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OPINION COMMITTEE

FILE # MI-46347-10
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TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

COMMISSIONER
Anne Heiligenstein

February 19, 2010

RQ-0868-GA

Ms. Nancy Fuller
Chair, Opinion Committee
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

Re: Whether the Department of Family and Protective Services has rulemaking authority to increase the number of training hours required for persons who provide child-care services in day-care centers and group day-care homes.

Dear Ms. Fuller:

This is to request your opinion as to whether the Department of Family and Protective Services (the department) has authority to increase minimum training standards relating to the number of hours required for initial and annual training of certain persons who work in day-care centers and group day-care homes.

Chapter 42 of the Human Resources Code¹ (HRC) grants authority to the department to regulate providers of child care. Section 42.042 directs the department to promulgate rules, including the promulgation of "minimum standards" for the provision of child-care services and requires a comprehensive review of the department's minimum standards every six years. The department is currently undergoing the required six-year review of minimum standards applicable to day-care providers and, as part of that process, has gathered extensive input from child-care providers, child development experts and others regarding the standards. Expert opinion and research support a positive correlation between the amount of training provided to child-care workers and the quality of child-care services provided. Accordingly, among the changes the department is being urged to consider are changes to the department's minimum training standards to increase the minimum number of initial and annual training hours required of child day-care providers.

¹ All subsequent statutory references are to the Human Resources Code.

Section 42.042(p) provides, in pertinent part, that:

The department by rule shall prescribe minimum training standards for an employee of a regulated child-care facility², including the time required for completing the training. The department may not require an employee to repeat required training if the employee has completed the training within the time prescribed by department rule.

Section 42.0421, contains further legislative guidance about minimum training standards. Subsection (a) provides as follows (*emphasis supplied*):

(a) The minimum training standards prescribed by the department under Section 42.042(p) for an employee of a day-care center or group day-care home *must include*:

- (1) eight hours of initial training for an employee of a day-care center who has no previous training or employment experience in a regulated child-care facility, to be completed before the employee is given responsibility for a group of children;
- (2) 15 hours of annual training for each employee of a day-care center or group day-care home, excluding the director, which must include at least six hours of training in one or more of the following areas:
 - (A) child growth and development;
 - (B) guidance and discipline;
 - (C) age-appropriate curriculum; and
 - (D) teacher-child interaction; and
- (3) 20 hours of annual training for each director of a day-care center or group day-care home, which must include at least six hours of training in one or more of the following areas:
 - (A) child growth and development;
 - (B) guidance and discipline;
 - (C) age-appropriate curriculum; and
 - (D) teacher-child interaction.

The question the department is posing is whether the legislature intended the *total number* of initial and annual training hours in paragraphs (1)-(3) of Subsection 42.0421(a) (i.e., 8, 15 and 20 hours respectively), to be the *least number* of hours that the department may establish in its minimum training standards relating to employees and directors of day-care centers and group day-care homes, or whether the legislature intended the total number of hours reflected in the

² Note that the term "regulated child-care facility" includes both residential and day-care facilities.

statute to be the precise number of hours which the department may require in its minimum training standards - no more, no less.

We note that total number of training hours delineated within paragraphs (1) - (3) of Subsection 42.0421(a), are prefaced by the phrase "must include." According to the Code Construction Act, the words "includes" and "including" are "terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded." This definition applies unless the statute or context in which the terms are used requires a different definition. *See Section 311.005, Government Code.*

Applying this construction, it could be argued that the legislature used the term "must include" that prefaced paragraphs (1)-(3) of Subsection 42.0421(a), as a term of enlargement rather than a term of restriction - meaning that the department's minimum training standards must include "no fewer than" or "at least" the total number of training hours set forth under paragraphs 42.0421(a)(1)-(3) - but could also include a greater number of total initial and annual training hours.

On the other hand, the legislature's intent in prefacing paragraphs (1)-(3) to Subsection 42.0421(a), with the "must include" phrase may simply have been to indicate that these three paragraphs are a "non-exclusive enumeration" of what must be included in the department's minimum training standards. For example, the training hours specified in Section 42.0421(a) apply solely to certain types of day-care providers, whereas the department's duty under Section 42.042(p) is to adopt minimum training standards for all regulated child-care facilities - including both day-care and residential-care facilities.

A review of the legislative history does not provide any explicit guidance on the question of whether the legislature intended Section 42.0421 to be the minimum number of training hours the department could include in its minimum training standards for day-care centers and day-care homes - or the precise number. Section 42.0421 was first added to Chapter 42 by Senate Bill 558, during the 76th Legislative Session in 1999.³ In large part, the enrolled bill codified the department's then existing minimum training standards relating to initial and annual training hours - standards that had previously been promulgated under authority of Section 42.042(p).⁴ However, Senate Bill 558 differed slightly from the department's existing standards in that it added a specific number of initial training hours for employees of group day-care homes (the

³ Prior to 1999, Section 42.0426, HRC was already in existence and imposed training requirements on all licensed child-care facilities (both day-care and residential providers) to provide training on certain topics; however, § 42.0426 did not then, and still does not, impose a specific number of hours for either initial or annual training on the topics covered in this section. The introduced version of SB 558 initially sought to amend Section 42.0426, but was later amended to add Section 42.0421, which was directed solely at licensed and registered providers of day-care services.

⁴ The training requirements applicable to providers of child day-care services that pre-dated the enactment of Section 42.0421 were located in various subchapters of Chapter 715, Title 40, Texas Administrative Code.

number was already established as eight initial training hours for day-care centers) and added requirements for one hour of specialized training on certain topics (both initially and annually) in Subsections 42.0421(b) and (c), for those who provide care to children under the age of 24 months in day-care centers, group day-care homes, and registered family homes.

Proponents of SB 558 supported the codification of the department's then existing minimum training standards, as modified, into the Human Resources Code, although some proponents argued that the statutory provisions did not go far enough and that the number of training hours should have been increased. Opponents argued generally that the training requirements are costly for child-care providers and make child care less affordable. *See reports from the Senate Research Center, House Research Organization, and House Bill Analysis associated with SB 588, on file with the Texas Legislative Reference Library.*

Since the enactment of Section 42.0421 in 1999, there have been numerous legislative efforts to modify this section, some of which were enacted and some of which were not. In 2001, SB 833 was enacted to amend Subsections 42.0421(a)(2) and (a)(3), to add the requirement that at least six of the annual training hours for employees and directors be devoted to covering specific training topics. In 2005, 2007, and 2009, HB 1877, SB 50, and SB 59, respectively, would have amended Section 42.0421 to impose certain requirements on the method of training delivery and/or the qualifications of persons who provide training; however, none of these bills were enacted. In 2009, SB 572 (companion HB 1901), was enacted and added the language that currently appears in Subsection 42.0421(e), imposing new training requirements for persons who transport children under the age of nine. HB 1970 would have added training requirements relating to childhood obesity and nutrition, but this bill was not enacted. Of greatest relevance was SB 1730, which would have amended the very same total training hours at issue in this opinion request.

As introduced in the 81st Legislative Session, SB 1730 would have amended paragraphs (1) - (3) of Subsection 42.0421(a) to increase the required training hours in day-care centers and group day-care homes to 40 hours of initial training, 25 hours of annual training for employees, and 40 hours of annual training for child-care directors. The version of the bill passed out of the Senate lowered the required hours in paragraphs (a)(1) - (3) to 16, 17 and 30 hours, respectively. This same version of the bill was successfully voted out of the House Human Services Committee and placed on General Calendars, where it died without passage in the final days of the session. The bill garnered broad support from a wide spectrum of child advocates who testified in favor of SB 1730, while there was only limited testimony in opposition to the bill.

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The Senate and House Bill analyses for this bill contain the same summary of the background and purpose for SB 1730, as follows:

Pre-kindergarten and appropriate child care has been documented and reported to increase the educational and social success of children. Many parents enroll their children in a variety of child-care facilities that are regulated by the Department of Family and Protective Services (DFPS). The certification and training for child-care workers and operators is regulated by DFPS as well.

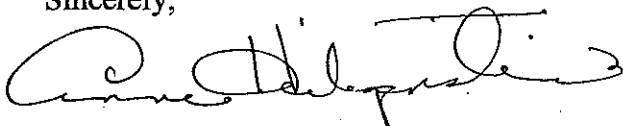
In recent years, there has been an increase in incidents occurring at child-care facilities and by child-care workers that have resulted in harm to or even death of a child. Many in the industry, as well as parents and other interested parties, believe that increased training would decrease these incidents. It is also the belief that increased training would provide the workers and directors with more knowledge on child-care operations and services for children.

[S.B. 1730] amends current law relating to minimum training standards for employees of certain child-care facilities.

The bill analyses contain no explicit guidance on the question of whether the department has authority under its delegated rulemaking authority in Subsection 42.042(p) to increase the initial and annual training hour requirements above and beyond those specified in statute.

Accordingly, we respectfully request your opinion as to whether or not the language in Section 42.0421(a) should be interpreted to reflect the precise number of total hours that may be required of employees and directors of day-care centers and group day-care homes, or merely the minimum threshold, above which the department may increase the total number of hours under its delegated rulemaking authority in Section 42.042(p), HRC. Attached is a list of stakeholders who the department believes will have an interest in the outcome of this opinion request. If additional information is needed from the department to assist with this opinion request, please contact Gerry Williams, General Counsel, at (512) 438-3805.

Sincerely,



Anne Heiligenstein

Attachment