

**DEPARTMENT OF HUMAN SERVICES
AGING AND PEOPLE WITH DISABILITIES
OREGON ADMINISTRATIVE RULES**

**CHAPTER 411
DIVISION 89**

**NURSING FACILITIES/LICENSING - COMPLAINTS, INSPECTIONS,
AND SANCTIONS**

411-089-0010 Inspections/Surveys

(Effective 2/1/1995)

(1) Frequency. The Division shall, in addition to any investigations conducted pursuant to complaints, conduct a general inspection of each facility to determine compliance with nursing facility laws on a schedule consistent with the survey schedule defined by the Health Care Financing Administration, and at such other times as the Division deems necessary,

(2) Content. The general inspection will include a review of resident care practices. Results of the review shall be summarized on the survey form.

(3) Documentation: A nursing facility shall maintain all written documentation required by Oregon law. Such written documentation shall be kept on the facility premises. When documents and records are requested by the Division, the facility shall make the requested materials available to the investigator or inspector for review and copying.

Stat. Auth.: ORS 410.070, 441.055 & 441.615

Stats. Implemented: ORS 441.087, 441.050, 441.615, 441.630, 441.690, 441.695 & 441.710

411-089-0020 Sanctions, Generally

(Effective 10/1/1990)

(1) Information collected during a visit by any Division or Area Agency on Aging representative, regardless of the reason for the visit, may be used as a basis for any sanction imposed by the Division.

(2) The use of any one sanction by the Division does not preclude the implementation of any other sanction(s) for the same deficiencies.

(3) The Division may seek appropriate administrative or injunctive relief prior to the completion of an investigation or inspection if it appears that a resident might otherwise be deprived of rights secured by federal or state law.

(4) If after an investigation or inspection the Division believes there is substantial evidence that a violation has occurred or is occurring, the Division may seek by administrative or judicial means to obtain such remedial relief as may be appropriate, including voluntary compliance, contested case, and injunction proceedings.

Stat. Auth.: ORS 441.055, 441.615 & 441.070

Stats. Implemented: ORS 411.050, 441.615 & 441.710

411-089-0030 Civil Penalties

(Amended 7/1/2010)

(1) CONSIDERATIONS. In determining the amount of a civil penalty the Division shall consider:

(a) Any prior violations of statute or rule by the facility or licensee that relates to operation of a nursing facility;

(b) The financial benefits, if any, realized by the facility as a result of the violation, such as costs avoided as a result of not having obtained sufficient staffing, equipment, or supplies;

(c) The gravity of the violation including the actual and potential threat to health, safety, and well-being of residents, the duration of the threat or number or times the threat occurred, and the number of residents threatened;

(d) The severity of the actual or potential harm caused by the violation including whether the actual or potential harm included loss of life or serious physical or emotional injury;

(e) The facility's history of correcting violations and preventing recurrence of violations; and

(f) Exhibit 89-1, Civil Penalty Chart, which is incorporated by reference and is a part of this rule.

(2) SINGLE VIOLATION CIVIL PENALTIES. Violations of any requirement within any part of the following statutes, rules, or sections of the following rules are a violation that may result in a civil penalty after a single occurrence.

(a) Violations involving direct resident care, feeding, or sanitation involving direct resident care including any violation of:

(A) OAR 411-085-0060 (Specialty Nursing Facilities);

(B) OAR 411-085-0200(2) (Facility Employees);

(C) OAR 411-085-0210 to 411-085-0220 (Facility Policies, Quality Assurance);

(D) OAR 411-085-0360 (Abuse);

(E) OAR 411-086-0010 to 411-086-0020 (Administrator, Director of Nursing Services);

(F) OAR 411-086-0040 (except section (3)) (Admission of Residents);

(G) OAR 411-086-0050 to 411-086-0060 (Day Care, Assessment, Care Plan);

(H) OAR 411-086-0110 to 411-086-0150 (Nursing Services);

(I) OAR 411-086-0200 to 411-086-0260 (Physician, Dental, Rehabilitative, Activity, Social, Dietary, and Pharmaceutical Services);

(J) OAR 411-086-0300 (except section (6)) (Clinical Records);

(K) OAR 411-086-0310 to 411-086-0360 (Employee Orientation and Training, Disaster Preparation, Infection Control, Smoking, Furnishings, and Equipment);

(L) OAR 411-087-0100(1)(a) and (c) (Repair and Cleanliness);
or

(M) OAR 411-087-0440 (Alarm and Nurse Call Systems).

(b) Violation involving failure to provide staff-to-resident ratio including any violation of:

(A) OAR 411-086-0030 (except section (1)) (RN Care Manager); or

(B) OAR 411-086-0100 (Nursing Staffing).

(c) Violation of any rule adopted pursuant to ORS 441.610 including:

(A) OAR 411-085-0300 to 411-085-0350 (Resident Rights);

(B) OAR 411-086-0040(3) (Advance Directives);

(C) OAR 411-086-0300(6) (Record Retention); or

(D) OAR chapter 411, division 088 (Rights Regarding Transfers).

(d) Violation of ORS 441.605 (Resident Rights) or any general or final order of the Division.

(3) CIVIL PENALTIES REQUIRING REPEAT VIOLATIONS. Violation of any Division rule not listed in section (2) of this rule is subject to a civil penalty under the following circumstances:

(a) Such violation is determined to exist on two consecutive surveys, inspections, or visits; and

(b) The Division prescribed a reasonable time for elimination of the violation at the time of, or subsequent to, the first citation.

(4) AMOUNT OF CIVIL PENALTY.

(a) Violation of any requirement or order listed in section (2) of this rule is subject to a civil penalty of not more than \$500 for each day the violation occurs, unless otherwise provided by this section;

(b) Violation of any requirement listed in section (3) of this rule is subject to a civil penalty of not more than \$500 per violation, unless otherwise provided by this section;

(c) Violation involving resident abuse that resulted in serious injury or death is subject to a civil penalty of not less than \$500 nor more than \$1,000, or as otherwise required by federal law (ORS 441.995(3) and ORS 441.715(1)(c));

(d) The Division shall impose a civil penalty of not less than \$2,500 for each occurrence of substantiated abuse that resulted in the death, serious injury, rape, or sexual abuse of a resident. The civil penalty may not exceed \$15,000 in any 90-day period.

(A) To impose this civil penalty, the Division shall establish that:

(i) The abuse arose from deliberate or other than accidental action or inaction;

(ii) The conduct resulting in the abuse was likely to cause death, serious injury, rape, or sexual abuse of a resident; and

(iii) The person substantiated for the abuse had a duty of care toward the resident.

(B) For the purposes of this civil penalty, the following definitions apply:

(i) "Serious injury" means a physical injury that creates a substantial risk of death or that causes serious disfigurement, prolonged impairment of health, or

prolonged loss or impairment of the function of any bodily organ.

(ii) "Rape" means rape in the first, second, or third degree as described in ORS 163.355, 163.365, and 163.375.

(iii) "Sexual abuse" means any form of nonconsensual sexual contact, including but not limited to unwanted or inappropriate touching, sodomy, sexual coercion, sexually explicit photographing, or sexual harassment. The sexual contact must be in the form of any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.

(iv) "Other than accidental" means failure on the part of the licensee, or licensee's employees, agents, or volunteers for whose conduct licensee is responsible, to comply with applicable Oregon Administrative Rules.

(5) PAYMENT TO BE CONSIDERED ADMISSION OF VIOLATION. Unless the Division agrees otherwise, for purposes of history of the facility, any payment of a civil penalty shall be treated by the Division as a violation of the statutes or rules alleged in the civil penalty notice for which the civil penalty was paid for.

(6) All penalties recovered shall be deposited in the Quality Care Fund.

(7) NOTICE. The Division's notice of its intent to impose a civil penalty shall include the statements set out in OAR 411-089-0040(3)(a)-(f), and shall also include a statement that if the licensee fails to request a hearing within 10 days of the date the notice was mailed, the licensee shall have waived the right to a hearing.

(8) HEARING REQUEST.

(a) If the Division issues a notice of intent to impose a civil penalty, the licensee shall be entitled to a hearing in accordance with ORS chapter 183.

(b) A request for a hearing must be in writing and must be received by the Division within 10 days of the date the notice of intent to impose a civil penalty was mailed to the licensee. The hearing request must include an admission or denial of each factual matter alleged in the notice and shall affirmatively allege a short plain statement of each relevant affirmative defense the licensee may have. The Division may extend the time allowed for submission of the admission or denial and affirmative defenses for up to 30 calendar days.

(9) **DEFAULT ORDER.** If a hearing is not timely requested, or if the licensee withdraws a hearing request or fails to appear at a scheduled hearing, the Division may enter a final order by default imposing the civil penalty. In the event of a default, the Division's file on the subject of the civil penalty automatically becomes a part of the record for purposes of proving the Division's prima facie case.

Stat. Auth.: ORS 441.615, 441.637, 441.710, 441.715, & 441.990
Stats. Implemented: ORS 410.070, 441.055, 441.615, 441.637, 441.715, & 441.990

411-089-0040 Nursing Facility License Denial, Suspension, Revocation

(Effective 10/1/1993)

(1) **Basis for Denial, Revocation -- Mandatory.** A license shall be suspended and/or revoked or denied if a certificate of noncompliance is issued by the State Fire Marshal, Deputy or other approved representative pursuant to ORS Chapter 479.

(2) **Basis for Denial or Revocation -- Discretionary.** A license may be denied or revoked by the Division when it finds that the licensee or applicant:

(a) Failed to comply with nursing facility law such that the health, safety or welfare of residents is or was jeopardized; or

(b) Failed to substantially comply with nursing facility law during any three inspections within a five year period (for the purpose of this rule,

"inspection" means an on-site visit to the facility by the Division for licensing or certification); or

(c) Has been convicted, under any state or federal law, of a felony or of a misdemeanor associated with the operation of a health care facility or agency within the previous ten years; or

(d) Had an incident of ownership of ten percent or greater in or had a management or control interest in any facility in any state when the facility was terminated from participation in the Medicaid or Medicare program, or at a time when the facility voluntarily terminated participation in the Medicaid or Medicare program during any state or federal termination process; or

(e) Had an incident of ownership of ten percent or greater in any facility in any state which failed to reimburse any state or the federal government for Medicaid or Medicare overpayments on a timely basis within the preceding five year period; or

(f) Had an incident of ownership of ten percent or greater or a management or control interest in a health care facility or agency whose license was involuntarily suspended, revoked or not renewed within the preceding five years; or

(g) Had a nursing home administrator's license revoked, suspended or not renewed in any state (excluding revocation based on failure to pay license fee or failure to maintain required continuing education requirements when not serving as an administrator) within the preceding five year period; or

(h) Provided false, incorrect or misleading information to the Division on the license application form; or

(i) Provided false, incorrect or misleading information to the Division regarding care of residents, facility finances or resident funds; or

(j) Failed to provide workers' compensation coverage for health care facility employees when required by state law in any state; or

(k) Permitted, aided or abetted any illegal act which had a significant adverse impact on resident health, safety or welfare within the preceding five year period; or

(l) Had an incident of ownership of ten percent or greater in any health care facility in any state at a time when the facility was denied an operating license (excluding denial based upon absence of bed need); or

(m) Demonstrated fiscal instability within the preceding five years and such instability relates to the licensee/applicant's ability to provide care and/or operate a facility. Examples of fiscal instability include but are not limited to the experiencing of more than one instance of any of the following events or the experiencing of more than one of the following events:

(A) Failure to compensate employees in a timely manner;

(B) Failure to maintain in any facility an adequate inventory of medical supplies, personal supplies, or food;

(C) Failure to promptly pay any judgments, taxes, warrants or other liens;

(D) Failure to pay utility bills or other bills related to the operation or maintenance of any facility (excluding failure to pay when the facility has a clear basis to dispute the billing); or

(E) A poor credit rating; or

(n) Has demonstrated fiscal instability within the past five years by having experienced any other history of poor credit or poor financial management; or

(o) Has failed to pay a civil penalty imposed by the Division.

(3) Notice of Intent to Revoke or Deny. The Division's notice of its intent to deny or revoke a nursing facility license shall include:

(a) A statement that the licensee or applicant has a right to a contested case hearing or a statement of the time and place of the hearing;

(b) A statement of the authority and jurisdiction under which the hearing is to be held;

(c) A reference to the particular sections of the statute and rules involved;

(d) A short and plain statement of the matters asserted or charged;

(e) A statement that the licensee or applicant is entitled to be represented by counsel and to respond and to present evidence and argument on all issues involved;

(f) A statement that the record of the proceeding to date, including information in the Division file or files on the subject of the revocation or denial of the license automatically becomes part of the contested case record upon default for purposes of proving the Division's prima facie case; and

(g) A statement that if the licensee or applicant fails to request a hearing within 21 days of the date the notice of revocation was received, or within 60 days of the date the notice of denial was received, whichever is applicable, the licensee or applicant shall have waived the right to a hearing.

(4) Informal Conference. When the Division issues a notice of intent to revoke or deny a license, the licensee or applicant shall be entitled to an informal conference to respond to the notice. The conference shall be held before a person authorized to issue the order or to make recommendations regarding issuance of the order. A request for an informal conference must be received in writing and must be received by the Division within ten days of the date of the notice of the intent to revoke or deny the license was received by the licensee or applicant. If the licensee or applicant fails to submit a timely request for a conference, the licensee or applicant shall have waived the right to the conference.

(5) Hearing:

(a) Right to Hearing. When the Division issues a notice of intent to revoke or deny a license, the licensee or applicant shall be entitled to a contested case hearing in accordance with the provisions of ORS Chapter 183;

(b) Request for Hearing. A request for hearing must be in writing and must be received by the Division within:

(A) Twenty-one days of the date the licensee received the notice of revocation; or

(B) Sixty days of the date the applicant received the notice of denial of licensure.

(c) Date of Hearing. The hearing shall be held within 60 days of the request for hearing unless the Division and the licensee or applicant agree to a later date;

(d) Continued Operation Prohibited. A facility may not continue operation if the facility license is immediately suspended because of serious and immediate danger to resident health or safety pursuant to OAR 411-089-0040(2).

(6) Default Order. If the licensee or applicant fails to request a contested case hearing within the prescribed time period, withdraws a previous hearing request, or fails to appear at a scheduled hearing, the Division may enter an order denying or revoking the license by default. In the event of a default, the Division's file(s) on the subject of revocation or denial automatically become part of a contested case record for the purposes of proving the Division's prima facie case.

(7) Emergency Suspension Order:

(a) When the Division finds that a serious and immediate threat to resident health and safety exists, the Division may immediately suspend a nursing facility license. An emergency suspension order must be in writing. The order may be issued without prior notice to the licensee and without a prior opportunity for a contested case hearing;

(b) Except where the threat to residents is so imminent that the Division determines that pre-suspension notice is not practical, the Division will provide the licensee with a pre-suspension notice and an opportunity to object prior to issuing an emergency suspension order. The pre-suspension order shall:

(A) Describe generally the acts of the licensee and/or circumstances that would be grounds for an emergency suspension order under this rule; and

(B) Describe generally the reasons why the acts of the licensee and/or the circumstances seriously and immediately endanger resident health and safety; and

(C) Identify the person at the Division whom the licensee may contact and who is authorized to make recommendations regarding issuance of the order.

(c) If pre-suspension notice is issued, the licensee shall be entitled to an immediate opportunity to respond to the notice before a person authorized to issue the order or to make recommendations regarding issuance of the order. The emergency suspension order may be issued at any time thereafter;

(d) When an emergency suspension order is issued, the Division will serve the order on the licensee either personally or by registered or certified mail. The order shall include the following statements:

(A) The licensee's right to a hearing, or a statement of the time and place of the hearing;

(B) The authority and jurisdiction under which the hearing is to be held;

(C) A short plain statement of the matters asserted or charged;

(D) A reference to the particular sections of the statutes and rules involved;

(E) That the licensee may elect to be represented by counsel and may respond and present evidence and argument on all issues involved;

(F) That the licensee has a right to demand that a hearing, if requested, be held as soon as practical;

(G) That if the demand for a hearing is not received by the Division within 90 days of the date of the emergency suspension order the licensee shall have waived its right to a hearing under ORS Chapter 183;

(H) The effective date of the emergency suspension order;

(I) Findings of the specific acts or omissions of the licensee that are the grounds for the suspension, and the reasons the acts or omissions seriously and immediately threaten the health and safety of the residents; and

(J) That the Division may combine the hearing on the emergency suspension order with any other Division proceeding affecting the license, and that the procedures for the combined proceeding shall be those applicable to the other proceeding affecting the license.

(e) If a timely request for a hearing is received, the Division will hold the hearing as soon as practical. At the hearing the Division shall consider the facts and circumstances, including, but not limited to:

(A) Whether the acts or omissions of the licensee pose a serious danger to resident health and safety; and

(B) Whether the circumstances at the time of the hearing justify confirmation, alteration or revocation of the order.

(8) License Expiration. If the Division determines a license has expired due to the facility's discontinued operation, the licensee has a right to an informal conference under section (4) of this rule and a hearing under section (5) of this rule. The Division may issue a default order pursuant to section (6) of this rule.

Stat. Auth.: ORS 410.070, 441.030, 441.055 & 441.615

Stats. Implemented: ORS 441.030 & 441.615

411-089-0050 Restriction of Admissions

(Effective 10/1/1993)

(1) Purpose. The purpose of this rule is to protect nursing facility residents and prospective residents from threats to their health, safety and welfare, and to help ensure that the attention of facilities with serious deficiencies is directed toward correcting those deficiencies.

(2) Basis for Admission Restriction. When the Division finds an immediate threat to resident health and safety, the Division may order an immediate restriction of admissions, or may immediately restrict the number or type of admissions at the facility. An Admission Restriction Order shall be in writing and may be issued without prior notice to the licensee and without an opportunity for a contested case hearing:

(a) In determining whether to order a restriction of admission under this rule, the Division shall consider:

(A) The needs of the residents and prospective residents;

(B) The severity of the threat to current and prospective residents; and

(C) The history of the care provided by the licensee.

(b) For the purposes of this rule, an immediate threat to resident health and safety may exist when a facility lacks adequate alarm systems including, but not limited to, call bells, fire, door alarm and/or any other means to protect against a threat to resident health and safety;

(c) For the purposes of this rule, an immediate threat to resident health and safety exists when:

(A) The Division finds a pattern of:

(i) Failure to assess or take action to prevent or treat decubitus ulcers, weight loss, infection, dehydration or other changes in the physical condition of residents; or

(ii) Failure to follow physician's orders, including failure to correctly administer medications; or

(iii) Abuse as defined by ORS 441.630, or preventable injuries; or

(B) The Division finds that any other condition or combination of conditions exists which, in the opinion of the Division, constitute an immediate threat to resident health and safety, or a potential threat to new residents.

(3) Impending Admission Restriction Notice. Except where the threat to residents is so imminent that the Division determines pre-restriction notice is not practical, the Division will provide the licensee with a pre-restriction notice and an opportunity for an informal conference at least 48 hours prior to issuing an Admission Restriction Order. The Notice of Impending Restriction of Admission may be provided in writing, sent by certified or registered mail to the licensee, or provided orally in person or by telephone to the licensee or to the person apparently in charge at the facility. When the notice is delivered orally, the Division shall subsequently provide written notice to the licensee by registered or certified mail. The pre-restriction notice shall:

(a) Describe generally the acts or omissions of the licensee and the circumstances which led to the finding that an immediate threat to resident health and safety exists at the facility;

(b) Describe generally why the acts or omissions and the circumstances create an immediate threat to resident or prospective resident health and safety; and

(c) Identify a person at the Division whom the licensee may contact and who is authorized to enter the Admission Restriction Order or to make recommendations regarding issuance of an order; and

(d) Specify the date and time the Admission Restriction Order will take effect.

(4) Informal Conference. If an informal conference is requested, the conference shall be held at a location designated by the Division. If determined to be appropriate by the Division, the conference may be held by telephone:

(a) With Pre-Admission Restriction Notice. If a pre-admission restriction notice is issued, the licensee shall be provided with an opportunity for an informal conference to object to the Division's proposed action. The Admission Restriction Order may be issued at any time after the informal conference;

(b) Without Pre-Admission Restriction Notice. If an Admission Restriction Order is issued without prior notice, the licensee may request an immediate informal conference to object to the Division's action.

(5) Admission Restriction Order. When an Admission Restriction Order is issued, the Division shall serve the order on the licensee either personally or by registered or certified mail. The order shall include the following statements:

(a) The licensee's right to a hearing or a statement of the time and place of the hearing;

(b) The authority and jurisdiction under which the hearing is being held;

(c) A reference to the particular sections of the statute and rules involved;

(d) The effective date of the restriction;

(e) A short and plain statement of the nature of the matter asserted or charged;

(f) That the licensee may elect to be represented by counsel and to respond and present evidence and argument on all issues involved. If

the licensee is to be represented by counsel, the licensee shall notify the Division;

(g) That the licensee has the right to demand that a hearing, if requested, be held as soon as practical;

(h) That if a demand for hearing is not received by the Division within 90 days of the date of the notice of the Admission Restriction Order, the licensee shall have waived the right to a hearing under ORS Chapter 183;

(i) Findings of specific acts or omissions of the licensee are grounds for the admission restriction, and the reasons these acts or omissions constitute an immediate and serious threat to the health and safety of the residents; and

(j) That the Division may combine the hearing on the Admission Restriction Order with any other Division proceeding affecting the licensee. The procedures for the combined proceeding shall be those applicable to the other proceedings affecting the license.

(6) Posting of Admission Restriction Order. A licensee who has been ordered to restrict admissions to a facility shall immediately post a "Restriction of Admissions Notice" on both the inside and outside faces of each door of the facility through which any person may enter or exit the facility. Such public notices shall be provided by the Division. The notices shall not be removed, altered or obscured until the restriction has been lifted by the Division. Removal of the notice without Division authorization is a Class C misdemeanor.

(7) Hearing:

(a) Right to Hearing. If the Division issues an Admission Restriction Order, the licensee is entitled to a contested case hearing pursuant to ORS Chapter 183;

(b) Hearing Request. The request for a hearing must be received within 90 days of the Admission Restriction Order;

(c) Date of Hearing. When a timely request for hearing is received, the hearing will be held as soon as practical, but not later than 30 days after the request for hearing, unless the Division and the licensee agree to a later date;

(d) At the hearing, the Division shall consider the facts and the circumstances including, but not limited to:

(A) Whether at the time of the issuance of the restriction there was probable cause from evidence available to the Division to believe there were grounds for the Admission Restriction Order;

(B) Whether the acts or omissions of the licensee posed an immediate threat to resident health and safety;

(C) Whether changed circumstances, including implementation of effective systems to help ensure deficiencies causing the restriction do not recur, eliminate the need for continuing the restriction; and

(D) Whether the agency followed the appropriate procedures in issuing the restriction.

(8) Request for Reinspection. When the licensee determines the circumstances causing the restriction no longer exist, and that effective systems are in place to help ensure similar deficiencies do not recur, the licensee may make written request to the Division for a reinspection. The Division will conduct the reinspection within 15 working days following receipt of the written request.

(9) Reinspection.

(a) If the Division finds there is no longer an immediate threat to resident health and safety as defined in this rule, and finds effective systems are in place to ensure similar deficiencies do not recur, the restriction will be lifted. The Division will notify the facility by telephone of the decision to lift or not lift the restriction within five working days from the completion of the reinspection. Telephone notification will be followed by written notification;

(b) If the Division determines an immediate threat to resident health and safety continues to exist after a reinspection, the admission restriction will not be lifted and the Division is not obligated to reinspect again for at least 45 days. A decision not to rescind the Admission Restriction Order shall be given to the licensee in writing and the licensee shall be informed of the right to a contested case hearing pursuant to ORS Chapter 183. Nothing in this rule is intended to limit the Division's authority to visit or inspect the facility at any time.

(10) Exceptions to Admission Restriction Order. While an Admission Restriction Order is in place, the Division, in its sole discretion, may authorize the facility to admit former residents with a right of return or right of readmission. The Division, in its sole discretion, may also authorize the facility to admit new residents for whom the Division determines that alternate placement is not feasible.

Stat. Auth.: ORS 410.070, 441.030, 441.055 & 441.615
Stats. Implemented: ORS 441.030 & 441.615

411-089-0070 Facility Fund
(Adopted 7/1/2010)

(1) Moneys in the Facility Fund are appropriated to the Division to pay for the reasonable expenses of a trustee or temporary manager.

(2) BASIS FOR APPOINTMENT.

(a) A trustee may be appointed when a court finds that the health and welfare of facility residents are in jeopardy pursuant to ORS 441.281.

(b) A temporary manager may be appointed by the Division, with consent of the licensee, if the Division determines that the health or safety of facility residents is in jeopardy pursuant to OAR 411-089-0075.

(3) LICENSEE REPAYMENT TO FACILITY FUND. When the Division is required to utilize the Facility Fund to meet expenses of a trustee or temporary manager, the amount used shall constitute a loan to the facility and shall be repayable to the Facility Fund.

(4) FACILITY FUND FEE ASSESSMENT.

(a) Licensees shall pay an annual fee that does not exceed the annual license fee until the Facility Fund balance reaches \$750,000.

(b) When the Facility Fund balance reaches \$750,000, annual fee collection shall be discontinued.

(c) When the Facility Fund balance falls below \$600,000, annual fee collection shall be reinstated.

(5) ALLOWABLE COST. The facility payment described in section (4)(a) of this rule shall be considered an allowable cost.

Stat Auth: ORS 441.341, 441.615, 441.637, 441.710, 441.715, & 441.990
Stats Implemented: ORS 441.301, 441.303, and 441.336

411-089-0075 Temporary Manager

(Adopted 7/1/2010)

(1) APPOINTMENT. The Division, with the consent of the licensee, may appoint a temporary manager to assume control of the day-to-day operation of the facility in accordance with Oregon Laws 2009, chapter 539, sections 14 through 18. The appointment may be for a period not to exceed six months.

(2) CRITERIA. A temporary manager may be appointed if the Division determines that the health or safety of residents in the facility are, or in the immediate future shall be, in jeopardy based upon:

(a) The licensee's unwillingness or inability to comply with Division rules in the operation of the facility;

(b) The imminent insolvency of the facility;

(c) The Division's revocation or suspension of the license of the facility; or

(d) The Division's determination that the licensee intends to cease operations and to close the facility without adequate arrangements for the relocation of the residents.

(3) DUTIES AND POWERS. The temporary manager has all of the duties and powers, as agreed upon between the Division and the licensee that are necessary to ensure the safety and well-being of the residents and the continued operation of the facility.

(4) QUALIFICATIONS. In order to qualify for appointment as temporary manager, the prospective appointee must:

(a) Be familiar with the Division's rules for the operation of the facility to be served;

(b) Be familiar with the needs of the resident population in the facility to be served; and

(c) Have a demonstrated history (five year minimum) of operating and managing a similar facility in substantial compliance with Division rules.

Stat. Auth.: ORS 441.615, 441.637, 441.710, 441.715, & 441.990

Stats. Implemented: ORS 410.070, 441.055, 441.615, 441.637, 441.715, & 441.990

Complaints, Inspections & Sanctions

411-089-0100 Complaint Intake, Investigation

(Effective 2/1/1995)

(1) Complaint Intake. The local SPD/AAA office receiving a complaint shall ask questions to obtain as much of the information requested on the SPD Complaint Intake Form as possible. The local office of the Division or Type B AAA shall have at least one person designated and available to receive complaint calls throughout the work day.

(2) Complaint Investigation.

(a) All Complaints Investigated. The Division shall ensure all complaints, including anonymous complaints, received regarding violation of nursing facility laws are investigated.

(b) Multiple Problems. If the complaint alleges more than one problem, each allegation of abuse or another rule violation shall be treated as a separate complaint, and shall be given a separate finding. This is not intended to require a separate status report or complaint investigation report for each allegation.

(c) Complainant Interview. The SPD/AAA office representative shall interview the complainant immediately and as necessary during the investigation.

(d) Accompany Investigator. The investigator shall ask if the complainant and/or a designee wish to accompany the investigator to the site. The purpose of allowing the complainant or a designee to accompany the investigator is to identify individuals and circumstances relevant to the complaint. If someone is to accompany the investigator, the investigator shall notify such party of the time and allow the party to accompany the investigator during the site visit.

(e) Timeframe to Begin Investigation. The investigations shall be initiated as follows:

(A) If the complaint alleges a resident's health or safety is in imminent danger or the resident has recently, died, been hospitalized or been treated in an emergency department the on-site investigation shall begin within two hours of the complaint.

(B) If the complainant alleges circumstances that could result in abuse and the circumstances could place a resident's health or safety in imminent danger, the on-site investigation shall begin prior to the end of the first work day following receipt of the complaint.

(C) All other complaint investigations shall begin and be completed within 90 days following receipt of the complaint.

(f) Prior Notification Prohibited. The Division/AAA shall not contact the facility prior to the on-site investigation.

(g) Facility Visit. The investigation shall include at least one unannounced visit to the facility. Upon arrival at the facility, the investigator shall announce his/her presence to the administrator or other person designated to be in charge. The investigator shall explain the purpose of the visit unless the investigator has reason to believe that disclosing the purpose of the visit would impede the investigation.

(h) Witness Interview. Reasonable effort shall be made to interview all possible witnesses, including the alleged perpetrator(s), if any, the resident(s) and any other person(s), including residents, identified by any source as having personal knowledge about the allegation(s).

(A) Investigators have the authority to conduct the interview in private unless the witness expressly makes an unsolicited request that a third party be present.

(B) The investigator shall obtain the mailing address of the alleged perpetrator.

(C) If the investigator is unable to interview a witness identified by the complainant, the complainant shall be notified before the investigation is concluded.

(i) Investigation Format. In addition to interviews, the investigator shall make personal observations of physical circumstances and review documentation, including clinical records. The facility shall promptly provide all requested documentation available for review and copying.

Stat. Auth.: ORS 410.070, 441.055 & 441.637

Stats. Implemented: ORS 441.637 & 441.650

411-089-0110 Initial Status Report (Abuse Complaints Only)
(Effective 2/1/1995)

(1) Initial Status Report for Abuse Investigations (Local SPD/AAA Office). Except in cases where the investigation is part of a general inspection pursuant to federal law, the Division or Type B AAA shall complete an Initial Status Report for all abuse investigations within two work days of the start of the investigation.

(2) Content. The Initial Status Report shall include:

(a) A summary of the complaint identifying each alleged incident or problem. The Initial Status Report shall not include names of residents, complainants or other people interviewed during the investigation;

(b) The status of the investigation:

(c) Whether the complaint was filed at the direction of facility administration:

(d) A determination of whether action to protect the resident(s) is needed and whether the facility must take action:

(e) The name and telephone number of the investigator:

(f) The projected date the Complaint Investigation Report will be completed; and

(g) A statement that the Complaint Investigation Report will be available upon request after the Division issues a Letter of Determination.

(3) Distribution. The Initial Status Report shall be provided either in person or by mail to the following individuals as soon as practical, but no later than two work days after its completion:

(a) The complainant, unless the complainant waives the requirement;

(b) If the complaint involves a specific resident or residents, to the resident(s) or person(s) designated to receive information concerning the resident(s);

(c) A representative of the Long Term Care Ombudsman, upon request:

(d) The facility; and

(e) SPD Central Office.

(4) Availability of Initial Status Report. The Initial Status Report shall be placed in the local SPD/AAA facility files and available for public inspection upon completion.

Stat. Auth.: ORS 410.070, 441.055 & 441.637

Stats. Implemented: ORS 441.637 & 441.650

411-089-0120 Complaint Investigation Report (Local SPD/AAA Office)
(Effective 2/1/1995)

(1) Report Required. The investigator shall write a complaint investigation report after each investigation is completed.

(2) Content. The complaint investigation and the findings shall be summarized on the SDS Complaint Investigation Report Form. The Form shall not include the names of any resident, complainant or person(s) interviewed. The investigation report shall include:

(a) The nature of the allegation(s);

(b) The investigator's personal observations relating to relevant evidence, including the date(s) and time(s) of each incident (as appropriate);

(c) A summary of the documents reviewed;

(d) A summary of each interview.

(e) The investigator's findings regarding the incident or problem alleged in each allegation; and

(f) The factual basis for the finding.

(3) Investigator's Conclusions. For each alleged wrong doing the investigator shall prepare a separate evaluation and written conclusion. The conclusion shall be:

- (a) The alleged wrong doing is substantiated;
- (b) The alleged wrong doing is not substantiated; or
- (c) The investigator is unable to determine whether the alleged wrong doing is substantiated or not substantiated because necessary, relevant information could not be obtained; or that following a complete investigation, a reasonable person could not objectively conclude whether it was likely the wrong doing occurred.

(4) Timeframe for Completion Processing (Local Office).

- (a) If a complaint alleges abuse, the complaint report shall be completed within 5 work days after the investigation is completed, but not later than 62 days after receipt of the complaint.
- (b) All other complaint investigation reports shall be completed within 90 days of the receipt of the complaint.
- (c) Investigation reports shall be sent to SPD Central Office promptly upon completion.

Stat. Auth.: ORS 410.070, 441.055 & 441.637

Stats. Implemented: ORS 441.637, 441.650 & 441.676

411-089-0130 Division Findings for Complaint Investigations (Central Office)

(Effective 2/1/1995)

Central Office Review. The Division shall review the Complaint Investigation Report and any evidence submitted with the report.

(1) Central Office Determination. The Division shall review the Complaint Investigation Report and shall determine for each alleged violation there is:

(a) "Substantiated abuse" (a reasonable person could objectively conclude it is more likely than not abuse occurred), including identification of rule violated;

(b) "Substantiated, non-abuse" (a reasonable person could objectively conclude it is more likely than not a rule violation, other than abuse, occurred), including identification of rule violated;

(c) "Unsubstantiated" (a reasonable person could objectively conclude it is unlikely any rule violation occurred); or

(d) "Unable to Substantiate" (an investigation could not be completed because necessary, relevant information could not be obtained; or that following a complete investigation, a reasonable person could not objectively conclude whether it was more or less likely a rule violation occurred).

(2) If the Division determines there is substantiated abuse, the Division shall determine whether the facility was responsible, or individual(s) responsible, or both. In determining responsibility, the Division shall consider intent, knowledge, ability to control, and adherence to professional standards, as applicable.

(a) Facility Responsible. Examples of when the Division shall determine the facility is responsible for the abuse include but are not limited to the following:

(A) Failure to provide minimum staffing in accordance with OAR 411-086-0100(2) without reasonable effort to correct; or

(B) Failure to check for or act upon relevant information available from a licensing board; or

(C) Failure to act upon information from any source regarding a possible history of abuse by any staff or prospective staff; or

(D) Failure to adequately train or orient staff; or

(E) Failure to provide adequate supervision of staff/residents; or

(F) Failure to allow sufficient time to accomplish assigned tasks;
or

(G) Failure to provide adequate services; or

(H) Failure to provide adequate equipment or supplies; or

(I) Failure to follow orders for treatment or medication.

(b) Individual Responsible. Examples of when the Division shall determine the individual is responsible shall include but are not limited to:

(A) Intentional acts against a resident(s) including assault, rape, kidnapping, murder, sexual abuse, or verbal or mental abuse;

(B) Acts contradictory to clear instructions from facility, unless the act is determined by the Division to be caused by a "facility problem" such as those identified in paragraph (2)(b)(A) of this rule:

(C) Callous disregard for resident rights or safety; or

(D) Intentional acts against a resident's property (e.g., theft, misuse of funds).

(c) An individual shall not be considered responsible for the abuse if the individual demonstrates the abuse was caused by factors beyond the individual's control. "Factors beyond the individual's control" are not intended to include such factors as misuse of alcohol or drugs or lapses in sanity.

Stat. Auth.: ORS 410.070, 441.055 & 441.637

Stats. Implemented: ORS 441.637, 441.650, 441.665 & 441.677

411-089-0140 Letters of Determination
(Amended 7/1/2010)

Within 60 days of receipt by the Division of the investigation report, the Division shall issue a letter of determination.

(1) CONTENT. The letter of determination shall:

- (a) Explain the nature of each allegation;
- (b) Include the date and time of each occurrence;
- (c) For each allegation, include a determination of whether the allegation is substantiated, unsubstantiated, or unable to substantiate;
- (d) For each substantiated allegation, state whether the violation was abuse or another rule violation;
- (e) For each substantiated allegation of abuse, explain the Division's determination of responsibility;
- (f) Include a copy of the complaint investigation report;
- (g) State that the complainant, any individual found responsible for abuse, and the facility have 10 days to provide additional or different information; and
- (h) Explain, when applicable, if sanctions (e.g., civil penalty, license revocation) are pursued, a formal appeal process shall be available.

(2) APPEAL RIGHTS, NURSING ASSISTANT. The letter of determination, in cases of substantiated abuse by a nursing assistant, shall explain the following:

- (a) The Division's intent to enter the finding of abuse into the Nursing Assistant Registry;
- (b) The nursing assistant may provide additional information for inclusion in the Nursing Assistant Registry if provided within 10 days;
- (c) The Nursing Assistant Registry;
- (d) The nursing assistant has 10 days to respond in writing with different or additional information, 30 days to request in writing a

contested case hearing as provided in ORS 183.411 to 183.470, and the consequences of failure to respond; and

(e) If the opportunity to request a contested case hearing expires without a request for hearing by the nursing assistant, the nursing assistant shall be found responsible for the abuse and the finding shall be entered in the Nursing Assistant Registry.

(3) DISTRIBUTION.

(a) The letter of determination shall be distributed to the facility, the complainant (if known), and the Division or Type B AAA office;

(b) The letter of determination shall be sent by certified mail or delivered in person to any nursing assistant found responsible for abuse. In the case of a nursing assistant, notice sent to the nursing assistant's last known address is sufficient to meet the requirements of this rule;

(c) The letter of determination shall also be mailed to any health related board or agency that certified or licensed an individual determined to be responsible for abuse. EXCEPTION: If the party determined to be responsible is a nursing assistant, the letter may not be mailed to the State Board of Nursing until the nursing assistant has exhausted all his or her appeal rights; and

(d) A copy of the letter of determination shall be placed in the Division's facility complaint file.

(4) REVISION.

(a) The Division may reinvestigate a complaint, issue a revised letter of determination, or both if the Division determines further information provided by the complainant, accused individual, or facility merits such action.

(b) If the Division issues a revised letter of determination, the letter shall be distributed to all individuals identified in section (3) of this rule.

(5) FAILURE TO REQUEST HEARING OR TO APPEAR.

(a) If the nursing assistant fails to request a contested case hearing in writing within 30 days of the letter of determination, or if the nursing assistant scheduled to attend the hearing fails to attend, the Division shall affirm the letter of determination and notify the State Board of Nursing of the Division's finding. The abuse finding shall be entered into the Nursing Assistant Registry.

(b) If the nursing assistant is scheduled to appear at a contested case hearing but fails to attend at the scheduled time, or within 15 minutes thereafter, the nursing assistant shall be considered to have waived the right to a hearing. The hearing may be rescheduled if:

(A) A written request to reschedule the hearing is received by the Division within 10 days after the scheduled hearing; and

(B) The causes for not attending at the scheduled time for the hearing and for not requesting a postponement of the hearing prior to the hearing were beyond the control of the nursing assistant.

(6) JUDICIAL REVIEW. The nursing assistant found to be responsible for abuse shall be provided notice of the opportunity for judicial review pursuant to ORS 183.482. This notice shall accompany or be incorporated within the Division's final order regarding the nursing assistant's responsibility for abuse.

Stat. Auth.: ORS 410.070, 441.055, & 441.637

Stats. Implemented: ORS 441.637 & 441.677

411-089-0150 Administrative Review for Nursing Assistants (Abuse)
(Repealed 7/1/2010)

EXHIBIT 89-1 Civil Penalty Chart (OAR 411-089-0030)

I. RANGE OF CIVIL PENALTIES

A.	Abuse: ORS 441.715(1)(c)	\$2,500 - \$15,000
B.	Abuse: ORS 441.995(3)	\$500 - \$1,000
C.	Injury, Serious ¹	\$500 - \$1,000
D.	Injury, Moderate ²	\$300 - \$500
E.	Injury, Minor ³	\$100 - \$300
F.	Injury, Potential	\$100 - \$300
G.	Other	\$100 - \$500
	a. Involuntary seclusion	
	b. Corporal punishment	
	c. Verbal abuse	
	d. Financial abuse (consider amount taken/expended)	
	e. Emotional abuse	
	f. Loss of dignity	

II. MODIFIERS (The history for the 24 months prior to the incident will be used to determine whether penalty is assessed at the upper or lower penalty ranges listed above)

- A. Citation of “related problem”⁴ through survey, complaint investigation or letter (increases penalty)
- B. Civil Penalty issues for “related problem” (increases penalty)
- C. Facility history of preventing, correcting other violations (If SPD determines the licensee took significant action to correct “related problem,” SPD *may* waive part of all of the modifier (IIA & IIB))
- D. Facility history relating to current violation (SPD may increase penalty if facility fails to correct situation/eliminate threat after being made aware of situation/incident. Decrease or suspend penalty after evaluating facility response to incident and efforts to eliminate recurrence)
- E. Extended duration (If SPD determines the licensee or facility staff had opportunity to correct the deficiency after it first occurred, but action was delayed SPD may either increase the Civil Penalty by up to 100%, or issue the penalty on a “per day” basis)
- F. Facility Financial Benefit (SPD may increase the base Civil Penalty, or the modifier, based upon SPD’s estimate of the cost savings to the facility)
- G. Complaint is self-reported (reduces penalty)
- H. Multiple residents: Potential or actual injury (increases penalty)

¹**Serious Injury** means permanent physical injury that creates a substantial risk of death or that causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

²**Moderate Injury** means an injury, which would ordinarily be temporary loss of functioning in a typical person and/or illness or pain lasting more than 24 hours, even if controlled by medication.

³**Minor Injury** means an injury resulting in temporary discomfort/pain. Treated in-house, including medication/treatment. Bed rest for short duration, ordinarily not more than 24-48 hours.

⁴**Related Problem** means the same staff or resident(s) involved, or the same rule or same harm or same underlying cause.