

1 **CHAPTER 809. CHILD CARE SERVICES**

2
3 **PROPOSED RULES WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS**
4 **REGISTER. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS**
5 **SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE TEXAS REGISTER.**
6

7 The Texas Workforce Commission (Commission) proposes the following new section to Chapter
8 809, relating to Child Care Services:

9
10 Subchapter E. Requirements to Provide Child Care, §809.94

- 11
12 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**
13 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**
14 **PART III. IMPACT STATEMENTS**
15 **PART IV. COORDINATION ACTIVITIES**
16

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18 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

19 The intent of the proposed changes to the Chapter 809 Child Care Services rules is to provide a
20 mechanism by which the Commission and Local Workforce Development Boards (Boards) can
21 ensure that child care providers receiving Commission child care funds are:

- 22 --meeting minimum health and safety standards as determined by the Texas Department of
23 Family and Protective Services (DFPS); and
24 --providing the basic quality of care for children receiving Commission-funded child care.
25

26 The Commission rule changes are designed to balance two fundamental principles of the Child
27 Care and Development Fund (CCDF):

- 28 --providing for the health and safety of children receiving subsidized child care; and
29 --ensuring that parents can choose from the full range of child care options to best suit their
30 family needs.
31

32 Additionally, the Commission rules work in concert with the DFPS process for placing child care
33 providers on corrective or adverse action. The Commission rules are based on DFPS regulatory
34 remedies for child care providers that are found to be in noncompliance with health and safety
35 standards and are designed to provide appropriate actions for Boards and parents, given the level
36 of risk to children as determined by DFPS. The rules also balance parental choice and the health
37 and safety of children with child care providers' due process for remedying regulatory
38 deficiencies determined by DFPS.
39

40 *Levels of Corrective and Adverse Action by DFPS*

41
42 The Commission rules are predicated on the following three levels of actions that DFPS can take
43 when a child care provider is found to be in noncompliance with state regulatory standards:

- 44 1. Evaluation Corrective Action
45 2. Probation Corrective Action
46 3. Adverse Action

1 According to the DFPS licensing rules at 40 TAC, Chapter 745, DFPS may impose an
2 evaluation corrective action (evaluation status) when a provider's deficiencies present a lower
3 risk to children and, as long as the conditions imposed by the evaluation are followed, the
4 provider does not need to cease operating to make the corrections. Evaluation status:
5 --involves a period of heightened monitoring;
6 --is imposed only after a plan for compliance has been developed and when a specific incident or
7 pattern of deficiencies is not serious enough to require probation; and
8 --cannot be imposed for less than 30 days or for more than six months.

9
10 For providers placed on evaluation status, the Commission rules require Boards to ensure that
11 parents with children enrolled, or parents wishing to enroll children, in Commission-funded child
12 care with the provider are notified in writing of the provider's evaluation status with DFPS. A
13 parent can choose to continue the enrollment with the provider if the parent signs an
14 acknowledgment affirming that he or she has been notified of the provider's evaluation status and
15 has chosen to continue the enrollment.

16
17 According to Chapter 745 of the DFPS rules, DFPS may impose a probation corrective action
18 (probationary status) when a specific incident or a pattern of deficiencies can lead to adverse
19 action. Probationary status:
20 --is appropriate where a risk to children may exist but when further action, such as closing the
21 provider, is not necessary as long as the deficiencies are addressed through the corrective action
22 plan; and
23 --cannot be imposed for less than 30 days or for more than one year.

24
25 Additionally, Chapter 745 of the DFPS rules requires providers placed on evaluation or
26 probationary status to post the corrective action notice in a prominent place near each public
27 entrance.

28
29 For providers placed on probationary status, the Commission rules require Boards to ensure that
30 parents with children enrolled in Commission-funded child care with the provider are notified in
31 writing of the provider's probationary status. A parent can choose to continue the enrollment
32 with the provider if the parent signs an acknowledgment affirming that he or she has been
33 notified of the provider's probationary status and has chosen to continue the enrollment.
34 However, the Board must ensure that no new enrollments of children receiving Commission-
35 funded child care are accepted with a provider in probationary status.

36
37 According to Chapter 745 of the DFPS rules, an adverse action is applied when DFPS attempts
38 to close a provider. Adverse action is taken when DFPS determines that the provider has
39 deficiencies that endanger the health and safety of children. DFPS adverse actions include
40 notifying the provider of DFPS' intent to deny, revoke, or suspend the provider's permit. If an
41 adverse action is taken, the provider has a right to request an administrative review and a
42 hearing. If the adverse action is upheld, the provider must close. Chapter 745 of the DFPS rules
43 also requires that when a provider receives notice from DFPS that it intends to take adverse
44 action against the provider, the provider must post the notice of the adverse action in a prominent
45 place near each public entrance. The provider must also notify each parent, guardian, or

1 managing conservator of the children enrolled within five days of receiving the notice from
2 DFPS.

3
4 The Commission rules do not allow reimbursements for Commission-funded child care to any
5 provider against which DFPS is taking adverse action. Therefore, Boards must ensure that:
6 --no new referrals are made to the providers; and
7 --children currently enrolled in Commission-funded child care with such providers are
8 transferred to another eligible provider.

9
10 Chapter 745 of the DFPS rules provides that if, during an inspection, DFPS licensing staff
11 discovers conditions that pose a threat of immediate danger to the children, DFPS licensing staff
12 can take immediate actions to remove the children and initiate an emergency suspension and
13 closure order. When this happens, DFPS policies require the provider to notify parents to pick
14 up their children within four hours or by the end of the day, whichever is longer. The operation
15 is then closed for no more than 10 days. Further, DFPS must initiate an adverse action in the
16 form of an intent to revoke no later than five days from the date of the emergency closure.
17 Although the provider may request an administrative review of the emergency closure and
18 adverse action, the provider cannot operate or care for children during the administrative review.

19
20 Because the emergency suspension and closure order requires all children at the facility to be
21 removed from care, the Commission believes it is not necessary to address provider eligibility
22 for reimbursement in Commission rules as the provider is not entitled to any reimbursement
23 while children are not allowed in care. Furthermore, the emergency nature of the closure, the
24 short time frame for parental notification, and the requirement for immediate removal of children
25 make additional parental notification an unnecessary burden upon the Board.

26
27 However, issuance of an emergency suspension and closure order may not mean that a provider
28 has ceased operating. Under Chapter 745 of DFPS rules, a provider may seek a court injunction
29 to stop the emergency suspension and closure if the provider disagrees with the DFPS
30 determination that the provider poses an immediate threat to children. The court may decide to
31 uphold the decision to close the operation. On the other hand, the court may enjoin closure and
32 allow the provider to continue operating pending the outcome of the administrative review of the
33 adverse action.

34
35 Under DFPS rules, emergency closure actions are treated as adverse actions. Consistent with
36 this approach, the Commission rules require Boards to treat a provider that, by a court order, is
37 continuing operations pending the outcome of the administrative review, in accordance with the
38 procedures for adverse actions.

39 *Parent Choice*

40 CCDF regulations at 45 C.F.R. §98.30 require states to allow parents to choose from a variety of
41 child care categories including care in child care centers, group homes, and family homes, and
42 care in the child's home. States cannot promulgate rules that significantly restrict parental choice
43 in categories of care or that have the effect of excluding categories of care. Although the rules
44 may affect a parent's choice of a particular individual provider under certain circumstances
45 (specifically, providers placed on probationary status or adverse action), the rules neither restrict
46

1 parents' choice of a particular provider category nor have the effect of excluding a substantial
2 number of providers in any category.

3
4 According to DFPS data, the number of licensed and registered child care providers in State
5 Fiscal Year 2008 (SFY'08) (September 1, 2007, through August 31, 2008) totaled 19,995. Also
6 during SYF'08, 320 child care providers were placed on corrective or adverse action. Of those,
7 211 were placed on corrective action (113 on evaluation status and 98 on probationary status),
8 and 109 were placed on adverse action. Therefore, the providers affected by these rules
9 represent approximately 1.6 percent of all providers. DFPS data also shows that approximately
10 2.3 percent of licensed child care centers, 1.3 percent of licensed homes, and 0.8 percent of
11 registered homes were placed on some type of corrective or adverse action.

12
13 The rules do not limit parent choice of the full range of provider categories in any specific local
14 workforce development area (workforce area). Harris County had 86 providers on corrective or
15 adverse action, followed by Bexar County with 22 providers. Only 5 other counties in Texas had
16 more than 10 providers on corrective or adverse action. These providers represent less than 1
17 percent of the providers in a particular workforce area. Finally, of the 320 providers on
18 corrective or adverse action during SFY'08, only 184 served children receiving Commission-
19 funded child care. During that same period, 9,023 regulated providers cared for children
20 receiving Commission-funded child care. Therefore, only 2 percent of regulated providers
21 serving children in Commission-funded child care were placed on any type of corrective or
22 adverse action.

23
24 Based on this data, the Commission concludes that these rules will not significantly limit parent
25 choice of any provider category. Additionally, the rules allow a parent to enroll a child with a
26 provider that is on evaluation status and allow a parent with a child currently enrolled with a
27 provider on evaluation status to continue enrollment (provided the parent signs a statement
28 acknowledging that the parent is aware of the provider's status with DFPS).

29
30 However, providers against whom DFPS is taking adverse action have been found by DFPS to
31 have deficiencies that pose a risk to children. The Commission believes it is necessary to ensure
32 the health and safety of children receiving publically subsidized child care, therefore the rules do
33 not allow parents of children enrolled in Commission-funded child care the choice of a provider
34 on adverse action.

35 *Administrative Review Process through DFPS*

36 The Commission emphasizes that Boards must allow a provider on corrective or adverse action
37 to pursue DFPS' administrative review prior to the Board taking action to notify the parents,
38 close enrollment, or transfer children. DFPS rules, Chapter 745, give providers 15 days from the
39 initial notification of corrective or adverse action to request an administrative review. However,
40 providers may request a waiver of an administrative review within that 15-day period. DFPS
41 provides official notice to the provider following the administrative review or after receiving the
42 request from the provider to waive the administrative review.

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44
45 To assist in the implementation of these rules, DFPS has agreed to provide the Agency with an
46 official notification when providers are placed on corrective or adverse action. Upon receiving

1 notification from DFPS, the Agency will notify the affected Board. The Commission will
2 provide further guidance and procedures to Boards through the issuance of a Workforce
3 Development (WD) Letter. The rule language specifies that Board actions are taken only after
4 receiving notification from the Agency of the provider's official status with DFPS.
5

6 The Commission also emphasizes the importance of allowing the DFPS administrative review to
7 be completed prior to notifying the parents, closing enrollment, or transferring children to
8 another provider. This allows providers to address any due process issues through DFPS. The
9 administrative review is conducted under DFPS standard rules and procedures as set out in
10 Chapter 745. The decision to place the provider on corrective or adverse action rests solely with
11 DFPS and includes the DFPS' administrative review process. Therefore, the provider cannot
12 appeal this decision to the Board. Further, the provider has no appeal rights to the Agency under
13 Chapter 823, the Commission's Integrated Complaints, Hearings, and Appeals rules.
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16 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

17 **SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE**

18 **The Commission proposes the following new section to Subchapter E:**
19

20 **§809.94. Providers Placed on Corrective or Adverse Action by the Texas Department of** 21 **Family and Protective Services**

22 New §809.94 sets forth actions Boards must take when a provider is placed on corrective or
23 adverse action by DFPS.
24

25
26 Section 809.94(a) describes Board requirements regarding providers placed on evaluation
27 corrective action (evaluation status).
28

29 Section 809.94(a)(1) requires Boards to ensure that parents with children currently enrolled in
30 Commission-funded child care with the provider are notified in writing of the provider's
31 evaluation status. The Board must ensure that parents are notified no later than five business
32 days from receipt of the Agency's notification of the DFPS decision to place the provider on
33 evaluation status.
34

35 Section 809.94(a)(2) requires Boards to ensure that parents choosing to enroll a child in
36 Commission-funded child care with a provider on evaluation status are notified of the provider's
37 status with DFPS prior to enrolling the child.
38

39 Section 809.94(b) describes Board requirements regarding providers placed on probation
40 corrective action (probationary status).
41

42 Section 809.94(b)(1) requires Boards to ensure that parents with children currently enrolled in
43 Commission-funded child care with the provider are notified in writing of the provider's
44 probationary status. These requirements mirror those in §800.94(a)(1) for children enrolled with
45 a provider on evaluation status. The Board must ensure that parents are notified no later than
46 five business days from receipt of the Agency's notification of DFPS' decision to place the

1 provider on probationary status. If a parent decides to continue enrollment with a provider on
2 corrective action (i.e., evaluation or probationary status), the parent must sign a written
3 acknowledgment that he or she has been notified of the provider's status.

4
5 The Commission allows parents with children currently enrolled in Commission-funded child
6 care with a provider on evaluation or probationary status to continue this enrollment in order to
7 preserve parent choice and avoid any disruption of child care. The Commission recognizes that
8 the current placement may best meet the needs of the working parent--requiring parents to
9 transfer to another provider may place an undue burden on the parents and jeopardize their work
10 arrangements.

11
12 Section 809.94(b)(2) requires that Boards must ensure that no new referrals are made to
13 providers on probationary status. DFPS' decision to place a provider on probationary status
14 involves findings that present a higher risk to children, thus it is essential that no new
15 enrollments of children receiving Commission-funded child care occur until the provider corrects
16 the deficiencies and is removed from probationary status by DFPS. The intent of this
17 requirement is to ensure that the provider is aware of the importance of correcting any
18 deficiencies as well as to ensure that children are initially placed with providers that meet
19 minimum health and safety requirements.

20
21 Section 809.94(c) allows parent choice when a parent wants a child to be enrolled or continued
22 to be enrolled with a provider on DFPS corrective action. A parent receiving the notification of
23 the provider's status with DFPS, but who chooses to continue enrollment with the provider must
24 sign an acknowledgment indicating that he or she is aware of the provider's status with DFPS,
25 but has chosen to continue with the enrollment. The parent must return the acknowledgment to
26 the Board's child care contractor within 10 days of receiving the notification.

27
28 The Commission believes that a parent should be informed and acknowledge in a signed
29 document that enrollment with the provider is the parent's choice. Although this will not
30 necessarily prevent future litigation by the parent, requiring a parent to affirmatively
31 acknowledge his or her decision is consistent with the principle of parental choice and
32 establishes informed consent should something happen to the child while in the provider's care.

33
34 Section 809.94(d) prohibits providers on any corrective action from receiving enhanced
35 reimbursement rates under §809.20. Specifically, providers who are Texas Rising Star (TRS)
36 certified, participating in Texas Early Education Model (TEEM), or Texas School Ready!TM
37 certified are prohibited from receiving enhanced reimbursement rates while on DFPS evaluation
38 or probationary status. The providers will remain eligible to receive the Board's regular
39 reimbursement rate, but will not be eligible for the enhanced rate. It is the Commission's intent
40 that providers receiving enhanced reimbursement rates are being compensated for attaining
41 higher quality of early care and education. Therefore, if DFPS has placed a provider on
42 corrective or adverse action, then the provider is not offering a higher quality of early care and
43 education.

44
45 Section 809.94(e) sets forth Board requirements regarding providers against whom DFPS is
46 taking adverse action.

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2 Section 809.94(e)(1) requires that Boards notify parents with children enrolled in Commission-
3 funded child care no later than two business days after receiving notification from the Agency
4 that DFPS is taking adverse action against the provider. The Commission includes a maximum
5 two-day notification requirement to emphasize the importance of timely notification when a
6 provider is on adverse action. Because adverse action is taken when DFPS determines that
7 conditions at the provider pose a risk to the health and safety of the children, it is important to
8 notify parents of children receiving Commission-funded child care as quickly as possible. In
9 order to speed the notification process, the Commission also notes that the notification does not
10 have to be in writing, but may be a notification by phone or other means. The Board may
11 provide written notification as long as the notification is provided to the parent no later than two
12 days from receiving notification from the Agency.

13
14 Section 809.94(e)(2) requires Boards to ensure that children enrolled in Commission-funded
15 child care with the provider are removed from care at that provider no later than five business
16 days after receiving notification from the Agency that DFPS is taking adverse action against the
17 provider. Although it is important to stress the timely nature of ensuring parental notification, it
18 is also important to provide the parent with sufficient time and opportunity to locate and choose
19 another eligible provider that meets the child care needs of the parent.

20
21 Section 809.94(e)(3) requires Boards to ensure that no new referrals for Commission-funded
22 child care are made to the provider while DFPS is taking adverse action.

23
24 Finally, §809.94(f) sets forth the provisions applicable to a provider for which DFPS has
25 determined that the provider poses an immediate risk to the health or safety of children and
26 cannot operate pending appeal of the adverse action, but for which there is a valid court order
27 that overturns DFPS' determination and allows the provider to operate pending administrative
28 review or appeal. Commission rules state that in this situation, Boards must take action
29 consistent with the provisions of §809.94(e). The Board must treat this situation in the same
30 manner as a provider against whom DFPS intends to take adverse action. Specifically, the Board
31 must notify parents no later than two business days after receiving notification from the Agency
32 that the provider is on adverse action with DFPS and ensure that enrolled children in
33 Commission-funded child care are removed from that provider's care no later than five business
34 days after receiving notification from the Agency that the provider is on adverse action with
35 DFPS.

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37
38 **PART III. IMPACT STATEMENTS**

39 Randy Townsend, Chief Financial Officer, has determined that for each year of the first five
40 years the rules will be in effect, the following statements will apply:

41
42 There are no additional estimated costs to the state and local governments expected as a result of
43 enforcing or administering the rules.

44
45 There are no estimated reductions in costs to the state and to local governments as a result of
46 enforcing or administering the rules.

1
2 There are no estimated losses or increases in revenue to the state or to local governments as a
3 result of enforcing or administering the rules.

4
5 There are no foreseeable implications relating to costs or revenue of the state or local
6 governments as a result of enforcing or administering the rules.

7
8 There are no anticipated economic costs to persons required to comply with the rules.

9
10 There is no anticipated adverse economic impact on small or microbusinesses as a result of
11 enforcing or administering the rules.

12 13 Economic Impact Statement and Regulatory Flexibility Analysis

14 The proposed rules will not have an adverse economic impact on small businesses. There would
15 be minor administrative costs to notify parents and obtain and record parental acknowledgments
16 in such cases. The rules may have estimated economic costs to some required to comply,
17 including Boards and child care providers placed on corrective or adverse action by DFPS, but
18 these would not be significant. Program staff has estimated that the number of facilities
19 potentially impacted by these rules would total 1.6 percent of the total number of child care
20 facilities in the state; this would create an impact and cost that would not be significant.

21
22 Mark Hughes, Director of Labor Market Information, has determined that there is no significant
23 negative impact upon employment conditions in the state as a result of the rules.

24
25 Laurence M. Jones, Director, Workforce Development Division, has determined that for each
26 year of the first five years the rules are in effect, the public benefit anticipated as a result of
27 enforcing the rules will be to ensure that child care providers receiving Commission child care
28 funds are meeting minimum health and safety standards as determined by DFPS and are
29 providing the basic quality of care for children enrolled in Commission-funded child care.

30
31 The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to
32 be within the Agency's legal authority to adopt.

33 34 35 **PART IV. COORDINATION ACTIVITIES**

36 In the development of these rules for publication and public comment, the Commission sought
37 the involvement of Texas' 28 Boards. The Commission provided the concept paper regarding
38 these rule amendments to the Boards for consideration and review on October 28, 2008. The
39 Commission also conducted a conference call with Board executive directors and Board staff on
40 October 31, 2008, to discuss the concept paper. During the rulemaking process, the Commission
41 considered all information gathered in order to develop rules that provide clear and concise
42 direction to all parties involved.

43
44 Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce
45 Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin,
46 Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us.

1 The Commission must receive comments postmarked no later than 30 days from the date this
2 proposal is published in the *Texas Register*.

3
4 The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the
5 Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for
6 the effective administration of Agency services and activities, and the Texas Human Resources
7 Code §44.002, regarding Administrative Rules.

8
9 The proposed rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well
10 as Texas Government Code, Chapter 2308.

11

1 **CHAPTER 809. CHILD CARE SERVICES**

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3 **SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE**

4
5 **§809.94. Providers Placed on Corrective or Adverse Action by the Texas Department**
6 **of Family and Protective Services.**

7
8 (a) For a provider placed on evaluation corrective action (evaluation status) by DFPS,
9 Boards shall ensure that:

10
11 (1) parents with children enrolled in Commission-funded child care are notified in
12 writing of the provider's evaluation status no later than five business days after
13 receiving notification from the Agency of DFPS' decision to place the provider
14 on evaluation status; and

15
16 (2) parents choosing to enroll children in Commission-funded child care with the
17 provider are notified in writing of the provider's evaluation status prior to
18 enrolling the children with the provider.

19
20 (b) For a provider placed on probation corrective action (probationary status) by DFPS,
21 Boards shall ensure that:

22
23 (1) parents with children in Commission-funded child care are notified in writing
24 of the provider's probationary status no later than five business days after
25 receiving notification from the Agency of DFPS' decision to place the provider
26 on probationary status; and

27
28 (2) no new referrals are made to the provider while on probationary status.

29
30 (c) A parent receiving notification of a provider's evaluation or probationary status with
31 DFPS pursuant to subsections (a) and (b) of this section may choose to continue the
32 enrollment of a child with the provider if the parent signs and returns to the Board's
33 child care contractor within 10 business days of receiving such notification a written
34 acknowledgment that the parent is aware of the provider's status with DFPS, but
35 chooses to enroll the child with the provider.

36
37 (d) For a provider placed on evaluation or probationary status by DFPS, Boards shall
38 ensure that the provider is not reimbursed at the Boards' enhanced reimbursement
39 rates described in §809.20 while on evaluation or probationary status.

40
41 (e) For a provider against whom DFPS is taking adverse action, Boards shall ensure
42 that:

43
44 (1) parents with children enrolled in Commission-funded child care are notified no
45 later than two business days after receiving notification from the Agency that
46 DFPS intends to take adverse action against the provider;

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(2) children enrolled in Commission-funded child care with the provider are transferred to another eligible provider no later than five business days after receiving notification from the Agency that DFPS intends to take adverse action against the provider; and

(3) no new referrals for Commission-funded child care are made to the provider while DFPS is taking adverse action.

(f) For adverse actions in which DFPS has determined that the provider poses an immediate risk to the health or safety of children and cannot operate pending appeal of the adverse action, but for which there is a valid court order that overturns DFPS' determination and allows the provider to operate pending administrative review or appeal, Boards shall take action consistent with subsection (e) of this section.