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

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| TO: | Department of Family and Protective Services Logo**Chair and Members Department of Family and Protective Services Council** |
| FROM: | **H. L. Whitman, Jr. DFPS Commissioner** |
| SUBJECT: | **Agenda Item 5a: Recommendation to propose rule changes to 40 TAC, Chapter 700, Subchapter C relating to Eligibility for Child Protective Services; Subchapter H relating to Adoption Assistance Program; Division 1 of Subchapter J relating to the Relative and Other Designated Caregiver Program; Division 2 of Subchapter J relating to the Permanency Care Assistance Program; and Division 2 of Subchapter Q relating to Post-Permanency Services** |
| DATE: | **July 22, 2016** |

BACKGROUND AND PURPOSE

The Child Protective Services (CPS) Division of the Department of Family and Protective Services (DFPS) proposes changes to Title 40, Texas Administrative Code (TAC), Chapter 700, Subchapter C relating to Eligibility for Child Protective Services; Subchapter H relating to the Adoption Assistance Program; Division 1 of Subchapter J relating to the Relative And Other Designated Caregiver Program; Division 2 of Subchapter J relating to the Permanency Care Assistance Program; and Division 2 of Subchapter Q relating to Post-Permanency Services.

The primary purpose of the revisions is to ensure that the rules regarding eligibility for financial assistance and services for foster families, kinship families, and families that assume legal responsibility of children in the conservatorship of DFPS are consistent with federal mandates as well as DFPS's current policies and practices. In addition, the changes are intended to aid in public understanding of DFPS's eligibility criteria for the financial assistance and services. Except for the four changes discussed below, the rule changes primarily consist of updating and clarifying the agency's existing rules. The practice and policy shifts that are being proposed in the rules are as follows:

* New rule § 700.883 which states that in limited circumstances, an adoptive parent who took conservatorship of the child prior to the finalization of the adoption may qualify for adoption assistance benefits through the fair hearing process at DFPS's discretion and in limited circumstances if specific criteria have been met. While this new rule is somewhat of a shift in current practice, DFPS has previously interpreted the existing rules pertaining to adoption assistance to permit adoptive parents to file for a fair hearing in such situations when the parent otherwise meets the criteria for adoption assistance benefits. This rule clarifies and makes explicit that interpretation.
* New rule § 700.1059 which provides that a relative or fictive kin that was granted permanent managing conservatorship of a child prior to signing a permanency care assistance agreement may still receive benefits on behalf of the child through the fair hearing process if the child meets all eligibility requirements and the caregiver shows that there is good reason to excuse the failure to sign the agreement prior to the grant of conservatorship. Federal law and guidance require DFPS to offer a fair hearing as a procedural protection in cases in which benefits are denied, including denial of permanency care assistance benefits. Further, the adoption assistance rules explicitly permit reversal of a denial of adoption assistance if there is good reason to excuse failure to have signed an adoption assistance agreement; however, the existing permanency care assistance rules do not have a similar provision, although legally DFPS has interpreted federal requirements to supersede the state rules on this point. As such, this new rule clarifies DFPS's current practice and implements federal law and guidance.
* New rule § 700.1061 which provides that if the child's permanent managing conservator dies or becomes incapacitated, permanency care assistance benefit may continue to an individual that is subsequently granted permanent managing conservatorship of the child if that person was named as the successor in the original permanency care assistance agreement or in an amendment to that agreement. This proposed addition is made pursuant to the mandates of federal legislation, Preventing Sex Trafficking and Strengthening Families Act (H.R. 4980) from the 113th United States Congress, which became public law on September 29, 2014.
* Amendments to existing rules §§ 700.1726, 700.1728, and 700.1731 and new rule §700.1727 which provide that children in permanent managing conservatorships with non-parent relatives and fictive kin are eligible to receive various post permanency services similar to post-adopt services, if specific criteria has been met. The purpose of these proposed rules is to ensure that children that exit into conservatorship receive the same services as children that exit into an adoptive placement in order to help the children and families adjust to the permanency, cope with any history of abuse in the child's background, cope with mental health issues the child may have, and avoid permanent or long-term removal of the children from their family.

DETAILED SECTION ANALYSIS AND DISPOSITION TABLE

| **Current Rule Sections** | **Proposed Action; New Rule Section** | **Summary Explanation of Proposed Action** |
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| §700.332 | Amend | The rule incorporates policy-based eligibility criteria and restrictions for foster child day care, including eligibility requirements related to the child, the purposes for which care may be authorized, and the types of centers and homes that may be utilized. |
| §700.334 | New | The rule adds eligibility criteria for special needs foster child day care to the agency's publicly adopted rules. |
| §700.802 | Amend | The rule amends subsection (d) to conform the rule with current practice that children with special needs who are not adopted from DFPS conservatorship must meet the criteria of §700.803(b) of this title to be eligible for Title IV-E adoption assistance. |
| §700.804 | Amend | * The rule amends subsection (1)(A) to clarify that to qualify as a child with special needs, the child must be in the managing conservatorship of DFPS from the time of adoptive placement until consummation of the adoption, unless it is a subsequent adoption. * The rule changes the term "handicapping condition" to "disabling condition" to reflect current terminology. |
| §700.821 | Amend | The rule clarifies the current federal requirement that to be eligible for Title IV-E Medicaid and monthly adoption assistance payments, the adoption assistance agreement must be signed before consummation of the adoption; makes additional clarifying edits related to the underlying federal requirements. |
| §700.825 | Amend | * The rule is amended to conform with the federal definition of "applicable child." * The requirement in subsections (b) and (c) that the child meet one of the criteria of §700.821(c) of this title to be considered an applicable child is deleted, because the language is duplicative of §700.821. * The effective date of October 1, 2009, for subsections (b) and (c) is deleted, since it has passed. |
| §700.850 | Amend | The rule amends subsection (c) to specify that claims for reimbursement received later than 18 months after the adoption is finalized may be referred to the Texas Comptroller of Public Accounts for processing as a miscellaneous claim to allow for flexibility in filing the claims. |
| §700.851 | Amend | The rule amends subsection (a)(1) to clarify that the child must be adoptively placed in the home after the child's 16th birthday but before the child's 18th birthday to qualify for extended adoption assistance benefits to reflect the legislative intent of extended adoption assistance benefits which is to promote the adoption of older children. |
| §700.863 | Amend | The rule is amended to clarify that a child who has been receiving adoption assistance benefits under a signed adoption assistance agreement would remain eligible for adoption assistance benefits in a subsequent adoption when certain conditions are met, even if the child is not in the conservatorship of DFPS from the time of adoptive placement until the consummation of the subsequent adoption. |
| §700.880 | Amend | The rule is amended to clarify that a fair hearing to appeal the denial, suspension, reduction, or termination of adoption assistance benefits is also available as provided in new rule §700.883 under this title (relating to "Can I still get adoption assistance benefits if I assume legal responsibility of a child in DFPS conservatorship before the adoption is finalized?"). |
| §700.881 | Amend | The rule changes the term "handicapping condition" to "disabling condition" to reflect current terminology. |
| §700.883 | New | The new rule permits, in extremely limited circumstances, an adoptive parent who intervenes in a court proceeding and assumes permanent managing conservatorship of a child prior to the adoption being finalized to apply for adoption assistance benefits at DFPS's discretion if certain criteria enumerated in the rule are met. |
| §700.1013 | Amend | The rule incorporates policy-based eligibility criteria and restrictions for kinship day care, including eligibility requirements related to the child, the purposes for which care may be authorized, and the types of centers and homes that may be utilized. |
| §700.1025 | Amend | * This rule was updated to clarify the maximum amount of reimbursement a permanent managing conservator may receive for nonrecurring expenses related to becoming the permanent managing conservator. * In addition, the terminology used to refer to a permanent managing conservator and permanent managing conservatorship was updated to be consistent throughout the rule. |
| §700.1027 | Amend | * The definition for a successor guardian was added to the rule to explain when an individual who was subsequently granted permanent managing conservatorship of a child after the death or incapacitation of the initial permanent managing conservator is entitled to receive permanency care assistance benefits for that child. * Non-substantive edits were made to the rule including updating terminology used to refer to the permanency care assistance agreement and updating terminology and definitions used to refer to the relative or fictive kin that is granted permanent managing conservatorship of a child that was previously in the conservatorship of DFPS. |
| §700.1029 | Amend | The following non-substantive changes were made to the rule:   * updating terminology used to refer to the permanency care assistance agreement; * updating terminology used to refer to the relative or fictive kin that is granted permanent managing conservatorship of a child that was previously in the conservatorship of DFPS; and * updating terminology used when a child is returned to the home the child was originally removed from. |
| §700.1031 | Amend | * Subsection (b) of the rule was updated to clarify that the simplest way for relatives and fictive kin to be eligible for foster care reimbursement payments is to become verified as foster parents. * Subsection (d) of the rule was updated to clarify that a person who has been awarded sole or joint managing conservatorship of a child in a temporary or final order is not entitled to foster care reimbursements for *that child*. |
| §700.1037 | Amend | * Subsection (d) was updated with a reference to new §700.1059 (relating to Can a child still get benefits if a permanency care assistanceagreement was not signed before the permanent kinship conservator was granted permanent managing conservatorship of the child?) to clarify when an individual may receive permanency care assistance benefits even if the individual did not sign a permanency care assistance agreement prior to being granted permanent managing conservatorship. * Non-substantive edits were made to the rule including updating terminology used to refer to the permanency care assistance agreement and updating terminology used to refer to the relative or fictive kin that is granted permanent managing conservatorship of a child that was previously in the conservatorship of DFPS. |
| §700.1039 | Amend | Non-substantive edits were made to the rule including updating terminology used to refer to the permanency care assistance agreement and updating terminology used to refer to the relative or fictive kin that is granted permanent managing conservatorship of a child that was previously in the conservatorship of DFPS. |
| §700.1041 | Amend | * Subsection (a) was updated with a reference to new §700.1059 (relating to Can a child still get benefits if a permanency care assistance agreement was not signed before the permanent kinship conservator was granted permanent managing conservatorship of the child?) to clarify that in limited circumstances an individual may receive permanency care assistance benefits even if the individual did not sign a permanency care assistance agreement prior to the grant of permanent managing conservatorship. * Non-substantive edits were made to the rule including updating terminology used to refer to the permanency care assistance agreement and updating terminology used to refer to the relative or fictive kin who is granted permanent managing conservatorship of a child that was previously in the conservatorship of DFPS. |
| §700.1043 | Amend | The following non-substantive changes were made to the rule:   * updating terminology used to refer to the relative or fictive kin that is granted permanent managing conservatorship of a child who was previously in the conservatorship of DFPS; and * deleting content regarding the maximum amount of reimbursement a permanent managing conservator is entitled to receive for permanency care assistance agreements signed prior to and post August 1, 2012 as all agreements now signed will be after 2012. |
| §700.1045 | Amend | The following non-substantive changes were made to the rule:   * updating terminology used to refer to the permanency care assistance agreement; and * updating terminology used to refer to the relative or fictive kin who is granted permanent managing conservatorship of a child that was previously in the conservatorship of DFPS. |
| §700.1047 | Amend | * New subsection (e) was added to clarify that if the permanent kinship conservator dies or becomes incapacitated and a successor guardian assumes legal custody of the child, the permanency care assistance agreement is terminated and the successor guardian must enter into a new agreement with DFPS in order to receive permanency care assistance on behalf of the child. * Non-substantive edits were made to the rule including updating terminology used to refer to the permanency care assistance agreement and updating terminology used to refer to the relative or fictive kin who is granted permanent managing conservatorship of a child that was previously in the conservatorship of DFPS. |
| §700.1049 | Amend | * Subsection (a) of this section was updated to specify that a permanent kinship conservator who enters into a permanency care assistance agreement is responsible for notifying DFPS when he or she has identified a potential successor guardian. * Non-substantive edits were made to the rule including updating terminology used to refer to the permanency care assistance agreement and updating terminology used to refer to the relative or fictive kin who is granted permanent managing conservatorship of a child that was previously in the conservatorship of DFPS. |
| §700.1051 | Amend | Non-substantive edits were made to the rule including updating terminology used to refer to the permanency care assistance agreement and updating terminology used to refer to the relative or fictive kin that is granted permanent managing conservatorship of a child that was previously in the conservatorship of DFPS. |
| §700.1053 | Amend | * Subsection (a) was reworded to clarify that the permanent kinship conservator must be granted permanent managing conservatorship of the youth after the child's 16th birthday to receive extended permanency care assistance to reflect the legislative intent of promoting permanency of older children. * Terminology used to refer to the relative or fictive kin who is granted permanent managing conservatorship of a child that was previously in the conservatorship of DFPS was updated. |
| §700.1059 | New | * The new rule provides that a permanent kinship conservator who did not sign a permanency care assistance agreement before being granted permanent managing conservatorship of a child may still receive permanency care assistance benefits if the conservator requests a fair hearing, shows that there is good reason to excuse the failure to have signed the agreement, and meets the eligibility requirements for permanency care assistance benefits. * The new rule further provides that if DFPS agrees that the child iseligible for benefits and the failure to have signed a permanency care assistanceagreement should be excused, DFPS and the conservator can sign an agreed order and forgo the fair hearing; however, the hearing officer must approve the agreed order and the conservator must sign anagreement consistent with the provisions of the order prior to receiving benefits. |
| §700.1061 | New | * The new rule provides that a child remains eligible for permanency care assistance benefits when the child's permanent kinship conservator dies or becomes incapacitated and a successor guardian assumes legal responsibility of the child as long as the successor guardian meets all legal requirements in the definition. * The new rule also specifies when the successor guardian will start receiving payments, when retroactive payments may be granted, and the terms and conditions of the agreement. |
| §700.1726 | Amend | This rule was amended to specify that post-permanency services are provided to families that have been granted permanent managing conservatorship of a child previously in the conservatorship of DFPS, in addition to adoptive families. |
| §700.1727 | New | This rule provides the types of post-permanency services available to adoptive families and families that were granted permanent managing conservatorship of a child previously in the conservatorship of DFPS. |
| §700.1728 | Amend | This rule was updated to include the eligibility criteria for post-permanency services available to families that were granted permanent managing conservatorship of a child previously in the conservatorship of the department. |
| §700.1731 | Amend | * This rule was updated to state that families granted permanent managing conservatorship of a child previously in the conservatorship of the department are eligible to receive post-permanency counseling services. * The rule was also updated to include the maximum length of time post-permanency counseling services are provided for and the procedure for seeking an extension of services. |
| §700.1733 | Amend | Non-substantive changes were made to clarify that Residential Treatment Services are only available for adopted children. |

STATUTORY AUTHORITY AND STATUTES AFFECTED

The modification is proposed under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provides that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Department of Family and Protective Services Council shall study and make recommendations to the executive commissioner and the commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The modifications to TAC §§ 700.332 and 700.334 implement Texas Family Code § 264.124.

The modifications to TAC §§ 700.802, 700.804, 700.821, 700.823, 700.825, 700.848, 700.850, 700.863, 700.880, 700.881, and 700.883 implement Texas Family Code §§ 162.301 and 162.304. The modification to TAC § 700.851 implements Texas Family Code § 162.3041. The modification to TAC § 700.861 implements Texas Family Code §§ 162.201, 162, 202, and 162.203.

The modification to TAC § 700.1013 implements Texas Family Code § 264.755.

The modifications to TAC §§ 700.1025, 700.1027, 700.1029, 700.1031, 700.1037, 700.1041, 700.1043, 700.1045, 700.1047, 700.1049, 700.1051, 700.1059, and 700.1061 implement Texas Family Code §§ 264.760, 264.851, 264.852, 264.8521, and 264.853. The modification to § 700.1039 implements Texas Family Code § 264.854. The modification to § 700.1053 implements Texas Family Code § 264.855.

The modifications to TAC §§ 700.1726, 700.1727, 700,1728, 700.1731 and 700.1733 implement Texas Family Code § 162.306.

FISCAL IMPLICATIONS

(a) Fiscal Impact. For each of the first five years that the rules will be in effect, DFPS anticipates the following costs to state government as a result of enforcing or administering the proposed rule changes:

* DFPS does not anticipate any costs associated with implementing existing rules §§ 700.332 and 700.1013 and proposed rule §700.334 relating to day care eligibility as the rule changes merely update the agency's rules to conform with current practice and policy, consistently with the requirements of the Administrative Procedure Act. There is no fiscal impact because the eligibility limitations and clarifications are currently applied across the state; they just have not previously been incorporated into the agency's rules, which is the purpose of the changes in this portion of the rule packet.
* DFPS anticipates that any costs associated with proposed rule § 700.883 relating to the eligibility of an adoptive parent to request adoption assistance benefits through a fair hearing if the parent assumed legal responsibility of the child prior to consummation will be negligible. While exact costs of awarding benefits to these individuals cannot be determined, DFPS has only awarded adoption assistance benefits in these situations approximately four times in the last ten years.
* DFPS does not anticipate any additional costs pursuant to proposed rule § 700.1059 which permits a permanent managing conservator to request permanency care assistance benefits through a fair hearing for failure to sign a permanency care assistance agreement prior to the grant of conservatorship. As DFPS currently interprets federal law and guidance and existing agency rules to require a fair hearing in such situations, the fair hearing officers who receive these applications already approve payment of the benefits if the child is otherwise eligible.
* DFPS estimates that the cost of continuing permanency care assistance benefits to a subsequent conservator appointed upon the death or incapacitation of the original conservator pursuant to proposed rule § 700.1061 will be negligible as additional payments will not be made to the subsequent conservator but rather, the conservator will continue receiving payments that DFPS had already allocated towards the original conservator. While the subsequent conservator will be entitled to a one-time reimbursement of nonrecurring expenses related to the cost of assuming legal custody of the child, this one time reimbursement is limited to $1,200 per child. As approximately only 3,071 children have exited DFPS's care into a permanent managing conservatorship with a relative caregiver since fiscal year 2011, DFPS anticipates that the cost of providing non-recurring expenses to a subsequent conservator in the event that the original conservator dies or becomes incapacitated will be negligible.
* DFPS estimates that the cost for providing post-permanency services statewide to kinship conservators for a full fiscal year, pursuant to amendments to existing rules §§ 700.1726, 700.1728, 700.1731, and new rule § 700.1727 will be $600,000. This amount has already been identified for the corresponding Request for Proposals (RFP).

(b) Public Costs and Benefits. For each of the first five years that the proposed sections will be in effect, the public benefit anticipated as a result of the rule change will be that the public will be aware of the types of funding and services that are available to foster families, kinship families, and families that adopt or are granted permanent managing conservatorship of children previously in the conservatorship of DFPS. There is no anticipated economic cost to the public to comply with the proposed sections.

(c) Impact on Business. There is no anticipated adverse impact on small, micro, and large businesses as a result of the proposed rule change because the proposed rule change should not affect the cost of doing business, does not impose new requirements on any business, and does not require the purchase of any new equipment or any increased staff time in order to comply.

(d) Local Employment Impact and Takings Statements. No local employment impact statement was required for this rule. The agency is not required to complete a takings impact assessment regarding the proposed section(s).

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

STAKEHOLDER INPUT

As the changes were primarily made to ensure conformity with federal law as well as current DFPS policy and practice, stakeholder input was not solicited.

RECOMMENDATION

It is recommended that the Council consider the proposed rule action, as discussed in this memorandum, and that the Council recommend proposal, with or without changes to the rules as they are attached to this memo.

ATTACHMENTS

Attached is a copy of the proposed change to the rule section as staff recommended for submittal to the *Texas Register*.