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Safety First: Streamlining and Simplifying Foster Care Regulatory Environment

Key Points

- Texas continues to struggle with alleviating longstanding problems with its foster care system, most recently losing more than 1,000 placements intended for older youth and those with more complex needs.
- Foster families and child welfare service providers point to an “unnecessarily burdensome and punitive” regulatory environment as one of the driving forces behind the loss of placement capacity.
- Texas child-placing agencies and foster families must navigate multiple layers of oversight from at least three separate agencies.
- The lack of alignment among state regulators creates confusion and inefficiency that ultimately undermines the goal of promoting the safety and well-being of children in the care of the state.
- Several child welfare service providers have made the decision to cease certain operations due to the overly restrictive regulatory environment.

Executive Summary

More than a decade after being sued in federal court over the state of its foster care system, Texas continues to struggle to address problems that placed children in its care at risk of harm. The most recent crisis saw the loss of more than 1,000 foster care beds between December 2020 and April 2021, resulting in a dramatic increase in the number of children entering the care of the state without a safe, stable placement. These children spent multiple nights sleeping in offices, hotels, and other unlicensed facilities. Although many factors contributed to the “Children Without Placement” crisis, an increasingly complex, disjointed, inefficient, and—at times—punitive regulatory environment played an outsized role in the reduction of foster homes and service providers at the root of the problem. This paper provides a brief overview of the current Texas child welfare licensing and regulatory environment and makes recommendations for how the 88th Legislature can simplify and streamline oversight of the families and service providers who are essential to caring for the state’s most vulnerable children.

Introduction

For more than a decade, the Texas foster care system has been in a state of crisis. In March 2011, Children’s Rights, Inc., a national child advocacy litigation organization, sued the state in federal court on behalf of a class of children in the permanent care of the state. The suit alleged that the policies and practices of the Department of Family and Protective Services (DFPS) routinely exposed these children to an unreasonable—and unconstitutional—risk of harm ([M.D. v. Abbott, 2015, pp. 11–12](#)). After years of litigation, the court ruled in favor of the Plaintiffs in December 2015, finding that the failures of DFPS resulted in children “almost uniformly leav[ing] State custody more damaged than when they entered” ([p. 254](#)). As of this writing, the state remains under remedial orders issued by the court.

Following the court’s judgment, the Texas Legislature began addressing the many deficiencies identified in the lawsuit while also responding to other crises that surfaced. This response included increasing the department’s budget by more than \$800 million since 2015 and authorizing hundreds of millions of additional dollars in one-time emergency appropriations ([Legislative Budget Board, 2022, pp. 3, 9](#)). In addition, the Legislature enacted reforms designed to modernize and restructure the state’s foster care system with the goal of making it safer and more responsive to the needs of the children in its care.

Beginning in August 2020, the number of “Children Without Placement” (CWOP) rose dramatically from around 50 per month to more than 400 per month—an increase of more than 700%.

Despite these efforts, progress has been slow, with the state struggling to comply with the federal court’s remedial orders and to implement changes enacted by the Legislature ([McKinley, 2022](#)). As a result of the Department’s sluggish response to legislative directives, many of the problems that have long troubled the Texas foster care system persist.

One example of these perpetual problems is the frequency with which children enter the foster care system without proper placement. Beginning in August 2020, the number of “Children Without Placement” (CWOP) rose dramatically from around 50 per month to more than 400 per month—an increase of more than 700% ([DFPS, 2022a, p. 2](#)). A central driver of the placement crisis was the loss of more than 1,000 beds between December 2020 and April 2022, which mainly impacted older youth and those with more severe and complex needs ([DFPS, 2022b, p. 4](#)).

Although several factors contributed to the loss of placement options for children entering foster care, one factor consistently cited by child-placing agencies and foster families is the increasingly burdensome regulatory environment. In January 2022, an expert panel appointed by the judge presiding over the *M.D. v. Abbott* lawsuit delivered a report analyzing the placement crisis and making recommendations for improvements. According to the expert panel’s report, providers and foster families “were almost uniformly critical of the ways in which the state has increased its oversight of placements,” which they described as “unnecessarily burdensome and punitive” ([Stanley et al., 2022, p. 6](#)). Foster parents expressed that they were fearful of being cited by state licensing authorities “for minor infractions related to a youth’s exercise of autonomy, sometimes breaking household rules” ([p. 7](#)). Providers and families also pointed out that the current regulatory landscape is multilayered and disjointed, with several entities sharing responsibility for oversight of the foster care system. This multilayered system has created confusion as regulators frequently provide inconsistent and, at times, contradictory directives. The

current lack of clarity in the regulatory landscape is having the unintended consequence of making children in foster care less safe.

Nonprofit child-placing agencies and the foster families who volunteer to care for our state’s most vulnerable children are the foundation of the foster care system. The feedback provided by these critical stakeholders underscores that the state’s current approach to foster care licensing and oversight is unsustainable and costing the state much-needed resources for the children in its care. Addressing the foster care placement crisis will require the state to go back to the drawing board and make substantive changes to its licensing, regulatory, and oversight practices that prioritize child safety and reduce barriers to recruiting and retaining high-quality placements for children.

The Regulatory Landscape

Responsibility for licensing and oversight of foster care providers in Texas is shared between the Health and Human Services Commission (HHSC) and DFPS. [Chapter 42 of the Texas Human Resources Code](#) empowers the executive commissioner of HHSC to regulate all child-care and child-placing activities in the state. This regulatory authority includes the power to promulgate rules governing the licensing and ongoing monitoring of child-placing agencies and foster and adoptive homes.

The two primary sources of these rules are the “Minimum Standards for Child Placing Agencies” and “Minimum Standards for General Residential Operations” ([HHSC, 2022a; HHSC 2022b](#)). Regulation of every organization in the state that provides foster care and adoptive services as well as foster and adoptive homes is governed by the more general “Minimum Standards for Child Placing Agencies.” Child placing agencies that provide 24-hour residential care, in which children are housed in specialized facilities that provide more specialized treatment and therapeutic services, are subject to rules contained in the “Minimum Standards for General Residential Operations” ([HHSC, n.d.-a](#)). Both sets of regulations are extensive, comprising more than 900 pages. By way of comparison, Florida regulations governing the licensure of child-placing ([Fla. Admin. Code R. 65C-15](#)) and child-caring ([Fla. Admin. Code R. 65C-46](#)) agencies, foster family homes ([Fla. Admin. Code R. 65C-45](#)), and adoptive homes ([Fla. Admin. Code R. 65C-16](#)) are contained in approximately 90 pages. Despite its seemingly lighter regulatory burden, Florida consistently outperforms Texas in keeping children safe while in foster care. According to data from the United States Department of Health and Human Services Children’s Bureau ([n.d.](#)),

Florida ranked in the top five among states for preventing maltreatment of children in foster care each year from 2016 and 2020, the most recent years for which data is available. During this same time period, the average rank for Texas was 27th. Although the number of pages of regulations is insufficient on its own to provide a full picture of the restrictiveness or effectiveness of an individual state's regulatory environment, it can give us a general sense of the state's approach to oversight of foster homes and providers.

Each regulation within the Texas minimum standards is “weighted based on a common understanding of the risk to children presented if the standard or rule is violated” (HHSC, 2022a, p. 6). The five weights—high, medium-high, medium, medium-low, and low—are intended as an aid for regulatory staff and service providers in assessing the severity of standard violations and guiding corrective action (HHSC, n.d.-b). Compliance with minimum standards is assessed during regularly scheduled and unannounced inspections. Section 42.044 of the Texas Human Resources Code requires each licensed entity to be inspected at least once a year but allows for more inspections as necessary. At least one annual inspection visit must be unannounced.

In addition to compliance with minimum standards, child welfare service providers under contract with DFPS are subject to ongoing contract monitoring (DFPS, n.d.). This monitoring is distinct from the licensing oversight conducted by HHSC, but there is considerable overlap between the two, particularly in the areas of regulatory compliance and child safety. Like minimum standards compliance, contract monitoring may include on-site visits by DFPS contract staff.

A further layer of regulation for providers and homes has come in the wake of the *M.D. v. Abbott* lawsuit. Pursuant to the judge's remedial orders in that case, child welfare providers may also be subject to additional oversight by court monitors appointed by the judge. In its Final Order of January 19, 2018, the court invested the monitors with broad authority to “assess and report on Defendants' compliance with the terms” of the remedial orders issued by the court (*M.D. v. Abbott*, 2018, pp. 113–114). This authority includes the power to gain access to the premises of any provider the monitor “deems relevant to their work” (p. 114). The court's Final Order also included a provision requiring DFPS to place “facilities that show a pattern of contract or policy violations” under “heightened monitoring” (p. 81). The order, however, does not specify what types of contract or policy violations should lead to heightened monitoring, leaving the door open for providers with

low-risk violations unrelated to child safety to come under heightened monitoring. Providers placed under heightened monitoring are subject to “more frequent inspections, corrective actions and, as appropriate, other remedial actions under DFPS' enforcement framework.”

Although heightened monitoring is intended to better ensure the safety of children in the state's care, it has come under criticism from providers who argue that procedures governing heightened monitoring lack clarity. Specifically, providers have “asked for greater clarity about what is expected of them to exit that status and for assistance in making the changes necessary to demonstrate compliance and improvement” (Stanley et al., 2022, pp. 6–7). As of August 2022, DFPS and HHSC are engaged in a “joint effort to streamline and align ... oversight” of providers placed on heightened monitoring (DFPS, 2022c, p. 3). It remains to be seen, however, if these efforts will prove successful in providing the clarity and guidance needed to effectively improve the safety and quality of the state's child welfare services.

Simplifying and Streamlining Child Welfare Regulation

As detailed in the previous section, Texas child welfare service providers are subject to multiple layers of oversight from at least three distinct entities, each empowered to interpret regulatory requirements and take corrective action against providers. This regulatory landscape has come under increasing criticism from providers for creating confusion and inefficiency that ultimately undermines the goal of promoting the safety and well-being of children in the care of the state. It has also led some providers, like Arrow Child and Family Ministries, to cease providing certain services in Texas (Texas Alliance CFS, 2022, 1:33 – 1:51).

Arrow is one of the largest child and family services providers in Texas, serving more than 1,500 children in foster care across 15 locations in the state (Arrow, 2021, p. 10; Texas Alliance CFS, 2022, 0:50–1:32). On May 3, 2022, during the hearing of the Texas Senate Special Committee on Child Protective Services, Arrow CEO Scott Lundy testified that the organization “recently decided to no longer provide residential services in Texas due to the current climate of regulation and decision-making” (Texas Alliance CFS, 2022, 1:33–1:51). In discussing the Texas child welfare regulatory environment, Mr. Lundy testified that while regulation is important for holding providers accountable for keeping kids safe and achieving the desired outcomes, the current approach is undermining those goals (13:55–14:38). According to Lundy, “the regulatory

environment is oppressive, disjointed and siloed, reactive, and is making the system less stable and safe” ([Texas Alliance of Child and Family Services, 2022](#)).

As discussed earlier, these concerns were raised almost universally by providers interviewed by the expert panel appointed in connection with the ongoing *M.D. v. Abbott* lawsuit ([Stanley et al., 2022, p. 6](#)). Providers interviewed by the expert panel specifically pointed to what Mr. Lundy referred to as the “disjointed and siloed” regulatory environment as a major source of the problem, noting that it is common to receive multiple on-site visits at different times from both DFPS and HHSC during which inspectors often provide “misleading and contradictory” feedback ([p. 7](#)). Providers stressed the need for better coordination between DFPS and HHSC to create a “more respectful and transparent process.” Foster families similarly pointed to inconsistency and a lack of knowledge on the part of state regulators as a major barrier to caring for children placed in their homes. Both foster families and service providers expressed a strong desire for greater support and assistance from the state in providing quality care for children.

Although the expert panel’s report downplayed the role of heightened monitoring in contributing to the lack of placements, it did acknowledge that “there is a need to strengthen trust and confidence” between state agencies and the foster families and providers they regulate and recommended that DFPS and HHSC work with providers to develop practices that support “cooperative [and] productive” relationships ([p. 14](#)). Nevertheless, it is clear that the current licensing and regulatory environment is unsustainable and a major contributing factor to the current instability of the Texas child welfare system.

Conclusion and Recommendations

For the better part of the last decade, the Texas Legislature has done an admirable job enacting reforms and providing resources to fundamentally transform the state’s struggling child welfare system. The slow pace of implementation of these reforms by DFPS, however, has hampered transformation efforts. As lawmakers continue this important work during the 88th Legislature, simplifying and streamlining the licensing and regulation of child welfare service providers and foster and adoptive families should be a top priority. Recommended reforms include:

- Designating a single agency as the primary entity responsible for licensing and oversight of child welfare service providers.

- Establishing clear, consistent standards for the application of heightened monitoring as required by the *M.D. v. Abbott* remedial orders. At minimum, these standards should define the circumstances under which a provider comes under heightened monitoring and require the regulatory agency to develop a detailed, step-by-step plan and timeline to guide a provider in working its way off of heightened monitoring.
- Engaging an independent third party to audit the regulatory environment and make binding recommendations for:
 - ▶ eliminating any minimum standards that are unnecessary, duplicative, or not relevant to ensuring child safety;
 - ▶ simplifying procedures to maximize the amount of time caregivers spend serving children as opposed to engaging in compliance activities; and
 - ▶ creating a regulatory culture that prioritizes supporting providers and improving service quality over punitive interventions. ★

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Brown has dedicated his career to serving vulnerable children and strengthening families through community-focused, liberty-minded solutions. As an attorney, he has represented children in the child welfare system, advocated for the rights of parents, and helped build families through domestic and international adoption.

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