

**NOTICE OF PROPOSED RULEMAKING FILING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT**

For internal agency use only.

Department of Human Services, Aging and People with Disabilities (APD)		411
Agency and Division Name	Administrative Rules Chapter Number	
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FILING CAPTION

(Must be 15 words or fewer)

Prohibits adult foster homes, residential care/nursing facilities from retaliating against whistleblowers, SB 917 (2019).

Last Date and Time for Public Comment: Written comments may be submitted via email to Kristina.R.Krause@dhsola.state.or.us, faxed to 503-373-7823, or mailed to Kristina Krause, APD Rules Coordinator, 500 Summer Street NE, E2, Salem, OR 97301 until **05/26/2020 at 5 p.m.**

05/20/2020	4 p.m. – 5 p.m.	Call-in only due to CDC/Governor’s guidance + 1 (503) 934-1400, Conference ID: 41081340#	Staff
Hearing Date	Time	Address	Hearings Officer

Note for attendees: If you wish to provide comment, please call in to the number above by no later than 15 minutes after the start time listed.

Everyone has a right to know about and use DHS|OHA programs and services. DHS|OHA provides free help. Some examples of the free help DHS|OHA can provide are: sign language and spoken language interpreters, written materials in other languages, braille, large print, audio and other formats. If you need help or have questions, please contact Eleni Gialoyrakes at 503-373-2083, 711 TTY, eleni.m.gialoyrakes@dhsola.state.or.us at least 48 hours before the meeting.

RULEMAKING ACTION

List each rule number separately (000-000-0000) below. Attach proposed, tracked changed text for each rule at the end of the filing.

ADOPT:

AMEND: 411-052-0005; 411-052-0025; 411-052-0035

REPEAL:

RULE SUMMARY:

411-052-0005: Prohibits licensee or administrator from interfering with or retaliating against an employee or volunteer who discloses information of mistreatment of a resident in the adult foster home.

411-052-0025: Imposes mandatory penalty of \$500 for interfering with or retaliating against an individual making a good faith disclosure of mistreatment in an adult foster home.

411-052-0035: The Department may revoke or refuse to renew the license of a licensee who has interfered with or retaliated against a whistleblower in an adult foster home.

STATEMENT OF NEED AND FISCAL IMPACT

Need for Rule(s):

The Department needs to immediately amend rule to comply with SB 917 (2019). Although this law applies to nursing facilities, residential living facilities and adult foster homes, the administrative rules for both nursing facilities and residential care facilities do not need to be amended as their language already meets the intent of this law. However, adult foster home rules do not contain comparable language and need to be amended.

Fiscal and Economic Impact:

The Fiscal and Economic Impact is stated below in the Department's statement of Cost of Compliance.

Statement of Cost of Compliance:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s).

State Agencies: The Department estimates there will be no fiscal impact on state agencies.

Units of Local Government: The Department estimates there will be no fiscal impact on the units of local government.

Consumers: The Department estimates there will be no fiscal impact on consumers.

Providers: The Department estimates there will be no fiscal or economic impact on providers.

Public: The Department estimates there will be no fiscal or economic impact on the public.

(2) Effect on Small Businesses:

(a) Estimate the number and type of small businesses subject to the rule(s);

There are approximately 1,600 adult foster homes subject to this rule, most of which are considered a small business as defined by ORS 183.310.

(b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s);

The proposed changes impact providers as described above in the Department's statement of cost of compliance.

(c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

The proposed changes impact providers as described above in the Department's statement of cost of compliance.

Describe how small businesses were involved in the development of these rule(s)?

A small business, or representative of a small business, as defined in ORS 183.310 participated on the Administrative Rule Advisory Committee. Small businesses will also be included in the public review and comment period.

Documents Relied Upon, and where they are available:

SB 917 Enrolled (2019 Regular Session)

<https://olis.oregonlegislature.gov/liz/2019R1/Measures/Overview/SB917>

Oregon Laws 2019, Chapter 381

https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2019orlaw0381.pdf

Was an Administrative Rule Advisory Committee consulted? Yes or No?

If not, why not?

Yes.

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

**CHAPTER 411
DIVISION 52**

**ADULT FOSTER HOMES FOR OLDER ADULTS OR ADULTS WITH
PHYSICAL DISABILITIES - COMPLAINTS, INVESTIGATIONS, AND
SANCTIONS**

411-052-0005 Investigations and Inspections

(1) The LLA must conduct an inspection of an AFH and all structures on the AFH property:

- (a) Before issuance of a license.
- (b) Before the annual renewal of a license. The LLA must conduct this inspection unannounced.
- (c) Upon receipt of an oral or written complaint of violations that threaten the health, safety, or welfare of residents.
- (d) Anytime the Department has probable cause to believe a home has violated a regulation or provision of these rules or is operating without a license.

(2) The Department may conduct inspections:

- (a) Any time such inspections are authorized by these rules and any other time the Department considers it necessary to determine if a home is in compliance with these rules or with conditions placed upon the license.
- (b) To determine if cited violations have been corrected.
- (c) For the purpose of routine monitoring of the residents' care.

(3) State or local fire inspectors must be permitted access to enter and inspect AFHs regarding fire safety upon the Department's request.

(4) The Department, the LLA, the investigative authority, the Oregon Health Authority (OHA), and the Centers for Medicare and Medicaid Services (CMS) have authority and must have full access to examine and copy facility and resident records, including, but not limited to, Residency Agreements, and resident account records, as applicable.

(5) The Department, LLA, investigative authority, OHA, and CMS staff have authority to interview the licensee, resident manager, other caregivers, and the residents. Interviews must be confidential and conducted privately.

(6) Licensees must authorize all staff to permit the Department, LLA, the investigative authority, OHA and CMS staff, for the purpose of inspection, investigation, and other duties within the scope of the inspector's or investigator's authority:

(a) Entrance to the AFH and any other structure on the premises; and

(b) Access to resident and facility records.

(7) The Department, LLA, the investigative authority, OHA, and CMS has authority to conduct inspections with or without advance notice to the licensee, staff, or the residents of the home. The Department, LLA, and CMS shall not give advance notice of any inspection if it is believed that notice might obstruct or seriously diminish the effectiveness of the inspection or enforcement of these rules.

(8) If the Department, LLA, investigative authority, OHA or CMS staff are not permitted access for inspection, a search warrant may be obtained.

(9) The inspector must respect the private possessions of the residents, licensee, and staff while conducting an inspection.

(10) ABUSE REPORTING. Abuse is prohibited. The facility employees and licensee may not permit, aid, or engage in abuse of residents. Abuse and suspected abuse must be reported in accordance with OAR 411-020-0020.

(a) MANDATORY REPORTING. The licensee and all facility employees are mandatory reporters and must immediately report abuse and suspected abuse, including events overheard or witnessed by observation to the investigative authority.

(b) LAW ENFORCEMENT AGENCY. The local law enforcement agency must be called first when the suspected abuse is believed to be a crime (e.g., rape, murder, assault, burglary, kidnapping, theft of controlled substances).

(11) IMMUNITY AND PROHIBITION OF RETALIATION.

(a) The licensee or administrator shall not interfere with a good faith disclosure of information by an employee or volunteer concerning the abuse or mistreatment of a resident in the adult foster home. The information that is shared may include the reporting of violations of licensing or certification requirements, criminal activity at the adult foster home, violations of state or federal laws or any practice that threatens the health and safety of a resident being made to:

(A) The Long-Term Care Ombudsman, the Department of Human Services, a law enforcement agency or other entity with legal or regulatory authority over the adult foster home; or

(B) A family member, guardian, friend or other person who is acting on behalf of the resident.

(b) Interfering with the disclosure of information could include the following measures:

(A) By training an employee or volunteer to sign a nondisclosure or similar agreement prohibiting the employee or volunteer from disclosing the information; or

(B) By taking actions or communicating to the employee or volunteer that the employee or volunteer may not disclose the information.

~~(a)~~(c) The licensee or administrator may shall not retaliate against any resident after the resident or someone acting on the resident's behalf has filed a complaint in any manner, including, but not limited to:

(A) Increasing or threatening to increase charges.

(B) Decreasing or threatening to decrease services.

(C) Withholding rights or privileges.

(D) Taking or threatening to take any action to coerce or compel the resident to leave the facility.

(E) Threatening to harass or abuse a resident in any manner.

~~(b)~~(d) The licensee or administrator must ensure any complainant, witness, or employee of a facility is not subjected to retaliation by any caregiver, (including the caregiver's family and friends who may live in or frequent the AFH) for making a report, being interviewed about a complaint, or being a witness, including, but not limited to, restriction of access to the home or a resident or, if an employee, dismissal or harassment.

~~(c)~~(e) Anyone who, in good faith, reports abuse or suspected abuse has immunity, as approved by law, from any civil liability that might otherwise be incurred or imposed with respect to the making or content of an abuse complaint.

(12) Immunity under this rule does not protect self-reporting licensees from liability for the underlying conduct that is alleged in the complaint.

(13) Any person who believes these rules have been violated may file a complaint with the Department, the LLA, or the investigative authority.

(14) The Department or the investigative authority shall investigate complaints in accordance with the adult protective services rules in OAR chapter 411, division 20.

(15) Immediate protection shall be provided for the residents by the Department, the LLA, or the investigative authority, as necessary, regardless of whether the investigative report is completed. The licensee or administrator must immediately cease any practice that places a resident at risk of serious harm.

(16) A copy of the entire investigation report shall be sent to the Department upon completion of the investigation report.

(17) PUBLIC FILE. Comply with the Department's June 30, 2019, Public File policy for maintaining current information on all licensed adult foster homes. The Department's Public File policy can be found at the Local Licensing Authority.

Stat. Auth.: ORS 409.050, 410.070, 413.085, 443.001, 443.004, 443.725, 443.730, 443.735, 443.738, 443.742, 443.760, 443.767, 443.775, 443.790
Stats. Implemented: ORS 124.050, 124.060, 124.075, 409.050, 410.070, 413.085, 443.001 - 443.004, 443.705 - 443.825, 443.875, 443.991

411-052-0025 Sanctions – Civil Penalties

(1) Except as otherwise provided in this rule, civil penalties of not less than \$100 per violation, and not more than \$250 per violation may be assessed for a general violation of these rules.

(2) Mandatory penalties up to \$500, unless otherwise required by law, shall be assessed for falsifying resident or facility records or causing another to do so.

(3) A mandatory penalty of \$250 shall be imposed for failure to have either the licensee or other qualified caregiver on duty 24 hours per day in the AFH.

(4) A mandatory penalty of not less than \$100 and not more than \$250 shall be imposed for dismantling or removing the battery from, or failing to install, any required smoke or carbon monoxide alarm.

(5) The Department shall impose a civil penalty of not less than \$250 and no more than \$500 on a licensee who admits a resident knowing that the resident's care needs exceed the license classification of the licensee and the admission places the resident or other residents at risk of harm.

(6) A mandatory penalty of \$500 shall be assessed for interfering with or retaliating against an individual making a good faith disclosure of information concerning the abuse or mistreatment of an individual receiving care and services in an adult foster home.

~~(6)~~(7) Civil penalties of not less than \$100 and not more than \$1,000 per occurrence may be assessed for substantiated abuse.

~~(7)~~(8) If the Department, or the Department's designee, conducts an investigation and abuse is substantiated and if the abuse resulted in the death, serious injury, rape, or sexual abuse of a resident, the Department shall impose a civil penalty of not less than \$2,500 for each violation.

(a) To impose this civil penalty, the Department must establish:

(A) The abuse arose from deliberate or other than accidental action or inaction.

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

(C) The person with the finding of abuse had a duty of care toward the resident.

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

(A) "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.

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

(C) "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.

(D) "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.

~~(8)~~(9) In addition to any other liability or penalty provided by law, the Department may impose a penalty for any of the following:

- (a) Operating the home without a license.
- (b) The number of residents exceeds the licensed capacity.
- (c) The licensee fails to achieve satisfactory compliance with the requirements of these rules within the time specified or fails to maintain such compliance.
- (d) The home is unable to provide adequate level of care to the residents.
- (e) There is retaliation or discrimination against a resident, family, employee, volunteer or any other person for making a complaint against the home.
- (f) The licensee fails to cooperate with the Department or fails to cooperate with the prescribing practitioner or licensed health care professional in carrying out a resident's care plan.

(g) The licensee fails to obtain an approved background check from the Department before employing a caregiver in the home.

~~(9)~~(10) A civil penalty may be imposed for violations other than those involving the health, safety, or welfare of a resident if the licensee fails to correct the violation as required when a reasonable time frame for correction was given.

~~(10)~~(11) Violations requiring a mandatory civil penalty that occurred while the licensee was operating the AFH will be imposed by the Department, even if the licensee subsequently closes the home or voluntarily surrenders the license.

~~(11)~~(12) Any civil penalty imposed under this rule becomes due and payable 10 calendar days after the order imposing the civil penalty becomes final by operation of law or on appeal. The notice must be delivered in person or sent by registered or certified mail and must include:

(a) A reference to the sections of the statute, rule, standard, or order involved.

(b) A short and plain statement of the matters asserted or charged.

(c) A statement of the amount of the penalty or penalties imposed.

(d) A statement of the right to request a hearing.

~~(12)~~(13) The person to whom the notice is addressed shall have 20 calendar days from the date the notice is mailed to make written application for a hearing. If a written request for a hearing is not timely received, the Department shall issue a final order by default.

~~(13)~~(14) All hearings shall be conducted according to the applicable provisions of ORS 183.

~~(14)~~(15) When imposing a civil penalty, the Department shall consider the following factors:

(a) The history of the person incurring the penalty in taking all feasible steps or procedures to correct the violation.

(b) Any prior violations of statutes, rules, or orders pertaining to the facility.

(c) The economic and financial conditions of the person incurring the penalty.

(d) The immediacy and extent to which the violation threatens or threatened the health, safety, or welfare of one or more residents.

(e) The degree of harm to residents.

~~(15)~~(16) If the person notified fails to request a hearing within the time specified, or if after a hearing the person is found to be in violation of a license, rule, or order, an order may be entered assessing a civil penalty.

~~(16)~~(17) Unless the penalty is paid within 10 calendar days after the order becomes final, the order constitutes a judgment and may be recorded by the county clerk, which becomes a lien upon the title to any interest in real property owned by that person. The Department may also initiate a notice of revocation for failure to comply with a final order.

~~(17)~~(18) Civil penalties are subject to judicial review under ORS 183.480, except that the court may, at its discretion, reduce the amount of the penalty.

~~(18)~~(19) All penalties recovered under ORS 443.790 to 443.815 are paid to the Quality Care Fund.

Stat. Auth.: ORS 409.050, 410.070, 413.085, 443.001, 443.004, 443.725, 443.730, 443.735, 443.738, 443.742, 443.760, 443.767, 443.775, 443.790

Stats. Implemented: ORS 124.050, 409.050, 410.070, 413.085, 443.001 - 443.004, 443.705 - 443.825, 443.875, 443.991

411-052-0035 Sanctions - Denial, Revocation, or Non-Renewal of License

(1) The Department shall deny, revoke, or refuse to renew a license where the Department finds:

(a) There has been substantial non-compliance with these rules or where there is substantial non-compliance with local codes and ordinances or any other state or federal law or rule applicable to the health and safety of caring for residents in an AFH.

(b) The Department has conducted a background check and determined the applicant or licensee is not approved in accordance with OAR 411-049-0120.

(c) The licensee allows a caregiver, or any other person, excluding the residents, to reside or work in the AFH, who has been convicted of potentially disqualifying crimes, and has been denied, or refused to cooperate with the Department in accordance with OAR 411-049-0120.

(d) The applicant or licensee falsely represents that he or she has not been convicted of a crime.

(2) The Department shall deny, revoke, or refuse to renew a license where the Department has received notice from the Department of Revenue in accordance with ORS 305.385.

(3) The Department may deny, revoke, or refuse to renew an AFH license if the applicant or licensee:

(a) Submits incomplete or untrue information to the Department.

(b) Has a history of, or demonstrates financial insolvency, such as foreclosure, eviction due to failure to pay rent, or termination of utility services due to failure to pay bills.

(c) Has a prior denial, suspension, revocation, or refusal to renew a certificate or license to operate a foster home or residential care facility in this or any other state or county.

(d) Is associated with a person whose license for a foster home or residential care facility was denied, suspended, revoked, or refused to be renewed due to abuse or neglect of the residents, creating a threat to the residents, or failure to possess physical health, mental health, or good personal character within three years preceding the present action, unless the applicant or licensee is able to demonstrate to the Department by clear and convincing evidence that the person does not pose a threat to the residents. For purposes of this subsection, an applicant or licensee is "associated with" a person if the applicant or licensee:

(A) Resides with the person.

(B) Employs the person in the AFH.

(C) Receives financial backing from the person for the benefit of the AFH.

(D) Receives managerial assistance from the person for the benefit of the AFH.

(E) Allows the person to have access to the AFH.

(F) Rents or leases the AFH from the person.

(e) Has threatened the health, safety, or welfare of any resident.

(f) Has abused, neglected, or exploited any resident.

(g) Has interfered with an individual who has made a good faith disclosure of information concerning the abuse or mistreatment of a resident receiving care and services in an adult foster home.

(hg) Has a medical or psychiatric problem that interferes with the ability to provide care and services.

(~~ih~~) Has previously been cited for the operation of an unlicensed AFH.

(~~ij~~) Does not possess the good judgment or character deemed necessary by the Department.

(~~ik~~) Fails to correct a violation within the specified time frame.

(~~il~~) Refuses to allow access and inspection.

(~~im~~) Fails to comply with a final order of the Department to correct a violation of the rules for which an administrative sanction has been imposed, such as a license condition.

(~~in~~) Fails to comply with a final order of the Department imposing an administrative sanction, including the imposition of a civil penalty.

(~~oo~~) Fails to take or pass the Department's Ensuring Quality Care course and examination.

(~~pe~~) Fails to obtain an approved background check for subject individuals according to [OAR 411-049-0120](#) on more than one occasion.

(~~qp~~) Has previously surrendered a license while under investigation or administrative sanction during the last three years.

(~~rq~~) Is not currently or has not previously been in compliance with employment or tax laws.

(~~sf~~) Fails to operate the home or any other facility in substantial compliance with [ORS 443.705 to 443.825](#).

(4) If the Department issues a notice of revocation for the reason of abuse, neglect, or exploitation of a resident, the licensee may request a review in writing within 10 calendar days from the date the notice of revocation was mailed. If a request is made, the Department must review all material relating to the allegation of abuse, neglect, or exploitation and the revocation within 10 calendar days. The Department shall determine,

based on a review of the material, whether to sustain the decision. If the Department does not sustain the decision, the license shall be restored immediately. The decision of the Department is subject to a contested case hearing under ORS 183.

(5) If a license is revoked or not renewed, the licensee is entitled to a contested case hearing preceding the effective date of the revocation or non-renewal if the licensee requests a hearing in writing within 60 calendar days from the date the notice is mailed. If no written request for a hearing is timely received, the Department shall issue the final order by default. The Department may designate its file as the record for purposes of default.

(6) A license subject to revocation or non-renewal remains valid during an administrative hearings process even if the hearing and final order are not issued after the expiration date of the license.

(7) If an initial license is denied for any reason other than the results of a test or inspection, the applicant is entitled to a hearing if the applicant requests a hearing in writing within 60 calendar days from the date the notice was mailed. If no written request for a hearing is timely received, the Department shall issue a final order by default. The Department may designate its file as the record for purposes of default.

(8) If a license is revoked or not renewed, the Department may arrange for residents to move for their protection.

Stat. Auth.: ORS 409.050, 410.070, 413.085, 430.735, 443.001, 443.004, 443.725, 443.730, 443.735, 443.738, 443.742, 443.760, 443.767, 443.775, 443.790

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