

TEMPORARY FILING
INCLUDING STATEMENT OF NEED & JUSTIFICATION
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

APD: Prohibits residential care facilities from retaliating against whistleblowers, SB 917 (2019)

Agency Approved Date: [06/21/2021]

Effective Date: [06/23/2021] through [12/19/2021]

RULEMAKING ACTION

List each rule number separately (000-000-0000). Attach clean text for each rule at the end of the filing

ADOPT:

AMEND: 411-054-0028; 411-054-0105; 411-054-0130

SUSPEND:

RULE SUMMARY:

Include a summary for each rule included in this filing.

411-054-0028: Allows employee or volunteer to disclose, in good faith, information concerning mistreatment or abuse of a resident to Long-Term Care Ombudsman, the Department, and others without retaliation by licensee or administrator.

411-054-0105: Prohibits licensee or administrator from interfering with or retaliating against an employee or volunteer who discloses information of mistreatment of a resident in the residential care facility.

411-054-0130: Allows the Department to revoke or refuse to renew the license of a licensee who has interfered with or retaliated against a whistleblower in a residential care facility.

STATEMENT OF NEED AND JUSTIFICATION

Need for the Rule(s):

The Department needs to immediately amend rule to be in compliance with SB 917 (2019).

Justification of Temporary Filing:

Failure to act promptly and immediately amend OAR chapter 411, division 054 will result in serious prejudice to the public interest, the Department, and residents of residential care facilities. These rules need to be adopted promptly so that residential care facilities will not be able to interfere with or retaliate against a whistleblower who discloses information regarding mistreatment in a residential care facility.

OAR chapter 411, division 054 needs to be amended promptly because it is important to protect staff and volunteers who, in good faith, disclose information concerning potential mistreatment within facilities (protect whistleblowers).

Documents Relied Upon, and where they are available:

<https://olis.oregonlegislature.gov/liz/2019R1/Measures/Overview/SB917>
https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2019orlaw0381.pdf

/s/ Mike McCormick, Interim Director, Aging and People with Disabilities 06/21/2021
Signature Date

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

**CHAPTER 411
DIVISION 54**

RESIDENTIAL CARE AND ASSISTED LIVING FACILITIES

411-054-0028 Abuse or Mistreatment Reporting and Investigation
(Temporary effective 06/23/2021 through 12/19/2021)

(1) The facility must have policies and procedures in place to assure the prevention and appropriate response to any incident. In the case of incidents of abuse, suspected abuse, or injury of unknown cause, policies and procedures must follow the requirements outlined below. In the case of incidents that are not abuse or injuries of unknown cause where abuse has been ruled out, the facility must have policies and procedures in place to respond appropriately, which may include such things as re-assessment, monitoring, or medication review.

(2) ABUSE REPORTING. Abuse is prohibited. The facility employees, agents and licensee must not permit, aid, or engage in abuse of residents who are under their care.

(a) STAFF REPORTING. All facility employees are required to immediately report abuse and suspected abuse to the local SPDDepartment office, or the local AAA, the facility administrator, or to the facility administrator's designee.

(b) FACILITY REPORTING. The facility administrator, or designee, must immediately notify the local SPDDepartment office, or the local AAA, of any incident of abuse or suspected abuse, including events overheard or witnessed by observation.

(c) 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, etc.).

(d) INJURY OF UNKNOWN CAUSE. Physical injury of unknown cause must be reported to the local SPD Department office, or the local AAA, as suspected abuse, unless an immediate facility investigation reasonably concludes and documents that the physical injury is not the result of abuse.

(3) FACILITY INVESTIGATION OF ABUSE OR SUSPECTED ABUSE. In addition to immediately reporting abuse or suspected abuse to SPDthe Department, AAA, or the law enforcement agency, the facility must promptly investigate all reports of abuse and suspected abuse and take measures necessary to protect residents and prevent the reoccurrence of abuse. Investigation of suspected abuse must document:

- (a) Time, date, place and individuals present;
- (b) Description of the event as reported;
- (c) Response of staff at the time of the event;
- (d) Follow-up action; and
- (e) Administrator's review.

(4) IMMUNITY AND PROHIBITION OF RETALIATION.

(a) The facility 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 facility. The information that is shared may include the reporting of violations of licensing or certification requirements, criminal activity at the facility, violations of state or federal laws or any practice that threatens the health and safety of a resident of the facility to:

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

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

(b) Unless performed with the intent to comply with state or federal law, including but not limited to protecting residents' rights or carrying out a facility's policies and procedures that are consistent with state and federal law, it is interference with the disclosure of information as described in subsection (a) if a facility:

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

(B) Trains an employee or volunteer not to disclose the information; or

(C) Takes actions or communicates to the employee or volunteer that the employee or volunteer may not disclose the information.

~~(a)(c)~~ The facility licensee, employees and agents must not retaliate in any way against anyone who participates in the making of an abuse complaint, including but not limited to restricting otherwise lawful access to the facility or to any resident, or if an employee, dismissal or harassment.

~~(b)(d)~~ Anyone who, in good faith, reports abuse or suspected abuse shall have immunity from any liability that might otherwise be incurred or imposed with respect to the making or content of an abuse complaint.

Stat. Auth.: ORS 410.070, 443.417, 443.450

Stats. Implemented: ORS 443.400 - 443.455, 443.991

411-054-0105 Inspections and Investigations

(Temporary effective 06/23/2021 through 12/19/2021)

(1) The facility must cooperate with Department personnel in inspections, complaint investigations, planning for resident care, application procedures, and other necessary activities.

(a) Records must be made available to the Department upon request. Department personnel must have access to all resident and facility

records and may conduct private interviews with residents. Failure to comply with this requirement shall result in regulatory action.

(b) The State Long Term Care Ombudsman must have access to all resident and facility records that relate to an investigation. Certified Ombudsman volunteers may have access to facility records that relate to an investigation and access to resident records with written permission from the resident or guardian.

(c) The State Fire Marshal or authorized representative must be permitted access to the facility and records pertinent to resident evacuation and fire safety.

(d) The Oregon Health Authority and appropriate Local Public Health Authority must be permitted access to the facility and records pertinent to investigation of illness or outbreak, as authorized by law.

(2) The facility 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 facility, as described in OAR 411-054-0028(4).

~~(2)~~(3) Staff of the Department shall visit and inspect every facility at least but not limited to once every two years for a full survey to determine whether the facility is maintained and operated in accordance with these rules.

(a) For each year during which a facility does not have a full survey, the Department shall conduct an inspection of the kitchen and other areas where food is prepared for residents.

(b) Subsection (a) will not go into effect until July 1, 2022.

(c) Facilities not in compliance with these rules must submit, within ten days of receipt of the inspection report, a plan of correction that satisfies the Department.

(d) The Department may impose sanctions for failure to comply with these rules.

~~(3)~~(4) Department staff may consult with and advise the facility administrator concerning methods of care, records, housing, equipment, and other areas of operation.

~~(4)~~(5) A copy of the most current inspection report and any conditions placed upon the license must be posted with the facility's license in public view near the main entrance to the facility.

~~(5)~~(6) ABUSE OR RULE VIOLATION. Upon completion of substantiation of abuse or rule violation, the Division shall immediately provide written notification to the facility.

(a) WRITTEN NOTICE. The written notice 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 inconclusive;

(D) For each substantiated allegation, state whether the violation was abuse or another rule violation;

(E) Include a copy of the complaint investigation report;

(F) State that the complainant, any person reported to have committed wrongdoing, and the facility have 15 days to provide additional or different information; and

(G) For each allegation, explain the applicable appeal rights available.

(b) APPORTIONMENT. If the Department determines there is substantiated abuse, the Department may determine that the facility, an individual, or both the facility and an individual are responsible for the abuse. In determining responsibility, the Department shall consider intent, knowledge and ability to control, and adherence to professional standards as applicable.

(A) FACILITY. Examples of when the Department shall determine the facility is responsible for the abuse include but are not limited to:

(i) Failure to provide minimum staffing in accordance with these rules without reasonable effort to correct;

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

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

(iv) Failure to adequately provide oversight, training, or orientation of staff;

(v) Failure to allow sufficient time to accomplish assigned tasks;

(vi) Failure to provide adequate services;

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

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

(B) INDIVIDUAL. Examples of when the Department shall determine the individual is responsible for the abuse include but are not limited to:

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

(ii) Acts contradictory to clear instructions from the facility, unless the act is determined by the Department to be caused by the facility as identified in paragraph (A) above;

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

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

(C) An individual may 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.

(c) DUE PROCESS RIGHTS.

(A) NON-NURSING ASSISTANT. The written notice in cases of substantiated abuse by a person other than a nursing assistant shall explain the person's right to:

(i) File a petition for reconsideration pursuant to OAR 137-004-0080; and

(ii) Petition for judicial review pursuant to ORS 183.484.

(B) NURSING ASSISTANT. The written notice in cases of substantiated abuse by a nursing assistant shall explain:

(i) The Department's intent to enter the finding of abuse into the Nursing Assistant Registry following the procedure set out in OAR 411-089-0140; and

(ii) The nursing assistant's right to provide additional information and request a contested case hearing as provided in OAR 411-089-0140.

(C) FACILITY. The written notice shall advise the facility of the facility's due process rights as appropriate.

(d) DISTRIBUTION.

(A) The written notice shall be mailed to the facility, any person reported to have committed wrongdoing, the complainant (if known), and the Department or Type B AAA office; and

(B) A copy of the written notice shall be placed in the Department's facility complaint file.

~~(6)~~(7) Upon receipt of a notice of abuse for victims covered by ORS 430.735, the facility shall provide written notice of the findings to the person found to have committed abuse, the residents of the facility, the residents' case managers, and the residents' guardians.

Stat. Auth.: ORS 410.070, 443.417, 443.450

Stats. Implemented: ORS 443.400 - 443.455, 443.991

411-054-0130 Non-Renewal, Denial, Suspension, or Revocation of License

(Temporary effective 06/23/2021 through 12/19/2021)

(1) ~~SPD~~The Department may deny, suspend, revoke, or refuse to renew a license under the following conditions:

(a) Where ~~SPD~~the Department finds there has been substantial failure to comply with these rules;

(b) Where the State Fire Marshal or authorized representative certifies there is failure to comply with all applicable ordinances and rules relating to safety from fire;

(c) If the licensee fails to implement a plan of correction or comply with a final order of ~~SPD~~the Department imposing an administrative sanction, including the imposition of a civil penalty;

(d) Failure to disclose requested information on the application or provision of incomplete or incorrect information on the application;

(e) Where imminent danger to the health or safety of residents exists;

(f) When the facility has interfered with an employee or volunteer who has made a good faith disclosure of information as described in 411-054-0028(4) and 411-054-0105(2);

~~(f)~~(g) Abandonment of facility operation;

| ~~(g)~~(h) Loss of physical possession of the premise;

| ~~(h)~~(i) Loss of operational control of the facility; or

| ~~(i)~~(j) Appointment of a receiver, trustee, or other fiduciary by court order.

| (2) Such revocation, suspension, denial, or non-renewal shall be done in accordance with the rules of ~~SPD~~the Department and ORS chapter 183.

| (3) Nothing in this rule is intended to preclude ~~SPD~~the Department from taking other regulatory action on a suspended licensee for violation of the licensing regulations in these rules.

Stat. Auth.: ORS 410.070, 443.450

Stats. Implemented: ORS 443.400 - 443.455, 443.991