

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

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)

APD: Amending rules related to adult foster home complaints, investigations, and sanctions

Last Date and Time for Public Comment: Written comments may be submitted via email to apd.rules@dhsoha.state.or.us or mailed to Kristina Krause at 500 Summer Street NE, E-02, Salem, OR 97301 until **12/2/2021 at 5 p.m.**

	Teleconference Only	
11/18/2021	2 p.m. – 3 p.m.	Staff
Hearing Date	Time	Hearings Officer
	+1 (971) 277-2343 Conference ID: 747712087#	
	Address	

HEARING NOTES: If you wish to provide comment, please call in to the teleconference number 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 or other formats. If you need help or have questions, please contact Kristina Krause at 503-339-6104, apd.rules@dhsoha.state.or.us or 711 TTY at least five business days before the hearing.

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.

AMEND:

411-052-0005; 411-052-0015; 411-052-0035

RULE SUMMARY:

411-052-0005 Investigations and Inspections

- Housekeeping to amend rules for consistency and to clarify information. These amendments include minor grammatical changes, renumbering rule references due to proposed language and adding additional language such as the word “administrator” for consistency with the adult foster home rules.
- Requires that inspections be conducted in-person as required by SB 556 (2021 Regular Session).
- Proposed amendment to comply with SEIU collective bargaining agreement requiring all state personnel to show Department issued identification in compliance with the Department’s policy upon arriving for inspection of an adult foster home.

411-052-0015 Procedures for Correction of Violations

- Proposed language clarifying time frame for requesting a meeting after receiving a violation.

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

- Proposed language changing 60 calendar days to 21 calendar days written notice requirement when requesting a hearing for revocations to be consistent with statute.
- Proposed amendment to clarify language to allow all applicants for all licenses that are denied or not renewed for reasons other than inspections to have 60 days to request a hearing as outlined in statute. Rule states an initial license only.

STATEMENT OF NEED AND FISCAL IMPACT

Need for Rule(s):

The Oregon Department of Human Services (Department) is proposing to permanently amend rules in chapter 411, division 052 to implement SB 556 (2021 Regular Session) requiring in person inspections. The Department is

also proposing to permanently amend rules to clarify language and be more consistent with statute.

Other changes may be made to 411, division 052 to correct grammatical errors, ensure consistent terminology, address issues identified during the public comment period, and to improve the accuracy, structure and clarity of the rule.

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 that there will be no fiscal impact to units of local government. The local licensing authority has historically conducted in person inspections of adult foster home facilities, the legislative requirements outlined in SB 556 clarify that inspections must be conducted in person. Given that inspections have historically been conducted in person, there is no anticipated fiscal impact on state agencies.

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

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

Providers: The Department estimates that there will be no fiscal impact to providers. These changes are a reflection of making rule and statute match, housekeeping, clarifying language, meeting SEIU collective bargaining agreement requirements and legislative requirements as outlined in SB 556. There is no anticipated fiscal impact.

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 1,400 Aging and People with Physical Disabilities Adult Foster Homes that are subject to these rules.

(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:

For SB 556 (2021)

<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB556/Enrolled>

Was an Administrative Rule Advisory Committee consulted? Yes.

If not, why not?

/s/ Mike McCormick, Interim Director, Aging and People with Disabilities

Signature

9/27/2021

Date

**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 in person inspection of an AFH and all structures on the AFH property. The in person inspection must be conducted:

(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, administrator, 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. State personnel and representatives are required to show Department issued identification in compliance with the Department's October 09, 2020 policy.

(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.

(c) The licensee or administrator 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.

(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.

(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

411-052-0015 Procedures for Correction of Violations

(1) If, as a result of an inspection or investigation, the Department determines that abuse has occurred, the licensee shall be notified verbally to immediately cease the abusive act. The Department shall follow-up with a written confirmation of the warning to cease the abusive act and shall include notification that further sanctioning may be imposed.

(2) If an inspection or investigation indicates a violation of these rules other than abuse, the LLA shall notify the licensee of the violation in writing.

(3) The notice of violation may not include information that may be used to identify a resident in accordance with OAR 411-020-0030, Confidentiality, and federal HIPAA Privacy Rules. Notices placed in the public file must comply with OAR 411-052-0005 and must include the following:

- (a) A description of each condition that constitutes a violation.
- (b) Each rule that has been violated.
- (c) A specific time frame for correction, not to exceed 30 calendar days after receipt of the notice. The LLA may approve a reasonable time of more than 30 calendar days if correction of the violation within that time frame is not practical. If the licensee or administrator requests more than 30 calendar days to correct the violation, such time must be specified in the licensee or administrator's plan of correction and must be found acceptable by the LLA.
- (d) Sanctions that may be imposed against the home for failure to correct the violation.
- (e) The right of the licensee to contest the violation if an administrative sanction is imposed.
- (f) The right of the licensee to request a variance as provided in OAR 411-049-0160.

(4) At any time after receipt of a notice of violation or an inspection report, a meeting may be requested by the applicant, the licensee, the LLA, or the Department ~~may request a meeting~~. The meeting must be requested within 21 calendar days and be scheduled within 10 business days of a request by any party.

- (a) The purpose of the meeting is to discuss the violation stated in the notice of violation, provide information, and to assist the applicant or licensee in achieving compliance with the requirements of these rules.
- (b) The request for a meeting by an applicant, licensee, LLA, or the Department does not extend any previously established time frame for correction.

(5) The applicant or licensee must notify the LLA of correction of the violation by completing a written response in the licensee or administrator's statement of correction section on the violation. Notification of correction of

the violation must be submitted to the LLA no later than the date specified in the notice of violation.

(6) The LLA may conduct a re-inspection of the home after the date the LLA receives the report of compliance, or after the date the violation must be corrected as specified in the notice of violation.

(7) For violations that present an imminent danger to the health, safety, or welfare of residents, the licensee or administrator must correct the violation and abate the conditions no later than 24 hours after receipt of the notice of violation. The LLA may inspect the home after the 24-hour period to determine if the violation has been corrected as specified in the notice of violation.

(8) If residents are in immediate danger, the license may be immediately suspended, and arrangements made to move the residents.

(9) If after inspection of a home, the violations have not been corrected by the date specified in the notice of violation, or if the LLA has not received a report of compliance, the Department may institute one or more administrative sanctions.

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 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.
- (h) Has a medical or psychiatric problem that interferes with the ability to provide care and services.
- (i) Has previously been cited for the operation of an unlicensed AFH.
- (j) Does not possess the good judgment or character deemed necessary by the Department.
- (k) Fails to correct a violation within the specified time frame.
- (l) Refuses to allow access and inspection.
- (m) 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.

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

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

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

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

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

(s) 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 ~~2160~~ 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 or not renewed 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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