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

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| TO: | Department of Family and Protective Services Logo**Chair and Members Department of Family and Protective Services Council** |
| FROM: | **John J. Specia, Jr., DFPS Commissioner** |
| SUBJECT: | **Agenda Item XX: Recommendation to propose rule changes in 40 TAC 745 Licensing, relating to enforcement actions and technical assistance** |
| DATE: | **April 22, 2016** |

## BACKGROUND AND PURPOSE

The Child Care Licensing (CCL) Division proposes to amend 40 TAC, Chapter 745, Licensing, Subchapters K (Inspections and Investigations) and L (Remedial Actions). The recommended changes are needed to implement recommendations the Sunset Advisory Commission made in the *Department of Family and Protective Services Staff Report with Commission Decisions* published in August 2014 and required by Senate Bill (S.B.) 206, SECTIONS 81 and 82, that was passed by the 84th Texas Legislature in 2015. These sections respectively created Human Resources Code (HRC) §42.0704 and amended §42.078(a-2).

HRC §42.0704 requires DFPS to adopt rules that outline a general enforcement policy that describes the department's approach to enforcement, including:

* A summary of the department's general expectations in enforcing HRC, Chapter 42; and
* A methodology for determining appropriate action to take when a permit holder violates Licensing laws or rules that allows the department to consider the circumstances of the particular case, the nature and seriousness of the violation, history of previous violations, and other aggravating and mitigating factors.

HRC §42.0704 also requires the department to develop a plan for strengthening its enforcement efforts and for making objective regulatory decisions. Prior to the effective date of the rules proposed in this rule packet, Licensing will require all Licensing staff to receive training to promote staff's understanding of the policy and their ability to apply it appropriately and clearly explain it to providers. After the initial training, the concepts will be incorporated into Licensing's Basic Skills Development training, which all new Licensing staff receive, moving forward. Licensing's Performance Management Unit (PMU) performs quality assurance activities to ensure Licensing staff are adhering to policy and consistently enforcing licensing laws and regulations and will evaluate the effectiveness of the enforcement policy through a quality assurance review scheduled to be completed in early fiscal year 2018 (one year after implementation of the new enforcement policy). In addition, PMU risk analysts conduct neutral assessments of an operation's compliance history when Licensing staff identify the operation as having a compliance history that is at increased risk for children. As part of this process, PMU provides recommendations for enforcement actions and, six months later, reviews the operation's record to determine what enforcement action was taken and whether risk was reduced. This work enables Licensing to assess the effectiveness of the enforcement policy on an ongoing basis.

The new version of HRC §42.078(a-2) expands the department's authority to impose administrative penalties before taking corrective action to all high risk violations, not just violations related to background checks.

A summary of the changes to create an enforcement framework include:

* Changing the title of Subchapter L from "Remedial Actions" to "Enforcement Actions";
* Defining "technical assistance" and outlining when and why technical assistance is provided;
* Clarifying that enforcement actions are not progressive in nature, meaning they are not necessarily recommended or imposed from least to most restrictive;
* Clarifying that CCL may end an enforcement action at any time to impose a more serious enforcement action;
* Removing the ability to extend an enforcement action;
* Identifying a voluntary plan of action as a voluntary enforcement action;
* Defining voluntary plan of action as a collaborative effort between CCL and the provider;
* Identifying factors CCL considers when deciding to recommend a voluntary plan of action;
* Limiting the number of times a plan of action may be recommended if an operation has already been on a plan of action for similar issues within the previous year;
* Providing a more clearly defined delineation between evaluation and probation by restricting the circumstances under which CCL may consider imposing evaluation;
* Decreasing the length of time an operation may remain on evaluation to six months;
* Identifying factors CCL considers when deciding to impose evaluation;
* Identifying factors CCL considers when deciding to impose probation;
* Identifying factors CCL considers when deciding to impose each adverse action; and
* Adding language allowing CCL to impose administrative penalties prior to taking corrective action for violations of high risk standards

## DETAILED SECTION ANALYSIS AND DISPOSITION TABLE

| **Current Rule Sections** | **Proposed Action; New Rule Section** | **Summary Explanation of Proposed Action** |
| --- | --- | --- |
|  | New Subchapter K DIVISION 6 | Create a new DIVISION in Subchapter K to house rules related to technical assistance. |
|  | New §745.8581 | This new rule defines technical assistance and clarifies that technical assistance is not a deficiency or an enforcement action and is not used in lieu of citing a deficiency. |
|  | New §745.8583 | This new rule identifies when and how Licensing may provide technical assistance. |
|  | New §745.8585 | This new rule clarifies that a permit holder may not request an administrative review of Licensing providing technical assistance. |
|  | New §745.8600 | This new rule outlines the general purpose of enforcement actions. |
| §745.8601 | Amend | This amendment clarifies that Licensing may provide technical assistance in response to a deficiency in addition to recommending or imposing another enforcement action. |
| §745.8603 | Amend | This amendment:   * Replaces the term "remedial action" with "enforcement action"; * Adds voluntary actions to the chart in subsection (a) listing the types of enforcement actions Licensing may take; * Rewords and clarifies that listed family homes are not subject to voluntary or corrective action; * Adds subsection (b) to clarify that Licensing recommends or imposes enforcement actions based on risk and that CCL does not have to impose a less restrictive action if it is determined that a more restrictive action is warranted; and * Adds subsection (c) to clarify that Licensing may take multiple actions at the same time. |
| §745.8605 | Amend | This amendment:   * Replaces the term "remedial action" with "enforcement action"; and * Deletes outdated date references in regards to operations that are ineligible to receive for a permit for a period of 5 years. |
| §745.8607 | Amend | This amendment:   * Replaces the term "remedial action" with "enforcement action"; and * Clarifies in section (5) that CCL also considers the permit holder's ability to maintain compliance with standards, rules, and laws, when deciding which type of enforcement action to recommend or impose. |
| §745.8609 | Amend | This amendment:   * Replaces the term "remedial action" with "enforcement action"; * Adds voluntary actions to section (1) of the chart; and * Clarifies in section (2) that Licensing notifies a permit holder of the intent to impose adverse action in writing. |
| §745.8611 | Amend | This amendment:   * Replaces the term "remedial action" with "enforcement action" and removes language referring to extensions; * Adds new section (1) "Voluntary Action" to the chart in subsection (a) and includes a maximum timeframe of six months for a voluntary plan of action; * Makes the following changes to new sections (2) and (3) in the chart in subsection (a):   + Removes the minimum length of time evaluation and probation may be imposed;   + Removes language referring to extensions for evaluation and probation; and   + Reduces the amount of time evaluation may be imposed from a maximum of one year to six months; * Renumbers existing section (3) to new section (4) and clarifies that the suspension period will be up to 120 days as necessary to resolve the danger or threat of danger; * Renumbers existing section (4) to new section (5) in the chart in subsection (a); and * Adds subsection (b) stating that Licensing may end voluntary or corrective action early if compliance is met and maintained, or if compliance is not met and Licensing determines a more restrictive enforcement action is necessary. |
| §745.8613 | Amend | This amendment:   * Replaces the term "remedial action" with "enforcement action"; * Adds new section (1) to the chart in subsection (a) to include voluntary plan of action and clarifies that a permit holder does not have the right to challenge a plan of action, since it is a voluntary action; and * Renumbers the existing numbers in the chart in subsection (a). |
| Subchapter L Division 2 Title | Amend | This amendment renames Division 2 of Subchapter L to "Voluntary and Corrective Actions." |
| §745.8631 | Amend | This amendment:   * Adds a new section (1) to include voluntary plan of action and describes a voluntary plan as an action that: * Licensing recommends; and * Is a collaborative effort between Licensing and the operation to improve compliance with minimum standards; * Renumbers existing sections (1) and (2) to new sections (2) and (3); and * Makes the following changes to new sections (2) and (3) regarding evaluation and probation:   + Removes language outlining the actions Licensing may take if compliance is not met, or if deficiencies worsen since this information is included in the new proposed §745.8641; and   + Clarifies that Licensing will conduct inspections at least monthly during the evaluation and probation period. |
| §745.8633 | Repeal | This rule is being repealed and proposed as new §745.8639. |
|  | New §745.8633 | This new rule outlines when Licensing may recommend a voluntary plan of action, including:   * Outlining the criteria Licensing considers to determine whether to recommend a plan of action in subsection (a); * Stating that Licensing may take into consideration the compliance history for each operation the permit holder oversees when determining whether a plan of action is appropriate in subsection (b); and * Outlining when Licensing may consider imposing a more restrictive enforcement action in lieu of a voluntary plan of action in subsection (c). |
| §745.8635 | Repeal | This rule is being repealed and being proposed with changes at §745.8643. |
|  | New §745.8635 | This new rule outlines when Licensing may impose evaluation, including:   * Listing the circumstances under which Licensing may impose evaluation in subsection (a); and * Stating that Licensing may impose probation or adverse action if Licensing determines the operation is not eligible for evaluation in subsection (b). |
|  | New §745.8637 | This new rule outlines when Licensing may impose probation, including:   * Listing the circumstances under which Licensing may impose probation in subsection (a); and * Stating that Licensing may impose adverse action if Licensing determines the operation is not eligible for probation in subsection (b). |
|  | New §745.8639 | This new rule lists the requirements a permit holder must meet during a voluntary plan of action. |
|  | New §745.8641 | This new rule contains the same language as repealed §745.8633. The language remains mostly the same as the repealed rule. However, language has been amended in section (3) to clarify what must be posted during evaluation and probation. |
|  | New §745.8643 | This new rule clarifies that CCL may increase inspections or recommend a more serious enforcement action if an operation does not comply with conditions of evaluation or probation. This language is similar to content in repealed rule §745.8631. |
|  | New §745.8649 | This new rule contains the exact language as repealed §745.8651, which describes types of adverse actions. |
|  | New §745.8650 | This new rule outlines the circumstances under which Licensing may deny a permit. |
| §745.8651 | Repeal | This rule is being repealed and re-proposed as the new §745.8649. |
|  | New §745.8651 | This new rule outlines the circumstances under which Licensing may impose an adverse amendment on a permit. |
|  | New §745.8652 | This new rule outlines the circumstances under which Licensing may suspend an operation's permit. |
|  | New §745.8654 | This new rule outlines the circumstances under which Licensing may revoke a permit. |
| §745.8657 | Amend | This amendment updates the department's name and a program offered through a different state agency. |
| §745.8659 | Amend | This amendment:  Removes the requirement for the department publish adverse actions in a local newspaper and publish denials when the operation was previously operating. Licensing posts information regarding suspensions and revocations on the department's public website per the requirements in Human Resources Code §42.025 and 42.077. |
| §745.8713 | Amend | This amendment:   * Adds that Licensing may impose an administrative penalty for a violation of a high risk standard; and * Deletes old subsection (2) since new subsections (2)(A) and (2)(B) sufficiently address the issue of timely submitting information required to conduct a background and criminal history check. |

## 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.

The modifications implement the HRC §§42.042, 42.0704, and 42.078(a-2).

## 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 will be that:

* Compliance with HRC §§42.0704 and 42.078(a-2);
* Implement Sunset Recommendations;
* Transparency between providers, the public, and CCL staff who will have a common understanding of the decision making process as it relates to enforcement actions
* Improved consistency in decision-making; and
* Increased use of voluntary plans of action will reduce the number of corrective action imposed or adverse actions taken.

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 or micro businesses as a result of the proposed rule change because the proposed rule change should not affect the cost of doing business; does not impose new requirements on any business; and does 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(s).

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

## STAKEHOLDER INPUT

In order to develop the rules to necessary to support the enforcement framework and the expansion of the use of administrative penalties, CCL established a cross-program workgroup which met four times over the summer of 2015. The workgroup consisted of field staff from child day-care, residential child-care, and state office. The proposed rules were developed based on the drafted enforcement framework and the recommendations for the expansion of administrative penalties agreed upon by this workgroup.

CCL also met with external stakeholders to present, discuss, and get input on the proposed enforcement framework and expanded administrative penalties on February 2, 2016. The workgroup consisted of child day-care and residential child-care providers, as well as representatives from CCL and legal services. The workgroup provided input and comments regarding the drafted enforcement framework and administrative penalties rules.

Additional 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*.