April 7, 2016

The Health and Human Services Commission proposes, on behalf of the Department of Family and Protective Services (DFPS), amendments to §§711.1, 711.5, 711.7, 711.11, 711.13, 711.17, 711.19, 711.21, 711.23, 711.201, 711.403, 711.419, 711.423, 711.603, 711.609, 711.611, 711.613, 711.801, and 711.802; the repeal of 711.3, 711.9, 711.15, 711.25, 711.401, 711.405, 711.407, 711.409, 711.411, 711.605, 711.607, 711.1001, 711.1002, 711.1003, 711.1005, 711.1007, 711.1009, 711.1011, 711.1012, 711.1013, 711.1015, 711.1201, 711.1203, 711.1205, 711.1207, and 711.1209; and new 711.3, 711.401, 711.405, 711.605, 711.804, 711.806, 711.901, 711.903, 711.905, 711.907, 711.909, 711.911, 711.913, and 711.915 in Chapter 711, concerning Investigations in Department of Aging and Disability Services (DADS) and Department of State Health Services (DSHS) Facilities and Related Programs. The purpose of the amendments, new, and repeals is to implement Senate Bills (SB) 760 and 1880, 84th Legislature (Adult Protection Services (APS) Scope and Jurisdiction Bills), which expanded the APS Provider (formally APS Facility) program's jurisdiction to investigate abuse, neglect, and exploitation. These bills ensure 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 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.

These amendments, new, and repeals implement APS's expanded jurisdiction and modify existing rules to reflect such expansion, as applicable. These rules will take effect on September 1, 2016. The updates in Chapter 711 will implement statutory changes as required by the APS Scope and Jurisdiction Bills.

A summary of the changes are as follows:

DFPS is changing the chapter title to Investigations of Individuals Receiving Services from Certain Providers: (1) conforms with the name used in the APS Scope and Jurisdiction Bills; and (2) reflects APS's expanded authority to investigate individuals receiving services from certain providers.

Amendments to §711.1: (1) updates the purpose to align the section with APS Scope and Jurisdiction Bills; and (2) describes APS's expanded investigatory authority

Section 711.3 is being repealed and new §711.3 updates terms and abbreviations to align with APS Scope and Jurisdiction bills and other clarifications made in this rule proposal including: direct provider, facility, home and community-based services, individual receiving services, limited service provider, non-serious physical injury, provider, serious physical injury, and service provider.

Amendment to §711.5: (1) updates and clarifies what APS investigates; (2) deletes provision on sexual exploitation as it is subsumed within the definition of sexual abuse; and (3) deletes the term "person served" and uses statutory term "individual receiving services" instead to define whom can be an alleged victim.

Amendments to §711.7: (1) updates and clarifies what APS does not investigate; (2) deletes confusing examples; (3) expands exclusion of investigating business or operational issues related to managed care or consumer directed services; and (4) expands exclusion of investigating clinical issues to all licensed professionals rather than just specific ones.

The repeal of §711.9 deletes guidance that will be written into policy as it was confusing and rarely applicable.

Amendment to §711.11: (1) updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills; and (2) expands rule citations for restraints for new providers resulting from APS expanded authority.

Amendments to §711.13: (1) updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills; and (2) updates the definition of sexual exploitation as part of sexual abuse definition in paragraph (a)(8).

The repeal of §711.15 moves the content of the rule into §711.13(a)(8) as part of the sexual abuse definition.

Amendment to §711.17 updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills.

Amendments to §711.19 updates language to more appropriately align with APS Scope and Jurisdiction Bills, and clarifies confusing examples.

Amendments to §711.21: (1) updates and clarifies who is an alleged perpetrator of exploitation to align with APS Scope and Jurisdiction Bills; and (2) expands definition of exploitation to include attempted exploitation and theft in a home or community setting other than HCS and TxHml waiver programs.

Amendments to §711.23: (1) updates and clarifies language to more appropriately align with APS Scope and Jurisdiction Bills; (2) clarifies what is not considered abuse, neglect, or exploitation; and (3) expands rule citations for new providers resulting from APS expanded authority.

Section 711.25 is repealed because it expires September 1, 2016.

Amendments to §711.201: (1) clarifies reporting requirements; and (2) maintains one hour notification for facilities, community centers, local authorities, and HCS/TxHmL waiver programs.

Section 711.401 is repealed and new §711.401: (1) updates the notification chart of whom APS notifies following an intake of an allegation of abuse, neglect, or exploitation; and (2) updates the requirements for APS notification to providers, law enforcement, and the Office of Inspector General (OIG).

Amendment to §711.403 clarifies steps taken when a general complaint is received.

Section 711.405 is repealed and new §711.405 clarifies what action is taken if the alleged perpetrator is a licensed professional.

The repeal of §§711.407, 711.409 and 711.411 consolidates all affected rules into §711.405.

Amendment to §711.419 clarifies who is notified of investigation extensions.

Amendment to §711.423 updates terms related to unknown perpetrator and system issues.

Amendment to §711.603 clarifies what is included in the investigation report.

Section 711.605 is repealed and new §711.605 clarifies and updates who receives the investigation report.

The repeal of §711.607 moves the content of the rule §711.605.

Amendments to §711.609 and §711.611 updates and clarifies how the reporter and alleged victim, guardian, or parent are notified of the finding and how to appeal.

Amendment to §711.613 clarifies when the report can be released by the service provider.

Amendments to §711.801 and §711.802 clarifies: (1) what steps an investigator takes if an individual receiving services from an HCS waiver program provider requires emergency protective services; and (2) what steps an investigator takes if an individual receiving services from an ICF-IID provider requires emergency protective services.

New §711.804 and §711.806 identifies what steps an investigator takes if an individual, adult or child, living in an HCS waiver provider home but not receiving HCS waiver services requires emergency protective services.

New Subchapter J, Appealing the Investigation Finding, provides rules for appealing the investigation finding.

New §711.901 defines and describes an appeal of the investigation finding.

New §711.903 clarifies how an appeal of the investigation finding affects an act of reportable conduct.

New §711.905 clarifies who may request an appeal of the investigation finding.

New §711.907 describes how a qualified party requests an appeal of the investigation finding.

New §711.909 describes the timeline for an appeal of the investigation finding.

New §711.911 describes how and when an appeal of the investigation finding is conducted.

New §711.913 describes the process for the administrator of a state-operated facility to contest a decision of the APS Assistant Commissioner.

New §711.915 describes when a finding may be changed without an appeal of the investigation finding.

The repeal of Subchapter K consists of §§711.1001, 711.1002, 711.1003, 711.1005, 711.1007, 711.1009, 711.1011, 711.1012, 711.1013, 711.1015: the substance of this subchapter has been maintained but has been updated, consolidated, and clarified for APS's expanded authority in new Subchapter J.

The repeal of Subchapter M consists of §§711.1201, 711.12013, 711.1205, 711.1207, 711.1209: the substance of this subchapter has been maintained but has been updated, consolidated, and clarified for APS's expanded authority in new Subchapter J.

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 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

Subchapter A, Introduction

TAC Section Number(s) §§711.1, 711.3, 711.5, 711.7711.11, 711.13, 711.17, 711.19, 711.21, 711.23,

Proposed Action

X Amendment

X New

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.

§711.1. What is the purpose of this chapter?

The purpose of this chapter is to:

(1) implement [the] Human Resources Code (HRC)**, Chapter 48, Subchapter F,** [§48.255(a) and (c) and §48.355(c),] and Texas Family Code §261.404[, which require the Texas Department of Family and Protective Services (DFPS) to develop joint rules with the Texas Department of Aging and Disability Services (DADS) and the Texas Department of State Health Services (DSHS) to facilitate investigations in DADS and DSHS facilities and related programs, and Texas Family Code §261.404];

(2) describe [Adult Protective Services investigations of allegations]:

(A) **Adult Protective Services (APS) investigations of allegations** **of abuse, neglect, and exploitation involving:**

**(i) adults or children receiving services from a provider, as that term is defined in HRC §48.251(9), if the person alleged or suspected to have committed the abuse, neglect, or exploitation is a provider.** [DADS and DSHS facilities];

(**ii) adults or children who live in a residence that is owned, operated, or controlled by a provider in the home and community-based services (HCS) waiver program described by §534.001(11)(B), Government Code, regardless of whether the individual is receiving services under the home and community-based services (HCS) waiver program; and**

**(iii) children receiving services from a home and community support services agency licensed under Chapter 142, Health and Safety Code, if the person alleged or suspected to have committed the abuse, neglect, or exploitation is an officer, employee, agent, contractor, or subcontractor of the home and community support services agency; and**

(B) **that** **APS does not investigate allegations if the provider alleged or suspected to have committed the abuse, neglect, or exploitation is operated, licensed, or certified, or registered by a state agency that has the authority to investigate a report of abuse, neglect, or exploitation of an individual by the provider**[.local authorities];

[(C) community centers;]

[(D) home and community-based services programs;]

[(E) licensed intermediate care facilities for individuals with intellectual disabilities and related conditions (ICF-IID); and]

[(F)a contractor or agent of one of the programs listed in subparagraphs (A) - (E)of this paragraph;]

(3) define abuse, neglect, and exploitation **for investigations conducted under Human Resources Code, Chapter 48, Subchapter F and Texas Family Code §261.404** [of a person served by the programs listed in paragraph (2) of this section];

(4) - (5) (No change.)

**§711.3. How are the terms in this chapter defined?**

**The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:**

**(1) Adult--An adult is a person:**

**(A) 18 years of age or older; or**

**(B) under 18 years of age who:**

**(i) is or has been married; or**

**(ii) has had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.**

**(2) Alleged perpetrator-- A direct provider alleged to have committed an act of abuse, neglect, or exploitation.**

**(3) APS--Adult Protective Services, a division of DFPS.**

**(4) Agent--An individual (e.g., student, volunteer), not employed by but working under the auspices of a service provider.**

**(5) Allegation--A report by an individual that an individual receiving services has been or is in a state of abuse, neglect, or exploitation as defined by this subchapter.**

**(6) Child--A person under 18 years of age who:**

**(A) is not and has not been married; or**

**(B) has not had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.**

**(7) Clinical practice--Relates to the demonstration of professional competence of a licensed professional as described by the appropriate licensing professional board.**

**(8) Community center--A community mental health center; community center for individuals with intellectual or developmental disabilities; or community mental health center and community center for individuals with intellectual or developmental disabilities, established under the Health and Safety Code, Title 7, Chapter 534, Subchapter A.**

**(9) Consumer Directed Services (CDS) employer--A consumer directed services client or their legally authorized representative.**

**(10) DADS--Department of Aging and Disability Services.**

**(11) Designated Perpetrator--A direct provider who has committed an act of abuse, neglect, or exploitation.**

**(12) Direct Provider--A person, employee, agent, contractor, or subcontractor of a service provider responsible for providing services to an individual receiving services.**

**(13) DFPS--Department of Family and Protective Services.**

**(14) DSHS--Department of State Health Services.**

**(15) Emergency order for protective services--A court order for protective services obtained under Human Resources Code, §48.208.**

**(16) Facility--**

**(A) DADS and DSHS central offices, state supported living centers, state hospitals, the Rio Grande State Center, the Waco Center for Youth, the El Paso Psychiatric Center, and community services operated by DADS or DSHS;**

**(B) A person contracting with a health and human services agency to provide inpatient mental health services; and**

**(C) Intermediate care facilities for individuals with an intellectual disability or related conditions (ICF-IID) licensed under Chapter 252, Health and Safety Code.**

**(17) HHSC--Texas Health and Human Services Commission.**

**(18) Home and community-based services--Have the meaning given to them in §48.251(a)(5) as services provided in the home or community in accordance with 42 U.S.C. §1315, 42 U.S.C. §1315a, 42 U.S.C. §1396a, or 42 U.S.C. §1396n.**

**(19) Home and community-based services (HCS) waiver program--The Medicaid program authorized under §1915(c) of the federal Social Security Act (42 U.S.C. §1396n(c)) for the provision of services to persons with an intellectual or developmental disability described by §534.001(11)(B), Government Code.**

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

**(21) ICF-IID--A licensed intermediate care facility for individuals with an intellectual disability or related conditions as described in Chapter 252, Health and Safety Code.**

**(22) Incitement--To spur to action or instigate into activity; the term implies responsibility for initiating another's actions.**

**(23) Individual receiving services--**

**(A) An adult or child who receives services from a provider as that term is defined in §48.251(a)(9), Human Resources Code.**

**(B) An adult or child who lives in a residence that is owned, operated, or controlled by an HCS waiver program provider regardless of whether the individual is receiving HCS waiver program services; or**

**(C) A child receiving services from a HCSSA.**

**(24) Investigator--An employee of Adult Protective Services who has:**

**(A) demonstrated competence and expertise in conducting investigations; and**

**(B) received training on techniques for communicating effectively with individuals with a disability.**

**(25) Limited Service Provider--An entity that contracts with a service provider to provide services.**

**(26) Local authority-- Either:**

**(A) a local mental health authority designated by the HHSC executive commissioner in accordance with §533.035, Health and Safety Code, and as defined by §531.002, Health and Safety Code; or**

**(B) a local intellectual and developmental disability authority designated by the HHSC executive commissioner in accordance with §533A.035, Health and Safety Code, and as defined by §531.002, Health and Safety Code.**

**(27) Non-serious physical injury--**

**(A) In state supported living centers and state hospitals only, any injury requiring minor first aid and determined not to be serious by a registered nurse, advanced practice registered nurse (APRN), or physician.**

**(B) For all other service providers any injury determined not to be serious by the appropriate medical personnel. Examples of non-serious physical injury include:**

**(i) superficial laceration;**

**(ii) contusion two and one-half inches in diameter or smaller; or**

**(iii) abrasion.**

**(28) Perpetrator-- A direct provider who has committed or alleged to have committed an act of abuse, neglect, or exploitation.**

**(29) Preponderance of evidence--Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.**

**(30) Prevention and management of aggressive behavior (PMAB)--DADS and DSHS' proprietary risk management program that uses the least intrusive, most effective options to reduce the risk of injury for persons served and staff from acts or potential acts of aggression.**

**(31) Provider--A provider is:**

**(A)  a facility;**

**(B)  a community center, local mental health authority, and local intellectual and developmental disability authority;**

**(C)  a person who contracts with a health and human services agency or managed care organization to provide home and community-based services;**

**(D)  a person who contracts with a Medicaid managed care organization to provide behavioral health services;**

**(E)  a managed care organization;**

**(F)  an officer, employee, agent, contractor, or subcontractor of a person or entity listed in subparagraphs (A)-(E) of this paragraph; and**

**(G)  an employee, fiscal agent, case manager, or service coordinator of an individual employer participating in the consumer-directed service option, as defined by §531.051, Government Code.**

**(32) Reporter--The person, who may be anonymous, making an allegation.**

**(33) Serious physical injury--**

**(A) In state supported living centers and state hospitals only, any injury requiring medical intervention or hospitalization or any injury determined to be serious by a physician or APRN. Medical intervention is treatment by a licensed medical doctor, osteopath, podiatrist, dentist, physician's assistant, or APRN. For the purposes of this subchapter, medical intervention does not include first aid, an examination, diagnostics (e.g., x-ray, blood test), or the prescribing of oral or topical medication;**

**(B) For all other service providers, any injury determined to be serious by the appropriate medical personnel. Examples of serious physical injury include:**

**(i) fracture;**

**(ii) dislocation of any joint;**

**(iii) internal injury;**

**(iv) contusion larger than two and one-half inches in diameter;**

**(v) concussion;**

**(vi) second or third degree burn; or**

**(vii) any laceration requiring sutures or wound closure.**

**(34) Service Provider--A provider, HCSSA, or HCS waiver program provider responsible for employing, contracting with, or supervising the direct provider.**

**(35) Texas Home Living (TxHmL) waiver program--The Medicaid program authorized under §1915(c) of the federal Social Security Act (42 U.S.C. §1396n(c)) for the provision of services to persons with an intellectual or developmental disability described by §534.001(11)(D), Government Code.**

**(36) Sexually transmitted disease--Any infection with or without symptoms or clinical manifestations that can be transmitted from one person to another by sexual contact.**

**(37) Victim--An individual receiving services who is alleged to have been abused, neglected, or exploited.**

§711.5. What does APS investigate under this chapter?

(a) When the alleged perpetrator is **a direct provider,** [an employee, contractor, agent,] or is unknown, and the alleged victim is **an individual receiving services** [a person served], APS investigates allegations of:

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

**(3)** [(4)] verbal/emotional abuse;

[(3) sexual exploitation;]

**(4)** [(5)] neglect; and

**(5)** [(6)] exploitation.

(b) APS also investigates:

(1) pregnancy of **an individual receiving services from** [a person served by] a facility or facility contractor if there is:

(A) medical verification that conception could have occurred while the **individual receiving services** [person served] was a resident of the facility or facility contractor; and

(B) a reasonable expectation that conception occurred while the **individual** [person] was a resident of the facility or facility contractor;

(2) sexually transmitted disease (STD) of **an individual receiving services from** [a person served by] a facility or facility contractor, if the **individual** [person] could have acquired the STD while a resident of the facility or facility contractor; and

(3) injury of unknown origin if [the] appropriate medical personnel, after examining the **individual receiving services** [person served], suspect the injury is the result of abuse or neglect.

§711.7. What does APS not investigate under this chapter?

APS does not investigate:

(1) (No change.)

(2) general complaints[,] such as:

(A) [a] rights **violations** [violation];

**(B)** [(C)] daily administrative operations;

[(C) theft of property;]

[(D) failure to carry out a person served's program or treatment plan, that does not result in a specific incident or allegation involving a person served; or]

[(E) failure to maintain adequate numbers of appropriately trained staff that does not result in a specific incident or allegation involving a person served;]

[(F) failure to provide care or services to a person served that does not result in emotional or physical harm to the person and that is determined not to place the person at risk for harm;]

[(G) situations in which a staff member other than the responsible staff member provided care or supervision to the person served and no harm came to the person served; or]

**(3) operational issues related to the business of managed care or consumer directed services; or**

**(4)** [(3)] if the allegation involves only the clinical practice of a **licensed professional** [physician, dentist, registered nurse, licensed vocational nurse, or pharmacist].

§711.11. How is physical abuse defined?

In this chapter, when the alleged perpetrator is **a direct provider** [an employee, agent, or contractor], physical abuse is defined as:

(1) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, which caused or may have caused physical injury or death to **an individual receiving services** [a person served];

(2) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to **an individual receiving services** [a person served]; or

(3) the use of chemical or bodily restraints on **an individual receiving services** [a person served] not in compliance with federal and state laws and regulations, including:

(A) (No change.)

**(B)** **25 TAC Chapter 404, Subchapter E (relating to Rights of Persons Receiving Mental Health Services);**

**(C)** [(B)]40 TAC Chapter 3, Subchapter F (relating to Restraints);

**(D)** **40 TAC Chapter 90, Subchapter C (relating to Standards for Licensure);**

**(E)** **40 TAC Chapter 2, Subchapter G (relating to Role and Responsibilities of a Local Authority)**;

**(F)** [(C)] 40 TAC Chapter 9, Subchapter D (relating to Home and Community-based Services (HCS) **Program and Community First Choice (CFC)**)**;** [and]

**(G)** 40 TAC Chapter 9, Subchapter N (relating to Texas Home Living (TxHmL) **Program and Community First Choice (CFC)**); [and]

**(H)** [(D)] 40 TAC Chapter **97** [90], Subchapter **H** [C] (relating to Standards **Specific to Agencies Licensed to Provide Hospice Services** [for Licensure])[.]**;**

**(I) 40 TAC Chapter 42, Subchapter D (relating to Additional Program Provider Provisions); and**

**(J)** **1 TAC Chapter 353, Subchapter C (Member Bill of Rights)**

§711.13. How is sexual abuse defined?

(a)In this chapter, when the alleged perpetrator is **a direct provider** [an employee, agent, or contractor], sexual abuse is defined as any sexual activity, including but not limited to:

(1) kissing **an individual receiving services** [a person served] with sexual intent;

(2) hugging **an individual receiving services** [a person served] with sexual intent;

(3) stroking **an individual receiving services** [a person served] with sexual intent;

(4) fondling **an individual receiving services** [a person served] with sexual intent;

(5) engaging in with **an individual receiving services** [a person served]:

(A) - (B) (No change.)

(6) requesting, soliciting, or compelling **an individual receiving services** [a person served] to engage in:

(A) - (B) (No change.)

(7) in the presence of **an individual receiving services** [a person served]:

(A) - (B) (No change.)

(8) committing sexual exploitation**. Sexual exploitation is** [as] defined **as**:

**(A) a pattern, practice, or scheme of conduct against an individual receiving services, which may include sexual contact, that can reasonably be construed as being for the purposes of sexual arousal or gratification or sexual abuse of any person.**

**(B) The term does not include obtaining information about a patient's sexual history within standard accepted clinical practice.** [in §711.15 of this title (relating to How is sexual exploitation defined?) against a person served];

(9) committing sexual assault as defined in the Texas Penal Code §22.011, against **an individual receiving services** [a person served];

(10) committing aggravated sexual assault as defined in the Texas Penal Code, §22.021, against **an individual receiving services** [a person served]; and

(11) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, videotaping, or depicting of **an individual receiving services** [a person served] if the **direct provider** [employee, agent, or contractor] knew or should have known that the resulting photograph, film, videotape, or depiction of the **individual receiving services** [person served] is obscene as defined in the Texas Penal Code, §43.21, or is pornographic.

(b) Notwithstanding any other provision in this section, consensual sexual activity between **a direct provider** [an employee, agent, or contractor], and **an adult receiving services** [an alleged victim] is not considered sexual abuse if the consensual sexual relationship began prior to the **direct provider** [employee, agent, or contractor] becoming a paid **direct provider** [employee, agent, or contractor].

§711.17. How is verbal/emotional abuse defined?

(a) In this chapter, when the alleged perpetrator is **a direct provider** [an employee, agent, or contractor], verbal/emotional abuse is defined as any act or use of verbal or other communication, including gestures, to:

(1) curse, vilify, or degrade **an individual receiving services** [a person served]; or

(2) threaten **an individual receiving services** [a person served] with physical or emotional harm.

(b) In order for the definition of verbal/emotional abuse to be met, the act or communication must:

(1) result in observable distress or harm to the **individual receiving services** [person served]; or

(2) (No change).

§711.19. How is neglect defined?

**(a)** In this chapter, when the alleged perpetrator is **a direct provider** [an employee, agent, or contractor], neglect is defined as a negligent act or omission [by any individual responsible for providing services to a person served,] which caused or may have caused physical or emotional injury or death to **an individual receiving services** [a person served] or which placed **an individual receiving services** [a person served] at risk of physical or emotional injury or death.

**(b) Examples of neglect** **may** **include** [Neglect includes], but **are** [is] not limited to, the failure to:

(1) establish or carry out an appropriate individual program plan or treatment plan for a **specific individual** **receiving services** [person served], if such failure results in **physical or emotional injury or death to an individual receiving services or which placed an individual receiving services at risk of physical or emotional injury or death** [a specific incident or allegation involving a person served];

(2) provide adequate nutrition, clothing, or health care to a specific **individual receiving services** [person served] in a residential or inpatient program **if such failure results in physical or emotional injury or death to an individual receiving services or which placed an individual receiving services at risk of physical or emotional injury or death**; or

(3) provide a safe environment for a specific **individual receiving services** [person served], including the failure to maintain adequate numbers of appropriately trained staff, if such failure results in **physical or emotional injury or death to an individual receiving services or which placed an individual receiving services at risk of physical or emotional injury or death** [a specific incident or allegation involving a person served].

§711.21. How is exploitation defined?

**(a)** In this chapter, when the alleged perpetrator is a [an] **direct provider to an individual receiving services in or from a facility, local authority, community center, or HCS waiver program or TxHmL waiver program provider,** [employee, agent, or contractor,] exploitation**:**

**(1)** is defined as the illegal or improper act or process of using **an individual receiving services** [a person served] or the resources of **an individual receiving services** [a person served] for monetary or personal benefit, profit, or gain**;**[.] **and**

**(2) excludes theft as defined in Chapter 31 of the Texas Penal Code.**

**(b) In this chapter when the alleged perpetrator is a direct provider to an individual receiving services from any other services provider, exploitation:**

**(1) is defined as the illegal or improper act or process of using or attempting to use an individual receiving services or the resources of an individual receiving services for monetary or personal benefit, profit, or gain; and**

**(2) includes theft as defined in Chapter 31 of the Texas Penal Code.**

§711.23. What is not considered abuse, neglect, or exploitation?

Abuse, neglect, and exploitation do not include the following:

(1) the proper use of restraints and seclusion, including Prevention and Management of Aggressive Behavior (PMAB), and the approved application of behavior modification techniques as described in:

(A) - (B) (No change.)

(C) 40 TAC Chapter 3, Subchapter F (relating to Restraints); [and]

(D) 40 TAC Chapter 90, Subchapter C (relating to Standards for Licensure);

**(E) 40 TAC Chapter 2, Subchapter G (relating to Role and Responsibilities of a Local Authority);**

**(F) 40 TAC Chapter 9, Subchapter D (relating to Home and Community-based Services (HCS) Program and Community First Choice (CFC));**

**(G) 40 TAC Chapter 9, Subchapter N (relating to Texas Home Living (TxHmL) Program and Community First Choice (CFC));**

**(H) 40 TAC Chapter 97, Subchapter H (Standards Specific to Agencies Licensed to Provide Hospice Services);**

**(I) 40 TAC Chapter 42, Subchapter D (relating to Additional Program Provider Provisions); and**

**(J) 1 TAC Chapter 353, Subchapter C (Member Bill of Rights).**

(2) actions taken in accordance with the rules of **DADS, DSHS, or HHSC** [the Texas Department of Aging and Disability Services and the Texas Department of State Health Services]; or

(3) actions that **a direct provider** [an employee, contractor, or agent] may reasonably believe to be immediately necessary to avoid imminent harm to self, **individuals receiving services** [persons served], or other individuals provided the actions are limited only to those actions reasonably believed to be necessary under the existing circumstances. [Such actions do not include acts of unnecessary force or the inappropriate use of restraints or seclusion, including PMAB.]

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 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

Subchapter A, Introduction

TAC Section Number(s) §§711.3, 711.9, 711.15, 711.25

Proposed Action

X Repeal

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The repeals 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 repeals 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.

§711.3. How are the terms in this chapter defined?

§711.9. How does APS determine if it has jurisdiction to investigate in situations when a person served by the program is also an employee of the program?

§711.15. How is sexual exploitation defined?

§711.25. What effect do Senate Bill (SB) 1880 and SB 760 (84th Texas Legislature, Regular Session) have on the jurisdiction of Adult Protective Services (APS) to investigate allegations of abuse, neglect, or exploitation of individuals receiving services from certain providers?

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 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

Subchapter C, Duty to Report

TAC Section Number(s) §711.201

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.

§711.201. What is your duty to report if you **are** **a direct provider or service provider** [are an employee, agent, or contractor of a facility, local authority, community center, or HCS]?

**(a)** If you know or suspect that **any individual receiving services** [a person served] is being or has been abused, neglected, or exploited or meets other criteria specified in §711.5of this title (relating to What does APS investigate under this chapter?), you must:

(1) report such knowledge or suspicion to DFPS immediately, if possible, [but in no case more than one hour after knowledge or suspicion] by calling the DFPS toll-free number at 1-800-647-7418 or **using** [by use of] the Internet at <http://www.txabusehotline.org>;

(2) - (3) (No change).

**(b)** **For facilities, community centers, local authorities, and HCS waiver program and TxHmL waiver program providers, the report made under subsection (a)(1) of this section must be made no more than one hour after knowledge or suspicion of abuse, neglect, or exploitation of an individual receiving 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.

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

Chapter 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

Subchapter E, Conducting the Investigation

TAC Section Number(s) §§711.401, 711.405, 711.407, 711.409, 711.411

Proposed Action

X Repeal

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The repeals 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 repeals 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.

§711.401. Who and when does the investigator notify of an allegation and when is the identity of the reporter revealed?

§711.405. What action does the investigator take if the alleged perpetrator is a physician, dentist, registered nurse, licensed vocational nurse, or pharmacist for a state-operated facility or a licensed ICF-IIDthat maintains a peer review committee?

§711.407. What action does the investigator take if the alleged perpetrator is a licensed professional other than a physician, dentist, registered nurse, licensed vocational nurse, or pharmacist for a facility?

§711.409. What action does the investigator take if the alleged perpetrator is a physician, dentist, registered nurse, licensed vocational nurse, or pharmacist for a community center, local authority, licensed ICF-IIDwithout a peer review committee, or HCS?

§711.411. What action does the investigator take if the alleged perpetrator is a licensed professional other than a physician, dentist, registered nurse, licensed vocational nurse, or pharmacist for a community center, local authority, licensed ICF-IID, or HCS?

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 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

Subchapter E, Conducting the Investigation

TAC Section Number(s) §§711.401, 711.403, 711.405, 711.419, 711.423

Proposed Action

X Amendment

X New

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The amendments and new sections 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 and new sections 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.

**§711.401. Who and when does the Investigator notify for allegations of abuse, neglect, or exploitation and when is the identity of the reporter revealed?**

**(a) For all allegations of abuse, neglect, or exploitation of an individual receiving services, the investigator makes the following notifications, as appropriate:**

|  |  |  |
| --- | --- | --- |
| **When the alleged perpetrator is a direct provider of a …** | **The Investigator notifies** | **Within…** |
| **Facility, community center, local authority, HCS waiver program or TxHmL waiver program provider** | **The facility, community center, local authority, HCS waiver program or TxHmL waiver program provider** | **One hour of receipt of the allegation by DFPS** |
| **HCS waiver program provider or TxHmL waiver program provider** | **DADS Office of Consumer Rights and Services** | **24 hours of receipt of the allegation by DFPS or the next working day** |
| **Service provider in the home or community excluding the HCS waiver program or TxHmL waiver program** | **Service provider** | **24 hours of receipt of the allegation by DFPS** |
| **Limited service provider in the home or community excluding the HCS waiver program or TxHmL waiver program** | **Limited service provider & service provider** | **24 hours of receipt of the allegation by DFPS** |
| **Managed care organization** | **Managed care organization** | **24 hours of receipt of the allegation by DFPS** |
| **Consumer Directed Service Option employer** | **(1) CDS employer; and**  **(2) Service coordinator, case manager, or Fiscal Management Service Agency as appropriate** | **24 hours of receipt of the allegation by DFPS** |

**(b) For notifications described in subsection (a) of this section, the identity of the reporter is revealed only if the alleged perpetrator is a mental health service provider and the allegation is sexual exploitation in accordance with Chapter 81, Texas Civil Practice and Remedies Code.**

**(c) The investigator notifies law enforcement within one hour of receipt of the allegation by DFPS and reveals the identity of the reporter for:**

**(1) any allegation of abuse, neglect, or exploitation involving a child; and**

**(2) any allegation of abuse, neglect, or exploitation involving an individual receiving services believed to constitute a criminal offense under any law.**

**(d) The investigator notifies the Office of Inspector General within one hour of receipt of the allegation by DFPS and reveals the identity of the reporter for any allegation of abuse, neglect, or exploitation believed to constitute a criminal offense under any law involving an individual receiving services:**

**(1) in a state supported living center;**

**(2) the ICF-IID component of the Rio Grande State Center; or**

**(3) in a state hospital.**

§711.403. Who and when does the investigator notify upon receiving an allegation that relates to a general complaint?

Within 24 hours or the next working day following receipt of an allegation that relates to a general complaint, as described in §711.7(2) of this title (relating to What does APS not investigate under this chapter?), the investigator **makes notifications per §711.401(1)(a) of this title (relating to Who and when does the investigator notify for allegations of abuse, neglect, or exploitation and when is the identity of the reporter revealed?) if the service provider is identified at intake** [notifies the administratorof the general complaint].

**§711.405. What action does the investigator take if the alleged perpetrator is a licensed professional?**

**(a) The investigator determines whether the allegation involves clinical practice by consultation with an appropriate professional, and in state hospitals, in accordance with 25 TAC §417.509 (relating to Peer Review).**

**(b) If the allegation is determined to involve clinical practice, the investigator refers the allegation to the service provider for peer or professional review. If the service provider does not have a peer or professional review process, the investigator refers the allegation to the service provider as well as the appropriate professional licensing board.**

**(c) If the allegation is determined to not involve clinical practice, the investigator investigates the allegation.**

**(d) If there are multiple allegations, the investigator refers any allegation involving clinical practice to the service provider for peer/professional review and investigates any allegation not involving clinical practice.**

§711.419. What if the investigator cannot complete the investigation on time?

(a) If additional time is required to complete the investigation, the investigator must request an extension by submitting an Extension Request form to the **appropriate** [regional] APS program administrator.

(b) The [regional] APS program administrator may grant an extension for good cause for one to 14 calendar days depending on the needs of the investigation.

(c) The investigator must notify the service **provider** [administrator] of all extensions.

§711.423. Is the investigator required to designate a perpetrator or alleged perpetrator?

(a) (No change.)

(b) The **perpetrator is** [investigator indicates] "perpetrator unknown" when a positive identification of the responsible person(s) cannot be made.

(c) The **perpetrator is** [investigator indicates] "systems issue" when **the investigator determines** [it is determined] that the lack of established policy or procedure contributed to the abuse, neglect, or exploitation.

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 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

Subchapter G, Release of Report and Findings

TAC Section Number(s) §§711.603, 711.605, 711.609, 711.611, 711.613,

Proposed Action

X Amendment

X New

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The amendments and new section 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 Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new section 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.

§711.603. What is included in the investigative report?

The investigative report includes the following:

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

(5) **concerns and** recommendations**, if any,** resulting from the investigation;

(6) - (7) (No change.)

(8) the physician's exam and treatment of abuse/neglect‑related injuries documented on the DADS or DSHS Client Injury/Incident Report **for state supported living centers or state hospitals** [(state-operated facilities only)];

(9) - (10) (No change.)

(11) a signed and dated Client Abuse and Neglect Report (AN-1-A) form, **as appropriate,** reflecting the information contained in paragraphs (4), (6), and (7) of this section.

**§711.605. Who receives the investigative report?**

1. **The investigator sends a copy of the investigative report to:**

**(1) The notification contact identified in §711.401(a) of this title (relating to Who and When does the investigator notify for allegations of abuse, neglect, or exploitation and when is the identity of the reporter revealed?) with the identity of the reporter revealed in accordance with §711.401(b);**

**(2) The appropriate health and human service agency including:**

**(A) HHSC for investigations involving managed care organization members;**

**(B) DADS State Office, if the investigation involves:**

**(i) A state supported living center;**

**(ii) An HCS waiver program or TxHmL waiver program providers; or**

**(iii) Licensed ICF-IID; and**

**(C) DSHS State Office, if the investigation involves:**

**(i) Youth Empowerment Services (YES) waiver program, the waiver authorized under 1915c of the Social Security Act; or**

**(ii) Home and Community-based Services-Adult Mental Health Program (HCBS-AMH), the program authorized under 1915i of the Social Security Act;**

**(3) The DADS Assistant Commissioner of state supported living centers (SSLC) or the DSHS Assistant Commissioner for Mental Health and Substance Abuse Services or their designee for an investigation in a facility, as applicable;**

**(4) Local law enforcement when an individual receiving services has been abused, neglected, or exploited in a manner that constitutes a criminal offense under any law, including Texas Penal Code §22.04;**

**(5) The Office of the Inspector General when an individual receiving services at a state hospital, SSLC, or ICF-IID component of the Rio Grande State Center has been abused, neglected, or exploited in a manner that constitutes a criminal offense under any law; and**

**(6) The state office of Adult Protective Services for any confirmed finding against a licensed professional except for investigations involving licensed professionals employed at a state hospital or state supported living center.**

**(b) The state office of APS forwards a copy of the report received under subsection (a)(6) of this section to the appropriate professional licensing board.**

**(c) A provider who contracts with a managed care organization must forward any completed investigation report received under subsection (a) of this section to the managed care organization with which the provider contracts for services for the alleged victim.**

**(d) Law enforcement or a prosecutor may request that DFPS delay the release of the investigative report, or may request that DFPS delay forwarding a copy of the report to the appropriate licensing authority.**

§711.609. **Is** [How and when is] the reporter notified of the finding **and the method to appeal, and if so, how**?

**Yes; the reporter is notified** [Within 30 calendar days of completion] of the **finding of the** investigation **and the method to appeal the finding.**[,] **The** [the] investigator **makes the notification within 5 business days of completion of the investigation.**[notifies the reporter in writing of the:]

[(1) finding of the investigation; and]

[(2) method of appealing the finding.]

§711.611. Is the victim or alleged victim, guardian, or parent notified of the finding **and the method to appeal, and if so, how**?

Yes**;**[.] **the** [The] victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child) is notified of the finding of the investigation and the method to appeal the finding**.**[,]

**(1) For facilities, community centers, local authorities, and HCS waiver program or TxHmL waiver program providers providing services to an individual enrolled in the HCS or TxHmL waiver programs, the notification is made** in accordance with the following rules of DADS and DSHS:

**(A)** [(1)] for state hospitals and the mental health services of the Rio Grande State Center--25 TAC §417.510 (relating to Completion of the Investigation);

**(B)** [(2)] for state supported living centers and the ICF-IIDcomponent of the Rio Grande State Center--40 TAC §3.305(c)(relating to Completion of anInvestigation);

**(C)** [(3)] for local authorities and community centers--25 TAC §414.555 and 40 TAC §4.555 (relating to Information To Be Provided to Victim or Alleged Victim and Others);

**(D)** [(4)] for HCS **waiver** programs--40 TAC Chapter 9, Subchapter D (relating to Home and Community-based Services (HCS) program**;** [and]

**(E) for TxHmL waiver programs--**40 TAC Chapter 9, Subchapter N (relating to Texas Home Living (TxHmL) program); or

**(F)** [(5)] for licensed ICFs-IID--40 TAC Chapter 90, Subchapter G (relating to Abuse, Neglect, and Exploitation; Complaint and Incident Reports and Investigations)**; and**[.]

**(2) For all other service providers, the investigator makes the notification within 5 business days following the date the investigation report was signed and dated by the investigator.**

§711.613. Can the investigative report be released by **a** [the] **service providers** [State Supported Living Centers, the State Hospitals, licensed ICFs-IID, local authorities, or HCSs]?

Upon request, the investigative report (with any information concealed that would reveal the identities of the reporter and any **individual receiving services** [person served] who is not the victim or alleged victim) may be released:

(1) **by a facility** [for facilities and their contractors,] to**:**

**(A)** the victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child), in accordance with 25 TAC §417.511(b) (relating to Confidentiality of Investigative Process and Report), and 40 TAC §3.305(k) (relating to Completion of an Investigation)[,]**; and** [or]

**(B)** the perpetrator in accordance with 25 TAC §417.512(d) (relating to Classifications and Disciplinary Actions) and 40 TAC §3.305(e);

(2) **by a** [for] local **authority** [authorities,] **or** community **center** [centers, and their respective contractors] to:

(A) (No change.)

(B) the perpetrator or alleged perpetrator [by the administrator or contractor CEO]; [and]

(3) for **HCS** [HCSs] **waiver program or TxHmL waiver program providers providing services to an individual enrolled in the HCS waiver program or TxHmL waiver programs** [and their contractors, ]to the victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child), in accordance with 40 TAC Chapter 9, Subchapter D (relating to Home and Community-based Services (HCS) Program) and 40 TAC Chapter 9, Subchapter N (relating to Texas Home Living (TxHmL) Program)**; and**[.]

**(4) for all other service providers, the investigative report shall not be released except in accordance with §711.605(c) of this chapter (relating to Who receives the investigative report?).**

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 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

Subchapter G, Release of Report and Findings

TAC Section Number(s) §§711.605, 711.607

Proposed Action

X Repeal

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The repeals 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 repeals 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.

§711.605. Who receives the investigative report?

§711.607. Does the investigator reveal the identity of the reporter in the investigative report released to the administrator, contractor CEO, or Consumer Rights and 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 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

Subchapter I, Provision of Services

TAC Section Number(s) §§711.801, 711.802, 711.804, 711.806

Proposed Action

X Amendment

X New

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The amendments and new sections 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 Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The amendments and new sections 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.

§711.801. What action does the investigator take if **an individual** [a person served by] **enrolled in the HCS waiver program receiving services from** an HCS **waiver program provider** needs emergency services?

(a) If the investigator determines that **an individual receiving HCS waiver program services** [a person served by] **from** an HCS **waiver program provider** is in immediate threat of serious physical harm or death as a result of abuse, neglect, or exploitation, then the investigator requests **that** the HCS **waiver program provider**, if appropriate, [to] take action to remove the threat of physical harm or death. In deciding whether it is appropriate to request that the HCS **waiver program provider** take action, the investigator considers the following factors at a minimum:

(1) the ability of the HCS **waiver program provider** to take action in a timely manner;

(2) (No change.)

(3) **setting/location** [location] of the HCS **waiver program provider** [site]; and

(4) (No change.)

(b) If the investigator determines that it is not appropriate to request **that** the HCS **waiver program provider** [to] take action, or if the HCS **waiver program provider** does not respond appropriately to a request, then the investigator utilizes the resources of the APS In-home staff to provide emergency services necessary to prevent serious physical harm or death.

(c) The investigator informs **DADS Office of** Consumer Rights and Services of the investigator's determination that **an individual enrolled in the HCS waiver program receiving services from an HCS waiver program provider** [a person served by an HCS]was in immediate threat of serious physical harm or death as a result of abuse, neglect, or exploitation, within 24 hours or the next working day of such determination.

§711.802. What action does the investigator take if **an individual receiving services from** [a person served by] a licensed ICF-IIDneeds emergency services?

(a) If the investigator determines that **an individual receiving services from** [a person served by] a licensed ICF-IID is in immediate threat of serious physical harm or death as a result of abuse, neglect, or exploitation, then the investigator requests **that** the licensed ICF-IID, if appropriate, to take action to remove the threat of physical harm or death. In deciding whether it is appropriate [to] request that the licensed ICF-IIDtake action, the investigator considers the following factors at a minimum:

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

(b) If the investigator determines that it is not appropriate to request the licensed ICF-IID to take action or if the licensed ICF-IID does not respond appropriately to a request, then the investigator contacts **DADS** [the Department of Aging and Disability Services (DADS)] Regulatory division and provides DADS with all information that DFPS believes makes it necessary for DADS to file a petition for temporary care and protection of a resident. If DADS determines, based on information from the DFPS investigator, that immediate removal is necessary to protect the resident from further abuse, neglect, or exploitation, DADS will file the petition.

**§711.804 What action does the investigator take if an adult lives in a residence that is owned, operated, or controlled by an HCS waiver program provider but does not receive HCS waiver services and needs emergency services?**

**(a) If the investigator determines that an adult who lives in a residence that is owned, operated, or controlled by an HCS waiver program provider but does not receive HCS waiver services is in immediate threat of serious physical harm or death as a result of abuse, neglect, or exploitation, then the investigator requests that the HCS waiver program provider, if appropriate, take action to remove the threat of physical harm or death. In deciding whether it is appropriate to request that the provider take action, the investigator considers the following factors at a minimum:**

**(1) ability of the provider to take action in a timely manner;**

**(2) identity of the alleged perpetrator;**

**(3) setting of the service provision; and**

**(4) type of action needed to remove the threat.**

**(b) If the investigator determines that it is not appropriate to request that the HCS waiver program provider take action or if the HCS waiver program provider does not respond appropriately to a request, then the investigator utilizes the resources of the APS In-home staff to provide emergency services necessary to prevent serious physical harm or death.**

**§711.806 What action does the investigator take if a child lives in a residence that is owned, operated, or controlled by an HCS waiver program provider but does not receive HCS waiver services and needs emergency services?**

**(a) If the investigator determines that a child who lives in a residence that is owned, operated, or controlled by an HCS waiver program provider but does not receive HCS waiver services is in immediate threat of serious physical harm or death as a result of abuse, neglect, or exploitation, then the investigator requests that the HCS waiver program provider, if appropriate, take action to remove the threat of physical harm or death. In deciding whether it is appropriate to request that the HCS waiver program provider take action, the investigator considers the following factors at a minimum the:**

**(1) ability of the provider to take action in a timely manner;**

**(2) identity of the alleged perpetrator;**

**(3) setting/location of the HCS waiver program provider; and**

**(4) type of action needed to remove the threat.**

**(b) If the investigator determines that it is not appropriate to request that the HCS waiver program provider take action or if the HCS waiver program provider does not respond appropriately to a request, then the investigator contacts the parent, legally authorized representative, or Child Protective Services (CPS) conservator.**

**(c) If the parent or legally authorized representative does not respond appropriately to a request, the investigator makes a case-related special request for services to CPS.**

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 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

**Subchapter J, Appealing the Investigation Finding**

TAC Section Number(s) §§711.901, 711.903, 711.905, 711.907, 711.909, 711.911, 711.913, 711.915

Proposed Action

X New

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The new sections 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 sections 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.

**§711.901 What is an appeal of the investigation?**

**(a) An appeal is a challenge of the findings of the investigation, as described in §711.421 of this chapter (relating to What are the possible findings of an investigation?) by a qualified party, as described by §711.905 of this chapter (relating to Who may request an appeal of the investigation?).**

**(b) An appeal may not challenge the determination of whether a confirmation rises to the level of reportable conduct for purposes of the Employee Misconduct Registry.**

**(c) There are two levels of appeal:**

**(1) The first level of appeal is conducted by the Director of Provider Investigations or their designee, or a reviewer designated by the Assistant Commissioner of APS.**

**(2) If a qualified party disagrees with the decision of the first appeal, the qualified party may further appeal. This second appeal is conducted by a reviewer designated by the Assistant Commissioner of APS.**

**(d) The determination resulting from the second appeal is final and cannot be appealed by any qualified party except Disability Rights Texas.**

**§711.903. How is an appeal affected by a determination that the perpetrator's confirmed act of abuse, neglect, or exploitation may rise to the level of reportable conduct?**

**An appeal that is described in this subchapter is not affected by a determination that the confirmed act(s) of abuse, neglect, or exploitation may rise to the level of reportable conduct. The designated perpetrator will not receive notice about their right to request an EMR hearing until the timeframe for all appeals described in this subchapter have expired, or until the second appeal is completed and a confirmed finding that rises to the level of reportable conduct is upheld.**

**§711.905. Who may request an appeal of the investigation?**

**(a) In order to be a qualified party to request an appeal, you must be:**

**(1) the administrator of the service provider or their attorney;**

**(2) the CDS employer or their legal representative;**

**(3) the reporter;**

**(4) the victim or alleged victim, or the legal guardian or parent (if the victim or alleged victim is a child); or**

**(5) Disability Rights Texas, only if Disability Rights Texas represents the victim or alleged victim or is authorized by law to represent the victim or alleged victim.**

**(b) An alleged or designated perpetrator may not request an appeal even if they are otherwise a qualified party. An alleged or designated perpetrator may not coerce a CDS employer into requesting an appeal on their behalf.**

**§711.907. How does a qualified party request an appeal?**

**(a) To request an appeal, the qualified party must complete either the DFPS' "Request for Appeal of an APS Provider Investigation" form or "Appeal Addendum," as appropriate to the level of appeal, and send the completed form either via email to APS\_Provider\_Appeals@dfps.state.tx.us or via mail to APS Provider Appeals, Adult Protective Services Division, Department of Family and Protective Services, P.O. Box 149030, E-561, Austin, Texas, 78714-9030.**

**(b) The victim, alleged victim, legal guardian, parent (if the victim or alleged victim is a child), and reporter may request an appeal by calling DFPS toll-free at 1-888-778-4766.**

**§711.909. What is the timeline for requesting an appeal?**

**(a) To request a first level appeal:**

**(1) Service providers may request an appeal no later than the 30th calendar day following the date the investigative report was signed and dated by the investigator;**

**(2) Reporters, alleged victims, and legal guardians may request an appeal no later than the 60th calendar day following the date the investigative report was signed and dated by the investigator;**

**(3) Disability Rights Texas may request an appeal no later than the 60th calendar day following the date the investigative report was signed and dated by the investigator; and**

**(4) DFPS may accept a request for appeal after the deadline for good cause as determined by DFPS.**

**(b) To challenge the decision from the first level appeal, a qualified party has 30 calendar days following the date the appeal decision letter is signed.**

**§711. 911. How and when is the appeal conducted?**

**(a) A first level appeal is conducted by the Director of Provider Investigations or their designee, or a reviewer designated by the Assistant Commissioner of APS, who:**

**(1) analyzes the investigative report and the methodology used to conduct the investigation and makes a decision to sustain, alter, or reverse the original finding;**

**(2) completes the review within 14 calendar days after receipt of the request; and**

**(3) notifies the appeal requestor of the appeal decision; and**

**(4) as appropriate, notifies the service provider, victim, and/or reporter if the finding changed.**

**(b) A secondary appeal is conducted by a reviewer designated by the Assistant Commissioner of APS, who:**

**(1) analyzes the investigative report and makes a decision to sustain, alter, or reverse the original finding;**

**(2) completes the review within 14 calendar days after receipt of the request; and**

**(3) notifies the appeal requestor of the appeal decision; and**

**(4) as appropriate, notifies the service provider, victim, and/or reporter if the finding changed.**

**§711.913. What if the administrator of a state-operated facility disagrees with the secondary appeal decision?**

**If the administrator of a state-operated facility disagrees with the secondary appeal decision, as referenced in §711.911(b) of this chapter (relating to How and when is the appeal conducted?), then they may contest the decision in accordance with 25 TAC §417.510(g)(2) (relating to Completion of the Investigation) and 40 TAC §3.305(b) (relating to Completion of an Investigation).**

**§711.915. Is a finding ever changed without an appeal?**

**DFPS, in its sole discretion, may designate a person to conduct a review of the investigation records or reopen an investigation to collect additional evidence. If a review of the records and any additional investigating results in a change of the finding, DFPS will notify the appropriate parties in writing.**

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 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

Subchapter K, Requesting a Review of Finding if You Are the Administrator or Contractor CEO

TAC Section Number(s) §§711.1001, 711.1002, 711.1003, 711.1005, 711.1007, 711.1009, 711.1011, 711.1012, 711.1013, 711.1015

Proposed Action

X Repeal

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The repeals 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 repeals 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.

§711.1001. What if the administrator or contractor CEO wants to request a review of the finding or the methodology used to conduct the investigation?

§711.1002. How is a request for review affected by a determination that the perpetrator's confirmed act of abuse, neglect, or exploitation may rise to the level of reportable conduct?

§711.1003. How is a review as described in §711.1001 of this title (relating to What if the administrator or contractor CEO wants to request a review of the finding or the methodology used to conduct the investigation?) requested?

§711.1005. Is there a deadline to request a review?

§711.1007. How is the review of a finding conducted?

§711.1009. How is the review of the methodology conducted?

§711.1011. What if the administrator or contractor CEO wants to challenge the methodological review decision(s) made by the regional APS program administrator?

§711.1012. Is there a deadline for the administrator or contractor CEO to challenge the methodological review decision(s) made by the regional APS program administrator?

§711.1013. What if the administrator of a state-operated facility disagrees with the finding review decision?

§711.1015. Is a finding ever changed without a request for review of finding or methodology?

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 711, Investigations **of Individuals Receiving Services from Certain Providers** [in DADS and DSHS Facilities and Related Programs]

Subchapter M, Requesting an Appeal if You Are the Reporter, Alleged Victim, Legal Guardian, or With Disability Rights Texas

TAC Section Number(s) §§711.1201, 711.1203, 711.1205, 711.1207, 711.1209

Proposed Action

X Repeal

Proposed Date of Adoption:

X Other (Specify)

September 1, 2016

The repeals 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 repeals 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.

§711.1201. Who may request an appeal?

§711.1203. How does the reporter, victim or alleged victim, legal guardian or parent, or Disability Rights Texasrequest an appeal?

§711.1205. Is there a deadline to request an appeal?

§711.1207. How is the appeal conducted?

§711.1209. Is a finding ever changed without a request for appeal?

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

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