

40 TAC § 745.601
Tex. Admin. Code tit. 40, § 745.601

§ 745.601. What words must I know to understand this subchapter?

These words have the following meanings:

- (1) Continuous stay--Staying overnight or consecutive nights at an operation.
- (2) Direct care or direct access--Being counted in the child-to-caregiver ratio or having any responsibility that requires contact with children in care.
- (3) Frequently present at your operation--More than two non-continuous visits at your operation in a 30-day period; one continuous stay per year at your operation and the duration of the stay exceeds seven days; or more than two continuous stays per year at your operation and the duration of each stay exceeds 48 hours. For foster homes, the following individuals are not considered frequently present at a foster home:
 - (A) A child unrelated to a foster parent who visits the foster home unless:
 - (i) The child is responsible for the care of foster children; or
 - (ii) There is a reason to believe that the child has a criminal history or previously abused or neglected another child; or
 - (B) An adult unrelated to a foster parent who visits the foster home unless:
 - (i) The adult has unsupervised access to children in care; or

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(ii) There is a reason to believe that the adult has a criminal history or previously abused or neglected a child.

(4) Initial background check--The first background check that your operation requests on a person who is required to undergo a background check, as provided in this subchapter.

(5) Non-continuous visit--Being physically present at an operation for a period of time of less than 24 hours. Multiple or periodic visits to an operation within the same day is one visit.

(6) Owner--A person who owns a child-care operation. An owner includes:

(A) A sole proprietor;

(B) A partner in a partnership; or

(C) An officer of the governing body if the officer:

(i) Has a role in the everyday operation of the facility;

(ii) Participates in making policies that address the everyday operation of the child-care operation or DFPS requirements; or

(iii) Signs background check requests or requests risk evaluations for the operation.

(7) Regularly--On a scheduled basis.

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(8) Renewal background check--A recurring background check that your operation must request for someone periodically after your operation submits an initial background check for that person, as provided in this subchapter.

(9) Substitute employee--A person on the premises of a child-care operation for the purpose of fulfilling an employee or caregiver role in the absence of an employee or caregiver usually present at the operation.

(10) Unsupervised access--The person is allowed to be with children without the presence of a qualified caregiver.

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§ 745.603. Who does DFPS consider to be present at an operation while children are in care?

DFPS considers someone to be present at an operation while children are in care if the person:

(1) Is physically present at the operation while any child is in the care of the operation;

(2) Has responsibilities that may require the person to be present at the operation while children are in care;

(3) Resides at the operation or is present at the operation on a regular or frequent basis; or

(4) Otherwise may have access to children in care of the operation, regardless of the location where the care is provided.

**40 TAC § 745.611
Tex. Admin. Code tit. 40, § 745.611**

§ 745.611. What are background checks?

There are four types of background checks:

(1) A name-based criminal history check: the Department of Public Safety (DPS) conducts a comparative search between a person's name and the DPS database of crimes committed in the State of Texas;

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(2) A fingerprint-based criminal history check: DPS and the Federal Bureau of Investigation (FBI) conduct comparative searches between a person's fingerprints and the DPS database of crimes committed in the State of Texas and the FBI database of crimes committed anywhere in the United States, respectively;

(3) A DFPS central registry check: DFPS conducts a comparative search between a person's name and the DFPS central registry, which is a DFPS database of people who have been found by DFPS's divisions of Child Protective Services, Adult Protective Services, or Licensing to have abused or neglected a child; and

(4) An out-of-state central registry check: a comparative search between a person's name and another state's database of persons who have been found to have abused or neglected a child.

**40 TAC § 745.613
Tex. Admin. Code tit. 40, § 745.613**

§ 745.613. What is the purpose of background checks?

These checks are completed to determine whether:

(1) A person has any criminal or abuse and neglect history; and

(2) His presence is a risk to the health or safety of children in care.

**40 TAC § 745.615
Tex. Admin. Code tit. 40, § 745.615**

§ 745.615. On whom must I request background checks?

(a) You must request a name-based criminal history check and a DFPS central registry check for:

(1) The director, owner, and operator of the operation;

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(2) Each person employed at the operation;

(3) Each prospective employee at the operation;

(4) Each current or prospective foster parent providing foster care through a child-placing agency;

(5) Each prospective adoptive parent seeking to adopt through a child-placing agency;

(6) Each person at least 14 years of age, other than a client in care, who:

(A) Is counted in child-to-caregiver ratios in accordance with the relevant minimum standards;

(B) Will reside in a prospective adoptive home if the adoption is through a child-placing agency;

(C) Has unsupervised access to children in care at the operation; or

(D) Resides in the operation;

(7) Each person 14 years of age or older, other than a client in care, who will regularly or frequently be staying or working at an operation or prospective adoptive home while children are in care; and

(8) Each substitute employee, unless you confirm that the organization providing the substitute employee has completed a background check for the person through DFPS within the last 24 months.

(b) In addition to any other background check required by this section, you must request fingerprint-based criminal history checks on the following:

Current through 39 Tex.Reg. No. 5000, dated June 27, 2014, as effective on or before June 30, 2014

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(1) If you are a permit holder, or applicant for a permit, for a child-placing agency, general residential operation, independent foster home, child-care center, before or after-school program, or school-age program, you must request a fingerprint-based criminal history check for each person who is required to have a name-based background check under subsection (a)(1)-(6) of this section; and

(2) If you are a permit holder, or applicant for a permit, for any operation type, you must request a fingerprint-based criminal history check for each person whose name is submitted for a background check under subsection (a) of this section if:

(A) The person has lived in another state any time during the five-year period prior to the date you submit an initial background check; or

(B) The person moved out-of-state at any time between the date on which you submitted your last background check and the date your next renewal background check for that person is due; or

(C) At the time your initial or renewal background check is due, you have reason to suspect other criminal history exists in another state.

(c) In addition to any other background check required by this section, child-placing agencies and independent foster homes that will accept the placement of children in the conservatorship of DFPS must request an out-of-state central registry check for a foster or adoptive parent applicant and any other adult living in the home of the applicant who has lived outside of the state any time during the previous five years preceding the prospective foster or adoptive parent's application to become a foster or adoptive parent.

(d) You do not have to request a background check on a professional who is licensed or is required to have a background check to meet compliance with another governmental entity's requirements if:

(1) You do not employ or contract with the professional;

(2) The professional will only be present at the child-care operation in an official capacity; and

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(3) For day care operations, you obtain written parental consent before allowing the professional to have unsupervised access to a child in care.

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§ 745.616. Transitional rule for submission of fingerprint-based criminal history checks required by the 83rd Texas Legislature

(a) Background and Purpose. The 83rd Texas Legislature enacted changes to Human Resources Code (HRC) § 42.056, imposing new fingerprint check requirements on certain persons affiliated with residential child-care operations who had not previously been required to undergo these checks. See Acts 2013, 83rd R.S., Ch. 746, § 3. The purpose of this transitional rule is to provide guidance on when these checks should be submitted and when Licensing will begin to cite an operation for a violation of minimum standards for failing to submit the required fingerprint-based checks. This rule section applies only to general residential operations, child-placing agencies and independent foster homes, and only with respect to persons who were not required to undergo fingerprint-based criminal history checks under HRC § 42.056, as that statute existed on August 31, 2013.

(b) Employees Hired and Homes Verified or Approved On or After September 1, 2013. Beginning September 1, 2013, you must submit fingerprint checks for employees who are hired on or after September 1, 2013, and persons in homes verified or approved on or after September 1, 2013, in accordance with the timeframes listed below:

Figure: 40 TAC §745.616(b)

Persons Requiring an FBI Fingerprint Check	When an FBI Fingerprint Check Is Due
Prospective foster or adoptive parent	Prior to the foster or adoptive home's verification or approval
Prospective employee	Prior to employment
Person 14 years or older who resides in a prospective foster or adoptive home or a residential operation in applicant status	Prior to the foster or adoptive home's verification or approval or before the person may be in contact with children in care at a residential operation

(c) Employees Hired and Homes Verified or Approved Before September 1, 2013. Beginning September 1, 2013, you must submit fingerprint checks for all current employees and persons in already verified or approved homes who do not already have a valid fingerprint-based check on file, in accordance with the timeframes listed below:

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Figure: 40 TAC §745.616(c)

Persons Requiring an FBI Fingerprint Check	When an FBI Fingerprint Check Is Due
Person who will be turning 14 years of age and is counted in the child/caregiver ratio, has unsupervised access to children in care, or resides in a residential operation, foster home, or adoptive home	At the time of the person's 14th birthday
Any of the following persons affiliated with a general residential operation: <ul style="list-style-type: none"> • director/owner/operator, • employee (including the designated licensed administrator or backups), or • person already 14 years or older who is counted in child/caregiver ratio, has unsupervised access to children in care, or resides in a general residential operation 	By March 1, 2014
Any of the following persons who are affiliated with a child-placing agency, active agency foster home, independent foster home, independent foster group home, or adoptive home, as applicable: <ul style="list-style-type: none"> • current foster or adoptive parent, • director/owner/operator, • employee (including the designated licensed administrator or backups), or • person already 14 years or older who is counted in child/caregiver ratio, has unsupervised access to children in care, or resides in the operation or home 	By June 1, 2014
Any of the following persons who are affiliated with an inactive foster home: <ul style="list-style-type: none"> • current foster parent; or • person already 14 years or older who is counted in child/caregiver ratio, has unsupervised access to children in care, or resides in the home. 	Before the home's status may change from inactive to active
Anyone for whom: <ul style="list-style-type: none"> • you have requested a risk evaluation; and • a risk evaluation decision is pending 	Before the risk evaluation decision may be issued

(d) Technical Assistance and Enforcement. For persons described in subsection (b) of this section, Licensing will provide technical assistance to residential operations until March 1, 2014, and will begin citing operations for violation of minimum standards for any deficiencies relating to fingerprint-based checks after March 1, 2014. For persons described in subsection (c) of this section, Licensing will provide technical assistance to residential operations until September 1, 2014, and will begin citing operations for violation of minimum standards for any deficiencies relating to fingerprint-based checks after September 1, 2014.

(e) Rule Expiration. This rule expires on December 31, 2014.

40 TAC § 745.617
Tex. Admin. Code tit. 40, § 745.617

§ 745.617. If my operation is located in a large building that includes other businesses or services, must I request a background check on people working in the building who are not involved in my operation?

You do not have to request a background check unless the individual is regularly or frequently present in the area of

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the building where the operation is located.

**40 TAC § 745.619
Tex. Admin. Code tit. 40, § 745.619**

§ 745.619. For a registered child-care home that is also a foster home, must I request background checks on foster children who are over 14 years old?

No. Foster children are considered clients.

**40 TAC § 745.621
Tex. Admin. Code tit. 40, § 745.621**

§ 745.621. Must I request background checks on board members of corporations or associations who own or govern the operation?

No, you do not have to request a background check on an individual board member unless he is specifically listed as one of the persons you must request a background check on in § 745.615 of the title (relating to On whom must I request background checks?).

**40 TAC § 745.623
Tex. Admin. Code tit. 40, § 745.623**

§ 745.623. How do I request a background check?

(a) You must verify and send us the following identifying information for every person required to be checked in § 745.615 of this title (relating to On whom must I request background checks?):

(1) Name (last, first, middle), including any maiden or married names or alias;

(2) Date of birth;

(3) Sex;

(4) Social security number;

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(5) Current and previous address;

(6) Driver's license or a state issued identification card number;

(7) Any addresses, including counties, where the person has lived outside of the state of Texas any time during the five years preceding the date of the background check request; and

(8) Race (this information does not have to be verified).

(b) If you operate a child day-care operation other than a child-care center, before or after-school program, or school-age program, you must complete a request for a background check either:

(1) On-line through the DFPS website; or

(2) Send in a request via a signed form provided by your local Licensing office or the DFPS Centralized Background Check Unit.

(c) If you operate a residential child-care operation or a child-care center, before or after-school program, or school-age program, you must submit your requests on-line through the DFPS website.

**40 TAC § 745.625
Tex. Admin. Code tit. 40, § 745.625**

§ 745.625. When must I submit a request for an initial or renewal background check?

(a) You must submit a request for an initial background check for each person required to have a background check under § 745.615 of this title (relating to On whom must I request background checks?):

(1) At the time you submit your application for a permit to us;

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(2) At the time you hire someone;

(3) At the time you contract with someone who requires a background check;

(4) At the time a person applies to be a foster or adoptive parent;

(5) At the time a non-client resident 14 years or older moves into your home or operation, or a non-client resident living in your home or operation becomes 14 years old; and

(6) At the time you become aware of anyone requiring a background check under § 745.615 of this title, for on whom you have not previously requested the required background check.

(b) You must request a renewal background check for each person required to have a background check under § 745.615 of this title, which is due no later than two years from the date of your most recently requested initial or renewal background check on that person.

**40 TAC § 745.626
Tex. Admin. Code tit. 40, § 745.626**

§ 745.626. How soon after I request a background check on a person can that person provide direct care or have direct access to a child?

(a) You must have received the person's DPS and Central Registry name-based check results prior to allowing the person to provide direct care or have direct access to children in care.

(b) If a fingerprint-based check is required, you must receive the results of the fingerprint check prior to allowing the person to provide direct care or have direct access to a child in care, unless:

(1) Your operation is experiencing a staff shortage; and

(2) The results of the name-based DPS and Central Registry checks do not preclude the person's presence at the operation while children are in care.

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(c) A person who is allowed to provide direct care under subsection (b) of this section must submit his fingerprints as soon as possible, but not later than 30 days after the earliest date he first provides direct care, has direct access to a child, or is hired. Once you receive the fingerprint-based check results, you must not allow the person to be present at the operation while children are in care if the results contain criminal history that precludes the person from being present at the operation while children are in care.

**40 TAC § 745.629
Tex. Admin. Code tit. 40, § 745.629**

§ 745.629. How do I submit fingerprints for a fingerprint-based criminal history check?

After you make your request through DFPS, you must submit the fingerprints electronically through the assigned applicant fingerprinting service center of DPS.

**40 TAC § 745.630
Tex. Admin. Code tit. 40, § 745.630**

§ 745.630. If a fingerprint-based criminal history check has already been completed on a person, must that person submit new fingerprints at the time my initial or renewal background check on that person is due?

(a) At the time you submit an initial or renewal background check for a person who has previously undergone a fingerprint-based criminal history background check, you indicate that whether that person is required to undergo a fingerprint-based check as provided in subsection (b) of § 745.615 of this title (relating to On whom must I request background checks?). However, a previously conducted fingerprint-based check remains valid and DFPS will waive the requirement to submit new fingerprints under the following circumstances:

(1) DFPS previously conducted a fingerprint-based check for the person, and:

(A) The results of the previously completed check are still available to DFPS; and

(B) The date on which you submit an initial or renewal background check for the person is not more than two years since the date you or another operation last submitted a name-based check for that person;

(2) An entity other than DFPS, including but not limited to the Texas Education Agency, previously conducted a fingerprint-based criminal history check on the person, and those results:

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(A) Are stored in the Department of Public Safety (DPS) Clearinghouse and are available to DFPS;

(B) Were obtained from a comparative search between the person's fingerprints and the DPS database of crimes committed in the State of Texas and the Federal Bureau of Investigation (FBI) database of crimes committed anywhere in the United States; and

(C) Were received by DPS from the FBI not more than two years from the date on which your first fingerprint-based check on the person is due; or

(3) DFPS relied upon a previously completed fingerprint-based check from the DPS clearinghouse, as provided in paragraph (2) of this subsection, and the person who was the subject of that check continues to undergo name-based criminal history checks which are submitted to DFPS no less frequently than every two years since the date of the last background check submitted for that person.

(b) Notwithstanding subsection (a) of this section, a previously completed fingerprint-based criminal history check is no longer considered valid and a new fingerprint-based check must be conducted by DFPS if:

(1) DFPS previously conducted a fingerprint-based check for the person or waived the requirement based on a previously submitted check that another entity completed, the person failed to undergo a name-based check at least every two years since the most recent fingerprint-based check conducted by DFPS;

(2) The person moved out-of-state after the most recent fingerprint-based check was completed by DFPS or another entity; or

(3) You have reason to suspect that the person has out-of-state criminal history since the most recent fingerprint-based check was completed by DFPS or another entity.

(c) This rule applies to fingerprint-based checks that are first required for a person on or after March 1, 2014, the effective date of this rule. Persons for whom a fingerprint-based check was conducted prior to March 1, 2014, are governed by the rules and DFPS policies that were in effect at the time their first fingerprint-based check was conducted, unless or until one of the circumstances described in subsection (b) of this section occurs on or after

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March 1, 2014.

40 TAC § 745.631
Tex. Admin. Code tit. 40, § 745.631

§ 745.631. Must Licensing complete the background check(s) before issuing my permit?

If you are applying to operate a licensed child-care home or center, a registered child-care home, a listed family home, an independent foster home or a foster group home, we must receive the results from the background checks before issuing you a permit. For all other permits, we may issue a permit to an applicant before we receive the results of the background checks.

40 TAC § 745.633
Tex. Admin. Code tit. 40, § 745.633

§ 745.633. Can a child-placing agency (CPA) verify a foster home, foster group home, or adoptive home prior to receiving the results of the background checks?

No, a CPA must receive a cleared background check from us before verifying the home.

40 TAC § 745.635
Tex. Admin. Code tit. 40, § 745.635

§ 745.635. Can I do my own criminal history background checks?

Yes, but your background checks will not replace those we must conduct. You must still send us all the information required in § 745.623 of this title (relating to How do I request a background check?).

40 TAC § 745.637
Tex. Admin. Code tit. 40, § 745.637

§ 745.637. What information may I obtain from Licensing's records regarding a person's previous history in a child-care operation?

We will provide you with information from our records regarding a person's previous history in child care, as long as the information is not confidential.

40 TAC § 745.651
Tex. Admin. Code tit. 40, § 745.651

§ 745.651. What types of criminal convictions may affect a person's ability to be present at an operation?

(a) A felony or misdemeanor conviction under Texas law, the laws of another state, or federal law may affect a person's ability to be present at an operation. There are three charts with information regarding specific crimes that may affect a person's ability to be present at an operation. Each chart specifies whether a conviction permanently or temporarily bars a person from being present at one of the relevant operations while children are in care, whether a person is eligible for a risk evaluation, and whether a person who is eligible for a risk evaluation may be present at the operation pending the outcome of the risk evaluation. The three charts are:

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(1) Licensed or Certified Child Care Operations: Criminal History Requirements;

(2) Foster or Adoptive Placements: Criminal History Requirements; and

(3) Registered Child Care Homes and Listed Family Homes: Criminal History Requirements.

(b) The three charts listed in subsection (a) of this section will be reviewed and updated annually, published every January as an “In Addition” document in the Texas Register, and are available on the DFPS website at www.dfps.state.tx.us/Child_Care/.

(c) For any felony offense that is not specifically enumerated in the relevant chart listed in subsection (a) of this section, the person must have an approved risk evaluation prior to being present at the operation if:

(1) The person was convicted within the past 10 years for the offense; or

(2) The person is currently on parole for the offense.

(d) In addition to the criminal offenses that are specifically enumerated in each chart listed in subsection (a) of this section and felony offenses described in subsection (c) of this section, substantially similar federal offenses and offenses in other states will be treated the same as the similar Texas offense.

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§ 745.653. If a criminal history check reveals a criminal conviction other than those enumerated in the relevant chart listed in § 745.651 of this title (relating to What types of criminal convictions may affect a person’s ability to be present at an operation?), will Licensing notify me of the results?

Yes, we will notify you, but you will not be required to take any action.

40 TAC § 745.655

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Tex. Admin. Code tit. 40, § 745.655

§ 745.655. Do criminal convictions include deferred adjudication for an offense that may affect a person's ability to be present at an operation?

(a) Except as provided under subsection (b) of this section, a criminal conviction includes deferred adjudication only if the court has not dismissed the proceedings and discharged the person with the deferred adjudication after successful completion of any community supervision, also known as probation.

(b) Convictions include deferred adjudication regardless of whether the court has dismissed the proceedings and discharged the person with the deferred adjudication when the person is an applicant for a permit.

40 TAC § 745.656

Tex. Admin. Code tit. 40, § 745.656

§ 745.656. Will a requirement that a person register with the Texas Sex Offender Registry affect the person's ability to be present at an operation?

Yes, a person who is required to register as a sex offender in Texas may not be present at an operation while children are in care.

40 TAC § 745.657

Tex. Admin. Code tit. 40, § 745.657

§ 745.657. What types of Central Registry findings may affect a person's ability to be present at an operation?

(a) Except for a person described in subsection (b) of this section, the following chart lists the types of Central Registry findings that may affect a person's ability to be present at an operation. The chart specifies whether a person with a finding is barred from being present at an operation or is eligible for a risk evaluation, and whether a person eligible for a risk evaluation may be present at an operation pending the outcome of the risk evaluation:

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Figure: 40 TAC §745.657(a)

Types of Central Registry Findings for Child Abuse or Neglect	Is This Person Eligible for a Risk Evaluation?	If This Person Is Eligible for a Risk Evaluation, May the Person be Present at an Operation While Children are in Care Pending the Outcome of the Risk Evaluation?
(1) A Sustained DFPS Finding of Physical Abuse.	Except for a person described in subsection (b) of this section, this person is permanently barred from being present at an operation while children are in care. Persons described in subsection (b) of this section are eligible for a risk evaluation.	Except for a person described in subsection (b) of this section, this is not applicable, because this person is not eligible for a risk evaluation. This person must not be present at an operation while children are in care. Persons described in subsection (b) of this section cannot be present at an operation while children are in care pending a risk evaluation. However, if the risk evaluation is approved, then they may be present at the operation.
(2) A Sustained DFPS Finding of Sexual Abuse.	No, this person is permanently barred from being present at an operation while children are in care.	Not applicable, because this person is not eligible for a risk evaluation. This person must not be present at an operation while children are in care.
(3) A Sustained DFPS Finding of Emotional Abuse.	Yes	Yes, (i) if the person continued to work at the operation pending the outcome of due process for the designated finding because we had not determined the person's presence at the same operation was an immediate threat or danger to the health or safety of children; or (ii) if we previously approved a risk evaluation without conditions for the same finding, the more recent check does not reveal new information about the finding, and the circumstances of the person's contact with children at the operation are the same as when we approved the risk evaluation.

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(4) A Sustained DFPS Finding of Neglect (including neglectful supervision, physical neglect, medical neglect, and refusal to accept parental responsibility).	Yes	Yes, (i) if the person continued to work at the operation pending the outcome of due process for the designated finding because we had not determined the person's presence at the same operation was an immediate threat or danger to the health or safety of children; or (ii) if we previously approved a risk evaluation without conditions for the same finding, the more recent check does not reveal new information about the finding, and the circumstances of the person's contact with children at the operation are the same as when we approved the risk evaluation.
(5) A DFPS Finding, Not Already Sustained, of Any Types of Child Abuse or Neglect Previously Mentioned In This Chart, Where We Have Determined the Presence of the Person at an Operation Is an Immediate Threat or Danger to the Health or Safety of Children.	No, this person is temporarily barred from being present at an operation while children are in care.	Not applicable, because this person is not eligible for a risk evaluation. This person must not be present at an operation while children are in care. Note: The removal from contact with children is not permanent until the finding is sustained.
(6) A Finding of Abuse or Neglect from another state or jurisdiction, regardless of whether the finding is sustained.	The person's eligibility for a risk evaluation is the same as the relevant sustained DFPS finding noted in sections (1) - (4) of this chart.	The person's ability to be present at an operation while children are in care pending the outcome of a risk evaluation is the same as the relevant sustained DFPS finding noted in sections (1) - (4) of this chart.

(b) A prospective foster or adoptive parent, or any person that is required to undergo a background check because of the foster or adoptive parent application, is eligible for a risk evaluation for a sustained finding of physical abuse if:

(1) It has been more than five years since the date of the physical abuse finding; and

(2) The prospective foster or adoptive parent is related to or has a significant longstanding relationship with the foster or adoptive child.

40 TAC § 745.659
Tex. Admin. Code tit. 40, § 745.659

§ 745.659. What will happen if a person at my child-care operation has a criminal conviction or a Central Registry finding?

We will notify the child-care operation in writing:

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(1) Of any criminal conviction enumerated in the relevant chart listed under § 745.651 of this title (relating to What types of criminal convictions may affect a person's ability to be present at an operation?), and any sustained Central Registry finding listed in § 745.657 of this title relating to (What types of Central Registry findings may affect a person's ability to be present at an operation?), including:

(A) Whether this conviction or sustained finding permanently bars or temporarily bars this person from being present at an operation while children are in care, or whether you may request a risk evaluation for this person; and

(B) If this person is eligible for a risk evaluation, whether this person may be present at your child-care operation while children are in care pending the outcome of the risk evaluation.

(2) Of any Central Registry finding of child abuse or neglect that is not sustained, where we have determined the presence of the person at an operation poses an immediate threat or danger to the health or safety of children. The notification letter will inform you that this person has not at this time had any due process regarding this matter. However, if we determine that the person is an immediate threat or danger to the health or safety of children, you must immediately remove the person from contact with children. We will subsequently notify your operation of any future decisions regarding this matter including whether the person may have contact with children.

40 TAC § 745.661

Tex. Admin. Code tit. 40, § 745.661

§ 745.661. What must I do after Licensing notifies me that a person at my operation has one of these types of criminal convictions or Central Registry findings?

You must take appropriate action, which may include immediately removing this person from your child-care operation while the children are in care, restricting the person's duties, and/or requesting a risk evaluation for this person. Your decision in this matter should be based upon the information provided to you, as specified in § 745.659 of this title (relating to What will happen if a person at my child-care operation has a criminal conviction or a Central Registry finding?).

40 TAC § 745.663

Tex. Admin. Code tit. 40, § 745.663

§ 745.663. What if the person with the criminal conviction or central registry finding believes the information obtained is incorrect?

Your responsibilities are the same as noted in § 745.661 of this title (relating to What must I do after Licensing notifies me that a person at my operation has one of these types of criminal convictions or central registry findings?). However, you may contact the local Licensing staff who sent the notice letter to discuss the accuracy of the information. For criminal convictions, you may conduct a fingerprint-based criminal history check through DPS to determine the accuracy of the conviction.

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**40 TAC § 745.681
Tex. Admin. Code tit. 40, § 745.681**

§ 745.681. When may I request a risk evaluation?

You may request a risk evaluation when:

(1) We have informed you that the person with the criminal conviction or central registry finding of child abuse or neglect is eligible for a risk evaluation; and

(2) You believe the person with the criminal conviction or central registry finding (this may be yourself in some situations) does not pose a risk to the health or safety of children.

**40 TAC § 745.683
Tex. Admin. Code tit. 40, § 745.683**

§ 745.683. Who is responsible for submitting a request for a risk evaluation?

(a) If the person with the criminal conviction or Central Registry finding is an independent foster home parent, a registered child-care home permit holder, a listed family home permit holder, or any sole proprietor that is an applicant for any type of permit, then the person must request his own risk evaluation;

(b) If the person with the criminal conviction or Central Registry finding is a child-placing agency foster parent, adoptive parent, or the non-client child of the foster or adoptive home, then the child-placing agency must request the risk evaluation;

(c) If the person with the criminal conviction or Central Registry finding is a licensed administrator, then the child-placing agency or general residential operation must request the risk evaluation; and

(d) For everyone else, the governing body, director, designee, independent foster home parent, or family home permit holder as appropriate, must request the risk evaluation.

**40 TAC § 745.685
Tex. Admin. Code tit. 40, § 745.685**

§ 745.685. How do I submit a request for a risk evaluation?

You must submit a completed risk evaluation packet to the DFPS Centralized Background Check Unit. The

Current through 39 Tex.Reg. No. 5000, dated June 27, 2014, as effective on or before June 30, 2014

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evaluation packet must include the completed risk evaluation form and all required supporting documentation.

**40 TAC § 745.686
Tex. Admin. Code tit. 40, § 745.686**

§ 745.686. What are the time frames for requests for a risk evaluation?

(a) If you have been notified that a person who was the subject of the background check may continue to work or be present at an operation pending a risk evaluation, then:

(1) You must notify the Centralized Background Check Unit (CBCU) that you intend to request a risk evaluation within seven calendar days of when you receive notification from CBCU that the person may continue to work or be present at the operation pending a risk evaluation; and

(2) You must return the completed risk evaluation packet to the CBCU within 21 calendar days after you receive notice from CBCU that a risk evaluation is required. However, you may request two 14-calendar-day extensions for good cause.

(b) DFPS has 14 calendar days to review the paperwork submitted and notify you in writing that your risk evaluation is either:

(1) Complete and accepted for processing; or

(2) Incomplete. The notification letter will explain what is needed to complete the packet.

(c) If your risk evaluation packet is returned as incomplete, you have one additional 14-calendar-day period to submit the information needed to complete the packet.

(d) If you do not meet the timeframes in subsection (a) or (c) of this section for compliance with the request for a risk evaluation, you may continue with the risk evaluation process. However, the person who is the subject of the background check may not continue to be present at an operation pending the outcome of the risk evaluation.

(e) Once a risk evaluation packet has been accepted by DFPS as complete, then DFPS has 21 calendar days to make

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a determination on the risk evaluation. DFPS may exceed this time frame for good cause.

**40 TAC § 745.687
Tex. Admin. Code tit. 40, § 745.687**

§ 745.687. What must I include in my request for a risk evaluation based on criminal history?

You must include the following:

(1) A completed Form 2974, Request for Risk Evaluation Based on Past Criminal History or Central Registry Findings;

(2) A valid rationale from the operation's director, owner, operator, or administrator explaining why the person who has the criminal history does not pose a risk to the health or safety of children;

(3) An official copy of the final record of judicial finding or conviction (signed by a judge and file stamped);

(4) If the person was incarcerated:

(A) A copy of local, state, or federal release order;

(B) The date the person was released from incarceration; and

(C) If applicable, the terms and conditions of parole;

(5) If the person was given a probated sentence (including deferred adjudication), the dates of the probation and information related to the terms and conditions of the probation, including documentation regarding whether or not the person successfully completed the terms of probation and paid all court costs, supervision fees, and court-ordered restitution and fines. If the person is presently on probation, a statement from the person's probation officer regarding the status of the person's probation;

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(6) Age of the person at the time the crime was committed;

(7) A detailed, signed statement from the person regarding the nature and seriousness of the crime for which the person was convicted, including:

(A) Why the person was arrested;

(B) Where the person was when arrested;

(C) Who else was involved in the criminal incident;

(D) Whether anyone was injured;

(E) The extent and nature of other arrests within the person's past criminal history;

(F) What has changed for this person since the time of the arrest; and

(G) Why the person does not feel that he or she poses a risk to children in care;

(8) Evidence of rehabilitative effort;

(9) The work history of the person over the past 10 years, including names of employers, dates of employment, and positions held;

(10) At least three reference letters from individuals who are not related to the person (professionals, employers, law enforcement, etc.) and who have knowledge about the person's character and, if applicable, the person's ability to

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work with children;

(11) Information related to the person's role (or prospective role) with your operation, including:

(A) Job title (for employees);

(B) Hours and days of service;

(C) Job responsibilities;

(D) Nature and amount of interaction with children in care;

(E) Plans for supervision of the person; and

(F) Anticipated amount of unsupervised time with children in care;

(12) The ages and any special needs of children in care for whom the person will be responsible and/or with whom the person may interact;

(13) If the risk evaluation is for a relative foster or adoptive placement or a foster or adoptive placement where the person has a significant longstanding relationship with the child, then:

(A) The names and dates of birth of any foster or adoptive children who have been or are expected to be placed in the home (if known);

(B) A description of the foster or adoptive parent's relationship to each child; and

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(C) A copy of a home assessment or home screening, if one has been completed; and

(14) Any additional items requested by the CBCU Manager to assist with the determination of risk.

40 TAC § 745.688
Tex. Admin. Code tit. 40, § 745.688

§ 745.688. May Licensing place conditions or restrictions on a person's presence at an operation pending the outcome of a risk evaluation?

If a person can be present at an operation pending the outcome of a risk evaluation, we may place conditions or restrictions on the person's presence at the operation as we find necessary to protect the health or safety of children. For example, we may restrict an employee from having a certain role at the operation pending the outcome of the risk evaluation.

40 TAC § 745.689
Tex. Admin. Code tit. 40, § 745.689

§ 745.689. What must I include in my request for a risk evaluation based on a Central Registry finding?

You must include the following:

(1) A completed Form 2974, Request for Risk Evaluation Based on Past Criminal History or Central Registry Findings;

(2) A valid rationale from the operation's director, owner, operator, or administrator explaining why the person who has a Central Registry finding does not pose a risk to the health or safety of children;

(3) Age of the person at the time of the abuse or neglect;

(4) The amount of time that has elapsed since the person's last abuse or neglect finding;

(5) A detailed, signed statement from the person regarding the nature and seriousness of the abuse and/or neglect

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finding, including:

- (A) The circumstances involved in the abuse and/or neglect incident and investigation;
 - (B) The extent and nature of the person's past abuse and/or neglect history;
 - (C) What has changed for this person since the time of the abuse or neglect finding; and
 - (D) Why the person does not feel that he or she poses a risk to children in care;
- (6) Evidence that factors which impact the risk of future abuse or neglect have changed;
- (7) At least three reference letters from individuals who are not related to the person (professionals, employers, caseworkers, etc.) and who have knowledge about the person's character and, if applicable, the person's ability to work with children;
- (8) The work history of the person over the past 10 years, including names of employers, dates of employment, and positions held;
- (9) Information related to the person's role (or prospective role) with your operation, including:
- (A) Job title (for employees);
 - (B) Hours and days of service;
 - (C) Job responsibilities;

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(D) Nature and amount of interaction with children in care;

(E) Plans for supervision of the person; and

(F) Anticipated amount of unsupervised time with children in care;

(10) The ages and any special needs of children in care for whom the person will be responsible and/or with whom the person may interact;

(11) If the risk evaluation is for a relative foster or adoptive placement or a foster or adoptive placement where the person has a significant longstanding relationship with the child, then:

(A) The names and dates of birth of any foster or adoptive children who have been or are expected to be placed in the home (if known);

(B) A description of the foster or adoptive parent's relationship to each child; and

(C) A copy of a home assessment or home screening, if one has been completed; and

(12) Any additional items requested by the CBCU Manager to assist with the determination of risk.

40 TAC § 745.695
Tex. Admin. Code tit. 40, § 745.695

§ 745.695. What criminal history and Central Registry findings are relevant to a person's ability to be a licensed administrator?

(a) A licensed administrator must comply with the criminal history requirements in § 745.651(a)(1) of this title (relating to What types of criminal convictions may affect a person's ability to be present at an operation?).

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(b) In addition to complying with the relevant criminal history requirements in subsection (a) of this section, a licensed administrator is monitored for offenses related to financial crimes, including all Title 7 Offenses Against Property and Title 11 Organized Crime offenses in the Penal Code.

(c) A licensed administrator must comply with the Central Registry requirements outlined in § 745.657 of this title (relating to What types of Central Registry findings may affect a person's ability to be present at an operation?).

**40 TAC § 745.696
Tex. Admin. Code tit. 40, § 745.696**

§ 745.696. Does having a criminal history or Central Registry finding prohibit me from becoming a licensed administrator?

(a) Criminal history and Central Registry findings may affect your ability to have an administrator's license or a licensed administrator's ability to be present at a particular operation.

(b) You are prohibited from being a licensed administrator if you have:

(1) A criminal conviction or Central Registry finding that would bar you from being present at an operation while children are in care; or

(2) A felony conviction of a financial crime within the past 10 years.

(c) You are not prohibited from being a licensed administrator if you have a felony conviction of a financial crime older than 10 years or a misdemeanor conviction of a financial crime. However, these crimes do require a risk evaluation and Licensing may place restrictions on your license. In addition, you may not be present at the operation while children are in care until the operation requests a risk evaluation for you, and the risk evaluation is approved.

(d) You are not prohibited from being a licensed administrator if you have a criminal conviction or Central Registry finding that only requires a risk evaluation. However, Licensing may place restrictions on your license. In addition, you may not be present at the operation while children are in care until the operation requests a risk evaluation for you, and the risk evaluation is approved.

**40 TAC § 745.697
Tex. Admin. Code tit. 40, § 745.697**

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§ 745.697. Is an approved risk evaluation permanent?

(a) You do not have to request a risk evaluation for the same criminal conviction or central registry finding that a previous background check revealed if each of the following conditions are met:

(1) Your operation previously requested a risk evaluation for the same finding or criminal conviction, and DFPS approved the risk evaluation;

(2) The more recent check does not reveal a new finding or criminal conviction; and

(3) The person's role as identified in the risk evaluation decision letter and the circumstances of the person's contact with children at the operation are the same as when we approved the risk evaluation.

(b) You must submit a new request for a risk evaluation by notifying the Centralized Background Check Unit (CBCU) at the time any of the conditions under subsection (a) of this section can no longer be met. The CBCU will then determine whether the person can continue to work or be present at your operation pending the new risk evaluation. After you notify the CBCU that you intend to request a new risk evaluation, the time frames and other processes for completing a risk evaluation that are described in this subchapter apply. Any conditions or restrictions that the CBCU put on the person's presence at the operation as a result of the previously approved risk evaluation will remain in effect unless and until they are explicitly amended by the CBCU.

40 TAC § 745.699

Tex. Admin. Code tit. 40, § 745.699

§ 745.699. What should I do if a person in my child-care operation is currently the subject of a criminal investigation?

You must report the investigation to us if the person is arrested or charged with a crime.

40 TAC § 745.701

Tex. Admin. Code tit. 40, § 745.701

§ 745.701. May a person arrested or charged with a crime be present at an operation while children are in care?

(a) A person arrested or charged with a crime may not be present at an operation while children are in care if:

(1) A conviction for the arrest or charged offense would permanently or on a time-limited basis bar the person from being present at the operation, or would prohibit the person from being present at the operation pending

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the outcome of a risk evaluation; or

(2) We determine that the person poses an immediate threat to the health or safety of children.

(b) If the person is arrested or charged with a crime for which the person would be eligible to be present at the operation pending a risk evaluation if convicted, we may place conditions or restrictions on the person's presence at the operation while children are in care pending the resolution of the criminal matter as we find necessary to protect the health or safety of children.

**40 TAC § 745.703
Tex. Admin. Code tit. 40, § 745.703**

§ 745.703. If I have knowledge that a person has a criminal conviction or Central Registry finding, can the person be present at my operation while children are in care?

This person may be present in your operation while children are in care if you have requested a background check under this subchapter (relating to Background Checks), and:

(1) The results do not indicate a criminal conviction or a Central Registry finding that precludes the person from being present at an operation while children are in care under § 745.651 and § 745.657 of this title (relating to What types of criminal convictions may affect a person's ability to be present at an operation? and What types of Central Registry findings may affect a person's ability to be present at an operation?); or

(2) We have approved a risk evaluation on the person that meets § 745.697 of this title (relating to Is an approved risk evaluation permanent?).

**40 TAC § 745.705
Tex. Admin. Code tit. 40, § 745.705**

§ 745.705. What must I do if a person in my child-care operation is the subject of an abuse or neglect investigation?

If you have knowledge that Child Protective Services is conducting an investigation, you must report this to us immediately. The person under investigation by us or CPS may have contact with children unless we determine that he poses an immediate threat or danger to the health or safety of children.

**40 TAC § 745.707
Tex. Admin. Code tit. 40, § 745.707**

§ 745.707. Who makes the final decision on a risk evaluation?

The manager of the DFPS Centralized Background Check Unit or his designee reviews the risk evaluation request and determines whether or not a person with a criminal conviction or central registry finding poses a risk to children in a particular operation.

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40 TAC § 745.709
Tex. Admin. Code tit. 40, § 745.709

§ 745.709. What is the basis of the risk evaluation decision?

We base the risk evaluation decision upon all of the information submitted under § 745.687 or § 745.689 of this title (relating to What must I include in my request for a risk evaluation based on criminal history? and What must I include in my request for a risk evaluation based on a central registry finding?), the compliance history and regulatory status of the operation, the role and responsibility of the person in his current position, and any federal requirements for adoptive and foster parents regarding criminal convictions.

40 TAC § 745.711
Tex. Admin. Code tit. 40, § 745.711

§ 745.711. What can I do if I disagree with the risk evaluation decision?

You have no rights to have a risk evaluation decision reviewed or appealed.

40 TAC § 745.731
Tex. Admin. Code tit. 40, § 745.731

§ 745.731. What are designated perpetrators and sustained perpetrators of child abuse or neglect?

(a) A designated perpetrator is a person on the DFPS central registry found by DFPS to have abused or neglected a child, but who has not exhausted his right to an administrative review or due process hearing. See Subchapter M of this chapter (relating to Administrative Reviews and Due Process Hearings).

(b) A sustained perpetrator is also a person on the DFPS central registry found by DFPS to have abused or neglected a child, but who has already been offered his rights to an administrative review and due process hearing, and the:

(1) Designated perpetrator's rights to the administrative review and due process hearing have expired; or

(2) Finding was upheld in the due process hearing.

40 TAC § 745.733
Tex. Admin. Code tit. 40, § 745.733

§ 745.733. Will Licensing release a central registry finding on a designated perpetrator or sustained perpetrator to my operation?

(a) In most situations, we will not release the central registry finding for a designated perpetrator until the designated

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perpetrator's rights to dispute the finding have been completed. However, there are some instances where we may release the central registry finding on a designated perpetrator before his rights to dispute the finding have been completed. We may release the central registry finding to:

(1) Your operation if we determine the presence of the designated perpetrator is an immediate threat or danger to the health or safety of children. In this situation we will also instruct you that this person must be immediately removed from contact with children;

(2) Individuals who have control over the designated perpetrator's access to children, if we determine the presence of the designated perpetrator is an immediate threat or danger to the health or safety of children;

(3) A court for the purpose of justifying a request for appropriate judicial relief; or

(4) Parents of children in care when we determine the information is necessary to meet a child's needs.

(b) We may release the central registry finding for a sustained perpetrator without any further notification from DFPS to:

(1) Operations with licensing permits or an application for a permit; and

(2) Individuals who have control over the sustained perpetrator's access to children.

**40 TAC § 745.735
Tex. Admin. Code tit. 40, § 745.735**

§ 745.735. What notice will Licensing send a designated perpetrator or a sustained perpetrator working at an operation?

(a) We will notify the designated perpetrator:

(1) Of the abuse or neglect finding;

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(2) Whether we will release the finding to his employer prior to or after the administrative and/or due process hearing is completed; and

(3) Of his rights to an administrative review and due process hearing with instructions on how to request them.

(b) We will not notify a sustained perpetrator of the central registry finding or of any subsequent release of the finding. We notified him of his rights when we designated him as a perpetrator.

(c) If a designated perpetrator is a minor, we will address the designation to the parents of the minor.

**40 TAC § 745.751
Tex. Admin. Code tit. 40, § 745.751**

§ 745.751. What factors does Licensing consider when determining if a person or an operation is an immediate threat to the health or safety of children?

We consider the following:

- (1) The severity of the deficiency, including abuse or neglect;
- (2) The circumstances surrounding the deficiency, including abuse or neglect;
- (3) The seriousness of any injuries to children;
- (4) The length of time since the deficiency, including abuse or neglect, occurred;
- (5) Whether the deficiency has been repeated;
- (6) The compliance history of the operation;

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- (7) The current regulatory status of the operation;
- (8) How quickly corrections to the deficiency can be made;
- (9) If any corrections have already been made:
- (10) The role of the person in the abuse or neglect;
- (11) The current position, role, and responsibilities of the person; and
- (12) The degree and/or immediacy of the threat or danger.

**40 TAC § 745.753
Tex. Admin. Code tit. 40, § 745.753**

§ 745.753. How will I know whether Licensing has determined that a person or my operation poses an immediate threat or danger to the health or safety of children?

We will notify the person and/or the operation in the original notice of the decision or action that we are taking. The notice will indicate that we have determined the person or the operation poses an immediate threat or danger to the health or safety of children and whether the person may continue to work in their present position or the operation may continue to operate pending the outcome of the administrative review and due process hearing.

**40 TAC § 745.901
Tex. Admin. Code tit. 40, § 745.901**

§ 745.901. Who is a controlling person at a child-care operation?

- (a) A controlling person of a child-care operation is any:

- (1) Owner of the operation or member of the governing body of the operation, including, as applicable, an executive, an officer, a board member, a partner, a sole proprietor and the sole proprietor's spouse, or the

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primary caregiver at a child-care home and the primary caregiver's spouse;

(2) Person who manages, administrates, or directs the operation or its governing body, including a day care director or a licensed administrator; or

(3) Person who either alone or in connection with others has the ability to influence or direct the management, expenditures, or policies of the operation. For example, a person may have influence over the operation because of a personal, familial, or other relationship with the governing body, manager, or other controlling person of the operation.

(b) A person does not have to be present at the operation or hold an official title at the operation or governing body in order to be a controlling person.

(c) An employee, lender, secured creditor, or landlord of the operation is not a controlling person unless the person meets a definition in subsection (a) of this section.

**40 TAC § 745.903
Tex. Admin. Code tit. 40, § 745.903**

§ 745.903. When and how must an operation submit controlling-person information to Licensing?

(a) You must provide information about each person that is a controlling person at your operation as defined in § 745.901(a) of this title (relating to Who is a controlling person at a child-care operation?) when you apply for your permit.

(b) After you receive a permit from us, you must provide us information about someone who is a controlling person at your operation within two days after a person becomes a controlling person.

(c) To provide the information to us, you must either:

(1) Enter the information on-line through the DFPS website; or

(2) Submit a completed Controlling Person Form to your local Licensing office.

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**40 TAC § 745.905
Tex. Admin. Code tit. 40, § 745.905**

§ 745.905. When will Licensing designate someone at my child-care operation as a controlling person?

(a) We will designate each person who meets the definition of a controlling person in § 745.901(a) of this title (relating to Who is a controlling person at a child-care operation?) as a controlling person at your operation when:

(1) We revoke your permit; or

(2) You voluntarily close your operation or relinquish your permit after you receive notice of our intent to revoke your permit or that we are revoking your permit.

(b) We may designate a person at your operation as controlling, regardless of whether you submitted their name on a Controlling Person Form.

**40 TAC § 745.907
Tex. Admin. Code tit. 40, § 745.907**

§ 745.907. What are the consequences of Licensing designating me as a controlling person?

(a) If we designate you as a controlling person:

(1) We may not issue you a permit to operate a child-care operation for five years after our designation is sustained; and

(2) You may not be the controlling person at a child-care operation for five years after the designation is sustained.

(b) Our designation of you as a controlling person is sustained when the revocation or voluntary closure described in § 745.905 of this title (relating to When will Licensing designate someone at my child-care operation as a controlling person?) is final and:

(1) You have waived your due process rights regarding the designation; or

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(2) The designation is upheld after you have exhausted your due process rights.

(c) Another state agency may deny your application for a permit based on information obtained from us, as outlined in Chapter 531 of the Government Code, Subchapter W (relating to Adverse Licensing, Listing, or Registration Decisions).

**40 TAC § 745.909
Tex. Admin. Code tit. 40, § 745.909**

§ 745.909. What due process rights do I have if Licensing designates me as a controlling person?

(a) If we designate you as a controlling person, we will offer you an administrative review and due process hearing. See Subchapter M of this chapter (relating to Administrative Reviews and Due Process Hearings).

(b) At our discretion, we may combine the administrative review with a review regarding the revocation. The administrative law judge may combine hearings that involve issues related to the same decision or action.

**40 TAC § 745.911
Tex. Admin. Code tit. 40, § 745.911**

§ 745.911. In what other circumstances may a person not serve as a controlling person at my operation?

A person may not serve as a controlling person in a child-care operation if:

(1) We sustained the person as a controlling person within the previous five years;

(2) The person is ineligible to apply for a permit because of an adverse action that was sustained during the previous five years; or

(3) The person was a permit holder, controlling person, or otherwise listed on the application for a permit for a facility that had its permit denied, revoked, suspended, or terminated by a state health and human services agency in the last 10 years, as outlined in Chapter 531 of the Government Code, Subchapter W (relating to Adverse Licensing, Listing, or Registration Decisions). Depending upon the circumstances that led to the previous permit denial, suspension, revocation, or termination and the person's relationship to that facility, we may determine that this person may not serve as a controlling person for your child-care operation.

40 TAC § 745.913

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Tex. Admin. Code tit. 40, § 745.913

§ 745.913. When does Licensing check whether someone is ineligible to serve as a controlling person at my child-care operation?

Licensing will check to determine whether someone is ineligible to serve as a controlling person, when:

- (1) You submit an application for a permit; and
- (2) Any time we receive information that identifies someone as a controlling person.

**40 TAC § 745.915
Tex. Admin. Code tit. 40, § 745.915**

§ 745.915. What happens after Licensing determines that someone is ineligible to serve as a controlling person at my child-care operation?

- (a) We will notify you in writing if someone is ineligible to serve as a controlling person at your operation.
- (b) If the person that we have prohibited from serving as a controlling person believes that the results of the check are inaccurate, you may contact the Licensing office that sent the notice to you to discuss the accuracy of the information.
- (c) Unless we determine that the notification was inaccurate, this person may not serve as a controlling person at your operation.

**40 TAC § 745.4151
Tex. Admin. Code tit. 40, § 745.4151**

§ 745.4151. What drug testing policy must my residential child-care operation have?

- (a) The Department of Family and Protective Services is required to adopt a model drug testing policy for residential child-care operations under the Human Resources Code, 42.057. Your residential child-care operation must either adopt the model drug testing policy or have a written drug testing policy that meets or exceeds the criteria in the model policy. Although this policy only covers drugs, coverage of alcohol may be included. The department recommends that an operation obtain legal advice before adopting and implementing any drug testing policy.

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(b) Residential child-care operations must pay for any required drug tests, except as provided in subsection (c)(7) of this section.

(c) The mandatory criteria for the Model Drug Testing Policy For Residential Child-Care Operations include:

(1) Purpose. (Name of residential child-care operation) has a vital interest in ensuring the safety of resident children through the appropriate drug testing of employees, while also protecting the rights of the employees.

(2) Scope. This policy applies to all employees of residential child-care operations, including child-placing agencies, that directly care for or has access to a child in care, and applicants for such employment. With respect to allegations of drug abuse (See paragraph (4)(D) of this subsection), this policy applies to any person who works under the auspices of a residential child-care operation and directly cares for or has access to a child in care.

(3) Definitions. The following definitions apply to this section.

(A) Abusing drugs--The use of any:

(i) Drug or substance defined by the Texas Controlled Substances Act, Texas Health and Safety Code, Chapter 481; or

(ii) Prescription or non-prescription drug that is not being used for the purpose for which it was prescribed or manufactured.

(B) Drug testing--The scientific analysis of urine, blood, breath, saliva, hair, tissue, and other specimens for detecting a drug.

(C) Employee--A person is an employee of your operation if you pay the person a wage or salary and direct or have the right to direct his work. For the purposes of this definition:

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(i) Directing a person's work includes having control over when, where, and how the person conducts his work and providing the person with training that is necessary for the person to conduct his work;

(ii) Controlling when a person works includes setting the person's work hours;

(iii) Controlling how a person works includes assigning the person the task(s) that he must accomplish and exercising responsibility for the means and details by which the person accomplishes the task(s); and

(iv) A person is not an "employee" of a child-placing agency merely because the agency verifies him as a foster parent.

(D) Random drug testing--A testing cycle that varies the frequency and intervals that specimens are collected for testing and selects employees in a random manner that does not eliminate already tested employees from future testing. The testing should ensure all employees are subject to random testing on a continuing basis.

(E) Good cause to believe the person may be abusing drugs--A reasonable belief based on facts sufficient to lead a prudent person to conclude that the person who works under the auspices of the residential child-care operation may be abusing drugs. Sufficient facts may include direct observations of the person using or possessing drugs, or exhibiting physical symptoms, including but not limited to slurred speech or difficulty in maintaining balance; erratic or marked changes in behavior, including a decrease in the quality or quantity of the person's productivity, judgment, reasoning, and concentration and psychomotor control, accidents, and deviations from safe working practices; or any other reliable information.

(F) Person who works under the auspices of the residential child-care operation--A person who meets the definition in § 745.8553 of this title (relating to Who works "under the auspices of an operation"?).

(4) Mandatory drug testing.

(A) All applicants that are intended to be hired for employment are subject to pre-employment testing, and may not provide direct care or have access to a child in care until the drug test results are available;

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(B) All employees are subject to random, unannounced drug testing;

(C) Any employee that is the subject of a child abuse or neglect investigation, when DFPS determines there is “good cause to believe the employee may be abusing drugs”, must be drug tested within 24 hours of notification by DFPS to the residential child-care operation; and

(D) Any person alleged to be abusing drugs may be tested within 24 hours, if the person:

(i) Works under the auspices of the residential child-care operation;

(ii) Directly cares for or has access to a child in care; and

(iii) There is “good cause to believe the person may be abusing drugs.”

(5) Drug testing procedures. All drug testing will:

(A) At a minimum screen for marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP);

(B) Use one of the following drug-testing methods:

(i) A drug test performed by a certified laboratory;

(ii) A testing kit with proven rates of false positives below 2% and false negatives below 8% on all drugs screened; or

(iii) Another testing method for which there is scientific proof of accuracy comparable to either of the

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first two choices, such as saliva, hair, or spray drug testing;

(C) Ensure the integrity and identity of the specimen collected from the time of collection to the time of disposal to minimize the opportunity for an employee to adulterate or substitute a specimen; and

(D) Preserve the privacy and rights of the person tested. This includes safeguarding the results of any test and maintaining them, so they remain confidential and free from unauthorized access.

(6) Discipline.

(A) An applicant or employee's consent to submit to drug testing is required as a condition of employment, and the refusal to consent may result in refusal to hire the applicant and disciplinary action, including discharge, against the employee for a refusal;

(B) An employee who is tested because there is "good cause to believe the employee may be abusing drugs," may be suspended pending receipt of written test results and further inquiries that may be required;

(C) An employee determined through drug testing to have abused drugs is subject to discipline, up to and including discharge;

(D) An applicant for employment or an employee determined through drug testing to have abused drugs may not be employed in a position with direct contact with children in care if the employee presents a risk of harm to children; and

(E) An employee determined through drug testing to have abused drugs may be offered the opportunity to complete a rehabilitation program at the employee's expense.

(7) Appeal. An applicant or employee whose drug test is positive may, at the applicant or employee's expense:

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(A) Have an opportunity to explain and offer written documentation why there is another cause for the positive drug test;

(B) Request that the remaining portion of the sample that yielded the positive results, if available, be submitted for an additional independent test, including second tests to rule out false positive results; and/or

(C) Submit the written test result for an independent medical review.

(8) Documentation.

(A) All applicants that you intend to hire for employment and employees must be provided a copy of your drug testing policy and must sign a document consenting to these terms and conditions of employment.

(B) All drug test results of employees will be kept for one year after an employee's last work day with the residential child-care operation, or until any investigation involving the person is resolved, whichever is later. All other drug test results required by this rule will be kept for one year from the date the drug test was administered. The results must be available for review by Licensing Division within 24 hours of the request.

**40 TAC § 745.4201
Tex. Admin. Code tit. 40, § 745.4201**

§ 745.4201. May I take possession of a child from a law enforcement or juvenile probation officer?

You may take possession of a child from law enforcement if you are:

(1) A licensed emergency shelter; or

(2) A licensed child-placing agency that we have authorized to take possession of children from a law enforcement or juvenile probation officer.

**40 TAC § 745.4203
Tex. Admin. Code tit. 40, § 745.4203**

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§ 745.4203. How does a child-placing agency become authorized to take possession of a child from a law enforcement or juvenile probation officer?

If you are a child-placing agency, the following must occur before you can take possession of a child from a law enforcement or juvenile probation officer:

- (1) You submit to us a Request to Accept Children from a Law Enforcement Officer form;
- (2) We review the request to determine whether you are equipped to accept these types of emergency admissions; and
- (3) If we authorize you to accept such admissions, we add your ability to accept these admissions to the conditions on your license.

**40 TAC § 745.4205
Tex. Admin. Code tit. 40, § 745.4205**

§ 745.4205. What must I do when I take possession of a child from a law enforcement or juvenile probation officer?

When you take possession of a child from a law enforcement or juvenile probation office you must:

- (1) With the assistance of the officer who has the child, complete an Admission of a Child from a Law Enforcement Officer form;
- (2) Immediately notify DFPS that you have taken possession of the child by calling the abuse neglect hotline; and
- (3) Provide the completed form referred to in paragraph (1) of this section to the DFPS investigator who responds to the call.

**40 TAC § 745.8301
Tex. Admin. Code tit. 40, § 745.8301**

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§ 745.8301. What if I cannot comply with a specific minimum standard?

If you cannot comply, you will be deficient in a minimum standard; however, you may request a waiver or variance. A waiver or variance is not an entitlement. We consider each request individually.

**40 TAC § 745.8303
Tex. Admin. Code tit. 40, § 745.8303**

§ 745.8303. What is the difference between a waiver and a variance?

By statute, you may request a waiver if the economic impact of compliance with a minimum standard is great enough to make compliance impractical. You may request a variance if there is good and just cause for you to meet the purpose of the minimum standard in a different way. PRS processes waivers and variances in the same manner.

**40 TAC § 745.8305
Tex. Admin. Code tit. 40, § 745.8305**

§ 745.8305. How do I request a waiver or variance?

You must submit your written request and any supporting documentation to the Licensing representative. Your written request must be either a PRS Child Care Waiver/Variance Request Form or a letter containing all of the information required on the form.

**40 TAC § 745.8307
Tex. Admin. Code tit. 40, § 745.8307**

§ 745.8307. How does Licensing make the decision to grant or deny my waiver or variance request?

We will not grant a waiver or variance if the minimum standard is required by statute. For all other waiver and variance requests, we consider the following factors when making the decision to grant or deny your request:

- (1) The risk to children if you are not meeting the standard;
- (2) The compliance history of your operation;
- (3) The monitoring plan assigned to your operation;

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(4) Any waivers or variances currently in effect;

(5) Your regulatory status (for example, whether you are on initial status, evaluation, or probation);

(6) Any economic factors or other constraints affecting your ability to comply; and

(7) Any other variables identified by Licensing staff.

**40 TAC § 745.8309
Tex. Admin. Code tit. 40, § 745.8309**

§ 745.8309. Who makes the decision to grant or deny my waiver or variance request?

The PRS Licensing representative reviews the material you submit and makes a recommendation to his supervisor or his supervisor's designee. The Licensing supervisor or his designee makes the final decision to grant or deny the waiver or variance.

**40 TAC § 745.8311
Tex. Admin. Code tit. 40, § 745.8311**

§ 745.8311. Does a waiver or variance expire?

Yes. We grant a waiver or variance for a specific amount of time and specify the date it will expire. In no circumstances will a waiver or variance be granted for more than three years.

**40 TAC § 745.8313
Tex. Admin. Code tit. 40, § 745.8313**

§ 745.8313. Is a waiver or variance unconditional?

No. We may set conditions on the waiver or variance, so it does not place children at risk. You must comply with the conditions at all times.

**40 TAC § 745.8315
Tex. Admin. Code tit. 40, § 745.8315**

§ 745.8315. What if I disagree with the time limit or conditions that Licensing places on my waiver or variance?

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The waiver or variance time limit and conditions are determined by the supervisor or the supervisor's designee and are based on the risk to children. You may discuss an alternative time limit or conditions with the Licensing staff who made the decision. The Licensing supervisor or designee may choose to amend the time limit or conditions as a result of the discussion or continue to require the original conditions. If you cannot reach a mutual agreement as to the time limit or conditions, you can either comply with the minimum standard or appeal the denial in the same manner specified in § 745.8319 of this title (relating to What can I do if Licensing denies or revokes my waiver or variance?).

**40 TAC § 745.8317
Tex. Admin. Code tit. 40, § 745.8317**

§ 745.8317. Can Licensing amend or revoke a waiver or variance, including its conditions?

Yes. We may amend or revoke a waiver or variance if:

- (1) It presents a risk to children;
- (2) The circumstances that supported it have changed;
- (3) You failed to meet the conditions; or
- (4) We agree to an alternative time limit or conditions.

**40 TAC § 745.8319
Tex. Admin. Code tit. 40, § 745.8319**

§ 745.8319. What can I do if Licensing denies or revokes my waiver or variance?

If we deny or revoke your waiver or variance, you may request an administrative review. You must send your written request to the Director of Licensing within 15 calendar days after you receive our denial or revocation letter. Forward a copy of your letter to the Licensing supervisor. Your request for a review must include a copy of the letter denying your request for a waiver or variance, and any additional information that supports your waiver or variance request. We will hold you accountable for complying with the minimum standard for which you requested a waiver or variance while you are requesting an administrative review.