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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

APD 20-2024

CHAPTER 411

DEPARTMENT OF HUMAN SERVICES

AGING AND PEOPLE WITH DISABILITIES AND DEVELOPMENTAL DISABILITIES

FILED

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ARCHIVES DIVISION
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& LEGISLATIVE COUNSEL

FILING CAPTION: ODDS: SB99 AFH-DD Bill of Rights for LGBTQIA2S+ Residents and Residents Living with HIV

EFFECTIVE DATE: 05/01/2024 THROUGH 10/27/2024

AGENCY APPROVED DATE: 04/29/2024

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NEED FOR THE RULE(S):

The Oregon Department of Human Services, Office of Developmental Disabilities Services (ODDS) needs to immediately adopt OAR 411-360-0175 to implement SB 99 (2023) about the Bill of Rights for LGBTQIA2S+ residents and residents living with the human immunodeficiency virus (HIV) in adult foster homes for individuals with intellectual or developmental disabilities (AFH-DD).

OAR 411-360-0175 about AFH-DD Bill of Rights for LGBTQIA2S+ Residents and Residents Living with HIV needs to be immediately adopted to implement the requirements of SB 99 (2023) by:

- Defining terms used throughout the rule.
- Including LGBTQIA2S+ Bill of Rights and protections that prohibit an AFH-DD provider from taking certain actions, based in whole or in part, on a resident's actual or perceived sexual orientation, gender identity, gender expression, or HIV status.
- Requiring a new notice of non-discrimination.
- Providing for protection of resident records, informed consent, and access to transgender-related medical care, hormone therapy, and supportive counseling.
- Adding LGBTQIA2S+ training requirements for providers and training standards.
- Providing for exemptions to the rule.

ODDS needs to proceed by filing temporary rule changes and is unable to proceed through the permanent rulemaking process because ODDS needs to immediately implement SB 99 (2023) to provide protections for LGBTQIA2S+ residents and residents living with HIV and notify current providers of new training requirements that must be met by the end of the year.

JUSTIFICATION OF TEMPORARY FILING:

OAR 411-360-0175 needs to be immediately adopted to meet the legislative intent of SB 99 (2023) and implement the Bill of Rights for LGBTQIA2S+ residents and residents living with HIV.

Failure to act promptly and immediately adopt OAR 411-360-0175 prevents ODDS from implementing SB 99 (2023) and complying with Oregon Law. This will result in serious prejudice to:

- AFH-DD residents who identify as LGBTQIA2S+.
- AFH-DD residents living with HIV.
- AFH-DD providers.
- ODDS.

Without these rules, ODDS is not able to:

- Establish the AFH-DD Bill of Rights for LGBTQIA2S+ residents and residents living with HIV.
- Require a new notice of non-discrimination.
- Provide for protection of resident records, informed consent, and access to transgender-related medical care, hormone therapy, and supportive counseling.
- Include LGBTQIA2S+ training requirements for providers and training standards.

Immediately adopting OAR 411-360-0175 allows ODDS to establish the Bill of Rights for LGBTQIA2S+ residents and residents living with HIV to meet the legislative intent of SB 99 (2023) and ensure protections for AFH-DD residents who identify as LGBTQIA2S+ or live with HIV.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

1. Enrolled SB 99 (2023). Available at:

<https://olis.oregonlegislature.gov/liz/2023R1/Downloads/MeasureDocument/SB0099/Enrolled>

2. Overview and Measure History of Senate Bill 99 (2023). Available at:

<https://olis.oregonlegislature.gov/liz/2023R1/Measures/Overview/SB99>

3. ORS 441.111 through 441.122. Available at: https://www.oregonlegislature.gov/bills_laws/ors/ors441.html

4. Temporary rulemakings for adult foster homes licensed by the Oregon Department of Human Services, Aging and People with Disabilities Division (APD). Available at: <https://www.oregon.gov/odhs/rules-policy/Pages/apd-rules.aspx>

5. APD's SB 99 LGBTQIA2S+ Bill of Rights Rules Advisory Committee. Available at:

<https://www.oregon.gov/odhs/rules-policy/Pages/apd-rac.aspx>

ADOPT: 411-360-0175

RULE SUMMARY: OAR 411-360-0175 about AFH-DD Bill of Rights for LGBTQIA2S+ Residents and Residents Living with HIV is being immediately adopted to implement the requirements of SB 99 (2023) by:

- Defining terms used throughout the rule.
- Including LGBTQIA2S+ Bill of Rights and protections that prohibit an AFH-DD provider from taking certain actions, based in whole or in part, on a resident's actual or perceived sexual orientation, gender identity, gender expression, or HIV status.
- Requiring a new notice of non-discrimination.
- Providing for protection of resident records, informed consent, and access to transgender-related medical care, hormone therapy, and supportive counseling.
- Adding LGBTQIA2S+ training requirements for providers and training standards.
- Providing for exemptions to the rule.

CHANGES TO RULE:

411-360-0175

AFH-DD Bill of Rights for LGBTQIA2S+ Residents and Residents Living with HIV

(1) DEFINITIONS.¶

(a) "Gender expression" means an individual's gender-related appearance and behavior, whether or not these are stereotypically associated with the sex the individual was assigned at birth.¶

(b) "Gender identity" means an individual's internal, deeply held knowledge or sense of the individual's gender, regardless of physical appearance, surgical history, genitalia, legal sex, sex assigned at birth, or name and sex as it appears in medical records or as it is described by any other individual, including a family member, guardian, or legal representative of the individual. An individual's gender identity is the last gender identity expressed by an individual who lacks the present ability to communicate.¶

(c) "Gender nonconforming" means having a gender expression that does not conform to stereotypical expectations of one's gender.¶

(d) "Gender transition" means a process by which an individual begins to live according to that individual's gender identity rather than the sex the person was assigned at birth. The process may or may not include changing the individual's clothing, appearance, name or identification documents, or undergoing medical treatments.¶

(e) "Harass" or "harassment" means to act in a manner that is unwanted, unwelcomed, or uninvited, or that demeans, threatens, or offends a resident.¶

(A) This includes bullying, denigrating, or threatening a resident based on a resident's actual or perceived status as a member of one of the protected classes in Oregon, such as:¶

(i) Race.¶

(ii) Color.¶

(iii) National origin.¶

(iv) Religion.¶

(v) Disability.¶

(vi) Sex (includes pregnancy).¶

(vii) Sexual orientation.¶

(viii) Gender identity.¶

(ix) Age.¶

(x) Marital status.¶

(B) An example of harassment includes, but is not limited to, requiring a resident to show identity documents in order to gain entrance to a restroom or other area of an AFH-DD that is available to other individuals of the same gender identity as the resident.¶

(f) "LGBTQIA2S+" means lesbian, gay, bisexual, transgender, queer, intersex, asexual, Two Spirit, nonbinary, or other minority gender identity or sexual orientation. These terms are defined below:¶

(A) "Lesbian" means the sexual orientation of an individual who is female, feminine, or nonbinary and who is physically, romantically, or emotionally attracted to other women. Some lesbians may prefer to identify as gay, a gay woman, queer, or in other ways.¶

(B) "Gay" means the sexual orientation of an individual attracted to people of the same gender. Although often used as an umbrella term, it is used more specifically to describe men attracted to men.¶

(C) "Bisexual" means an individual who has the potential to be physically, romantically, or emotionally attracted to people of more than one gender, not necessarily at the same time, in the same way, or to the same degree.¶

(D) "Transgender" means having a gender identity or gender expression that differs from the sex one was assigned at birth, regardless of whether one has undergone or is in the process of undergoing gender-affirming care. Being transgender does not imply any specific sexual orientation. Therefore, transgender people may identify as straight, gay, lesbian, bisexual, etc.¶

(E) "Queer" means individuals who do not identify as exclusively straight or an individual who has non-binary or gender-expansive identities.¶

(i) Queer is often used as a catch-all to refer to the LGBTQIA2S+ population as a whole.¶

(ii) This term was previously used as a slur but has been reclaimed by many parts of the LGBTQIA2S+ movement. It can also include transgender people who identify as male or female. The term should only be used to refer to a specific person if that person self-identifies as queer.¶

(F) "Intersex" means someone born with a variety of differences in their sex traits and reproductive anatomy. Intersex traits greatly vary, including differences in, but not limited to, hormone production and reproductive anatomy.¶

(G) "Asexual" or "Ace" means a complete or partial lack of sexual attraction or lack of interest in sexual activity with others. Asexuality exists on a spectrum, and asexual people may experience no, little, or conditional sexual attraction. Many people who are asexual still identify with a specific romantic orientation.¶

(H) "2S" or "Two-Spirit" is a term used within some Indigenous communities, encompassing cultural, spiritual, sexual, and gender identity. The term reflects complex indigenous understandings of gender roles, spirituality, and the long history of sexual and gender diversity in Indigenous cultures. The definition and common use of the term two-spirit may vary among Tribes and Tribal communities.¶

(I) The "+" means other identities and expressions of gender, romantic and sexual orientation, including minority

gender identities.[¶]

(g) "Nonbinary" means an individual who does not identify exclusively as a man or a woman. Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside these categories. While many also identify as transgender, not all non-binary people do. Non-binary can also be used as an umbrella term encompassing identities such as agender, bigender, genderqueer, or gender-fluid.[¶]

(h) "Reasonable clinical judgement" means the application of healthcare knowledge based on clinical reasoning, evidence, and theories.[¶]

(i) "Resident" means an individual residing in an AFH-DD and receiving Department-funded developmental disabilities services.[¶]

(j) "Sexual orientation" means romantic or sexual attraction, or a lack of romantic or sexual attraction, to other people.[¶]

(2) LGBTQIA2S+ BILL OF RIGHTS AND PROTECTIONS. A provider and the staff of an AFH-DD may not take any of the following actions based, in whole or in part, on a resident's actual or perceived sexual orientation, gender identity, gender expression, or human immunodeficiency virus status:[¶]

(a) Deny admission to an AFH-DD, transfer or refuse to transfer a resident within an AFH-DD or to another AFH-DD, or exit or evict a resident from an AFH-DD.[¶]

(b) Deny a request by a resident to choose the resident's roommate, when a resident is sharing a room.[¶]

(c) If rooms are assigned by gender, assign, reassign, or refuse to assign a room to a transgender or other LGBTQIA2S+ resident other than in accordance with the resident's gender identity, unless at the request of the resident or if required by federal law.[¶]

(d) Prohibit a resident from using or harass a resident who seeks to use or does use, a restroom that is available to other individuals of the same gender identity as the resident, regardless of whether the resident is making a gender transition, has taken or is taking hormones, has undergone gender affirmation surgery, or presents as gender nonconforming.[¶]

(e) Repeatedly and willfully refuse to use a resident's chosen name or pronouns after being reasonably informed of the resident's chosen name or pronouns.[¶]

(f) Deny a resident the right to wear or be dressed in clothing, accessories or cosmetics, or to engage in grooming practices, that are permitted to any other resident.[¶]

(g) Restrict a resident's right to associate with other residents or with visitors, including the resident's right to consensual sexual relations or to display physical affection, unless the restriction is uniformly applied to all residents in a nondiscriminatory manner.[¶]

(h) Deny or restrict medical or nonmedical care that is appropriate to a resident's organs and bodily needs, or provide medical or nonmedical care that, to a similarly situated, reasonable person, unduly demeans the resident's dignity or causes avoidable discomfort.[¶]

(i) Fail to accept a resident's verbal or written attestation of the resident's gender identity or require a resident to provide proof of the resident's gender identity using any form of identification.[¶]

(j) Fail to take reasonable actions, within the provider's control, to prevent discrimination or harassment when the provider knows or should have known about the discrimination or harassment.[¶]

(k) Refuse or willfully fail to provide any service, care, or reasonable accommodation to a resident or an applicant for services or care.[¶]

(3) NOTICE OF NON-DISCRIMINATION.[¶]

(a) An AFH-DD must include the notice in subsection (b) in its current nondiscrimination policy and written materials, and in all places and on all materials where that policy or those written materials are posted.[¶]

(b) "(Name of AFH) does not discriminate and does not permit discrimination, including but not limited to bullying, abuse or harassment, based on an individual's actual or perceived sexual orientation, gender identity, gender expression or human immunodeficiency virus status, or based on an individual's association with another individual on account of the other individual's actual or perceived sexual orientation, gender identity, gender expression or human immunodeficiency virus status. If you believe you have experienced this kind of discrimination, you may file a complaint with your services coordinator or the Oregon Department of Human Services at odds.complaints@odhsoha.oregon.gov."[¶]

(4) INDIVIDUAL RECORD DISCLOSURE.[¶]

(a) Unless required or allowed by state or federal law, a provider shall not disclose any personally identifiable information regarding:[¶]

(A) A resident's sexual orientation.[¶]

(B) Whether a resident is LGBTQIA2S+.[¶]

(C) A resident's gender transition status.[¶]

(D) A resident's human immunodeficiency virus status.[¶]

(b) A provider must take appropriate steps to minimize the likelihood of inadvertent or accidental disclosure of information described in subsection (a) of this section to other residents, visitors, or staff, except to the minimum

extent necessary for staff to perform their duties. Appropriate steps may include policies and procedures, training, or other documented actions or plans that address record disclosure by the provider and staff.

(5) RESIDENT RECORD. A resident's record must, before move-in and when updated, include the following information:

(a) Legal name for billing purposes.

(b) To promote person centered care, any difference from legal records, as indicated by the individual, concerning:

(A) Chosen name.

(B) Pronouns.

(C) Gender identity.

(6) An individual has the right to be given informed consent before any non-therapeutic examination or, observation of, or treatment is provided.

(7) A transgender resident shall be provided access to any assessments, therapies, and treatments that are recommended by the resident's health care provider, including but not limited to transgender-related medical care, hormone therapy, and supportive counseling.

(8) LGBTQIA2S+ TRAINING REQUIREMENTS.

(a) PROVIDERS AND STAFF.

(A) All current providers, resident managers, and substitute caregivers must complete the initial Department-approved LGBTQIA2S+ training, outlined in section (9)(a) of this rule, by December 31, 2024 and every two years thereafter.

(B) All new providers, resident managers, and substitute caregivers hired on or after January 1, 2025, must complete the required LGBTQIA2S+ training, outlined in section (9)(a) of this rule, prior to beginning job responsibilities and every two years thereafter.

(C) An AFH-DD must designate two employees, one to represent management (provider or resident manager) and one to represent substitute caregivers, to serve as a point of contact for the AFH-DD regarding compliance with this rule and to work together on a general training plan for the AFH-DD. For an AFH-DD with no substitute caregivers, the provider or resident manager may meet this requirement.

(D) A provider is responsible for the cost of providing LGBTQIA2S+ training to their staff.

(b) CONTRACTORS.

(A) A contractor who contracts with an AFH-DD to provide services and supports directly to residents must complete the required LGBTQIA2S+ training outlined in section (9)(a) of this rule.

(i) Contractors that are exempt from this training requirement include contractors who contract directly with a resident or the resident's representative, and contractors who do not generally provide services and supports directly to residents, such as contractors for landscaping, pest control, deliveries, and building repairs.

(ii) A contractor is responsible for the cost of providing the LGBTQIA2S+ training to their own employees or agents.

(iii) The contract between an AFH-DD and a contractor must include language requiring LGBTQIA2S+ training in accordance with subsection (A) above.

(B) All current contractors must provide the initial Department-approved LGBTQIA2s+ training, outlined in section (9)(a) of this rule, to their employees or agents by December 31, 2024 and every two years thereafter.

(C) All contractors hired on or after January 1, 2025, must complete the required LGBTQIA2S+ training, outlined in section (9)(a) of this rule, prior to providing contracted services to the AFH-DD and every two years thereafter.

(c) DOCUMENTATION OF TRAINING. A provider must retain records including contracts documenting the completion of the initial and subsequent LGBTQIA2S+ training required for each provider, resident manager, substitute caregiver, and non-exempt contractors. Upon request, the training records must be made available to the Oregon Department of Human Services, Community Developmental Disabilities Program licensors, and the Office of the Long-Term Care Ombudsman.

(9) LGBTQIA2S+ TRAINING STANDARDS.

(a) LGBTQIA2S+ trainings must address the following elements:

(A) Caring for LGBTQIA2S+ residents and residents living with human immunodeficiency virus.

(B) Preventing discrimination based on a resident's sexual orientation, gender identity, gender expression, or human immunodeficiency virus status.

(C) The defined terms commonly associated with LGBTQIA2S+ individuals and human immunodeficiency virus status.

(D) Best practices for communicating with or about LGBTQIA2S+ residents and residents living with human immunodeficiency virus, including the use of an individual's chosen name and pronouns.

(E) A description of the health and social challenges historically experienced by LGBTQIA2S+ residents and residents living with human immunodeficiency virus, including discrimination when seeking or receiving care and

the demonstrated physical and mental health effects within the LGBTQIA2S+ community associated with such discrimination.[¶]

(F) Strategies to create a safe and affirming environment for LGBTQIA2S+ residents and residents living with human immunodeficiency virus, including suggested changes to policies and procedures, forms, signage, communication between residents and their families, activities, in-house services, and staff training.[¶]

(b) The person or entity providing the training must demonstrate a commitment to advancing quality care for LGBTQIA2S+ residents and residents living with human immunodeficiency virus in this state.[¶]

(c) A provider may apply to the Department to provide LGBTQIA2S+ training.[¶]

(A) The training must meet the standards listed in subsection (a) of this section and include all of the following:[¶]

(i) A statement of the qualifications and training experience of the provider or staff.[¶]

(ii) The proposed methodology for providing the training either online or in person.[¶]

(iii) An outline of the training.[¶]

(iv) Copies of the materials to be used in the training.[¶]

(B) The Department shall review the materials submitted to determine whether to approve or deny the request. The Department shall inform the provider of their decision, in writing, no later than 90 business days from the date of submission.[¶]

(10) EXEMPTIONS.[¶]

(a) Any requirements in this rule and as outlined in ORS 441.111 through 441.119 and 441.993 may not be applied to an AFH-DD if the requirement is incompatible with:[¶]

(A) The professionally reasonable clinical judgement of a licensed health care professional; or[¶]

(B) A state or federal statute, federal regulation, or administrative rule that applies to the AFH-DD.[¶]

(b) A provider must provide documentation supporting the reasonable clinical judgement made by a licensed health care professional for any decision that is incompatible as described in subsection (a) of this section.

Statutory/Other Authority: ORS 409.050, 427.104, 430.662, 441.116, 441.122, 443.001, 443.004, 443.725, 443.730, 443.734, 443.735, 443.738, 443.742, 443.760, 443.765, 443.767, 443.775, 443.790

Statutes/Other Implemented: ORS 409.010, 427.007, 427.101, 427.104, 430.610, 430.662, 441.111-441.122, 441.993, 443.001-443.004, 443.705-443.825, 443.875, 443.991