

MEMORANDUM

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

**TO: Chair and Members
Department of Family and Protective Services Council**

**FROM: Howard Baldwin
Interim Commissioner**

**SUBJECT: Agenda Item 5d: Recommendation to propose rule changes
in 40 TAC, Chapter 745, Licensing**

DATE: October 21, 2011



BACKGROUND AND PURPOSE

The Child Care Licensing Program is proposing changes to Chapter 745, Licensing. The purpose of the proposal is to implement legislation passed during the 82nd Legislative Session.

House Bill (H.B.) 1615 adds new §42.065 to Chapter 42 of the Human Resources Code. This new section restricts under what circumstances medication may be given to a child. Except in a medical emergency, a child day-care operation must have parental consent before giving a child a prescription or over-the-counter medication.

H.B. 3051 adds new §42.041(f) to Chapter 42 of the Human Resources Code, which extends the "parents on the premises" exemption for child day-care operations. A child day-care operation, located in a county with a population of 800,000 or more that is adjacent to an international border, is now exempt if it provides care for a child no more than 15 hours a week so that a person may attend an educational class provided by a nonprofit entity.

Senate Bill (S.B.) 76 adds Chapter 313 to the Labor Code, and Human Resources Code §42.0523. This new chapter addresses relative child care under a listed family home permit. The child care can now occur in the child's own home under specific circumstances, although the address on the permit must still be the child-care provider's home address.

S.B. 78 adds Subchapter W, Adverse Licensing, Listing, or Registration Decisions, to Chapter 531 of the Government Code. This new law compels state Health and Human Services agencies to maintain and share information regarding facility permits that have been denied, revoked, or suspended. The new law allows the Health and Human Services Agencies to use the shared records to deny a permit to an applicant who has already been denied, revoked, or suspended by another agency. Records must be kept for at least 10 years.

S.B. 1178 includes many changes regarding Child Care Licensing. The changes to Chapter 42 of the Human Resources Code:

1. increase flexibility for a municipality to maintain their exempt status;
2. expand the "controlling person" concept to all child-care facilities and family homes, not just residential operations;
3. expand the circumstances under which Child Care Licensing can conduct investigations in listed family homes to include a reported risk of immediate health or safety danger to children in care;
4. automatically suspend a listing if the listed family home fails to submit required

- background checks, then automatically revoke the listing if not corrected within six months. These actions are not subject to due process;
5. automatically suspend a permit if the permit holder fails to pay required annual fees, then automatically revoke the permit if the fee is not paid within six months. These actions are not subject to due process;
 6. add school-age and before or after-school programs to the child-care facilities that must have fingerprint-based background checks on all staff;
 7. allow a person or business who provides substitute employees to regulated child-care operations to run background checks on potential substitute employees;
 8. expand monetary penalties to listed family homes;
 9. amend §42.072(e) so that an applicant denied a permit for a child-care operation may not continue to operate during appeal of the decision;
 10. add Subchapter G, relating to shelter care, so that shelter care can be regulated separately from other types of child day care. The result is a certificate of compliance rather than a license, limited inspection and investigations, and fewer minimum standards. This new subchapter largely reflects the subchapter already in place for the regulation of employer-based day care;
 11. allow adverse action against a residential child care licensed administrator based on a criminal history relevant to the duties of a licensed administrator, such as fraud or embezzlement; and
 12. allow easier access to a person's fingerprints on file with the Department of Public Safety for the purpose of conducting background checks.

DETAILED SECTION ANALYSIS AND DISPOSITION TABLE

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
§745.21	Amend	<ul style="list-style-type: none"> Changes a cross reference to rule §745.901, as the title of this rule is proposed for change; and Updates the definition of "minimum standards" to include Chapters 743 (Shelter Care) and 744 (School-Age and Before or After-School Programs), and Employer-Based Child Care.
§745.33	Amend	S.B. 76 addresses relative child care under a listed family home permit. This rule defines "child day care." The proposed change adds a subsection to describe the circumstances under which a listed family home may now provide care in the child's own home.
§745.37	Amend	S.B. 1178 changes the regulation of shelter care in the law from regulation of other child care operations. The result for shelter care is a certificate of compliance rather than a license. This rule lists the types of operations that Child Care Licensing regulates and changes the permit type for shelter care from a license to a compliance certificate.

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
§745.115	Amend	<p>This rule lists exemptions for programs regulated by other government entities. The proposed change reflects the flexibility added to the law for municipal recreation programs created by S.B. 1178. Under certain conditions, these programs can now accept public comment through their web site rather than having a previously required annual public hearing.</p> <p>Another proposed change to this rule updates a reference to the Texas Commission on Alcohol and Drug Abuse, so that the rule now refers to the Department of State Health Services.</p>
§745.117	Amend	<p>House Bill (H.B.) 3051 extends the "parents on the premises" exemption for child day care operations. A child day care operation, located in a county with a population of 800,000 or more and the county is adjacent to an international border, is now exempt if it provides care for a child no more than 15 hours a week so that a person may attend an educational class provided by a nonprofit entity. The proposed change to the rule adds the exemption referenced above.</p> <p>Another proposed change corrects an incorrect cross reference to another subsection of the rule.</p>
§745.243	Amend	<p>S.B. 76 addresses relative child care under a listed family home permit. The child care can now occur in the child's own home under specific circumstances. This care is exempt from fees.</p> <p>S.B. 1178 changes the regulation of shelter care in the law from the regulation of other child care operations. The results for shelter care are a certificate of compliance and no proof of liability insurance. .</p> <p>S.B. 1178 also expands the controlling person concept to all child care operations, not just residential care.</p> <p>This rule lists the requirements for a permit application, based on permit type. The proposed changes:</p> <ul style="list-style-type: none"> • add the Controlling Person Form as a required part of the application packet for all permit types; • clarify that care provided in the child's own home under a listed family home permit is not subject to a listing fee; • reflect that shelter care facilities will now have their own application form, specific to the permit type; and • delete portions of the shelter care application packet that will no longer apply, such as proof of liability insurance.
§745.503	Amend	<p>S.B. 76 addresses relative child care under a listed family home permit. The child care can now occur in the child's own home under specific circumstances. This care is exempt from fees. This rule implements the fee exemption.</p>

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
§745.505	Amend	<p>S.B. 76 addresses relative child care under a listed family home permit. The child care can now occur in the child's own home under specific circumstances. This care is exempt from fees.</p> <p>S.B. 1178 allows for the automatic suspension of any permit for not paying required annual fees, and then the automatic revocation of the permit if not corrected within six months.</p> <p>This rule implements the fee exemption and the automatic suspension and revocation for non-payment of annual license fees.</p>
§745.509	Amend	<p>S.B. 1178 allows for the automatic suspension of any permit for not paying required annual fees, and then automatic revocation of the permit if not corrected within six months.</p> <p>This rule implements the automatic suspension and revocation for non-payment of annual license fees.</p>
§745.601	Amend	<p>S.B. 1178 allows a person or business who provides substitute employees to regulated child-care operations to run background checks on potential substitute employees.</p> <p>This rule defines the terms used throughout the subchapter related to background checks. The proposed change adds a definition for "substitute employee".</p>
§745.615	Amend	<p>S.B. 1178 requires businesses that provide substitute caregivers to operations to get background checks on those caregivers, and adds school-age and before or after-school programs to the child care facilities that must have fingerprint-based background checks on all staff.</p> <p>This rule outlines who must have a background check. The proposed changes:</p> <ul style="list-style-type: none"> • Add substitute employees/caregivers to the list of persons who must have a background check, and • Add staff of a school-age or before or after-school program to the list of persons who must have a fingerprint-based background check.
	New §745.696	<p>S.B. 1178 amends Human Resources Code §43.010 to allow adverse action against a residential child care Licensed Administrator based on a criminal history relevant to the duties of a Licensed Administrator.</p> <p>This proposed new rule notes that any specific crimes that affect a person's ability to be a licensed administrator and whether that person is eligible for a risk evaluation will be available on the DFPS public website. This list will include additional crimes that relate to the duties of a licensed administrator but may not prevent a person from being employed at a child care operation, like money laundering and Medicaid fraud.</p>

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
Chapter 745, Subchapter G, Residential Controlling Person and Certain Employment Prohibited	Amend	<p>S.B. 1178 expands the "controlling person" concept to all child care facilities and family homes, not just residential operations. The controlling person designation allows Child Care Licensing, and with S.B. 78 other health and human services agencies, to track and take action against individual persons who have been an administrative or governing body official in an operation that had a license denied, revoked, or suspended.</p> <p>The proposed change is to remove the word "residential" from the title of this subchapter, as controlling persons are no longer limited to residential child care operations.</p> <p>Rules §745.901 - §745.913 below are part of this subchapter. All changes relate to S.B. 1178.</p>
§745.901	Amend	<p>The proposed changes to this rule defining controlling persons:</p> <ul style="list-style-type: none"> • Remove the word "residential" from the rule to broaden the applicability of the rule to all child care operations, • Clarify that the spouse of a sole proprietor is considered a controlling person, • Clarify that the primary caregiver at a child care home and the primary caregiver's spouse are considered controlling persons; and • List day care directors and licensed administrators as examples of persons who manage a child care operation.
§745.903	Amend	<p>The proposed change to this rule regarding submitting information about controlling persons to Child Care Licensing removes the word "residential" to broaden the applicability of the rule to all child care operations.</p>
§745.905	Amend	<p>The proposed change to this rule regarding when Child Care Licensing will designate a person as a controlling person removes the word "residential" to broaden the applicability of the rule to all child care operations.</p>
§745.907	Amend	<p>This rule outlines the consequences for being designated by Child Care Licensing as a controlling person. The proposed changes remove the word "residential" from the rule and delete a subsection prohibiting employment of a person sustained as a controlling person. A change in the law, through S.B. 1178, now allows a sustained controlling person to seek employment in a regulated child care operation, but not serve as a controlling person for the operation.</p> <p>Another proposed change to the rule adds a cross reference to §745.905, for clarity and consistency.</p>

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
§745.911	Amend	This rule outlines other circumstances under which a person may not serve as a controlling person. A proposed change in this rule allows a sustained controlling person to seek employment in a regulated child care operation, but not serve as a controlling person for the operation. The word "residential" is removed from the rule. Another proposed change is an addition to the rule regarding a person who was a controlling person for a facility that had its permit denied, revoked, suspended, or terminated by another health and human services agency, per S.B. 78. DFPS may now use that information in determining whether a person may be a controlling person at an operation.
§745.913	Amend	This rule describes how Licensing determines whether a person may serve as a controlling person at an operation. A proposed addition states that at the stage of a permit application DFPS will determine if any person was a controlling person for a facility that had its permit denied, revoked, suspended, or terminated by another health and human services agency, per S.B. 78. The word "residential" is also removed from the rule.
§745.8407	Amend	<p>H.B. 1615 adds Human Resources Code §42.065. This new section of the law restricts under what circumstances medication may be given to a child.</p> <p>S.B. 76 addresses relative child care under a listed family home permit. The child care can now occur in the child's own home under specific circumstances.</p> <p>S.B. 1178 adds Subchapter G (relating to Shelter Care) to the Human Resources Code, so that shelter care can be regulated separately from other types of child day care. The result is a certificate of compliance rather than a license, limited inspection and investigations, and fewer minimum standards.</p> <p>This rule lists when Child Care Licensing may conduct an inspection or investigation in each operation type. For listed family homes, the proposed changes:</p> <ul style="list-style-type: none"> • add inspection to ensure that care is being provided within the limits of the permit issued; • add that Licensing may investigate due to an allegation of an immediate health or safety risk to children in care; • add that Licensing may investigate due to an allegation that the home administered medication to a child in violation of new Human Resources Code 42.065 (regarding parental consent for medications); and • clarify that an investigation may occur due to an allegation that the home is caring for 4 or more unrelated children or receiving compensation for four or more unrelated children. <p>The other proposed change adds shelter care as a separate category, with inspections only prior to issuance or as part of an investigation, and investigations only related to alleged abuse/neglect or alleged deficiency related to a licensing statute or rule.</p>

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
	New §745.8427	This new rule lists the compliance expectations for listed family homes. Listed family homes do not have minimum standards. However, there are now multiple requirements in law with which listed family homes must comply. Therefore, Child Care Licensing proposes this rule to summarize and clarify the compliance expectations for listed family homes.
§745.8605	Amend	<p>This rule lists circumstances under which Licensing can take remedial action. The proposed changes are related to S.B. 1178 and S.B. 78:</p> <ul style="list-style-type: none"> • References to residential child care are removed from sections related to controlling persons and/or a history of remedial action, since these now apply to all operation types; • A section is added to clarify that remedial action may be taken if controlling person information is not submitted to Licensing per §745.903; and • A section is added to reference denying a permit based on the person having a revoked, suspended, or terminated permit through another state agency, per S.B. 78.
§745.8805	Amend	The proposed change to this rule regarding administrative review clarifies that automatic suspension or revocation for non-payment of fees is not subject to administrative review, per S.B. 1178.
§745.8835	Amend	The proposed change to this rule regarding due process hearings clarifies that automatic suspension or revocation for non-payment of fees is not subject to due process hearings, per S.B. 1178.
§745.8875	Amend	<p>S.B. 1178 amends Human Resources Code §42.072(e) so that an applicant denied a permit may not continue to operate during appeal of the decision.</p> <p>The proposed change to this rule regarding adverse actions clarifies that an operation may not continue to operate while appealing the denial of a license.</p>
§745.9037	Amend	<p>S.B. 1178 amends Chapter 43 of the Human Resources Code to allow adverse action against a residential child care Licensed Administrator based on a criminal history relevant to the duties of a Licensed Administrator.</p> <p>This rule lists the circumstances under which Licensing may take remedial action against a licensed administrator or licensed administrator applicant. The proposed change adds a criminal conviction relevant to the duties of a licensed administrator and references new proposed rule §745.696.</p>

STATUTORY AUTHORITY AND STATUTES AFFECTED

The modification is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provides 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; and HRC §40.021, which provides that the Department of Family and Protective Services Council shall study and make

recommendations to the executive commissioner and the commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

FISCAL IMPLICATIONS

(a) Fiscal Impact. For each of the first five years that the rules will be in effect there will not be costs or revenues to state or local government as a result of enforcing or administering these sections.

(b) Public Costs and Benefits. For each of the first five years that the proposed sections will be in effect, the public benefit anticipated as a result of the rule changes will be that children in regulated day care will have better safety protections because (1) medications will only be provided with parental consent; (2) persons that have previously had permits denied, revoked, or suspended will no longer be able to obtain similar permits in other licensed areas and agencies; (3) applicants denied a permit may no longer operation pending an appeal of the denial; (4) adverse actions may be taken against a licensed administrator based on criminal history relevant to his duties; and (5) background checks will be conducted in all School Age and Before or After-School Programs. A revision to §745.615, which outlines who must submit to background checks, adds staff of a School-Age and Before or After-School Program to the list of persons who must have a fingerprint-based criminal history check. Costs will be associated with this proposed change, as described below.

(c) Impact on Business. On average, a child day care center submits approximately 16.6 FBI fingerprint checks per year. Fingerprint-based criminal history checks cost \$44.20 and are paid by the individual requiring the check or by the associated child care operation. This amount is a collection of several fees:

- The FBI charges \$19.25 to conduct a fingerprint check.
- DPS charges \$15 to conduct a fingerprint check (the FBI will not conduct a fingerprint check until the requesting state conducts one).
- The private contractor who collects fingerprints in Texas charges a \$9.95 processing fee (this is a fee set in the contract between the private contractor and DPS).

In addition, new employees may have an estimated travel cost associated with obtaining a fingerprint scan. The cost may range from a negligible amount (for those living in metropolitan areas near a contractor site), to a maximum of \$51, for those living in the most rural areas. It is assumed that these costs are most often borne by the person undergoing the fingerprint-based criminal history check; however, some School Age and Before or After-School Programs may cover these costs.

However, it is assumed that a large majority of the School Age and Before or After-School Programs are already conducting fingerprint-based criminal history checks. Senate Bill 68 (during the 81st Legislature) created the School Age and Before or After-School Programs, a new classification of licensed day care operations. Many operations meeting these new definitions had been regulated previously as day-care centers and had the option of converting their day-care center permits to School Age and Before or After-School Programs permits by August 31, 2011. A total of 527 centers converted their permits by the end of June 2011. Day-care centers were already required to conduct fingerprint-based criminal history checks, so it is assumed that the day-care centers that opted for conversion to a School Age and Before or After-School Program permit were already meeting this fingerprint-based criminal history requirement and continue to meet the requirement. There were also a total of 174 new

operations that obtained a permit to operate as a School Age and Before or After-School Program through the end of June 2011.

The DFPS FY 2010 data book reflects 9,436 licensed child-care centers in Texas, many of which are either a small business or micro-business as defined in Chapter 2006, Government Code. Chapter 2006 defines a small business as one that is for-profit, independently owned, and has fewer than 100 employees or less than six million dollars in annual gross receipts. A small business that has no more than 20 employees is further defined as a micro-business. Based on surveys of child-care providers, DFPS estimates that roughly 55% of child-care centers are for-profit businesses and that roughly 70% are independently owned. Approximately 98% of child-care centers have fewer than 100 employees and roughly 68% have no more than 20 employees. It is assumed that the survey respondents would also be a representative sample of School Age and Before or After-School Program providers, and the results of the survey are current for rulemaking estimates in 2011. Chapter 2006 requires that an agency prepare a Regulatory Flexibility Analysis (RFA) for any rule that has a negative economic impact on small businesses, unless consideration of alternative methods of achieving the rule's purpose would not be consistent with the health, safety, and environmental and economic welfare of the state. Because the changes to § 745.615 that result in possible adverse economic impact to small businesses are required by Section 42.056, Human Resources Code, these changes are considered *per se* necessary for the health and safety of the children served by child-care centers subject to these rules. Accordingly, no RFA was prepared prior to proposal of these rules.

(d) Local Employment Impact and Takings Statements. No local employment impact statement was required for these rules. The agency is not required to complete a takings impact assessment regarding the proposed sections.

(e) Technology Impact. There is no anticipated impact on technology as a result of the proposed rule changes.

STAKEHOLDER INPUT

DFPS shared draft copies of the proposed rule changes with all members of the Committee on Licensing Standards for their review and comment. Stakeholder input will be considered as it is received during the period for comments on the rule.

RECOMMENDATION

It is recommended that the Council consider the proposed rule action, as discussed in this memorandum, and that the Council recommend proposal, with or without changes to the rules as they are attached to this memo.

ATTACHMENTS

Attached is a copy of the proposed change to the rule section as staff recommended for submittal to the *Texas Register*.