April 7, 2016

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§705.1001, 705.2105, 705.2107, 705.3102, 705.4103, 705.4105, 705.4107, 705.6101, 705.7103, and 705.7105; new §705.2103; and the repeal of §705.2103 in Chapter 705, concerning Adult Protective Services. The purpose of the amendments, new rules and repeal is to implement Senate Bills 760 and 1880 (84th Legislature), the APS Scope and Jurisdiction Bills, which expanded the APS Provider (formally Facility) program's jurisdiction to investigate abuse, neglect, and exploitation. These bills ensured continued State of Texas compliance with the Center for Medicaid and Medicare Services (CMS) requirements for the health and welfare of recipients of home and community-based services (HCBS). The bills (1) expanded the authority of Adult Protective Services (APS) to investigate, inter alia, all home and community-based service providers whether providing services in a traditional or managed care service delivery model, (2) clarified and addressed the gaps and inconsistencies that resulted from evolving service delivery changes and changes in contracting arrangements, and (3) updated statutory language and requirements related to provider and agency responsibilities.

The proposed rules implement APS's expanded jurisdiction and modify existing DFPS rules, as applicable, to the expanded jurisdiction. These rules will take effect on September 1, 2016. The updates in Chapters 705 will implement statutory changes as required by the APS Scope and Jurisdiction Bills.

A summary of the changes are as follows:

The amendment to §705.1001 updates and adds definitions for emergency protective services, home and community support services agencies (HCSSA) agency, paid caretaker, protective services, and purchased client services, and removes definitions of terms not used in this subchapter.

Section 705.2103 is repealed and proposed new to update who is eligible for purchased client services and when purchased client services are available.

The amendment to§705.2105 and §705.2107 updates terms and establishes who is eligible for purchased client services and when purchased client services are available.

The amendment to§705.3102 clarifies when APS can apply for a protective order.

The amendment to§705.4103 clarifies the circumstances in which a designated perpetrator has the right to appeal a validated finding.

The amendment to §705.4105 clarifies to whom APS may release the findings of an investigation when the findings of the investigation are valid.

The amendment to §705.4107 updates language.

The amendment to§705.6101 clarifies when APS uses assessments in an in-home case and when a case worker must consult with a supervisor.

The amendment to§705.7103 deletes outdated language.

The amendment to§705.7105 updates terms to align with APS Scope and Jurisdiction bills. In particular the APS Provider program's expanded authority to investigate providers; make minor edits.

APS coordinated and held stakeholder meetings July 16, 2015, August 4, 2015, October 15, 2015, January 8, 2016, and February 8, 2016. These meetings discussed stakeholder concerns, recommendations, and rule proposals. Stakeholder feedback was incorporated into rule development.

Lisa Subia, Chief Financial Officer of DFPS, has determined that for the first five-year period the proposed sections will be in effect there will be fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Subia also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that the expanded authority of DFPS to investigate abuse, neglect, and exploitation of individuals receiving services from certain providers. Due to needed additional staffing and technology, the estimated impact on state government and appropriated funding levels is $1,603,723 for Fiscal Year (FY) 2016, $1,712,345 FY 2017, $1,712,345 FY 2018, $1,712,345 FY 2019, and $1,712,345 FY 2020. The impact on federal government will be $333,585 FY 2016, $370,716 FY 2017, $370,716 FY 2018, $370,716 FY 2019, and $370,716 FY2020. Upon implementation, actual experience has yielded higher caseloads than originally assumed resulting in additional costs to the state. The fiscal impact of these additional costs cannot be estimated at this time. There will be no effect on large, small, or micro-businesses because the proposed change 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. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Ms. Subia has determined that the proposed sections do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under §2007.043, Government Code.

Questions about the content of the proposal may be directed to Lauren Villa at (512) 438-3805 in DFPS's Legal Division. Electronic comments may be submitted to [Lauren.Villa@dfps.state.tx.us.](file:///\\12AUST1001FS02\SHARE10012\Legal\RULES\RULE%20ASSIGNMENTS\0r552%20APS%20XX%20Rules\Proposed%20Docs\Lauren.Villa@dfps.state.tx.us.%20) Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-552, Department of Family and Protective Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Title 40, Social Services & Assistance, Part 19, Dept. of Family and Protective Services

Chapter 705, Adult Protective Services

Subchapter A, Definitions

TAC Section Number(s) §705.1001

Proposed Action

X Amendment

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The amendment 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 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 amendment implements HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §48.251 through 48.258 and Family Code §261.404.

§705.1001. How are the terms in this chapter defined? The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (4) (No change.)

(5) Alleged victim/perpetrator--An adult with a disability or aged 65 or older who has been reported to **APS** [adult protective services] to be in a state of or at risk of self-neglect.

(6) - (14) (No change).

**(15) Emergency Protective Services-- Services provided to an alleged victim subject to an investigation conducted under Subchapter F, Chapter 48, Human Resources Code, to alleviate danger of serious harm or death.**

**(16)** [(15)] Emotional harm--A highly unpleasant mental reaction with observable signs of distress, such as anguish, grief, fright, humiliation, or fury.

**(17) Home and community support services agency (HCSSA)-- An agency licensed under Chapter 142, Health and Safety Code.**

**(18)** [(16)] Intimidation--Behavior by actions or words creating fear of physical injury, death, or abandonment.

**(19)** [(17)] Ongoing relationship--A personal relationship that includes:

(A) frequent and regular interaction;

(B) a reasonable assumption that the interaction will continue; and

(C) an establishment of trust, beyond a commercial or contractual agreement.

**(20)** [(18)] Paid caretaker--

**(A)** An employee of a home and community support services agency (HCSSA) **providing non-Medicaid services to an alleged victim;** [licensed under Chapter 142, Health and Safety Code, to provide personal care services to an alleged victim,] or

**(B) An** [an] individual or family member privately hired and receiving monetary compensation to provide personal care services**, as defined in §142.001(22-a) of the Health and Safety Code,** to an alleged victim. [“Personal care” is defined in §142.001(22-a) of the Health and Safety Code.]

**(21)** [(19)] Person with a disability--An adult with a physical, mental, or developmental disability that substantially impairs the adult's ability to adequately provide for his own care or protection.

**(22)** [(20)] Physical injury--Physical pain, harm, illness, or any impairment of physical condition.

**(23)** [(21)] Protective services--The services furnished by DFPS or by a protective services agency to **an** [a] **alleged or** designated victim (including a designated victim/perpetrator) or to the **alleged or** designated victim's relative or caretaker if DFPS determines the services are necessary to prevent the designated victim from being in or returning to a state of abuse, neglect, or financial exploitation. These services may include social casework, case management, and arranging for psychiatric and health evaluation, home care, day care, social services, health care, respite services, and other services consistent with Human Resources Code, Chapter 48. The term does not include the **investigation of an allegation of** [services of DFPS or another protective services agency in conducting an investigation regarding an allegation of] abuse, neglect, or financial exploitation. (Human Resources Code, §48.002)

**(24) Purchased Client Services-- A type of protective service provided in accordance with Human Resources Code §48.002(a)(5), including, but not limited to, emergency shelter, medical, and psychiatric assessments, in-home care, residential care, heavy housecleaning, minor home repairs, money management, transportation, emergency food, medication, and other supplies.**

**(25)** [(23)] Reporter--A person who makes a report to DFPS about a situation of alleged abuse, neglect, or financial exploitation of an alleged victim.

**(26)** [(24)] Serious harm--In danger of sustaining significant physical injury or death; or danger of imminent impoverishment or deprivation of basic needs.

**(27)** [(25)] Substantially impairs--When a disability grossly and chronically diminishes an adult’s physical or mental ability to live independently or provide self-care as determined through observation, diagnosis, evaluation, or assessment.

**(28)** [(26)] Sustained perpetrator--A designated perpetrator whose validated finding of abuse, neglect, or financial exploitation of a designated victim has been sustained by an administrative law judge in a due process hearing, including a release hearing or Employee Misconduct Registry (EMR) hearing, or the designated perpetrator has waived the right to a hearing.

**(29)** [(27)] Unreasonable confinement--An act that results in a forced isolation from the people one would normally associate with, including friends, family, neighbors, and professionals; an inappropriate restriction of movement; or the use of any inappropriate restraint.

This agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued in Austin, Texas, on .

Title 40, Social Services & Assistance, Part 19, Dept. of Family and Protective Services

Chapter 705, Adult Protective Services

Subchapter D, Eligibility

TAC Section Number(s) §705.2103

Proposed Action

X Repeal

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The repeal 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 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 repeal implements HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §48.251 through 48.258 and Family Code §261.404.

§705.2103. What are emergency client services?

This agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued in Austin, Texas, on .

Title 40, Social Services & Assistance, Part 19, Dept. of Family and Protective Services

Chapter 705, Adult Protective Services

Subchapter D, Eligibility

TAC Section Number(s) §705.2103, 705.2105, 705.2107

Proposed Action

X New

X Amendment

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The new section and amendments are 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 Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The new section and amendments implement HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §48.251 through 48.258 and Family Code §261.404.

**§705.2103. Who is eligible for emergency protective services?**

**Emergency protective services may be offered to:**

**(a) An individual receiving services from a provider as defined by Human Resources Code §48.251(a)(9); or**

**(b) An adult who lives in a residence that is owned, operated, or controlled by a provider of home and community-based services under the home and community-based services waiver program described by §534.001(11)(B), Government Code, regardless of whether the adult is receiving services under that waiver program from the provider.**

§705.2105. Who is eligible for **purchased** [emergency] client services?

To be eligible for **purchased** [emergency] client services, an alleged victim must be receiving [adult] protective services in accordance with Human Resources Code, §48.002(a)(5) and §48.205.The alleged victim musthave a service plan developed by DFPS under these sections indicatingthat [emergency] client services are needed to remedy abuse, neglect, or financial exploitation.

§705.2107. When are **purchased** [emergency] client services available?

(a) State and local resources must be used before **purchased** [emergency] client services are expended.

(b) Not all **purchased** [emergency] client services are available in all geographic areas of the state. DFPS may limit the units of service or length of time that clients can receive **purchased** [emergency] client services, based upon service plans, availability of funds, and availability of service providers.

(c) If the region does not have sufficient funds to provide **purchased** [emergency] client services to all eligible clients, the client will not be able to receive **purchased** [emergency] client services at the time the clientis determined eligible. Clients who are still in need of **purchased** [emergency] client services when services are available will be given priority based upon the date of the service plan indicating the need for **purchased** [emergency] client services.

This agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued in Austin, Texas, on .

Title 40, Social Services & Assistance, Part 19, Dept. of Family and Protective Services

Chapter 705, Adult Protective Services

Subchapter G, Family Violence

TAC Section Number(s) §705.3102

Proposed Action

X Amendment

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The amendment 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 Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendment implements HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §48.251 through 48.258 and Family Code §261.404.

§705.3102. Can DFPS apply for protective orders?

When APSstaff validate an allegation that an alleged victimis a victim of family violence as specified in the Texas Family Code, §71.004, DFPSmay apply for a protective order to protect the victim. Before filing the protective order, the APScaseworker contacts the victim and a **non-abusive** [nonabusive] adult member of the household, if available:

(1) (No change.)

(2) to request assistance in developing a safety plan for **the protection of** the victim and any **non-abusive** [nonabusive] household members.

This agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued in Austin, Texas, on .

Title 40, Social Services & Assistance, Part 19, Dept. of Family and Protective Services

Chapter 705, Adult Protective Services

Subchapter J, Release Hearings

TAC Section Number(s) §705.4103, 705.4105, 705.4107

Proposed Action

X Amendment

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The amendments are 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 Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §48.251 through 48.258 and Family Code §261.404.

§705.4103. Does the designated perpetrator have the right to appeal?

(a)When APS staff validates an allegation of abuse, neglect, or financial exploitation **against a designated perpetrator and an entity or employer (such as a contracting agency or senior center) allows such designed perpetrator** [of a designated victim and an entity such as a provider agency, home and community support services agency (HCSSA), senior center, or other employer allows the designated perpetrator] to have access to adults with disabilities, adults aged 65 or older, or children, then the APS caseworker may notify the entity of the findings by complying with this subchapter. If the findings are to be released to **any** [the] entity **or employer,** the designated perpetrator must be given prior written notification, except in emergencies, and an opportunity to request an Administrative Review of Investigative Findings and a hearing before the State Office of Administrative Hearings.

(b) - (d) (No change.)

§705.4105. How is the designated perpetrator notified of the intent to release?

(a) The caseworker must give written notification to each designated perpetrator if:

(1) (No change.)

(2) the findings are to be released outside of DFPS to an entity **or employer** which allows the designated perpetrator access to adults with disabilities, adults aged 65 or older, or children; and

(3) (No change.)

(b) Written notification must include:

(1) (No change.)

(2) the entity **or employer** to which the findings will be released;

(3) - (8) (No change.)

§705.4107. What is the designated perpetrator's role during an administrative review?

(a) (No change.)

(b) The designated perpetrator is responsible for:

(1) any costs **incurred** [he incurs] for the review, except for interpreter services provided by DFPS.

(2) (No change.)

This agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued in Austin, Texas, on .

Title 40, Social Services & Assistance, Part 19, Dept. of Family and Protective Services

Chapter 705, Adult Protective Services

Subchapter L, Risk Assessment

TAC Section Number(s) §705.6101

Proposed Action

X Amendment

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The amendment 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 Family and Protective Services 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 amendment implements HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §48.251 through 48.258 and Family Code §261.404.

§705.6101. What assessments does APS use in an in-home case?

(a) APS uses assessments to determine whether an elderly person or individual with a disability is **in** [at] imminent **danger** [risk] of abuse, neglect, or financial exploitation [and needs protective services] or is in a state of abuse, neglect, or financial exploitation and needs protective services.

(b) APS uses a series of three assessments:

(1) - (2) (No change.)

(3) Strengths and Needs Assessment: If APS validates abuse, neglect, or financial exploitation and provides protective services, a strengths and needs assessment helps APS to develop **a** service plan appropriate to the client's needs.

(c) - (d) (No change.)

This agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued in Austin, Texas, on .

Title 40, Social Services & Assistance, Part 19, Dept. of Family and Protective Services

Chapter 705, Adult Protective Services

Subchapter M, Confidentiality and Release of Records

TAC Section Number(s) §705.7103, 705.7105

Proposed Action

X Amendment

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The amendments are 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 Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the DFPS Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments implement HRC Chapter 48, as amended by S.B. 1880 and S.B. 760, notably Subchapter F, §48.251 through 48.258 and Family Code §261.404.

§705.7103. **To which** [Which] investigations **does** [do] this subchapter apply [to]?

These rules apply to investigations conducted by the Department of Family and Protective Services Adult Protective Services staff under Chapter 48 of the Human Resources Code and §261.404 of the Texas Family Code**.** [(investigations of abuse, neglect, or exploitation of persons under age 18 years receiving services for mental health or mental retardation).]

§705.7105. **Which** [What] definitions apply to this subchapter?

The following words and terms have the following meanings unless the context clearly indicates otherwise:

(1) Adult Protective Services (APS) client--An elderly **person** or [disabled] person **with a disability** as defined in Human Resources Code, §48.002(1) and (8), or a person under age 18 years receiving services **from certain providers as described** [for mental health or mental retardation as described] in §261.404 of the Texas Family Code.

(2) Case records--All records described in §48.101 or §48.102 of the Human Resources Code, which were collected, developed, or used in an abuse, neglect, or exploitation investigation, or in providing services as a result of an investigation, and which are under the custody and control of DFPS. [Case records include investigation records, as well as service records.]

(3) - (4) (No change.)

(5) Report--An allegation of abuse, neglect, or exploitation, as described in §48.002 of the Human Resources Code, **this Chapter, and** [or] **Chapter** 711 [Chapter] of this title (relating to Investigations **of Individuals Receiving Services from Certain Providers** [in TDMHMR Facilities and Related Programs]) made to DFPS.

(6) (No change.)

This agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Issued in Austin, Texas, on .