

MEMORANDUM

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

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

FROM: **Howard G. Baldwin, Jr.
Commissioner**

SUBJECT: **Agenda Item 6a: Recommendation to propose rule changes
in 40 TAC, Chapter 705, Adult Protective Services,
including abuse, neglect and exploitation definitions for In-
home investigations; and Chapter 711, Investigations in
DADS Mental Retardation and DSHS Mental Health
Facilities and Related Programs**

DATE: **April 20, 2012**



BACKGROUND AND PURPOSE

The Adult Protective Services (APS) Division recommends changes to 40 TAC, Chapter 705, Adult Protective Services for in-home investigations; and Chapter 711 for facility investigations. The Chapter 705 rule establishes the definitions of abuse, neglect and exploitation (ANE), improves the language for clarity, and updates outdated language. The Chapter 711 rule provides consistency for the Chapter 705 changes to the definitions of ANE in EMR cases, updates names and outdated terminology, and expands or clarifies terms.

Proposed Changes to Chapter 705

The current ANE definitions for the APS In-Home Program, by and large, reflect the statutory language. Senate Bill (S.B.) 221, 82nd Legislature, Regular Session, 2011, gave authority to the Health and Human Services Executive Commissioner to establish definitions of ANE in rule in lieu of the current statutory definitions for the APS In-Home program. DFPS sought this change for two reasons.

First, due to increasing intakes and decreasing staff, APS desires to more effectively target who it serves. APS plays the de facto role of the safety net for certain aspects of the Texas health and human services delivery system. Through rule change, APS hopes to clarify and refine its role by targeting investigations and services to APS clients who agree to these services and by not using scarce resources on clients better served by others. APS is proposing three types of changes:

1. Eliminate cases when the APS investigation will not alleviate the root cause of the ANE.
2. Eliminate duplication of cases in which other entities have clearer responsibility and resources.
3. Streamline cases in which an expedited investigation would be more efficient.

The second reason APS requested this authority is a need to make changes to definitions for paid caretakers, particularly employees of home and community support service agencies (HCSSAs). The current APS in-home ANE definitions apply in situations in which a caretaker is paid or non-paid. APS believes a distinction is needed between paid and non-paid caretakers

based on the premise that paid caretakers have a higher duty or responsibility than a non-paid caretaker, which should be reflected in the definitions.

Proposed Changes to Chapter 711

The proposed changes to Chapter 711 include updating name changes and the expansion or clarification of terms. It also includes several changes to bring conformity with current practice related to how reviews and appeals are conducted, how Employee Misconduct Registry cases are handled, and how findings in cases may be changed upon review after the case is closed.

DETAILED SECTION ANALYSIS AND DISPOSITION TABLE

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
705.1001	Repeal and New	The new section: (1) adds definitions for APS, DFPS, emotional harm, intimidation, ongoing relationship, paid caretaker, person with a disability, physical injury, serious harm, substantially impairs, and unreasonable confinement; (b) deletes definitions of abuse, aged or disabled person, CAPS, collateral contact, emotional or verbal abuse, exploitation, family violence, least restrictive alternative, neglect, personal care facility, primary worker, principal, secondary worker, and sexual abuse; and (c) updates the definitions of some of the remaining terms that were contained in the repealed rule.
	New Rule §705.1003	Adds a rule to define the term "physical abuse" and differentiates between caretakers and paid caretakers.
	New Rule §705.1005	Adds a rule to define "sexual abuse" and changes the previous definition by clarifying what does not constitute consent.
	New Rule §705.1007	Adds a rule to define "emotional or verbal abuse" and differentiates between caretakers and paid caretakers.
	New Rule §705.1009	Adds a rule to define "neglect," including self-neglect.
	New rule §705.1011	Adds a rule to define "financial exploitation" and differentiates between caretakers and paid caretakers. The definition includes "attempted exploitation" and "identity theft" as required by S.B. 221.

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
	New Rule 705.2101	Updates the information previously found in §705.2916 regarding how investigations are prioritized.
	New Rule §705.2103	Updates what qualifies as emergency client services by clarifying information previously found in §705.2940.
	New Rule §705.2105	Adds who is eligible for emergency client services previously found in §705.2940.
	New Rule §705.2107	Adds when emergency client services are available as previously found in §705.2940.
§705.2915	Repeal	Deletes the rule because it is duplicative.
§705.2916	Repeal	Repeals this section regarding protective services priorities and adds the information to new §705.2101.
§705.2940	Repeal	Repeals this section regarding emergency client services and moves some of the information to new §§705.2103, 705.2105, and 705.2107.
§705.3101	Amend	Clarifies the role of APS when a person is the victim of domestic violence; and updates the reference to the Texas Family Code.
§705.3102	Amend	Updates the language of the rule and a reference to the Texas Family Code.
§705.4101	Repeal and New	For clarity and to update the language, the old rule was repealed and revamped into four new rules (§§705.4101, 705.4103, 705.4105, and 705.4107). This new rule relates to the terms defined in this subchapter.
	New Rule §705.4103	Clarifies the rights of the designated perpetrator to appeal the APS findings. The rule also clarifies what due process hearings are available to a designated perpetrator.
	New Rule §705.4105	Clarifies the responsibility of the agency to notify the designated perpetrator when intending to release investigation findings.
	New Rule §705.4107	Addresses the role of the designated perpetrator during the administrative review process.

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
	New Rule §705.4109	Clarifies that administrative reviews (release hearings) are closed to the public.
	New Rule §705.4111	Clarifies who receives notification of the final decision.
§705.6101	Amend	Adds the word "financial" before all references to "exploitation."
§705.8101	Amend	Updates the language of the rule to be consistent with other changes being made in this chapter.
§711	Amend	Revises the chapter title to delete the words "mental retardation" and "mental health."
§711.1	Amend	Adds that APS investigates allegations in licensed intermediate care facilities for persons with intellectual disabilities and related conditions (ICF-ID).
§711.3 (22)	Amend	Adds the definition of ICF-ID, and revises the name of the home and community-based services waiver (HCSW) program to the home and community-based services (HCS) program.
§711.13	Amend	Clarifies that DFPS, for good cause shown, may find that consensual sexual activity in an ongoing relationship begun prior to the provision of services is not sexual abuse.
§711.405	Amend	Replaces "ICF-MR" with "ICF-ID", and updates several rule references.
§711.611	Amend	Replaces "ICF-MR" with "ICF-ID", and updates several rule references.
§711.613	Amend	Replaces "ICF-MR" with "ICF-ID", revises "HCSW" to "HSC", and updates several rule references.
§711.1013	Amend	Updates rule references.
	New Rule §711.1015	Clarifies the right of the department to conduct a review of an investigation without a request for a review of finding or methodology and the responsibility to notify all involved parties of any change in the finding.
§711 Subchapter M	Amend	Updates the name of Advocacy, Inc. to Disability Rights Texas.
§711.1201 §711.1203	Amend	Updates the name of Advocacy, Inc. to Disability Rights Texas.

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
§711.1207	Amend	Clarifies that APS may review the "methodology used" during a requested review or appeal of findings. Removes the requirement that APS notify the "victim, or alleged victim, guardian or parent (if victim is a child)", which is the providers' responsibility.
	New Rule §711.1209	Clarifies the right of DFPS to conduct a review of investigation without an appeal request and the responsibility to notify all involved parties of any change in the finding.
§711.1402	Amend	Amends this section to: 1. define "facility investigation" and clarifies the entities under the investigatory responsibility of APS; 2. revise the HCS definition to incorporate use of people first (respectful) language; 3. change HCSW to HCS; change ICF-MR to the current term ICF-ID; and 4. replace "mental retardation" with "intellectual disabilities."
§711.1404	Repeal and New	Clarifies which physical abuse, sexual abuse, emotional or verbal abuse, neglect, and financial exploitation In-home definitions that are being proposed in the Chapter 705 apply to the Employee Misconduct Registry.
§711.1406	Amend	Clarifies that DFPS, for good cause shown, may find that consensual sexual activity in an ongoing relationship begun prior to the provision of services is not sexual abuse. Removes "MHMR" in reference to facility investigations.
§711.1408	Amend	Removes "MHMR" in reference to facility investigations.
§711.1413	Amend	Makes the rule consistent with other rules on emergency releases.
§711.1421	Amend	Clarifies that Employee Misconduct Registry (EMR) hearings may be postponed until the criminal case resolves; and updates the name of hearing examiner to administrative law judge.
711.1426	Amend	Makes a grammatical correction.

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
§711.1427	Amend	Clarifies that EMR hearings are confidential and closed to the public; and updates the name of hearing examiner to administrative law judge.
§711.1429	Amend	In accordance with Human Resources Code, §48.405 as modified by the 82 nd Legislature in S.B. 221, the HHSC Hearings Unit EMR decisions will now be final; the decision will no longer be a Proposal for Decision.

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 this section. The rule changes will have minimal impact on the operation of the APS program and no foreseen fiscal impact.

(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 change will be that APS will focus on targeting services to the most vulnerable adults that it can most effectively serve. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

(c) Impact on Business. There is no anticipated adverse impact on small, micro, and large businesses as a result of the proposed rule change because the proposed rule change should not affect the cost of doing business. The changes do not impose new requirements on any business and do not require the purchase of any new equipment or any increased staff time in order to comply.

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

(e) Technology Impact. No technology impact will result as a change to the rules.

STAKEHOLDER INPUT

The proposed rule revisions to Chapter 705 were presented to stakeholders in a meeting held on October 10, 2011. Stakeholders were contacted via email and provided the opportunity to participate in the meeting or to submit comments prior to the meeting. The stakeholders who

participated in the meeting were later sent a draft version of the proposed rule change regarding the amended definition of sexual abuse, which was the only area of substantive disagreement at the meeting. Additional outreach through participation in a conference call and written material was made to mental health authorities and a presentation was made to area agency on aging staff. APS will continue to obtain and consider public comment throughout the rule process.

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*.