

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 6d: Recommendation to propose rule changes to Background Checks in 40 TAC, Chapter 744, Minimum Standards for School-Age and Before or After-School Programs; Chapter 745, Licensing; Chapter 746, Minimum Standards for Child-Care Centers; and Chapter 747, Minimum Standards for Child-Care Homes**

DATE: **July 20, 2012**



BACKGROUND AND PURPOSE

The Child Care Licensing Program is recommending changes to administrative rules in Chapter 745, Licensing. The recommended changes are to establish consistency in the implementation of the background check process, a more organized and timely risk evaluation process, and to make the both processes more easily understood by the public.

The primary change is to replace the crimes that are currently enumerated very broadly in rule, with charts that specifically enumerate crimes that are monitored by Licensing. These charts will be specific to types of operations and will include information regarding:

- whether a conviction permanently or temporarily bars a person from being present at an operation while children are in care;
- whether a person is eligible for a risk evaluation; and
- whether a person who is eligible for a risk evaluation may be present at the operation pending the outcome of the risk evaluation.

The charts will be reviewed and updated every year and published in the *Texas Register* every January. The revamping of the background check process will increase consistency in the implementation of the background check rules by the Department and will help the public and the stakeholders to more easily understand the process. In addition, changes to the charts can be made more expeditiously to keep them updated with legislative changes and as more common crimes need to be specifically enumerated.

In addition, the rule changes also:

- clarify that successfully completed deferred adjudications are not considered convictions for background check purposes, but they will be considered when the person is an applicant for a permit;

- Add eligibility for a risk evaluation for physical abuse findings, when it has been more than 5 years since the date of the finding and the prospective foster or adoptive parent is related to or has significant longstanding relationship with the foster or adoptive child.
- Add time frames for submitting requests for risk evaluations, as well as time frames for DFPS to respond to those requests.
- Update the rule language for what information must be submitted in relation to Form 2974, Request for Risk Evaluation Based on Past Criminal History and Central Registry Findings.
- Establish in rule Licensing’s authority to place conditions or restrictions on a person who may be present at an operation pending a risk evaluation.
- Clarify that in addition to the criminal history requirements noted in §745.651, licensed administrators will also be monitored for financial crimes.
- Clarify that a person may not be a licensed administrator if the person has criminal history or a Central Registry finding that bars the person from being present at an operation while children are in care. Clarifies that a person may be a licensed administrator if the person has a criminal history or a Central Registry finding that requires a risk evaluation, however, Licensing may place restrictions on the license and the person may not be present at the operation while children are in care until the operation requests a risk evaluation for the person, and the risk evaluation is approved.

The proposed rule amendments to Chapters 744, 746, and 747 are to be consistent with the rule changes in Chapter 745.

DETAILED SECTION ANALYSIS AND DISPOSITION TABLE

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
§744.305	Amend	Amends the rule to be consistent with the rule changes in Chapter 745.
§745.651	Repeal	Repeals the rule because extensive changes are needed and will propose as new §745.651.
	New §745.651	<ul style="list-style-type: none"> • Updates and replaces old §745.651, §745.657, and §745.693. • Deletes the listing of criminal convictions in rule and adds a reference to the three charts on the DFPS website that contain criminal convictions and information on whether a conviction permanently or temporarily bars a person from being present at one of the relevant operations while children are in care, whether a person is eligible for a risk evaluation, and whether a person who is eligible for a risk evaluation may be present at the operation pending the outcome of the risk evaluation. • States the three charts will be reviewed and updated every year and published in the <i>Texas Register</i> every January. • Clarifies that for any felony crimes not enumerated in the chart, a person must have an approved risk evaluation before being

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		<p>present at an operation while children are in care.</p> <ul style="list-style-type: none"> Clarifies that the crimes in the chart also apply to similar other state and federal crimes
§745.653	Amend	Corrects the references in relation to the newly worded rules.
§745.655	Repeal	Repeals the rule and will propose as new §745.657 with new updated content.
	New §745.655	Clarifies that a successfully completed deferred adjudication is not considered a conviction for criminal background check purposes except when applying for a permit.
	New §745.656	Clarifies a person required to register as a sex offender cannot be present at an operation while children are in care.
§745.657	Repeal	This rule is redundant because this information is now located in new §745.651 and §745.657.
	New §745.657	<ul style="list-style-type: none"> Updates and replaces old §745.655, §745.657, and §745.695. Adds a clause to both new §745.657(3) and new §745.657(4) allowing a person's presence at an operation pending a risk evaluation "if the person continued to work at the operation pending the outcome of due process for the designated finding because we had not determined the person's presence at the same operation was an immediate threat or danger to the health or safety of children." Clarifies that for background check purposes a finding of abuse or neglect from another state will be treated the same as a sustained DFPS finding of abuse or neglect. Adds eligibility for a risk evaluation for a physical abuse finding if the finding is more than five years old and the prospective foster or adoptive parent is related to or has a significant longstanding relationship with the foster or adoptive child.
§745.659	Amend	Updates the references noted in the rule and clarifies the language of the rule.
§745.661	Amend	Since §745.688 now clarifies that Licensing may place conditions or restrictions on a person's presence at an operation pending the outcome of a risk evaluation, this amendment clarifies that the operation may need to restrict a person's duties after notification from Licensing.
§745.683	Amend	Clarifies the titles of the individuals responsible for submitting a risk evaluation and adds that a sole proprietor who is an applicant for any type of permit must request his or her own risk evaluation.
§745.685	Amend	Clarifies the language of the rule to be more consistent with new §745.686, which specifies the time frames for requesting a risk evaluation.
	New §745.686	<ul style="list-style-type: none"> Adds a 7-day time frame for requesting a risk evaluation and a 14-day time frame for completing a risk evaluation packet. Allows two 14 day extensions relating to the submission of a risk

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
		<p>evaluation packet for “good cause.”</p> <ul style="list-style-type: none"> • Adds a consequence for not meeting the time frames. If the requester acts outside of the time frames, the requester can continue to pursue a risk evaluation but the person subject to the risk evaluation may not continue to be present at the operation pending the risk evaluation. • Includes a 14-day time frame for the department to determine whether or not a risk evaluation packet is complete and to notify the operation of the status of the packet. • Includes a 21-day time frame for the department to make a determination on a risk evaluation after accepting a completed risk evaluation packet.
§745.687	Amend	<ul style="list-style-type: none"> • Clarifies the language of the rule to be more consistent with what the CBCU is currently asking for via Form 2974, Request for Risk Evaluation Based on Past Criminal History or Central Registry Finding. • Adds the requirement of “any additional items requested by the CBCU Manager to assist with the determination of risk.”
	New §745.688	<p>Adds Licensing’s authority to place restrictions or conditions on a person’s presence at an operation pending the outcome of a risk evaluation.</p>
§745.689	Amend	<ul style="list-style-type: none"> • Clarifies the language of the rule to be more consistent with what the CBCU is currently asking for via Form 2974, Request for Risk Evaluation Based on Past Criminal History or Central Registry Finding. • Adds the requirement for additional information regarding the relationship of the foster or adoptive parents and the child, if any person is eligible for a risk evaluation and it is a relative foster or adoptive placement or the foster or adoptive placement has a significant longstanding relationship with the child. • Adds the requirement of “any additional items requested by the CBCU Manager to assist with the determination of risk.”
§745.691	Repeal	<p>Repeals the rule because new §745.686 addresses incomplete requests for risk evaluations.</p>
§745.693	Repeal	<p>Repeals the rule as much of the content is embodied in new §745.651.</p>
§745.695	Repeal	<p>Repeals the rule as much of the content is embodied in new §745.657.</p>
§745.696	Repeal	<p>Along with revamping the background check rules, this rule is being deleted and re-proposed as new §745.695.</p>
	New §745.695	<ul style="list-style-type: none"> • Indicates a licensed administrator must comply with the criminal history requirements in §745.651(a)(1). • Adds that in addition, licensed administrators are also monitored for financial crimes.

Current Rule Sections	Proposed Action; New Rule Section	Summary Explanation of Proposed Action
		<ul style="list-style-type: none"> Indicates a licensed administrator must comply with Central Registry requirements in new §745.657.
	New §745.696	<ul style="list-style-type: none"> This new rule clarifies how criminal history or a Central Registry finding may affect a person's ability to have an administrator's license or a licensed administrator's ability to be present at a particular operation. If a person has a criminal history or Central Registry finding that bars the person from being present at an operation while children are in care, then the person is prohibited from being a licensed administrator. If a person has a felony conviction of a financial crime within the last 10 years, then the person is prohibited from being a licensed administrator. If a person has a felony conviction of a financial crime older than 10 years or any misdemeanor conviction of a financial crime, then the person is not prohibited from being a licensed administrator. However, Licensing may place restrictions on the person's license, and the person may not be present at the operation while children are in care until the operation requests a risk evaluation for the person, and the risk evaluation is approved. If a person has a criminal history or Central Registry finding that only requires a risk evaluation, then the person is not prohibited from being a licensed administrator. However, Licensing may place restrictions on the person's license, and the person may not be present at the operation while children are in care until the operation requests a risk evaluation for the person, and the risk evaluation is approved.
§745.699	Amend	The language is clarified to be more consistent with the changes made to §745.701.
§745.701	Amend	<ul style="list-style-type: none"> Clarifies the language for when a person arrested or charged with a crime may be present at an operation while children are in care. Adds subsection (b) for those persons arrested or charged with a crime for which the person would be entitled to a risk evaluation if convicted. This subsection establishes Licensing's authority to place conditions or restrictions on such a person's presence at the operation while children are in care pending the resolution of the criminal matter as Licensing finds necessary to protect the health and safety of children.
§745.703	Amend	Corrects the references in relation to the newly worded rules.
§746.305	Amend	Amends the rule to be consistent with the rule changes in Chapter 745.
§747.303	Amend	Amends the rule to consistent with the rule changes in Chapter 745.

STATUTORY AUTHORITY AND STATUTES AFFECTED

The modification is proposed under Human Resources Code (H.R.C.) §40.0505 and Government Code §531.0055, 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; and H.R.C. §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.

(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 would be:

- A clearer understanding of the specific crimes that Licensing monitors for in the background check process.
- A more organized and timely risk evaluation process.
- Current and accurate information regarding the risk evaluation process for the public's access on the DFPS website.
- A clearer understanding of the risk evaluation process by stakeholders.
- An enhanced consistency across both the residential child-care and child day-care programs.
- Greater protection for children resulting from improved decision-making by operations concerning their employees.

There is no anticipated economic cost to persons who are required to comply with any of the proposed rule changes.

(c) Impact on Business. There is no anticipated adverse impact on small, micro, and large businesses as a result of the proposed rule changes because the proposed rule changes should not affect the cost of doing business.

(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

Stakeholder input will be obtained during the 30-day public comment period.

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*.