

1 **CHAPTER 809. CHILD CARE SERVICES**

2
3 **ADOPTED RULES WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS**
4 **REGISTER. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS**
5 **SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE TEXAS REGISTER.**
6

7 The Texas Workforce Commission (Commission) adopts the following new section, without
8 changes, to Chapter 809, relating to Child Care Services, as published in the March 13, 2009,
9 issue of the *Texas Register* (34 TexReg 1791):
10

11 Subchapter E. Requirements to Provide Child Care, §809.94
12

13 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

14 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND**
15 **RESPONSES**
16

17 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

18 The intent of the adopted changes to the Chapter 809 Child Care Services rules is to provide a
19 mechanism by which the Commission and Local Workforce Development Boards (Boards) can
20 ensure that child care providers receiving Commission child care funds are:

- 21 --meeting minimum health and safety standards as determined by the Texas Department of
 - 22 Family and Protective Services (DFPS); and
 - 23 --providing the basic quality of care for children receiving Commission-funded child care.
- 24

25 The Commission rule changes are designed to balance two fundamental principles of the Child
26 Care and Development Fund (CCDF):

- 27 --providing for the health and safety of children receiving subsidized child care; and
 - 28 --ensuring that parents can choose from the full range of child care options to best suit their
 - 29 family needs.
- 30

31 Additionally, the Commission rules work in concert with the DFPS process for placing child care
32 providers on corrective or adverse action. The Commission rules are based on DFPS regulatory
33 remedies for child care providers that are found to be in noncompliance with health and safety
34 standards and are designed to provide appropriate actions for Boards and parents, given the level
35 of risk to children as determined by DFPS. The rules also balance parental choice and the health
36 and safety of children with child care providers' due process for remedying regulatory
37 deficiencies determined by DFPS.
38

39 *Levels of Corrective and Adverse Action by DFPS*
40

41 The Commission rules are predicated on the following three levels of actions that DFPS can take
42 when a child care provider is found to be in noncompliance with state regulatory standards:

- 43 1. Evaluation Corrective Action
- 44 2. Probation Corrective Action
- 45 3. Adverse Action

1 According to the DFPS licensing rules at 40 TAC, Chapter 745, DFPS may impose an evaluation
2 corrective action (evaluation status) when a provider's deficiencies present a lower risk to
3 children and, as long as the conditions imposed by the evaluation are followed, the provider does
4 not need to cease operating to make the corrections. Evaluation status:
5 --involves a period of heightened monitoring;
6 --is imposed only after a plan for compliance has been developed and when a specific incident or
7 pattern of deficiencies is not serious enough to require probation; and
8 --cannot be imposed for less than 30 days or for more than six months.

9
10 For providers placed on evaluation status, the Commission rules require Boards to ensure that
11 parents with children enrolled, or parents wishing to enroll children, in Commission-funded child
12 care with the provider are notified in writing of the provider's evaluation status with DFPS. A
13 parent can choose to continue the enrollment with the provider if the parent signs an
14 acknowledgment affirming that he or she has been notified of the provider's evaluation status and
15 has chosen to continue the enrollment.

16
17 According to Chapter 745 of the DFPS rules, DFPS may impose a probation corrective action
18 (probationary status) when a specific incident or a pattern of deficiencies can lead to adverse
19 action. Probationary status:
20 --is appropriate where a risk to children may exist but when further action, such as closing the
21 provider, is not necessary as long as the deficiencies are addressed through the corrective action
22 plan; and
23 --cannot be imposed for less than 30 days or for more than one year.

24
25 Additionally, Chapter 745 of the DFPS rules requires providers placed on evaluation or
26 probationary status to post the corrective action notice in a prominent place near each public
27 entrance.

28
29 For providers placed on probationary status, the Commission rules require Boards to ensure that
30 parents with children enrolled in Commission-funded child care with the provider are notified in
31 writing of the provider's probationary status. A parent can choose to continue the enrollment
32 with the provider if the parent signs an acknowledgment affirming that he or she has been
33 notified of the provider's probationary status and has chosen to continue the enrollment.
34 However, the Board must ensure that no new enrollments of children receiving Commission-
35 funded child care are accepted with a provider in probationary status.

36
37 According to Chapter 745 of the DFPS rules, an adverse action is applied when DFPS attempts
38 to close a provider. Adverse action is taken when DFPS determines that the provider has
39 deficiencies that endanger the health and safety of children. DFPS adverse actions include
40 notifying the provider of DFPS' intent to deny, revoke, or suspend the provider's permit. If an
41 adverse action is taken, the provider has a right to request an administrative review and a
42 hearing. If the adverse action is upheld, the provider must close. Chapter 745 of the DFPS rules
43 also requires that when a provider receives notice from DFPS that it intends to take adverse
44 action against the provider, the provider must post the notice of the adverse action in a prominent
45 place near each public entrance. The provider must also notify each parent, guardian, or

1 managing conservator of the children enrolled within five days of receiving the notice from
2 DFPS.

3
4 The Commission rules do not allow reimbursements for Commission-funded child care to any
5 provider against which DFPS is taking adverse action. Therefore, Boards must ensure that:
6 --no new referrals are made to the providers; and
7 --children currently enrolled in Commission-funded child care with such providers are
8 transferred to another eligible provider.

9
10 Chapter 745 of the DFPS rules provides that if, during an inspection, DFPS licensing staff
11 discovers conditions that pose a threat of immediate danger to the children, DFPS licensing staff
12 can take immediate actions to remove the children and initiate an emergency suspension and
13 closure order. When this happens, DFPS policies require the provider to notify parents to pick
14 up their children within four hours or by the end of the day, whichever is longer. The operation
15 is then closed for no more than 10 days. Further, DFPS must initiate an adverse action in the
16 form of an intent to revoke no later than five days from the date of the emergency closure.
17 Although the provider may request an administrative review of the emergency closure and
18 adverse action, the provider cannot operate or care for children during the administrative review.

19
20 Because the emergency suspension and closure order requires all children at the facility to be
21 removed from care, the Commission believes it is not necessary to address provider eligibility
22 for reimbursement in Commission rules as the provider is not entitled to any reimbursement
23 while children are not allowed in care. Furthermore, the emergency nature of the closure, the
24 short time frame for parental notification, and the requirement for immediate removal of children
25 make additional parental notification an unnecessary burden upon the Board.

26
27 However, issuance of an emergency suspension and closure order may not mean that a provider
28 has ceased operating. Under Chapter 745 of DFPS rules, a provider may seek a court injunction
29 to stop the emergency suspension and closure if the provider disagrees with the DFPS
30 determination that the provider poses an immediate threat to children. The court may decide to
31 uphold the decision to close the operation. On the other hand, the court may enjoin closure and
32 allow the provider to continue operating pending the outcome of the administrative review of the
33 adverse action.

34
35 Under DFPS rules, emergency closure actions are treated as adverse actions. Consistent with
36 this approach, the Commission rules require Boards to treat a provider that, by a court order, is
37 continuing operations pending the outcome of the administrative review, in accordance with the
38 procedures for adverse actions.

39 *Parent Choice*

40
41 CCDF regulations at 45 C.F.R. §98.30 require states to allow parents to choose from a variety of
42 child care categories including care in child care centers, group homes, and family homes, and
43 care in the child's home. States cannot promulgate rules that significantly restrict parental choice
44 in categories of care or that have the effect of excluding categories of care. Although the rules
45 may affect a parent's choice of a particular individual provider under certain circumstances
46 (specifically, providers placed on probationary status or adverse action), the rules neither restrict

1 parents' choice of a particular provider category nor have the effect of excluding a substantial
2 number of providers in any category.

3
4 According to DFPS data, the number of licensed and registered child care providers in State
5 Fiscal Year 2008 (SFY'08) (September 1, 2007, through August 31, 2008) totaled 19,995. Also
6 during SYF'08, 320 child care providers were placed on corrective or adverse action. Of those,
7 211 were placed on corrective action (113 on evaluation status and 98 on probationary status),
8 and 109 were placed on adverse action. Therefore, the providers affected by these rules
9 represent approximately 1.6 percent of all providers. DFPS data also shows that approximately
10 2.3 percent of licensed child care centers, 1.3 percent of licensed homes, and 0.8 percent of
11 registered homes were placed on some type of corrective or adverse action.

12
13 The rules do not limit parent choice of the full range of provider categories in any specific local
14 workforce development area (workforce area). Harris County had 86 providers on corrective or
15 adverse action, followed by Bexar County with 22 providers. Only 5 other counties in Texas had
16 more than 10 providers on corrective or adverse action. These providers represent less than 1
17 percent of the providers in a particular workforce area. Finally, of the 320 providers on
18 corrective or adverse action during SFY'08, only 184 served children receiving Commission-
19 funded child care. During that same period, 9,023 regulated providers cared for children
20 receiving Commission-funded child care. Therefore, only 2 percent of regulated providers
21 serving children in Commission-funded child care were placed on any type of corrective or
22 adverse action.

23
24 Based on this data, the Commission concludes that these rules will not significantly limit parent
25 choice of any provider category. Additionally, the rules allow a parent to enroll a child with a
26 provider that is on evaluation status and allow a parent with a child currently enrolled with a
27 provider on evaluation status to continue enrollment (provided the parent signs a statement
28 acknowledging that the parent is aware of the provider's status with DFPS).

29
30 However, providers against whom DFPS is taking adverse action have been found by DFPS to
31 have deficiencies that pose a risk to children. The Commission believes it is necessary to ensure
32 the health and safety of children receiving publically subsidized child care, therefore the rules do
33 not allow parents of children enrolled in Commission-funded child care the choice of a provider
34 on adverse action.

35 36 *Administrative Review Process through DFPS*

37 The Commission emphasizes that Boards must allow a provider on corrective or adverse action
38 to pursue DFPS' administrative review prior to the Board taking action to notify the parents,
39 close enrollment, or transfer children. DFPS rules, Chapter 745, give providers 15 days from the
40 initial notification of corrective or adverse action to request an administrative review. However,
41 providers may request a waiver of an administrative review within that 15-day period. DFPS
42 provides official notice to the provider following the administrative review or after receiving the
43 request from the provider to waive the administrative review.

44
45 To assist in the implementation of these rules, DFPS has agreed to provide the Agency with an
46 official notification when providers are placed on corrective or adverse action. Upon receiving

1 notification from DFPS, the Agency will notify the affected Board. The Commission will
2 provide further guidance and procedures to Boards through the issuance of a Workforce
3 Development (WD) Letter. The rule language specifies that Board actions are taken only after
4 receiving notification from the Agency of the provider's official status with DFPS.
5

6 The Commission also emphasizes the importance of allowing the DFPS administrative review to
7 be completed prior to notifying the parents, closing enrollment, or transferring children to
8 another provider. This allows providers to address any due process issues through DFPS. The
9 administrative review is conducted under DFPS standard rules and procedures as set out in
10 Chapter 745. The decision to place the provider on corrective or adverse action rests solely with
11 DFPS and includes the DFPS' administrative review process. Therefore, the provider cannot
12 appeal this decision to the Board. Further, the provider has no appeal rights to the Agency under
13 Chapter 823, the Commission's Integrated Complaints, Hearings, and Appeals rules.
14
15

16 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND** 17 **RESPONSES**

18 **SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE**

19 **The Commission adopts the following new section to Subchapter E:**
20
21

22 **§809.94. Providers Placed on Corrective or Adverse Action by the Texas Department of** 23 **Family and Protective Services**

24 New §809.94 sets forth actions Boards must take when a provider is placed on corrective or
25 adverse action by DFPS.
26

27 Section 809.94(a) describes Board requirements regarding providers placed on evaluation
28 corrective action (evaluation status).
29

30 Section 809.94(a)(1) requires Boards to ensure that parents with children currently enrolled in
31 Commission-funded child care with the provider are notified in writing of the provider's
32 evaluation status. The Board must ensure that parents are notified no later than five business
33 days from receipt of the Agency's notification of the DFPS decision to place the provider on
34 evaluation status.
35

36 Section 809.94(a)(2) requires Boards to ensure that parents choosing to enroll a child in
37 Commission-funded child care with a provider on evaluation status are notified of the provider's
38 status with DFPS prior to enrolling the child.
39

40 Section 809.94(b) describes Board requirements regarding providers placed on probation
41 corrective action (probationary status).
42

43 Section 809.94(b)(1) requires Boards to ensure that parents with children currently enrolled in
44 Commission-funded child care with the provider are notified in writing of the provider's
45 probationary status. These requirements mirror those in §800.94(a)(1) for children enrolled with
46 a provider on evaluation status. The Board must ensure that parents are notified no later than

1 five business days from receipt of the Agency's notification of DFPS' decision to place the
2 provider on probationary status. If a parent decides to continue enrollment with a provider on
3 corrective action (i.e., evaluation or probationary status), the parent must sign a written
4 acknowledgment that he or she has been notified of the provider's status.
5

6 The Commission allows parents with children currently enrolled in Commission-funded child
7 care with a provider on evaluation or probationary status to continue this enrollment in order to
8 preserve parent choice and avoid any disruption of child care. The Commission recognizes that
9 the current placement may best meet the needs of the working parent--requiring parents to
10 transfer to another provider may place an undue burden on the parents and jeopardize their work
11 arrangements.
12

13 Section 809.94(b)(2) requires that Boards must ensure that no new referrals are made to
14 providers on probationary status. DFPS' decision to place a provider on probationary status
15 involves findings that present a higher risk to children, thus it is essential that no new
16 enrollments of children receiving Commission-funded child care occur until the provider corrects
17 the deficiencies and is removed from probationary status by DFPS. The intent of this
18 requirement is to ensure that the provider is aware of the importance of correcting any
19 deficiencies as well as to ensure that children are initially placed with providers that meet
20 minimum health and safety requirements.
21

22 Section 809.94(c) allows parent choice when a parent wants a child to be enrolled or continued
23 to be enrolled with a provider on DFPS corrective action. A parent receiving the notification of
24 the provider's status with DFPS, but who chooses to continue enrollment with the provider must
25 sign an acknowledgment indicating that he or she is aware of the provider's status with DFPS,
26 but has chosen to continue with the enrollment. The parent must return the acknowledgment to
27 the Board's child care contractor within 10 days of receiving the notification.
28

29 The Commission believes that a parent should be informed and acknowledge in a signed
30 document that enrollment with the provider is the parent's choice. Although this will not
31 necessarily prevent future litigation by the parent, requiring a parent to affirmatively
32 acknowledge his or her decision is consistent with the principle of parental choice and
33 establishes informed consent should something happen to the child while in the provider's care.
34

35 Section 809.94(d) prohibits providers on any corrective action from receiving enhanced
36 reimbursement rates under §809.20. Specifically, providers who are Texas Rising Star (TRS)
37 certified, participating in Texas Early Education Model (TEEM), or Texas School Ready!TM
38 certified are prohibited from receiving enhanced reimbursement rates while on DFPS evaluation
39 or probationary status. The providers will remain eligible to receive the Board's regular
40 reimbursement rate, but will not be eligible for the enhanced rate. It is the Commission's intent
41 that providers receiving enhanced reimbursement rates are being compensated for attaining
42 higher quality of early care and education. Therefore, if DFPS has placed a provider on
43 corrective or adverse action, then the provider is not offering a higher quality of early care and
44 education.
45

1 Section 809.94(e) sets forth Board requirements regarding providers against whom DFPS is
2 taking adverse action.

3
4 Section 809.94(e)(1) requires that Boards notify parents with children enrolled in Commission-
5 funded child care no later than two business days after receiving notification from the Agency
6 that DFPS is taking adverse action against the provider. The Commission includes a maximum
7 two-day notification requirement to emphasize the importance of timely notification when a
8 provider is on adverse action. Because adverse action is taken when DFPS determines that
9 conditions at the provider pose a risk to the health and safety of the children, it is important to
10 notify parents of children receiving Commission-funded child care as quickly as possible. In
11 order to speed the notification process, the Commission also notes that the notification does not
12 have to be in writing, but may be a notification by phone or other means. The Board may
13 provide written notification as long as the notification is provided to the parent no later than two
14 days from receiving notification from the Agency.

15
16 Section 809.94(e)(2) requires Boards to ensure that children enrolled in Commission-funded
17 child care with the provider are removed from care at that provider no later than five business
18 days after receiving notification from the Agency that DFPS is taking adverse action against the
19 provider. Although it is important to stress the timely nature of ensuring parental notification, it
20 is also important to provide the parent with sufficient time and opportunity to locate and choose
21 another eligible provider that meets the child care needs of the parent.

22
23 Section 809.94(e)(3) requires Boards to ensure that no new referrals for Commission-funded
24 child care are made to the provider while DFPS is taking adverse action.

25
26 Finally, §809.94(f) sets forth the provisions applicable to a provider for which DFPS has
27 determined that the provider poses an immediate risk to the health or safety of children and
28 cannot operate pending appeal of the adverse action, but for which there is a valid court order
29 that overturns DFPS' determination and allows the provider to operate pending administrative
30 review or appeal. Commission rules state that in this situation, Boards must take action
31 consistent with the provisions of §809.94(e). The Board must treat this situation in the same
32 manner as a provider against whom DFPS intends to take adverse action. Specifically, the Board
33 must notify parents no later than two business days after receiving notification from the Agency
34 that the provider is on adverse action with DFPS and ensure that enrolled children in
35 Commission-funded child care are removed from that provider's care no later than five business
36 days after receiving notification from the Agency that the provider is on adverse action with
37 DFPS.

38
39 **Comment:** One commenter representing Board and Board child care contractor staff agreed
40 with the rule changes and thanked the Commission for making the changes. The commenter
41 stated that the changes were needed and were the right direction to go.

42
43 **Response:** The Commission appreciates the comment and thanks the Boards for providing
44 input during the rulemaking process.

1 COMMENTS WERE RECEIVED FROM:
2 Joyce Sneed, on behalf of the Concho Valley Workforce Development Board and the Board's
3 child care contractor.

4
5 The Agency hereby certifies that the adoption has been reviewed by legal counsel and found to
6 be within the Agency's legal authority to adopt.

7
8 The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the
9 Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for
10 the effective administration of Agency services and activities, and the Texas Human Resources
11 Code §44.002, regarding Administrative Rules.

12
13 The adopted rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as
14 Texas Government Code, Chapter 2308.

15

1 **CHAPTER 809. CHILD CARE SERVICES**

2
3 **SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE**

4
5 **§809.94. Providers Placed on Corrective or Adverse Action by the Texas Department**
6 **of Family and Protective Services.**

- 7
8 (a) For a provider placed on evaluation corrective action (evaluation status) by DFPS,
9 Boards shall ensure that:
- 10
11 (1) parents with children enrolled in Commission-funded child care are notified in
12 writing of the provider's evaluation status no later than five business days after
13 receiving notification from the Agency of DFPS' decision to place the provider
14 on evaluation status; and
15
16 (2) parents choosing to enroll children in Commission-funded child care with the
17 provider are notified in writing of the provider's evaluation status prior to
18 enrolling the children with the provider.
19
- 20 (b) For a provider placed on probation corrective action (probationary status) by DFPS,
21 Boards shall ensure that:
- 22
23 (1) parents with children in Commission-funded child care are notified in writing
24 of the provider's probationary status no later than five business days after
25 receiving notification from the Agency of DFPS' decision to place the provider
26 on probationary status; and
27
28 (2) no new referrals are made to the provider while on probationary status.
29
- 30 (c) A parent receiving notification of a provider's evaluation or probationary status with
31 DFPS pursuant to subsections (a) and (b) of this section may choose to continue the
32 enrollment of a child with the provider if the parent signs and returns to the Board's
33 child care contractor within 10 business days of receiving such notification a written
34 acknowledgment that the parent is aware of the provider's status with DFPS, but
35 chooses to enroll the child with the provider.
36
- 37 (d) For a provider placed on evaluation or probationary status by DFPS, Boards shall
38 ensure that the provider is not reimbursed at the Boards' enhanced reimbursement
39 rates described in §809.20 while on evaluation or probationary status.
40
- 41 (e) For a provider against whom DFPS is taking adverse action, Boards shall ensure
42 that:
- 43
44 (1) parents with children enrolled in Commission-funded child care are notified no
45 later than two business days after receiving notification from the Agency that
46 DFPS intends to take adverse action against the provider;

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- (2) children enrolled in Commission-funded child care with the provider are transferred to another eligible provider no later than five business days after receiving notification from the Agency that DFPS intends to take adverse action against the provider; and
- (3) no new referrals for Commission-funded child care are made to the provider while DFPS is taking adverse action.
- (f) For adverse actions in which DFPS has determined that the provider poses an immediate risk to the health or safety of children and cannot operate pending appeal of the adverse action, but for which there is a valid court order that overturns DFPS' determination and allows the provider to operate pending administrative review or appeal, Boards shall take action consistent with subsection (e) of this section.