

# DUE PROCESS

## STEPS FOLLOWING ISSUANCE OF A REASON TO BELIEVE<sup>1</sup>

Note: At the conclusion of the investigation, the finding is sent to HHSC and a parallel process begins on the HHSC side. For more information click [here](#).

### DFPS PROCESS

RTB issued. Then:

- **DFPS due process on the finding begins.**
  - **Step 1:** Notification letter sent to subject of investigation (referred to as DP for brevity). 40 TAC [707.745](#), including info on right to an admin review to dispute findings. As of 9/1/20, the notice should also be sent to the operation. 40 TAC § [707.745](#)(a)(4). The notice goes to the “person in charge” unless that person is the perpetrator, so you may need to establish internal processes for distributing this notice if it does reach you.
  - **Step 2:** DP requests administrative review of investigation findings (or ARIF<sup>2</sup>, which is an informal review of the findings). Only the DP is eligible for an ARIF. 40 TAC § [707.817](#). The request is made using [Form J-801-2011](#), and must be received or postmarked within 15 calendar days of receiving the notice about a right to admin review. The request must also include information on the findings and documentation that supports the DP’s position. 40 TAC § [707.819](#).<sup>3</sup>
  - **Step 3:** DFPS reaches out to DP within 10 calendar days of receiving request. [707.823](#)(b).
  - **Step 4:** ARIF held<sup>4</sup> ([707.823](#))—
    - Generally held as telephone conference but may be in person in office
    - Must be held within 30 days unless delay needed for provision of requested records. If additional time needed for records, ARIF must be held within 30 days of DP obtaining requested records. Current request form estimates it may take as long as six months to receive the redacted record. There is no outer time limit for DFPS’ provision of records.

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<sup>1</sup> Focused only on RTB and ensuing process for CCI findings. Future documents may include information on the consequences to the DP and operation pending the outcome of due process or information on how findings may or may not be released. This document also presumes that both the subject and operation wish to fully pursue due process around the substance/findings of an investigation and ensuing regulatory action, so does not include detailed information on waiver of admin review or due process.

<sup>2</sup> The DFPS terminology is “ARIF”. HHSC’s procedure is referred to as an administrative review as the underlying action being appealed is broader than investigation findings.

<sup>3</sup> The DP can also opt to skip the ARIF and go straight to SOAH. See 40 TAC §§ 707.829, 707.831.

<sup>4</sup> Historically, the ARIFs have been conducted by CCI staff. Rules indicated that the designee conducting the review must not have been involved in or directly supervised the investigation. 40 TAC § 707.821. However, because the reviews were still within CCI and there were reports of individuals who had been involved doing the reviews, DFPS is moving the reviews to another area. There is no known ETA for this transition.

- Also may take longer if there is good cause to delay. DP can request delay for good cause and the person conducting the review will make a decision re: good cause based on policy. Good cause is not further elaborated in policy but the general process is laid out in Section [7715](#). The absence of specifications around good cause may permit some flexibility for the requestor in making any arguments around good cause.
- DFPS may proceed without DP's participation in certain circumstances (failure to respond to contact attempts, failure to schedule within 30 days without good cause, or missing the review without good cause).
- **Step 5:** DFPS staff conducting the hearing considers all materials ([707.823\(e\)](#)) and makes decision. [707.825](#).
  - A written decision is issued:
    - Within 30 calendar days if a meeting or telephone conference was held,
    - Within 60 days if a review was conducted without participation of DP, or
    - According to policy if there is good cause to extend the time frame.

40 TAC §[707.827](#).

- If the finding is upheld, the DP can receive a SOAH due process hearing. In the alternative, DP can waive ARIF on the front end and go straight to SOAH. If a DP does not request a review within the required timeframe, the review will automatically be waived and DP will be given notice of the opportunity for a hearing at SOAH. ([707.829](#); [707.831](#)).
- If the finding is reversed or altered, DFPS records should be updated. In addition, HHSC has 30 days from receiving notice of an overturn to determine whether the related citation for a/n/e standard is still appropriate. CCR HB [6971](#)
  - Unless the citation was already overturned, the review is conducted by the PA or RD, regardless of whether an administrative review was requested for citation previously.
  - If the review is conducted and the citation is determined to be no longer appropriate, the RD/PA updates records in the licensing automated system, (CLASS).
  - If review conducted and citation determined to still be appropriate, the PA or RD documents the decision in CLASS and takes no further action.
- **Due Process Hearing at State Office of Administrative Hearings (SOAH) for DFPS finding**
  - Formal review by an Administrative Law Judge (ALJ) to determine whether DFPS findings meet the preponderance of evidence standard<sup>5</sup> and whether findings should be upheld, reversed, or altered. [707.841](#), [707.853](#)
  - **Step 1:** Due process hearing requested ([707.845](#))—
    - Must be in writing to the Docket Clerk for Child Care Licensing using contact info included in notice informing DP of right to due process.
    - Request must describe the findings and include a copy of the notice letter informing the person of the right to the due process hearing.
    - Request must be postmarked (for mail) or received within 30 days of receiving notice of the right to request the due process hearing.
  - **Step 2:** Case docketed and hearing set ([707.847](#))—
    - HHSC requests an ALJ to set hearing
    - HHSC sends hearing notice to DP and/or attorney, if applicable.
    - No specific time frame during which this request must be made. The request may sit idle for months or years.
  - **Step 3:** Hearing conducted—
    - Follows certain legal rules ([707.849](#))

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<sup>5</sup> I.e., when all evidence is weighed, it is more likely than not that abuse, neglect, or exploitation occurred.

- May be combined with hearings related to other findings from same incident or related regulatory findings ([707.851](#))
- ALJ may make a default decision if DP fails to appear ([707.855](#))
- **Step 4: Decision made—**
  - If finding reversed or altered, DFPS records should be updated. In addition, HHSC has 30 days from receiving notice of an overturn to determine whether the related citation for a/n/e standard is still appropriate. CCR HB [6971](#)
    - Unless the citation already overturned, the review is conducted by PA or RD, regardless of whether administrative review requested for citation previously.
    - If review conducted and the citation is determined to be no longer appropriate, RD/PA updates records in CLASS.
  - If review conducted and citation determined to still be appropriate, the PA or RD documents the decision in CLASS and takes no further action.
  - If upheld, DP is changed to “sustained perpetrator” in the Central Registry. ([707.857](#)).

We believe the only remaining recourse for the DP re RTB would be to consult attorney and potentially file suit in district court. The due process for the operation is detailed below.

### **RELATED REGULATORY ACTIVITY AND SUBSEQUENT DUE PROCESS**

- **HHSC CCR has a role during and after the DFPS a/n/e investigation.**
  - Overall, Per CCR Handbook, [6911](#):

HHSC investigators are responsible for the following activities related to a DFPS investigation, including:

    - a. Participating in risk assessments with DFPS;
    - b. Discussing with DFPS information that DFPS shares about the operation that relates to HHSC’s regulatory responsibilities;
    - c. Evaluating the information DFPS provides to determine whether to cite violations of laws, rules, or minimum standards, and/or whether enforcement actions are necessary;
    - d. Indicating whether an injury the DFPS investigator confirmed is related to a minimum standards violation;
    - e. Notifying the operation and Centralized Background Check Unit (CBCU), when applicable, of the results;
    - f. Conducting follow-up inspections for deficiencies;
    - g. Seeking injunctions for unregulated operations that refuse to cease operating;
    - h. Sending notifications to, and closing operations that, DFPS determines are not subject to regulation; and
    - i. Closing the investigation in CLASS.
  - HHSC investigators evaluate information collected during DFPS investigations and cite deficiencies by inspection, Monitoring assessment, or directly within the DFPS Investigation, as appropriate. CCR HB [6940](#).
- **At time of DFPS INV closure:**
  - DFPS investigator notifies the HHSC investigator of the disposition, transfers the investigation to the HHSC investigator in CLASS, and communicates information about possible violations. CCR HB [6940.2](#). See also HRC [40.042](#)(f); 40 TAC [707.729](#), [707.745](#)
  - Within 10 days of the notification of disposition, HHSC investigator evaluates the evidence and:
    - follows up with the DFPS investigator regarding any questions or issues related to the information DFPS provided;
    - conducts an inspection to confirm the violations, if needed;
    - documents compliance information on the Add/View Allegation page in CLASS as follows:
      - adds the minimum standard regarding the prohibition of abuse, neglect, or exploitation of a child and marks as compliant or deficient, as appropriate
      - cites any other violation of minimum standards, rules, or law and provides technical assistance, as appropriate; and
    - notifies the operation of the results of the investigation (see 6960 Notification for a DFPS Investigation) using CLASS Investigation Letter 2896 (cumulative record of all violations cited throughout INV, including those the operation has already received notice of)
  - HHSC Investigator also provides notice to the Centralized Background Check Unit (CBCU) if there is an RTB finding—
    - Notice sent to CBCU inspector assigned to operation within 3 days of receiving notice of disposition from DFPS INV.
    - CBCU determines need for emergency release of finding.<sup>6</sup>
- If CCR cites the operation for a/n/e related deficiency<sup>7</sup>, then due process begins on the CCR Side.

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<sup>6</sup> The process of CBCU considering for emergency release predates a policy/practice change by DFPS to release all findings to the operation at investigation conclusion. While an emergency release could still theoretically be determined necessary, it seems unlikely in light of practice change.

<sup>7</sup> This is also true for deficiencies beyond the a/n/e incident but the focus here is on the trajectory of an abuse/neglect finding.

- First part of due process: administrative review (informal review to determine whether a Licensing decision or action was appropriate under applicable Licensing rule or law). 40 TAC 745.8801<sup>8</sup>
  - **First step:** Admin Review requested—
    - Complete request must be received (email/fax) or postmarked (mail) within 15 days of receiving notice of right to admin review. 745.8806.
    - (745.8809) Complete request must:
      - Be in writing and sent to the contact info on notification letter or inspection report
      - Describe the decision or action being disputed
      - Indicate why decision being disputed/how the requestor is in compliance with applicable Licensing rule/law<sup>9</sup>
      - Include any documentation that supports requestor’s position
    - Request stops actions based on the citation. According to 745.8803 “If you do not waive your right to request an administrative review, we may not implement any decision or action that is the subject of the review until your due process rights concerning the decision or action are exhausted.” Request may suspend corrective action if request for hearing relates to entire corrective action; if request is only for one or more conditions then requestor will be notified whether evaluation/probation will continue with changes or be suspended pending the outcome of administrative review. 745.8871. However, posting requirement still applies. 745.8873. In addition, in circumstances where person or operation has been determined to be an immediate threat they may need to either stop being present or cease operation, respectively (unless injunction obtained). 745.8877.
  - **Second step:** Admin review conducted (745.8815)—
    - Generally conducted by telephone but may be in person and if related to a deficiency, may involve a site visit.
    - CCR contacts requestor within 10 days of receiving written request.
    - Must be held within 30 days of CCR’s contact to the requestor unless delay needed for provision of requested records. If additional time needed for records must be held within 30 days of DP obtaining requested records. There is no specific time frame or outer limit for HHSC/CCR provision of records to the requestor.
    - Also may take longer if there is good cause to delay. Requestor can request delay for good cause in writing and the person conducting the review will make a decision re: good cause based on policy. The policy on point appears to be section [7714.1](#) though there is not additional detail on what constitutes good cause.
    - HHSC may proceed without requestor’s participation in certain circumstances (failure to respond to contact attempts, failure to complete review within 30 days without good cause)
  - **Third step:** decision made (745.8815)
    - HHSC staff conducting the review will consider information presented and make decision to uphold, amend, or overturn decision/action in dispute.
    - Decision will be made within 21 days of conducting the administrative review unless good cause exists according to policy.

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<sup>8</sup> The CCR due process rules are some of the only rules remaining in Title 40 of the Texas Administrative Code for Licensing. Nearly all of the other portions of Chapter 745 are in Title 26. However, some remain in the pre-split portion of TAC and are scheduled to move later in the summer. They also may be substantively updated to reflect the split of DFPS and HHSC. All references in this document are either to Chapter 707 or 745 of Title 40.

<sup>9</sup> Note that HHSC’s current rules require more specificity at the outset of a request than do DFPS’. This may be updated in future rule revisions.

- (745.8835, 745.8837) If upheld, may be eligible for hearing at SOAH for reasons including<sup>10</sup>:
  - CCR determines a person or operation is an immediate threat or danger to health or safety of children (if person determined to be immediate threat, only the person can request; if operation only the governing body, director or designee can request)
  - CCR taking adverse action against operation (only the governing body, director or designee can request)
  - CCR designating requestor as controlling person (only the governing body, director or designee can request)
  - CCR imposing administrative penalty (controlling person can request if imposed against controlling person; governing body, director, or designee can request if penalty imposed against permit holder).

### SOAH Hearing related to HHSC action/decision

- **Step 1:** request for due process hearing. (745.8839, 745.8841) Request must be:
  - Made by the person eligible as outlined above and in 745.8837
  - In writing, sent by certified mail
  - Describe the decision being disputed and why the requestor disagrees
  - Include a copy of the letter informing the requestor of the right to the hearing
  - Sent and postmarked within 30 days after receiving the notice of the right to the hearing.
  - Sent to the docket clerk in legal services, using contact info in the notification letter, as well as the licensing staff that sent the notice letter. Note that one rule calls for certified mail (745.8839) and one calls for certified or regular mail (745.8841). It appears likely that the safest course would either be certified mail for both – or certified mail to the docket clerk and regular mail to the licensing staff.
- **Step 2:** Case docketed and hearing set (745.8843)—
  - HHSC requests ALJ to set hearing
  - HHSC sends hearing notice to DP and/or attorney, if applicable.
  - No specific time frame
- **Step 3:** Hearing conducted—
  - Follows certain legal rules (745.8845)
  - Parties can discuss facts not evaluated by CCR staff as well as new interpretation of facts. Rules provide that “alleged changes that have made to the operation after the decision to take adverse action are not directly relevant to the due process hearing, and the administrative law judge may exclude them”. (745.8847)
  - May be combined with hearings related to other findings from same incident or related regulatory findings (745.8851)
  - ALJ may make a default decision if requestor fails to appear (745.8853)
- **Step 4:** ALJ makes decision --Decision/action will be upheld, reversed, or altered (745.8849)

It appears the only remaining recourse would be to consult attorney and potentially file suit in district court.

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<sup>10</sup> There are other triggers for SOAH review in the rules. However, those do not appear relevant here.