ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 8. ADVISORY OPINIONS

1 TAC §§8.1, 8.3, 8.5, 8.7, 8.11, 8.13, 8.15, 8.17 - 8.19

The Texas Ethics Commission (the Commission) adopts amendments to Texas Ethics Commission rules in Chapter 8. Specifically, the Commission adopts amendments to §8.1, regarding Definitions, §8.3, regarding Subject of an Advisory Opinion, §8.5, regarding Persons Eligible To Receive an Advisory Opinion; §8.7, regarding Request for an Advisory Opinion, §8.11, regarding Review and Processing of a Request, §8.13 regarding Time Period, §8.15, regarding Publication in *Texas Register;* Comments, §8.17, regarding Letter Response, and §8.19, regarding Confidentiality, and adopts new §8.18, regarding No Defense to Prosecution or Civil Penalty. The amendments are adopted without changes to the proposed text as published in the May 1, 2020, issue of the *Texas Register* (45 TexReg 2777). The rules will not be republished.

Section 571.091 of the Government Code requires the Commission to "prepare a written opinion answering the request of a person subject to [certain identified] laws for an opinion about the application of any of these laws to the person in regard to a specified existing or hypothetical factual situation." The Commission is also required to "issue an advisory opinion not later than the 60th day after the date the commission receives the request." By Commission vote, the 60-day deadline can be extended twice by 30 days.

Section 571.097 of the Government Code provides a defense to prosecution or to the imposition of a civil penalty that the person reasonably relied on a written advisory opinion relating the provision of the law the person is alleged to have violated or relating to a fact situation that is substantially similar to the fact situation in which the person is involved. Thus, an advisory opinion provides a useful function for the regulated community by providing assurance that a certain action is permissible. In 2019, the legislature passed Senate Bill 548, amending section 571.097 to state that a requestor of an opinion will have a similar defense if the requestor submits a written advisory opinion and the Commission does not issue an opinion within the 60-day period required by section 571.092. The defense applies only to acts giving rise to a potential violation of law occurring in the period beginning on the date the deadline passes and ending on the date the Commission issues the requested opinion. Thus, if a person requests an opinion and the Commission does not issue an opinion within the required 60-day period, or within the extended time period if the Commission votes to extend by 30 or 60 days, then the requestor has an absolute defense. The amendment is effective on September 1, 2019.

The passage of Senate Bill 548 prompted Commission staff to review the existing procedural rules for advisory opinions. Staff's primary concern is that a person who submits a request for an advisory opinion would have a defense to prosecution if the Commission does not meet in time to meet the 60-day deadline, or if the Commission meets to consider a draft opinion but does not adopt an opinion because of insufficient votes. At the November meeting, some of the commissioners expressed support for a rule that would automatically extend the 60-day deadline by another 60 days. The draft rules that are prepared for this agenda item include a rule (§8.13(b)) that would enact automatic extensions and numerous additional changes to clarify the advisory opinion process for both requestors and staff.

No public comments were received on these amended rules.

The amended and new rules are adopted under Texas Government Code §571.062, which authorizes the commission to adopt rules to administer Chapter 571 of the Government Code.

The adopted amendments and new rule affect Subchapter D of Chapter 571 of the Government 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.

Filed with the Office of the Secretary of State on June 23, 2020.

TRD-202002505
J.R. Johnson
General Counsel
Texas Ethics Commission
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For further information, please call: (512) 463-5800

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CHAPTER 12. SWORN COMPLAINTS
SUBCHAPTER A. GENERAL PROVISIONS AND PROCEDURES

1 TAC §12.29, §12.30

The Texas Ethics Commission (the Commission) adopts amendments to Texas Ethics Commission rules in Chapter 12. Specifically, the Commission amends §12.29, regarding Subpoenas Issued by Commission, and adds new §12.30, regarding Subpoenas Issued by Counsel for the Respondent. The amendment and new rule are adopted without changes to the proposed text as published in the May 1, 2020, issue of the *Texas Register* (45 TexReg 2779). The rules will not be republished.

Section 571.137 of the Government Code authorizes the Commission to issue subpoenas in connection with a preliminary review (on application by Commission staff) or a formal hearing. The 2019 regular legislative session passed Senate Bill 548, which amended Tex. Gov't Code §571.125 and 571.130, regarding subpoenas in the Preliminary Review and Formal Hearing processes.

In response to the bill, Commission staff considered the need for any rules to clarify such subpoenas. Staff have expressed concerns about subpoenas being issued without receiving any notice. To address that concern, staff drafted this rule that would require any subpoena and proof of service to be filed with the Commission within three days of service. The rule also includes an enforcement mechanism authorizing the Commission's presiding officer to essentially sanction a respondent for noncompliance by excluding evidence obtained with the subpoena.

The statute specifically authorizes a respondent's counsel to "subpoena a witness to a hearing in the same manner as an attorney may issue a subpoena in a proceeding in a county or district court." This appears, at the very least, to authorize a subpoena commanding a person to "attend and give testimony at a "hearing." It is not entirely clear whether this would authorize a subpoena to compel a person to produce documents or other tangible items at a hearing. The subpoena and discovery rules in the TRCP often use the term "witness" broadly to refer to a person served with or responding to a subpoena.

Senate Bill 548 applies only to a complaint filed on or after September 1, 2019.

No public comments were received on this amended rule.

The amended and new rule are adopted under Texas Government Code §571.062, which authorizes the commission to adopt rules to administer Title 15 of the Election Code.

The amended and new rule affect Title 15 of the Election 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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1 TAC §12.34

The Texas Ethics Commission (the Commission) adopts an amendment to Texas Ethics Commission rules in Chapter 12. Specifically, the Commission adds new §12.34, regarding Agreed Orders. The new rule is adopted without changes to the proposed text as published in the May 1, 2020, issue of the *Texas Register* (45 TexReg 2781). The rule will not be republished.

No public comments were received on this new rule.

The new rule is adopted under Texas Government Code §571.062, which authorizes the commission to adopt rules to administer Chapter 571 of the Government Code.

The adopted new rule affects Subchapter E of Chapter 571 of the Government 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 12. SWORN COMPLAINTS

The Texas Ethics Commission (the Commission) adopts amendments to Texas Ethics Commission rules in Chapter 12. Specifically, the Commission amends §12.83, regarding Preliminary Review, and §12.84, regarding Notice of Preliminary Review Hearing. The amendments are adopted without changes to the proposed text as published in the May 1, 2020, issue of the *Texas Register* (45 TexReg 2782). The rules will not be republished.

These amended rules address the Commission's sworn complaint procedures in response to Senate Bill 548 (SB 548), enacted in the 2019 legislative session. Section 571.1242, Texas Government Code, as amended by SB 548, requires the Commission to either propose an agreement to settle a complaint or dismiss the complaint within 120 days after receiving the respondent's response to a notice of a complaint or the respondent's response to written questions, whichever is later. Section 571.1242 also requires the Commission to set a complaint for a preliminary review hearing "at the next [C]ommission meeting for which notice has not yet been posted" if a respondent rejects a proposed settlement during preliminary review.

The bill repealed the previous requirement that the Commission set a complaint for a preliminary review hearing if it is not resolved within 30 or 75 business days, depending on the category of the alleged violations in the complaint, of the respondent receiving the notice of the complaint. The amended rules are intended to clarify how these new requirements apply.

No public comments were received on these amended rules.

SUBCHAPTER C. INVESTIGATION AND PRELIMINARY REVIEW

1 TAC §12.83

The amended rule is adopted under Texas Government Code §571.062, which authorizes the commission to adopt rules to administer Chapter 571 of the Government Code.

The amended rule affects Subchapter E of Chapter 571 of the Government 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 D. PRELIMINARY REVIEW HEARING

1 TAC §12.84

The amended rule is adopted under Texas Government Code §571.062, which authorizes the commission to adopt rules to administer Chapter 571 of the Government Code.

The amended rule affects Subchapter E of Chapter 571 of the Government 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 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES

SUBCHAPTER A. GENERAL RULES

1 TAC §20.1

The Texas Ethics Commission (the Commission) adopts an amendment to Texas Ethics Commission rules in Chapter 20. Specifically, the Commission amends §20.1, regarding Definitions. The amendment is adopted without changes to the proposed text as published in the May 1, 2020, issue of the *Texas Register* (45 TexReg 2784). The rule will not be republished.

House Bill 2586 from the 86th legislative session, which went into effect on September 1, 2019, allows, under certain circumstances, "hybrid" political committees to accept corporate or labor organization contributions to fund direct campaign expenditures.

The rule amendments address "hybrid" and "direct campaign expenditure-only" committees, which are concepts introduced by the new legislation. To simplify the rules, definitions for each type of committee would be helpful. The definitions of "hybrid committee" and "direct campaign expenditure-only committee" merely copy the statutory language that describes these types of committees.

The adopted amendment rule should be read in conjunction with an amendment to Texas Ethics Commission rule §24.18 and new rules §22.35 and §24.19, which are adopted contemporaneously with this amendment.

No public comments were received on this amended rule.

The amended rule is adopted under Texas Government Code Section 571.062, which authorizes the Commission to adopt rules to administer Title 15 of the Election Code.

The amended rule affects Title 15 of the Election 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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J.R. Johnson
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CHAPTER 22. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

1 TAC §22.35

The Texas Ethics Commission (the Commission) adopts an amendment to Texas Ethics Commission rules in Chapter 22. Specifically, the Commission adds new §22.35, regarding Corporate Contributions to Certain Political Committees. The amendment is adopted without changes to the proposed text as published in the May 1, 2020, issue of the *Texas Register* (45 TexReg 2785). The rule will not be republished.

HB 2586 allows for the creation of what is referred to in campaign finance law as a hybrid political action committee, which may accept unlimited contributions from corporations and labor organizations to make direct campaign expenditures (i.e. independent expenditures), while using other non-corporate contributions to contribute to candidates.

Adopted rule 22.35 requires hybrid PACs, direct campaign expenditure-only committees, and general-purpose committees that accept contributions for administrative or solicitation expenses, to keep corporate or labor organization contributions in a separate account, to ensure that corporate contributions given to political committees, including hybrid PACs, are not given to candidates, officeholders, or their specific-purpose committees. The adopted rule also clarifies that corporate and labor organization contributions generally may not be used to make a political contribution.

This new rule should be read in conjunction with new Ethics Commission rule §24.19 and amendments to Ethics Commission rules §20.1 and §24.18, which are adopted contemporaneously with this new rule.

No public comments were received on this amended rule.

The amended rule is adopted under Texas Government Code §571.062, which authorizes the commission to adopt rules to administer Chapter 571 of the Government Code.

The adopted new rule affects Title 15 of the Election 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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J.R. Johnson
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CHAPTER 24. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES APPLICABLE TO CORPORATIONS AND LABOR ORGANIZATIONS

1 TAC §24.18, §24.19

The Texas Ethics Commission (the Commission) adopts amendments to Texas Ethics Commission rules in Chapter 24. Specifically, the Commission amends §24.18, regarding Designation of Contribution for Administrative Purposes, and adds new §24.19, regarding Affidavit Required by a Political Committee Making a Direct Campaign Expenditure from a Political Contribution Accepted from a Corporation or Labor Organization. The amendment and new rule are adopted without changes to the proposed text as published in the May 1, 2020, issue of the *Texas Register* (45 TexReg 2785). The rules will not be republished.

HB 2586 allows for the creation of what is referred to in campaign finance law as a hybrid political action committee, which may accept unlimited contributions from corporations and labor organizations to make direct campaign expenditures (i.e. independent expenditures), while using other non-corporate contributions to contribute to candidates.

The amendment to Ethics Commission rule §24.18 creates a presumption in most cases that corporate money given to a political committee is deemed designated "as restricted to the establishment, administration, maintenance, or operation of a general-purpose committee." The amendment exempts hybrid PACs from this rule so that hybrid PACs may also use corporate contributions to fund direct campaign expenditures, as allowed by HB 2586. The amendment also adds a presumption that a corporate contribution to a political committee is deemed designated for permissible administrative purposes if it is deposited in a separate segregated account.

New Ethics Commission rule §24.19 is added primarily for clarity. It restates the new statutory requirement that the affidavit must be included in a political committee's campaign treasurer appointment before using a political contribution from a corporation or labor organization to make a direct campaign expenditure in connection with a campaign for an elective office. The second sentence is the substance of the rule, which states that the requirement to file a "Hybrid PAC affidavit" also applies to a direct campaign expenditure only committee.

The adopted amendment and new rule should be read in conjunction with an amendment to Ethics Commission rule §20.1 and new rule §22.35, which are adopted contemporaneously with this amendment and new rule.

No public comments were received on this amended and new rule.

The amended and new rule are adopted under Texas Government Code §571.062, which authorizes the commission to adopt rules to administer Title 15 of the Election Code.

The amended and new rule affect Title 15 of the Election 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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J.R. Johnson
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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 11. TEXAS HEALTHCARE TRANSFORMATION AND QUALITY IMPROVEMENT PROGRAM REIMBURSEMENT

1 TAC §355.8201

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.8201, concerning Waiver Payments to Hospitals for Uncompensated Care.

The amendment is adopted with changes to the proposed text as published in the April 10, 2020, issue of the *Texas Register* (45 TexReg 2381). The text of the rule will be republished.

BACKGROUND AND JUSTIFICATION

The rule amendment describes the methodology HHSC will use to calculate and distribute unspent Uncompensated Care (UC) payments for program years 2014 through 2017.

The hospital specific limit (HSL) is a limit on the amount of payments a hospital may receive for care to Medicaid and low-income uninsured patients. In Texas during the program years at issue, two types of HSLs existed for hospitals that participated in the Disproportionate Share Hospital (DSH) and UC programs: an interim HSL and a final HSL. The interim HSL is defined by HHSC and the final HSL is described in federal law. The interim

HSL is calculated in the payment year for DSH and UC to determine payment amounts using historical Medicaid and uninsured data. The final HSL is calculated two years after the payment year using actual data to determine whether hospitals were overpaid.

The final HSL has been the subject of ongoing federal litigation for several years. In 2010, the Centers for Medicare & Medicaid Services (CMS) promulgated a series of Frequently Asked Questions (FAQs) relating to the calculation of the final HSL. FAQ 33 stated that, when calculating the HSL, full payments from commercial insurers should offset the costs of providing care to Medicaid beneficiaries who also had commercial insurance. In December 2014, Texas Children's Hospital sued CMS to stop enforcement of FAQ 33. The court issued a temporary injunction preventing CMS from enforcing that FAQ.

Because of the uncertainty resulting from the litigation, HHSC agreed to refrain from paying 5 percent of UC payments and 3.5 percent of DSH payments annually until the issues underlying the lawsuit were resolved. That practice remained in effect for each program year between 2014 and 2017. During that time, HHSC withheld approximately $646.2 million in UC payments.

Upper Payment Limit Obligation

In December 2011, HHSC received federal approval for an 1115 demonstration waiver that would allow HHSC to expand Medicaid managed care statewide and preserve supplemental Medicaid funding received under the Upper Payment Limit (UPL) program. Under the 1115 waiver, HHSC established the Delivery System Reform Incentive Payment (DSRIP) and UC funding pools.

The 1115 waiver approval required supplemental payments made during the first demonstration year of the waiver to be included in the UC pool cap. CMS determined that HHSC did not include UPL supplemental payments made in November 2011 and December 2011 (prior to the 1115 waiver approval) and, as such, this resulted in an overpayment in UC pool funding for the first demonstration year. CMS determined the total overpayment, known as the "UPL obligation," is approximately $480.8 million, and that the obligation must be offset against the UC pool for the first five demonstration years of the waiver.

HHSC proposed multiple methodologies and sought stakeholder input to determine the most appropriate method to pay the remaining UPL obligation and to distribute the unspent UC funds for program years 2014 through 2017. Through this rule, HHSC is implementing one methodology discussed by HHSC and stakeholders. HHSC will use the $646.2 million in unspent UC funds to offset the remaining UPL obligation and distribute the remaining unspent UC funds.

The methodology HHSC will use to distribute the unspent UC payments is described below.

Methodology for Dispensing Unspent UC Payments

The amendment to §355.8201 describes the methodology HHSC will use to calculate and distribute payments to hospitals made after July 31, 2020, using the unspent funds for UC program years 2014 through 2017. The amendment also details the basis for each hospital's payment allocation.

First, HHSC will apply the unspent UC funds from program years 2014 through 2017 to the remaining UPL obligation. After accounting for the UPL obligation, HHSC will then calculate the remaining amount of unspent UC funds available for each program year.

The remaining unspent funds will be allocated based on each hospital's relative share of payments that are from a third-party payor for a Medicaid-enrolled patient and associated with third-party coverage as defined in §355.8066. Each hospital's payment allocation will be based on 100 percent of the hospital's payments associated with third-party coverage, except for children's hospitals, whose payment allocation will be based on 150 percent of their payments associated with third-party coverage. State hospitals, physician group practices, and ambulance and dental providers will not receive payments under the proposed methodology, as the CMS litigation and UPL debt repayment most significantly affected the initial UC payments to non-state hospitals.

HHSC will allocate a hospital's payment by multiplying the appropriate payment allocation percentage by the amount of payments that are from third-party payors for Medicaid patients received by the hospital in the data year of the corresponding UC program year. HHSC will then divide the payment amount by the total amount of payments from third-party payors for Medicaid patients received by all participating hospitals in the data year of the corresponding UC program year, and then multiply the amount by the remaining unspent UC funds available for the program year. Each hospital's payment will be limited to the actual costs incurred by that hospital calculated for the UC reconciliation for that program year.

COMMENTS

The 31-day comment period ended May 11, 2020.

During this period, HHSC received comments regarding the proposed rule from five commenters: Children's Hospital Association of Texas, CHRISTUS Health, Sensible Care EMS Ambulance Service, Tenet Healthcare, and Texas Children's Hospital.

A summary of comments relating to the rule and HHSC's responses to the comments follow.

Comment: Most commenters support the proposed rule amendment. Specifically, commenters expressed support for the proposed methodology of applying the unspent UC funds to the outstanding UPL obligation and the proposed methodology of distributing the remaining unspent UC funds.

Response: HHSC appreciates the comments in support of the proposal. No changes were made in response to the comments.

Comment: One commenter proposed HHSC include Emergency Medical Services Ambulance providers because they have suffered an increased cost of caring for the uninsured.

Response: While governmental ambulance providers are eligible to participate in UC, HHSC excluded governmental ambulance providers, as well as state hospitals, physician group practices, and dental providers, from the proposed methodology because the CMS litigation and UPL debt repayment most significantly affected the initial UC payments to non-state hospitals. No changes were made in response to this comment.

Comment: One commenter recommended HHSC amend the secondary reconciliation provision of the rule because the current provision requires a different and more restrictive methodology to be used to calculate the final HSL than was used to calculate the adjusted interim HSL.

Response: HHSC understands the commenter's concern but declines to make the suggested change because the comment is outside the scope of the proposed amendment. HHSC will take the comment into consideration for a future rule amendment. No changes were made in response to this comment.

Comment: One commenter requested HHSC amend the new language in §355.8201(g)(8)(A) relating to the methodology HHSC will use to calculate the unspent UC payments. The commenter proposed HHSC change the language to apply the proposed methodology to UC payments made after July 1, 2020. The commenter informed HHSC that the rule as proposed would impact a delayed UC payment owed to a provider for demonstration year (DY) 3, which the commenter did not believe was HHSC's intent.

Response: HHSC agrees with the commenter that a change is necessary. After the proposed rule was published, HHSC was made aware that the proposed language would impact the delayed DY 3 UC payment, which was not the intent. The delayed UC payment is separate from the withheld UC payments and thus should not be paid under the proposed methodology. By revising the rule to reflect the earliest distribution date of the withheld UC payments, HHSC will be able to make the delayed DY 3 UC payment prior to implementing the proposed methodology. HHSC has revised §355.8201(g)(8)(A) from the proposed version to change "January 1, 2020" to "July 31, 2020."

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; Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32.

§355.8201. Waiver Payments to Hospitals for Uncompensated Care.

(a) Introduction. Texas Healthcare Transformation and Quality Improvement Program §1115(a) Medicaid demonstration waiver payments are available under this section for services provided between October 1, 2017 and September 30, 2019, by eligible hospitals described in subsection (c) of this section. Waiver payments to hospitals for uncompensated charity care provided beginning October 1, 2019, are described in §355.8212 of this division (relating to Waiver Payments to Hospitals for Uncompensated Charity Care). Waiver payments to hospitals must be in compliance with the Centers for Medicare & Medicaid Services approved waiver Program Funding and Mechanics Protocol, HHSC waiver instructions and this section.

(b) Definitions.

(1) Affiliation agreement--An agreement, entered into between one or more privately-operated hospitals and a governmental entity that does not conflict with federal or state law. HHSC does not prescribe the form of the agreement.

(2) Aggregate limit--The amount of funds approved by the Centers for Medicare & Medicaid Services for uncompensated-care payments for the demonstration year that is allocated to each uncompensated-care provider pool, as described in subsection (f)(2) of this section.

(3) Anchor--The governmental entity identified by HHSC as having primary administrative responsibilities on behalf of a Regional Healthcare Partnership (RHP).

(4) Centers for Medicare & Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(5) Clinic--An outpatient health care facility, other than an Ambulatory Surgical Center or Hospital Ambulatory Surgical Center, that is owned and operated by a hospital but has a nine-digit Texas Provider Identifier (TPI) that is different from the hospital's nine-digit TPI.

(6) Data year--A 12-month period that is described in §355.8066 of this title (relating to Hospital-Specific Limit Methodology) and from which HHSC will compile cost and payment data to determine uncompensated-care payment amounts. This period corresponds to the Disproportionate Share Hospital data year.

(7) Delivery System Reform Incentive Payments (DSRIP)--Payments related to the development or implementation of a program of activity that supports a hospital's efforts to enhance access to health care, the quality of care, and the health of patients and families it serves. These payments are not considered patient-care revenue and are not offset against the hospital's costs when calculating the hospital-specific limit as described in §355.8066 of this title.

(8) Demonstration year--The 12-month period beginning October 1 for which the payments calculated under this section are made. This period corresponds to the Disproportionate Share Hospital program year.

(9) Disproportionate Share Hospital (DSH)--A hospital participating in the Texas Medicaid program that serves a disproportionate share of low-income patients and is eligible for additional reimbursement from the DSH fund.

(10) Governmental entity--A state agency or a political subdivision of the state. A governmental entity includes a hospital authority, hospital district, city, county, or state entity.

(11) HHSC--The Texas Health and Human Services Commission or its designee.

(12) Institution for mental diseases (IMD)--A hospital that is primarily engaged in providing psychiatric diagnosis, treatment, or care of individuals with mental illness.

(13) Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(14) Large public hospital--An urban public hospital - Class one as defined in §355.8065 of this title (relating to Disproportionate Share Hospital Reimbursement Methodology).

(15) Mid-Level Professional--Medical practitioners which include only these professions: Certified Registered Nurse Anesthetists, Nurse Practitioners, Physician Assistants, Dentists, Certified Nurse Midwives, Clinical Social Workers, Clinical Psychologists, and Optometrists.

(16) Private hospital--A hospital that is not a large public hospital as defined in paragraph (14) of this subsection, a small public hospital as defined in paragraph (21) of this subsection or a state-owned hospital.

(17) Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(18) Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform. Regional Healthcare Partnerships will support coordinated, efficient delivery of quality care and a plan for investments in system transformation that is driven by the needs of local hospitals, communities, and populations.

(19) RHP plan--A multi-year plan within which participants propose their portion of waiver funding and DSRIP projects.

(20) Rural hospital--A hospital enrolled as a Medicaid provider that is:

(A) located in a county with 60,000 or fewer persons according to the 2010 U.S. Census; or

(B) designated by Medicare as a Critical Access Hospital (CAH) or a Sole Community Hospital (SCH); or

(C) designated by Medicare as a Rural Referral Center (RRC) and is not located in a Metropolitan Statistical Area (MSA), as defined by the U.S. Office of Management and Budget, or is located in an MSA but has 100 or fewer beds.

(21) Small public hospital--An urban public hospital - Class two or a non-urban public hospital as defined in §355.8065 of this title.

(22) Transition payment--Payments available only during the first demonstration year to hospitals that previously participated in a supplemental payment program under the Texas Medicaid State Plan. For a hospital participating in the 2012 DSH program, the maximum amount a hospital may receive in transition payments is the lesser of:

(A) the hospital's 2012 DSH room; or

(B) the amount the hospital received in supplemental payments for claims adjudicated between October 1, 2010, and September 30, 2011.

(23) Uncompensated-care application--A form prescribed by HHSC to identify uncompensated costs for Medicaid-enrolled providers.

(24) Uncompensated-care payments--Payments intended to defray the uncompensated costs of services that meet the definition of "medical assistance" contained in §1905(a) of the Social Security Act that are provided by the hospital to Medicaid eligible or uninsured individuals.

(25) Uninsured patient--An individual who has no health insurance or other source of third-party coverage for services, as defined by CMS.

(26) Urban rural referral center--A hospital designated by Medicare as a Rural Referral Center (RRC) that is located in a Metropolitan Statistical Area (MSA), as defined by the U.S. Office of Management and Budget, and that has more than 100 beds.

(27) Waiver--The Texas Healthcare Transformation and Quality Improvement Program Medicaid demonstration waiver under §1115 of the Social Security Act.

(c) Eligibility. A hospital that meets the requirements described in this subsection may receive payments under this section.

(1) Generally. To be eligible for any payment under this section:

(A) a hospital must have a source of public funding for the non-federal share of waiver payments; and

(B) if it is a hospital not operated by a governmental entity, it must have filed with HHSC an affiliation agreement and the documents described in clauses (i) and (ii) of this subparagraph.

(i) The hospital must certify on a form prescribed by HHSC:

(I) that it is a privately-operated hospital;

(II) that no part of any payment to the hospital under this section will be returned or reimbursed to a governmental entity with which the hospital affiliates; and

(III) that no part of any payment under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the hospital's receipt of the supplemental funds.

(ii) The governmental entity that is party to the affiliation agreement must certify on a form prescribed by HHSC:

(I) that the governmental entity has not received and has no agreement to receive any portion of the payments made to any hospital that is party to the agreement;

(II) that the governmental entity has not entered into a contingent fee arrangement related to the governmental entity's participation in the waiver program;

(III) that the governmental entity adopted the conditions described in the certification form prescribed by or otherwise approved by HHSC pursuant to a vote of the governmental entity's governing body in a public meeting preceded by public notice published in accordance with the governmental entity's usual and customary practices or the Texas Open Meetings Act, as applicable; and

(IV) that all affiliation agreements, consulting agreements, or legal services agreements executed by the governmental entity related to its participation in this waiver payment program are available for public inspection upon request.

(iii) Submission requirements.

(I) Initial submissions. The parties must initially submit the affiliation agreements and certifications described in this subsection to the HHSC Rate Analysis Department on the earlier of the following occurrences after the documents are executed:

(-a-) The date the hospital submits the uncompensated-care application that is further described in paragraph (2) of this subsection; or

(-b-) Thirty days before the projected deadline for completing the IGT for the first payment under the affiliation agreement. The projected deadline for completing the IGT is posted on HHSC Rate Analysis' website for each payment under this section.

(II) Subsequent submissions. The parties must submit revised documentation as follows:

(-a-) When the nature of the affiliation changes or parties to the agreement are added or removed, the parties must submit the revised affiliation agreement and related hospital and governmental entity certifications.

(-b-) When there are changes in ownership, operation, or provider identifiers, the hospital must submit a revised hospital certification.

(-c-) The parties must submit the revised documentation thirty days before the projected deadline for completing the IGT for the first payment under the revised affiliation agreement. The projected deadline for completing the IGT is posted on HHSC Rate Analysis' website for each payment under this section.

(III) A hospital that submits new or revised documentation under subclause (I) or (II) of this clause must notify the Anchor of the RHP in which the hospital participates.

(IV) The certification forms must not be modified except for those changes approved by HHSC prior to submission.

(-a-) Within 10 business days of HHSC Rate Analysis receiving a request for approval of proposed modifications, HHSC will approve, reject, or suggest changes to the proposed certification forms.

(-b-) A request for HHSC approval of proposed modifications to the certification forms will not delay the submission deadlines established in this clause.

(V) A hospital that fails to submit the required documentation in compliance with this subparagraph will not receive a payment under this section.

(2) Uncompensated-care payments. For a hospital to be eligible to receive uncompensated-care payments, in addition to the requirements in paragraph (1) of this subsection, the hospital must:

(A) submit to HHSC an uncompensated-care application for the demonstration year, as is more fully described in subsection (g)(1) of this section, by the deadline specified by HHSC;

(B) submit to HHSC documentation of:

(i) its participation in an RHP; or

(ii) approval from CMS of its eligibility for uncompensated-care payments without participation in an RHP;

(C) be actively enrolled as a Medicaid provider in the State of Texas at the beginning of the demonstration year; and

(D) have submitted, and be eligible to receive payment for, a Medicaid fee-for-service or managed-care inpatient or outpatient claim for payment during the demonstration year.

(3) Changes that may affect eligibility for uncompensated-care payments.

(A) If a hospital closes, loses its license, loses its Medicare or Medicaid eligibility, withdraws from participation in an RHP, or files bankruptcy before receiving all or a portion of the uncompensated-care payments for a demonstration year, HHSC will determine the hospital's eligibility to receive payments going forward on a case-by-case basis. In making the determination, HHSC will consider multiple factors including whether the hospital was in compliance with all requirements during the demonstration year and whether it can satisfy the requirement to cooperate in the reconciliation process as described in subsection (i) of this section.

(B) A hospital must notify HHSC Rate Analysis Department in writing within 30 days of the filing of bankruptcy or of changes in ownership, operation, licensure, Medicare or Medicaid enrollment, or affiliation that may affect the hospital's continued eligibility for payments under this section.

(d) Source of funding. The non-federal share of funding for payments under this section is limited to timely receipt by HHSC of public funds from a governmental entity.

(e) Payment frequency. HHSC will distribute waiver payments on a schedule to be determined by HHSC and posted on HHSC's website.

(f) Funding limitations.

(1) Payments made under this section are limited by the maximum aggregate amount of funds allocated to the provider's uncompensated-care pool for the demonstration year. If payments for uncompensated care for an uncompensated-care pool attributable to a demonstration year are expected to exceed the aggregate amount of funds allocated to that pool by HHSC for that demonstration year, HHSC will reduce payments to providers in the pool as described in subsection (g)(5) of this section.

(2) HHSC will establish the following seven uncompensated-care pools: a state-owned hospital pool; a large public hospital pool; a small public hospital pool; a private hospital pool; a physician group practice pool; a governmental ambulance provider pool; and a publicly owned dental provider pool as follows:

(A) The state-owned hospital pool.

(i) The state-owned hospital pool funds uncompensated-care payments to state-owned teaching hospitals, state-owned IMDs and state chest hospitals.

(ii) HHSC will determine the allocation for this pool at an amount less than or equal to the total annual maximum uncompensated-care payment amount for these hospitals as calculated in subsection (g)(2) of this section.

(B) Set-aside amounts. HHSC will determine set-aside amounts as follows:

(i) For small public hospitals:

(I) that are also rural hospitals:

(-a-) Divide the amount of funds approved by CMS for uncompensated-care payments for the demonstration year by the amount of funds approved by CMS for uncompensated-care payments for the 2013 demonstration year and round the result to four decimal places.

(-b-) Determine the small rural public hospital set-aside amount by multiplying the value from item (-a-) of this subclause by the sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all small rural public hospitals that are eligible to receive uncompensated-care payments under this section and that meet the definition of a small public hospital from subsection (b)(21) of this section. Truncate the resulting value to zero decimal places.

(II) that are also urban RRCs, for DY 7 only, determine the small public urban RRC set-aside amount by multiplying by 54% the sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all small public urban RRCs that are eligible to receive uncompensated-care payments under this section and that meet the definition of an urban RRC from subsection (b)(26) of this section. Truncate the resulting value to zero decimal places.

(ii) For private hospitals:

(I) that are also rural hospitals:

(-a-) Divide the amount of funds approved by CMS for uncompensated-care payments for the demonstration year by the amount of funds approved by CMS for uncompensated-care payments for the 2013 demonstration year and round the result to four decimal places.

(-b-) Determine the private rural hospital set-aside amount by multiplying the value from item (-a-) of this sub-

clause by the sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all private rural hospitals that are eligible to receive uncompensated-care payments under this section and that meet the definition of a small public hospital from subsection (b)(21) of this section. Truncate the resulting value to zero decimal places.

(II) that are also urban RRCs, for DY 7 only, determine the private urban RRC set-aside amount by multiplying by 54% the sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all private urban RRCs that are eligible to receive uncompensated-care payments under this section and that meet the definition of an urban RRC from subsection (b)(26) of this section. Truncate the resulting value to zero decimal places.

(iii) Determine the total set-aside amount by summing the results of subclauses (i)(I), (i)(II), (ii)(I), and (ii)(II) of this subparagraph.

(C) Non-state-owned provider pools. HHSC will allocate the remaining available uncompensated-care funds, if any, and the set-aside amount among the non-state-owned provider pools as described in this subparagraph. The remaining available uncompensated-care funds equal the amount of funds approved by CMS for uncompensated-care payments for the demonstration year less the sum of funds allocated to the state-owned hospital pool under subparagraph (A) of this paragraph and the set-aside amount from subparagraph (B) of this paragraph.

(i) HHSC will allocate the funds among non-state-owned provider pools based on the following amounts:

(I) Large public hospitals:

(-a-) The sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all large public hospitals, as defined in subsection (b)(14) of this section, eligible to receive uncompensated-care payments under this section; plus

(-b-) An amount equal to the IGTs transferred to HHSC by large public hospitals to support DSH payments to themselves and private hospitals for the same demonstration year.

(II) Small public hospitals:

(-a-) The sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all non-rural and non-urban RRC small public hospitals, as defined in subsection (b)(21) of this section, eligible to receive uncompensated-care payments under this section; plus

(-b-) An amount equal to the IGTs transferred to HHSC by small public hospitals to support DSH payments to themselves for Pass One and Pass Two payments for the same demonstration year.

(III) Private hospitals: The sum of the interim hospital specific limits from subsection (g)(2)(A) of this section for all non-rural and non-urban RRC private hospitals, as defined in subsection (b)(16) of this section, eligible to receive uncompensated-care payments under this section.

(IV) Physician group practices: The sum of the unreimbursed uninsured costs and Medicaid shortfall for physician group practices, as described in §355.8202(g)(2)(A) of this title (relating to Waiver Payments to Physician Group Practices for Uncompensated Care).

(V) Governmental ambulance providers: The sum of the uncompensated care costs multiplied by the federal medical assistance percentage (FMAP) in effect during the cost reporting period for governmental ambulance providers, as described in §355.8600 of this title (relating to Reimbursement Methodology for Ambulance Services). Estimated amounts may be used if actual data is not available at the time calculations are performed.

(VI) Publicly-owned dental providers: The sum of the total allowable cost minus any payments for publicly owned dental providers, as described in §355.8441 of this title (relating to Reimbursement Methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services). Estimated amounts may be used if actual data is not available at the time calculations are performed.

(ii) HHSC will sum the amounts calculated in clause (i) of this subparagraph.

(iii) HHSC will calculate the aggregate limit for each non-state-owned provider pool as follows:

(I) To determine the large public hospital pool aggregate limit:

(-a-) multiply the remaining available uncompensated-care funds, from this subparagraph, by the amount calculated in clause (i)(I) of this subparagraph; and

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places.

(II) To determine the small public hospital pool aggregate limit:

(-a-) multiply the remaining available uncompensated-care funds from this subparagraph by the amount calculated in clause (i)(II) of this subparagraph;

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places; and

(-c-) add the result from item (-b-) of this subclause to the amount calculated in subparagraph (B)(ii) of this paragraph.

(III) To determine the private hospital pool aggregate limit:

(-a-) multiply the remaining available uncompensated-care funds from this subparagraph by the amount calculated in clause (i)(III) of this subparagraph;

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places; and

(-c-) add the result from item (-b-) of this subclause to the amount calculated in subparagraph (B)(iii) of this paragraph.

(IV) To determine the physician group practice pool aggregate limit:

(-a-) multiply the remaining available uncompensated-care funds from this subparagraph by the amount calculated in clause (i)(IV) of this subparagraph; and

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places.

(V) To determine the maximum aggregate amount of the estimated uncompensated care costs for all governmental ambulance providers:

(-a-) multiply the remaining available uncompensated-care funds from this subparagraph by the amount calculated in clause (i)(V) of this subparagraph; and

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places.

(VI) To determine the publicly owned dental providers pool aggregate limit:

(-a-) multiply the remaining available uncompensated-care funds from this subparagraph by the amount calculated in clause (i)(VI) of this subparagraph; and

(-b-) divide the result from item (-a-) of this subclause by the amount calculated in clause (ii) of this subparagraph and truncate to zero decimal places.

(3) Payments made under this section are limited by the availability of funds identified in subsection (d) of this section. If sufficient funds are not available for all payments for which a hospital is eligible, HHSC will reduce payments as described in subsection (h)(2) of this section.

(g) Uncompensated-care payment amount.

(1) Application.

(A) Cost and payment data reported by the hospital in the uncompensated-care application is used to calculate the annual maximum uncompensated-care payment amount for the applicable demonstration year, as described in paragraph (2) of this subsection.

(B) Unless otherwise instructed in the application, the hospital must base the cost and payment data reported in the application on its applicable as-filed CMS 2552 Cost Report(s) For Electronic Filing Of Hospitals corresponding to the data year and must comply with the application instructions or other guidance issued by HHSC.

(i) When the application requests data or information outside of the as-filed cost report(s), the hospital must provide all requested documentation to support the reported data or information.

(ii) For a new hospital, the cost and payment data period may differ from the data year, resulting in the eligible uncompensated costs based only on services provided after the hospital's Medicaid enrollment date. HHSC will determine the data period in such situations.

(2) Calculation. A hospital's annual maximum uncompensated-care payment amount is the sum of the components below. In no case can the sum of payments made to a hospital for a demonstration year for DSH and uncompensated-care payments, less the payments described in paragraph (3) of this subsection, exceed a hospital's specific limit as determined in §355.8066 of this title after modifications to reflect the adjustments described in paragraph (4) of this subsection.

(A) The interim hospital specific limit, calculated as described in §355.8066 of this title, except that an IMD may not report cost and payment data in the uncompensated-care application for services provided during the data year to Medicaid-eligible and uninsured patients ages 21 through 64, less any payments to be made under the DSH program for the same demonstration year, calculated as described in §355.8065 of this title;

(B) Other eligible costs for the data year, as described in paragraph (3) of this subsection;

(C) Cost and payment adjustments, if any, as described in paragraph (4) of this subsection; and

(D) For each hospital eligible for payments under subsection (f)(2)(C)(i)(I) of this section, the amount transferred to HHSC by that hospital's affiliated governmental entity to support DSH payments for the same demonstration year.

(3) Other eligible costs.

(A) In addition to cost and payment data that is used to calculate the hospital-specific limit, as described in §355.8066 of this title, a hospital may also claim reimbursement under this section for uncompensated care, as specified in the uncompensated-care application, that is related to the following services provided to Medicaid-eligible and uninsured patients:

(i) direct patient-care services of physicians and mid-level professionals;

(ii) pharmacy services; and

(iii) clinics.

(B) The payment under this section for the costs described in subparagraph (A) of this paragraph are not considered inpatient or outpatient Medicaid payments for the purpose of the DSH audit described in §355.8065 of this title.

(4) Adjustments. When submitting the uncompensated-care application, hospitals may request that cost and payment data from the data year be adjusted to reflect increases or decreases in costs resulting from changes in operations or circumstances.

(A) A hospital:

(i) may request that costs not reflected on the as-filed cost report, but which would be incurred for the demonstration year, be included when calculating payment amounts;

(ii) may request that costs reflected on the as-filed cost report, but which would not be incurred for the demonstration year, be excluded when calculating payment amounts.

(B) Documentation supporting the request must accompany the application. HHSC will deny a request if it cannot verify that costs not reflected on the as-filed cost report will be incurred for the demonstration year.

(C) In addition to being subject to the reconciliation described in subsection (i)(1) of this section which applies to all uncompensated-care payments for all hospitals, uncompensated-care payments for hospitals that submitted a request as described in subparagraph (A)(i) of this paragraph that impacted the interim hospital-specific limit described in paragraph (2)(A) of this subsection will be subject to the reconciliation described in subsection (i)(2) of this section.

(D) Notwithstanding the availability of adjustments impacting the interim hospital-specific limit described in this paragraph, no adjustments to the interim hospital-specific limit will be considered for purposes of Medicaid DSH payment calculations described in §355.8065 of this title.

(5) Reduction to stay within uncompensated-care pool aggregate limits. Prior to processing uncompensated-care payments for any payment period within a waiver demonstration year for any uncompensated-care pool described in subsection (f)(2) of this section, HHSC will determine if such a payment would cause total uncompensated-care payments for the demonstration year for the pool to exceed the aggregate limit for the pool and will reduce the maximum uncompensated-care payment amounts providers in the pool are eligible to receive for that period as required to remain within the pool aggregate limit.

(A) Calculations in this paragraph will be applied to each of the uncompensated-care pools separately.

(B) HHSC will calculate the following data points:

(i) For each provider, prior period payments to equal prior period uncompensated-care payments for the demonstration year.

(ii) For each provider, a maximum uncompensated-care payment for the payment period to equal the sum of:

(I) the portion of the annual maximum uncompensated-care payment amount calculated for that provider (as described in this section and the sections referenced in subsection (f)(2)(C) of this section) that is attributable to the payment period; and

(II) the difference, if any, between the portions of the annual maximum uncompensated-care payment amounts attributable to prior periods and the prior period payments calculated in clause (i) of this subparagraph.

(iii) The cumulative maximum payment amount to equal the sum of prior period payments from clause (i) of this subparagraph and the maximum uncompensated-care payment for the payment period from clause (ii) of this subparagraph for all members of the pool combined.

(iv) A pool-wide total maximum uncompensated-care payment for the demonstration year to equal the sum of all pool members' annual maximum uncompensated-care payment amounts for the demonstration year from paragraph (2) of this subsection.

(v) A pool-wide ratio calculated as the pool aggregate limit from subsection (f)(2) of this section divided by the pool-wide total maximum uncompensated-care payment amount for the demonstration year from clause (iv) of this subparagraph.

(C) If the cumulative maximum payment amount for the pool from subparagraph (B)(iii) of this paragraph is less than the aggregate limit for the pool, each provider in the pool is eligible to receive their maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph without any reduction to remain within the pool aggregate limit.

(D) If the cumulative maximum payment amount for the pool from subparagraph (B)(iii) of this paragraph is more than the aggregate limit for the pool, HHSC will calculate a revised maximum uncompensated-care payment for the payment period for each provider in the pool as follows:

(i) HHSC will calculate a capped payment amount equal to the product of the provider's annual maximum uncompensated-care payment amount for the demonstration year from paragraph (2) of this subsection and the pool-wide ratio calculated in subparagraph (B)(v) of this paragraph.

(ii) If the payment period is not the final payment period for the demonstration year, the revised maximum uncompensated-care payment for the payment period equals the lesser of:

(I) the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph; or

(II) the difference between the capped payment amount from clause (i) of this subparagraph and the prior period payments from subparagraph (B)(i) of this paragraph.

(iii) If the payment period is the final payment period for the demonstration year:

(I) HHSC will calculate an IGT-supported maximum uncompensated-care payment for the payment period equal to the amount of the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph that is supported by an IGT commitment.

(-a-) For hospitals and physician group practices, HHSC will obtain from each RHP anchor a current breakdown of IGT commitments from all governmental entities, including governmental entities outside of the RHP, that will be providing IGTs for uncompensated-care payments for each hospital and physician group practice within the RHP that is eligible for such payments for the payment period.

(-b-) Ambulance and dental providers will be assumed to have commitments for 100 percent of the non-federal share of their payments. The non-federal share for ambulance providers is provided through certified public expenditures (CPEs); for ambulance providers, references to IGTs in this subsection should be read as references to CPEs.

(II) HHSC will calculate an IGT-supported maximum uncompensated-care payment for the demonstration year to equal the IGT-supported maximum uncompensated-care payment for the payment period from subclause (I) of this clause plus the provider's prior period payments from subparagraph (B)(i) of this paragraph.

(III) For providers with an IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause that is less than or equal to their capped payment amount from clause (i) of this subparagraph, the provider's revised maximum uncompensated-care payment for the payment period equals the IGT-supported maximum uncompensated-care payment amount for the payment period from subclause (I) of this clause. For these providers, the difference between their capped payment amount from clause (i) of this subparagraph and their IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause is their unfunded cap room.

(IV) HHSC will sum all unfunded cap room from subclause (III) of this clause to determine the total unfunded cap room for the pool.

(V) For providers with an IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause that is greater than their capped payment amount from clause (i) of this subparagraph, the provider's revised maximum uncompensated-care payment amount for the payment period is calculated as follows:

(-a-) For each provider, HHSC will calculate an overage amount to equal the difference between the IGT-supported maximum uncompensated-care payment amount for the demonstration year from subclause (II) of this clause and their capped payment amount for the demonstration year from clause (i) of this subparagraph. Unfunded cap room from subclause (IV) of this clause will be distributed to these providers based on each provider's overage as a percentage of the pool-wide overage.

(-b-) For each provider, the provider's revised maximum uncompensated-care payment amount for the payment period is equal to the sum of its capped payment amount from clause (i) of this subparagraph and its portion of its pool's unfunded cap room from item (-a-) of this subclause less its prior period payments from subparagraph (B)(i) of this paragraph.

(E) Once reductions to ensure that uncompensated-care expenditures do not exceed the aggregate limit for the demonstration year for the pool are calculated, HHSC will not re-calculate the resulting payments for any provider for the demonstration year, including if the IGT commitments upon which the reduction calculations were based are different than actual IGT amounts.

(F) Notwithstanding the calculations described in subparagraphs (A) - (E) of this paragraph, if the payment period is the final payment period for the demonstration year, to the extent the payment is supported by IGT, each rural hospital is guaranteed a payment at least equal to its interim hospital specific limit from paragraph (2)(A) of this

subsection multiplied by the value from subsection (f)(2)(B)(i)(I) of this section for the demonstration year less any prior period payments. If this guarantee will cause payments for a pool to exceed the aggregate pool limit, the reduction required to stay within the pool limit will be distributed proportionally across all non-rural and non-urban RRC providers in the pool based on each provider's resulting payment from subparagraphs (A) - (E) of this paragraph as compared to the payments to all non-rural and non-urban RRC hospitals in the pool resulting from subparagraphs (A) - (E) of this paragraph.

(G) Notwithstanding the calculations described in subparagraphs (A) - (E) of this paragraph, if the payment period is the final payment period for the demonstration year, to the extent the payment is supported by IGT, each urban RRC is guaranteed a payment at least equal to its interim hospital specific limit from paragraph (2)(A) of this subsection multiplied by 54% for the demonstration year less any prior period payments. If this guarantee will cause payments for a pool to exceed the aggregate pool limit, the reduction required to stay within the pool limit will be distributed proportionally across all non-rural and non-urban RRC providers in the pool based on each provider's resulting payment from subparagraphs (A) - (E) of this paragraph as compared to the payments to all non-rural and non-urban RRC hospitals in the pool resulting from subparagraphs (A) - (E) of this paragraph.

(6) Prohibition on duplication of costs. Eligible uncompensated-care costs cannot be reported on multiple uncompensated-care applications, including uncompensated-care applications for other programs. Reporting on multiple uncompensated-care applications is duplication of costs.

(7) Advance payments.

(A) In a demonstration year in which uncompensated-care payments will be delayed pending data submission or for other reasons, HHSC may make advance payments to hospitals that meet the eligibility requirements described in subsection (c)(2) of this section and submitted an acceptable uncompensated-care application for the preceding demonstration year from which HHSC calculated an annual maximum uncompensated-care payment amount for that year.

(B) The amount of the advance payments will be a percentage, to be determined by HHSC, of the annual maximum uncompensated-care payment amount calculated by HHSC for the preceding demonstration year.

(C) Advance payments are considered to be prior period payments as described in paragraph (5)(B)(i) of this subsection.

(D) A hospital that did not submit an acceptable uncompensated-care application for the preceding demonstration year is not eligible for an advance payment.

(E) If a partial year uncompensated-care application was used to determine the preceding demonstration year's payments, data from that application may be annualized for use in computation of an advance payment amount.

(8) Payments of unspent funds.

(A) HHSC will use the methodology described in this paragraph to calculate payment amounts to hospitals for uncompensated-care payments that are made after July 31, 2020, using any remaining funding for uncompensated-care program years beginning before October 1, 2017.

(B) The basis for each hospital's payment allocation will be the total amount of payments received by the hospital in the data year that are from a third-party payor for a Medicaid-enrolled patient and associated with third-party coverage as defined in §355.8066 of this subchapter (relating to Hospital-Specific Limit Methodology).

(C) All hospitals' payment allocations will be based on 100 percent of the amount described in subparagraph (B) of this paragraph, except:

(i) Children's hospitals as defined in §355.8065 of this subchapter (related to Disproportionate Share Hospital Reimbursement Methodology) will receive a payment allocation based on 150 percent of the amount described in subparagraph (B) of this paragraph.

(ii) State-owned teaching hospitals, state-owned IMDs, state chest hospitals, physician group practices, ambulance providers, and dental providers will not receive a payment allocation under the methodology described in this paragraph.

(D) Each hospital's payment amount will be allocated by:

(i) applying the appropriate percentage described in subparagraph (C) of this paragraph to the amount described in subparagraph (B) of this paragraph;

(ii) dividing the amount calculated in clause (i) of this subparagraph by the total amount of payments described in subparagraph (B) of this paragraph for all participating hospitals; and

(iii) multiplying the amount in clause (ii) of this subparagraph by the remaining uncompensated-care funding for the program year.

(E) Each payment amount will be compared to actual costs incurred by the hospital as determined by the reconciliation calculated for the demonstration year, as described in subsection (i) of this section.

(i) A hospital will receive the lesser of its actual costs, as determined by the reconciliation calculated for the demonstration year under subsection (i) of this section, or the hospital's allocation described in subparagraph (D) of this paragraph.

(ii) If, following the determination described in clause (i) of this subparagraph, there is funding remaining in the UC program year, the remaining funding amounts will be placed into a second pool.

(iii) The second pool will be allocated to hospitals that have not received UC payments that exceed their actual costs, as determined by the reconciliation calculated for the demonstration year under subsection (i) of this section after accounting for any additional payment the hospital is receiving under the methodology described in this paragraph. Any distribution under this subparagraph will be allocated by:

(I) Dividing the hospital's total uncompensated-care costs, as determined by the reconciliation calculated for the demonstration year under subsection (i) of this section, by the total uncompensated-care costs for all participating hospitals, as determined by the reconciliation calculated for the demonstration year under subsection (i) of this section; and

(II) Multiplying the amount described in subclause (I) of this clause by the funding remaining in the uncompensated-care program year after the distribution described in subparagraph (D) of this paragraph.

(h) Payment methodology.

(1) Notice. Prior to making any payment described in subsection (g) of this section, HHSC will give notice of the following information:

(A) the payment amount for the payment period (based on whether the payment is made quarterly, semi-annually, or annually);

(B) the maximum IGT amount necessary for a hospital to receive the amount described in subparagraph (A) of this paragraph; and

(C) the deadline for completing the IGT.

(2) Payment amount. The amount of the payment to a hospital will be determined based on the amount of funds transferred by the affiliated governmental entity or entities as follows:

(A) If the governmental entity transfers the maximum amount referenced in paragraph (1) of this subsection, the hospital will receive the full payment amount calculated for that payment period.

(B) If a governmental entity does not transfer the maximum amount referenced in paragraph (1) of this subsection, HHSC will determine the payment amount to each hospital owned by or affiliated with that governmental entity as follows:

(i) At the time the transfer is made, the governmental entity notifies HHSC, on a form prescribed by HHSC, of the share of the IGT to be allocated to each hospital owned by or affiliated with that entity and provides the non-federal share of uncompensated-care payments for each entity with which it affiliates in a separate IGT transaction; or

(ii) In the absence of the notification described in clause (i) of this subparagraph, each hospital owned by or affiliated with the governmental entity will receive a portion of its payment amount for that period, based on the hospital's percentage of the total payment amounts for all hospitals owned by or affiliated with that governmental entity.

(C) For a hospital that is affiliated with multiple governmental entities, in the event those governmental entities transfer more than the maximum IGT amount that can be provided for that hospital, HHSC will calculate the amount of IGT funds necessary to fund the hospital to its payment limit and refund the remaining amount to the governmental entities identified by HHSC.

(3) Final payment opportunity. Within payments described in this section, a governmental entity that does not transfer the maximum IGT amount described in paragraph (1) of this subsection during a demonstration year will be allowed to fund the remaining payments at the time of the final payment for that demonstration year. The IGT will be applied in the following order:

(A) To the final payment up to the maximum amount;

(B) To remaining balances for prior payment periods in the demonstration year.

(i) Reconciliation. HHSC will reconcile actual costs incurred by the hospital for the demonstration year with uncompensated-care payments, if any, made to the hospital for the same period:

(1) If a hospital received payments in excess of its actual costs, the overpaid amount will be recouped from the hospital, as described in subsection (j) of this section.

(2) If a hospital received payments less than its actual costs, and if HHSC has available waiver funding for the demonstration year in which the costs were accrued, the hospital may receive reimbursement for some or all of those actual documented unreimbursed costs.

(3) Except in demonstration year 2 (October 1, 2012, to September 30, 2013), if a hospital submitted a request as described in subsection (g)(4)(A)(i) of this section that impacted its interim hospital-specific limit, that hospital will be subject to an additional reconciliation as follows:

(A) HHSC will compare the hospital's adjusted interim hospital-specific limit from subsection (g)(4)(A)(i) of this section for the demonstration year to its final hospital-specific limit as described in §355.8066(c)(2) of this title for the demonstration year.

(B) If the final hospital-specific limit is less than the adjusted interim hospital-specific limit, HHSC will recalculate the hospital's uncompensated-care payment for the demonstration year substituting the final hospital-specific limit for the adjusted interim hospital-specific limit with no other changes to the data used in the original calculation of the hospital's uncompensated-care payment other than any necessary reductions to the original IGT amount and will recoup any payment received by the hospital that is greater than the recalculated uncompensated-care payment. Recouped funds may be redistributed to other hospitals that received payments less than their actual costs.

(4) Each hospital that received an uncompensated-care payment during a demonstration year must cooperate in the reconciliation process by reporting its actual costs and payments for that period on the form provided by HHSC for that purpose, even if the hospital closed or withdrew from participation in the uncompensated-care program. If a hospital fails to cooperate in the reconciliation process, HHSC may recoup the full amount of uncompensated-care payments to the hospital for the period at issue.

(j) Recoupment.

(1) In the event of an overpayment identified by HHSC or a disallowance by CMS of federal financial participation related to a hospital's receipt or use of payments under this section, HHSC may recoup an amount equivalent to the amount of the overpayment or disallowance. The non-federal share of any funds recouped from the hospital will be returned to the entity that owns or is affiliated with the hospital.

(2) Payments under this section may be subject to adjustment for payments made in error, including, without limitation, adjustments under §371.1711 of this title (relating to Recoupment of Overpayments and Debts), 42 CFR Part 455, and Chapter 403, Texas Government Code. HHSC may recoup an amount equivalent to any such adjustment.

(3) HHSC may recoup from any current or future Medicaid payments as follows:

(A) HHSC will recoup from the hospital against which any overpayment was made or disallowance was directed.

(B) If, within 30 days of the hospital's receipt of HHSC's written notice of recoupment, the hospital has not paid the full amount of the recoupment or entered into a written agreement with HHSC to do so, HHSC may withhold any or all future Medicaid payments from the hospital until HHSC has recovered an amount equal to the amount overpaid or disallowed.

(k) Penalty for failure to complete Category 4 reporting requirements for Regional Healthcare Partnerships. Hospitals must comply with all Category 4 reporting requirements set out in Chapter 354 of this title, Subchapter D (relating to Texas Healthcare Transformation and Quality Improvement Program). If a hospital fails to complete required Category 4 reporting measures by the last quarter of a demonstration year:

(1) the hospital will forfeit its uncompensated-care payments for that quarter; or

(2) the hospital may request from HHSC a six-month extension from the end of the demonstration year to report any outstanding Category 4 measures.

(A) The fourth-quarter payment will be made upon completion of the outstanding required Category 4 measure reports within the six-month period.

(B) A hospital may receive only one six-month extension to complete required Category 4 reporting for each demonstration year.

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 June 25, 2020.

TRD-202002529
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: July 15, 2020
Proposal publication date: April 10, 2020
For further information, please call: (512) 407-3285

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 4. PRESCRIBED BURNING BOARD ENFORCEMENT PROGRAM

SUBCHAPTER A. ENFORCEMENT, INVESTIGATION, PENALTIES AND PROCEDURES

4 TAC §4.2

The Texas Department of Agriculture (the Department) adopts amendments to the Texas Administrative Code, Title 4, Part 1, Chapter 4, Subchapter A, Enforcement, Investigation, Penalties and Procedures, §4.2, without changes to the proposed text as published in the May 15, 2020, issue of the *Texas Register* (45 TexReg 3189). The rule will not be republished.

The adopted amendments to §4.2 revise the Prescribed Burning Board's Schedule of Violations. These changes are made to update the source law column of the Schedule of Violations and clarify abbreviations and certain provisions in the penalty matrix. No substantive changes are made to the amount of the penalties or the conduct that may lead to the assessment of a penalty.

The Department received no comments.

The amendments are adopted under §153.102 of the Natural Resources Code, which provides the Department with the authority to adopt a schedule of disciplinary sanctions that the Department may impose for violations of Chapter 153 of the Natural Resources Code, and Section 12.016 of the Agriculture Code, which provides that the Department may adopt rules as necessary for the administration of its powers and duties under the code.

Chapter 153 of the Texas Natural Resources Code is affected by the adoption.

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 June 23, 2020.

TRD-202002497
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Effective date: July 13, 2020
Proposal publication date: May 15, 2020
For further information, please call: (512) 936-9360

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 170. PRESCRIPTION OF CONTROLLED SUBSTANCES

The Texas Medical Board (Board) adopts amendments changing the title of 22 TAC Chapter 170 to "Prescription of Controlled Substances." Further amendments are adopted to §170.2, concerning Definitions, and §170.3, concerning Minimum Requirements for the Treatment of Chronic Pain. The Board also adopts new rule §170.9, in new Subchapter C, titled "Prescription Monitoring Program Check."

The amendments to §170.2 are adopted pursuant to HB 2174, 86th Texas Legislature, which set forth certain opioid prescription limits for the treatment of acute pain through new Section 481.07636 of the Texas Health and Safety Code. Section 170.3 amendments are proposed pursuant to §481.0764 of the Texas Health and Safety Code, which mandates a review of the Prescription Monitoring Program (PMP) prior to the issuance of a prescription for opioids, benzodiazepines, barbiturates, and carisoprodol. New Subchapter C, Prescription Monitoring Program Check, is adopted in accordance with Sections 481.076, 481.0764, and 481.0765 of the Texas Controlled Substances Act.

The Board sought stakeholder input at meetings held on October 9, 2019 and February 18, 2020. The stakeholder comments were incorporated into the proposed rules as published in the April 3, 2020, issue of the *Texas Register* (45 TexReg 2284).

The amendments to §170.2 and §170.3 are adopted without changes to the proposed text published in the April 3, 2020, issue of the *Texas Register* (45 TexReg 2284). The adopted amendments to §170.2 and §170.3 will not be republished.

The new rule §170.9 in new Subchapter C titled Prescription Monitoring Program Check is adopted with non-substantive changes to the proposed language published in the April 3, 2020, issue of the *Texas Register* (45 TexReg 2284), based upon written comments received. Adopted new §170.9 will be republished.

The adopted amendments to §170.2, Definitions, are as follows:

The amendment to §170.2(2), relating to the definition for acute pain, clarifies that acute pain is time limited to no more than 30 days from the date of initial prescription for opioids for treatment of the pain during a period of treatment for the acute condition or injury.

The amendment to §170.2(4), relating to definition for chronic pain, clarifies that chronic pain is pain that exists for a period that has continued for no less than 91 days from the date of initial prescription for opioids for treatment of the condition or injury.

The amendments add new 170.2(10), setting forth a definition for post-surgical, post-procedure, persistent non-chronic pain. The new definition clarifies that there is pain that continues to exist in a period after the acute phase, but before becoming medically recognized as chronic pain. This period of pain exists for a period of more than 30 days but less than 91 days from the date of initial prescriptions for opioids during a period of treatment. This definition creates a period of time in which a physician will be allowed to prescribe opioids for more than a 10-day period for a condition, injury, or disease not already excepted under HB 2174, if the standard of care permits, and allow for an appropriate period for such treatment without the requirements related to chronic pain applying. Paragraphs (11) - (14) are re-numbered accordingly.

The adopted amendments to §170.3, Minimum Requirements for the Treatment of Chronic Pain, are as follows:

Section 170.3 amendments are adopted pursuant to §481.0764 of the Texas Controlled Substances Act, which mandates a review of the PMP prior to the issuance of a prescription for opioids, benzodiazepines, barbiturates, and carisoprodol.

Section 170.3(1)(C) is amended so that a review of the PMP is mandatory rather than optional. Remaining proposed amendments are changes made for readability and represent other non-substantive re-wording necessitated by the primary changes in text.

Section 170.3(5)(E)(v) is amended so that language indicating an option of checking the PMP when conducting a periodic review of a patient's compliance is deleted. A physician must continue to review the PMP prior to issuing each and every prescription for opioids, benzodiazepines, barbiturates, and carisoprodol. The proposed deletion is not intended to change a physician's duty to review the PMP and represents a non-substantive re-wording of the section.

Section 170.3(7) is amended to clarify that documentation of the PMP check must be maintained in the patient's medical record.

Chapter 170, New Subchapter C, §170.9. Prescription Monitoring Program Check.

The Texas Medical Board (Board) adopts new Subchapter C, Prescription Monitoring Program Check, in accordance with Sections 481.076, 481.0764, and 481.0765 of the Texas Controlled Substances Act. The purpose of the rule is to clarify when and under what circumstances a physician is required to check the PMP before issuing certain controlled substances. New Subchapter C adds one new section, §170.9, which contains five interrelated parts.

New §170.9(1) provides a description of the types of physician-patient interaction and medical settings that require a PMP check. This portion of the rule also specifies that the check is required prior to and each time a prescription is issued for opioids, benzodiazepines, barbiturates, or carisoprodol to the ultimate user.

New §170.9(2) clarifies the types of physician-patient interaction and medical settings that do not require a PMP check.

New §170.9(3) clarifies that documentation of the PMP check is required. The language also clarifies that it is permissible to place a copy of the patient's PMP history in the patient's medical record to demonstrate the check was conducted as required when a prescription is issued for opioids, benzodiazepines, barbiturates, or carisoprodol to the ultimate user. This documentation method is proposed as acceptable, in addition to other appropriate forms and methods of documentation.

New §170.9(4) clarifies that physicians must perform the PMP check. This portion of the rule also specifies that physicians may allow certain other qualified individuals to check the PMP under Section 481.076(a)(5)(B) of the Health and Safety Code.

New §170.9(5) provides exceptions to the required PMP check in accordance with Section 481.0765 of the Texas Controlled Substances Act.

TMB received no written comments regarding proposed amendments to §170.3.

TMB received written comments regarding proposed amendments to §170.2 from the Texas Chiropractic Association (TCA) and a joint comment submitted by the following eight organizations (hereinafter referred to collectively as "the Organizations"): The Texas Medical Association, Texas Pain Society, Texas Society of Anesthesiologists, Texas Academy of Physicians, Texas Chapter of the American College of Physician Services, American College of Obstetricians and Gynecologists, Texas Association of Obstetricians and Gynecologists, and the Texas College of Emergency Physicians. TMB received written comments regarding proposed amendments to §170.9 from the Texas Orthopaedic Association (TOA) and the Organizations. No one appeared to provide oral comment at the TMB meeting held on June 12, 2020.

Summary of Comments

Section 170.2, Definitions

Joint Comment: The Organizations indicated a mix of support and opposition to the proposed definitions, objected to the lack of input on the proposed language prior to publication, and asked that the rules be returned to additional opioid workforce meetings for further discussion and development. The Organizations stated that their membership expressed concern and some confusion with tying the definitions to a prescription for opioids, recommending that they be tied to the onset or duration of pain instead. The Organizations recommended that the reference to palliative care should be referred to as "supportive palliative care", in accordance with changes adopted through SB 916 to Section 142A of the Texas Health and Safety Code.

TMB Response: TMB disagrees and declines to adopt the proposed amendments with changes. The new language reflects significant discussion from numerous physicians and associations over the terms "acute pain" "persistent non-chronic pain" and "chronic pain" during the opioid workgroup meetings. The general understanding, based on opioid workgroup and audience input, was that the proposed definitions were acceptable to utilize. However, additional opioid workgroup meetings will be held in order to continue discussing further possible improvements to the definitions.

The new and amended definitions retain the commonly understood timeframe that pain persisting over 90 days should be considered chronic. In addition, limiting acute to 30 days is consistent with the intent of the legislature to ensure judicious use of opioids during initial treatment phase for pain. Current research indicates that tolerance and addiction potential is greatly

increased when these types of medication are prescribed for periods more than ten days.

Regarding the request to refer to "supportive palliative care" rather than "palliative care", SB 916' s language provides that all references to "palliative care" in the Health and Safety Code or other law mean "supportive palliative care", making it unlikely that there will be confusion between the two terms. TMB' s adopted language referencing "palliative care" reflects the wording of Section 481.07636 of the Health and Safety Code.

Texas Chiropractic Association Comment: TCA opposed TMB' s proposed language defining "acute pain" and "post-surgical, post-procedure, persistent non-chronic pain", stating the definitions were not supported by the medical literature and were contrary to the legislative intent behind HB 2174. TCA requested that the proposed definition for "acute pain" be changed so it is defined to last longer than 30 days and further asked that the proposed definition for "post-surgical, post-procedure, persistent non-chronic pain" be eliminated so that it would be included in the definition of "acute pain."

TMB Response: TMB disagrees and declines to adopt the amended definitions with changes recommended by TCA. The new language reflects significant discussion from numerous physicians and associations during the opioid workgroup meetings. Section 481.07636 concerns limits on acute pain prescribing, but it is commonly understood that many forms of pain can exceed the 10-day prescription limit. The limit of 10-days is retained in the rules. However, consistent with its express rulemaking authority related to the treatment of pain and opioid prescribing, TMB recognizes the need for flexibility in treating patients.

These definitions retain the commonly understood timeframe of pain persisting over 90 days being considered chronic pain. In addition, limiting the acute pain definition to 30 days is consistent with the intent of the legislature to ensure judicious use of opioids during the initial treatment period for pain. Current research indicates that tolerance and addiction potential is greatly increased when these types of medication are prescribed for periods of more than ten days. But the rule also acknowledges each patient presents unique considerations related to a physician' s medical decision-making related to pain treatment and prescription medications.

New Section 170.9

Texas Orthopaedic Association Comment: TOA expressed general support for the rule, and specifically for the language allowing qualified delegates to perform the PMP check, but opposed documentation requirements set forth under the rule. TOA recommended allowing PMP' s technology to document evidence of a PMP check and further that the rules provide that the use of an integrated PMP within an EHR program provide evidence of compliance.

TMB Response: TMB disagrees and declines to adopt the rule with the recommended changes. TMB has been given express authority under Tex. Occ. Code Chapters 153 and 168 to write rules related to the treatment of pain, including documentation standards. These additions for documenting PMP checks are consistent with existing rules in Chapter 170 related to documentation as a method to ensure compliance with the legislative intent to monitor prescribing practices. In addition, TMB understands the EHR systems are set-up to integrate automatic PMP checks. The concern is that this can be done by anyone with access to the records and an electronic check could be done by simply clicking a box, creating uncertainty as to the identity of the individual who completed the review. Therefore, there is a need to add a requirement of verification to ensure that the practitioner prescribing is the individual who reviewed the information prior to issuing the prescription.

Joint Comment: The organizations expressed overall support for the rule, but opposed the documentation requirement, stating that Health and Safety Code Section 481.0764 does not require documentation of the PMP check. The organizations also stated that other agency rules, the Texas Board of Pharmacy (BOPH) and Texas Department of Licensing and Regulation (TDLR), respectively, do not require such documentation for pharmacists or podiatrists. The organizations further requested TMB "to deem physicians using an integrated EHR system to check the PMP as compliant with Section 481.0764(a)", stating that such would be consistent with TDLR and BOPH rules. Finally, the organizations recommended non-substantive drafting revisions.

TMB Response: TMB disagrees and declines to adopt the rule with the recommended changes related to the documentation mandate. Requiring the documentation of PMP checks is consistent with existing rules in Chapter 170 related to documentation as a method to ensure compliance with the legislative intent to monitor prescribing practices. In addition, TMB understands the EHR systems are set-up to integrate automatic PMP checks. The concern is that this can be done by anyone with access to the records and an electronic check could be done by simply clicking a box, creating uncertainty as to the identity of the individual who completed the review. Therefore, there is a need to add a requirement of verification to ensure that the practitioner prescribing is the individual who reviewed the information prior to issuing the prescription.

TMB agrees and appreciates the minor drafting revisions recommended, and adopts the new rule 170.9 with non-substantive changes incorporating those revisions.

SUBCHAPTER A. PAIN MANAGEMENT

22 TAC §170.2, §170.3

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to recommend and adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine; and enforce this subtitle. The amendments are further adopted under the authority of Sections 481.07636, 481.076, 481.0764, and 481.0765 of the Texas Health and Safety Code.

No other statutes, articles or codes are affected by this adoption.

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 June 23, 2020.

TRD-202002503
Scott Freshour
General Counsel
Texas Medical Board
Effective date: July 13, 2020
Proposal publication date: April 3, 2020
For further information, please call: (512) 305-7016

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SUBCHAPTER C. PRESCRIPTION MONITORING PROGRAM CHECK

22 TAC §170.9

The new rule is adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to recommend and adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine; and enforce this subtitle.

The new rule is further adopted under the authority of Sections 481.07636, 481.076, 481.0764, and 481.0765 of the Texas Health and Safety Code.

§170.9. Prescription Monitoring Program Check.

The legislature has recognized the impact of the opioid crisis on the health and well-being of its citizens. The Prescription Monitoring Program (PMP) is a valuable tool to help prevent diversion of drugs and opioid-related overdose deaths. This subchapter establishes rules for a mandatory PMP check.

(1) Before a prescription for opioids, benzodiazepines, barbiturates, or carisoprodol will be issued to a patient, a mandatory PMP check of the patient's controlled substance prescription history is required. The review of the patient's PMP prescribing history must be completed prior to and each time a prescription is issued for opioids, benzodiazepines, barbiturates, or carisoprodol to the patient for:

(A) take-home use, upon leaving an outpatient setting such as doctor's office, or ambulatory surgical center; or

(B) upon discharge from an inpatient setting, such as a hospital admission or discharge from an emergency department visit.

(2) A mandatory PMP check is not required before or during an inpatient stay, such as a hospital admission, or during an outpatient encounter in settings, such as an emergency department or ambulatory surgical center visit.

(3) The review of the patient's PMP prescribing history must be documented in the patient's medical records. Permitted documentation methods include, but are not limited to, placing a copy of the PMP check in the patient's medical records.

(4) The PMP check and documentation required by this section may be done by:

(A) the physician; or

(B) a delegate of the physician who is legally authorized under Section 481.076(a)(5)(B) of the Health and Safety Code.

(5) Exceptions. The PMP check set forth under paragraph (1) of this section is not required in the following circumstances:

(A) the prescriptions are issued pursuant to hospice care, treatment for a patient's diagnosis of cancer, or treatment for a patient's sickle cell disease and this is clearly documented in the patient's medical record; or

(B) the prescriber makes and documents a good faith attempt to comply but is unable to access the PMP because of circumstances outside the control of the prescriber.

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 June 23, 2020.

TRD-202002504

Scott Freshour
General Counsel
Texas Medical Board
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For further information, please call: (512) 305-7016

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PART 41. TEXAS BEHAVIORAL HEALTH EXECUTIVE COUNCIL

CHAPTER 881. GENERAL PROVISIONS

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §§881.1 - 881.13

The Texas Behavioral Health Executive Council adopts new §§881.1 - 881.13, relating to general provisions for the Executive Council. Except for §881.2, concerning Definitions, the new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2640) and will not be republished. In response to changes being proposed in 22 Texas Administrative Code Chapter 681, where the term Licensed Professional Counselor Intern (LPC-I) is being changed to Licensed Professional Counselor Associate (LPC-A), the Council adopts the corresponding name changes in §881.2 as a non-substantive change, which will be republished.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 2001.004 of the Tex. Gov't Code requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. These new rules are the general framework regarding the Executive Council's operations and the implementation of its statutory duties.

List of interested groups or associations against the rules.

None.

Summary of comments against the rules.

A commenter recommended deleting all of proposed §881.13. The commenter believed the rule was too vague, restricts citizen's rights to participate in public meetings, and provided too much discretion for the agency to act based upon what the commenter believes is undefined criteria.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

Texas agencies have the inherent authority to not only conduct meetings and other operations but also control how to conduct such proceedings. Section 881.13 insures that all participants, including the agency and the public, are treated fairly and respectfully so that agency business can be conducted in an orderly fashion. The rule aids and promotes respectful participation in meetings and put those on notice that if they choose to be threatening or abusive such conduct has no place before this agency. For these reasons the agency declines to make the requested changes, and hereby adopts the rule with no changes.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code, which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§881.2. Definitions.

(a) The following definitions are generally applicable throughout the agency's rules and policies:

(1) The term "ALJ" as used herein shall refer to an administrative law judge employed by SOAH.

(2) The terms "Chapter 501," "Chapter 502," "Chapter 503," "Chapter 505," and "Chapter 507" as used herein shall refer to the corresponding chapter in the Occupations Code.

(3) The term "Executive Council" or "Council" as used herein shall refer to the Texas Behavioral Health Executive Council (BHEC).

(4) The term "member board" as used herein shall refer to:

(A) The Texas State Board of Examiners of Marriage and Family Therapists (TSBEMFT);

(B) The Texas State Board of Examiners of Professional Counselors (TSBEPC);

(C) The Texas State Board of Examiners of Psychologists (TSBEP); or

(D) The Texas State Board of Social Worker Examiners (TSBSWE).

(5) The term "PFD" as used herein shall refer to a proposal for decision issued by an ALJ.

(6) The terms "professional development" and "continuing education" as used herein have the same meaning.

(7) The term "SOAH" as used herein shall refer to the State Office of Administrative Hearings.

(8) The term "TAC" as used herein shall refer to the Texas Administrative Code.

(b) The following definitions apply only to those rules specific to the regulation of the practice of marriage and family therapy:

(1) "LMFT" refers to a licensed marriage and family therapist and has the same meaning as assigned by §502.002 of the Occupations Code.

(2) "LMFT Associate" refers to a licensed marriage and family therapist associate and has the same meaning as assigned by §502.002 of the Occupations Code.

(c) The following definitions apply only to those rules specific to the regulation of the practice of professional counseling:

(1) "LPC" refers to a licensed professional counselor and has the same meaning as assigned by §503.002 of the Occupations Code.

(2) "LPC Associate" refers to an individual licensed as a professional counselor associate under §503.308 of the Occupations Code.

(d) The following definitions apply only to those rules specific to the regulation of the practice of psychology:

(1) "LPA" or "Psychological Associate" refers to an individual licensed as a psychological associate under §501.259 of the Occupations Code.

(2) "LSSP" refers to an individual licensed as a specialist in school psychology under §501.260 of the Occupations Code.

(3) "Provisionally licensed psychologist" or "provisional licensee" means an individual licensed as a psychologist with provisional status under §501.253 of the Occupations Code.

(4) "PSYPACT" refers to the Psychology Interjurisdictional Compact found in Chapter 501, Subchapter L of the Occupations Code.

(e) The following definitions apply only to those rules specific to the regulation of the practice of social work:

(1) "LBSW" refers to a licensed baccalaureate social worker and has the same meaning as assigned by §505.002 of the Occupations Code.

(2) "LCSW" refers to a licensed clinical social worker and has the same meaning as assigned by §505.002 of the Occupations Code.

(3) "LMSW" refers to a licensed master social worker and has the same meaning as assigned by §505.002 of the Occupations Code.

(4) "LMSW-AP" refers to an individual licensed as a master social worker with the advanced practitioner specialty recognition.

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 June 29, 2020.

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Darrel D. Spinks
Executive Director
Texas Behavioral Health Executive Council
Effective date: September 1, 2020
Proposal publication date: April 24, 2020
For further information, please call: (512) 305-7706

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SUBCHAPTER B. RULEMAKING

22 TAC §881.20, §881.21

The Texas Behavioral Health Executive Council adopts new §881.20 and §881.21, relating to rulemaking for the Executive Council. The new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2643). The rules will not be republished.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 507.153 Tex. Occ. Code limits the ability of the Executive Council to adopt rules pertaining to qualifications for licensure, the scope and standards of practice, continuing educations requirements, and a schedule of sanctions unless such a rule is first proposed by a member board. Additionally, §2001.004 of the Tex. Gov't Code requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. These new rules are the general framework regarding the Executive Council's rulemaking procedures and proceedings.

List of interested groups or associations against the rule.

The Bluebonnet Counseling Association of Texas

The American Association for Marriage and Family Therapy

The Texas Counseling Association

The Texas Psychological Association

The Texas Association of Marriage and Family Therapy

The National Association of Social Workers - Texas Chapter

The Texas Society for Clinical Social Work

Summary of comments against the rule.

Commenters suggested changes to rule §881.20. Many requested grammatical changes, such as changing "must also" with "may only" because they felt §507.153 of the Tex. Occ. Code would require such a change. Generally, the commenters were concerned that rule §881.20 does not appropriately delineate the roles the Council and each underlying board will play in the rule making process or does not align with statutory intent.

Commenters suggested changes to rule §881.21. A commenter requested grammatical changes for the purposes of clarity. Other commenters requested the rule allow for petitions for rulemaking to be submitted directly to the appropriate boards instead of directly to the Council.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

The agency disagrees that rule §881.20 usurps the authority of an underlying board or does not align with statutory intent. Sections 507.151 and 507.152 of the Tex. Occ. Code make it clear that all authority to administer, enforce, and adopt rules regarding the regulation of marriage and family therapists, professional counselors, psychologists, and social workers resides with the Council. While §507.153(a) of the Tex. Occ. Code does require that all rules concerning qualifications for licensure, scope of practice, continuing education requirements, and a schedule of sanction be first proposed by the applicable board; §507.153(c) and (d) of the Tex. Occ. Code states the council retains authority for final adoption of all rules and may adopt rules prescribing the procedure by which rules may be proposed to the Council. Rule §881.20 comports with this statutory mandate; and the commenters requested changes to this rule would impose limitations and restrictions upon the Council's review of rules proposed by boards that is not required by the Texas Occupations Code. The Council is required by law to review the rules proposed by boards and the agency disagrees that it should further restrict or limit its ability to do so, therefore the Council declines to make the requested changes.

Because the statutory authority for the adoption of all rules resides with the Council, then it is necessary for rule §881.21 to require all petitions for rulemaking to be directed to the Council. If a petition addresses a subject matter that by statute must first be proposed by a board, then under §507.151(b) of the Tex. Occ. Code the Council may request input or assistance from the applicable board. The Council also declines to make the requested grammatical changes because the rule, as drafted, does not appear to create any confusion or misunderstand to the general public.

For these reasons the agency declines to make the requested changes, and hereby adopts the rules with no changes.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council also adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

Lastly, the Executive Council adopts part of these new rules under the authority found in §2001.021 of the Tex. Gov't Code which requires state agencies to prescribe by rule the form for a petition for adoption of rules by interested persons and the procedure for its submission, consideration, and disposition.

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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Darrel D. Spinks
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Texas Behavioral Health Executive Council
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For further information, please call: (512) 305-7706

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SUBCHAPTER C. PERSONNEL

22 TAC §§881.30 - 881.32

The Texas Behavioral Health Executive Council adopts new §§881.30 - 881.32, relating to personnel for the Executive Council. The new sections are adopted without changes to the proposed text as published in the April 24, 2020, issues of the *Texas Register* (45 TexReg 2646) and will not be republished.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.101 and 507.102 of the Tex. Occ. Code authorizes the Executive Council to employ an executive director and develop policymaking and management responsibilities for the Executive Council and executive director. Additionally, §656.048 of the Tex. Gov't Code requires state agencies to adopt rules relating to training and education for agency administrators and employees. Lastly, §661.002 of the Tex. Gov't Code requires state agencies to adopt rules and prescribe procedures relating to the operation of the agency sick leave pool. These new rules implement these requirements.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

A commenter question why are more procedures needed than in the Government Code and Employees Retirement System of Texas pertaining to the sick leave pool.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

Section 661.002 of the Tex. Gov't Code requires state agencies to adopt rules and prescribe procedures relating to the operation of an agency sick leave pool, therefore the Executive Council must adopt rule §881.32.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts part of these new rules under the authority found in §656.048 of the Tex. Gov't Code which requires state agencies to adopt rules relating to training and education for agency administrators and employees.

Lastly, the Executive Council adopts these new rules pursuant to the authority found in §661.002 of the Tex. Gov't Code which requires state agencies to adopt rules and prescribe procedures relating to the operation of an agency sick leave pool.

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 D. CONTRACTS AND PROCUREMENT

22 TAC §881.40, §881.41

The Texas Behavioral Health Executive Council adopts new §881.40 and §881.41, relating to contracts and procurement for the Executive Council. The new sections are adopted without changes to the proposed text as published in the April 24, 2020, issues of the *Texas Register* (45 TexReg 2647). The rules will not be republished.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Section 2155.076 of the Tex. Gov't Code requires state agencies to develop and adopt protest procedures for resolving vendor protests relating to purchasing issues, which must be consistent with the comptroller's rules. Section 2156.005 of the Tex. Gov't Code requires state agencies making purchases to adopt the comptroller's rules related to bid opening and tabulation. Section 2260.052 of the Tex. Gov't Code requires state agencies with rulemaking authority to develop rules to govern the negotiation and mediation of a claim for breach of contract. Section 2261.202 of the Tex. Gov't Code requires state agencies that make procurements to establish and adopt by rule a policy that clearly defines the contract monitoring roles and responsibilities. Section 2161.003 of the Tex. Gov't Code requires a state agency to adopt the comptroller's rules adopted under Section 2161.002 of the Tex. Gov't Code, pertaining to historically underutilized businesses, as the agency's own rules. These new rules implement these requirements.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

Lastly, the Executive Council adopts these new rules pursuant to the authority found in §§2155.076, 2156.005, 2161.002, 2161.003, 2260.052, and 2261.202 of the Tex. Gov't Code which as previously discussed requires state agencies to enact rules pertaining to bidding, purchasing, contracting, procurement, protests, and dispute resolution.

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 882. APPLICATIONS AND LICENSING

SUBCHAPTER A. LICENSE APPLICATIONS

22 TAC §§882.1 - 882.13

The Texas Behavioral Health Executive Council adopts new §§882.1 - 882.13, relating to license applications. Except for §882.6, the new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2649) and will not be republished. In response to non-substantive changes being requested by the Office of the Texas Governor, §882.6 is being changed and adopted as republished below.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Section 507.254 of the Tex. Occ. Code authorizes the Executive Council to issue a license, which must also include the name of the applicable board. Generally, these new rules implement the application process and procedures which will be used by the Executive Council.

List of interested groups or associations against the rule.

The Bluebonnet Counseling Association of Texas

The Texas Counseling Association

The Texas Psychological Association

The Texas Association of Marriage and Family Therapists

The National Association of Social Workers - Texas Chapter

The Texas Society for Clinical Social Work

Summary of comments against the rule.

A commenter requested rule §882.1 be changed to no longer require a letter be sent notifying the applicant of the agency's determination and instructions for next steps. The commenter suggests replacing letters with email notifications. Another commenters recommends that the processing time periods for all applications be made the same. One commenter believes this rule conflicts with the rule pertaining to fees, rule §885.1, because this rule states applications with the incorrect fee amount will be returned while the fees rule states fees are non-refundable.

A commenter questioned whether rule §882.2, which requires transcripts be sent to the agency directly, will still allow for applicants that are students to still be able to be approved to take certain licensure exams prior to conferral of a degree. Another commenter requested the deletion of the requirement to use DHS-USCIS Systematic Alien Verification of Entitlements (SAVE) Program for the verification of immigration status of applicants because the commenter felt it was unnecessarily and burdensome.

A commenter requested changes to rule §882.3 for the purposes of clarity, to include the possible denial of an application for examination as well as an application for licensure.

A commenter requested rule §882.6 be changed to allow for a board to set the amount of times an applicant may retake an exam. Another commenter requested the rule be changed to allow an applicant that has failed an exam to practice under supervision of a licensed practitioner for several years to then make a recommendation regarding the candidate's licensure. A commenter also requested changes for the purpose of clarity.

Commenters requested changes to rule §882.9, they want the rule to state that the Council will publish processing times of applications for each license type.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

The Administrative Procedures Act, Chapter 2001 of the Tex. Gov't Code, requires notification by certain means; therefore rule

§882.1 must comport with these requirements and require notification by letter, although this rule does not prohibit the use of email when corresponding with applicants. Rule §882.1 does not conflict with rule §885.1 because the Council will not process an application until it is complete, which requires the Council to receive the correct fee amount. Once the correct fee amount is received it is non-refundable, and the application will be processed, but if the wrong amount is received it will be returned to the applicant to submit the correct amount. Rule §882.1 specifies different processing time periods for different license types because that is the current practice in place, in the future the Council may reevaluate whether to make all the same but, due to data base restrictions, for the time being this rule will maintain the same time periods for the completeness of an application submission that currently exist.

Rule §882.2 must require that transcripts come directly from a verified source in order to ensure the authenticity of the submission. Depending upon a particular board, there may still be procedures for an applicant to be approved to sit for an examination prior to graduation but a license cannot be issued until the Council receives an official copy of a transcript verifying the conferral of a degree. The Council believes the utilization of the SAVE Program will make the application process easier for the verification of immigration status of applicants, additionally the use of the SAVE Program is required by federal law.

The Council declines to amend rule §882.3 as requested because the requested edits to add denial of exam applications to the rule appears unnecessary to the agency and does not appear to add any additional clarity to the rule.

Rule §882.6 is authorized and required, as written, because §507.253 of the Tex. Occ. Code states the Council shall, by rule, establish a limit on the number of exam retakes and the requirements for retaking an exam.

The Council declines to amend rule §882.9 as requested. While the Council's intent is to provide the public as much information as possible about processing times for licenses, depending upon what information and how it is stored by all the boards will determine what the Council will be able to publish. The rule as written will more accurately demonstrate the agency's workload. The agency does not see the need to include these requested changes in the rule, as the Council believes the general language currently in the rule is sufficient.

For these reasons the agency declines to make the requested changes, and hereby adopts the rules with no changes.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts these new rules in part under the authority found in §§2005.003 and 2005.006 of the Tex. Gov't Code which requires state agencies to adopt rules for processing applications and issuing licenses, as well as complaint procedures for the same.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§882.6. Limitation on Number of Examination Attempts.

(a) An applicant may take an examination administered or required by the Council no more than three times. Failure to pass an examination subject to this rule within three attempts, will result in an automatic denial of an application.

(b) Notwithstanding subsection (a) of this section, an applicant whose application is denied under this rule may reapply for licensure, but will not be allowed or approved to sit for the exam again until the applicant has submitted a detailed study plan designed to address the known or suspected areas of deficiency. The study plan must be approved by the relevant member board before authorization will be given to retake the examination.

(c) Examinations which do not require pre-authorization by the Council to take, are not subject to this rule.

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

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SUBCHAPTER B. LICENSE

22 TAC §§882.20 - 882.27

The Texas Behavioral Health Executive Council adopts new §§882.20 - 882.27, relating to license. Except for §882.22 and §882.23, the new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2652) and will not be republished. In response to non-substantive changes being requested by the Office of the Texas Governor, §882.22 and §882.23 are being changed and adopted as republished below.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Section 507.254 of the Tex. Occ. Code authorizes the Executive Council to issue a license, which must also include the name of the applicable board. Generally, these new rules provide the form and function for the licenses issued by the Executive Council.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

A commenter requested changes to rule §882.22(a) for consistency reasons. The commenter believes previously licensed marriage and family therapists seeking to reinstate a revoked license should be excepted from this rule to be consistent with §502.252(b)(7) of the Tex. Occ. Code.

A commenter requested edits to rule §882.26(c). The commenter believes the requirement that two or more psychologist be on staff limits opportunities for post-doctoral training and does not guarantee greater learning than if there was just one. Additionally, the commenter believes the minimum two hours per week of face-to-face supervision does not allow for supervision by technology or electronic means.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

The lack of an exclusion or exception in rule §882.22(a) for LMFTs is unnecessary. Rule §881.10(a), pertaining to conflicts between other laws and council rules, would dictate that if a Council rule conflicted with a statute in the Texas Occupations Code, the statute would control. In this instance, rule §882.22(a) allows those with a prior license to apply for reinstatement with the Council. This does not guarantee that all prior revoked licensees will be reinstatement. An individual who had an LMFT revoked may still apply for reinstatement, but pursuant to §502.252(b)(7) the Tex. Occ. Code the Council would not be able to reinstate the license. Therefore rule §882.22(a) does not conflict with the Texas Occupations Code.

Rule §882.26(c) pertains to the criteria for a post-doctoral program to be consider substantially equivalent to an APA accredited or APPIC member program. An individual may always apply with the Council for licensure and once approved the individual may conduct a post-doctoral program required for licensure as a psychologist that is not APA accredited, an APPIC member program, or substantially equivalent. Therefore this rule does not limit the opportunity for post-doctoral training, it defines the pathway to complete this training prior to an application for licensure. Additionally, other rules, such as 22 Texas Administrative Code §465.2, allow for supervision by electronic means.

For these reasons the agency declines to make the requested changes, and hereby adopts the rules with no changes.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§882.22. Reinstatement of a License.

(a) A person whose license has expired or been retired, revoked, or resigned, may apply for reinstatement of the license. A person seeking re-licensure must apply for reinstatement, rather than applying for a new license.

(b) An application for reinstatement shall be in writing and in the form prescribed by the Council.

(c) In the case of revocation or resignation, application for reinstatement shall not be made prior to one year after the effective date of the revocation or resignation or prior to any time period specified in the order of revocation or resignation. A person whose license was revoked under §108.053 may apply for reinstatement of the license if the person meets the requirements of §108.055 of the Occupations Code.

(d) A person seeking reinstatement of a license shall appear before the Council or member board to answer any questions or address any concerns raised by the person's application if requested by a council or board member or the Executive Director. Failure to comply with this paragraph shall constitute grounds for denial of the application for reinstatement.

(e) The Council may approve or deny an application for reinstatement, and in the case of a denial, the Council may also set a reasonable period that must elapse before another application may be filed. The Council may also impose reasonable terms and conditions that an applicant must satisfy before reinstatement of an unrestricted license.

(f) An application for reinstatement of an expired, retired, revoked, or resigned license may be granted upon proof of each of the following:

(1) payment of the application fee;

(2) submission of a self-query report from the National Practitioner Data Bank (NPDB) reflecting any disciplinary history or legal actions taken against the applicant. A self-query report must be submitted to the agency in the sealed envelope in which it was received from the NPDB;

(3) a fingerprint based criminal history check which reflects no disqualifying criminal history;

(4) passage of any examinations required by a member board;

(5) documentation of any continuing education required by a member board; and

(6) submission of any other documentation or information requested in the application or which the Council or a member board may deem necessary in order to ensure the public's safety.

(g) The Council will evaluate each of the following criteria when considering reinstatement of an expired, revoked, or resigned license:

(1) circumstances surrounding the expiration, revocation, or resignation of the license;

(2) conduct of the applicant subsequent to the expiration, revocation, or resignation of the license;

(3) lapse of time since the expiration, revocation, or resignation of the license;

(4) compliance with all terms and conditions imposed by the Council or a member board in any previous order; and

(5) applicant's present qualification to practice the regulated profession based upon the history of related employment, service, education, or training, as well as the applicant's continuing education since the expiration, revocation, or resignation of the license.

(h) Notwithstanding time limits on original applications and examinations found elsewhere in these rules, an applicant seeking reinstatement of a license must submit all required documentation and information, and successfully pass all required examinations within the period specified by the Council. Failure to do so shall result in the application for reinstatement expiring.

§882.23. License Required to Practice.

(a) A person may not engage in or represent that the person is engaged in the practice of marriage and family therapy, professional counseling, psychology, or social work within this state, unless the person is licensed or otherwise authorized to practice by law.

(b) A person is engaged in the practice of marriage and family therapy within this state if any of the criteria set out in §502.002(6) of the Occupations Code occurs either in whole or in part in this state.

(c) A person is engaged in the practice of professional counseling within this state if any of the criteria set out in §503.003(a) of the Occupations Code occurs either in whole or in part in this state.

(d) A person is engaged in the practice of psychology within this state if any of the criteria set out in §501.003(b) of the Occupations Code occurs either in whole or in part in this state.

(e) A person is engaged in the practice of social work within this state if any of the criteria set out in §505.0025 of the Occupations Code occurs either in whole or in part 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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SUBCHAPTER C. DUTIES AND RESPONSIBILITIES

22 TAC §§882.30 - 882.36

The Texas Behavioral Health Executive Council adopts new §§882.30-882.36, relating to duties and responsibilities. The new sections are adopted without changes to the proposed text as published in the April 24, 2020 issue of the *Texas Register* (45 TexReg 2655) and will not be republished.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Section 507.254 of the Tex. Occ. Code authorizes the Executive Council to issue a license, which must also include the name of the applicable board. These new rules pertain to the duties and responsibilities of applicants going through the application process and licensees once they have obtained a license, which generally prohibit false or deceptive statements or practices.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

A commenter is concerned that rule §882.30(b) does not treat all license types equally and requests the rule be a single unified standard for all license types.

A commenter believes rule §882.32(a) requires licensees to be responsible for ensuring adequate record keeping for the agency and believes licensees cannot make sure the agency does the right thing with the information provided.

One commenter requested the addition of the word "must" to rule §882.36(a) for grammatical reasons. Another commenter requested the inclusion of Chapter 104 and 107 of the Texas Family Code in this rule.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

Pursuant to Tex. Occ. Code §§502.261(a) and 503.314(a) a marriage and family therapist and a licensed professional counselor must, respectively, display a copy of their license at their principle place of practice or in an appropriate and public manner. Therefore rule §882.30(b) must provide an exception for those licensed under Chapters 502 and 503 because Texas law will not allow them to provide a patient or client only written notification of a holder's license number along with instructions for verification.

Rule §882.32(a) requires licensee to update their contact information in the Council's online licensing system. A licensee will be responsible for entering the required information into this system, which the licensee will be able to check online. All data entry will be done by the licensee, there is no basis to think that the agency will manipulate, alter, or not use this data.

The addition of the word "must" in rule §882.36(a) would have no effect on this rule, and the agency does not find that this requested change is necessary to clear up any potential public confusion or misunderstanding of this rule. Rule §882.36 provides references to many of the statutes effecting a licensee's practice, but the rule is not intended to be an exhaustive list of every statute that could have an effect on a licensee. Citations to the Texas Family Code, specifically Chapter 107, are included in other rules of practice which a licensee should already be aware of before conducting any practice in the areas governed by the Texas Family Code; therefore the Council declines to add additional statutory references to this rule.

For these reasons the agency declines to make the requested changes, and hereby adopts the rules with no changes.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 D. CRIMINAL HISTORY AND LICENSE ELIGIBILITY

22 TAC §§882.40 - 882.42

The Texas Behavioral Health Executive Council adopts new §§882.40 - 882.42, relating to criminal history and license eligibility. Except for §882.42, concerning Ineligibility Due to Criminal History, the new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2658) and will not be republished. In response to non-substantive changes being requested by the Office of the Texas Governor, §882.42 is being changed and adopted as republished below.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Section 507.254 of the Tex. Occ. Code authorizes the Executive Council to issue a license, which must also include the name of the applicable board; and §507.156 of the Tex. Occ. Code requires the Executive Council to adopt rules pertaining to the Executive Council's authority to revoke, suspend, or deny a license based upon a criminal conviction. These new rules implement this statutory duty.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

A commenter was concerned that subsections (b) and (d) of §882.40 contradicted each other and subsection (c) will allow licensees to renew a license by merely being fingerprinted and not completing any other renewal requirement.

One commenter requested the addition of the word "based" to fingerprint criminal history background checks in §882.41(d) for consistency reasons.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

Section 882.40(b) is a standalone requirement, it can apply to any licensee at any time, and does not contradict any other subsection of this rule. Subsection (c) of the rule deals with licensees who have not yet been required to complete a criminal history background check, and it does not waive any requirements for the renewal of a license. Subsection (d) of the rule pertains solely to those applicants who have already completed a criminal history background check and it exempts them from subsection (c).

The addition of the word "based" in §882.41(d) to describe the fingerprint criminal history background check would have no effect on this rule, the same term was used in §882.60(e), and the agency does not find that this requested change is necessary to clear up any potential public confusion or misunderstanding of this rule.

For these reasons the agency declines to make the requested changes, and hereby adopts the rules with no changes.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code, which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts these new rules pursuant to the authority found in §507.156 of the Tex. Occ. Code, which requires the Executive Council to adopt rules necessary to comply with Chapter 53 of the Tex. Occ. Code.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§882.42. Ineligibility Due to Criminal History.

(a) The Council may revoke or suspend a license, disqualify a person from receiving or renewing a license, or deny a person the opportunity to be examined for a license due to a felony or misdemeanor

conviction, or a plea of guilty or nolo contendere followed by deferred adjudication, if the offense:

(1) is listed in Article 42A.054 of the Code of Criminal Procedure;

(2) was a sexually violent offense, as defined by Article 62.001 of the Code of Criminal Procedure; or

(3) directly relates to the duties and responsibilities of a licensee.

(b) In determining whether a criminal conviction directly relates to the duties and responsibilities of a licensee, the agency shall consider the factors listed in §53.022 of the Occupations Code. Each member board shall determine which crimes are directly related to the duties and responsibilities of its licensees.

(c) If the agency determines that a criminal conviction directly relates to the duties and responsibilities of a licensee, the agency must consider the factors listed in §53.023 of the Occupations Code when determining whether to suspend or revoke a license, disqualify a person from receiving a license, or deny a person the opportunity to take a licensing examination. It shall be the responsibility of the applicant or licensee to provide documentation or explanations concerning each of the factors listed in the law. Any documentation or explanations received will be considered by the agency when deciding whether to suspend or revoke a license, disqualify a person from receiving a license, or deny a person the opportunity to take a licensing examination.

(d) Notwithstanding any schedule of sanctions adopted by the Council or a member board, the Council shall:

(1) revoke a license due to a felony conviction under §35A.02 of the Penal Code, concerning Medicaid fraud, in accordance with §36.132 of the Human Resources Code;

(2) revoke or suspend a license for unprofessional conduct in accordance with §105.002 of the Occupations Code; and

(3) revoke a license due to a license holder's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.

(e) In accordance with Chapter 108 of the Occupations Code, an application for licensure as a psychologist or social worker will be denied if the applicant:

(1) is required to register as a sex offender under Chapter 62 of the Code of Criminal Procedure;

(2) has been previously convicted of or placed on deferred adjudication for the commission of a felony offense involving the use or threat of force; or

(3) has been previously convicted of or placed on deferred adjudication for the commission of an offense:

(A) under §§22.011, 22.02, 22.021 or 22.04 of the Penal Code, or an offense under the laws of another state or federal law that is equivalent to an offense under one of those sections;

(B) during the course of providing services as a health care professional; and

(C) in which the victim of the offense was a patient.

(f) A person whose application was denied under subsection (e) of this section may reapply for licensure if the person meets the requirements of §108.054 of the Occupations Code.

(g) In accordance with §108.053 of the Occupations Code, the Council shall revoke the license of a psychologist or social worker if the licensee is:

(1) convicted or placed on deferred adjudication for an offense described by subsection (e)(2) or (3) of this section; or

(2) required to register as a sex offender under Chapter 62 of the Code of Criminal Procedure.

(h) The Council will provide notice to a person whose application has been denied due to criminal history as required by §53.0231 and §53.051 of the Occupations 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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Darrel D. Spinks
Executive Director
Texas Behavioral Health Executive Council
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For further information, please call: (512) 305-7706

SUBCHAPTER E. CONTINUING EDUCATION

22 TAC §882.50

The Texas Behavioral Health Executive Council adopts new §882.50, relating to continuing education. The new section is adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2660) and will not be republished.

Reasoned Justification.

The new rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Section 507.254 of the Tex. Occ. Code authorizes the Executive Council to issue a license, which must also include the name of the applicable board. In order to maintain and renew a license, each license holder is required to obtain a minimum amount of education per renewal period in order to renew a license. Each applicable board will determine the minimum amount of required education and the Executive Council will ensure compliance. This new rule pertains to the Executive Council's ability to audit license holders for compliance purposes.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

A commenter requested the rule reference that inactive status licensees do not have to comply with this rule. Other commenters were concerned that the rule would result in 10% of all licensees being audited every month, which would could result in over auditing and be more burdensome than beneficial to licensees and the agency.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

Rule §882.21(b)(2) already states that inactive licensees do not have to comply with continuing education requirements while the license is inactive, restating the same in §882.50 would be duplicative and unnecessary.

Rule §882.50(a) requires all licensee to complete the minimum amount of continuing education required to renew a license for each renewal period. Rule §882.50(b) allows the agency to conduct audits of licensees to ensure compliance with the continuing education requirements. Every month, a group of licensees will be required to renew their license and under §882.50(b)(1) 10% of these licensees will be subject to an audit, and, as the rule states, they will need to show compliance before their license will be renewed. Therefore, the only licensees that will be subject to the random audits of rule §882.50(b)(1) will be those renewing their license.

For these reasons the agency declines to make the requested changes, and hereby adopts the rule with no changes.

Statutory Authority.

The new rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this new rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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. LICENSING PROVISIONS RELATED TO MILITARY SERVICE MEMBERS, VETERANS, AND MILITARY SPOUSES

22 TAC §882.60, §882.61

The Texas Behavioral Health Executive Council adopts new §882.60 and §882.61, relating to licensing provisions related to military service members, veterans, and military spouses. The new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2661). The rules will not be republished.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Section 507.254 of the Tex. Occ. Code authorizes the Executive Council to issue a license, which must also include the name of the applicable board. Chapter 55 of the Tex. Occ. Code requires state agencies that issue a license to adopt rules pertaining to licensing eligibility requirements for military service members, veterans, and spouses. These new rules implement this statutory duty.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

One commenter requested the addition of the word "based" to fingerprint criminal history background checks in rule §882.60(e) for consistency reasons.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

One commenter thought the addition of rule 882.61 was an excellent change.

Agency Response.

The addition of the word "based" in rule §882.60(e) to describe the fingerprint criminal history background check would have no effect on this rule, the same term was used in rule §882.41(d), and the agency does not find that this requested change is necessary to clear up any potential public confusion or misunderstanding of this rule. For these reasons the agency declines to make the requested change, and hereby adopts the rule with no changes.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts these new rules pursuant to the authority found in §507.156 of the Tex. Occ. Code which requires the Executive Council to adopt rules necessary to comply with Chapter 53 of the Tex. Occ. Code.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which re-

quires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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. EMERGENCY TEMPORARY LICENSE

22 TAC §882.70

The Texas Behavioral Health Executive Council adopts new §882.70, relating to Emergency Temporary License. The new section is adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2663). The rule will not be republished.

Reasoned Justification.

The new rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Section 507.254 of the Tex. Occ. Code authorizes the Executive Council to issue a license, which must also include the name of the applicable board. Sections 501.263, 502.258, 503.308, and 505.357 of the Tex. Occ. Code require the adoption of rules for the Executive Council to issue a temporary license. This new rule implements this statutory duty.

List of interested groups or associations against the rule.

The Bluebonnet Counseling Association of Texas

The Texas Counseling Association

The Texas Psychological Association

The Texas Association of Marriage and Family Therapists

The National Association of Social Workers - Texas

The Texas Society for Clinical Social Work

Summary of comments against the rule.

Commenters have requested rule §882.70, pertaining to emergency temporary license, be amended to allow out-of-state licensees who are not in good standing the ability to apply for and be granted temporary licensure. Additionally, one commenter requested the emergency temporary license be made available for those applicants needing a job but waiting for the agency to process the application.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

To allow out-of-state licensees who are not in good standing, meaning they are subject to a current disciplinary action, to apply for and be granted emergency temporary licenses would be antithetical to the mission of this agency - to protect the public. Once the out-of-state licensee is no longer subject to a disciplinary action then the licensee may apply, but to allow potential bad actors a pathway to temporary licensure will increase the potential for more harm. The purpose for the emergency temporary license is to allow out-of-state licensees to provide services in Texas in response to a disaster, therefore this licensing rule is not something that should be used for the typical or regular licensing process. For these reasons the agency declines to make the requested changes, and hereby adopts the rule with no changes.

Statutory Authority.

The new rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this new rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts this new rule pursuant to the authority found in §§501.263, 502.258, 503.308, and 505.357 of the Tex. Occ. Code which requires the Executive Council to adopt rules for the issuance of temporary licenses.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 883. RENEWALS

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §§883.1 - 883.3

The Texas Behavioral Health Executive Council adopts new §§883.1 - 883.3, relating to general provisions for the renewal

of a license. The new sections are adopted without changes to the proposed text as published in the April 24, 2020, issues of the *Texas Register* (45 TexReg 2665). The rules will not be republished.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Section 507.255 of the Tex. Occ. Code authorizes the Executive Council to renew licenses issued by the Executive Council, which must also include the name of the applicable board, and these new rules implement this statutory duty. Generally, these new rules establish the requirements for the biennial renewal of a license, and this biennial renewal period will be based upon the last day of the license holder's birth month.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

A commenter believes rule §883.2 should be amended so it does not conflict with the renewal or expiration dates listed in the rules for other license types.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

Rule §883.2 concerns the date on which a license, that can be renewed, must be renewed by, which is the last day of the licensee's birth month; except for those individuals that have more than one license from a member board, the renewal date shall coincide with the individual's existing renewal date. The commenter is concerned that this rule will conflict with the rules concerning the LPC-A (22 TAC §681.91) and the temporary license for social workers (22 TAC §781.411), but, by statute (§§503.308 and 505.357 of the Tex. Occ. Code, respectively) and by these rules, neither of those licenses can be renewed; so there exists no conflict because rule §883.2 does not apply to those rules. The commenter is also concerned that rule §883.2 will conflict with the rule concerning LMFT Associates (22 TAC §801.202). Rule §883.2 will work with the LMFT Associate rule because LMFT Associates will be required to renew on a biennial basis by the last day of the licensee's birth month. The only difference is under the LMFT Associates rule there is a limit to how many times a licensee may renew that license, because the license is intended to be used to gain licensure as an LMFT. Rule §883.2 does not conflict with the LMFT Associate rule because rule §883.2 only specifies the date upon which a renewal is required but does not address when a particular license can no longer be renewed. Additionally, the rules the commenter is concerned will conflict with rule §883.2 are currently working through the rule amendment process in an effort to avoid any possible future conflict. For these reasons the agency declines to make the requested changes, and hereby adopts the rule with no changes.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

Lastly, the Executive Council adopts these new rules under the authority of §507.255 of the Tex. Occ. Code which authorizes the Executive Council to issue license renewals upon meeting certain criteria.

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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Darrel D. Spinks
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Texas Behavioral Health Executive Council
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SUBCHAPTER B. RENEWAL PROVISIONS FOR MILITARY PERSONNEL

22 TAC §883.10

The Texas Behavioral Health Executive Council adopts new §883.10, relating to renewal terms for military personnel on active duty. The new section is adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2667). The rule will not be republished.

Reasoned Justification.

The new rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Section 507.255 of the Tex. Occ. Code authorizes the Executive Council to renew licenses issued by the Executive Council, which must also include the name of the applicable board; and §55.002 of the Tex. Occ. Code requires state licensing agencies to adopt a rules regarding licensing renewal exemptions for individuals serving as military service members. This new rule implements the statutory duty.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The new rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this new rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts this new rule under the authority of §507.255 of the Tex. Occ. Code which requires the Executive Council to issue license renewals upon meeting certain criteria.

Lastly, the Executive Council adopts this new rule pursuant to the authority found in §55.002 of the Tex. Occ. Code which requires state licensing agencies to adopt a rules regarding licensing renewal exemptions for individuals serving as military service members.

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 884. COMPLAINTS AND ENFORCEMENT

SUBCHAPTER A. FILING A COMPLAINT

22 TAC §§884.1 - 884.3, 884.5, 884.6

The Texas Behavioral Health Executive Council adopts new §§884.1 - 884.3, 884.5, and 884.6, relating to filing a complaint. Except for §884.2, the new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2668) and will not be republished. In response to non-substantive changes being requested by the Office of the Texas Governor, §884.2 is being changed and adopted as republished below.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 2001.004 of the Tex. Gov't Code requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. These new rules are the general framework regarding the Executive Council's procedures for filing a complaint.

List of interested groups or associations against the rule.

The Coalition for Family Court Reform

Summary of comments against the rule.

A commenter requested rule §884.1 be amended so there would be no time limit for complaints alleging sexual misconduct, the commenter wanted to allow child victims as much time as possible to file a complaint. The commenter acknowledges that this would exceed record retention requirements but felt other records or testimony could be used in an investigation of such a complaint.

Commenters requested changes or the deletion of rule §884.3 in its entirety. Some commenters believe the process and requirements outlined in the rule for filing a complaint against a forensic examiner is overly burdensome to complainants and will not help protect to public against bad actors and misconduct. Some commenters believe the intent of the rule is so staff may dismiss complaints without investigating them. Some ask that the rule allow for the filing of a complaint while a family law case is still pending before a court and that there be no requirement for a complainant to provide or include any documentation regarding their complaint. Another commenter was concerned that allowing attorneys to provide opinion letter in support of a complaint will unnecessarily involve attorneys in the complaint process allowing them to opine on how a licensee did or did not follow the Texas Family Code as it relates to testing, which the commenter asserts an attorney has no such expertise to do. The commenter is afraid that attorneys will try to use the complaint process as a litigation tactic in family law cases. Another commenter wants the rule to include language that allows a complainant to file a copy of a court order making a finding that a child custody evaluator's report is defective, deficient, or in violation of a legal standard.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

While the Council is sympathetic to the commenter's concern in rule §884.1 regarding the investigation of sexual abuse allegations perpetrated against children, as a matter of fairness the Council believes that some time limitation must be imposed upon complaints against licensees. In order for licensees to be able to appropriately and fully respond to a complaint a licensee will almost always provide a copy of the records maintained by the licensee pertaining to the alleged victim, which is typically a patient file. Logically, it only makes sense to tie the requirement in this rule to the records retention requirements for each licensee. Additionally, if a criminal statute of limitation has not expired, the

alleged victim may file a criminal complaint and if the licensee is convicted of a criminal offense it will most likely also result in a disciplinary action against that individual's license.

Regarding the comments pertaining to §884.3, this agency is charged with the task of fairly regulating its licensees - so that the public is protected and that licensees are fairly investigated and prosecuted. The Council believes this rule will maintain this balance. The purpose behind the rule is to streamline the complaint intake process, the documents or information needed to initiate the complaint are items that will be necessary in virtually every court ordered forensic evaluation. Agency staff currently reviews complaints when they are initially filed for legal sufficiency, such as to determine if the allegation on their face state a violation of the law. The basic documentation and information required by this rule are used to make this determination. If a complaint fails to state a violation of law the complaint will be dismissed and the complainant will be notified why the agency could not investigate the complaint. Agency staff will often contact a complainant for more information or documentation regarding an alleged violation of law that staff is unable to determine if a violation of law has occurred. What this rule does is put complainants on notice of what staff will need to process and start investigations such complaints. Currently attorneys are not prohibited from filing complaints and opinion letters, the rule uses an attorney opinion letter as one example of possible documentation that may aid in the processing of a complaint and this agency does not have statutory authority to prohibit attorneys from filing complaints or letters for or against a complaint. The rule is intended to curtail the use of this agency's complaint process as a litigation tactic by requiring a judgment, final order, or dismissal be entered and provided with the complaint prior to the agency processing the complaint. The rule, as currently drafted, allows a complainant may file a copy of a court order finding a defect in a report or ordering a licensee to correct a defect in a report.

For these reasons the agency declines to make the requested changes, and hereby adopts the rules with no changes.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts these new rules pursuant to the authority found in §507.204 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning the investigation of a complaint filed with the Executive Council.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§884.2. Standardized Complaint Form.

All complaints must be submitted on the Council-approved complaint form. The complaint form shall be obtained free of charge from the Council's website or by requesting a copy from the Council.

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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Texas Behavioral Health Executive Council
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SUBCHAPTER B. INVESTIGATIONS AND DISPOSITION OF COMPLAINTS

22 TAC §§884.10 - 884.12

The Texas Behavioral Health Executive Council adopts new §§884.10 - 884.12, relating to investigation and disposition of complaints. Except for §884.10 and §884.12, the new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2670) and will not be republished. In response to non-substantive changes being requested by the Office of the Texas Governor, §884.10 and §884.12 are being changed and adopted as republished below.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 2001.004 of the Tex. Gov't Code requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. These new rules are the general framework regarding the Executive Council's procedures for investigating and potentially resolving a complaint.

List of interested groups or associations against the rule.

The Bluebonnet Counseling Association of the Texas

The Texas Counseling Association

The Texas Psychological Association

The Texas Association of Marriage and Family Therapists

The National Association of Social Workers - Texas Chapter

The Texas Society for Clinical Social Work

Summary of comments against the rule.

Commenters requested changes to rule §884.12(c). In general commenters requested the rule be changed from allowing mem-

bers boards to provide input and assistance in enforcement matters and proceedings to requiring it. Some commenters believed §507.306 of the Tex. Occ. Code requires this change.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

The comments all focus on subsection (c) of rule §884.12 but they may not have considered this subsection in conjunction with the entire rule. Subsection (a) of the rule states, in part: "each member board shall be responsible for reviewing complaints involving the standard of care, ethical guidelines, or scope of practice following a contested case before SOAH and making a recommendation to the Council regarding the final disposition." Then in subsection (c) the Council is allowed to solicit input and request assistance from a member board before entering the final order. Changing subsection (c) to a mandatory requirement, as opposed to permissive one, will only make subsection (c) redundant to the requirements of subsection (a). Therefore rule §884.12 complies with §507.306 of the Tex. Occ. Code; and for these reasons the agency declines to make the requested changes, and hereby adopts the rule with no changes.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts these new rules pursuant to the authority found in §507.204 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning the investigation of a complaint filed with the Executive Council.

The Executive Council adopts these new rules pursuant to the authority found in §§507.305 and 507.306 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning informal proceedings to resolve a complaint and assistance in disciplinary proceedings.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§884.10. Investigation of Complaints.

(a) The following priority rating system shall serve to distinguish between categories of complaints. The priority rating system is as follows:

(1) cases involving a probability of imminent physical harm to the public or a member of the public;

(2) cases involving sexual misconduct;

(3) cases involving applicants for licensure; and

(4) cases involving all other violations of state or federal law.

(b) The Enforcement Division shall investigate all complaints in a timely manner. A schedule shall be established for conducting each phase of a complaint that is under the control of the Council not later than the 30th day after the date the complaint is received. The schedule shall be kept in the information file of the complaint, and all parties shall be notified of the projected time requirements for pursuing the complaint. A change in the schedule must be noted in the complaint information file, and all parties to the complaint must be notified in writing not later than the seventh day after the date the change is made.

(c) The Council may accept, but is not obligated to investigate, a complaint that lacks sufficient information to identify the source or the name of the person who filed the complaint.

(d) A complainant may explain the allegations made in the complaint by attaching or including with the complaint any evidence the complainant believes is relevant to a determination of the allegations, including written statements or communications, medical or mental health records, recordings, photographs, or other documentary evidence.

(e) A review will be conducted upon receipt of a complaint to determine if the Council has jurisdiction over the complaint, and if so, whether the complaint states an allegation which, if true, would constitute a violation of the Council's rules or other law within the jurisdiction of the Council.

(f) Complaints that do not state a violation of a law within the jurisdiction of the Council shall be dismissed. If the complaint alleges a violation of a law within the jurisdiction of another agency, the complaint will be referred to that agency as required or allowed by law.

(g) Complaints that state a violation of a law within the jurisdiction of the Council shall be investigated by an investigator assigned by the Enforcement Division.

(h) Licensees will receive written notice of any alleged complaint(s), including specific information regarding any violation(s) encountered. Notice to a licensee is effective and service is complete when sent by registered or certified mail to the licensee's address of record at the time of the mailing.

(i) Following completion of the investigation, an investigation report shall be drafted. This report shall include a recommendation as to whether the investigation has produced sufficient evidence to establish probable cause that a violation has occurred.

(j) The Enforcement Division Manager (or the manager's designee) and legal counsel shall review the investigation report to determine if there is probable cause that a violation occurred.

(k) A complaint for which the staff determines probable cause exists shall be referred for an informal conference by agency staff or a member board's Disciplinary Review Panel. Agency staff shall send the respondent notice of the date and time of the informal conference.

(l) A complaint for which staff or a Disciplinary Review Panel determines that probable cause does not exist shall be referred for dismissal.

(m) The services of a private investigator shall be retained only in the event that staff investigator positions are vacant or inadequate to provide essential investigative services. The services of a private investigative agency shall be obtained in accordance with the state's procurement procedures.

(n) If a complainant or respondent are represented by an attorney, any notice or service required by law shall be made upon the attorney at the attorney's last known address.

§884.12. Complaint Disposition.

(a) The Council must approve and enter all final orders following a contested case before SOAH or where no agreement exists between the agency and the respondent regarding the disposition of a contested enforcement related matter. However, each member board shall be responsible for reviewing complaints involving the standard of care, ethical guidelines, or scope of practice following a contested case before SOAH and making a recommendation to the Council regarding the final disposition. A recommendation from a member board must include any recommended modifications to the findings of fact and conclusions of law in the PFD, as well as the recommended sanction. A proposed final order reflecting a member board's recommendations shall satisfy the requirements of this rule.

(b) The Council shall review recommendations from member boards for anti-competitive impacts, administrative consistency, and good governance concerns. The Council may not substitute its judgment in contested enforcement matters for that of a member board where, in the Council's determination, none of the aforementioned concerns are present.

(c) The Council may solicit input from and request the assistance of a member board when considering a contested enforcement matter if there are concerns about the standard of care or ethical practice shown by a licensee. The Council may specify the format of the input and assistance requested to satisfy the requirements of this rule.

(d) Each member board is authorized to dismiss complaints and approve and enter agreed final orders and informal dispositions; Council ratification is not required. The Executive Director shall report the number of dismissals and agreed orders entered under this rule at Council meetings.

(e) Disposition by the Executive Director.

(1) The Executive Director is authorized to:

(A) dismiss a complaint if the investigator and legal counsel agree that a violation did not occur or that the agency lacks jurisdiction over the complaint;

(B) dismiss a complaint recommended for dismissal by a Disciplinary Review Panel;

(C) dismiss a complaint following a contested case hearing before SOAH where the ALJ finds no violation of the law has occurred;

(D) accept the voluntary resignation of a license;

(E) offer, approve, and enter agreed orders if the disciplinary sanction imposed complies with the disciplinary guidelines and relevant schedule of sanctions; and

(F) enter an order suspending a license upon receipt of an order suspending a license issued under Chapter 232 of the Family Code. Council ratification is not required.

(2) The Executive Director shall report the number of agreed orders, dismissals, resignations, and suspensions ordered, along with a brief summary of the basis for each, to the Council and relevant member board at the next regular meeting.

(3) The Executive Director must, when offering an agreed order or resignation order prior to an informal conference, advise the respondent of the right to an informal conference and that the matter will be set for an informal conference if requested or if an informal disposition cannot be agreed upon.

(f) Any person who files a complaint will be notified of the disposition of the complaint. A person who filed a complaint that is dismissed will be notified of the dismissal by letter and the letter will reflect the legal basis or reason for the dismissal. A person who filed a complaint resulting in disciplinary action will be sent a copy of the Council's final order.

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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Darrel D. Spinks
Executive Director
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SUBCHAPTER C. DISCIPLINARY GUIDELINES AND SCHEDULE OF SANCTIONS

22 TAC §884.20, §884.21

The Texas Behavioral Health Executive Council adopts new §884.20 and §884.21, relating to disciplinary guidelines and schedule of sanctions. The new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2673) and will not be republished.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 2001.004 of the Tex. Gov't Code requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. These new rules are the general framework regarding the Executive Council's procedures for imposing sanctions.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts these new rules pursuant to the authority found in §507.204 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning the investigation of a complaint filed with the Executive Council.

The Executive Council adopts these new rules pursuant to the authority found in §507.304 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning a schedule of sanctions.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 D. DUTIES AND RESPONSIBILITIES

22 TAC §§884.30 - 884.32

The Texas Behavioral Health Executive Council adopts new §§884.30 - 884.32, relating to Duties and Responsibilities. Except for §884.30 and §884.32, the new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2676) and will not be republished. In response to non-substantive changes being requested by the Office of the Texas Governor, §884.30 and §884.32 are being changed and adopted as republished below.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 2001.004 of the Tex. Gov't Code requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. These new rules require licensees to provide notice to the public of the complaint process, they require licensees to cooperate with Executive Council investigations, and they require licensees to report legal actions and a discipline.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts these new rules pursuant to the authority found in §507.204 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning the investigation of a complaint filed with the Executive Council.

The Executive Council adopts these new rules pursuant to the authority found in §507.202 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning notice to the public of the complaint process.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§884.30. Cooperation with Council Investigations.

Licensees must cooperate with and respond to Council investigations. Failure to cooperate or respond may serve as grounds for a Council-initiated complaint and disciplinary action.

§884.32. Reportable Legal Action and Discipline.

(a) Licensees are required to report legal actions as follows:

(1) Any conviction, sentence, dispositive agreement, or order placing the licensee on community supervision or pretrial diversion, must be reported in writing to the Council within thirty days of the underlying event. A report must include the case number, court, and county where the matter is filed, together with a description of the matter being reported. A licensee shall provide copies of court documents upon request from agency staff.

(2) Any lawsuit brought by or against a licensee concerning or related to the delivery of services regulated by this agency or billing practices by the licensee. A report must include a copy of the initial pleading filed by or served upon the licensee, and must be submitted to the Council within thirty days of either filing by or service upon the licensee.

(3) Any administrative or disciplinary action initiated against a licensee by another health regulatory agency in this state or any other jurisdiction, or any agency or office within the federal government, must be reported to the Council by sending notification of the action within thirty days of the licensee receiving notice of the action. A report must include a copy of any complaint, notice of violation, or other documentation received by the licensee from the initiating entity which describes the factual basis for the action. A licensee must also supplement this report to the Council with a copy of any order, letter, or determination setting forth the final disposition of the matter within thirty days following the final disposition.

(b) A complaint shall be opened if a reported criminal action constitutes grounds for disciplinary action under applicable state or federal law. A complaint may be opened if a reported civil action constitutes grounds for disciplinary action under Council rules.

(c) Reciprocal Discipline:

(1) A complaint may be opened upon receipt of a report of discipline against a licensee by another health licensing agency in this state or any other jurisdiction.

(2) The Council may impose disciplinary action on a licensee according to its own schedule of sanctions for the conduct forming the basis of the other health licensing agency's disciplinary action.

(3) A voluntary surrender of a license in lieu of disciplinary action or during an investigation by another health licensing agency constitutes disciplinary action under this rule.

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

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SUBCHAPTER E. LICENSE SUSPENSION

22 TAC §884.40, §884.41

The Texas Behavioral Health Executive Council adopts new §884.40 and §884.41, relating to license suspension. Except for §884.40, the new sections are adopted without changes to the proposed text as published in the April 24, 2020 issue of the *Texas Register* (45 TexReg 2677) and will not be republished. In response to non-substantive changes being requested by the Office of the Texas Governor, §884.40 is being changed and adopted as republished below.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 2001.004 of the Tex. Gov't Code requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. These new rules pertain to the Executive Council's proceedings to temporarily suspend a license.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts these new rules pursuant to the authority found in §507.204 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning the investigation of a complaint filed with the Executive Council.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§884.40. Temporary Suspension of a License.

(a) In accordance with §507.302 of the Occupations Code, a license shall be temporarily suspended when the Council or an executive committee of the Council determines that the continued practice

by a licensee (respondent) would constitute a continuing and imminent threat to the public welfare.

(b) An executive committee of the Council shall convene as follows:

(1) For each temporary suspension proceeding, the Council shall appoint a three-member executive committee, called a "suspension panel," to consider the information and evidence presented by agency staff. The suspension panel must have at least one member from the same profession as the respondent and a majority of members from the respondent's member board. The suspension panel shall confer with each other and name a chair of the suspension panel.

(2) In the event of the recusal of a suspension panel member or the inability of a suspension panel member to attend a temporary suspension proceeding, the presiding officer for the Council may appoint an alternate council member to serve on the suspension panel.

(3) The suspension panel may convene in-person or via telephone, video conference, or other electronic means.

(c) Temporary Suspension Hearing. The meeting at which the suspension panel considers a temporary suspension is a temporary suspension hearing. At the temporary suspension hearing, agency staff shall present evidence and information to the suspension panel that the continued practice by a person licensed by the Council would constitute a continuing and imminent threat to the public welfare. Notice of the temporary suspension hearing shall be sent to the respondent no less than 10 days before the hearing by personal service or by registered or certified mail.

(d) Order of Temporary Suspension. If a majority of the suspension panel votes to temporarily suspend a license, the suspension shall have immediate effect, and the chair of the suspension panel will sign an Order of Temporary Suspension. The Order of Temporary Suspension shall include a factual and legal basis establishing imminent peril to the public health, safety, or welfare, as required by §2001.054(c-1) of the Government Code. The Order shall be sent to the respondent by first-class mail or email.

(e) Temporary Suspension Without Notice. In accordance with §507.302(b) of the Occupations Code, a license may be suspended without notice to the respondent if at the time of the suspension, agency staff request a hearing before SOAH to be held as soon as practicable but no later than 14 days after the date of the temporary suspension. The hearing is referred to as the "probable cause hearing."

(f) Notice, Continuance, and Waiver of Probable Cause Hearing. Agency staff shall serve notice of the probable cause hearing upon the respondent in accordance with SOAH's rules. The respondent may request a continuance or waiver of the probable cause hearing. If the ALJ grants the continuance request or the respondent waives the probable cause hearing, the suspension remains in effect until the suspension is considered by SOAH at the continued probable cause hearing or at the final hearing. If the probable cause hearing is not held within 14 days and the respondent did not request a continuance or waive the probable cause hearing, the suspended license is reinstated.

(g) Probable Cause Hearing. At the probable cause hearing, an ALJ shall determine whether there is probable cause to continue the temporary suspension of the license and issue an order on that determination.

(h) Final Hearing. The State Office of Administrative Hearings shall hold a hearing no later than 61 days from the date of the temporary suspension. At this hearing, agency staff shall present evidence supporting the continued suspension of the license and may present evidence of any additional violations related to the licensee. This hearing is referred to as the "final hearing."

(i) Notice and Continuance of Final Hearing. Agency staff shall send notice of the final hearing in accordance with SOAH's rules. The respondent may request a continuance or waive the final hearing. If a final hearing is not held within 61 days of the date of the temporary suspension and the respondent did not request a continuance or waive the final hearing, the license is reinstated.

(j) Proposal for Decision. Following the final hearing, the ALJ shall issue a PFD on the suspension. The PFD may also address any other additional violations related to the licensee.

(k) A temporary suspension takes effect immediately and shall remain in effect until:

(1) a final or superseding order of the Council is entered;

(2) the ALJ issues an order determining that there is no probable cause to continue the temporary suspension of the license; or

(3) a SOAH hearing is not timely held.

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. SPECIAL PROVISIONS FOR PERSONS LICENSED TO PRACTICE PSYCHOLOGY

22 TAC §884.50, §884.51

The Texas Behavioral Health Executive Council adopts new §884.50 and §884.51, relating to special provisions for persons licensed to Practice Psychology. The new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2680). The rules will not be republished.

Reasoned Justification.

The new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 2001.004 of the Tex. Gov't Code requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. These new rules pertain to the Executive Council's proceedings

for competency evaluations and remedial plans for persons licensed under Chapter 501 Tex. Occ. Code.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts these new rules pursuant to the authority found in §507.204 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning the investigation of a complaint filed with the Executive Council.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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. COMPLIANCE

22 TAC §884.55

The Texas Behavioral Health Executive Council adopts new §884.55, relating to Compliance. The new section is adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2682). The rule will not be republished.

Reasoned Justification.

The new rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 2001.004 of the Tex. Gov't Code requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. This new rule pertains to the Executive Council's procedures for monitoring and ensuring compliance with Executive Council orders.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The new rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this new rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts this new rule pursuant to the authority found in §507.204 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning the investigation of a complaint filed with the Executive Council.

The Executive Council adopts this new rule pursuant to the authority found in §507.404 of the Tex. Occ. Code which requires the Executive Council to adopt rules regarding monitoring a license holder's compliance with Executive Council orders.

Lastly, the Executive Council adopts this new rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 H. CONTESTED CASES

22 TAC §§884.60 - 884.63, 884.65

The Texas Behavioral Health Executive Council adopts new §§884.60 - 884.63 and 884.65, relating to Contested Cases. The new sections are adopted without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2683) and will not be republished.

Reasoned Justification.

Overview and Explanation of the Proposed Rule. The proposed new rules are needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 2001.004 of the Tex. Gov't Code requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. These new rules pertain to the Executive Council's procedures for conducting a contested case to resolve a complaint.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The new rules are adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts these new rules pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts these new rules pursuant to the authority found in §507.204 of the Tex. Occ. Code which requires the Executive Council to adopt rules concerning the investigation of a complaint filed with the Executive Council.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 885. FEES

22 TAC §885.1

The Texas Behavioral Health Executive Council adopts new §885.1, relating to Fees.

The new section is adopted with changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2685). In response to changes being proposed in 22 Texas Administrative Code Ch. 681, where the term Licensed Professional Counselor Intern (LPC-I) is being changed to Licensed Professional Counselor Associate (LPC-A), the Council adopts the corresponding name changes in rule §885.1, as a non-substantive change, which is republished below. Additionally, other changes have been made to the adopted rule to correct errors in the previously published text.

Reasoned Justification.

The new rule is needed to implement Tex. H.B. 1501, 86th Leg., R.S. (2019). This legislation created the Texas Behavioral Health Executive Council and authorized the Executive Council to regulate marriage and family therapists, professional counselors, psychologists, and social workers. Sections 507.151 and 507.152 of the Tex. Occ. Code authorizes the Executive Council to administer and enforce Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code, as well as adopt rules as necessary to perform the Executive Council's duties and implement Chapter 507. Section 507.154 of the Tex. Occ. Code authorizes the Executive Council to set fees necessary to cover the costs of administering Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code. The new rule establishes application and renewal fees in the amount necessary to meet the contingency rider found in §18.11 of Art. IX in the General Appropriations Act for 2020-2021, see Tex. H.B. 1, 86th Leg., R.S. (2019).

List of interested groups or associations against the rule.

The Texas Counseling Association

The Texas Psychological Association

The Fort Bend Psychological Association

The Texas Association of Marriage and Family Therapists

The National Association of Social Workers - Texas Chapter

The Texas Society for Clinical Social Work

Summary of comments against the rule.

Commenters voiced their disapproval with the increase in fees, and many asked for a reduction in either the increase of the fees or a reduction in the fees previously charged. Some of the commenters believed licensing's fees were already too high and others requested that the fees stay the same. A group of licensees, psychologists, voiced their disapproval that the fees for their particular licensure application and renewals was substantially higher than others license types, some believed they were paying a disproportionate amount to fund the agency, and requested either a decrease in their fees or that all fees be the same for each license type. Some commenters voiced an opinion that an increase in fees will negatively impact businesses, while others believed businesses will be negatively impacted until the fees for all license types are the same. Some commenters also believed that having different fees for different licenses will reduce competition and put those license types with higher fees at a competitive disadvantage.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

The agency must generate enough revenue to meet the contingency rider found in §18.11 of Art. IX in the General Appropriations Act for 2020-2021. Therefore, in order to meet this obligation, some of the current fees for applications and renewals must be increased.

This adopted rule will increase application fees for the following license types: Licensed Baccalaureate Social Worker (LBSW) and Licensed Master Social Worker (LMSW) applications will increase by $29; Licensed Clinical Social Worker (LCSW) applications will increase by $29; Social Worker supervisor status applications will increase by $30; initial Licensed Marriage and Family Therapist (LMFT) associate applications will increase by $29; LMFT by endorsement applications will increase by $31; LMFT supervisor status applications will increase by $30; Licensed Professional Counselor (LPC), LPC intern, and provisional license applications will increase by $31; and LPC supervisor status applications will decrease by $50.

This adopted rule will increase renewal fees for the following license types: LBSW and LMSW renewal applications will increase by $61; LMSW advanced practitioner and LCSW renewal applications will increase by $63; LMFT and LMFT associate renewal applications will increase by $11; LPC renewal applications will increase by $41; LPC supervisor status renewal applications will decrease by $50; and Licensed Specialist in School Psychology renewal applications will increase by $21. This adopted rule will create a new fee for the renewal of supervisor status for social workers which will be $50.

Those license types not listed will have no increase in application or renewal fees. For example, the application fee for psychologists may appear to have increased but the application process for licensure as a psychologist now includes the prior provisional licensure processes, so the net increase is effectively zero.

In order to equitably distribute the fees among the different license types, the agency started with the current application and renewal fees. In order to meet the legislatively mandated revenue requirement and in effort to implement the smallest possible changes to the current fee structure in place, those fees that were substantially higher than others stayed the same while those fees that were lower were increased modestly as listed above.

Several psychologists commented that by paying higher fees they were paying a disproportionate amount to fund the agency then other license types so they would be paying more and receiving the same benefits as others. This comment is not mathematically correct. According to the 2017 Sunset Commission report there are approximately 4,826 psychologists, if all renew their license under the new renewal fee of $412 it will generate approximately $1,988,312. According to the 2015 Sunset Commission report there are approximately 23,797 social workers, if all renew their license under the new renewal fee of $135 it will generate approximately $3,212,595. As a licensee group, psychologists will not be contributing a larger amount of revenue to the agency, the opposite is actually correct. Additionally, such a comment runs contrary to the intended purpose for the creation of the Executive Council, so that multiple mental health professions could come together, to pool resources, and become a more efficient regulatory body, as opposed to each licensed profession remaining siloed, having little interaction with each other.

Currently all license types are active in the Texas marketplace, and there is no current indication or data to support one license type has a competitive advantage or disadvantage over the other due to the current fee structure. The commenters have provided no empirical data or other information to support any anti-competitive effect the current fee structure has on the Texas marketplace. The commenters assume an increased fee or higher fee directly correlates to an anti-competitive effect, but psychologists have historically paid higher fees than other license types and again there is no current data to demonstrate one mental health profession has a competitive advantage or disadvantage over the other due to the current fees in place.

For these reasons the agency declines to make the requested changes, and hereby adopts the rule with no changes.

Statutory Authority.

The new rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this new rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council adopts this new rule pursuant to the authority found in §507.154 of the Tex. Occ. Code which authorizes the Executive Council to set fees necessary to cover the costs of administering Chapters 501, 502, 503, 505, and 507 of the Tex. Occ. Code.

Lastly, the Executive Council adopts these new rules under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§885.1. Executive Council Fees.

(a) General provisions.

(1) All fees are nonrefundable and cannot be waived except as otherwise permitted by law.

(2) Fees required to be submitted online to the Council must be paid by debit or credit card. All other fees paid to the Council must be in the form of a personal check, cashier's check, or money order.

(3) For applications and renewals the Council is required to collect fees to fund the Office of Patient Protection (OPP) in accordance with Texas Occupations Code §101.307, relating to the Health Professions Council.

(4) For applications, examinations, and renewals the Council is required to collect subscription or convenience fees to recover costs associated with processing through Texas.gov.

(5) All examination fees are to be paid to the Council's designee.

(b) The Executive Council adopts the following chart of fees: Figure: 22 TAC §885.1(b)

(c) Late fees.

(1) If the person's license has been expired for 90 days or less, the person may renew the license by paying to the Council a fee in an amount equal to one and one-half times the base renewal fee.

(2) If the person's license has been expired for more than 90 days but less than one year, the person may renew the license by paying to the Council a fee in an amount equal to two times the base renewal fee.

(3) If the person's license has been expired for one year or more, the person may not renew the license; however, the person may apply for reinstatement of the license.

(d) Open Records Fees. In accordance with §552.262 of the Government Code, the Council adopts by reference the rules developed by the Office of the Attorney General in 1 TAC Part 3, Chapter 70 (relating to Cost of Copies of Public Information) for use by each governmental body in determining charges under Government Code, Chapter 552 (Public Information) Subchapter F (Charges for Providing Copies of Public Information).

(e) Military Exemption for Fees. All licensing and examination base rate fees payable to the Council are waived for the following individuals:

(1) military service members and military veterans, as those terms are defined by Chapter 55, Occupations Code, whose military service, training, or education substantially meets all licensure requirements; and

(2) military service members, military veterans, and military spouses, as those terms are defined by Chapter 55, Occupations Code, who hold a current license issued by another jurisdiction that has licensing requirements that are substantially equivalent to the requirements of 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.

Filed with the Office of the Secretary of State on June 29, 2020.

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Darrel D. Spinks
Executive Director
Texas Behavioral Health Executive Council
Effective date: September 1, 2020
Proposal publication date: April 24, 2020
For further information, please call: (512) 305-7706

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 353. INTRODUCTORY PROVISIONS

SUBCHAPTER G. TEXAS NATURAL RESOURCES INFORMATION SYSTEM (TNRIS)

31 TAC §353.102, §353.103

The Texas Water Development Board (TWDB) adopts new 31 Texas Administrative Code (TAC) §353.102 and §353.103, relating to geographic information standards, and renames 31 TAC Chapter 353 Subchapter G, without changes to the proposed text as published in the April 24, 2020, issue of the *Texas Register* (45 TexReg 2687). The rules will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the additions is to establish standards that achieve uniformity of data and compatibility among geographic information software products used by state agencies and to place the standards under the direction of the state geographic information officer. These rules additions to GIS standards are identical to those currently under the Department of Information Resources (DIR), which intends to repeal its rules set out in 1 TAC Chapter 205. The rules are moving to the Texas Water Development Board (TWDB) because the state geographic information officer resides within this agency.

The current Chapter 353 Subchapter G, Texas Natural Resources Information System Partnerships, is renamed Texas Natural Resources Information System (TNRIS) to allow for inclusion of multiple rules related to this TWDB program within a single subchapter.

SECTION BY SECTION DISCUSSION OF THE ADOPTED RULES

§353.102 Definitions

Section 353.102 provides descriptions for terms related to geographic information technology, including a description for the state geographic information officer.

§353.103 State Agency Geographic Information Standards

Section 353.103 adopts standards to guarantee that data created or procured by state agencies achieve compatibility with all geographic information software products. Standards also ensure the data are uniform in the event datasets are compiled from different sources.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The board reviewed this rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the rulemaking is not subject to Texas Government Code §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in the Administrative Procedure Act. A "major environmental rule" is defined as a rule with the specific intent to protect the environment or reduce risks to human health from environmental exposure, or a rule that may adversely affect in a material way the economy or a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to ensure state agencies develop geographic information in a compatible format for ease of data exchange, seek out data procurement partners for cost share and cost reduction, and to ensure maps depicting boundary lines include a "not surveyed by a professional surveyor" disclaimer.

Even if the rules were major environmental rules, Texas Government Code §2001.0225 still would not apply to this rulemaking because Texas Government Code §2001.0225 only applies to a major environmental rule the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not meet any of these four applicability criteria because it: (1) does not exceed any federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and (4) is not adopted solely under the general powers of the agency, but rather is adopted under the authority of Texas Water Code §16.021. Therefore, these rules do not fall under any of the applicability criteria in Texas Government Code §2001.0225.

TAKINGS IMPACT ASSESSMENT

The board evaluated the rules and performed an analysis of whether they constitute a taking under Texas Government Code Chapter 2007. The specific purpose of the rules is to provide state agency standards for geographic information procurement and compilation.

Promulgation and enforcement of these rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. In other words, these rules require state agency compliance with standards for geographic information technology without burdening or restricting or limiting an owner's right to property and reducing its value by 25% or more. Therefore, the rulemaking does not constitute a taking under Texas Government Code Chapter 2007.

PUBLIC COMMENT

The proposed rule amendments were open for public comment, and the comment period ended on May 26, 2020. No comments were received, and no changes to the proposed rules have been made.

STATUTORY AUTHORITY

This rulemaking is under the authority of Texas Water Code §6.101, which gives the TWDB the authority to adopt rules, and Texas Water Code §16.021.

Cross-reference to statute: Texas Water Code §16.021.

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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TRD-202002596
Ashley Harden
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Texas Water Development Board
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For further information, please call: (512) 463-7686

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TITLE 34. PUBLIC FINANCE

PART 11. TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

CHAPTER 304. MEMBERSHIP IN THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §§304.2 - 304.4

The Texas Emergency Services Retirement System (TESRS) adopts new rules §§304.2 - 304.4, regarding membership in the pension system and participation in the pension system by departments. The new rules are adopted by the Board without substantive changes to the proposed text as published in the April 24, 2020, edition of the *Texas Register* (45 TexReg 2693); however, non-substantive changes to the structure of the adopted rules were made to improve their consistency with *Texas Register* outlining and formatting guidelines. The new rules will be republished.

The new rules are necessary to clarify Board rules governing participation in the system to allow the administration of TESRS to comply with House Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which amended §§861 - 865, Texas Government Code.

The adopted new rules are necessary to allow a participating department to revoke its election to participate in TESRS in an actuarially sound manner and to allow employees of participating departments to participate in TESRS in a manner that maintains the qualified status of the pension system, each as contemplated

under House Bill (H.B.) 3247, 86th Legislature, Regular Session, 2019, which amended §§861 - 865, Texas Government Code.

New §304.2, concerning Departmental Revocation of Participation in the Pension System, and §304.3, concerning Determination of Accrued Benefit, would allow a participating department to revoke its election to participate in TESRS in a manner that protects the actuarial soundness of the pension system and the accrued benefits of active fire fighters, EMS personnel, and support personnel in the pension system by requiring those departments that revoke participation in the pension system to pay within five years of the date of revocation a revocation charge equal to the department's allocated share of the TESRS net pension liability.

New §304.2 allows a participating department to revoke its election to participate in the pension system in a manner that maintains an actuarially sound pension system. The new rule applies to the following five circumstances:

1. A department notifies the pension system of its intent to no longer participate;

2. A department ceases to exist or perform emergency services;

3. A department ceases to enroll eligible members or make required contributions;

4. A department is no longer funded or maintained by political subdivision; or

5. All members of a department become ineligible to continue participating (i.e., all become paid employees of a non-governmental entity or covered by another pension system).

New §304.3 will protect the pension benefits of members of a department that revokes its participation in the pension system by fully vesting their accrued benefits as of the date of the department's revocation. The new rule provides a schedule detailing the calculation of vested accrued benefits for members.

New §304.4, concerning Employees of Participating Departments, allows employees of a participating department to participate in the pension system in a manner that ensures the participation of employees of participating departments, whether full-time or part-time, satisfies the plan qualification requirements under §401(a) of the Internal Revenue Code of 1986, as amended (Code), and maintains the status of the pension system as a governmental plan under §414(d) of the Code.

No public comments were received regarding the proposed new rules for Chapter 304.

The new rules are adopted under the Texas Government Code, §865.006(b), which authorizes the state board to adopt rules as necessary for the administration of the fund. Texas Government Code, §862.001, is affected by this proposal.

§304.2. Departmental Revocation of Participation in the Pension System.

(a) For purposes of this section and §304.3 of this title (relating to Determination of Accrued Benefit):

(1) "Effective date of revocation" means the later of the date upon which the requirements listed in subsection (c) of this section are satisfied or the date upon which the revocation occurs.

(2) "Revocation" means the occurrence of one of the events listed in subsection (b) of this section.

(b) A participating department will revoke, or be deemed to have revoked, its election to participate in the pension system as provided under §862.001(b), Texas Government Code, upon the occurrence of one of the following events:

(1) a department notifies the pension system of its intent to no longer participate in the pension system;

(2) a department ceases to exist or ceases to perform emergency services;

(3) a department ceases to enroll its eligible members in the pension system or to make contributions to the pension system for eligible members as required under Chapter 865, Texas Government Code;

(4) the political subdivision associated with the department establishes a paid department and no longer funds or otherwise maintains the department; or

(5) all members of a department become ineligible to continue participating in the pension system as paid employees pursuant to §304.4(c) of this title (relating to Employees of Participating Departments) or because they are covered by another public retirement system in the state.

(c) In connection with a revocation:

(1) the governing body of the department must provide written notice of its intent to no longer participate in the pension system or the circumstances causing the revocation to occur to the executive director, the governing body of the political subdivision associated with the department, and all current members of the department at least 120 days prior to the date the revocation will occur or, if such prior notice is not possible, as soon as practicable, provided that the notice period may be shortened or waived by the executive director in his or her sole discretion;

(2) the local board of the department must certify:

(A) that all individuals who have performed emergency services or support services (if applicable) for the department and were eligible to participate in the pension system during the 2 years prior to the date the revocation occurs have been properly enrolled in the pension system; and

(B) the accuracy of the department's membership roster and the total amount of qualified service earned by each current and former member as of the date the revocation occurs;

(3) all affected members of the department as defined in §304.3(a) of this title will become fully vested in such affected member's accrued benefit as determined under §304.3 of this title as of the date the revocation occurs, regardless of the years of qualified service or age of such affected member as of such date, and the affected member's accrued benefit shall be nonforfeitable as of such date; and

(4) no later than 60 days after receipt of the notice required under subsection (c)(1) of this section or notice from the executive director under subsection (d) of this section, the governing body of the political subdivision associated with the department must pay, or enter into an agreement to pay in accordance with subsection (j) of this section:

(A) all required contributions for each month of service performed by members prior to the date the revocation occurs that have not been paid, including, without limitation, contributions for any months of service which have not yet been invoiced by the pension system and for members of the department who were not enrolled in the pension system but should have been during the 2 years prior to the date the revocation occurs; and

(B) the revocation charge as determined under subsection (h) of this section in order to maintain an actuarially sound pension system as required by §862.001(b), Texas Government Code.

(d) If the executive director becomes aware that one of the events listed in subsection (a) of this section has occurred and the governing body of a participating department has not provided notice of such event to the pension system as required under subsection (c)(1) of this section, the executive director will send written notice to the governing body of the participating department and the governing body of the political subdivision associated with the department as soon as administratively possible to inform them that a revocation of the department's election to participate in the pension system has occurred and to notify each party of its responsibilities under this section. If the parties notify the executive director within 30 days of the date of the notice provided under this subsection that the revocation was unintentional and provide evidence satisfactory to the executive director that the circumstances that caused the revocation have been cured, the revocation will be deemed to have not occurred.

(e) The executive director will notify the state board of the occurrence of any revocation under this section at the next meeting of the state board following the effective date of the revocation.

(f) As of the effective date of the revocation:

(1) the revoking department will no longer be considered a participating department in the pension system;

(2) no additional members of the department may be enrolled in the pension system;

(3) no member of the department may accrue additional qualified service or benefits in connection with the performance of emergency services or support services for the department; and

(4) the governing body of the department and the governing body of the political subdivision associated with the department will have no further financial obligations to the pension system, except as provided under an agreement entered into under subsection (c)(4) of this section.

(g) Within 90 days after the effective date of revocation, the executive director will send written notice to each current member, vested terminated member, and retiree of the department by first class mail to the person's most recent address of record on file with the pension system. Such notice will explain how the person's benefits provided under the pension system are affected by the department's revocation, including, without limitation, the immediate vesting of the member's accrued benefit as determined under §304.3 of this title (if applicable), the amount of such accrued benefit, and information related to when and how the member may commence such accrued benefit.

(h) In order to maintain an actuarially sound pension system as required under §862.001(b), Texas Government Code, the governing body of the political subdivision associated with the department that revokes its participation in the pension system will be charged an additional amount as determined by the pension system's actuary in accordance with generally accepted actuarial standards. Such revocation charge shall be an amount equal to the department's allocated share of the pension system's net pension liability. The pension system's net pension liability used to determine the revocation charge under this section is the net pension liability of the pension system as reported in the most recent audited financial report of the pension system as that term is defined by GASB Statement No. 67.

(i) For purposes of this section, the department's allocated share of the pension system's net pension liability shall be equal to the greater of (1) or (2) where:

(1) equals the average of the department's contribution allocation percentage in the 2 most recent audited reports of information required for disclosure by GASB Statement No. 68 (GASB 68); and

(2) equals the average of the department's contribution allocation percentage in the 2 most recent audited reports of information required for disclosure by GASB 68 adjusted for decreases, if any, in the department's contribution rate per month and for decreases, if any, in the number of active members in the 5 most recent plan years.

(j) The governing body of the political subdivision associated with the department may enter into a written agreement with the pension system to pay any unpaid contributions, the revocation charge determined under subsection (h) of this section, or both over a period of time not to exceed 5 years. Interest on such amount due will accrue at the assumed rate of investment return of the pension system at the time the agreement is entered into, except that interest will be waived if full payment of the amount is completed no later than the first (1st) anniversary of the effective date of revocation.

(k) Neither the pension system nor the state board, nor any employee of the pension system, including, without limitation, the executive director, shall be liable to any person for any claim or loss of benefits resulting from the revocation of a department's participation in the pension system.

(l) Notwithstanding anything to the contrary above, the state board may temporarily suspend the ability of any department to voluntarily revoke its election to participate in the pension system as described in subsection (b)(1) of this section if continuing to allow such revocations would have a negative impact on the administration or actuarial soundness of the pension system.

§304.3. Determination of Accrued Benefit.

(a) For purposes of §304.2 of this title (relating to Departmental Revocation of Participation in the Pension System) and this section, an "affected member" means each current member of a participating department who is listed on the department's certified membership roster as required under §304.2(c)(2) of this title and who has not commenced a retirement benefit prior to the date a revocation occurs as determined under §304.2 of this title.

(b) Each affected member will be fully vested in the affected member's accrued benefit in the pension system as of the date the revocation occurs, regardless of the years of qualified service or age of such affected member as of such date, as determined under subsection (c), (d), or (e) of this section, as applicable.

(c) If the affected member has less than 10 years of qualified service with the pension system as of the date the revocation occurs, his or her accrued benefit will be equal to the product of (1) and (2) where:

(1) equals the product of the actual number of years of qualified service the affected member has earned with the pension system, including any partial years, multiplied by five percent (5%); and

(2) equals the full service retirement annuity determined under §308.2(f) of this title (relating to Service Retirement Annuity) based on the department's average monthly Part One contributions as of such date.

(d) If the affected member has at least 10 years but less than 15 years of qualified service with the pension system as of the date the revocation occurs, his or her accrued benefit will be equal to the product of (1) and (2) where:

(1) equals the sum of fifty percent (50%) plus the product of the actual number of years of qualified service, including any partial years, in excess of 10 years that the affected member has earned with the pension system multiplied by ten percent (10%); and

(2) equals the full service retirement annuity determined under §308.2(f) of this title based on the department's average monthly Part One contributions as of such date.

(e) If the affected member has 15 years of qualified service or more with the pension system as of the date the revocation occurs, his or her accrued benefit will be equal to the full service retirement benefit determined under §308.2(f) of this title plus any supplemental benefit determined under §308.2(g) of this title based on the department's average monthly Part One contributions and the affected member's actual years of qualified service as of such date.

(f) An affected member who vests in his or her accrued benefit under this section may commence such accrued benefit upon attaining age 55 by applying for a retirement benefit in accordance with Chapter 864, Texas Government Code.

(g) Accrued benefits of vested terminated members and retirees of a department will not be affected by a department's revocation of its participation in the pension system under §304.2 of this title. A vested terminated member of such department may commence his or her accrued benefit upon attaining age 55 by applying for a retirement benefit in accordance with Chapter 864, Texas Government Code, and a retiree of such department will continue to receive the retirement benefit he or she was receiving as of the date of such revocation.

§304.4. Employees of Participating Departments.

(a) In this section, "Code" means the Internal Revenue Code of 1986, as amended.

(b) Effective September 1, 2019, the 86th Texas Legislature adopted H.B. 3247 which amended §862.002, Texas Government Code, to allow the employees of a participating department to participate in the pension system. Pursuant to the authority granted to the state board under §861.006(a), Texas Government Code, and as contemplated by §302.7 of this title (relating to Employees of Participating Departments), the state board adopts this rule to ensure the participation of employees of participating departments, whether full-time or part-time, satisfies the plan qualification requirements under §401(a) of the Code and to maintain the status of the pension system as a governmental plan under §414(d) of the Code.

(c) Notwithstanding §862.002, Texas Government Code, the employees of any department that does not constitute or is not part of a governmental entity or a government-controlled entity are not eligible to participate in the pension system, including, without limitation, a §501(c)(3) or other nonprofit corporation incorporated under state law that contracts with a governmental entity to provide fire protection and emergency response services for the general public or receives public funding for the performance of such services.

(d) For purposes of this section, a participating department will constitute or will be considered to be a part of a governmental entity if the participating department is a department of a municipality, county, special-purpose district or authority or any other political subdivision of the state of Texas whose employees are considered employees of a governmental entity.

(e) For purposes of this section, a participating department will constitute or will be considered to be a part of a government-controlled entity if a majority of the governing body of the department is composed of publicly elected or appointed officials of the state of Texas or individuals appointed by such elected or appointed officials, regardless of whether or not the department itself is a governmental entity.

(f) Solely for purposes of participation in the pension system and, except as otherwise provided below, prior to the first date of participation in the pension system, if a governmental entity or government-controlled entity has both employees and volunteers who are performing emergency services or support services, the governing body of such entity may elect to treat its paid employees as members of a paid department that is separate from its volunteer department, and such paid department may make a separate election as to whether or not to participate in the pension system under §862.001(a-1), Texas Government Code. The governing body of such governmental entity or government-controlled entity must notify the executive director in writing of its election to treat its paid employees as members of a separate department prior to any election to participate in the pension system.

(g) Notwithstanding subsection (f) of this section, the governing body of a participating department that constitutes or is part of a governmental entity or a government-controlled entity that has made an election to participate in the pension system under §862.001(a-1), Texas Government Code, before September 1, 2020, may elect to treat its paid employees as members of a separate paid department that will not participate in the pension system by notifying the executive director in writing of its election no later than December 31, 2020. Such paid department will not be considered to have elected to participate in the pension system and its paid employees will not be enrolled as members of the pension system unless a separate election is made by the governing body of the department on behalf of such paid department to participate in the pension system.

(h) Any governmental entity or government-controlled entity that elects to separate its paid employees and volunteers into different departments for purposes of participation in the pension system under this section must maintain separate records for each department, including, without limitation, records related to the enrollment of its members and qualified service earned by each member in such department.

(i) For purposes of determining a member's eligibility to participate in the pension system, if a member performs emergency services or support services as both an employee and a volunteer for the same participating department, such member will not be eligible to earn qualified service for his or her service in both positions unless each position has different roles and responsibilities that are clearly distinct from the roles and responsibilities of the other position.

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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TRD-202002647
Kevin Deiters
Executive Director
Texas Emergency Services Retirement System
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Proposal publication date: April 24, 2020
For further information, please call: (800) 919-3372

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 163. COMMUNITY JUSTICE ASSISTANCE DIVISION STANDARDS

37 TAC §163.33

The Texas Board of Criminal Justice adopts amendments to §163.33, concerning Community Supervision Staff, without changes to the proposed text as published in the March 20, 2020, issue of the *Texas Register* (45 TexReg 1966). The rule will not be republished.

The adopted amendments clarify and codify current procedure regarding the duration of community supervision officer (CSO) and residential CSO certification. The adopted amendments specify that once the Community Justice Assistance Division (CJAD) has certified a CSO or residential CSO, the CSO or residential CSO will maintain certification and eligibility for certification provided they are in compliance with training hour requirements and are employed by a Community Supervision and Corrections Department (CSCD).

No comments were received regarding the amendments.

The amendments are adopted under Texas Government Code §§492.013, 509.003.

Cross Reference to Statutes: None.

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 June 26, 2020.

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Erik Brown
Director of Legal Affairs
Texas Department of Criminal Justice
Effective date: July 16, 2020
Proposal publication date: March 20, 2020
For further information, please call: (936) 437-6700

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37 TAC §163.35

The Texas Board of Criminal Justice adopts amendments to §163.35, concerning Supervision, without changes to the proposed text as published in the March 20, 2020, issue of the *Texas Register* (45 TexReg 1969). The rule will not be republished.

The adopted amendments clarify that a level of supervision for each offender based on the offender's criminogenic needs will be determined within 90 days, as opposed to two months, of placement on community supervision, acceptance of a transfer case, or discharge from any residential facility, and that a written individualized case supervision or treatment plan will be provided within 90 days, as opposed to two months. The adopted amendments codify current procedure. Other amendments are minor word changes, clarifications, and organizational changes.

No comments were received regarding the amendments.

The amendments are adopted under Texas Government Code §§492.013, 509.003.

Cross Reference to Statutes: None.

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 June 26, 2020.

TRD-202002576
Erik Brown
Director of Legal Affairs
Texas Department of Criminal Justice
Effective date: July 16, 2020
Proposal publication date: March 20, 2020
For further information, please call: (936) 437-6700

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

The Department of Family and Protective Services (DFPS), adopts the repeal of §§700.401 - 700.412, Subchapter E, §§700.451, 700.453, 700.455, 700.457, 700.459, 700.461, 700.463, 700.465, 700.467, 700.469, 700.471, 700.473, 700.475, 700.477, 700.479, 700.481, 700.505 - 700.509, 700.511 - 700.521, 700.523, 700.551, 700.553, 700.555, 700.557, 700.559, 700.561, 700.563, 700.565, and 700.567, in Chapter 700, concerning Child Protective Services. The repealed rules are adopted without changes to the proposed text as published in the March 6, 2020, issue of the *Texas Register* (45 TexReg 1613). The rules will not be republished.

BACKGROUND AND JUSTIFICATION

Through the enactment of House Bill (HB) 5 and Senate Bill (SB) 11, 85th Legislature, R.S. (2017), the Texas Department of Family and Protective Services (DFPS) became a stand-alone agency on September 1, 2017, separate from the Texas Health and Human Services Commission (HHSC) but for the provision of various administrative support services as provided in Government Code § 531.00553. This entailed internal reorganization of certain programs and divisions within DFPS as well as consolidation of other DFPS functions and programs into HHSC. Specifically, HB 5, HB 249, and SB 11 amended the Government Code, Texas Family Code (TFC), and Human Resources Code (HRC) to effectuate transfer of the Child Care Licensing regulatory program from DFPS to HHSC while keeping the function of investigating abuse, neglect, and exploitation in child care operations at DFPS. HB 5 also mandated DFPS to create a division to oversee all investigations concerning abuse, neglect, and exploitation of children. Consequently, the following three investigative functions were moved under the new Child Protective Investigations (CPI) division: (1) investigations of child abuse, neglect, and exploitation in childcare operations, which are now conducted by the Child Care Investigations (CCI) program but were formerly under Child Care Licensing; (2) child protective services investigations, which are now conducted by the Investigations program but were formerly under Child Protective Services (CPS); and (3) special investigations, which are conducted

by the Special Investigations (SI) program but were formerly under CPS.

As such, the overarching purpose of the rule changes is to create new chapter 707 in Title 40, Part 19, of the Texas Administrative Code that contains the rules for the CPI division of DFPS. As the division consists of functions that were already in existence in DFPS, the rule updates entail transferring already existing rules into this new chapter and further amending such rules to reflect the agency's new structure and new processes post 85th legislative session. This new chapter will include the investigation rules for traditional child protective services investigation and alternative response (formerly in 40 TAC 700, Subchapter E); rules relating to school investigations which are now handled by the SI program (formerly in 40 TAC 700, Subchapter D); and rules for investigations in child-care operations conducted by CCI (formerly in 40 TAC 745, Subchapters K and M).

COMMENTS

The 30-day comment period ended April 5, 2020. During this period, DFPS did not receive any comments regarding the proposed rules.

SUBCHAPTER D. SCHOOL INVESTIGATIONS

40 TAC §§700.401 - 700.412

STATUTORY AUTHORITY

The repeals are adopted under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

The repeals implement the Child Abuse Prevention and Treatment Act, Chapters 40 and 42 of the Texas Human Resources Code; Chapter 261 of the Texas Family Code including Texas Family Code §261.001; and Texas Government Code §531.02013.

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 June 25, 2020.

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Tiffany Roper
General Counsel
Department of Family and Protective Services
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Proposal publication date: March 6, 2020
For further information, please call: (512) 438-3397

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SUBCHAPTER E. INTAKE, INVESTIGATION, AND ASSESSMENT

DIVISION 1. INVESTIGATIONS

40 TAC §§700.451, 700.453, 700.455, 700.457, 700.459, 700.461, 700.463, 700.465, 700.467, 700.469, 700.471, 700.473, 700.475, 700.477, 700.479, 700.481, 700.505 - 700.509, 700.511 - 700.521, 700.523

The repeals are adopted under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

The repeals implement the Child Abuse Prevention and Treatment Act, Chapters 40 and 42 of the Texas Human Resources Code; Chapter 261 of the Texas Family Code including Texas Family Code §261.001; and Texas Government Code §531.02013.

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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Tiffany Roper
General Counsel
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For further information, please call: (512) 438-3397

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DIVISION 2. ALTERNATIVE RESPONSE

40 TAC §§700.551, 700.553, 700.555, 700.557, 700.559, 700.561, 700.563, 700.565, 700.567

The repeals are adopted under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

The repeals implement the Child Abuse Prevention and Treatment Act, Chapters 40 and 42 of the Texas Human Resources Code; Chapter 261 of the Texas Family Code including Texas Family Code §261.001; and Texas Government Code §531.02013.

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 June 25, 2020.

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Tiffany Roper
General Counsel
Department of Family and Protective Services
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Proposal publication date: March 6, 2020
For further information, please call: (512) 438-3397

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CHAPTER 707. CHILD PROTECTIVE INVESTIGATIONS

The Department of Family and Protective Services (DFPS), adopts new §§707.447, 707.449, 707.451, 707.453, 707.455,

707.457, 707.459, 707.461, 707.463, 707.465, 707.467, 707.469, 707.471, 707.473, 707.477, 707.481, 707.483, 707.485, 707.487, 707.489, 707.491, 707.493, 707.495, 707.497, 707.499, 707.501, 707.503, 707.505, 707.507, 707.509, 707.511, 707.513, 707.515, 707.517, 707.549, 707.551, 707.553, 707.555, 707.557, 707.559, 707.561, 707.563, 707.565, 707.567, 707.597, 707.599, 707.601, 707.603, 707.605, 707.607, 707.609, 707.611, 707.613, 707.615, 707.617, 707.619, 707.621, 707.623, 707.625, 707.701, 707.703, 707.711, 707.713, 707.715, 707.717, 707.719, 707.721, 707.723, 707.725, 707.727, 707.729, 707.741, 707.743, 707.745, 707.747, 707.761, 707.763, 707.765, 707.767, 707.769, 707.781, 707.783, 707.785, 707.787, 707.789, 707.791, 707.793, 707.795, 707.797, 707.799, 707.801, 707.803, 707.815, 707.817, 707.819, 707.821, 707.823, 707.825, 707.827, 707.829, 707.831, 707.841, 707.843, 707.845, 707.847, 707.849, 707.851, 707.853, 707.855, 707.857, and 707.859 in new Chapter 707, concerning Child Protective Investigations.

New §§707.451, 707.453, 707.457, 707.467, 707.471, 707.473, 707.477, 707.481, 707.483, 707.485, 707.487, 707.489, 707.493, 707.495, 707.497, 707.499, 707.501, 707.505, 707.509, 707.511, 707.513, 707.515, 707.517, 707.551, 707.553, 707.561, 707.563, 707.565, 707.605, 707.607, 707.609, 707.611, 707.613, 707.615, 707.617, 707.619, 707.621, 707.623, 707.625, 707.703, 707.713, 707.715, 707.719, 707.727, 707.729, 707.763, 707.765, 707.767, 707.783, 707.787, 707.789, and 707.791 are adopted with changes to the proposed text published in the March 6, 2020 issue of the *Texas Register* (45 TexReg 1618). The changes only reflect non-substantive variations from the proposed rules, and as such do not create any new duties or powers, nor affect new persons or entities, other than those given notice. The rules will be republished.

New §§707.447, 707.449, 707.455, 707.459, 707.461, 707.463, 707.465, 707.469, 707.491, 707.503, 707.507, 707.549, 707.555, 707.557, 707.559, 707.597, 707.599, 707.601, 707.603, 707.701, 707.711, 707.717, 707.721, 707.723, 707.725, 707.741, 707.743, 707.745, 707.747, 707.761, 707.769, 707.781, 707.785, 707.793, 707.795, 707.797, 707.799, 707.801, 707.803, 707.815, 707.817, 707.819, 707.821, 707.823, 707.825, 707.827, 707.829, 707.831, 707.841, 707.843, 707.845, 707.847, 707.849, 707.851, 707.853, 707.855, 707.857, and 707.859 are adopted without changes to the proposed text in the March 6, 2020 issue of the *Texas Register* (45 TexReg 1618). The rules will not be republished.

BACKGROUND AND JUSTIFICATION

Through the enactment of House Bill (HB) 5 and Senate Bill (SB) 11, 85th Legislature, R.S. (2017), the Texas Department of Family and Protective Services (DFPS) became a stand-alone agency on September 1, 2017, separate from the Texas Health and Human Services Commission (HHSC) but for the provision of various administrative support services as provided in Government Code §531.00553. This entailed internal reorganization of certain programs and divisions within DFPS as well as consolidation of other DFPS functions and programs into HHSC. Specifically, HB 5, HB 249, and SB 11 amended the Government Code, Texas Family Code (TFC), and Human Resources Code (HRC) to effectuate transfer of the Child Care Licensing regulatory program from DFPS to HHSC while keeping the function of investigating abuse, neglect, and exploitation in child care operations at DFPS. HB 5 also mandated DFPS to create a division to oversee all investigations concerning abuse, neglect, and exploitation of children. Consequently, the following three investigative functions were moved under the new Child Protective Investigations (CPI) division: (1) investigations of child abuse, neglect, and exploitation in childcare operations, which are now conducted by the Child Care Investigations (CCI) program but were formerly under Child Care Licensing; (2) child protective services investigations, which are now conducted by the Investigations program but were formerly under Child Protective Services (CPS); and (3) special investigations, which are conducted by the Special Investigations (SI) program but were formerly under CPS.

As such, the overarching purpose of the rule changes is to create new chapter 707 in Title 40, Part 19, of the Texas Administrative Code that contains the rules for the CPI division of DFPS. As the division consists of functions that were already in existence in DFPS, the rule updates entail transferring already existing rules into this new chapter and further amending such rules to reflect the agency's new structure and new processes post 85th legislative session. This new chapter will include the investigation rules for traditional child protective services investigation and alternative response (formerly in 40 TAC 700, Subchapter E); rules relating to school investigations which are now handled by the SI program (formerly in 40 TAC 700, Subchapter D); and rules for investigations in child-care operations conducted by CCI (formerly in 40 TAC 745, Subchapters K and M).

Specifically regarding CCI, the rule updates reflect how CCI abuse, neglect, and exploitation investigations are conducted as of September 1, 2017 pursuant to the transfer of CCL regulatory functions to HHSC. Finally, the CCI abuse, neglect, and exploitation rules are also being updated to reflect how CCI investigates allegations of abuse, neglect, and exploitation using the definitions in Texas Family Code §261.001 that formerly applied only to child protective services investigations. Rule changes regarding the abuse, neglect, and exploitation definitions implement HB 249 and SB 11, which directed DFPS to use standardized definitions and processes for both, child-care investigations and child protective services investigations.

COMMENTS

The 30-day comment period ended April 5, 2020. During this period, DFPS did not receive any comments regarding the proposed rules.

SUBCHAPTER A. INVESTIGATIONS

DIVISION 1. INTAKE, INVESTIGATION AND ASSESSMENT

40 TAC §§707.447, 707.449, 707.451, 707.453, 707.455, 707.457, 707.459, 707.461, 707.463, 707.465, 707.467, 707.469, 707.471, 707.473, 707.477, 707.481, 707.483, 707.485, 707.487, 707.489, 707.491, 707.493, 707.495, 707.497, 707.499, 707.501, 707.503, 707.505, 707.507, 707.509, 707.511, 707.513, 707.515, 707.517

STATUTORY AUTHORITY

The new sections are adopted under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§707.451. What terms and definitions are used in reports, investigations, and assessments of abuse and neglect?

(a) The following terms have the following meanings when used in this subchapter:

(1) An absent parent or non-custodial parent--a parent who, at the time of the occurrence of the conduct which is the basis for the investigation, does not have actual possession or control of the child and is not primarily responsible for the child's care because of any of the following:

(A) Divorce;

(B) Separation;

(C) Incarceration; or

(D) Any other reason that results in the parent not having actual possession or control and primary responsibility of the child.

(2) Accident--an unforeseen, unexpected, or unplanned act or event that occurs unintentionally and causes or threatens physical injury despite exercising the care and diligence that a reasonable and prudent person would exercise under similar circumstances to avoid the risk of injury.

(3) Child--person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.

(4) Child safety--the absence of danger or the presence of protective actions demonstrated over time by a parent or caregiver that mitigates dangers to the child.

(5) Danger--behaviors or conditions that place a child in imminent danger of serious harm.

(6) Day--calendar day unless otherwise specified.

(7) Guardian--anyone named as "guardian of the person of a child" by a probate court order.

(8) Household--

(A) A unit composed of persons living together in the same dwelling, whether or not they are related to each other, when the dwelling consists of:

(i) The child's family's household, including the households of both parents when the parents reside separately;

(ii) A household in which the parent has arranged for or authorized placement of the child; or

(iii) A household in which the child is legally placed by a parent or a court.

(B) During the receipt and investigation of reports of child abuse and neglect, we treat an unrelated person who resides elsewhere or whose place of residence cannot be determined as a member of the household if the person is at least 10 years old and either:

(i) Has regular free access to the household; or

(ii) When in the household dwelling takes care of or assumes responsibility for children in the household.

(9) Investigations--a program of the Child Protective Investigations division of the Texas Department of Family and Protective Services that investigates allegations of child abuse and neglect by a person responsible for the child's care, custody, or welfare as defined in Texas Family Code §261.001(5)(A)-(C).

(10) Managing or possessory conservator--a person legally responsible for a child as the result of a court order.

(11) Parent--the mother, a man presumed to be the biological father or who has been adjudicated to be the biological father by a court of competent jurisdiction, or an adoptive mother or father. The term does not include a parent as to whom the parent-child relationship has been terminated.

(12) Preponderance of evidence--evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

(13) Protective actions--specific actions that have been taken by an individual or family to directly address the danger of abuse and neglect and are demonstrated over time.

(14) Reasonable effort to prevent--actions that a person responsible for a child's care, custody, or welfare would have taken to protect a child from abuse the person knew or reasonably should have known was occurring. It is not required for that person to have directly perpetrated the abuse.

(15) Reporter--an individual who makes a report to the Texas Department of Family and Protective Services or a duly constituted law enforcement agency alleging the abuse or neglect of a child. If more than one individual makes a report alleging abuse or neglect of the same child, all such individuals shall have the designation of a reporter.

(16) Risk factors--elements of individual and family functioning that may place a child at risk of abuse or neglect.

(17) Risk of child abuse or neglect--a reasonable likelihood that in the foreseeable future there will be an occurrence of child abuse or neglect as defined in Texas Family Code (TFC) §261.001. The presence of risk does not constitute abuse or neglect as defined in TFC §261.001 but qualifies children and families to receive protective services as specified in §700.311(a)(1), subchapter C, chapter 700, of this title (relating to Eligible Individuals).

(18) Strengths--resources and conditions of an individual or the family that increase the likelihood or ability to protect a child from abuse or neglect but do not fully address the danger to the child.

(19) Substantial harm--real and significant physical injury or damage to a child.

(20) Substantial risk--a real and significant possibility or likelihood.

(b) Terms not defined in this subchapter have the meaning given in the Texas Family Code, including definitions in Chapter 101 and §261.001, Texas Family Code, and other relevant law, or their ordinary meaning if not defined in law.

§707.453. What is emotional abuse?

(a) Emotional abuse is a subset of the statutory definitions of abuse that appear in Texas Family Code §261.001(1) and includes the following acts or omissions by a person:

(1) Mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(2) Causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning; or

(3) The current use by a person of a controlled substance as defined by Chapter 481, Health and Safety Code, in a manner or to the extent that the use results in mental or emotional injury to a child.

(b) In this section, the following terms have the following meanings:

(1) "Mental or emotional injury" means:

(A) That a child of any age experiences significant or serious negative effects on intellectual or psychological development or functioning. Although the child does not have to experience physical injury or be diagnosed by a medical or mental health professional in order for us to determine that the child suffers from a mental or emotional injury, when assessing the child, we will consult with professional collaterals outside of the Texas Department of Family and Protective Services that have witnessed and validated that the child is exhibiting behaviors indicative of observable and material impairment as specified in paragraph (2) of this subsection. When the mental or emotional injury involves exposure to domestic violence, we will consult with professional collaterals that have documented expertise or training in the dynamics of domestic violence, whenever possible.

(B) For purposes of paragraph (3) of subsection (a), "mental or emotional injury" resulting from a person's current use of a controlled substance includes a child of any age experiencing interference with normal psychological development, functioning, or emotional or mental stability, as evidenced by an observable and substantial change in behavior, emotional response, or cognition, related to the person's current use of a controlled substance.

(2) "Observable and material impairment" means discernible and substantial damage or deterioration to a child's emotional, social, and cognitive development. It may include but is not limited to depression; anxiety; panic attacks; suicide attempts; compulsive and obsessive behaviors; acting out or exhibiting chronic or acute aggressive behavior directed toward self or others; withdrawal from normal routine and relationships; memory lapse; decreased concentration; difficulty or inability to make decisions; or a substantial and observable change in behavior, emotional response, or cognition.

§707.457. What is sexual abuse?

(a) Sexual abuse is a subset of the statutory definitions of abuse that appear in Texas Family Code §261.001(1) and includes the following acts or omissions by a person:

(1) Sexual conduct harmful to a child's mental, emotional, or physical welfare, including:

(A) Conduct that constitutes the offense of continuous sexual abuse of young child or children under §21.02, Penal Code;

(B) Indecency with a child under §21.11, Penal Code;

(C) Sexual assault under §22.011, Penal Code; or

(D) Aggravated sexual assault under §22.021, Penal Code;

(2) Failure to make a reasonable effort to prevent sexual conduct harmful to a child;

(3) Compelling or encouraging the child to engage in sexual conduct as defined by §43.01, Penal Code, including compelling or encouraging the child in a manner that constitutes an offense of:

(A) Trafficking of persons under §20A.02(a)(7) or (8), Penal Code;

(B) Prostitution under §43.02(b), Penal Code; or

(C) Compelling prostitution under §43.05(a)(2), Penal Code;

(4) Causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene as defined by §43.21, Penal Code, or pornographic; or

(5) Causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child as defined by §43.25, Penal Code.

(b) In this section, the following terms have the following meanings:

(1) "Causing, permitting, encouraging, engaging in, or allowing the photographing...." is a condition of the statutory definition of sexual abuse. It is met even if the child participates voluntarily.

(2) "Compelling or encouraging the child to engage in sexual conduct...." is a condition of the statutory definition of sexual abuse. It is met whether the child actually engages in sexual conduct or simply faces a substantial risk of doing so.

(3) "Sexual conduct harmful to a child's mental, emotional or physical welfare" includes but is not limited to rape; incest; sodomy; inappropriate touching of the child's anus, breast, or genitals, including touching under or on top of the child's clothing; deliberately exposing one's anus, breast, or any part of the genitals to a child; touching the child in a sexual manner or directing sexual behavior towards the child; showing pornography to a child; encouraging a child to watch or hear sexual acts; compelling, encouraging, or permitting a child to engage in prostitution; watching a child undress, shower, or use the bathroom with the intent to arouse or gratify one's sexual desire; voyeurism; sexually oriented acts, which may or may not include sexual contact or touching with intent to arouse or gratify the sexual desire of any person; and any sexually oriented act or practice that would cause a reasonable child under the same circumstance to feel uncomfortable or intimidated or that results in harm or substantial risk of harm to a child's growth, development, or psychological functioning.

(c) For purposes of paragraph (4) of subsection (a), pornographic has the same meaning as specified in Texas Penal Code §43.26.

§707.467. What is neglectful supervision?

(a) Neglectful supervision is a subset of the statutory definitions of neglect that appear in Texas Family Code (TFC) §261.001(4) and includes the following acts or omissions by a person:

(1) Placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child;

(2) Placing a child in or failing to remove the child from a situation in which the child would be exposed to a substantial risk of sexual conduct harmful to the child; or

(3) Placing a child in or failing to remove the child from a situation in which the child would be exposed to acts or omissions that constitute abuse under TFC §261.001(1)(E), (F), (G), (H), or (K) committed against another child.

(b) Neglectful supervision as defined in paragraph (1) of subsection (a) excludes an accident.

(c) For purposes of evaluating an allegation of "neglectful supervision", we will consider the following factors when assessing substantial risk:

(1) The child's age;

(2) Any arrangements the parents made to ensure the child's safety;

(3) The child's physical condition, psychological functioning, and level of maturity;

(4) Any intellectual, physical, or medical disability the child has;

(5) Any previous history or patterns of abuse or neglect;

(6) The frequency and duration of similar incidents; and

(7) The overall safety of the child's environment.

(d) In the case of prenatal use of alcohol or a controlled substance that was not lawfully prescribed by a medical practitioner, was lawfully prescribed as a result of the mother seeking out multiple health care providers as a means of exceeding ordinary dosages, or was not being used in accordance with a lawfully issued prescription, the mother is responsible for neglectful supervision under paragraph (1) of subsection (a) if:

(1) The mother knew or reasonably should have known she was pregnant; and

(2) It appears that the mother's use endangered the physical and emotional well-being of the infant. It is not necessary that the infant actually suffers from an injury.

(A) For the limited purpose of this subsection, "endangered" means that the mother's prenatal use exposed the infant to loss or injury or jeopardized the infant's emotional or physical health.

(B) "Endangered" includes but is not limited to a consideration of the following factors: evidence the mother extensively used alcohol or regularly or extensively used a controlled substance over the course of the pregnancy or in close proximity to the child's expected birth date, evidence that the mother has an alcohol or drug addiction, or evidence that the infant was at a substantial risk of immediate harm from the mother's use of alcohol or a controlled substance.

§707.471. What is physical neglect?

(a) Physical neglect is a subset of the statutory definitions of neglect that appear in Texas Family Code §261.001(4) and includes the following act or omission by a person: the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services had been offered and refused.

(b) In this section, the following terms have the following meanings:

(1) "...necessary to sustain the life or health of the child ...." is a condition of the statutory definition of physical neglect and is met if the failure to provide food, clothing, or shelter results in an observable and material impairment to the child's growth, development, or functioning, or in a substantial risk of an observable and material impairment. For purposes of this paragraph, "observable and material impairment" means discernible and substantial damage or deterioration to the child's health or physical condition. It may include but is not limited to malnourishment; sudden or extreme weight loss; serious skin conditions or skin breakdown; serious illness or other serious medical conditions; or any other serious physical harm to the child as a direct result of the physical neglect.

(2) "Relief services" means both public and private services, including but not limited to services provided through the government, community agencies, volunteer organizations, relatives, friends, neighbors, etc., that are intended to improve the overall well-being and physical condition of the family. The services must be affordable, reasonable, readily available, and appropriate to meet the needs of the family. It is not necessary that the relief services be provided by us.

(c) Evidence of physical neglect may include but is not limited to the following if they endanger the life or health of the child: unsound or decaying walls, ceiling, floors, or stairways; ineffective or faulty heating, cooling, or ventilation systems; inadequate, faulty, or broken plumbing including contaminated water; broken windows, mirrors or other glass; dangerous sleeping arrangements; the existence of dangerous bacteria or germs; nonexistent or ineffective waste disposal; dangerous food storage; fecal contamination or excessive animal feces throughout the house; untreated infestations such as fleas, roaches, or rodents; significant and uncontrolled mildew and mold; dirt buildup that is likely to cause bacteria and viruses in the dwelling; and hazardous junk material or appliances left unsecured and within easy access to the child.

§707.473. What is refusal to assume parental responsibility (RAPR)?

(a) RAPR is a subset of the statutory definitions of neglect that appear in Texas Family Code §261.001(4) and includes the following act or omission by a person: the failure by the person responsible for a child's care, custody, or welfare to permit the child to return to the child's home without arranging for the necessary care for the child after the child has been absent from the home for any reason, including having been in residential placement or having run away.

(b) We will not make a finding of abuse or neglect against you and will not put your name on the child abuse and neglect central registry described in subchapter C, chapter 702, of this title (relating to Child Abuse and Neglect Central Registry) if you refuse to permit the child to remain in or return to the child's home because:

(1) The child has a severe emotional disturbance;

(2) The refusal is based solely on your inability to obtain mental health services necessary to protect the safety and well-being of the child; and

(3) You have exhausted all reasonable means available to you to obtain the mental health services described above.

(c) In this subsection, the term severe emotional disturbance means a mental, behavioral, or emotional disorder of sufficient duration to result in functional impairment that substantially interferes with or limits a person's role or ability to function in family, school, or community activities as defined in Texas Family Code §261.001(9). We consider a child to have a severe emotional disturbance when a licensed mental health professional has given the child a mental health diagnosis that:

(1) Is recognized by the current version of the Diagnostic and Statistical Manual of Mental Disorders. Examples of mental health diagnoses that are consistent with severe emotional disturbance include, but are not limited to, Bipolar, Post-Traumatic Stress Disorder, Disruptive Mood Dysregulation Disorder, Conduct Disorder, Depression, Emotionally Disturbed, Mood Disorder, Oppositional Defiant Disorder, Psychotic Disorder, and Reactive Attachment Disorder; and

(2) Results in severe mental, behavioral, or emotional impairment(s) in functioning such that the child poses a danger to him or herself or others, or a licensed mental health professional has determined the child needs inpatient mental health or residential treatment.

(d) When determining whether the refusal to permit a child to remain in or return to the child's home was based solely on your inability to obtain mental health services necessary to protect the safety and well-being of the child and whether you exhausted all reasonable means available to obtain mental health services and prevent the removal of the child, we will consider factors including, but not limited to, the following:

(1) The reasons you were unable to access appropriate mental health treatment to meet the child's needs, such as your financial resources, the lack of appropriate services available in the community, or other reasons.

(2) Whether you followed recommendations of the mental health professionals who have treated the child, including complying with recommendations about actions you need to take, or, if in disagreement with a professional, whether you discussed with the professional concerns regarding recommendations, or sought out other mental health professionals for assistance or treatment, to the extent reasonable and practicable.

(3) Whether the present need for mental health services is necessary to protect the safety and well-being of the child unrelated to any recent incident of abuse or neglect.

(e) We will review records in the central registry and remove your name if you were included in the central registry when the Texas Department of Family and Protective Services was named managing conservator of your child who has a severe emotional disturbance solely, so you could obtain mental health services for the child.

§707.477. When do we make a finding of emotional abuse, physical abuse, or neglectful supervision against a person responsible for a child's care, custody, or welfare in an investigation involving domestic violence?

(a) If you are a victim of domestic violence, we will not make a finding of abuse or neglect against you solely because the domestic violence was committed in close physical proximity to the child. If the child is at risk of bodily injury or substantial risk of physical, mental, or emotional harm due solely to the violence committed against you, we will make a finding against you for failing to remove the child from that risk of harm only if, after considering the totality of the circumstances, we determine:

(1) you failed to take advantage of services or supports that would have protected the child;

(2) the services or supports were known to you; and

(3) the services or supports were reasonably available to you in the past or made available during the course of the investigation.

(b) If you are a perpetrator of domestic violence we will make a finding of abuse or neglect against you if you engage in conduct that is described by any of the definitions of abuse or neglect in this division. In particular, we will make a finding of neglectful supervision if you commit the act in such close physical proximity to the child that the child's location and the level of violence reasonably places the child at risk of bodily injury or substantial risk of immediate harm.

§707.481. What are our responsibilities in receiving reports of child abuse and neglect?

(a) The Statewide Intake division of the Texas Department of Family and Protective Services (DFPS) receives reports of child abuse and neglect 24 hours a day, seven days a week.

(b) DFPS must assist the public in understanding what to report and which protective interventions are available in response. If a report clearly does not involve child abuse or neglect or risk of abuse or neglect, DFPS may provide information and refer the reporter to other community services to help the child and family.

§707.483. Are there certain allegations we do not classify as reports of abuse or neglect?

(a) We will not classify reports about the following types of circumstances as allegations of abuse or neglect or risk of abuse or neglect:

(1) Truancy. Voluntary absence from school without a valid excuse.

(2) Runaway. A child who is voluntarily absent from the home without the consent of the parent or guardian.

(3) Children in need of supervision (CHINS). Children from ages 10 to 17 who are before a juvenile court for offenses under the Texas Family Code, §51.03(b).

(4) Latch-key children. School-age children left unattended part of the day, whose parents have taken appropriate precautions to assure the children's safety; and

(5) Harmful or violent children. Children who harm or commit violent acts against other children but are not members of the alleged victim's family or household, and who are not themselves abused or neglected.

(b) Notwithstanding subsection (a) of this section, if there are allegations in the report that otherwise meet the definition of abuse or neglect, we will investigate those allegations in accordance with this division.

§707.485. What are the timeframes within which we must respond to a report of child abuse or neglect assigned for investigation?

(a) The Texas Department of Family and Protective Services assigns priorities for reports of abuse and neglect based on the assessment of the immediacy of the risk and the severity of the possible harm to the child. Prior to initiating an investigation, we will review the intake report to determine if the initial priority and action recommended is appropriate or must be updated.

(1) Priority I reports concern children who appear to face an immediate risk of abuse or neglect that could result in death or serious harm.

(2) Priority II reports are all other reports of abuse or neglect that are not assigned a Priority I.

(b) Subject to the availability of funds, we must:

(1) Immediately respond to a report of abuse or neglect that is assigned a Priority I and involves circumstances in which the death of the child or substantial bodily harm to the child will imminently result unless we immediately intervene;

(2) Within 24 hours respond to a report of abuse or neglect that is assigned a Priority I, other than a report described in paragraph (1) of this subsection, by initiating an investigation; and

(3) Within 72 hours respond to a report of abuse or neglect that is assigned a Priority II by initiating an investigation or, pursuant to Texas Family Code §261.3015, by forwarding the report to specialized screening staff.

§707.487. Do we notify law enforcement of all reports received of child abuse or neglect?

Yes. We must notify appropriate law enforcement agencies of reports of child abuse or neglect within the following time frames:

(1) Within 24 hours of receiving a priority I report, a sexual abuse report, or a report alleging abuse or neglect in a public or private school. The initial notification may be provided using a method that is mutually agreed upon between DFPS and the law enforcement agency. This deadline applies even if subsequent information shows that the report is unfounded or does not qualify for priority I treatment. If we provide the initial notification orally, we must also provide a written notification within three days after receiving the report.

(2) We must send a written notification of all other reports within three days of receiving them.

(3) Reports submitted electronically are considered written notification for purposes of this section.

§707.489. How do we respond to reports of child abuse or neglect?

(a) When the Statewide Intake division of the Texas Department of Family and Protective Services receives a report of alleged abuse or neglect of a child, we may respond with any of the following protective interventions, as further described in this section:

(1) Closure without assignment for investigation following screening;

(2) Administrative closure;

(3) An abbreviated investigation;

(4) A thorough investigation; or

(5) An alternative response.

(b) Administrative closure.

(1) Under certain circumstances, we may administratively close a report which was initially assigned for investigation if we obtain additional information indicating that an investigation is no longer warranted. Criteria we consider when deciding to administratively close an investigation include, but are not limited to, situations in which:

(A) The allegations have already been investigated by us;

(B) The allegations have been refuted based on a credible source and all of the following criteria are met:

(i) There are no previous findings of abuse or neglect against the parent or caregiver in the current investigation or alternative response case;

(ii) We have not received any subsequent reports of abuse or neglect of any alleged victim, with the exception of reports that involve the same incidents and allegations as in the original report;

(iii) After contacting a professional or other credible sources with direct knowledge about the child's condition, we have determined that the child's safety can be assured without further assessment, response, services, or assistance; and

(iv) we determine that no abuse or neglect occurred.

(C) We do not have jurisdiction to conduct the investigation because:

(i) Another authorized entity, such as law enforcement or another state agency, has jurisdiction to conduct the investigation;

(ii) The alleged victim is not a child or was not born alive; or

(iii) The abuse or neglect, a danger, or risk of abuse or neglect is not occurring in Texas.

(D) The investigation was initiated on the basis of an anonymous report and after completing any necessary initial tasks, including any required interviews or collateral contacts, we determine that:

(i) There is no corroborating evidence; and

(ii) A parent has taken actions to protect the alleged victims from any identified dangers.

(2) If an investigation has been open for more than sixty days after the date of the intake, the supervisor must administratively close the investigation if all the following criteria are met:

(A) There are no previous findings of abuse or neglect against the parent or caregiver in the current investigation or alternative response case;

(B) We have not received any additional reports of abuse or neglect of any alleged victim, with the exception of reports that involve the same incidents and allegations as in the original report;

(C) After contacting a professional or other credible sources with direct knowledge about the child's condition, the supervisor determined that the child's safety can be assured without further investigation, response, services, or assistance;

(D) No abuse or neglect occurred;

(E) Closing the case would not expose the child to undue risk of harm; and

(F) The program director reviews and determines that administratively closing the case is appropriate.

(3) Exception. Notwithstanding the criteria in subparagraph (B) of paragraph 1 of this subsection, if we have made contact with the alleged victim or alleged perpetrator, the investigation is not eligible for administrative closure under subparagraph (B). However, the case may still be eligible for other types of administrative closure or abbreviated rule out, if applicable.

(c) Abbreviated investigation with a disposition of "ruled out".

(1) Cases assigned for investigation may be handled with an abbreviated investigation with findings of "ruled out", if we determine that no abuse or neglect has occurred and the child's safety can be assured without further investigation, response, services or assistance. We may submit an investigation as an abbreviated rule out, which does not require completing the formal risk assessment tool, when all of the following criteria in addition to any other criteria defined policy are met:

(A) There are no previous findings of abuse or neglect against the parent or caregiver in the current investigation or alternative response case;

(B) We have not received any subsequent reports of abuse or neglect of any alleged victim unless the new report involves the same incident(s) and allegation(s) under investigation; and

(C) The reporter is not anonymous.

(2) We must at a minimum perform the following tasks before submitting the investigation as an abbreviated rule out:

(A) Interview and visually inspect each alleged victim;

(B) Interview at least one parent or other person with primary or legal responsibility for each alleged victim;

(C) Complete a safety assessment and document whether any noted dangers are controlled by protective actions that have been or will be taken by the child's parent or other person with primary or legal responsibility for the child; and

(D) Conduct any required home visit.

(d) Thorough investigation.

(1) Except as provided in subsection (f) of this section and division 2 of this subchapter (relating to Alternative Response), we must complete a thorough investigation if we obtain information indicating that:

(A) There are dangers to the child because of abuse or neglect;

(B) Risk of abuse or neglect is indicated; or

(C) Based on information in the report and any initial contacts, it is impossible to determine whether or not there are dangers to the child because of abuse or neglect or whether risk of abuse or neglect is indicated.

(2) Before closing a thorough investigation, we must at a minimum perform the following tasks:

(A) Interview each alleged victim child;

(B) Interview at least one of the parents or other person with primary or legal responsibility for the victim child;

(C) Interview each alleged perpetrator;

(D) Interview other individuals who have information that is relevant or potentially relevant to the report of abuse or neglect;

(E) Complete a safety assessment and document whether any noted dangers are controlled by protective actions that have been or will be taken by the child's parent or other person with primary or legal responsibility for the child, unless the investigation relates to a deceased child and there is no other child in the home; and

(F) Assess the risk of future abuse or neglect, unless the investigation relates to a deceased child and there is no other child in the home.

(e) Alternative response. An alternative response is a protective intervention governed by division 2 of this subchapter and Texas Family Code, §261.3015, that involves an assessment of the family, including a safety assessment, and provision of necessary services and supports. Alternative response does not result in a formal finding of abuse or neglect or the designation of a perpetrator.

(f) Exceptions to required interviews. We are not required to conduct an interview to close an abbreviated or thorough investigation as described in subsections (c) and (d) of this section if we exhaust all reasonable efforts to conduct the interview but are unable to do so because:

(1) The person to be interviewed is unable to be interviewed because of age or other exceptional circumstance;

(2) The person to be interviewed, the person's parent or other legal guardian, or the attorney representing the person refuses to permit the interview;

(3) The alleged perpetrator has been arrested or is under investigation by a law enforcement agency and the interview would interfere with the investigation or violate the alleged perpetrator's rights; or, the alleged perpetrator is detained and the jail, prison, or other detention facility in which the alleged perpetrator is detained will not permit the interview; or

(4) The person to be interviewed has been interviewed by another entity and we accept the substitute interview. If the person, the person's parent or other legal guardian, or the attorney representing the person requests that the person also be interviewed by us, the investigator must conduct one supplemental interview.

§707.493. When will we directly purchase medical examinations for children during an investigation of abuse and neglect?

(a) Medical, psychological, or psychiatric examinations may be paid for by:

(1) Families who are willing to pay or to use family insurance;

(2) Local resources that make examinations available without cost; or

(3) Local funds.

(b) Medicaid may also pay for medical examinations when the child is eligible and has medical problems or injuries that require examination or treatment.

(c) If no other resources are available, we may directly purchase medical examinations of children during investigations of abuse and neglect as long as purchased medical examinations are performed by a licensed physician or dentist.

§707.495. How do we make dispositions after completing the investigation?

(a) At the end of the investigation, we must assign a disposition to each allegation identified for the investigation in order to:

(1) Specify the conclusions about the occurrence of abuse or neglect;

(2) Derive the overall disposition for the investigation; and

(3) Derive the overall role for each person with respect to the abuse or neglect that was investigated.

(b) We may make any of the following dispositions:

(1) Reason-to-believe. Based on a preponderance of the evidence, we conclude that abuse or neglect has occurred.

(2) Ruled-out. We determine, based on available information that it is reasonable to conclude that the abuse or neglect has not occurred.

(3) Unable to complete. We could not draw a conclusion whether alleged abuse or neglect occurred, because the family:

(A) Could not be located to begin the investigation or moved and could not be located to finish the investigation; or

(B) was unwilling to cooperate with the investigation.

(4) Unable-to-determine. We conclude that none of the dispositions specified in paragraphs (1)-(3) of this subsection are appropriate.

(5) Administrative closure. Information we received after a case was assigned for investigation reveals that continued intervention is unwarranted as outlined in §707.489 of this subchapter (relating to How do we respond to reports of child abuse or neglect?).

(c) The overall investigation disposition is the summary finding about the abuse or neglect that was investigated. The overall disposition is derived from the individual allegation dispositions in the following manner:

(1) Reason-to-believe. If any allegation disposition is "reason-to-believe", the overall case disposition is "reason-to-believe".

(2) Ruled out. If all allegation dispositions are "ruled out" or are a mixture of "ruled out" and "administrative closure", the overall case disposition is "ruled out".

(3) Unable to complete. If any allegation disposition is "unable to complete" and no allegation disposition is "reason-to-believe" or "unable to determine", the overall investigation disposition is "unable to complete".

(4) Unable to determine. If any allegation disposition is "unable to determine" and no allegation disposition is "reason to believe", the overall case disposition is "unable to determine".

(5) Administrative closure. Decisions with regard to administrative closure are made at the case level as specified in §707.489 of this subchapter. Therefore, all allegations must be disposed of by

indicating that administrative closure has been selected. If anyone allegation meets criteria for allegation dispositions as specified in paragraphs (1)-(4) of this subsection, a case is not eligible for administrative closure.

§707.497. What roles can we assign to persons involved in a case after the investigation is complete?

(a) We only investigate an individual as a possible perpetrator of child abuse or neglect if the individual is:

(1) At least 10 years old; and

(2) A member of the family or household.

(b) The overall role for a person at the end of the investigation is the finding of the person's involvement in the abuse or neglect that was investigated. After we have given a disposition to all allegations, the roles for the persons involved in the abuse or neglect are derived. The following are the roles that can be derived at the end of an investigation of child abuse or neglect:

(1) Designated victim. Based on a preponderance of the evidence, we conclude that the child has been abused or neglected as defined in Texas Family Code (TFC) §261.001(1) and (4).

(2) Designated perpetrator. Based on a preponderance of the evidence, we conclude that the individual is responsible for abuse or neglect of a child for whom that person has responsibility for care, custody, or welfare as defined in TFC §261.001(5)(A)-(C).

(3) Designated victim/perpetrator. Based on a preponderance of the evidence, we conclude that the individual:

(A) Is a child, age 10 years or older;

(B) Is a victim as described in paragraph (1) of this subsection and has also abused or neglected other children who are in the family or household; and

(C) Is named in the same investigation as the designated victim.

(4) Unknown (unable-to-determine). We could not determine whether the person was involved in the alleged abuse or neglect because the investigator could not determine whether or not the alleged abuse or neglect occurred.

(5) Unknown (unable to complete). We could not draw a conclusion whether alleged abuse or neglect involving the person occurred because the family:

(A) Could not be located to begin the investigation, or moved and could not be located to finish the investigation; or

(B) Was unwilling to cooperate with the investigation.

(6) No role. Either:

(A) The overall disposition for the investigation is ruled out or administrative closure, as defined in §707.495 of this subchapter (relating to How do we make dispositions after completing the investigation?), in which case all persons named in allegations are given the role of "no role";

(B) We have determined that based on the available information, it is reasonable to conclude that the individual was not a victim of child abuse or neglect or is not responsible for abuse or neglect of a child in the investigation; or

(C) The person was not alleged to have abused or neglected a child in the case.

§707.499. Who will we notify of the investigation results?

(a) Required notification in abbreviated ruled out and thorough investigations.

(1) We must notify the following parties about the findings of an abbreviated ruled out or thorough investigation unless one of the exceptions specified in subsection (d) of this section apply:

(A) Each parent or other person with primary or legal responsibility for each alleged victim or alleged perpetrator who is a minor;

(B) Each person identified as an alleged perpetrator. For an alleged perpetrator who is a minor, we may send the notice to the child's parents or other person with primary or legal responsibility for the child; and

(C) The reporter, if the reporter's identity is known.

(2) We must provide notice to the persons specified in paragraph (1) of this subsection within 15 days after the investigation is closed by the supervisor.

(b) Required notification in administratively closed investigations.

(1) We must notify the following parties about the findings of an investigation that was closed administratively unless one of the exceptions specified in subsection (d) of this section apply:

(A) Each parent or other person with primary or legal responsibility for each alleged victim or alleged perpetrator who is a minor; and

(B) The reporter, if the reporter's identity is known.

(2) We must provide notice to the parents or other person with primary or legal responsibility for each alleged victim or alleged perpetrator who is a minor no later than 24 hours after the investigation is closed by the supervisor and to the reporter within 15 days.

(c) Optional provision of investigation findings upon request.

(1) We may provide information about the investigation to each parent or other person with primary or legal responsibility for any child in the home under investigation, at the request of the parent or person with primary or legal responsibility of the child, unless one of the exceptions specified in subsection (d) of this section exists. We may provide information from the investigation to the extent we deem necessary for the protection and care of the child when such information is necessary to meet the child's needs.

(2) We must not release information that is subject to redaction under §700.204, subchapter B, chapter 700, of this title (relating to Redaction of Records Prior to Release).

(d) Exceptions to providing notification.

(1) During the investigation, we were unable to locate the person entitled to notification despite having made reasonable efforts to locate the person.

(2) Notwithstanding requirements to notify certain persons of investigation results, we will not provide the notice when we determine that the notice is likely to endanger the safety of any child in the home, the reporter, or any other person who participated in the investigation of the report. This safety exception does not apply to a designated perpetrator entitled to receive notice under subsection (f) of this section, or to a former alleged perpetrator entitled to receive notice under subsection (g) of this section.

(3) We may delay notification of a person entitled to notification under this section if a law enforcement agency requests the delay because timely notification would interfere with an ongoing criminal

investigation. We may delay notification only in those circumstances in which the law enforcement agency agrees to notify us at the earliest time that the delay is no longer needed. We must provide the notification within 15 days after the date on which we are notified that the law enforcement agency has withdrawn the request to delay the notification.

(4) We will not provide required notifications or optional information about findings under this section if an investigation is being closed administratively because the report was referred for investigation to another authorized entity, such as law enforcement or another state agency.

(e) Form of notification. Notifications about the findings of an investigation may be either written or oral, except the notifications in paragraphs (1)-(2) of this subsection must be provided in writing:

(1) Written notification of the designated perpetrator, or designated victim perpetrator; and

(2) Written notification of an alleged perpetrator when all allegations in the case involving the person as an alleged perpetrator have been ruled out.

(f) Required written notification of the designated perpetrator. We must give written notice of the findings of the investigation to everyone who has been identified as a designated perpetrator as specified in §707.497(b)(2) or (3) of this subchapter (relating to What roles can we assign to persons involved in a case after the investigation is complete?). For a designated perpetrator who is a minor, the notice is sent to the child's parents or other person with primary or legal responsibility for the child.

(g) Required written notification of an alleged perpetrator when all allegations involving the person as an alleged perpetrator have been ruled out. We must give written notice of the right to request removal of role information to each person who was identified as an alleged perpetrator when all the allegations in the case involving the person as an alleged perpetrator have been ruled out. If the person is a minor, we may send the notice to the minor's parents.

(h) Notifying the reporter. If the reporter is not a professional working with the family, notification to the reporter discloses only:

(1) That we investigated the report; and

(2) Whether we provided services to the family during the investigation or plan to provide services to the family after the investigation.

§707.501. When do we conduct risk and safety assessments?

(a) Overview. During an investigation, we must assess both the immediate safety of the children in the home and the risk of recurrence of abuse or neglect.

(1) Assessing safety. We conduct a formal safety assessment to assess the presence or absence of danger indicators in the home during each contact with the family to determine whether the child is safe in the home.

(2) Assessing risk. Unless the conditions specified in subsection (b) of this section exist, we conduct a formal risk assessment to assess the likelihood that abuse or neglect will reoccur in the foreseeable future.

(b) When we do not complete a formal risk assessment. When any of the following conditions exists, we are not in a position to assess the likelihood that abuse or neglect will reoccur in the foreseeable future:

(1) The disposition of the allegations of child abuse or neglect is "unable to complete", as defined in §707.495 of this subchapter (relating to How do we make dispositions after completing the investigation?);

(2) The preliminary investigation is closed administratively, as specified in §707.489(b) of this subchapter (relating to How do we respond to reports of child abuse or neglect?;

(3) The disposition of the allegations of child abuse or neglect is "ruled out" pursuant to an abbreviated investigation as specified in §707.489(c) of this chapter;

(4) The family has only one child, and the child has died;

(5) The investigation was conducted in a school and did not involve members of the child's family or household;

(6) The investigation was conducted on a relative or other household; or

(7) The investigation meets the criteria of a Baby Moses case under Subchapter D of Chapter 262, Texas Family Code.

(c) Conclusions about safety and risk assessments. After assessing both safety and risk, and identifying sources of strengths and protective actions in the family, we determine whether:

(1) The child should be removed;

(2) The family should be referred for family based safety services as specified in subchapter G, chapter 700 of this title (relating to Services For Families); and/or for immediate or short-term protective services as specified §707.503 of this subchapter (relating to When will we intervene for the purpose of providing immediate or short-term protection to a child?); or

(3) The case should be closed.

(d) We may close the case when either of the following circumstances exists:

(1) The family's level of risk is low or moderate and there are no unmanaged danger indicators in the home; or

(2) The family appears willing and able, through the use of family and community resources, to deal with the safety and risk factors in their lives to ensure the safety of the child(ren) for the foreseeable future.

(e) We may remove the child(ren) if the criteria for removal under Subchapter B of Chapter 262, Texas Family Code, is met or we may refer the case for family based safety services as specified in subchapter G, chapter 700 of this title if:

(1) There is a high or very high likelihood that abuse or neglect will reoccur in the foreseeable future or the child is not safe in the home because of unmanaged danger indicators;

(2) Safety or risk factors were identified; and

(A) The family appears unable or unwilling to utilize family and community resources in a manner that will ensure the safety of the child(ren) for the foreseeable future; or

(B) There are not sufficient strengths and/or protective actions, and available resources to provide for the safety of the child(ren) in the foreseeable future without intervention; or

(3) The family would benefit from family based safety services to help manage the risk to the child(ren) in the foreseeable future.

(f) We must ensure that the child receives immediate or short-term protective services as specified §707.503 of this subchapter if the

family cannot protect the child from abuse or neglect in the immediate or short-term future without assistance.

(g) Documentation of spouse or partner abuse. The investigator must document an occurrence or history of spouse or partner abuse during the risk assessment. The documentation contains information obtained during the investigation as it relates to principals within that case.

§707.505. What are the requirements for an administrative review of investigation findings?

(a) The purpose of an Administrative Review of Investigation Findings (ARIF) is to provide an informal review process for a person who has been designated as a perpetrator or victim/perpetrator of child abuse or neglect as specified in §707.497(b)(2) or (3) of this subchapter (relating to What roles can we assign to persons involved in a case after the investigation is complete?).

(b) To be eligible, you must request an ARIF, in writing, within 45 days after receiving notice of the findings of the investigation. If you are 18 years of age or older and are requesting an ARIF to challenge a reason-to-believe finding made against you when you were a minor, your request will be considered timely and we will grant your request if you have not previously had an ARIF and are not otherwise found ineligible.

(c) You will not be entitled to an ARIF for a finding of abuse or neglect if a court of competent jurisdiction has already issued a ruling consistent with that specific finding.

(d) Except as provided in subsection (f) of this section, within 45 days after the date we receive your request for an ARIF, we must:

(1) Conduct the ARIF; or

(2) Notify you that your request has been denied because you are not eligible for an ARIF, as specified in this section.

(e) After you submit a written request for an ARIF, we will contact you to schedule the review. If we are unable to make contact with you and you do not respond to the attempts to make contact within 30 days of the initial attempt, we will not proceed with the review and you will waive your right to an ARIF. If you subsequently contact us after the above-specified timeframe, we may reschedule the review if we determine that you had a good reason for exceeding the timeframe.

(f) We may postpone an ARIF when there is a pending civil or criminal suit or an ongoing criminal investigation relating to the same acts or omissions involved in the finding of abuse or neglect or we find that there is other good cause for extending the deadline. If we decide to postpone the ARIF, we will notify you in writing within 45 days after receiving your request for an ARIF. If the ARIF is postponed due to a pending civil or criminal suit or ongoing criminal investigation, the notification will indicate the length of time of the delay or specify that you must notify us when the court case has been completed or the criminal investigation has been closed, as appropriate. We will review your eligibility for an ARIF after the delay. If you are determined eligible for an ARIF, we must conduct it within 45 days from notification of the completion of the suit or criminal investigation that caused the postponement.

(g) The ARIF is conducted by a DFPS employee (the "resolution specialist") who was not involved in the investigation and did not directly supervise the investigation. The ARIF is an informal review in which the participants may appear, make statements, provide relevant written materials, and ask questions. You have the right to bring a legal representative and a support person to the review. The support person may not participate in the review. If you are a minor, your parent or guardian may also speak on your behalf during the review. Any witnesses that you have must submit their statements in writing to the resolution specialist.

(h) The resolution specialist may review the investigation case record, ask questions, and gather other relevant information. The formal rules of evidence do not apply and the review does not include formal witness testimony. The resolution specialist may consider all allegations relating to the investigation, including allegations that were "reason-to-believe", "unable-to-determine", or "ruled-out" at the conclusion of the investigation, and the evidence gathered during the investigation and the ARIF process. The resolution specialist must confirm that decisions of "reason-to-believe" are supported by a preponderance of the evidence.

(i) After completing the ARIF, the resolution specialist must timely issue a written decision that upholds, reverses, or alters the original investigation findings. The resolution specialist only reviews and issues a written decision on findings pertaining to you. An original finding of "reason-to-believe" for abuse or neglect may be upheld or may be reversed to a finding of either "unable-to-determine" or "ruled-out". A finding may be altered with respect to the type of abuse or neglect found to have occurred. For example, an original finding of "reason-to-believe" for "physical abuse" of a child may be altered to a finding of "reason-to-believe" for "neglectful supervision" of the child.

(j) If the resolution specialist's decision reverses or alters any of the original investigation findings, we must change our records regarding the outcome of the investigation to reflect the resolution specialist's decision.

(k) Notwithstanding anything in this section, if you are entitled to an administrative hearing before the State Office of Administrative Hearings (SOAH), we may waive the ARIF and proceed directly to the SOAH hearing.

§707.509. What standards for conducting investigations of abuse and neglect apply to the Investigations program?

To encourage professionalism and consistency in the investigation of reports of child abuse and neglect, as specified in the Texas Family Code (TFC) §261.310, the Texas Department of Family and Protective Services adopts the following standards for individuals who investigate reports of child abuse and neglect:

(1) Each individual responsible for investigating reports of child abuse and neglect, or for conducting interviews during investigations of child abuse and neglect, must receive a minimum of 12 hours of professional training every year.

(2) The professional training curriculum for individuals who conduct investigations or investigation interviews must include information about:

(A) Abuse and neglect as defined in TFC §261.001 including the distinction between:

(i) Physical injuries resulting from abuse; and

(ii) Ordinary childhood injuries;

(B) Abuse involving mental or emotional injury as defined in TFC §261.001(1);

(C) Available treatment resources;

(D) The types of child abuse and neglect reported to DFPS, including information about the receipt of false reports;

(E) Forensic interviewing and investigatory techniques and the collection of physical evidence; and

(F) Federal child welfare laws.

(3) All investigatory interviews that are recorded should be recorded:

(A) Accurately, without interruption; and without alteration;

(B) Should be made on equipment that is capable of making an accurate recording; and

(C) Should be made by a person that is competent to make the recording.

(4) In accordance with Subchapter E of Chapter 264, Texas Family Code, investigators should:

(A) Utilize Children's Advocacy Centers when appropriate and follow protocols to minimize the number of interviews with a child; and

(B) Be thorough and exercise professional judgment and expertise in determining the nature, extent, and number of interviews and examinations of suspected child abuse victims.

(5) All documents generated during investigations must be maintained according to the Investigations published records retention schedule on the DFPS website, including:

(A) Original tape recordings of telephone intakes;

(B) Any recordings of interviews; and

(C) Worker case notes regarding the investigation.

(6) Investigators must make a reasonable effort to locate and notify each parent of an alleged victim of the report of abuse or neglect relating to the child victim.

§707.511. On whom do we conduct criminal history records checks during the course of an investigation?

(a) As provided in Government Code §411.114, we must obtain criminal history record information maintained by the Texas Department of Public Safety (DPS) regarding an alleged perpetrator unless the alleged perpetrator is a victim/perpetrator in the report.

(b) When necessary to complete a safety assessment, risk assessment, family assessment, or other assessment (including home studies or child care arrangements), we are entitled to obtain criminal history record information maintained by DPS regarding any of the following parties:

(1) Persons living in the residence in which the alleged victim resides;

(2) Persons providing, at the request of the child's parent, in-home care for an alleged child victim; and

(3) Persons providing, at the request of the child's parent, in-home care for a child, as long as the person provides written consent to the release and disclosure of the information.

(c) For purposes of this rule, the term "residence" means "household" as that term is defined in §707.451(a)(8) of this subchapter (relating to What terms and definitions are used in reports, investigations, and assessments of abuse and neglect?).

(d) In addition to criminal history record information that we obtain from DPS, we may also obtain information from the Federal Bureau of Investigation and any other criminal justice agency, subject to any limitations provided by law.

§707.513. What provisions govern the release and maintenance of records generated in conjunction with an investigation conducted by Investigations?

(a) Investigation records are confidential case records pursuant to the federal Child Abuse Prevention and Treatment Act and Texas Family Code (TFC) §261.201, and as further provided in subchapter B, chapter 700, of this title (relating to Confidentiality and Release of Records).

(b) We will withhold or release confidential case records that are gathered and maintained in response to a report of abuse or neglect of a child, as authorized by state and federal law, and in accordance with governing rules in subchapter B, chapter 700.

(c) We maintain investigation records in accordance with the Investigations published records retention schedule on the DFPS website.

§707.515. How does the Texas Department of Family and Protective Services assign roles upon receipt of a report alleging child abuse or neglect?

When a report of abuse or neglect is initially received by the Statewide Intake division of the Texas Department of Family and Protective Services (DFPS), each person named in the report is assigned one of the following roles:

(1) Alleged victim. An alleged victim is a child who is suspected of being a victim of abuse or neglect as defined in Texas Family Code (TFC) §261.001(1) and (4).

(2) Alleged perpetrator. An alleged perpetrator is a person responsible for the child's care, custody, or welfare as defined in TFC §261.001(5)(A)-(C), who is suspected of committing the alleged abuse or neglect.

(3) Alleged victim/perpetrator. An alleged victim/perpetrator is a child 10 years of age or older who is suspected of both:

(A) being a victim as described under paragraph (1) of this section; and

(B) abusing or neglecting other children in the family/household named in the same report.

(4) Unknown. A person with the role of unknown is a person whose actions with regard to the alleged abuse or neglect are not known by the reporter. The person may or may not have played a part in the suspected abuse or neglect.

(5) No Role. A person with the role of no role is a person, according to the reporter, who could clearly not have had a role in the alleged abuse or neglect.

§707.517. When is a person alleged to have committed abuse or neglect of a child entitled to request that we remove information from our records regarding that person's role as an alleged perpetrator in an investigation?

(a) Pursuant to Texas Family Code §261.315, you will be entitled to request removal of information from our records concerning your role as an alleged perpetrator in an investigation if all of the allegations against you in that investigation are ruled-out:

(1) At the conclusion of the investigation which has been approved for closure by a supervisor;

(2) As the result of an administrative review of investigation findings (ARIF) conducted pursuant to §707.505 of this subchapter (relating to What are the requirements for an administrative review of investigation findings?);

(3) As the result of a review conducted by the Office of Consumer Relations under division 3, subchapter I, chapter 702, of this title (relating to Office of Consumer Affairs Review of Perpetrator Designation);

(4) As the result of a due process hearing, when eligible, as provided in subchapter F, chapter 700, of this title (relating to Release Hearings); or

(5) As the result of any other final ruling which has the legal effect of ruling out all allegations against you from that investigation.

(b) Within 15 days following the conclusion of an investigation or other final ruling as described in subsection (a) of this section, we will mail a written notice to you informing you of your right to request removal of certain information and of the procedures which you must follow in order to exercise that right. If you are a minor, we will send the notice to your parents or other person with primary or legal responsibility.

(c) A request to remove role information shall not be deemed to be properly made unless you:

(1) Submit the request on a completed form prescribed by us and provided to you for this purpose, or submit a written request containing substantially equivalent information which allows us to locate the investigation in question and which clearly states the purpose of the request;

(2) Sign the request, or your parents or other person with primary or legal responsibility sign the request if you are a minor; and

(3) Mail or deliver the request to us to the address prescribed on the form for this purpose within 45 days after the mailing date of the notice required in subsection (b) of this section.

(d) Upon receipt of a request for removal of role information which meets all of the criteria set forth in subsection (c) of this section, we will initiate procedures to remove any information from our records which would tend to reveal that you were named as an alleged perpetrator of abuse and neglect in the investigation in which all allegations against you were ruled out. We will complete the process of removal of role information within 90 days from receipt of a properly submitted request.

(e) During the period of time following the receipt of a request properly made under subsection (c) of this section, and prior to the completion of the removal of information required in subsection (d) of this section, we will not release any information which is subject to removal under subsection (d) of this section to anyone who might otherwise be entitled to receive a copy of the investigation records, unless we are ordered to release that information pursuant to a valid court order.

(f) A request for removal of role information which does not meet the criteria set out in subsection (c) of this section will be denied. Notice of the denial and the reasons for the denial will be provided to you within 30 days of us receiving the request for removal.

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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Tiffany Roper
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Department of Family and Protective Services
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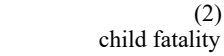

DIVISION 2. ALTERNATIVE RESPONSE

40 TAC §§707.549, 707.551, 707.553, 707.555, 707.557, 707.559, 707.561, 707.563, 707.565, 707.567

STATUTORY AUTHORITY

The new sections are adopted under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§707.551. What is alternative response?

Alternative response is a type of protective intervention conducted by the Investigations program of the Child Protective Investigations division of the Texas Department of Family and Protective Services (DFPS) in response to allegations of abuse or neglect of a child by a person responsible for the child's care, custody or welfare as defined in TFC §261.001(5)(A)-(C), that is an alternative to an abbreviated or thorough investigation as described in §707.489 of this subchapter (relating to How do we respond to reports of child abuse or neglect?). Cases that are handled with alternative response:

(1) do not result in a formal disposition of the allegations of abuse or neglect as provided in §707.495 of this subchapter (relating to How do we make dispositions after completing the investigation?) or in the designation of a perpetrator as described in §707.497 of this subchapter (relating to What roles can we assign to persons involved in a case after the investigation is complete?);

(2) do not result in the listing of any individual on the child abuse and neglect central registry described in subchapter C, chapter 702, of this title (relating to Child Abuse and Neglect Central Registry); and

(3) focus on short-term collaboration with and engagement of families in order to empower them to ensure the safety of their children.

§707.553. Which cases may be conducted as an alternative response?

(a) We may conduct an alternative response to any allegation of abuse or neglect that meets the criteria for investigation by us pursuant to Chapter 261, Texas Family Code, and division 1 of this subchapter (relating to Intake, Investigation, and Assessment), provided that:

(1) the case is assigned a priority other than Priority I;

(2) the case does not involve a child victim under the age of six, as further defined in policy. If a child under six is found to be living in a home after the alternative response case has been initiated, we will continue the alternative response unless there are allegations of physical or sexual abuse;

(3) there is no open investigation, Family Based Safety Services case, or conservatorship case involving the family; and

(4) the case is not excluded pursuant to subsection (b) of this section.

(b) We will not conduct or continue to conduct an alternative response if any of the following conditions are present:

(1) there is a current allegation of sexual abuse or risk of sexual abuse;

(2) the current report or alternative response involves a child fatality that is alleged to be the result of abuse or neglect:

(3) the current report or alternative response involves a family or household member who is a designated or sustained perpetrator of physical abuse that led to a child fatality in a previous investigation;

(4) there is a current allegation or other credible information indicating a risk of serious physical injury or immediate serious harm to a child who is the subject of the alternative response;

(5) An investigation is required to be conducted pursuant to Texas Family Code §261.406 and subchapter B of this chapter (relating to School Investigations) or pursuant to subchapter C of this chapter (relating to Child Care Investigations); or

(6) The alleged perpetrator is a foster parent or prospective adoptive parent.

(c) We may exclude a case for one of the conditions identified in subsection (b) of this section at the point the intake is received or screened or based on information discovered during the alternative response case.

§707.561. What investigative actions may we take when conducting an alternative response?

(a) When conducting an alternative response, we may take any protective action authorized for an investigation that is necessary for the protection of a child, including but not limited to:

(1) removing the child;

(2) facilitating a parental child safety placement;

(3) obtaining a court order in aid of investigation; or

(4) obtaining a court order to participate in services.

(b) We may take any appropriate protective action either prior to or following the transfer of the case to be handled as an investigation.

(c) We may contact and obtain information and records from any person we are authorized to obtain information or records from while conducting an investigation pursuant to division 1 of this subchapter (relating to Intake, Investigation, and Assessment). However, to the greatest extent possible while ensuring child safety, we attempt to obtain information and records in collaboration with the family and in a manner that is least intrusive to the family.

(d) We are not required to attempt to find or notify a parent who does not reside in the home of a family for whom we are conducting an alternative response.

§707.563. Do we maintain written records from an alternative response?

Yes. We must maintain a written record of an alternative response.

§707.565. What provisions govern the release and maintenance of records generated in conjunction with an alternative response?

(a) Records of an alternative response are confidential case records as provided by the federal Child Abuse Prevention and Treatment Act and Texas Family Code (TFC) §261.201, and as further provided in subchapter B, chapter 700, of this title (relating to Confidentiality and Release of Records).

(b) We will withhold or release confidential alternative response case records in the same manner as other records that are gathered or maintained in response to a report of abuse or neglect of a child, as authorized by state and federal law, and in accordance with governing rules in subchapter B, chapter 700.

(c) We maintain alternative response case records in accordance with the Investigations published records retention schedule on the DFPS website. We may utilize information from an alternative response if alternative response case records are available and we receive a subsequent report of abuse or neglect involving a person who participated in an alternative response case.

(d) Notwithstanding any other provision of this chapter, we do not release alternative response case records in response to a request for information received pursuant to TFC §261.308(e).

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. SCHOOL INVESTIGATIONS

40 TAC §§707.597, 707.599, 707.601, 707.603, 707.605, 707.607, 707.609, 707.611, 707.613, 707.615, 707.617, 707.619, 707.621, 707.623, 707.625

STATUTORY AUTHORITY

The new sections are adopted under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§707.605. What do the following terms mean when used in this subchapter?

(a) The following terms have the following meanings when used in this subchapter:

(1) Alleged perpetrator--A person who is alleged or suspected of being responsible for the abuse or neglect of a child.

(2) Alleged victim--A child who is alleged to be the victim of abuse or neglect.

(3) Child--A person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.

(4) Preponderance of evidence--Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

(5) Reporter--An individual who makes a report to the Texas Department of Family and Protective Services or a duly constituted law enforcement agency alleging the abuse or neglect of a child. If more than one individual makes a report alleging abuse or neglect of the same child, all such individuals shall have the designation of a reporter.

(6) School personnel and volunteers--Persons who have access to children in a school setting and are providing services to or caring for the children. School personnel include but are not limited to

school employees, contractors, school volunteers, school bus drivers, school cafeteria staff, and school custodians.

(7) School setting--The physical location of a child's school or of an event sponsored or approved by the child's school, or any other location where the child is in the care, custody, or control of school personnel in their official capacity, including transportation services. This does not include:

(A) school settings involving only children in facilities regulated by the Texas Health and Human Services Commission (HHSC) when HHSC contracts with the local school district to provide education services; or

(B) school settings that are a part of child care operations regulated by the Child Care Licensing division of HHSC.

(b) Terms used in this division that are not defined in this division shall have the meanings assigned to those terms in Chapters 101 and 261, Texas Family Code, and in division 1 of subchapter A of this chapter (relating to Intake, Investigation, and Assessment) unless the context clearly indicates otherwise.

§707.607. How is child abuse and neglect defined for the purpose of a school investigation?

(a) For the purpose of an investigation in a school setting, the terms abuse and neglect shall have the meaning assigned to those terms in the Texas Family Code §261.001(1) and (4), as those terms are further defined in division 1 of subchapter A of this chapter (relating to Intake, Investigation, and Assessment), unless the definition is clearly inapplicable to reports of abuse or neglect in school settings or as otherwise provided in this subchapter.

(b) Abuse and neglect in this context do not include the following:

(1) Use of restraints or seclusion that do not meet the statutory definitions of child abuse or neglect;

(2) Actions that school personnel or volunteers at the child's school reasonably believe to be immediately necessary to avoid imminent harm to the child or other individuals, if the actions:

(A) are limited only to those actions reasonably believed to be necessary under the existing circumstances; and

(B) do not include acts of unnecessary force or the inappropriate use of restraints or seclusion, such as the use of restraints or seclusion as a substitute for lack of staff;

(3) Reasonable discipline.

(c) Notwithstanding subsection (b) of this section, if there are allegations in the report that otherwise meet the definition of "abuse" or "neglect" by school personnel or volunteers in a school setting, those allegations will be investigated in accordance with this subchapter.

§707.609. When will a report of alleged abuse or neglect occurring in a school setting be assigned for investigation?

(a) A report of alleged abuse or neglect occurring in a school setting will be assigned for investigation if the following criteria are met:

(1) The allegations meet the definitions of abuse or neglect contained in §707.607 of this subchapter (relating How is child abuse and neglect defined for the purpose of a school investigation?);

(2) The alleged perpetrator is a person meeting the definition of school personnel or volunteers at the child's school;

(3) The alleged victim is a child or was a child at the time that the alleged abuse or neglect occurred;

(4) The alleged abuse or neglect occurred in a school setting;

(5) The alleged abuse or neglect occurred during the current school year or there is a likelihood that sufficient evidence can still be obtained to establish whether or not abuse or neglect occurred in a school setting; and

(6) The same allegations involving the school setting were not already investigated by us.

(b) A report of alleged abuse and neglect which does not meet the criteria for investigation specified in this section shall be referred to an appropriate law enforcement entity or other investigating agency in accordance with Texas Family Code §261.105.

(c) When we do not accept a report for investigation, we will notify the reporter verbally or in writing of the reason the report will not be investigated and that the reporter may discuss concerns about the decision with the supervisor.

§707.611. Who do we notify when we receive a report of child abuse or neglect in a school setting?

We must provide notification of all school-related reports of child abuse or neglect to the law enforcement entity with jurisdiction for criminal investigations in the geographical area where the alleged incident occurred, within the time frames set out in §707.487 of subchapter A of this chapter (relating to Do we notify law enforcement of all reports received of child abuse or neglect?).

§707.613. What are the priorities and time frames for initiating school investigations?

We must assign a priority to all reports accepted for investigation and must initiate an investigation within the corresponding time frame, as specified in §707.485 of subchapter A of this chapter (relating to What are the timeframes within which we must respond to a report of child abuse or neglect assigned for investigation?). Prior to initiating an investigation, we will review the intake report to determine if the initial priority and action recommended is appropriate or must be updated.

§707.615. Which school personnel must we notify prior to initiating a school investigation?

(a) Prior to conducting an investigation under this subchapter, we must notify the school principal (or the principal's supervisor if the school principal is an alleged perpetrator) of the fact that a report has been assigned for investigation, the nature of the allegations contained in the report, and the date and time we plan to visit the school campus to begin the investigation.

(b) We must also orally notify the superintendent of the school district about the investigation. If the alleged perpetrator is an employee of a charter school, we must orally notify the director of the charter school of the investigation. If the alleged perpetrator is an employee of a private school, we must orally notify the chief executive officer of the private school of the investigation.

(c) We must request that the school personnel notified of the investigation as provided in subsections (a) and (b) of this section not alert the alleged perpetrator or others regarding the report until we have had an opportunity to interview the alleged perpetrator.

§707.617. How are school investigations conducted?

(a) An investigation conducted under this subchapter shall include the following investigative steps unless the allegations of child abuse and neglect can be clearly confirmed or ruled-out without taking one or more of these steps:

(1) Obtain a full statement of the allegation from the reporter, as appropriate to the case.

(2) Interview and visually inspect each alleged victim, as appropriate in the case.

(3) Interview any other witnesses or persons who may have collateral information, including the child's parents or guardian.

(4) Interview the alleged perpetrator, if available.

(5) Obtain photographs, school records, or other pertinent physical evidence, if relevant to the investigation.

(6) Request that a parent of an alleged victim obtains a medical, psychological, or psychiatric examination of the child and that the records of such examination be provided to us, if necessary, to properly investigate the allegations in the case.

(7) Request that the alleged perpetrator submit to a medical, psychological, or psychiatric examination and that the records of such examination be provided to us, if necessary, to properly investigate the allegations in the case; and

(8) Cooperate with law enforcement in the event that law enforcement is conducting a joint investigation regarding the allegations.

(b) We will conduct a criminal history background check on the alleged perpetrator in accordance with Texas Government Code, §411.114, and §707.511 of subchapter A of this chapter (relating to On whom do we conduct criminal history records checks during the course of an investigation?).

(c) The Special Investigator who conducts the investigation must complete the investigation, reach a disposition for each allegation made in the report, and submit the investigation report and findings to a supervisor for approval within 30 calendar days after initiating the investigation unless an extension of time is approved by the supervisor due to extenuating circumstances. The supervisor must approve the investigation or return it to the Special Investigator for further action within 10 calendar days of receiving the investigative report. If the tenth day falls on a weekend or state holiday, the supervisor has until the next working day to complete the required review.

§707.619. What procedures apply when we conduct an interview or examination during a school investigation?

(a) School officials or other persons related to the school setting may not interfere with an investigation of a report of child abuse or neglect conducted by the Texas Department of Family and Protective Services, pursuant to Texas Family Code §261.303, Interference with Investigation; Court Order. Interviews and examinations in a school investigation may take place on or off the school premises, as deemed appropriate by us, pursuant to all applicable standards. We will notify appropriate school personnel prior to conducting an interview or visual inspection on school premises. We may request that school personnel or volunteers not be present during the interview or visual inspection of an alleged victim, an alleged perpetrator, an adult or child witness, or any other person who may have information relevant to the investigation if we determine that:

(1) The presence of school personnel or volunteers would compromise the integrity of the investigation; or

(2) A better interview or examination of the child would result without school personnel or volunteers being present.

(b) Notwithstanding subsection (a) of this section, if the school is not under the jurisdiction of the Texas Education Agency, we must have consent or a court order to conduct the interview and visual inspection of the child unless we have a reason to believe that the child is in immediate danger of physical or sexual abuse.

(c) We must comply with the requirements in §707.491(b) of subchapter A of this chapter (relating to What procedures apply when the investigator makes contact with and conducts interviews of parent(s) and alleged perpetrator(s) during an investigation?).

§707.621. How do we make dispositions and assign roles in a case after completing the investigation?

(a) At the conclusion of the investigation, we must assign an individual disposition to each allegation of abuse or neglect, as well as an overall disposition to the investigation.

(b) We use the following allegation dispositions for investigations in school settings:

(1) Reason-to-believe;

(2) Ruled-out;

(3) Unable to complete;

(4) Unable to determine; and

(5) Administrative closure.

(c) The overall investigation disposition is the summary finding about the abuse or neglect that was investigated. The overall disposition is determined in the following manner:

(1) Reason-to-believe. If any allegation disposition is "reason-to-believe", the overall investigation disposition is "reason-to-believe".

(2) Unable-to-determine. If any allegation disposition is "unable-to-determine" and no allegation disposition is "reason-to-believe", the overall investigation disposition is "unable-to-determine".

(3) Unable to complete. If any allegation disposition is "unable to complete" and no allegation disposition is "reason-to-believe" or "unable-to-determine", the overall investigation disposition is "unable to complete".

(4) Ruled-out. If all allegation dispositions are "ruled-out", the overall investigation disposition is "ruled out".

(5) Administrative closure. The overall disposition of an investigation is "administrative closure" if all individual allegations in the investigation are given the disposition of "administrative closure".

(d) The overall role for the alleged perpetrator and alleged victim at the end of an investigation in the school setting is the summary finding about the person's involvement in the abuse or neglect that was investigated. An individual's overall role is determined as follows:

(1) Designated perpetrator. When any allegation involving the alleged perpetrator is "reason-to-believe".

(2) Designated victim. When any allegation involving the alleged victim is "reason-to-believe".

(3) Unknown (unable-to-determine). When any allegation involving the person is "unable-to-determine" and no allegation involving the person is "reason-to-believe".

(4) Unknown (unable to complete). When any allegation involving the person is "unable to complete" and no allegation involving the person is "reason-to-believe" or "unable-to-determine".

(5) No role. When all allegations involving the person are "ruled-out" or "administrative closure".

§707.623. Will we notify school officials once the investigation is completed?

(a) Yes. After the completion of an investigation, we are statutorily required to provide a report of the investigation, redacted to remove the identity of the reporter, to either:

(1) The Texas Education Agency (Director of Education Investigations) for an investigation concerning an employee of a public or charter school; or

(2) The school's chief executive officer for an investigation concerning an employee of a private school, unless the chief executive officer is the alleged perpetrator.

(b) On request, we must also provide a redacted copy of the report to the following:

(1) State Board for Educator Certification;

(2) President of the local school board or local governing body for the school;

(3) The superintendent of the school district; and

(4) The school principal, unless the principal is the alleged perpetrator.

(c) If the overall investigation disposition is "reason-to-believe", the report must include information about the designated perpetrator's right to challenge the disposition through an administrative review of the investigation findings (ARIF), and through the Office of Consumer Relation's review of perpetrator designation conducted pursuant to division 3 of chapter 702 of this title (relating to Office of Consumer Affairs Review of Perpetrator Designation), if the finding is upheld at the ARIF. The report must also state that DFPS will notify any entity listed in subsections (a) and (b) of this section, that originally received a copy of the report of the investigation in the event that the dispositions are changed as a result of an ARIF or other challenge.

(d) Notwithstanding any other provision in this section, we are not required to provide notice to a school official if we administratively close a report of abuse or neglect prior to notifying school officials under §707.611 of this subchapter (relating to Who do we notify when we receive a report of child abuse or neglect in a school setting) that DFPS received a report of abuse or neglect in the school setting.

§707.625. How is notice provided to non-school entities when a school investigation is completed?

The Texas Department of Family and Protective Services must comply with the notification requirements contained in Chapter 261, Texas Family Code, and in §707.499 of subchapter A of this chapter (relating to Who will we notify of the investigation results?).

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. CHILD CARE INVESTIGATIONS

DIVISION 1. DEFINITIONS

40 TAC §707.701, §707.703

STATUTORY AUTHORITY

The new sections are adopted under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§707.703. What do the following terms mean when used in this subchapter?

(a) The following terms have the following meanings when used in this subchapter:

(1) Alleged Perpetrator--a person being investigated by us because the person is alleged to have abused, neglected, or exploited a child in a child care operation.

(2) Caregiver--A person whose duties include the supervision, guidance, and protection of a child or children.

(3) Central registry--A Texas Department of Family and Protective Services (DFPS) database of persons who have been found by DFPS to have abused, neglected, or exploited a child, including abusing, neglecting, or exploiting a child in a child care operation. See subchapter C, chapter 702, of this title (relating to Child Abuse and Neglect Central Registry).

(4) Child--A person under 18 years of age.

(5) Child Care Investigations (CCI) --a program of the Child Protective Investigations division of the Department of Family and Protective Services that investigates allegations of child abuse, neglect, and exploitation in child care operations.

(6) Child Care Licensing (CCL) --a department of the Regulatory Services Division of the Texas Health and Human Services Commission that regulates child care operations under Chapter 42, Human Resources Code. CCL was formerly under the Texas Department of Family and Protective Services until September 1, 2017.

(7) Child care operation--a facility, family home, or other entity that is subject to regulation by CCL under Chapter 42, Human Resources Code, regardless of whether the operation has received the necessary permit to provide the child care under that chapter.

(8) Designated perpetrator--A person on the DFPS central registry found by us to have abused, neglected, or exploited a child in a child care operation, but who has not exhausted the right to a due process hearing. See division 7 of this subchapter (relating to Due Process Hearings).

(9) Finding of abuse, neglect, or exploitation--A determination that we made at the completion of an investigation based on the evidence gathered that a preponderance of the evidence supports the allegation(s) of child abuse, neglect, or exploitation in a child care operation.

(10) Intake Report--An allegation of child abuse, neglect, or exploitation in a child care operation.

(11) Parent--A child's biological mother or father, adoptive mother or father, or person that has legal responsibility for or legal custody of a child, including the managing conservator or legal guardian. The term does not include a parent whose parental rights have been terminated.

(12) Preponderance of evidence--Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.

(13) Single-source continuum contractor (SSCC) --the entity that DFPS contracts with to provide the full continuum of foster care and case management services to children and families on behalf of Child Protective Services within a designated geographic area for purposes of implementing community-based care as defined in Texas Family Code §264.152(4).

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DIVISION 2. OVERVIEW OF INVESTIGATION IN CHILD CARE OPERATIONS

40 TAC §§707.711, 707.713, 707.715, 707.717, 707.719, 707.721, 707.723, 707.725, 707.727, 707.729

STATUTORY AUTHORITY

The new sections are adopted under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§707.713. What standards for conducting investigations of abuse, neglect, and exploitation apply to the Child Care Investigations program?

To encourage professionalism and consistency in the investigation of reports of child abuse, neglect, and exploitation, as specified in the Texas Family Code (TFC) §261.310, the Texas Department of Family and Protective Services (DFPS) adopts the following standards for individuals who investigate reports of child abuse, neglect, and exploitation in a child care operation:

(1) Each individual responsible for investigating reports of child abuse, neglect, or exploitation in a child care operation, or for conducting interviews during such investigations, must receive at least 12 hours of professional training every year.

(2) The professional training curriculum for individuals who conduct investigations or investigation interviews must include information about:

(A) Abuse, neglect, and exploitation as defined in Texas Family Code (TFC) §261.001, including the distinction between:

(i) physical injuries resulting from abuse; and

(ii) ordinary childhood injuries;

(B) Abuse involving mental or emotional injury as defined in TFC §261.001(1) and division 5 of this subchapter (relating to Abuse, Neglect, and Exploitation);

(C) The types of abuse, neglect, and exploitation reported to DFPS;

(D) Forensic interviewing, including the collection of physical evidence and advanced training in investigative protocols and techniques; and

(E) Applicable federal child welfare laws.

(3) All investigatory interviews that are recorded should be recorded:

(A) Accurately, without interruption, and without alteration;

(B) Should be made on equipment that is capable of making an accurate recording; and

(C) Should be made by a person that is competent to make the recording.

(4) Individuals who investigate reports of child abuse should:

(A) Utilize Children's Advocacy Centers, as appropriate;

(B) Follow protocols to minimize the number of interviews with a child; and

(C) Coordinate with experts to be thorough and exercise professional judgment in determining the nature, extent, and number of interviews, observations, and examinations of suspected child abuse victims.

(5) All documents generated during investigations must be maintained according to the Child Care Investigations published records retention schedule on the DFPS website, including:

(A) Original tape recordings of telephone intakes;

(B) Any recordings of interviews; and

(C) Worker case notes regarding the investigation.

§707.715. What are the timeframes within which we must respond to a report of child abuse, neglect, or exploitation assigned for investigation?

(a) We assign priorities for reports of abuse, neglect, and exploitation based on the assessment of the immediacy of the risk and the severity of the possible harm to the child. Prior to initiating an investigation, we will review the intake report to determine if the initial priority and action recommended is appropriate or must be updated.

(1) Priority I reports concern:

(A) death or immediate risk of death; serious injury; or life-threatening abuse, neglect, or exploitation; or

(B) imminent risk of death, serious injury, or life-threatening abuse, neglect, or exploitation.

(2) Priority II reports are all other reports of abuse, neglect, or exploitation that are not assigned a Priority I.

(b) Subject to the availability of funds, we must:

(1) Immediately respond to a report of abuse, neglect, or exploitation that is assigned a Priority I and involves:

(A) the death of a child; or

(B) circumstances in which serious physical or emotional harm or death of a child will result unless we immediately intervene.

(2) Respond within 24 hours to a report of abuse, neglect, or exploitation that is assigned a Priority I and involves circumstances in which the threat of serious physical or emotional harm or death of a child is not immediate but may occur in the very near future unless we intervene.

(3) Respond within 72 hours to a report of abuse, neglect, or exploitation that is assigned a Priority II.

§707.719. Must the child care operation allow us to visit the operation as part of the investigation?

(a) Yes, pursuant to Texas Human Resources Code §42.04412 and Texas Family Code §261.303, the child care operation must not interfere with an investigation that we are conducting.

(b) If anyone at the child care operation refuses, prevents, or delays us from visiting and investigating all areas of the operation during the hours of operation, we may seek a court order granting us access to the operation and records maintained by the operation. In addition, Child Care Licensing may issue the child care operation a deficiency or take an enforcement action against the operation if the operation refuses, prevents, or delays our ability to conduct an investigation.

§707.727. Will we investigate anonymous reports?

Yes. We will investigate an anonymous report alleging abuse, neglect, and exploitation.

§707.729. Will an abuse, neglect, and exploitation finding be posted on the Texas Health and Human Services' Search Texas Child Care website?

A finding of an abuse, neglect, and exploitation investigation that we conducted is confidential and will not be posted on the Texas Health and Human Services' Search Texas Child Care website. However, we will provide our investigation findings, including any findings for anonymous reports, to Child Care Licensing (CCL) pursuant to Texas Human Resources Code (HRC) §40.042(f). If CCL cites an operation with any deficiency related to the abuse, neglect, or exploitation investigation, CCL will post the deficiency on the website. A CCL deficiency may be related to an abuse, neglect, or exploitation finding or to another minimum standards deficiency that we identified during the abuse, neglect, or exploitation investigation.

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DIVISION 3. NOTIFICATION

40 TAC §§707.741, 707.743, 707.745, 707.747

STATUTORY AUTHORITY

The new sections are adopted under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

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DIVISION 4. CONFIDENTIALITY

40 TAC §§707.761, 707.763, 707.765, 707.767, 707.769

STATUTORY AUTHORITY

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§707.763. Are abuse, neglect, and exploitation investigations in child care operations confidential?

(a) Abuse, neglect, and exploitation investigation records of child care operations are confidential pursuant to the federal Child Abuse Prevention and Treatment Act and Texas Human Resources Code (HRC) §40.005 and §42.004 and not available to the general public, except as provided under applicable federal or state law and as further described in the rules in this division. However, Child Care Licensing (CCL) maintains a monitoring file for each operation and will have access to the investigation records pursuant to HRC §40.042(f). The portions of the abuse, neglect, or exploitation investigation records that are maintained by CCL in the operation's monitoring file are not confidential and may be released to the public.

(b) Notwithstanding subsection (a) of this section, DFPS does not release any records until the investigation is complete.

(c) Records related to a child fatality that is the subject of an investigation may be released to the general public as provided under subchapter D, Release of Records Related to a Child Fatality, in chapter 702 of this title (relating to General Administration).

§707.765. Who may obtain confidential abuse, neglect, and exploitation investigation information from the Child Care Investigation's file made confidential under the federal Child Abuse Prevention and Treatment Act and Texas Human Resources Code (HRC) §§40.005 and 42.004?

(a) The following may obtain confidential abuse, neglect, and exploitation investigation information from us subject to the limitations described in §707.767 (relating to Are there any portions of the abuse, neglect, or exploitation investigation records that may not be released to anyone?) and §707.769 (relating to Who can review or have a copy of a photograph or an audio or visual recording, depiction, or documentation of a child that is in the abuse, neglect, or exploitation investigation records maintained by us?) in this division:

(1) Texas Department of Family and Protective Services (DFPS) staff, including volunteers, as necessary to perform their assigned duties;

(2) Child Care Licensing (CCL) pursuant to HRC §40.042(f), in order to carry out its regulatory functions under HRC Chapter 42;

(3) The parent of the child who is the subject of the investigation;

(4) An attorney ad litem, guardian ad litem, or court appointed special advocate of an alleged victim of child abuse, neglect, or exploitation;

(5) The alleged perpetrator, or the parent of an alleged perpetrator that is a minor;

(6) Law enforcement;

(7) A member of the state legislature when necessary to carry out that member's official duties;

(8) A child care operation cited for a deficiency by CCL as a result of the investigation;

(9) A single-source continuum contractor (SSCC) for community-based care when:

(A) The SSCC subcontracts with the child care operation where the investigation occurred;

(B) The operation has signed a release of information; and

(C) CCL cited the operation for a deficiency as a result of the investigation;

(10) An administrative law judge who conducts a due process hearing related to a finding of abuse, neglect, or exploitation or related to an enforcement action taken by CCL or another state agency as a result of the finding. See division 7 of this subchapter (relating to Due Process Hearings);

(11) A judge of a court of competent jurisdiction in a criminal or civil case arising out of an investigation of child abuse, neglect, or exploitation, if the judge:

(A) provides notice to DFPS and any other interested parties;

(B) after reviewing the information, including audio and/or videotapes, determines that the disclosure is essential to the administration of justice and will not endanger the life or safety of any individual; and

(C) includes in the disclosure order any safeguards that the court finds appropriate to protect the interest of the child involved in the investigation;

(12) According to Texas Family Code (TFC) §162.0062, a prospective adoptive parent of a child who is the subject of the investigation or who is the alleged or designated perpetrator in the investigation;

(13) A child care licensing agency or child welfare agency from another state that requests information on the alleged perpetrator as part of a background check or to assist in its own child abuse, neglect, or exploitation investigation; and

(14) Any other person authorized by state or federal law to have a copy.

(b) Notwithstanding any other provision of this section, the parent of a child who is not the subject of the investigation or the alleged or designated perpetrator in the investigation but was a collateral witness during the investigation is entitled to the portion of the investigation record related to their child.

(c) A social study evaluator may obtain a complete, non-redacted copy of any investigative report regarding abuse, neglect, or exploitation that relates to any person residing in the residence subject to the child custody evaluation, as provided by TFC §107.111.

§707.767. Are there any portions of the abuse, neglect, and exploitation investigation records that may not be released to anyone?

(a) Except as described in subsection (b) of this section, we may not release the following portions of the abuse, neglect, and exploitation investigation records to anyone:

(1) Any information that would interfere with an ongoing law enforcement investigation or prosecution;

(2) Any information identifying the person who made a report that resulted in an investigation;

(3) The location of a family violence shelter;

(4) Information pertaining to an individual who was provided family violence services;

(5) The location of a victims of trafficking shelter center, which would include:

(A) A general residential operation that provides trafficking victim services under 26 Texas Administrative Code (TAC) chapter 748, subchapter V (relating to Additional Requirements For Operations that Provide Trafficking Services); and

(B) A child-placing agency that provides trafficking victim services under 26 TAC Chapter 749, Subchapter V (relating to Additional Requirements For Child-Placing Agencies That Provide Trafficking Victims Services);

(6) Information pertaining to an individual who was provided services at a victims of trafficking shelter center, including a general residential operation or a child-placing agency that provides trafficking victim services;

(7) The identity of any child or information identifying the child in an abuse, neglect, or exploitation investigation, unless the requestor is:

(A) The child's parent or prospective adoptive parent; or

(B) The single-source continuum contractor (SSCC) for community-based care when:

(i) the SSCC subcontracts with the child care operation where the investigation occurred;

(ii) the operation has signed a release of information; and

(iii) CCL cited the operation for a deficiency as a result of the investigation;

(8) Foster home screenings, adoptive home screenings, and post-placement adoptive reports, unless:

(A) The requester is the person being evaluated; or

(B) The Department of Family and Protective Services (DFPS) Commissioner approves the release of a screening or report based on a determination that, in the Commissioner's discretion, the release advances the goals of child protection; and

(9) Any other information made confidential under state or federal law.

(b) Notwithstanding any other provision in this section, DFPS may provide any of the above confidential information to the following, as specified:

(1) DFPS staff, including volunteers, as necessary to perform their assigned duties;

(2) CCL in order to carry out its regulatory functions under Human Resources Code, Chapter 42;

(3) Law enforcement for the purpose of investigating allegations of child abuse, neglect, or exploitation; failure to report child abuse, neglect, or exploitation; or false or malicious reporting of alleged child abuse, neglect or exploitation;

(4) A member of the state legislature when necessary to carry out that member's official duties;

(5) Any other individuals ordered by an administrative law judge or judge of a court of competent jurisdiction; and

(6) A social study evaluator who has requested a complete, non-redacted copy of any investigative report regarding abuse, neglect, or exploitation that relates to any person residing in the residence subject to the child custody evaluations, as provided by Texas Family Code §107.111.

(c) Notwithstanding any other provision in this subchapter, Child Care Investigations staff, in consultation with the DFPS' Office of the General Counsel, may withhold any information in its records if the release of that information would endanger the life or safety of any individual.

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DIVISION 5. ABUSE, NEGLECT, AND EXPLOITATION

40 TAC §§707.781, 707.783, 707.785, 707.787, 707.789, 707.791, 707.793, 707.795, 707.797, 707.799, 707.801, 707.803

STATUTORY AUTHORITY

The new sections are adopted under Human Resources Code (HRC) §40.027, which provides that the Department of Family and Protective Services commissioner shall oversee the development of rules relating to the matters within the department's jurisdiction and notwithstanding any other law, shall adopt rules for the operation and provision of services by the department.

§707.783. Who is considered a person responsible for a child's care, custody, or welfare for purposes of a child abuse, neglect, or exploitation investigation in a child care operation?

(a) Texas Family Code §261.001(5) includes the following as a "person responsible for a child's care, custody, or welfare" in a child care operation:

(1) Foster parent of the child;

(2) Personnel or a volunteer at a public or private child-care facility that provides services for the child or at a public or private residential institution or facility where the child resides; and

(3) An employee, volunteer, or other person working under the supervision of a licensed or unlicensed child-care facility, including a family home, residential child-care facility, employer-based day-care facility, or shelter day-care facility, as those terms are defined in Chapter 42, Texas Human Resources Code.

(b) For purposes of paragraph (3) of subsection (a), "an employee, volunteer, or other person working under the supervision of a licensed or unlicensed child-care facility" means any person working under the auspices of a child care operation and includes:

(1) Any employee or volunteer of the operation;

(2) Any person under contract with the operation;

(3) A director, owner, operator, or administrator of an operation;

(4) Anyone who has responsibility for the children in care;

(5) Anyone who has unsupervised access to the children in care;

(6) Anyone who regularly or routinely lives or is present at the operation; and

(7) Any other person permitted by act or omission to have access to children in care.

§707.787. What is emotional abuse?

(a) Emotional abuse is a subset of the statutory definitions of abuse that appear in Texas Family Code §261.001(1) and includes the following acts or omissions by a person:

(1) Mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;

(2) Causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning; or

(3) The current use by a person of a controlled substance as defined by Chapter 481, Health and Safety Code, in a manner or to the extent that the use results in mental or emotional injury to a child.

(b) In this section, the following terms have the following meanings:

(1) "Mental or emotional injury" means:

(A) That a child of any age experiences any significant change in the child's physical health, intellectual development, or social behavior, including changes in sleeping and eating patterns, changes in school, or depression. The child does not have to experience physical injury or be diagnosed by a medical or mental health professional in order for us to determine that the child suffers from a mental or emotional injury. However, when assessing the child, we must consult with professional collaterals outside of the Texas Department of Family and

Protective Services that have witnessed and validated that the child is exhibiting behaviors that show an observable and material impairment as specified in paragraph (2) of this subsection. If a medical or mental health professional examines the child, we will consult with the medical or mental health professional prior to making a finding.

(B) For purposes of paragraph (3) of subsection (a), "mental or emotional injury" resulting from a person's current use of a controlled substance includes a child of any age experiencing interference with normal psychological development, functioning, or emotional or mental stability, as evidenced by an observable and substantial change in behavior, emotional response, or cognition, related to the person's current use of a controlled substance.

(2) "Observable and material impairment" means discernible and substantial damage or deterioration to a child's emotional, social, and cognitive development. It may include but is not limited to depression; anxiety; panic attacks; suicide attempts; compulsive and obsessive behaviors; acting out or exhibiting chronic or acute aggressive behavior directed toward self or others; withdrawal from normal routine and relationships; memory lapse; decreased concentration; difficulty or inability to make decisions; or a substantial and observable change in behavior, emotional response, or cognition.

§707.789. What is physical abuse?

(a) Physical abuse is a subset of the statutory definitions of abuse that appear in Texas Family Code §261.001(1) and includes the following acts or omissions by a person:

(1) Physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident;

(2) Failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child;

(3) The current use by a person of a controlled substance as defined by Chapter 481, Health and Safety Code, in a manner or to the extent that the use results in physical injury to a child; or

(4) Causing, expressly permitting, or encouraging a child to use a controlled substance as defined by Chapter 481, Health and Safety Code.

(b) In this section, the following terms have the following meanings:

(1) "Accident" means an unforeseen, unexpected, or unplanned act or event that occurs unintentionally and causes or threatens physical injury despite exercising the care and diligence that a reasonable and prudent person would exercise under similar circumstances to avoid the risk of injury.

(2) "Genuine threat of substantial harm from physical injury" means exposing the child to any risk of suffering a physical injury. This does not require actual physical contact or injury. It may include but is not limited to the following acts: striking, shoving, shaking, or hitting a child, whether intended as discipline or not.

(3) "Physical injury that results in substantial harm to the child" means any bodily harm, including but not limited to scratches; scrapes; cuts, welts, red marks; skin bruising; lacerations, pinch marks; sprains; dislocated, fractured, or broken bones; concussions; burns; and damage to internal organs. When determining whether the harm is substantial, we may consider factors including but not limited to the location of the harm; the child's age, physical condition, psychological functioning, and level of maturity; any special needs the child may have; and other relevant factors.

§707.791. What is sexual abuse?

(a) Sexual abuse is a subset of the statutory definitions of abuse that appear in Texas Family Code §261.001(1) and includes the following acts or omissions by a person:

(1) Sexual conduct harmful to a child's mental, emotional, or physical welfare, including:

(A) Conduct that constitutes the offense of continuous sexual abuse of young child or children under §21.02, Penal Code;

(B) Indecency with a child under §21.11, Penal Code;

(C) Sexual assault under §22.011, Penal Code; or

(D) Aggravated sexual assault under §22.021, Penal Code;

(2) Failure to make a reasonable effort to prevent sexual conduct harmful to a child;

(3) Compelling or encouraging the child to engage in sexual conduct as defined by §43.01, Penal Code, including compelling or encouraging the child in a manner that constitutes an offense of:

(A) Trafficking of persons under §20A.02(a)(7) or (8), Penal Code;

(B) Prostitution under §43.02(b), Penal Code; or

(C) Compelling prostitution under §43.05(a)(2), Penal Code;

(4) Causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene as defined by §43.21, Penal Code, or pornographic; or

(5) Causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child as defined by §43.25, Penal Code.

(b) In this section, the following terms have the following meanings:

(1) "Causing, permitting, encouraging, engaging in, or allowing" the photographing, filming, or depicting of, or sexual performance by, a child as described in paragraphs (4) and (5) of subsection (a) is not limited to actions the child was forced or coerced to participate in. The definition of sexual abuse is met even if the child voluntarily participates in the action.

(2) "Compelling or encouraging the child to engage in sexual conduct" as described in paragraph (3) of subsection (a) does not require that the child actually engage in sexual conduct. The definition of sexual abuse is met as long as there is a substantial risk of a child engaging in the sexual conduct.

(3) "Pornographic" or "pornography" means material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct.

(4) "Sexual conduct harmful to a child's mental, emotional or physical welfare" includes but is not limited to rape; incest; sodomy; inappropriate touching of the child's anus, breast, or genitals, including touching under or on top of the child's clothing; deliberately exposing one's anus, breast, or any part of the genitals to a child; touching the child in a sexual manner or directing sexual behavior towards the child; showing pornography to a child; encouraging a child to watch or hear sexual acts; compelling, encouraging, or permitting a child to engage in prostitution; watching a child undress, shower, or use the bathroom with the intent to arouse or gratify one's sexual desire; voyeurism; sex-

ually oriented acts, which may or may not include sexual contact or touching with intent to arouse or gratify the sexual desire of any person; and any sexually oriented act or practice that would cause a reasonable child under the same circumstance to feel uncomfortable or intimidated or that results in harm or substantial risk of harm to a child's growth, development, or psychological functioning.

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DIVISION 6. ADMINISTRATIVE REVIEWS

40 TAC §§707.815, 707.817, 707.819, 707.821, 707.823, 707.825, 707.827, 707.829, 707.831

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DIVISION 7. DUE PROCESS HEARINGS

40 TAC §§707.841, 707.843, 707.845, 707.847, 707.849, 707.851, 707.853, 707.855, 707.857, 707.859

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