

Chapter 809. CHILD CARE AND DEVELOPMENT

Subchapter K. FUNDS MANAGEMENT

40 TAC §809.231

The Texas Workforce Commission (Commission) proposes an amendment to §809.231, relating to access to child care services.

Purpose: The purpose of the amendment is to make available more flexibility for Boards to implement child care. More specifically, the purpose of the amendment is to remove language that requires all Boards to ensure that child care provider rates meet or exceed the 75th percentile of the market rates and instead permits each Board to determine the rates that are appropriate for the Board's local workforce development area (workforce area) that would ensure equal access to child care services as described in the federal regulations. Because the federal regulations merely set the 75th percentile as a recommended benchmark but not necessarily a required level of payment for providers, a Board may exercise local control by factoring additional criteria in setting provider rates. Once a Board determines the appropriate rates for the workforce area, the Board will submit those rates to the Commission in the Board's integrated strategic and operational plan for approval by the Commission with explanation of the justification of the rates.

The amendment to the rule is intended to provide Boards with maximum flexibility, in accordance with state and federal laws and regulations, to design a service mechanism that will assist the greatest number of families in accessing the most affordable, accessible, and quality child care in each workforce area. Boards have established policies on several child care subjects ranging from income eligibility to reimbursement rates. In their role as policy makers, Boards ensure that parents, providers, contractors and potential contractors, employers, and the public in general have the opportunity to participate and comment on proposed child care administrative policies through open meetings. The enhanced flexibility afforded to Boards ensures that the policies maximize the use of funds by tailoring the management of child care services to meet the specific needs of each workforce area.

Background: Child Care services are provided to low-income families to create and promote long-term self-sufficiency, by enabling parents to work, attend skills training for work, or increase educational levels by offering affordable, accessible, and quality child care that supports the physical, social, emotional, and intellectual development and safety of children. Recognizing that parents best understand the needs of their children, these services empower parents to make informed choices regarding child care that best suits the family's needs. The Commission also advocates improvements in the affordability, accessibility, and quality of child care while supporting health, safety, licensing, and regulatory standards for child care providers.

Access to child care services that meets the needs of individual families is critically important to parents and children, to schools, to the workplace, and to other community institutions that interface with families. The Commission's intent is that Boards comply with the federal requirement to provide parental choice in accessing child care services as expressed by the Administration for Children and Families (ACF) in the preamble to the federal regulations (63 FedReg 39935) regarding 45 CFR § 98.43 Equal Access.

The federal statute relating to the Child Care and Development Fund (CCDF) (42 U.S.C.A. §9858 *et seq.*) requires that provider payment rates are sufficient to permit access by eligible families to child care services that are comparable to those services available to families that do not receive subsidies. The Child Care and Development Block Grant Act (CCDBG) §658E(c)(4) (42 U.S.C.A. 9858(e)(4)) requires that a summary of the facts upon which the determination of the sufficiency of payment rates to ensure equal access are based. The applicable federal regulations provide that access to child care services is accomplished when Boards ensure the following:

- (1) access to the full range of child care providers,
- (2) adequate payment rates, and
- (3) affordable copayments.

A Board shall demonstrate in the integrated strategic and operation plan that it has considered these following three key elements in determining that its child care program provides equal access for eligible families to child care services.

The first element of equal access to child care services is choice from a broad array of categories and types of providers, e.g., the categories of center-based, group, family, in-home care (relative care), and types of providers such as for-profit and nonprofit providers, sectarian providers, and relative providers as already required by 45 CFR §98.30. Federal guidance on what constitutes equal access as it relates to choice of providers is as follows: All working parents, regardless of income, need the full range of categories of care and types of providers from which they may choose their child care services. This is because child care needs vary considerably according to the child's age and special needs, the parent's work schedule, provider proximity, cultural values and expectations. Therefore, the ACF guidance indicates that the statutory requirement of equal access means that low-income working parents

receiving CCDF-subsidized care must have a full range of the categories and types of providers from which to choose care that they believe best meets their needs and those of their children.

The second element of equal access to child care services is adequate payment rates, based on a local market survey conducted no earlier than two years prior to the effective date of the current Child Care Plan filed with the United States Department of Health and Human Services (DHHS). Federal guidance on what constitutes equal access to child care services as it relates to adequate payment rates is as follows: The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) eliminated the requirement that, in establishing payment rates, Boards take into account variations in the cost of providing care in different categories of care, to different age groups, and to children with special needs. While eliminating the requirement for different payment rates for different categories of care, Boards are required to provide a summary of the facts relied upon by the Board to determine that such rates are sufficient to ensure equal access.

The federal statute indicates that if families receiving child care subsidies under the CCDF are to have equal access to local child care, the payment rates established by a Board should be comparable to those paid by families who are not eligible for subsidies. In other words, the payment rates should reflect the child care market. Although the requirement for specified rate categories has changed, the reality remains that the market reflects differences along several dimensions.

The focus of PRWORA on work further highlights the need for Boards to establish payment rates that support work. Child care is often the major factor which determines whether parents are able to work, and access to a variety of child care arrangements is necessary both to support today's increasingly diverse workforce and workplace demands and to ensure that the healthy development of children is not compromised.

If payments for child care are to be sufficient to provide equal access to child care services in the open market, then payments must be established in the context of market conditions. A survey, in that it reflects market realities, is an essential and critical factor--but not the only factor--that must be considered when a Board establishes rates. It is because survey findings are so central to understanding and gauging what level of payment might provide equal access that the ACF has made the requirement.

The Commission notes that ACF cautions against narrowly interpreting the survey requirement. For example, as suggested, up-to-the-minute vacancy data from Child Care Resource and Referral Agencies (CCR&Rs) or licensing bureaus could be used in conjunction with market rate survey information to make quick and frequent adjustments to the payments to providers. In setting or adjusting rates, the Commission reminds Boards of the general principle that Federal subsidy funds cannot pay more for services than is charged to the general public for the same service.

At this time, however, a survey is an essential part of the *facts* upon which payment rates are established.

The Commission notes that ACF has used the 75th percentile as a reference point against which a Board can judge if its provider payment rates afford equal access. It must be presumed that a rate that provides access to at least three-quarters of all care does, in fact, provide equal access. The ACF has not, however, required that payments be set at the 75th percentile, hence, it cannot be characterized as an arbitrary limit.

When establishing rates, the Commission expects that a Board will take into account survey results showing variations in charges for different categories of care. But, because there may be other facts that a Board considers, the Commission believes such a prescriptive requirement would contradict the intent of the statute.

A payment rate which provides for equal access does not necessarily provide access to every provider, irrespective of the provider's charge. There is no statutory basis for preventing a family from choosing a particular provider whose charges exceed the Board's payment rate. Nor is there an obligation on the part of the Board to pay an amount that is higher than the rate it determined is sufficient to provide equal access. In cases such as these, some States have created a contractual requirement that the provider will not charge the family the difference between its usual charge and the Board's rate. By offering the provider speedy, assured payments, the Board has been able to convince the providers to accept this stipulation. Payments for child care services for children with disabilities must also provide for equal access.

The third essential element of equal access is that any copayment or fee paid by the parent is affordable for the family and sliding fee scales should not be designed in a way that limits parental choice. Federal guidance on what constitutes equal access as it relates to copayments is as follows: The Commission emphasizes that Boards have flexibility in establishing their sliding fee scales. Information regarding the parent fee or copayment provision is contained in preambles applicable to 40 TAC §§809.45 and 809.46.

The elements must be addressed in the summary of facts submitted in a Board's integrated strategic and operational plan. Boards are free to include additional facts they used in determining rates that ensure equal access.

For purposes of this preamble, the term "Agency" refers to the daily operations of the Texas Workforce Commission under the direction of the executive director, and the term "Commission" refers to the three-member body of governance composed of Governor-appointed members.

The amended rule enables Boards to more fully exercise local control by setting integrated or service-specific provider fee structures for child care and to establish provider fee policies in a manner as determined by the Board to best meet the needs of the population being served in the workforce area and eliminates a state requirement that goes beyond federal requirements.

Randy Townsend, Director of Finance, has determined that for each year of the first five years the rule will be in effect, the following statements will apply:

there are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rule;

there are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule;

there are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule;

there are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rule; and

there are anticipated economic costs to persons required to comply with the rule in that Boards may set a provider fee policy at a higher or lower amount than currently in place in the Board area. The guidance on setting provider rates is set forth in the preamble applicable to the Child Care and Development Fund relating to 45 CFR §98.43.

Mr. Townsend has also determined that there is no anticipated adverse impact on small businesses as a result of enforcing or administering the rule because small businesses are not regulated or required to do anything by the rule.

Mark Hughes, Director of Labor Market Information, has determined that there is no foreseeable negative impact upon employment conditions in this state as a result of the proposed amendment.

Barbara Cigainero, Director of Workforce and Development, has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to help ensure access to child care for families in Texas and to encourage local control by Boards relating to child care.

Comments on the proposal may be submitted to Nancy Hard, Texas Workforce Commission Building, 101 East 15th Street, Room 130T, Austin, Texas 78778, (512) 936-0474. Comments may also be submitted via fax to (512) 463-5067 or e-mailed to: Nancy.Hard@twc.state.tx.us. Comments must be received by the Agency within thirty days from the date of the publication in the *Texas Register*.

The amendment to the rule is proposed under Texas Labor Code §§301.061 and 302.002, which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The rule affects Texas Labor Code, Chapter 302, and Texas Human Resources Code, Chapters 31 and 44. §809.231. *Provider Reimbursement Rates*.

(a) Based on a market rate survey provided by the Agency, [~~Commission~~], a Board shall establish the reimbursement rates for purchased child care to ensure that the rates provide equal access to [~~at least three-fourths of all~~] child care services in the local market and in a manner consistent with state and federal statutes and regulations governing child care.

(b) The Board or its contractor shall not reimburse a provider retroactively for new reimbursement rates.

(c) A Board or its contractor shall ensure that providers who are reimbursed for additional staff needed to assist in the care of a child with disabilities are paid a rate up to 190% of the provider's reimbursement rate for a child of that same age.

(1) The higher rate, which may be called an inclusion assistance rate, is an increased provider reimbursement rate to provide for additional staff to assist in the care of a child with disabilities, which shall take into consideration the estimated cost of the additional staff needed by a child with disabilities.

(2) The Board shall ensure that a professional, who is familiar with assessing the needs of children with disabilities, certifies the need for the inclusion assistance rate.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State, on July 14, 2000.

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J. Randel (Jerry) Hill

General Counsel

Texas Workforce Commission

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For further information, please call: (512) 463-8812