

CHAPTER 809. CHILD CARE SERVICES

**ADOPTED RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE *TEXAS REGISTER*.**

ON **JUNE 2, 2009**, THE TEXAS WORKFORCE COMMISSION ADOPTED THE BELOW RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.

Estimated date of publication in the *Texas Register*: **June 19, 2009**

The rules will take effect: **June 22, 2009**

The Texas Workforce Commission (Commission) adopts amendments to the following section of Chapter 809, relating to Child Care Services, without changes, as published in the December 12, 2008, issue of the *Texas Register* (33 TexReg 10146):

Subchapter C. Eligibility for Child Care Services, §809.41

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

**PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, as amended, requires that providers of federal public benefits verify the citizenship or immigration status of all beneficiaries of public assistance. The Child Care and Development Fund (CCDF) is among the U.S. Health and Human Services programs that are subject to the verification provisions of PRWORA. On November 25, 1998, the Administration for Children and Families (ACF) issued Program Instruction ACYF-PI-CC-98-08 to clarify that the child is the primary beneficiary of the CCDF program and as such *only the child's* citizenship or immigration status is subject to verification.

PRWORA §432(d), as amended, exempts nonprofit charitable organizations that provide federal, state, or local public benefits from determining, verifying, or otherwise requiring proof of citizenship or immigration status from any applicant for such benefits. In Program Instruction ACYF-PI-CC-98-08, ACF affirmed that this exemption is applicable when nonprofit charitable organizations determine eligibility for CCDF, but *not* applicable when governmental entities or nonprofits that are not charitable organizations determine eligibility. Additionally, the CCDF Lead Agency cannot require nonprofit charitable organizations determining eligibility for the CCDF program to verify citizenship and immigration status.

Texas Labor Code §302.023 requires that the administration of workforce development programs be delegated to the Local Workforce Development Boards (Boards) and Texas Government Code §2308.264(a) prohibits Boards from directly determining eligibility for services. As a

result, child care eligibility is determined by entities that contract with Boards--a majority of which are nonprofit charitable organizations. ACF guidance in ACYF-PI-CC-98-08 did not specify whether the CCDF Lead Agency contracting with nonprofit charitable organizations--which are exempt from verifying a child's citizenship or immigration status--retains the responsibility for ensuring that such verification is conducted.

On May 2, 2008, ACF issued Program Instruction CCDF-ACF-PI-2008-01 to clarify its previous guidance and respond to inquiries from a number of states regarding verification of citizenship or immigration status of CCDF applicants. The Program Instruction states that while nonprofit charitable organizations are exempt from the verification requirements mandated by Title IV of PRWORA, the CCDF Lead Agency is not exempt from its responsibility to ensure that only eligible individuals receive services. Therefore, when contracting directly or indirectly with a nonprofit charitable organization that elects not to verify the citizenship or immigration status of applicants for CCDF services, the Texas Workforce Commission, as the CCDF Lead Agency, remains responsible for ensuring that a child's citizenship and immigration status is verified.

As a result of this clarification, the Commission adopts amendments to Chapter 809, Child Care Services rules, to ensure that a child's citizenship or legal immigrant status is verified as part of the basic eligibility determination for CCDF services.

## **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES**

### **SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES**

**The Commission adopts the following amendment:**

#### **§809.41. A Child's General Eligibility for Child Care Services**

New §809.41(a)(2) is added to require that Boards must ensure that a child's citizenship or legal status is verified as a component of eligibility for child care services.

This change reflects guidance from ACF that a child's citizenship or immigration status must be verified to comply with PRWORA requirements.

Pursuant to §809.42(a), prior to authorizing child care a Board must ensure that its child care contractor verifies eligibility for child care services, which includes a child's citizenship or immigration status. Program Instruction CCDF-ACF-PI-2008-01 states that Lead Agencies have flexibility to establish procedures for verifying an applicant's citizenship or immigration status. However, the procedures must be in accordance with U.S. Department of Justice (DOJ) requirements for verifying eligibility for "Federal public benefit" programs found in the November 17, 1997, DOJ "Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996." (62 FR 61344).

To comply with the federal directive in Program Instruction CCDF-ACF-PI-2008-01 in a timely manner, on December 8, 2008, the Commission issued Workforce Development (WD) Letter 44-

08, entitled "Child Care Services: Documentation of a Child's Age, Citizenship, or Immigration Status" to provide Boards with guidance on methods for verifying a child's citizenship or immigration status that comply with DOJ guidance.

Also, because some child care contractors are nonprofit charitable organizations and exempt from verifying citizenship or immigration status under PRWORA §432(d), the Commission will also issue guidance to Boards that maintains this exemption but ensures that the verifications are performed.

Certain paragraphs in §809.41 have been renumbered to accommodate additions or deletions.

**Comment:** Four commenters believed that the ACF program instruction of 2008, on which the Commission based the proposed rule, is inconsistent with the DOJ interim guidance provided in 1997, which states that nonprofit charitable organizations cannot be required to verify citizenship.

**Response:** The Commission takes no position regarding the contention that there may be an inconsistency between the 1997 DOJ interim guidance and the ACF guidance issued in May 2008. As the Lead Agency responsible for administering the CCDF program and funds, the Commission must comply with all directives issued by ACF regarding CCDF program and funds. In particular, the Commission must ensure that CCDF funds are spent in the manner determined by ACF and applicable federal laws. ACF affirmed in CCDF-ACF-PI-2008-01 that nonprofit charitable organizations are exempt from citizenship verification requirements. However, Lead Agencies are not exempt and must ensure that the verifications are performed. The Commission affirmed this exemption in §809.41(a)(2) and in WD Letter 44-08 to ensure that Boards and their child care contractors comply with the nonprofit charitable organization exemption.

**Comment:** Two commenters suggested that the Commission withdraw the proposed rule. One commenter suggested that the Commission wait until the new White House administration issues further guidance.

**Response:** As Lead Agency responsible for administering the CCDF program, the Commission must comply with all ACF directives regarding CCDF. The Commission does not have the authority to choose which federal guidance to implement and which federal guidance to leave pending in anticipation of possible changes from a new administration.

**Comment:** One commenter questioned why the rule was being changed as ACF had not threatened Lead Agencies with loss of funding. As such, there is no rush to act. The commenter believed that before ACF could threaten an agency with "pulling funds," there must be a determination of improper payments.

**Response:** The Commission disagrees with the assumption that it should wait to be threatened with loss of funding before acting. The Commission will always respond to directives and guidance from federal agencies and address any issue to ensure that federal

funds are spent properly. This includes complying with the ACF guidance on verifying a child's citizenship and immigration status.

**Comment:** One commenter believed that Texas influenced ACF to issue guidance on citizenship. The commenter pointed out that ACF did not issue the guidance in 2008 until after requested to do so by the Agency.

**Response:** The Commission disagrees with the comment. ACF specifically notes in its guidance that the purpose is to "clarif[y] previous policy guidance and respond to inquiries received from a number of States regarding verification of the citizenship and immigration status of CCDF applicants." Moreover, the action corresponds with ACF's efforts to reduce improper payments in subsidized child care and other federally funded programs. ACF's requirements for implementing the "Improper Authorizations for Payment Report" specified that the citizenship or immigration status of the child must be contained in the case file or the case file would be considered as missing a required data element for determining eligibility; and, thus, would constitute an error and possible improper payment. The Agency, along with other states, requested clarification from ACF to ensure compliance with the data requirement of the "Improper Authorizations for Payment Report."

**Comment:** One commenter stated that the Commission rules would have the effect of prohibiting a charitable nonprofit from receiving a contract with the Board to determine child care eligibility.

**Response:** The Commission disagrees with the comment. Charitable nonprofits are not exempt from the majority of the eligibility requirements, and have raised no concerns about ability or willingness to perform those functions. The child care eligibility determination process consists of verifying: 1) the parent's eligibility requirements including verifying the family income and the parent work status or participation in education or job training activities; and 2) the child's eligibility requirements such as the child's age and U.S. citizenship or legal immigration status. As the ACF guidance clarified, charitable nonprofits are not required to verify citizenship or immigration status of the child, a subset of the entire eligibility verification process. However, as the CCDF Lead Agency, the Commission has the responsibility to see that this determination is still performed if a charitable nonprofit is unwilling to do so, and pass this requirement on to the Boards.

Accordingly, when Boards undertake a competitive procurement process for child care eligibility determinations, they must procure for all elements of eligibility verification. When selecting the entity or entities, the Board takes into consideration contractor qualifications, service offerings, as well as the total overall cost to the Board of conducting both parts of the eligibility process (parent eligibility and child eligibility). If a charitable nonprofit organization declines to verify citizenship or immigration status directly, but offers to subcontract that service to another entity as part of its procurement bid, then the Board will take that into consideration in evaluating the bid, just as if a single entity provided both portions of eligibility determination. However, if a charitable nonprofit organization declines to include that service in its bid, that bid would be considered nonresponsive to the Board's request, consistent with procurement guidelines. Unless a Board separately procures each

element of eligibility verification, allowing the Board to contract with separate entities to ensure the full verification is conducted, the bid of a charitable nonprofit choosing not to perform all elements requested would not be considered responsive. In either case, the Board will attempt to contract out the eligibility process to provide the lowest cost to the Board and ultimately to the state.

Selecting a single contractor or a combination of contractors to perform all of the eligibility services listed in a request for proposal over a contractor that can perform only some of the services does not constitute a penalty.

**Comment:** One commenter stated that allowing a Board to take into consideration in awarding a child care contract an entity's willingness or ability to document citizenship or immigration status has the practical result of penalizing a charitable nonprofit. The commenter stated that this is in conflict with the DOJ interim guidance, which states that a charitable nonprofit choosing not to document citizenship should not be penalized for providing public benefits to an individual who is not a U.S. citizen or legal immigrant except when it does so in violation of independent program verification requirements or in the face of a verification determination made by a nonexempt entity.

**Response:** The Commission disagrees that the Agency's rules implementing ACF directives in any way penalize charitable nonprofit entities. The comment correctly cites the DOJ interim guidance statement that a charitable nonprofit that does not document citizenship should not be penalized for providing public benefits to an individual who is not a U.S. citizen or legal immigrant. The comment also correctly states that the charitable nonprofit may be penalized if it provides public benefits to an individual who is not a U.S. citizen or legal immigrant when it does so in violation of "independent program verification requirements." As the Lead Agency, the Agency must ensure that charitable nonprofit entities are afforded the ACF exemption, while at the same time, ensure that public benefits are not provided to an ineligible individual. It is important to note that, in Texas, determining child care eligibility is an independent process, separate and distinct from providing subsidized child care services. Boards contract with entities, some of which may be charitable nonprofits, to determine eligibility. Once eligibility is determined by the entity, the parent chooses a child care provider. The entity determining eligibility follows the Agency's and the Board's "independent program verification requirements" and makes referrals to child care providers based on the parent choice of provider. Accordingly, the risk of providing public benefits to ineligible individuals must be addressed at the eligibility determination stage.

**Comment:** One commenter noted that a Board wrote a letter to the Agency during rule development stating that the rule would place additional costs on the Boards at a time when the Boards are trying to decrease administrative and operational expenditures. The commenter expressed concerns that this rule would add stress to an already stretched and stressed system.

**Response:** The Commission disagrees that the rule would place stress on the child care system. As mentioned in the impact statements of the proposed rules (as published in the

December 12, 2008, issue of the *Texas Register*, 33 TexReg 10146), any costs associated with implementing the rules are not likely to be significant, particularly when such verification can occur using the same documentation currently used to verify the child's age. Additionally, citizenship and immigration status verification for child care is a one-time procedure per child compared to parental working status and income level, which may be verified as many as four times per year. Finally, the verification also may be satisfied through the required verification process associated with other federal assistance programs, such as qualification for Temporary Assistance for Needy Families or Supplemental Nutrition Assistance Program benefits, prior to qualification for subsidized child care.

**Comment:** One commenter stated that the explanations for implementing §809.41(a)(2) in WD Letter 44-08 include elements that are inconsistent with the federal law and DOJ guidance. Specifically, the letter did not include in the list of acceptable verification documents the ability of the parent to provide a written declaration under penalty of perjury from one or more third parties or the applicant's written declaration under penalty of perjury as allowed under DOJ's Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility under Title IV of PRWORA.

**Response:** The Commission notes that the documentation requirements provided in WD Letter 44-08 were taken directly from the DOJ guidance. Program Instruction CCDF-ACF-PI-2008-01 gives Lead Agencies flexibility to establish procedures for verifying an applicant's citizenship or immigration as long as they comply with the DOJ interim guidance. The Commission points out that the written declaration referenced in DOJ's guidance is accompanied by an additional requirement that the citizenship and immigration status be verified.

The DOJ interim guidance allows the option for the required verification to be a document verifying citizenship or a written declaration. The DOJ guidance also states that the written declaration presents "a greater potential for undetected false claims of being a United States citizen or non-citizen national, and therefore should be used with caution in appropriate circumstances." Additionally, although the DOJ guidance allows a written declaration from a qualified alien, the DOJ interim guidance also states that the individual should be asked to provide documentation to verify the legal immigration status. Therefore, the Commission contends that the process set out in Agency rules for determining U.S. citizenship or legal immigrant status conforms with DOJ interim guidance.

**Comment:** One commenter stated that "public safety is enhanced when public needs are effectively met." The commenter asked that the focus be on "productivity, efficiency, economy, and making sure that needs are met with the limited funds that we have." The commenter noted that its organization sometimes finds "lots of overlap, fragmentation, and duplication" in nonprofit agencies. The commenter suggested that no action be taken.

**Response:** The Commission agrees that productivity, efficiency, and economy are important factors. One reason Boards have the flexibility to take into consideration an entity's willingness or ability to provide full verification, including documenting a child's citizenship or immigration status, is to prevent the type of concerns mentioned in the comment such as

overlap, fragmentation, and duplication. These problems could occur if a Board is forced to split the eligibility determination between two contractors. However, the Commission disagrees that the best course is to take no action. The DOJ guidance long ago established that nonprofits do not have to verify citizenship or immigration status. The ACF guidance simply clarified that while that is true, citizenship must still be verified by someone in order for a child to be entitled to receive subsidized child care, and the Lead Agencies are responsible for ensuring that this is done.

**Comment:** Two commenters expressed concern for immigrants who have experienced dire circumstances to get into the United States and those who have had to overcome the language and cultural barriers to get assistance. One commenter mentioned that many have fled severe abuse and are able to stay because they are asylees, refugees, or victims under the Violence Against Women Act. The commenter explained that the immigrants would once again suffer great hardship because of resulting delays if they were to have their identification lost or stolen and were unable to prove their immigration status to receive child care. The commenter added that the process would be cumbersome for a child care–providing organization to understand the complexity of the documents to accept.

**Response:** The Commission recognizes dedication of advocates who assist immigrants. The Commission's intent is to ensure that federal and state funds are expended on those eligible to receive subsidized care. It is important to remember that it is only the child's citizenship or immigration status--not the parent's--that must be verified. This guidance has been provided to the Boards in WD Letter 44-08, which includes a list of acceptable documents, taken from DOJ guidance, to verify a child's citizenship or immigration status and age.

The Commission notes that the eligibility verification process applies to all families and is conducted regardless of immigrant status. All individuals in need of child care services share common traits and the need for immediate services is one of them. The Texas workforce system strives to provide service as promptly as possible, as long as the eligibility determination is completed in compliance with federal and state regulations. The Commission does not believe that it would be any more complex to ask for verification of the child's citizenship or immigration status than it would be to ascertain the family's income eligibility or the child's age.

Finally, the Commission understands the concern that child care providers may have difficulty understanding the complexity of the acceptable documents for verifying citizenship. However, the Commission again points out that the actual providers of child care are not responsible for verifying citizenship and immigration status. As mentioned previously, in Texas, determining eligibility for subsidized child care is an independent process that is separate from providing child care services. Once eligibility is determined by the Board's child care contractor, the parent chooses a child care provider. The child care provider is not responsible for determining eligibility and will not be required to understand the documents necessary for verifying the child's citizenship or immigration status. The task of verifying the correct documents is left to the child care contractor and not the child care provider.

**Comment:** One commenter stated that there is a discriminatory impact and violation of Texas Government Code §2105.004, which states that "[a]n agency or provider may not use block grant funds in a manner that discriminates on the basis of race, color, national origin, sex, or religion." The commenter stated that "no children at all should be kept from receiving child care from a nonprofit charitable organization for lack of verification."

**Response:** The Commission appreciates the desire for all children to receive care irrespective of their status. The Commission disagrees that the proposed rule violates the cited statute. The proposed rule has neither a discriminatory intent nor effect. Federal regulation as clarified through ACF guidance requires Lead Agencies to verify a child's age and citizenship or immigration status before the child can receive subsidized child care. This is part of the eligibility process and is applied uniformly to all children. As long as the child's age and status are verified and the family's income level falls within the Board-established limits, then a child is eligible for care. It does not matter where the child was born.

**Comment:** One commenter asked why both the ACF guidance and the proposed rule do not mention the statement found in DOJ guidance at 62 C.F.R. §61349 that an applicant cannot be conclusively denied benefits without first verifying the applicant's status with the U.S. Citizenship and Immigration Services' guidelines. The commenter then noted that the DOJ guidance followed that statement with a series of complex steps for verifying citizenship and immigration status. The commenter stated that these steps were also not mentioned in the Commission rules.

**Response:** The Commission notes that the DOJ statement referenced in the comment, when taken in context of the DOJ guidance, applies to cases in which the document presented does not on its face reasonably appear to be genuine or to relate to the person presenting it. The Commission also points out that the comment failed to include the related statement in the DOJ guidance that the entity determining eligibility:

"should refer to the legal requirements of your program and to any applicable guidance provided by the federal agency or department overseeing your program, if any, to determine whether you would grant or withhold benefits during the period of time in which you are verifying the applicant's immigration status."

ACF, the federal agency overseeing subsidized child care, has issued guidance that if an audit review determines an ineligible recipient received CCDF assistance, such funds would be considered misspent and subject to disallowance. The Commission concludes that this guidance implies that federal child care benefits cannot be extended to individuals until the recipient has been determined to be eligible, including verifying citizenship and immigration status.

**Comment:** One commenter stated that there may be several situations in which the child may not have any of the documents listed in WD Letter 44-08, but may be a citizen or legal immigrant. These situations include children for whom an adult relative has temporary custody of a child in an abusive parental relationship; children in domestic violence

situations; and children whose documents have been made unavailable due to fire or natural disaster.

**Response:** The Commission appreciates the comment and points out that authorizing child care for children in protective services is under the authority of Texas Department of Family and Protective Services' (DFPS) Child Protective Services (CPS) division. DFPS has confirmed that the citizenship or immigration status of children receiving protective services child care funded by CCDF is verified by CPS prior to authorizing child care services.

Regarding instances in which the child's documents may have been destroyed by fire or natural disaster, the Commission notes that the documents listed in WD Letter 44-08 are typically public records for which the parent can and should request replacements. The Commission does not anticipate that the request for the public document, particularly a birth certificate, would significantly delay the eligibility documentation process.

**COMMENTS WERE RECEIVED FROM:**

The Honorable Representative Eddie Rodriguez, State Representative, District 51  
Andrew Rivas, Executive Director, Texas Catholic Conference  
Blake Stanford, Texas Child and Adult Care Food Program Sponsors Association  
Bruce Bower, Individual, and on behalf of Pax Christi Austin  
Kate Lincoln-Goldfinch, American Gateways  
Clint Smith, Gray Panthers of Texas

The Agency hereby certifies that the adoption has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

The rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted rules will affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

## Chapter 809. CHILD CARE SERVICES

### SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES

#### §809.41. A Child's General Eligibility for Child Care Services

- (a) Except for a child receiving or needing protective services as described in §809.49, for a child to be eligible to receive child care services, a Board shall ensure that the child:
  - (1) meets one of the following age requirements:
    - (A) be under 13 years of age; or
    - (B) at the option of the Board, be a child with disabilities under 19 years of age;
  - (2) is a U.S. citizen or legal immigrant as determined under applicable federal laws, regulations, and guidelines; and
  - (3) resides with:
    - (A) a family whose income does not exceed the income limit established by the Board, which income limit must not exceed 85% of the state median income for a family of the same size; and
    - (B) parents who require child care in order to work or attend a job training or educational program.
- (b) Notwithstanding the requirements set forth in subsection (c) of this section, a Board shall establish policies, including time limits, for the provision of child care services while the parent is attending an educational program.
- (c) Time limits pursuant to subsection (b) of this section shall ensure the provision of child care services for four years, if the eligible child's parent is enrolled in an associate's degree program that will prepare the parent for a job in a high-growth, high-demand occupation as determined by the Board.
- (d) Unless otherwise subject to job search limitations as stipulated in this title, the following shall apply:
  - (1) For child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, General Administration, Subchapter B, Allocation and Funding, and specifically, §800.58 Child Care), an enrolled child may be eligible for child care services for four weeks within a federal fiscal year in order for the child's parent to search for work because of interruptions in the parent's employment.

- (2) For child care services funded by the Commission from sources other than those specified in paragraph (1) of this subsection, child care services during job search activities are limited to four weeks within a federal fiscal year.