

TITLE 26 HEALTH AND HUMAN SERVICES
PART 1 HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 745 LICENSING

EMERGENCY RULE ADOPTION PREAMBLE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts on an emergency basis in Texas Administrative Code Title 26 Part 1, Chapter 745, Licensing, new §745.10301 and amended §745.115, in response to the Governor's May 31, 2021, proclamation certifying an ongoing and imminent threat due to individuals unlawfully crossing the Texas-Mexico border. As authorized by Texas Government Code §2001.034, HHSC may adopt an emergency rule without prior notice or hearing upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of the emergency rulemaking is to continue complying with the Governor's direction in the May 31, 2021, proclamation declaring a state of disaster in certain Texas counties and for affected state agencies. In this proclamation, the Governor directed HHSC to take all necessary steps to discontinue state licensing of certain child-care facilities that shelter or detain unlawful immigrants or other individuals not lawfully present in the United States. The Governor suspended Texas Human Resources Code §42.046 and §42.048 and all other relevant laws to the extent necessary for HHSC to comply with this direction. To date, this proclamation remains in effect, and HHSC accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of these emergency rule and emergency rule amendment until such time that HHSC can adopt permanent rules to comply with the Governor's declaration.

The new emergency rule §745.10301 provides that child-care programs that are exempt from licensure and regulation by HHSC operate separately from child-care operations that are licensed or certified by HHSC. The emergency amendment of §745.115 clarifies that a program that provides care exclusively to unlawfully present individuals, as defined in §745.10301, is exempt from licensure and regulation by HHSC.

STATUTORY AUTHORITY

The emergency rulemaking is adopted under Texas Government Code §§2001.034 and 531.0055, and Texas Human Resources Code Chapter 42. Texas Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing, if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to

adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Texas Human Resources Code §42.001 states that the purpose of Chapter 42 of the Texas Human Resources Code is to protect the health, safety, and well-being of the children of the state who reside in child-care facilities, and §42.042 requires the Executive Commissioner to adopt rules to carry out the provisions of that chapter.

The new and amended sections implement Texas Government Code §531.0055 and Texas Human Resources Code Chapter 42.

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

ADDITIONAL INFORMATION

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

TITLE 26 HEALTH AND HUMAN SERVICES
 PART 1 HEALTH AND HUMAN SERVICES COMMISSION
 CHAPTER 745 LICENSING
 SUBCHAPTER C OPERATIONS THAT ARE EXEMPT FROM
 REGULATION
 DIVISION 2 EXEMPTIONS FROM REGULATION

§745.115. What programs regulated by other governmental entities are exempt from Licensing regulation?

The following programs and facilities are exempt from our regulation:

Figure: 26 TAC §745.115

Governmental Entity	Description of Exempt Programs
(1) Federal	<p><u>(A) A facility operated on a federal installation, including military bases and Indian reservations; or</u></p> <p><u>(B) A program that provides 24-hour care exclusively to individuals not lawfully present in the United States who are in the custody of the federal government.</u></p>

Governmental Entity	Description of Exempt Programs
(2) State	<p>(A) A facility operated by the Texas Juvenile Justice Department;</p> <p>(B) A facility providing services solely for the Texas Juvenile Justice Department;</p> <p>(C) Any other correctional facility for children operated or regulated by another state agency or political subdivision;</p> <p>(D) A treatment facility or structured program for treating chemically dependent persons that is licensed by the Texas Health and Human Services Commission;</p> <p>(E) A youth camp licensed by the Texas Department of State Health Services;</p> <p>(F) A youth camp exempt from licensure by the Texas Department of State Health Services under Texas Health and Safety Code, §141.0021, because it is:</p> <p style="padding-left: 40px;">(i) Operated by or on "a campus of an institution of higher education" or "a private or independent institution of higher education," as those terms are defined in Texas Education Code §61.003; and</p> <p style="padding-left: 40px;">(ii) Regularly inspected by a local governmental entity for compliance with health and safety standards.</p>

Governmental Entity	Description of Exempt Programs
(3) Municipal	<p>A recreation program for elementary age (5-13 years) children with the following criteria:</p> <ul style="list-style-type: none"> (i) A municipality operates the program (ii) The governing body of the municipality annually adopts standards of care by ordinance after a public hearing for such programs, although the governing body of a municipality with a population of at least 300,000 that has adopted standards by ordinance after public hearings at least twice may accept public comment through its Internet website for at least 30 days in lieu of having a public hearing; (iii) The program provides these standards to the parents of each program participant; (iv) The ordinances include child to caregiver ratios, minimum employee qualifications, minimum building, health, and safety standards, and mechanisms for monitoring and enforcing the adopted local standards; (v) The program informs the parents that the state does not license the program; and (vi) The program does not advertise itself as a child care operation.

TITLE 26 HEALTH AND HUMAN SERVICES
PART 1 HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 745 LICENSING
SUBCHAPTER X EMERGENCY RULES

§745.10301. May a general residential operation provide care to or shelter an unlawfully present individual?

(a) In this emergency rule, the following terms are defined as follows:

(1) Exempt program--A child-care program that is exempt from or otherwise not subject to regulation as a child-care operation by Texas Health and Human Services Commission (HHSC) under Texas Human Resources Code Chapter 42, and this chapter.

(2) General residential operation (GRO)--A child-care facility that requires a license or certification under Texas Human Resources Code Chapter 42 in order to provide care to seven or more children for 24 hours a day in compliance with Chapter 748 of this title (relating to Minimum Standards For General Residential Operations).

(3) Unlawfully present individual--An individual who is neither a citizen nor has a right to be present in the United States under the Immigration and Nationality Act or accompanying regulations or decisions, who is in the custody of the federal government. This term includes a child who has no lawful immigration status in the United States and:

(A) with respect to whom, there is no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody, as described in 6 U.S.C. §279(g)(2); or

(B) who is detained with a parent or other adult family member who is not lawfully present in the United States.

(b) Governor Abbott's May 31, 2021, proclamation declaring a state of disaster directs HHSC to discontinue state licensure of child-care facilities that shelter or detain unlawfully present individuals. Accordingly, a licensed or certified GRO may not provide care to or shelter an unlawfully present individual.

(c) A licensed or certified GRO must operate separately from an exempt program that provides care for an unlawfully present individual, including ensuring that the exempt program:

(1) has separate caregivers from the GRO or has caregivers that do not provide care at the GRO while caring for children at the exempt program; and

(2) does not use an area of the GRO's building or grounds at the same time that the GRO is using the area, except that the exempt program and GRO may share restrooms and indoor/outdoor activity areas under a written plan regarding how caregivers from the GRO and the exempt program will supervise the children in the shared space.

(d) A licensed or certified GRO that operates a licensed operation and a sufficiently separated exempt program to provide care for an unlawfully present individual must:

(1) notify HHSC in writing; and

(2) submit to HHSC a written plan for how the exempt program will operate separately from the GRO, as required by subsection (c) of this section.

(e) If HHSC determines that a licensed or certified GRO is providing care for an unlawfully present individual, HHSC will place the operation on probation. If the operation does not meet all requirements of the probation within the first 30 days of the probationary period, HHSC will seek revocation or refuse to renew the GRO's license or certification.

(f) As provided by Texas Human Resources Code §42.074, a program that operates in violation of this rule may be subject to an injunction, temporary restraining order, or other civil or criminal action.

(g) No provision of this section limits or restricts HHSC's authority to take an enforcement action described in Texas Human Resources Code Chapter 42 or a rule adopted under that chapter.

(h) If there is any inconsistency between this emergency rule and any suspended provision in Texas Human Resources Code Chapter 42 or a rule adopted under that chapter, this emergency rule will prevail so long as this emergency rule is in effect.