

## **CHAPTER 809. CHILD CARE SERVICES**

**PROPOSED RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE *TEXAS REGISTER*.**

**ON FEBRUARY 24, 2009, THE TEXAS WORKFORCE COMMISSION PROPOSED THE BELOW RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.**

Estimated Publication Date of the Proposal in the *Texas Register*: **March 13, 2009**

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The Texas Workforce Commission (Commission) proposes the following new section to Chapter 809, relating to Child Care Services:

Subchapter E. Requirements to Provide Child Care, §809.94

- PART I. PURPOSE, BACKGROUND, AND AUTHORITY
- PART II. EXPLANATION OF INDIVIDUAL PROVISIONS
- PART III. IMPACT STATEMENTS
- PART IV. COORDINATION ACTIVITIES

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

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

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

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

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

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

### *Levels of Corrective and Adverse Action by DFPS*

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

1. Evaluation Corrective Action
2. Probation Corrective Action
3. Adverse Action

According to the DFPS licensing rules at 40 TAC, Chapter 745, DFPS may impose an evaluation corrective action (evaluation status) when a provider's deficiencies present a lower risk to children and, as long as the conditions imposed by the evaluation are followed, the provider does not need to cease operating to make the corrections. Evaluation status:

--involves a period of heightened monitoring;

--is imposed only after a plan for compliance has been developed and when a specific incident or pattern of deficiencies is not serious enough to require probation; and

--cannot be imposed for less than 30 days or for more than six months.

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

According to Chapter 745 of the DFPS rules, DFPS may impose a probation corrective action (probationary status) when a specific incident or a pattern of deficiencies can lead to adverse action. Probationary status:

--is appropriate where a risk to children may exist but when further action, such as closing the provider, is not necessary as long as the deficiencies are addressed through the corrective action plan; and

--cannot be imposed for less than 30 days or for more than one year.

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

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

However, the Board must ensure that no new enrollments of children receiving Commission-funded child care are accepted with a provider in probationary status.

According to Chapter 745 of the DFPS rules, an adverse action is applied when DFPS attempts to close a provider. Adverse action is taken when DFPS determines that the provider has deficiencies that endanger the health and safety of children. DFPS adverse actions include notifying the provider of DFPS' intent to deny, revoke, or suspend the provider's permit. If an

adverse action is taken, the provider has a right to request an administrative review and a hearing. If the adverse action is upheld, the provider must close. Chapter 745 of the DFPS rules also requires that when a provider receives notice from DFPS that it intends to take adverse action against the provider, the provider must post the notice of the adverse action in a prominent place near each public entrance. The provider must also notify each parent, guardian, or managing conservator of the children enrolled within five days of receiving the notice from DFPS.

The Commission rules do not allow reimbursements for Commission-funded child care to any provider against which DFPS is taking adverse action. Therefore, Boards must ensure that:

- no new referrals are made to the providers; and
- children currently enrolled in Commission-funded child care with such providers are transferred to another eligible provider.

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

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

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

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

### *Parent Choice*

CCDF regulations at 45 C.F.R. §98.30 require states to allow parents to choose from a variety of child care categories including care in child care centers, group homes, and family homes, and care in the child's home. States cannot promulgate rules that significantly restrict parental choice in categories of care or that have the effect of excluding categories of care. Although the rules may affect a parent's choice of a particular individual provider under certain circumstances (specifically, providers placed on probationary status or adverse action), the rules neither restrict parents' choice of a particular provider category nor have the effect of excluding a substantial number of providers in any category.

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

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

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

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

### *Administrative Review Process through DFPS*

The Commission emphasizes that Boards must allow a provider on corrective or adverse action to pursue DFPS' administrative review prior to the Board taking action to notify the parents, close enrollment, or transfer children. DFPS rules, Chapter 745, give providers 15 days from the

initial notification of corrective or adverse action to request an administrative review. However, providers may request a waiver of an administrative review within that 15-day period. DFPS provides official notice to the provider following the administrative review or after receiving the request from the provider to waive the administrative review.

To assist in the implementation of these rules, DFPS has agreed to provide the Agency with an official notification when providers are placed on corrective or adverse action. Upon receiving notification from DFPS, the Agency will notify the affected Board. The Commission will provide further guidance and procedures to Boards through the issuance of a Workforce Development (WD) Letter. The rule language specifies that Board actions are taken only after receiving notification from the Agency of the provider's official status with DFPS.

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

## **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

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

**The Commission proposes the following new section to Subchapter E:**

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

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

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

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

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

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

Section 809.94(b)(1) requires Boards to ensure that parents with children currently enrolled in Commission-funded child care with the provider are notified in writing of the provider's probationary status. These requirements mirror those in §800.94(a)(1) for children enrolled with a provider on evaluation status. The Board must ensure that parents are notified no later than five business days from receipt of the Agency's notification of DFPS' decision to place the provider on probationary status. If a parent decides to continue enrollment with a provider on corrective action (i.e., evaluation or probationary status), the parent must sign a written acknowledgment that he or she has been notified of the provider's status.

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

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

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

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

Section 809.94(d) prohibits providers on any corrective action from receiving enhanced reimbursement rates under §809.20. Specifically, providers who are Texas Rising Star (TRS) certified, participating in Texas Early Education Model (TEEM), or Texas School Ready!<sup>TM</sup> certified are prohibited from receiving enhanced reimbursement rates while on DFPS evaluation or probationary status. The providers will remain eligible to receive the Board's regular

reimbursement rate, but will not be eligible for the enhanced rate. It is the Commission's intent that providers receiving enhanced reimbursement rates are being compensated for attaining higher quality of early care and education. Therefore, if DFPS has placed a provider on corrective or adverse action, then the provider is not offering a higher quality of early care and education.

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

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

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

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

Finally, §809.94(f) sets forth the provisions applicable to a provider for 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. Commission rules state that in this situation, Boards must take action consistent with the provisions of §809.94(e). The Board must treat this situation in the same manner as a provider against whom DFPS intends to take adverse action. Specifically, the Board must notify parents no later than two business days after receiving notification from the Agency that the provider is on adverse action with DFPS and ensure that enrolled children in Commission-funded child care are removed from that provider's care no later than five business days after receiving notification from the Agency that the provider is on adverse action with DFPS.

### **PART III. IMPACT STATEMENTS**

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and local governments expected as a result of enforcing or administering the rules.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to persons required to comply with the rules.

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules.

#### **Economic Impact Statement and Regulatory Flexibility Analysis**

The proposed rules will not have an adverse economic impact on small businesses. There would be minor administrative costs to notify parents and obtain and record parental acknowledgments in such cases. The rules may have estimated economic costs to some required to comply, including Boards and child care providers placed on corrective or adverse action by DFPS, but these would not be significant. Program staff has estimated that the number of facilities potentially impacted by these rules would total 1.6 percent of the total number of child care facilities in the state; this would create an impact and cost that would not be significant.

Mark Hughes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Laurence M. Jones, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to ensure that child care providers receiving Commission child care funds are meeting minimum health and safety standards as determined by DFPS and are providing the basic quality of care for children enrolled in Commission-funded child care.

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

### **PART IV. COORDINATION ACTIVITIES**

In the development of these rules for publication and public comment, the Commission sought the involvement of Texas' 28 Boards. The Commission provided the concept paper regarding

these rule amendments to the Boards for consideration and review on October 28, 2008. The Commission also conducted a conference call with Board executive directors and Board staff on October 31, 2008, to discuss the concept paper. During the rulemaking process, the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to [TWCPolicyComments@twc.state.tx.us](mailto:TWCPolicyComments@twc.state.tx.us). The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

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

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

## Chapter 809. CHILD CARE SERVICES

### SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

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

- (a) For a provider placed on evaluation corrective action (evaluation status) by DFPS, Boards shall ensure that:
- (1) parents with children enrolled in Commission-funded child care are notified in writing of the provider's evaluation status no later than five business days after receiving notification from the Agency of DFPS' decision to place the provider on evaluation status; and
  - (2) parents choosing to enroll children in Commission-funded child care with the provider are notified in writing of the provider's evaluation status prior to enrolling the children with the provider.
- (b) For a provider placed on probation corrective action (probationary status) by DFPS, Boards shall ensure that:
- (1) parents with children in Commission-funded child care are notified in writing of the provider's probationary status no later than five business days after receiving notification from the Agency of DFPS' decision to place the provider on probationary status; and
  - (2) no new referrals are made to the provider while on probationary status.
- (c) A parent receiving notification of a provider's evaluation or probationary status with DFPS pursuant to subsections (a) and (b) of this section may choose to continue the enrollment of a child with the provider if the parent signs and returns to the Board's child care contractor within 10 business days of receiving such notification a written acknowledgment that the parent is aware of the provider's status with DFPS, but chooses to enroll the child with the provider.
- (d) For a provider placed on evaluation or probationary status by DFPS, Boards shall ensure that the provider is not reimbursed at the Boards' enhanced reimbursement rates described in §809.20 while on evaluation or probationary status.
- (e) For a provider against whom DFPS is taking adverse action, Boards shall ensure that:
- (1) parents with children enrolled in Commission-funded child care are notified no later than two business days after receiving notification from the Agency that DFPS intends to take adverse action against the provider;

- (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.