

MEMORANDUM

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

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

FROM: **Howard Baldwin
Commissioner**

SUBJECT: **Agenda Item 7a: Recommendation to adopt rule
changes in 40 TAC, Chapter 705, Adult Protective
Services; and Chapter 711, Investigations in DADS
and DSHS Facilities and Related Programs**



DATE: **July 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705 rule establishes definitions of abuse, neglect and exploitation (ANE), improves language for clarity, and updates outdated language. The Chapter 711 rule provides consistency for the Chapter 705 changes to the definitions of ANE in the Employee Misconduct Registry cases, updates names and outdated terminology, and expands and clarifies terms.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, DFPS desires to target who it serves more effectively. 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, DFPS 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. DFPS 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; and
3. streamline cases in which an expedited investigation would be more efficient.

The second reason DFPS requested this authority is a need to make changes to definitions for paid caretakers, particularly employees of home and community support services agencies (HCSSAs). The current APS in-home ANE definitions apply in situations in which a caretaker is paid or non-paid. DFPS 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 non-paid caretakers, which should be reflected in the definitions. In addition to these changes, DFPS is also clarifying and updating the language of the other rules in this chapter.

Proposed Changes to Chapter 711

The proposed changes to Chapter 711 include updating name changes and the expansion or clarification of terms. The changes also bring conformity with the in-home abuse, neglect and exploitation definitions being adopted in Chapter 705 of this title (relating to Adult Protective Services), the 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. Also, the name of the chapter is revised to delete the words "mental retardation" and "mental health."

STATUTORY AUTHORITY AND STATUTES AFFECTED

The current ANE definitions for the APS in-home program, by and large, reflect the statutory language. 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.

The new section is proposed under Human Resources Code (HRC) §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 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.

The new section is proposed under Human Resources Code §48.252 and Family Code §261.404, which provide APS authority to investigate allegations of abuse, neglect, and exploitation of persons receiving services from state-operated facilities and similar providers.

COMMENTS AND RESPONSES

Prior to publication of the proposed rules, initial drafts of the proposed rules 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 subsequent 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 also met individually with representatives from various stakeholder groups.

The rules were presented to the DFPS Council at their meeting on April 20, 2012. At the meeting, public testimony was received from several stakeholder representatives.

The proposed rules were published in the *Texas Register* on May 18, 2012. DFPS received comments from the Texas Association for Home Care & Hospice.

The responses to comments are noted below.

Section Affected and Original Proposal	Summary of Commenter's Concern	Department Response and Rationale
§705.1001(7); §705.1001(11); and §705.1001(18)	None.	No comments were received regarding the terms "authorized representative", "community care" or "institution"; however, DFPS found that the terms are not used in Chapter 705. DFPS recommends deleting these terms.
§705.1001(20)	None.	§705.1001(20), the definition for "ongoing relationship", is renumbered as §705.1001(17). No comment was received; however, DFPS determined two changes to the definition were needed: (1) Subsection (D) of this definition requires "an awareness of the circumstances in which the alleged victim is living." The definition of a caretaker already requires a person to accept responsibility for an alleged victim, and the definition of a paid caretaker already requires a person to be hired to provide personal care services. So, subsection (D) is not needed and DFPS recommends deleting it. (2) It was noted that current clarifying language regarding subsection (C) was missing, so DFPS recommends changing subsection (C) to read as follows, "an establishment of trust, beyond a commercial or contractual agreement."

Section Affected and Original Proposal	Summary of Commenter's Concern	Department Response and Rationale
§705.1001(21)	None.	<p>§705.1001(21), the definition for "paid caretaker" is renumbered as §705.1001(18).</p> <p>No comment was received; however, DFPS recommends amending this rule by adding the language "to provide personal care services to an alleged victim" to clarify and modify the home and community support service agency (HCSSA) employee paid caretaker definition. And "personal care" is defined in Section 142.001(22-a) of the Health and Safety Code</p> <p>Also see comments at §705.1009(b)(2) regarding "paid caretaker" and "personal care services".</p>
§705.1005	None.	No comment was received; however, DFPS recommends adding "the" before "alleged victim" in §705.1005(b)(5) for clarity.
§705.1007	None.	No comment was received; however, DFPS recommends amending (a) to include the word "reasonable" to modify "person" because the intellectual disabilities of some APS clients make some of their fears unreasonable.
§705.1009 (b)(2)	A commenter did not agree with adding the concept of "negligence" to the definition of "neglect by a paid caretaker." This commenter felt the language exceeded DFPS' statutory authority. In addition, the commenter felt this additional language might result in professionals (e.g. nurses or doctors) being investigated for clinical practice issues (e.g. giving the wrong medication).	<p>DFPS recommends adopting this definition without change.</p> <p>Newly passed (2011) §48.001(c) of the Human Resources Code gave DFPS the authority to adopt rules, which would define ANE for in-home investigations. The proposed rule establishes a standard of conduct that is appropriate and necessary for a paid caretaker as that term is now defined in section 705.1001(18).</p> <p>However, DFPS has clarified that the "paid caretaker" definition at §705.1001(21) (now renumbered to 705.1001 (18)) only applies to "personal care" services as defined in Section 142.001(22-a) of the Health and Safety Code. Since many professionals (e.g. doctors and nurses) do not provide personal care services, this should alleviate some of the concern. In addition, APS is developing policy regarding how to handle clinical issues for an in-home setting.</p>

Section Affected and Original Proposal	Summary of Commenter's Concern	Department Response and Rationale
§705.1011	<p>A commenter expressed concern as to why “informed consent” was not included in the paid caretaker definition of exploitation.</p> <p>This commenter also indicated concern that the reference to Fraud in Chapter 32 of the Penal Code does not have the intended effect as the proposed rule fails to clarify that certain acts by a home and community support service agency employee constitute Medicare/Medicaid fraud but not financial exploitation.</p>	<p>DFPS agrees with the commenter and recommends amending §705.1011 in a manner that sets identical standards, including informed consent, for financial exploitation for both paid caretakers and unpaid caretakers with the exception of including theft as exploitation only for paid caretakers.</p> <p>DFPS also agrees that including the Fraud language of Chapter 32 of the Penal Code confuses the issue and is deleting this language. However, certain fraud will from time to time be classified as exploitation for paid and unpaid caretakers. DFPS is not recommending adding a reference to Medicare/Medicaid fraud in rule. Adult Protective Services policy currently clarifies that Medicare/Medicaid fraud is not financial exploitation as defined in §705.1011.</p> <p>DFPS is also recommending replacing "person" with "alleged victim" throughout the definition.</p>
§705.4103(a)	None.	No comment was received; however, DFPS recommends amending §705.4103(a) to include the term “home and community support services agency” in lieu of “home health agency.”
§711.1	None	No comment was received; however, DFPS found that the wording for home and community-based services programs had not been updated. DFPS recommends updating the language by deleting the word “waiver”.
§711.3(11)	None.	No comment was received; however, DFPS found that this section was not updated with people-first language. DFPS recommends updating with people-first language.
§711.3(20)	None	No comment was received; however, DFPS found that the wording for home and community-based services programs had not been updated. DFPS recommends updating the language by deleting the word “waiver”.
§711.3(26)	None.	No comment was received; however, DFPS found inconsistent capitalization and use of parentheses. DFPS recommends modifying the format to be consistent with §711.3(21).

Section Affected and Original Proposal	Summary of Commenter's Concern	Department Response and Rationale
§711.13(b)	None	No comment was received; however, DFPS found the "for good cause shown" and "ongoing relationship" wording confusing and is recommending that the language in section (b) be simplified.
§711.1402(14)	None.	<p>No comment was received; however, DFPS found that this section only references the Human Resources Code and not the new rule definitions for in-home investigations. DFPS recommends referencing investigations conducted by APS under Chapter 705.</p> <p>DFPS also found that this section inaccurately portrays in-home investigations as limited to those involving HCSSA providers, and DFPS is recommending the deletion of that language.</p>
§711.1404	<p>(1) A commenter did not agree with adding the concept of "negligence" to the definition of "neglect by a paid caretaker." This commenter felt the language exceeded DFPS' statutory authority. In addition, the commenter felt this additional language might result in professionals (e.g. nurses or doctors) being investigated for clinical practice issues (e.g. giving the wrong medication).</p>	<p>(1) DFPS recommends adopting the "neglect" definition without change.</p> <p>Newly passed (2011) §48.001(c) of the Human Resources Code gave DFPS the authority to adopt rules, which would define ANE for in-home investigations. The proposed rule establishes a standard of conduct that is appropriate and necessary for a paid caretaker as that term is now defined in section 705.1001(18).</p> <p>However, DFPS has clarified the "paid caretaker" definition at §705.1001(21) (now renumbered to 705.1001 (18)) as only applying to "personal care" services as defined in Section 142.001(22-a) of the Health and Safety Code. Since many professionals (e.g. doctors and nurses) do not provide personal care services, this should alleviate some of the concern. In addition, APS is developing policy regarding how to handle clinical issues for an in-home setting.</p>
	<p>(2a) A commenter expressed concern as to why "informed consent" was not included in the paid caretaker definition of exploitation.</p>	<p>(2a) DFPS recommends amending §711.1404(5) in a manner that sets identical standards, including informed consent, for financial exploitation for both paid caretakers and unpaid caretakers with the exception of including theft as exploitation only for paid caretakers.</p>

Section Affected and Original Proposal	Summary of Commenter's Concern	Department Response and Rationale
§711.1404 (cont'd)	(2b) This commenter also indicated concern that the reference to Chapter 32 of the Penal Code does not have the intended effect as the proposed rule fails to clarify that certain acts by a home and community support service agency employee constitute Medicare/Medicaid fraud but not financial exploitation.	(2b) DFPS agrees that including the Fraud language of Chapter 32 of the Penal Code confuses the issue and is deleting this language. However, certain fraud will from time to time be classified as exploitation for paid or unpaid caretakers. DFPS is not recommending adding a reference to Medicare/Medicaid fraud in rule. Adult Protective Services policy currently clarifies that Medicare/Medicaid fraud is not financial exploitation as defined in §711.1404(5).
	None.	DFPS is also recommending (a) replacing "person" with "alleged victim" throughout the definition; (b) referencing for in-home investigations the ANE definitions as defined in Chapter 705 of this title (relating to Adult Protective Services; and (c) making the same definitional changes to §711.1404(2)(B)(v), §711.1404(3)(A), and §711.1404(5) that were made to §705.1005(b)(5), §705.1007(a), and §705.1011. For specific changes made on those rules, please see the comments for the specific rule.
§711.1406(b)	None	No comment was received; however, DFPS found the "for good cause shown" and "ongoing relationship" wording confusing and is recommending that the language in section (b) be simplified.

RECOMMENDATION

It is recommended that the Council recommend adoption of these rules, with or without changes, as they are attached to this memo.

SCHEDULE

Milestones	Dates
Proposed rules presented to the Council for recommendation to publish	April 20, 2012
Approval to publish proposed rules received from HHSC	May 2, 2012
Proposed rules published in the <i>Texas Register</i>	May 18, 2012
Thirty-day comment period ends	June 18, 2012

Milestones	Dates
Rules presented to the Council for recommendation to adopt	July 20, 2012
Estimated date that DFPS receives approval to adopt rules from HHSC	August 3, 2012
Estimated date the adopted rules published in the <i>Texas Register</i>	August 17, 2012
Estimated effective date	September 1, 2012

ATTACHMENTS

Attached is a copy of the proposed adopted rules, as recommended for submittal to the Texas Register.