

Secretary of State  
**CERTIFICATE AND ORDER FOR FILING TEMPORARY ADMINISTRATIVE RULES  
and  
STATEMENT OF NEED AND JUSTIFICATION**

I certify that the attached copies are true, full and correct copies of the TEMPORARY Rule(s) adopted on  
November 1, 2016 by the

Department of Human Services, Office of Self-Sufficiency Programs			461
<b>Agency and Division</b>			<b>Chapter Number</b>
Kris Skaro	Human Services Building 500 Summer St NE, E-48 Salem, OR 97301	503-945-6067	<a href="mailto:kris.a.skaro@state.or.us">kris.a.skaro@state.or.us</a>
<b>Rules Coordinator</b>	<b>Address</b>	<b>Telephone</b>	<b>Email</b>

to become effective November 1, 2016 through April 29, 2017.\*

*\*Temporary rules are effective for a maximum of 180 days including the effective date.*

**Rule Caption:** *Amending rule relating to child care provider eligibility*

**In the Matter of:** *Temporary amendment of OAR 461-165-0180*

**AMEND:** 461-165-0180

ORS 329A.500, 411.060, 411.070

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**Stat. Auth.**

Child Care Development Block Grant (CCDBG) Act of 2014; CFR Part 98 (98.40, 98.41, 98.42, 98.44)

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**Other Auth.**

ORS 329A.500, 329A.505, 409.610, 411.060, 411.070, 411.122

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**Stats. Implemented**

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## Rule Summary

OAR 461-165-0180 about child care provider eligibility requirements is being amended to reflect changes to federal requirements that apply to child care providers who receive Child Care Development Fund (CCDF) funds. Primary changes are summarized below and rule text showing changes is available at [http://www.dhs.state.or.us/policy/selfsufficiency/ar\\_recent.htm](http://www.dhs.state.or.us/policy/selfsufficiency/ar_recent.htm).

- Defining "legally exempt" and "legally exempt relative".

- Stating that legally exempt providers who are not legally exempt relatives must meet the Office of Child Care (OCC) Regulated Subsidy Provider requirements, including the site visit requirement.
- Stating that legally exempt providers who *are* legally exempt relatives are not subject to the OCC Regulated Subsidy Provider requirements.
- Adding training and certification requirements for legally exempt providers who are not legally exempt relatives and requiring them to be completed prior to providing child care, unless a temporary waiver is approved.
- Stating staff-to-children ratios for certain child care centers or programs.

## Need for the Rules

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Federal law requires training and professional development standards for child care providers who receive child care subsidy payments paid to families by the Department. Training is required prior to being approved by the Department, or during an orientation period, and on an annual basis. Training is to include 10 basic health and safety topics as well as recognizing and reporting child abuse and neglect. Federal law also requires (and [Oregon law authorizes](#)) a pre-service inspection and annual unannounced visits of certain providers receiving CCDF funds to ensure that health and safety standards are being followed. This requires the Early Learning Division (ELD) of the OCC and the Department to begin annual health and safety reviews of license exempt non-relative child care providers in home and center environments by November 1, 2016. These rule amendments implement these requirements.

## Documents Relied Upon

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Proposed changes to the Child Care and Development Fund (CCDF) regulations (45 CFR 98) art published December 24, 2015, in the Federal Register, Vol. 80, No. 247 available at <https://www.gpo.gov/fdsys/pkg/FR-2015-12-24/pdf/2015-31883.pdf>.

HB 2015 (2015) available on the Oregon Legislative Information System at <https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB2015>.

## Justification of Temporary Rules

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The Department finds that failure to act promptly by amending OAR 461-165-0180 will result in serious prejudice to the public interest, the Department, and families served by the Department's child care subsidy recipients because the Department is not in compliance with federal regulations and requirements of the Lead Agency charged with the administration of CCDF funds (the ELD). The Department needs to proceed by temporary rule because the public, the Department, and families and providers in the child care subsidy program will immediately benefit when the Department's practice and rules are in compliance with all state and federal requirements related to the use of CCDF funds.

## Eligibility of Child Care Providers

- (1) The Department must approve a child care provider to receive payment for child care if information available to the Department provides no basis for denying eligibility unless the Department determines, following a final fitness determination (see OAR 125-007-0260 and 407-007-0320) or Child Protective Service (CPS) records checks, that the provider or other *subject individual* (see OAR 125-007-0210 and 407-007-0210(8)(a)(J)) is not eligible for payment.
- (2) Ineligibility for payment may result from any of the following:
  - (a) A finding of "denied".
    - (A) A provider may be "denied" under OAR 461-165-0410 and 461-165-0420. If, after conducting a weighing test as described in OAR 407-007-0300, the Department finds substantial risk to the health or safety of a *child* (see OAR 461-001-0000) in the care of the provider, the provider must be "denied" and is ineligible for payment.
    - (B) A provider who has been "denied" has the right to a hearing under OAR 407-007-0335.
  - (b) A finding of "failed".
    - (A) A provider may be "failed" if the Department determines, based on a specific eligibility requirement and evidence, that a provider does not meet an eligibility requirement of this rule not covered in paragraph (c)(A) of this section.
    - (B) While the provider is in "failed" status:
      - (i) The Department does not pay any other child care provider for child care at the "failed" provider's site.
      - (ii) The Department does not pay a child care provider at another site if the "failed" provider is involved in the child care operation unless the Department determines that the reasons the provider is in "failed" status are not relevant to the new site.
    - (C) A provider with a status of "failed" may reapply at any time by providing the required documents and information to the Department for review.
  - (c) A finding of "suspended".

- (A) A provider may be "suspended" if the Department determines and provides notice that the provider does not meet an eligibility requirement in the following subsections and paragraphs of section (7) of this rule: (d), (e), (h), (i), (j), (k), (L), (o)(H), (o)(I), (o)(L), or (t) or in section (10) of this rule. A provider who has been "suspended" may challenge this status by requesting a contested case hearing subject to the requirements and limitations of OAR 461-025.
- (B) While the provider is in "suspended" status:
  - (i) The provider is ineligible for payment for at least six months.
  - (ii) The Department does not pay any other child care provider for child care at the "suspended" provider's site.
  - (iii) The Department does not pay a child care provider at another site if the "suspended" provider is involved in the child care operation unless the Department determines that the reasons the provider is in "suspended" status are not relevant to the new site.
- (C) A provider with a status of "suspended" may be eligible for payments after the six month ineligibility period ends when the provider has been approved following reapplication, including providing the required documents and information to the Department for review.
- (d) The Department has referred an overpayment against the provider for collection and the claim is unsatisfied.
- (3) The provider must submit a completed Child Care Provider Listing Form (DHS 7494) to the Department within 30 calendar days from the date the Department issues the listing form to the client. The provider and each individual identified under section (4) of this rule must complete and sign the authorization for a records check through the Criminal History (CH) record system maintained by the Oregon State Police (OSP), Federal Bureau of Investigation (FBI), and the Child Protective Service (CPS) record system maintained by the Department and, if necessary, an authorization to release information and fingerprint cards. The provider, each individual described in section (4) of this rule, and each *subject individual* described in OAR 125-007-0210 and 407-007-0210(8)(a)(J) must fully disclose all requested information as part of the records check.
- (4) This rule also establishes additional requirements for the following individuals:
  - (a) The site director of an exempt child care facility and each employee of the facility who may have unsupervised access to a *child* in care.
  - (b) The child care provider and each individual the provider uses to supervise a *child* in his or her absence.

- (c) In the case of a provider who provides care for a *child* in the provider's home--
  - (A) Each individual 16 years of age or older who lives in the provider's home; and
  - (B) Each individual who visits the home of the provider during the hours care is provided and may have unsupervised access to a *child* in care.
  
- (5) To receive payment or authorization for payment, the provider must ~~meet~~ comply with at least one of the requirements of either subsection (a) or (b) of this section following subsections:
  - (a) If the provider is not *legally exempt* (see section (11) of this rule):
    - (A) ~~Currently~~ Be currently certified or registered with the Office of Child Care (OCC) of the Oregon Department of Education (ODE) under OAR 414-205-0000 to 414-205-0170, 414-300-0000 to 414-300-0440, or 414-350-0000 to 414-350-0250 ~~unless *legally exempt*,~~ and be in compliance with the applicable rules;
    - (B) Complete the Department's background check process;
    - (C) ~~The provider must also~~ Complete the Department's listing process; and
    - (D) ~~Be~~ Be approved by the Department.
  
  - (b) ~~If the provider is *legally exempt* from being certified or registered with the OCC and a *legally exempt relative* (see section (11) of this rule);~~
    - (A) ~~e~~ Complete the Department's background check process;
    - (B) Complete the Department's listing process; and
    - (C) ~~h~~ Be approved by the Department.
  
  - (c) If the provider is *legally exempt* and not a *legally exempt relative* for all children in care:
    - (A) Meet all OCC Regulated Subsidy Provider requirements under OAR 414-180-0005 through 414-180-0100;
    - (B) Submit to and pass a site visit at the location where care will be provided;
    - (C) Complete the Department's background check process;

(D) Complete the Department's listing process; and

(E) Be approved by the Department.

- (6) Each individual described in section (4) of this rule must:
- (a) Allow the Department to conduct a national criminal history records check through the Oregon State Police and the Federal Bureau of Investigation as specified in OAR 407-007-0250.
  - (b) Provide, in a manner specified by the Department, information required to conduct CH, FBI, OSP, and CPS records checks and determine whether the provider meets health and safety requirements.
  - (c) Have a history of behavior that indicates no substantial risk to the health or safety of a *child* in the care of the provider.
- (7) Each provider must:
- (a) Obtain written approval from their certifier or certifier's supervisor if the provider is also certified as a foster parent.
  - (b) Be 18 years of age or older and in such physical and mental health as will not affect adversely the ability to meet the needs of safety, health, and well-being of a *child* in care.
  - (c) Not be in the same filing group (see OAR 461-110-0310 and 461-110-0350) as the *child* cared for; the *parent* (see OAR 461-001-0000) of a *child* in the *filing group*; or a sibling living in the home of a *child* in the *filing group*.
  - (d) Allow the Department to inspect the site of care while child care is provided.
  - (e) Keep daily attendance records showing the arrival and departure times for each *child* in care and billing records for each *child* receiving child care benefits from the Department. These written records must be retained for a minimum of 12 months and provided to the Department upon request.
  - (f) Be the individual or facility listed as providing the child care. The provider may only use someone else to supervise a *child* on a temporary basis if the person was included on the most current listing form and the provider notifies the Department's Direct Pay Unit.
  - (g) Not bill a Department client for an amount collected by the Department to recover an overpayment or an amount paid by the Department to a creditor of the provider because of a lien, garnishment, or other legal process.

- (h) Report to the Department's Direct Pay Unit within five days of occurrence:
  - (A) Any arrest or conviction of any *subject individual* or individual described in section (4) of this rule.
  - (B) Any involvement of any *subject individual* or individual described in section (4) of this rule with CPS or any other agencies providing child or adult protective services.
  - (C) Any change to the provider's name or address including any location where care is provided.
  - (D) The addition of any *subject individual* or individual described in section (4) of this rule.
  - (E) Any reason the provider no longer meets the requirements under this rule.
- (i) Report suspected child abuse of any *child* in his or her care to CPS or a law enforcement agency.
- (j) Supervise each *child* in care at all times.
- (k) Prevent any individual who behaves in a manner that may harm children from having access to a *child* in the care of the provider. This includes anyone *under the influence* (see section (11) of this rule).
- (L) Allow the custodial parent of a *child* in his or her care to have immediate access to the *child* at all times.
- (m) Inform a parent of the need to obtain immunizations for a *child* and have a completed, up-to-date Oregon shot record called the "Certification of Immunization Status" (CIS) form on file for each *child* in care.
- (n) Take reasonable steps to protect a *child* in his or her care from the spread of infectious diseases.
- (o) Ensure that the home or facility where care is provided meets all of the following standards:
  - (A) Each floor level used by a *child* has two usable exits to the outdoors (a sliding door or window that can be used to evacuate a *child* is considered a usable exit). If a second floor is used for child care, the provider must have a written plan for evacuating occupants in the event of an emergency.
  - (B) The home or facility has safe drinking water.

- (C) The home or facility has a working smoke detector on each floor level and in any area where a *child* naps.
- (D) Each fireplace, space heater, electrical outlet, wood stove, stairway, pool, pond, and any other hazard has a barrier to protect a *child*. ~~Gates and enclosures have the Juvenile Products Manufacturers Association (JPMA) certification seal to ensure safety. Any gate or barrier may not pose a risk or hazard to any *child* in care.~~
- (E) Any firearm, ammunition, and other items that may be dangerous to children, including but not limited to alcohol, inhalants, tobacco and e-cigarette products, matches and lighters, any legally prescribed or over-the-counter medicine, cleaning supplies, paint, plastic bags, and poisonous and toxic materials are kept in a secure place out of a child's reach.
- (F) The building, grounds, any toy, equipment, and furniture are maintained in a clean, sanitary, and hazard-free condition.
- (G) The home or facility has a telephone in operating condition.
- (H) No one may smoke or carry any lighted smoking instrument, including e-cigarettes or vaporizers, in the home or facility or within ten feet of any entrance, exit, window that opens, or any ventilation intake that serves an enclosed area, during child care operational hours or anytime child care children are present. No one may use smokeless tobacco in the home or facility during child care operational hours or anytime child care children are present. No one may smoke or carry any lighted smoking instrument, including e-cigarettes and vaporizers, or use smokeless tobacco in motor vehicles while child care children are passengers.
- (I) No one may consume alcohol or use controlled substances (except legally prescribed and over-the-counter medications) or marijuana (including medical marijuana) on the *premises* (see section (11) of this rule) during child care operational hours or anytime child care children are present. No one *under the influence* of alcohol, controlled substances (except legally prescribed and over-the-counter medications) or marijuana (including medical marijuana) may be on the *premises* during child care operational hours or anytime child care children are present. No one may consume alcohol or use controlled substances (except legally prescribed and over-the-counter medications) or marijuana (including medical marijuana) in motor vehicles while child care children are passengers.
- (J) Is not a half-way house, hotel, motel, shelter, or other temporary housing such as a tent, trailer, or motor home. The restriction in this paragraph does not apply to licensed (registered or certified) care approved in a hotel, motel, or shelter.



- (K) Is not a structure –
    - (i) Designed to be transportable; and
    - (ii) Not attached to the ground, another structure, or to any utilities system on the same *premises*.
  - (L) Controlled substances (except lawfully prescribed and over-the-counter medications), marijuana (including medical marijuana, marijuana edibles, and other products containing marijuana), marijuana plants, derivatives, and associated paraphernalia may not be on the premises during child care operational hours or anytime child care children are present.
  - (p) Complete and submit a new listing form every two years, or sooner at the request of the Department, so that the Department may review the provider's eligibility.
  - (q) Provide evidence of compliance with the Department's administrative rules, upon request of Department staff.
  - (r) Comply with state and federal laws related to child safety systems and seat belts in vehicles, bicycle safety, and crib standards under 16 CFR 1219 and 1220.
  - (s) Place infants to sleep on their backs.
  - (t) Not hold a medical marijuana card; or distribute, grow, or use marijuana (including medical marijuana) or any controlled substance (except lawfully prescribed and over-the-counter medications).
  - (u) Develop and communicate expulsion and suspension policies to the parent or caretaker.
- (8) ~~Child Care providers who are License Exempt or Registered Family Child Care Providers with the Office of Child Care (OCC) of the Oregon Department of Education (ODE) under OAR 414-205-0000 to 414-205-0170-Legally exempt providers~~ must complete the "~~Basie~~Introduction to Child Care Health and Safety" two-hour, web-based training as provided in the following subsections: ~~or the three-hour Oregon Kids Healthy and Safe (OKHS) classroom training prior to being approved by the Department.~~
- (a) ~~Prior to June 16, 2014, a provider who sends the Department a Child Care Provider Listing and Provider Information Sheet (DHS 7494) with a revision date of March 2013, or those who attempt to take the web-based training but are unable due to technical difficulties at the training site, will not be failed for not meeting this training requirement.~~

- ~~(b) License Exempt or Registered Family Child Care Providers who are exempt from this training are those who state at least one of the following:~~
- ~~(A) English is a second language.~~
- ~~(B) No internet access is available.~~
- (a) Legally exempt providers with a list date prior to November 1, 2016, must complete the "Introduction to Child Care Health and Safety" training by June 30, 2017.
- (b) Legally exempt providers with a list date of November 1, 2016 or later must complete the "Introduction to Child Care Health and Safety" prior to Department approval.
- (9) ~~A child care provider not subject to certification or registration with the Office of Child Care (OCC) of the Oregon Department of Education (ODE) under OAR 414-205-0000 to 414-205-0170, 414-300-0000 to 414-300-0440, or 414-350-0000 to 414-350-0250; Legally exempt providers must:~~
- ~~(a) Complete an orientation provided by the Department or a Child Care Resource and Referral agency within 90 days of being approved by the Department if he or she:~~
- ~~(aA) Receives funds from the Department; and~~
- ~~(bB) Begins providing child care services after June 30, 2010, or resumes providing child care services, after a break of more than one year that began after June 30, 2010.~~
- (10) Child care providers and any individual supervising, transporting, preparing meals, or otherwise working in the proximity of child care children and those completing daily attendance and billing records shall not be *under the influence*.
- (11) For purposes of these rules:
- (a) "Premises" means the home or facility structure and grounds, including indoors and outdoors and space not directly used for child care.
- (b) "Under the influence" means observed abnormal behavior or impairments in mental or physical performance leading a reasonable person to believe the individual has used alcohol, any controlled substances (including lawfully prescribed and over-the-counter medications), marijuana (including medical marijuana), or inhalants that impairs their performance of essential job function or creates a direct threat to child care children or others. Examples of abnormal behaviors include, but are not limited to hallucinations, paranoia, or violent

outbursts. Examples of impairments in physical or mental performance include, but are not limited to slurred speech as well as difficulty walking or performing job activities.

- (c) "Legally exempt" means the child care provider is exempt from licensing with the ODE Office of Child Care because the provider is not subject to the licensing requirements under OAR 414-205-0000 to 414-205-0170, OAR 414-350-000 to 414-350-0405, and OAR 414-300-0000 to 414-300-0415.
  - (d) "Legally exempt relative" means a *legally exempt* provider who is a relative to all children in care including a great-grandparent, grandparent, aunt, uncle, or sibling not living in the home of any *child* in care.
- (12) Legally exempt providers that are not a *legally exempt relative* to all children in care must meet all of the requirements in this section before approval by the Department, unless otherwise noted:
- (a) Have an up-to-date, in-person infant and child CPR and first aid certification or have a currently valid waiver of this requirement from the Child Care Resource and Referral program.
  - (b) Complete the Recognizing and Reporting Child Abuse and Neglect (RRCAN) web-based training. If training is not immediately available, the Department may approve a child care provider prior to completing the training, but for no more than 90 days.
  - (c) Complete six hours of ongoing education in each two-year listing period as provided in this subsection. All trainings must be accepted by the Oregon Center for Career Development (OCCD) and be part of the OCCD's 10 Core Knowledge Categories recognized by Oregon Registry Online to count toward the six hours.
    - (A) Two of the six hours must fall under the "Human Growth and Development" category; and
    - (B) Two of the six hours must cover "Understanding & Guiding Behavior".
- (13) Child care centers or programs that are *legally exempt* from certification or registration with the OCC, are located in a commercial or institutional facility, and receive payment from the Department on behalf of a family receiving a child care subsidy, may not exceed the following staff to children in care ratios:
- (a) Six weeks through 23 months of age, the minimum number of staff to children is one to four. The maximum number of children in a group is eight.
  - (b) 24 months through 35 months of age, the minimum number of staff to children is one to five. The maximum number of children in a group is 10.

- (c) 36 months of age to attending kindergarten, minimum number of staff to children is one to 10. The maximum number of children in a group is 20.
- (d) Attending kindergarten and older, the minimum number of staff to children is one to 15. The maximum number of children in a group is 30.
- (e) In a mixed-age group of children, the number of staff and group size shall be determined by the age of the youngest child in the group.

Stat. Auth.: ORS 181.537, 329A.500, 409.050, 411.060, 411.070

Stats. Implemented: ORS 181.537, 329A.340, 329A.500, 409.010, 409.050, 409.610, 411.060, 411.070, 411.122