

RULEMAKING HEARINGS

DEPARTMENT OF HUMAN SERVICES - 1240 ADULT AND FAMILY SERVICES DIVISION

There will be a hearing before the Tennessee Department of Human Services to consider the promulgation of amendments pursuant to T.C.A. §§ 4-5-202 and 71-3-501 et seq. The hearing will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, T.C.A. § 4-5-204, and will take place in the 2nd Floor Conference Room, Citizens Plaza Building, 400 Deaderick Street, Nashville, Tennessee, at 6:30 p.m., Central Time, on the 17th day of August, 2006.

Any individuals with disabilities who wish to participate in these proceedings or to review these filings should contact the Department of Human Services to discuss any auxiliary aids or services needed to facilitate such participation. Such initial contact should be made no less than ten (10) days prior to the scheduled meeting date or the date the party intends to review such filings, to allow time for the Department of Human Services to determine how it may reasonably provide such aid or service. Initial contact may be made with the Department of Human Services' ADA Coordinator, Hing Hoskins, 400 Deaderick Street, 3rd Floor Nashville, Tennessee 37248 and (615) 313-5554.

For a copy of this Notice of Rulemaking Hearing, contact: William B. Russell, General Counsel, Department of Human Services, Citizens Plaza State Office Building, 400 Deaderick Street, 15th Floor, Nashville, Tennessee, 37248, telephone number (615) 313-4731.

SUBSTANCE OF PROPOSED RULES

ADULT AND FAMILY SERVICES DIVISION CHAPTER 1240-4-2 LICENSURE RULES FOR DROP-IN CHILD CARE CENTERS

AMENDMENTS

Subparagraph (d) of paragraph (9) of subchapter 1240-4-2-.02, Definitions, is amended by deleting subparagraph (d) in its entirety and by substituting instead the following new language, so that, as amended, subparagraph (d) shall read as follows:

- (d) A "drop-in center" differs from a "family child care home," a "group child care home," and a "child care center," in that a "drop-in center" is designed to provide short-term child care, not to exceed the limitations specified in paragraph (15) below. Child care provided in the other three (3) specified categories of child care agencies is not subject to the limitations of paragraph (15).

Authority: T.C.A. §§ 4-5-202; 71-1-105(5) and (12); 71-3-501(8), (9) and (10); 71-3-502(a)(2) and 71-3-501 et seq.

Paragraph (15) of subchapter 1240-4-2-.02, Definitions, is amended by deleting paragraph (15) in its entirety and by substituting instead the following new language, so that, as amended, paragraph (15) shall read as follows:

- (15) Drop-In Child Care Center.

RULEMAKING HEARINGS

- (a) A place or facility operated by any person or entity providing child care for fifteen (15) or more children at the same time, none of whom are related to the primary caregiver, for short periods of time as follows:
1. Workweek Care.
 - (i) Provided during regular working hours, Monday through Friday, 6:00 a.m. to 6:00 p.m.
 - (ii) No individual child may be in child care for more than seven (7) hours per day or fourteen (14) hours per week, exclusive of snow days.
 2. Evening and Weekend Care.
 - (i) Provided weekday evenings after 6:00 p.m. and weekends beginning on Friday at 6:00 p.m. and ending on Sunday at 10:00 p.m.
 - (ii) An individual child may receive care in excess of seven (7) hours per day, but may not receive care in excess of a total of twenty (20) hours per week, exclusive of snow days.
 3. Exception for Snow Days. Drop-in care for school age children may exceed the maximum hours listed in parts 1 and 2, above, during snow days.
- (b) Notwithstanding any other provision of this chapter to the contrary, drop-in centers operated by not-for-profit organizations that provide child care without compensation for no more than two (2) hours per day with a maximum of ten (10) hours per week, while the parent or other custodian is engaged in short-term activities on the premises of the organization, shall register as providing “casual care” and shall not be deemed to be, or regulated as, a drop-in center.

Authority: T.C.A. §§ 4-5-202; 71-1-105(5) and (12); 71-3-501(8); 71-3-502(a)(2); and 71-3-501 et seq.

Subchapter 1240-4-2, Definitions, is amended by adding the following language as the new paragraph (27) and by renumbering all paragraphs, thereafter, as appropriate:

- (27) Snow Day. For purposes of this chapter, a “snow day” is defined as a day when the affected child’s school is officially closed by the school system due to weather, teacher in-service, etc.

Authority: T.C.A. §§ 4-5-202; 71-1-105(5) and (12); 71-3-501(8); 71-3-502(a)(2); and 71-3-501 et seq.

Subparagraph (c) of paragraph (6) of subchapter 1240-4-2-.04, Ownership, Organization and Administration, is amended by deleting subparagraph (c) in its entirety and by substituting instead the following new language so that, as amended, subparagraph (c) shall read as follows:

- (c) No child shall be accepted into child care in excess of the maximum allowable hours as set forth in paragraph 1240-4-2-.02(15). The drop-in center shall maintain and make available to the Department attendance records verifying that no child receives care in excess of the maximum allowable hours.

RULEMAKING HEARINGS

Authority: T.C.A. §§ 4-5-202; 71-1-105(5) and (12); 71-3-501(8); 71-3-502(a)(2); and 71-3-501 et seq.

Paragraph (7) of subchapter 1240-4-2-.04, Ownership, Organization and Administration, is amended by re-designating existing paragraph (7) as paragraph (8) and by adding the following new language as a new paragraph (7) so that, as amended, the new paragraph (7) shall read as follows:

- (7) Care of School-Age Children on Snow Days.
 - (a) A drop-in center may not accept any school-age child for care unless:
 - 1. The Department has previously determined that the center is an appropriate and safe location for school-age children on snow days.
 - 2. The drop-in center applied for, and was granted, a license which specifically authorizes the licensee to provide such care. Any such authorization to provide such care shall be noted on the license.
 - (b) The Department shall set a limit on the number of school-age children that a center may accept at any given time based upon the amount of space that the center has available.
 - (c) No child thirteen (13) years of age or older may be cared for by a drop-in center on a snow day.
 - (d) In order to assure that the center is capable of providing safe care to the additional numbers of children needing care during school closings, the center shall annually provide the Department with an updated list of trained caregivers and staff available for emergency call duty.

Authority: T.C.A. §§ 4-5-202; 71-1-105(5) and (12); 71-3-501(15); 71-3-502(a)(2); 71-3-534; and 71-3-501 et seq.

Part 1 of subparagraph (b) of paragraph (4) of subchapter 1240-4-2-.04, Ownership, Organization and Administration, is amended by adding a new subpart (viii), so that, as amended the new subpart shall read as follows:

- (viii) Verification of the status check on the Department of Health's Vulnerable Persons Registry required by Rule 1240-4-2-.05(e)4.

Authority: T.C.A. §§ 4-5-202; 71-1-105(5) and (12); 71-3-502(a)(2); 71-3-507 and 71-3-501 et seq.

Subparagraph (e) of paragraph (1) of Rule 1240-4-2-.05, Staff Requirements, is amended by deleting subparagraph (e) in its entirety and by substituting instead the following new language so that, as amended the paragraph shall read as follows:

- (e) Criminal History Background Review and Abuse Registry Requirements; Exclusions from Contact with Children, Waivers from Exclusions; Appeals of Waiver Denials.
 - 1. Individuals Requiring a Fingerprint Criminal History Background Review and Abuse (Vulnerable Persons) Registry Check:

RULEMAKING HEARINGS

- (i) Any individual applying to work as a paid employee, director or manager of the child care agency in a position that will require or allow the individual to have contact with children at any time;
 - (ii) Any individual applying to work as a new substitute and who is expected to offer, or who provides, at least thirty-six (36) hours of substitute services to the agency in any calendar year;
 - (iii) Any individual applying for a license to operate a child care agency that is not the renewal of an existing license, or any individual who otherwise seeks to be an operator, as defined by the rules of the Department, of a child care agency, as defined in T.C.A. § 71-3-501, and who will, in the course of their role as licensee, have significant contact, as determined by the Department, with the children in care. For purposes of this paragraph, "operator" shall be an individual who is an owner or administrator of a child care agency or child care system;
 - (iv) Residents of a New Agency. Any individual who is a resident of the child care agency and who is fifteen (15) years of age or older upon the date the agency receives its initial temporary license or, if the agency has been issued an annual license, then upon the date the agency received its annual license; and
 - (v) New Residents of an Existing Agency. Any individual who is fifteen (15) years of age or older upon moving into a licensed/approved child care agency.
2. Pending outcome of the criminal history background review as described in this paragraph, and the outcome of the review of the individual's status on the Department of Health's Vulnerable Persons Registry, the applicant for employment or a substitute or volunteer position, or for a license to operate, shall be conditional and shall be dependent upon the results of these background checks.
3. Requirements for Submission of a Fingerprint Sample.
- (i) Criminal History Disclosure Form. Individuals identified in subparagraph (a) shall complete and sign the Criminal History Disclosure Form provided by the Department.
 - (I) The failure to properly complete all sections of the Criminal History Disclosure Form shall result in the individual being prohibited from working, substituting, residing in or acting as a licensee for the child care agency.
 - (II) The failure to disclose all criminal history information may result in the individual being:
 - I. Excluded from working, directing, managing, operating, substituting, volunteering, residing in or acting as a licensee in any child care agency licensed by the Department; and
 - II. Referred for criminal prosecution pursuant to the provisions of state law.
 - (ii) Fingerprint Sample. The child care agency shall be responsible for obtaining and submitting the fingerprint sample of any person required by this Chapter in the form and manner directed by the Department:

RULEMAKING HEARINGS

- (I) Within ten (10) calendar days of the first day of beginning employment or substitute status;
 - (II) Within ten (10) calendar days of the license application or seeking operator status;
 - (III) Within ten (10) calendar days of the application for an initial license for a facility in which the person resides; or
 - (IV) Within ten (10) calendar days after the resident moves into the child care facility.
- (iii) Unless otherwise notified by the Department, the child care agency shall be responsible for all costs associated with obtaining the fingerprint sample, and the Department will pay for the costs of the criminal background check by the Tennessee Bureau of Investigation.
4. Vulnerable Persons Registry. The child care agency shall be responsible for determining, within the same time periods as set forth in subpart (e)3(ii) above, the status on the Department of Health's Vulnerable Persons Registry of any individual who is required by part 1 above to undergo a criminal history background review. Verification of such status check shall be maintained in the employee's record pursuant to the requirements set forth in 1240-4-2-.04(4)(b).
- (f) Exclusion of Persons from Contact with Children.
1. Prohibited Criminal or Abuse or Neglect History.
- (i) No individual with a prohibited criminal history as defined below, regardless of whether such individual is required by these rules to undergo a criminal history background review, may work, substitute or volunteer in a child care agency, or be a resident, licensee, director or manager of a child care agency who has access to children, or be an operator who has significant contact with children or otherwise have unrestricted access to children in any manner whatsoever.
 - (ii) An individual shall be immediately and automatically excluded from child care or any contact whatsoever with children, as described above, if the individual's criminal history includes:
 - (I) A criminal conviction or a no-contest or guilty plea; or any pending criminal action, including individuals subject to any warrant, indictment, presentment, etc.; or placement in a pretrial diversion; or,
 - (II) A pending juvenile action or previous juvenile adjudication, which, if an adult, would constitute a criminal offense; and
 - (III) Any of the circumstances in items (I) or (II) above involves any of the following criminal offenses:
 - I. Any offense (including a lesser included offense) involving the physical, sexual or emotional abuse or gross neglect of a child, or involving a threat to the health, safety or welfare of a child;

RULEMAKING HEARINGS

- II. Any offense (including a lesser included offense) involving violence or the threat of violence against another person; and/or
 - III. Any offense (including a lesser included offense) involving the manufacture, sale, distribution or possession of any drug.
- (iii) An individual shall also be immediately and automatically excluded from child care or from access in any manner whatsoever to the children in the care of the agency, if the individual:
- (I) Reveals a prohibited or potentially prohibited criminal history on the Criminal History Disclosure Form; or
 - (II) Is listed on the Department of Health's Vulnerable Persons Registry; and/or
 - (III) Is known to the management or licensee of a child care agency as a perpetrator of child abuse or child sexual abuse or to have a prohibited criminal history, or who is identified to the child care agency's management or licensee by the Department of Human Services or by the Department of Children's Services as a validated perpetrator of abuse of a child based upon an investigation conducted by the Department of Children's Services or by the child protective services agency of any other state; or, who at anytime is identified by any person or entity to the child care agency's management or licensee and is confirmed by the Department of Human Services as having a prohibited criminal history.
- (iv) Exclusion from driving duties. An individual with a prohibited history as set forth below shall be immediately and automatically excluded from providing driving duties on behalf of the child care agency if the individual:
- (I) Has a pending criminal action (including warrants, indictments, presentments, etc.), is completing a pretrial diversion, or has been convicted of or pled guilty to any offense involving the use of a motor vehicle while under the influence of any intoxicant, which constitutes a violation of T.C.A. §§ 39-13-213; 55-10-101; 55-10-102 or 55-10-401; or
 - (II) Has been convicted of or pled guilty to any felony involving the use of a motor vehicle while under the influence of any intoxicant. In such case, the individual shall not be employed or otherwise serve as a driver for a child care agency for a period of five (5) years from the date of the conviction or guilty plea.
- (v) Exclusions for Child Neglect. An individual who has been identified by the Department of Children's Services as having neglected a child based on an investigation conducted by that Department or any child protective services agency of any state, and who has not been criminally charged or convicted or pled guilty or no-contest as stated above, shall be supervised by another adult while providing care for children.
2. The child care agency shall immediately, upon receipt, review the results of the criminal history background review and Vulnerable Persons Registry and shall immediately exclude any individual with a prohibited history as directed by the Department.

RULEMAKING HEARINGS

3. Failure to exclude individuals with a criminal history or abuse or neglect finding.

Failure to immediately exclude any individual subject to exclusion or supervision pursuant to this subchapter and T.C.A. § 71-3-507, as directed by the Department, may result in the immediate suspension, denial or revocation of the child care agency's license.

(g) Waivers from Exclusions Due to Criminal or Abuse or Neglect History.

1. Any person who is excluded or whose license is denied based upon the results of the criminal history background review, or based upon any other determination, may request in writing to the Department's Director of Licensing within ten (10) calendar days of receiving notice of such exclusion or denial a waiver from these automatic exclusion requirements.
2. Excluded individuals, prior to receiving official notice of the exclusion or denial from the Department, may also make a written request for a waiver by letter or directly on the Department's Criminal History Disclosure Form.
3. Requests for a waiver shall state the basis for the request, including any extenuating or mitigating circumstances that would, in the person's opinion, clearly warrant an exemption from the exclusion. Any documentary evidence may also be submitted with the request.
4. Requests for waivers shall be heard by an advisory committee and reviewed by the Department in accordance with the provisions of T.C.A. § 71-3-507.
5. Any person who is excluded from providing care or services to children under any provisions of this subchapter shall remain excluded pending the outcome of any exemption review and appeals.

(h) Supplemental Background Checks.

1. The Department may, at anytime, request that the criminal background or status on the Department of Health's Vulnerable Persons Registry of any individuals having access to children under any of the circumstances set forth in this subchapter be reviewed using the processes described above or in T.C.A. § 71-3-507. All other provisions applicable to any pre-employment or post-employment, residential or access status of any individual shall apply to any background review conducted pursuant to this subparagraph (h).
2. The employment status of persons for whom a post-employment criminal history background review was conducted, or the status of existing licensees or operators, substitutes, volunteers or residents of a child care agency for whom a criminal history background review was conducted after license approval or after employment or assuming duties as a volunteer or substitute, and who were not otherwise subject to a pre-status applicant background check and to the exclusionary provisions provided in this subchapter, shall be governed by the provisions of this subchapter and T.C.A. § 71-3-507.

Authority: T.C.A. §§ 4-5-202; 71-1-105(5) and (12); 71-3-502(a)(2); 71-3-507 and 71-3-501 et seq.

RULEMAKING HEARINGS

Subparagraph (f) of paragraph (2) of Rule 1240-4-2-.05, Staff Requirements, is amended by deleting subparagraph (f) in its entirety and by substituting instead the following new language so that, as amended, the paragraph shall read as follows:

- (f) Training.
 - 1. Notwithstanding any other requirements of Title 71, Chapter 3, Part 5 of the Tennessee Code Annotated, training requirements for the staff of any Drop-In Child Care Center shall be limited to basic health and safety precautions as well as the detection and reporting of child abuse and neglect for children in the center's care.
 - 2. Within the first thirty (30) days of employment, all staff working with children shall receive training in the detection, reporting, and prevention of child abuse. Such training shall be documented in the agency's records.

Authority: T.C.A. §§ 4-5-202; 71-1-105(5) and (12); 71-3-502(a)(2); and 71-3-501 et seq.

Paragraph (13) of Rule 1240-4-2-.08, Health and Safety, is amended by deleting paragraph (13) in its entirety and by substituting the following language, so that, as amended, the paragraph shall read as follows:

- (13) Duty to Report Child Abuse and Neglect.
 - (a) Duty to Report.
 - 1. Every operator, owner, licensee, director, or staff member of, or substitute staff member or volunteer in a child care agency licensed by the Department of Human Services is individually responsible, and is required by T.C.A. §§ 37-1-403 and 37-1-605, to immediately report any reasonable suspicion of child abuse or neglect to the Department of Children's Services, local law enforcement or the judge of the juvenile court in the county of the child's residence.
 - 2. Determining Suspicion of Abuse/Neglect.
 - (i) Due to both the immediate risk to children's safety, as well as to the extreme risk of destroying or losing critical evidence, the agency and/or individual staff shall not delay reporting possible abuse or neglect in an attempt to conduct an investigation to verify the abuse/neglect allegations.
 - (ii) In determining a reasonable suspicion for purposes of reporting, the agency shall limit questioning of the child and may make only the most basic inquiries necessary to determine if any reasonable possibility of abuse or neglect exists.
 - (iii) The agency does not have to, and shall not attempt to, validate (or "prove") the allegation prior to making a report as required by this paragraph (13). A final determination of the validity of the report of abuse or neglect shall be made exclusively by the Department of Children's Services and/or by law enforcement based upon the report by the child care agency's staff.
 - 3. Each center shall develop procedures, approved by the Department of Human Services in conformity with DCS policy, for staff to follow to report suspected abuse and neglect.

RULEMAKING HEARINGS

4. Any statement from a child reasonably indicating abuse/neglect of that child or another child or any evidence of abuse/neglect observed on a child shall be immediately reported by staff to the Department of Children's Services in a manner specified by that department, to local law enforcement or to the judge of the juvenile court in the county of the child's residence.
- (b) The telephone numbers of the Department of Children's Services, the local law enforcement or the juvenile judge of the county of the child's residence for staff to call to report suspected abuse and neglect shall be posted in a conspicuous location by each telephone.
- (c) Prohibited Procedures for Reporting Suspected Child Abuse/Neglect/Penalties.
1. The agency shall not develop or implement a policy that inhibits, interferes with or otherwise affects the duty of any staff, including substitutes and volunteers, to report suspected abuse or neglect of a child as required by subparagraph (a) above and T.C.A. §§ 37-1-403 and 605, and shall not otherwise directly or indirectly require staff to report to the agency management or seek the approval of agency management prior to any individual staff member reporting the suspected abuse or neglect.
 2. A report of suspected child abuse or neglect of a child enrolled in the child care agency by the operator, owner, licensee, director or staff member of, or substitute staff member or volunteer in, a child care agency shall not be made to any other entities or persons, including, but not limited to, hospitals, physicians, or educational institutions as an alternative to or substitute for the reporting requirements to the persons or entities specifically listed in subparagraph (a) above.
 3. The operator, owner, licensee, director, or staff member of, or substitute staff member or volunteer in, the child care agency shall not suggest to, advise or direct a parent or caretaker of a child enrolled in the child care agency to make a report of suspected child abuse or neglect regarding that parent's or caretaker's own child who is enrolled in the child care agency as a means of fulfilling the duty of the operator, owner, licensee, director, or staff member of, or substitute staff member or volunteer in, the child care agency to report child abuse or neglect as required by T.C.A. §§ 37-1-403 and 37-1-605.
 4. Because the statutory requirements of T.C.A. §§ 37-1-403 and 37-1-605 do not authorize the prohibited procedures described in parts 1-3 of this subparagraph (c) to fulfill the statutory duty of any person, and especially the duty of those licensed by the State of Tennessee to care for and protect vulnerable children, to make timely and effective reports of child abuse and neglect to appropriate investigative agencies, and because the prohibited procedures described in parts 1-3 of this subparagraph (c) are completely unreliable procedures to ensure that the appropriate authorities are able to timely and satisfactorily investigate suspected child abuse or neglect, any action that does not comply in all respects with subparagraph (a) above will not fulfill the statutory duty to report child abuse or neglect and the licensing requirements of this Chapter.
 5. Failure to Report Properly Is Grounds for Suspension, Denial or Revocation of the Agency License.
 - (i) Failure to make the reports required by subparagraph (a) above or the use of the prohibited methods described in parts 1-3 of this subparagraph (c) as an attempt to fulfill the duty to report suspected child abuse or neglect, for children in

RULEMAKING HEARINGS

the care of the child care agency are, by themselves, grounds for suspension, denial or revocation of the agency's license.

- (ii) If the facts establish by a preponderance of the evidence that there has not been strict compliance with the requirements of subparagraph (a) above or that the prohibited procedures described in parts 1-3 of this subparagraph (c) have been utilized as an alternative means of fulfilling the requirements of subparagraph (a) above, these circumstances shall create a rebuttable presumption for the Administrative Law Judge and the Child Care Agency Board of Review that the duty to report child abuse or neglect has not been fulfilled, and this ground for suspension, denial, or revocation of the agency's license by the Department of Human Services shall be sustained unless such presumption is rebutted by a preponderance of the evidence.
- (d) Agency Duties During Investigations of Child Abuse and Neglect; Custodial Authority of Children.
1. Every operator, owner, licensee, director, or staff member of, or substitute staff member or volunteer in, a child care agency licensed by the Department of Human Services shall fully cooperate with all agencies involved in the investigation of child abuse or neglect, and with the Department of Human Services in efforts to provide protection for children enrolled in the child care agency.
 2. The agency shall provide access to records of children and staff.
 3. The agency shall allow appropriate investigators to interview children and staff.
 4. The agency shall not interfere with a child abuse and neglect investigation.
 5. The agency shall protect the child by requesting the investigator's identification.
 6. The agency shall maintain confidentiality of the investigation and shall not disclose the investigation or details of the investigation except as required to carry out procedures for the protection of children or as otherwise directed by the Department of Children's Services, law enforcement or the Department of Human Services.
- (e) Upon notification of a pending abuse/neglect investigation of any agency staff member or resident of a home-based center, the agency shall enter into a Safety Plan with the Department regarding the individual's access to the agency and to children in the care of the agency.
- (f) All agency staff, including non-caregiving staff, shall receive training every six (6) months regarding procedures to report child abuse and neglect.

Authority: T.C.A. §§ 4-5-202; 71-1-105(5) and (12); 71-3-502(a)(2); 71-3-507 and 71-3-501 et seq.

The Notice of Rulemaking set out herein was properly filed in the Department of State on the 30th day of June, 2006. (06-42)