

Secretary of State
NOTICE OF PROPOSED RULEMAKING HEARING*
A Statement of Need and Fiscal Impact accompanies this form

FILED
9-15-16 5:09 PM
ARCHIVES DIVISION
SECRETARY OF STATE

Department of Human Services, Administrative Services Division and Director's Office
Agency and Division

407

Administrative Rules Chapter Number

Jennifer Bittel

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Rules Coordinator

Telephone

Department of Human Services, Administrative Services Division and Director's Office, 250 Winter St. NE, Salem, OR 97301

Address

RULE CAPTION

Child Abuse Checks on Providers; Other Rule Corrections and Updates

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

Hearing Date	Time	Location	Hearings Officer
10-17-16	10:00 a.m.	Human Services Building, 500 Summer St NE, Salem, OR 97301, Room	Kris Skaro

RULEMAKING ACTION

Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

ADOPT:

AMEND:

OAR 407-007-0210, 407-007-0250, 407-007-0279, 407-007-0290, 407-007-0320, 407-007-0330

REPEAL:

OAR 407-007-0210(T), 407-007-0250(T), 407-007-0279(T), 407-007-0290(T), 407-007-0320, 407-007-0330(T)

RENUMBER: Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

AMEND AND RENUMBER: Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

Statutory Authority:

181A.200, 409.027 & 409.050

Other Authority:

ORS 181A.215; 419B.035, 42USC1320a-7(a); 42USC12645g

Statutes Implemented:

ORS 181A.195, 181A.200, 409.010, 409.027, 443.004 and Oregon Laws 2016, chapter 106, section 6

RULE SUMMARY

Oregon Laws 2016, chapter 106, section 6 (2016 SB1515) became effective 7/1/2016. It added requirements regarding proctor foster parents applying for certification or recertification through a child-caring agency. These requirements were added to the rules on 7/1/2016; the current proposed rulemaking makes those changes permanent. The requirements include:

The addition of disclosure language needed in the background check request allows the Department to release information to the child-caring agency.

The requirement that the proctor foster parent disclose all substantiated or founded abuse, and all protective orders or restraining orders against the proctor foster parent.

The addition of serious adult neglect, protective orders or restraining orders against the proctor foster parent as potentially disqualifying.

The addition of the making of a false statement about abuse or protective orders, restraining orders by the proctor foster parent as a reason to close background check request.

OAR 407-007-0279 amendments were added to the rules on 7/1/2016; the current proposed rulemaking makes those amendments

permanent. The proposed amendments follow CMS guidelines that the mandatory exclusion from holding a position due to certain convictions or conditions is only for 5 years. The previous rule language had an error that needed correcting immediately to match current requirements.

Proposed amendments to OAR 407-007-0290 broaden the abuse check on Department of Human Services' providers to include a check of child abuse records and all other SIs if in their position they will have direct contact with children. Any substantiated child abuse against these SIs will be considered potentially disqualifying and require a weighing test under these provider rules.

Other updates include clarification to rules language, error corrections and alignment with current processes.

Proposed rules are available on the Department of Human Services website: <http://www.oregon.gov/DHS/POLICIES/Pages/ss-admin-rules.aspx>. Written comments may be submitted until Friday, October 21, 2016 at 5:00 p.m. via email to kris.a.skaro@state.or.us, faxed to 503-373-7032, or mailed to Kris Skaro, Rules Coordinator, 500 Summer Street NE, E-48, Salem, Oregon, 97301.

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

10-21-2016 5:00 p.m.	Jennifer Bittel	jennifer.bittel@state.or.us
Last Day (m/d/yyyy) and Time for public comment	Rules Coordinator Name	Email Address

*The Oregon Bulletin is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation.

Secretary of State
STATEMENT OF NEED AND FISCAL IMPACT
A Notice of Proposed Rulemaking Hearing accompanies this form.

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Department of Human Services, Administrative Services Division and Director's Office
Agency and Division

407
Administrative Rules Chapter Number

Child Abuse Checks on Providers; Other Rule Corrections and Updates

Rule Caption (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)

In the Matter of:

The proposed amendment of OAR 407-007-0210, 407-007-0250, 407-007-0279, 407-007-0290, 407-007-0320, 407-007-0330 and the proposed repeal of OAR 407-007-0210(T), 407-007-0250(T), 407-007-0279(T), 407-007-0290(T), 407-007-0320, 407-007-0330(T).

Statutory Authority:

181A.200, 409.027 & 409.050

Other Authority:

ORS 181A.215; 419B.035, 42USC1320a-7(a); 42USC12645g

Statutes Implemented:

ORS 181A.195, 181A.200, 409.010, 409.027, 443.004 and Oregon Laws 2016, chapter 106, section 6

Need for the Rule(s):

Oregon Laws 2016, chapter 106, section 6 (2016 SB1515) became effective 7/1/2016. It added requirements regarding proctor foster parents applying for certification or recertification through a child-caring agency. These requirements were added to the rules on 7/1/2016; the current proposed rulemaking makes those changes permanent. The requirements include:

The addition of disclosure language needed in the background check request allows the Department to release information to the child-caring agency.

The requirement that the proctor foster parent disclose all substantiated or founded abuse, and all protective orders or restraining orders against the proctor foster parent.

The addition of serious adult neglect, protective orders or restraining orders against the proctor foster parent as potentially disqualifying.

The addition of the making of a false statement about abuse or protective orders, restraining orders by the proctor foster parent as a reason to close background check request.

OAR 407-007-0279 amendments were added to the rules on 7/1/2016; the current proposed rulemaking makes those amendments permanent. The proposed amendments follow CMS guidelines that the mandatory exclusion from holding a position due to certain convictions or conditions is only for 5 years. The previous rule language had an error that needed correcting immediately to match current requirements.

Proposed amendments to OAR 407-007-0290 broaden the abuse check on Department of Human Services' providers to include a check of child abuse records and all other SIs if in their position they will have direct contact with children. Any substantiated child abuse against these SIs will be considered potentially disqualifying and require a weighing test under these provider rules.

Other updates include clarification to rules language, error corrections and alignment with current processes.

Documents Relied Upon, and where they are available:

ORS 181A.195, 181A.200, 181A.215, 409.010, 409.027, 409.050, 419B.035, and Oregon Law 2016, chapter 106, section 6 available at https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx

Fiscal and Economic Impact:

The Department estimates that the fiscal impact of the CPS check expansion would be approximately \$1,058,826 per biennium. This includes additional time for fitness determination staff to do the CPS checks and in the event of a denial the related appeals time anticipated.

The Department estimates no fiscal or economic impact on other state agencies, units of local government, the public, or small businesses, including small businesses with these rule revisions.

The federal mandatory exclusions are already in place and adding the language to the administrative rules has no fiscal impact.

Statement of Cost of Compliance:

1. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

The Department estimates that the fiscal impact of the CPS check expansion would be approximately \$1,058,826 per biennium. This includes additional time for fitness determination staff to do the CPS checks and in the event of a denial the related appeals time anticipated.

The Department estimates no fiscal or economic impact on other state agencies, units of local government, the public, or small businesses, including small businesses with these rule revisions.

The federal mandatory exclusions are already in place and adding the language to the administrative rules has no fiscal impact.

2. Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number of small business and types of businesses and industries with small businesses subject to the rule:

None.

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services:

None.

c. Equipment, supplies, labor and increased administration required for compliance:

None.

How were small businesses involved in the development of this rule?

Small businesses and advocacy organizations representing small businesses were invited to participate in the Rules Advisory Committee.

Administrative Rule Advisory Committee consulted?: Yes

If not, why?:

Yes, representatives included the ACLU, SEIU, Oregon Health Care Association, Oregon Home Care Commission, and Oregon Alliance of Children's Programs.

<u>10-21-2016 5:00 p.m.</u>	<u>Jennifer Bittel</u>	<u>jennifer.bittel@state.or.us</u>
Last Day (m/d/yyyy) and Time for public comment	Printed Name	Email Address

**CHAPTER 407
DEPARTMENT OF HUMAN SERVICES**

**DIVISION 7
CRIMINAL RECORDS AND ABUSE CHECK RULES**

Criminal Records Checks and Abuse Checks on Providers

407-007-0210

Definitions

In addition to the definitions in OAR 125-007-0210 and 407-007-0010, the following definitions apply to OAR 407-007-0200 to 407-007-0370:

- (1) "Appointing authority" means an individual designated by the qualified entity (QE) who is responsible for appointing QE designees (QEDs). Examples include but are not limited to human resources staff with the authority to offer and terminate employment, a business owner, a member of the board of directors, a director, or a program administrator.
- (2) "Child-caring agency proctor foster parent" means an individual who is an applicant for certification or recertification of a proctor foster home by a child-caring agency pursuant to OAR 413-215-0301 to 413-215-0396.
- (3) "Ineligible due to ORS 443.004" means BCU has determined that an SI, subject to ORS 443.004 and either OAR 407-007-0275 or 407-007-0277, has one or more convictions that prohibit the SI from holding the position listed in the background check request.
- (34) "Mandatory exclusion" means BCU has determined that an SI, subject to federal law or regulation, has one or more convictions or conditions that prohibit the SI from holding the position listed in the background check request.
- (45) "Qualified entity (QE)" means a community mental health or developmental disability program, local health department, or an individual, business, or organization, whether public, private, for-profit, nonprofit, or voluntary, that provides care, including a business or organization that licenses, certifies, or registers others to provide care (see ORS 181A.200).
- (56) "QE designee (QED)" means an individual appointed by the QE's appointing authority to handle background checks on behalf of the QE.
- (67) "QE Initiator (QEI)" means an approved SI to whom BCU has granted access to the Criminal Information Management System (CRIMS) for one QE for the purpose of entering background check request data.
- (78) "Subject individual (SI)" means an individual on whom BCU conducts a criminal records check and an abuse check, and from whom BCU may require fingerprints for the purpose of conducting a national criminal records check.
- (a) An SI includes any of the following:
- (A) An individual who is licensed, certified, registered, or otherwise regulated or authorized for payment by the Department or Authority and who provides care.
- (B) An employee, contractor, temporary worker, or volunteer who provides care or has access to clients, client information, or client funds within or on behalf of any entity or agency licensed, certified, registered, or otherwise regulated by the Department or Authority.
- (C) Any individual who is paid directly or indirectly with public funds who has or will have contact with recipients of:
- (i) Services within an adult foster home (defined in ORS 443.705); or
- (ii) Services within a residential facility (defined in ORS 443.400).

(D) Any individual who works in a facility and provides care or has access to clients, client information, or client funds secured by any residential care or assisted living facility through the services of a personnel services or staffing agency.

(E) Any individual who works in a facility and provides care, or has access to clients, client information, or client funds secured by any nursing facility through the services of a personnel services or staffing agency.

(F) Except as excluded in section (78)(b)(C) and (D) of this rule, an individual who lives in a facility that is licensed, certified, registered, or otherwise regulated by the Department to provide care. The position of this SI includes but is not limited to resident manager, household member, or boarder.

(G) For any child foster home, proctor foster home or child adoptive home certified by a child-caring agency governed by OAR chapter 413 division 215:

(i) A child-caring agency proctor foster parent;

(ii) An adoptive parent applicant or an approved adoptive parent;

(ii) An adult household member in an adoptive or child foster home 18 years of age and over; and

(iviii) A household member in an adoptive or child foster home under 18 years of age if there is reason to believe that the household member may pose a risk to children placed in the home.

(iv) A respite care provider in an adoptive or child foster home.

(H) An individual with contact with clients, client information, or client funds, who is working, contracted with, or volunteering for a private licensed-child-caring agency, or residential program for children, governed by OAR chapter 413 division 215; an In-Home Safety and Reunification Services (ISRS) program, a Strengthening, Preserving and Reunifying Families (SPRF) provider, or system of care contractor providing child welfare services pursuant to ORS chapter 418.

~~(H)~~ A homecare worker as defined in ORS 410.600, a personal support worker as defined in ORS 410.600, a personal care services provider, or an independent provider employed by a Department or Authority client who provides care to the client if the Department or Authority helps pay for the services.

~~(H)~~ A child care provider and their employees reimbursed through the Department's child care program and other individuals in child care facilities that are exempt from certification or registration by the Office of Child Care of the Oregon Department of Education. This includes all individuals listed in OAR 461-165-0180~~(4)~~.

~~(JK)~~ An appointing authority, QED, or QEI associated with any entity or agency licensed, certified, registered, otherwise regulated by the Department, or subject to these rules.

~~(KL)~~ An individual providing on the job certified nursing assistant classes to staff within a long term care facility.

~~(LM)~~ A student enrolled in a Board of Nursing approved nursing assistant training program in which the instruction and training occurs solely in a nursing facility.

~~(MN)~~ Except for those excluded under section (78)(b)(B), a student or intern who provides care or has access to clients, client information, or client funds within or on behalf of a QE.

~~(NO)~~ Any individual serving as an owner, operator, or manager of a room and board facility pursuant to OAR chapter 411, division 68.

~~(OP)~~ An employee providing care to clients of the Department's Aging and People with Disabilities (APD) programs who works for an in-home care agency as defined by ORS 443.305 ~~whewhich~~ has a contract with the Department's APD programs.

~~(PQ)~~ Any individual who is required to complete a background check pursuant to Department or Authority program rules or a contract with the Department or Authority, if the requirement is within the Department or Authority's statutory authority. Specific statutory authority or reference to these rules and the positions under the contract subject to a background check must be specified in the contract. The exceptions in section (78)(b) do not apply to these SIs.

(b) An SI does not include:

(A) Any individual under 16 years of age.

(B) A student or intern in a clinical placement at a clinical training setting subject to administrative rules implemented under ORS 413.435.

(C) Department, Authority, or QE clients. The only circumstance in which BCU shall allow a check to be performed on a client pursuant to this paragraph is if the client falls within the definition of “subject individual” as listed in sections ~~(78)~~(a)(A)-~~(EF)~~ and ~~(78)~~(a)(G)-~~(PQ)~~ of this rule, or if the facility is dually licensed for different populations of vulnerable individuals.

(D) Individuals working in child care facilities certified or registered by OED.

(E) Special event volunteers or limited volunteers whose access to clients is no more than three days in any two-week period. These volunteers must always be actively supervised in accordance with OAR 407-007-0315 and have no unsupervised contact with clients.

~~(EF)~~ Individuals employed by a private business that provides services to clients and the general public and is not regulated by the Department or Authority.

~~(FG)~~ Individuals employed by a business that provides appliance or structural repair for clients and the general public and who are temporarily providing these services in a licensed or certified QE. The QE shall ensure active supervision of these individuals while on QE property and the QE may not allow unsupervised contact with QE clients or residents. This exclusion does not apply to a business that receives funds from the Department or Authority for care provided by an employee of the business.

~~(GH)~~ Individuals employed by a private business in which a client of the Department or Authority is working as part of a Department- or Authority-sponsored employment service program. This exclusion does not apply to an employee of a business that receives funds from the Department or Authority for care provided by the employee.

~~(HI)~~ Employees, contractors, students, interns, and volunteers working in hospitals, ambulatory surgical centers, outpatient renal dialysis facilities, and freestanding birthing centers, as defined in ORS 442.015, and special inpatient care facilities as defined by the Authority in administrative rule.

(J) Employees, contractors, students, interns, and volunteers working in home health agencies, in-home care agencies, or hospice programs as defined by the Authority in administrative rule.

~~(K)~~ Volunteers, who are not under the direction and control of a licensed, certified, registered, or otherwise regulated QE.

~~(L)~~ Individuals employed or volunteering in a Medicare-certified health care business which is not subject to licensure or certification by the State of Oregon.

~~(M)~~ Individuals working in restaurants or at public swimming pools.

~~(N)~~ Hemodialysis technicians.

~~(O)~~ Employees, contractors, temporary workers, or volunteers who provide care, or have access to clients, client information, or client funds of an alcohol and drug program that is certified, licensed, or approved by the Authority’s Health Systems Division to provide prevention, evaluation, or treatment services. This exclusion does not apply to programs specifically required by other Authority program rules to conduct criminal records checks in accordance with these rules.

~~(P)~~ Individuals working for a transit service provider which conducts background checks pursuant to ORS 267.237.

~~(Q)~~ Emergency medical technicians and first responders certified by the Authority’s Emergency Medical Services and Trauma Systems program.

~~(R)~~ Employees, contractors, temporary workers, or volunteers of continuing care retirement communities registered under OAR chapter 411, division 67.

~~(S)~~ Individuals hired by or on behalf of a resident in a QE to provide care privately to the resident.

~~(T)~~ An employee, contractor, temporary worker, or volunteer who provides care or has access to clients, client information, or client funds within or on behalf of any entity or agency licensed, certified,

registered, or otherwise regulated by the Department or Authority, where the clients served permanently reside in another state.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027-~~8~~, 443.004, & OL 2016, chapter 106, section 6.

407-007-0250

Background Check Process

(1) A QE and SI shall use CRIMS to request a background check. In addition to information required in OAR 125-007-0220, the background check request shall include the following information regarding an SI:

(a) Position title and description of duties to be considered;

(b) Indication of the SI's direct contact with any of the following:

(A) Children (for a child-caring agency governed by OAR chapter 413 division 215, children includes a individual who is under 21 years of age who is residing in or receiving care or services);

(B) Adults;

(C) Seniors (65 years and older);

(D) Confidential information;

(E) Secure Facilities;

(F) Finances or financial records; or

(G) Information Technology Systems.

(c) Worksite location or locations where the SI will be working;

(d) Disclosure of all criminal history;

(A) The SI must disclose all arrests, charges, and convictions regardless of outcome or when the arrests, charges, or convictions occurred. Disclosure includes any juvenile record of arrests, charges, or the outcome of arrests or charges against a juvenile.

(B) The disclosed crimes and the dates must reasonably match the SI's criminal offender information and other criminal records information, as determined by BCU.

(e) Disclosure of other information to be considered in the event of a weighing test.

(A) The SI may provide mitigating information for BCU to review in a weighing test.

(B) BCU may require the SI to provide other information as needed to conduct the weighing test.

(df) For an SI who is SI who is a proctor foster parent certified by a child-caring agency governed by OAR chapter 413 division 215:

(A) The SI must provide a release of information allowing the Department to provide the QE with information regarding the open or pending abuse investigations or substantiated allegations of abuse or neglect against the SI.

(B) The SI must also disclose:

(i) Any currently open or pending child or adult protective services abuse or neglect investigations;

(ii) Any substantiations of child or adult abuse or neglect investigations; and

(iii) Any restraining order or protective order against the SI.

(C) If the SI has any of the following, the Department shall provide the QE notification:

(i) Information regarding the open or pending abuse investigations in which the SI is a reported or alleged perpetrator.

(ii) Information regarding substantiated allegations of abuse or neglect against the SI.

(iii) Confirmation of the SI being certified or licensed by the Department Child Welfare programs as a child foster home provider.

(2) The background check request shall include the following notices to the SI:

(a) A notice regarding disclosure of Social Security number indicating that:

- (A) The SI's disclosure is voluntary; and
- (B) The Department requests the Social Security number solely for the purpose of positively identifying the SI during the criminal records check process.
- (b) A notice that the SI may be subject to fingerprinting as part of a criminal records check.
- (c) A notice that BCU shall conduct an abuse check on the SI. Unless required by program rule, an SI is not required to disclose any history of potentially disqualifying abuse, but may provide BCU with mitigating or other information.
- (3) Using identifying information submitted in a background check request, BCU shall conduct an abuse check to determine if the subject individual has potentially disqualifying abuse.
- (4) BCU shall conduct an Oregon criminal records check. Using information submitted on the background check request, BCU may obtain criminal offender information from LEDS and may request other criminal records information as needed.
- (5) BCU shall handle criminal offender information in accordance with applicable OSP requirements in ORS chapter 181 and the rules adopted pursuant thereto (see OAR chapter 125, division 007 and chapter 257, division 15).
- (6) BCU may conduct a fingerprint-based national criminal records check.
 - (a) A fingerprint-based national criminal records check may be completed under any of the following circumstances:
 - (A) The SI has been outside Oregon:
 - (i) For 60 or more consecutive days during the previous 18 months and the SI is a child care provider or other individual included in OAR 461-165-0180(4).
 - (ii) For 60 or more consecutive days during the previous five years for all other SIs.
 - (B) The LEDS check, SI disclosures, or any other criminal records information obtained by BCU indicate there may be criminal records outside of Oregon.
 - (C) The SI has an out-of-state driver license or out-of-state identification card.
 - (D) BCU or the QE has reason to question the identity of the SI or the information on the criminal record found in LEDS.
 - (E) A fingerprint-based criminal records check is required by federal or state laws or regulations, other Department or Authority rules, or by contract with the Department or Authority.
 - (F) The SI is an employee of an agency which the Centers ~~effor~~ Medicare and Medicaid Services has designated high risk pursuant to 42 CFR 424.518.
 - (G) Any SI applying to be or renewing the position with regard to child adoption or children in foster care licensed by the Department or ~~private-licensed~~ child_caring agencies. Renewing SIs do not need a fingerprint-based criminal records check if BCU has a record of a previous fingerprint-based criminal records checks that is within BCU's retention schedule. Applicable SI positions include:
 - (i) A relative caregiver, foster parent, or adoptive parent in Oregon;
 - (ii) An adult household member in an adoptive or child foster home 18 years of age and over;
 - (iii) A household member in an adoptive or child foster home under 18 years of age if there is reason to believe that the household member may pose a risk to children placed in the home; or
 - (iv) A respite care provider in an adoptive or child foster home.
 - (H) BCU has reason to believe that fingerprints are needed to make a final fitness determination.
 - (b) BCU shall request a fingerprint capture for an SI under the age of 18 in accordance with OAR 125-007-0220(3).
 - (c) The SI shall complete and submit a fingerprint capture when requested by BCU within the time frame indicated in a written notice. BCU shall send the request to the QE and the QED shall notify the SI.
 - (A) BCU shall give the SI notice regarding the Social Security number as set forth in section (2)(a) of this rule.

(B) BCU may require new fingerprint capture and its submission if previous fingerprint captures result in a rejection by OSP or the FBI.

(7) BCU may also conduct a state-specific criminal records check instead of or in addition to a national criminal records check. Reasons for a state-specific criminal records check include but are not limited to:

(a) When BCU has reason to believe that out-of-state criminal records may exist and a national criminal records check cannot be accomplished.

(b) When BCU has been unable to complete a national criminal records check due to illegible fingerprints.

(c) When the national criminal records check results show incomplete information about charges or criminal records without final disposition.

(d) When there is indication of residency or criminal records in a state that does not submit all criminal records to the FBI.

(e) When, based on available information, BCU has reason to believe that a state-specific criminal records check is necessary.

(8) In order to complete a background check and fitness determination, BCU may require additional information from the SI including but not limited to additional criminal, judicial, other background information, or proof of identity.

(9) If BCU determines that an SI has addition potentially disqualifying convictions or conditions after receiving the background check request, BCU shall provide the SI, if available, the opportunity to disclose criminal records, potentially disqualifying conditions, and other information as indicated in OAR 407-007-0300 before completion of the final fitness determination.

(910) BCU may conduct a background check in situations of imminent danger.

(a) If the Department or Authority determines there is indication of criminal or abusive behavior that could more likely than not pose an immediate risk to vulnerable individuals, BCU shall conduct a new criminal records check on an SI without the completion of a new background check request.

(b) If BCU determines that a fitness determination based on the new background check would be adverse to the SI, BCU shall provide the SI, if available, the opportunity to disclose criminal records, potentially disqualifying conditions, and other information as indicated in OAR 407-007-0300 before completion of the final fitness determination.

~~(1011)~~ All criminal records checks conducted under this rule shall be documented.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, & OL 2016, chapter 106, section 6.

407-007-0279

Federal Mandatory Exclusions

(1) Convictions and conditions under 42 USC 1320a-7(a) result in mandatory exclusion for SIs if they occurred within five years from the date the final fitness determination. If the convictions and conditions under 42 USC 1320a-7(a) occurred after five years from the date the final fitness determination, the individual is subject to a fitness determination under OAR 125-007-0260 and 407-007-0320.

(a) ~~This sub section~~ Section (1) of this rule applies to an SI who is:

(A) Home care worker or personal support worker as defined in ORS 410.600.

(B) Is employed by:

(i) A residential facility as defined in ORS 443.400 that receives Medicare or state health care funds;

(ii) An in-home care agency as defined in ORS 443.005 that receives Medicare or state health care funds;

(iii) A home health agency as defined in ORS 443.005 that receives Medicare or state health care funds;

(b) If BCU determines that an individual is subject to this rule and has an exclusion listed in 42 USC 1320a-7, BCU shall make the determination of mandatory exclusion. Convictions or conditions requiring mandatory exclusion include:

- (A) Convictions related to the delivery of Medicare or State health care program services.
- (B) Convictions related to the abuse of a client or patient.
- (C) Felony convictions related to health care fraud, ~~if the offense occurred after August 21, 1996.~~
- (D) Felony convictions related to the manufacture, delivery, prescription or dispensing of a controlled substance, ~~if the offense occurred after August 21, 1996.~~

(c) Under OAR 125-007-0260, the determination of mandatory exclusion is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of any other potentially disqualifying convictions and conditions the SI has.

(d) A determination of mandatory exclusion is subject to appeal rights only if allowed under 42 UCS 1320a-7(c) or 42 USC 1320a-7(d). If allowed, appeals shall comply with OAR 125-007-0300, 943-007-0335 and 943-007-0501.

(2) Convictions and conditions under 42 USC 12645g result in mandatory exclusion for SIs.

(a) ~~This subsection~~ Section (2) of this rule applies to a SIs who working or volunteering under the National and Community Service Act of 1990 as amended by the Serve America Act, including participants and employees in:

- (A) Americorps;
- (B) Foster Grandparents;
- (C) Senior Companions; or
- (D) Any other programs funded under national service laws.

(b) If BCU determines that an individual is subject to this rule and has an exclusion listed in 42 USC 12645g, BCU shall make the determination of mandatory exclusion. Exclusions include:

- (A) Listing on, or requirement to be listed on a sex offender registry;
- (B) Conviction for murder.
- (C) Refusal to complete the background check.
- (D) False statement by the SI in connection with criminal history disclosure.

(c) Under OAR 125-007-0260(2)(d), the determination of “mandatory exclusion” is considered an incomplete fitness determination. A fitness determination with a weighing test is not required regardless of any other potentially disqualifying convictions and conditions the SI has.

(d) A determination of “mandatory exclusion” due to 42 USC 12645g is not subject to appeal rights under OAR 125-007-0300, 407-007-0330, 407-007-0335, 943-007-0335, or 943-007-0501.

Stat. Auth.: ORS 181A.195 & 409.050

Stats. Implemented: ORS 181A.195

407-007-0290

Other Potentially Disqualifying Conditions

Pursuant to OAR 125-007-0270, the following are potentially disqualifying conditions, if they exist on the date of the Department receives the background check request ~~final fitness determination unless otherwise noted:~~

- (1) The SI makes a false statement to the QE or Department, including the provision of materially false information, false information regarding criminal records, or failure to disclose information regarding criminal records. Nondisclosure of violation or infraction charges may not be considered a false statement.
- (2) The SI is a registered sex offender in any jurisdiction. There is a rebuttable presumption that an SI is likely to engage in conduct that would pose a significant risk to vulnerable individuals if the SI has been

designated a predatory sex offender in any jurisdiction under ORS 181.585 or found to be a sexually violent dangerous offender under ORS 144.635 (or similar statutes in other jurisdictions).

(3) The SI has an outstanding warrant for any crime in any jurisdiction.

(4) The SI has a deferred sentence, conditional discharge, or is participating in a diversion program for any crime in any jurisdiction.

(5) The SI is currently on probation, parole, or post-prison supervision for any crime in any jurisdiction, regardless of the original conviction date (or date of guilty or no contest plea if there is no conviction date).

(6) The SI has been found in violation of post-prison supervision, parole, or probation for any crime in any jurisdiction, regardless of the original conviction date (or date of guilty or no contest plea if there is no conviction date) within five years from the date the ~~background check request was electronically submitted to BCU through CRIMS or the date BCU conducted a criminal records check due to imminent danger~~final fitness determination.

(7) The SI has an unresolved arrest, charge, or a pending indictment for any crime in any jurisdiction.

(8) The SI has been arrested in any jurisdiction as a fugitive from another state or a fugitive from justice, regardless of the date of arrest.

(9) The SI has an adjudication in a juvenile court in any jurisdiction, finding that the SI was responsible for a potentially disqualifying crime that would result in a conviction if committed by an adult. Subsequent adverse rulings from a juvenile court, such as probation violations, shall also be considered potentially disqualifying if within five years from the date ~~the background check request was signed or the date BCU conducted a criminal records check due to imminent danger~~of the final fitness determination.

(10) The SI has a finding of “guilty except for insanity,” “guilty except by reason of insanity,” “not guilty by reason of insanity,” “responsible except for insanity,” “not responsible by reason of mental disease or defect,” or similarly worded disposition in any jurisdiction regarding a potentially disqualifying crime, unless the local statutes indicate that such an outcome is considered an acquittal.

(11) The SI has potentially disqualifying abuse as determined from abuse investigation reports which have an outcome of founded, substantiated, or valid and in which the SI is determined to have been responsible for the abuse. For the following SIs, potentially disqualifying abuse includes:

(a) For ~~SIs an SI~~ associated with child foster homes licensed by the Department’s DD programs, child foster or adoptive homes ~~licensed/certified~~ through the Department’s Child Welfare Division, child foster ~~homes licensed through a private licensed child caring agency, adoptive families through a private licensed child caring agency,~~ or adoptive ~~families through the Department’s Child Welfare Division,~~ potentially disqualifying abuse includes: homes governed by OAR chapter 413 division 215, but not an SI who is a proctor foster parent certified by a child-caring agency governed by OAR chapter 413 division 215:

(A) Child protective services history held or received by the Department or ~~the Office of Adult Abuse Prevention and Investigations (OAAPI)~~ regardless of the date of initial report;

(B) Child protective services history reviewed pursuant to the federal Adam Walsh Act requirements, determined by BCU to be potentially disqualifying; and

(C) Adult protective services investigations of physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to BCU by OAAPI and APD programs based on severity.

(b) ~~For staff, volunteers, or contractors of a private licensed child caring agency, an ISRS program, a SPRF provider, or a System of Care contractor providing child welfare services pursuant to ORS chapter 418 chapter 418,~~ potentially disqualifying abuse includes:

~~(A) Child protective services history held by the Department or OAAPI regardless of the date of initial report; and~~

~~(B) Adult protective services investigations of physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to BCU by OAAPI and APD based on severity.~~

~~(c) For child care providers and associated subject individuals defined in OAR 407-007-0210:~~

~~(A) Child protective services history held by the Department or OAAPI regardless of the date of initial report, date of outcome, and considered potentially disqualifying pursuant to OAR 461-165-0420; and~~

~~(B) Adult protective services investigations of physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to BCU by the OAAPI and APD programs based on severity.~~

~~For an SI on the background check registry maintained under OAR 407-007-0600 to 407-007-0640; licensed, certified, or otherwise regulated by the Department; associated with any QE licensed, certified, or otherwise regulated by the Department (any QE licensed, certified, or regulated only with the Authority and not the Department are not included):~~

~~(A) Child protective services history held or received by the Department or OAAPI regardless of the date of initial report; and~~

~~(B) Adult protective services investigations of physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to BCU by the OAAPI and APD programs based on severity.~~

~~(c) For any other SI with direct contact with children:~~

~~(A) Child protective services history held or received by the Department or OAAPI regardless of the date of initial report; and~~

~~(B) Adult protective services investigations of physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to BCU by the OAAPI and APD programs based on severity.~~

(d) For all other SIs, potentially disqualifying abuse includes founded or substantiated adult protective services investigations of physical abuse, sexual abuse, or financial exploitation initiated on or after January 1, 2010, as provided to the BCU by OAAPI and APD programs based on severity.

~~(12) The SI has child protective services investigations open or pending through the Department or OAAPI as of the date the background check request was electronically submitted to BCU through CRIMS or the date BCU conducted a criminal records check due to imminent danger. This potentially disqualifying condition only applies to:~~

~~(a) SIs associated with child foster homes licensed by the Department's DD programs, child foster or adoptive homes licensed/certified through the Department's Child Welfare Division, child foster homes licensed through a private licensed child-caring agency, adoptive families through a private licensed child-caring agency, or adoptive families through the Department's Child Welfare Division homes governed by OAR chapter 413 division 215;~~

~~(b) Staff, volunteers or contractors of a private licensed child_caring agency, an ISRS program, a SPRF provider, or a System of Care contractor, providing child welfare services pursuant to ORS chapter 418; or~~

~~(c) Child care providers and associated subject individuals defined in OAR 407-007-0210.~~

~~(13) For an SI who is a proctor foster parent certified by a child-caring agency governed by OAR chapter 413 division 215 SI who is child-caring agency proctor foster parent, the SI is the individual found responsible for substantiated adult protective services investigation of neglect initiated on or after January 1, 2010, as provided to BCU by OAAPI and APD based on severity.~~

~~(13) For an SI who is a proctor foster parent certified by a child-caring agency governed by OAR chapter 413 division 215 child-caring agency proctor foster parent, the SI has any restraining order or protective order against the SI.~~

~~(14) For an SI who is SI who is a proctor foster parent certified by a child-caring agency governed by OAR chapter 413 division 215 a child-caring agency proctor foster parent, the SI makes a false statement to~~

the QE or Department, including the provision of materially false information, regarding abuse, restraining orders, or protective orders; or failure to disclose information regarding abuse, restraining orders, or protective orders. Nondisclosure of unsubstantiated or inconclusive abuse or dismissed restraining orders or protective others, may not be considered a false statement.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027-~~2~~, 443.004, & OL 2016, chapter 106, section 6.

407-007-0320

Final Fitness Determinations

(1) BCU shall make a final fitness determination pursuant to OAR 125-007-0260 and these rules after all necessary background checks have been received and a weighing test, if necessary, has been completed. For the purpose of a final fitness determination as defined in OAR 407-007-0010(18), an authorized designee includes:

(a) A BCU staff trained to make a final fitness determination;

(b) A BCU hearing representative if a fitness determination is contested under OAR 407-007-0330 or 407-007-0335; or

(c) An administrative law judge if a contested fitness determination results under a contested case hearing through the Office of Administrative Hearings.

(12) The final fitness determination results in one of the following outcomes:

(a) BCU may approve an SI if:

(A) The SI has no potentially disqualifying convictions or potentially disqualifying conditions; or

(B) The SI has potentially disqualifying convictions or potentially disqualifying conditions and, after a weighing test, BCU determines that more likely than not, the SI poses no risk to the physical, emotional, or financial well-being of vulnerable individuals.

(b) BCU may approve an SI with restrictions if BCU determines that more likely than not, the SI poses no risk to the physical, emotional, or financial well-being of vulnerable individuals if certain restrictions are placed on the SI. Restrictions may include but are not limited to restrictions to one or more specific clients, job duties, or environments. A new background check and fitness determination shall be completed on the SI before removing a restriction.

(c) BCU shall deny an SI who the BCU determines, after a weighing test, more likely than not, poses a risk to the physical, emotional, or financial well-being of vulnerable individuals.

(d) In the following situations, the SI shall have no hearing rights and BCU shall consider a background check to have an outcome of incomplete fitness determination:

(A) The QE or SI discontinues the application or fails to cooperate with the background check or fitness determination process, including but not limited to failure to disclose all requested criminal, abuse or other information, refusal to be fingerprinted or failing to respond in a timely manner to written correspondence from BCU. The background check request is considered closed.

(B) BCU determines that the SI is ineligible due to ORS 443.004 in accordance with OAR 407-007-0275 or 407-007-0277. The background check request is considered completed.

(C) BCU or the QE withdraws or closes the background check request before a final fitness determination for any reason. The background check request is considered closed.

(D) The SI withdraws the application, leaves the position prior to completion of the background check, or the Department cannot locate or contact the SI. The background check request is considered closed.

(E) The SI is determined to be ineligible for the position by the QE for reasons other than the background check. The background check request is considered closed.

~~(F) BCU determines that~~ The SI who is a proctor foster parent certified by a child-caring agency governed by OAR chapter 413 division 215 ~~SI is a child-caring agency proctor foster parent and fails to provide a release of information, the background check request is considered closed.~~

~~(e) BCU shall make the final fitness determination of mandatory exclusion if the SI is~~ subject to OAR 407-007-0279 ~~and. If the SI~~ has a conviction or condition listed ~~. BCU makes a determination of mandatory exclusion if the, the~~ background check request is considered completed. The SI has hearing rights only if granted ~~in~~ under federal law.

~~(ef)~~ BCU shall issue an intent to deny if the final fitness determination ~~is made under~~ meets the criteria in OAR 407-007-0335 (1). The SI has expedited hearings rights under OAR 407-007-0335.

~~(23)~~ Upon completion of a final fitness determination, BCU or the QE shall provide notice to the SI.

(a) If approved, BCU shall provide notice to the QE through CRIMS. The QE shall provide the SI a copy of the notice or CRIMS documentation.

(b) If the final fitness determination is a denial based on potentially disqualifying abuse under OAR 407-007-0290(11)(d) and there are no other potentially disqualifying convictions or conditions, BCU shall issue a Notice of Intent to Deny and provide the SI hearing rights under OAR 407-007-0335.

~~(c)~~ Except as required by section (4)(a) of this rule, if denied or approved with restrictions, BCU shall issue a notice of fitness determination to the SI which includes the potentially disqualifying convictions or conditions that the outcome was based upon, information regarding appeal rights, and the notice becoming a final order in the event of a withdrawal or failure to appear at the hearing.

(d) The effective date of action shall be recorded on the notice or CRIMS documentation.

~~(34)~~ BCU shall provide the QE notification of the final fitness determination when the SI is being denied or approved with restrictions.

~~(45)~~ When an SI is denied, the SI shall not be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the background check request. A denial applies only to the position and application in question. A denial shall result in immediate termination, dismissal, or removal of the SI.

~~(56)~~ When an SI is approved with restrictions, the SI shall only be allowed to work, volunteer, be employed, or otherwise perform in the position listed on the background check request and only under the stated restrictions. A restricted approval applies only to the position and application in question. A restricted approval shall result in immediate implementation of the restrictions.

~~(67)~~ BCU shall maintain any documents obtained or created during the background check process.

~~(78)~~ BCU shall make new fitness determinations for each background check request. The outcome of previous fitness determinations does not set a precedent for subsequent fitness determinations.

Stat. Auth.: ORS 181A.200, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 409.010, 409.027 ~~&~~, 443.004, & OL 2016, chapter 106, section 6.

407-007-0330

Contesting a Fitness Determination

(1) An SI may contest a final fitness determination of denied or restricted approval pursuant to OAR 125-007-0300 unless already granted contested case hearing rights under OAR 407-007-0335.

(2) If an SI is determined to have a mandatory exclusion pursuant to federal law and OAR 407-007-0279, the SI may have hearing rights only if allowed by federal law.

(3) If an SI is denied, the SI may not hold the position, provide services or be employed, licensed, certified, or registered, or otherwise perform in positions covered by these rules. An SI appealing a restricted approval may only work under the terms of the restriction during the appeal.

(4) If an adverse outcome is changed at any time during the appeal process, the change does not guarantee employment or placement.

(5) An SI may represent himself or herself or have legal representation during the appeal process. For the purpose of this rule, the term "SI" shall be considered to include the SI's legal representative.

(a) An SI who is appealing an adverse outcome regarding the position of homecare worker as defined in ORS 410.600 or personal support worker as defined in ORS 410.600 may be represented by a labor union representative pursuant to ORS 183.459.

(b) For all other SIs, the SI may not be represented by a lay person.

(6) An SI may contest an adverse fitness determination by requesting a contested case hearing. The contested case hearing process is conducted in accordance with OAR 125-007-0300, ORS 183.411 to 183.497 and the Attorney General's Uniform and Model Rules of Procedure for the Office of Administrative Hearings (OAH), OAR 137-003-0501 to 137-003-0700.

(a) To request a contested case hearing, the SI shall complete and sign the Hearing Request form.

(b) The completed and signed form must be received by the Department within 45 calendar days after the effective date of action.

(c) BCU shall accept a properly addressed hearing request that was not timely filed if it was postmarked within the time specified for timely filing.

(d) In the event an appeal is not timely by the date of receipt or by the date of postmark, BCU shall determine, based on a written statement from the SI and available information, if there is good cause to proceed with the appeal.

(e) BCU may refer an untimely request to the OAH for a hearing on the issue of timeliness.

(7) BCU may conduct an administrative review before referring the appeal to the OAH.

(a) The SI must participate in the administrative review. Participation may include but is not limited to providing additional information or additional documents requested by the BCU within a specified amount of time.

(b) The administrative review is not open to the public.

(8) BCU may conduct additional criminal records checks or abuse checks during the contested case hearing process to update or verify the SI's potentially disqualifying convictions or conditions and factors to consider in the weighing test. ~~If needed,~~ If BCU finds new potentially disqualifying convictions and conditions during the administrative review, BCU shall make a new final fitness determination and amend the notice of fitness determination while still maintaining the original hearing rights and deadlines.

(9) The Department shall be represented by a hearing representative in contested case hearings. The Department may also be represented by the Office of the Attorney General.

(a) The administrative law judge shall make a new final fitness determination based on evidence and the contested case hearing record.

(b) The only remedy an administrative law judge may grant is a final fitness determination that the subject individual is approved, approved with restrictions, or denied. Under no circumstances shall the Department or the QE be required to place an SI in any position, nor shall the Department or the QE be required to accept services or enter into a contractual agreement with an SI.

(10) The notice of final fitness determination issued is final as if the SI never requested a hearing in the following situations:

(a) The SI failed to request a hearing in the time allotted in this rule. No other document will be issued after the notice of final fitness determination.

(b) The SI withdraws the request for hearing at any time during the appeal process.

(11) BCU may make an informal disposition based on the administrative review. The Department shall issue a final order and new notice of final fitness determination. If the resulting fitness determination is an adverse outcome, the appeal shall proceed to a contested case hearing.

(12) BCU shall issue a dismissal order in the following situations:

(a) The SI may withdraw a hearing request verbally or in writing at any time before the issuance of a final order. A dismissal order due to the withdrawal is effective the date the withdrawal is received by BCU or the OAH. The SI may cancel the withdrawal in writing within 14 calendar days after the date of withdrawal.

(b) BCU shall dismiss a hearing request when the SI fails to participate in the administrative review. Failure to participate in the administrative review shall result in termination of hearing rights. The order is effective on the due date for participation in the administrative review. BCU shall review a good cause request to reinstate hearing rights if received in writing by BCU within 14 calendar days.

(c) BCU shall dismiss a hearing request when the SI fails to appear at the time and place specified for the contested case hearing. The order is effective on the date scheduled for the hearing. BCU shall review a good cause request to reinstate hearing rights if received in writing by BCU within 14 calendar days of the order.

(13) After a hearing, the administrative law judge shall issue a proposed and final order.

(a) If no written exceptions are received by BCU within 14 calendar days after the service of the proposed and final order, the proposed and final order becomes the final order.

(b) If timely written exceptions to the proposed and final order are received by BCU, the Department's Director or designee shall consider the exceptions and serve a final order, or request a written response or a revised proposed and final order from the administrative law judge.

(14) Final orders, including dismissal and default orders, are subject to reconsideration or rehearing petitions within 60 calendar days after the order is served, pursuant to OAR 137-003-0675.

(15) BCU may provide the QED with the results of the appeal.

Stat. Auth.: ORS 181A.200, 183.459, 409.027 & 409.050

Stats. Implemented: ORS 181A.195, 181A.200, 183.459, 409.010, 409.027 & 443.004