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

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| TO: | **Chair and Members Department of Family and Protective Services Council** | agencyseal |
| FROM: | **H. L. Whitman, Jr.**  **DFPS Commissioner** |
| SUBJECT: | **Agenda Item 6c: Recommendation to adopt rule changes in 40 TAC 745 Licensing, relating to enforcement actions and technical assistance** |
| DATE: | **July 22, 2016** |

BACKGROUND AND PURPOSE

The Child Care Licensing (CCL) Division is recommending adoption of amendments in 40 TAC, Chapter 745, Licensing, Subchapters K (Inspections and Investigations) and L (Remedial Actions). The recommended changes are needed to implement recommendations the Sunset Advisory Commission made in the Department of Family and Protective Services Staff Report with Commission Decisions published in August 2014 and required by Senate Bill (S.B.) 206, SECTIONS 81 and 82, that was passed by the 84th Texas Legislature in 2015. These sections respectively created Human Resources Code (HRC) §42.0704 and amended §42.078(a-2).

HRC §42.0704 requires the Department of Family and Protective Services (hereinafter "DFPS" or "the department") to adopt rules that outline a general enforcement policy that describes the department's approach to enforcement, including:

* A summary of the department's general expectations in enforcing HRC, Chapter 42; and
* A methodology for determining appropriate action to take when a permit holder violates Licensing laws or rules that allows the department to consider the circumstances of the particular case, the nature and seriousness of the violation, history of previous violations, and other aggravating and mitigating factors.

HRC §42.0704 also requires the department to develop a plan for strengthening its enforcement efforts and for making objective regulatory decisions. Prior to the effective date of the rules proposed in this rule packet, CCL will require all CCL staff to receive training to promote staff's understanding of the policy and their ability to apply it appropriately and clearly explain it to providers. After the initial training, the concepts will be incorporated into CCL's Basic Skills Development training, which all new CCL staff receive, moving forward. CCL's Performance Management Unit (PMU) performs quality assurance activities to ensure CCL staff are adhering to policy and consistently enforcing Licensing laws and regulations and will evaluate the effectiveness of the enforcement policy through a quality assurance review scheduled to be completed in early fiscal year 2018 (one year after implementation of the new enforcement policy). In addition, PMU risk analysts conduct neutral assessments of an operation's compliance history when CCL staff identify the operation as having a compliance history that is at increased risk for children. As part of this process, PMU provides recommendations for enforcement actions and, six months later, reviews the operation's record to determine what enforcement action was taken and whether risk was reduced. This work enables CCL to assess the effectiveness of the enforcement policy on an ongoing basis.

The new version of HRC §42.078(a-2) expands the department's authority to impose administrative penalties before taking corrective action to all high risk violations, not just violations related to background checks.

A summary of the changes to create an enforcement framework include:

* Changing the title of Subchapter L from "Remedial Actions" to "Enforcement Actions";
* Defining "technical assistance" and outlining when and why technical assistance is provided;
* Clarifying that enforcement actions are not progressive in nature, meaning they are not necessarily recommended or imposed from least to most restrictive;
* Clarifying that CCL may end an enforcement action at any time to impose a more serious enforcement action;
* Removing the ability to extend an enforcement action;
* Identifying a voluntary plan of action as a voluntary enforcement action;
* Defining voluntary plan of action as a collaborative effort between CCL and the provider;
* Identifying factors CCL considers when deciding to recommend a voluntary plan of action;
* Limiting the number of times a plan of action may be recommended if an operation has already been on a plan of action for similar issues within the previous year;
* Providing a more clearly defined delineation between evaluation and probation by restricting the circumstances under which CCL may consider imposing evaluation;
* Decreasing the length of time an operation may remain on evaluation to six months;
* Identifying factors CCL considers when deciding to impose evaluation;
* Identifying factors CCL considers when deciding to impose probation;
* Identifying factors CCL considers when deciding to impose each adverse action; and
* Adding language allowing CCL to impose administrative penalties prior to taking corrective action for violations of high risk standards

STATUTORY AUTHORITY AND STATUTES AFFECTED

The new section is adopted 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 implement the HRC §§42.042, 42.0704, and 42.078(a-2).

## COMMENTS AND RESPONSES

The rules were presented to the DFPS Council at their meeting on April 22, 2016. At the time of the meeting there was no public testimony.

The proposed rules were published in the *Texas Register* on May 27, 2016*.* DFPS received one comment from the Texas Press Association regarding the rule change to remove the requirement for the department to publish adverse actions in a local newspaper. The response to the comment is noted below.

| **Section Affected and Original Proposal** | **Summary of Commenter’s Concern** | **Department Response and Rationale** |
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| Subchapter K DIVISION 6 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8581 | No comment. | The department recommends deleting language that suggests deficiencies are limited to deficiencies related to Minimum Standards. An operation may be deficient in Minimum Standards, as well as laws, rules, specific permit terms, or conditions of evaluation, probation, or suspension, as articulated in a more general rule (745.8601) and otherwise adopting this section with no changes. Aligning the language throughout all the rules will aid in public understanding. |
| §745.8583 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8585 | No comment. | The department recommends clarifying language related to deficiencies. See §745.8581. |
| §745.8600 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8601 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8603 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8605 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8607 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8609 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8611 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8613 | No comment. | The department recommends deleting an incorrectly placed comma from the chart in subdivision (a)(1) and otherwise adopting this section with no changes. |
| Subchapter L Division 2 Title | No comment. | The department recommends adoption of this section with no changes. |
| §745.8631 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8633 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8633 (repeal) | No comment. | The department recommends adoption of this section with no changes |
| §745.8635 | No comment. | The department recommends:   * changing the wording in paragraph (a)(2) for clarification * modifying the language in (a)(3) to make it clear operations may still be placed on evaluation if they have attempted to address the same issues through a voluntary plan of action, assuming evaluation is otherwise appropriate, and * correcting a technical error in (a)(4) and making the language consistent with the parallel provision in §745.8637. |
| §745.8635 (repeal) | No comment. | The department recommends adoption of this section with no changes. |
| §745.8637 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8639 | No comment. | The department recommends clarifying language related to deficiencies. See §745.8581. |
| §745.8641 | No comment. | The department recommends clarifying language related to deficiencies. See §745.8581. |
| §745.8643 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8649 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8650 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8651 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8651 (repeal) | No comment. | The department recommends adoption of this section with no changes. |
| §745.8652 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8654 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8657 | No comment. | The department recommends adoption of this section with no changes. |
| §745.8659 | DFPS received one comment from the Texas Press Association related to this rule.  The Texas Press Association opposes the removal of the requirement of the Department to publish notice of adverse action in a local newspaper. They believe that much of the populace does not have access to the internet and requiring consumers to search the internet as well as the DFPS website for operations with an adverse action unfairly burdens the public. | The department recommends adoption of this rule with no changes.  The department has had the option to publish notice on the department's Internet website since the passage of Senate Bill 68 by the 81st Legislature. Since September 1, 2009, when the amended statute took effect, the department has primarily published notice on the agency website. The notice remains on the agency website list for five years and is easily accessible from the *Search Texas Child Care* feature which provides the public, including families looking for child care, information about all child care operations and homes regulated by DFPS and is the most used feature on the agency website. Both Internet service and public access to computers, through libraries and other locations such as the YMCA, is increasing. While few or no families would be able to search prior issues of newspapers for the compliance history of an operation, even those families who do not own a computer of their own are likely to be able to search DFPS' public website. |
| §745.8713 | No comment. | The department recommends adoption of this section with no changes |

RECOMMENDATION

It is recommended that the Council recommend adoption of these rules, with or without changes, as they are attached to this memo.

SCHEDULE

| **Milestones (To Be Completed by CPI)** | **Dates** |
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| Proposed rules presented to the Council for recommendation to publish | April 22, 2016 |
| Approval to publish proposed rules received from HHSC | April 22, 2016 |
| Proposed rules published in the *Texas Register* | May 27, 2016 |
| Thirty-day comment period ends | June 27, 2016 |
| Rules presented to the Council for recommendation to adopt | July 22, 2016 |
| Approval to adopt rules received from HHSC |  |
| Adopted rules published in the *Texas Register* |  |
| Effective date |  |

ATTACHMENTS

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