



TO: Health and Human Services Commission
Executive Council

DATE: February 22, 2018

FROM: Lana E. Estevilla, Director of Policy and
Program Operations, Child Care Licensing

AGENDA ITEM: 2.j

SUBJECT: Foster Family Home Capacity

BACKGROUND: Federal Legislative Other: Program Initiative

The purpose of the amendment to Texas Administrative Code, Title 26, §749.2551 is to implement House Bill 7, Section 59, 85th Legislature, Regular Session, 2017, which adds §42.0463 to the Human Resources Code. This new section of the Human Resources Code authorizes the Health and Human Services Commission (HHSC) to develop a rule to establish exceptions, which allow a foster family home to have an expanded capacity of seven or eight children (up from the current maximum of six children). The amendment allows this capacity exception to be implemented for each child over a capacity of six that is part of a sibling group, has a prior relationship with the foster family (including a kinship placement), or is being relocated due to a natural disaster. The amendment requires a child-placing agency to complete and sign an exception form for each foster family home using the exception. The amendment also clarifies that a child-placing agency may request an exception for any foster family home to care for seven or eight children for circumstances other than the aforementioned exceptions by using the process for requesting a variance. The Child Care Licensing (CCL) department of the HHSC Regulatory Services Division will make a decision to grant or deny the exception based upon current factors for granting a variance.

ISSUES AND ALTERNATIVES:

It is anticipated that the providers and stakeholders will be in support of these exceptions, which will allow foster family homes to have an expanded capacity of seven or eight children under certain circumstances. However, some providers may want CCL to allow a broader set of circumstances in which foster family homes may have an expanded capacity of seven or eight children.

STAKEHOLDER INVOLVEMENT:

A workgroup meeting was held on October 27, 2017. The workgroup consisted of approximately eight providers that had a mix of licenses as a child-placing agency and/or a general residential operation, one foster parent, three participants from the Child Protective Services Division of the Department of Family and Protective Services, and several participants from CCL. The amendment was shared during the workgroup meeting, and there was much discussion. Based on the discussion, the original version of the amendment was modified.

After modification, the amendment was then posted for informal stakeholder comments on the Health and Human Services Rulemaking website from November 7, 2017 through November 17, 2017. During this time, HHSC received one comment and one question on the proposed amendment One Voice Texas and Trulight127 Foster and Adopt Ministries. In response to the comment, HHSC made further changes to the amendment.

FISCAL IMPACT:

None

SERVICES IMPACT STATEMENT:

The anticipated public benefit will be that: (1) Licensing will be in compliance with Human Resources Code, §42.0463; (2) child-placing agencies will be able to make faster placement decisions with the rule in effect rather than having to request a variance and waiting for approval; (3) the rule allows for an expanded capacity in the least restrictive settings for children in care; and (4) sibling groups will be placed together when possible.

RULE DEVELOPMENT SCHEDULE:

February 22, 2018	Present to HHSC Executive Council
March 2018	Publish proposed rules in <i>Texas Register</i>
July 2018	Publish adopted rules in <i>Texas Register</i>
July 2018	Effective date

PROPOSED PREAMBLE

The Texas Health and Human Services Commission (HHSC) proposes an amendment to 26 TAC §749.2551, concerning “What is the maximum number of children a foster family home may care for?” in Chapter 749, Minimum Standards for Child-Placing Agencies.

BACKGROUND AND PURPOSE

The purpose of the amendment is to implement House Bill 7, SECTION 59, 85th Legislature, Regular Session, 2017, which added §42.0463 to the Human Resources Code. This new section of the Human Resources Code authorizes HHSC to develop a rule to establish exceptions, allowing a foster family home to have an expanded capacity of seven or eight children (up from the current maximum of six children). The amendment allows this capacity exception to be implemented for each child over a capacity of six that is part of a sibling group, has a prior relationship with the foster family (including a kinship placement), or is being relocated due to a natural disaster. The amendment requires a child-placing agency to complete and sign an exception form for each foster family home using the exception. The amendment also clarifies that a child-placing agency may request an exception for a foster family home to care for seven or eight children for circumstances other than the aforementioned exceptions by using the process for requesting a variance. The Child Care Licensing (CCL) department of the Health and Human Services Commission (HHSC) Regulatory Services Division will make a decision to grant or deny the exception based upon current factors for granting a variance.

Stakeholder input and feedback was used in the development of the proposed rule. The proposed amendment was also posted for informal stakeholder comments on the Health and Human Services rulemaking website from November 7 – 17, 2017, and comments received were incorporated into the rule.

The federal district judge in *M.D. v. Perry, Civ. A. No. 2:11-cv-00084 (S.D. Tex.)*, the Children’s Rights lawsuit, ordered that no child in the permanent managing conservatorship (PMC) of the Texas Department of Family and Protective Services (DFPS) may be in a foster home with more than six children. However, the 5th Circuit has issued a stay with respect to that order. If this stay is lifted or the order prohibiting the placement of more than six PMC children in one home is otherwise effective, DFPS will be able to implement the order through its contracts with the child-placing agencies and any other entities that DFPS contracts with that are subject to the minimum standards in Chapter 749.

SECTION-BY-SECTION SUMMARY

The proposed amendment of §749.2551 includes changes to: (1) subsection (a) to make certain language consistent with language in subsection (b); (2) subsection (b) that allow a one-parent foster family home with a full-time live-in caregiver or a two-parent foster family home to care for seven or eight children (versus the current capacity of six children) if each foster or adoptive child that a child-placing agency places in the home over a capacity of six is part of a sibling group, has a prior relationship with the foster family (including a kinship placement), or is being relocated due to a natural disaster. Additionally, there are limits on how many infants and children with primary medical needs requiring total care that a foster family home may care for. A child-placing agency must complete a Foster Family Home Capacity Exception Form and place the form in the file of the foster family home. Finally, after the Foster Family Home Exception Form is completed and signed, the child-placing agency must lower the home's capacity each time a foster or adoptive (not consummated) child leaves the home until the home's capacity does not exceed six; and (3) subsection (d) that clarify a child-placing agency may request an exception for a foster family home to care for seven or eight children for circumstances other than the aforementioned exceptions by using the process for requesting a variance. The exception request must meet the requirements of the rules relating to a variance in Chapter 745, Subchapter J, Waivers and Variances Minimum Standards. CCL will make a decision to grant or deny the exception based upon the current factors for granting a variance.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each of the first five years that the amendment will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the rule as proposed.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rule will be in effect implementation of the proposed amended rule:

- (1) will not create or eliminate a government program;
- (2) will not affect the number of employee positions;
- (3) will not require an increase or decrease in future legislative appropriations;
- (4) will not affect fees paid to the agency;

- (5) will not create a new rule;
- (6) will expand an existing rule;
- (7) will not change the number of individuals subject to the rule; and
- (8) will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Greta Rymal, Deputy Executive Commissioner for Financial Services, has also determined that there will be no adverse effect on small businesses, micro-businesses, or rural communities. The rule does not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rule.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated costs to persons who are required to comply with the rule as proposed.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule: (1) is necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule; (2) is necessary to protect the health, safety, and welfare of the residents of Texas; and (3) does not impose a cost on regulated persons.

PUBLIC BENEFIT

Jean Shaw, Associate Commissioner for CCL, has determined that for each of the first five years that the amendment is in effect, the public will benefit from the proposed amendment. The anticipated public benefit will be that: (1) Licensing will be in compliance with HRC §42.0463; (2) child-placing agencies will be able to make faster placement decisions with the rule in effect rather than having to request a variance and waiting for approval; (3) the rule allows for expanding capacity in the least restrictive settings for children in care; and (4) sibling groups will be placed together when possible.

TAKING IMPACT ASSESSMENT

HHSC has determined that the proposed amendment does 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, does not constitute a taking under Government Code §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Gerry Williams at (512) 438-5559 in the Child Care Licensing Division of HHSC or e-mail him at Gerry.Williams@hhsc.state.tx.us.

Written comments on the proposal may be submitted to Gerry Williams, Rules Developer (18R011), Child Care Licensing, Health and Human Services Commission E-550, P.O. Box 149030, Austin, Texas 78714-9030. Electronic comments may be submitted to HHRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 30 calendar days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 18R011" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under 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, and §531.02011, which transferred the regulatory functions of DFPS to HHSC.

The amendment implements Human Resources Code §§42.042 and 42.0463, which correspond with the regulatory functions transferred from DFPS to HHSC.

This agency certifies that this proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

TITLE 26 [40] HEALTH AND HUMAN [SOCIAL] SERVICES [AND ASSISTANCE]
 PART 1 [19] TEXAS HEALTH AND HUMAN SERVICES COMMISSION [DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES]
 CHAPTER 749 MINIMUM STANDARDS FOR CHILD-PLACING AGENCIES
 SUBCHAPTER M FOSTER HOMES: SCREENINGS AND VERIFICATIONS
 DIVISION 5 CAPACITY AND CHILD/CAREGIVER RATIO

§749.2551. What is the maximum number of children a foster family home may care for?

(a) A ~~two-parent foster family home or~~ one-parent foster family home with one additional full-time, live-in caregiver or a two-parent foster family home may care for up to six children, except as noted in the chart below:

<i>If the home cares for:</i>	<i>Then the maximum number of children the home may care for is:</i>
Infants	Six, with a maximum of two infants and two more children less than six years old, unless the placement is necessary to maintain a sibling group of children.
One child or more receiving treatment services for primary medical needs	<ul style="list-style-type: none"> • Six, with a maximum of three children with primary medical needs requiring total care, unless the placement is necessary to maintain a sibling group of children; or • Four, if all placements are children with primary medical needs requiring total care, unless the placement is necessary to maintain a sibling group of children. • Foster family homes verified to provide treatment services to children with primary medical needs before January 1, 2015, may continue to care for up to six children with no limitation.

(b) A one-parent foster family home with one additional full-time, live-in caregiver or a two-parent foster family home may care for seven or eight children if all of the following criteria are met:

(1) Each foster or adoptive child that you place in the home that expands the home's capacity to more than six children:

(A) Is part of a sibling group;

(B) Has a prior relationship with the foster family, including a kinship (relative or close family friend) placement; or

(C) Is being relocated due to a natural disaster;

(2) The foster family home cares for a maximum of two infants and two more children less than six years old, unless the placement is necessary to maintain a sibling group of children;

(3) The foster family home cares for a maximum of three children with primary medical needs requiring total care, unless the placement is necessary to maintain a sibling group of children;

(4) You complete a Foster Family Home Capacity Exception Form with the appropriate signatures and place the form in the foster family home record; and

(5) After you complete the exception form, you lower the home's capacity each time a child listed on the form leaves the home until the home's capacity does not exceed six. This applies to both a foster child that leaves and a child who was placed in the home to be adopted leaves without the adoption being consummated.

(c) [(b)] A one-parent foster family home or two-parent foster family home with one foster parent absent for extended periods of time (such as military service or out-of-town job assignments) may care for up to six children, except as noted in the chart below:

<i>If the home cares for:</i>	<i>Then the maximum number of children the home may care for is:</i>
Any child less than five years old	Five
Infants	Five, with a maximum of two infants and two more children less than six years old, unless the placement is necessary to maintain a sibling group of children.

<i>If the home cares for:</i>	<i>Then the maximum number of children the home may care for is:</i>
Three or more children receiving treatment services	Four
One child or more receiving treatment services for primary medical needs	<ul style="list-style-type: none"> • Four, with a maximum of one child with primary medical needs requiring total care, unless the placement is necessary to maintain a sibling group of children; or • Two, if all placements are children with primary medical needs requiring total care, unless the placement is necessary to maintain a sibling group of children. • Foster family homes verified to provide treatment services to children with primary medical needs before January 1, 2015, may continue to care for up to four children with no limitation.

(d) Notwithstanding subsections (a), (b), and (c) of this section, a child-placing agency may request an exception for a foster family home to care for seven or eight children by using the process for requesting a variance that is in Subchapter J of Chapter 745 of this title (relating to Waivers and Variances for Minimum Standards) and meeting the requirements of that subchapter. Licensing will make the decision to deny or grant an exception in accordance with factors listed in §745.8307 of this title (relating to How does Licensing make the decision to grant or deny my waiver or variance request?).

(e)[(e)] The maximum number of children that a foster family home may care for includes any biological and adopted children of the caregivers who live in the foster home, any children receiving foster or respite child-care, and any children for whom the family provides day care. All adults in care must also be counted in the capacity of the home as required by §749.2651(b) of this title (relating to May a foster home accept adults into the home for care?).