

OFFICE OF THE SECRETARY OF STATE  
DENNIS RICHARDSON  
SECRETARY OF STATE  
  
LESLIE CUMMINGS  
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION  
MARY BETH HERKERT  
DIRECTOR  
  
800 SUMMER STREET NE  
SALEM, OR 97310  
503-373-0701

**TEMPORARY ADMINISTRATIVE ORDER**  
INCLUDING STATEMENT OF NEED & JUSTIFICATION

**SSP 2-2019**

CHAPTER 461  
DEPARTMENT OF HUMAN SERVICES  
SELF-SUFFICIENCY PROGRAMS

**FILED**  
01/24/2019 3:58 PM  
ARCHIVES DIVISION  
SECRETARY OF STATE  
& LEGISLATIVE COUNSEL

FILING CAPTION: Lead testing requirements in subsidized child care

EFFECTIVE DATE: 01/24/2019 THROUGH 06/30/2019

AGENCY APPROVED DATE: 01/24/2019

CONTACT: Robert Trachtenberg  
503-947-5290  
robert.trachtenberg@state.or.us

DHS-SSP  
500 Summer Street NE, E-48  
Salem, OR 97301

Filed By:  
Robert Trachtenberg  
Rules Coordinator

NEED FOR THE RULE(S):

OAR 461-165-0180 about the eligibility of child care providers needs to be amended to protect children receiving Department-subsidized child care from lead exposure by requiring child care providers who are exempt from licensing by the Office of Child Care and who are not related to children in care to test for lead in all water faucets or fixtures used for drinking, cooking, preparing infant formula or preparing food.

JUSTIFICATION OF TEMPORARY FILING:

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 children in subsidized child care not regulated by the Office of Child Care (OCC). This amendment is needed to support the health of children. This amendment protects children receiving Department-subsidized child care from lead exposure by requiring child care providers who are exempt from licensing by the OCC and who are not related to children in care to test for lead in all water faucets or fixtures used for drinking, cooking, preparing infant formula or preparing food. As the OCC does not regulate lead testing of water for license exempt providers that was put in place on September 30, 2018, this amendment is needed for the Department to continue to regulate water quality for license exempt child care providers.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Environmental Protection Agency, Office of Ground Water and Drinking Water, "3Ts for Reducing Lead in Drinking Water in Schools and Child Care Facilities" (October 2018) available at  
[https://www.epa.gov/sites/production/files/2018-09/documents/final\\_revised\\_3ts\\_manual\\_508.pdf](https://www.epa.gov/sites/production/files/2018-09/documents/final_revised_3ts_manual_508.pdf)

Former OAR 461-165-0180(o)(B) effective August 1, 2018 available at <https://apps.state.or.us/cf1/caf/arm/OldRules/461-165-0180.htm>

Oregon Department of Education, Early Learning Division lead testing rules approved on September 27, 2018 (ELD 13-2018) available at <https://secure.sos.state.or.us/oard/viewReceiptPDF.action?filingRsn=39578>

AMEND: 461-165-0180

RULE SUMMARY: OAR 461-165-0180 about the eligibility of child care providers is being amended to require child care providers who are exempt from licensing by the Office of Child Care and who are not related to children in care to test for lead in all water faucets or fixtures used for drinking, cooking, preparing infant formula or preparing food. This amendment protects children receiving Department-subsidized child care from lead exposure. This amendment is retroactive to September 30, 2018.

CHANGES TO RULE:

461-165-0180

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) The Department may approve a child care provider who is legally exempt (see section (12) of this rule) as a child care provider for a child (see OAR 461-001-0000) in their household, despite the criminal or CPS history of another member of this household, if all of the following requirements are met:¶¶

(a) There is no criminal history consisting of a disqualifying crime listed in 45 CFR 98.43(c).¶¶

(b) The household member with the criminal or CPS history is a parent (see OAR 461-001-0000) or caretaker relative (see OAR 461-001-0000) of the child needing child care.¶¶

(c) The child care is needed for the household member with the criminal or CPS history to participate in the JOBS program, or the education or employment covered by the ERDC program.¶¶

(d) The approval for Department payments only applies for the child of the household member, or a child for whom the household member is a caretaker relative.¶¶

(3) 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 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 (8) of this rule: (b), (d), (e), (h), (i), (j), (k), (L), (o)(H), (o)(I), (o)(L), (t), or in section (11) 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.¶

(4) 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 (5) 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.¶

(5) This rule also establishes additional requirements for the following individuals:¶

(a) The site director of an exempt child care facility and each individual in 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.¶

(6) To receive payment or authorization for payment, the provider must comply with at least one of the following subsections:¶

(a) If the provider is not legally exempt:¶

(A) 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 and be in compliance with the applicable rules;¶

(B) Complete the Department's background check process;¶

(C) Complete the Department's listing process; and¶

(D) Be approved by the Department.¶

(b) If the provider is legally exempt and a legally exempt relative (see section (12) of this rule):¶

(A) Complete the Department's background check process;¶

(B) Complete the Department's listing process; and¶

(C) 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.¶
- (d) In the case of a tribally licensed child care facility:¶
  - (A) Must receive annual health and safety inspections from the Indian Health Services;¶
  - (B) Each individual who may have unsupervised access to a child in care must be enrolled in the Early Learning Division Office of Child Care Central Background Registry or approved by the Department of Human Services Background Check Unit;¶
  - (C) Complete the Department's listing process; and¶
  - (D) Be approved by the Department.¶
- (7) Each individual described in section (5) 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.¶
- (8) 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; and¶
    - (A) Have competence, sound judgment and self-control when working with children;¶
    - (B) Be mentally, physically and emotionally capable of performing duties related to child care.¶
  - (c) Not be in the same ERDC or TANF filing group (see OAR 461-110-0330 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 the child.¶
  - (d) Allow the Department to visit or 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.¶
    - (A) Times must be recorded as the child care children arrive and depart.¶
    - (B) Written attendance and billing records for each child receiving child care benefits from the Department 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, indictment, or conviction of any subject individual or individual described in section (5) of this rule.¶
    - (B) Any involvement of any subject individual or individual described in section (5) 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 (5) 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. This includes being within sight or sound of all children; being aware of what each child is doing; being near enough to children to respond when needed; and being physically present when kindergarten-age or younger children are playing outside, unless the play area is fully fenced and hazard free.¶
- (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 (12) 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, or a non-medical or medical Exemption 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 water that is safe for drinking and preparing food. ~~Additionally, a legally exempt provider must meet the lead testing requirements in OAR 414-180-0015(5)-(13) and OAR 414-180-0045(1)~~(see section (15) of this rule).¶
  - (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. 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 (12) 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 parents and caretakers.¶

(v) Provide care at a location within the state of Oregon.¶

(9) Legally exempt providers must complete the "Introduction to Child Care Health and Safety" two-hour, web-based training prior to Department approval.¶

(10) Legally exempt providers must 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 the provider 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.¶

(11) 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.¶

(12) 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 OCC 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.¶

(13) 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 or classroom training.¶

(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".¶

- (14) 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.¶¶
- (15) Except as noted otherwise below, the requirements of this section are in effect starting September 30, 2018. As used in this section, "drinking water faucet or fixture" means any plumbing fixture on the premises used to obtain water for drinking, cooking, preparing infant formula or preparing food. This section only applies to a provider who is legally exempt and not a legally exempt relative. This section applies to legally exempt providers approved to receive Department subsidy payments prior to September 30, 2018. This section applies to legally exempt providers who submit a completed Child Care Provider Listing form for Department-approval starting September 30, 2018. This section does not apply to care provided in the child's home when the legally exempt provider lives somewhere else.¶¶
- (a) In locations where care is provided, lead testing is required for each drinking water faucet or fixture.¶¶
  - (b) Providers must test each drinking water faucet or fixture at least once every six years from the date of the last test. Providers who have had a drinking water faucets or fixture tested within six years prior to the effective date of this rule will need to submit the results to the Department or the Office of Child Care (OCC), in the Department of Education, Early Learning Division.¶¶
  - (c) If a home or facility does not use any of the on-site plumbing fixtures to obtain water for drinking, cooking, preparing infant formula, or preparing food, the provider must:¶¶
    - (A) Submit a written statement to the Department or OCC identifying the alternative source of water and confirming that the provider does not use any on-site plumbing fixtures for drinking, cooking, preparing infant formula, or preparing food; and¶¶
    - (B) Notify the Department or OCC in writing if the alternative source of water changes.¶¶
  - (d) All sample collection and testing must be in accordance with the Environmental Protection Agency (EPA)'s 3Ts for Reducing Lead in Drinking Water in Schools and Child Care Facilities, Revised Manual from October 2018, adopted by this reference.¶¶
    - (A) If test results show water from any drinking water faucet or fixture has 15 parts per billion (ppb) or more of lead, the provider must:¶¶
      - (i) Prevent access to that drinking water faucet or fixture immediately after receiving the test results; and¶¶
      - (ii) Continue to prevent access to that drinking water faucet or fixture until mitigation is completed in accordance with paragraph (B) of this subsection.¶¶
    - (B) Following receipt of test results showing that water from any drinking water faucet or fixture has 15 parts per billion (ppb) or more of lead, the provider must comply with all of the following sub-paragraphs:¶¶
      - (i) Submit a corrective action plan to the Department or OCC for approval within 60 days of receiving the test results. The corrective action plan must identify an appropriate mitigation strategy in accordance with Module 6 of the EPA's 3Ts for Reducing Lead in Drinking Water in Schools and Child Care Facilities, Revised Manual from October 2018, adopted by this reference.¶¶
      - (ii) Implement the mitigation method within 30 days of approval by OCC.¶¶
  - (C) A provider who fails to submit a corrective action or a mitigation method is no longer eligible to receive child care subsidy payments.¶¶

(e) The provider must keep a copy of the most recent test results on-site at all times.¶

(f) Providers must follow the routine practices identified in Module 6 of the EPA's 3Ts for Reducing Lead in Drinking Water in Schools and Child Care Facilities, Revised Manual from October 2018.

Statutory/Other Authority: ORS 181.537, 329A.500, 409.050, 411.060, 411.070

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