

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 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 33. MONEY SERVICES BUSINESSES

7 TAC §33.13

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts amendments to §33.13, concerning how to obtain a new license and the deadlines associated with applications. The amended rule clarifies the accepted payment form and refund of money services businesses (MSB) license application fees. The amended rule is adopted without changes to the proposed text as published in the December 25, 2020, issue of the *Texas Register* (45 TexReg 9372). The amended rule will not be republished.

Amendment to §33.13(d)(1)(B)

Current §33.13(d)(1)(B) requires an MSB license applicant to submit the application fee in the form of a check. In practice, an applicant will often submit the fee through the Nationwide Multistate Licensing System and Registry (NMLS). The adopted amendment clarifies that an applicant may submit the fee either through the NMLS or in the form of a check.

Amendment to §33.13(d)(2)

Current §33.13(d)(2) allows the department to return an MSB license application before processing if the application is missing one of the items required by §33.13(d)(1), such as the application fee, search firm reports, or financial statements. The department can determine if one of these items is missing with an initial cursory review of the application. If the application fee is submitted, but other items are missing, current §33.13(d)(2) allows the department to either return the application fee or apply it to a "promptly" submitted "subsequent application" containing the missing items. In most cases where the department receives an application missing the required items, an applicant submits the missing items within several business days and before the department returns the application or fee; therefore, the department applies the fee to the initial application and no subsequent application is submitted. If a subsequent application or the missing items are not submitted promptly, it is unclear under current §33.13(d)(2) whether the department is required to refund the fee.

The adopted amendment to §33.13(d)(2) eliminates the ambiguity of the term "promptly" by requiring the applicant to submit missing items within 10 days of the department receiving the application and removes reference to a "subsequent application."

The adopted amendment to §33.13(d)(2) also clarifies that the department will refund an application fee if the missing items are not submitted within 10 days. Thus, as adopted, §33.13(d)(2) allows the department to either: (1) return an application and refund the application fee; or (2) apply the fee to the application within 10 days if missing items are submitted. If missing items are not submitted within 10 days, the department will return the application and refund the fee.

Amendment to §33.13(f)

When an application contains all required items and is not returned, the department must process and investigate the application before it is accepted for filing. This often involves making a request for additional information from the applicant pursuant to §33.13(e)(1). After reviewing the additional information, the department can make follow-up requests for additional information pursuant to §33.13(f)(3). If the applicant does not provide the requested information, the application can be considered abandoned pursuant to TAC §33.13(g)(1), and the application fee is not refunded pursuant to §33.13(g)(2). After the department has fully processed and investigated an application, the department accepts the application for filing, and the application fee is non-refundable pursuant to §33.27(d)(1).

In a limited number of cases, an applicant withdraws the application and demands a refund of the fee after the department has made multiple requests for additional information and expended significant resources processing it, but before the department has accepted it for filing. Current §33.13 does not explicitly give the department the right to keep the application fee in these situations.

The adopted amendment to §33.13(f) clarifies at what point in the application process the application fee becomes non-refundable if the applicant withdraws the application. As amended, §33.13(f) provides that the application fee will not be refunded after the applicant responds to the department's initial request for additional information pursuant to §33.13(e)(1). Thus, as amended, after the department has requested additional information, an applicant will have the option to either: (1) allow the department to continue to process the application but not receive a refund if the application is later withdrawn; or (2) withdraw their application at that time and receive a refund.

The department received no comments regarding the proposed amendments.

The amendments are adopted pursuant to Texas Finance Code, §151.102, which authorizes the commission to adopt rules for the regulation of money services businesses.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 19, 2021.

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING SPECIAL EDUCATION

The Texas Education Agency (TEA) adopts amendments to §§89.1001, 89.1011, 89.1035, 89.1040, 89.1047, 89.1050, 89.1055, 89.1070, 89.1075, 89.1094, 89.1165, 89.1193, 89.1195, and 89.1197 and new 89.1005 and 89.1092, concerning special education services. The amendments to §§89.1035, 89.1070, and 89.1197 are adopted with changes to the proposed text as published in the October 16, 2020 issue of the *Texas Register* (45 TexReg 7363) and will be republished. The amendments to §§89.1001, 89.1011, 89.1040, 89.1047, 89.1050, 89.1055, 89.1075, 89.1094, 89.1165, 89.1193, and 89.1195 and new 89.1005 and 89.1092 are adopted without changes to the proposed text as published in the October 16, 2020 issue of the *Texas Register* (45 TexReg 7363) and will not be republished. The adopted revisions reflect changes resulting from state legislation and federal guidance; provide clarification related to the full individual and initial evaluation, contracting for services from non-public day schools, and placement of students with disabilities in off-campus programs; update references to statute and state agency names; and remove expired provisions.

REASONED JUSTIFICATION: The rules in Chapter 89, Subchapter AA, address provisions for special education services, including general provisions, clarification of federal regulations and state law, and dispute resolution. Legislation from the 86th Texas Legislature, 2019, as well as federal guidance require that some of the rules in the subchapter be revised. Other rules required revision to provide clarification, update cross references, and remove expired provisions. Specifically, the adopted revisions update rules as follows.

Division 1, General Provisions

The adopted amendment to §89.1001, Scope and Applicability, updates a reference from the Texas Youth Commission to the Texas Juvenile Justice Department.

Adopted new §89.1005, Instructional Arrangements and Settings, is added as a result of House Bill (HB) 3, 86th Texas Legislature, 2019. HB 3 renumbered Texas Education Code (TEC), §42.151, to §48.102 and amended it to transfer rulemaking authority related to instructional arrangements for students with disabilities from the State Board of Education (SBOE) to

the commissioner of education. As a result, the language from 19 TAC §89.63 adopted under the SBOE's authority is adopted as new §89.1005. The adopted new rule is substantially similar to §89.63 and identifies provisions for instructional arrangements and settings, including mainstream, homebound, hospital class, speech therapy, resource room/services, self-contained (mild, moderate, or severe) regular campus, off-home campus, nonpublic day school, vocational adjustment class/program, residential care and treatment facility (not school district resident), and state-supported living center.

Division 2, Clarification of Provisions in Federal Regulations and State Law

The adopted amendment to §89.1011, Full Individual and Initial Evaluation, clarifies when a referral for a special education evaluation may or must be made.

The adopted amendment to §89.1035, Age Ranges for Student Eligibility, updates cross references to 19 TAC §89.1070. In response to public comment, changes were made at adoption to update additional cross references to §89.1070.

The adopted amendment to §89.1040, Eligibility Criteria, implements changes to TEC, §30.002, by Senate Bill (SB) 522, 86th Texas Legislature, 2019, regarding evaluation of a student's visual impairment. Additionally, the amendment aligns the rule with federal guidance. The previous definition in §89.1040(c)(12) may have had the effect of narrowing the Individuals with Disabilities Education Act (IDEA) definition in 34 CFR, §300.8(c)(13), of "visual impairment including blindness." As noted by the May 22, 2017 Letter to State Directors of Special Education, Preschool/619 State Coordinators from the U.S. Department of Education, Office of Special Education Programs, because the IDEA definition of "visual impairment including blindness" does not contain a modifier to allow states to define a precise level of impairment, "any impairment in vision, regardless of significance or severity, must be included in a State's definition, provided that such impairment, even with correction, adversely affects a child's educational performance." (emphasis in original)

The adopted amendment to §89.1047, Procedures for Special Education Decision-Making for Students in Foster Care, implements changes to TEC, §29.0151, by HB 1709, 86th Texas Legislature, 2019, by clarifying that surrogate parents may not be employees of TEA.

The adopted amendment to §89.1050, The Admission, Review, and Dismissal Committee, replaces the reference to the Department of Assistive and Rehabilitative Services with the Texas Health and Human Services Commission. Additionally, the reference to TEC, §42.151, is changed to TEC, §48.102, due to a renumbering of statute by HB 3, 86th Texas Legislature, 2019.

The adopted amendment to §89.1055, Content of the Individualized Education Program, removes provisions that expired at the beginning of the 2018-2019 school year. References to the 2018-2019 school year are removed from subsections (h) and (i).

The adopted amendment to §89.1070, Graduation Requirements, implements changes to TEC, §28.025, by HB 165, 86th Texas Legislature, 2019, which altered the means by which an endorsement may be earned. The adopted amendment specifies the modifications that may be made for a student eligible for special education services to earn an endorsement. References to statute and other administrative rule are also

updated. In response to public comment, changes were made at adoption to update cross references to 19 TAC §89.1070. A technical change was also made at adoption to replace the term "state assessments" with the term "end-of-course assessment instruments."

The adopted amendment to §89.1075, General Program Requirements and Local District Procedures, removes reference to TEC, §29.007, which was repealed by SB 1376, 86th Texas Legislature, 2019. In addition, language is added in subsection (f) to specify that school districts must comply with 19 TAC §89.1094 when contracting for services from non-public day schools.

Adopted new §89.1092, Contracting for Residential Educational Placements for Students with Disabilities, is added as a result of HB 3, 86th Texas Legislature, 2019. HB 3 renumbered TEC, §42.151, to §48.102 and amended it to transfer rulemaking authority related to contracts for residential placements for students with disabilities from the SBOE to the commissioner. As a result, the language from 19 TAC §89.61 adopted under the SBOE's authority is adopted as new §89.1092. In order to align with 19 TAC §89.1094, the new rule differs from the current SBOE rule by increasing in subsection (a)(4)(E) the number of onsite visits a school district must make to a residential facility. Additionally, new subsection (b) is added to specify the notification procedures a school district must follow if an admission, review, and dismissal (ARD) committee decides to place a student in a residential facility and address TEA's approval of the use of funds and/or the facility as applicable.

The adopted amendment to §89.1094, Students Receiving Special Education and Related Services in an Off-Campus Program, includes technical edits such as updated references to statute and other administrative rule and clarification regarding the placement of students with disabilities in off-campus programs.

Division 7, Dispute Resolution

Adopted amendments to §89.1165, Request for Special Education Due Process Hearing, §89.1193, Special Education Mediation, §89.1195, Special Education Complaint Resolution, and §89.1197, State Individualized Education Program Facilitation, allow for the filing by electronic mail of special education due process hearing requests, special education mediation requests, special education complaints, requests for reconsideration of special education investigative reports, and requests for a state-provided facilitator for an ARD committee meeting. In response to public comment, a change was made at adoption to §89.1197 to increase the number of days by when a parent and local education agency (LEA) may request a facilitated individualized education program (IEP) team meeting. An additional change to §89.1197 was made at adoption to update a cross reference to 19 TAC §89.1050.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began October 16, 2020, and ended November 16, 2020, and included public hearings on October 27 and 29, 2020. Following is a summary of the public comments received and corresponding responses.

Comment: The Texas Council of Administrators of Special Education (TCASE) noted that the terms "general education" and "regular education" are used inconsistently throughout the rules and recommended that the term "general education" be used throughout.

Response: The agency disagrees that the terms need to be updated since the two terms are synonymous.

Comment: The Texas Classroom Teachers Association (TCTA) supported the proposed amendment to §89.1005, explaining that it maintains the important elements of §89.63.

Response: The agency agrees.

Comment: Disability Rights Texas (DRTx) recommended amending the phrase "vocational adjustment class/program" in proposed new §89.1005(c)(9) by changing the word "class" to "course" in order to align with terminology used in the field. Additionally, DRTx recommended amending proposed new §89.1005(c)(9) to include the statement "regularly scheduled direct involvement by special education personnel may be varied during the placement if the student is documented as meeting or exceeding individual transition goals."

Response: The agency disagrees. The rule describes an instructional setting, which is the reason the term "class" is used. The term "course" refers to a curriculum, not a setting. In addition, the recommended language relating to direct involvement by special education personnel could possibly limit the protections inherit in the ARD committee process for developing a student's IEP. The recommended language is also inconsistent with the requirement of 34 Code of Federal Regulations (CFR), §300.320, that the ARD committee determine and the IEP state the location, duration, and frequency of the student's special education and related services.

Comment: The Texas School for the Blind and Visually Impaired (TSBVI) commented that §89.1035 should be amended to clarify and implement TEC, §30.021(e), by adding language that would allow certain students with visual impairments who have graduated with a diploma and whose eligibility for special education and related services has ended, although still within the age range for eligibility, to continue to be eligible so as to receive expanded core curriculum from TSBVI.

Response: The agency disagrees as the rule is not inconsistent with TEC, §30.021(e). However, TEA will continue to work with TSBVI and the Texas School for Deaf (TSD) to pursue solutions related to providing extended core curriculum as provided for in state law.

Comment: TSBVI supported changes to §89.1040(c)(12).

Response: The agency agrees.

Comment: TSBVI commented that language should be added to §89.1070(a) to provide that graduation with a diploma that ends eligibility for special education and related services would not end eligibility for a student who is blind or has a visual impairment and requires services from TSBVI pursuant to TEC, §30.021(e).

Response: The agency disagrees as the rule is not inconsistent with TEC, §30.021(e). However, TEA will continue to work with TSBVI and TSD to pursue solutions related to providing extended core curriculum as provided for in state law.

Comment: An individual questioned whether proposed changes to §89.1070 create new special education eligibility. Specifically, the individual questioned whether new subsection (b)(2) permits students who have passed all courses for graduation credit without a modified curriculum but whose ARD committee has not required them to perform satisfactorily on the state assessments to retain eligibility for special education and related services even after they have received a diploma. The individual recommended that §89.1070 clarify that students graduating under new §89.1070(b)(2) are no longer eligible for special education and related services.

Response: The agency disagrees with the recommended change and clarifies that new §89.1070(b)(2) does not create any new eligibility allowances. Instead, the new language seeks to align with existing allowable LEA reported graduation codes, which are based on the federal requirements of 34 CFR, §300.102. The federal requirements provide that eligibility for special education and related services ends with the award of a high school diploma that is fully aligned with state standards. Thus, if a student's ARD committee determines that successful performance on end-of-course assessments is not required and the student graduates under §89.1070(b)(2), the student continues to be eligible to return for additional special education and related services as allowed for in §89.1070(j) so long as the student meets the age eligibility requirement.

Comment: An individual noted that several cross references in proposed §89.1070 need to be updated.

Response: The agency agrees and has made the necessary changes at adoption.

Comment: TCTA supported the addition of language in §89.1011 that specifies that a student is not required to be provided with interventions for any specific length of time prior to a referral being made or a full individual and initial evaluation being conducted. Additionally, TCTA supported the clarification that full individual and initial evaluation may be initiated at any time by school personnel.

Response: The agency agrees.

Comment: TCASE noted that §89.1121(h) has an outdated weight for mainstream funding and that the subsection needs to be revised.

Response: This comment is outside the scope of the proposed rulemaking since no changes were proposed to §89.1121. However, the agency may consider the suggested changes in future rulemaking.

Comment: DRTx and TCASE noted that §89.1197(e)(2) and (3) could be deleted in order to allow for a greater opportunity for facilitated IEP team meetings to occur.

Response: The agency disagrees with striking §89.1197(e)(2) and (3) because the agency believes it is vitally important for families and school districts to work together locally to reach consensus on a student's educational programming. The state envisions a state-facilitator as being a next level of support for families and school districts only when required. However, the agency agrees that §89.1197(e)(3) could be updated to allow more opportunity for facilitation. At adoption, language was modified to extend the timeline for a request for IEP facilitation from five calendar days to ten calendar days after the ARD committee meeting that ended in disagreement.

Comment: DRTX and TCASE recommended that, if §89.1197(e)(2) is not deleted as recommended, the reference to §89.1050(f) be updated to §89.1050(g).

Response: The agency agrees. The reference to §89.1050(f) has been updated at adoption to §89.1050(g).

DIVISION 1. GENERAL PROVISIONS

19 TAC §89.1001, §89.1005

STATUTORY AUTHORITY. The amendment and new section are adopted under Texas Education Code (TEC), §28.025, as amended by House Bill (HB) 165, 86th Texas Legislature, 2019, which establishes requirements, in part, for endorsements;

TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §29.004, which establishes state-specific criteria related to full individual and initial evaluations for special education; TEC, §29.005, which establishes state-specific criteria related to students' individualized education programs (IEPs); TEC, §29.010, which establishes requirements related to monitoring activities for special education; TEC, §29.011 and §29.0111, which establish requirements related to transition programming for students eligible for special education; TEC, §29.0151, as amended by HB 1709, 86th Texas Legislature, 2019, which establishes requirements related to the appointment of surrogate parents to children in foster care who are eligible for special education services; TEC, §29.019, which establishes requirements related to the state's facilitated IEP project; TEC, §30.002, as amended by Senate Bill 522, 86th Texas Legislature, 2019, which establishes requirements related to the state's development and implementation of a plan for the education of children with visual impairments who are under 21 years of age; TEC, §48.102, as added by HB 3, 86th Texas Legislature, 2019, which establishes requirements related to funding for special education programs; 34 Code of Federal Regulations (CFR), §300.8, establishes definitions of eligibilities under special education; 34 CFR, §300.147, which establishes state monitoring requirements for facilities in which a student's admission, review, and dismissal committee have placed students who are eligible for special education; 34 CFR, §§300.151-300.153, which establish requirements related to the filing and resolution of special education complaints; 34 CFR, §300.320, which establishes requirements related to content of a student's IEP; 34 CFR, §300.506, which establishes requirements related to a state's mediation program; 34 CFR, §300.507, which establishes requirements related to a state's due process hearing program; and 34 CFR, §300.600, which establishes requirements related to the state's monitoring authority of special education programs.

CROSS REFERENCE TO STATUTE. The amendment and new section implement Texas Education Code, §§28.025, as amended by House Bill (HB) 165, 86th Texas Legislature, 2019; 29.001; 29.003; 29.004; 29.005; 29.010; 29.011; 29.0111; 29.0151, as amended by HB 1709, 86th Texas Legislature, 2019; 29.019; 30.002, as amended by Senate Bill 522, 86th Texas Legislature, 2019; and 48.102, as added by HB 3, 86th Texas Legislature, 2019; and 34 Code of Federal Regulations, §§300.8, 300.147, 300.151, 300.152, 300.153, 300.320, 300.506, 300.507, and 300.600.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 2. CLARIFICATION OF PROVISIONS IN FEDERAL REGULATIONS AND STATE LAW

19 TAC §§89.1011, 89.1035, 89.1040, 89.1047, 89.1050, 89.1055, 89.1070, 89.1092, 89.1094

STATUTORY AUTHORITY. The amendments and new section are adopted under Texas Education Code (TEC), §28.025, as amended by House Bill (HB) 165, 86th Texas Legislature, 2019, which establishes requirements, in part, for endorsements; TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §29.004, which establishes state-specific criteria related to full individual and initial evaluations for special education; TEC, §29.005, which establishes state-specific criteria related to students' individualized education programs (IEPs); TEC, §29.010, which establishes requirements related to monitoring activities for special education; TEC, §29.011 and §29.0111, which establish requirements related to transition programming for students eligible for special education; TEC, §29.0151, as amended by HB 1709, 86th Texas Legislature, 2019, which establishes requirements related to the appointment of surrogate parents to children in foster care who are eligible for special education services; TEC, §29.019, which establishes requirements related to the state's facilitated IEP project; TEC, §30.002, as amended by Senate Bill 522, 86th Texas Legislature, 2019, which establishes requirements related to the state's development and implementation of a plan for the education of children with visual impairments who are under 21 years of age; TEC, §48.102, as added by HB 3, 86th Texas Legislature, 2019, which establishes requirements related to funding for special education programs; 34 Code of Federal Regulations (CFR), §300.8, establishes definitions of eligibilities under special education; 34 CFR, §300.147, which establishes state monitoring requirements for facilities in which a student's admission, review, and dismissal committee have placed students who are eligible for special education; 34 CFR, §§300.151-300.153, which establish requirements related to the filing and resolution of special education complaints; 34 CFR, §300.320, which establishes requirements related to content of a student's IEP; 34 CFR, §300.506, which establishes requirements related to a state's mediation program; 34 CFR, §300.507, which establishes requirements related to a state's due process hearing program; and 34 CFR, §300.600, which establishes requirements related to the state's monitoring authority of special education programs.

CROSS REFERENCE TO STATUTE. The amendments and new section implement Texas Education Code, §§28.025, as amended by House Bill (HB) 165, 86th Texas Legislature, 2019; 29.001; 29.003; 29.004; 29.005; 29.010; 29.011; 29.0111; 29.0151, as amended by HB 1709, 86th Texas Legislature, 2019; 29.019; 30.002, as amended by Senate Bill 522, 86th Texas Legislature, 2019; and 48.102, as added by HB 3, 86th Texas Legislature, 2019; and 34 Code of Federal Regulations, §§300.8, 300.147, 300.151, 300.152, 300.153, 300.320, 300.506, 300.507, and 300.600.

§89.1035. *Age Ranges for Student Eligibility.*

(a) Pursuant to state and federal law, services provided in accordance with this subchapter must be available to all eligible students ages 3-21. Services will be made available to eligible students on their third birthday. Graduation with a regular high school diploma pursuant to §89.1070(b)(1), (b)(3)(D), (f)(1), (f)(2), (f)(3), or (f)(4)(D) of this title (relating to Graduation Requirements) terminates a student's eligibility to receive services in accordance with this subchapter. An eligible student receiving special education services who is 21 years of age on September 1 of a school year will be eligible for services through the end of that school year or until graduation with a regular high school diploma pursuant to §89.1070(b)(1), (b)(3)(D), (f)(1), (f)(2), (f)(3), or (f)(4)(D) of this title, whichever comes first.

(b) In accordance with the Texas Education Code (TEC), §§29.003, 30.002(a), and 30.081, a free appropriate public education must be available from birth to students with visual or auditory impairments.

§89.1070. *Graduation Requirements.*

(a) Graduation with a regular high school diploma under subsections (b)(1), (b)(3)(D), (f)(1), (f)(2), (f)(3), or (f)(4)(D) of this section terminates a student's eligibility for special education services under this subchapter and Part B of the Individuals with Disabilities Education Act and entitlement to the benefits of the Foundation School Program, as provided in Texas Education Code (TEC), §48.003(a).

(b) A student entering Grade 9 in the 2014-2015 school year and thereafter who receives special education services may graduate and be awarded a regular high school diploma if the student meets one of the following conditions.

(1) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title and satisfactorily completed credit requirements for graduation under the Foundation High School Program specified in §74.12 of this title (relating to Foundation High School Program) applicable to students in general education as well as satisfactory performance as established in the TEC, Chapter 39, on the required end-of-course assessment instruments.

(2) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title and satisfactorily completed credit requirements for graduation under the Foundation High School Program specified in §74.12 of this title applicable to students in general education but the student's ARD committee has determined that satisfactory performance on the required end-of-course assessment instruments is not necessary for graduation.

(3) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title and satisfactorily completed credit requirements for graduation under the Foundation High School Program specified in §74.12 of this title through courses, one or more of which contain modified curriculum that is aligned to the standards applicable to students in general education, as well as satisfactory performance as established in the TEC, Chapter 39, on the required end-of-course assessment instruments, unless the student's ARD committee has determined that satisfactory performance on the required end-of-course assessment instruments is not necessary for graduation. The student must also successfully complete the student's individualized education program (IEP) and meet one of the following conditions.

(A) Consistent with the IEP, the student has obtained full-time employment, based on the student's abilities and local employment opportunities, in addition to mastering sufficient self-help skills to enable the student to maintain the employment without direct and ongoing educational support of the local school district.

(B) Consistent with the IEP, the student has demonstrated mastery of specific employability skills and self-help skills that do not require direct ongoing educational support of the local school district.

(C) The student has access to services that are not within the legal responsibility of public education or employment or educational options for which the student has been prepared by the academic program.

(D) The student no longer meets age eligibility requirements.

(c) A student receiving special education services may earn an endorsement under §74.13 of this title (relating to Endorsements) if the student:

(1) satisfactorily completes the requirements for graduation under the Foundation High School Program specified in §74.12 of this title as well as the additional credit requirements in mathematics, science, and elective courses as specified in §74.13(e) of this title with or without modified curriculum;

(2) satisfactorily completes the courses required for the endorsement under §74.13(f) of this title without any modified curriculum or with modification of the curriculum, provided that the curriculum, as modified, is sufficiently rigorous as determined by the student's ARD committee; and

(3) performs satisfactorily as established in the TEC, Chapter 39, on the required end-of-course assessment instruments unless the student's ARD committee determines that satisfactory performance is not necessary.

(d) Notwithstanding subsection (c)(3) of this section, a student receiving special education services classified in Grade 11 or 12 who has taken each of the state assessments required by Chapter 101, Subchapter CC, of this title (relating to Commissioner's Rules Concerning Implementation of the Academic Content Areas Testing Program) or Subchapter DD of this title (relating to Commissioner's Rules Concerning Substitute Assessments for Graduation) but failed to achieve satisfactory performance on no more than two of the assessments is eligible to receive an endorsement if the student has met the requirements in subsection (c)(1) and (2) of this section.

(e) A student receiving special education services who entered Grade 9 before the 2014-2015 school year may graduate and be awarded a high school diploma under the Foundation High School Program as provided in §74.1021 of this title (relating to Transition to the Foundation High School Program), if the student's ARD committee determines that the student should take courses under that program and the student satisfies the requirements of that program. Subsections (c) and (d) of this section apply to a student transitioning to the Foundation High School Program under this subsection. As the TEC, §28.0258 and §39.025(a-2), modify the state assessment requirements applicable to students in general education, a student receiving special education services who is classified in Grade 11 or 12 who has taken each of the state assessments required by Chapter 101, Subchapter CC, of this title (relating to Commissioner's Rules Concerning Implementation of the Academic Content Areas Testing Program) or Subchapter DD of this title (relating to Commissioner's Rules Concerning Substitute Assessments for Graduation) but failed to achieve satisfactory performance on no more than two of the assessments may graduate if the student has satisfied all other applicable graduation requirements.

(f) A student receiving special education services who entered Grade 9 before the 2014-2015 school year may graduate and be awarded a regular high school diploma if the student meets one of the following conditions.

(1) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title and satisfactorily completed credit requirements for graduation (under the recommended or distinguished achievement high school programs in Chapter 74, Subchapter F, of this title (relating to Graduation Requirements, Beginning with School Year 2007-2008) or Chapter 74, Subchapter G, of this title (relating to Graduation Requirements, Beginning with School Year 2012-2013)), as applicable, including satisfactory performance as established in the TEC, Chapter 39, on the required state assessments.

(2) Notwithstanding paragraph (1) of this subsection, as the TEC, §28.0258 and §39.025(a-2), modify the state assessment requirements applicable to students in general education, a student receiving special education services who is classified in Grade 11 or 12 may graduate under the recommended or distinguished achievement high school program, as applicable, if the student has taken each of the state assessments required by Chapter 101, Subchapter CC, of this title (relating to Commissioner's Rules Concerning Implementation of the Academic Content Areas Testing Program) or Subchapter DD of this title (relating to Commissioner's Rules Concerning Substitute Assessments for Graduation) but failed to achieve satisfactory performance on no more than two of the assessments and has met all other applicable graduation requirements in paragraph (1) of this subsection.

(3) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title and satisfactorily completed credit requirements for graduation (under the minimum high school program in Chapter 74, Subchapter F or G, of this title), as applicable, including participation in required state assessments. The student's ARD committee will determine whether satisfactory performance on the required state assessments is necessary for graduation.

(4) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title through courses, one or more of which contain modified content that is aligned to the standards required under the minimum high school program in Chapter 74, Subchapter F or G, of this title, as applicable, as well as the satisfactorily completed credit requirements under the minimum high school program, including participation in required state assessments. The student's ARD committee will determine whether satisfactory performance on the required state assessments is necessary for graduation. The student graduating under this subsection must also successfully complete the student's IEP and meet one of the following conditions.

(A) Consistent with the IEP, the student has obtained full-time employment, based on the student's abilities and local employment opportunities, in addition to mastering sufficient self-help skills to enable the student to maintain the employment without direct and ongoing educational support of the local school district.

(B) Consistent with the IEP, the student has demonstrated mastery of specific employability skills and self-help skills that do not require direct ongoing educational support of the local school district.

(C) The student has access to services that are not within the legal responsibility of public education or employment or educational options for which the student has been prepared by the academic program.

(D) The student no longer meets age eligibility requirements.

(g) All students graduating under this section must be provided with a summary of academic achievement and functional performance

as described in 34 Code of Federal Regulations (CFR), §300.305(e)(3). This summary must consider, as appropriate, the views of the parent and student and written recommendations from adult service agencies on how to assist the student in meeting postsecondary goals. An evaluation as required by 34 CFR, §300.305(e)(1), must be included as part of the summary for a student graduating under subsections (b)(3)(A), (B), or (C) or (f)(4)(A), (B), or (C) of this section.

(h) Students who participate in graduation ceremonies but who are not graduating under subsections (b)(3)(A), (B), or (C) or (f)(4)(A), (B), or (C) of this section and who will remain in school to complete their education do not have to be evaluated in accordance with subsection (h) of this section.

(i) Employability and self-help skills referenced under subsections (b)(3) and (f)(4) of this section are those skills directly related to the preparation of students for employment, including general skills necessary to obtain or retain employment.

(j) For students who receive a diploma according to subsections (b)(2); (b)(3) (A), (B), or (C); or (f)(4)(A), (B), or (C) of this section, the ARD committee must determine needed educational services upon the request of the student or parent to resume services, as long as the student meets the age eligibility requirements.

(k) For purposes of this section, modified curriculum and modified content refer to any reduction of the amount or complexity of the required knowledge and skills in Chapters 110-117, 126-128, and 130 of this title. Substitutions that are specifically authorized in statute or rule must not be considered modified curriculum or modified content.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

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



DIVISION 7. DISPUTE RESOLUTION

19 TAC §§89.1165, 89.1193, 89.1195, 89.1197

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §28.025, as amended by House Bill (HB) 165, 86th Texas Legislature, 2019, which establishes requirements, in part, for endorsements; TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §29.004, which establishes state-specific criteria related to full individual and initial evaluations for special education; TEC, §29.005, which establishes state-specific criteria related to students' individualized education programs (IEPs); TEC, §29.010, which establishes requirements related to monitoring activities for special education; TEC, §29.011 and §29.0111, which establish requirements related to transition programming for students eligible for special education; TEC, §29.0151, as

amended by HB 1709, 86th Texas Legislature, 2019, which establishes requirements related to the appointment of surrogate parents to children in foster care who are eligible for special education services; TEC, §29.019, which establishes requirements related to the state's facilitated IEP project; TEC, §30.002, as amended by Senate Bill 522, 86th Texas Legislature, 2019, which establishes requirements related to the state's development and implementation of a plan for the education of children with visual impairments who are under 21 years of age; TEC, §48.102, as added by HB 3, 86th Texas Legislature, 2019, which establishes requirements related to funding for special education programs; 34 Code of Federal Regulations (CFR), §300.8, establishes definitions of eligibilities under special education; 34 CFR, §300.147, which establishes state monitoring requirements for facilities in which a student's admission, review, and dismissal committee have placed students who are eligible for special education; 34 CFR, §§300.151-300.153, which establish requirements related to the filing and resolution of special education complaints; 34 CFR, §300.320, which establishes requirements related to content of a student's IEP; 34 CFR, §300.506, which establishes requirements related to a state's mediation program; 34 CFR, §300.507, which establishes requirements related to a state's due process hearing program; and 34 CFR, §300.600, which establishes requirements related to the state's monitoring authority of special education programs.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§28.025, as amended by House Bill (HB) 165, 86th Texas Legislature, 2019; 29.001; 29.003; 29.004; 29.005; 29.010; 29.011; 29.0111; 29.0151, as amended by HB 1709, 86th Texas Legislature, 2019; 29.019; 30.002, as amended by Senate Bill 522, 86th Texas Legislature, 2019; and 48.102, as added by HB 3, 86th Texas Legislature, 2019; and 34 Code of Federal Regulations, §§300.8, 300.147, 300.151, 300.152, 300.153, 300.320, 300.506, 300.507, and 300.600.

§89.1197. *State Individualized Education Program Facilitation.*

(a) In accordance with the Texas Education Code, §29.020, the Texas Education Agency (TEA) will establish a program that provides independent individualized education program (IEP) facilitators beginning with the 2014-2015 school year.

(b) For the purpose of this section, IEP facilitation has the same general meaning as described in §89.1196(a) of this title (relating to Individualized Education Program Facilitation), except that state IEP facilitation is used when the admission, review, and dismissal (ARD) committee is in dispute about decisions relating to the provision of a free and appropriate public education to a student with a disability and the facilitator is an independent facilitator provided by the TEA.

(c) A request for IEP facilitation under this section must be filed by completing a form developed by the TEA that is available upon request from the TEA and on the TEA website. The form must be filed with the TEA by one of the parties by electronic mail, mail, hand-delivery, or facsimile.

(d) IEP facilitation under this section must be voluntary on the part of the parties and provided at no cost to the parties.

(e) In order for the TEA to provide an independent facilitator, the following conditions must be met.

(1) The required form must be completed and signed by both parties.

(2) The dispute must relate to an ARD committee meeting in which mutual agreement about one or more of the required elements

of the IEP was not reached and the parties have agreed to recess and reconvene the meeting in accordance with §89.1050(g) of this title (relating to The Admission, Review, and Dismissal Committee).

(3) The request for IEP facilitation must have been filed within 10 calendar days of the ARD committee meeting that ended in disagreement, and a facilitator must be available on the date set for reconvening the meeting.

(4) The dispute must not relate to a manifestation determination or determination of interim alternative educational setting under 34 Code of Federal Regulations (CFR), §300.530 or §300.531.

(5) The same parties must not be concurrently involved in special education mediation under §89.1193 of this title (relating to Special Education Mediation).

(6) The issues in dispute must not be the subject of a special education complaint under §89.1195 of this title (relating to Special Education Complaint Resolution) or a special education due process hearing under §89.1151 of this title (relating to Special Education Due Process Hearings) and §89.1165 of this title (relating to Request for Special Education Due Process Hearing).

(7) The same parties must not have participated in IEP facilitation concerning the same student under this section within the same school year of the filing of the current request for IEP facilitation.

(f) Within five business days of receipt of a request for an IEP facilitation under this section, the TEA will determine whether the conditions in subsections (c)-(e) of this section have been met and will notify the parties of its determination and the assignment of the independent facilitator, if applicable.

(g) Notwithstanding subsections (b)-(e) of this section, if a special education due process hearing or complaint decision requires a public education agency to provide an independent facilitator to assist with an ARD committee meeting, the public education agency may request that the TEA assign an independent facilitator. Within five business days of receipt of a written request for IEP facilitation under this subsection, the TEA will notify the parties of its decision to assign or not assign an independent facilitator. If TEA declines the request to assign an independent facilitator, the public education agency must provide an independent facilitator at its own expense.

(h) The TEA's decision not to provide an independent facilitator is final and not subject to review or appeal.

(i) The independent facilitator assignment may be made based on a combination of factors, including, but not limited to, geographic location and availability. Once assigned, the independent facilitator must promptly contact the parties to clarify the issues, gather necessary information, and explain the IEP facilitation process.

(j) The TEA will use a competitive solicitation method to seek independent facilitation services, and the contracts with independent facilitators will be developed and managed in accordance with the TEA's contracting practices and procedures.

(k) At a minimum, an individual who serves as an independent facilitator under this section:

(1) must have demonstrated knowledge of federal and state requirements relating to the provision of special education and related services to students with disabilities;

(2) must have demonstrated knowledge of and experience with the ARD committee meeting process;

(3) must have completed 18 hours or more of training in IEP facilitation, consensus building, and/or conflict resolution as specified in the TEA's competitive solicitation;

(4) must complete continuing education as determined by the TEA;

(5) may not be an employee of the TEA or the public education agency that the student attends; and

(6) may not have a personal or professional interest that conflicts with his or her impartiality.

(l) An individual is not an employee of the TEA solely because the individual is paid by the TEA to serve as an independent facilitator.

(m) An independent facilitator must not be a member of the student's ARD committee, must not have any decision-making authority, and must remain impartial to the topics under discussion. The independent facilitator must assist with the overall organization and conduct of the ARD committee meeting by:

(1) assisting the committee in establishing an agenda and setting the time allotted for the meeting;

(2) assisting the committee in establishing a set of guidelines for the meeting;

(3) guiding the discussion and keeping the focus on developing a mutually agreed upon IEP for the student;

(4) ensuring that each committee member has an opportunity to participate;

(5) helping to resolve disagreements that arise; and

(6) helping to keep the ARD committee on task so that the meeting purposes can be accomplished within the time allotted for the meeting.

(n) An independent facilitator must protect the confidentiality of personally identifiable information about the student and comply with the requirements in the Family Educational Rights and Privacy Act regulations, 34 CFR, Part 99, relating to the disclosure and redisclosure of personally identifiable information from a student's education record.

(o) The TEA will develop surveys to evaluate the IEP facilitation program and the independent facilitators and will request that parties who participate in the program complete the surveys.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

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TITLE 25. HEALTH SERVICES

PART 11. CANCER PREVENTION AND RESEARCH INSTITUTE OF TEXAS

CHAPTER 703. GRANTS FOR CANCER PREVENTION AND RESEARCH

25 TAC §703.3, §703.26

The Cancer Prevention and Research Institute of Texas ("CPRIT" or "the Institute") adopts the amendments to 25 TAC §703.3(b)(4) and §703.26(e)(12) without changes to the proposed amendments as published in the December 4, 2020, issue of the *Texas Register* (45 TexReg 8726); therefore, the rules will not be republished. The amendments relate to Request for Applications content and reimbursement of a grant recipient's professional association dues and fees.

Reasoned Justification

The amendment to §703.3(b)(4) clarifies that in the Request for Applications, the Institute may specify the minimum level of effort, if any, that a Principal Investigator, co-Principal Investigator, or other specified key personnel must maintain for the grant project. The change to §703.26(e)(12) clarifies that professional association membership fees or dues for an individual employed by a grant recipient are not allowable for reimbursement. However, membership fees or dues paid by the grant recipient for the entity's membership in business, technical, and professional organizations may be an allowable expense.

Summary of Public Comments and Staff Recommendation

CPRIT received no public comments regarding the proposed amendments to §§703.3(b)(4) and 703.26(e)(12).

Certification

The Institute hereby certifies that Kristen Pauling Doyle, General Counsel, reviewed the adoption of the rules and found it to be a valid exercise of the agency's legal authority.

The rule changes are adopted under the authority of the Texas Health and Safety Code Annotated, §102.108, which provides the Institute with broad rule-making authority to administer the chapter, including rules for awarding grants.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Heidi McConnell

Chief Operating Officer

Cancer Prevention and Research Institute of Texas

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For further information, please call: (512) 305-8487



TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 744. MINIMUM STANDARDS FOR SCHOOL-AGE AND BEFORE OR AFTER-SCHOOL PROGRAMS

The Texas Health and Human Services Commission (HHSC) adopts amendments to §§744.123, 744.501, 744.2001, 744.2003, 744.2005, 744.2007, 744.2105, 744.2401, 744.2409, 744.2411, and 744.2421; new §744.2002 and §744.2403; and the repeal of §§744.2403, 744.2405, 744.2407, 744.2415, and 744.2417 in Title 26, Texas Administrative Code, Chapter 744, Minimum Standards for School-Age and Before or After-School Programs.

The amendments to §§744.123, 744.2003, 744.2105, and 744.2411 are adopted with changes to the proposed text as published in the November 20, 2020, issue of the *Texas Register* (45 TexReg 8254). These rules will be republished.

The amendments to §§744.501, 744.2001, 744.2005, 744.2007, 744.2401, 744.2409, and 744.2421; new §744.2002 and §744.2403; and the repeal of §§744.2403, 744.2405, 744.2407, 744.2415, and 744.2417 are adopted without changes to the proposed text as published in the November 20, 2020, issue of the *Texas Register* (45 TexReg 8254). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The amendments, new sections, and repeals are necessary to implement Senate Bill (S.B.) 952, 86th Legislature, Regular Session, 2019, which added Subsections 42.042(e-3), (e-4), and (e-5) to the Texas Human Resources Code (HRC). The new Subsections require HHSC Child Care Regulation (CCR) to align the minimum standards for child-care centers and registered child-care homes with standards for physical activity and screen time in *Caring for Our Children* (CFOC), 4th edition, and with the nutrition standards of the federal Child and Adult Care Food Program (CACFP).

CCR is extending these requirements to School-Age and Before and After-School Programs in Chapter 744 and Licensed Homes in Chapter 747, so that the minimum standards for physical activity, nutrition, and screen time are congruent throughout Chapters 744, 746, and 747.

COMMENTS

The 31-day comment period ended December 21, 2020. During this period, HHSC received comments regarding the proposed rules from six commenters, including Texans Care for Children, Texas Association for the Education of Young Children, Partnership for Healthy Texas, Texas Pediatric Society, the American Heart Association, and the Texas Medical Association. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Regarding §744.2411, one commenter stated the proposed rule does not support the CACFP requirement that meal substitution for a child with a disability that restricts the child's diet must be supported by written approval from a physician or other health-care professional with prescriptive authority. The commenter stated that there is nothing in the proposed rules that would prevent a health-care professional without prescribing authority from approving a meal substitution for a child with a disability that restricts the child's diet.

Response: HHSC agrees with the comment and is revising the rule to support the CACFP requirement.

Comment: Six commenters generally supported the rules that align the minimum standards with the active play and screen time requirements in CFOC and nutritional requirements with CACFP meal patterns. Commenters stated specific support of increase opportunities for children to engage in active play through newly clarified amounts of active play offered, requirements for planned daily physical activities for children of all ages, reduction in screen time activities, and meal and snack alignment with CACFP meal patterns that provide clearer guidelines and increase flexibility for child-care providers.

Response: HHSC appreciates the support of the rules.

HHSC made minor editorial changes to §744.123 to delete a repeated word and correct punctuation to be consistent with other Licensing chapters.

HHSC also received comments on parallel rules in Chapter 746, Minimum Standards for Child-Care Centers, published in the November 20, 2020, issue of the *Texas Register* (45 TexReg 8264). HHSC is amending the proposed text in §744.2003 and §744.2105 to ensure the minimum standards for physical activity, nutrition, and screen time remain congruent throughout Chapters 744, 746, and 747. For a more detailed description of comments received for Chapter 746 and HHSC's response, please see the preamble for Chapter 746, which is published elsewhere in this issue of the *Texas Register*.

SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS

DIVISION 3. DEFINITIONS

26 TAC §744.123

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§744.123. *What do certain words and terms mean when used in this chapter?*

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or another subchapter or unless the context clearly indicates otherwise. In addition, the following words and terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

- (1) Activity space--An area or room used for children's activities, including areas separate from a group's classroom.
- (2) Administrative and clerical duties--Duties that involve the administration of an operation, such as bookkeeping, enrolling children, answering the telephone, and collecting fees.
- (3) Admission--The process of enrolling a child in an operation. The date of admission is the first day the child is physically present at the operation.
- (4) Adult--A person 18 years old and older.

(5) Age-appropriate--Activities, equipment, materials, curriculum, and environment that are developmentally consistent with the chronological age of the child being served.

(6) Attendance--When referring to a child's attendance, the physical presence of a child at the operation on any given day or at any given time, as distinct from the child's enrollment in the operation.

(7) Before or after-school program--An operation that provides care before and after or before or after the customary school day and during school holidays, for at least two hours a day, three days a week, to children who attend pre-kindergarten through grade six.

(8) Caregiver--A person who is counted in the child to caregiver ratio, whose duties include the supervision, guidance, and protection of a child. As used in this chapter, a caregiver must meet the minimum education, work experience, and training qualifications required under Subchapter D of this chapter (relating to Personnel). A caregiver is usually an employee, but may also be a substitute, volunteer, or contractor, as outlined in Subchapter D, Division 5 of this chapter (relating to Substitutes, Volunteers, and Contractors).

(9) Certified Child-Care Professional Credential--A credential given by the National Early Childhood Program Accreditation to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(10) Certified lifeguard--A person who has been trained in life saving and water safety by a qualified instructor, from a recognized organization that awards a certificate upon successful completion of the training. The certificate is not required to use the term "lifeguard," but you must be able to document that the certificate represents the type of training described.

(11) CEUs--Continuing education units. A standard unit of measure for adult education and training activities. One CEU equals 10 clock hours of participation in an organized, continuing-education experience, under responsible, qualified direction and instruction. Although a person may obtain a CEU in many of the same settings as clock hours, the CEU provider must meet the criteria established by the International Association for Continuing Education and Training to be able to offer the CEU.

(12) Child Development Associate Credential--A credential given by the Council for Professional Recognition to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(13) Clock hour--An actual hour of documented:

(A) Attendance at instructor-led training, such as seminars, workshops, conferences, early childhood classes, and other planned learning opportunities, provided by an individual or individuals, as specified in §744.1319(a) of this chapter (relating to Must the training for my caregivers and the director meet certain criteria?); or

(B) Self-instructional training that was created by an individual or individuals, as specified in §744.1319(a) and (b) of this chapter, or self-study training.

(14) Corporal punishment--The infliction of physical pain on a child as a means of controlling behavior. This includes spanking, hitting, slapping, or thumping a child.

(15) Days--Calendar days, unless otherwise stated.

(16) Director--An adult you designate to have daily, on-site responsibility for your operation, including maintaining compliance with the minimum standards, rules, and laws. As this term is used in

this chapter, a director may be an operation director, program director, or site director, unless the context clearly indicates otherwise.

(17) Employee--A person an operation employs full-time or part-time to work for wages, salary, or other compensation. Employees are all of the operation staff, including caregivers, kitchen staff, office staff, maintenance staff, the assistant director, all directors, and the owner, if the owner is ever on site at the operation or transports a child.

(18) Enrollment--The list of names or number of children who have been admitted to attend an operation for any given period of time; the number of children enrolled in an operation may vary from the number of children in attendance on any given day.

(19) Entrap--A component or group of components on equipment that forms angles or openings that may trap a child's head by being too small to allow the child's body to pass through, or large enough for the child's body to pass through but too small to allow the child's head to pass through.

(20) Field trips--Activities conducted away from the operation.

(21) Food service--The preparation or serving of meals or snacks.

(22) Frequent--More than two times in a 30-day period. Note: For the definition of "regularly or frequently present at an operation" as it applies to background checks, see §745.601 of this title (relating to What words must I know to understand this subchapter?).

(23) Garbage--Waste food or items that when deteriorating cause offensive odors and attract rodents, insects, and other pests.

(24) Governing body--A group of persons or officers of a corporation or other type of business entity having ultimate authority and responsibility for the operation.

(25) Group activities--Activities that allow children to interact with other children in large or small groups. Group activities include storytelling, finger plays, show and tell, organized games, and singing.

(26) Health-care professional--A licensed physician, a licensed advanced practice registered nurse (APRN), a licensed vocational nurse (LVN), a licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of the license. This does not include physicians, nurses, or other medical personnel who are not licensed in the United States or in the country in which the person practices.

(27) Health check--A visual or physical assessment of a child to identify potential concerns about a child's health, including signs or symptoms of illness and injury, in response to changes in the child's behavior since the last date of attendance.

(28) High school equivalent--

(A) Documentation of a program recognized by the Texas Education Agency (TEA) or other public educational entity in another state, which offers similar training on reading, writing, and math skills taught at the high school level, such as a General Educational Development (GED) certificate; or

(B) Confirmation that the person received home-schooling that adequately addressed basic competencies such as basic reading, writing, and math skills, which would otherwise have been documented by a high school diploma.

(29) Individual activities--Opportunities for the child to work independently or to be away from the group, but supervised.

(30) Inflatable--An amusement ride or device, consisting of air-filled structures designed for use by children, as specified by the manufacturer, which may include bouncing, climbing, sliding, or interactive play. They are made of flexible fabric, kept inflated by continuous air flow by one or more blowers, and rely upon air pressure to maintain their shape.

(31) Instructor-led training--Training characterized by the communication and interaction that takes place between the student and the instructor. The training must include an opportunity for the student to interact with the instructor to obtain clarifications and information beyond the scope of the training materials. For such an opportunity to exist, the instructor must communicate with the student in a timely fashion, including answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively interacting with students. Examples of this type of training include, classroom training, web-based on-line facilitated learning, video-conferencing, or other group learning experiences.

(32) Janitorial duties--Those duties that involve the cleaning and maintenance of the operation's building, rooms, furniture, etc. Cleaning and maintenance include such duties as cleansing carpets, washing cots, and sweeping, vacuuming, or mopping a restroom or a classroom. Sweeping up after an activity or mopping up a spill in a classroom that is immediately necessary for the children's safety is not considered a janitorial duty.

(33) Local sanitation official--A sanitation official designated by the city or county government.

(34) Multi-site operations--Two or more operations owned by the same person or entity, but the operations have separate permits. These operations may have centralized business functions, record keeping, and leadership.

(35) Natural environment--Settings that are natural or typical for all children of the same age without regard to ability or disability. For example, a natural environment for learning social skills is a play group of peers.

(36) Nighttime care--Care given on a regular or frequent basis to children who are starting or continuing their night sleep, or to children who spend the night or part of the night at the operation between the hours of 9:00 p.m. and 6:00 a.m.

(37) Operation--A person or entity offering a before or after-school program or school-age program that is subject to Licensing's regulation. An operation includes the building and the premises where the program is offered, any person involved in providing the program, and any equipment used in providing the program.

(38) Operation director--A director at your operation who is not supervised by a program director. An operation that has an operation director cannot have a program director or a site director.

(39) Owner--The sole proprietor, partnership, corporation, or other type of business entity who owns the operation.

(40) Permit holder--The owner of the operation that is granted the permit.

(41) Permit is no longer valid--For purposes of this chapter, a permit remains valid through the renewal process. A permit only becomes invalid when your:

(A) Operation voluntarily closes;

(B) Operation must close because of an enforcement action in Chapter 745, Subchapter L of this title (relating to Enforcement Actions);

(C) Permit expires according to §745.481 of this title (relating to When does my permit expire?); or

(D) Operation must close because its permit is automatically revoked according to Texas Human Resources Code §§42.048(e), 42.052(j), or 42.054(f).

(42) Physical activity (moderate)--Levels of activity for a child that are at intensities faster than a slow walk, but still allow the child to talk easily. Moderate physical activity increases heart rate and breathing rate.

(43) Physical activity (vigorous)--Rhythmic, repetitive physical movement for a child that uses large muscle groups, causing the child to breathe rapidly and only enabling the child to speak in short phrases. Typically, the child's heart rate is substantially increased and the child is likely to be sweating while engaging in the vigorous physical activity.

(44) Pre-kindergarten age child--A child who is three or four years of age before the beginning of the current school year.

(45) Premises--Includes the operation, any lots on which the operation is located, any outside ground areas, any outside play areas, and the parking lot.

(46) Program--The services and activities provided by an operation.

(47) Program director--A director who oversees your program at multi-site operations and supervises a site director at each operation.

(48) Regular--On a recurring, scheduled basis. Note: For the definition of "regularly or frequently present at an operation" as it applies to background checks, see §745.601 of this title.

(49) Safety belt--A lap belt and any shoulder straps included as original equipment on or added to a vehicle.

(50) Sanitize--The use of a product (usually a disinfecting solution) that is registered by the Environmental Protection Agency (EPA) which substantially reduces germs on inanimate objects to levels considered safe by public health requirements. Many bleach and hydrogen peroxide products are EPA-registered. You must follow the product's labelling instructions for sanitizing (paying attention to any instructions regarding contact time and toxicity on surfaces likely to be mouthed by children). For an EPA-registered sanitizing product or disinfecting solution that does not include labelling instructions for sanitizing (a bleach product, for example), you must follow these steps in order:

(A) Washing with water and soap;

(B) Rinsing with clear water;

(C) Soaking in or spraying on a disinfecting solution for at least two minutes. Rinsing with cool water only those items that children are likely to place in their mouths; and

(D) Allowing the surface or item to air-dry.

(51) School-age child--A child who is five years of age and older and is enrolled in or has completed kindergarten.

(52) School-age program--An operation that provides supervision and recreation, skills instruction, or skills training for at least two hours a day and three days a week to children who attend pre-kindergarten through grade six. A school-age program operates before or after the customary school day and may also operate during school holidays, the summer period, or any other time when school is not in session.

(53) Screen time activity--An activity during which a child views media content on a cell or mobile phone, tablet, computer, television, video, film, or DVD. Screen time activities do not include video chatting with a child's family or assistive and adaptive computer technology used by a child with special care needs on a consistent basis.

(54) Self-instructional training--Training designed to be used by one individual working alone and at the individual's own pace to complete lessons or modules. Lessons or modules commonly include questions with clear right and wrong answers. An example of this type of training is web-based training. Self-study training is also a type of self-instructional training.

(55) Self-study training--Non-standardized training where an individual reads written materials, watches a training video, or listens to a recording to obtain certain knowledge that is required for annual training. Self-study training is limited to three hours of annual training per year.

(56) Site director--A director who has on-site responsibility at a specific operation, but who is supervised by a program director.

(57) Special care needs--A child with special care needs is a child who has a chronic physical, developmental, behavioral, or emotional condition and who also requires assistance beyond that required by a child generally to perform tasks that are within the typical chronological range of development, including the movement of large or small muscles, learning, talking, communicating, self-help, social skills, emotional well-being, seeing, hearing, and breathing.

(58) State or local fire marshal--A fire official designated by the city, county, or state government.

(59) Universal precautions--An approach to infection control where all human blood and certain human bodily fluids are treated as if known to be infectious for HIV, HBV, and other blood-borne pathogens.

(60) Water activities--Related to the use of swimming pools, splashing pools, wading pools, sprinkler play, or other bodies of water.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

DIVISION 4. OPERATIONAL POLICIES

26 TAC §744.501

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner

of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER F. DEVELOPMENTAL ACTIVITIES AND EQUIPMENT DIVISION 1. ACTIVITIES AND ACTIVITY PLANS

26 TAC §§744.2001 - 744.2003, 744.2005, 744.2007

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§744.2003. What are the additional requirements if my operation cares for a child under the age of five?

If your operation cares for a child under the age of five, you must:

(1) Have written procedures that include the following:

(A) How caregivers will supervise the child while transitioning the child to and from restrooms, indoor and outdoor activity spaces, and spaces shared by other persons outside of the operation;

(B) How caregivers will meet the unique care needs of the child;

(C) How caregivers will meet the outdoor play and physical activity needs in §744.2002(1) and (3) of this division (relating to What additional activities must caregivers provide when a child is in care for more than five consecutive hours in a day?), including:

(i) A minimum of two opportunities for outdoor play, weather permitting, for at least 60 total minutes when a child is in care for eight hours, although you may prorate this requirement if a child is in care for less than eight hours; and

(ii) A minimum of 90 minutes of moderate to vigorous active play when a child is in care for eight hours, although you may prorate this requirement if a child is in care for less than eight hours;

(D) Under what circumstances the child will be mixing with older children in the operation; and

(E) Any modifications to space or equipment that will be made to accommodate the child.

(2) Have written policies that address the promotion of indoor and outdoor physical activity that are consistent with this division. Your policies must include:

(A) The benefits of physical activity and outdoor play;

(B) The duration of physical activity at your operation, both indoor and outdoor;

(C) The type of physical activity (structured and unstructured) that children may engage in at your operation;

(D) Each setting in which your physical activity program will take place;

(E) The recommended clothing and footwear that will allow a child to participate freely and safely in physical activities; and

(F) A plan to ensure physical activity occurs on days when extreme weather conditions prohibit or limit outdoor play.

(3) Follow the policies and procedures and make the policies and procedures available for review by:

(A) Licensing upon request during your hours of operation; and

(B) Parents at enrollment and as needed thereafter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. DISCIPLINE AND GUIDANCE

26 TAC §744.2105

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code

§42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§744.2105. *What types of discipline and guidance or punishment are prohibited?*

There must be no harsh, cruel, or unusual treatment of any child. The following types of discipline and guidance are prohibited:

- (1) Corporal punishment or threats of corporal punishment;
- (2) Punishment associated with food, naps, or toilet training;
- (3) Pinching, shaking, or biting a child;
- (4) Hitting a child with a hand or instrument;
- (5) Putting anything in or on a child's mouth;
- (6) Humiliating, ridiculing, rejecting, or yelling at a child;
- (7) Subjecting a child to harsh, abusive, or profane language;
- (8) Placing a child in a locked or dark room, bathroom, or closet;
- (9) Withholding active play or keeping a child inside as a consequence for behavior, unless the child is exhibiting behavior during active play that requires a brief supervised separation or time out that is consistent with §744.2103(b)(4) of this subchapter (relating to What methods of discipline and guidance may a caregiver use?); and
- (10) Requiring a child to remain silent or inactive for inappropriately long periods of time for the child's age.

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SUBCHAPTER J. NUTRITION AND FOOD SERVICE

26 TAC §§744.2401, 744.2403, 744.2409, 744.2411, 744.2421

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§744.2411. *What are the requirements for a child who requires a special diet or does not want to eat foods the operation serves?*

(a) To serve a child a therapeutic or special diet, you must:

(1) Have written approval from:

(A) A physician or health-care professional with prescriptive authority if the diet relates to a disability that restricts the child's diet; or

(B) A health-care professional or a registered or licensed dietician if the diet does not relate to a disability that restricts the child's diet;

(2) Maintain the written approval in the child's record; and

(3) Give the information to all employees preparing and serving food.

(b) You must discuss recurring eating problems with the child's parent.

(c) You may encourage but must not force children to eat.

(d) You must not serve nutrient concentrates and supplements such as protein powders, liquid protein, vitamins, minerals, and other nonfood substances without written instructions as required in subsection (a)(1) of this section.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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26 TAC §§744.2403, 744.2405, 744.2407, 744.2415, 744.2417

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 746. MINIMUM STANDARDS FOR CHILD-CARE CENTERS

The Texas Health and Human Services Commission (HHSC) adopts amendments to §§746.123, 746.501, 746.2203, 746.2205, 746.2207, 746.2417, 746.2507, 746.2607, 746.2707, 746.2805, 746.3209, 746.3301, 746.3309, 746.3311, and 746.3319; new §746.2206 and §746.3303; and the repeal of §§746.3303, 746.3305, 746.3307, 746.3315 and 746.3316 in Title 26, Texas Administrative Code, Chapter 746, Minimum Standards for Child Care Centers.

The amendments to §§746.123, 746.501, 746.2707, 746.2805, and 746.3311 are adopted with changes to the proposed text as published in the November 20, 2020, issue of the *Texas Register* (45 TexReg 8261). These rules will be republished.

The amendments to §§746.2203, 746.2205, 746.2207, 746.2417, 746.2507, 746.2607, 746.3209, 746.3301, 746.3309, and 746.3319; new §746.2206 and §746.3303; and the repeal of §§746.3303, 746.3305, 746.3307, 746.3315 and 746.3316 are adopted without changes to the proposed text as published in the November 20, 2020, issue of the *Texas Register* (45 TexReg 8261). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The amendments, new sections, and repeals are necessary to implement Senate Bill (S.B.) 952, 86th Legislature, Regular Session, 2019, which added Subsections 42.042(e-3), (e-4), and (e-5) to the Texas Human Resources Code (HRC). The new Subsections require HHSC Child Care Regulation (CCR) to align the minimum standards for child-care centers and registered child-care homes with standards for physical activity and screen time in *Caring for Our Children* (CFOC), 4th edition, and with the nutrition standards of the federal Child and Adult Care Food Program (CACFP).

COMMENTS

The 31-day comment period ended December 21, 2020. During this period, HHSC received comments regarding the proposed rules from 16 commenters, including Stretch-n-Grow of McKinney, Kiddie Academy of Missouri City, Christian Preschool Centers, Inc., Crème de la Crème, Education Connection, Austin Community College Children's Lab School, Kyle's Bright Beginnings, Foundations Academy, Kids University, Texans Care for Children, Texas Association for the Education of Young Children, Partnership for Healthy Texas, Texas Pediatric Society, the American Heart Association, and the Texas Medical Association. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Regarding §746.123(41) and (53), one commenter stated the rules are confusing and requested "current school year" be more clearly defined as a center may serve several school districts with varying start dates.

Response: HHSC disagrees with the comment and declines to revise the rule. However, HHSC will add information to a Helpful Information box, following the rule in the Minimum Standards publications on the HHSC provider webpage, to clarify that the beginning of the current school year is based on the start date of the school district the child attends.

Comment: Regarding §746.123(48), one commenter requested HHSC clarify the definition of "media content" within the definition of screen time activity to eliminate potential ambiguity in regulating the standard.

Response: HHSC disagrees with the comment and declines to revise the rule. The definition of screen time activity must be aligned with the CFOC definition. However, HHSC will clarify the term "media content" by adding examples to a Helpful Information box, following the rule in the Minimum Standards publications on the HHSC provider webpage.

Comment: Regarding §746.501(18)(A), one commenter stated that child-care operators are unqualified to discuss the benefits of physical activity as required by the rule. The commenter also stated that describing benefits of physical activity is unnecessary to ensure proper care of children.

Response: HHSC disagrees with the comment and declines to revise the rule. Specific operational policies concerning physical activities are required in the CFOC standards. To aid child-care center staff in writing their policies, HHSC will provide additional resources regarding physical activity by adding links to the CFOC standards and the CCR Technical Assistance Library in a Helpful Information box, following the rule in the Minimum Standards publications on the HHSC provider webpage.

Comment: Regarding §746.501(18)(E), one commenter recommended HHSC revise the language in the rule that requires an operation to include in its operational policies the recommended clothing and footwear a child requires for active play. The commenter recommended HHSC reduce ambiguity by clarifying what is recommended versus what is required.

Response: HHSC agrees with the comment and is revising the rule to clarify the operation's policy must include the recommended clothing and footwear that will allow a child to participate freely and safely in physical activities.

Comment: Regarding §746.2206(1)(A), one commenter requested HHSC review this requirement--due to logistical, staffing, equipment, and financial concerns--for taking non-walking infants under 12 months of age outside. The commenter recommended adding or removing some of the mandates of the policy and requiring that child-care center employees not carry infants outside of the classroom.

Response: HHSC disagrees with the comment and declines to revise the rule. The recommendation is not aligned with CFOC standards. Additionally, the rule includes language that allows for flexibility in addressing the outdoor activity needs of infants birth through 12 months of age.

Comment: Regarding §746.2206(1)(B), one commenter stated that subparagraph (B) does not specify that outdoor play occur, weather permitting, as it does paragraph (1) of the rule.

Response: HHSC disagrees with the comment and declines to revise the rule. The clause that specifies outdoor play occur, weather permitting, in paragraph (1) applies to both subparagraph (1)(A) and (1)(B).

Comment: Regarding §746.2206(2)(B), one commenter issued a statement of support for the rule regarding the minimum amount of time for moderate and vigorous active play for pre-kindergarten age children.

Response: HHSC appreciates the support of the rule.

Comment: Regarding §746.2207(c)(3), one commenter agreed with reducing the regular amount of screen time from two hours to one hour per day, but the commenter requested an allowance for days when inclement weather reduces outside time.

Response: HHSC disagrees with the comment and declines to revise the rule. The recommendation is not aligned with CFOC standards. Additionally, new rules for physical activity require centers to meet activity requirements regardless of weather. Extra time indoors must be utilized to meet the active play requirements that typically would be met outside. Screen time activities do not provide the level of child and caregiver engagement needed to fulfill that requirement.

Comment: Regarding §746.2207(c)(3) and (c)(5), one commenter stated the rules prohibit children from watching entire movies on special occasions, particularly during field trips to movie theatres. The commenter further noted that movies include advertisements for upcoming movies, which would violate the proposed rules.

Response: HHSC disagrees with the comment and declines to revise the rule. The rule applies to activities at the child-care center only. A Helpful Information box, following the proposed rule in the Minimum Standards publications on the HHSC provider webpage, contains information that further clarifies that the rule does not apply to field trips.

Comment: Regarding §746.2207(d), one commenter requested HHSC clarify the term "homework" as a child-care center may use a smart board to post daily schedules, have children sign in, etc. The commenter recommended HHSC revise the rule to read "a school-age child may use screen time without restriction" or "a school-age child may use screen time for homework or activities other than videos."

Response: HHSC disagrees with the comment and declines to revise the rule. The recommendation is not aligned with CFOC standards. However, HHSC will clarify that daily sign-in, rosters, or schedules displayed on a smart board are not examples of media content subject to screen time limitations in a Helpful Information box, following the rule that defines screen time, §746.123(48), in the Minimum Standards publications on the HHSC provider webpage.

Comment: Regarding §746.2417(2)(B), two commenters requested an infant's digestion be included as part of the eating process to allow an infant to remain upright in a restrictive device for 30 minutes after eating to mitigate side effects from gastroesophageal reflux.

Response: HHSC disagrees with the comment and declines to revise the rule. The request is not aligned with the CFOC standards. Additionally, current minimum standards allow child-care centers to accommodate any special health needs indicated on infant feeding instructions, the center's enrollment form, or the child's health statement.

Comment: Regarding §746.2417(2)(B), one commenter stated that 15 minutes is not enough time to allow an infant to play in a restrictive device, particularly when the infant is content and enjoying the device. The commenter also stated a caregiver may

take longer than 15 minutes to complete tasks with other infants in the room, thus resulting in an infant remaining in the device beyond the 15-minute time limit.

Response: HHSC disagrees with the comment and declines to revise the rule. The recommendation is not aligned with CFOC standards.

Comment: Regarding §746.2707(4), one commenter stated using tape recorders as an example is outdated and recommended HHSC replace it with "cd players, mp3 players, streaming audio devices."

Response: HHSC agrees that the example should be revised but disagrees with the examples the commenter recommended. This rule is about promoting small muscle development in school-age children and any examples must support development in that specific area. HHSC is revising the rule to provide new examples.

Comment: Regarding §746.2805(9), one commenter stated that allowing children to play outside following poor behavior in the classroom reinforces negative behavior and contradicts current best practices regarding positive reinforcement. The commenter recommended adding language to allow the child a choice to remain inside in a calming corner or safe space.

Response: HHSC disagrees with the comment but is revising the rule to clarify the appropriate use of time out during active play. Preventing a child from engaging in active play outside as a delayed consequence for poor behavior inside, as the commenter suggested, is not aligned with the CFOC standards. HHSC is further clarifying the rule by adding examples to illustrate the appropriate use of time out during active play to the Helpful Information box, following the proposed rule in the Minimum Standards publications on the HHSC provider webpage.

Comment: Regarding §746.2805(9), three commenters stated that a caregiver should not withhold outdoor active play due to classroom behavior but should have the ability to address poor behavior during indoor or outdoor active play with a short time away from the group as an immediate consequence.

Response: HHSC agrees with the comment is revising the rule to clarify the appropriate use of time out during active play. HHSC is further clarifying the rule by adding examples to illustrate the appropriate use of time out during active play to the Helpful Information box, following the proposed rule in the Minimum Standards publications on the HHSC provider webpage.

Comment: Regarding §746.3301(b), two commenters expressed concerns with the fiscal impact of following the CACFP meal patterns. One commenter stated the requirement to follow CACFP requirements is particularly hard for centers that are ineligible for CACFP reimbursement because they do not enroll children who receive subsidies from the Texas Workforce Commission. The commenter further stated the required food quantities are costly and wasteful and requested HHSC address the cost to providers. The second commenter also expressed concerns regarding the fiscal impact due to increased food quantities and recommended HHSC restore the original language of the rule that allowed child-care centers to follow CACFP meal patterns or Licensing meal requirements.

Response: HHSC disagrees with the comment and declines to revise the rule. HHSC is statutorily required to align the minimum standards with the CACFP meal patterns. HHSC determined these rules have no fiscal impact on child-care centers based on a survey completed by the Texas Department of Agriculture that

determined the CACFP meal pattern changes are cost neutral. Moreover, any child-care center may participate in CACFP for reimbursement, as participation is not contingent on enrollment in a separate state or federal program.

Comment: Regarding §746.3301(e), one commenter expressed concern with the financial impact of allowing second servings of food to all children in care.

Response: HHSC disagrees with the comment and declines to revise the rule. This rule does not impose a new requirement on child-care centers as it is an existing rule that was moved from a repealed rule in this packet. There is no new financial impact to child-care centers.

Comment: Regarding §746.3311, one commenter stated the proposed rule does not support the CACFP requirement that meal substitution for a child with a disability that restricts the child's diet must be supported by written approval from a physician or other health-care professional with prescriptive authority. The commenter explained that there is nothing in the proposed rules that would prevent a health-care professional without prescribing authority from approving a meal substitution for a child with a disability that restricts the child's diet.

Response: HHSC agrees with the comment and is revising the rule to support the CACFP requirement.

Comment: Regarding the phrase "weather permitting," as it appears in several rules regarding physical activity, one commenter requested a better definition of the phrase due to concerns some child-care centers will not take children outside when the weather is less than ideal.

Response: HHSC disagrees with the comment and declines to revise the rules. The language in the rules is aligned with CFOC standards. Additionally, child-care centers continue to have a responsibility to establish policies that support the minimum standards and protect the safety of children in care; this includes making decisions regarding inclement weather and assessing any risk, or lack thereof, to enrolled children. For these reasons, HHSC does not find it necessary to expand upon the specific weather conditions that would prohibit outdoor play.

Comment: Six commenters generally supported the rules that align the minimum standards with the active play and screen time requirements in CFOC and nutritional requirements with CACFP nutrition standards. Commenters stated specific support of increase opportunities for children to engage in active play through newly clarified amounts of active play offered, requirements for planned daily physical activities for children of all ages, limiting infant time in restrictive equipment to 15 minutes, requirements for caregiver directed tummy time, reduction in screen time activities, and meal and snack alignment with CACFP meal patterns that provide clearer guidelines and increase flexibility for child-care providers.

Response: HHSC appreciates the support of the rules.

HHSC made minor editorial changes to §746.123 to delete a repeated word and remove the word "or" from a list.

SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS

DIVISION 3. DEFINITIONS

26 TAC §746.123

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§746.123. *What do certain words and terms mean when used in this chapter?*

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or another subchapter or unless the context clearly indicates otherwise. In addition, the following words and terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

- (1) Activity space--An area or room used for children's activities, including areas separate from a group's classroom.
- (2) Administrative and clerical duties--Duties that involve the operation of a child-care center, such as bookkeeping, enrolling children, answering the telephone, and collecting fees.
- (3) Admission--The process of enrolling a child in a child-care center. The date of admission is the first day the child is physically present in the center.
- (4) Adult--A person 18 years old and older.
- (5) Age-appropriate--Activities, equipment, materials, curriculum, and environment that are developmentally consistent with the chronological age of the child being served.
- (6) Alternate care program--A program in which no child is in care for more than five consecutive days, and no child is in care for more than 15 days in one calendar month, regardless of the duration of each stay.
- (7) Attendance--When referring to a child's attendance, the physical presence of a child at the child-care center's program on any given day or at any given time, as distinct from the child's enrollment in the child-care center.
- (8) Bouncer seat--A stationary seat designed to provide gentle rocking or bouncing motion by an infant's movement, or by battery-operated movement. This type of equipment is designed for an infant's use from birth until the child can sit up unassisted.
- (9) Caregiver--A person who is counted in the child to caregiver ratio, whose duties include the supervision, guidance, and protection of a child. As used in this chapter, a caregiver must meet the minimum education, work experience, and training qualifications required under Subchapter D of this chapter (relating to Personnel). A caregiver is usually an employee, but may also be a substitute, volunteer, or contractor, as outlined in Subchapter D, Division 5 of this chapter.
- (10) Certified Child-Care Professional Credential--A credential given by the National Early Childhood Program Accreditation to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.
- (11) Certified lifeguard--A person who has been trained in life saving and water safety by a qualified instructor, from a recognized organization that awards a certificate upon successful completion of the training. The certificate is not required to use the term "lifeguard," but

the permit holder must be able to document that the certificate represents the type of training described.

(12) CEUs--Continuing education units. A standard unit of measure for adult education and training activities. One CEU equals 10 clock hours of participation in an organized, continuing-education experience, under responsible, qualified direction and instruction. Although a person may obtain a CEU in many of the same settings as clock hours, the CEU provider must meet the criteria established by the International Association for Continuing Education and Training to be able to offer the CEU.

(13) Child--An infant, a toddler, a pre-kindergarten age child, or a school-age child.

(14) Child-care center--A child-care facility that is licensed to care for seven or more children for less than 24 hours per day, at a location other than the permit holder's home. If you were licensed before September 1, 2003, the location of the center could be in the permit holder's home.

(15) Child-care program--The services and activities provided by a child-care center.

(16) Child Development Associate Credential--A credential given by the Council for Professional Recognition to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(17) Clock hour--An actual hour of documented:

(A) Attendance at instructor-led training, such as seminars, workshops, conferences, early childhood classes, and other planned learning opportunities, provided by an individual or individuals as specified in §746.1317(a) of this chapter (relating to Must the training for my caregivers and the director meet certain criteria?); or

(B) Self-instructional training that was created by an individual or individuals, as specified in §746.1317(a) and (b) of this chapter, or self-study training.

(18) Corporal punishment--The infliction of physical pain on a child as a means of controlling behavior. This includes spanking, hitting, slapping, or thumping a child.

(19) Days--Calendar days, unless otherwise stated.

(20) Employee--A person a child-care center employs full-time or part-time to work for wages, salary, or other compensation. Employees are all of the child-care center staff, including caregivers, kitchen staff, office staff, maintenance staff, the assistant director, the director, and the owner, if the owner is ever on site at the center or transports a child.

(21) Enrollment--The list of names or number of children who have been admitted to attend a child-care center for any given period of time; the number of children enrolled in a child-care center may vary from the number of children in attendance on any given day.

(22) Entrap--A component or group of components on equipment that forms angles or openings that may trap a child's head by being too small to allow the child's body to pass through, or large enough for the child's body to pass through but too small to allow the child's head to pass through.

(23) Field trips--Activities conducted away from the child-care center.

(24) Food service--The preparation or serving of meals or snacks.

(25) Frequent--More than two times in a 30-day period. Note: For the definition of "regularly or frequently present at an operation" as it applies to background checks, see §745.601 of this title (relating to What words must I know to understand this subchapter?).

(26) Garbage--Waste food or items that when deteriorating cause offensive odors and attract rodents, insects, and other pests.

(27) Group activities--Activities that allow children to interact with other children in large or small groups. Group activities include storytelling, finger plays, show and tell, organized games, and singing.

(28) Health-care professional--A licensed physician, a licensed advanced practice registered nurse (APRN), a licensed vocational nurse (LVN), a licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of the license. This does not include physicians, nurses, or other medical personnel who are not licensed in the United States or in the country in which the person practices.

(29) Health check--A visual or physical assessment of a child to identify potential concerns about a child's health, including signs or symptoms of illness and injury, in response to changes in the child's behavior since the last date of attendance.

(30) High school equivalent--

(A) Documentation of a program recognized by the Texas Education Agency (TEA) or other public educational entity in another state, which offers similar training on reading, writing, and math skills taught at the high school level, such as a General Educational Development (GED) certificate; or

(B) Confirmation that the person received homeschooling that adequately addressed basic competencies such as basic reading, writing, and math skills, which would otherwise have been documented by a high school diploma.

(31) Individual activities--Opportunities for the child to work independently or to be away from the group, but supervised.

(32) Infant--A child from birth through 17 months.

(33) Inflatable--An amusement ride or device, consisting of air-filled structures designed for use by children, as specified by the manufacturer, which may include bouncing, climbing, sliding, or interactive play. They are made of flexible fabric, kept inflated by continuous air flow by one or more blowers, and rely upon air pressure to maintain their shape.

(34) Instructor-led training--Training characterized by the communication and interaction that takes place between the student and the instructor. The training must include an opportunity for the student to interact with the instructor to obtain clarifications and information beyond the scope of the training materials. For such an opportunity to exist, the instructor must communicate with the student in a timely fashion, including answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively interacting with students. Examples of this type of training include classroom training, web-based on-line facilitated learning, video-conferencing, or other group learning experiences.

(35) Janitorial duties--Those duties that involve the cleaning and maintenance of the child-care center building, rooms, furniture, etc. Cleaning and maintenance include such duties as cleansing carpets, washing cots, and sweeping, vacuuming, or mopping a restroom or a classroom. Sweeping up after an activity or mopping up a spill in

a classroom that is immediately necessary for the children's safety is not considered a janitorial duty.

(36) Local sanitation official--A sanitation official designated by the city or county government.

(37) Natural environment--Settings that are natural or typical for all children of the same age without regard to ability or disability. For example, a natural environment for learning social skills is a play group of peers.

(38) Permit is no longer valid--For purposes of this chapter, a permit remains valid through the renewal process. A permit only becomes invalid when your center voluntarily closes or must close because of an enforcement action in Chapter 745, Subchapter L of this title (relating to Enforcement Actions).

(39) Physical activity (moderate)--Levels of activity for a child that are at intensities faster than a slow walk, but still allow the child to talk easily. Moderate physical activity increases the child's heart rate and breathing rate.

(40) Physical activity (vigorous)--Rhythmic, repetitive physical movement for a child that uses large muscle groups, causing the child to breathe rapidly and only enabling the child to speak in short phrases. Typically, the child's heart rate is substantially increased, and the child is likely to be sweating while engaging in vigorous physical activity.

(41) Pre-kindergarten age child--A child who is three or four years of age before the beginning of the current school year.

(42) Premises--Includes the child-care center, any lots on which the center is located, any outside ground areas, any outside play areas, and the parking lot.

(43) Regular--On a recurring, scheduled basis. Note: For the definition of "regularly or frequently present at an operation" as it applies to background checks, see §745.601 of this title.

(44) Restrictive device--Equipment that places the body of a child in a position that may restrict airflow or cause strangulation; usually, the child is placed in a semi-seated position. Examples of restrictive devices are car seats, swings, bouncy seats, and high chairs.

(45) Safety belt--A lap belt and any shoulder straps included as original equipment on or added to a vehicle.

(46) Sanitize--The use of a product (usually a disinfecting solution) that is registered by the Environmental Protection Agency (EPA) which substantially reduces germs on inanimate objects to levels considered safe by public health requirements. Many bleach and hydrogen peroxide products are EPA-registered. You must follow the product's labeling instructions for sanitizing (paying particular attention to any instructions regarding contact time and toxicity on surfaces likely to be mouthed by children, such as toys and crib rails). For an EPA-registered sanitizing product or disinfecting solution that does not include labelling instructions for sanitizing (a bleach product, for example), you must follow these steps in order:

(A) Washing with water and soap;

(B) Rinsing with clear water;

(C) Soaking in or spraying on a disinfecting solution for at least two minutes. Rinsing with cool water only those items that children are likely to place in their mouths; and

(D) Allowing the surface or item to air-dry.

(47) School-age child--A child who is five years of age and older and is enrolled in or has completed kindergarten.

(48) Screen time activity--An activity during which a child views media content on a cell or mobile phone, tablet, computer, television, video, film, or DVD. Screen time activities do not include video chatting with a child's family or assistive and adaptive computer technology used by a child with special care needs on a consistent basis.

(49) Self-instructional training--Training designed to be used by one individual working alone and at the individual's own pace to complete lessons or modules. Lessons or modules commonly include questions with clear right and wrong answers. An example of this type of training is web-based training. Self-study training is also a type of self-instructional training.

(50) Self-study training--Non-standardized training where an individual reads written materials, watches a training video, or listens to a recording to obtain certain knowledge that is required for annual training. Self-study training is limited to three hours of annual training per year.

(51) Special care needs--A child with special care needs is a child who has a chronic physical, developmental, behavioral, or emotional condition and who also requires assistance beyond that required by a child generally to perform tasks that are within the typical chronological range of development, including the movement of large or small muscles, learning, talking, communicating, self-help, social skills, emotional well-being, seeing, hearing, and breathing.

(52) State or local fire marshal--A fire official designated by the city, county, or state government.

(53) Toddler--A child from 18 months through 35 months.

(54) Universal precautions--An approach to infection control where all human blood and certain human bodily fluids are treated as if known to be infectious for HIV, HBV, and other blood-borne pathogens.

(55) Water activities--Related to the use of swimming pools, splashing pools, wading pools, sprinkler play, or other bodies of water.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

DIVISION 4. OPERATIONAL POLICIES

26 TAC §746.501

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of

services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§746.501. *What written operational policies must I have?*

(a) You must develop written operational policies and procedures that at a minimum address each of the following:

- (1) Hours, days, and months of operation;
- (2) Procedures for the release of children;
- (3) Illness and exclusion criteria;
- (4) Procedures for dispensing medication or a statement that medication is not dispensed;
- (5) Procedures for handling medical emergencies;
- (6) Procedures for parental notifications;
- (7) Discipline and guidance that is consistent with Subchapter L of this chapter (relating to Discipline and Guidance). A copy of Subchapter L may be used for your discipline and guidance policy;
- (8) Suspension and expulsion of children;
- (9) Safe sleep policy for infants from birth through 12 months old that is consistent with the rules in Subchapter H of this chapter (relating to Basic Requirements for Infants) that relate to sleep requirements and restrictions, including sleep positioning, and crib requirements and restrictions, including mattresses, bedding, blankets, toys, and restrictive devices;
- (10) Meals and food service practices;
- (11) Immunization requirements for children, including tuberculosis screening and testing if required by your regional Texas Department of State Health Services or local health authority;
- (12) Hearing and vision screening requirements;
- (13) Enrollment procedures, including how and when parents will be notified of policy changes;
- (14) Transportation, if applicable;
- (15) Water activities, if applicable;
- (16) Field trips, if applicable;
- (17) Animals, if applicable;
- (18) Promotion of indoor and outdoor physical activity that is consistent with Subchapter F of this chapter (relating to Developmental Activities and Activity Plan); your policies must include:
 - (A) The benefits of physical activity and outdoor play;
 - (B) The duration of physical activity at your operation, both indoor and outdoor;
 - (C) The type of physical activity (structured and unstructured) that children may engage in at your operation;
 - (D) Each setting in which your physical activity program will take place;
 - (E) The recommended clothing and footwear that will allow a child to participate freely and safely in physical activities; and
 - (F) A plan to ensure physical activity occurs on days when extreme weather conditions prohibit or limit outdoor play.

(19) Procedures for providing and applying, as needed, insect repellent and sunscreen, including what types will be used, if applicable;

(20) Procedures for parents to review and discuss with the child-care center director any questions or concerns about the policies and procedures of the child-care center;

(21) Procedures for parents to participate in the child-care center's operation and activities;

(22) Procedures for parents to review a copy of the child-care center's most recent Licensing inspection report and how the parent may access the minimum standards online;

(23) Instructions on how a parent may contact the local Licensing office, access the Texas Abuse and Neglect Hotline, and access the HHSC website;

(24) Your emergency preparedness plan;

(25) Your provisions to provide a comfortable place with an adult sized seat in your center or within a classroom that enables a mother to breastfeed her child. In addition, your policies must inform parents that they have the right to breastfeed or provide breast milk for their child while in care;

(26) Preventing and responding to abuse and neglect of children, including:

(A) Required annual training for employees;

(B) Methods for increasing employee and parent awareness of issues regarding child abuse and neglect, including warning signs that a child may be a victim of abuse or neglect and factors indicating a child is at risk for abuse or neglect;

(C) Methods for increasing employee and parent awareness of prevention techniques for child abuse and neglect;

(D) Strategies for coordination between the center and appropriate community organizations; and

(E) Actions that the parent of a child who is a victim of abuse or neglect should take to obtain assistance and intervention, including procedures for reporting child abuse or neglect;

(27) Procedures for conducting health checks, if applicable; and

(28) Information on vaccine-preventable diseases for employees, unless your center is in the home of the permit holder. The policy must address the requirements outlined in §746.3611 of this chapter (relating to What must a policy for protecting children from vaccine-preventable diseases include?).

(b) You must also inform the parents that:

(1) They may visit the child-care center at any time during your hours of operation to observe their child, the program activities, the building, the premises, and the equipment without having to secure prior approval; and

(2) Under the Texas Penal Code any area within 1,000 feet of a child-care center is a gang-free zone, where criminal offenses related to organized criminal activity are subject to a harsher penalty. You may inform the parents by:

(A) Providing this information in the operational policies;

(B) Distributing the information in writing to the parents; or

(C) Informing the parents verbally as part of an individual or group parent orientation.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. DEVELOPMENTAL ACTIVITIES AND ACTIVITY PLAN

26 TAC §§746.2203, 746.2205 - 746.2207

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER H. BASIC CARE REQUIREMENTS FOR INFANTS

26 TAC §746.2417

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory

functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER I. BASIC CARE REQUIREMENTS FOR TODDLERS

26 TAC §746.2507

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER J. BASIC CARE REQUIREMENTS FOR PRE-KINDERGARTEN AGE CHILDREN

26 TAC §746.2607

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner

of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER K. BASIC CARE REQUIREMENTS FOR SCHOOL-AGE CHILDREN

26 TAC §746.2707

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§746.2707. *What activities must I provide for a school-age child?*

Daily activities for a school-age child must include at least the following:

- (1) Study time for those children who choose to work on homework;
- (2) Opportunities for outdoor play, weather permitting;
- (3) Opportunities for thinking skills and sensory development. Examples of age-appropriate equipment or activities include sand and water play; construction materials and blocks; puzzles with 50 or more pieces; pattern-making materials, such as wood, paper, plastic, beads, ceramic tiles, cloth, or cardboard; games that contain rules and require some skill or strategy; specific skill development materials, such as rulers, tape measures, telescopes, weather observation equipment, models of the solar system, and microscopes; books; and magazines;
- (4) Opportunities for small-muscle development. Examples of age-appropriate equipment or activities include art and craft materials, such as paints, markers, colored pencils, crayons, clay, weaving, or braiding materials; music and musical instruments of all types; and puzzles or interlocking building blocks;

(5) Opportunities for large-muscle development. Examples of age-appropriate equipment or activities include balls and sports equipment, such as kick balls, baseballs, soccer balls, basketballs, skates, and horseshoes; riding equipment, such as kick scooters or skateboards, with kneepads, elbow pads, and helmets; and outdoor and gym equipment, such as slides, swings, climbing apparatus, and upper-body equipment;

(6) Opportunities for active play both indoors and outdoors. Examples of age-appropriate equipment or activities include active games such as tag and Simon Says, dancing and creative movement to music and singing, simple games and dramatic or imaginary play that encourages running, stretching, climbing, and walking; and

(7) Opportunities for social and emotional development. Examples of age-appropriate equipment or activities include dolls with detailed, realistic accessories; role-play materials, including real equipment for library, hospital, post office, costumes, makeup and disguise materials; puppets and puppet show equipment; transportation toys, such as small vehicles or models; play and art materials; nature materials; and human and animal figurines.

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SUBCHAPTER L. DISCIPLINE AND GUIDANCE

26 TAC §746.2805

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§746.2805. *What types of discipline and guidance or punishment are prohibited?*

There must be no harsh, cruel, or unusual treatment of any child. The following types of discipline and guidance are prohibited:

- (1) Corporal punishment or threats of corporal punishment;
- (2) Punishment associated with food, naps, or toilet training;
- (3) Pinching, shaking, or biting a child;
- (4) Hitting a child with a hand or instrument;

- (5) Putting anything in or on a child's mouth;
- (6) Humiliating, ridiculing, rejecting, or yelling at a child;
- (7) Subjecting a child to harsh, abusive, or profane language;
- (8) Placing a child in a locked or dark room, bathroom, or closet;
- (9) Withholding active play or keeping a child inside as a consequence for behavior, unless the child is exhibiting behavior during active play that requires a brief supervised separation or time out that is consistent with §746.2803(4)(D) of this subchapter (relating to What methods of discipline and guidance may a caregiver use?); and
- (10) Requiring a child to remain silent or inactive for inappropriately long periods of time for the child's age, including requiring a child to remain in a restrictive device.

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SUBCHAPTER P. NIGHTTIME CARE

26 TAC §746.3209

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER Q. NUTRITION AND FOOD SERVICE

26 TAC §§746.3301, 746.3303, 746.3309, 746.3311, 746.3319

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§746.3311. *What are the requirements for a child who requires a special diet or does not want to eat foods that the center serves?*

(a) To serve a child a therapeutic or special diet, you must:

(1) Have written approval from:

(A) A physician or health-care professional with prescriptive authority if the diet relates to a disability that restricts the child's diet; or

(B) A health-care professional or a registered or licensed dietician if the diet does not relate to a disability that restricts the child's diet;

(2) Maintain the written approval in the child's record; and

(3) Give the information to all employees preparing and serving food.

(b) You must discuss recurring eating problems with the child's parent.

(c) You may encourage but must not force children to eat.

(d) You must not serve nutrient concentrates and supplements such as protein powders, liquid protein, vitamins, minerals, and other nonfood substances without written instructions as required in paragraph (a)(1) of this section.

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26 TAC §§746.3303, 746.3305, 746.3307, 746.3315, 746.3316

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of

services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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CHAPTER 747. MINIMUM STANDARDS FOR CHILD-CARE HOMES

The Texas Health and Human Services Commission (HHSC) adopts amendments to §§747.123, 747.501, 747.2103, 747.2105, 747.2317, 747.2407, 747.2507, 747.2607, 747.2705, 747.3009, 747.3101, 747.3109, 747.3111, and 747.3119; new §§747.2102, 747.2104, and 747.3103; and the repeal of §§747.3103, 747.3105, 747.3107, 747.3115, and 747.3116 in Title 26, Texas Administrative Code, Chapter 747, Minimum Standards for Child-Care Homes.

The amendments to §§747.123, 747.501, 747.2607, 747.2705, and 747.3111 are adopted with changes to the proposed text as published in the November 20, 2020, issue of the *Texas Register* (45 TexReg 8276). These rules will be republished.

The amendments to §§747.2103, 747.2105, 747.2317, 747.2407, 747.2507, 747.3009, 747.3101, 747.3109, and 747.3119; new §§747.2102, 747.2104, and 747.3103; and the repeal of §§747.3103, 747.3105, 747.3107, 747.3115 and 747.3116 are adopted without changes to the proposed text as published in the November 20, 2020, issue of the *Texas Register* (45 TexReg 8279). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The amendments, new sections, and repeals are necessary to implement Senate Bill (S.B.) 952, 86th Legislature, Regular Session, 2019, which added Subsections 42.042(e-3), (e-4), and (e-5) to the Texas Human Resources Code (HRC). The new Subsections require HHSC Child Care Regulation (CCR) to align the minimum standards for child-care centers and registered child-care homes with standards for physical activity and screen time in *Caring for Our Children* (CFOC), 4th edition, and with the nutrition standards of the federal Child and Adult Care Food Program (CACFP).

CCR is extending these requirements to School-Age and Before and After-School Programs in Chapter 744 and Licensed Homes in Chapter 747, so that the minimum standards for physical activity, nutrition, and screen time are congruent throughout Chapters 744, 746, and 747.

COMMENTS

The 31-day comment period ended December 21, 2020. During this period, HHSC received comments regarding the proposed rules from six commenters, including Texans Care for Children, Texas Association for the Education of Young Children, Partnership for Healthy Texas, Texas Pediatric Society, the American Heart Association, and the Texas Medical Association. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Regarding §747.3111, one commenter stated the proposed rule does not support the CACFP requirement that meal substitution for a child with a disability that restricts the child's diet must be supported by written approval from a physician or other health-care professional with prescriptive authority. The commenter stated that there is nothing in the proposed rules that would prevent a health-care professional without prescribing authority from approving a meal substitution for a child with a disability that restricts the child's diet.

Response: HHSC agrees with the comment and is revising the rule to support the CACFP requirement.

Comment: Six commenters generally supported the rules that align the minimum standards with the active play and screen time requirements in CFOC and nutritional requirements with CACFP meal patterns. Commenters stated specific support of increased opportunities for children to engage in active play through newly clarified amounts of active play offered, requirements for planned daily physical activities for children of all ages, limiting infant time in restrictive equipment to 15 minutes, requirements for caregiver directed tummy time, reduction in screen time activities, and meal and snack alignment with CACFP meal patterns that provide clearer guidelines and increase flexibility for child-care providers.

Response: HHSC appreciates the support of the rules.

HHSC made minor editorial changes to §747.123 to delete a repeated word and remove the word "or" from a list.

HHSC also received comments on parallel rules in Chapter 746, Minimum Standards for Child-Care Centers, published in the November 20, 2020, issue of the *Texas Register* (45 TexReg 8264). HHSC is amending the proposed text in §§747.501, 747.2607, and 747.2705 to ensure the minimum standards for physical activity, nutrition, and screen time remain congruent throughout Chapters 744, 746, and 747. For a more detailed description of comments received for Chapter 746 and HHSC's response, please see the preamble for Chapter 746, which is published elsewhere in this issue of the *Texas Register*.

SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS

DIVISION 3. DEFINITIONS

26 TAC §747.123

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code

§42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§747.123. *What do certain words and terms mean when used in this chapter?*

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or another subchapter or unless the context clearly indicates otherwise. In addition, the following words and terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

- (1) Activity space--An area or room used for children's activities.
- (2) Administrative and clerical duties--Duties that involve the operation of a child-care home, such as bookkeeping, enrolling children, answering the telephone, and collecting fees.
- (3) Admission--The process of enrolling a child in a child-care home. The date of admission is the first day the child is physically present in the home.
- (4) Adult--A person 18 years old and older.
- (5) After-school hours--Hours before and after school, and days when school is not in session, such as school holidays, summer vacations, and teacher in-service days.
- (6) Age-appropriate--Activities, equipment, materials, curriculum, and environment that are developmentally consistent with the chronological age of the child being served.
- (7) Attendance--When referring to a child's attendance, the physical presence of a child at the child-care home on any given day or at any given time, as distinct from the child's enrollment in the child-care home.
- (8) Bouncer seat--A stationary seat designed to provide gentle rocking or bouncing motion by an infant's movement, or by battery-operated movement. This type of equipment is designed for an infant's use from birth until the child can sit up unassisted.
- (9) Caregiver--A person who is counted in the child to caregiver ratio, whose duties include the supervision, guidance, and protection of a child. As used in this chapter, a caregiver must meet the minimum education, work experience, and training qualifications required under Subchapter D of this chapter (relating to Personnel).
- (10) Certified Child-Care Professional Credential--A credential given by the National Early Childhood Program Accreditation to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.
- (11) Certified lifeguard--A person who has been trained in life saving and water safety by a qualified instructor, from a recognized organization that awards a certificate upon successful completion of the training. The certificate is not required to use the term "lifeguard," but you must be able to document that the certificate represents the type of training described.
- (12) CEUs--Continuing education units. A standard unit of measure for adult education and training activities. One CEU equals 10 clock hours of participation in an organized, continuing-education experience, under responsible, qualified direction and instruction. Although a person may obtain a CEU in many of the same settings as clock hours, the CEU provider must meet the criteria established by the International Association for Continuing Education and Training to be able to offer the CEU.

(13) Child--An infant, a toddler, a pre-kindergarten age child, or a school-age child.

(14) Child-care home--A registered or licensed child-care home, as specified in §747.113 of this chapter (relating to What is a registered child-care home?) or §747.115 of this chapter (relating to What is a licensed child-care home?). This term includes the program, home, grounds, furnishings, and equipment.

(15) Child-care program--The services and activities provided by a child-care home.

(16) Child Development Associate Credential--A credential given by the Council for Professional Recognition to a person working directly with children. The credential is based on assessed competence in several areas of child care and child development.

(17) Clock hour--An actual hour of documented:

(A) Attendance at instructor-led training, such as seminars, workshops, conferences, early childhood classes, and other planned learning opportunities, provided by an individual or individuals as specified in §747.1315(a) of this chapter (relating to Must child-care training meet certain criteria?); or

(B) Self-instructional training that was created by an individual or individuals, as specified in §747.1315(a) and (b) of this chapter, or self-study training.

(18) Corporal punishment--The infliction of physical pain on a child as a means of controlling behavior. This includes spanking, hitting, slapping, or thumping a child.

(19) Days--Calendar days, unless otherwise stated.

(20) Employee--An assistant caregiver, substitute caregiver, or any other person a child-care home employs full-time or part-time to work for wages, salary, or other compensation, including kitchen staff, office staff, maintenance staff, or anyone hired to transport a child.

(21) Enrollment--The list of names or number of children who have been admitted to attend a child-care home for any given period of time; the number of children enrolled in a child-care home may vary from the number of children in attendance on any given day.

(22) Entrap--A component or group of components on equipment that forms angles or openings that may trap a child's head by being too small to allow the child's body to pass through, or large enough for the child's body to pass through but too small to allow the child's head to pass through.

(23) Field trips--Activities conducted away from the child-care home.

(24) Food service--The preparation or serving of meals or snacks.

(25) Frequent--More than two times in a 30-day period. Note: For the definition of "regularly or frequently present at an operation" (child-care home) as it applies to background checks, see §745.601 of this title (relating to What words must I know to understand this subchapter?).

(26) Garbage--Waste food or items that when deteriorating cause offensive odors and attract rodents, insects, and other pests.

(27) Group activities--Activities that allow children to interact with other children in large or small groups. Group activities include storytelling, finger plays, show and tell, organized games, and singing.

(28) Health-care professional--A licensed physician, a licensed advanced practice registered nurse (APRN), a licensed vocational nurse (LVN), a licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of the license. This does not include physicians, nurses, or other medical personnel who are not licensed in the United States or in the country in which the person practices.

(29) Health check--A visual or physical assessment of a child to identify potential concerns about a child's health, including signs or symptoms of illness and injury, in response to changes in the child's behavior since the last date of attendance.

(30) High school equivalent--

(A) Documentation of a program recognized by the Texas Education Agency (TEA) or other public educational entity in another state, which offers similar training on reading, writing, and math skills taught at the high school level, such as a General Educational Development (GED) certificate; or

(B) Confirmation that the person received home-schooling that adequately addressed basic competencies such as basic reading, writing, and math skills, which would otherwise have been documented by a high school diploma.

(31) Individual activities--Opportunities for the child to work independently or to be away from the group, but supervised.

(32) Infant--A child from birth through 17 months.

(33) Inflatable--An amusement ride or device, consisting of air-filled structures designed for use by children, as specified by the manufacturer, which may include bouncing, climbing, sliding, or interactive play. They are made of flexible fabric, kept inflated by continuous air flow by one or more blowers, and rely upon air pressure to maintain their shape.

(34) Instructor-led training--Training characterized by the communication and interaction that takes place between the student and the instructor. The training must include an opportunity for the student to interact with the instructor to obtain clarifications and information beyond the scope of the training materials. For such an opportunity to exist, the instructor must communicate with the student in a timely fashion, including answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively interacting with students. Examples of this type of training include, classroom training, web-based on-line facilitated learning, video-conferencing, or other group learning experiences.

(35) Janitorial duties--Those duties that involve the cleaning and maintenance of the child-care home, building, rooms, furniture, etc. Cleaning and maintenance include such duties as cleansing carpets, washing cots, and sweeping, vacuuming, or mopping a restroom or a classroom. Sweeping up after an activity or mopping up a spill in a classroom that is immediately necessary for the children's safety is not considered a janitorial duty.

(36) Natural environment--Settings that are natural or typical for all children of the same age without regard to ability or disability. For example, a natural environment for learning social skills is a play group of peers.

(37) Permit is no longer valid--For purposes of this chapter, a permit remains valid through the renewal process. A permit only becomes invalid when your:

(A) Home voluntarily closes;

(B) Home must close because of an enforcement action in Chapter 745, Subchapter L of this title (relating to Enforcement Actions);

(C) Permit expires according to §745.481 of this title (relating to When does my permit expire?); or

(D) Home must close because its permit is automatically revoked according to the Human Resources Code §§42.048(e), 42.052(i), or 42.054(f).

(38) Physical activity (moderate)--Levels of activity for a child that are at intensities faster than a slow walk, but still allow the child to talk easily. Moderate physical activity increases the child's heart rate and breathing rate.

(39) Physical activity (vigorous)--Rhythmic, repetitive physical movement for a child that uses large muscle groups, causing the child to breathe rapidly and only enabling the child to speak in short phrases. Typically, the child's heart rate is substantially increased, and the child is likely to be sweating while engaging in vigorous physical activity.

(40) Pre-kindergarten age child--A child who is three or four years of age before the beginning of the current school year.

(41) Regular--On a recurring, scheduled basis. Note: For the definition of "regularly or frequently present at an operation" (child-care home) as it applies to background checks, see §745.601 of this title.

(42) Restrictive device--Equipment that places the body of a child in a position that may restrict airflow or cause strangulation; usually, the child is placed in a semi-seated position. Examples of restrictive devices are car seats, swings, bouncy seats, and high chairs.

(43) Safety belt--A lap belt and any shoulder straps included as original equipment on or added to a vehicle.

(44) Sanitize--The use of a product (usually a disinfecting solution) that is registered by the Environmental Protection Agency (EPA) which substantially reduces germs on inanimate objects to levels considered safe by public health requirements. Many bleach and hydrogen peroxide products are EPA-registered. You must follow the product's labelling instructions for sanitizing (paying particular attention to any instructions regarding contact time and toxicity on surfaces likely to be mouthed by children, such as toys and crib rails). For an EPA-registered sanitizing product or disinfecting solution that does not include labelling instructions for sanitizing (a bleach product, for example), you must follow these steps in order:

(A) Washing with water and soap;

(B) Rinsing with clear water;

(C) Soaking in or spraying on a disinfecting solution for at least two minutes. Rinsing with cool water only those items that children are likely to place in their mouths; and

(D) Allowing the surface or item to air-dry.

(45) School-age child--A child who is five years of age and older and is enrolled in or has completed kindergarten.

(46) Screen time activity--An activity during which a child views media content on a cell or mobile phone, tablet, computer, television, video, film, or DVD. Screen time activities do not include video chatting with a child's family or assistive and adaptive computer technology used by a child with special care needs on a consistent basis.

(47) Self-instructional training--Training designed to be used by one individual working alone and at the individual's own

pace to complete lessons or modules. Lessons or modules commonly include questions with clear right and wrong answers. An example of this type of training is web-based training. Self-study training is also a type of self-instructional training.

(48) Self-study training--Non-standardized training where an individual reads written materials, watches a training video, or listens to a recording to obtain certain knowledge that is required for annual training. Self-study training is limited to three hours of annual training per year.

(49) Special care needs--A child with special care needs is a child who has a chronic physical, developmental, behavioral, or emotional condition and who also requires assistance beyond that required by a child generally to perform tasks that are within the typical chronological range of development, including the movement of large or small muscles, learning, talking, communicating, self-help, social skills, emotional well-being, seeing, hearing, and breathing.

(50) State or local fire marshal--A fire official designated by the city, county, or state government.

(51) Toddler--A child from 18 months through 35 months.

(52) Universal precautions--An approach to infection control where all human blood and certain human bodily fluids are treated as if known to be infectious for HIV, HBV, and other blood-borne pathogens.

(53) Water activities--Related to the use of swimming pools, splashing pools, wading pools, sprinkler play, or other bodies of water.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Karen Ray

Chief Counsel

Health and Human Services Commission

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SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

DIVISION 4. OPERATIONAL POLICIES

26 TAC §747.501

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§747.501. What written operational policies must I have?

You must develop written operational policies and procedures that at a minimum address each of the following:

- (1) Procedure for the release of children;
- (2) Illness and exclusion criteria;
- (3) Procedures for dispensing medication, or a statement that medication is not dispensed;
- (4) Procedures for handling medical emergencies;
- (5) Discipline and guidance policy that is consistent with Subchapter L of this title (relating to Discipline and Guidance). A copy of Subchapter L may be used for your discipline and guidance policy;
- (6) Safe sleep policy for infants from birth through 12 months old that is consistent with the rules in Subchapter H of this chapter (relating to Basic Requirements for Infants) that relate to sleep requirements and restrictions, including sleep positioning, and crib requirements and restrictions, including mattresses, bedding, blankets, toys, and restrictive devices;
- (7) Animals, if applicable;
- (8) Promotion of indoor and outdoor physical activity that is consistent with Subchapter F of this chapter (relating to Developmental Activities and Activity Plan). Your policies must include:
 - (A) The duration of physical activity at your home, both indoor and outdoor;
 - (B) The recommended clothing and footwear that will allow a child to participate freely and safely in physical activities; and
 - (C) A plan to ensure physical activity occurs on days when extreme weather conditions prohibit or limit outdoor time.
- (9) Procedures for parents to visit the child-care home any time during your hours of operation to observe their child, program activities, the home, the premises, and equipment without having to secure prior approval;
- (10) Procedures for parents to review a copy of the child-care home's most recent Licensing inspection report and how the parent may access the minimum standards online;
- (11) Instructions on how a parent may contact the local Licensing office, access the Texas Abuse and Neglect Hotline, and access the HHSC website;
- (12) Your emergency preparedness plan;
- (13) Procedures for conducting health checks, if applicable; and
- (14) Information on vaccine-preventable diseases for employees, if your licensed child-care home is not located in your own residence. The policy must address the requirements outlined in §747.3411 of this chapter (relating to What must a policy for protecting children from vaccine-preventable diseases include?).

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SUBCHAPTER F. DEVELOPMENTAL ACTIVITIES AND ACTIVITY PLAN

26 TAC §§747.2102 - 747.2105

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER H. BASIC CARE REQUIREMENTS FOR INFANTS

26 TAC §747.2317

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER I. BASIC CARE REQUIREMENTS FOR TODDLERS

26 TAC §747.2407

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER J. BASIC CARE REQUIREMENTS FOR PRE-KINDERGARTEN AGE CHILDREN

26 TAC §747.2507

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER K. BASIC CARE REQUIREMENTS FOR SCHOOL-AGE CHILDREN

26 TAC §747.2607

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§747.2607. What activities must I provide for a school-age child?

Daily activities for a school-age child must include at least the following:

- (1) Study time for those who choose to do homework;
- (2) Opportunities for outdoor play, weather permitting;
- (3) Opportunities for thinking skills and sensory development. Examples of age-appropriate equipment or activities include sand and water play; construction materials and blocks; puzzles with 50 or more pieces; pattern-making materials, such as wood, paper, plastic, beads, ceramic tiles, cloth, or cardboard; games that contain rules and require some skill or strategy; specific skill development materials such as rulers, tape measures, telescopes, weather observation equipment, models of the solar system, and microscopes; books; and magazines;
- (4) Opportunities for small-muscle development. Examples of age-appropriate equipment or activities include art and craft materials, such as paints, markers, colored pencils, crayons, clay, weaving, or braiding materials; music and musical instruments of all types; and puzzles or interlocking building blocks;
- (5) Opportunities for large-muscle development. Examples of age-appropriate equipment or activities include balls and sports equipment, such as kick balls, baseballs, soccer balls, basketballs, skates, and horseshoes; riding equipment, such as kick scooters or skateboards, with knee pads, elbow pads, and helmets; and outdoor and gym equipment, such as slides, swings, climbing apparatus, and upper-body equipment;
- (6) Opportunities for active play both indoors and outdoors. Examples of age-appropriate active play include active games such as tag and Simon Says, dancing and creative movement to music and singing, simple games, and dramatic or imaginary play that encourages running, stretching, climbing, and walking; and

(7) Opportunities for social and emotional development. Examples of age-appropriate equipment or activities include dolls with detailed, realistic accessories; role-play materials, including real equipment for library, hospital, post office, costumes, makeup, and disguise materials; puppets and puppet show equipment; transportation toys, such as small vehicles or models; play and art materials; nature materials; and human and animal figurines.

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SUBCHAPTER L. DISCIPLINE

26 TAC §747.2705

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§747.2705. What types of discipline and guidance or punishment are prohibited?

There must be no harsh, cruel, or unusual treatment of any child. The following types of discipline and guidance are prohibited:

- (1) Corporal punishment or threats of corporal punishment;
- (2) Punishment associated with food, naps, or toilet training;
- (3) Pinching, shaking, or biting a child;
- (4) Hitting a child with a hand or instrument;
- (5) Putting anything in or on a child's mouth;
- (6) Humiliating, ridiculing, rejecting, or yelling at a child;
- (7) Subjecting a child to harsh, abusive, or profane language;
- (8) Placing a child in a locked or dark room, bathroom, or closet;
- (9) Withholding active play or keeping a child inside as a consequence for behavior, unless the child is exhibiting behavior during active play that requires a brief supervised separation or time out that is consistent with §747.2703(4)(D) of this subchapter (relating to What methods of discipline and guidance may I use?); and

(10) Requiring a child to remain silent or inactive for inappropriately long periods of time for the child's age, including requiring a child to remain in a restrictive device.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER P. NIGHTTIME CARE

26 TAC §747.3009

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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SUBCHAPTER Q. NUTRITION AND FOOD SERVICE

26 TAC §§747.3101, 747.3103, 747.3109, 747.3111, 747.3119

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which trans-

ferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

§747.3111. *What are the requirements for a child who requires a special diet or does not want to eat foods I serve?*

(a) To serve a child a therapeutic or special diet, you must:

(1) Have written approval from:

(A) A physician or health-care professional with prescriptive authority if the diet relates to a disability that restricts the child's diet; or

(B) A health-care professional or a registered or licensed dietician if the diet does not relate to a disability that restricts the child's diet;

(2) Maintain the written approval in the child's record; and

(3) Give the information to all caregivers preparing and serving food.

(b) You must discuss recurring eating problems with the child's parent.

(c) You may encourage, but not force children to eat.

(d) You must not serve nutrient concentrates and supplements such as protein powders, liquid protein, vitamins, minerals, and other nonfood substances without written instructions as required in subsection (a)(1) of this section.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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26 TAC §§747.3103, 747.3105, 747.3107, 747.3115, 747.3116

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Government Code §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER B. DISEASE DETECTION AND RESPONSE

DIVISION 2. CHRONIC WASTING DISEASE - MOVEMENT OF DEER

31 TAC §65.92

The Texas Parks and Wildlife Commission in a duly noticed meeting on November 10, 2020, adopted an amendment to 31 TAC §65.92, concerning CWD Testing, without changes to the proposed text as published in the October 2, 2020, issue of the *Texas Register* (45 TexReg 6962). The rule will not be republished.

The amendment requires permitted deer breeders to report all mortalities of breeder deer possessed in a breeding facility within 14 days of detection and to submit all CWD test samples to an accredited testing laboratory within 14 days of collection.

Prior to 2015, the department's regulatory apparatus for detecting chronic wasting disease (CWD) in captive deer was contained in various subchapters regulating various permits that authorize the holding of deer in captivity. The testing standards imposed by the rules were considered to be at best minimally efficacious for detecting CWD in captive deer populations and were intended to be the least burdensome regulatory footprint possible in light of the fact that up to that point in time, CWD had not been discovered in captive breeding facilities in Texas. However, with the discoveries of multiple CWD-positive deer in deer breeding facilities in 2015 and 2016, the department adopted rules that imposed significantly more robust testing protocols and movement restrictions. Those rules are contained in Chapter 65, Subchapter B, and supersede the testing rules contained in Chapter 65, Subchapter T.

CWD is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, elk, red deer, sika, and their hybrids (susceptible species). It is classified as a TSE (transmissible spongiform encephalopathy), a family of diseases that includes scrapie (found in sheep), bovine spongiform encephalopathy (BSE, found in cattle), and variant Creutzfeldt-Jakob Disease (vCJD) in humans.

Much remains unknown about CWD. The peculiarities of its transmission (how it is passed from animal to animal), infection rate (the frequency of occurrence through time or other comparative standard), incubation period (the time from exposure to clinical manifestation), and potential for transmission to other species are still being investigated. There is no scientific evidence to indicate that CWD is transmissible to humans. What is known is that CWD is invariably fatal to cervids, and is transmitted both directly (through deer-to-deer contact) and indirectly (through environmental contamination). Moreover, a high prevalence of the disease correlates with deer population declines, and human dimensions research suggests that hunters will avoid areas of high CWD prevalence. Additionally, the apparent persistence of CWD in contaminated environments represents a significant obstacle to eradication of CWD from either farmed or free-ranging cervid populations.

It is imperative that deer mortalities within a breeding facility be reported promptly for inventory reconciliation, which is necessary for the department to be able to quickly initiate contact tracing in the event of an epidemiological investigation. Prompt submission of CWD samples aids in early detection of the disease where it exists, which reduces the probability of CWD being transferred from a CWD-positive deer breeding facility to other deer breeding facilities or release sites. Additionally, prompt submission of CWD samples is recommended by accredited diagnostic testing laboratories. The amendment is intended to provide assurances that reporting and testing protocols are optimal.

The department received three comments opposing adoption of the proposed amendment. The commenters stated that 30 days or 60 days was a more feasible time period for the submission of tissue samples because a 14-day limit is problematic for people who need to find veterinarians or sample collectors on short notice, people who live far from a town, those who wish to personally deliver their samples, and individuals who don't live near a facility but are responsible for transporting samples to a lab. The commenters also stated that 14 days is problematic because permit holders prefer to hand-deliver tissue samples in order to avoid the possibility of samples being lost in transit. One commenter stated that the rules should stipulate that the time period for sample submission should begin with the postmarked date of samples, not on the date test results are obtained. The department disagrees with the comments and responds that because the efficacy of disease management strategies is dependent to a large extent on the quality and immediacy of the data upon which decisions are based, the intent of the rule is to ensure that the department receives the greatest number of viable test results in as close to real time as is reasonably possible. If CWD is present within a facility, the longer it takes for the department to know about it, the more problematic the task of protecting a public resource becomes. The department also responds that because all towns in Texas and all accredited testing laboratories are easily within a two-day drive from any point in the state, on that basis the department does not believe the 14-day time period presents a hardship. The department also responds that although it understands that mortalities and subsequent testing obligations are not predictable events, 14 days is sufficient time to locate a qualified person to remove, prepare, and submit a sample. No changes were made as a result of the comments.

The department received five comments supporting adoption of the proposed amendment.

The Texas Chapter of The Wildlife Society, the Texas Wildlife Association, the Texas Foundation for Conservation, the Texas

and Southwestern Cattle Raisers Association, and the Humane Society of the United States commented in favor of adoption of the proposed rule.

The Texas Deer Association and the Deer Breeder Corporation commented against adoption of the proposed rule.

The amendment is adopted under the authority of Parks and Wildlife Code, Chapter 43, Subchapter L, which authorizes the commission to make regulations governing the possession, transfer, purchase, sale, of breeder deer held under the authority of the subchapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2021.

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SUBCHAPTER C. PERMITS FOR TRAPPING, TRANSPORTING, AND TRANSPLANTING GAME ANIMALS AND GAME BIRDS

31 TAC §§65.101 - 65.103, 65.107, 65.109, 65.111, 65.115

The Texas Parks and Wildlife Commission in a duly noticed meeting on November 10, 2020 adopted amendments to 31 TAC §§65.101 - 65.103, 65.107, 65.109, 65.111, and 65.115, concerning Permits to Trap, Transport, and Transplant Game Animals and Game Birds (popularly known as "Triple T" permits). Section 65.102 is adopted with changes to the proposed text as published in the October 2, 2020, issue of the *Texas Register* (45 TexReg 6971) and will be republished. Sections 65.101, 65.103, 65.107, 65.109, 65.111, and 65.115 are adopted without change and will not be republished.

The change to §65.102, concerning Disease Detection Requirements, places a period at the end of subsection (a).

In general, the amendments harmonize the subchapter with the contents of Chapter 65, Subchapter B, concerning Disease Detection and Response, but also make specific substantive and non-substantive changes as noted.

Prior to 2015, the department's regulatory apparatus for detecting chronic wasting disease (CWD) was contained in this subchapter (Chapter 65, Subchapter T). The testing standards imposed by the rules were considered to be at best minimally efficacious for detecting CWD in captive deer populations and were intended to be the least burdensome regulatory footprint possible in light of the fact that up to that point in time, CWD had not been discovered in captive breeding facilities in Texas. However, with the discoveries of multiple CWD-positive deer in deer breeding facilities in 2015 and 2016, the department adopted rules that imposed more robust testing protocols and movement restrictions. Those rules are contained in Chapter 65, Subchap-

ter B and superseded the testing rules previously in effect under Chapter 65, Subchapter C.

CWD is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, elk, red deer, sika, and their hybrids (susceptible species). It is classified as a TSE (transmissible spongiform encephalopathy), a family of diseases that includes scrapie (found in sheep), bovine spongiform encephalopathy (BSE, found in cattle), and variant Creutzfeldt-Jakob Disease (vCJD) in humans.

Much remains unknown about CWD. The peculiarities of its transmission (how it is passed from animal to animal), infection rate (the frequency of occurrence through time or other comparative standard), incubation period (the time from exposure to clinical manifestation), and potential for transmission to other species are still being investigated. There is no scientific evidence to indicate that CWD is transmissible to humans. What is known is that CWD is invariably fatal to cervids and is transmitted both directly (through deer-to-deer contact) and indirectly (through environmental contamination). Moreover, a high prevalence of the disease correlates with deer population declines, and human dimensions research suggests that hunters will avoid areas of high CWD prevalence. Additionally, the apparent persistence of CWD in contaminated environments represents a significant obstacle to eradication of CWD from either farmed or free-ranging cervid populations.

Additionally, the amendments function to standardize the department's approach to the process of administering the Triple T program. The specificity in the current rules apply primarily to deer, which are by far the most commonly transplanted game species in the state. However, the department occasionally is approached with requests concerning other species of game animals and game birds, and the department believes a standardized set of rules for processing all Triple T requests is appropriate, although there will be exceptions as required for specific species because of biological parameters.

The amendment to §65.101, concerning Definitions, creates a definition for "aggregate acreage" in order to define that term for purposes of allowing multiple landowners to collaborate in stocking and restoration efforts, either as the source of or destination for game animals and game birds. The term is defined as "contiguous tracts of land, to, from, and between which game animals and game birds have complete and unrestricted access, combined by multiple landowners to create an area of land for the purpose of trapping or releasing game animals or game birds under a permit issued under this subchapter." It is biologically important to require all tracts to be contiguous and for released animals to be capable of moving at will for purposes of maximum biological benefit to the resource and the landscape. For purposes of clarity, the amendment also defines "landowner" as "any person who has an ownership interest in a tract of land, and includes a person authorized by the landowner to act on behalf of the landowner as the landowner's agent or manager of an aggregate acreage," which is necessary to clearly delineate what is meant by that term as it used for purposes of aggregate acreage permit issuance.

The amendment also creates a definition for "georeferenced map." A crucial component of the department's CWD management effort is the monitoring of free-ranging deer that are trapped and translocated and captive-bred deer that are introduced to, transferred among, and released from captive herds under department-issued permits. Such activities occur in virtually every area of the state. Because of the sheer geographic scale

involved, the accuracy of geographical information regarding the locations where deer have been transferred by humans is one of the most important components of efficacious disease management efforts. Knowing exactly where transplanted populations were trapped and translocated allows epidemiological investigators to quickly and accurately determine the source and extent of pathways for disease propagation and allows responders to focus resources efficiently and effectively.

The amendment also inserts the term "agricultural products" in the definition of "natural habitat." The intent of the current rules is to authorize releases of game animals and game birds into places where natural habitat alone is capable of providing nutrition and cover and the released species are not dependent on the provision of supplemental, artificial, or unnatural food or cover for survival.

The amendment eliminates the definition of "permit year" and replaces it with the more accurate term "trapping year." The department authorizes trapping activities only at times in the life cycle when those activities would exert the least stress on species being trapped.

The amendment also eliminates the definition of "recruitment," which is an artefact of previous rules and is not employed in the subchapter.

The amendment also eliminates the definition of "stocking policy" because the statutory authority to issue Triple T permits and the criteria for their issuance exist independently of the agency's stocking policy, rendering the reference superfluous.

Finally, the amendment alters the definition of "wildlife stocking plans" to differentiate the content of stocking plans for species other than deer and javelina, which are partially governed by regulatory provisions in Chapter 65, Subchapter A, concerning the content of wildlife management plans for those species. There are no other department rules specifying the content of wildlife management plans for species other than deer and javelina.

The amendment to §65.602, concerning Disease Detection Requirements, eliminates the current contents of the section other than subsection (a)(5) and replaces them with a reference to Subchapter B, Division 2, of the chapter. As stated previously in this preamble, the CWD testing and movement requirements for deer are set forth in Chapter 65, Subchapter B, Division 2, which makes the contents of §65.602 superfluous. Current subsection (a)(5) establishes an identification requirement for deer released under a Triple T permit and is being retained as subsection (b).

The amendment to §65.103, concerning Trap, Transport, and Transplant Permit, consists of several actions. Current subsections (a) - (c) and (f) are eliminated because those subsections are relocated to §65.107, concerning Permit Application and Processing, where they more properly belong. Current subsections (d), (e), and (g) are retained and re-designated as subsections (a), (c), and (b), respectively, with the contents of new subsection (c) altered to stipulate that the antler removal must be at a point within the first two inches above each pedicel. The amendment adds new subsection (d) to stipulate that the department will not issue Triple T permits for desert bighorn sheep or migratory game birds. The department is itself stocking desert bighorn sheep in all suitable habitat as part of a decades-long reintroduction program, and federal law prohibits the trapping and transplanting of migratory birds. The amendment also alters the title of the section to include the shorthand name for the permit (Triple T).

The amendment to §65.107, concerning Permit Application and Processing, consists of the relocated provisions of current §65.103(a) - (c) and (f), with modifications as noted. As noted previously in this preamble, one of the goals of the rulemaking is to standardize the application and issuance process for Triple T permits across all species of game animals and game birds. New §65.107(a)(1) accomplishes those goals. Current paragraph (1) requires applications to be made on a form prescribed by the department. The department has steadily migrated almost all manual application systems to an online format because the ubiquity of smart phones, tablets, laptops, desktops, and other devices makes it possible to utilize automated processes to enhance administrative efficiencies. The new subsection therefore requires an applicant for a Triple T permit to submit an administratively complete application via an online application. Current §65.103(b) requires an applicant for a Triple T permit to submit trap site information, release site information, the number of deer to be trapped at each trap site, and the number of deer to be released at each release site. The new paragraph requires the same information as part of an administratively complete application, consisting of, at a minimum, the specific trap-site information indicated on the application form (including a georeferenced map of the trap site); the specific release-site information indicated on the application form (including a georeferenced map of the release site); the number of game animals or game birds to be trapped at each trap site; the number of game animals or game birds to be released at each release site; and any additional habitat, population, and monitoring information or data the department deems necessary to evaluate the prospective activity. The requirement of geospatial data, as discussed earlier in this preamble, is to enhance the department's ability to conduct contract tracing in the event that epidemiological investigations become necessary. Similarly, the new paragraph broadens the applicability of the current rule language to encompass game animals and game birds, as opposed to being restricted solely to deer.

The amendment to §65.107 alters current paragraph (2) to remove a superfluous reference to the name of the permit.

The amendment to §65.107 alters current paragraph (3) to remove a reference to Urban White-tailed Deer Removal Permits and multiple trap and release sites because new paragraph (4) contains provisions governing Triple T permits for aggregate acreages, which replaces those provisions.

The amendment to §65.107 adds new paragraph (4) to prescribe the requirements for Triple T permits affecting multiple acreages. The department wishes to create a vehicle for multiple landowners to bundle aggregate acreage to qualify for or maximize game animal and game bird translocation to enhance hunting opportunity. The new provision allows Triple T permit issuance for an aggregate acreage based on a single application, provided each participating landowner's name, address, and express consent to join in the aggregate acreage is on file with the department for each tract of land comprising the aggregate acreage; each landowner agrees in writing to the number of game animals or game birds to be trapped or released on the aggregate acreage; and a single landowner has been designated in writing to be the supervisory permittee. Because the Triple T program will be administered via an online application that relates data unique to specific tracts of land enrolled in the program, aggregate acreages must be treated as a single tract for purpose of permit issuance; therefore, a single program participant must be designated to receive the permit and act as the supervisory permittee for Triple T activities.

New paragraph (6) consists of the relocated provisions of current §65.103(b) concerning application deadlines.

The amendment alters the provisions of current paragraph (5) to eliminate the word "agent." The new definition of "landowner" includes a landowner's agent.

The amendment to §65.107 creates new subsection (b) containing the relocated contents of current §65.103(c)(1) - (7).

The amendment to §65.109, concerning Issuance of Permit, stipulates that except as specifically provided otherwise, permits under the subchapter will not be issued without an inspection of the prospective release sites. The department believes that it is prudent to preserve the ability to inspect a prospective release site to ensure that suitable habitat to sustain a population of released game animals or game birds exists and that the release of game animals or game birds will not be detrimental to existing populations or systems.

The amendment also removes references to the department's stocking policy, for reasons discussed previously in this preamble, specifies that permit applications can be approved by employees authorized to do so, updates a citation to regulations governing aerial wildlife management permits, and relocates the provisions of current §65.103(a)(1) and (2) regarding data waiver of inspection for certain properties participating in the department's Managed Lands Deer Permit Program, the submission of population and harvest data, and provisions regarding compliance with the wildlife management plan (WMP) in effect for the property. The current rule contains an obsolete reference to Level II and Level III MLD (managed lands deer) properties. The rules governing the MLDP were extensively revised in 2015, resulting in the elimination of the Level II and Level III designations, which have been replaced by what is now called the Conservation Option of the MLDP.

The amendment also clarifies that the review of department decisions to deny issuance or renewal of a permit relating to deer are to be conducted in compliance with the provisions of Parks and Wildlife Code, Chapter 12, Subchapter G and Subchapter U of the chapter, which is necessary because Parks and Wildlife Code, Chapter 12, Subchapter G and Subchapter U are specific to department permits regarding deer, and the review of such decisions with respect to all other species will be conducted under the provisions of proposed new subsection (e).

The amendment also adds new subsection (e) to establish provisions governing refusal of issuance of permits under the subchapter (other than permits for deer) to persons on the basis of certain previous criminal behavior involving wildlife law. The new subsection allows the department to refuse permit issuance to any person who has been finally convicted of, pleaded *nolo contendere* to, or received deferred adjudication or been assessed an administrative penalty for a violation of: Parks and Wildlife Code, Chapter 43, Subchapters C, E, F, G, H, L, or R; a provision of the Parks and Wildlife Code that is a Class A or B misdemeanor, state jail felony, or felony; Parks and Wildlife Code, §63.002; or the Lacey Act (16 U.S.C. §§3371-3378). In addition, the new section allows the department to prevent a person from acting on behalf of or as a surrogate for a person prevented from obtaining a permit under the new provisions and provides for a review process for agency decisions to refuse permit issuance.

The department has determined that the decision to issue a permit to hold protected live wildlife should take into account an applicant's history of violations involving the capture and possession of live animals, major violations of the Parks and

Wildlife Code (Class B misdemeanors, Class A misdemeanors, and felonies), and Lacey Act violations. The department reasons that it is appropriate to deny the privilege of taking or allowing the take of wildlife resources to persons who exhibit a demonstrable disregard for the regulations governing wildlife. Similarly, it is appropriate to deny the privilege of holding wildlife to a person who has exhibited demonstrable disregard for wildlife law in general by committing more egregious (Class B misdemeanors, Class A misdemeanors, and felonies) violations of wildlife law.

The Lacey Act (16 U.S.C. §§3371-3378) is a federal law that, among other things, prohibits interstate trade in or movement of wildlife, fish, or plants taken, possessed, transported, or sold in violation of state law. Lacey Act prosecutions are normally conducted by the United States Department of Justice in federal courts. Although a Lacey Act conviction or civil penalty is often predicated on a violation of state law, the federal government need only prove that a state law was violated; there is no requirement for there to be a record of conviction in a state jurisdiction. Rather than expending resources and time conducting concurrent state and federal prosecutions, the department believes that it is reasonable to use a Lacey Act conviction or civil penalty as the basis for refusing to issue or renew a permit. Because the elements of the underlying state criminal offense must be proven to establish a conviction or assessment of a civil penalty for a Lacey Act violation, the department reasons that such conviction or assessment constitutes legal proof that a violation of state law occurred, and it is therefore redundant and wasteful to pursue a conviction in state jurisdiction to prove something that has already been proven in a federal court.

The denial of permit issuance or renewal as a result of an adjudicative status listed in the proposed amendment would not be automatic, but within the discretion of the department. Factors that may be considered by the department in determining whether to refuse permit issuance based on adjudicative status include, but are not limited to: the number of final convictions or administrative violations; the seriousness of the conduct on which the final conviction or administrative violation is based; the existence, number and seriousness of offenses or administrative violations other than offenses or violations that resulted in a final conviction; the length of time between the most recent final conviction or administrative violation and the application for enrollment or renewal; whether the final conviction, administrative violation, or other offenses or violations were the result of negligence or intentional conduct; whether the final conviction or administrative violations resulted from the conduct committed or omitted by the applicant, an agent of the applicant, or both; the accuracy of information provided by the applicant; for renewal, whether the applicant agreed to any special provisions recommended by the department as conditions; and other aggravating or mitigating factors.

The amendment also provides for department review of a decision to refuse permit issuance or renewal. The amendment requires the department to notify an applicant not later than the 10th day following a decision to refuse permit issuance or denial and to set a time and date for conducting a review of an agency decision to refuse permit issuance or renewal within 10 days of receiving a request for a review. The amendment stipulates that a review panel consist of three department managers with appropriate expertise in the activities conducted under the permit in question. The new provision is intended to help ensure that decisions affecting permit issuance and renewal are correct.

The amendment also prohibits any person who has been finally convicted of, pleaded *nolo contendere* to, received deferred adjudication for, or been assessed an administrative penalty for an offense listed in the section from participating in, assisting, or being involved with an activity authorized under the subchapter. The provision is necessary because permit activities are typically conducted by other persons in addition to the person named on the permit. The department believes that conditions that would prevent a person from obtaining a permit should also apply to persons engaging in permitted activities under a permit.

The amendment to §65.111, concerning Permit Conditions and Period of Validity, creates new subsection (a) to stipulate that the department may place limitations on the hunting or taking of game animals or game birds at a release site that the department deems necessary to facilitate or enhance the establishment of a sustainable population. The department views the authorization for Triple T permits to be an exercise in ethical wildlife management practices and will not allow the hunting of released animals if the circumstances dictate that the population is not established or sustainable.

The amendment to §65.115, concerning Notification, Record-keeping, and Reporting Requirements, requires the notification requirements of subsection (a) to be by email. As discussed earlier in this preamble, the department is attempting to modernize formerly manual processes. The amendment also eliminates a redundancy in subsection (b) regarding the daily log required to be kept by permittees.

The department received five comments supporting adoption of the rules as proposed.

The Texas Chapter of the Wildlife Society, the Texas Wildlife Association, the Texas Foundation for Conservation, the Texas and Southwestern Cattle Raisers Association, and the Humane Society of the United States commented in support of adoption of the proposed rules.

The amendments are adopted under the authority of Parks and Wildlife Code, §43.061, which requires the commission to adopt rules for the content of wildlife stocking plans, certification of wildlife trappers, and the trapping, transporting, and transplanting of game animals and game birds under Chapter 43, Subchapter E.

§65.102. Disease Detection Requirements.

(a) The provisions of Subchapter B, Division 2, of this chapter apply to the movement of deer pursuant to a permit issued under this subchapter.

(b) All deer released shall be tattooed in one ear with a department-assigned identification number.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2021.

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James Murphy

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775

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SUBCHAPTER D. DEER MANAGEMENT
PERMIT (DMP)

31 TAC §65.133

The Texas Parks and Wildlife Commission in a duly noticed meeting on November 10, 2020, adopted an amendment to 31 TAC §65.133, concerning General Provisions, without changes to the proposed text as published in the October 2, 2020, issue of the *Texas Register* (45 TexReg 6971). The rule will not be republished.

The amendment consists of several changes. The amendment replaces the word "wild" with the term "free-ranging." Under Parks and Wildlife Code, §43.601, the department may issue a permit for the management of the wild white-tailed deer population on acreage enclosed by a fence capable of retaining white-tailed deer and preventing entry by white-tailed deer under reasonable and ordinary circumstances. Under Parks and Wildlife Code, §1.011, all wild animals inside the borders of this state are the property of the people of this state. Parks and Wildlife Code, §1.101, defines "wild," when used in reference to an animal, to mean a species, including each individual of a species, that normally lives in a state of nature and not ordinarily domesticated. The current terminology in §65.133 is imprecise because the distinction it is intended to address is between deer held in captivity and deer that are free-ranging (i.e., capable of coming and going at will). Parks and Wildlife Code, §1.011, is unambiguous: all individual deer, whether free-ranging or captive, are wild and are the property of the people of the state. The amendment eliminates imprecise language and removes a reference to breeder deer as being private property, which is erroneous for the reasons described earlier.

The amendment also updates references to statute and other rules of the department that are referenced in §65.133. The current rule refers to "Scientific Breeder's Permit." In 2017, the Texas Legislature amended Parks and Wildlife Code, Chapter 43, Subchapter L to rename that permit the deer breeder's permit. Similarly, the current rule refers to the department's Managed Lands Deer Program with language that is no longer accurate, as the rules governing that program have been moved. Therefore, the amendment introduces the correct references and terminology in subsection (e). The amendment to subsection similarly corrects a reference to a section title.

The department received one comment opposing adoption of the proposed amendment. The commenter did not offer a reason or rationale for opposing adoption.

The department received five comments supporting adoption of the proposed amendment.

The Texas Chapter of the Wildlife Society, the Texas Wildlife Association, the Texas Foundation for Conservation, the Texas and Southwestern Cattle Raisers Association, and the Humane Society commented in support of adoption of the proposed rules.

The amendment is adopted under the authority of Parks and Wildlife Code, §43.603, which provides that a permit issued under Parks and Wildlife Code, Chapter 43, Subchapter R, is subject to conditions established by the commission.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 389-4775



SUBCHAPTER T. DEER BREEDER PERMITS

The Texas Parks and Wildlife Commission in a duly noticed meeting on November 10, 2020, adopted the repeal of 31 TAC §65.604, amendments to §§65.601 - 65.603, 65.605, and 65.610 - 65.612, and new §65.604, concerning Deer Breeder Permits. Sections 65.601, 65.602, 65.610, and 65.611 are adopted with changes to the proposed text as published October 2, 2020, issue of the *Texas Register* (45 TexReg 6972). The rules will be republished. The repeal of §65.604, the amendments to §§65.601, 65.603, 65.605, and 65.612, and new §65.604 are adopted without change and will not be republished.

The change to §65.601, concerning Definitions, provides for an effective date of May 15, 2021, for the amendment to the definition of "facility" in paragraph (2), which is intended to allow a reasonable time for affected permittees to arrange for compliance with provisions of the rule that affect the small number of facilities with disjunct pens.

The change to §65.602, concerning Permit Requirement and Permit Privileges; General Provisions, adds language to subsection (e) to allow for the use of facility infrastructure such as chutes and pens to be used to handle animals other than deer, provided the animals are members of species that are not susceptible to chronic wasting disease (CWD). As proposed and adopted, the rules prohibit the commingling of breeder deer with other deer, livestock, exotic livestock, or similar animals. The intent of the provision is to eliminate the possibility of interspecific transfer of diseases, including CWD, to or by breeder deer within deer breeding facilities as a result of co-occupation of or serial introduction to deer breeding facilities by animals other than the specific deer authorized to be possessed in the facility. However, the department received public comment to the effect that the rules would be problematic for persons who are engaged in animal husbandry other than deer breeding because such persons would incur expenses related to duplication of infrastructure used to handle animals. The department determined that so long as such infrastructure is indicated on the required facility diagram and employed only temporarily to handle species that are not susceptible to CWD, there is little risk of disease transmission. The change also implements an effective date of April 1, 2021, for subsections (d) and (e), which the department intends to provide a reasonable timeframe for compliance.

The change to §65.610, concerning Transfer of Deer alters subsection (f)(3)B to replace a reference to "transport permit" with the correct term, which is "transfer permit." The change also alters (f)(7) to clarify that a breeder deer that dies at or en route to or from a veterinary medical facility will be treated by the department as a mortality occurring within the source deer breeding facility for the purposes of calculating testing obligations under the

department's comprehensive CWD management rules in Chapter 65, Subchapter B.

The change to §65.611, concerning Prohibited Acts, alters subsection (d) to provide for department authorization to possess a breeder deer in a nursing facility beyond 120 days of the deer's birth. The department has determined that in some instances, such as natal complications, it may be necessary for a fawn to be kept in a nursing facility beyond six months of age. The change also alters subsections (e) and (l) to accommodate the change made to §65.602 discussed earlier in this preamble.

In general, the amendments harmonize the subchapter with the contents of Chapter 65, Subchapter B, concerning Disease Detection and Response, but also make specific substantive and non-substantive changes as noted.

Prior to 2015, the department's regulatory apparatus for detecting chronic wasting disease (CWD) in deer breeding facilities was contained in this subchapter (Chapter 65, Subchapter T). The testing standards imposed by the rules were considered to be at best minimally efficacious for detecting CWD in captive deer populations and were intended to be the least burdensome regulatory footprint possible in light of the fact that up to that point in time, CWD had not been discovered in captive breeding facilities in Texas. However, with the discoveries of multiple CWD-positive deer in deer breeding facilities in 2015 and 2016, the department adopted rules that imposed more robust testing protocols and movement restrictions. Those rules are contained in Chapter 65, Subchapter B, and supersede the testing rules currently contained in Chapter 65, Subchapter T.

CWD is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, elk, red deer, sika, and their hybrids (susceptible species). It is classified as a TSE (transmissible spongiform encephalopathy), a family of diseases that includes scrapie (found in sheep), bovine spongiform encephalopathy (BSE, found in cattle), and variant Creutzfeldt-Jakob Disease (vCJD) in humans.

Much remains unknown about CWD. The peculiarities of its transmission (how it is passed from animal to animal), infection rate (the frequency of occurrence through time or other comparative standard), incubation period (the time from exposure to clinical manifestation), and potential for transmission to other species are still being investigated. There is no scientific evidence to indicate that CWD is transmissible to humans. What is known is that CWD is invariably fatal to cervids and is transmitted both directly (through deer-to-deer contact) and indirectly (through environmental contamination). Moreover, a high prevalence of the disease correlates with deer population declines, and human dimensions research suggests that hunters will avoid areas of high CWD prevalence. Additionally, the apparent persistence of CWD in contaminated environments represents a significant obstacle to eradication of CWD from either captive or free-ranging cervid populations.

The repeal of §65.604, concerning Disease Monitoring, is necessary because the section is now superfluous and unnecessary, since disease monitoring and testing requirements for CWD, including those for deer breeders and persons who obtain or receive deer from deer breeders, are contained in Chapter 65, Subchapter B.

The amendment to §65.601, concerning Definitions, eliminates the definitions for "accredited test facility," "certified wildlife biologist," "release," and "sale." The definition for "accredited test facility" is no longer necessary since disease monitoring and test-

ing requirements for CWD are contained in Chapter 65, Subchapter B. The amendment to §65.603(b) creates a "certified facility inspector" function to replace that previously performed under the rubric of "certified wildlife biologist," which the department has determined is not an appropriate descriptor of the activities being performed. The definitions for "release" and "sale" are being eliminated because the department is using the term "transfer" to encompass all situations in which a transfer permit is required, which includes for purposes of release and/or sale. For the same reasons, the amendment alters the definition of "transfer permit" to simply state that a transfer permit is a permit authorizing the movement of breeder deer to any person or registered facility authorized to possess or receive breeder deer. Additionally, the amendment replaces the term "unique number" with "unique identifier" to be consistent with terminology used in Parks and Wildlife Code, §43.3561, and clarify that a unique identifier is issued by the department to the deer breeder, who will ultimately assign the number to a breeder deer born in that permit holder's facility. The amendment also alters the definition of "facility" to specify that enclosures within a facility must be contiguous (physically bordering or adjoining each other; connected). The department, in consultation with Texas Animal Health Commission (TAHC), is managing CWD-positive deer breeding facilities that in some cases consist of multiple enclosures that are not contiguous with each other and in some instances are separated by miles of pasture land or private and public roads. Under current rules, deer can be moved between such enclosures without activation of transfer permits. Consequently, neither the department nor TAHC have accurate records documenting which non-contiguous enclosure any particular deer is actually in, or any documentation of movement history between enclosures, which challenges both agencies' disease-management strategies. Requiring a separate facility identification number for each enclosure that is physically separate from other enclosures and requiring a transfer permit to be activated to transfer deer between such enclosures is a prudent disease management and prevention action that is expected to introduce minimal, if any, burden on the permittee; however, the department notes that proposed amendment requires persons who wish to maintain multiple enclosures that are not contiguous to obtain a separate deer breeding permit for each enclosure that is not contiguous to other enclosures.

The amendment to §65.602, concerning Permit Requirement and Permit Privileges; General Provisions, clarifies subsection (a) to provide that a person may possess live deer in this state by means other than a permit (e.g., an authorization to temporarily retain breeder deer in an enclosure to allow them to acclimate to a release site), and removes a generic reference to the subchapter in favor of a reference to a specific provision of the Parks and Wildlife Code that enumerates the specific statutory privileges enjoyed by the holder of a deer breeder's permit. As mentioned previously in this preamble, terms such as "sale" and "release" are being replaced with the term "transfer" because most if not all instances in which a breeder deer is moved require the activation of a transfer permit; those changes are made throughout this rulemaking. Similarly, the amendment eliminates current paragraphs (b)(4), (6) and (7) because the activities addressed in those provisions are also effected by activation of a transfer permit. The amendment also adds new subsection (d) to stipulate that registered breeding facilities may possess only white-tailed deer or only mule deer. The department will not issue a permit allowing both species of deer to be kept in a single facility, which is necessary to eliminate the possibility of accidental or intentional comingling of species and hybridization, and to address disease

concerns associated with comingling white-tailed deer and mule deer. Similarly, the amendment adds new subsection (e), which stipulates that except as provided, no deer, livestock, exotic livestock, or similar animals may be present in, confined in, or have access to a deer breeding facility other than the deer listed on the reconciled herd inventory for the facility reported to the department, which is necessary to reduce disease risks that could be introduced by other animals and not limited to CWD-susceptible species.

The amendment to §65.603, concerning Application and Permit Issuance, clarifies application requirements with respect to the infrastructure of a prospective deer breeding facility, requires an inspection of the facility to be performed by a facility inspector authorized by the department, and establishes the minimum requirements for a person to become an authorized facility inspector.

The amendments clarify several areas regarding the content of applications for deer breeder permits. The current rules require an applicant to "submit a completed application to the department." The application requires, among other things, a plat of the prospective facility (to include individual enclosures, the dimension and size of each enclosure, the approximate location of feeding and watering devices within each enclosure, the approximate location of man-made and/or natural shelters, and the location of all fences and gates). In addition, the application requires a letter of endorsement from a certified wildlife biologist attesting that the prospective facility meets the department's regulatory requirements for facility standards; deer are not currently within the facility; that deer eventually introduced to the facility will have adequate access to food, water, and shade and/or shelter; the facility identified in the application is fully constructed and functional; and any additional information the biologist deems pertinent. The department has determined that the contents of the application relating to facility infrastructure should be specified by rule in order to avoid misunderstandings, confusion, or the implication that the information required in an application is voluntary rather than mandatory or that the accuracy of the information is open to interpretation by the applicant. To that end, the amendment to §65.603 requires an application to include a diagram of the facility that clearly defines each distinct enclosure within the facility, including fences and gates, and explicitly requires the letter of endorsement from an authorized pen inspector to affirm that the infrastructure of a prospective deer breeding facility is adequate for the humane treatment of breeder deer (including adequate access to food, continuous supplies of water and ample cover or shelter), has been secured to prevent ingress to and egress from the facility by animals similar to deer or livestock, and that no animals similar to deer or livestock are present within the facility.

The amendment to §65.603 also alters current rules regarding facility inspections. Under current rule, prospective deer breeding facilities must be inspected by a certified wildlife biologist as a condition of potential licensure. The department has determined that although it is necessary to require facility inspections and to require them to be performed by persons with the educational and experiential background necessary to do so effectively, it is not necessary to require accreditation as a certified wildlife biologist. Therefore, new subsection (b) would stipulate that an authorized facility inspector be a person not employed by the department who has been awarded a bachelor's degree or higher in wildlife science, wildlife management, or related discipline; has at least three years of post-graduate experience associated with breeder deer within the five-year period preceding any facility in-

spection activity; has no record within the previous five years of non-compliance with department regulations regarding breeder deer herd inventories; and has not been finally convicted of or been assessed an administrative penalty for a legal violation that would prevent the person from being an agent or surrogate for a deer breeder under applicable department rules in Chapter 65, Subchapter U. The department reasons that it is appropriate to prohibit persons who exhibit a demonstrable disregard for laws and regulations governing wildlife from acting as an authorized facility inspector for the purposes of the subchapter.

The amendment to §65.603 also stipulates that additions to a facility must be approved by the department. Current rules require permittees to submit an accurate diagram of the facility indicating all changes to the facility; however, it is not explicitly stated that the diagram must be updated each time a change is made to the facility. The amendment remedies that.

Finally, the amendment to §65.603 amends a reference to a subsection within the section, which is necessary because the designation of the referenced subsection has changed as a result of the amendments.

New §65.604, concerning Disease Monitoring, provides a reference to Chapter 65, Subchapter B, Division 2, concerning Chronic Wasting Disease - Movement of Deer, which contains applicable provisions governing disease management with respect to breeder deer.

The amendment to §65.605, concerning Holding Facility Standards and Care of Deer, alters subsection (a) to clarify that facility fencing requirements apply to all facilities authorized to hold breeder deer, including nursing and medical facilities.

The amendment to §65.605 also adds new subsection (b) to require permittees to ensure that deer in a breeding facility have access to adequate food, water, and cover. Although the pen inspection required by §65.603, concerning Permit Application and Issuance, requires attestation that adequate food, a continuous supply of water, and ample cover or shelter is provided at any given breeding facility, the department believes it is important to stipulate that those things are not simply conditions for permit issuance, but expectations of day-to-day operations. The current rule does not explicitly address food, water, or shelter requirements, as the department has thus far considered that since breeder deer are at least anecdotally very valuable to deer breeders, it should be axiomatic that deer breeders would protect the deer they are permitted to possess; however, the department has become aware of situations in which permittees have failed to provide what the department considers to be basic standards of animal care, and in at least one instance a deer breeder has been cited for animal cruelty. Therefore, the department believes it is necessary to provide for such standards by rule.

The amendment also alters current subsection (b) to specify notification requirements for deer breeders in the event that a deer escapes from a breeding facility. Under current rule, a permittee must notify the department immediately upon discovering the escape of a deer from the breeding facility, which initiates a ten-day window for recapture efforts and provides for an additional five-day period provided the permittee proves to the department's satisfaction that reasonable efforts have been made to recapture the deer. The department has encountered situations in which it is difficult to ascertain the nature and progress of a permittee's efforts to recapture escaped deer, which is problematic from a disease management perspective. Therefore, the amendment requires the notification to include a detailed de-

scription of the permittee's intended efforts to recapture the deer, including the methods, dates, and times of attempted recapture efforts and a daily notification of the execution of those recapture efforts. The amendment eliminates the current provision for an additional five-day period for recapture and allows recapture and reintroduction to a deer breeding facility after 10 days only if the department approves that action for disease management purposes. The department believes that 10 days is sufficient time for bona fide recapture attempts to take place, and that reintroduction of escaped deer after that time is warranted only if the department has determined it is necessary, based on the CWD status of the facility in question and that of the surrounding landscape to which the deer has escaped.

The amendment to §65.605 also adds new subsection (d) to address the failure to recapture breeder deer that escape from a deer breeding facility that is prohibited by law from receiving or transferring breeder deer under the provisions of Chapter 65, Subchapter B, Division 2 at the time of or subsequent to the escape. The new subsection addresses such instances by requiring the implementation of a disease-testing plan for the property where the breeding facility is located and any contiguous tract of land under common ownership. The disease-testing plan will specify CWD testing and reporting requirements for deer harvested on the affected properties and additional CWD testing requirements in the deer breeding facility. The intent of the new subsection is to address concerns regarding deer that have escaped from breeding facilities known to be of epidemiological concern with respect to CWD.

The amendment to §65.610, concerning Transfer of Deer, amends subsection (a) to clarify that transfer permit requirements apply to breeder deer in a trailer or vehicle. The current provision requires activation of a transfer permit when deer are moved into or out of a facility but does not specifically indicate an exact point in time at which the transfer permit activation must occur. The department has determined that it is reasonable to assume that transfer activities have started when deer are loaded into a trailer or vehicle; thus, the amendment requires a transfer permit to have been activated prior to deer being possessed in a trailer or vehicle.

The amendment also alters subsection (b) to comport its contents with the disease management provisions of Chapter 65, Subchapter B, which, as noted previously in this preamble, governs the movement of breeder deer pursuant to disease management regulations. The amendment eliminates current paragraphs (1) - (4) and (6) and adds clarifying language to the remaining paragraphs to comport terminology.

The amendment also adds new subsection (c) to stipulate that white-tailed deer and mule deer may not be transferred to any facility located in a county for which there is no open season for that species. The department believes that it is biologically irresponsible to allow breeder deer to be transferred to destinations outside of the natural or historic range of the species, especially in light of the nearly 3,000 reported escapes of breeder deer and the 9,687 breeder deer that department inspections have determined cannot be accounted for by permittees responsible for such deer. Desert mule deer have evolved in and are adapted to a specific historical range in West Texas; to allow desert mule deer to be transferred to facilities outside their historic native range would introduce a host of potential known and unknown problems (transmission of diseases, parasites, etc.) that the department believes can be avoided by prohibiting movement outside of historic range.

The amendment eliminates the contents of current subsection (c) because they are superfluous in light of other provisions governing transfer permits (addressed earlier in this preamble) and replaces them with the contents of current §65.610(d)(1), which provides that the department will not authorize the release of deer if the release would detrimentally affect existing populations or systems.

The amendment alters current subsection (d) by removing paragraph (1) as discussed previously in this preamble.

The amendment alters the provisions of current subsection (e) to clarify that the deer specifically identified on the transfer permit are the only deer that may be moved under the transfer permit during the 48-hour time period authorized by the permit, and that a transport manifest identifying the specific deer in possession while in transport must be physically possessed by the person in possession of the deer during transport if the transfer involves multiple trips, vehicles, or destinations. The intent of the amendment is to remove any ambiguity as to what a transfer permit applies to or what a transfer permit specifically authorizes. The department has encountered situations in which permittees have activated a transfer permit, but the transfer permit does not accurately identify the deer in the transport vehicle or even the number of deer in the transport vehicle. Sometimes there are situations when a deer breeder makes multiple trips or uses multiple transport vehicles to complete a transfer, and it is important that each shipment of deer is accompanied by a transport manifest clearly identifying the specific deer on the transport vehicle. The department believes that it is reasonable to expect that in any given instance of transport, the deer in a trailer or means of transportation are in fact the deer identified on the transfer permit as the deer being transported.

Under the provisions of current subsection (e)(3), a transfer permit may be activated by phone or online. The amendment requires all permit activations to be executed online, but also provides for activation by phone or email in the event the department's online system is unavailable. The department believes that the ubiquity of smart phones, tablets, laptops, and other devices makes phone notification unnecessary except in special circumstances.

The amendment non-substantively alters current subsection (e)(4) to clarify that the current requirement that an application for a transfer permit indicate the source and destination of the deer being moved must include the facility identification numbers assigned by the department to the source and destination facilities. Similarly, the amendment alters current subsection (e)(5) to replace "all activities" with "movement of deer" for purposes of improved precision.

The amendment to current subsection (e)(6) replaces "veterinarian" with "veterinarian's medical facility for emergency medical treatment" to more precisely describe the destination and conditions under which a breeder deer may be transported without activation of a transfer permit, and amends the provision to require that if deer moved without a transfer permit under the provision are removed from the means of transportation and temporarily housed in a location that may house other susceptible species at any point between departure from the source facility and return to the source facility, a transfer permit must be activated prior to the return of the deer to the source facility. The new provision is necessary for effective epidemiological contact tracing in the event that the deer or the source facility become part of an epidemiological investigation at a later date. The amendment also clarifies that an eligible-aged breeder deer that dies at

or while being transported to or from a veterinary facility under the provisions of the proposed amendment is considered to be an eligible mortality for the purposes of the department's CWD management rules contained in Chapter 65, Subchapter B.

The amendment to §65.611, concerning Prohibited Acts, consist of several actions. The amendment alters the provisions of subsection (b) to state that it is an offense to possess or place breeder deer in any place or facility if the herd inventory on file with the department does not account for the deer, which is necessary for purposes of disease control.

The amendment also adds new subsection (d) to prohibit the possession of a breeder deer in a nursing facility later than 120 days following the deer's birth, except as provided in writing by the department. The current rules allow the transport of fawns to nursing facilities in order to provide nourishment until the fawns are self-sufficient. It is a generally accepted fact of deer biology that fawns have been weaned within the first 120 days of life. The department believes that fawns should be returned to their respective breeding facilities when they are capable of feeding on their own.

The amendment also adds new subsection (e) to prohibit the commingling and/or interbreeding of white-tailed deer and mule deer, with exceptions. White-tailed deer and mule deer have different breeding strategies, breeding chronologies, habitat preferences, and predator evasion behaviors, all of which are important in sustaining populations. Hybrids in captivity have shown escape behaviors that are chaotic, confused, and would lead to lower survival probabilities. It is documented in research facilities that hybrids have a higher mortality rate than purebred white-tailed deer or mule deer, and research indicates that hybrid fawns have low survival rates. The department has determined that allowing the production of hybrids and/or their release is unwise.

The amendment also adds new subsection (i) to specifically emphasize that an authorized facility inspector commits an offense by submitting the checklist or letter of endorsement required by the rules if that person has not personally conducted an onsite inspection of the facility in question. The department notes that the offense would be a Class C Misdemeanor, which gives the department a less serious option to pursue for minor infractions, as opposed to a felony or Class B Misdemeanor prosecution for falsification of a government record that is also possible based on the same conduct.

The amendment also adds new subsection (j) to clarify that it is an offense for any person to violate or fail to comply with the provisions of a disease-testing plan issued under the provisions of §65.605(d). Although the rules as adopted require a permittee under certain specific circumstances to follow a disease-testing plan following the failure to capture an escaped deer, and failure to do so would constitute a violation of permit provisions and therefore be an offense, the department believes it is important to emphasize that failure to comply with the disease-testing plan is an offense.

The amendment adds new subsection (k) to prohibit the cloning of white-tailed or mule deer except as specifically authorized under a department-issued permit. The department strongly believes that the unknown and unforeseeable biological consequences resulting from the cloning of native wildlife make it imperative to prohibit any such activity except for one possibility, which is credible scientific research predicated on a compelling scientific need.

The amendment also adds new subsection (I) to prohibit the possession of deer, livestock, exotic livestock, or similar animals in a deer breeding facility, or allow such animals to access a deer breeding facility, except for temporary activities involving species that are not susceptible to CWD.

Finally, the amendment to §65.612, concerning Disposition of Deer, makes non-substantive change to comport the terminology in the section with changes made elsewhere in the rules to standardize terminology with respect to transfer permits.

The department received eight comments opposing adoption of the rules as proposed. All eight commenters articulated some sort of reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow. The department notes that because some commenters offered multiple reasons for opposing adoption, the number of department responses is greater than the total number of comments received.

One commenter opposed adoption and stated that the department has no business regulating deer breeders, that the overpopulation of deer costs the public millions of dollars because of automobile collisions, that doe tags should be eliminated, and that regulatory complexity is causing the number of hunters to decline. The department disagrees with the comment and responds that under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter L, the Texas Legislature specifically requires the department to regulate the possession of breeder deer. The department also responds that motor vehicle collisions with deer are not within the commission's regulatory authority to address, that doe tags (antlerless tags) are necessary to ensure that antlerless deer in possession of any person have been legally harvested, and that the appeal of other forms of recreation and the lack of affordable hunting opportunity seem to be the primary drivers of declining hunting participation. No changes were made as a result of the comment.

One commenter opposed adoption and stated that goats used to nurse fawns should be allowed to be possessed within breeding facilities. The department disagrees with the comment and responds that the rules currently in effect already provide for the removal of fawns from a breeding facility for nursing purposes. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that requiring breeders to obtain separate permits for non-contiguous enclosures presents an unnecessary financial burden to permit holders. The department disagrees with the comment and responds, first, that the provisions regarding non-contiguous enclosures have the potential to affect approximately 12 percent of current permit holders to varying degrees; second, any permit holder who chooses not to obtain a separate permit for non-contiguous enclosures can move deer in their possession to a single location without having to obtain a new permit for each non-contiguous enclosure; and third, that the maximum annual additional cost to each affected permit holder is \$200 per non-contiguous enclosure. Although the department does not have access to financial records of permit holders, anecdotal evidence from trade association publications suggests that the additional cost is not burdensome. No changes were made as a result of the comments.

One commenter opposed adoption and stated that ability of facility owners to meet the required testing in all non-contiguous facilities, should they be required to have separate CWD testing standards within herds already conducting adequate surveil-

lance, effectively doubles or triples the cost for business owners to secure permits each year, which is unnecessary and duplicative because breeders are required to test 80% of their eligible mortalities, while maintaining a sample size equal or greater to 3.6% of the age-eligible animals in each facility. The commenter also stated that non-contiguous enclosures are often used to house specific age cohorts of deer and often times do not carry a high mortality rate. The department disagrees with the comment and responds that the rules do not impose testing requirements on any permit holder, but do offer approximately 12 percent of current permit holders a choice between consolidating deer currently possessed in multiple non-contiguous enclosures (without any changes to testing obligations) and obtaining separate permits for each non-contiguous enclosure (which may or may not present additional testing costs, depending on circumstances unique to each permit holder who so decides). The department also notes that there are strategies that would enable permit holders to consolidate deer in a single enclosure and, over time, use those deer to populate additional non-contiguous enclosures under new permits without incurring additional testing costs. Finally, the department notes that prior to the publication of the proposed rules, approximately 25% of the permit holders whose facilities contained disjunct pens had already obtained separate permits for those pens. No changes were made as a result of the comment.

One commenter opposed adoption and stated that instead of requiring a separate permit for each disjunct pen the department should assign a sub-facility identification to each disjunct pen at no cost, which would save money for permit holders by eliminating the need to pay for new permits and increased testing costs. The department disagrees with the comment and responds that, in addition to the responses to previous comments regarding testing costs and fees, the programming costs and attendant delays in implementation associated with reconfiguring the department's electronic applications make such a scenario problematic. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the requirements of proposed §65.603(b)(3) should apply only to deer breeding facilities operated by a certified pen inspector and not facilities inspected by that person in the past. The department agrees with the comment and responds that the provision in question applies to the actions of any person in their capacity as a permit holder, and not to actions as a pen inspector. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules should specifically describe the testing requirements for facilities from which deer escape. The department disagrees with the comment and responds that the rules as adopted apply only to facilities designated by the department as not qualified to transfer or receive deer because of insufficient disease testing and only in the event that escaped deer cannot be recaptured. The department notes that such facilities represent an inherent risk independent of the occurrence or causation of escape and because of the unique nature of each such facility in the context of location and other parameters, the department concludes that it is prudent to allow for custom disease testing plans to be implemented when recapture efforts are unsuccessful. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that the rules should allow the use of holding and handling infrastructure within facilities to manage species other than deer. One of the commenters stated that such infrastructure should be restricted to

use on species that are not susceptible to CWD. The department agrees with the comments and has changed the rules to allow such infrastructure to be used for the temporary holding and handling of species other than deer, provided they are non-susceptible species.

One commenter opposed adoption and stated that the rule provisions regarding escaped breeder deer could create scenarios where permittees get trapped in "subjective, overburdensome, or restrictive disease testing plans through acts of nature, acts of God, or causes completely outside of their control." The department disagrees with the comment and responds that the rules as adopted apply only to facilities designated by the department as not qualified to transfer or receive deer because of insufficient disease testing and only in the event that escaped deer cannot be recaptured. The department notes that such facilities represent an inherent risk independent of the occurrence or causation of escape and because of the unique nature of each such facility in the context of location and other parameters, the department concludes that it is prudent to allow for custom disease testing plans to be implemented when recapture efforts are unsuccessful. No changes were made as a result of the comment.

One commenter opposed adoption and stated that many ranches hold species other than deer and that the use of pens to house or hold other species causes no harm and the prohibition of such use is not science based, but speculative at best. The commenter stated the rules do not protect deer but are a taking of land without payment. The department disagrees with the comment and responds that the intraspecific transmission of wildlife diseases has been well documented. The department further responds that the rules as adopted do not constitute a taking. The decision to obtain a deer breeder permit is completely voluntary and Parks and Wildlife Code, Chapter 43, Subchapter L, provides that no person may possess live white-tailed or mule deer in captivity for purposes of breeding unless the person possesses a valid permit from the department to do so. No changes were made as a result of the comment.

One commenter opposed adoption and stated that a high-fenced ranch containing deer pens makes escape from a pen irrelevant because the deer are still in captivity. The department disagrees with the comment and responds that if the comment is in regard to the requirement for a separate permit for discrete pens that are currently under a single permit, the intent of the rule is to be able to monitor the movement of breeder deer between sets of pens, not to prevent escape; the department further notes that the current rules require deer breeding facilities to be surrounded by a fence capable of retaining deer at all times. If the comment is in regard to the provisions regarding escape of deer, the department disagrees with the comment and responds that the rules as adopted apply only to deer that escape from a facility that the department has designated as non-movement qualified, which occurs only because the facility is an epidemiological risk to other captive and free ranging populations. No changes were made as a result of the comment.

The department received five comments supporting adoption of the proposed rules.

The Texas Chapter of the Wildlife Society, the Texas Wildlife Association, the Texas Foundation for Conservation, the Texas and Southwestern Cattle Raisers Association, and the Humane Society of the United States commented in support of adoption of the proposed rules.

The Texas Deer Association and the Deer Breeder Corporation opposed adoption of the proposed rules.

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The amendments and new section are adopted under the authority of Parks and Wildlife Code, Chapter 43, Subchapter L, which authorizes the commission to make regulations governing the possession, transfer, purchase, and sale of breeder deer held under the authority of the subchapter; and §61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

§65.601. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings assigned by Parks and Wildlife Code.

(1) Authorized agent--An individual designated by the permittee to conduct activities on behalf of the permittee. For the purposes of this subchapter, the terms 'deer breeder' and 'permittee' include authorized agents.

(2) Facility--

(A) Until May 15, 2021, one or more enclosures, in the aggregate and including additions, that are the site of deer breeding operations under a single deer breeder's permit.

(B) On and after May 15, 2021, one or more contiguous enclosures, in the aggregate and including additions, that are the site of deer breeding operations under a single deer breeder's permit.

(3) Movement qualified--A status, determined by the department, under which the transfer of deer to or from a facility is authorized.

(4) Serial Number--A permanent four-digit number assigned to a deer breeder by the department. A serial number shall be preceded by the prefix "TX".

(5) Transfer permit--A permit authorizing the movement of breeder deer to or from a facility.

(6) Unique identifier--As defined by Parks and Wildlife Code, §43.3561(a)(5).

§65.602. Permit Requirement and Permit Privileges; General Provisions.

(a) Except as provided in this chapter, no person may possess a live deer in this state unless that person possesses:

(1) a valid permit issued by the department under the provisions of Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, or R; or

(2) specific written authorization under the provisions of this subchapter.

(b) In accordance with Parks and Wildlife Code, §43.357, a person who possesses a valid deer breeder's permit may:

(1) engage in the business of breeding legally possessed breeder deer within the facility for which the permit was issued;

(2) take possession of breeder deer transferred from another facility in compliance with the provisions of this chapter;

(3) transfer breeder deer that are in the legal possession of the permittee; and

(4) except as provided by this subchapter, recapture lawfully possessed breeder deer that have been marked in accordance with Parks and Wildlife Code, §43.3561 that have escaped from a permitted facility.

(c) Unless specifically provided otherwise in this subchapter or the conditions of permit, all permit applications, permit renewals, notifications, reporting, and recordkeeping required by this subchapter shall be submitted electronically via the department's Internet-based deer breeder application.

(d) A deer breeding facility shall contain either white-tailed deer or mule deer, as authorized by the permit. The provisions of this subsection take effect April 1, 2021.

(e) Except for deer that are not required to be identified and reported to the department under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter L, no deer, livestock, exotic livestock, or similar animals may be present in, confined in, or have access to a deer breeding facility other than the deer listed on the reconciled herd inventory for the facility reported to the department; however, infrastructure such as chutes and pens within a permanent structure identified on a facility diagram required under this subchapter may be used to temporarily retain and handle animals other than white-tailed or mule deer held under provisions of a deer breeder permit, provided the animals are members of species that are not CWD-susceptible species. The provisions of this subsection take effect April 1, 2021.

§65.610. *Transfer of Deer.*

(a) General. No person may possess breeder deer in a trailer or vehicle, or remove or allow removal of breeder deer from a trailer, or accept, introduce, or allow introduction of breeder deer into a permitted facility, unless a valid transfer permit has been activated as provided in this section.

(b) Transfer by deer breeder. In accordance with the provisions of Subchapter B, Division 2, of this chapter (concerning Chronic Wasting Disease - Movement of Deer), the holder of a valid deer breeder's permit may transfer legally possessed breeder deer to:

(1) a facility registered with the department for purposes of veterinary treatment; or

(2) an educational display or zoological facility permitted by the department. A transfer under this paragraph is final; breeder deer transferred to a permitted educational display or zoological facility may not be returned to any breeder facility.

(c) White-tailed deer and mule deer may not be transferred to a facility located in a county for which there is no open season for that species.

(d) The department will not authorize the transfer of breeder deer to a release site if the department has determined that the transfer will detrimentally affect existing populations or systems.

(e) Release.

(1) Breeder deer lawfully transferred to a registered release site may be held in temporary captivity for any period of time from March 1 through the eleventh day immediately preceding an open deer season to acclimate the breeder deer to habitat conditions at the release site; however, such temporary captivity must be specifically authorized in writing by the department. Not later than 11:59 p.m. on the eleventh day immediately preceding an open deer season, all deer being held in temporary captivity under the provisions of this paragraph shall be released. Release shall consist of the removal of at least 20 feet of the components of a pen that serve to maintain deer in a state of detention within the pen; however, no opening shall be less than 10 feet in width.

Such components shall be removed for no fewer than 30 consecutive days.

(2) An enclosure used to temporarily detain deer under this paragraph shall be physically separate from any deer breeding facility and the deer being temporarily held shall not be commingled with breeder deer. Deer held in temporary captivity shall not be returned to any deer breeding facility.

(3) The department will not authorize the detention of deer under this paragraph during an open hunting season.

(4) Deer in temporary captivity under the provisions of this paragraph shall not be hunted while in temporary captivity.

(f) Transfer permit.

(1) A transfer permit is valid for 48 consecutive hours from the time of activation.

(2) A transfer permit authorizes the transfer of the breeder deer specifically identified on the transfer permit to one and only one registered facility.

(3) A transport manifest is a written document that specifically identifies the deer in a means of transport at any given time between departure from the source facility identified on the transfer permit and any destination facility identified on the transfer permit. A person in possession of deer during transport under a transfer permit must physically possess a transport manifest under any of the following conditions:

(A) multiple vehicles are employed to transport deer to only one destination identified in a single transfer permit;

(B) a single vehicle is employed for multiple trips to a single destination identified in a single transfer permit; or

(C) a single instance of transport involves stops at multiple destinations.

(4) A transfer permit is activated only by:

(A) utilizing the department's online application; or

(B) notifying the Law Enforcement Communications Center in Austin by phone or email in the event the department's online application is offline or otherwise unavailable to the general public.

(C) It is an offense for any person to transport a deer under a transfer permit unless the person also possesses a confirmation number issued by the department indicating receipt of the notification for that instance of transport.

(5) No person may possess a live breeder deer at any place other than within a permitted facility unless that person also possesses on their person a department-issued transfer permit legibly indicating, at a minimum:

(A) the species, sex, and unique number of each breeder deer in possession;

(B) the facility identification numbers for the source and destination facilities; and

(C) the date and time that the permit was activated.

(6) Not later than 48 hours following the completion of the movement of breeder deer under a transfer permit, the permit shall be completed and submitted to the department.

(7) A deer breeder may transport breeder deer without a transfer permit from a permitted facility to a licensed veterinarian's medical facility for emergency medical treatment, provided:

(A) the transport occurs by the most feasible direct route;

(B) the breeder deer are not removed from the means of transportation at any point from the time of departure from the source facility to the time of return to the source facility, including at the place of treatment; and

(C) the breeder deer do not leave this state.

(D) If a breeder deer is removed from the means of transportation to the medical facility and is temporarily housed in a location that may house other susceptible species, then a transfer permit reflecting that transport must be activated and completed and an additional transfer permit must be activated prior to the deer returning to the deer breeding facility.

(E) An eligible-age deer that is transported to a veterinary medical facility under the provisions of this section and dies at any time before being returned to a breeding facility will be treated as a mortality within the originating facility for the purposes of the requirements of Subchapter B of this chapter.

(g) Marking of vehicles and trailers. No person may possess, transport, or cause the transportation of breeder deer in a trailer or vehicle under the provisions of this subchapter unless the trailer or vehicle exhibits an applicable inscription, as specified in this subsection, on the rear surface of the trailer or vehicle. The inscription shall read from left to right and shall be plainly visible at all times while possessing or transporting breeder deer upon a public roadway. The inscription shall be attached to or painted on the trailer or vehicle in block, capital letters, each of which shall be of no less than six inches in height and three inches in width, in a color that contrasts with the color of the trailer or vehicle. If the person is not a deer breeder, the inscription shall be "TXD". If the person is a deer breeder, the inscription shall be the deer breeder serial number issued to the person.

§65.611. Prohibited Acts.

(a) Deer obtained from the wild under the authority of a permit or letter of authority issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter C, E, or R shall not be commingled with deer held in a permitted deer breeding facility.

(b) A person commits an offense if that person places or holds breeder deer in captivity at any place or in any facility for which the herd inventory on file with the department does not account for those breeder deer, except for fawn breeder deer that are not yet required to be reported to the department.

(c) No breeder deer shall be held in a trailer or other vehicle of any type except for the purpose of immediate transportation from one location to another.

(d) Except as expressly authorized in writing by the department, no person may possess a breeder deer in a nursing facility beyond 120 days following the deer's birth.

(e) No person may hold more than one cervid species at any time in a deer breeding facility except as provided by §65.602(e) of this title (relating to Application and Permit Issuance), or cause or allow the interbreeding by any means of white-tailed deer and mule deer.

(f) Possession of a deer breeder's permit is not a defense to prosecution under any statute prohibiting abuse of animals.

(g) No deer breeder shall exceed the number of breeder deer allowable for the permitted facility, as specified by the department on the deer breeder's permit.

(h) This subsection does not apply to breeder deer lawfully obtained prior to June 21, 2005. Except as provided in this subsection, no person may:

(1) possess a deer acquired from an out-of-state source; or

(2) import or attempt to import deer from an out-of-state source.

(i) It is an offense for any person the department has authorized as a facility inspector to submit the checklist or letter of endorsement required by §65.603(a)(2) of this title (relating to Application and Permit Issuance) if the person has not personally conducted an onsite inspection at the facility.

(j) It is an offense for any person to violate or fail to comply with the provisions a disease-testing plan created under the provisions of §65.605(d) of this subsection.

(k) No person may clone or authorize or participate in the cloning of a white-tailed deer or mule deer unless specifically authorized to do so by a permit issued by the department under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter C. For the purposes of this subsection, cloning is the creation or attempted creation of a white-tailed or mule deer from a single progenitor cell.

(l) Except as provided under §65.602(e) of this title, no person may possess deer, livestock, exotic livestock, or similar animals in a deer breeding facility, or allow deer, livestock, exotic livestock, or similar animals to access a deer breeding facility other than:

(1) the deer identified in the reconciled herd inventory for the facility; and

(2) offspring that are not required to be identified and reported to the department under the provisions of Parks and Wildlife Code, Chapter 43, Subchapter L.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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James Murphy

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



31 TAC §65.604

The repeal is adopted under the authority of Parks and Wildlife Code, Chapter 43, Subchapter L, which authorizes the commission to make regulations governing the possession, transfer, purchase, and sale of breeder deer held under the authority of the subchapter; and §61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 20. STATEWIDE PROCUREMENT AND SUPPORT SERVICES

SUBCHAPTER A. GENERAL PROVISIONS

DIVISION 2. DEFINITIONS

34 TAC §20.25

The Comptroller of Public Accounts adopts amendments to 34 TAC §20.25, concerning definitions, without changes to the proposed text as published in the January 8, 2021, issue of the *Texas Register* (46 TexReg 289). The rule will not be republished.

These amendments are to clarify the procurement rules in Chapter 20. The purpose of including definitions in §20.25 is to define terms used in Chapter 20. The amendments change references in subsections (a) and (b) from "this section" to "this chapter." These changes will ensure the uniform application of the definitions throughout Chapter 20.

No comments were received regarding adoption of the amendment.

These amendments are adopted under Government Code, §2155.0012, which authorizes the comptroller by rule to efficiently and effectively administer state purchasing of goods and services.

These amendments implement Government Code, §§2151.003, 2155.001 and 2155.0011, which outline the general procurement responsibility of the comptroller.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Don Neal

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Comptroller of Public Accounts

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For further information, please call: (512) 475-0387



SUBCHAPTER B. PUBLIC PROCUREMENT AUTHORITY AND ORGANIZATION

DIVISION 1. PRIMARY AND DELEGATED PROCUREMENT AUTHORITY

34 TAC §20.81

The Comptroller of Public Accounts adopts an amendment to §20.81, concerning general purchasing provisions, without changes to the proposed text as published in the January 8, 2021, issue of the *Texas Register* (46 TexReg 292). The rule will not be republished.

This rule is found in Chapter 20 (Statewide Procurement and Support Services), Subchapter B (Public Procurement Authority and Organization), Division 1 (Primary and Delegated Procurement Authority).

The amendment adds new subsection (d), which describes the authority of the comptroller related to purchasing by state agencies. New subsection (d) restates the limitation on the comptroller's authority in Government Code, §2155.140. Specifically, the comptroller's authority does not apply to purchases from a gift or grant in support of research.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Government Code, §2155.0012, which authorizes the comptroller by rule to efficiently and effectively administer state purchasing of goods and services.

The amendment implements Government Code, §§2151.003, 2155.001 and 2155.0011, which outline the general procurement responsibility of the comptroller.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 3. CONTRACT MANAGEMENT GUIDE AND TRAINING

34 TAC §20.133

The Comptroller of Public Accounts adopts amendments to §20.133, concerning training and certification program, without changes to the proposed text as published in the January 8, 2021, issue of the *Texas Register* (46 TexReg 293). The rule will not be republished. This rule is found in Chapter 20 (Statewide Procurement and Support Services), Subchapter B (Public Procurement Authority and Organization), Division 3 (Contract Management Guide and Training).

This amendment corrects an inconsistency. Subsection (i) states that a procurement professional must obtain 24 hours of continuing education every three years; in contrast, subsection (j)(3) refers to 12 hours of required continuing education. These amendments make it clear that a procurement professional must obtain 24 hours of continuing education every three years.

No comments were received regarding adoption of the amendment.

These amendments are adopted under Government Code, §656.051.

These amendments implement Government Code, §§656.051, 656.052, and 656.054 which provides the comptroller with the authority to adopt rules relating to the administration of the training and certification of state agency purchasing and contract management personnel.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. SPECIAL CATEGORIES OF CONTRACTING

DIVISION 4. UNIFORM GRANT AND CONTRACT STANDARDS

34 TAC §§20.456 - 20.467

The Comptroller of Public Accounts adopts the repeal of §§20.456 - 20.467, concerning Uniform Grants and Contract Management, without changes to the proposed text as published in the January 8, 2021, issue of the *Texas Register* (46 TexReg 295). The rules will not be republished. This repeals Chapter 20, Subchapter E, Division 4 in its entirety.

The comptroller repeals these sections because the new Texas Grant Management Standards include updated guidance on these issues and supersede the guidance currently in rule. Government Code, Chapter 783 requires the comptroller to establish uniform assurances and standard financial management conditions for certain grants. However, no statute requires or expressly authorizes the comptroller to adopt that guidance as rules.

No comments were received regarding adoption of the amendment.

The repeals are adopted under Government Code, §403.011, which outlines the general powers of the comptroller, and §783.004, which designates the comptroller as the state agency for uniform grant and contract management.

The repeals affect Government Code, §§783.001 - 783.010.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 1. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER F. TESTIMONY

37 TAC §1.92

The Texas Department of Public Safety (the department) adopts new §1.92, concerning Reimbursement of Witnesses at Public Safety Commission Hearings. This rule is adopted without changes to the proposed text as published in the December 25, 2020, issue of the *Texas Register* (45 TexReg 9391). The rule will not be republished.

New §1.92 was simultaneously proposed with the repeal of §29.201, concerning Reimbursement of Witnesses at Public Safety Commission Hearings to move this section to a more appropriate chapter and subchapter of the department's rules.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and §411.007(f).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 15. DRIVER LICENSE RULES
SUBCHAPTER B. APPLICATION
REQUIREMENTS--ORIGINAL, RENEWAL,
DUPLICATE, IDENTIFICATION CERTIFICATES

37 TAC §15.29

The Texas Department of Public Safety (the department) adopts new §15.29, concerning Alternative Methods for Driver License Transactions. This rule is adopted without changes to the proposed text as published in the December 25, 2020, issue of the *Texas Register* (45 TexReg 9392) The rule will not be republished.

Driver License System (DLS) upgrades underway include programming to allow learner license holders to submit proof of completion of requirements to obtain a provisional license through Texas.gov. This will also allow these applicants to obtain duplicates and change their address without visiting a driver license office, reducing the number of times teen license holders must return to the driver license office. Other changes clarify language and requirements for alternative transactions that will include renewals for commercial driver license holders conforming to recent Federal Motor Carrier Safety Administration (FMCSA) rule changes. The new rule is necessary to move the issuance related information from repealed §15.59 into Subchapter B and clarify that learner, provisional and commercial driver license holders may perform transactions through alternative methods.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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37 TAC §15.34

The Texas Department of Public Safety (the department) adopts amendments to §15.34, concerning Renewal Period Prior to Expiration. This rule is adopted without changes to the proposed text as published in the December 25, 2020, issue of the *Texas Register* (45 TexReg 9393). The rule will not be republished.

Minors who are eligible to apply for a provisional license may do so sixty (60) days prior to their 18th birthday. The current rule

limits the applicant to a thirty day window for that transaction. The Driver License System (DLS) is programmed to allow the application sixty (60) days prior to their 18th birthday.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. EXAMINATION
REQUIREMENTS

37 TAC §15.59

The Texas Department of Public Safety (the department) adopts the repeal of §15.59 concerning Alternative Methods for Driver License Transactions. This repeal is adopted without changes to the proposed text as published in the December 25, 2020, issue of the *Texas Register* (45 TexReg 9394). The rule will not be republished.

This repeal is necessary to move the issuance related information in current §15.59 to new proposed §15.29 in Subchapter B and incorporate the exam related information from §15.59 into §15.62, concerning Additional Requirements in Subchapter C. These proposed simultaneous changes will replace §15.59.

No comments were received regarding the adoption of this repeal.

This repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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37 TAC 15.62

The Texas Department of Public Safety (the department) adopts amendments to §15.62, concerning Additional Requirements. This rule is adopted without changes to the proposed text as published in the December 25, 2020 issue of the *Texas Register* (45 TexReg 9394). The rule will not be republished.

The Impact Texas Drivers (ITD) program includes components for teens and young adults. The current rule references an adult component that is not being pursued and has been replaced by the teen component of the program. This amendment also adds examination related information from §15.59 that is being repealed.

No comments were received regarding the adoption of this rule.

This rule is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521 of the Texas Transportation Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 29. PRACTICE AND PROCEDURE

37 TAC §§29.1 - 29.3, 29.5, 29.21, 29.24, 29.27, 29.29, 29.30, 29.32, 29.33

The Texas Department of Public Safety (the department) adopts amendments to §§29.1 - 29.3, 29.5, 29.21, 29.24, 29.27, 29.29, 29.30, 29.32, 29.33, concerning Practice and Procedure. These rules are adopted without changes to the proposed text as published in the December 25, 2020, issue of the *Texas Register* (45 TexReg 9395). The rules will not be republished.

These amendments are necessary to implement Senate Bill 616 enacted by the 86th Legislature, specifically changes regarding procedures for contested cases.

No comments were received regarding the adoption of these rules.

These rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and §2001.004 which authorizes state agencies to adopt rules of practice concerning contested cases.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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37 TAC 29.4, 29.6 - 29.10, 29.12 - 29.19, 29.22, 29.23, 29.25, 29.26, 29.28, 29.34, 29.201

The Texas Department of Public Safety (the department) adopts the repeal of §§29.4, 29.6 - 29.10, 29.12 - 29.19, 29.22, 29.23, 29.25, 29.26, 29.28, 29.34, and 29.201, concerning Practice and Procedure. These repeals are adopted without changes to the proposed text as published in the December 25, 2020, issue of the *Texas Register* (45 TexReg 9398). The rules will not be republished.

These repeals are necessary to remove department procedural rules currently addressed by Texas Government Code, Chapter 2001, the Texas Rules of Civil Procedure or the administrative rules of the State Office of Administrative Hearings.

No comments were received regarding the adoption of this repeal.

This repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Government Code, §2001.004 which authorizes state agencies to adopt rules of practice concerning contested cases.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 38. FUSION CENTER OPERATIONS

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §§38.1 - 38.3

The Texas Department of Public Safety (the department) adopts new §§38.1 - 38.3, concerning General Provisions. These rules are adopted without changes to the proposed text as published in the December 25, 2020, issue of the *Texas Register* (45 TexReg 9399). The rules will not be republished.

Section 421.084(a) of the Texas Government Code directs the department to adopt rules to govern the operations of fusion centers in this state, including the establishment of a common concept of operations to provide baseline standards to protect privacy, civil rights, civil liberties and promote consistency and interoperability between the fusion centers in the state. Sections 38.1, 38.2 and 38.3 define terms related to the operation of fusion centers, and provide a common concept for operations for fusion centers, including a required annual capabilities assessment.

No comments were received regarding the adoption of these rules.

These rules are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to

adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §421.084, which authorizes the department to adopt rules to govern the operations of the fusion centers in this state.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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D. Phillip Adkins

General Counsel

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