

## **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 JULY 13, 2010, 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*: **July 30, 2010**

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The Texas Workforce Commission (Commission) proposes amendments to 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
- PART III. IMPACT STATEMENTS
- PART IV. COORDINATION ACTIVITIES

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

On May 29, 2007, the Commission adopted Chapter 809 Child Care Services rules requiring relatives caring for children in the relative's home to be a listed family home with the Texas Department of Family and Protective Services (DFPS). The intent of the new requirement was to minimize the risk of having Commission-funded child care services provided by individuals with a history of child abuse or neglect or with a criminal background that could call into question the individual's suitability for providing publicly funded child care. DFPS conducts checks of listed family homes against its Child Protective Services' (CPS) central registry of neglect and abuse and also conducts a criminal history check. The background and criminal history checks are conducted on the relative caring for a child receiving subsidized care, and any individual age 14 years of age or older who resides in or is frequently present in the relative's home during the hours of child care.

However, because child care provided exclusively in the child's home (in-home child care) does not meet the statutory definition of a family home in Texas Human Resources Code, Chapter 42, there is no such background check for relatives providing in-home care. Instead, §809.91(f)(2) requires Boards to ensure that relative in-home care providers do not appear on the Texas Department of Public Safety's (DPS) Sex Offender Registry, pursuant to Texas Code of Criminal Procedure, Chapter 62.

Because in-home child care providers are subject only to sex offender registry checks--but not criminal background checks or checks against the CPS central registry--this significantly weakens the background and criminal history check requirement for relative providers. As such,

in-home providers pose a greater risk to children with regard to subsidies paid to providers who might not be eligible to provide care--especially when compared to relative providers caring for children in the relative's home who must undergo background checks every two years. Even when DPS Sex Offender Registry checks are required for caregivers, this does not ensure that all other individuals who regularly or frequently stay or work in the home are not on the Sex Offender Registry.

To ensure that Commission-funded child care services are provided in a safe environment, the Commission's proposed Chapter 809 amendments address the following:

- The frequency of DPS Sex Offender Registry Checks for relative in-home child care providers.
- The placement of additional requirements on the use of relative in-home child care.

## **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 to Subchapter E:**

#### **§809.91. Minimum Requirements for Providers**

Child Care and Development Fund (CCDF) regulations at 45 C.F.R. §98.30(e) require states to allow parents to choose from a variety of child care settings, including in-home care. Further, §98.30(f) states that CCDF funds will not be available to a Lead Agency if state or local rules, procedures, or other requirements significantly restrict parental choice by expressly or effectively excluding or limiting parent access to provider types.

However, CCDF regulations at 45 C.F.R. §98.30(e) allow states to impose limitations on the use of in-home care.

The preamble to the CCDF regulations states:

Child care administrators have faced a number of special challenges in monitoring the quality of care and the appropriateness of payments to in-home providers. For that reason, we give Lead Agencies complete latitude to impose conditions and restrictions on in-home care. We have revised §98.16(g)(2) to require that Lead Agencies, in their CCDF Plans, specify any limitations on in-home care and the reasons for those limitations. (Federal Register, Vol. 63, No. 142, Friday, July 24, 1998, p. 39949)

As allowed by regulation, and because DFPS does not regulate in-home child care, the Commission:

- has always limited in-home child care to eligible relatives who are exempt from CCDF-required health and safety standards; and
- does not allow in-home child care by unregulated nonrelatives such as friends, neighbors, babysitters, or nannies.

As further allowed by CCDF regulations, the Commission may impose additional, more-stringent standards on the use of in-home child care; thus, making fewer relatives exempt from a criminal history check and a check against the CPS central registry of child abuse and neglect conducted by DFPS. These limits on the use of in-home care meet the Commission's intent to minimize the risk of having Commission-funded child care services provided by suitable individuals.

However, the Commission recognizes there are a variety of situations in which in-home care may be the best or only option. For example, a child with disabilities, especially a very young child, may require access to special medical or adaptive equipment that is in the child's home. In most cases, it would be impractical or ill-advised to move the child and the child's equipment to a relative's home, and care in the child's home would be the only practical option. Also, given the scarcity of regulated infant care in many areas of the state, relative in-home care may be the only option for families with very young children. Additionally, parents who work evenings, nights, or weekends may experience considerable difficulty in locating child care arrangements and in-home care may be the only option available to the family.

Section 809.91(e), specifying the circumstances in which a relative child care provider can reside in the same household as the eligible child, is removed and incorporated in new §809.91(e)(3).

Section 809.91(e)(1) adds the phrase "which is not the child's home" to clarify that the eligible relative child care provider cannot reside in the same household as the eligible child unless the care is provided under the circumstances specified in §809.91(e)(3). This change in rule language reflects the current practice and guidance provided in Workforce Development (WD) Letter 40-07, Change 1, issued June 22, 2007, and entitled "Background Checks for Relative Child Care Providers: Implementation Timeline."

Section 809.91(e)(2) defines "caring for a child in the child's own home" as "in-home child care."

Section 809.91(e)(2)(A)–(C) specifies that a relative in-home child care provider must undergo a check against the DPS Sex Offender Registry at the following points:

- (A) The parent's initial eligibility determination;
- (B) The parent's redetermination; and
- (C) When the parent changes to a different relative in-home child care provider.

The language reflects guidance in WD Letter 18-10, issued March 24, 2010, and entitled "Texas Department of Public Safety Sex Offender Registry Checks."

Requiring that relative in-home child care providers do not appear on the DPS Sex Offender Registry at these points aligns with the Commission's intent to:

- protect the health and safety of children served by Commission-funded child care; and
- minimize the risk of child care subsidies being paid to individuals who appear on the registry.

Section 809.91(e)(3) sets forth the situations under which Boards must allow relative in-home child care. CCDF regulations require that states allow parents to choose in-home child care, but states can limit the use of in-home child care.

Section 809.91(e)(3)(A)–(D) requires that Boards allow relative in-home child care for the following:

- (A) A child with disabilities as defined in §809.2(6), and his or her siblings;
- (B) A child under 18 months of age, and his or her siblings;
- (C) A child of a teen parent; and
- (D) When the parent's work schedule requires evening, overnight, or weekend care, in which taking the child outside of the child's home for child care would be disruptive to the child.

Section 809.91(e)(4) provides a Board may allow relative in-home child care when the Board's child care contractor determines and documents that other child care arrangements are not available to the parent in the community. The Commission recognizes that in many communities in the state, particularly in rural communities and small towns, there are no regulated child care facilities available to parents.

Certain subsections, paragraphs, and subparagraphs in §809.91 have been relettered and renumbered to accommodate additions or deletions.

### **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. The proposed rules affect unregulated relatives caring for Commission-subsidized children in the children's homes. However, such providers are not considered microbusinesses.

Our reasoning for these conclusions is as follows:

In Fiscal Year 2009 (FY'09), according to data provided by the Workforce Development Division (as originally reported in the local child care service delivery system [CCSD]), approximately 2 percent, or 2,470, of all children in child care (i.e., Commission-funded child

care services) received child care in the child's own home (i.e., in-home child care). The associated proportion of the subsidized children, corresponding child care expenditures, or the magnitude of child care regulations affected by these rules is not significant, in any case.

Of the 2,470 children in subsidized in-home child care--as reported in CCSD in FY'09--approximately one-third were infants, the siblings of infants, or children of teen parents. Fewer than 1 percent of children in subsidized in-home child care were children with disabilities or received in-home care during irregular hours (evening/nights/weekend care). An undetermined proportion of children in subsidized in-home child care would have fallen into the category in the proposed rules in which other (i.e., extenuating) circumstances exist (as determined and documented by the Board's child care contractor), which result in alternative child care provider arrangements being unavailable. Therefore, it is possible during the next five years--if they are similar to FY'09--that the majority of these 2,470 children in subsidized in-home child care may not be eligible for subsidized in-home child care, were these proposed rules to be in effect. As a result, the implementation of these rules may lead to a somewhat lower workload of DFPS background checks and DPS Sex Offender Registry checks. Were the same number of children formerly in subsidized in-home child care (but no longer eligible) to transfer to licensed or otherwise regulated child care facilities, then workloads would generally be the same.

Federal regulations and Commission rules support parental choice in selecting a child care provider. Motivated by the need to ensure that Commission-funded child care services are provided in a safe environment, the Commission is now proposing that the requirements associated with in-home child care result in a somewhat more regulated context. Parents--even those who may be precluded from in-home child care--may still choose for the relative to care for the child in the relative's home (if the relative agrees, and if the home is or can become a listed family home with DFPS). It is not possible to estimate with any degree of certainty the future background check workload for DFPS that could result from implementation of these rules; however, it is likely that potential increases could be accommodated with modest increases of pertinent federal child care funding provided through interagency contract from the Commission. Of course, parents precluded from in-home child care also may select some other licensed or otherwise regulated child care alternatives.

#### Economic Impact Statement and Regulatory Flexibility Analysis

The Agency has determined that the proposed rules will not have an adverse economic impact on small businesses as these proposed rules place no requirements on small businesses, including child care providers. The proposed rules affect unregulated relatives caring for subsidized children in the children's homes. However, such providers are not considered small businesses.

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 proposed rules will be to:

--protect the health and safety of children served by Commission-funded child care;

--minimize the risk of child care subsidies being paid to individuals who appear on the DPS Sex Offender Registry; and  
--ensure that public child care funds are spent in accordance with federal laws, regulations, and guidelines.

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's 28 Local Workforce Development Boards. The Commission provided the concept paper regarding these rule amendments to the Boards for consideration and review on April 27, 2010. The Commission also conducted a conference call with Board executive directors and Board staff on April 30, 2010, 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 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

#### §809.91. 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 subsection (e) ~~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 paragraph (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 who 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) the prevention and control of infectious diseases (including immunizations);
    - (B) building and physical premises safety; and
    - (C) 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.~~

~~(e)(f)~~ For relative child care providers to be eligible for reimbursement for Commission-funded child care services, the following applies:

(1) Relative child care providers caring for a child in the relative's own home, which is not the child's home, residence 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);

(2) For relative child care providers caring for a child in the child's own ~~residence~~ home (in-home child care), Boards shall ensure that ~~the~~ relative child care providers do ~~provider does~~ not appear on the Texas Department of Public Safety's (DPS) Sex Offender Registry, pursuant to Chapter 62 of the Texas Code of Criminal Procedure, Chapter 62, at the following points:

(A) The parent's initial eligibility determination;

(B) The parent's redetermination; and

(C) When the parent transfers the care to a different relative in-home child care provider.

(3) A Board shall allow relative in-home child care for the following:

(A) A child with disabilities as defined in §809.2(6), and his or her siblings;

(B) A child under 18 months of age, and his or her siblings;

(C) A child of a teen parent; and

(D) When the parent's work schedule requires evening, overnight, or weekend child care in which taking the child outside of the child's home would be disruptive to the child.

(4) A Board may allow relative in-home child care for circumstances in which the Board's child care contractor determines and documents that other child care provider arrangements are not available in the community.