

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

**CHAPTER 411
DIVISION 89**

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

411-089-0010 Inspections and Surveys

(Amended 06/28/2015)

(1) Frequency. The Department shall, in addition to any investigations conducted pursuant to complaints, conduct a general inspection of each facility to determine compliance with nursing facility laws on a schedule consistent with the survey schedule defined by the Centers for Medicare and Medicaid Services (CMS), and at such other times as the Department deems necessary.

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

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

Stat. Auth.: ORS 410.070, 441.055, 441.615

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

411-089-0020 Sanctions, Generally

(Amended 06/28/2015)

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

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

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

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

Stat. Auth.: ORS 441.055, 441.615, 441.070

Stats. Implemented: ORS 411.050, 441.615, 441.710

411-089-0030 Civil Penalties

(Amended 04/01/2016)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Violation of OAR 411-070-0470 (2) (3), (5), (6), (8) (Nursing Assistant Training and Competency Evaluation Programs Reimbursement).

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

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

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

(4) AMOUNT OF CIVIL PENALTY.

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

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

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

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

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

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

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

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

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

(i) "Serious injury" means a physical injury that creates a substantial risk of death or that causes serious disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

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

(iii) "Sexual abuse" means any form of sexual contact between an employee of a nursing facility or a person providing services in the nursing facility and a resident of that facility, including, but not limited to, sodomy, sexual coercion, sexually explicit photographing, or sexual harassment. The sexual contact must be in the form of any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.

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

(5) ADMINISTRATOR SANCTIONS - NURSING FACILITY CLOSURES.

Any individual who is or was the administrator of a facility and fails or failed to comply with the requirements at OAR 411-085-0025(2)(d)(e)(f)(h), OAR 411-085-0025(3)(a), or OAR 411-088-0070(1)(g), (3)(d), or (4):

(a) Are subject to a civil monetary penalty as follows:

(A) A minimum of \$500 for the first offense;

(B) A minimum of \$1,500 for the second offense; and

(C) A minimum of \$3,000 for the third and subsequent offenses.

(b) May be subject to exclusion from participation in any Federal health care program as defined in section 1128B(f) of the Patient Protection and Affordable Care Act; and

(c) Are subject to any other penalties that may be prescribed by law.

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

(7) All penalties recovered are deposited in the Quality Care Fund.

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

(9) HEARING REQUEST.

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

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

(10) DEFAULT ORDER. If a hearing is not timely requested, if the licensee withdraws a hearing request, or fails to appear at a scheduled hearing, the Department may enter a final order by default imposing the civil penalty. In the event of a default, the Department's file on the subject of the civil

penalty automatically becomes a part of the record for purposes of proving the Department's prima facie case.

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

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

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

(Amended 06/28/2015)

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

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

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

(b) Failed to substantially comply with nursing facility law during any three inspections within a five year period. For the purpose of this rule, "inspection" means an on-site visit to the facility by the Department for licensing or certification;

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

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

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

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

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

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

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

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

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

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

(m) Demonstrated fiscal instability within the preceding five years and such instability relates to the licensee or applicant's ability to provide care or operate a facility, or both provide care and operate a facility. Examples of fiscal instability include, but are not limited to,

experiencing more than one instance of any of the following events or experiencing more than one of the following events:

- (A) Failure to compensate employees in a timely manner;
- (B) Failure to maintain, in any facility, an adequate inventory of medical supplies, personal supplies, or food;
- (C) Failure to promptly pay any judgments, taxes, warrants, or other liens;
- (D) Failure to pay utility bills or other bills related to the operation or maintenance of any facility, excluding failure to pay when the facility has a clear basis to dispute the billing; or
- (E) A poor credit rating.

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

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

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

- (a) A statement that the licensee or applicant has a right to a contested case hearing or a statement of the time and place of the hearing;
- (b) A statement of the authority and jurisdiction under which the hearing is to be held;
- (c) A reference to the particular sections of the statute and rules involved;
- (d) A short and plain statement of the matters asserted or charged;

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

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

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

(4) Informal Conference. When the Department issues a notice of intent to revoke or deny a license, the licensee or applicant shall be entitled to an informal conference to respond to the notice. The conference shall be held before a person authorized to issue the order or to make recommendations regarding issuance of the order. A request for an informal conference must be received in writing by the Department within 10 days of the date the notice of the intent to revoke or deny the license was received by the licensee or applicant. If the licensee or applicant fails to submit a timely request for a conference, the licensee or applicant shall have waived the right to the conference.

(5) Hearing:

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

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

(A) 21 days of the date the licensee received the notice of revocation; or

(B) 60 of the date the applicant received the notice of denial of licensure.

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

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

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

(7) Emergency Suspension Order.

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

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

(A) Describe generally the acts of the licensee or circumstances that are grounds for an emergency suspension order under this rule, or both;

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

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

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

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

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

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

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

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

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

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

(G) That if the demand for a hearing is not received by the Department within 90 days of the date of the emergency

suspension order, the licensee shall have waived its right to a hearing under ORS Chapter 183;

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

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

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

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

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

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

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

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

Stats. Implemented: ORS 441.030, 441.615

411-089-0050 Restriction of Admissions

(Amended 06/28/2015)

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

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

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

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

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

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

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

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

(A) The Department finds a pattern of:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) The effective date of the restriction;

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

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

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

(h) That if a demand for hearing is not received by the Department within 90 days of the date of the notice of the Admission Restriction

Order, the licensee shall have waived the right to a hearing under ORS Chapter 183;

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

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

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

(7) Hearing:

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

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

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

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

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

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

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

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

(8) Re-inspection.

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

(b) If the Department finds there is no longer an immediate threat to resident health and safety, and finds effective systems are in place to ensure similar deficiencies do not recur, the restriction must be lifted. The Department must notify the facility by telephone of the decision to lift or not lift the restriction within five working days from the completion of the re-inspection. Telephone notification must be followed by written notification.

(c) If the Department determines an immediate threat to resident health and safety continues to exist after a re-inspection, the admission restriction is not lifted and the Department is not obligated to re-inspect again for at least 45 days. A decision not to rescind the Admission Restriction Order shall be given to the licensee in writing and the licensee shall be informed of the right to a contested case hearing pursuant to ORS Chapter 183. Nothing in this rule is intended

to limit the Department's authority to visit or inspect the facility at any time.

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

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

411-089-0070 Facility Fund
(Amended 06/28/2015)

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

(2) BASIS FOR APPOINTMENT.

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

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

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

(4) FACILITY FUND FEE ASSESSMENT.

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

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

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

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

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

411-089-0075 Temporary Manager

(Amended 06/28/2015)

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

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

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

(b) The imminent insolvency of the facility;

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

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

(3) DUTIES AND POWERS. The temporary manager has all of the duties and powers, as agreed upon between the Department and the licensee,

that are necessary to ensure the safety and well-being of the residents and the continued operation of the facility.

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

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

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

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

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

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

Complaints, Inspections & Sanctions

411-089-0100 Complaint Intake, Investigation

(Amended 06/28/2015)

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

(2) **Complaint Investigation.**

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

(b) **Multiple Problems.** If the complaint alleges more than one problem, each allegation of abuse or another rule violation shall be treated as a separate complaint, and shall be given a separate

finding. This is not intended to require a separate status report or complaint investigation report for each allegation.

(c) Complainant Interview. The APD or Type B AAA office representative shall interview the complainant immediately and, as necessary, during the investigation.

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

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

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

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

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

(f) Prior Notification Prohibited. Neither the Department nor the local APD or Type B AAA office shall contact the facility before the on-site investigation.

(g) Facility Visit. The investigation shall include at least one unannounced visit to the facility. Upon arrival at the facility, the investigator shall announce his or her presence to the administrator

or other person designated to be in charge. The investigator shall explain the purpose of the visit, unless the investigator has reason to believe that disclosing the purpose of the visit would impede the investigation.

(h) *Witness Interview.* Reasonable effort shall be made to interview all possible witnesses, including alleged perpetrators (if any), the involved residents and any other persons, including other residents, identified by any source as having personal knowledge about any allegations.

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

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

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

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

Stat. Auth.: ORS 410.070, 441.055, 441.637

Stats. Implemented: ORS 441.637, 441.650

411-089-0110 Initial Status Report (Abuse Complaints Only)

(Amended 06/28/2015)

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

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

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

(b) The status of the investigation;

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

(d) A determination of whether action to protect the residents is needed and whether the facility must take action;

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

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

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

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

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

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

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

(d) The facility; and

(e) OLRO.

(4) Availability of Initial Status Report. Upon completion, the Initial Status Report shall be placed in the local APD or Type B AAA facility files and available for public inspection.

Stat. Auth.: ORS 410.070, 441.055, 441.637

Stats. Implemented: ORS 441.637, 441.650

411-089-0120 Complaint Investigation Report (Local APD or Type B AAA Office)

(Amended 06/28/2015)

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

(2) Content. The complaint investigation and the findings of the investigation shall be summarized on the complaint investigation report form. The form shall not include the names of any resident, complainant, or persons interviewed. The investigation report shall include:

(a) The nature of the allegations;

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

(c) A summary of the documents reviewed;

(d) A summary of each interview;

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

(f) The factual basis for the finding.

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

(a) The alleged wrongdoing is substantiated;

(b) The alleged wrongdoing is not substantiated; or

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

(4) Timeframe for Completion Processing (Local APD or Type B AAA Office).

(a) If a complaint alleges abuse, the complaint report shall be completed within five working days after the investigation is completed, but not later than 60 days after receipt of the complaint.

(b) All other complaint investigation reports shall be completed within 90 days of the receipt of the complaint.

(c) Investigation reports shall be sent to OLRO promptly upon completion.

Stat. Auth.: ORS 410.070, 441.055, 441.637

Stats. Implemented: ORS 441.637, 441.650, 441.676

411-089-0130 Division Findings for Complaint Investigations (OLRO)
(Amended 06/28/2015)

OLRO Review. OLRO shall review the Complaint Investigation Report and any evidence submitted with the report.

(1) OLRO Determination. OLRO shall review the Complaint Investigation Report and shall determine for each alleged violation:

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

(b) There is "Substantiated, non-abuse," which means a reasonable person is able objectively to conclude it is more likely than not a rule

violation, other than abuse, occurred, including identification of rule violated;

(c) Is "Unsubstantiated," which means a reasonable person is able objectively to conclude it is unlikely any rule violation occurred; or

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

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

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

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

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

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

(D) Failure to adequately train or orient staff;

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

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

(G) Failure to provide adequate services;

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

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

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

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

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

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

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

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

Stat. Auth.: ORS 410.070, 441.055, 441.637

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

411-089-0140 Letters of Determination

(Amended 06/28/2015)

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

(1) CONTENT. The letter of determination shall:

(a) Explain the nature of each allegation;

(b) Include the date and time of each occurrence;

(c) For each allegation, include a determination of whether the allegation is substantiated, unsubstantiated, or unable to substantiate;

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

(e) For each substantiated allegation of abuse, explain the Department's determination of responsibility;

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

(g) State that the complainant, any individual found responsible for abuse, and the facility have 10 days to provide additional or different information; and

(h) Explain, when applicable, if sanctions (e.g., civil penalty, license revocation) are pursued, a formal appeal process shall be available.

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

(a) The Department's intent to enter the finding of abuse into the Nursing Assistant Registry;

(b) The nursing assistant may provide additional information for inclusion in the Nursing Assistant Registry if provided within 10 days;

(c) The Nursing Assistant Registry;

(d) The nursing assistant has 10 days to respond in writing with different or additional information, 30 days to request in writing a contested case hearing as provided in ORS 183.411 to 183.470, and the consequences of failure to respond; and

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

(3) DISTRIBUTION.

- (a) The letter of determination shall be distributed to the facility, the complainant (if known), and the local APD or Type B AAA office;
- (b) The letter of determination shall be sent by certified mail or delivered in person to any nursing assistant found responsible for abuse. In the case of a nursing assistant, notice sent to the nursing assistant's last known address is sufficient to meet the requirements of this rule;
- (c) The letter of determination shall also be mailed to any health-related board or agency that certified or licensed an individual determined to be responsible for abuse. However, if the party determined to be responsible is a nursing assistant, the letter may not be mailed to the State Board of Nursing until the nursing assistant has exhausted all his or her appeal rights; and
- (d) A copy of the letter of determination shall be placed in the Department's facility complaint file.

(4) REVISION.

- (a) The Department may reinvestigate a complaint, issue a revised letter of determination, or both if the Department determines further information provided by the complainant, accused individual, or facility merits such action.
- (b) If the Department issues a revised letter of determination, the letter shall be distributed to all individuals identified in section (3) of this rule.

(5) FAILURE TO REQUEST HEARING OR TO APPEAR.

- (a) If the nursing assistant fails to request a contested case hearing in writing within 30 days of the letter of determination, or if the nursing assistant scheduled to attend the hearing fails to attend, the Department shall affirm the letter of determination and notify the State

Board of Nursing of the Department's finding. The abuse finding shall be entered into the Nursing Assistant Registry.

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

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

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

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

Stat. Auth.: ORS 410.070, 441.055, 441.637

Stats. Implemented: ORS 441.637, 441.677

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

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

(Amended 04/01/2014)

I. RANGE OF CIVIL PENALTIES

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

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

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

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

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

³ Minor injury means an injury resulting in temporary discomfort or pain, treated in-house, including medication or treatment or bed rest for short duration, ordinarily not more than 24-48 hours.

⁴ Related problem means the same staff or resident involved or the same rule, same harm, or same underlying cause.