

TITLE 26 HEALTH AND HUMAN SERVICES
PART 1 HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 745 LICENSING
SUBCHAPTER X EMERGENCY RULES
DIVISION 3 PREVIOUS COMPLIANCE HISTORY, HEIGHTENED
MONITORING, AND THE DECISION TO ISSUE OR
DENY A RESIDENTIAL CHILD-CARE OPERATION LICENSE

EMERGENCY RULE ADOPTION PREAMBLE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 26 Texas Administrative Code, Chapter 745 Licensing, new emergency rules §745.10201, concerning the terms used in the emergency rules; §745.10203, concerning to whom the new emergency rules apply; §745.10205, concerning Child Care Regulation's (CCR) consideration of an applicant's previous compliance history when evaluating an application for a new license to operate a residential child-care operation; and §745.10207, concerning the issuance of a new license to a residential child-care operation that was previously on heightened monitoring. As authorized by Texas Government Code §2001.034, the Commission may adopt emergency rules without prior notice upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

HHSC adopts the emergency rules to require CCR to consider the previous five-year compliance history of related operations when evaluating an application for a new residential child-care operation license. The rules require the review when an applicant has been operating in a different location, has previously closed an operation, or has significant ties to another operation. The new emergency rules also require the continuation of heightened monitoring as a condition of a new license if a previous or related operation is on heightened monitoring, met the criteria for heightened monitoring in the previous five years, but was not placed on heightened monitoring, or was placed on heightened monitoring in the previous five years and did not successfully complete it.

In a December 18, 2020, order in the *MD v. Abbott* litigation, the court identified the need for CCR to evaluate compliance histories and continuity of heightened monitoring in evaluation of license applications to ensure children in the conservatorship of the Department of Family and Protective Services (DFPS) who are placed in residential child-care operations licensed by HHSC are not placed at an unreasonable risk of serious harm in violation of their Fourteenth Amendment substantive due process rights.

The new emergency rules comply with this order and other federal court orders finding that federal law requires, and unreasonable risk of serious harm exists in

the absence of, certain actions by HHSC to protect the health, safety, and welfare of certain children. Accordingly, HHSC finds that immediate adoption of the emergency rules is necessary to prevent imminent peril to the public health, safety or welfare and comply with federal law, as found and ordered by the federal court.

STATUTORY AUTHORITY

The emergency rules are adopted under Texas Government Code §2001.034 and §531.0055 and Texas Human Resources Code §42.001 and §42.042. Texas Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing, if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of the rules on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Texas Human Resources Code §42.001 states that it is the policy of the state to ensure the protection of all children under care in child-care facilities. In addition, Texas Human Resources Code §42.042 authorizes the Executive Commissioner of HHSC to adopt rules governing the regulation of child care facilities in Chapter 42 of the Texas Human Resources Code.

The new sections implement Texas Government Code §531.0055, §531.0055 and Texas Human Resources Code §42.001 and §42.042.

The agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

ADDITIONAL INFORMATION

For further information, please call: (512) 438-3269.

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§745.10201. What do the following terms mean when used in this division?

The following terms have the following meanings when used in this division:

(1) Change in ownership--As stated in §745.437 of this chapter (relating to What is a change in ownership of an operation?).

(2) Child Care Regulation (CCR)--A department of the Texas Health and Human Services Commission that regulates residential child-care operations.

(3) Controlling person--As stated in §745.901 of this chapter (relating to Who is a controlling person at a child-care operation?).

(4) Heightened monitoring--An increase in oversight of a residential child-care operation that has a pattern of deficiencies relating to minimum standard deficiencies weighted medium or higher, confirmed abuse or neglect findings, or Texas Department of Family and Protective Services (DFPS) contract violations. Heightened monitoring is mandated by a court order in the *MD vs Abbott* litigation dated March 18, 2020.

(5) Single source continuum contractor--A child-placing agency that contracts with DFPS to provide community-based care, including contractual supervision over other child-placing agencies and their child-placing activities.

§745.10203. Who does this division apply to?

This division applies to an applicant for a general residential operation or child-placing agency license that demonstrates an intent to obtain a contract with the Texas Department of Family and Protective Services (DFPS) or a single source continuum contractor to provide care to children in the conservatorship of DFPS.

§745.10205. What previous compliance history of a residential child-care operation must CCR consider when evaluating an application for a license to operate a residential child-care operation?

(a) When evaluating an application for a residential child-care license, CCR must consider the previous five-year compliance history of a residential child-care operation that:

(1) Is applying for a new license in a different location;

(2) Is re-applying for a new license after voluntarily closing; or

(3) Had a change in ownership; and

(A) Any controlling person from the previous operation serves or intends to serve as a controlling person in the new operation; or

(B) A new owner, including a sole proprietor, either partner of a partnership, or any member of the governing body of a corporation, is related to a controlling person of the previous operation by a third degree of consanguinity or second degree of affinity as defined in §745.21 of this chapter (relating to What do the following words and terms mean when used in this chapter?).

(b) The five-year compliance history consideration required by this section must include and document information concerning a related residential child-care operation, including:

(1) The number of abuse, neglect, or exploitation intakes in the previous five years;

(2) The number of confirmed abuse, neglect, or exploitation findings in the previous five years;

(3) The number of citations issued for corporal punishment in the previous five years; and

(4) A narrative description of how this data and information was or will be considered.

(c) The five-year compliance history consideration required by this section is a component of the application evaluation and must be completed prior to the on-site inspection related to the application for a new license.

(d) The five-year compliance history collected under subsection (b) of this section may be considered in future extended compliance history reviews of a license granted pursuant to an application subject to subsection (a) of this section.

§745.10207. May CCR issue a new license to a residential child-care operation that was previously on heightened monitoring?

(a) When issuing an initial license to a residential child-care operation that is on or otherwise meets the criteria for heightened monitoring and is applying for a new license in a different location, CCR must include a condition on the license that the operation is on heightened monitoring.

(b) When issuing an initial license to a residential child-care operation that was on heightened monitoring at the time of voluntary closure or otherwise met the criteria for heightened monitoring in the five years before voluntarily closing and reapplying for a new license at the same or a different location, CCR must include a condition on the license that the operation is on heightened monitoring.

(c) When issuing an initial license to a residential child-care operation that had a change in ownership while on heightened monitoring or otherwise met the criteria for heightened monitoring in the five years before the change in ownership, CCR must include a condition on the license that the operation is on heightened monitoring if:

(1) Any controlling person from the previous operation serves or intends to serve as a controlling person in the new operation; or

(2) A new owner, including a sole proprietor, either partner of a partnership, or any member of the governing body of a corporation, is related to a controlling person of the previous operation by a third degree of consanguinity or second degree of affinity as defined in §745.21 of this chapter (relating to What do the following words and terms mean when used in this chapter?).

(d) If an operation successfully completed heightened monitoring in the five years prior to the relocation, voluntary closure, or change of ownership, CCR will not include a condition on the license that the operation is on heightened monitoring, unless the operation again met the criteria for heightened monitoring after successfully completing it.

(e) When issuing an initial license to a residential child-care operation, if CCR determines that the applicant has employed or intends to employ a substantial number of employees from a previous operation, CCR as a condition of the license may include employee screening requirements or training requirements that must be met before employees may have contact with children.

(f) The timeframes for an initial license in §745.347 of this chapter (relating to How long is an initial license valid?) may be extended for an initial license issued with conditions as described by this section.