

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 JANUARY 30, 2007, 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*: **February 16, 2007**
Estimated End of Comment Period: **March 19, 2007**

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

Subchapter E. Requirements to Provide Child Care, §809.91

PART I. PURPOSE, BACKGROUND, AND AUTHORITY
PART II. EXPLANATION OF INDIVIDUAL PROVISIONS
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PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The Commission is entrusted by the citizens of the state of Texas to be a responsible steward of public funds. The Commission takes this responsibility seriously, particularly concerning the health and safety of children. The receipt of public child care funds includes the responsibility to ensure that child care is provided in a safe environment. Commission rules ensure that the health and safety of children receiving Commission-funded child care services are protected by requiring that regulated child care providers—i.e., licensed child care centers, licensed child care homes, and registered child care homes—that care for children in Commission-funded child care be subject to state-mandated and federally required health and safety standards under the supervision of the Texas Department of Family and Protective Services (DFPS). These standards include requiring immunizations for children, conducting periodic health and safety inspections, as well as conducting background checks for criminal history, and checking the Child Protective Services' (CPS) child abuse registry (Texas Human Resources Code, Chapter 42).

Child Care and Development Fund (CCDF) regulations, however, allow states to exempt children who are cared for by relatives from federally mandated minimum health and safety standards (45 C.F.R. §98.41(e)). In the preamble to the CCDF regulations, the Administration for Children and Families (ACF) expressly states that the "intent of the statute was to give grantees (States) the option to exempt certain relatives from the health and safety requirements that all other CCDF child care providers must meet" (*Federal Register*, Vol. 63, No. 142, July 24, 1998, at 39957, or CCDF preamble). The Commission is firmly committed to the principle

of parent choice and believes that parents have the right to choose the type of child care provider that best meets their needs, including relative providers. However, the principle of parent choice does not override the principle of ensuring the health and safety of children receiving publicly funded child care services.

Federal regulations also allow states to impose more stringent requirements on child care service providers that receive assistance under CCDF than those requirements imposed on other child care providers, so long as those additional requirements are consistent with the safeguards for parental choice (45 C.F.R. §98.40). Other than prohibiting an individual who appears on the Texas Department of Public Safety's (DPS) Sex Offender Registry from being an eligible relative child care provider, the Commission has not established more stringent requirements for relative child care providers, and as such, these providers are not subject to criminal background checks or child abuse registry checks, as other regulated and listed providers are. Further, the CCDF preamble provides that "with respect to criminal background checks...(ACF agrees) that it is appropriate to encourage States to adopt criminal background checks as part of their effort to meet CCDF health and safety standards" (CCDF preamble at 39956). In light of the flexibility afforded states under the CCDF regulations, the Commission has determined that additional requirements for unregulated relative child care providers can be incorporated into existing rules.

In Texas, family homes listed with DFPS are subject to background checks. Although §42.002(9) of the Texas Human Resources Code appears to exempt providers that care exclusively for children who are related to the provider from the definition of "family home," Texas Human Resources Code §42.052(d) states that a family home that provides care exclusively for any number of children related to the caretaker is not required to be listed or registered with DFPS. However, while not requiring a relative child care provider to be listed, §42.052(d) does not prohibit a relative care provider from being listed with DFPS.

Furthermore, DFPS rule at 40 TAC §745.141 states that a child care operation that is considered exempt from DFPS regulations may still apply for a permit from DFPS if the operator is required to have a permit to receive public funding. Therefore, if the Commission requires relative child care providers to list with DFPS as a prerequisite to receiving Commission funds, relative child care providers—based on DFPS rules—will be required to have a criminal background check conducted by DFPS.

The Commission has fully examined both state and federal regulations regarding criminal and child abuse background checks and analyzed the feasibility of requiring background checks of relative providers before authorizing Commission-funded child care. Although Commission rules allows parents the right to choose a relative provider (eligible under 45 C.F.R. §98.2 and §809.91 of this chapter), the Commission has concluded that a parent's right to choose a relative provider cannot come at the expense of placing that child with someone whose criminal or CPS child abuse and neglect history may indicate the individual could potentially endanger the child, particularly when this placement is government funded.

Therefore, the Commission proposes to amend its rules to require relative child care providers to be listed with DFPS, and in doing so, make relative providers subject to criminal background

checks, CPS central registry searches, and facility inspection in the event of a complaint of suspected child abuse or neglect.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

The Commission proposes the following amendments:

§809.91 Minimum Requirements for Providers

Section 809.91(b) provides the requirements for child care providers listed with DFPS. Section 809.91(b)(1) states that Local Workforce Development Boards (Boards) shall not prohibit a relative child care provider who is listed with DFPS and meets the eligibility requirements of §809.91 from being an eligible relative child care provider. The Commission includes this statement to clarify that although §809.91(b)(2) allows Boards the option not to include listed family homes as eligible child care providers, Boards do not have the option to exclude relative providers listed with DFPS as eligible relative child care providers.

Section 809.91(b)(2) gives Boards the option to include listed family homes as eligible providers, as long as the Boards ensure that there are local laws in effect that protect the health and safety of children. The Commission adds language to clarify that this option applies only to listed family homes, as defined in §809.2(12) of this chapter, that provide care for children unrelated to the provider. This provision is consistent with 45 C.F.R. §98.41(e), which does not allow states to exempt non-relative child care providers from health and safety standards.

Section 809.91(f), which prohibits an individual who appears on the DPS Sex Offender Registry from being an eligible relative child care provider, is removed.

New §809.91(f) is a broader provision designed to ensure that a criminal background check on a relative child care provider is conducted by DFPS prior to authorizing care with the relative provider. The new subsection requires that relative child care providers shall list with DFPS to ensure that a criminal background check and a check of the CPS central registry is conducted prior to authorizing care with that relative.

The Commission emphasizes that the criminal background check and the check of individuals on the CPS central registry of child abuse and neglect will be conducted by DFPS using its current application and background check procedures for listed family homes. The Commission does not intend for a Board or the Board's child care contractor to conduct any of the functions associated with the listing process.

Prior to authorizing child care, the child care contractor must inform the parent that the prospective relative must be listed with DFPS and provide the application—or notify the relative how to access the application—for listing with DFPS. The relative must submit the application along with the \$20 annual fee to DFPS and DFPS will conduct the necessary background checks. If there is no criminal history match or match on the CPS central registry of child abuse and

neglect, DFPS will inform the relative that no matches occurred and will issue a listing to the relative. Once the listing is issued, the relative will be eligible to provide Commission-funded child care services for the eligible child. DFPS has informed the Commission that background checks usually are completed within 48 hours and the listing issued to the relative within one week of receiving the application. The Board's sole responsibility is to ensure that the child care contractor verifies that the relative is listed with DFPS, which can be authenticated by viewing the listing permit that DFPS provides to the relative. DFPS also has informed the Commission that once the listing is issued, the DFPS Web site is updated the next day. The child care contractor also can verify the listing through the DFPS Web site.

The Commission emphasizes that the child care contractor cannot authorize the relative to receive Commission child care funds until DFPS issues the listing to the relative. Additionally, the Commission does not intend that relative child care providers be reimbursed retroactively for child care provided to the eligible child by the relative pending the results of the DFPS background checks.

In addition, new §809.91(f) states that in all other respects, relatives listed with DFPS are exempt from the CCDF health and safety requirements at 45 C.F.R. §98.41(a). This provision is consistent with 45 C.F.R. §98.41(e), which allows states to exempt relative child care providers from health and safety standards. Specifically, other than the background checks required of child care providers listing with DFPS, relative providers who care for children receiving Commission-funded child care services are exempt from standards related to the prevention and control of infectious disease; building and physical premises safety; and minimum health and safety training.

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:

Based on the Agency's estimates of approximately 15,000 per year of self-arranged care providers who will choose to apply to become listed family homes, and DFPS' cost estimates for processing this number of listed family homes, including associated criminal background checks (conducted by DPS), CPS central registry checks, and facility inspection in the event of a complaint of suspected child abuse or neglect, we estimate the additional cost to the state, as a result of enforcing or administering the rule, to be approximately \$41 per relative provider home listed in Fiscal Year 2008 and \$37 in each of the succeeding four years.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. We estimate an increase in revenue to the state of \$20 for each relative home listed per year (a required DFPS fee). There are no estimated reductions in revenue to the state and to local governments as a result of enforcing or administering the rules.

Mr. Townsend has determined that administering or enforcing the rules may have implications relating to child care costs for Boards, although it is unclear whether this rule would influence or otherwise affect the proportion of children in subsidized child care who are in relative child care

arrangements.

Mr. Townsend has determined that the anticipated economic costs to persons required to comply with the rules is \$20 annually, based on the current DFPS licensing fee for listed homes. Other fees that may become necessary as a result of changes in law may affect this anticipated economic cost.

Mr. Townsend also has determined that there is no anticipated adverse economic impact on small businesses or microbusinesses as a result of enforcing or administering these rules because they are not regulated or otherwise affected by this rule.

Mark Hughes, Director, Labor Market Information, has determined that there is no significant negative impact upon employment conditions in this state as a result of the proposed rules. Mr. Hughes does not expect any significant impact upon overall employment conditions in the state as a result of the proposed rules.

Laurence M. Jones, Director, Workforce Development Division, has determined that the public benefit anticipated as a result of enforcing the proposed rules will be to ensure that child care funds are used for child care services that promote a safe environment for children.

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 policy concept regarding these rule amendments to the Boards for consideration and review. The Commission also conducted conference calls with Board executive directors and Board staff on January 5, 2007, to discuss the policy concept. Additionally, the Commission sought the involvement of DFPS. 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, Policy and Development, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to 512-475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission 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 will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

§809.91. Minimum Requirements for Providers

- (a) A Board shall ensure that child care subsidies are paid only to:
 - (1) regulated child care providers as described in §809.2(17);
 - (2) relative child care providers as described in §809.2(18), subject to the requirements in subsections (e) and (f) of this section; or
 - (3) at the Board option, listed family homes as defined in §809.2(12), subject to the requirements in subsection (b)(2) of this section.
- (b) For providers listed with DFPS, the following applies:
 - (1) A Board shall not prohibit a relative child care provider who is listed with DFPS and meets the minimum requirements of this section from being an eligible relative child care provider.
 - (2) If a Board chooses to include listed family homes, as defined in §809.2(12), that provide care for children unrelated to the provider, a Board shall ensure that there are in effect, under local law, requirements applicable to the listed family homes designated to protect the health and safety of children. Pursuant to 45 C.F.R. §98.41, the requirements shall include:
 - (A)(1) the prevention and control of infectious diseases (including immunizations);
 - (B)(2) building and physical premises safety; and
 - (C)(3) minimum health and safety training appropriate to the child care setting.
- (c) Except as provided by the criteria for Texas Rising Star Provider Certification, a Board or the Board's child care contractor shall not place requirements on regulated providers that:
 - (1) exceed the state licensing requirements stipulated in Texas Human Resources Code, Chapter 42; or
 - (2) have the effect of monitoring the provider for compliance with state licensing requirements stipulated in Texas Human Resources Code, Chapter 42.
- (d) When a Board or the Board's child care contractor, in the course of fulfilling its responsibilities, gains knowledge of any possible violation regarding regulatory standards, the Board or its child care contractor shall report the information to the appropriate regulatory agency.
- (e) Relative child care providers shall not reside in the same household as the eligible child unless:
 - (1) the eligible child is a child of a teen parent; or
 - (2) the Board's child care contractor determines and documents that other child care provider arrangements are not reasonably available. Factors used to determine the reasonable availability of child care may include, but are not limited to:
 - (A) the parent's work schedule;
 - (B) the availability of adequate transportation; or
 - (C) the age of the child.

~~(f) An individual appearing on the Texas Department of Public Safety's Sex Offender Registry, pursuant to Chapter 62 of the Texas Code of Criminal Procedure, shall not be eligible to be a relative child care provider.~~

(f) To be eligible for reimbursement for Commission-funded child care services, relative child care providers shall list with DFPS; however, pursuant to 45 C.F.R §98.41(e), relative child care providers listed with DFPS shall be exempt from the health and safety requirements of 45 C.F.R. §98.41(a).