July 8, 2016

The Health and Human Services Commission adopts, on behalf of the Department of Family and Protective Services (DFPS), new §§745.8581, 745.8583, 745.8585, 745.8600, 745.8633, 745.8635, 745.8637, 745.8639, 745.8641, 745.8643, 745.8649, 745.8650, 745.8651, 745.8652, and 745.8654; amendments to §§745.8601, 745.8603, 745.8605, 745.8607, 745.8609, 745.8611, 745.8613, 745.8631, 745.8657, 745.8659 and 745.8713; and the repeal of §§745.8633, 745.8635 and 745.8651 in Chapter 745, concerning Licensing. New §§745.8581, 745.8585, 745.8635, 745.8639, and 745.8641 are adopted with changes to the proposed text published in the in May 27, 2016, issue of the *Texas Register* (41 TexReg 3896). New §§745.8583, 745.8600, 745.8633, 745.8637, 745.8643, 745.8649, 745.8650, 745.8651, 745.8652, and 745.8654; amendments to §§745.8601, 745.8603, 745.8605, 745.8607, 745.8609, 745.8611, 745.8613, 745.8631, 745.8657, 745.8659 and 745.8713; and the repeal of §§745.8633, 745.8635 and 745.8651 are adopted without changes to the proposed text and will not be republished.

The justification of the new sections, amendments, and repeals is 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:

(1) A summary of the department's general expectations in enforcing Human Resources Code, Chapter 42; and (2) 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 adopted 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 receives, 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 identifies 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: (1) changing the title of Subchapter L from "Remedial Actions" to "Enforcement Actions; (2) defining "technical assistance" and outlining when and why technical assistance is provided; (3) clarifying that enforcement actions are not progressive in nature, meaning they are not necessarily recommended or imposed from least to most restrictive; (4) clarifying that CCL may end an enforcement action at any time to impose a more serious enforcement action; (5) removing the ability to extend an enforcement action ; (6) identifying a voluntary plan of action as a voluntary enforcement action; (7) defining voluntary plan of action as a collaborative effort between CCL and the provider; (8) identifying factors CCL considers when deciding to recommend a voluntary plan of action; (9) 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; (10) providing a more clearly defined delineation between evaluation and probation by restricting the circumstances under which CCL may consider imposing evaluation; (11) decreasing the length of time an operation may remain on evaluation to six months; (12) identifying factors CCL considers when deciding to impose evaluation; (13) identifying factors CCL considers when deciding to impose probation; (14) identifying factors CCL considers when deciding to impose each adverse action; and (15) adding language allowing CCL to impose administrative penalties prior to taking corrective action for violations of high risk standards.

A summary of the changes are as follows:

New Division 6, in Subchapter K, to house rules related to technical assistance.

New §745.8581 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 identifies when and how Licensing may provide technical assistance.

New §745.8585 clarifies that a permit holder may not request an administrative review of Licensing providing technical assistance.

New §745.8600 outlines the general purpose of enforcement actions.

Amendment to §745.8601 clarifies that Licensing may provide technical assistance in response to a deficiency in addition to recommending or imposing another enforcement action.

Amendment to §745.8603: (1) replaces the term "remedial action" with "enforcement action"; (2) adds voluntary actions to the chart in subsection (a) listing the types of enforcement actions Licensing may take; (3) rewords and clarifies that listed family homes are not subject to voluntary or corrective action; (4) 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 (5) adds subsection (c) to clarify that Licensing may take multiple actions at the same time.

Amendment to §745.8605 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.

Amendment to §745.8607 replaces the term "remedial action" with "enforcement action". It also 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.

Amendment to §745.8609: (1) replaces the term "remedial action" with "enforcement action" (2) adds voluntary actions to section (1) of the chart; and (3) clarifies in section (2) that Licensing notifies a permit holder of the intent to impose adverse action in writing.

Amendment to §745.8611: (1) replaces the term "remedial action" with "enforcement action" and removes language referring to extensions; (2) 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; (3) makes the following changes to new sections (2) and (3) in the chart in subsection (a): (A) Removes the minimum length of time evaluation and probation may be imposed; (B) Removes language referring to extensions for evaluation and probation; and (C) Reduces the amount of time evaluation may be imposed from a maximum of one year to six months; (4) 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; (5) renumbers existing section (4) to new section (5) in the chart in subsection (a); and (6) 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.

Amendment to §745.8613: (1) replaces the term "remedial action" with "enforcement action"; (2) 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 (3) renumbers the existing numbers in the chart in subsection (a).

Division 2, in Subchapter L, is being renamed to "Voluntary and Corrective Actions."

Amendment to §745.8631: (1) adds a new section (1) to include a 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; (2) renumbers existing sections (1) and (2) to new sections (2) and (3); and (3) makes changes regarding evaluation and probation, including: removing language outlining the actions Licensing may take if compliance is not met, or if deficiencies worsen since this information is included in the new §745.8641 of this title (relating to What requirements must I meet during the evaluation or probation period?); and clarifying that Licensing will conduct inspections at least monthly during the evaluation and probation period.

Section §745.8633 is repealed and the content is incorporated into new §745.8641.

New §745.8633 outlines when Licensing may recommend a voluntary plan of action, including: (1) outlining the criteria Licensing considers to determine whether to recommend a plan of action in subsection (a); (2) 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 (3) outlining when Licensing may consider imposing a more restrictive enforcement action in lieu of a voluntary plan of action in subsection (c).

Section §745.8635 is repealed and text is being incorporated with changes in §745.8643.

New §745.8635 outlines when Licensing may impose evaluation, including: (1) listing the circumstances under which Licensing may impose evaluation in subsection (a); and (2) 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 outlines when Licensing may impose probation, including: (1) listing the circumstances under which Licensing may impose probation in subsection (a);and (2) stating that Licensing may impose adverse action if Licensing determines the operation is not eligible for probation in subsection (b).

New §745.8639 lists the requirements a permit holder must meet during a voluntary plan of action.

New §745.8641 contains the same language as repealed §745.8633. The language remains mostly the same as the repealed rule. However, language has been amended in paragraph (3) to clarify what must be posted during evaluation and probation.

New §745.8643 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 §745.8635.

New §745.8649 contains the exact language as repealed §745.8651, which describes types of adverse actions.

New §745.8650 outlines the circumstances under which Licensing may deny a permit.

Section §745.8651 is repealed and text moved to new §745.8649.

New §745.8651 outlines the circumstances under which Licensing may impose an adverse amendment on a permit.

New §745.8652 outlines the circumstances under which Licensing may suspend an operation's permit.

New §745.8654 outlines the circumstances under which Licensing may revoke a permit.

Amendment to §745.8657 updates the department's name and a program offered through a different state agency.

Amendment to §745.8659 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.

Amendment to §745.8713: (1) adds that Licensing may impose an administrative penalty for a violation of a high risk standard; and (2) deletes old paragraph (2) since new subparagraph (2)(A) and (2)(B) sufficiently address the issue of timely submitting information required to conduct a background and criminal history check.

The sections will function by enforcing: (1) compliance with HRC §42.0704 and §42.078(a-2); (2) implementation of the Sunset Recommendations; (3) 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; (4) improved consistency in decision-making; and (5) increased use of voluntary plans of action will reduce the number of corrective action imposed or adverse actions taken.

During the public comment period, DFPS received one comment from the Texas Press Association regarding §745.8659. The Texas Press Association opposes the removal of the requirement of DFPS to publish notice in a local newspaper when there is an adverse action against a facility. The Association believes that much of the populace does not have access to the internet and requiring consumers to search the internet as well as the DFPS website for operations with an adverse action unfairly burdens the public.

Response: DFPS has had the option to publish notice on the department's Internet website since the passage of Senate Bill 68 by the 81st Legislature. Since September 1, 2009, when the amended statute took effect, the Department has primarily published notice on the agency website. The notice remains on the agency website list for five years and is easily accessible from the *Search Texas Child Care* feature which provides the public, including families looking for child care, information about all child care operations and homes regulated by DFPS and is the most used feature on the agency website. Both Internet service and public access to computers, through libraries and other locations such as the YMCA, is increasing. While few or no families would be able to search prior issues of newspapers for the compliance history of an operation, even those families who do not own a computer of their own are likely to be able to search DFPS' public website. The department recommends adoption of this rule with no changes.

Although no comments were received regarding the other rules, DFPS is making the following revisions:

§745.8581: The department recommends deleting language that suggests deficiencies are limited to deficiencies related to Minimum Standards. An operation may be deficient in Minimum Standards, as well as laws, rules, specific permit terms, or conditions of evaluation, probation, or suspension, as articulated in a more general rule (745.8601) and otherwise adopting this section with no changes. Aligning the language throughout all the rules will aid in public understanding.

§745.8585: The department recommends clarifying language related to deficiencies. See §745.8581.

§745.8635: The department recommends: (1) changing the wording in paragraph (a)(2) for clarification; (2) modifying the language in (a)(3) to make it clear operations may still be placed on evaluation if they have attempted to address the same issues through a voluntary plan of action, assuming evaluation is otherwise appropriate; and (3) correcting a technical error in (a)(4) and making the language consistent with the parallel provision in §745.8637.

§745.8639: The department recommends clarifying language related to deficiencies. See §745.8581.

§745.8641: The department recommends clarifying language related to deficiencies. See §745.8581.