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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: | **Howard G. Baldwin, Jr. Commissioner** |
| SUBJECT: | **Agenda Item 6b: Recommendation to adopt rule changes in 40 TAC, Chapter 744, Minimum Standards for School-Age and Before or After-School Programs; Chapter 746, Minimum Standards for Child-Care Centers; Chapter 747, Minimum Standards for Child-Care Homes; and Chapter 748, General Residential Operations** |
| DATE: | **October 19, 2012** |

BACKGROUND AND PURPOSE

The Child Care Licensing Division is requesting approval to adopt the proposed administrative rules in 40 TAC, Chapter 746, Minimum Standards for Child-Care Centers; Chapter 747, Minimum Standards for Child-Care Homes; and Chapter 748, General Residential Operations; to support and implement new federal regulations related to safety standards for cribs; amend rules related to safe sleep practices; and amend rules to correct minimum standard numbers and cross references.

The Child Care Licensing Division is requesting approval to adopt the proposed rules in 40 TAC, Chapter 744, Minimum Standards for School-Age and Before or After School Programs; Chapter 746, Minimum Standards for Child-Care Centers**;** and Chapter 747, Minimum Standards for Child-Care Homes; requiring that child-care homes and centers include procedures in their operation’s policies if they conduct health checks of children in care.

**Crib Safety and Safe Sleeping**

New rules in Chapters 746, 747, and 748 will require child-care centers, child-care homes, and general residential operations to obtain and maintain documentation that verifies cribs meet the applicable federal rules at Title 16, Code of Federal Regulations (CFR), Parts 1219 and 1220. These federal rules, adopted by the Consumer Product Safety Commission, concern safety standards for full-size and non-full size cribs manufactured, sold, and used in the United States (U.S.). Beginning June 28, 2011, all cribs sold in the U.S. were required to meet the new federal requirements for overall crib safety. The documentation will verify that the following new requirements for cribs established by the U.S. Consumer Product Safety Commission (CPSC) have been met:

1. Traditional drop-side cribs cannot be made or sold; immobilizers and repair kits are not allowed.
2. Wood slats must be made of stronger woods to prevent breakage.
3. Crib hardware must have anti-loosening devices to keep it from coming loose or falling off.
4. Mattress supports must be more durable.
5. Safety testing must be more rigorous.

Federal law also requires that all cribs utilized in child-care facilities, child-care homes, and places of public accommodation (e.g. hotels), meet the new federal requirements in 16 CFR Parts 1219 or 1220, as applicable, by December 28, 2012.

Recommended changes to rules related to safe sleep practices add further clarification on providing a safe sleep environment for infants younger than 12 months of age based on recommendations from Caring for Our Children, 3rd Edition; and the American Academy of Pediatrics.

**Health Checks**

The proposed rules add the requirement that child-care homes and centers include procedures in their operation’s policies if they conduct health checks of children in care. A health check is a visual or physical assessment of a child to identify potential concerns about a child’s health, including signs or symptoms of illness and injury, in response to changes in the child’s behavior since the last date of attendance.

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.

COMMENTS AND RESPONSES

Child Care Licensing first notified child-care providers of the changes to federal crib regulation via email in June 2011. The notification informed providers that they had until December 28, 2012 to comply, and that minimum standards would be revised to reflect the changes in the federal requirements. Child Care Licensing also provided information in an article in the Fall 2011 edition of *Texas Child Care Quarterly*, which included frequently asked questions and answers regarding the federal requirements. Information regarding the changes to the federal requirements has also been available to child-care providers and the general public on the Child Care Licensing website. Moreover, CCL staff have provided verbal and written technical assistance to providers regarding the changes.

The rules were presented to the DFPS Council at their meeting on July 20, 2012. At the time of the meeting, there was no public testimony. Licensing notified the following stakeholders of the proposed rules and public comment period:

* Licensed child care centers
* Licensed, registered, and listed child care homes
* General residential operations
* School-Age and Before or After-School Programs
* Subscribers to the DFPS Latest Child Care Regulations email notification list
* Committee on Licensing Standards

Licensing provided notification to all providers by mailing a postcard in early August. Licensing also notified all stakeholders by email on August 17, 2012. The notification provided stakeholders with an email address, mailing address, and phone number to direct comments on the proposed rules.

The proposed rules were published in the Texas Register on August 17, 2012 and were open to comment until September 17, 2012*.* DFPS received 18 comments regarding Chapter 746, Minimum Standards for Child-Care Centers and 2 comments regarding Chapter 747, Minimum Standards for Child-Care Homes. DFPS did not receive any comments regarding Chapter 748, General Residential Operations or Chapter 744, Minimum Standards for School-Age and Before or After School Programs. DFPS received comments regarding the rule changes by both phone calls and email, and commenters included providers of licensed child care centers and registered child care homes and a crib manufacturer.

Responses to comments are noted below.

| **Section Affected and Original Proposal** | **Summary of Commenter’s Concern** | **Department Response and Rationale** |
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| 744.105 (27) | None | The department recommends adoption of this section with no changes. |
| 744.501 | None | The department recommends adoption of this section with no changes. |
| 746.105(32) | None | The department recommends adoption of this section with no changes. |
| 746.501 | DFPS received one comment related to this rule.  One commenter indicated that the additional training hours will be a financial burden on the commenter’s small business. The commenter stated that she pays for the employee’s annual training hours. The commenter stated that she did not raise the tuition rates for the current year but may have to increase the rates next year. The commenter expressed concern with parents seeking unregulated in-home care for their children due to the increased cost in child care. | The department recommends adoption of this rule with no changes.  The only requirement in this rule related to training requires an operation to have policies requiring annual training for employees related to preventing and responding to abuse and neglect of children. This new requirement was mandated in the last legislative session by SB 471, became effective in statute in January 2012, and effective in administrative rule in March 2012. Child Care Licensing did not propose and is not changing any language related to training requirements or hours at this time. |
| 746.801 | DFPS received one comment related to this rule.  One commenter stated that the Consumer Product Safety Commission is going to accept the tracking label and registration card in addition to the certificate of compliance to verify that a crib meets compliance with the new federal regulations. | The department recommends adoption of this section with one change.  After this rule was proposed, the Consumer Product Safety Commission (CPSC) broadened the types of documentation that are accepted to verify a crib’s compliance with the new regulations, by accepting the tracking label, registration card, or certificate of compliance as verification. In order to allow providers additional ways to comply with the new regulations, Licensing recommends revising the language of the rule from “certificate of compliance for cribs” to “documentation for cribs”, as specified in §746.2409 of this title (relating to What specific requirements must my cribs meet?). |
| 746.2409(a) | DFPS received fourteen comments related to this rule.  One commenter expressed concern with meeting the deadline to replace existing cribs.  One commenter expressed concern with lack of disposal/recycle options of existing cribs.  Two commenters expressed concerns with having to replace cribs that do not have drop-down sides based on the new standards. The commenters stated it is an unnecessary expense.  Ten commenters expressed concerns with having to replace hospital grade cribs, which they stated were superior to the other cribs. The commenters also expressed concerns with the financial burden it will place on operations to have to replace hospital grade cribs. Six of the eleven commenters also stated that hospital grade cribs are registered as medical devices and fall under the jurisdiction of the Food and Drug Administration rather than the CPSC. | The department recommends adoption of this section with changes.  As noted previously, these rules implement federal regulations that have been published since June of 2011 and are mandated by December of 2012.  The CPSC website states that cribs not meeting the new standards should not be resold, donated, or given away to a local thrift store. CPSC recommends disassembling the crib before discarding it.  In addition to “drop-side cribs” the federal regulations deal with crib safety standards relating to stronger wood slats, crib hardware, mattress supports, and safety testing.  It is true that medical devices fall under the jurisdiction of the FDA rather than the CPSC. As such, DFPS is also allowing this rule to be met by documenting that each crib is a medical device that is listed and registered with the FDA. However, based on information DFPS gathered from the FDA, it does not appear that the FDA believes medical devices (cribs) should be used for healthy children, and it is anticipated that the FDA will eventually adopt regulations regarding the use of cribs as medical devices, which may impact child-care centers. An operation that needs additional time to comply with the minimum standard due to the financial burden of purchasing new cribs may submit a waiver request. A decision regarding a waiver request will be made on an individual basis after assessing an operation’s current cribs for safety based on requirements already established in minimum standards  Based on comments from other rules, the department is also allowing an operation to maintain documentation, other than a certificate of compliance, to verify that a crib is compliant with new federal regulations. |
| 746.2415(6) | DFPS received two comments related to this rule.  One commenter did not agree with adding blankets as an item that is prohibited to be placed in a crib and does not agree with increasing the age of children that the standard applies to from 6 months to 12 months.  One commenter stated that a parent who wants their child to sleep covered in a receiving blanket, especially during cooler months, should be able to do so. The commenter stated that comforters or soft bedding are inappropriate but considers a lightweight blanket to be appropriate and should be allowed. | The department recommends adoption of this section with no changes.  Quilts, comforters and other types of soft bedding are already prohibited from being placed in cribs. Adding “blankets,” “loose” bedding, and “sleep positioning devices” to the rule will help to further clarify what items increase the risk of SIDS. Raising the age in the rule will help to provide a safe sleep environment for infants younger than 12 months of age based on recommendations from the American Academy of Pediatrics and Caring for Our Children, 3rd Edition. |
| 747.105(33) | None | The department recommends adoption of this section with no changes. |
| 747.501 | None | The department recommends adoption of this section with no changes. |
| 747.801 | DFPS received two comments related to this rule.  One commenter stated that with the change, the Department is protecting manufacturers, making them richer by obligating the home day cares to buy new cribs. The commenter suggested that the Department get experts to inspect the cribs and extend the certificates of compliance.  One commenter disagrees with the idea of having certificates of compliance for cribs. The commenter reports to have newer cribs and states it is unnecessary to be required to have a certificate for each crib. The commenter suggested having the inspector to take a look at the cribs and determine whether or not they need to be replaced. The commenter expressed concern with hidden costs that will become apparent once the rules are set. | The department recommends adoption of this section with one change.  As noted previously, these rules implement federal regulations that have been published since June of 2011 and are mandated by December of 2012. However, after the rule was proposed, the Consumer Product Safety Commission (CPSC) broadened the types of documentation that are accepted to verify a crib’s compliance with the new regulations, by accepting the tracking label, registration card, or certificate of compliance as verification. In order to allow providers additional ways to comply with the new regulations, Licensing recommends revising the language of the rule from “certificate of compliance for cribs” to “documentation for cribs”, as specified in §747.2309 of this title (relating to What specific safety requirements must my cribs meet). |
| 747.2309 | None | Although no comments were received specifically for this rule revision, the department recommends adoption of this section with changes that are necessary because of comments related to 746.2409(a).  The changes allow an operation to maintain documentation, other than a certificate of compliance, to verify that a crib is compliant with new federal regulations. In addition, this rule may be met by documenting that each crib is a medical device that is listed and registered with the FDA. However, based on information DFPS gathered from the FDA, it does not appear that the FDA believes medical devices (cribs) should be used for healthy children, and it is anticipated that the FDA will sometime in the future adopt regulations regarding the use of cribs as medical devices, which may impact child-care homes. An operation that needs additional time to comply with the minimum standard due to the financial burden of purchasing new cribs may submit a waiver request. A decision regarding a waiver request will be made on an individual basis after assessing an operation’s current cribs for safety based on requirements already established in minimum standards. |
| 747.2315(5) | None | The department recommends adoption of this section with no changes. |
| 748.1751 | None | Although no comments were received specifically for this rule revision, the department recommends adoption of this section with changes that are necessary because of comments related to 746.2409(a).  The changes allow an operation to maintain documentation, other than a certificate of compliance, to verify that a crib is compliant with new federal regulations. In addition, this rule may be met by documenting that each crib is a medical device that is listed and registered with the FDA. However, based on information DFPS gathered from the FDA, it does not appear that the FDA believes medical devices (cribs) should be used for healthy children, and it is anticipated that the FDA will sometime in the future adopt regulations regarding the use of cribs as medical devices, which may impact child-care homes. An operation that needs additional time to comply with the minimum standard due to the financial burden of purchasing new cribs may submit a waiver request.  A decision regarding a waiver request will be made on an individual basis after assessing an operation’s current cribs for safety based on requirements already established in minimum standards. |
| 748.1757(c) | None | The department recommends adoption of this section with no changes. |

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 (To Be Completed by CPI)** | **Dates** |
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| Proposed rules presented to the Council for recommendation to publish | July 20, 2012 |
| Approval to publish proposed rules received from HHSC | July 30, 2012 |
| Proposed rules published in the *Texas Register* | August 17, 2012 |
| Thirty-day comment period ends | September 17, 2012 |
| Rules presented to the Council for recommendation to adopt | October 19, 2012 |
| Projected date approval to adopt rules received from HHSC | October 30, 2012 |
| Projected date adopted rules published in the *Texas Register* | November 9, 2012 |
| Projected effective date | December 1, 2012 |

ATTACHMENTS

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