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| MEMORANDUM**TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES** |

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| TO: | **Chair and Members Department of Family and Protective Services Council** | agencyseal |
| FROM: | **John J. Specia, Jr.Commissioner** |
| SUBJECT: | **Agenda Item 6f: Recommendation to propose rule changes in 40 TAC, Chapter 745, Licensing; and Chapter 749, Minimum Standards for Child-Placing Agencies** |
| DATE: | **October 18, 2013** |

BACKGROUND AND PURPOSE

The Child Care Licensing Division proposes rule amendments to the Texas Administrative Code (TAC), Chapter 745, to implement Senate Bill (S.B.) 330, S.B. 353, S.B. 427, House Bill (H.B.) 1648, and H.B. 2725, which were enacted by the 83rd Legislature, Regular Session, 2013.

S.B. 330 amended the Texas Family Code (TFC) by adding §107.05145, which enables a social study evaluator to obtain from DFPS a complete, unredacted copy of any investigative record regarding abuse or neglect that relates to any person residing in the residence subject to the social study. To implement this legislation, DFPS is proposing amendments to rules in Chapter 745 to outline:

* that a social study evaluator is entitled to obtain a complete, unredacted copy of a confidential Child Care Licensing investigative report; and
* how a social study evaluator may obtain this information.

S.B. 353 amended Human Resources Code (HRC) §42.041(b)(12) to create an exemption from DFPS regulation for certain emergency shelters that:

* do not otherwise require a child-care license from DFPS;
* provide shelter or care to a minor and the minor’s children, if any, pursuant to TFC §32.201; and
* either contract with a state or federal agency ***or*** are a family violence center that meets the requirements to obtain a contract with HHSC as specified in HRC §51.005(b)(3).

S.B. 427, Section 1, amended the HRC by adding §42.041(b)(23), which creates an exemption from DFPS regulation for certain emergency shelters that:

* do not otherwise require a child-care license from DFPS;
* provide emergency shelter and care for up to 15 days to alleged victims of human trafficking (as defined under Penal Code § Section 20A.02) who are between the ages of 13 and 17:
* are operated by a nonprofit organization; and
* are located in a municipality with a population of at least 600,000 that is in a county on an international border; and
1. are either licensed by, or operate under an agreement with, a state or federal agency to provide shelter and care to children; ***or***
2. are a family violence shelter that meets the requirements to obtain a contract with HHSC as specified in HRC §51.005(b)(3).

S.B. 353 and S.B. 427, Section 1, also amended HRC §42.041(b)(13) to correct the name of a state agency from “Texas Youth Commission” to “Texas Juvenile Justice Department.” To implement S.B. 353 and S.B. 427, Section 1, DFPS is proposing amendments to rules in Chapter 745 to:

* correct the name of a state agency listed in §745.115(2); and
* outline the two new exemption categories.

S.B. 427, Section 3, amended HRC §42.056 by adding Federal Bureau of Investigation (FBI) fingerprint check requirements for the following persons affiliated with a child-placing agency, independent foster home, or general residential operation unless a valid FBI check was previously obtained:

* any prospective foster or adoptive parent regardless of whether the child-placing agency accepts placement of children in the conservatorship of DFPS;
* a current foster or adoptive parent;
* the director, owner, and operator;
* an employee;
* a prospective employee;
* any person who is aged 14 or older and is counted in the child/caregiver ratio;
* any person who is aged 14 or older and has unsupervised access to children in care; and
* any person who is aged 14 or older and resides in a residential operation, foster or adoptive home, or prospective foster or adoptive home.

S.B. 427, Section 4, amended HRC §42.078(a) and (a-1) and added (a-2) to:

* permit DFPS to impose a monetary penalty against any type of operation (other than a small employer-based child-care operation or a temporary shelter program) or a controlling person;
* clarify that a nonmonetary penalty must be imposed before a monetary penalty unless the violation is listed in Subsection (a-2); and
* permit DFPS to impose a monetary penalty before imposing a non-monetary penalty in accordance with Subsection (a-2) for the following violations:
1. failing to timely submit background check requests on two or more occasions;
2. failing to submit a background check request before the 30th day after being notified by DFPS that the background check request is overdue;
3. allowing a person to be present at an operation when the results of the background check have not been received (except in certain cases where there is a staff shortage);
4. knowingly allowing a person to be present at an operation when the background check results have been received and those results preclude the person’s presence; and
5. violating a condition/restriction that was placed on the person’s presence at the operation as part of a pending or approved risk evaluation.

To implement S.B. 427, Section 4, DFPS is proposing amendments to rules in Chapter 745 to outline:

* when Child Care Licensing may impose a monetary penalty before a nonmonetary penalty; and
* when Child Care Licensing may impose a monetary penalty against a controlling person.

S.B. 427, Sections 7 and 8, amended HRC §§43.004 and 43.009 by adding Federal Bureau of Investigation (FBI) fingerprint check requirements for licensed administrators and applicants for an administrator’s license unless a valid FBI check was previously obtained.

To implement S.B. 427, Sections 3, 7, and 8, DFPS is proposing amendments to rules in Chapter 745 to clarify which persons require a fingerprint-based criminal history check.

S.B. 427, Section 9, amended HRC §43.010 by adding that DFPS may deny, revoke, suspend, or refuse to renew a license for an applicant for an administrator’s license or a currently licensed administrator who has engaged in conduct that makes the person ineligible for:

* a permit under HRC §42.072; or
* employment as a controlling person or services in that capacity under Section §42.062.

To implement S.B. 427, Section 9, DFPS is proposing amendments to rules Chapter 745 to clarify the circumstances under which Child Care Licensing may take remedial action against an administrator’s license or administrator’s license application.

H.B. 1648 added HRC §42.004, which makes photographs, audio or video recordings, depictions, or documentations of a child made by Child Care Licensing in the course of an inspection or investigation confidential, and allows Child Care Licensing to release these items only as outlined in rule or by law. To implement H.B.1648, DFPS is proposing amendments to existing rules in Chapter 745 and the addition of one new rule at §745.8495 concerning the confidentiality of licensing records. Because H.B. 1648 takes effect on September 1, 2013, Licensing is proposing the simultaneous adoption of §745.8495, as an emergency rule, in order to provide immediate rule-based authority for who can have access to the records made confidential by H.B. 1648. The emergency rule will remain in effect until such time as the non-emergency rules proposed in this Agenda Item take effect. (See the related agenda item in this council packet for the background and content of the emergency rule adoption of §745.8495.)

H.B. 2725 amended Government Code §552.138 to define “victims of trafficking shelter center” and expand existing confidentiality requirements for family violence shelters and sexual assault programs to victims of trafficking shelter centers that are licensed as general residential operations, independent foster homes, or child-placing agencies. To implement this legislation, DFPS is proposing amendments to Chapter 745.

The Child Care Licensing Division is also proposing amendments and new rules to Chapters 745 and 749 to comply with federal background check requirements, clarify existing background check requirements, provide more flexibility to operations requesting risk evaluations, and reduce risk to children by thoroughly vetting a person who is on parole before allowing him or her to be present at an operation.

DETAILED SECTION ANALYSIS AND DISPOSITION TABLE

| **Current Rule Sections** | **Proposed Action; New Rule Section** | **Summary Explanation of Proposed Action** |
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| §745.115 | Amend | The amendment implements HRC §42.041(b)(13) by changing the title of Texas Youth Commission to Texas Juvenile Justice Department. |
| §745.129 | Amend | The amendment implements HRC §42.041(b)(12) and (b)(23) by amending Subsection (4) and adding Subsection (7) to outline the circumstances under which an emergency shelter is exempt from licensure when the shelter provides shelter and care to:* a minor and the minor’s children, if any; or
* a victim of human trafficking as defined in Penal Code 20A.02.
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| §745.601 | Amend | The amendment adds definitions for the terms “initial background check” and “renewal background check” that are used in Subchapter F, Chapter 745, to clarify background check requirements. |
|  | New §745.603 | This new rule clarifies existing background check requirements by defining who DFPS considers to be “present at an operation while children are in care”. |
| §745.615 | Repeal and New §745.615 | Section 745.615 is repealed and proposed as new. The new rule implements HRC §§42.042 and 42.056 and makes the following changes from the repealed version of §745.615: (1) deletes references to background checks for an administrator’s license, which are addressed in rule amendments in Subchapter N of Chapter 745;(2) deletes a subsection that only required an FBI fingerprint check prior to the placement of a child in DFPS conservatorship in some cases; (3) requires child-placing agencies, independent foster homes, and general residential operations to request an FBI fingerprint check for all persons listed in subsection (a)(1)-(6); and (4) adds needed clarification to the background check requirements. |
|  | New§745.616 | This new transitional rule provides a phased-in schedule for the submission of new fingerprint-based criminal history checks and establishes deadlines for compliance before any provider will be cited for violation of the new requirements. The substance of this rule has already been shared with providers so that they would have as much advance warning as possible regarding the new FBI check requirements mandated by SB 427, which became effective 9/1/2013.  |
| §745.625 | Amend | The rule clarifies when an initial or renewal background check is due in accordance with HRC §42.056.  |
| §745.630 | Repeal and New | This repealed and new rule clarifies when a previously completed FBI fingerprint-based check remains valid, as well as when a new check must be conducted.  |
| §745.651 | Amend | This rule specifies which criminal convictions may affect a person’s ability to be present at an operation. Amendments provide that a person must have an approved risk evaluation prior to being present at an operation if the person:* was convicted of a felony not enumerated in the criminal convictions charts of the DFPS website; and
* is currently on parole for the offense.

The purpose of the rule changes is to reduce risk to children by thoroughly vetting a person who is on parole before allowing him or her to be present at an operation. |
| §745.686 | Amend | This rule outlines the time frames for requesting a risk evaluation. This rule is amended to give operations additional time to submit a risk evaluation packet. |
| §745.697 | Amend | This rule specifies criteria for when an approved risk evaluation is considered permanent. This rule is amended to indicate a person with an approved risk evaluation at an operation does not need a new risk evaluation only for as long as:* the person’s role at the operation, as identified in the risk evaluation letter, does not change; and
* the circumstances of that person’s contact with children at the operation are the same as when the risk evaluation was approved.

This rule is further amended to indicate that if any of the criteria for making an approved risk evaluation permanent are not met, then:* the operation must request a new risk evaluation and all of the time frames and processes noted in Chapter 745, Subchapter F would apply;
* the Centralized Background Check Unit (CBCU) will determine
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| §745.697 (continued) |  | whether or not the person may work or be present at the operation; and * the conditions or restrictions noted on the previously approved risk evaluation will remain in effect unless or until the CBCU explicitly amends them.
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| §745.8481 | Amend | This rule specifies the types of information in an operation's monitoring file that may be released and those which are confidential. The proposed amendments: * clarify that the rule is applicable to all information in the operation's monitoring file, not only inspection results; and
* add a cross-reference to §745.8493 (regarding *Are there any portions of Licensing records that Licensing may not release to anyone?)* in order to more clearly outline what information from the operation's monitoring file is confidential and may not be released.
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| §745.8485 | Amend | This rule specifies which investigative records are confidential. The proposed amendments:1. clarify that completed investigations that do not involve abuse and neglect become part of the operation's monitoring file and confidentiality limits of those records are outlined in §745.8481; and
2. delete duplicative language in subsection (c) regarding what information may not be released to the public, as that information is covered in §745.8493 (regarding *Are there any portions of Licensing records that Licensing may not release to anyone?*).
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| §745.8487 | Amend | This rule outlines what information Child Care Licensing can release to the public after the completion of an abuse or neglect investigation. The proposed amendments clarify that DFPS:1. must remove the information listed in this section before releasing it to the public; and
2. may not release to the public information that is confidential under §745.8493 (regarding *Are there any portions of Licensing records that Licensing may not release to anyone?*).
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| §745.8491 | Amend | This rule specifies which persons can obtain information in a confidential abuse or neglect investigation file. The proposed amendments:1. change the title and rule to clarify who can obtain information in the portions of the abuse or neglect investigation file that is both confidential and not releasable to the public, yet not prohibited
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| §745.8491 (continued) |  | from being released to anyone as described in §§745.8493 (regarding Are there any portions of Licensing records that Licensing may not release to anyone?) and 745.8495 (regarding Who can review or have a copy of a photograph or an audio or visual recording, depiction, or documentation of a child that is in Licensing records?); and1. implement Family Code §107.05145 by adding language that a social study evaluator has the authority to obtain from DFPS a complete, unredacted copy of any investigative report regarding abuse or neglect that relates to any person residing in the residence subject to the social study.
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| §745.8493 | Amend | This rule currently outlines what portions of an abuse or neglect investigation file that Child Care Licensing may not release to anyone. The proposed amendments:1. Change the title and rule to expand the rule's applicability to include all Licensing records.
2. Delete subsection (a)(1), which covers the confidentiality of photographs, videotapes, and audiotapes of children taken during an abuse or neglect investigation, because the requirements related to the confidentiality of these items are being moved to new rule §745.8495 (regarding *Who can review or have a copy of a photograph or an audio or visual recording, depiction, or documentation of a child that is in Licensing records?)* as part of implementation of Human Resources Code §42.004.
3. Implement Government Code §552.138, which expands existing confidentiality requirements for family violence shelters and sexual assault programs to victims of trafficking shelter centers that are licensed as General Residential Operations or Child-Placing Agencies. The rule is being amended to outline that certain information regarding these shelter centers cannot be released.
4. Implement Family Code §107.05145, which enables a social study evaluator to obtain from DFPS a complete, unredacted copy of any investigative report regarding abuse or neglect that relates to any person residing in the residence subject to the social study. The rule is being amended to outline that the information can be released to the social study evaluator.
5. Add a statement to clarify that any other information is not listed but confidential under state or federal law also may not be released.
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|  | New §745.8495 | The new rule implements HRC §42.004, by specifying the persons who may review or have copies of confidential audio or video depictions of children in Licensing records.  |
| §745.8711 | Amend | This rule currently specifies when a monetary penalty may be imposed. The amendments implement HRC §42.078, by referencing an exception to imposing a nonmonetary penalty before a monetary one as specified in new §745.8713. |
|  | New §745.8713 | This new rule implements HRC §42.078 by specifying that a monetary penalty may be imposed before imposing other forms of corrective action against an operation, or a controlling person for an operation, for:* failing to timely submit background check requests on two or more occasions;
* failing to submit a background check request before the 30th day after being notified by DFPS that the background check request is overdue;
* allowing a person to be present at an operation when the results of the background check have not been received (except in cases where there is a staff shortage);
* knowingly allowing a person to be present at an operation when the background check results have been received and those results preclude the person’s presence; or
* violating a condition/restriction that was placed on the person’s presence at the operation as part of a pending or approved risk evaluation.
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|  | New §745.8715 | This new rule implements HRC §42.078 by listing circumstances under which an administrative penalty may be imposed against a controlling person. |
|  | New§745.8934 | This new rule implements HRC §43.004 by requiring applicants for an administrator license to undergo a fingerprint-based criminal history check, unless they have previously undergone a check that remains valid, as provided under §745.630. |
| §745.8993 | Amend | This rule amendment implements HRC §43.009 by requiring licensed administrators to undergo a fingerprint-based criminal history check each time their license is renewed, unless they have previously undergone a check that remains valid, as provided under §745.630. |
| §745.9037 | Amend | This rule specifies the circumstances in which remedial action may be taken against an administrator’s license or an application for an administrator’s license.This rule implements HRC §43.010 by changing “child-care facility” to “facility” to be consistent with statute. This rule implements HRC §43.010 and allows DFPS to deny, revoke, suspend, or refuse to renew a license for an applicant for an administrator’s license or a currently licensed administrator who is sustained as a controlling person and currently banned from obtaining a permit. |
| §745.9071 | Amend | This rule specifies how a social study evaluator can obtain certain information needed to complete an independent pre-adoptive social study. The proposed amendments implement TFC §107.05145, which enables a social study evaluator to obtain from DFPS a complete, unredacted copy of any investigative report regarding abuse or neglect that relates to any person residing in the residence subject to the social study. The title is being changed and a subsection (c) is being added to specify how the social study evaluator will obtain an unredacted copy of an investigative report regarding abuse or neglect. |
| §745.9093 | Amend | This rule specifies how a social study evaluator can obtain certain information needed to complete an independent post-placement adoptive social study and report. The amendments implement TFC §107.05145, which enables a social study evaluator to obtain from DFPS a complete, unredacted copy of any investigative report regarding abuse or neglect that relates to any person residing in the residence subject to the social study. The title is being changed and a subsection (c) is being added to specify how the social study evaluator will obtain an un-redacted copy of an investigative report regarding abuse or neglect. |
| §749.2473 | Amend | This rule specifies what a child-placing agency must do before approving a foster home that another child-placing agency previously approved. The changes to this rule clarify background check requirements by requiring child-placing agencies to meet the requirements in Chapter 745, Subchapter F (Background Checks), rather than requiring the child-placing agency to request new background checks, before approving a foster home that another child-placing agency has previously approved.  |

STATUTORY AUTHORITY AND STATUTES AFFECTED

The modification is proposed under HRC §40.0505 and Government Code §531.0055, which provide that the HHSC Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DFPS; and HRC §40.021, which provides that the DFPS 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 proposed rules implement:

* Chapter 42 of the Human Resources Code;
* Chapter 43 of the Human Resources Code;
* Chapter 522 of the Government Code; and
* Chapter 107 of the Texas Family Code.

FISCAL IMPLICATIONS

(a) Fiscal Impact. For each of the first five years that the rules will be in effect there will be no costs or revenues to local government as a result of enforcing or administering this section. According to the CBCU, implementation of the legislation requiring FBI checks for additional persons will increase the CBCU’s workload; however, the Legislature provided an FTE to cover the increase in workload. CPS will be required to meet fingerprinting requirements for some of their current staff who fall under the purview of CPS’ child-placing agency license. The cost of the fingerprint check is $41.45 per employee. The legislature provided funding to cover $31.50 per check. CPS is paying the extra $9.95 for each check. CPS anticipates paying for 2,125 FBI checks during the first year of implementation for a total of $21,144 and 430.3 FBI checks during each subsequent year of implementation for a total of $4,281 per year. These costs will be absorbed within existing resources.

(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:

* Compliance with the Human Resources Code, Texas Family Code, and Government Code.
* Compliance with federal background check requirements.
* Clarification regarding current background check requirements.
* Increased flexibility for operations requesting risk evaluations.
* Reduced risk to children.

An economic cost is anticipated for persons required to comply with the proposed rule changes relating to S.B. 427’s FBI fingerprint check requirements. The proposed changes to §745.615 will impact large, small, and micro-businesses and persons who must comply with the new regulations concerning fingerprint-based background checks. The proposed change will impact three categories of residential operations: 1) general residential operations; 2) child-placing agencies; and 3) independent foster homes. Some of these operations meet the definition of a small or micro-business under Chapter 2006 of the Government Code. The proposed change will also impact individuals who currently hold an administrator’s license and individuals who apply for an administrator’s license.

An FBI check for a prospective or current foster parent costs $39.95, while for others (e.g., employees or administrators) an FBI check costs $41.45. After the first year of implementation, the one-time cost of an FBI check will generally be limited to prospective employees, prospective foster parents, applicants for an administrator’s license, etc. Once a person has undergone an initial fingerprint-based FBI check, the person is not required to resubmit fingerprints in the future provided the person does not move out-of-state after the initial check and that the person undergoes name-based background checks at least every two years.

(c) Impact on Business. An adverse impact on small, micro, and large businesses is anticipated as a result of S.B. 427 and the proposed rule changes to §745.615. Child Care Licensing anticipates the one-time cost of a fingerprint check required by HRC §42.056 may impact the operation’s cost of doing business, to the extent that the business chooses to cover the costs of fingerprint-based checks on persons affiliated with the operation. The total economic impact will vary greatly, depending on the size of the operation, the number of background checks requested by the operation, the turnover rate of the operation’s employees; and whether or not the operation assumes responsibility for payment of the costs of fingerprints or requires the person being fingerprinted to bear that cost.

(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. An impact on technology is not anticipated as a result of the proposed rule changes.

STAKEHOLDER INPUT

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

In response to the passage of H.B. 1648 (83rd Legislature), Child Care Licensing developed a workgroup to obtain input from providers, stakeholders, advocates, and field staff on the development of rule amendments to confidentiality rules in TAC 745, Subchapter K, Division 3. A workgroup meeting was held on June 24, 2013, where Child Care Licensing obtained input on rule development. The workgroup provided feedback on the draft rules during a meeting held on July 29, 2013.

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*.