

Section 800.351- 800.355 and 800357-800.359.
Monitoring by Boards, Subrecipients and Contract Service Providers

The Texas Workforce Commission (Commission) adopts new § § 800.301 - 800.307, 800.351 - 800.353, and 800.357 - 800.359, concerning monitoring without changes to the proposed text as published in the November 13, 1998, issue of the *Texas Register* (23 TexReg 11569). The adopted text will not be republished here.

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Proposed §800.356 is deleted.

The purpose of the new rules is to consolidate into a general location in Chapter 800, the rules pertaining to monitoring of local workforce development Boards (Boards), Board contractors, and subrecipients.

The Commission recognizes the important role that Monitoring serves in ensuring the fiscal and program accountability of the programs administered. The consolidation of these rules serves to highlight this importance while also clarifying the roles, responsibilities, and expectations for the participating parties.

The Commission held a public hearing on the proposed rules at 1:30 p.m. on November 20, 1998, in Room 644 of the Texas Workforce Commission Building at 101 East 15th Street in Austin, Texas.

The Commission received comments on the rules from local workforce development Boards, and other entities regarding monitoring. Some comments were for the rules, and others did not state whether they supported or opposed the rules. Others had concerns and questions about the rules as proposed, and suggested changes.

The names of interested groups or associations offering comments on the rules are as follows:

The Concho Valley Workforce Development Board;

The North Central Texas Workforce Development Board;

The West Central Workforce Development Board;

The Panhandle Regional Planning Commission;

The East Texas Council of Government (COG);

Catholic Charities Diocese of Beaumont;

Neighborhood Centers, Inc.; and

The State Child Care Advisory Committee.

Following each comment or group of related comments is the Commission's response.

Comment: One commenter asks when the Commission will make its child-care monitoring policies and procedures available to the Boards.

Response: The Commission's Contract Monitoring policies and procedures are reproduced in the Financial Manual for Grants and Contracts (FMGC) published by the Commission's Grants Administration Department. Revisions to the policy manual based on the new child care rules will be sent as soon as feasible.

Comment: One commenter expresses concern that the rules provide contradictory direction concerning who and what to monitor.

Response: The proposed rules serve to document and clarify expectations. Subchapter G summarizes the monitoring work to be done by the Commission. Specifically, §800.303 identifies both the parties subject to monitoring and an overview of the monitoring to be done. Additionally, Subchapter I summarizes the monitoring work to be done by Boards, subrecipients, and contract service providers. Specifically, §800.353 identifies both the parties subject to monitoring and an overview of the monitoring to be done.

Comment: One commenter requested clarification of the term subrecipient and questions whether this definition includes colleges, universities, and proprietary schools.

Response: The term subrecipient refers to any entity receiving federal funds through a Board. If receiving federal funds through a Board, a college, university, or proprietary school would be a subrecipient. If the college, university, or proprietary school were engaged to provide services as a result of a procurement action, it may also be a contract service provider. In either event, both as a subrecipient or a contract service provider, the monitoring responsibilities prescribed in Subchapter I would apply.

Comment: One commenter suggested that the definitions of "contract service provider" and "subrecipient" are somewhat unclear, and could be interpreted to overlap.

Response: The Commission agrees that these terms can and will often times overlap. The term subrecipient refers to any entity receiving federal funds through a Board. If receiving federal funds through a Board, and engaged to provide services as a result of a procurement action, a subrecipient may also be a contract service provider. In either event, both as a subrecipient or a contract service provider, the monitoring responsibilities prescribed in Subchapter I would apply.

Comment: Two commenters suggested that this section should include review of the LOP (List of Providers).

Response: The Commission disagrees that LOP should be named in the rule but agrees that documents necessary to determine compliance and performance may include review of LOP's.

Comment: One commenter suggested that the term "authoritative pronouncements" is vague and recommends specific language be substituted.

Response: The term authoritative pronouncements is used to refer to the vast array of guidance, interpretations, and information provided by the many oversight, administrative, and/or regulatory bodies who govern the more than 28 programs administered by the Commission. Although desired, more specific language would not encompass this broad universe of information.

Comment: One commenter recommended the Commission develop reporting timelines that would ensure timely information is reported and used to improve decision making.

Response: The Commission agrees that reporting timelines are necessary. Existing Monitoring policies and procedures already provide for a 30 day timeline for release of draft monitoring reports.

Comment: Two commenters suggested that this section include procedures for preparing a draft report that the Board and Contractor can respond to before it becomes final and subject to the Open Records Act. In addition, the commenter recommends that monitors prepare findings.

Response: Existing procedures call for a draft report to be issued for Board and/or contractor response prior to public release of the final report. All final reports include

the Board's and/ or contractor's response to findings. The monitoring team conducting each site visit prepares the related findings and draft report.

Comment: One commenter suggested adding language to require the Commission to issue reports within 30 working days after completion of each monitoring visit.

Response: The Commission agrees that reporting timelines are necessary. Existing Monitoring policies and procedures already provide for the 30 day timeline being recommended.

Comment: One commenter indicated that it is unclear when a Board would submit a written response to the Commission's Resolution Section and questions whether this would be done each time the Board responds to a monitoring report or only in special circumstances.

Response: Monitoring findings not successfully resolved during the monitoring process are turned over to the Resolution Section. Each Board, subrecipient, or contract service provider is notified of the issues being reviewed and allowed reasonable timeframes to provide responses and additional information and/or documentation.

Comment: One commenter suggested adding language to require Boards, subrecipients, or contract service providers to submit written responses to draft monitoring reports within 30 working days of their receipt of the Commission's draft report.

Response: The Commission agrees that response timelines are necessary. However, a rule requiring such action within strict timeframes would be overly restrictive by not recognizing the individual circumstances that may be required of Boards, subrecipients, or contract service providers to adequately respond to monitoring findings.

Comment: One commenter suggested that sections §800.353 and §800.355 conflict with one another: one section asking that Board's monitoring activities be planned to focus on areas of greatest risk; and the other requiring a schedule or timetable for monitoring all funded activities.

Response: The Commission agrees and changes rule §800.355 (a) to reflect the value of risk assessment tools in determining the funded activities to be monitored.

Comment: One commenter requested clarification of the term high-risk.

Response: The term "high-risk" does not refer to a specific Board, subrecipient, or contract service provider, but is a term meant to describe the relative risk of one provider to the others. The results of an effective risk assessment will compare the relative risk of all subrecipients and contract service providers. Those rated with a high risk factor would rate higher than those with a low risk factor, and therefore would be more likely to warrant monitoring coverage.

Comment: One commenter suggested that this section is a duplication of §800.353(c) which requires the use of risk assessment in determining monitoring focus.

Response: The Commission agrees and §800.354(d) is deleted.

Comment: Two commenters suggested that the estimated time budgeted to perform each review would vary for each review and recommended deleting this provision from Monitoring Plans.

Response: Although the time required to complete each review may vary, the Commission believes it is important for each Board, subrecipient, or contract service provider to estimate the time required to perform needed monitoring activities. In addition, this information should also be used to plan and schedule the monitoring activities of the Board, subrecipient, or contract service provider.

Comment: One commenter asserted that this Section is overly prescriptive in establishing local chains of command, requiring separation of monitoring and technical assistance, and assignment of the monitoring function to a specific person or group. The commenter recommends that this section be deleted and any additional legislative requirements be included in §800.355.

Response: The Commission agrees that overly prescriptive rules are not helpful. Accordingly, §800.356 has been deleted.

Comment: Two commenters suggested that the provision requiring separate monitoring and technical assistance functions would not be economically feasible for mid to small size child care managers.

Response: The requirements included in this section describe the functions needed to help ensure effective monitoring. Monitoring activities are more effective in identifying issues and recommending solutions when conducted by independent staff who are not also involved in service delivery.

Comment: One commenter noted the Commission's identification of monitoring responsibilities, but requested the Commission provide specific training on monitoring of Child Care Programs.

Response: The Commission agrees that appropriate training is critical to ensuring programs are effectively managed, operated, and monitored. A training curriculum will be developed that incorporates child care monitoring policies and procedures. A schedule of training will then be distributed to all Boards, child care program administrators, and contractors.

Comment: One commenter suggested that in the case of child care providers with provider agreements, comprehensive reviews seem unnecessary and costly.

Response: The Commission believes in the concept of accountability to help ensure funds are used for authorized purposes, and that programs achieve expected results. Although burdensome at times, monitoring efforts help ensure fiscal and program accountability, while also ensuring that accurate and reliable information is captured and used for decision-making.

Comment: One commenter suggested that the provision requiring separate monitoring and technical assistance functions could increase the costs by requiring outside staff or consultants.

Response: The requirements included in this section describe the functions needed to help ensure effective monitoring. Monitoring activities are more effective in identifying issues and recommending solutions when conducted by independent staff who are not also involved in service delivery.

Comment: One commenter expressed concern that small child care centers will experience financial difficulty complying with the rules. This commenter recommended that additional funding be provided for compliance.

Response: The Commission agrees that overly prescriptive requirements could increase the cost of compliance. However, the monitoring rules being proposed do not create additional responsibilities for Boards, subrecipients, or contract services providers. The requirements identified in these rules serve to summarize those already found in specific program rules, contracts, or agency policy.

Comment: One commenter believed the cost for the monitoring requirement will be greater than the amount estimated. Specifically, the commenter expressed concern that the analysis does not address the requirement that both the administrative entity and the subcontractors perform monitoring activities, thus resulting in greater

administrative expenditures. In addition, the commenter requested clarification as to whether the estimated cost is considered an annual cost or a cost per monitoring visit.

Response: The estimated costs included in the preamble are estimates for small businesses as defined by TGC § 2006.001. They are defined as legal entities (including partnerships, corporations, or sole proprietorships) that are: formed for the purpose of making a profit; independently owned and operated (non-public and/or non-governmental entity); and have less than 100 employees or less than \$1 million in annual gross receipts. Because the proposed rule does not create additional responsibilities for Boards, subrecipients, or contract service providers, there should be no additional costs required to comply with the proposed rules. The estimated costs are expected annual costs.

Comment: One commenter expressed concern that the cost analysis is faulty because it would require more full-time equivalent positions to monitor all of the programs, conduct the detailed monitoring work, develop and implement appropriate written policies and procedures, and adequately train monitoring staff.

Response: The estimate included in the preamble represents the estimated costs applicable to a small business as defined by the Texas Government Code. The estimated costs for "non-small" businesses could be expected to be higher. The increase would be relative to the number of programs administered and the volume of activity within each program area.

Subchapter I. Monitoring by Boards, Subrecipients, and Contract Service Providers

The new rules are proposed under Texas Labor Code, Title 4, and particularly §301.061, which provides the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of the Commission programs.

§800.351. Scope and Purpose.

- (a) The purpose of this subchapter is to set forth the provisions governing the monitoring responsibilities of Boards, subrecipients, and contract service providers.
- (b) The rules contained in this subchapter apply in addition to any program-specific rules to all programs administered by the Commission, except that to the extent of any conflict, the program-specific rule will govern.

§800.352. Definitions.

The following words or terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission -- The Texas Workforce Commission.

(2) Board -- A certified local workforce development Board with an approved plan pursuant to The Workforce and Economic Competitiveness Act, Texas Government Code, Chapter 2308, as amended.

(3) Contract Service Providers -- An entity engaged to provide goods, services, or both as a result of a procurement process.

(4) Subrecipient -- An entity receiving federal funds through a Board.

§800.353. Board Monitoring of Subrecipient Performance.

(a) Boards, subrecipients, and contract service providers shall monitor entities that receive public funds. Monitoring shall include monitoring of both the fiscal and program performance of the entities or subrecipients administering and delivering services. These monitoring activities should be designated to ensure programs achieve intended results and resources are efficiently and effectively used for authorized purposes and are protected from waste, fraud, and abuse. Monitoring activities must be planned to focus on areas of highest risk to help ensure the most effective use of monitoring resources.

(b) Monitoring activities shall assess a contractor's compliance with applicable laws, regulations, authoritative pronouncements, and contract provisions. These activities shall encompass both financial and programmatic monitoring and shall be evaluated on a periodic basis.

(c) The monitoring function shall include:

- (1) a risk assessment tool;
- (2) a monitoring plan;
- (3) a monitoring program; and
- (4) reporting and resolution processes.

(d) The subrecipient shall develop and implement written policies and procedures that describe and support the monitoring process.

§800.354. Risk Assessment.

(a) Boards, subrecipients, or contract service providers shall include a risk assessment tool in their monitoring functions.

(b) The risk assessment tool shall identify high-risk subrecipients or contract service providers and high areas of risk within an individual subrecipient or contract service provider. The entity responsible for including the risk assessment tool in their monitoring functions shall be responsible for determining what constitutes high-risk or a high area of risk.

(c) Boards, subrecipients, or contract service providers shall establish monitoring schedules and customizing monitoring programs that best utilize monitoring resources. Boards, subrecipients, or contract service providers shall quantify, as much as possible, areas of risk identified for assessment.

§800.355. Monitoring Plan.

(a) Boards, subrecipients, or contract service providers shall develop their own local-level monitoring plan based on the results of the risk assessment. This monitoring plan shall incorporate all of the following:

(1) a schedule or timetable for monitoring funded activities, subrecipients, and contract service providers based upon risk assessment results;

(2) the type of review planned for each subrecipient or contract service provider, such as on-site review, comparative financial analysis, desk review, or other type of appropriate review; and

(3) the estimated time budgeted to perform each review.

(b) Boards, subrecipients, or contract service providers may perform monitoring reviews either formally or informally, but shall incorporate the risk assessment results in scheduling decisions.

§800.357. Controls Over Monitoring.

To ensure a comprehensive and effective monitoring, Boards, subrecipients, or contract service providers shall:

(1) require periodic reports outlining monitoring reviews, noncompliance issues, and the status of corrective actions;

(2) brief the Board or appropriate Board subcommittee at regularly scheduled meetings;

(3) require an annual evaluation of the monitoring function to determine its effectiveness, by a person or entity independent of the monitoring function; and

(4) develop a written monitoring procedure to be used in monitoring both program and fiscal operations.

§800.358. Reporting and Resolution Requirements.

(a) Boards, subrecipients, or contract service providers shall ensure that monitoring reports identify instances of noncompliance with federal and state laws, regulations and Commission policies, and provide recommendations for corrective action and program quality enhancements.

(b) Boards, subrecipients, or contract service providers shall ensure that the Board, subrecipients, and contract service providers establish timelines for the completion of corrective action plans, based on the severity of the deficiency. The Boards or subrecipients shall work with the contract service providers to ensure implementation of corrective actions.

(c) Boards, subrecipients, or contract service providers shall ensure that a copy of monitoring reports shall be provided to the governing Board, and that upon request copies shall be provided to the Commission.

§800.359. Independent Audit Requirements.

(a) Boards, subrecipients, or contract service providers subject to the Single Audit Act must have an independent audit performed in compliance with the Office of Management and Budget Circular A-133.

(b) The audit must be approved by the cognizant agency of the Board, subrecipient, or contract service provider, with a copy provided to the Commission for review. The cognizant agency is the formal agency assigned with oversight responsibility for the Board, subrecipient, or contract service provider.

(c) Boards, subrecipients, or contract service providers may be reimbursed by the Commission for their share of audit expenses if:

(1) funding is available and reimbursement is permitted by applicable funding sources;

- (2) the audit is found to be acceptable upon review by the Commission; and
- (3) the audit and reimbursement request follows Commission policies and procedures.