

Secretary of State  
Certificate and Order for Filing  
**TEMPORARY ADMINISTRATIVE RULES**  
&  
**STATEMENT OF NEED AND JUSTIFICATION**

I certify that the attached copies\* are true, full and correct copies of the TEMPORARY Rule(s) adopted on [upon filing] by the  
Date prior to or same as filing date

Department of Human Services, Aging and People with Disabilities 411

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Agency and Division	Administrative Rules Chapter Number
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Salem, OR 97301-1074	

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Rules Coordinator	Address	Telephone
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to become effective [April 1, 2016] through [September 27, 2016].  
Date upon filing or later A maximum of 180 days including the effective date.

**RULE CAPTION**

**Quality and Efficiency Incentive Program**

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

**IN THE MATTER OF**

**The temporary amendment of OAR 411-070 relating to nursing facilities**

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**RULEMAKING ACTION**

**ADOPT:**

**AMEND:**

411-070-0437; 411-070-0442

**SUSPEND:**

Stat. Auth.: ORS 410.070, 414.065

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Other Auth.: HB 2216 (2013), SB 1585 (2016)

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Stats. Implemented: ORS 410.070, 414.065

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**RULE SUMMARY**

The Department of Human Services (DHS), Aging and People with Disabilities (APD) is temporarily amending the Medicaid Nursing Facility rules set forth within OAR chapter

411, division 070 to comply Senate Bill 1585, which revises the Quality and Efficiency Incentive Program (QEIP) for Oregon Medicaid nursing facilities.

**Documents Relied Upon, and where they are available:**

House Bill 2216 (2013) & Senate Bill 1585 (2016), available from DHS Hearings and Rules Unit, 500 Summer Street NE E48, Salem, Oregon 97301.

**Need for the Temporary Rule(s):**

The Department needs to amend OAR 411-070 to comply with Senate Bill 1585 (2016) to revise the Quality and Efficiency Incentive Program (QEIP) for Oregon Medicaid nursing facilities. The Department needs to adopt these temporary amendments to allow APD to continue the Quality and Efficiency Incentive Program for Nursing Facility until June 30, 2016 in accordance with the legislative decision. The current language states the nursing facility has to be purchased by another nursing facility by December 31, 2015 to be eligible for this program. The Department is amending the language to comply with the bill changes by changing the language from "purchased" to "a facility has to have an acquisition plan submitted to purchase to the Department" and extends the date to June 30, 2016.

**Justification of Temporary Rule(s):**

Failure to act promptly and immediately amend OAR 411-070 will result in serious prejudice to Medicaid nursing facilities, the Department, and members of the public. These rules need to be adopted promptly so that the Department is in compliance with the legislative mandate to change the program according to Senate Bill 1585 (2016).

OAR 411-070 needs to be amended promptly because failure to implement these amendments by April 1, 2016 would cause the APD to be out of compliance with legislative mandate and Medicaid would be forced to cover the operating costs as beds remain vacant.

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

**CHAPTER 411  
DIVISION 70**

**NURSING FACILITIES/MEDICAID – GENERALLY AND  
REIMBURSEMENT**

**411-070-0437 Quality and Efficiency Incentive Program**

(1) ESTABLISHMENT. Effective October 7, 2013 through ~~December 31, 2015~~June 30, 2016, the Department establishes the Quality and Efficiency Incentive Program (Program) in order to implement Enrolled House Bill 2216 (Chapter 608, 2013 Oregon Laws) and Enrolled Senate Bill 1585 (2016). The Program is designed to reimburse quality nursing facilities that voluntarily reduce bed capacity that increases occupancy levels and enhances efficiency with the goal of slowing the growth of system-wide costs. The Department may provide additional compensation to nursing facilities who qualify for the legislatively approved Program. Such compensation may not exceed \$9.75 per resident day and may not exceed four years from the date of eligibility. Eligibility to participate in this Program sunsets on ~~December 31, 2015~~June 30, 2016.

(2) CAPACITY REDUCTION DISCUSSIONS. If two or more providers wish to initiate discussions concerning reduction of bed capacity in a community, the providers must notify the Department. The notice must identify the community and state that the parties wish to discuss reduction of bed capacity in that market pursuant to the Program.

(a) Upon receipt of a notice to discuss reduction of bed capacity, the Department shall review the notice and either approve or disapprove the proposed preliminary discussion. The Department shall approve the preliminary discussion if the community is one in which the proposed capacity reduction is consistent with the goals of the Program.

(b) If the Department approves the preliminary discussion, the Department shall notify the providers who requested approval and shall schedule a meeting at which a Department representative shall be made available to supervise the discussion. Providers in the affected market may attend the meeting and may discuss capacity reduction for that market under the supervision of the Department.

(c) The Department shall determine the time, place, and mechanism to discuss the reduction of bed capacity. The discussions may be held in-person or by means of conference call, video conference, or such other means that allow for each participant to hear and be heard by the other participant at the same time.

(d) Notice to the Department is not required for two providers who wish to discuss a specific transfer of bed capacity.

(3) CAPACITY REDUCTION TRANSACTIONS. Prior to any purchase of bed capacity under the Program, the parties to the transaction must notify the Department.

(a) The notice must describe the parties, the specific facilities, the proposed transaction, and the acquisition plan for the transaction.

(b) The acquisition plan must include documentation demonstrating that:

(A) The purchasing operator is able to meet or arrange for the needs of the individuals residing in the selling facility and meet all change of ownership or operator and closure criteria as described in OAR 411-085-0025;

(B) The selling operator meets the eligibility criteria described in section (5) of this rule and meets the criteria for nursing facility closure described in OAR 411-085-0025;

(C) Bed capacity in the community shall be reduced as a result of the transaction; and

(D) The transaction does not compromise care or health status of residents.

(c) The Department may approve the acquisition plan, disapprove the acquisition plan, or request further information or changes in the acquisition plan. The Department shall approve the transaction upon finding that the acquisition plan is expected to satisfy conditions (A) through (D) in subsection (b) of this section. If the Department approves or disapproves the transaction, the Department shall issue an order approving or disapproving the transaction and explaining how conditions (A) through (D) in subsection (b) of this section are satisfied or not satisfied.

(d) The purchasing operator may receive incentives under the Program only if the Department approves the transaction and the purchasing and selling operators complete the transaction as described in the acquisition plan. Upon meeting the qualifying conditions, eligibility for the incentives will be effective on the date the operator submitted the acquisition plan to the Department. The purchasing operator and selling operator are entitled to state action antitrust immunity for the transaction only if the Department approves the transaction.

(e) Once approved for participation in the Program, the selling facility must provide all notices and meet the other requirements of a facility closure under OAR 411-085-0025, including limiting admissions of residents to the facility.

#### (4) COMMUNITY TRANSITION MEETING.

(a) The Department, in consultation with the Long Term Care Ombudsman, shall convene a regional planning meeting in communities in which a facility plans to surrender the facility's license under these rules. The meeting shall engage the community in:

(A) Planning to promote the safety and dignity of residents who shall be impacted by the surrender;

(B) A discussion regarding the local need for more home and community-based settings; and

(C) Assessing opportunities for more residential programs and supporting residential capacity.

(b) The Community Transition Meeting is initiated by the Department upon approval of an acquisition as described in this rule.

(5) ELIGIBILITY. The eligibility requirements for participation in the Program are:

(a) The nursing facility bed capacity being sold (the "selling facility") is not an Essential Nursing Facility or from a facility operated on behalf of the Oregon Department of Veteran's Affairs; and

(b) The selling facility's entire bed capacity is purchased and the seller agrees to surrender the nursing facility's license on the earlier of the date that:

(A) The last resident is transferred from the facility; or

(B) 180 days after the effective date of the sale of the facility bed capacity.

(c) A Program applicant (the "purchasing operator") must meet all of the following criteria at the time of the acquisition plan submission:

(A) Operate one or more facilities licensed by the Department as a nursing facility;

(B) Must be determined to be in substantial compliance from the annual licensing and recertification survey at the date of the acquisition plan submission; and

(C) Have no substantiated facility abuse meeting the criteria in ORS 441.715(2)(c) within six months of the date of the acquisition plan submission.

(d) The selling facility must provide all notices and meet the requirements of a facility closure under OAR 411-085-0025.

(6) ANTITRUST PROVISION.

(a) The Department declares its intent to exempt from state antitrust laws and provide state action immunity from federal antitrust laws individuals and entities that engage in transactions, meetings, or surveys described in sections (2) and (3) of this rule that might otherwise be constrained by such laws.

(b) The following activities are not immunized from antitrust liability:

(A) Agreements among competing providers to reduce the number of beds they operate outside of a sale;

(B) Provider meetings to discuss bed reduction strategies outside of the negotiation of a specific sale and where no Department representative is in attendance; or

(C) Collateral agreements between competing providers that involve their pricing strategies, how to respond to requests for proposals, or other discussions outside the sale of facilities.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 410.070, ~~&~~ OL 2013 chapter 608

#### **411-070-0442 Calculation of the Basic Rate and Complex Medical Add-on Rate**

(1) The rates are determined annually and referred to as the Rebasing Year.

(a) The basic rate is based on the statements received by the Department by October 31 for the fiscal reporting period ending on June 30 of the previous year. For example, for the biennium beginning July 1, 2013, statements for the period ending June 30, 2012 are used. The Department desk reviews or field audits these statements and determines the allowable costs for each nursing facility. The costs include both direct and indirect costs. The costs and days relating to pediatric beds are excluded from this calculation. The Department only uses financial reports of facilities that have

been in operation for at least 180 days and are in operation as of June 30.

(b) For each facility, its allowable costs, less the costs of its self-contained pediatric unit (if any), are inflated by the DRI Index, or its successor index. The DRI table as published in the fourth quarter of the year immediately preceding the beginning of the payment year will be used. Costs will be inflated to reflect projected changes in the DRI Index from the mid-point of the fiscal reporting period to the mid-point of the payment year (e.g., for the July 1, 2014 rebase, the midpoint of the fiscal reporting period is December 31, 2012 and the mid-point of the payment year is December 31, 2014).

(c) For each facility, its allowable costs per Medicaid day is determined using the allowable costs as inflated and resident days, excluding pediatric days as reported in the statement.

(d) The facilities are ranked from highest to lowest by the facility's allowable costs, per Medicaid day.

(e) The basic rate is determined by ranking the allowable costs per Medicaid day by facility and identifying the allowable cost per day at the applicable percentage. If there is no allowable cost per day at the applicable percentage, the basic rate is determined by interpolating the difference between the allowable costs per day that are just above and just below the applicable percentage to arrive at a basic rate at the applicable percentage. The applicable percentage for the period beginning July 1, 2013 is at the 63rd percentile.

(2) The Department provides an augmented rate to nursing facilities who qualify under the Quality and Efficiency Incentive Program as described in OAR 411-070-0437. An acquisition plan must be submitted to the Department on or after October 7, 2013 and on or before June 30, 2016. To receive the augmented rate, the purchasing operator must meet all requirements in OAR 411-070-0437(3) in order to receive the augmented rate bed capacity must be purchased on or after October 7, 2013 and on or before December 31, 2015. The qualifying nursing facility is paid the augmented rate for each Medicaid-eligible resident.

(3) Nursing facility bed capacity in Oregon shall be reduced by 1,500 beds by December 31, 2015, except for bed capacity in nursing facilities operated by the Department of Veteran's Affairs and facilities that either applied to the Oregon Health Authority for a certificate of need between August 1, 2011 and December 1, 2012, or submitted a letter of intent under ORS 442.315(7) between January 15, 2013 and January 31, 2013. An official bed count measurement shall be determined and issued by the Department prior to July 1, 2016 and each quarter thereafter if the goal of reducing the nursing facility bed capacity in Oregon by 1,500 beds is not achieved.

(a) For the period beginning July 1, 2013 and ending June 30, 2016, the Department shall reimburse costs as set forth in section (1) of this rule at the 63rd percentile.

(b) For each three-month period beginning on or after July 1, 2016 and ending June 30, 2020, in which the reduction in bed capacity in licensed facilities is less than the goal described in this section, the Department shall reimburse costs at a rate not lower than the percentile of allowable costs according to the following schedule:

(A) 63rd percentile for a reduction of 1,500 or more beds.

(B) 62nd percentile for a reduction of 1,350 or more beds but less than 1,500 beds.

(C) 61st percentile for a reduction of 1,200 or more beds but less than 1,350 beds.

(D) 60th percentile for a reduction of 1,050 or more beds but less than 1,200 beds.

(E) 59th percentile for a reduction of 900 or more beds but less than 1,050 beds.

(F) 58th percentile for a reduction of 750 or more beds but less than 900 beds.

(G) 57th percentile for a reduction of 600 or more beds but less than 750 beds.

(H) 56th percentile for a reduction of 450 or more beds but less than 600 beds.

(I) 55th percentile for a reduction of 300 or more beds but less than 450 beds.

(J) 54th percentile for a reduction of 150 or more beds but less than 300 beds.

(K) 53rd percentile for a reduction of 1 to 149 beds.

(4) The complex medical add-on rate is 40 percent of the basic rate.

~~(5) The Department shall add a standard payment to fund implementation of certified nursing assistant staffing requirements contained in OAR 411-086-0100 in accordance with the Legislatively Adopted Budget.~~

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 410.070, OL 2003 chapter 736, OL 2007 chapter 780, OL 2009 chapter 827, OL 2011 chapter 630, & OL 2013 chapter 608