

**DEPARTMENT OF HUMAN SERVICES
SENIOR AND DISABLED SERVICES DIVISION**

**OREGON ADMINISTRATIVE RULES
Chapter 411, Division 009**

CRIMINAL HISTORY CLEARANCE

Purpose

The purpose of these rules (OAR Chapter 411, Division 009) is to protect aged and disabled persons receiving long term care services by preventing persons with significant criminal histories from working in Senior and Disabled Services Division (SDSD) licensed or registered facilities and in some other environments where long term care is being provided.

411-009-0000 Definitions (Effective 12/1/00)

As used in these rules, OAR Chapter 411, Division 009, unless the context requires otherwise, the following definitions apply:

- (1) **“Actively Monitored”** means frequently observed. The term is used to describe the amount of oversight or supervision required for a subject individual who is on probation, and who is not yet determined to be “fit.” The person providing oversight must be someone who is already determined to be fit and who is in the facility or residence.
- (2) **“Authorized Division Representative”** or **“ADR”** means a qualified entity who is an employee of the Department of Human Services, Senior and Disabled Services Division or an Area Agency on Aging who has access to the Law Enforcement Data System (LEDS) information. The ADR must have no criminal history. In order to have access to LEDS information, Division representatives must complete training provided by the Division regarding these rules and must be approved by the Division to conduct fitness determinations .
- (3) **“Authorized Provider Designee”** or **“APD”** means a qualified entity who is designated by the administrator or owner of a nursing facility, assisted living facility or residential care facility, or manager of an in-home agency, staffing agency or training institution, to receive the results of a criminal history check from the

Division. The APD must have no criminal history. APD must complete training provided by the Division regarding these rules and must be approved by the Division to conduct fitness determinations.

- (4) **“Criminal History”** means a record of one or more convictions for any crime. Criminal history does not include “violations” or “infractions” (see ORS 161.505 - 161.585).
- (5) **“Criminal History Check Rules”** or **“These Rules”** means OAR Chapter 411 Division 009.
- (6) **“Division”** or **“SDSD”** means the Senior and Disabled Services Division of the Oregon Department of Human Services or an Area Agency on Aging (AAA) under contract to SDSD.
- (7) **“Employer”** means, for the purposes of these rules:
 - (a) An authorized provider designee (APD); or
 - (b) Adult foster home licensee; or
 - (c) In the case of a client-employed provider, employer means the client.
- (8) **“FBI”** means Federal Bureau of Investigation.
- (9) **“Facility”** means:
 - (a) An adult foster home as defined in OAR 411-050-0400;
 - (b) A residential care facility as defined in OAR 411-055-0000;
 - (c) An assisted living facility as defined in OAR 411-056-0005; or
 - (d) A nursing facility as defined in OAR 411-085-0005.
- (10) **“Family Member”** means husband, wife, natural parent, child, sibling, adopted child, adoptive parent, stepparent, stepchild, stepbrother, stepsister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, grandparent, grandchild, aunt, uncle, niece, nephew, or first cousin.

- (11) **“Fit”** means that the Oregon criminal history check and, when required by these rules, the national criminal history check have been completed and:
- (a) The subject individual has completed the Criminal History Release Authorization form (SDS 303) and, if required, the Mitigating Information form (SDS 303B), accurately and completely and determined to have no potentially disqualifying criminal history; or
 - (b) The subject individual has potentially disqualifying criminal history or has provided misleading or false information, but an evaluation (fitness determination) by an APD or ADR of the history and information, and the mitigating information, leads the APD or ADR to conclude that the subject individual’s history does not indicate a likelihood of behavior that could endanger the welfare of persons receiving care.
 - (c) Unless the context requires otherwise, “fit” refers to a final fitness determination.
- (12) **“Fitness Determination”** means an evaluation of a subject individual’s criminal history, supplemental information and any other mitigating information. The evaluation must be performed by an authorized provider designee (APD) or authorized Division representative (ADR) as required by ORS 181.537(7).
- (13) **“In-Home Agency”** means an organization with which the Division contracts to provide Medicaid services in the home of a Division client.
- (14) **“Law Enforcement Data System”** or **“LEDS”** means a criminal justice information system maintained by the Oregon State Police .
- (15) **“Long Term Care”** means the services provided in a facility, by an in-home agency or other entity or a person that contracts with SDSD to provide services in a clients home.
- (16) **“Mitigating Information”** means the circumstances in a subject individual’s life surrounding the criminal history and arrest history and subsequent events in the caregiver’s life. The term “mitigating information” may include information that reflects favorably and information that reflects negatively on the subject individual.

- (17) **“National Criminal History Check”** means a review by the Division of criminal history and supplemental information from the Federal Bureau of Investigation. This information is obtained through the submission of fingerprint cards.
- (18) **“Oregon Criminal History Check”** means a review by a qualified vendor, an APD or ADR of information from the Oregon State Police's Law Enforcement Data System (LEDS) or other substantially equivalent system . The Oregon Criminal History Check may include a review of information from the Oregon Justice Information Network (OJIN) or other official Oregon law enforcement agency or court records.
- (19) **“Out-of-State Residence”** means any location(s) outside Oregon for a period of 60 or more contiguous days.
- (20) **“Preliminary Fitness Determination”** means a fitness determination made by an APD or ADR prior to receipt of information obtained from the Oregon criminal history check or, if required, national criminal history check.
- (21) **“Potentially Disqualified”** means that the Division determined that a subject individual has a conviction for a potentially disqualifying 5-year or permanent crime. A person may also be “potentially disqualified” for providing misleading or false information. When a subject individual is potentially disqualified, a fitness determination must be conducted.
- (22) **“Qualified entity”** means an Authorized Provider Designee (APD) or an Authorized Division Representative (ADR).
- (23) **“Qualified Vendor”** means an entity which has received written approval from the Division to conduct criminal history checks.
- (24) **“Submit”** means to Fax, mail or deliver in person. Exception: fingerprint cards cannot be faxed.
- (25) **“Subject Individual”** means a person who is required to complete a criminal history check pursuant to these rules.
- (a) “Subject Individual” includes:

(A) A client-employed provider (CEP) who is employed by an SDSD client

and who provides services to the client. SDSD pays for the services (see OAR Chapter 411, Division 030);

- (B) An employee of an in-home agency or other entity which contracts with SDSD to provide services in clients' homes;
- (C) An employee, administrator, owner or manager of a facility;
- (D) Direct care staff secured through the services of a personnel services agency (e.g., a temporary nursing services agency);
- (E) A private duty nurse or care assistant, hired by the resident or another person, to work in the facility;
- (F) A volunteer, 18 years old or older, in a facility-organized volunteer program or a Department of Human Services volunteer, who has unsupervised access to residents (not intended to include residents or resident family members or those who visit the facility to provide group recreational or social activities);
- (G) A person, 16 years of age or older, who lives in an adult foster home (excluding relative foster homes), but who is not receiving long term care services;
- (H) A student nurse (RN or LPN) who is receiving training or clinical experience in the facility and who is not actively monitored;
- (I) Any other person receiving training or clinical experience in the facility;
- (J) A trainer who is monitoring any person receiving training or clinical experience in the facility;
- (K) Any other person in an adult foster home who is required, pursuant to the adult foster home rules, to have a criminal history check; and
- (L) In relative adult foster homes, the only people included in the term "subject individual" are the licensees. Other family members and occupants are not included.

(b) “Subject Individual,” as described in subsection (a), is not intended to include:

(A) Facility residents or SDSD clients who are receiving care; or

(B) Volunteers who are under 18 years of age (this exclusion does not apply to adult foster homes).

(26) “**Subject Individual on Probation**” or “**Individual on Probation**” means a subject individual who is allowed to work, volunteer, be trained or reside in a facility or other environment where long term care services are being provided prior to completion of a final fitness determination. An individual on probation must be actively monitored.

(27) “**Supplemental Information**” means information disclosed by the subject individual, and any other information, records or data obtained from any federal, state, county or other law enforcement agency or court system, pertaining to any arrests during the previous five years and any conviction, regardless of time frame, including the nature and disposition of any criminal charges such as sentencing, confinement, parole and release of the subject individual.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537

411-009-0005 Authorized Provider Designees *(Effective 12/1/00)*

(1) **AUTHORIZED PROVIDER DESIGNEE REQUIRED.** Each in-home agency and facility, excluding adult foster homes, must have one or more authorized provider designee(s).

(a) Authorized provider designees are required to have both Oregon and national criminal history checks and must be free of any criminal history .

(b) The facility or in-home agency must ensure completion and submission of the Authorized Provider Designee Application form (SDS 303A) to the Division for each prospective designee.

(c) Only authorized provider designees approved by the Division may request and

receive a copy of the Oregon criminal history check (LEDS report) .

- (d) If a provider does not have an employee eligible to serve as an authorized provider designee, then the provider must contract with or otherwise arrange for a third party who is eligible to serve as an authorized provider designee.
 - (e) An authorized Division representatives must conduct the fitness determination for subject individuals in adult foster homes.
- (2) **CONFLICT OF INTEREST.** An authorized provider designee and authorized Division representative must not have access to criminal history information, and must not participate in a fitness determination, of a subject individual with whom there is a conflict of interest.
- (a) “Conflict of Interest,” for the purpose of this section, means the subject individual is a family member of the APD or ADR, or they are related by domestic partnership, or through a financial or any other close personal relationship.
 - (b) The Division conducts the fitness determination when there is a conflict of interest and there is no other authorized provider designee available to the provider.
- (3) **DENIAL OR REVOCATION OF APPROVAL.** The Division may immediately suspend, deny or revoke approval of an APD or ADR if the Division determines the APD or ADR failed to comply with these rules or any Oregon statute or rule relating to the processing or confidentiality of criminal history or LEDS information.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537

411-009-0015 Request for Check (Effective 12/1/00)

A subject individual must not be allowed to work, volunteer, be trained or reside in a facility or other environment identified in these rules without first completing and submitting (FAX, mail, or deliver in person) to the Division a Criminal History Release Authorization form (SDS 303) and, when required, the SDS 303B form.

- (1) **MITIGATING INFORMATION FORM (SDS 303B).** The subject individual must complete a SDS 303B form if the subject individual indicates any convictions or pending charges, and when it is determined that the subject individual provided false or misleading information on the SDS 303 or SDS 303B.
 - (a) It is recommended that the employer give the subject individual a Mitigating Information form (SDS 303B) with the Criminal History Release Authorization form (SDS 303).
 - (b) If there are no convictions or pending charges, and if information provided on the SDS 303 is complete and accurate, the SDS 303B form is not required to be completed.
- (2) **REQUEST FROM FACILITY OR IN-HOME AGENCY.** Facilities (including adult foster homes) and in-home agencies must require each subject individual to complete and sign the Division's Criminal History Release Authorization form (SDS 303). This form authorizes the Division to obtain criminal history and supplemental information and release Oregon information to the authorized provider designee. Prior to allowing a subject individual to work, volunteer, be trained or reside in any of the environments identified in these rules, the facility or agency must submit the completed form to the Division.
- (3) **REQUEST FROM ADULT FOSTER HOME.** Subject individuals in adult foster homes are required to have completed the State of Oregon (LEDS) criminal history check and have no indication of potentially disqualifying out-of-state criminal history before being allowed to work, volunteer, reside or be trained in the facility.
 - (a) A fitness determination or preliminary fitness determination based on the LEDS check must be completed before the subject individual is allowed to work, volunteer, be trained in, or live in the adult foster home.
 - (b) Subject individuals who are required to complete a national criminal history check may work, volunteer or reside in the facility pending completion of the national check only if there is no indication of out-of-state criminal history.
- (4) **REQUEST FROM CLIENT-EMPLOYED PROVIDER (CEP).**
 - (a) Prior to being approved as a CEP, the CEP applicant must complete the

Division's Criminal History Release Authorization form (SDS 303), and return it to the local office of the Division. The local office authorized Division representative processes the request or submits the authorization form to SDDS Central Office ;

- (b) Local SDDS/AAA offices must not authorize payment to client-employed providers prior to receiving a completed Criminal History Release Authorization form (SDS 303).
- (c) When a CEP is employed by a new client, the ADR may conduct a new criminal history check.

(5) CRIMINAL HISTORY RECHECK.

- (a) Initiated by SDDS. The Division may recheck any subject individual's criminal history annually or when a licensing or certification inspection or a complaint investigation involving the subject individual gives the Division reason to believe a recheck is justified. When requested by the Division, the subject individual must submit a completed Criminal History Release Authorization form (SDS 303) to the Division. The Division pays for fingerprint processing fees; the subject individual or subject individual's employer must pay the fees for getting fingerprinted.
- (b) Initiated by Employer. The employer, through the authorized provider designee, may initiate a criminal history check annually and at such other times the employer has reason to believe a recheck is justified. The employer or subject individual must pay all criminal history check fees and fingerprint fees.
- (c) Adult Foster Homes. Criminal history checks for adult foster homes must be completed annually at time of license renewal. (NOTE: Fingerprints are only required when requested by the Division.)

- (6) DOCUMENTATION.** The facility or agency must be able to provide documentation to the Division that the SDS 303, and when required, the SDS 303B, have been submitted in accordance with this rule. A completed copy of the required forms must be kept on file at the facility, training institution or agency (see OAR 411-009-0090).

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537

411-009-0021 Criminal History Checks (*Effective 12/1/00*)

When an authorized provider designee (APD) or authorized Division representative (ADR) requests a criminal history check for a subject individual, the Division obtains a criminal history and supplemental information to determine whether the subject individual has any potentially disqualifying criminal history.

- (1) **OREGON CRIMINAL HISTORY CHECK.** The Division or qualified vendor must obtain criminal history and supplemental information through the Law Enforcement Data System (LEDS) or other substantially equivalent system and may use other sources identified in the definition of Oregon Criminal History Check (OAR 411-009-0000). Oregon criminal history and supplemental information must be handled in compliance with the rules and procedures of the Oregon State Police (OAR Chapter 257, Division 010).
 - (a) Disclosure. Oregon LEDS information is confidential. It must only be disclosed to authorized provider designees (APD) and authorized Division representatives (ADR). The APD or ADR who makes the fitness determination must allow the subject individual to inspect the LEDS report upon request, but must not give a copy of the LEDS report to the subject individual.
 - (b) Use of LEDS Information. Criminal history and supplemental information must only be used for the purposes described in these rules (OAR Chapter 411, Division 009).
 - (c) Fees. There is no fee for an Oregon criminal history check.
 - (d) Copy to APD or ADR. The Division provides a copy of the Oregon criminal history check to the authorized provider designee, or Authorized Division Representative, as appropriate, if the check reveals any criminal history.
- (2) **NATIONAL CRIMINAL HISTORY CHECK.** The Division may conduct a national criminal history check through the Oregon State Police and Federal Bureau

of Investigation (FBI).

- (a) **When Required.** A national criminal history check is required in any of the following circumstances:
 - (A) The caregiver's application or Criminal History Release Authorization form (SDS 303) indicates possible criminal history or arrests from outside of Oregon;
 - (B) The caregiver's application or Criminal History Release Authorization form (SDS 303) lists an out-of-state residence during the previous three years. ;
 - (C) The Oregon criminal history check indicates multi-state offender (possible out-of-state criminal history); or
 - (D) The Division receives questionable or conflicting information and determines that a national check is warranted.
- (b) **Exceptions.** The Division may determine a national criminal history check is not required if the subject individual, according to the Division's Criminal History Check Registry, has passed a national check within the previous three years and not had out-of-state residence during those three years.
- (c) **Handling of National Criminal History.**
 - (A) **Fingerprint Cards.** When a national criminal history check is required, the subject individual must submit two completed blue (FBI) fingerprint cards. Information listed on the card must include the subject individual's name(s), Social Security Number, date of birth, sex, race, height, weight, eye color, hair color and place of birth. The completed cards must be submitted to the Division for processing through the Oregon State Police.
 - (B) **Timeframe.** Completed fingerprint cards must be mailed or delivered to the Division within two weeks from the date the Division requests the fingerprint cards.

- (C) Fees:
- (i) The authorized provider designee or authorized Division representative must submit the fingerprint card(s) of the subject individual, the SDS 303, the SDS 303B (if any criminal history or arrest is listed on the SDS 303) and a check or money order , payable to the Senior and Disabled Services Division ;
 - (ii) The Division pays the fee for processing fingerprints for client-employed providers and relative adult foster homes;
 - (iii) Fees for national criminal history checks are established pursuant to ORS Chapter 181 .
- (D) SDSD Determines Fitness. When a national criminal history check by the Division’s Provider and Consumer Services Unit discloses potentially disqualifying criminal history or possible misleading or false information on the SDS 303 that is potentially disqualifying, the APD or ADR must provide a copy of the completed Mitigating Information form (SDS 303B) to the Division. The Division’s Provider and Consumer Services Unit makes the fitness determination, records the decision on the SDS 303B, and notifies the facility, APD or ADR.
- (E) Provider Notifies Subject Individual. The facility , APD or ADR must notify the subject individual of the decision by providing a copy of the completed SDS 303B (both sides) to the subject individual.
- (F) Confidentiality. National criminal history is confidential. Federal law prohibits the disclosure of information received from the FBI.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537 & ORS 181.730

411-009-0040 Subject Individuals on Probation (Effective 12/1/00)

- (1) **PROBATIONARY STATUS ALLOWED.** A subject individual is considered to be “on probation” prior to a final fitness determination under the following circumstances. A Criminal History Release Authorization form (SDS 303) must

have been completed and submitted to the Division. A subject individual on probation must be actively monitored by someone who is fit. The person doing the monitoring must be in the facility or residence when the individual on probation is in the facility or residence . In addition, the individual on probation must meet the following:

- (a) **No Indication of Potentially Disqualifying Criminal History.** If there is no indication of potentially disqualifying criminal history on the Criminal History Release Authorization form (SDS 303), the subject individual may be on probation without a preliminary fitness determination. This probationary status must be terminated if the state criminal history check indicates any potentially disqualifying criminal history. A finding of “multi-state offender” on the LEDS check constitutes potentially disqualifying history if neither out-of-state criminal history nor out-of-state arrest history was disclosed by the subject individual; or
- (b) **Volunteered Criminal History.** When a subject individual discloses potentially disqualifying criminal history on the Criminal History Release Authorization form (SDS 303) , the individual may be on probation only if found “fit” in a preliminary fitness determination . The preliminary fitness determination must be conducted by an authorized provider designee or authorized Division representative . Upon completion of the criminal history check, a final fitness determination must be completed if the check reveals any arrest during the last five years or criminal history (conviction) which was not disclosed by the subject individual on the Criminal History Release Authorization form (SDS 303); or
- (c) **Out-of-State Residency.** A subject individual with an out-of-state residence during the previous three years and who otherwise meets the criteria listed in subsection (1)(a) or (b) of this rule, must be actively monitored if allowed to work, volunteer, be trained or reside in any of the environments identified in these rules prior to completion of a final fitness determination.
- (d) **Client-Employed Provider.** A Senior and Disabled Services Division client-employed provider (CEP) may be monitored by the client if the client makes an informed decision to employ the person on probation.
- (e) **Probationary Status Is Optional.** Nothing in this rule is intended to require

that a subject individual who is eligible to be on probation be allowed to work, volunteer, be trained or reside in a facility prior to a final fitness determination.

- (f) Adult Foster Homes. Probationary status for subject individuals in an adult foster home is allowed only if after the Oregon criminal history check is completed by the Division there is no indication of potentially disqualifying out-of-state criminal history and a preliminary fitness determination finds the individual to be “fit.”

(2) **PROBATIONARY STATUS PROHIBITED.** A subject individual may not work, volunteer, be trained or reside in a facility or any other environment covered by these rules on a probationary basis or on any other basis if:

- (a) The subject individual’s criminal history check indicates potentially disqualifying criminal history and the subject individual has not been found “fit” following a fitness determination;
- (b) The subject individual’s state criminal history check indicates multi-state offender and the subject individual did not disclose out-of-state criminal history or out-of-state arrests on the Criminal History Release Authorization form (SDS 303) ; or
- (c) The subject individual’s state criminal history check indicates any arrest during the past five years for a potentially disqualifying crime, or any criminal history (conviction), and the subject individual did not disclose the arrest(s) or conviction(s) on the Criminal History Release Authorization form (SDS 303); or
- (d) The subject individual fails to complete and return the Mitigating Information form (SDS 303B) on a timely basis (see OAR 411-009-0060(2)); or
- (e) The subject individual is applying to become a licensee or owner of a licensed facility .
- (f) Adult Foster Homes. A subject individual must not be allowed probationary status in an adult foster home until information on the Oregon criminal history check (LEDS) is received and a preliminary fitness determination is

completed. If there is any indication of potentially disqualifying out-of-state criminal history, probationary status is not allowed.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537 & ORS 443.735

411-009-0050 Reasons for Disqualification (*Effective 12/1/00*)

- (1) **REFUSAL TO COOPERATE.** If a subject individual refuses to consent to a criminal history check or refuses to be fingerprinted, the person must be deemed “unfit.”
- (2) **MISLEADING OR FALSE INFORMATION.** Any subject individual providing misleading or false information on any application or report required by the Division may be determined to be unfit.
- (3) **DISQUALIFICATION BASED ON VOLUNTARILY DISCLOSED INFORMATION.** If a subject individual’s application indicates potentially disqualifying criminal history and a fitness determination concludes the subject individual is unfit, Oregon and national criminal history checks are not required. If, however, the subject individual requests an informal administrative review following the fitness determination, the criminal history check process must be completed. The administrative review may not be completed prior to completion of the criminal history check.
- (4) **POTENTIALLY PERMANENTLY DISQUALIFYING CRIMES.** A person convicted of any crime identified below is determined to be potentially disqualified. Such subject individual must not be allowed to be on probation or considered to be “fit” unless, following evaluation of the factors identified in OAR 411-009-0060(2)(b), the provider designee or Division representative determines the person’s criminal history does not indicate a likelihood of behavior that could endanger the welfare of persons receiving care.
 - (a) Abandonment of a Child (ORS 163.535);
 - (b) Abuse of Corpse I or II (ORS 166.087 or 166.085);
 - (c) Aggravated Murder (ORS 163.095);
 - (d) Animal Abuse I or II (ORS 167.320 or 167.315);
 - (e) Arson I (ORS 164.325);

- (f) Assault I, II or III (ORS 163.185, 163.175 or 163.165);
- (g) Burglary I (ORS 164.225);
- (h) Child Neglect I or II (ORS 163.547 or 163.545);
- (i) Coercion (ORS 163.275);
- (j) Compelling Prostitution (ORS 167.017);
- (k) Criminal Mistreatment I or II (ORS 163.205 or 163.200);
- (l) Displaying Obscene Materials to Minors (ORS 167.080);
- (m) Disseminating Obscene Material (ORS 167.087);
- (n) Encouraging Child Sexual Abuse I, II or III (ORS 163.684, 163.686 or 163.687);
- (o) Endangering the Welfare of a Minor (ORS 163.575);
- (p) Escape I (ORS 162.165);
- (q) Exhibiting an Obscene Performance to Minors (ORS 167.075);
- (r) Failure to Report Precursor Substance (ORS 475.950);
- (s) Felon in Possession of Firearm (ORS 166.270);
- (t) Firearm Used in Felony (ORS 166.429);
- (u) Furnishing Obscene Materials to Minors (ORS 167.065);
- (v) Incest (ORS 163.525);
- (w) Intimidation I or II (ORS 166.165 or 166.155);
- (x) Kidnaping I (ORS 163.235);
- (y) Manslaughter I or II (ORS 163.118 or 163.125);
- (z) Murder (ORS 163.115);
- (aa) Paying for Viewing Sexual Conduct Involving a Child (ORS 163.680);
- (bb) Possession of Weapons by Inmates of Institutions (ORS 166.275);
- (cc) Possession of Destructive Device (ORS 166.382);
- (dd) Racketeering (ORS 166.720);
- (ee) Rape I or II (ORS 163.375 or 163.365);
- (ff) Robbery I, II or III (ORS 164.415, 164.405 or 164.395);
- (gg) Sadomasochistic Abuse or Sexual Conduct in Live Show (ORS 167.062);
- (hh) Sending Obscene Materials to Minors (ORS 167.070);
- (ii) Sexual Penetration I or II (ORS 163.411 or 163.408);
- (jj) Sexual Abuse I, II or III (ORS 163.427, 163.425 or 163.415);
- (kk) Sodomy I or II (ORS 163.405 or 163.395);
- (ll) Stalking (ORS 163.732);
- (mm) Theft by Extortion (ORS 164.075);
- (nn) Unlawful Possession of Machine Guns, Certain Short-Barreled Firearms and Firearms Silencers (ORS 166.272);
- (oo) Unlawful Manufacture of a Destructive Device (ORS 166.384);

- (pp) Using Child in Display of Sexually Explicit Conduct (ORS 163.670);
- (qq) Any conviction for attempt, solicitation or conspiracy to commit crimes listed in this section, including any conviction based on criminal liability for conduct of another pursuant to ORS 161.155;
- (rr) Any crime in any other jurisdiction which is the substantial equivalent of any of the Oregon crimes listed in this section.

(5) **POTENTIALLY FIVE-YEAR DISQUALIFYING CRIMES.** A person convicted during the previous five years of any crime(s) identified below is determined to be potentially disqualified. Such subject individual must not be allowed to be on probation or considered to be “fit” unless, following evaluation of the factors identified in OAR 411-009-0060(2)(b), the provider designee or Division representative determines the person’s criminal history does not indicate a likelihood of behavior that could endanger the welfare of persons receiving care. The five year period is measured from the date of conviction. This list is not intended to include any offenses which under Oregon law are considered “violations” and not “crimes.”

- (a) Adult Using Minor in Commission of Controlled Substance Offense (less than 5 grams marijuana) (ORS 167.262);
- (b) Aggravated Theft I (ORS 164.057);
- (c) Arson II (ORS 164.315);
- (d) Assault IV (ORS 163.160);
- (e) Bribe Receiving By Witness (ORS 162.275);
- (f) Bribe Receiving (ORS 162.025);
- (g) Bribing Witness (ORS 162.265);
- (h) Burglary II (ORS 164.215);
- (i) Commercial Drug Offense (ORS 475.996);
- (j) Contributing to the Sexual Delinquency of a Minor (ORS 163.435);
- (k) Controlled Substances, Prohibited Acts Generally (ORS 475.992);
- (l) Criminal Impersonation of a Police Officer (ORS 162.367);
- (m) Criminal Impersonation (ORS 162.365);
- (n) Criminal Driving While Suspended or Revoked or in Violation of a Permit (ORS 811.182);
- (o) Criminal Possession of a Forged Instrument I (ORS 165.022);
- (p) Criminal Possession of a Forgery Device (ORS 165.032);
- (q) Criminal Trespass in Possession of a Firearm (ORS 164.265);
- (r) Criminally Negligent Homicide (ORS 163.145);

- (s) Distribution to Minors (ORS 475.995);
- (t) Driving Under the Influence of Intoxicants (ORS 813.010);
- (u) Escape II (ORS 162.155);
- (v) Failure to Report Missing Precursor Substances (ORS 475.955);
- (w) Fleeing or Attempting to Elude Police (ORS 811.540);
- (x) Forgery I or II (ORS 165.013, 165.007);
- (y) Fraudulent Use of a Credit Card (over \$750) (ORS 165.055);
- (z) Fraudulently Obtaining a Signature (ORS 165.042);
- (aa) Frequenting a Place Where Controlled Substances are Used (ORS 167.222);
- (bb) Harassment (ORS 166.065);
- (cc) Hindering Prosecution (ORS 162.325);
- (dd) Illegally Selling Drug Equipment (ORS 475.960);
- (ee) Kidnapping II (ORS 163.225);
- (ff) Manufacture or Delivery Within 1000 Feet of a School (ORS 475.999);
- (gg) Menacing (ORS 163.190);
- (hh) Obstructing Governmental or Judicial Administration (ORS 162.235);
- (ii) Official Misconduct in the First Degree (ORS 162.415);
- (jj) Perjury (ORS 162.065);
- (kk) Possession of Burglary Tools (ORS 164.235);
- (ll) Possession of Materials Depicting Sexually Explicit Conduct of a Child, I or II (ORS 163.688 or 163.689);
- (mm) Prohibited Acts for Registrants, Controlled Substances (ORS 475.993);
- (nn) Prohibited Acts Involving Records and Fraud; (ORS 475.994);
- (oo) Promoting Prostitution (ORS 167.012);
- (pp) Providing Liquor to a Person Under 21 or to Intoxicated Person (ORS 471.410);
- (qq) Public Indecency (ORS 163.465);
- (rr) Rape III (ORS 163.355);
- (ss) Reckless Driving (ORS 811.140);
- (tt) Recklessly Endangering Another (ORS 163.195);
- (uu) Resisting Arrest (ORS 162.315);
- (vv) Sale or Gift of Explosives to Children (ORS 166.480);
- (ww) Sexual Misconduct (ORS 163.445);
- (xx) Sodomy III (ORS 163.385);
- (yy) Tampering with a Witness (ORS 162.285);
- (zz) Tampering with Drug Records (ORS 167.212);
- (aaa) Tampering with Public Records (ORS 162.305);
- (bbb) Theft by Receiving (ORS 164.095);

- (ccc) Theft by Deception (ORS 164.085);
- (ddd) Theft I, II or III (ORS 164.055, 164.045 or 164.043);
- (eee) Unlawful Factoring of a Credit Card Transaction (ORS 165.074);
- (fff) Unlawful Paramilitary Activity (ORS 166.660);
- (ggg) Unlawful Use of a Weapon (ORS 166.220);
- (hhh) A combination of any three convictions not listed in these rules which were committed on three different dates;
- (iii) Any conviction for attempt, solicitation or conspiracy to commit crimes listed in this section, including any conviction based on criminal liability for conduct of another pursuant to ORS 161.155;
- (jjj) Any crime outside Oregon which is the substantial equivalent of any of the Oregon crimes listed in this section.

(6) **CHARGES PENDING OR DISPOSITION UNKNOWN.** A subject individual charged or arrested for any crime listed in section (4) or (5) of this rule during the previous five years may be on probation while charges are pending or disposition is unknown only when allowed pursuant to OAR 411-009-0040(1)(b).

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537

411-009-0060 Fitness Determination (Effective 12/1/00)

- (1) **DEEMED “FIT”** (No disqualifying criminal history). A subject individual who has completed and submitted the Criminal History Release Authorization form (SDS 303), who has been determined to have no potentially disqualifying history and who provided complete and accurate information on the Criminal History Release Authorization form (SDS 303), and if applicable, the Mitigating Information form (303B), is fit.
- (2) **POTENTIALLY DISQUALIFYING INFORMATION.** A subject individual who is determined “unfit” because of potentially disqualifying criminal history as identified in OAR 411-009-0050 or because he/she provided misleading or false information must have an opportunity for a fitness determination.
 - (a) Opportunity to Submit Mitigating Information.
 - (A) If an APD or ADR determines that a subject individual has potentially

disqualifying criminal history, the the APD or ADR must provide a Mitigating Information form (SDS 303B) to the subject individual.

- (B) If an APD or ADR determines that a subject individual provided misleading or false information that could lead to a finding of “unfit,” the individual must be allowed the opportunity to explain on a SDS 303B or other form why misleading or false information was provided.
 - (C) A Mitigating Information form may be provided to the subject individual at the time the Criminal History Release Authorization form (SDS 303) is completed , but no later than seven days after it is determined that a mitigating information form is required.
- (b) Subject Individual Submits Mitigating Information. The subject individual must return the completed Mitigating Information form (SDS 303B) to the authorized provider designee within seven days after receipt. All of the following factors, as applicable, must be considered in determining if subject individual is “fit” or “unfit”:
- (A) The nature of crime(s) and number of offenses, including the facts that support the conviction(s).
 - (B) Supplemental information (see definition).
 - (C) The facts that indicate the provision of misleading or false information. In evaluating the provision of misleading or false information, consideration may be given to whether the subject individual was genuinely confused, there was subsequent full disclosure, there was an intent to deceive, there was a lapse of memory, etc.
 - (D) The relevancy, if any, of the crime(s), arrest(s), or false statement(s) to the specific requirements of the subject individual’s present or proposed position.
 - (E) Circumstances surrounding the commission of the crime and the individual’s history which would demonstrate the probability of repetition.

- (F) The passage of time and the individual's conduct since commission of the crime(s) that indicates rehabilitation or lack of rehabilitation, e.g. employment history, participation in therapy or education.
 - (G) The age of the individual at the time the crime was committed.
 - (H) History of abuse, domestic violence and neglect complaints, if any.
 - (I) If applicable, relationship to the client which demonstrates a positive and caring attitude toward the client.
- (c) Processing Mitigating Information.
- (A) National Criminal History. If the subject individual's national criminal history check process reveals potentially disqualifying information, the Division will request a Mitigating Information form (SDS 303B) unless complete mitigating information has already been submitted. When requested by the Division, the APD or ADR must mail or fax the completed SDS 303B to the Division within seven days .
 - (B) Decision Maker.
 - (i) The Division's Provider and Consumer Services Unit makes the fitness determination if the subject individual has a potentially disqualifying national criminal history or if the subject individual provided misleading or false information about out-of-state history.
 - (ii) The ADR makes the fitness determination if the subject individual is a client-employed provider or in an adult foster home or a relative foster home .
 - (iii) In all other cases, the authorized provider designee (APD) makes the fitness determination. The factors listed in subsection (2)(b) of this rule must be used to evaluate fitness.
 - (C) Fitness Determination. Within 10 days of receipt of all required

LEDS and national criminal history check results, and the completed SDS 303B, the authorized provider designee, authorized Division representative or Division must:

- (i) Evaluate the criminal history and the factors identified in subsection (2)(b) of this rule; and
 - (ii) Evaluate misleading or false information provided by the subject individual, if any, and
 - (iii) Determine whether the subject individual is fit or unfit and complete Fitness Determination on the SDS 303B.
- (d) **Rejection of Subject Individuals.** OAR Chapter 411, Division 009, does not preclude an employer from eliminating a subject individual from consideration prior to initiating a criminal history check nor does it require an employer to hire a subject individual who is determined to be fit.
- (3) **JUVENILE RECORD.** A subject individual may not be found unfit because of the existence or contents of a juvenile record that has been expunged pursuant to ORS 419A.260 through 419A.262.
- (4) **NOTICE TO SUBJECT INDIVIDUAL.** The entity making the fitness determination must complete the Fitness Determination box on the Mitigating Information form (SDS 303B), sign and date the form .
 - (a) **Decision Based on LEDS Check.** The APD or ADR shall mail or deliver in person the original or a copy (both sides of form) to the subject individual within five days of the determination.
 - (b) **Decision Based on National Check.** When the fitness determination is made by the Division based on national criminal history, the Division mails the SDS 303B to the APD or ADR. The APD or ADR must mail or deliver in person the SDS 303B to the subject individual within five days of receipt.
- (5) **DOCUMENTATION.** The facility, agency or organization must document the fitness determination, including the factors considered during the fitness determination, and who participated in the fitness determination.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537 & ORS 443.735

411-009-0070 Appeal, Review, Hearing Process *(Effective 12/1/00)*

- (1) **HISTORY DISPUTED.** If a subject individual wishes to challenge the accuracy or completeness of information provided by the Oregon State Police, the Federal Bureau of Investigation or other agencies reporting information to the Division, he/she must make his/her appeal to the entity providing the information. Such challenges are not subject to the appeal process described in this rule.
- (2) **APPEAL OF FITNESS DETERMINATION.** If a subject individual wishes to dispute an adverse fitness determination, the subject individual may appeal the determination by requesting an informal administrative review and a contested case hearing . The subject individual is notified of the opportunity for appeal on the Mitigating Information form (SDS 303B).
 - (a) **Hearing Request.** In order to request a contested case hearing the subject individual or their legal representative must complete and sign the Division's Administrative Hearing Request form (AFS 443).
 - (b) **Deadline for Appeal.**
 - (A) The completed and signed AFS 443 form must be received by the Division not later than 45 days after the SDS 303B notice is first delivered or mailed to the subject individual.
 - (B) If the subject individual successfully contests the accuracy or completeness of information provided by the Oregon State Police, the Federal Bureau of Investigation or other agencies reporting information to the Division, the Division will extend the deadline to appeal the fitness decision, or will ensure that a new fitness decision is completed.
 - (c) **Extension of Deadline.** The Division may extend the time to request a hearing if the Division determines the delay was caused by factors beyond

the reasonable control of the subject individual.

- (3) **INFORMAL ADMINISTRATIVE REVIEW.** When an adverse fitness determination is made, and the subject individual appeals the decision, the Division may conduct an informal administrative review with the authorized provider designee or authorized Division representative, as appropriate, and the subject individual. Upon completion of the Division's informal review, the subject individual must be advised in writing of the finding.
- (4) **HEARING.**
 - (a) **Format.** The hearing must be conducted in accordance with ORS 183.413 through 183.470 and OAR 137-003-0501 through 0700.
 - (b) **Agency Representation.** Division employees are authorized to appear on behalf of Senior and Disabled Services Division for criminal history check hearings.
 - (c) **Exhibits.** The hearing officer must be provided a complete copy of the criminal history check information.
 - (A) In the case of federal criminal history and criminal history from jurisdictions outside Oregon, the subject individual must obtain copies of the FBI criminal history report, or a copy of the state criminal history report from each state in which there was criminal or arrest history recorded. The subject individual must provide copies of such documentation to the hearings officer at least seven days prior to the scheduled hearing;
 - (B) In the case of Oregon criminal history, the Division must provide a copy of the LEDS print-out to the hearings officer; and
 - (C) Information obtained from an Oregon criminal history check is prima facie evidence if certified by the Division representative as a true copy.
 - (d) **Witnesses.** The authorized provider designee or authorized Division representative who completed the fitness determination must participate in

the hearing.

- (e) **Party Status.** Persons with an interest in the outcome of the hearing may request party status in accordance with ORS 183.310.
- (f) **Proposed and Final Orders.** In criminal history check contested cases, the hearing officer will prepare and serve a proposed order in accordance with OAR 137-003-0645. Written exceptions and arguments to a proposed order must be submitted to the Division Administrator not later than 30 days from the date of service of the proposed order. The Division will issue a final order.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537 & ORS 183.310

411-009-0080 Criminal History Check Registry (Effective 12/1/00)

- (1) **CONTENTS OF REGISTRY.** The Division must maintain a Criminal History Check Registry for national criminal history checks which includes at a minimum:
 - (a) Name of subject individual checked;
 - (b) Social Security Number of subject individual if submitted;
 - (c) The name of the facility or agency initiating the check;
 - (d) The date(s) of each national history check; and
 - (e) The outcome of the check (fit or unfit).
- (2) **PROCESS.** When a national criminal history check is required, the authorized provider designee and Division may use the Criminal History Check Registry to determine if a national check has recently been completed. Information in the registry may be relied upon if the date the national check was completed was in the previous three years and the subject individual did not have an out-of-state residence during the three years.

- (3) **NATIONAL CHECKS CONDUCTED BY OTHER DIVISIONS.** The Division may rely upon information obtained through a national criminal history check conducted by another Division of the Oregon Department of Human Services .

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537

411-009-0090 Retention of Criminal History and Supplemental Information
(Effective 12/1/00)

- (1) **SDSD FORMS.** The employer must keep copies of the Criminal History Release Authorization form (SDS 303) and the Mitigating Information form (SDS 303B) for a minimum of one year if the subject individual is not employed. In the case of an employee or volunteer, copies must be kept for a minimum of two years after the employee or volunteer leaves employment or volunteer status.
- (2) **LEDS REPORTS.** Copies of LEDS records must be destroyed within 30 days of the fitness determination; or if the fitness determination is appealed, within 30 days of the completion of the appeal. LEDS reports must be kept in a locked file until shredded or burned. Fingerprint cards held by the Division must be destroyed upon completion of the national criminal history check.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537 & ORS 181.730

411-009-0100 Alternate Qualified Vendor *(Effective 12/1/00)*

The criminal history check required pursuant to these rules may be conducted by an alternate qualified vendor (supplier) of criminal history information if the vendor is certified by the Department of Human Services or the Division to provide such information pursuant to ORS 181.537.

- (1) **ACCESS TO INFORMATION.** In order to be approved by the Division, the vendor must demonstrate to the satisfaction of the Division that it has access to

substantially the same information as found on the Law Enforcement Data System.

- (2) **DOCUMENTATION.** The qualified vendor must keep the completed Criminal History Release Authorization form (SDS 303) and, when applicable, the Mitigating Information for (SDS 303B), for each criminal history check request in order to continue to be certified.
- (3) **REVOCACTION OF CERTIFICATION.** The qualified vendor must apply the standards described in these rules. The Department or Division may immediately revoke certification of the vendor if the vendor fails to adhere to the requirements in these rules. Such vendors may request a contested case hearing per ORS Chapter 183.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537

411-009-0110 Immunity From Liability (Effective 12/1/00)

The employer, the authorized provider designee and authorized Division representative have immunity from any civil liability that might otherwise be incurred or imposed for determining, in accordance with these rules, that a subject individual is not fit to hold a position, provide services, or be employed, as described in ORS 181.537(7). An employer and authorized provider designee who in good faith comply with ORS Chapter 181 and these rules are not liable for the failure to hire a prospective employee or the decision to discharge an employee on the basis of the authorized provider designees decision. No employee of the state, a business or an organization is liable for defamation, invasion of privacy, negligence or any other civil claim in connection with the lawful dissemination of information lawfully obtained under ORS Chapter 181 or these rules.

Stat. Auth.: ORS 410.070

Stats. Implemented: ORS 181.537

The official copy of an Oregon Administrative Rule is contained in the Administrative Order filed at the Secretary of State, Archives Division, 800 Summer St. NE, Salem, Oregon 97310. Any discrepancies with published versions of the rule are satisfied in favor of the Administrative Order.