a psychologist and there are no therapeutic contraindications for admission to the Redirect program.

(f) Additional Considerations for Youth Receiving Special Education Services.

(1) If the youth is receiving special education services, a manifestation determination review must be held to determine if the youth's conduct was a direct result of the failure to implement the youth's IEP, and if the conduct was caused by or had a direct and substantial relationship to the youth's disability. Except as noted in paragraph (2) of this subsection, the results of the manifestation determination review will have the following impact on admission to the Redirect program:

(A) if the determination is that there was a failure to implement the youth's IEP, the youth may not be placed in the Redirect program; and

(B) if the determination is that the conduct was caused by or had a direct and substantial relationship to the youth's disability, the youth may not be placed in the Redirect program unless the youth's parent/guardian consents to such placement as part of the youth's behavior intervention plan.

(2) Regardless of the results of a manifestation determination review, a youth may be admitted to the Redirect program if the rule violation includes possession of a weapon or the infliction of serious bodily injury upon another person.

(A) For purposes of paragraph (2) of this subsection only, weapon means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, not including a pocket knife with a blade of less than 2 1/2 inches in length.

(B) For purposes of paragraph (2) of this subsection only, serious bodily injury means bodily injury which involves:

(i) a substantial risk of death;

(ii) extreme physical pain;

(iii) protracted and obvious disfigurement; or

(iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(g) Admission Process. A Level II due process hearing must be held in accordance with §95.55 of this title. Unless there are considerations concerning special education services which would make the youth ineligible for placement in the Redirect program, as described in subsection (f) of this section, the youth may be admitted to the Redirect program if there is a finding of true with no extenuating circumstances that the youth committed a rule violation listed in subsection (d) of this section.

(h) Program Requirements.

(1) The Redirect program is administered in a special unit designated for such purpose. If the Redirect program is administered in a designated location within the security unit, the doors will remain unlocked except during sleeping hours or emergencies.

(2) A youth's placement in the Redirect program shall not exceed 42 calendar days.

(3) At least 5 1/2 hours of education services will be provided on scheduled academic days.

(4) If a youth is currently receiving special education services, staff must ensure that the youth continues to receive educational services that will enable the youth to meet the goals of the youth's IEP.

(5) An individual plan must be developed for each youth. The plan must be written in a language clearly understood by the youth. The plan must:

(A) address the specific target behavior or cluster of behaviors that led to admission to the Redirect program, taking into consideration the psychologist's recommendations to address the motivation for the behavior;

(B) involve strategies for intervention and prevention of the target behavior through skills development;

(C) include a component which addresses transition to the general campus population; and

(D) provide clearly written objectives for release from the Redirect program.

(6) Staff must explain the individual plan to the youth. Youth will be provided an opportunity to sign the plan in acknowledgment.

(7) The individual plan and youth's progress with regard to target behaviors and skills development is reviewed and evaluated at least once every seven days by the multi-disciplinary team.

(8) Youth shall be gradually reintegrated into campus programming as soon as he/she demonstrates comprehension of the goals established in the treatment plan.

(9) Youth who are placed in the Redirect program are afforded living conditions and privileges approximating those available to the general campus population.

(10) Youth will receive a minimum of 30 minutes of counseling per day with the assigned case manager or designee.

(11) Youth will receive weekly mental health status exams by a psychologist.

(12) Youth will be provided with at least one hour of large muscle exercise seven days per week.

(i) Temporary Removal from the Redirect Program. Youth may be referred to the security program while currently assigned to the Redirect program if the youth meets criteria as set forth in §97.40 of this title. Any time spent in the security program is counted toward the 42-day maximum in the Redirect program.

(j) Criteria for Release from Redirect Program. A youth shall be released from the Redirect program and returned to his/her assigned dorm upon the earliest of the following events:

(1) a determination by the multi-disciplinary team that the youth has met goals set forth in his/her individual plan; or

(2) a determination by the superintendent or designee that the program has failed to be implemented as designed for reasons other than non-compliance of the youth; or

(3) a decision by the superintendent or designee to return the youth to his/her assigned dorm or transfer to an alternative placement based on:

(A) population concerns in the Redirect program; or

(B) a recommendation by a mental health professional due to the youth's mental health condition; or

(C) other administrative concerns.

(4) a decision by the receiving superintendent or designee not to continue the Redirect program after an administrative transfer of the youth to another high restriction facility while assigned to the Redirect program; or

(5) the youth has completed 42 calendar days in the program.

(k) Right to Appeal. The youth shall be notified in writing of his/her right to appeal placement in the Redirect program in accordance with §93.53 of this title. The pendency of an appeal shall not preclude implementation of the decision.

(l) Family Notification. In accordance with §87.5 of this title, a youth's parents or guardian shall be notified within 24 hours after the due process hearing of the youth's admission to the Redirect program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 3, 2009.

TRD-200903275

Cheryl K. Townsend

Executive Commissioner

Texas Youth Commission

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Proposal publication date: May 15, 2009

For further information, please call: (512) 424-6014



SUBCHAPTER B. DUE PROCESS HEARINGS PROCEDURES

37 TAC §§95.50, 95.51, 95.55, 95.57, 95.59, 95.61, 95.71

The new rules are adopted under Human Resources Code §61.075, which provides TYC with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public. The new rules are also adopted under §61.076, which provides TYC with the responsibility to provide any medical or psychiatric treatment that is necessary.

§95.50. Definitions--Due Process Hearings.

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

(1) Administrative Law Judge--an attorney employed by the Texas Youth Commission (TYC) who is responsible for determining if there is a preponderance of evidence presented at a Level I hearing to prove the youth committed an alleged rule violation and if the requested dispositions will be imposed.

(2) Advocate--a TYC employee, contract employee, or enrolled volunteer assigned to represent the youth at a Level II, III, or IV hearing who is trained by TYC to serve as an advocate.

(3) Community Detention--temporary placement of a youth in a community detention facility pending a Level I or II due process hearing.

(4) Community Detention Facilities--local detention facilities designed for either juveniles or adults, including jails.

(5) Detention Hearing--the court hearing required by the Texas Family Code to determine whether conditions exist to justify the detention of a juvenile.

(6) Extenuating Circumstances--facts that do not rise to the level of a legal defense but that do provide a reasonable explanation for the youth's behavior. Examples of such facts include, but are not limited to, acts in which:

(A) the only property involved in the offense was of minimal value and the youth returned it undamaged to its owner;

(B) the only bodily injury intended or inflicted by the youth consisted of brief or minor discomfort;

(C) the youth's conduct was an impulsive response to perceived provocation and posed no threat to persons or property; or

(D) the youth was persuaded to participate in the offense by a parent or other authority figure.

(7) Hearing Manager--an impartial person who will determine if there is a preponderance of evidence presented at a Level II hearing to prove the youth committed an alleged rule violation and if the requested dispositions will be imposed.

(8) High Restriction Facility--has the meaning assigned under §85.27 of this title.

(9) Institution Detention--temporary placement of youth in a high-restriction facility security unit as described in §95.59 and §95.61 of this title.

(10) Institutional Status--the status assigned to all youth who have not yet been released on parole or who have had their parole status revoked through a Level I due process hearing. Youth may be on institutional status while assigned to high or medium restriction placements.

(11) Level I Hearing--an administrative due process hearing used within TYC to determine if a youth's parole will be revoked.

(12) Level II Hearing--an administrative due process hearing used within TYC to determine if major disciplinary consequences will be imposed, contraband money will be deposited in the student benefit fund, whether a youth will be admitted to or extended in a psychiatric stabilization unit, and whether to move a youth to a higher restriction level for non-disciplinary reasons.

(13) Level III Hearing--an administrative due process hearing used within TYC to determine whether a youth will be admitted to or extended in the security unit, and whether minor disciplinary consequences will be issued to a youth in a medium restriction program or on parole.

(14) Level IV Hearing (Detention Review Hearing)--an administrative due process hearing used within TYC, held in lieu of a detention hearing for the same purpose.

(15) Non-Disciplinary Reasons--reasons not related to a violation of rules that transfer to a higher restriction assignment is necessary, including but not limited to:

(A) the youth has treatment, educational, medical, or other needs that cannot be met at the current placement; or

(B) there is no longer a home placement available for the youth.

(16) Parole Status--the status assigned to all youth who have been released on parole. Youth may be on parole status while assigned to a medium restriction placement or an approved home or home substitute.

(17) Preponderance of the evidence--a standard of proof meaning the greater weight and degree of credible evidence admitted at the hearing, e.g., whether the credible evidence makes it more likely than not that a particular proposition is true.

(18) Staff representative--the person assigned to assemble and present the allegation(s) and evidence at a hearing.

(19) Referring Staff--the TYC employee or contract employee who requests a youth's detention.

§95.51. Level I Hearing Procedure.

(a) Purpose. The purpose of this rule is to establish a due process procedure to be followed when seeking to revoke the parole status of a youth as a disciplinary consequence for behavior that presents an unacceptable risk to the safety of persons and property. Parole revocation is considered a major consequence.

(b) Definitions. Definitions pertaining to this rule are under §95.50 of this title.

(c) General Provisions.

(1) A Level I hearing is required in order to revoke a youth's parole status. Parole may be revoked if it is found that a youth has committed a law violation or a parole rule violation as established in §95.4 of this title and:

(A) revocation is determined to be in the best interest of the youth or community; and/or

(B) the youth is found to be in need of further rehabilitation at a Texas Youth Commission (TYC) or contract placement.

(2) The following information will be considered to determine if parole revocation is appropriate:

(A) the severity of the offense(s) found true at the hearing;

(B) any behavioral or adjustment issues while on parole and the steps taken by the staff representative to address those issues;

(C) whether or not the youth's conduct while on parole presents a threat to persons or property;

(D) reasons the youth is in need of services offered at a TYC or contract placement;

(E) whether appropriate community-based alternatives have been exhausted;

(F) any impact statement(s) written by the victim(s);

(G) any participation in constructive activity; and

(H) any extenuating circumstances.

(3) A Level I hearing on any allegation(s) shall be scheduled as soon as possible but no later than seven days from the date of the alleged offense, excluding weekends and holidays, except when:

(A) staff documents that it was impossible, impractical, or inappropriate to have scheduled the hearing sooner; or

(B) local authorities make a written request that TYC defer an allegation to their jurisdiction for prosecution; or

(C) TYC staff elects to defer a Level I hearing on all allegations of misconduct due to criminal allegation(s) pending or filed as adult charges, except that if the pending charge is a first degree felony offense, there must be a written request as described in subparagraph (B) of this paragraph in order to defer the allegation.

(4) TYC may re-issue a directive and request a Level I hearing concerning new or previously deferred allegation(s) if later circumstances make such action appropriate.

(5) The hearing shall be conducted by an administrative law judge appointed by the TYC hearings section chief. The administrative law judge shall be impartial.

(6) The hearing shall be conducted in two parts: fact-finding and disposition.

(A) The purpose of the factfinding shall be to establish whether there is a preponderance of evidence to prove the youth engaged in the alleged misconduct.

(B) The purpose of the disposition shall be to determine whether revocation of parole is appropriate under the circumstances.

(7) A youth whose parole is revoked will be assigned a minimum length of stay in accordance with §85.25 of this title.

(8) The person requesting a hearing shall appoint a staff representative to appear at the hearing and present the reasons for the proposed action. The staff representative shall also be responsible for making relevant information available to all parties to the hearing.

(9) The youth shall be assisted by legal counsel at the hearing. The agency will arrange counsel for indigent youth.

(10) If the youth's parole is not revoked, lesser disciplinary consequences may be imposed for any rule violation(s) proved at the hearing.

(11) If the youth is on parole from another state and is being supervised by TYC under agreement with the other state, a parole revocation hearing may be held by TYC and the youth may be returned to the sending state. Such a hearing is coordinated by the TYC interstate compact administrator and general counsel.

(12) If a TYC parolee commits an offense in another state, the return of such youth is coordinated by the TYC interstate compact administrator and the general counsel. A parole revocation hearing is coordinated by and held at the request of the assigned staff representative.

(13) The hearing shall be held in the community where the alleged rule violation occurred unless the administrative law judge directs that it be held in another locale.

(14) All necessary parties shall be present at the hearing site unless it is conducted pursuant to §95.53 of this title.

(15) The staff representative shall provide the youth with written notice of the date and time of the hearing not less than three (3) working days before the scheduled date. This notice shall include:

(A) the reason(s) for the hearing;

(B) the proposed action to be taken; and

(C) the youth's rights in connection with the hearing.

(16) If the youth is under 18 years of age, the staff representative shall make reasonable efforts to inform the youth's parent(s) of the date, time, place of, and reasons for the hearing not less than three (3) working days prior to the scheduled hearing date. If the youth is 18 years of age or older, such notice shall be provided only with the youth's authorization to release information.

(17) The staff representative shall provide counsel for the youth with written notice of the date, time, place of, and reasons for the hearing not less than three (3) working days prior to the scheduled hearing date. The notice to counsel shall also include:

(A) the name, address, and telephone number of the staff representative and the administrative law judge;

(B) a list of all witnesses the staff representative intends to call;

(C) an indication of the expected testimony of each witness;

(D) copies of any statements made by the youth;

(E) copies of any statements, affidavits, reports, or other documentation relied upon as grounds for the proposed action; and

(F) copies of any reports or summaries which will be relied upon at disposition.

(18) The staff representative shall provide counsel for the youth with reasonable access to all information held by TYC concerning the youth. Counsel for the youth will respect the confidential nature of such information and will comply with reasonable requests to withhold sensitive information from the youth or the youth's family.

(19) As soon as possible following receipt of the notice of hearing, and no later than the commencement of the hearing, counsel shall inform the staff representative of any witnesses he/she wishes to call on behalf of the youth. The staff representative will, if necessary and possible, assist counsel in contacting those witnesses and securing their attendance at the hearing.

(20) The staff representative will ensure that all witnesses are given written notice of the time, date, and location of the hearing at least three days in advance of the hearing.

(21) At the staff representative's request, the TYC chief administrative law judge may sign and issue a subpoena to compel the attendance of a necessary witness at the hearing or the production of books, records, papers, or other objects. A person who testifies falsely, fails to appear when subpoenaed, or fails or refuses to produce material under the subpoena is subject to the same orders and penalties to which a person taking those actions before a court is subject.

(22) The administrative law judge may, upon his/her own motion or the good cause motion of any party, recess or continue the hearing for such periods of time as may be necessary to ensure an informed fact finding.

(23) Prior to the hearing, the administrative law judge may review copies of any documentation previously provided to counsel except for those documents which relate solely to dispositional criteria. The administrative law judge shall review such information only if the hearing proceeds to disposition.

(24) A victim who appears as a witness should be provided a waiting area which eliminates or minimizes contact between the victim and the youth, the youth's family, or witnesses on behalf of the youth.

(25) To protect the confidential nature of the hearing, persons other than the youth, counsel for the youth, the staff representative, and the youth's parent(s) may be excluded from the hearing room at the discretion of the administrative law judge, however:

(A) observers may be permitted with the consent of the youth;

(B) any person except the youth's counsel or the staff representative may be excluded from the hearing room if his/her presence causes undue disruption or delay of the hearing. The reason(s) for the youth's exclusion shall be stated on the record.

(26) The hearing shall be recorded and the administrative law judge shall retain copies of all documents admitted into evidence. Physical evidence may be retained at the discretion of the administrative law judge; if not retained, an adequate description of the item(s) shall be entered in the record by oral stipulation.

(27) Factual issues not in dispute may be stipulated to by the staff representative and counsel for the youth. Such stipulations shall be made on the record of the hearing.

(28) A youth accused of misconduct shall be given the opportunity to respond "true" or "not true" to each allegation of such conduct prior to any evidence being heard on such allegations.

(A) The youth shall have a right to respond "not true" to any such allegation and require that proof of the allegation be presented at the hearing.

(B) A response of "true" to any such allegation shall be sufficient to establish each and every element necessary to proof of that allegation without the presentation of any other evidence.

(29) The administrative law judge may administer an oath to all witnesses to testify truthfully.

(30) With the exception of the youth and the staff representative, any person designated as a witness may be excluded from the hearing room during the testimony of other witnesses and may be instructed to refrain from discussing his/her testimony with anyone until all the witnesses have been dismissed.

(31) The administrative law judge may question each witness at his/her discretion. Counsel for the youth and the staff representative shall be given an opportunity to question each witness.

(32) The administrative law judge may permit a witness to testify outside the presence of the youth if such appears reasonable and necessary to secure the testimony of the witness. If the youth is excluded from the hearing room during testimony, counsel for the youth shall be present during the testimony and shall have the opportunity to review the testimony with the youth before questioning the witness.

(33) The youth shall not be called as a witness unless, after consulting with counsel, the youth waives his/her right to remain silent on the record.

(A) The youth's failure to testify shall not create a presumption against him/her.

(B) A youth who waives his/her right to remain silent may only be questioned concerning those issues addressed by the youth's testimony.

(34) All factual issues shall be determined by a preponderance of the evidence.

(35) The administrative law judge shall determine the admissibility of evidence. Irrelevant, immaterial, or unduly repetitious evidence will be excluded.

(36) The rules of evidence will generally be applicable to the fact-finding portion of the hearing. Unless specifically precluded by statute, evidence not admissible under those rules may be admitted if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Criminal exclusionary rules are not applicable in TYC hearings.

(37) A judgment from a court indicating a youth has pled guilty or true to an offense and has not received deferred adjudication is sufficient to prove the youth committed the offense.

(38) Copies of due process hearing documents need not be certified if such document(s) are part of the youth's record(s) or have been received through Interstate Compact. Such documents are considered reliable and admissible for all purposes.

(39) Accomplice testimony is sufficient to prove an allegation if it is corroborated by other evidence tending to connect the youth with the alleged violation. The corroboration is not sufficient if it merely shows the commission of the violation alleged. If two accomplices testify, the testimony of each can serve to corroborate the other.

(40) Legally recognized privileges of relationships will be given effect.

(41) Evidence otherwise admissible may be received in written form if so doing will expedite the hearing and will not significantly prejudice the rights or interests of the youth. This includes but is not limited to use of affidavits admitted to show the following:

- (A) ownership and lack of consent;
- (B) identity of signature on instrument and lack of consent of complaining witness in a forgery case;
- (C) lack of permission to leave designated placement;
- (D) chain of custody;
- (E) identity of substance found in a urine sample;
- (F) identity of a controlled substance found in possession of a youth.

(42) A youth's written statement concerning his/her possible involvement in illegal activities is admissible if it is signed by the youth and accompanied by evidence indicating that the youth made the statement voluntarily after being advised of:

- (A) the right to remain silent;
- (B) the possible consequences of giving the statement;
- (C) the right to consult with an attorney prior to giving the statement; and
- (D) the right to have an attorney provided if the youth is indigent.

(43) A youth's non-recorded oral statement is admissible if it:

- (A) relates facts which are found to be true and which tend to establish the youth's guilt; or
- (B) was *res gestae* of the conduct that is the subject of the hearing or of the arrest; or
- (C) even if it does not meet subparagraph (A) or (B) of this paragraph, the statement does not stem from law enforcement or agency staff questioning of youth; or
- (D) even if the statement does stem from law enforcement or agency staff questioning, the statement is voluntary and bears on the youth's credibility as a witness.

(44) A youth's recorded oral statement (tape recorded, videotaped, or otherwise electronically recorded) concerning his/her possible involvement in illegal activities is admissible if it is accompanied by evidence on the recording that it was given after the youth was advised of the rights in paragraph (42) of this subsection. All voices on the recording must be identified and the recording must be accurate and unaltered. A transcript of the recordings is not sufficient.

(45) A youth's admissible out of hearing/court statement admitting he/she committed an offense is sufficient to prove the of-

fense only if it is corroborated by other evidence that the offense was committed.

(46) The administrative law judge shall rule immediately on any motions or objections made in the course of the hearing. All such motions, objections, and rulings shall be included in the administrative law judge's written report.

(47) Following the presentation of all evidence pertaining to the factual issues raised at the hearing, the administrative law judge shall announce his/her findings as to those issues.

(A) The administrative law judge may find that the evidence suffices to prove conduct other than that originally alleged and enter the appropriate finding in the record if the original allegation gave sufficient notice of the conduct proved.

(B) Irrespective of the evidence, the administrative law judge may not find a criminal offense more serious than that originally alleged unless the original allegation has been amended on the record and after notice to counsel for the youth.

(C) If the administrative law judge finds any allegation to be true, the hearing shall proceed to disposition; if not, the hearing shall be adjourned with no change in the youth's status.

(48) The administrative law judge may receive additional evidence for purposes of disposition. The evidence received at disposition may be in the form of testimony from witnesses submitted during fact-finding or at disposition, as well as written reports offered by youth, staff, professionals, counselors, or consultants. Relevant documents contained in the youth's record may be admitted and considered. All written documents offered shall be provided to the parties three days prior to the hearing unless otherwise waived. Hearsay evidence is admissible in disposition.

(49) Parole will be revoked if the administrative law judge determines that revocation is in the youth's and/or the community's best interest and/or the youth is in need of further rehabilitation at a TYC facility.

(50) If parole is revoked, the youth will be assigned a minimum length of stay in accordance with §85.25 of this title, based on the most serious offense found true at the hearing. Such minimum length of stay may be reduced in accordance with §85.25 of this title.

(51) If, despite a finding of extenuating circumstances relevant to the proven offense, the administrative law judge finds revocation is appropriate under the circumstances, the youth's parole will be revoked but the assigned minimum length of stay will be reduced.

(52) Following announcement of the decision as to disposition, the administrative law judge shall inform the youth of the right to appeal any or all findings and decisions made at the hearing.

(53) Immediately following the close of the hearing, the administrative law judge shall give the youth a copy of the hearing report form.

(54) A notice of appeal shall not suspend implementation of the administrative law judge's decision(s), which shall be effective when announced at the hearing.

(55) As soon as possible following the conclusion of the hearing, the administrative law judge shall prepare a written report which shall include:

- (A) a summary of the evidence presented;
- (B) findings of fact, including the reliability of the evidence and the credibility of the witnesses, and the reasons for those findings;

- (C) conclusions of law;
- (D) an explanation of the dispositional decision; and
- (E) rulings made on motions and objections and the reasons therefore.

(56) Copies of the administrative law judge's report shall be provided to counsel for the youth and the staff representative.

(57) An edited copy of the administrative law judge's report is given to the youth.

§95.55. Level II Hearing Procedure.

(a) Purpose. The purpose of this rule is to establish a procedure to be followed when the second highest level of due process is afforded a youth. Rule violations proven through a Level II Hearing will be part of the youth's disciplinary record.

(b) Definitions. Definitions pertaining to this rule are under §95.50 of this title.

(c) Applicability. The Level II hearing procedure is appropriate due process in the following instances:

(1) imposing a major disciplinary consequence in accordance with §95.3 of this title;

(2) placing a youth in the Redirect program in accordance with §95.17 of this title;

(3) placement of a youth on parole assigned to a home or home substitute in a medium restriction facility for non-disciplinary reasons;

(4) placement of a youth whose initial assignment was to a medium restriction facility in a high restriction facility for non-disciplinary reasons;

(5) with a few exceptions in procedure as identified in §95.71 of this title:

(A) admission to the Corsicana Stabilization Unit; and

(B) extension of time to treat a psychiatric disorder in connection with a Corsicana Stabilization Unit placement (as appropriate); or

(6) deposit of contraband money into the student benefit fund found in possession of a youth while in a residential program.

(d) Criteria.

(1) To impose a major consequence, place a youth in the Redirect program, or place contraband money in the student benefit fund, the hearing manager must find:

(A) the youth committed an eligible rule violation; and

(B) there are no extenuating circumstances.

(2) To transfer a youth to a higher restriction level for non-disciplinary reasons; the hearing manager must find there are no less restrictive placements appropriate and available for the youth.

(3) For criteria for admission to or extension in the Corsicana Stabilization Unit, see §87.67 of this title.

(e) Procedure.

(1) When a youth in a residential facility is alleged to have committed a major rule violation or a minor rule violation requiring a security referral, an investigation into that violation must be started within 24 hours of the alleged offense and completed within 24 hours of the time started. A decision on whether or not to pursue a Level II Hearing must be made within 24 hours of the completion of the in-

vestigation. Any delay in these timelines must be justified with documentation of circumstances that made it impossible, impractical, or inappropriate to meet them. The investigation must be conducted by the staff member other than the one reporting the alleged violation.

(2) The appropriate staff person shall request permission to schedule a hearing from the facility administrator, parole supervisor, quality assurance administrator, or their designees.

(3) For hearings regarding rule violations or contraband money, the hearing shall be conducted as soon as practical but not later than seven days, excluding weekends and holidays, after the alleged violation was committed or the money was found. A delay of more than seven days in holding the hearing must be justified by documentation of circumstances which made it impossible, impractical, or inappropriate to schedule the hearing earlier.

(4) For hearings regarding a non-disciplinary transfer, the youth may waive the hearing in writing and agree to the transfer. If the youth does not waive the hearing, the hearing must be held prior to the transfer. If good cause compels a pre-hearing transfer, the hearing shall be held within three calendar days after the transfer.

(5) If the youth is being held in a security unit due to potential interference with a pending a Level II hearing, the hearing shall be conducted within five calendar days from the date of admission to detention. A delay of more than five days in holding the hearing must be justified by documentation of circumstances which made it impossible, impractical, or inappropriate to schedule the hearing earlier.

(6) Failure to document circumstances making it impossible, impractical, or inappropriate to timely investigate and hold the hearing may result in a dismissal or reversal of the decision of the hearing manager.

(7) The appropriate facility administrator, parole supervisor, quality assurance administrator, or their designees will appoint a hearing manager and staff representative.

(8) The hearing manager shall be a Texas Youth Commission (TYC) staff member who is trained to function as a hearing manager.

(A) The hearing manager shall not be a person who:

(i) witnessed any part of the alleged violation of which the youth is accused; or

(ii) made a decision to place the youth in the security unit or in a detention program pending the hearing.

(B) If the youth is currently assigned to an institution, the hearing manager shall be someone not directly responsible for supervising the youth.

(C) If the youth is currently assigned to a halfway house, the hearing manager shall not be a member of the halfway house staff.

(D) If the youth is currently assigned to a contract program, the hearing manager shall not be the TYC quality assurance specialist assigned to that youth.

(E) If the youth is currently assigned to his/her home, the hearing manager shall not be the parole officer assigned to the youth's case or the quality assurance specialist who works directly with the youth's supervising officer.

(9) The staff representative shall be responsible for assembling all evidence and giving all notices required for the hearing as well as presenting all evidence at the hearing.

(10) The youth shall be given written notice of his/her rights not less than 24 hours prior to the hearing. The youth's rights are:

- (A) the right to remain silent;
- (B) the right to be assisted by an advocate at the hearing;
- (C) the right to confront and cross-examine adverse witnesses who testify at the hearing;
- (D) the right to contest adverse evidence admitted at the hearing;
- (E) the right to call readily available witnesses and present readily available evidence on his/her own behalf at the hearing; and
- (F) the right to appeal the results of the hearing. The youth's right to appeal cannot be waived.

(11) The youth shall be assisted by a TYC employee, contract employee, or volunteer who has been trained to serve as an advocate. The youth shall be given the opportunity to choose an advocate from those trained. The youth's choice shall be honored unless there is a showing of unavailability for any reason. If the youth makes no choice, or the first choice is unavailable for any reason, the hearing manager shall appoint the advocate. In cases where the youth is not proficient in the English language, the appointed advocate shall be proficient in English as well as the primary language of the youth or an interpreter shall be used.

(12) The youth and the youth's advocate shall be given written notice of the reasons for calling the hearing, the proposed action to be taken, and the evidence to be relied upon not less than 24 hours prior to the hearing. After receipt of the written notice and consultation with the advocate, the youth may waive the 24-hour notice period by agreeing, in writing, to an earlier hearing time.

(13) All youth in TYC facilities and secure contract placements shall be given the hearing packet (all written materials relied upon and a list of witnesses) at least 24 hours in advance of the hearing. The paperwork may be taken away from the youth if the youth is misusing the papers in any way.

(14) If the youth is less than 18 years of age, reasonable efforts shall be made to inform the youth's parent(s) of the time and place of the hearing not less than 24 hours prior to the hearing. If the youth is 18 years of age or older, such notice shall be provided only with the youth's authorization to release information.

(15) Hearings to impose major consequences, to place a youth in the Redirect program, or to place contraband money in the student benefit fund shall consist of two parts: factfinding and disposition, and shall be held where the youth resides unless the hearing manager determines that some other site is more appropriate. During the fact-finding portion of the hearing, only evidence concerning the alleged misconduct may be considered; the youth's prior behavior shall not be considered unless disposition is reached.

(16) Hearings regarding non-disciplinary transfers shall consist of fact finding to determine if the transfer is necessary because there are no less restrictive placement options appropriate and available for the youth.

(17) The hearing shall be recorded and the recording shall be the official record of the hearing. The recording and the hearing packet shall be preserved for six months following the hearing.

(18) The youth shall be present during the hearing unless the youth waives his/her presence or his/her behavior prevents the hearing from proceeding in an orderly and expeditious fashion.

(A) A voluntary waiver of the youth's presence shall be in writing and signed by the youth and his/her advocate. If the youth does not sign the waiver for any reason, his/her presence is not waived.

(B) If the youth waives his/her presence, the hearing may be conducted by teleconference.

(C) If a youth is excluded for behavioral reasons, or to secure the testimony of a witness, those reasons shall be documented in the hearing record. The advocate shall be present during the testimony and shall have the opportunity to question the witness.

(D) A true plea cannot be entered on behalf of a youth who has waived his/her presence at the hearing.

(19) A victim who appears as a witness should be provided a waiting area where he/she is not likely to come in contact with the youth except during the hearing.

(20) Witnesses will take an oath prior to testifying. Witnesses may testify by telephone or videoconference if in-person testimony is impractical or unfeasible. If testimony is provided by phone, persons required to be present at the hearing must be able to simultaneously hear the testimony.

(21) The hearing manager, staff representative, and advocate may question each witness in turn. The staff representative and advocate may offer summation statements.

(22) To protect the confidential nature of the hearing, persons other than the youth, the youth's advocate, staff representative, and the youth's parent(s) may be excluded from the hearing room at the discretion of the hearing manager; however, any person except the staff representative or the youth's advocate may be excluded from the hearing room if his/her presence causes undue disruption or delay of the hearing. The reason(s) for the exclusions are stated on the record.

(23) With the exception of the youth or staff representative, any person designated as a witness may be excluded from the hearing room during the testimony of other witnesses and may be instructed to refrain from discussing his/her testimony with anyone until all the witnesses have been dismissed.

(24) The hearing manager may permit a witness to testify outside the presence of the youth if such appears reasonable and necessary to secure the testimony of the witness. If the youth is excluded from the hearing room during testimony, the advocate for the youth shall be present during the testimony and shall have the opportunity to review the testimony with the youth before questioning the witness.

(25) The youth shall not be called as a witness unless, after consulting with the advocate, he/she waives his/her right to remain silent on the record. Neither the hearing manager nor the staff representative may question the youth unless he/she waives the right to remain silent.

(A) The youth's failure to testify shall not create a presumption against him/her.

(B) A youth who waives the right to remain silent may only be questioned concerning those issues addressed by his/her testimony.

(26) All credible evidence may be considered, irrespective of its form.

(27) The standard of proof for all disputed issues is a preponderance of the evidence.

(28) The hearing manager may recess or continue the hearing for such period(s) of time as may be necessary to ensure an informed and accurate fact-finding or to secure evidence the hearing manager determines may be relevant.

(29) The hearing manager will announce his/her findings of fact.

(30) If there is a finding of true, the hearing manager shall proceed to disposition and provide the youth an opportunity to present extenuating circumstances, with the exception that extenuating circumstances are not applicable to admissions or extensions of stay in the Corsicana Stabilization Unit or to transfers for non-disciplinary reasons. If no extenuating circumstances are found, the hearing manager shall order the disposition recommended by the staff representative.

(A) A hearing manager's decision that a youth will be transferred is final subject to approval by the appropriate administrator.

(B) A hearing manager's decision that a youth will be issued a consequence to be served at the youth's current placement is final subject to an appeal by the youth.

(C) If extenuating circumstances are found incident to the rule violation(s) proved at a Level II hearing, the youth shall not be assigned the requested dispositions or any other major consequences. However, the true finding will remain in the youth's record and can be considered by the youth's treatment team or parole officer in determining appropriate actions to address the youth's behavior. If extenuating circumstances are found incident to a youth's possession of prohibited money, the hearing manager determines the appropriate way to dispose of the money.

(31) The hearing manager shall prepare a report of his/her findings, which includes grounds for the hearing, evidence relied upon, and the decision.

(32) The youth is informed of his/her right to appeal to the agency's chief administrative officer at the close of the hearing. The pendency of an appeal shall not preclude implementation of the hearing manager's dispositional decision.

(33) A copy of the hearing report is given to the youth immediately following the close of the hearing.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 3, 2009.

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Cheryl K. Townsend

Executive Commissioner

Texas Youth Commission

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Proposal publication date: May 15, 2009

For further information, please call: (512) 424-6014



CHAPTER 97. SECURITY AND CONTROL

SUBCHAPTER A. SECURITY AND CONTROL

The Texas Youth Commission (TYC) adopts the repeal of §97.23, concerning Use of Force, and new §97.23, concerning Use of Force.

The repeal is adopted without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2936).

The new rule is adopted with changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2936). Changes to the proposed text include new subsection (m)(2), which prohibits the use of restraints on a youth while she is in labor, during delivery, or recovering from delivery unless approved by the executive commissioner or designee. The new subsection is added to comply with HB 3653, enacted by the 81st Legislature, which takes effect on September 1, 2009. Additional changes to the proposed text are outlined below, as described in the responses to public comments received.

The justification for the new rule is increased safety for youth and staff through clearer direction on when force should be used, what type of force is authorized, as well as increased controls on uses of force.

The new rule will make several key revisions to existing use of force policy. Concerning the use of Oleoresin Capsicum (OC) or pepper spray, the new rule requires prior authorization on a case by case basis from the facility administrator or designee unless immediate use is believed necessary to prevent serious injury or loss of life. The rule also clarifies the previous rule by establishing that only one supervisory Juvenile Correctional Officer, the shift supervisor, may carry OC spray. OC spray will no longer be authorized for use in preventing "fleeing apprehension", which is defined as youth being in an unapproved area and resisting apprehension by staff.

The new rule also makes significant changes to other areas regarding the use of force. A medical assessment will be provided following every use of manual restraint, not just those resulting in suspected injuries. Force will no longer be authorized to remove youth from a disruptive situation, unless the disruption causes danger to the youth or others. Use of riot shields during planned team restraints will be restricted to instances where the youth possesses a weapon or otherwise presents a significant risk of harm to staff. Additionally, requirements for use of restraints for medical or mental health purposes have been removed from this rule and published in a standalone rule, §91.98, which is also adopted in this issue of the *Texas Register*.

Comments regarding the rule were received from Advocacy Incorporated and Texas Appleseed. The comments are summarized below, along with TYC's responses.

Comment: Subsection (b)(2) should include: "Force shall only be used when other less restrictive interventions such as verbal de-escalation, use of problem solving groups, and behavior techniques have failed or are not practicable under the circumstances existing at the time."

Response: The proposed rule text states that "non-physical interventions are preferred, and must be used to the extent practical to manage youth behavior", "TYC authorizes its staff to use reasonable force as a last resort to maintain safety and order", and "alternatives to force must be used whenever practical to assist a youth in maintaining or regaining self-control". No changes were made to the proposed text as a result of the comment.

Comment: A subsection should be added stating, "Staff shall use only the least amount and type of reasonable force necessary to maintain order and safety."

Response: The proposed rule allows for the use of reasonable force. Reasonable force is defined in the rule as "the least amount of force which a trained staff, in like circumstances, would reasonably believe to be necessary to maintain order and safety as authorized under this rule." No changes were made to the proposed text as a result of the comment.

Comment: The rule should identify approved restraint equipment rather than allowing the executive commissioner or his/her designee to define acceptable restraint equipment.

Response: Codifying an exhaustive list of approved restraint equipment in the rule would not allow agency management the flexibility to appropriately respond to changes in vendors, product lines, agency needs, or other factors. A listing of approved restraint devices will be published in the management procedures developed to implement this rule. These procedures will be publicly available through TYC's website. No changes were made to the proposed text as a result of this comment.

Comment: Definitions for the following terms should be added: Imminent Self-Harm (A reasonable belief that a youth is about to harm him or herself unless immediate action is taken); Passive Resistance (Passive refusal to comply with an order from staff, or behavior reflecting only emotional venting or verbal aggression with no physical movement toward a target. Examples include refusing to turn around to be handcuffed, verbal refusal to comply with an order, non-verbal, non-aggressive refusal to comply with an order that does not pose a risk of imminent harm to youth, self, or third parties); Serious Bodily Injury (incorporate the definition used in §95.17); and Substantial Property Damage.

Response: The rule includes a definition for imminent harm, which includes self harm. A separate definition is not necessary. The term "passive resistance" is not used in the rule, therefore no definition is needed. TYC agrees that definitions for serious bodily injury and substantial property damage are needed. Subsection (e) of the adopted text has been amended to include these definitions.

Comment: The subsection addressing non-physical interventions should include a reference to proposed §95.20, allowing for a "cooling off period" during which youth are allowed to regain control of their behavior.

Response: The proposed text of the rule contains a reference to 37 TAC §95.20 in subsection (d). TYC believes this is the appropriate location for a reference to this rule. While the cooling off period itself is a non-physical intervention, referral to a room for a cooling off period may require a physical intervention, such as a physical escort. Cooling off periods are intended as an alternative to referral to the security unit, not necessarily as an alternative to the use of physical interventions, although they may serve that purpose as well. No changes were made to the proposed text as a result of this comment.

Comment: Subsection (h)(11) should be deleted, and a subsection with the following provisions should be added in its place: (1) the physician's order for restraint must include a time limit, special considerations, type of restraint, who will implement the restraint, and monitoring instruction; (2) the physician ordering the restraint must consult with the youth's treating physician and document the contact; (3) special procedures must be included for cases when an emergency situation requires the frequency of assessment or other aspects of care and treatment to differ from the provisions of this subchapter; (4) the monitoring plan must be documented in the youth's medical record; and (5) dentists may not order restraint.

Response: TYC has published a separate rule, 37 TAC §91.98, that establishes policy and procedural requirements for the application of medical restraints. Much of what is recommended in the comment is already provided for in §91.98. No changes were made to the proposed text of §97.23 as a result of the comment. However, TYC agrees some elements of the suggested section should be added to the adopted text of §91.98. Subsection (f)(3)(B) of §91.98 will be amended to require the provider's order to include any special instructions to be carried out by staff implementing the restraint. New subsection (f)(4)(I) will be added to §91.98 to require consultation between the treating provider and the provider ordering restraint when these are not the same individual. Special procedures should not be added to address times when required monitoring frequencies cannot be met. The expectation is for the policy to be followed at all times.

Comment: All of subsection (j)(2) should be deleted from the rule. Staff should only use the methods of manual restraint listed in (j)(1). When staff are allowed to deviate from approved, agency-trained restraint techniques, there is a greater likelihood of injury to youth or staff.

Response: Agency-trained methods of restraint cannot address every potential scenario that may arise. While the expectation is that staff members will use agency-trained methods whenever possible, staff members should have the ability to protect themselves and others by using any non-prohibited technique. No changes were made to the proposed text as a result of this comment.

Comment: The list of prohibited techniques should include any technique that restricts youth's circulation.

Response: The proposed rule text prohibits the use of pressure point compliance techniques and requires that restraint equipment must not interfere with circulation. No changes were made to the proposed text as a result of this comment.

Comment: Subsection (k)(1)(E) should also include "causing pain to restrict a youth's movement."

Response: The proposed rule text prohibits the use of pain compliance or joint manipulation techniques as a means of restraint. No changes were made to the proposed text as a result of the comment.

Comment: Subsection (l)(1)(B) should read "prevent substantial property damage," rather than "prevent significant property damage." This is consistent with the language in the subsection (h)(4).

Response: TYC agrees with the recommendation. Subsection (l)(1)(B) has been amended to read "substantial" rather than "significant."

Comment: Subsection (m) should prohibit restraining youth in a prone position. The proposed language conflicts with the language in proposed (k)(1)(A), which prohibits placing the youth in a position that is capable of causing positional asphyxia.

Response: Agency-approved manual restraint techniques allow for staff to momentarily place a youth in a prone position in order to apply mechanical restraints. The prohibition on applying pressure to the youth's back or chest applies to such manual methods of restraint, including when a youth is temporarily restrained in a prone position. The rule includes protections against maintaining the youth in a prone position for extended periods of time. No changes were made to the proposed text as a result of this comment.

Comment: OC spray should not be used if a youth is simply passively resisting an order, unless the youth's failure to comply poses a risk of imminent serious bodily injury to youth, other youth, third parties, or self.

Response: The proposed rule text requires that non-physical interventions and other physical interventions have been attempted and failed or determined to be impractical before OC spray can be used. Nothing in the rule allows for the use of OC spray on a youth who is simply passively resisting an order in any scenario other than those listed in subsection (n)(2)(A). A youth's failure to comply under any of the scenarios presented in subsection (n)(2)(A), regardless of the level of resistance, poses a serious risk which may warrant the use of OC spray to protect youth, staff, and the public. No changes were made to the proposed text as a result of this comment.

Comment: OC spray should not be used on a youth in a mental health treatment program.

Response: TYC has established that OC spray may be used under circumstances set forth in subsection (n)(2)(A). Youth undergo medical examinations to determine whether there is a condition that would contraindicate the use of OC spray. No changes were made to the proposed text as a result of this comment.

Comment: OC spray should not be used on a youth who is in a locked, individual cell unless necessary to prevent loss of life or serious bodily injury.

Response: Under the proposed rule, the criteria for planned team restraints of youth in locked, individual cells are narrower than those for use of OC spray. Of the three situations which allow for such restraints of youth in locked cells, only prevention of self-harm or recovery of a weapon would also potentially allow for use of OC spray. These two scenarios carry the potential to cause loss of life or serious bodily injury. No changes were made to the proposed text as a result of the comment.

37 TAC §97.23

The repeal is adopted under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 3, 2009.

TRD-200903272

Cheryl K. Townsend

Executive Commissioner

Texas Youth Commission

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Proposal publication date: May 15, 2009

For further information, please call: (512) 424-6014



37 TAC §97.23

The new section is adopted under the Human Resources Code, §61.045, which provides the commission with the responsibility for providing for the welfare, custody, and rehabilitation of the children in a school, facility, or program operated or funded by the commission.

§97.23. Use of Force.

(a) Purpose. This rule establishes the procedures for staff intervention when youth behavior threatens safety and order.

(b) General Provisions.

(1) Non-physical interventions are preferred, and must be used to the extent practical to manage youth behavior.

(2) Texas Youth Commission (TYC) authorizes its staff to use reasonable force as a last resort to maintain safety and order. Only staff who are trained in agency-approved techniques are authorized to use force.

(3) The use of force as punishment or for convenience of staff is strictly prohibited.

(4) Approved use of force techniques are those determined by TYC to minimize risk of harm to youth and staff.

(5) Staff shall release youth from manual or mechanical restraint as soon as the purpose for the restraint has been achieved.

(6) If a staff member observes a use of force in violation of policy, he/she shall take action, as practical, to protect the youth from harm.

(7) Staff shall report any violations of this policy as soon as possible, but no later than the end of the current shift.

(8) Violations of this policy may result in disciplinary action up to and including termination of employment.

(9) After any manual restraint or use of oleoresin capsicum (OC) spray, a youth shall be assessed by medical staff as soon as practical. Any injuries shall be documented in the medical record along with an explanation from the youth describing how the injuries occurred. Photographs shall be taken of all injuries.

(10) Only restraint equipment approved by the executive commissioner or his/her designee shall be used in TYC facilities. All restraint equipment shall be used in a manner consistent with its design and intended purpose.

(c) Applicability.

(1) This rule applies to all facilities, offices, and programs operated by or under contract with TYC, unless specifically stated otherwise in the rule.

(2) This rule does not apply to peace officers employed by the TYC Office of Inspector General.

(d) References.

(1) For riot control procedures, see §97.27 of this title.

(2) For procedures and programs designed to allow youth time to regain self-control, see §§95.20, 97.39, and 97.40 of this title.

(3) For criteria and procedures on administering a psychotropic drug in a psychiatric emergency when a youth will not give consent for the administration, see §91.92 of this title.

(4) For procedures relating to youth searches, see §97.9 of this title.

(5) For procedures and restrictions on the use of therapeutic restraints for medical or mental health purposes, see §91.98 of this title.

(e) Definitions.

(1) Handle With Care--an agency-trained physical intervention system.

(2) Imminent Harm--a reasonable belief that harm to persons or property is about to occur, unless immediate action is taken.

(3) Mental Health Professional--an individual who is a Psychiatrist, doctoral level Psychologist, masters level Associate Psychologist, Licensed Professional Counselor, or a Licensed Social Worker with an Advanced Clinical Practitioner (LMSW-ACP) designation.

(4) Positional Asphyxia--the reduction in oxygen in the bloodstream and tissues due to an impairment of a person's respiratory system caused by body positioning or the application of external weight/pressure.

(5) Practical--a reasonable belief that something is capable of being done.

(6) Reasonable Belief--a belief that would be held by a similarly trained staff considering the totality of the circumstances.

(7) Reasonable Force--the least amount of force which a trained staff, in like circumstances, would reasonably believe to be necessary to maintain order and safety as authorized under this rule.

(8) Serious Bodily Injury--an injury that creates a substantial risk of death, serious permanent disfigurement, or extended loss or impairment of the function of any bodily member or organ.

(9) Substantial Property Damage--at least \$500 in damage to state property or another's personal property.

(10) Totality of the Circumstances--facts and circumstances known by the actor at the time of the incident.

(11) Use of Force--physical measures used to direct, compel, or restrain bodily movement of a non-compliant youth.

(f) Non-Physical Interventions. Alternatives to force must be used whenever practical to assist a youth in maintaining or regaining self-control. Staff are prohibited from using profanity or slang based on race, gender, sexual orientation, or ethnicity to manage youth behavior. Staff will be trained in the use of the following non-physical intervention techniques:

(1) Staff presence--this includes mere presence of staff to include non-verbal gestures made with eyes, hands, head or body utilizing proximity, standing, eye contact and/or facial expressions; and/or involving additional staff to intervene.

(2) Verbal de-escalation--this includes verbal prompting, directive statements, and redirecting youth attention and/or behavior.

(3) Use of problem-solving groups.

(g) Physical Interventions. When reasonable force is necessary, staff are authorized to use the following methods:

(1) Physical Escort--touching of the arm, elbow, shoulder or back for the purpose of directing the youth from one location to another.

(2) Mechanical Restraint--use of a mechanical device applied to a youth as a means of restricting a youth's freedom of action.

(3) Manual Restraint--use of hands-on techniques as a means of restricting a youth's freedom of action.

(4) Planned Team Restraint--restraint of a youth who is in a locked or barricaded room by a pre-assembled team.

(5) OC Spray--oleoresin capsicum spray, also known as pepper spray. Oleoresin capsicum is a mixture of essential oil and resin found in nature and derived from any plant of the genus capsicum, such as jalapeño, cayenne, or habanero.

(h) Criteria for Use of Force. Except as otherwise indicated in this rule, reasonable force is authorized under the following circumstances:

(1) Protection of youth from imminent self-harm;

(2) Protection of self from imminent harm;

(3) Protection of other youth or third parties from imminent harm;

(4) Protection of property from imminent, substantial damage;

(5) Prevention of escape or fleeing apprehension;

(6) Movement of a youth referred to the security unit, other temporary isolation room, or alternative classroom;

(7) Movement of a resistant youth within the security unit when the youth's behavior is substantially disruptive and the youth refuses to stop the behavior;

(8) Movement of a resistant youth from a dangerous situation;

(9) To conduct a search of a resistant youth reasonably believed to be in possession of a weapon, an item that can be adapted for use as a weapon, a controlled substance, or other item(s) that breach the security of the facility;

(10) To conduct a search of a resistant youth entering the security unit; or

(11) Administration of medical treatment to a resistant youth when, under the circumstances, failure to administer the treatment could have serious health implications as determined by a physician or mid-level practitioner (such as a nurse practitioner or physician's assistant).

(i) Determining the Intervention or the Reasonable Force to be Used. In determining the type of intervention or the reasonable force to be used, staff must consider whether action needs to be taken immediately or can be delayed until additional staff can organize a team response.

(j) Approved Use of Force Techniques. Use of force techniques that may be used are limited to:

(1) agency-trained:

(A) physical escort;

(B) Handle With Care methods of manual restraint;

(C) mechanical restraints;

(D) OC spray, under certain limited circumstances; and

(2) other non-prohibited methods of manual restraint that under the totality of circumstances existing at the time:

(A) are more practical than the agency-trained Handle With Care methods of restraint, taking into account the youth's and staff's particular vulnerability to harm;

(B) involve a use of force that is measured and progressive to a degree no greater than that reasonably believed necessary to achieve the objective; and

(C) do not unduly risk serious harm or needless pain to the youth or staff.

(k) Prohibited Restraint Techniques.

(1) Prohibited restraint techniques include the following:

(A) restricting respiration in any way, such as applying a chokehold or pressure to a youth's back or chest or placing a youth in a position that is capable of causing positional asphyxia;

(B) using any method that is capable of causing loss of consciousness or harm to the neck;

(C) pinning down with knees to torso, head and/or neck;

(D) slapping, punching, kicking, or hitting;

(E) using pressure point, pain compliance and joint manipulation techniques, other than an approved Handle With Care method for release of a chokehold, bite or hair pull;

(F) modifying restraint equipment or applying any cuffing technique that connects handcuffs behind the back to ankle restraints;

(G) dragging or lifting of the youth by the hair or ear or by any type of mechanical restraints;

(H) lifting a youth's arms behind the back, while in mechanical restraints, in a manner that is capable of causing injury to the shoulder;

(I) using other youth or untrained staff to assist with the restraint;

(J) securing a youth to another youth or to a fixed object, other than to an agency-approved full-body restraint device; or

(K) administering a drug for controlling acute episodic behavior as a means of physical restraint, except when the youth's behavior is attributable to mental illness and the drug is authorized by a licensed physician and administered by a licensed medical professional.

(2) A physical contact that would otherwise be prohibited, under the above paragraph, does not include one that is only accidental and momentary.

(l) Requirements for Planned Team Restraint Situations.

(1) Criteria for Use. Planned team restraint is authorized only to:

(A) stop the youth from engaging in self-harm;

(B) prevent substantial property damage; or

(C) recover a weapon or item that has been adapted for use as a weapon and is capable of causing death or serious bodily injury.

(2) Requirements for Use.

(A) Prior to approval of planned team restraint, the facility administrator or administrative duty officer must personally observe the situation. Only the facility administrator or administrative duty officer may authorize a planned team restraint.

(B) All planned team restraints must be videotaped when practical, including a recording of a verbal description of the youth's conduct and all warnings provided the youth according to the agency approved script.

(C) Only staff trained in planned team restraint may participate in the team that is assembled for the room entry.

(D) The youth must be warned to discontinue the misconduct at least two times after the team is assembled and before the room entry. The team must provide continuous opportunities for compliance during the room entry.

(E) Use of the riot shield during a planned team restraint is limited to cases in which a youth has a weapon or a youth's behavior indicates there is a significant risk of harm to the staff members involved in the restraint.

(m) Requirements for Use of Mechanical Restraints.

(1) Guidelines for Use.

(A) Mechanical restraint equipment must not be secured so tightly as to interfere with circulation or so loosely as to permit chafing of the skin.

(B) When mechanical restraints are employed on a youth in a prone position, the youth is placed on his/her side as soon as practical in order to help ensure adequate respiration and circulation. The youth must be allowed to sit up as soon as his/her behavior is under control.

(C) A mechanical restraint, for other than transportation or riot control, shall be terminated as soon as the purpose for which the youth was restrained under subsection (h) of this section has been achieved, but in any event within 15 minutes, unless an extension is granted. Extensions may be granted by the facility administrator or designee for additional 30-minute intervals, until termination of restraint.

(D) When mechanical restraints are applied, staff shall ensure the youth's safety by checking the youth for adequate respiration and circulation every 15 minutes until termination of restraint. Staff will provide continuous visual supervision and appropriate assistance until the mechanical restraint is terminated.

(E) Mechanical ankle and wrist restraints attached to a waist belt by a lead chain may be used when transporting a youth to a security unit, within a security unit, and from a security unit in order to prevent harm to the youth or others. These restraints may not be attached in a manner that prevents the youth from being able to stand upright. Mechanical restraints may remain on the youth during the duration of the activity, if circumstances warrant such restraints.

(2) Mechanical Restraint Use by TYC Transportation Staff. Mechanical ankle and wrist restraints attached to a waist belt by a lead chain shall be used during secure transportation by designated TYC transportation staff. Exceptions may be made for youth being transported following release on parole from a residential program or when medically necessary.

(3) Mechanical Restraint Use by Other Transporters.

(A) Mechanical ankle and wrist restraints attached to a waist belt by a lead chain shall be used during transportation when a youth is being transported to a high restriction program.

(B) Mechanical ankle and wrist restraints attached to a waist belt by a lead chain may be used when transporting a youth off-campus.

(n) Requirements for Use of OC Spray.

(1) Persons Authorized to Use OC Spray.

(A) OC spray is permitted only in TYC-operated high restriction institutions.

(B) Unless reasonably believed necessary to prevent loss of life or serious bodily injury, authorization to use OC spray must be obtained from the facility administrator, assistant superintendent, or administrative duty officer prior to each use.

(C) The only staff authorized to routinely carry OC spray on-person are the facility administrator, assistant superintendent, administrative duty officer, juvenile correctional officer shift

supervisor (one per shift), director of security, and security personnel whose primary responsibility is to patrol the campus and respond to security-related incidents. Any staff positions in addition to those listed must be authorized in writing by the executive commissioner or his/her designee.

(D) Only staff who have been trained by TYC in the use of OC spray are authorized to use it.

(2) Criteria for Use.

(A) Except as provided in paragraph (2)(B) of this subsection, OC Spray is authorized for use only when non-physical interventions and other physical interventions have failed or are not practical, and it is reasonably believed necessary to:

- (i) quell a riot or major campus disruption;
- (ii) resolve a hostage situation;
- (iii) remove youth from behind a barricade in a riot or self-harm situation;
- (iv) secure an object that is being used as a weapon and that is capable of causing serious bodily injury;
- (v) protect youth, staff, or others from imminent serious bodily injury; or
- (vi) prevention of escape.

(B) Unless reasonably believed necessary to prevent loss of life or serious bodily injury, OC spray is not authorized for use on a youth when a medical provider has diagnosed the youth with a chronic, serious respiratory problem or other serious health condition identified by TYC. (e.g., significant eye problems, known history of severe allergic reaction to OC, or severe dermatological problems).

(3) Guidelines for Use.

(A) OC spray canisters must be carefully controlled at all times.

(B) Any youth affected by OC spray will be decontaminated with cool water as soon as the purpose of the restraint has been achieved.

(C) Immediately following de-contamination from OC spray, medical staff will be contacted to examine and, if necessary, treat and monitor all youth and staff affected by OC spray.

(D) Each individually assigned canister of OC must be weighed at the time it is assigned and after each use.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 3, 2009.

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Cheryl K. Townsend

Executive Commissioner

Texas Youth Commission

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For further information, please call: (512) 424-6014



37 TAC §§97.35 - 97.37, 97.40, 97.41, 97.43

The Texas Youth Commission (TYC) adopts the repeal of §97.35, concerning temporary segregation of youth out-of-control, §97.36, concerning standard security unity program requirements, §97.37, concerning security intake, §97.40, concerning security program, §97.41, concerning community detention, and §97.43, concerning institution detention program without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2939).

The justification for repealing the rules is the availability of accurate and up-to-date information concerning TYC programming and operations.

The repeal of §97.35 allows for the content of this rule to be republished under a new section number, §95.20, which is also adopted in this issue of the *Texas Register*.

The repeal of §97.36 allows for the content of this rule to be republished under a new section number, §97.40, which is also adopted in this issue of the *Texas Register*.

The repeal of §97.37 discontinues the Security Intake program at TYC's secure facilities. Youth will no longer be held in the Security Intake program for up to 24 hours while a determination is made whether or not to admit the youth to the security unit. New §97.40, which is adopted in this issue of the *Texas Register*, will require that this determination be made within one hour (or two if an extension is granted) after a youth is referred to the security unit.

The repeal of §97.40 allows for a significantly revised rule to be published in its place. The revised rule is adopted as a new rule in this issue of the *Texas Register*.

The repeal of §97.41 and §97.43 allows for the content of these rules to be republished under new section numbers, §95.59 and §95.61. The new rules are adopted in this issue of the *Texas Register*.

No comments were received regarding adoption of the proposed repeals.

The repeals are adopted under Human Resources Code §61.034, which provides TYC with the authority to adopt rules appropriate to the proper accomplishment of its functions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cheryl K. Townsend

Executive Commissioner

Texas Youth Commission

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37 TAC §97.40

The Texas Youth Commission (TYC) adopts new §97.40, concerning Security Program, with changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2940). Changes to the proposed text include clarification reflecting that youth may be admitted/extended in the security program if there is a reasonable belief that the youth will inter-

fere with a requested due process hearing. Clarification was also added to show that an extension in the security program must be based on the youth's current behavior. The youth's initial behavior resulting in admission to the security program cannot be used to extend the youth's stay in security. Additional changes to the proposed text are outlined below, as described in the responses to public comments received.

The justification for the new rule is the establishment of enhanced protections against undue extensions in confinement, provision of more direct service delivery to youth in confinement, as well as compliance with nationally recognized best practices and accreditation standards.

The new rule requires that the central office director of residential services approve any extension in the security program resulting in confinement beyond five days. Previous rules required this level of review/approval only after 11 days in confinement. The new rule also specifies that required visits from the clinical, chaplaincy, medical, case management, and administrative departments must take place in the youth's room, or with the youth outside of the room, unless the youth's current behavior prohibits direct contact for safety reasons. The new rule also clarifies that the required hour of large muscle exercise may not be counted toward the daily requirement to provide five and one-half hours of academic services in the security unit unless the youth is currently enrolled in physical education as part of his/her normal academic schedule.

Comments regarding the rule were received from Advocacy Incorporated and Texas Appleseed. The comments are summarized below, along with TYC's responses.

Comment: The admission criteria should explicitly state that youth who are engaging in self-injurious and/or suicidal behavior, or are having an acute psychiatric emergency, should not be placed in security. This section should also explicitly state that youth cannot self-refer to security. If the agency disregards our suggestion that security is not an appropriate placement for youth who are engaging in self-injurious and/or suicidal behavior, or youth who are having an acute psychiatric emergency, this section should be amended to require these youth to be evaluated by a psychiatrist within one hour of placement in security and should receive direct mental health services daily during their stay in security.

Response: TYC has published separate rules containing procedures for managing youth who are experiencing psychiatric emergencies and/or displaying suicidal behavior. TYC is currently in the process of revising these rules as well as the practice of self-referral to the security unit and will take the comment into consideration. No changes were made to the proposed text as a result of the comment.

Comment: Subsection (j) should be consistent with §95.17(h)(3), relating to "education services" for youth in the Redirect program. It should also include the language found in §95.17(h)(4), so that youth who are receiving special education services continue to receive educational services that will enable the youth to meet the goals of the youth's Individualized Education Program (IEP). This would ensure that the needs of special education students will be met while they are placed in security.

Response: TYC agrees with the recommendation and has amended subsection (j)(6)(G) of the adopted text to refer to "education services" rather than "academic services". TYC also agrees that language currently included in §95.17 regarding the provision of special education services in accordance with a

youth's IEP should be added to §97.40. The language has been added to the adopted text as new subsection (j)(6)(H).

The new rule is adopted under Human Resources Code §61.075, which provides TYC with the authority to order a committed child's confinement under conditions it believes best designed for the child's welfare and the interests of the public.

§97.40. Security Program.

(a) Purpose. The Texas Youth Commission (TYC) operates security programs at its high restriction facilities in order to temporarily remove youth who engage in certain dangerous or disruptive behaviors from the general campus population. This rule establishes admission criteria, service delivery requirements, and security provisions, and requirements for due process and administrative review for youth admitted to the security program.

(b) Applicability. This rule applies to TYC-operated high restriction facilities that operate security units.

(c) Definitions. Security Unit--a secure building on the campus of a high restriction TYC facility which contains individual rooms and a central control station. Entry to and exit from the building are controlled exclusively by staff.

(d) General Provisions.

(1) Confinement in the security program shall not be used as punishment or as a convenience for staff.

(2) Youth shall be afforded all basic youth rights, as established in §93.1 of this title, while confined in the security program.

(3) Except as otherwise authorized by the division director over residential services or designee on a case-by-case basis, confinement in the security program shall not exceed five calendar days or a maximum of 120 hours.

(4) The security program shall be operated within the security unit.

(e) Admission Criteria. A youth may be admitted to the security program when there is a reasonable belief the youth has committed a major rule violation or a minor rule violation requiring referral to the security unit, and:

(1) the youth is a serious and continuing escape risk;

(2) the youth is a serious and immediate physical danger to others and staff cannot protect them except by admitting the youth to security program;

(3) confinement is necessary to prevent imminent and substantial damage to property;

(4) confinement is necessary to control behavior that disrupts programming to the extent that the current program cannot continue except by admitting the youth to the security program; or

(5) the youth is likely to interfere with a pending or ongoing investigation or a requested or scheduled due process hearing.

(f) Admission Process.

(1) Within one hour after a youth's arrival at the security unit (or up two hours if an extension is approved by the facility administrator or designee), a staff member will hold a Level III hearing in accordance with §95.57 of this title to determine whether admission criteria have been met. The staff member appointed to conduct the review must not have been involved in the referral to the security program.

(2) If admission criteria are not met, the youth must be returned to the general population immediately.

(3) If admission criteria are met, the youth will be admitted to the security program for up to 24 hours.

(g) Extension Process.

(1) Extension Criteria.

(A) A 24-hour extension may be authorized if the following criteria are met, as established through a Level III hearing conducted in accordance with §95.57 of this title:

(i) based on current behavior, one or more of the admission criteria listed in subsection (e)(1) - (5) of this section continue to be present; or

(ii) there is documented evidence that the youth is not complying with the security program rules of conduct.

(B) No more than four (4) extensions may be authorized by facility staff.

(2) Extensions Beyond Five Days.

(A) The division director over residential services or designee may approve extensions after the 5th day of confinement only when no less restrictive placement is suitable for managing the youth's behavior and:

(i) the youth continues to present an immediate physical danger to others; or

(ii) the youth continues to be likely to interfere with a pending or ongoing investigation or a scheduled hearing.

(B) Each extension is valid for up to 72 hours.

(h) Release to the General Population.

(1) A youth shall be released to the general population upon:

(A) the expiration of the most recently approved period in confinement; or

(B) prior to the expiration of the most recently approved period upon a determination that the youth's behavior no longer warrants confinement in the security unit.

(2) A youth may be released from the security program only by the director of security or a staff member authorized to conduct an admission hearing.

(i) Administrative Reviews and Appeals.

(1) The director of security or designee will review all admission and local extension decisions within one workday. The person reviewing the decision must not have been involved in the decision. If it is determined that admission or extension criteria were not met or appropriate due process was not provided:

(A) the youth will be returned to the general population immediately; and

(B) the youth's record will be corrected to reflect the overturned security admission or extension.

(2) The youth will be notified in writing of his/her right to appeal a security program admission or extension to the facility administrator or designee. Appeals of decisions made by the facility administrator will be decided by the division director over residential services or designee. The youth is notified in writing of the outcome of the appeal.

(j) Security Program Requirements.

(1) Staff shall visually check each youth at least once every 15 minutes and shall document youth activity and location during the check.

(2) Individual doors are locked.

(3) The security program will adhere to a standard schedule approximating that of the general population. The schedule must include at least four hours outside of the locked room for each youth if the youth's behavior permits.

(4) The standard schedule and security program rules of conduct will be posted and reviewed with youth.

(5) Staff from the administrative, clinical, and/or religious departments shall visit each youth at least once each day. A nurse and case manager shall visit each youth at least once each day. Actual entry into the room or removal of the youth from the room for the purpose of discussion or counseling constitutes a visit, unless a youth's behavior prohibits direct contact for safety reasons.

(6) Youth shall be provided:

(A) appropriate psychological and medical services;

(B) an intervention plan that addresses the behavior that resulted in the referral or extension;

(C) adequate access to restroom facilities and drinking water;

(D) access to shower and hygiene routine at least once every 24 hours, as behavior permits;

(E) the same food, including snacks, prepared in the same manner as for other youth except for special diets that are prescribed on an individual basis by a physician, dentist, mental health professional, or approved by a chaplain;

(F) ability to earn privileges;

(G) access to at least five and one-half hours of education services each scheduled instructional day;

(H) educational services that will enable the youth to meet the goals of the youth's individualized education plan, if the youth is currently receiving special education services; and

(I) one hour each day of large muscle exercise out of the room or in an enclosed outdoor recreation area, as the youth's behavior and weather permit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cheryl K. Townsend
Executive Commissioner
Texas Youth Commission

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For further information, please call: (512) 424-6014

◆ ◆ ◆
TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 108. DIVISION FOR EARLY CHILDHOOD INTERVENTION SERVICES

The Texas Health and Human Services Commission (commission), on behalf of the Texas Department of Assistive and Rehabilitative Services (department), adopts the repeal of the DARS rules in Title 40, Part 2, Chapter 108, Division for Early Childhood Intervention Services, Subchapters A, B, D, E, and F, and adopts new Subchapters A, B, C, D, E, F, and G.

Specifically, the commission adopts the repeal of Subchapter A, §§108.21, 108.23, 108.25, 108.27, 108.29, 108.31, 108.33, 108.35, 108.37, 108.39, 108.43, 108.47, and 108.48, concerning Early Childhood Intervention Service Delivery; Subchapter B, §§108.55, 108.57, 108.59, and 108.61, concerning Procedural Safeguards and Due Process Procedures; Subchapter D, §§108.221, 108.223, 108.225, 108.227, 108.229, 108.231, 108.233 and 108.235, concerning General Provisions for Case Management Services for Infants and Toddlers with Developmental Disabilities; Subchapter E, §§108.261, 108.263, and 108.265, concerning Developmental Rehabilitation Services; and Subchapter F, §§108.291, 108.293 and 108.295, concerning System of Fees, without changes as published in the March 20, 2009, issue of the *Texas Register* (34 TexReg 1947) and will not be republished.

The commission adopts new Subchapter A, Early Childhood Intervention Service Delivery, §§108.1, 108.3, 108.5, 108.7, 108.9, 108.11, 108.13, 108.15, 108.17, 108.19, 108.71, 108.73, 108.75, and 108.77; Subchapter B, Procedural Safeguards And Due Process Procedures, §§108.101, 108.103, 108.105, 108.107, 108.109, 108.111, 108.113, 108.115, 108.117, 108.119, 108.121, 108.123, 108.125, 108.127, 108.129, 108.131, 108.133, 108.135, 108.137, and 108.139; Subchapter C, Early Childhood Intervention Staff Qualifications, §§108.301, 108.303, 108.305, 108.307, 108.309, 108.311, 108.313, 108.315, 108.317, 108.319, and 108.321; Subchapter D, General Provisions for Case Management Services for Infants and Toddlers with Developmental Disabilities, §§108.401, 108.403, 108.405, 108.407, 108.409, 108.411, 108.413, and 108.415; Subchapter E, Developmental Rehabilitation Services, §§108.501, 108.503, and 108.505; Subchapter F, System of Fees, §108.601 and §108.603; and Subchapter G, Contract Requirements, §§108.701, 108.703, 108.705, 108.707, 108.709 and 108.711.

New §§108.7, 108.11, 108.13, 108.15, 108.17, 108.19, 108.73, 108.77, 108.109, 108.403, 108.501, 108.503, 108.505, and 108.603 are adopted with changes to the proposed text as published in the March 20, 2009, issue of the *Texas Register* (34 TexReg 1947). The adopted text of the preceding rules is republished in this issue.

New §§108.1, 108.3, 108.5, 108.9, 108.71, 108.75, 108.101, 108.103, 108.105, 108.107, 108.111, 108.113, 108.115, 108.117, 108.119, 108.121, 108.123, 108.125, 108.127, 108.129, 108.131, 108.133, 108.135, 108.137, 108.139, 108.301, 108.303, 108.305, 108.307, 108.309, 108.311, 108.313, 108.315, 108.317, 108.319, 108.321, 108.401, 108.405, 108.407, 108.409, 108.411, 108.413, 108.415, 108.503, 108.601, 108.701, 108.703, 108.705, 108.707, 108.709 and 108.711 are adopted without changes to the

proposed text as published in the March 20, 2009, issue of the *Texas Register* (34 TexReg 1947) and will not be republished.

Background and Purpose

The repeals and new rules are being adopted to increase clarity and minimize duplication of, or conflicts with, federal statutes and rules. Chapter 108 is extensively restructured and expanded from five subchapters to seven subchapters.

These rules are authorized by the Texas Human Resources Code, Chapters 73 and 117; and The Individuals with Disabilities Education Act, as amended, 20 U.S.C. §1400 et seq. and its implementing regulations, 34 C.F.R. Part 303, as amended.

Section-By-Section Summary

Chapter 108 is extensively restructured and expanded from five subchapters to seven subchapters in order to increase clarity and minimize duplication of or conflicts with federal statutes and rules.

The following subchapters and sections in Title 40, Chapter 108, are repealed: Subchapter A, Early Childhood Intervention Service Delivery, and the following sections are repealed: §108.21, Purpose; §108.23, Definitions; §108.25, Service Delivery Requirements for Comprehensive Services; §108.27, Program Administration for Comprehensive Services; §108.29, Application and Program Requirements for Comprehensive Services; §108.31, Financial Management and Recordkeeping Requirements; §108.33, Funding Application Submission and Review; §108.35, Contract Award; §108.37, Contract; §108.39, Contract Actions; §108.43, Waiver of Program Standards for All ECI Providers Funded by the Department of Assistive and Rehabilitative Services, Division for Early Childhood Intervention Services; §108.47, Early Intervention Specialist Code of Ethics; and §108.48, Violations of the EIS Code of Ethics. The subject matter of these rules is moved to several of the new subchapters with changes intended to minimize duplication of or conflicts with federal statutes and rules. The subject matter of §108.21 and §108.23 is in new Subchapter A. Section 108.25 was an extremely long rule, and it has been broken up into separate sections placed in appropriate new subchapters. The subject matter of §§108.27, 108.29, 108.31, 108.33, 108.35, 108.37, and 108.39 has been moved to new Subchapter G. Section 108.43 is not replaced in any form. The subject matter of §108.47 and §108.48 has been moved to new Subchapter C.

Subchapter B, Procedural Safeguards and Due Process Procedures, and the following sections are repealed: §108.55, Procedural Safeguards for Comprehensive Services; §108.57, Early Childhood Intervention Procedures for Resolving Complaints; §108.59, Confidentiality; and §108.61, Primary Referral Requirements. The subject matter of these rules may be found in new Subchapter B along with portions of other repealed rules pertaining to the same matters. The subject matter of §108.55 and §108.57 has been modified to minimize duplication of or conflicts with federal statutes and rules. The subject matter of §108.59 is broken into several new rules.

Subchapter D, General Provisions for Case Management Services for Infants and Toddlers with Developmental Disabilities, and the following sections are repealed: §108.221, Introduction; §108.223, Definitions; §108.225, Reimbursable Services; §108.227, Recipient Eligibility for Early Childhood Intervention (ECI) Case Management Services; §108.229, Conditions for Case Management Provider Participation; §108.231, Qualified Personnel; §108.233, Retention of Records; and §108.235,

Provider Records. New Subchapter D is merely a renumbering of these sections, with minor changes to be consistent with the Medicaid State Plan.

Subchapter E, Developmental Rehabilitation Services, and the following sections are repealed: §108.261, Reimbursable Services; §108.263, Recipient Eligibility for Services Funded by the Developmental Rehabilitation Services Program; and §108.265, Conditions for Provider Participation in the Developmental Rehabilitation Services Program. New Subchapter E is a renumbering of these sections with an added definition of natural environment.

Subchapter F, System of Fees, and the following sections are repealed: §108.291, Purpose; §108.293, Definitions; and §108.295, Administration of Family Cost Share System. New Subchapter G is a renumbering of these sections with deletion of temporary information from the rules and with definitions being moved to new Subchapter A.

The following are the new subchapters of Chapter 108:

New Subchapter A, Early Childhood Intervention Service Delivery, consists of the following new rules: §108.1, Purpose; §108.3, Definitions; §108.5, Service Delivery Requirements for Early Intervention Services; §108.7, Client Eligibility; §108.9, Primary Referral Requirements; §108.11, Referral and Pre-Enrollment; §108.13, Assessment and Evaluation; §108.15, Health Standards for Early Intervention Services; §108.17, Individualized Family Service Plan (IFSP); §108.19, Required Early Intervention Services; §108.71, Service Coordination; §108.73, Transition; §108.75, Public Outreach; and §108.77, Safety Regulations.

New Subchapter B, Procedural Safeguards and Due Process Procedures, consists of the following new rules: §108.101, Purpose; §108.103, Responsibilities; §108.105, Prior Notice; §108.107, Parental Consent; §108.109, Surrogate Parents; §108.111, Early Childhood Intervention Procedures for Filing Complaints; §108.113, Early Childhood Intervention Procedures for Investigation and Resolution of Complaints; §108.115, Confidentiality Notice to Parents; §108.117, Access Rights; §108.119, Fees for Records; §108.121, Amendment of Records at Parent's Request; §108.123, Opportunity for a Hearing; §108.125, Minimum Requirements for Conducting a Hearing; §108.127, Results of Hearing; §108.129, Release of Personally Identifiable Information; §108.131, Safeguards; §108.133, Record Retention Period; §108.135, Destruction of Information; §108.137, Release of Records; and §108.139, Enforcement.

New Subchapter C, Early Childhood Intervention Staff Qualifications, consists of the following new rules: §108.301, Staff Health Regulations; §108.303, Professional Requirements; §108.305, Criminal Background; §108.307, Early Intervention Specialist (EIS) Professional; §108.309, Supervision of Entry Level EIS Professionals; §108.311, Fully Qualified EIS Professional Requirements; §108.313, Continuing Professional Education Requirements; §108.315, Registry; §108.317, Grievance Process; §108.319, Early Intervention Specialist Code of Ethics; and §108.321, Violations of the EIS Code of Ethics.

New Subchapter D, General Provisions for Case Management Services for Infants And Toddlers with Developmental Disabilities, consists of the following new rules: §108.401, Introduction; §108.403, Definitions; §108.405, Reimbursable Services; §108.407, Recipient Eligibility for Early Childhood Intervention (ECI) Case Management Services; §108.409, Conditions for Case Management Provider Participation; §108.411, Qualified

Personnel; §108.413, Retention of Records; and §108.415, Provider Records.

New Subchapter E, Developmental Rehabilitation Services, consists of the following new rules: §108.501, Reimbursable Services; §108.503, Recipient Eligibility for Services Funded by the Developmental Rehabilitation Services Program; and §108.505, Conditions for Provider Participation in the Developmental Rehabilitation Services Program.

Change: Concerning §108.503(3), corrected the title of 40 TAC §108.5 to "Service Delivery Requirements for Early Intervention Services".

New Subchapter F, System of Fees, consists of the following new rules: §108.601, Purpose, and §108.603, Administration of Family Cost Share System.

New Subchapter G, Contract Requirements, consists of the following new rules: §108.701, Application and Program Requirements for Comprehensive Services; §108.703, Contract Award; §108.705, Contract; §108.707, Remedial Contract Actions; §108.709, Financial Management and Recordkeeping Requirements; and §108.711, Data Collection and Reporting. Chapter 108, Subchapter G, Contract Requirements, collects portions of several repealed rules that deal with providers, their contracts, and their financial requirements.

Comments

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period. The commission has reviewed and accepts the responses. The commenters were individuals, associations, and/or groups, including the following: Texas Education Association, Texas Association for Marriage and Family Therapy, ECI Region 1 Consortium, Betty Hardwick MHMR, West Texas Centers for MHMR, and North Texas Rehab Center. No commenter was against the rules in their entirety; however, the commenters recommended changes as discussed in the summary of comments.

Comment: Concerning §108.7(b)(1) - (3), one commenter suggested the list of criteria for eligibility be ordered the same in rule as it is in the ECI Standards Manual for Contracted Programs.

Response: The commission disagrees. The eligibility criteria are of equal importance. The order in which the criteria are listed in the rule or the standards manual is not meant to imply more or less importance.

Comment: Concerning §108.7(c), one commenter questioned a discrepancy between a list of populations served in the proposed rules and a longer list in the proposed ECI Standards Manual for Contracted Programs.

Response: The list of populations served in §108.7(c) is intended to be broad examples and not an exclusive list. The list in the ECI Standards Manual for Contracted Programs provides additional detail.

Comment: Concerning §108.7(c), one commenter suggested that the phrase "as visually or auditorially impaired children" be replaced with "who have visual or auditory impairments" or "due to visual or auditory impairments."

Response: The commission agrees and has replaced "as visually or auditorially impaired children" with "who have visual or auditory impairments."

Comment: Concerning §108.11, one commenter suggested that the phrase "procedures for receiving and sending referrals using all primary referral sources" be changed to clarify the intent.

Response: The commission agrees and has replaced "procedures for receiving and sending referrals using all primary referral sources" with "procedures for receiving and making referrals for all primary referral sources."

Comment: Concerning §108.13(a)(4)(D), one commenter identified a run-on sentence and questioned the intent of the rule.

Response: The commission has corrected the run-on sentence by adding a ";" after "team" and has clarified the remaining assessment and evaluation information by transferring it into an expanded §108.17, specifically new §108.17(4) - (5).

Comment: Concerning §108.13(a)(4)(F), one commenter stated that the words "appropriate" and "multiple methods" are ambiguous.

Response: The rule is adopted as proposed, and further clarification will be provided in the DARS ECI Standards Manual for Contracted Programs.

Comment: Concerning §108.15(a), one commenter stated the rule was difficult to understand.

Response: The commission agrees. The rule subsection is edited to read, "If the information in the child's records does not include documentation of a physical examination in accordance with the periodicity schedule of the American Academy of Pediatrics, then the Individualized Family Service Plan (IFSP) team will determine if it needs any additional medical information to implement any or all of the strategies in the child's IFSP."

Comment: Concerning §108.17(1)(B), one commenter inquired if the phrase "services must be jointly coordinated" is clarified in State policy. If not, the commenter requested that the intent and expectations be clarified in rule.

Response: Further clarification will be provided in the ECI Standards Manual for Contracted Programs.

Comment: Concerning §108.17(2)(D), one commenter recommended the phrase "or who has been responsible for implementing the IFSP" be changed to "or who will be implementing the IFSP."

Response: The commission partially agrees. The phrase "or who has been responsible for implementing the IFSP" mirrors the federal requirement. For clarification, §108.17(2) is edited to "develop the initial and annual IFSPs" and §108.17(2)(D) is broken down into two clauses, §108.17(d)(D)(i) - (ii).

Comment: Concerning §108.19(e)(3), several commenters discussed the requirement that a contractor demonstrate the capacity to provide services for a minimum of 52 weeks of each year.

Response: The commission partially agrees and edits §108.19(e)(3) to "demonstrate the capacity to provide services 52 weeks each year." Business hours and holidays will be further defined in the ECI Standards Manual for Contracted Programs.

Comment: Concerning §108.77(b)(1), one commenter made general comments that the rule should not focus on the safety of the buildings but rather the focus should be on the safety of the providers going into the families' homes.

Response: The commission disagrees as other state and federal statutes and regulations already address employee safety and working conditions. However, some edits are being made to §108.77 made for clarity. Section 108.77(a) is edited to, "Contractors must have written policies and procedures which are implemented and evaluated to address safety regulations regarding emergencies for all buildings where ECI programs are housed (including offices)." Section 108.77(b)(1) is edited to, "Buildings must be physically accessible to persons with disabilities". The first sentence in §108.77(b)(2) is edited to, "Buildings must be inspected annually by a local or state fire authority." The first sentence in §108.77(b)(4) is edited to, "Buildings must be equipped with an external emergency release mechanism for opening interior doors that can be locked from the inside."

Comment: Concerning §108.501(b) and §108.505(b)(4), the commission received several comments on Chapter 13, Early Childhood Intervention Providers, of the proposed ECI Standards Manual for Contracted Programs, that discussed adding licensed marriage and family therapists, licensed marriage and family therapist associates, and/or licensed professional counselor interns to the lists of providers who can provide and supervise Developmental Rehabilitation Services.

Response: The commission partially agrees. The specific lists of providers who can provide and supervise Developmental Rehabilitation Services are in the Texas Medicaid State Plan. The commission will consider adding providers to the lists when the Texas Medicaid State Plan is revised. Sections 108.501(b) and 108.505(b)(4) are edited so the addition will be automatic if the relevant portion of the Texas Medicaid State Plan is amended.

The department staff on behalf of the commission provided comments, and the commission has reviewed and agrees to the following changes.

Change: Concerning §108.73(4), changed "at least 120 days" to "at least 90 days" to comply with federal regulations at 34 CFR 303.148.

Change: Concerning §108.109(c)(3) and §108.109(d)(4), made clarifying grammatical change to §108.109(c)(3) to read, "A person who qualifies to be a surrogate parent is not an employee solely because he or she is paid to serve as a surrogate", and to §108.109(d)(4), changed "section" to "chapter."

Change: Concerning §108.403(2), deleted definition of "Department" as the term is already defined in §108.3(10).

Change: Concerning §108.403(9), deleted definition of "Early Childhood Intervention (ECI) services" as "Early Intervention Services" is already defined in §108.3(13).

Change: Concerning §108.403(11), deleted definition of "Interdisciplinary team" as the term is already defined in §108.3(21).

Change: Concerning §108.403(12), deleted definition of "Intake" as the term is substantially the same as "Pre-Enrollment" which is defined in §108.3(24).

Change: Concerning §108.603(d)(1), replaced the term "intake" with "pre-enrollment" for consistency.

SUBCHAPTER A. EARLY CHILDHOOD INTERVENTION SERVICE DELIVERY

40 TAC §§108.21, 108.23, 108.25, 108.27, 108.29, 108.31, 108.33, 108.35, 108.37, 108.39, 108.43, 108.47, 108.48

The repeals are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel

Department of Assistive and Rehabilitative Services

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SUBCHAPTER B. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

40 TAC §§108.55, 108.57, 108.59, 108.61

The repeals are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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SUBCHAPTER D. GENERAL PROVISIONS FOR CASE MANAGEMENT SERVICES FOR INFANTS AND TODDLERS WITH DEVELOPMENTAL DISABILITIES

40 TAC §§108.221, 108.223, 108.225, 108.227, 108.229, 108.231, 108.233, 108.235

The repeals are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the

authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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SUBCHAPTER E. DEVELOPMENTAL REHABILITATION SERVICES

40 TAC §§108.261, 108.263, 108.265

The repeals are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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SUBCHAPTER F. SYSTEM OF FEES

40 TAC §§108.291, 108.293, 108.295

The repeals are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER A. EARLY CHILDHOOD INTERVENTION SERVICE DELIVERY

40 TAC §§108.1, 108.3, 108.5, 108.7, 108.9, 108.11, 108.13, 108.15, 108.17, 108.19, 108.71, 108.73, 108.75, 108.77

The new rules are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§108.7. Client Eligibility.

(a) The contractor must follow written criteria developed by the Department for determining eligibility for infants and toddlers with disabilities and accepting them into the program.

(b) Early intervention services are available to any child birth to 36 months of age who has a documented developmental delay, or a medically diagnosed condition that has a high probability of resulting in developmental delay, or exhibits atypical development. Determination of eligibility shall be as follows:

(1) Developmental delay: specific level of delay in one or more of the following areas measured and determined by appropriate diagnostic instruments or procedures by an interdisciplinary team and by informed clinical opinion: cognitive development, physical development, communication development, social-emotional development, or adaptive development.

(2) Atypical development: determination must be completed by a qualified professional (i.e., psychologist, occupational therapist, speech therapist, physical therapist, physician, etc.) through administration of an evaluation tool, parental report, and observation of one or more atypical behaviors.

(3) Medically diagnosed condition: must be determined by medical documentation of a specific condition with known etiology and developmental consequences that is included in the list of covered medical conditions approved by the Department. Children with a medically diagnosed condition that is not included in the list of covered medical conditions approved by the Department may still be eligible for early intervention services based on the criteria in paragraphs (1) and (2) of this subsection.

(c) Early childhood intervention services are provided to eligible children in the State including Native American children residing on reservations geographically located in Texas, children who are homeless, wards of the state, and those children authorized for services who have visual or auditory impairments as defined by the Texas Education Code.

§108.11. Referral and Pre-Enrollment.

The program must have procedures for receiving and making referrals for all primary referral sources.

§108.13. Assessment and Evaluation.

(a) The assessment and evaluation for early intervention services must be in accordance with the following criteria and procedures.

(1) Prior to any assessment or evaluation, the parent(s) must be fully informed and give permission regarding the following:

(A) disciplines or staff to be involved in conducting assessments and evaluations;

(B) family's role;

(C) measures to be used;

(D) when and how the information obtained will be synthesized and shared; and

(E) who will have access to the information obtained.

(2) If the parent(s) refuses participation in a specific area of an assessment or evaluation, early intervention services may not be denied in other areas.

(3) At no cost to the family, the program must provide a comprehensive, interdisciplinary assessment and evaluation for each child, including assessment activities related to the family.

(4) All assessments and evaluations of the child or family including tests and other evaluative methods and procedures must be:

(A) conducted by personnel trained to use appropriate methods and procedures;

(B) administered in the native language of the parent(s) and child or other mode of communication, unless it is clearly not feasible to do so;

(C) nondiscriminatory in regard to race or culture;

(D) reviewed on an ongoing basis and updated at a frequency recommended by the interdisciplinary team;

(E) based on informed clinical opinion; and

(F) based on appropriate use of multiple methods and procedures which ensure that no single criterion is utilized to determine delay or atypical development.

(b) Child assessments and evaluations must include in addition to all requirements in 34 CFR §303.322 an evaluation of the following developmental areas:

(1) vision and hearing, gross and fine motor skills, and nutrition status;

(2) self-help skills;

(3) an assessment of the child's unique strengths as well as needs in each of the developmental areas;

(4) the identification of services appropriate to meeting those needs; and

(5) parental input.

(c) Identification of the family's concerns, priorities, and resources must be voluntary. If a family agrees, the identification must:

(1) be family directed and designed to determine the concerns, priorities, and resources of the family related to enhancing the child's development; and

(2) be based on information provided by the family.

§108.15. Health Standards for Early Intervention Services.

(a) If the information in the child's records does not include documentation of a physical examination in accordance with the periodicity schedule of the American Academy of Pediatrics, then the

Individualized Family Service Plan (IFSP) team will determine if it needs any additional medical information to implement any or all of the strategies in the child's IFSP.

(b) The IFSP team can at any time request additional medical information and should do so as needed to assure the health and safety of the child.

(c) Children who will be participating in any ECI group activities must have immunizations appropriate to the child's age as recommended by the Texas Department of State Health Services (DSHS). If medical or religious reasons contraindicate immunization requirements, documentation to that effect must be maintained by the program, and the family must be notified that their child could be excluded from group activities if a contagious outbreak occurs.

(d) Child health standards. Contractors that receive ECI funds must have written policies and procedures which are implemented and evaluated in each of the following areas.

(1) Medication policies. If staff is involved in the administration of medication, written policies must be maintained regarding such administration.

(2) Infectious disease prevention and management.

(A) All programs must adhere to the procedures of the universal precautions as defined by the Centers for Disease Control of the United States Public Health Service.

(B) All programs must comply with the Texas Communicable Disease Prevention and Control Act, Health and Safety Code, Chapter 81.

(C) In the event of an outbreak of a contagious disease, children attending group activities must be excluded if they have not been immunized due to medical or religious contraindications.

(3) Contractors must follow all federal and state law and regulations regarding providing services and maintaining records for families and children with HIV or other communicable diseases.

§108.17. Individualized Family Service Plan (IFSP).

An Individualized Family Service Plan (IFSP) must be developed for each child eligible for early intervention services and the child's family. Early intervention services must be delivered in conformity with an IFSP.

(1) Procedures for development, review, and evaluation.

(A) The IFSP must be written within 45 days of referral and be developed jointly by the family and appropriate qualified personnel. The IFSP must be based on assessment and evaluation information and include services necessary to enhance the development of the child and the capacity of the family to meet the child's special needs. No IFSP shall be implemented without prior written consent from the parent(s). The contents and the implementation of the IFSP must be fully reviewed with the parent(s) prior to obtaining their consent.

(B) If early intervention services are delivered to a child by more than one contractor, services must be jointly coordinated.

(2) IFSP participants. An interdisciplinary team must meet to establish eligibility and develop the initial and annual IFSPs. The interdisciplinary team must include the following participants:

(A) the parent(s) of the child;

(B) other family members or care providers, when requested by the parent(s);

(C) an advocate or person outside the family, when requested by the parent(s);

(D) a minimum of two professionals from different disciplines consisting of:

(i) the service coordinator who has been working with the family since the initial referral of the child for evaluation, or who has been designated by the contractor to be responsible for the implementation of the IFSP; and

(ii) a person or persons directly involved in conducting the evaluations and assessments in §108.13 of this subchapter (relating to Assessment and Evaluation); and

(E) as appropriate, persons who will be providing early intervention services to the child or family.

(3) Contents of the plan. Contractors that receive funds from the Department must have a written IFSP for each child developed jointly by the interdisciplinary team including the child's parent(s).

(A) The IFSP must include an integrated summary of all assessments and evaluations of the child's present levels of physical development (including gross and fine motor skills, nutrition, vision, hearing, and health status), cognitive development, communication (speech-language) development, social-emotional development, and self-help skills or adaptive development. This integrated summary must be based on professionally acceptable criteria.

(B) A description of the child's strengths and needs must be included in the IFSP.

(4) Periodic review. A review of the IFSP for a child and the child's family must be conducted every six months, or more frequently if conditions warrant, or if the family requests such a review.

(A) The purpose of the periodic review is to determine:

(i) the degree to which progress toward achieving the outcomes is being made; and

(ii) whether modification or revision of the outcomes or services is necessary.

(B) The review may be carried out by a meeting or by another means that is acceptable to the parents and other participants.

(5) Annual meeting to evaluate the IFSP. A meeting must be conducted on at least an annual basis to evaluate the IFSP for a child and the child's family, and, as appropriate, to revise its provisions. The results of any current evaluations conducted under §108.13 of this subchapter, and other information available from the ongoing assessment of the child and family, must be used in determining what services are needed and will be provided.

§108.19. Required Early Intervention Services.

(a) The Individualized Family Service Plan (IFSP) shall include all early intervention services, as determined by the interdisciplinary team necessary to enhance the child's development or the family's capacity to meet the developmental needs of the child. These services must be provided under public supervision. With parental consent, the IFSP must also address the resources, priorities, and concerns of the family related to enhancing the child's development.

(b) The IFSP shall include a statement of the specific early intervention services necessary to meet the unique needs of the child and the family to achieve the outcomes expected to be achieved for the child and family. The array of available early intervention services must include, but is not limited to, the following:

(1) service coordination;

- (2) early identification, screening, and assessment services;
- (3) medical services only for diagnostic or evaluation purposes;
- (4) developmental services;
- (5) family education;
- (6) speech and language therapy;
- (7) audiology;
- (8) occupational therapy;
- (9) assistive technology devices and assistive technology services;
- (10) physical therapy;
- (11) psychological services;
- (12) family counseling;
- (13) social work services;
- (14) health services necessary to enable the child to benefit from the other early intervention services;
- (15) nursing services;
- (16) transportation;
- (17) nutrition services;
- (18) vision services; and
- (19) other services.

(c) Required services. Each comprehensive program must provide an evaluation and assessment, service coordination, an Individualized Family Service Plan (IFSP), and early intervention services. Each contractor funded by the Department for early intervention services and follow along must have the capacity to provide or arrange for all services described in subsection (b) of this section. All services which the child or family receives, regardless of the funding sources, must be considered toward meeting the service needs of the child as defined in the child's IFSP. No ECI funding can be used to arrange, provide, or duplicate a service for which other funding sources, public or private, are available and could be used.

(d) ECI child service standards in group settings.

(1) Determination of staff-child ratios must take into account the degree of each child's developmental level of functioning, the setting in which the child will be served, and the nature of the early intervention services to be provided.

(2) Contractors which provide child care as defined by the Texas Department of Family and Protective Services (DFPS) must meet licensing standards of DFPS.

(e) Types of services. For the purpose of this chapter, in addition to all required services in 34 CFR §303.13, the following types of services apply.

(1) Developmental services include:

(A) the design of learning environments and activities that promote the child's acquisition of skills in a variety of developmental areas, including cognitive processes and social interaction;

(B) curriculum planning, including the planned interaction of personnel, materials, and time and space, that leads to achieving the outcomes in the child's IFSP;

(C) providing families with information, skills, and support related to enhancing the skill development of the child; and

(D) working with the child to enhance the child's development.

(2) Service options. Each program must provide options for instruction or intervention, based upon consideration of the medical, social, educational, and developmental needs of the child and the resources, priorities, and concerns of the family as stated in the IFSP. These options include:

(A) individual services in the home, community or other locations;

(B) group services delivered at a site with other children;

(C) to the maximum extent appropriate to the needs of the child, early intervention services must be provided in natural environments, including home and community settings in which children without disabilities participate. Natural environments mean settings that are natural or normal for the child's age peers who have no disabilities;

(D) flexible hours in programming which allow options for parents to participate (i.e., working parents);

(E) variable degrees of family involvement in services, as determined by the family.

(3) Availability of services. The contractor must demonstrate the capacity to provide services for 52 weeks each year.

§108.73. Transition.

The Individualized Family Service Plan (IFSP) must include the steps to be taken to support the transition of the child to public school preschool services (the Individuals with Disabilities Education Act, Part B), upon reaching the age of three, or to other services that may be available, if appropriate. The steps required include:

(1) discussions with, and training of, the parent(s) regarding future placements and other matters related to the child's transition;

(2) procedures to prepare the child for changes in service delivery, including steps to help the child adjust to, and function in, a new setting;

(3) with parental consent, the transmission of information about the child to the local educational agency or other service providers or agencies, to ensure continuity of services, including evaluation and assessment information, and copies of IFSPs that have been developed; and

(4) with the approval of the family, the convening of a conference among the program, the family, and the local educational agency at least 90 days, but no more than 270 days, before the child's third birthday, or, if earlier, the date on which the child is eligible for the preschool program under the Individuals with Disabilities Education Act, Part B.

§108.77. Safety Regulations.

(a) Contractors must have written policies and procedures which are implemented and evaluated to address safety regulations regarding emergencies for all buildings where ECI programs are housed (including offices).

(b) Accessibility and safety. Contractors must have written policies and procedures which are implemented and evaluated in the following areas.

(1) Buildings must be physically accessible to persons with disabilities.

(2) Buildings must be inspected annually by a local or state fire authority. A safety and sanitation inspection must be completed annually. If the fire or safety and sanitation inspection indicates that hazards exist, these hazards must be corrected.

(3) Buildings must be clean, free of hazards, free of insect and rodent infestation, in good repair, with adequate light, ventilation, and temperature control.

(4) Buildings must be equipped with an external emergency release mechanism for opening interior doors that can be locked from the inside. Locks may not be used to restrain a child within a room.

(5) Buildings must be able to be safely evacuated in the event of an emergency.

(c) Transportation safety. Contractors must have written policies and procedures which are implemented and evaluated in the following areas.

(1) The transportation system operated by the ECI program must meet local and state licensing, inspection, insurance, and capacity requirements.

(2) Children must be transported in an appropriately installed, federally approved child passenger restraint seat, appropriate to the child's age and size.

(3) Drivers of vehicles must have valid and appropriate drivers' licenses. Drivers must have current defensive driving certification.

(4) Drivers and drivers' aides must have training in first aid, emergency care of seizures, and be certified in cardiopulmonary resuscitation for children and infants.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

40 TAC §§108.101, 108.103, 108.105, 108.107, 108.109, 108.111, 108.113, 108.115, 108.117, 108.119, 108.121, 108.123, 108.125, 108.127, 108.129, 108.131, 108.133, 108.135, 108.137, 108.139

The new rules are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with

the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§108.109. Surrogate Parents.

(a) Each contractor shall ensure that the rights of children eligible under this part are protected if:

(1) no parent can be identified;

(2) the contractor, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) the child is a ward of the state under the laws of Texas.

(b) The duty of the contractor includes the assignment of an individual to act as a surrogate parent for the child in a way consistent with existing state laws and regulations. This must include a method for:

(1) determining whether a child needs a surrogate parent;

(2) assigning a surrogate parent to the child; and

(3) providing training to ensure that the surrogate parent fully understands their role and responsibilities to represent the best interest of the child.

(c) Criteria for selecting surrogates are as follows.

(1) A person selected as surrogate must have no interest that conflicts with the interests of the child represented.

(2) A person assigned as a surrogate parent must not be an employee of any state agency or a person or an employee of a person providing early intervention services to the child or any family member of the child.

(3) A person who qualifies to be a surrogate parent is not an employee solely because he or she is paid to serve as a surrogate parent.

(4) A person selected as a surrogate parent must have knowledge and skills that ensure adequate representation of the interests of the child.

(5) The requirements of paragraphs (1) - (4) of this subsection ensure that the surrogate parent does not hold a job or a position that would either bias the decisions made for the child or make the surrogate parent vulnerable to the possibility of administrative retaliation for the execution of their responsibilities.

(d) A surrogate parent may represent a child in all matters related to:

(1) the evaluation and assessment of the child;

(2) development and implementation of the child's IFSPs, including annual evaluations and periodic reviews;

(3) the ongoing provision of early intervention services to the child; and

(4) any other rights established under this chapter.

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SUBCHAPTER C. EARLY CHILDHOOD INTERVENTION STAFF QUALIFICATIONS

**40 TAC §§108.301, 108.303, 108.305, 108.307, 108.309,
108.311, 108.313, 108.315, 108.317, 108.319, 108.321**

The new rules are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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SUBCHAPTER D. GENERAL PROVISIONS FOR CASE MANAGEMENT SERVICES FOR INFANTS AND TODDLERS WITH DEVELOPMENTAL DISABILITIES

**40 TAC §§108.401, 108.403, 108.405, 108.407, 108.409,
108.411, 108.413, 108.415**

The new rules are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§108.403. *Definitions.*

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

(1) **Assessment**--The ongoing procedures used by appropriate qualified personnel throughout the period of a child's eligibility to identify:

(A) the child's unique needs and strengths;

(B) the family's strengths and needs related to their child's development; and

(C) the nature and extent of intervention services needed by the child and the family in order to assess subparagraphs (A) and (B) of this paragraph.

(2) **Caregiver**--A person, such as a parent, foster parent, grandparent, child-care worker, who has responsibilities for the care of a child.

(3) **Case management**--Services provided to assist eligible individuals in gaining access to needed medical, social, educational, developmental, and other appropriate services.

(4) **Case manager (service coordinator)**--An Early Childhood Intervention (ECI) local program staff person who is assigned to a child and family, who is the single contact point for families, and who is responsible for assisting and empowering families in accessing services and coordinating those services.

(5) **Developmental delay**--A significant variation in normal development in one or more of the following areas as measured and determined by appropriate diagnostic instruments and procedures by an interdisciplinary team and by informed clinical opinion: cognitive development; physical development, including vision and hearing, gross and fine motor skills, and nutrition status; communication development; social and emotional development; and adaptive development or self-help skills.

(6) **Developmental disability**--Children from birth to age three who have substantial developmental delay or specific congenital or acquired conditions with a high probability of resulting in developmental disabilities if services are not provided.

(7) **ECI**--The Texas Early Childhood Intervention Program.

(8) **Individualized Family Service Plan (IFSP)**--A written plan, developed by the interdisciplinary team, based on all assessment and evaluation information and including the family's description of their strengths and needs, which outlines the intervention services for the child and the child's family.

(9) **Monitoring**--Periodic tracking, observation and follow up to ensure that services have been delivered, that services have been delivered on a timely basis, and that the services are addressing the clients' needs. Monitoring and follow up activities are conducted as needed and are documented in the child's case folder.

(10) **Needs assessment**--The needs assessment is conducted and documented by the case manager in conjunction with the Medicaid client's family. The documentation lists medical, social, nutritional, educational, developmental, and other appropriate needs of the Medicaid client. Individuals found not to be eligible for early intervention services, or whose families choose not to enroll in early intervention services are to be referred to any appropriate alternative care or services.

(11) **Plan of care**--Information gathered from the comprehensive needs assessment is incorporated into an Individualized Family Service Plan of care (IFSP). With family consent, family concerns, priorities and resources are identified and documented in the plan. The plan summarizes assessment results, includes the services necessary to enhance the development of the child and the capacity of the family to meet the child's unique needs, and must be coordinated with other service providers involved in delivery of services to the child and family.

(12) **Reassessment and Transition Planning**--A reassessment of the client's progress and needs is conducted at least every six months. The case manager documents the reassessment in the client's case folder. At reassessment the case manager will determine if modifications to the service plan are necessary and if the level of

involvement by the case manager should be adjusted. When services are no longer needed, or the child no longer qualifies for services, the case manager facilitates the planning, coordination, and transition to other appropriate care.

(13) Service coordination--Through linkage, coordination, facilitation, assistance, anticipatory guidance, and the provision of information about the child's medical needs to other health care providers, the case manager ensures the recipient's access to the care, resources and services to meet the client's needs. The case manager may assist the family in making applications for services, confirm service delivery dates with ECI staff, providers and supports, and assist the family with scheduling needs. The case manager assists the family in taking responsibility for ensuring that services are performed, and works with medical providers, ECI staff, and other community resources to coordinate care.

(14) Texas Health Steps--The name adopted by the State of Texas for the federally mandated Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program. It includes the State's Comprehensive Care Program extension to EPSDT.

(15) Time and Financial Information (TAFI)--A combined cost report and time study report, collected quarterly from providers.

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SUBCHAPTER E. DEVELOPMENTAL REHABILITATION SERVICES

40 TAC §§108.501, 108.503, 108.505

The new rules are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§108.501. Reimbursable Services.

(a) Services that are covered under the Developmental Rehabilitation Services Program are reimbursable to Medicaid providers who meet the conditions for provider participation as specified in §108.505 of this subchapter (relating to Conditions for Provider Participation in the Developmental Rehabilitation Services Program). Developmental Rehabilitation Services are diagnostic, evaluative, and consultative services for the purposes of identifying or determining the nature and extent of, and rehabilitating an individual's medical or other health-related condition. They are medical and/or remedial services that integrate therapeutic interventions into the daily routines of the child and family in order to restore or maintain function and/or to reduce dysfunction resulting from a mental or physical disability or developmental delay. Services are designed to enhance development in the physical/motor, communication, adaptive, cognitive, social

or emotional and sensory domains, or to teach compensatory skills for deficits that directly result from medical, developmental or other health-related conditions. Developmental Rehabilitation Services are provided as specified in the active Individualized Family Service Plan (IFSP) developed in accordance with 40 TAC §108.5 of this chapter (relating to Service Delivery Requirements for Early Intervention Services). The services include:

(1) developmentally appropriate individualized skills training and support to foster, promote, and enhance child engagement in daily activities, functional independence, and social interaction;

(2) assistance to caregivers in the identification and utilization of opportunities to incorporate therapeutic intervention strategies into daily life activities that are natural and normal for the child and family;

(3) continuous monitoring of child progress in the acquisition and mastery of functional skills to reduce or overcome limitations resulting from disability or developmental delays.

(b) The services listed in subsection (a)(1) - (3) of this section are performed by or under the supervision of a person authorized in the Texas Medicaid State Plan, including a licensed physician, registered nurse, licensed physical therapist, licensed occupational therapist, licensed speech language pathologist, licensed professional counselors, or licensed master social workers-advanced clinical practitioners acting within their scope of practice. Supervision in this section means participation in the initial and annual comprehensive assessment of the child as well as participation in the initial and annual development of the IFSP and any subsequent revisions of the plan that result in service changes.

(c) Developmental Rehabilitation Services are not reimbursable as Medicaid services when:

(1) provided to children with a diagnosis of a developmental disability defined as a severe, chronic disability of a person which:

(A) is attributable to mental or physical impairment or combination of mental and physical impairments;

(B) is manifested before the person attains age 22;

(C) is likely to continue indefinitely;

(D) results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, or economic self-sufficiency, or a diagnosis of mental retardation; or

(2) the services are guaranteed under the provisions of Individuals with Disabilities Education Act (IDEA) Part B.

§108.503. Recipient Eligibility for Services Funded by the Developmental Rehabilitation Services Program.

In order to receive Developmental Rehabilitation Services the recipient:

(1) must be enrolled in the Texas Medical Assistance Program;

(2) must be age 21 and under;

(3) must demonstrate the need for these services as documented in an active Individualized Family Service Plan (IFSP) developed in accordance with 40 TAC §108.5 of this chapter (relating to Service Delivery Requirements for Early Intervention Services).

§108.505. Conditions for Provider Participation in the Developmental Rehabilitation Services Program.

(a) In accordance with the regulations at 42 CFR §431.51, all willing and qualified providers may participate in this program.

(b) In order to be reimbursed for developmental rehabilitation services as specified in §108.501 of this subchapter (relating to Reimbursable Services), a provider must:

(1) meet applicable state and federal laws governing the participation of providers in the Medicaid Program;

(2) sign a provider agreement with the Medicaid single state agency;

(3) be certified by the Department;

(4) provide services under the supervision of a person authorized to supervise these services in the Texas Medicaid State Plan, including a licensed physician, registered nurse, licensed physical therapist, licensed occupational therapist, licensed speech language pathologist, licensed professional counselor, or licensed master social worker-advanced clinical practitioner acting within their scope of practice who are employed as agency or contract staff, or developmental rehabilitation services by a:

(A) licensed therapist,

(B) licensed counselor,

(C) licensed social worker,

(D) registered nurse,

(E) Early Intervention Specialist (EIS) professional participating in or certified through the ECI Competency Demonstration System,

(F) certified teacher certified through the ECI Competency Demonstration System, or

(G) psychological associate;

(5) provide to the maximum extent appropriate to the needs of the child, early intervention services in natural environments, including home and community settings in which children without disabilities participate. Natural environments mean settings that are natural or normal for the child's age peers who have no disabilities; and

(6) deliver services in accordance with the scope and duration of the Individualized Family Service Plan (IFSP).

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SUBCHAPTER F. SYSTEM OF FEES

40 TAC §108.601, §108.603

The new rules are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with

the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

§108.603. Administration of Family Cost Share System.

(a) Each ECI program must implement the family cost share system of sliding fees for all children enrolled in ECI comprehensive services in compliance with this subchapter, DARS policies concerning ECI and the contract.

(b) Prior to collection of income information or imposition of fees, parents must be fully informed of their right to receive certain ECI services at no cost, their right to refuse any services they do not wish to receive, their right to receive a review of their cost share or amounts due by an administrator of the program on request, and their right to information about any method the program may use to verify family income and allowable expenses.

(c) Programs must ensure that the inability of a family to pay for services will not result in the delay or denial of services to the child or the family.

(d) Determination of family income. The program will calculate the family's ability to pay based on the family's income in the following manner:

(1) During the pre-enrollment process and at each six month and annual Individualized Family Service Plan (IFSP) review the program will collect information from the family regarding the family's gross income.

(2) The program may require verification of income from families based on written local policies or may rely on family self-report of income.

(A) Except as provided in subparagraph (B) of this paragraph, families with proof of enrollment in Medicaid, CHIP, food stamps, SSI or TANF cash benefits for all children enrolled in ECI are automatically assumed to have an inability to pay. Children in the conservatorship of the State including children in foster care are automatically determined to have an inability to pay.

(B) Families enrolled in Medicaid who have private insurance and consent to having their private insurance billed will be automatically assumed to have an inability to pay and need not provide further information for family cost share determination, even if their private insurance denies all claims for coverage.

(C) Enrollment of a child in a Medicaid waiver program is not deemed to be evidence of inability to pay if the family is not eligible for other Medicaid benefits.

(D) All children with auditory or visual disabilities who are eligible for a free and appropriate public education from birth under the Texas Education Code, §29.003(b)(1) are exempt from the cost share system. A note of the exemption shall be included on the Family Cost Share Agreement.

(3) Once the annual gross family income has been determined, the parents may request that their annual adjusted family income be calculated by deducting allowable expenses from the gross income.

(A) Allowable expenses are those expenses expected to occur and/or be paid during the term of the IFSP and may include:

(i) Medical or dental expenses not reimbursed by insurance that the family incurred and which are expected to continue during the current IFSP period.

(ii) Payment toward outstanding medical or dental debt.

(iii) Medical and/or dental expenses and debt may include those accrued by all family members.

(iv) Childcare and respite expenses not reimbursed by other sources.

(v) Costs and fees associated with the adoption of a child.

(vi) Court-ordered child support payments for children who are not counted as family members or dependents in calculating the adjusted income and family cost share.

(B) The program may require verification of expenses from families based on written local policies or may rely on family self-report of expenses.

(4) Copies of income and/or expense documents need not be maintained by the program if an ECI employee reviews the documents and provides a written statement of verification, including a notation of the source of the documentation.

(5) A family who refuses to provide information for family cost share determination when requested by the program will be assessed as able to pay the highest cost share reflected on the sliding fee scale, until such time as they submit the required information. Services required to be provided at no cost will not be denied or delayed if the family fails to provide income information.

(6) If the program reviews the family's request for deductions to gross family income due to allowable expenses and finds that adjustments to the cost share are warranted, the cost share will take effect at the beginning of the next calendar month.

(7) Income is calculated based on income for all parents or guardians living in the same home with the child as a family. In situations where there is shared physical custody or shared legal or financial responsibility for a child, the adjusted income(s) of the parent(s) who financially supports the child will be considered unless conditions warrant otherwise.

(e) Determination of ability to pay and assignment of family cost share.

(1) Using the sliding scale developed by DARS, the program will determine the family's assigned monthly cost share. The sliding fee scale can be obtained from the Department.

(2) Families with a family income at or below 250 percent of the Federal Poverty Level will have a family cost share of \$0 and are determine to have an inability to pay.

(3) Families enrolled in Medicaid who have private insurance and refuse to allow ECI to bill their private insurance, thereby preventing submission of Medicaid claims, will be assigned a monthly cost share of \$10.

(f) IFSP services.

(1) Those services that must be provided at no cost to the family are:

(A) child find;

(B) evaluation and assessment;

(C) development of the Individualized Family Service

Plan;

(D) all services to children with auditory or visual disabilities eligible for a free and appropriate public education from birth under the Texas Education Code, §29.003(b)(1);

(E) service coordination;

(F) translation and interpreter services; and

(G) administrative and coordination activities related to the implementation of procedural safeguards and other components of the statewide system of early intervention services.

(2) The monthly family cost share is the maximum amount a family can be charged for all other services provided by ECI as part of an IFSP.

(3) The state respite program funded with state discretionary funds is not subject to the cost share system.

(4) A family will be responsible for the assigned monthly cost share unless no services, other than those listed in paragraph (1) of this subsection, were delivered in the month.

(5) The maximum monthly cost share for which the family will be responsible will be indicated on a Family Cost Share Agreement form that the family must sign.

(6) For a family with an ability to pay, services included on the IFSP which are subject to cost share shall not be provided until the family signs the Family Cost Share Agreement.

(7) Services included on the IFSP which are not subject to cost share shall begin immediately after the IFSP is developed.

(g) Review of family cost share.

(1) The family's ability to pay and cost share amount will be reviewed at the six month review and annual IFSP meeting, or at any time the family requests a review, including immediately following initial assessment of ability to pay. Programs may provide for a streamline review without completing a new Family Cost Share Agreement when there has been no change in family income or size since the previous review.

(2) ECI programs must develop a local process for a family to request reconsideration or adjustment of their assigned family cost share and/or to request a waiver of their cost share obligation, amounts currently due or overdue based on extraordinary circumstances, including amounts due based on denial of claims by a third-party payor as per subsection (h)(1)(A) of this section. Adjustments for allowable expenses should be made prior to the consideration of extraordinary expenses. The program may initiate the review process when staff members become aware that the family is experiencing extraordinary circumstances that impact the family's ability to pay their cost share obligations.

(A) The review should be conducted by the program director or designated administrator.

(B) Examples of circumstances that could justify a reconsideration or change of a family's assigned cost share, or that could justify a temporary waiver from their monthly cost share obligation or amounts currently due or overdue, could include but are not limited to:

(i) increase or decrease in income, including loss of job or temporary unpaid leave from employment;

(ii) short-term medical expenses not deducted during determination of adjusted income;

(iii) extraordinary child care or respite expenses not deducted during the determination of adjusted income;

- (iv) additional dependants or change in family size;
- (v) catastrophic loss such as fire, flood or tornado;
- (vi) short-term financial hardship such as major repair to the family home or car; or
- (vii) other extenuating circumstances or financial obligations which the family feels are not adequately considered in the assessment of adjusted income, assigned monthly cost share, or their ability to meet their cost share in any particular month(s).

(C) Families may be asked to submit verification of such circumstances. Refusal to do so may result in denial of the cost share adjustment.

(3) If the program determines that adjustments to the cost share are warranted, the revised cost share will take effect at the beginning of the next month. The Family Cost Share Agreement must be amended for any revision of the family cost share, and family signature must be obtained for the revised Family Cost Share Agreement.

(4) Families must be informed of the program's process for reviewing their family cost share amount before they are asked to sign the Family Cost Share Agreement.

(5) The family's last signed IFSP and Family Cost Share Agreement will remain in effect during any review process. For families without a signed Cost Share Agreement, the services included on the IFSP which are not subject to cost share shall begin or continue during any period of review.

(h) Children with Insurance.

(1) Third-party payors.

(A) With parental consent, programs must bill Medicaid, CHIP, TriCare and private insurance or other third-party payors for covered services delivered according to the IFSP. To allow the local program to establish insurance billing, in the initial six months of service, family cost share shall be set at \$0 as long as the child maintains insurance coverage and the parent continues to provide the program with consent to bill the insurance for ECI services. After the initial six months, third-party reimbursement of any IFSP service(s) will satisfy the family's cost share obligation for the month the service(s) was delivered. If the third-party payor completely denies coverage for IFSP services subject to fees, the family will be responsible for the assigned cost share.

(B) Any applicable insurance co-payments for services may be paid with ECI federal funds.

(2) Billing families for services.

(A) Programs must bill the family for the assigned cost share.

(B) The assigned family cost share is the maximum amount to be billed to the family regardless of the number of children in the family receiving services from ECI.

(3) Payment and non-payment of fees.

(A) Families will have 30 days from the billing date to pay their family cost share. All unpaid balances due from the family after 30 days will be considered delinquent unless the delay in payment is due to a delay in third-party reimbursement or notice of denial of a claim from a private or public third-party payor.

(B) Services subject to cost share will be suspended after 90 days for non-payment of family cost share. For families consenting to payment by third-party payors, the 90-day time period will begin

when notice is first received that the third-party payor has denied all claims for reimbursement and all appeals are exhausted, if applicable. Partial reimbursement by a third-party payor will satisfy the family's cost share obligation for the month, as per paragraph (1)(A) of this subsection.

(C) Families must be notified that failure to maintain their cost share account in good standing will, after 90 days, result in the suspension of IFSP services that are subject to family cost share, and that if services are later reinstated, the program cannot guarantee that they will be reinstated on the same schedule or with the same individual service provider as prior to suspension.

(D) Service coordination and other services not subject to family cost share must be continued during any period of suspension, except that respite vouchers may be denied for payment during a period of suspension.

(E) A notation must be made on the Family Cost Share Agreement that services subject to family cost share have been suspended due to non-payment. If a family transfers between Texas ECI programs, the Family Cost Share Agreement will be transferred to the receiving ECI program along with the IFSP.

(F) Services that have been suspended will be reinstated when the family's account is paid in full or the family negotiates an acceptable payment plan with the local program. If more than six months have transpired since suspension, the IFSP team must reassess the appropriateness of the IFSP before reinstating services. The IFSP and the Family Cost Share Agreement should reflect the date of the reinstatement of services.

(G) Programs must have a written local policy for collecting delinquent family cost share. Documentation must be kept of reasonable attempts to collect on unpaid balances. Reasonable attempts include multiple attempts at written notification, phone notification and/or e-mail. The Program Director or Administrator may modify a family's payment plan or cost share if circumstances warrant.

(i) Program fiscal and record-keeping policies.

(1) Revenue received from the family cost share may only be used for early intervention services within the ECI program and may not supplant any other local fund sources. Fees collected must be reported to the ECI state office as program income.

(2) The Family Cost Share Agreement and any financial records related to income, expenses, and payment history shall be kept separate from the child's other educational records, and should not be forwarded to a school district or other non-ECI service provider(s) at any time unless requested by the family. All financial records must be maintained in a manner consistent with the Family Educational Rights and Privacy Act.

(3) The Family Cost Share Agreement and financial records must be transferred to another ECI program in the state if the child and family transfer to another ECI program.

(4) The Family Cost Share Agreement and financial records are subject to subpoena, if applicable.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 3, 2009.
TRD-200903302

Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Effective date: September 1, 2009
Proposal publication date: March 20, 2009
For further information, please call: (512) 424-4050



SUBCHAPTER G. CONTRACT REQUIREMENTS

40 TAC §§108.701, 108.703, 108.705, 108.707, 108.709, 108.711

The new rules are adopted under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200903303
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Effective date: September 1, 2009
Proposal publication date: March 20, 2009
For further information, please call: (512) 424-4050



PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 813. SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM EMPLOYMENT AND TRAINING

The Texas Workforce Commission (Commission) adopts amending the title of Chapter 813, Food Stamp Employment and Training, *without* changes, to Chapter 813, Supplemental Nutrition Assistance Program Employment and Training, as published in the May 8, 2009, issue of the *Texas Register* (34 TexReg 2753).

The Commission adopts amendments, *without* changes, to the following sections of Chapter 813, relating to Supplemental Nutrition Assistance Program Employment and Training, as published in the May 8, 2009, issue of the *Texas Register* (34 TexReg 2753):

Subchapter A, General Provisions, §§813.1 - 813.3

Subchapter B, Access to Employment and Training Activities and Support Services, §§813.11 - 813.14

Subchapter C, Expenditure of Funds, §813.22

Subchapter D, Allowable Activities, §813.31 and §813.32

Subchapter E, Support Services for Participants, §813.41

The Commission adopts the following new sections *without* changes, to Chapter 813, relating to Supplemental Nutrition Assistance Program Employment and Training, as published in the May 8, 2009, issue of the *Texas Register* (34 TexReg 2753):

Subchapter A, General Provisions, §813.4 and §813.5

Subchapter D, Allowable Activities, §813.33 and §813.34

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted Chapter 813 rule change is to:

--implement new job retention services and support services;

--detail the requirements for documentation, verification, and supervision of work activities to further align with Choices services;

--specify when good cause must be determined; and

--make necessary technical corrections and clarifications, including changing the name of Food Stamp Employment and Training (FSE&T) to Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T).

The Food, Conservation, and Energy Act of 2008 (FCEA), enacted June 18, 2008, amended the Food Stamp Act of 1977, now named the Food and Nutrition Act of 2008. Among the changes, states have been given the option of providing job retention services and support services.

In accordance with 7 U.S.C. §2015(d)(4)(B)(vii) and 7 U.S.C. §2025(h)(3), the Commission has amended the Federal Fiscal Year 2009 (FFY'09) FSE&T State Plan to implement job retention services and support services effective FFY'09. The job retention policies outlined in the FFY'09 FSE&T State Plan amendment have been approved by the U.S. Department of Agriculture (USDA) Food and Nutrition Service (FNS).

Guidance received from FNS permits states to provide additional support services not allowed in prior years. Chapter 813 has been amended to include this change.

Because of the Commission's commitment to align Choices and SNAP E&T to the extent allowed under federal law, requirements for documentation, verification, and supervision of work activities are included in this chapter.

Also enacted under FCEA, the name of the Food Stamp Program was changed to the Supplemental Nutrition Assistance Program (SNAP). The Texas Health and Human Services Commission (HHSC), which administers the federal Food Stamp Program, has informed the Agency that effective April 1, 2009, it also will change the name of the state food stamp program to SNAP. To align with the federal and state name changes, the Commission will change the name FSE&T to SNAP E&T. This name change is made throughout the adopted rules in addition to other technical corrections and changes made to simplify and clarify rule language.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS

The Commission adopts the following amendments to Subchapter A:

§813.4. Board Policies and Local Procedures.

New §813.4 sets forth the requirements for the development of Board policies and local procedures.

To ensure consistency of the methods and amounts of work-related and housing assistance disbursed to SNAP recipients, and assist Boards with the management of SNAP E&T 50/50 percent funds, new §813.4(a)(1) - (2) requires Boards to establish policies and procedures regarding the methods and limitations for the provision of support services, specifically work-related expenses and housing assistance.

New §813.4(b) incorporates the contents of removed §813.11(g), which provides that Boards may establish optional policies that require the use of Eligible Training Provider System (ETPS) and Individual Training Accounts (ITAs), as set forth in Chapter 841 of this title relating to the Workforce Investment Act, to provide SNAP E&T-funded services for SNAP E&T participants.

New §813.4(c) requires Boards that establish the optional policies described in §813.4(b) to develop corresponding procedures.

§813.5. Documentation, Verification, and Supervision of Work Activities.

New §813.5 aligns SNAP E&T with Choices requirements for the documentation, verification, and supervision of all SNAP E&T work activities.

Section 813.5(a) states that all required information related to the documentation and verification of participation in SNAP E&T work activities, as described in the section, must be documented in The Workforce Information System of Texas (TWIST).

Section 813.5(b) requires that all participation in SNAP E&T must be verified and documented and that self-attestation must not be allowed.

Section 813.5(c) requires that all participation in the activity described in §813.31(5) must be verified and documented in TWIST at least monthly.

Section 813.5(d)(1) - (2) requires that all participation in the activities described in §813.31(1) and (4) and §813.32(a)(4) must be supervised daily and verified and documented in TWIST at least monthly.

Section 813.5(e)(1) - (2) requires that for the activities described in §813.31(2) and (3):

--no more than one hour of unsupervised study or homework time per each hour of class time must be counted toward participation in SNAP E&T; and

--all study and homework time in excess of one hour per hour of class time must be directly monitored, supervised, verified, and documented.

Section 813.5(e)(3)(A) - (B) requires that study or homework time must only count toward participation in SNAP E&T if:

--the study or homework time is directly correlated to the demands of the coursework for out-of-class preparation as described by the educational institution; and

--the educational institution's policy requires a certain number of out-of-class preparation hours for the class.

Section 813.5(e)(4) requires that good or satisfactory progress, as determined by the educational institution, must be verified and documented in TWIST at least monthly.

Section 813.5(e)(5) requires that all participation in SNAP E&T must be supervised daily.

Section 813.5(e)(6) requires that all participation in SNAP E&T must be verified and documented in TWIST at least monthly.

Certain paragraphs in this subchapter have been renumbered to accommodate the name change to SNAP E&T.

SUBCHAPTER B. ACCESS TO EMPLOYMENT AND TRAINING ACTIVITIES AND SUPPORT SERVICES

The Commission adopts the following amendments to Subchapter B:

§813.11. Board Responsibilities Regarding Access to SNAP E&T Activities and Support Services.

Section 813.11(g), providing Boards the option to require the use of ETPS and ITAs, is removed and incorporated in §813.4(b).

§813.13. Good Cause for Mandatory Work Registrants and Exempt Recipients Who Voluntarily Participate in SNAP E&T Services.

During the policy concept phase of the rulemaking process, the Commission received a comment noting that SNAP *Employment and Training: A Comprehensive Guide* states that mandatory work registrants can claim good cause before or after a penalty has been initiated in TWIST, as long as the penalty has not been imposed by HHSC.

The Commission agrees and appreciates the comment. To ensure clarity of the Commission's intent that good cause be determined before SNAP benefits are denied, §813.13(a)(1) - (2) adds language to specify that good cause must be determined when:

--mandatory work registrants state that they have a legitimate reason for failing to respond to the outreach notification; and

--mandatory work registrants and exempt recipients who voluntarily participate in SNAP E&T services have legitimate reasons for failing to participate in SNAP E&T activities.

SUBCHAPTER C. EXPENDITURE OF FUNDS

The Commission adopts the following amendments to Subchapter C:

§813.22. Use of Funds.

Section 813.22(1)(A) - (B) is reorganized for better clarity and adds the phrase "exempt recipients who voluntarily participate" to specify that SNAP E&T funds also can be used to provide SNAP E&T services to volunteers. In March 2005, the Commission amended Chapter 813 to allow Boards the flexibility to expand SNAP E&T services statewide to include volunteers. However, the Commission postponed amending this section until certain 50/50 funding issues were resolved.

Section 813.22(2) clarifies that only SNAP E&T 50/50 funds can be used to provide SNAP E&T support services listed in §813.41.

New §813.22(3) provides that job retention services for SNAP recipients who participated in SNAP E&T activities and obtained full-time employment may be provided for no more than 90 days

and must be funded with 100 percent funds or 50/50 funds, or both. USDA guidance allows states that elect to provide job retention services to use their 100 percent and 50/50 funds to administer these services.

New §813.22(4) provides that job retention support services for SNAP recipients who participated in SNAP E&T activities and obtained full-time or part-time employment may be provided for no more than 90 days and must be funded with 50/50 funds.

SUBCHAPTER D. ALLOWABLE ACTIVITIES

The Commission adopts the following amendments to Subchapter D:

§813.33. Job Retention Activities.

New §813.33(a)(1) - (3) allows Boards to provide job retention activities:

--similar to the SNAP E&T activities in §813.31(1) - (3), and as specified in the annual SNAP E&T state plan of operations, and any subsequent amendments, approved by USDA;

--for up to 90 days to SNAP recipients who participated in SNAP E&T activities and obtained full-time employment; and

--in full-service or minimum-service counties as funding permits.

New §813.33(b) requires Boards to ensure that SNAP eligibility is verified each month that job retention activities are provided.

§813.34. Job Retention Support Services.

New §813.34(1) - (2) allows Boards to provide job retention support services for up to 90 days to assist:

--mandatory work registrants who obtain part-time employment while participating, or after successfully participating, in SNAP E&T activities; and

--exempt recipients who participated in SNAP E&T activities and obtained full-time employment.

SUBCHAPTER E. SUPPORT SERVICES FOR PARTICIPANTS

The Commission adopts the following amendments to Subchapter E:

§813.41. Provision of SNAP E&T Support Services.

Section 813.41(a)(1)(B), prohibiting the provision of support services to mandatory work registrants for the purpose of retaining employment, is removed. As provided in new §813.34(a)(1), Boards may provide job retention support services for up to 90 days to assist mandatory work registrants with retaining employment.

Section 813.41(a)(2)(B), prohibiting the provision of support services to exempt recipients for the purpose of retaining employment, is removed. As provided in new §813.34(a)(2), Boards may provide job retention support services for up to 90 days to assist exempt recipients with retaining employment.

Section 813.41(b)(3) removes the term "work" and incorporates it into new §813.41(b)(4).

New §813.41(b)(4)(A) - (B) adds that support services include payment or reimbursement for work-related expenses that are:

--reasonable, necessary, and directly related to accepting or retaining employment; and

--paid for based on methods and amounts established in Boards' local policies and procedures.

New §813.41(b)(5) adds that support services include payment or reimbursement for housing expenses that are:

--reasonable, necessary, and directly related to SNAP E&T participation or retaining employment; and

--paid for based on methods and amounts established in Boards' local policies and procedures.

Certain subparagraphs in this subchapter have been renumbered to accommodate additions or deletions.

SUBCHAPTER F. COMPLAINTS AND APPEALS

The Commission adopts the following amendment to Subchapter F:

A technical correction is made to the title of Subchapter F, which is changed from "Complaints and Appeals" to "Complaints." Requirements related to appeals previously contained in Chapter 813 were removed in 2007 and moved to new Chapter 823, Integrated, Complaints, Hearings, and Appeals.

NO COMMENTS WERE RECEIVED.

The Agency hereby certifies that the adoption has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§813.1 - 813.5

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 28, 2009.

TRD-200903185

Reagan Miller

Deputy Division Director, Workforce Policy and Service Delivery

Texas Workforce Commission

Effective date: August 17, 2009

Proposal publication date: May 8, 2009

For further information, please call: (512) 475-0829



SUBCHAPTER B. ACCESS TO EMPLOYMENT AND TRAINING ACTIVITIES AND SUPPORT SERVICES

40 TAC §§813.11 - 813.14

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency

services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Reagan Miller

Deputy Division Director, Workforce Policy and Service Delivery

Texas Workforce Commission

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For further information, please call: (512) 475-0829



SUBCHAPTER C. EXPENDITURE OF FUNDS

40 TAC §813.22

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rule affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Reagan Miller

Deputy Division Director, Workforce Policy and Service Delivery

Texas Workforce Commission

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For further information, please call: (512) 475-0829



SUBCHAPTER D. ALLOWABLE ACTIVITIES

40 TAC §§813.31 - 813.34

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Reagan Miller

Deputy Division Director, Workforce Policy and Service Delivery

Texas Workforce Commission

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For further information, please call: (512) 475-0829



SUBCHAPTER E. SUPPORT SERVICES FOR PARTICIPANTS

40 TAC §813.41

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rule affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Reagan Miller

Deputy Division Director, Workforce Policy and Service Delivery

Texas Workforce Commission

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For further information, please call: (512) 475-0829



TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 9. CONTRACT MANAGEMENT

SUBCHAPTER G. HIGHWAY IMPROVEMENT CONTRACT SANCTIONS

43 TAC §9.114

The Texas Department of Transportation (department) adopts amendments to §9.114, concerning Opportunity for Formal Hearing. The amendments are adopted without changes to the proposed text as published in the May 15, 2009, issue of the *Texas Register* (34 TexReg 2942) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

The department's contractor sanction rules set forth the circumstances under which contractors may be sanctioned and the procedures that must be followed. The Texas Transportation Commission (commission) previously adopted §§9.100 - 9.115 to specify the process by which the department will administer and manage contractor sanctions associated with highway improvement contracts.

Amendments to §9.114, Opportunity for Formal Hearing, are necessary to clarify the appeals process available to those contractors sanctioned at a Level 1 as prescribed in existing §9.107(a)(1). Previous revisions to §9.114 and to 43 TAC §9.112, Opportunity for Informal Hearing, specified the appeals process for those contractors sanctioned at a Level 2 or greater, specifically providing for an opportunity for an informal hearing with the department and, if dissatisfied with the results of the informal hearing, subsequent opportunity for a formal hearing with the State Office of Administrative Hearings in accordance with 43 TAC §1.21 et seq. The appeals process for those contractors sanctioned at a Level 1 was inadvertently omitted from the formal appeal process. While contractors sanctioned at a Level 1 currently have the opportunity to request a formal hearing under 43 TAC §1.21 et seq, these amendments serve to further clarify within 43 TAC Chapter 9 the appeals process available to these contractors.

The opportunity for an informal hearing with the department prescribed under 43 TAC §9.112 is limited to those contractors sanctioned at a Level 2 or greater as imposition of these sanctions will prohibit a contractor from bidding on any department highway improvement contracts for the specified duration of the sanction. Any contractor who is suspended from bidding, regardless of the sanction level imposed, may request an informal hearing under §9.112. This additional department hearing process provides a more expeditious means of considering appeals associated with department suspensions and sanctions of a Level 2 or greater, while ensuring the maximum number of qualified bidders are eligible to bid on department highway improvement contracts.

Since Level 1 sanctions involve only a reduction in bidding capacity, contractors sanctioned at this level who are not simultaneously suspended may continue to submit bids on department highway improvement contracts while awaiting the results of any formal appeals filed under 43 TAC §9.114.

The 43 TAC Chapter 9, Subchapter G title is changed from Contractor Sanctions to Highway Improvement Contract Sanctions to clarify the application of the subchapter specifically to highway improvement contracts.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 31, 2009.

TRD-200903237

Joanne Wright

Deputy General Counsel

Texas Department of Transportation

Effective date: August 20, 2009

Proposal publication date: May 15, 2009

For further information, please call: (512) 463-8683



REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review*; (2)

notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (<http://www.sos.state.tx.us/texreg>). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative Code* on the web site (<http://www.sos.state.tx.us/tac>).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Public Utility Commission of Texas

Title 16, Part 2

The Public Utility Commission of Texas (commission) publishes this notice of intention to review Chapter 25, Substantive Rules Applicable to Electric Service Providers (Subchapters H - J) pursuant to Texas Government Code §2001.039, *Agency Review of Existing Rules*. The text of the rule sections will not be published. The text of the rules may be found in the Texas Administrative Code, Title 16, Economic Regulation, Part 2, or through the commission's website at www.puc.state.tx.us. Project Number 37228 is assigned to this proceeding.

Texas Government Code §2001.039 requires that each state agency review and readopt, readopt with amendments, or repeal the rules adopted by that agency pursuant to the Texas Government Code, Chapter 2001, Subchapter B, Rulemaking. As required by §2001.039, this review is to assess whether the reason for adopting or readopting the rules continues to exist. The commission requests specific comments from interested persons on whether the reasons for adopting each rule section in Chapter 25 continue to exist. If it is determined during this review that any section of Chapter 25 needs to be repealed or amended, the repeal or amendment will be initiated under a separate proceeding. This notice of intention to review Chapter 25 has no effect on the sections as they currently exist.

Jess Totten, Director of Competitive Markets, has determined that for each year of the first five-year period the sections are in effect there will be no new fiscal implications for state or local government as a result of enforcing or administering these sections that are not already in effect as a result of the previous adoption of these sections.

Mr. Totten has determined that for each year of the first five years these sections are in effect the public benefit anticipated as a result of enforcing these sections will be: protection of the public interest inherent in the rates and services of public utilities; monitoring of the established regulatory system to assure rates, operations, and services that are just and reasonable to the consumers and utilities; assurance of high-quality service to customers; protection of the public interest inherent in the service quality of electric service providers; and maintaining a healthy marketplace for competition among electric service providers. There will be no new effect on small businesses or micro-businesses as a result of enforcing these sections that is not already in effect as a result of the previous adoption of these sections. There are no new anticipated economic costs to persons who are required to comply with these sections as noticed for review that are not already in effect as a result of the previous adoption of these sections.

Mr. Totten has also determined that for each year of the first five years the sections are in effect there should be no effect on a local economy as a result of this review, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the review of Chapter 25 - Subchapters H - J (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 31 days after publication. Reply comments may be submitted within 45 days after publication. When filing comments interested persons are requested to comment on the sections in the same order they are found in the chapter and to clearly designate which section is being commented upon. All comments should refer to Project Number 37228.

The rules subject to this review are proposed for publication under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007, Supplement 2008) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and Texas Government Code §2001.039 which requires each state agency to review its rules every four years.

Cross Reference to Statutes: Texas Government Code §2001.039; Texas Utilities Code Annotated, Title II, Public Utility Regulatory Act; and Title IV, Chapters 161, 163, 181, 182, 183, 184, and 185.

SUBCHAPTER H. ELECTRICAL PLANNING.

DIVISION 1: Renewable Energy Resources and Use of Natural Gas.

16 TAC §25.172. Goal for Natural Gas.

16 TAC §25.173. Goal for Renewable Energy.

16 TAC §25.174. Competitive Renewable Energy Zones.

DIVISION 2: Energy Efficiency and Customer-Owned Resources.

16 TAC §25.181. Energy Efficiency Goal.

16 TAC §25.182. Energy Efficiency Grant Program.

16 TAC §25.183. Reporting and Evaluation of Energy Efficiency Programs.

16 TAC §25.185. Energy Efficiency Incentive Program for Military Bases.

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION.

DIVISION 1: Open-Access Comparable Transmission Service for Electric Utilities in the Electric Reliability Council of Texas.

16 TAC §25.191. Transmission Service Requirements.

16 TAC §25.192. Transmission Service Rates.
16 TAC §25.193. Distribution Service Provider Transmission Cost Recovery Factors (TCRF).
16 TAC §25.195. Terms and Conditions for Transmission Service.
16 TAC §25.196. Standards of Conduct.
16 TAC §25.198. Initiating Transmission Service.
16 TAC §25.199. Transmission Planning, Licensing and Cost-Recovery for Utilities within the Electric Reliability Council of Texas.
16 TAC §25.200. Load Shedding, Curtailments, and Redispatch.
16 TAC §25.202. Commercial Terms for Transmission Service.
16 TAC §25.203. Alternative Dispute Resolution (ADR).
DIVISION 2: Transmission and Distribution Applicable to All Electric Utilities.
16 TAC §25.211. Interconnection of On-Site Distributed Generation (DG).
16 TAC §25.212. Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation.
16 TAC §25.213. Metering for Distributed Renewable Generation.
16 TAC §25.214. Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities.
16 TAC §25.215. Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice.
16 TAC §25.216. Selection of Transmission Service Providers.
16 TAC §25.217. Distributed Renewable Generation.
16 TAC §25.221. Electric Cost Separation.
16 TAC §25.223. Unbundling of Energy Service.
16 TAC §25.227. Electric Utility Service for Public Retail Customers.

SUBCHAPTER J. COSTS, RATES AND TARIFFS.

DIVISION 1: Retail Rates.

16 TAC §25.231. Cost of Service.

16 TAC §25.232. Adjustment for House Bill 11, Acts of 72nd Legislature, First Called Special Session 1991.
16 TAC §25.233. Treatment of Integrated Resource Plan Costs.
16 TAC §25.234. Rate Design.
16 TAC §25.235. Fuel Costs - General.
16 TAC §25.236. Recovery of Fuel Costs.
16 TAC §25.237. Fuel Factors.
16 TAC §25.238. Power Cost Recovery Factors (PCRF).
16 TAC §25.239. Transmission Cost Recovery Factor for Certain Electric Utilities.
16 TAC §25.240. Contribution Disclosure Statements in Appeals of Municipal Utility Rates.
16 TAC §25.241. Form and Filing of Tariffs.
16 TAC §25.242. Arrangements Between Qualifying Facilities and Electric Utilities.
16 TAC §25.251. Renewable Energy Tariff.
DIVISION 2: Recovery of Stranded Costs.
16 TAC §25.261. Stranded Cost Recovery of Environmental Cleanup Costs.
16 TAC §25.263. True-up Proceeding.
16 TAC §25.264. Quantification of Stranded Costs of Nuclear Generation Assets.
16 TAC §25.265. Securitization by River Authorities and Electric Cooperatives.

TRD-200903224

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: July 30, 2009



IN

ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Comptroller of Public Accounts

Notice of Contract Award

Pursuant to §§2155.001, 2156.101, and 403.011 of Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces its award of the following contract:

A contract is awarded to Business Ink, Company, 10214 North IH 35, Austin, Texas 78753. The total contract amount is based on usage but estimated to be a maximum of \$600,000 per year depending on usage of the contract services during the contract term. No minimum amounts or quantities are guaranteed. The term of the contract is July 30, 2009 through August 31, 2010 with three (3) one (1) year options to extend to be exercised one (1) year at a time.

The Comptroller's Request for Proposals #193b (RFP) related to this contract award was published in the May 29, 2009, *Texas Register* (34 TexReg 3420)

TRD-200903242

William Clay Harris

Assistant General Counsel, Contracts

Comptroller of Public Accounts

Filed: July 31, 2009



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, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/10/09 - 08/16/09 is 18% for Consumer ¹Agricultural/Commercial ²credit through \$250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 08/10/09 - 08/16/09 is 18% for Commercial over \$250,000.

The monthly ceiling as prescribed by §303.005³ for the period of 08/01/09 - 08/31/09 is 18% for Consumer/Agricultural/Commercial/credit through \$250,000.

The monthly ceiling as prescribed by §303.005 for the period of 08/01/09 - 08/31/09 is 18% for Commercial over \$250,000.

¹Credit for personal, family or household use.

²Credit for business, commercial, investment or other similar purpose.

³For variable rate commercial transactions only.

TRD-200903332

Leslie L. Pettijohn

Commissioner

Office of Consumer Credit Commissioner

Filed: August 3, 2009



Commission on State Emergency Communications

Notice of Workshop

Implementation Plan for Recent Legislation and the Operations and Funding of Poison Control Centers

The Commission on State Emergency Communications (CSEC) will hold a workshop to discuss the impact of recent legislation on the Texas Poison Control Program, specifically as it pertains to the operations and funding of Poison Control Centers.

The workshop will be held **September 15, 2009, from 10:00 a.m. to 3:00 p.m.**, at 333 Guadalupe Street, Room 102, Austin, TX 78701.

The CSEC is holding this workshop to receive stakeholder and public input regarding the implementation of the requirements contained in Texas House of Representatives Bill Number 1093 (HB 1093). HB 1093 moves all functions and activities regarding the Poison Control Centers currently performed by the Department of State Health Services (DSHS) to the CSEC on May 1, 2010. A copy of HB 1093 may be found at http://www.911.state.tx.us/browse.php/HB_1093_Transition_Workshop. A primary purpose of the workshop will be to consider changes to existing CSEC §254.1, Operations and Funding of Poison Control Centers, to account for the change in legislation. Such changes would be proposed to the Commission at its meeting on October 13, 2009. Prior to the workshop, the CSEC Staff may post to the workshop webpage and notify registrants of any staff-proposed changes to §254.1 that will be discussed at the workshop.

The workshop agenda is as follows:

- I. Welcoming Remarks by CSEC Staff
- II. Overview of HB 1093 statutory requirements
- III. Discuss Staff-Proposed Changes to CSEC §254.1
- IV. Review comments
- V. Open Discussion
- VI. Closing

Written comments regarding implementation considerations of HB 1093 or §254.1 are invited and may be submitted in writing to CSEC before and/or after the workshop, but no later than September 30, 2009. All comments will be posted to CSEC's workshop webpage.

Comments may be sent to:

Commission on State Emergency Communications

Attention: Poison Workshop Comments

333 Guadalupe St., Suite 2-212, Austin, TX 78701

- or -

comments@csec.state.tx.us

Questions concerning the workshop or this notice should be referred to Norma Valle at (512) 305-6940 or norma.valle@csec.state.tx.us

Persons planning on participating in the workshop, please register by contacting Elizabeth Baker at (512) 305-6928 or elizabeth.baker@csec.state.tx.us.

Hearing and speech-impaired individuals with a telecommunications device for the deaf may contact CSEC at (512) 305-6925.

CSEC will not be broadcasting the workshop or allowing telephonic participation.

TRD-200903230

Patrick Tyler

General Counsel

Commission on State Emergency Communications

Filed: July 30, 2009

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 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. Section 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 **September 14, 2009**. Section 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 September 14, 2009**. 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, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: ACCEL QUICK STOP, INC. dba Libby Food Store; DOCKET NUMBER: 2009-0519-PST-E; IDENTIFIER: RN102494424; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 Texas Administrative Code (TAC) §115.245(2) and Texas Health and Safety Code (THSC), §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: \$2,768; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Advanced Environmental Recycling Technologies, Inc.; DOCKET NUMBER: 2009-0432-MLM-E; IDENTIFIER: RN101873164; LOCATION: Junction, Kimble County; TYPE OF

FACILITY: reconstituted wood products manufacturing; RULE VIOLATED: 30 TAC §335.4, by failing to prevent the unauthorized discharge of industrial solid waste; 30 TAC §335.6(h), by failing to provide notice of the intent to conduct the recycling of industrial solid waste or municipal hazardous waste; 30 TAC §335.9(a)(1), by failing to maintain records of all hazardous and industrial solid waste activities; 30 TAC §37.921 and §335.24(k), by failing to have financial assurance for closure of a recycling facility storing nonhazardous combustible recycling materials outdoors; and 30 TAC §324.1 and 40 Code of Federal Regulations (CFR) §279.22(c)(1), by failing to mark or clearly label containers used to store used oil with the words "Used Oil"; PENALTY: \$9,282; ENFORCEMENT COORDINATOR: Mike Meyer, (512) 238-4492; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(3) COMPANY: Albemarle Corporation; DOCKET NUMBER: 2009-0427-AIR-E; IDENTIFIER: RN100218247; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §115.722(d) and §116.115(c), 40 CFR §60.18(c)(3)(ii), Air Permit Number 48710, Special Condition (SC) Number 8(A), Air Permit Number 2101, SC Number 5(A), Air Permit Number 48576, SC Number 7, and Air Permit Number 77644, SC Number 3(A), and THSC, §382.085(b), by failing to maintain the HB-2 dry flare above the minimum net heating value of 300 British Thermal Units per standard cubic feet (BTU/scf); and 30 TAC §122.143(4) and §122.145(2)(A), Federal Operating Permit (FOP) Number O-02310, General Terms and Conditions (GTC), and THSC, §382.085(b), by failing to report all deviations in a semi-annual deviation report; PENALTY: \$20,989; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(4) COMPANY: Bob King's Truck Beds, LLC dba Kings Truck Beds; DOCKET NUMBER: 2009-0562-AIR-E; IDENTIFIER: RN104311055; LOCATION: Boyd, Wise County; TYPE OF FACILITY: fabricated metal products plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain a permit or satisfy the conditions for a permit by rule before conducting surface coating and dry abrasive cleaning operations; PENALTY: \$2,880; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Doug Dennis; DOCKET NUMBER: 2009-0555-OSI-E; IDENTIFIER: RN103837274; LOCATION: Springtown, Weatherford; Jack and Parker Counties; TYPE OF FACILITY: on-site sewage installer; RULE VIOLATED: 30 TAC §30.5(a) and §285.50(b), the Code, §37.003, and THSC, §366.071(a), by failing to hold an on-site sewage facility (OSSF) installer license prior to installing an OSSF; PENALTY: \$1,011; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800 and 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(6) COMPANY: Dome Petrochemical, L.C.; DOCKET NUMBER: 2009-0449-AIR-E; IDENTIFIER: RN101519551; LOCATION: Baytown, Chambers County; TYPE OF FACILITY: industrial organic chemical production plant; RULE VIOLATED: 30 TAC §§101.20(1) and (3), 115.354(2), 116.115(c), and 122.143(4), 40 CFR §60.482-1(a), FOP Number O-01572, Special Terms and Condition (STC) Numbers 1A and 10, New Source Review (NSR) Permit Number 45375/PSD-TX-1007, SC Numbers 1 and 23, and THSC, §382.085(b), by failing to conduct leak detection and repair on 471 components in volatile organic compound (VOC) service; 30 TAC §§101.20(3), 116.115(c), 116.116(a)(1), and 122.143(4), FOP Number O-01572,

STC Number 10, NSR Permit Number 45375/PSD-TX-1007, SC Numbers 1 and 25, and THSC, §382.085(b), by failing to submit a written request to amend NSR Permit Number 45375/PSD-TX-1007; 30 TAC §§101.20(3), 116.115(c), and 122.143(4), FOP Number O-01572, STC Number 10, NSR Permit Number 45375/PSD-TX-1007, SC Number 5, and THSC, §382.085(b), by failing to operate the vapor collection system and the vapor combustion unit (VCU) during loading operations; 30 TAC §§101.20(3), 116.115(c), and 122.143(4), FOP Number O-01572, STC Number 10, NSR Permit Number 45375/PSD-TX-1007, SC Number 19, and THSC, §382.085(b), by failing to install, calibrate, and maintain a continuous monitoring and recording instrument for oxygen and temperature for the VCU; and 30 TAC §§122.143(4), 122.145(2)(A), and 142.146(1), FOP Number O-01572, GTC, and THSC, §382.085(b), by failing to disclose a deviation within the semi-annual deviation reporting period and to accurately certify the annual compliance certification; PENALTY: \$39,059; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: Genesis Quality Aggregates, Limited; DOCKET NUMBER: 2009-0544-AIR-E; IDENTIFIER: RN105378632; LOCATION: Eagle Pass, Maverick County; TYPE OF FACILITY: aggregate processing and sales site; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.0518(a) and §382.085(b), by failing to obtain permit authorization for a source of air emissions or satisfy the conditions of a permit by rule; and 30 TAC §101.201(e) and THSC, §382.085(b), by failing to submit an excess opacity event notification within 24 hours of the discovery of the event; PENALTY: \$3,000; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(8) COMPANY: City of Grapevine; DOCKET NUMBER: 2009-0441-MWD-E; IDENTIFIER: RN101614352; LOCATION: Grapevine, Tarrant County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010486002, Permit Conditions Number 2 g., and the Code, §26.121(a)(1), by failing to prevent the unauthorized discharge of wastewater; PENALTY: \$3,750; Supplemental Environmental Project (SEP) offset amount of \$3,750 applied to holding a collection event to collect, properly dispose, or recycle household hazardous materials and electronics; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: HAMMOND MOUND UTILITIES, INC.; DOCKET NUMBER: 2009-0752-MWD-E; IDENTIFIER: RN101720886; LOCATION: Waller County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013984001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for total suspended solids (TSS); PENALTY: \$1,300; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: Hanson Aggregates, Inc.; DOCKET NUMBER: 2009-0343-IWD-E; IDENTIFIER: RN102186384; LOCATION: Bridgeport, Wise County; TYPE OF FACILITY: limestone crushing and washing plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0001406000, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits for TSS; and 30 TAC §305.125(1) and §319.5(b) and TPDES Permit Number WQ0001406000, Monitor-

ing and Reporting Requirements 3.a., by failing to collect and analyze samples for required parameters at the minimum frequency specified in the permit; PENALTY: \$8,108; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Ingram ReadyMix, Inc.; DOCKET NUMBER: 2009-0698-MLM-E; IDENTIFIER: RN105190193; LOCATION: San Antonio, Medina County; TYPE OF FACILITY: concrete ready mix production; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to submit an Edwards Aquifer Protection Plan for commission approval; and 30 TAC §281.25(a)(4) and 40 CFR §122.26(c), by failing to obtain authorization to discharge process water and storm water associated with the concrete production facility; PENALTY: \$3,750; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(12) COMPANY: Intercontinental Terminals Company, LLC; DOCKET NUMBER: 2009-0500-AIR-E; IDENTIFIER: RN100210806; LOCATION: La Porte, Harris County; TYPE OF FACILITY: petroleum bulk storage terminal; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 1078, SC Number 5, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: \$10,000; SEP offset amount of \$5,000 applied to Houston Regional Monitoring Corporation - Houston Area Monitoring; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(13) COMPANY: Kennen W. Jackson; DOCKET NUMBER: 2009-0934-WOC-E; IDENTIFIER: RN103397543; LOCATION: Mexia, Limestone County; TYPE OF FACILITY: public water system (PWS); RULE VIOLATED: 30 TAC §30.5(a) and §30.381(b), the Code, §37.003, and THSC, §341.034(b), by failing to obtain a valid PWS operator license prior to performing process control duties in the production, treatment, and distribution of public drinking water; PENALTY: \$750; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3100; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(14) COMPANY: Joe Kahla; DOCKET NUMBER: 2009-1110-OSI-E; IDENTIFIER: RN105745590; LOCATION: Jasper County; TYPE OF FACILITY: on-site sewage installer; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: \$210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(15) COMPANY: KAVMEL, INC. dba Shop Smart 2; DOCKET NUMBER: 2008-1471-PST-E; IDENTIFIER: RN101554632; LOCATION: Bedford, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery compatible systems; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II vapor recovery system (VRS) and each current employee receives in-house Stage II vapor recovery training regarding the purpose and correct operation of the Stage II VRS; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; PENALTY: \$4,375; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Lucite International, Inc.; DOCKET NUMBER: 2009-0522-AIR-E; IDENTIFIER: RN102736089; LOCATION: Nederland, Jefferson County; TYPE OF FACILITY: industrial organic chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), FOP Number O-01437, GTC and SC Number 11, NSR Permit Number 19004, SC Number 1, and THSC, §382.085(b), by failing to maintain emissions below the allowable emissions limit of 0.70 tons per year (TPY) of VOCs; 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), FOP Number O-01437, GTC and SC Number 11, NSR Permit Number 19003, SC Number 3, and THSC, §382.085(b), by failing to maintain emissions below allowable emissions limits of 0.42 TPY of nitrogen oxides; 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), and 122.143(4), FOP Number O-01437, GTC and SC Number 11, NSR Permit Number 19005 and PSD-TX-753, SC Number 1, and THSC, §382.085(b), by failing to prevent emissions of 0.05 tons of VOCs in 2007 from the Spent Acid Recovery Unit Stack; and 30 TAC §§101.20(1), 113.130, 115.354(1)(A), (2)(B) and (C), and (7)(B), 116.115(c), and 122.143(4), 40 CFR §§60.482-2(a)(1), 60.482-7(c)(1)(i), 63.163(b)(1), 63.168(d)(3), 63.173(a)(1), and 63.174(b)(3)(i), FOP Number O-01437, GTC, SC Numbers 1A, 8, and 11, and THSC, §382.085(b), by failing to monitor 6,903 components in the methyl methacrylate unit and 1,248 components in the acetone cyanohydrin unit; PENALTY: \$70,546; SEP offset amount of \$28,218 applied to City of Port Arthur: Port Arthur Alternative Fuel Vehicle and Equipment Program; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(17) COMPANY: City of Marlin; DOCKET NUMBER: 2009-1170-WQ-E; IDENTIFIER: RN104480892; LOCATION: Falls County; TYPE OF FACILITY: storm water; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: \$700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(18) COMPANY: Wanda Jo Noah; DOCKET NUMBER: 2009-0471-PST-E; IDENTIFIER: RN100565001; LOCATION: Granbury, Hood County; TYPE OF FACILITY: one underground storage tank (UST) and two aboveground storage tanks (ASTs); RULE VIOLATED: 30 TAC §334.127(a)(1), by failing to register with the agency two ASTs in existence on or after September 1, 1989; and 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system; PENALTY: \$3,575; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: Oglebay Norton Industrial Sands, Inc.; DOCKET NUMBER: 2009-0342-IHW-E; IDENTIFIER: RN100676683; LOCATION: Voca, McCulloch County; TYPE OF FACILITY: sand mining; RULE VIOLATED: 30 TAC §335.4, by failing to prevent the unauthorized discharge of industrial solid waste; 30 TAC §335.503 and §335.513, by failing to properly classify all industrial wastes generated at the facility; and 30 TAC §335.10(c), by failing to use the appropriate hazardous waste manifest; PENALTY: \$11,425; SEP offset amount of \$4,570 applied to Texas Association of Resource Conservation and Development Areas, Inc. - Abandoned Tire Clean-Up; ENFORCEMENT COORDINATOR: Mike Meyer, (512) 239-4492; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(20) COMPANY: Patton & Dial Quality Oil Company, LLC dba Grapeland Fuel; DOCKET NUMBER: 2009-0540-PST-E; IDENTIFIER: RN103060877; LOCATION: Grapeland, Houston County;

TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to provide a release detection method for the USTs; and 30 TAC §334.50(d)(1)(B)(iii)(I) and the Code, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; PENALTY: \$14,400; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(21) COMPANY: Rescar, Inc.; DOCKET NUMBER: 2007-1958-AIR-E; IDENTIFIER: RN100234681; LOCATION: Orange, Orange County; TYPE OF FACILITY: railcar repair and painting; RULE VIOLATED: 30 TAC §122.145(2)(B) and (C), FOP Number O-01532, GTC, and THSC, §382.085(b), by failing to submit a semi-annual deviation report; PENALTY: \$2,425; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(22) COMPANY: Springfield Custom Homes, Inc.; DOCKET NUMBER: 2009-1168-WQ-E; IDENTIFIER: RN105727143; LOCATION: Denton, Denton County; TYPE OF FACILITY: home builder; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: \$700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: Springfield Custom Homes, Inc.; DOCKET NUMBER: 2009-1169-WQ-E; IDENTIFIER: RN104763412; LOCATION: Denton, Denton County; TYPE OF FACILITY: home builder; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: \$700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: Larry D. Stephens; DOCKET NUMBER: 2009-1152-OSI-E; IDENTIFIER: RN103814232; LOCATION: Alvarado, Johnson County; TYPE OF FACILITY: on-site sewage; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational registration; PENALTY: \$210; ENFORCEMENT COORDINATOR: Kirk Schoppe, (512) 239-0489; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(25) COMPANY: Arlene Helen Stueve and Glenn Ronald Stueve dba Stueve Gold Dairy; DOCKET NUMBER: 2009-0291-AGR-E; IDENTIFIER: RN102816766; LOCATION: Deaf Smith County; TYPE OF FACILITY: dairy farm; RULE VIOLATED: 30 TAC §321.39(e) and TPDES Permit Number TXG920260, Part III, Section A.8.(b), by failing to store stockpiled manure within the drainage area of the retention control structure; 30 TAC §321.40(k)(3) and TPDES Permit Number TXG920260, Part III, Section A.11.(a), by failing to update and implement a nutrient management plan; and 30 TAC §321.40(k)(2) and TPDES Permit Number TXG920260, Part III, Section A.13.(a), by failing to cease applying waste or wastewater to the land management unit when results of the annual soil analysis indicate a level of greater than 350 parts per million of extractable phosphorus; PENALTY: \$2,650; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(26) COMPANY: Rita Karbalai dba Sundown Mobile Home Park; DOCKET NUMBER: 2009-0460-MWD-E; IDENTIFIER: RN101514271; LOCATION: Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012399001, Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permit effluent limit for ammonia nitrogen; and 30 TAC §305.125(17) and TPDES Permit Number WQ0012399001, Sludge Provisions, by failing to submit the annual sludge report for the monitoring period ending July 31, 2007; PENALTY: \$10,835; ENFORCEMENT COORDINATOR: Jeremy Escobar, (512) 239-1460; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(27) COMPANY: The Devereux Foundation; DOCKET NUMBER: 2009-0668-MWD-E; IDENTIFIER: RN103782918; LOCATION: Victoria, Victoria County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.65 and §305.125(1) and the Code, §26.121(a)(1), by failing to maintain authorization for the discharge of wastewater; PENALTY: \$4,160; SEP offset amount of \$3,328 applied to Keep Texas Beautiful - Texas Waterways Cleanup Program; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(28) COMPANY: Tyson Poultry, Inc.; DOCKET NUMBER: 2009-0601-AIR-E; IDENTIFIER: RN102771177; LOCATION: Tenaha, Shelby County; TYPE OF FACILITY: feed mill; RULE VIOLATED: 30 TAC §116.110(a)(1) and THSC, §382.0518(a) and §382.085(b), by failing to obtain authorization for all emission sources; 30 TAC §116.115(c), Air Permit Number 3797, SC Number 7B, and THSC, §382.085(b), by failing to maintain records necessary to determine compliance with operating conditions of the permit; and 30 TAC §116.115(c), Air Permit Number 3797, General Condition Number 9, and THSC, §382.085(b), by failing to operate air pollution emissions capture and abatement equipment properly during normal operations; PENALTY: \$7,433; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(29) COMPANY: Valero Refining-Texas, L.P.; DOCKET NUMBER: 2009-0510-AIR-E; IDENTIFIER: RN100211663; LOCATION: Corpus Christi, Nueces County; TYPE OF FACILITY: refinery; RULE VIOLATED: 30 TAC §§101.20(1) - (3), 113.120, 116.715(a), and 122.143(4), 40 CFR §§60.112b(a)(1)(i) and (iv), 61.351(a)(1), 63.119(b)(1) and (6), and 63.133(a)(2)(ii), Permit Number O-2250, STC Number 1A and Flexible Permit Number 2937/PSD-TX-1023M1, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(b) and (c) and THSC, §382.085(b), by failing to submit the final report in a timely manner; PENALTY: \$13,706; SEP offset amount of \$5,482 applied to Texas A&M University Kingsville - Corpus Christi Airshed Quality Monitoring; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(30) COMPANY: Vopak Terminal Deer Park, Inc.; DOCKET NUMBER: 2009-0532-AIR-E; IDENTIFIER: RN100225093; LOCATION: Deer Park, Harris County; TYPE OF FACILITY: petrochemical transfer; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 466A, SC Number 10, 40 CFR §§60.18, 63.11, and 63.2350, and THSC, §382.085(b), by failing to comply with the minimum net heating value of 300 BTU/scf; PENALTY: \$7,200; SEP offset amount of \$2,880 applied to Houston Regional Monitoring Corporation - Houston Area Monitoring; ENFORCEMENT COORDINATOR:

Rebecca Johnson, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-200903336

Kathleen C. Decker

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: August 4, 2009



Notice of Correction to Default Order Number 7

In the March 6, 2009, issue of the *Texas Register* (34 TexReg 1741), the Texas Commission on Environmental Quality (commission) published a notice of Default Order Number, specifically Item Number 7. The reference to Mohammad A. Swati was submitted in error by the commission as Docket Number 2008-0742-PST-E and instead should have been submitted as Docket Number 2008-0724-PST-E.

For questions concerning this error, please contact Stephanie J. Frazee at (512) 239-3693.

TRD-200903348

Kathleen C. Decker

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: August 4, 2009



Notice of District Hearing

Notice issued July 31, 2009.

TCEQ Docket No. 2009-0487-DIS; The Texas Commission on Environmental Quality (TCEQ) will conduct a hearing on an application for conversion (Application) of Memorial Hills Utility District (District) of Harris County from a water control and improvement district (WCID) to a municipal utility district (MUD). The Application was filed with the TCEQ and included a resolution by the District's Board of Directors (Applicant). The TCEQ will conduct this hearing under the authority of Chapters 49 and 54 of the Texas Water Code, Title 30, Chapter 293 of the Texas Administrative Code and the procedural rules of the TCEQ. The TCEQ will conduct the hearing at: 9:30 a.m., Wednesday, November 4, 2009, Building E, Room 201S, 12100 Park 35 Circle, Austin, Texas.

The District was created by a special act of the 61st Texas Legislature on May 6, 1968. Under this law the District had the authority to operate under Texas Water Code Chapters 49 and 51 as a WCID. The material filed with the Application states that conversion would serve the best interest of the District and would be a benefit to the land and property included in the District.

HEARING. As required by the Texas Water Code Chapter 54, §54.032 and Title 30 of the Texas Administrative Code Section §293.15, the above hearing regarding this application will be held no earlier than 14 days after notice of this hearing is published in a newspaper with general circulation in the county or counties in which the District is located. The purpose of this hearing is to provide all interested persons the opportunity to appear and offer testimony for or against the proposal contained in the resolution.

At the hearing, pursuant to the Texas Water Code §54.033 the Commission will determine if converting the current district into a municipal utility district; acquisition of road powers; and name change, that operates under Texas Water Code Chapter 54 would serve the best interest of the District and would be a benefit to the land and property included in the District, or, if there is any opposition to the proposed conversion,

the Commission may refer the application to the State Office of Administrative Hearings for a contested case hearing on the application.

INFORMATION. For information regarding the date and time this application will be heard before the TCEQ, please submit written inquiries to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC-103, at the same address. For additional information, individual members of the public may contact the Districts Review Team at (512) 239-4691. General information regarding TCEQ is available on the internet at www.tceq.state.tx.us.

Si desea información en Español, puede llamar al 1-512-239-0200.

Persons with disabilities who plan to attend this hearing and who need special accommodations at the hearing should call the TCEQ Office of Public Assistance at 800-687-4040 or 800-RELAY-TX (TDD), at least one week prior to the hearing.

TRD-200903356

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: August 5, 2009



Notice of Water Quality Applications

The following notices were issued on July 21, 2009 through July 30, 2009.

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

VEOLIA ES TECHNICAL SOLUTIONS, L.L.C., which operates the Port Arthur Facility, a hazardous waste treatment, storage, and disposal facility, has applied for a major amendment of TPDES Permit No. WQ0002417000, to relocate Outfall 001; clarify the discharge via Outfall 001 as boiler blowdown, non-process area storm water and treated domestic wastewater (via internal Outfall 101); remove internal Outfalls 201 and 301; revise the daily maximum total aluminum effluent limitation to a daily maximum dissolved aluminum effluent limitation at Outfall 001 (or apply an aluminum partitioning coefficient); remove Other Requirement Nos. 4, 5, and 6; and remove the biomonitoring requirements at Outfall 001. The current permit authorizes the discharge of previously monitored effluent, utility wastewater and storm water runoff on an intermittent and flow variable basis via Outfall 001. The facility is located south of State Highway 73 and approximately 3.5 miles southwest of the location where the State Highway 73 bridge crosses Taylor Bayou, Jefferson County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

CITY OF MILES has applied for a renewal of TCEQ Permit No. WQ0010138001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 80,000 gallons per day via surface irrigation of 115 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 at the northeastern corner of the intersection of Farm-to-Market Road 1692 and Paint Rock Road in Runnels County, Texas 76861.

CITY OF LINDEN has applied for a renewal of TPDES Permit No. WQ0010429002 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The facility is located approximately 1,600 feet southwest of the intersection of State Highway 155 and Hamilton Street in Cass County, Texas 75563.

CITY OF HOUSTON has applied for a renewal of TPDES Permit No. WQ0010495065, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,000,000 gallons per day. The facility is located at 8545 Scranton Street, due east of William P. Hobby Airport, approximately 0.7 mile southwest of the intersection Interstate Highway 45 (Gulf Freeway) and Airport Boulevard in Harris County, Texas 77061.

CITY OF ROGERS has applied for a renewal of TPDES Permit No. WQ0010804001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 161,000 gallons per day. The facility is located south of the City of Rogers, immediately west of Farm-to-Market Road 437 and approximately 3/4 mile south of the intersection of U.S. Highway 190 and Farm-to-Market Road 437 in Bell County, Texas.

CITY OF FREEPORT has applied for a renewal of TPDES Permit No. WQ0010882002 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The current permit also authorizes the disposal of treated domestic wastewater via irrigation of 67.68 acres of golf course land. The facility is located at 123 Slaughter Road, north of State Highway 36, approximately 1 mile south of the Brazos River in Brazoria County, Texas 77541.

THE FALLS MUNICIPAL UTILITY DISTRICT, has applied for a renewal of TPDES Permit No. WQ0013018001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The facility is located approximately 1.75 miles east-northeast of the intersection of Farm-to-Market Road 109 and Zimmerscheidt Road and approximately 9.5 miles north of the City of Columbus in Colorado County, Texas 78950.

SHADOWGLEN RESIDENTIAL COMMUNITY, LTD. has applied for a renewal of TPDES Permit No. WQ0013987001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 135,000 gallons per day. The facility is located approximately 0.5 mile east-southeast of the intersection of Fuchs Grove Road and Rector Loop and approximately 1.0 mile north of the City of Manor in Travis County, Texas 78653.

CRVC VIA BAYOU, LLC, has applied for a renewal of TPDES Permit No. WQ0014326001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility is located at 10000 San Leon Drive in Galveston County, Texas 77539.

CITY OF DRIPPING SPRINGS has applied for a renewal of TCEQ Permit No. WQ0014488001, which authorizes the disposal of treated domestic wastewater effluent at a daily average flow not to exceed 162,500 gallons per day via subsurface drip irrigation of 37.43 acres of public access pastureland and athletic fields in the Final Phase. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and onsite disposal areas are located approximately 0.55 mile east of the intersection of Ranch Road 12 and Farm-to-Market Road 150, as measured along Farm-to-Market Road 150, and, from that point, approximately 1,110 feet south of

Farm-to-Market Road 150 in Hays County, Texas. The offsite disposal area will be located approximately 0.44 mile south of the intersection of U.S. Highway 290 and Ranch Road 12, as measured along Ranch Road 12, and, from that point, approximately 1,280 feet east of Ranch Road 12 in Hays County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200903357

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: August 5, 2009



Notice of Water Rights Application

Notice issued July 30, 2009.

APPLICATION NO. 14-1288A; William Cody Elliott and Ashley Brook Elliott, P.O. Box 465, Christoval, Texas, 76935, applicants, have applied for an amendment to Certificate of Adjudication No. 14-1288 to add an upstream diversion point on the South Concho River, Colorado River Basin, and an additional place of use in Tom Green County. More information on the application and how to participate in the permitting process is given below. The application and a portion of the required fees were received on January 30, 2008. Additional information and fees were received on April 3, April 4, and April 18, 2008, and July 15, 2009. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on July 22, 2009. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, by August 17, 2009.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200903358

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: August 5, 2009



Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on July 31, 2009, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Nida, Inc. dba Lawndale Chevron; SOAH Docket No. 582-09-1255; TCEQ Docket No. 2008-0232-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Nida, Inc. dba Lawndale Chevron on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-200903359

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: August 5, 2009



Texas Facilities Commission

Request for Proposals #303-9-12002

The Texas Facilities Commission (TFC), on behalf of the Office of the Attorney General (OAG), announces the issuance of Request for Proposals (RFP) #303-9-12002. TFC seeks a five (5) year lease of approximately 5,737 square feet of office space in Weslaco, Hidalgo County, Texas.

The deadline for questions is August 21, 2009 and the deadline for proposals is August 31, 2009 at 3:00 p.m. The award date is October 21, 2009. 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 a 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 TFC Purchaser, Sandy Williams at (512) 475-0453. A copy of the RFP will be downloaded from the Electronic State Business Daily at http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=84199.

TRD-200903351

Kay Molina
General Counsel
Texas Facilities Commission
Filed: August 5, 2009

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Request for Proposals #303-9-12301

The Texas Facilities Commission (TFC), on behalf of the Texas Youth Commission (TYC), announces the issuance of Request for Proposals (RFP) #303-9-12301. TFC seeks a 5 year or 10 year lease of approximately 3,148 square feet of office space in Houston, Texas.

The deadline for questions is August 21, 2009, and the deadline for proposals is September 9, 2009, at 3:00 p.m. The award date is September 18, 2009. 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 a 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 TFC Purchaser Sandy Williams at (512) 475-0453. 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=84211.

TRD-200903353
Kay Molina
General Counsel
Texas Facilities Commission
Filed: August 5, 2009

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General Land Office

Notice of Invitation for Offer for Renewal of Major Consulting Services

The Texas General Land Office (GLO) is seeking a consultant that will provide geological services related to coastal geology and near-shore processes. These services are necessary to fulfill Coastal Erosion Planning and Response Act (CEPRA) legislative requirements for project monitoring, development of reports, and advancement of related studies. Periodically, the GLO is required to provide an updated coastal erosion plan to the Texas State Legislature. Part of that plan includes the identification of shoreline change, migration, and the possible threat to existing structures on the Texas coast. A consultant is needed to ensure that such research and reports are performed in a timely manner and in accordance with statutory requirements.

Pursuant to §2254.029 and §2254.031 of the Texas Government Code, the GLO is seeking to renew its contract for consulting services relating to the study of coastal geology and other coastal processes for the coastal erosion program under the authority of CEPRA for a two-year period beginning September 1, 2009 through August 31, 2011.

The consultant will develop technical reports and studies including, but not limited to, fieldwork, literature reviews, and data analysis. The consultant will be responsible for identifying, evaluating, and addressing, at a minimum, the following:

- * Beach morphology, dune dynamics;
- * Currents, sediment transport, interaction with structures;
- * Protection and restoration methods of beaches, dunes, and bay shorelines;
- * Design of shore protection projects and coastal structures;

- * Inlet management planning;
- * Sediment source identification/quantification; and
- * Inter-governmental coordination, public outreach, and consensus building.

It is the intent of the GLO to award this contract to Ms. Kimberly K. McKenna subject to the approval of the Governor's Office of Budget and Planning as required by Texas Government Code §2254.028. Ms. McKenna has previously provided these consulting services to the GLO with respect to the CEPRA program. Further information may be obtained by contacting Thomas Durnin, Texas General Land Office, 1700 N. Congress Avenue, Austin, Texas, 78701-1495, telephone (512) 463-1192.

TRD-200903331
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
General Land Office
Filed: August 3, 2009

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on September 1, 2009, at 9:00 a.m. to receive public comment on proposed rates for the Home and Community-based Services (HCS), Texas Home Living (TxHmL) and Consolidated Waiver (CWP) waiver programs. The HCS, TxHmL and CWP programs are operated by the Texas Department of Aging and Disability Services (DADS). The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.105(g), which require public notice and hearings on proposed Medicaid reimbursements. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Meisha Scott by calling (512) 491-1445, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. HHSC proposes to adjust the rates for the HCS, TxHmL and CWP programs in two phases. The first phase of proposed rates will be effective October 1, 2009, and the second phase of proposed rates will be effective upon the transfer of the HCS case management function to the Targeted Case Management (TCM) program delivered by the local Mental Retardation Agencies (MRAs). All proposed rates were determined in accordance with the rate setting methodologies listed below under "Methodology and Justification."

Methodology and Justification. The proposed rates were determined in accordance with the rate setting methodologies codified at Texas Administrative Code (TAC) Title 1, Chapter 355, Subchapter F, §355.723, Reimbursement Methodology for Home and Community-Based Services (HCS), as proposed to be amended, §355.791, Reporting Costs and Reimbursement Methodology for the Texas Home Living (TxHmL) Program, as proposed to be amended and §355.506 Reimbursement Methodology for Consolidated Waiver Program. The proposed amendment of §355.723, which appeared in the July 24, 2009, issue of the *Texas Register*, (34 TexReg 4801) updates the rule to describe how administrative and operations expenses are allocated to the various HCS service types. The proposed amendment of §355.791, which appeared in the July 3, 2009, issue of the *Texas Register*, (34 TexReg 4410) updates the rule to set TxHmL rates equal to HCS

rates for similar services. These rates 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). These changes are being made in accordance with the 2010-11 General Appropriations Act (Article II, S.B. 1, 81st Legislature, Regular Session, 2009), which appropriated funds to DADS for the State Fiscal Year 2010-2011 biennium for Medicaid rate increases for the HCS, TxHmL and CWP programs.

Briefing Package. A briefing package describing the proposed payment rates will be available on August 17, 2009. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Meisha Scott by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at meisha.scott@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 attention of Meisha Scott, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Meisha Scott at (512) 491-1998; or by e-mail to meisha.scott@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Meisha Scott, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-200903335
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 4, 2009



Public Notice

The Texas Health and Human Services Commission announces its intent to submit an amendment to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed effective date for this amendment is September 1, 2009.

The proposed amendment will adjust payment rates for the Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) Program as a result of the 2010-11 General Appropriations Act (Article II, Health and Human Services, 81st Legislature, Regular Session, 2009), which appropriated general revenue funds for provider rate increases for the ICF/MR Program. The reimbursement methodology will be modified to indicate that for the period beginning September 1, 2009 and ending August 31, 2011, ICF/MR payment rates will, on average, be equal to the payment rates in effect August 31, 2009 plus 1.54 percent.

The proposed adjustment of payment rates is estimated to result in additional annual aggregate expenditures of \$478,886 for the remainder of federal fiscal year (FFY) 2009 (September 1, 2009, through September 30, 2009), with approximately \$329,282 in federal funds and approximately \$149,604 in state general revenue. For FFY 2010, the proposed adjustment of payment rates is estimated to result in additional annual aggregate expenditures of \$5,746,630 with approximately \$4,014,021 in federal funds and approximately \$1,732,609 in state general revenue.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Pam McDonald by mail at Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, Mail Code H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1373; by facsimile at (512) 491-1998; or by e-mail

at pam.mcdonald@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-200903347
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: August 4, 2009



Texas Department of Housing and Community Affairs

Notice of Public Hearing on Section 8 Program 5-Year and 2010 Annual Plan

Section 511 of Title V of the Quality Housing and Work Responsibility Act of 1998 (P.L. 205-276) requires the Texas Department of Housing and Community Affairs (the Department) to prepare a 5-Year and 2010 Annual Plan covering operations of the Section 8 Program. The Department is required to hold a public hearing concerning this plan, pursuant to 24 CFR §903.17. The Department will hold a public hearing to receive written comments for the development of the Department's 5-Year and 2010 Annual Plan. The hearing will take place at the following time and location:

September 16, 2009

Texas Department of Housing and Community Affairs

221 East 11th Street, Room 116

Austin, Texas 78701

1:30 p.m. - 4:30 p.m.

The proposed 5-Year and 2010 Annual Plan and all supporting documentation are available to the public for viewing at the Department's main office, 221 East 11th Street, Attn: Section 8 Program, Austin, Texas on weekdays during the hours of 8:00 a.m. until 4:30 p.m. The proposed plan will also be available for viewing on the Department's website at www.tdhca.state.tx.us/sec8.htm.

Questions or requests for additional information may be directed to Willie Faye Hurd, Section 8 Program Manager, Community Affairs Division at whurd@tdhca.state.tx.us or by mail at P.O. Box 13941, Austin, Texas 78711-3941, (512) 475-3892. Comments must be received by 5:00 p.m. Friday, September 18, 2009.

Any interested persons unable to attend the hearing may submit their comments in writing to Willie Faye Hurd prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Willie Faye Hurd at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids or services for this hearing should contact Gina Esteves at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least two (2) days before the scheduled hearing so that appropriate arrangements can be made.

TRD-200903314
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: August 3, 2009

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Houston-Galveston Area Council

Request for Proposals

The Houston-Galveston Area Council solicits qualified organizations to provide social and healthcare services for individuals who have been affected by Hurricane Ike. A proposal package (RFP and attachments) will be available for download at <http://www.h-gac.com> or <http://www.wrksolutions.com> beginning at 12:00 noon Central Standard Time on Thursday, July 30, 2009. Hard copies of the proposal package will also be available at that time. A bidder's conference is scheduled for Thursday, August 6, 2009, from 10:00 a.m. to 12:00 noon in the Westin Oaks Hotel (5011 Westheimer Road, Houston, Texas 77056).

Proposals are due at H-GAC offices on or before 12:00 noon Central Daylight Time on Tuesday, August 25, 2009. Mailed proposals must be postmarked no later than Thursday, August 20, 2009. H-GAC will not accept late proposals; we will make no exceptions.

Prospective bidders may contact Carol Kimmick at (713) 627-3200 or ckimmick@wrksolutions.com or visit the web site to request a proposal package.

TRD-200903228

Jack Steele

Executive Director

Houston-Galveston Area Council

Filed: July 30, 2009

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Request for Proposals

The Houston-Galveston Area Council solicits proposals from qualified organizations to operate training for jobs projects. A proposal package will be available for download at www.h-gac.com or www.wrksolutions.com beginning at 5:00 p.m. Central Standard Time on Thursday, July 30, 2009. Hard copies of the proposal package will also be available at that time. A bidder's conference is scheduled for Monday, August 10, 2009 starting at 2:00 p.m. at the Houston-Galveston Area Council offices, 3555 Timmons Lane, 2nd floor, Conference Room A, Houston, Texas.

Proposals are due at H-GAC offices on or before 12:00 noon Central Daylight Time on Monday, August 31, 2009. Mailed proposals must be postmarked no later than Thursday, August 27, 2009. H-GAC will not accept late proposals; we will make no exceptions.

Prospective bidders may contact Carol Kimmick at (713) 627-3200 or ckimmick@theworksource.org or visit the web site to request a proposal package.

TRD-200903229

Jack Steele

Executive Director

Houston-Galveston Area Council

Filed: July 30, 2009

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Texas Department of Insurance

Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of HS1 MEDICAL MANAGEMENT, INC., a foreign third party administrator. The home office is HALLANDALE, FLORIDA.

Application of F & N ENTERPRISES, LLC, a foreign third party administrator. The home office is CREVE COEUR, MISSOURI.

Application of MEDICAL SECURITY CARD COMPANY, a foreign third party administrator. The home office is TUCSON, ARIZONA.

Application to change the name of DENTAL NETWORK OF AMERICA, INC. to DENTAL NETWORK OF AMERICA, LLC, a foreign third party administrator. The home office is DOVER, DELAWARE.

Application to change the name of PHYSICIANS HEALTHCARE ASSOCIATES, P.A. to EL PASO MED PARTNERS, P.A., a domestic third party administrator. The home office is EL PASO, TEXAS.

Application to change the name of FM BENEFIT PLANS AGENCY, INC. (DOING BUSINESS AS FM BENEFITS) to BUNKER HILL BENEFIT PLANS AGENCY, INC. (DOING BUSINESS AS BUNKER HILL BENEFITS), a domestic third party administrator. The home office is HOUSTON, TEXAS.

Application to change the home office of AMERICAN IMAGING MANAGEMENT, INC., NORTHBROOK, ILLINOIS to DEERFIELD, ILLINOIS, a foreign third party administrator.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of David Moskowit, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-200903360

Gene C. Jarmon

General Counsel and Chief Clerk

Texas Department of Insurance

Filed: August 5, 2009

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Texas Lottery Commission

Notice of Public Comment Hearing

A public hearing to receive public comments regarding the proposed procedures, Lotto Texas Jackpot Estimation Procedure, OC-JE-002; Lotto Texas Jackpot Payment and Investment, OC-JE-005; and Winner Payment Processing and Review, OC-WP-001, will be held on Wednesday, September 2, 2009, at 10:00 a.m. at the Texas Lottery Commission, Commission Auditorium, First Floor, 611 E. Sixth Street, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-200903337

Kimberly L. Kiplin

General Counsel

Texas Lottery Commission

Filed: August 4, 2009

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North Central Texas Council of Governments

Notice of Consultant Contract Award

Pursuant to the provisions of Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant proposal request appeared in the May 8, 2009, issue of the *Texas Register* (34 TexReg 2841). The

selected consultant will perform technical and professional work for the regional internet-based rideshare software application.

The consultant selected for this project is Ecology & Environment Inc., 368 Pleasant View Drive, Lancaster, New York 14086. The maximum amount of this contract is \$136,500.

TRD-200903334

R. Michael Eastland
Executive Director

North Central Texas Council of Governments

Filed: August 4, 2009



Texas Parks and Wildlife Department

Pre-Solicitation Notice

Professional Engineering Design Services for Project #101887

Dry Berth of Battleship Texas State Historic Site

This notice is for information purposes only. This is not a request for submission of proposals or qualifications. Responses or other inquiries are not appropriate at this time.

The Infrastructure Division of the Texas Parks and Wildlife Department (TPWD) intends to issue a Request for Qualifications (RFQ) for Professional Engineering Design Services as part of Project #101887, Dry Berth of Battleship Texas State Historic Site, La Porte, Harris County, Texas on September 1, 2009.

Detailed information about the requirements and selection process will be provided in the RFQ. The purpose of this notice is to inform qualified entities interested in providing these services that the release of the RFQ is imminent.

Upon issuance of the RFQ on September 1, 2009, all solicitation information will be available electronically on TPWD's website at http://www.tpwd.state.tx.us/business/bidops/current_bid_opportunities/construction/ and on the Electronic State Business Daily website at <http://esbd.cpa.state.tx.us>.

Hard copy documents relating to the September 1 solicitation for Professional Engineering Design Services will also be available at no charge by calling (512) 389-4442 or by e-mailing a request to contracting@tpwd.state.tx.us.

Background

The Battleship Texas, a National Historic Landmark, has been berthed continuously along the Houston Ship Channel at the San Jacinto Battleground State Historic Site since 1948, at which time she was transferred to the State of Texas following decommissioning by the U.S. Navy. TPWD assumed stewardship of the ship on September 1, 1983.

Since then, the TPWD strategy for major maintenance of the ship has been the traditional solution of towing her to a dry dock and implementing all appropriate repairs then returning her to her berth. Over time, the dry docking option has been restricted by the limited dry dock facilities within the Galveston Bay Inland waterway as well as concern that the ship could no longer sustain an extensive tow to an off site dry dock facility for repairs. Discussions began regarding the feasibility of removing the ship from the water and positioning the ship on a semi-permanent dry berth in the existing slip at the San Jacinto Battleground State Historic Site. This would remove the risk of the ship flooding, give the opportunity to conduct repair operations in the dry berth, and provide significant interpretive opportunity to display the ship in a unique and dramatic manner.

TPWD's desire is to create a dry berth solution that meets the following three criteria:

1. The solution must be, within reason, reversible.
2. The solution must visually respect the historic San Jacinto Battleground site.
3. The solution must provide a less expensive long-term solution to the alternative of conducting major dry docking every 10-15 years.

An independent marine engineering firm developed four viable dry berth concepts. The goal of the solicitation is to award a Professional Design Services contract for the engineering design firm to evaluate TPWD's four concepts or any of their own; present the recommended solution to the general public and oversight agencies; then proceed with full design and construction administration after public comment is accepted and addressed and oversight agency approvals are received.

Award will be made to the most qualified firm to provide engineering design services for the subject project in accordance with Government Code, Chapter 2254.

TRD-200903338

Todd George
Staff Attorney

Texas Parks and Wildlife Department

Filed: August 4, 2009



Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on July 28, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Arklaoktex, LLC for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 37295 before the Public Utility Commission of Texas.

The requested CFA service area footprint includes a name change to Arklaoktex, LLC, d/b/a Reach Broadband, and the expansion of the service area footprint to include the city limits and related unincorporated areas (if any) of the following: Aspermont, Ben Wheeler, Brinwood Shore POA, Brownsboro; Callendar Lake POA, Idalou, Matador, Overton, Panorama Estates, Rolling Oaks HOA, and West Tawakoni, as well as the unincorporated areas of Lansing, Sherwood, and South Tawakoni. Additionally, the service area footprints of the cities of Goodrich and Ore City, Texas are removed from the footprint.

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 at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37295.

TRD-200903339

Adriana A. Gonzales
Rules Coordinator

Public Utility Commission of Texas

Filed: August 4, 2009



Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on July 28, 2009, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of RB3, LLC for an Amendment to its State-Issued Certificate of Franchise Authority, Project Number 37296 before the Public Utility Commission of Texas.

The requested CFA service area footprint includes a name change to RB3, LLC, d/b/a Reach Broadband, and the expansion of the service area footprint to include the City Limits and related unincorporated areas (if any) of the following: Beckville, Brownfield, Devine, Kenedy, Lakeport, Lytle, O'Brien, and Olton, and the unincorporated areas of Easton, Elderville, Lake Cherokee North, and Lake Cherokee South. Additionally, the service area footprints of the cities of Oyster Creek and Freeport, Texas are removed from the footprint.

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 at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37296.

TRD-200903340
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 4, 2009



Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on July 30, 2009, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Northland Cable Television, Inc. for a State-Issued Certificate of Franchise Authority, Project Number 37311 before the Public Utility Commission of Texas.

The requested CFA service area includes the municipal boundaries of the City of Hico, Texas.

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 at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37311.

TRD-200903354
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 5, 2009



Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on August 3, 2009, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Centrovision, Inc. for a State-Issued Certificate of Franchise Authority, Project Number 37326 before the Public Utility Commission of Texas.

The requested CFA service area includes the City Limits of Morgan's Point Resort, Texas.

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 at (512) 936-7136 or toll free at (800) 735-2989. All inquiries should reference Project Number 37326.

TRD-200903355
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 5, 2009



Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on July 31, 2009, with the Public Utility Commission of Texas for an amendment to a certificated service area boundary in Gaines and Terry Counties, Texas.

Docket Style and Number: Application of Poka Lambro Telephone Cooperative, Inc. to Amend a Certificate of Convenience and Necessity to Modify the Service Area Boundaries of the Loop Exchange and Union Exchange. Docket Number 37320.

The Application: The minor boundary amendment is being filed to realign the common serving boundary between the Loop exchange and the Union exchange of Poka Lambro. The amendment will transfer a portion of serving area in the Union exchange to the Loop exchange to accommodate a customer currently located in the Union exchange who has asked to receive service from the Loop exchange.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by August 21, 2009, 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. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 37320.

TRD-200903361
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 5, 2009



Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On July 29, 2009, CenturyTel Acquisition, LLC filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted

in SPCOA Certificate Number 60730. Applicant intends to reflect a change in ownership/control, and a name change.

The Application: Application of CenturyTel Acquisition, LLC for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 37300.

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 August 19, 2009. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37300.

TRD-200903343
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 4, 2009



Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On July 29, 2009, CenturyTel Solutions, LLC filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60469. Applicant intends to reflect a change in ownership/control, and a name change.

The Application: Application of CenturyTel Solutions, LLC for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 37303.

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 August 19, 2009. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37303.

TRD-200903344
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 4, 2009



Notice of Application for Authority to Recover Lost Revenues and Costs of Implementing Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas, an application of July 29, 2009, for authority to recover lost revenues and costs of implementing expanded local calling service pursuant to the Public Utility Regulatory Act, Texas Utility Code Annotated §§55.041 - 55.048 and P.U.C. Substantive Rule §26.221. A summary of the application follows.

Project Title and Number: Application of Windstream Sugar Land, Inc. for Authority to Recover Lost Revenues and Costs of Implementing Expanded Local Calling Service, Project Number 37299.

Windstream Sugar Land, Inc. requests commission approval to continue a monthly surcharge in the revised amount of \$0.82 for business lines and \$0.41 for residential lines to each Windstream Sugar Land, Inc. basic local exchange access line, effective October 27, 2009.

Windstream Sugar Land, Inc. seeks approval to continue recovering costs and lost revenues associated with all ELCS routes currently in service in Windstream Sugar Land's service territory.

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, or call the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing-and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Project Number 37299.

TRD-200903342
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 4, 2009



Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application for sale, transfer, or merger filed with the Public Utility Commission of Texas on July 29, 2009, pursuant to the Public Utility Regulatory Act, TEXAS UTILITY CODE ANNOTATED §§14.001, 14.101, 51.010, 52.002, and 54.051-54.054 (Vernon 2007 & Supplement 2008) (PURA).

Docket Style and Number: Application of CenturyTel of San Marcos, Inc. for Sale, Transfer, or Merger of Embarq Corporation with CenturyTel, Inc. and Adoption of d/b/a CenturyLink, Docket Number 37298.

The Application: On July 29, 2009, CenturyTel of San Marcos, Inc. (CenturyTel San Marcos) filed an application to report the merger of Embarq Corporation (Embarq) with CenturyTel, Inc., CenturyTel San Marcos' parent, and to reflect a resulting adoption of the d/b/a CenturyLink. Under the terms of the transaction, Embarq will become a wholly-owned subsidiary of CenturyTel, Inc. No change in the Texas operations of CenturyTel San Marcos will occur as a result of the merger other than the use of the new d/b/a CenturyLink.

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, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing-and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 37298.

TRD-200903323
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 3, 2009



Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application for sale, transfer, or merger filed with the Public Utility Commission of Texas on July 29, 2009, pursuant to the Public Utility Regulatory Act, TEXAS UTILITY CODE ANNOTATED §§14.001, 14.101, 51.010, 52.002, and 54.051 - 54.054 (Vernon 2007 & Supplement 2008) (PURA).

Docket Style and Number: Application of CenturyTel of Port Aransas, Inc. for Sale, Transfer, or Merger of Embarq Corporation with CenturyTel, Inc. and Adoption of d/b/a CenturyLink, Docket Number 37301.

The Application: On July 29, 2009, CenturyTel of Port Aransas, Inc. (CenturyTel Port Aransas) filed an application to report the merger of Embarq Corporation (Embarq) with CenturyTel, Inc., CenturyTel Port Aransas' parent, and to reflect a resulting adoption of the d/b/a CenturyLink. Under the terms of the transaction, Embarq will become a wholly-owned subsidiary of CenturyTel, Inc. No change in the Texas operations of CenturyTel Port Aransas will occur as a result of the merger other than the use of the new d/b/a CenturyLink.

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, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing-and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 37301.

TRD-200903324
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 3, 2009



Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application for sale, transfer, or merger filed with the Public Utility Commission of Texas on July 29, 2009, pursuant to the Public Utility Regulatory Act, TEXAS UTILITY CODE ANNOTATED §§14.001, 14.101, 51.010, 52.002, and 54.051 - 54.054 (Vernon 2007 & Supplement 2008) (PURA).

Docket Style and Number: Application of CenturyTel of Northwest Louisiana, Inc. for Sale, Transfer, or Merger of Embarq Corporation with CenturyTel, Inc. and Adoption of d/b/a CenturyLink, Docket Number 37302.

The Application: On July 29, 2009, CenturyTel of Northwest Louisiana, Inc. (CenturyTel Northwest Louisiana) filed an application to report the merger of Embarq Corporation (Embarq) with CenturyTel, Inc., CenturyTel Northwest Louisiana's parent, and to reflect a resulting adoption of the d/b/a CenturyLink. Under the terms of the transaction, Embarq will become a wholly-owned subsidiary of CenturyTel, Inc. No change in the Texas operations of CenturyTel Northwest Louisiana will occur as a result of the merger other than the use of the new d/b/a CenturyLink.

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, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing-and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 37302.

TRD-200903326
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 3, 2009



Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application for sale, transfer, or merger filed with the Public Utility Commission of Texas on July 29, 2009, pursuant to the Public Utility Regulatory Act, TEXAS UTILITY CODE ANNOTATED §§14.001, 14.101, 51.010, 52.002, and 54.051 - 54.054 (Vernon 2007 & Supplement 2008) (PURA).

Docket Style and Number: Application of CenturyTel of Lake Dallas, Inc. for Sale, Transfer, or Merger of Embarq Corporation with CenturyTel, Inc. and Adoption of d/b/a CenturyLink, Docket Number 37304.

The Application: On July 29, 2009, CenturyTel of Lake Dallas, Inc. (CenturyTel Lake Dallas) filed an application to report the merger of Embarq Corporation (Embarq) with CenturyTel, Inc., CenturyTel Lake Dallas' parent, and to reflect a resulting adoption of the d/b/a CenturyLink. Under the terms of the transaction, Embarq will become a wholly-owned subsidiary of CenturyTel, Inc. No change in the Texas operations of CenturyTel Lake Dallas will occur as a result of the merger other than the use of the new d/b/a CenturyLink.

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, or call the Commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing-and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All correspondence should refer to Docket Number 37304.

TRD-200903327
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 3, 2009



Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on July 27, 2009, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Net/Town Telephone Corporation for a Service Provider Certificate of Operating Authority, Docket Number 37292 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service and long distance services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by the Austin Local Access and Transport Area.

Persons who wish to comment upon 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 August 19, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37292.

TRD-200903322
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: August 3, 2009



Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on July 29, 2009, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Inteltrace, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 37297 before the Public Utility Commission of Texas.

Applicant intends to provide data-only resale services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon 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 August 19, 2009. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 37297.

TRD-200903341

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: August 4, 2009

Office of Rural Community Affairs

Hurricanes Dolly/Ike Action Plan Amendment for Additional Disaster Funding

Memorandum

FROM: Oralia Cardenas, Director, Disaster Recovery Program

The Office of Rural Community Affairs (ORCA) in cooperation with the Texas Department of Housing and Community Affairs (TDHCA) invites you to attend an upcoming public hearing to obtain comments on a draft amendment (for the administration of over \$1.7 billion) to the current Plan for Disaster Recovery, U.S. Department of Housing and Urban Development (HUD), Consolidated Security, Disaster Assistance, and Continuing Appropriation Act, 2009, Public Law 110-329 (**Dolly/Ike Action Plan**), document related to the issuance of Community Development Block Grant (CDBG) Funding for Dolly/Ike disaster relief efforts. Comments of the distribution of funding for "necessary expenses related to disaster relief, long-term recovery, and restoration of infrastructure, housing and economic revitalization in the areas affected by hurricanes, floods, and other natural disasters occurring during 2008" are requested at this time. This specifically includes communities impacted by Hurricanes Dolly and Ike.

The first public hearing is scheduled for 9:00 a.m. to 11:00 a.m. on Thursday, August 13, 2009 in the Auditorium (Room 102) of the Texas AgriLife Research Center, 2415 East Hwy 83, Weslaco, Texas 78596. Additional public hearings are being scheduled for the cities of Houston/Galveston and Jefferson/Trinity counties.

Under the proposed Action Plan amendment ORCA will request HUD approve an amendment to the CDBG Dolly/Ike Action Plan disaster relief efforts. ORCA encourages your comments and participation either through attendance at a public hearing or in writing.

Written comments should be submitted by mail, e-mail, or fax by September 14, 2009 to:

Attention: Disaster Recovery Division, P.O. Box 17900, Austin, TX 78760-7900 Fax: (512) 936-6776 E-Mail: dractionplan2comments@orca.state.tx.us

Additional information regarding ORCA and a copy of the proposed amendment to the Dolly/Ike Action Plan can be found on the web by visiting ORCA's webpage: www.orca.state.tx.us

For more information, please call the Disaster Recovery Division at (512) 936-0934 or Toll Free at (800) 544-2042.

Memorandum

DE: Oralia Cardenas, Directora, Disaster Recovery Program

ASUNTO: Modificación del Plan de Acción de subsidios por desastres adicionales ocasionados por los huracanes Dolly/Ike

La Oficina de Asuntos Comunitarios Rurales (ORCA, por sus siglas en inglés), en colaboración con el Departamento de Vivienda y Asuntos Comunitarios del Estado de Texas (TDHCA) lo invita a participar de la próxima audiencia pública a fin de recibir comentarios acerca de una propuesta de modificación (para la administración de más de US \$1,7 mil millones) al actual Plan de Recuperación ante Desastres, Departamento de Vivienda y Desarrollo Urbano de los EE.UU. (HUD), Ley de Seguridad Consolidada, Asistencia por Desastres y Asignación Continua de 2009, (Ley Pública 110-329), (**Plan de Acción Dolly/Ike**), que es un documento relacionado con el financiamiento de Subsidios Globales para el Desarrollo Comunitario (CDBG) para intentar aliviar las consecuencias del desastre Dolly/Ike. En esta oportunidad, se recibirán comentarios sobre "los gastos necesarios para la compensación por desastres, la recuperación a largo plazo, el restablecimiento de la infraestructura, la vivienda y la revitalización económica en áreas afectadas por huracanes, inundaciones y otros desastres naturales que tuvieron lugar en el año 2008". Específicamente, quedan incluidas las comunidades afectadas por los huracanes Dolly e Ike.

La primera audiencia pública está prevista para el jueves 13 de agosto de 2009, de 9 a.m. a 11 a.m., en el Auditorium (Sala 102) del Texas AgriLife Research Center, 2415 East Hwy 83, Weslaco, Texas 78596. Se están programando otras audiencias públicas para las ciudades de Houston/Galveston y los condados de Jefferson/Trinity.

De conformidad con la propuesta de modificación al Plan de Acción, ORCA le solicitará a HUD que apruebe una modificación a los CDBG del Plan de Acción que intenta aliviar las consecuencias del desastre Dolly/Ike. ORCA lo invita a participar través de su asistencia a la audiencia pública o también por escrito.

Los comentarios escritos deberán enviarse por correo convencional, por correo electrónico o por fax hasta el 14 de septiembre de 2009 a la siguiente dirección:

Atención: Disaster Recovery Division, P.O. Box 17900, Austin, TX 78760-7900 Fax: (512) 936-6776 E-Mail: dractionplan2comments@orca.state.tx.us

En la página web de ORCA (www.orca.state.tx.us) podrá encontrar más información sobre ORCA y también una copia de la modificación propuesta al Plan de Acción Dolly/Ike.

Para más información, comuníquese con Disaster Recovery Division al (512) 936-0934 o al número gratuito (800) 544-2042.

TRD-200903315

Charles S. (Charlie) Stone

Executive Director

Office of Rural Community Affairs

Filed: August 3, 2009

Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Engineering Services

The City of Granbury, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

Current Project: Granbury Regional Airport. TxDOT CSJ No.:0902GRNBY. Current Scope: provide engineering/design services to rehabilitate and mark Runway 14/32 and taxiway.

There is no DBE Goal required for the current project. TxDOT Project Manager is Harry Lorton.

To assist in your proposal preparation the criteria, 5010 drawing, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Granbury Regional Airport".

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 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/business/projects/aviation.htm>. 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. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Seven completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than **September 9, 2009, 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 Becky Vick.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at <http://www.txdot.gov/business/projects/aviation.htm>. 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.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Becky Vick, Grant Manager. For technical questions, please contact Harry Lorton, Project Manager.

TRD-200903236

Joanne Wright

Deputy General Counsel

Texas Department of Transportation

Filed: July 31, 2009

The Texas A&M University System

Award Notification

In accordance with the provisions of Texas Government Code, Chapter 2254, Texas A&M University-Corpus Christi has entered into a consulting contract for Business/Process Mapping Analysis consulting services. The consultant will provide consulting assistance in the development of business process maps and analysis for the Enrollment Management Office at Texas A&M University-Corpus Christi located in Corpus Christi, Texas.

The Name and Address of Consultant is as follows: TABB Group, LLC, 115 Broadway, Suite 1204, New York, NY 10006.

Texas A&M University-Corpus Christi will pay an amount of \$61,909.00. The contract will begin on August 10, 2009 and shall terminate on November 13, 2009.

If any, the consultant will submit documents, films, recordings, or reports compiled by the consultant under the contract to Texas A&M University-Corpus Christi, no later than October 30, 2009.

Any questions regarding this posting should be directed to: David Davila, Associate Director, Purchasing, Texas A&M University-Corpus Christi, 6300 Ocean Drive, Unit 5731, Corpus Christi, TX 78412-5731, Voice: (361) 825-2616, E-mail: david.davila@tamucc.edu.

TRD-200903243

Don Barwick

HUB and Procurement Manager

The Texas A&M University System

Filed: July 31, 2009

Texas Water Development Board

Request for Applications for the Geomorphic Study of the Guadalupe River, Texas, from Kerr County to San Antonio Bay

The Texas Water Development Board (TWDB) requests the submission of Request for Qualifications (RFQs) for state Fiscal Year 2009 to conduct a research study of the geomorphology of the Guadalupe River, Texas, from Kerr County to San Antonio Bay. The TWDB has a total of \$35,000.00 available from the Research and Planning Fund for this study. Rules governing the Research and Planning Fund (31 Texas Administrative Code, Chapter 355), guidelines/instruction sheet are available on the TWDB website or by request.

Description of the Objectives and Purpose. The study will delineate major geomorphic process zones, with an emphasis on stream energetics as indicated by stream power and shear stress; identify major geomorphic controls (including karst hydrogeology, sea level and climate change, and antecedent topography); and determine the location and primary controls over key "hinge points" or transition zones.

The specific objectives are to:

(1) Develop a baseline characterization of the condition and behavior of the Guadalupe River.

- (2) Examine longitudinal (downstream) changes in flow processes and energetics, channel and valley morphology, and patterns of recent geomorphic change.
- (3) Classify the Guadalupe (based on items 1, 2) into geomorphic process zones.
- (4) Identify the primary controls, both contemporary and historic, of the geomorphic process zones.
- (5) Identify the current location, primary controls over, and potential future changes in critical transition zones.

Deliverables will include a report covering the objectives above, and maps (hardcopy and digital) of the process and key transition zones.

Description of Applicant Criteria. The applicable scope of work, schedule, and contract amount will be negotiated after the TWDB selects the most qualified applicants. Failure to arrive at mutually agreeable terms of a contract with the most qualified applicant shall constitute a rejection of the TWDB's offer and may result in subsequent negotiations with the next most qualified applicant. The TWDB reserves the right to reject any or all applications if staff determines that the application(s) does not adequately meet the required criteria or if the funding available is less than the requested funding.

Deadline for Submittal, Review Criteria and Contact Person for Additional Information. Five double-sided, double-spaced copies of a completed application must be filed with the TWDB no later than 12:00 p.m., Central Standard Time, September 4, 2009. Applications can be directed either in person to Mr. David Carter, Texas Water Development Board, Stephen F. Austin Building, Room 531, 1700 North Congress Avenue, Austin, Texas 78701; or by mail to Mr. David Carter, Texas Water Development Board, P.O. Box 13231 - Capitol Station, Austin, Texas 78711-3231. All applicants should obtain the TWDB's guidelines/instruction sheet for responding to the RFQ. Requests for information may be directed to Mr. Carter at the preceding mailing address, or by e-mail at david.carter@twdb.state.tx.us or by calling (512) 936-6079.

TRD-200903241
 Kenneth L. Petersen
 General Counsel
 Texas Water Development Board
 Filed: July 31, 2009



Workforce Solutions Brazos Valley Board

Request for Proposals for Printing Services

On August 7, 2009 Workforce Solutions Brazos Valley Board (WS-BVB) will release a Request for Proposal (RFP) for Printing Services of

products for its programs in the following counties: Brazos, Burleson, Grimes, Leon, Madison, Robertson, and Washington. The Board is seeking a single contractor qualified and experienced in providing a range of printing services. The complete scope of required services and the proposal requirements are contained in the Request for Proposal which may be viewed and downloaded at www.bvjobs.org.

A bidder's conference will be held at the office of Workforce Solutions Brazos Valley Board, 3991 East 29th Street, Bryan, Texas 77802 on August 18, 2009 at 2:00 p.m. CST. Bidders may submit questions by email to richard@swtexas.net up until the Bidders conference. All questions and answers will be posted on www.bvjobs.org by August 21, 2009.

Due Date:

An original and four (4) copies of a written proposal are due to the Board's offices no later than 4:00 p.m on Thursday, September 10, 2009. CST. Faxed or email proposals are not acceptable. Proposals received after the indicated due date and time regardless of delivery method will not be accepted or considered for award.

Proposals may be hand delivered to:

Attention: PRINTING services Proposal
 Darrek Ferrell, Program Specialist
 Workforce Solutions Brazos Valley Board
 3991 East 29th Street
 Bryan, Texas 77802

Proposals may be mailed to:

Attention: PRINTING services proposal
 Darrek Ferrell, Program Specialist
 Workforce Solutions Brazos Valley Board
 P.O. Drawer 4128
 Bryan, Texas 77805

Proposals received after the deadline will not be considered. WSBVB accepts no responsibility for late proposals.

TRD-200903352
 Tom Wilkinson
 Executive Director
 Workforce Solutions Brazos Valley Board
 Filed: August 5, 2009



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 33 (2008) is cited as follows: 33 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 "33 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 33 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code*, section numbers, or TRD number.

Both the *Texas Register* and the *Texas Administrative Code* are available online through the Internet. The address is: <http://www.sos.state.tx.us>. The *Register* is available in an .html version as well as a .pdf (portable document format) version

through the Internet. For website subscription 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 *Table of TAC Titles Affected*. The table 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 one or more *Texas Register* page numbers, as shown in the following example.

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

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