Family Residential Centers Rule

Minimum Standards for General Residential Operations

January 26, 2016

On behalf of the Department of Family and Protective Services (DFPS), the Health and Human Services Commission adopts new §748.7, concerning the applicability of Chapter 42, Human Resources Code, and licensing rules and statutes in general to family residential centers operated by contractors of U.S. Immigration and Customs Enforcement (ICE), with changes to the proposed text as published in the November 13, 2015, issue of the *Texas Register* (40 TexReg 8009).

The justification for §748.7 is to define the term "family residential center" (FRC) and to make FRCs subject to regulation as General Residential Operations (GROs). Requiring FRCs to comply with all requirements for GROs will be more protective of children than taking no action regarding the provision of child care without a license.

DFPS first adopted §748.7 on an emergency basis effective September 2, 2015 as published in the September 18, 2015, issue of the *Texas Register* (40 TexReg 6229). The emergency rule tailored minimum standards for GROs to FRCs so that DFPS could most effectively regulate them. In its publication of the emergency rule, DFPS cited that the July 24, 2015 ruling of *Flores v. Johnson*, CV 85-4544 DMG (C.D. Cal. July 24, 2015) "highlighted a gap in the oversight of the children" housed in family residential centers. DFPS found that there was an imminent peril to the public's health, safety, or welfare due to the lack of "comprehensive oversight of the care of children housed in the facilities by an independent agency." *Id.*

Grassroots Leadership, Inc., a non-profit organization, filed suit seeking declaratory and injunctive relief from the emergency rule on September 30, 2015, in the 353rd District Court in Travis County. Judge Karin Crump of the 250th Travis County District Court granted a Temporary Restraining Order halting the adoption and implementation of the emergency rule on September 30, 2015. *Grassroots v. TDFPS*, No. D-1-GN-15-004336 (353rd Dist. Ct., Travis County, Tex. Sept. 30, 2015). On November 20, 2015, Judge Crump issued a Temporary Injunction halting the adoption of the emergency rule until a trial on the merits can be held on May 9, 2016. *Grassroots v. TDFPS*, No. D-1-GN-15-004336 (353rd Dist. Ct., Travis County, Tex. Nov. 20, 2015). The Court specifically held that the Temporary Injunction did not preclude DFPS "from proceeding with traditional rule adoption procedures." *Id.* at 7. Accordingly, DFPS published §748.7 as a proposed rule in the November 13, 2015, issue of the *Texas Register* (40 TexReg 8009).

The adoption of the rule ensures the continued protection of children housed in the facilities by making the facilities subject to the regulatory authority of CCL along with its associated requirements, with limited exception.

The section will function by enhancing the quality of care for children housed in FRC's.

The essence of the new rule is the application of Child-Care Licensing's (CCL's) regulations related to GROs to FRCs, as defined in the rule. That definition, found in subsection (a), applies regulations for GROs to FRCs that are operated by or under

contract with ICE to enforce federal immigration laws and that detain children who remain with parents or other adult family members, who provide direct care for the child except in specific circumstances. The definition currently would apply only to the South Texas Family Residential Center (STFRC) operated by the Corrections Corporation of America in Dilley, Texas, and the Karnes County Residential Center operated by the GEO Group, Inc. in Karnes City, Texas.

Subsection (b) classifies the FRCs as GROs and requires them to comply with all associated requirements unless CCL issues a waiver or variance, or an exception is granted by the section itself. While the rule applies the standards to the FRCs and does not go into extensive detail regarding those standards, incorporating the standards for GROs by reference means incorporating a broad and comprehensive regulatory scheme designed to protect and enhance the well-being of children in care. As is discussed in additional detail in DFPS' responses to public comments received on the proposed rule, the regulatory overlay in place for GROs involves statutory mandates and direction, rules general applicable to all regulated operations including GROs which are found in Chapter 745 of this title, Licensing, as well as Minimum Standards specific to GROs found in Chapter 748 of this title. Those Minimum Standards include governing requirements across many domains that range from the qualifications for the Child Care Administrator each facility must employ to requirements for food storage to restrictions on the use of emergency behavior intervention.

Subsection (b) further clarifies that DFPS does not oversee requirements that pertain to other law. Of particular relevance to the comments received to the proposed rule, DFPS explicitly clarifies that it has no role in determining whether the FRC is classified as secure.

Subsection (c) lists several exceptions that DFPS determined at the outset were appropriate in recognition of the unique character of the FRCs. First, because children are housed with parents or family members, and there may be sibling groups of more than four children, DFPS recognized that the limitation on four room occupants could be directly at odds with the need to house families together wherever possible and safely achievable. Secondly, because children would be sharing rooms with parents or other family members, DFPS recognized that the FRCs would not be required to comply with all of the requirements related to children sharing a bedroom with an adult. Finally, because siblings may be of the opposite gender, and because there may be circumstances where young children of different families would be housed together, DFPS granted a partial exception to the limitations on children of the opposite gender sharing a room. It should be emphasized that the text of the subsection noted that the facilities would not be required to comply with *all* of the provisions in the referenced standards, which makes clear that the FRCs may be required to comply with portions of the standards in question. Furthermore, and more significantly, DFPS reiterated in subsection (d) its ultimate discretion to place conditions on any exceptions and described some examples of such conditions by way of illustration. Specifically, DFPS offered a non-exhaustive list of possible conditions on the exceptions to allow flexibility in the agency's exercise of its authority in recognition of its responsibility for overseeing the safety and well-being of children in care, which include: limits on the number of room occupants to meet fire safety standards, or limitations on allowing children of opposite genders to share a room only if they are in the same family. DFPS then

reiterated its discretion to place "any other limitation determined by the department to be necessary to the health, safety, or welfare of children in care."

Finally, in subsection (e) DFPS added a provision again in recognition of the FRCs' unique characteristics, which requires any documentation DFPS deems necessary to clarify the division of caretaking responsibility between FRC staff and the parents or family of a child in care. DFPS must not merely receive the documentation but must also approve it during the application process and at the point of any subsequent amendments to the documentation.

During the public comment period, DFPS sought public feedback regarding the proposed rules through multiple channels. In total, DFPS received 1486 comments in writing. DFPS received 3 responses through the U.S. Postal Service that were not also received either through email or in hard copy at the public meeting on the rule.

In total DFPS received 1460 responses via email. Of those responses, 701, or 48 percent were received from individuals or groups who reside outside the state of Texas. The vast majority of the comments (approximately 1350) were comprised of two standardized emails. The first of the two standardized emails appears to have been issued primarily in response to the emergency rule adopted by DFPS on September 2, 2015, the implementation of which was temporarily enjoined by the 250th District Court in Austin on November 12, 2015. Indeed, 488 of those comments were received prior to the publication of the proposed rule and could not, therefore, have been in response to the publication of the proposed rule. However, because the comments appear to be directed both at the emergency rule adoption as well as the substance of the rule and because several of the standardized emails were received following publication of the proposed rule, DFPS considered the substance of the standardized email in its discussion of comments and the agency's response. DFPS also considered the substance of the second standardized email, which opposed licensing the FRCs, and incorporated the substance into the summaries of the comments.

In addition, DFPS announced that it would hold a public meeting on the rule proposal on December 9, 2015, in the following ways: (1) in the *Texas Register* Open Meetings section; (2) through the govdelivery.com service, which allows interested persons to sign up for email or text updates regarding DFPS or other governmental agencies; and (3) on the DFPS website page for items of interest to stakeholders. The meeting was well attended and received media coverage. Forty-five people testified, some in their individual capacities and others on behalf of an organization or group. In addition, 11 speakers handed in individual written testimony. An advocacy group submitted approximately 800 written comments to the panel of DFPS and HHSC representatives present to take testimony. DFPS subsequently determined that all but 12 of those printed comments were identical printouts to emails previously received by DFPS. The entire meeting was transcribed and published on the DFPS public website at
http://www.dfps.state.tx.us/About_DFPS/Public_Meetings/Stakeholders/documents/2015-12-09-Licensing_Hearing_transcript_acc.pdf.

The public comments received by the agency included those submitted by interested groups or associations, as well as legislators in their official capacity. Specifically, the groups and officials submitted comments generally in opposition to the adoption of the rule include: the Interfaith Welcome Coalition; the Texas School of Law Immigration

Clinic; Methodist Healthcare Ministries of South Texas; the Texas Catholic Conference; the Benedictine Sisters; CARA Family Detention Pro Bono Project (comprised of the Catholic Legal Immigration Network, Inc.; the American Immigration Council; the Refugee and Immigrant Center for Education and Legal Services; and the American Immigration Lawyers Association); Heartland Alliance's National Immigrant Justice Center; Texas Pediatric Society; Rio Grande Equal Voice Network; Representative Trey Martinez Fischer, Chairman, Texas Mexican American Legislative Caucus; Texas Senators: Judith Zaffirini, José Rodríguez, José Menéndez, Sylvia R. Garcia, Rodney Ellis, Juan "Chuy" Hinojosa, John Whitmire, and Kirk Watson; the De Anda Law Firm; CASA Latina; Mexican American Legal Defense and Education Fund; Grassroots Leadership; Unitarian Universalist Service Committee; Texas Impact; Women's Refugee Commission; American Civil Liberties Union of Texas; Unitarian Universalist Association; National Association of Social Workers, Texas Chapter (NASW); and Catholic Charities of the Rio Grande Valley.

The following groups and officials submitted comments generally supporting the adoption of the rule: Representative James White and a representative of the Karnes County Residential Center.

Finally, while not formal public comment, the rule proposal was covered in various media outlets. Included in the coverage were two editorial pieces regarding the proposed rule. The Fort Worth Star-Telegram on December 10, 2015, noted that the testimony in the public meeting was to the effect that the family residential centers have "a long way to go" to provide care to children. The Star-Telegram further indicated that it was "a shame" licensure by DFPS had taken so long. In addition, the San Antonio Express News on December 15, 2015, noted that so long as women and children are being detained in the facilities, the state has some obligation to oversee the care of children who are detained there.

All of the public comments, whether submitted via mail, email or orally in the public meeting, were reviewed and considered by DFPS staff. The feedback generally fell into themes, which are summarized below, along with the agency's response.

(1) Comments Supporting Licensure As a Means to Protect Children and Improve Current Practice:

Comment: Two commenters, including one state representative, supported licensure. The representative noted that the state is statutorily obligated to ensure the safety and wellbeing of all children in Texas, and by providing oversight to the FRCs, DFPS would be able to ensure the children's safety and pass on its institutional knowledge of child safety and wellbeing to the federal government. The commenter further noted that by expanding its regulatory purview, DFPS would be able to play a vital role in identifying and providing services to children and families that are at high risk of human trafficking. Another commenter, who provides representation to one of the FRCs, noted that licensure is not merely an endorsement of the status quo as the FRCs would not only be required to meet the standards of a GRO, but would be required to provide evidence of compliance. The commenter cited to the significant fiscal impact to the FRCs to come into compliance with the proposed requirements, including increasing staff to detainee ratio, recruiting qualified staff to provide necessary services mandated by the rule,

meeting the public hearing requirements, ensuring CPR certifications, obtaining background checks for employees, meeting square footage requirements, and submitting materials clarifying the supervisory and caretaking responsibilities of staff and family members. The commenter also noted that the exemptions to minimum standards, which DFPS has authority to place limits on, were formulated to allow children to continue residing with their mothers and not to continue the status quo.

Response: DFPS agrees with the comments.

(2) Comments Expressing Concern with Licensure and Any Exceptions, Waivers, or Variances Associated with Licensure:

Comment: A significant number of commenters expressed concern that licensing the Karnes County and Dilley Centers with exemptions, as the rule allows, would amount to the mere rubber stamping of the centers as they currently operate without meaningful consideration of their ability to provide adequate child care. Specifically, the commenters argued that the rule would not ameliorate the conditions of the centers, but would rather allow the centers to continue operating as detention centers in a manner that is contrary to the safety and well-being of children. One commenter noted that the Karnes County center has a history of temporarily altering its conditions, such as redecorating, providing extra toys, and improving food quality, in preparation for visitations by external entities; however, it has not made significant and permanent improvements. According to the commenters, licensure would not change the inherent purpose and overall substandard environment of the Karnes County and Dilley centers.

Response: The Texas regulatory scheme in place for GROs is comprehensive, extensive, and rooted in basic tenets of child protection and welfare. By properly designating the FRCs as GROs, DFPS brings to bear not only the single rule adopted here but a host of statutory, regulatory, and policy-based requirements aimed directly at protecting the health, safety, and well-being of children in care. (See HRC §42.001). First, the Texas legislature has established the basic framework for the licensure of child-care facilities, primarily in CCL's enabling authority in HRC Chapter 42, as well as DFPS' general enabling statutes in HRC Chapter 40. (See in particular HRC §40.002(b)). The legislature has directed CCL, through the Executive Commissioner of HHSC, to adopt rules and standards to accomplish various purposes including: promoting the health, safety, and welfare of children; ensuring adequate supervision of children by capable, qualified, and healthy personnel; and ensuring that facilities follow the directions of health care professionals. (See HRC §42.042(e)). In addition to general direction to promulgate standards, the legislature has mandated certain critical aspects of the licensure process and its underlying requirements. For example, the Texas legislature has enacted laws related to the requirement for submission of an application (see HRC §42.046); requirements related to conducting and abiding by the results of criminal and abuse/neglect history checks (see HRC §42.056); the requirement that each facility hire and maintain a licensed child-care administrator for the facility (see HRC Chapter 43); and the requirement that a potential operation convene a public hearing in counties of a certain population size (see HRC §42.0461).

Based on its general statutory authority and duties, CCL has adopted a broad regulatory framework in Chapter 745 of this title, Licensing, contains rules of general applicability to various operations regulated by the agency. Of particular significance to this rule, Chapter 745 contains requirements and restrictions related to the criminal or abuse/neglect history of a person employed or present at the facility. (See Chapter 745, Subchapter F, Background Checks).

Next, CCL has various rule chapters in place recognizing the different operation types and the services they provide. (See HRC §42.042(f) and (g)). The various subchapters in this chapter related to GROs address a multitude of topics, many of which are discussed in greater detail in this preamble, including requirements related to training for staff, the provision of medical and dental care, the use of emergency behavior intervention. Examples of other topics covered by regulation and not discussed in great detail in this preamble include: requirements related to admission and service planning, the physical site of the operation, and transportation. Should there be any further question regarding the content of DFPS' standards, all are readily available to the public, both through the Secretary of State's website for the Texas Administrative Code (see http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=3&ti=40&pt=19) and DFPS' website (see http://www.dfps.state.tx.us/Child_Care/Child_Care_Standards_and_Regulations/default.asp). Moreover, the entire policy handbook in use by CCL staff is publicly available at any time (see https://www.dfps.state.tx.us/handbooks/Licensing/default.asp).

Against this extensive regulatory backdrop, the FRCs would be required to go through the same process as other GROs in the state and to demonstrate compliance with the various requirements of Texas statute and regulation discussed herein. First, they would be required to submit an application. Residential Child Care Licensing (RCCL) has 21 days to accept the application. (See §745.301 of this title (relating to How long does Licensing have to review my application and let me know my application status?)). During that time, RCCL reviews the application for completeness and ensures that policies and procedures that are required at application are included, and that applicable fees have been paid. At times, RCCL may need to request additional information or clarification from the GRO in order to accept the application or RCCL may return the application.

Once the application is accepted, RCCL has up to two months to complete a Standard by Standard inspection to evaluate compliance with Minimum Standards. (See §745.321 of this title (relating to What will Licensing do after accepting my application?)). Concurrently, in counties with a population of less than 300,000 people, the GRO has one month from the date the application was accepted to hold a public hearing. (See §745.275(2)(C) of this title (relating to What are the specific requirements for a public notice and hearing?)). Notice of the public hearing must be published at least ten days prior to the date of the hearing in a newspaper of general circulation in a community where the services will be provided. (HRC §42.061(b) and §745.275(1) of this title (relating to What are the specific requirements for a public notice and hearing?)).

Once the public hearing occurs, the GRO has ten working days to submit a verbatim record of the hearing and a complete comment summary report to RCCL. (See

§745.275(2)(C) of this title (relating to What are the specific requirements for a public notice and hearing?)). RCCL has two months after the date of the complete application being accepted to issue or deny the initial permit unless there is good cause to extend the timeframe, such as reviewing extensive comments of a public hearing. (See §745.321 of this title (relating to What will Licensing do after accepting my application?)).

RCCL may deny the application if the operation fails to comply with Minimum Standards, administrative rules, or the law. HRC §42.072(a) and §745.8605 of this title (relating to When can Licensing take remedial action against me?) further authorizes certain remedial actions related to failure to comply with aspects of the application process. Additionally, RCCL may deny the permit if information obtained through the public hearing process indicates licensure is inappropriate. (HRC §42.0461(e), §745.279 of this title (relating to How may the results of a public hearing affect my application for a permit or a request to amend my permit?), and §745.8605(21) of this title (relating to When can Licensing take remedial action against me?)).

When an initial permit is issued, it is valid for a period of six months. (HRC §42.051 and §745.347 of this title (relating to How long is an initial permit valid?)). During the initial permit period, RCCL will generally conduct a minimum of three unannounced inspections to determine compliance with Minimum Standards, administrative rules, and law. (§745.351 of this title (relating to If I have an initial permit, when will I be eligible for a non-expiring permit?)). If during the first initial permit period, the GRO fails to establish continued compliance and additional time is necessary to determine a pattern of compliance, RCCL may issue a second initial permit to establish ongoing compliance. If the second initial permit is issued, RCCL will again conduct at least three unannounced inspections. If after the first initial permit period or the second initial permit period, the GRO has established continued compliance, RCCL may issue a full permit. When a GRO is issued a full permit, RCCL will conduct at least one unannounced inspection per year, in addition to any other inspections or investigations that may be necessary as a result of reports received. (§745.8407 of this title (relating to When will Licensing inspect and/or investigate an operation?)).

The purpose of this rule is to apply the licensure requirements to the operations, a necessary byproduct of which is that they will come into compliance with said requirements. If a current practice is inconsistent with CCL standards, then the practice would be addressed in the licensure process. To argue that a given practice does not *currently* comply with regulations for child-care is to misapprehend the purpose of licensure and all that it entails.

Comment: Several commenters opposed the exceptions to Minimum Standards contained in the proposed rule stating that they are overbroad, arbitrary and capricious, set a dangerous precedent for regulating childcare facilities, and essentially allow the FRCs to continue operating under the status quo of a prison. The commenters noted that federal and state law do not provide any basis for lowering the standards for facilities that house accompanied minors as opposed to unaccompanied minors. They further noted that the exemptions effectively create a second-class of children subject to a lower, disparate standard from children under the custody of DFPS or unaccompanied minors. Several commenters expressed concern that the exceptions not only fail to

address the problems of abuse and neglect, but increase the risk of physical and sexual abuse and maltreatment by allowing different genders and unrelated family members to be housed together in large numbers. One commenter noted that there have already been numerous allegations of assault and potential sexual abuse because of the lack of age and gender restrictions, and another commenter noted that the exemptions compromise the families' ability to file complaints for poor living conditions and abuse and neglect. While some commenters acknowledged a need for oversight, they contended that DFPS should only adopt rules consistent with those for child care facilities by requiring the FRCs to meet all current minimum standards and ensure appropriate therapeutic and trauma-informed settings as is required for other GROs.

Response: From the outset, DFPS recognized that the character of the FRCs is without an identical counterpart in the current regulatory structure. Children are housed with their mothers or other adult family members, yet by virtue of being divested of some or all of their authority to direct the daily activities, place of residence, and other aspects of their children's lives, the mothers cannot be considered the sole caregivers as they would be outside the setting. Moreover, while the families are generally housed together, there are times in which a mother may be separated from her child, e.g. when capacity is extremely high and some of the children are housed in a common, dormitory-like fashion. To the extent the mothers are not exercising full parental control, and may not be with their children at a given time, the staff in the FRCs are assuming child-care responsibilities, and it is important that this care receives oversight from the cognizant state agency.

However, in recognition of the uniqueness of the setting, DFPS included several exceptions to Minimum Standards in both the emergency rule and the rule now under consideration. The first exception, related to the limitation on the number of room occupants is intended to permit living arrangements that preserve family units. DFPS included in subsection (d) of the rule language to clarify that there may be conditions related to the outer limit on the number of occupants, particularly where such a limit is necessary to comply with fire safety standards. DFPS will require a minimum of sixty square feet per child, and as discussed herein, DFPS applies exceptions, waivers and variances in light of their potential implications to child safety, and would not implement the exception such that it was inconsistent with its child protection obligations.

The second exception in the rule relates to children sharing a bedroom with an adult, and is intended to permit children to sleep in a room with their mothers. While DFPS' current standards related to adults sharing a bedroom with children relates to adults who are in care at the facility, unlike the mothers at the FRCs who are not in care, DFPS felt it was important to clarify from the outset that the limitation would be flexibly applied. Again, subsection (d) as well as DFPS' overall regulatory authority means that the exception is not unfettered, and DFPS may place conditions on it appropriate to the circumstances.

The third exception, like the others, is intended to permit the preservation of family units and may be tempered by any limitations DFPS deems appropriate. This particular exception relates to children of the opposite gender sharing a room. DFPS understands the concerns of commenters related to potential misconduct. However, DFPS intends to permit children of the opposite gender to share a room only if they are members of the

same family or under the age of six. The goal of the exception is to strike a balance between family preservation within the current facility and the paramount concern of child safety.

However, because the rule text initially generated confusion and concern regarding the scope and purpose of the exceptions, DFPS has modified the proposed text to provide further clarification. First, the exception regarding the limitation on room occupants has been modified to make explicit that the number of children permitted in the room will be based on the square footage of the room, with no fewer than sixty square feet per child. Second, the exception related to children sharing a bedroom has been clarified to specify that the exception relates to children remaining with their own family. Third, the exception permitting children of the opposite gender to share a bedroom has been amended so that children from different families who are opposite gender may not share a bedroom unless they are under the age of 6. Finally, DFPS incorporates by reference in subsection (d) its regulation in §745.8313 of this title (relating to Is a waiver or variance unconditional?), which makes it explicit that DFPS retains the discretion to place conditions on any waiver or variance, as well as the exceptions contained in §748.7.

Comment: One commenter suggested that in light of the aim of the regulation to preserve family units, subsection (c) be modified to preface the exceptions with the language "Because the designated facilities house mothers with their children…"

Response: DFPS declines to make the change. By definition which is part of the rule, an FRC is a facility in which a child is detained with the child's mother or other family member, and the adult or other family member provides direct care and supervision. For this reason, DFPS views the change as substantively unnecessary.

Comment: Similarly to previous comments regarding the exceptions contained in the rule text, several commenters raised concerns that because DFPS may grant a waiver or variance to a Minimum Standard, in addition to the exceptions listed in the published rule, child safety could be compromised and there may be a disparate standard for unaccompanied minors compared to those housed with their mothers in the FRCs.

Response: It is true that all GROs, including the FRCs, are potentially eligible for a waiver or variance of a particular standard. However, the issuance of any waiver or variance is guided by published standards and policy and tempered always by the need to protect children.

Waivers and variances are tools to assist child-care providers to comply with standards within a specified period of time, without compromising the safety of children served by the operation. A waiver or variance is not an entitlement. (See §745.8301 of this title (relating to What if I cannot comply with a specific minimum standard?)). Staff must evaluate the risk to children, along with several other specified variables, before granting approval for a waiver or variance. (See §745.8307 of this title (relating to How does Licensing make the decision to grant or deny my waiver or variance request?), and Licensing Policy and Procedures Handbook Section 5110 (available at

https://www.dfps.state.tx.us/handbooks/Licensing/Files/LPPH_pg_5000.asp#LPPH_5100)). A waiver or variance may not be granted if child safety would be negatively impacted. All waivers and variances, and any conditions placed on the waivers and variances, are time limited, and may be revoked or amended by CCL at any time if appropriate. (See §745.8317 of this title (relating to Can Licensing amend or revoke a waiver or variance, including its conditions?)). When granting a waiver or variance, conditions must be put into place to ensure that children are not at risk. (See §745.8313 of this title (relating to Is a waiver or variance unconditional?)) Such conditions must be easily observable and measurable by CCL staff as well as the caregivers in the facility. Licensing Policy & Procedure Handbook Section 5120 (available at http://www.dfps.state.tx.us/handbooks/Licensing/Files/LPPH_pg_5000.asp#LPPH_5120) Conditions are another way of achieving compliance with minimum standards and reducing risk to children. Conditions must be evaluated during each inspection and during each investigation relevant to the standard and the conditions. *Id.*

(3) Comments Relating to Problems with Detention in General and in the Individual FRCs:

Comment: Several commenters expressed opposition to the proposed rule on the grounds that the FRCs DFPS is seeking to license are not child care centers but rather detention centers designed to house individuals in the custody of ICE during immigration proceedings. Commenters argued that although the children are housed with their mothers, the mothers are stripped of authority to make decisions for their children's well-being. Commenters stated that the centers are similar to prisons in that they are enclosed within tall walls and barbed wire fences; house a large number of individuals rather than adhere to any specific child-to-provider ratio; require the families to submit to badge checks several times a day and pass through electronically locked doors for access to basic areas; limit and monitor access to telephones and computers which are provided to families at a monetary cost; discipline the families through the use of pepper spray and harsh consequences for children's misbehavior; threaten to remove children from mothers for failure to follow rules or if complaints are made; and house unrelated adults and children of different genders together in small non-private spaces. Many commenters further noted that the centers are operated by private prison corporations and staffed by individuals with backgrounds in law enforcement rather than individuals with experience and training in child care. Commenters also noted that simply hiring more staff with a background in law enforcement rather than child care will not change conditions in the FRCs.

Response: In both the rule and this adoption preamble, DFPS has stressed repeatedly that whether the FRC is operated as a detention or secure FRC is outside its purview. However, precisely because it appears that the mothers in the FRCs are divested of some or even all of their parental authority (when separated from their children, for example), DFPS has concluded that the FRCs and their staff are providing child care. The purpose of licensure is to ensure compliance with the standards for the provision of such care. Those standards, as previously discussed, are robust. Of particular relevance to this question, there are many standards that relate to the appropriate use

of discipline and punishment found in Subchapter M of this chapter (relating to Administrative Reviews and Due Process Hearings). There are detailed standards regarding the limited use of Emergency Behavior Intervention (EBI) found in Subchapter N of this chapter (relating to Administrator Licensing).

Next, while it may be true that the FRCs have heretofore hired staff with law enforcement experience, this does not translate inexorably to the same practices continuing in the future, nor does it alter the FRCs' obligation to comply with the child-care related training requirements placed on GROs by Minimum Standards. While the training requirements vary somewhat based on the services provided in a particular GRO, any caregiver at a licensed operation must participate in orientation, pre-service training, and annual training. Orientation gives the caregiver the opportunity to learn about the philosophy, organizational structure, policies, and a description of the services and programs the operation offers, as well as the needs and characteristics of children that the operation serves. Pre-service training focuses on topics relevant to job duties and must include, *inter alia*, content on appropriate discipline; child development; measures to identify, treat, and report suspected abuse, neglect and exploitation; and safety and emergency procedures. See §748.881 of this title (relating to What curriculum components must be included in the general pre-service training?)) Each caregiver would be required to receive a minimum of 16 hours of pre-service training in a course led by a qualified instructor. (See §748.863 of this title (relating to What are the pre-service hourly training requirements for caregivers and employees?) and §748.869 of this title (relating to What are the instructor requirements for providing pre-service training?)). It must be competency based and require participants to demonstrate competency upon completion. Each caregiver must complete a minimum of 20 hours of additional training annually, including specific training on EBI if it is used in the facility. (See §748.931 of this title (relating to What are the annual training requirements for caregivers and employees?)). Overall, the comments imply that licensure as a GRO would not change current practice in the FRC, a contention with which, as discussed above, DFPS disagrees.

Comment: Many commenters expressed concern over the risk of psychological harm for children and families residing in the centers. These commenters stated that the risk is particularly acute for immigrants, who have often fled persecution, abuse, and frequent trauma in their homelands. Commenters also asserted that children are especially at risk of developing short and long-term mental health issues due to being detained in the centers. One commenter specifically noted that infants living in detention centers have problems with brain development and social functioning due to disruptions in emotional attachments to their mothers, and children living in detention centers tend to have greater maladaptive social and emotional development, academic failure, and criminal involvement than children not living in detention centers. One commenter noted that the children know they are in detention centers and feel they are being punished, thereby, normalizing the concept of detention and negatively impacting their moral development and understanding of the criminal justice system. Further, commenters stated that many women and children in the centers are exhibiting symptoms of post-traumatic stress disorder, anxiety, depression, and other mental illnesses, and are not receiving adequate treatment for these issues.

Response: While DFPS is sympathetic to the concerns raised, the agency has no role in whether a person is placed or detained in one of the FRCs. However, so long as children are housed there, and so long as mothers are not permitted to fully exercise their parental responsibility, DFPS considers the FRCs to be providing child care. It is more protective of the children in the FRCs for DFPS to exercise its oversight than to abdicate its responsibility based on the notion that the centers are harmful.

Comment: A number of commenters expressed concern that the living conditions in the centers fail to meet the basic needs of children and families and pose fundamental threats to their health and safety. Commenters' specific concerns included residents' inadequate access to healthy, regular meals and snacks; cold temperatures in the centers and residents' inadequate access to heating or blankets; close living quarters in the centers with a large number of unrelated individuals; unhygienic living conditions; other poor living conditions and inadequate access to education for minors in the centers.

Response: Living conditions, to the extent they are covered by CCL's Minimum Standards for GROs, would addressed during the licensure process. To the extent the living conditions relate to be the practices of the federal government or its contractors with respect to adults in the FRCs, they are outside DFPS' scope of authority.

Comment: A significant number of commenters expressed concern that residents' health care needs are not being met in the Karnes County and Dilley centers. One commenter noted that the US Commission on Civil Rights found that the Karnes County center failed to comply with federal standards for medical care. Commenters asserted that specific problems at the centers include: failure to administer proper medical protocol; failure of medical staff to obtain informed consent of patients prior to medical treatment; unavailability of doctors when residents are ill; failure to timely treat residents' illnesses; failure to timely refer patients to hospitals when they are critically ill; administration of adult doses of vaccines to children; prescription of solely water or Vick's Vaporub to treat various illnesses, including serious illnesses; lack of follow-up care; unreasonably lengthy waiting times to receive care; and mothers being asked to sign waivers stating they have declined medical care if they leave the medical facility for any reason, despite long waiting times.

Response: DFPS' scope of authority is limited to the provision of medical care to children in the facility, and defers to the expertise of medical professionals in the determination of frequency and mode of treatment. However, Minimum Standards contain requirements specifically geared at ensuring a baseline of adequate medical treatment for children in care.

Generally speaking, an operation must provide medical and dental care to children in the operation. A child in care must receive medical and dental care: (1) initially, upon admission; (2) at as early an age as necessary; (3) as needed for relief of pain and infections (dental) or as needed for injury, illness, and pain (medical); and (4) as needed for ongoing maintenance of dental or medical health. See §748.1501 of this title

(relating to What general dental requirements must my operation meet?) and §748.1531 of this title (relating to What general medical requirements must my operation meet?).

A licensed dentist must determine the need and frequency of ongoing maintenance of dental health. (See §748.1503 of this title (relating to Who must determine the need and frequency of ongoing maintenance of dental health for a child?). A health-care professional must determine the need and frequency for ongoing maintenance of medical care and treatment for a child. (See §748.1533 of this title (relating to Who determines the need and frequency for ongoing maintenance of medical care and treatment for a child?)). The operation must comply with dentist and health-care professional recommendations for examinations and treatment for each child. (See §748.1501(d) and §748.1531(d) of this title). Subchapter J of this chapter (relating to Child Care) contains additional requirements related to various aspects of health care, including immunizations, communicable diseases, and nutrition and hydration, among others. Additional rights for children in care related to treatment are found in subchapter H of this chapter (relating to Child Rights).

Comment: Several commenters expressed concerns related to issues with the staff at the centers. One commenter expressed concern about the ethical practices of the management of the Karnes County center after her experience as a social worker there. The commenter reported being repeatedly asked to omit written information about residents' mental health needs from reports, to lie to federal immigration officials, and to withhold information from residents about their rights within the center. Other commenters asserted that staff misconduct regarding abuse and sexual assault has not been adequately addressed. In addition, one commenter stated that the centers are not complying with the Prison Rape Elimination Act (PREA) solitary confinement practices, which require that solitary confinement of minors to keep them or other residents safe only be used as a last resort. A few commenters noted that not only are the centers understaffed, but the employees are not qualified or trained to serve the families.

Response: Some of the concerns are outside DFPS' scope, such as extent of compliance with PREA. However, CCL will be implementing and enforcing Minimum Standards that would address some of the concerns regarding staff, at least insofar as they are serving in the role as a caregiver to a child. As previously discussed, Minimum Standards contain relatively extensive training requirements for all caregivers. For any facility that utilizes EBI, the training must include current information on EBI, and DFPS regulations generally require de-escalation and other age-appropriate techniques prior to utilization of any more severe measures. DFPS could not monitor staffing as a general proposition, but would monitor the adequacy of staff for the purposes of child-to-caregiver ratios in place in the FRCs. Minimum Standards also require various measures related to personnel and record keeping. In particular a permit holder must ensure the reporting of serious incidents including suspected abuse, neglect and exploitation. (See §748.105 of this title (relating to What are my operational responsibilities as the permit holder?)). Record keeping must ensure accurate and current child records. (See §748.393 of this title (relating to How must I maintain an active child record?)).

Comment: Several commenters advised that DFPS should take heed and not partake in the historical repetition of using family detention centers that inflict harm upon children and families. Commenters described how the T. Don Hutto Family Detention Center, ICE's first detention center in Texas that opened in 2006 and was operated by the for-profit corporation CCA, became a national and international scandal due to its substandard living quarters, inadequate health care, and inhumane treatment of children. Commenters noted that the American Civil Liberties Union of Texas (ACLU) and the University of Texas Immigration Law Clinic successfully sued ICE to stop the use of the center for the detainment of immigrant children and families.

Response: DFPS does not influence whether a family or child is placed in an FRC; rather, DFPS is carrying out its duty "to protect the health, safety, and well-being of the children of the state who reside in child-care facilities by establishing statewide minimum standards for their safety and protection and by regulating the facilities through a licensing program" for those children who are placed in the FRC. (See HRC **§42.001).**

(4) Comments Relating to DFPS's Authority to Investigate Abuse and Neglect Allegations in the Facilities Without Licensure:

Comment: Several commenters opposed licensure, stating that DFPS has statutory authority to investigate abuse and neglect in non-licensed FRCs, and therefore, can already provide regular and comprehensive oversight of the centers without licensure. The commenters stated that DFPS offers no explanation of how licensing and exempting the FRCs from minimum childcare standards will protect the children from abuse and neglect. Furthermore, the commenters asserted that creating exemptions will weaken DFPS's ability to ensure child safety and well-being. One commenter suggested that rather than licensing the FRCs, DFPS should instead appoint an independent medical and psychological team to investigate reports of abuse, neglect, and exploitation in order to monitor and assure the well-being of the detained children.

Response: DFPS has consistently maintained that CPS could investigate reports of abuse or neglect by a parent or caretaker in the FRCs. Conducting abuse or neglect investigations, however, is only one part of regulation. A child abuse or neglect investigation conducted by childcare licensing should be conducted within the scope of the operation's effort to comply with relevant minimum standards.

Significantly, for the purposes of child protection, licensure offers an ongoing avenue to monitor medical care as well as allegations of abuse and neglect and other deficiencies in FRCs. While the commenters were concerned that the only additional authority in the licensure would be to inspect specific licensing requirements, this is in truth a significant enhancement, as detailed herein, and invokes a comprehensive regulatory and protective scheme. Responding to reports of abuse and neglect is reactive, and it assumes that a vulnerable individual has access to a telephone or the Internet to freely make the report. Licensure is comprehensive, ongoing, and gives DFPS the authority to make both announced and unannounced inspections, in addition to investigating

individual reports of abuse or neglect. If a staff member is found to have abused or neglected a child there could be implications to the staff member's ability to work in the operation, which would not occur if the facility were not subject to regulation as a child-care facility, specifically as a GRO.

Finally, DFPS lacks authority to appoint an independent medical and psychological team to investigate reports of abuse, neglect and exploitation. The agency itself has the authority to investigate, but cannot without additional statutory authority and resources abdicate this responsibility and grant it instead to an independent group of medical and psychological professionals.

(5) Comments Relating to the *Flores* Settlement:

Comment: Many commenters argued that placing children in the Dilley and Karnes County centers violates the *Flores* settlement, which provides that children in immigration custody be placed in the least restrictive setting appropriate to their age and special needs, generally, a non-secure FRC licensed to care for dependent, as opposed to delinquent, minors. Commenters argued that the prison-like environments of the FRCs violate *Flores*, and licensing the FRCs with various exceptions will not remedy the violation. One commenter was concerned that the potential licensure of the two FRCs would permit ICE and its private partners to attempt to claim compliance with Judge Gee's July 24, 2015, and August 21, 2015, orders. One commenter noted that the U.S. Commission on Civil Rights conducted an extensive investigation into the FRCs and found that the Department of Homeland Security and its contractors are not holding children in the least restrictive settings. Additionally, one commenter asserted detainment is unnecessary because the majority of the families at the FRCs have already demonstrated credible fear to an asylum officer, do not pose a threat to public safety, and have relatives in the United States to house them while they await a hearing.

Response: DFPS has repeatedly emphasized that its role with respect to the two FRCs currently in Texas is to oversee the care of the children who are housed with their mothers or family members there, not to determine whether the facility is secure. DFPS has no control over whether individuals are placed in the FRCs, and any outcome in the litigation is a matter outside the scope of DFPS' purview.

(6) Comment Concerning DFPS' Overall Authority to License the FRCs:

Comment: One commenter argued that DFPS' regulation of FRCs was unlawful and without authority because the FRCs violate state laws regarding the detention of juveniles. The commenter argued that the Texas Family Code offers a "robust series of statutes that specifically prohibit, and even criminalize placement of certain children in secure detention facilities." The commenter documented reasons why the FRCs should be considered secure detention facilities, including the use of techniques such as isolation as punishment, the existence of high walls, restrictions on movement, and so forth. The commenter then argued that because they are secure detention facilities

where children are held, the FRCs, and any licensure of those FRCs, violates Texas laws regarding juvenile offenders. Specifically, the commenter asserts both that DFPS lacks statutory authority for and that DFPS is explicitly banned from licensure of the FRCs, though for the latter point no particular authority is cited. The rule, per the commenter, is without legal authority because children in the FRCs may be detained beyond statutory time frames and in contravention of other restrictions in Chapter 51 of the Texas Family Code (TFC), and because the children are never adjudicated in front of a Texas juvenile court but are being housed to enforce deportation laws, in contravention of TFC §54.011(f). Further, the commenter suggested that DFPS' licensure effectively aids in the commission of a Class B misdemeanor under the same statutory provision of TFC §54.011. The commenter explained that Texas juvenile detention laws prohibit the secure detention of children under the age of ten. Finally, after arguing that DFPS has no authority to regulate the centers as child-care facilities, the commenter concluded that DFPS was obligated to immediately order the FRCs to cease operation because they have been operating without such a license for more than one year pursuant to CCL's enabling chapter.

Response: The commenter's arguments related to the TFC are misplaced. As noted in materials attached by the commenter, the chapters of the TFC in question relate to facilities operated by or on behalf of the Texas Juvenile Justice Department or on behalf of a juvenile board in the state of Texas. They do not govern federal facilities, including the FRCs under discussion in this rule promulgation. To the commenter's point that DFPS should immediately order the FRCs to cease operation as unlicensed facilities, DFPS has not previously issued regulatory guidance regarding the FRCs' status and to take enforcement action against the operators of the FRCs would in all likelihood violate the Administrative Procedure Act, Chapter 2001 of the Texas Government Code, in addition to being patently unjust. DFPS declines to take any such action on the basis of a previously nonexistent regulatory pronouncement.

(7) Comments Relating to the Proposed Rule Being Contrary to DFPS's mission:

Comment: A significant number of commenters argued that the proposed rule is at odds with DFPS’s mission to protect children and families from abuse, neglect, and exploitation. These commenters expressed concern over the FRCs’ ability to provide for the safety and well-being of children when the FRCs were created to detain immigrants under federal immigration law and are managed by privately-owned prison companies under contract with ICE. A few commenters called DFPS’s integrity into question, asserting that the decision to license these FRCs is not motivated by concern for the children because licensing would not address or solve the problem of family detention. Specifically, one commenter argued that the rule does not have the best interests of children in mind, but rather exists only because these FRCs were determined to be outside of compliance by the court system. Additionally, many commenters argued that if DFPS truly wanted to hold these FRcs accountable for the well-being of children, DFPS would have responded to the numerous complaints received and investigated the FRcs under current authority.

Response: DFPS has concluded that licensure of the FRCs is mandated and consistent with its mission to protect vulnerable children in care. DFPS views the licensure process as a tool to enhance the FRcs' ability to provide for the children's safety and well-being. DFPS seeks not to solve the problem of family detention, but rather to provide protective oversight for children who find themselves in the FRCs. Finally, based on careful and ongoing review of the issues over the course of time, DFPS' position has evolved and culminated in the regulatory action contained herein.

(8) Comments Relating to the Fiscal Implications of the Proposed Rule:

Comment: A few commenters noted that the Child Care Licensing Division of DFPS already has limited resources so licensing two large facilities would have negative fiscal implications and involve a drain on other crucial agency resources. One commenter expressed concern over DFPS’s estimate that the rule will have no fiscal impact upon the agency, questioning how DFPS would provide the essential protection of regular and comprehensive oversight to the centers without a budget. Additionally, the commenter expressed concern for the lack of budget line items for psychiatrists, psychologists, or counselors in the private operators’ budget of $32 million a year for both centers. Additionally, a few commenters noted that there are other established alternatives that could address the government’s legitimate interests in managing immigration and ensuring child safety without inflicting further trauma on the families and at a lower financial cost.

Response: DFPS has concluded that it can absorb the workload associated with the rule within current resources, at least during the first five years following the rule's effective date. One of the FRCs submitted commentary that DFPS' fiscal estimates were too low, as discussed herein. DFPS believes its estimates are sound. Ultimately, the FRCs will assess the true costs of compliance to them and engage in the requisite cost-benefit balance analysis to determine how to proceed. Alternatives to the federal government's current immigration practice are outside the scope of this rule and DFPS' authority.

(9) Comments Relating to the Berks County Residential Center in Leesport, Pennsylvania:

Comment: Two commenters noted that the Pennsylvania Department of Human Services has publicly stated that it will refuse to renew the license of Berks County Residential Center, an ICE family detention center in Pennsylvania housing immigrant children and families similar to the Karnes County and Dilley centers, if the practice of using the facility as a secure family detention center continues because such practice is inconsistent with its current license as a child residential facility. The commenters urged DFPS to follow suit and refuse to license the Karnes County and Dilley centers.

Response: DFPS respects Pennsylvania's interpretation of its licensing laws and regulations. For the purposes of Texas law, DFPS has determined that the oversight inherent in licensure better serves the aims of child protection than the lack thereof.

(10) Comments Relating to the City of Dilley's Lack of Infrastructure to Support the Dilley Center:

Comment: One commenter opposed the rule, not due to the rule itself, but because the city of Dilley, with a population of only 3,894 residents, does not possess the infrastructure to support a large detention center. The commenter noted that water has cut out several times for the entire city since the Dilley center opened, and the center has had to call the city's emergency services for other unrelated incidents rather than being able to resolve such issues internally.

Response: DFPS would make basic assessments regarding the physical site as part of the licensure process. An assessment of the city's infrastructure would be beyond DFPS' authority, which would focus on the adequacy of the facility and its utilities vis-à-vis the provision of child care.

(11) Comments of Reasons for Adoption:

Comment: DFPS received two requests for a written, detailed rationale of the reasons for its adoption, or non-adoption, of the rule in question.

Response: While no particular authority was cited, DFPS will err on the side of maximum transparency and construe the requests to be requests for a statement of reasons for or against adoption pursuant to Texas Government Code §2001.030. Again, in the interest of maximum transparency, DFPS will include the statement in this preamble, though such inclusion is not required by the Government Code.

The principal reasons urged against the adoption of the rule may be summarized by reference to themes 2-10 detailed in the comments and response section. DFPS' reasoning for overruling the considerations and adopting the rule is discussed in detail in the summary section as well. It may be summarized by reiterating that the agency has concluded the broad regulatory scheme in place for GROs will be more protective of children than taking no action regarding the provision of child care without a license.

Section 748.7 is being adopted with change. DFPS staff made modifications to subsection (c), paragraphs (1), (2), (3), and subsection (d) to clarify the extent of and reasons for the variances.

Title 40, Social Services & Assistance, Part 19, Dept. of Family and Protective Services
Chapter 748, Minimum Standards for General Residential Operations
Subchapter A, Purpose and Scope
TAC Section Number(s) §748.7

Final Action

201504663 TRD Document Number
For Proposed Action

11/13/2015 Proposed Action
Publication Date

X New

X Adopted With Change

Effective Date:

X Other (Specify)
20 Days Following Publication

The new section is adopted under §40.0505, Human Resources Code, and §531.0055, Government Code, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The new section implements §42.042(a), Human Resources Code.

§748.7.How are these regulations applied to family residential centers?

(a) Definition. A family residential center is one that meets all of the following requirements:

(1) The center is operated by or under a contract with United States Immigration and Customs Enforcement;

(2) The center is operated to enforce federal immigration laws;

(3) Each child at the center is detained with a parent or other adult family member, who remains with the child at the center; and

(4) A parent or family member with a child provides the direct care for the child except for specific circumstances when the child is cared for directly by the center or another adult in the custody of the center.

(b) Classification. A family residential center is a general residential operation (GRO) and must comply with all associated requirements for GROs, unless the family residential center is approved for an individual waiver or variance or an exception is provided in this section. The department is responsible for regulating the provision of childcare as authorized by Chapters 40 and 42, Texas Human Resources Code and Chapter 261, Texas Human Resources Code. The department does not oversee requirements that pertain to other law, including whether the facilities are classified as secure or in compliance with any operable settlement agreements or other state or federal restrictions.

(c) Exceptions. A family residential center is not required to comply with all terms of the following Minimum Standards:

(1) the limitation of room occupants to four in §748.3357 of this title (relating to What are the requirements for floor space in a bedroom used by a child?), except that nothing in this exception shall be construed to require fewer

than 60 square feet per child;

(2) the limitation on a child sharing a bedroom with an adult in §748.3361 of this title (relating to May a child in care share a bedroom with an adult?), if the bedroom is being shared in order to allow a child to remain with the child's parent or other family member; and

(3) the limitations on children of the opposite gender sharing a room in §748.3363 of this title (relating to May children of opposite genders share a bedroom?), except that nothing in this exception shall be construed to permit children from different families who are over the age of six and members of the opposite gender to share a bedroom.

(d) Limitation of exception. Notwithstanding subsection (c) of this section, and as further described in §745.8313 of this title (relating to Is a waiver or variance undonditional?), the department retains the authority for placing conditions on the scope of the exceptions authorized for a family residential center, including conditions related to limiting occupancy in accordance with fire safety standards, limitations related to allowing children and adults of the opposite gender to occupy the same room only if they are part of the same family, and any other limitation determined by the department to be necessary to the health, safety, or welfare of children in care.

(e) Division of responsibility. In addition to the application materials described in §745.243(6) of this title (relating to What does a completed application for a permit include?), an applicant for a license under this section must submit the policies, procedures, and any other documentation that the department deems necessary to clarify the division of supervisory and caretaking responsibility between employees of the facility and the parents and other adult family members who are housed with the children. The department must approve the documentation during the application process and any subsequent amendments to the policies and procedures.

This agency certifies that the adoption has been reviewed by legal counsel and found it to be within the state agency's legal authority to adopt.

Issued in Austin, Texas, on _____.