NOTICE OF PROPOSED RULEMAKING FILING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

Oregon Department of Human Services (ODHS) Aging and People with Disabilities (APD)		411
Agency and Division Name		Administrative Rules Chapter Number
	ODHS, Aging and People with Disabilities 500 Summer Street NE, E-02 Salem, OR 97301	
Kristina Krause	apd.rules@odhsoha.oregon.gov	503-339-6104
Rules Coordinator	Email	Telephone
Stacey Spelman	STACEY.D.SPELMAN@odhs.oregon.gov	541-889-7553
Filing Contact	Email	Telephone

FILING CAPTION

APD: Amending 411-033 to add Electronic Visit Verification (EVV) Requirements

Last Date and Time for Public Comment: Written comments are accepted until **5:00 p.m. on March 15, 2024**. Please email comments to apd.rules@odhsoha.oregon.gov.

Hearing Date and Time: **02/23/2024, at 2:30 p.m.**

ZoomGov (virtual)
Join meeting:
https://www.zoomgov.com/j/1616264344?pwd=WDliWjZzT09RdER2d25RRWVNMHIvUT09

Join by phone: 1-669-254-5252, 1616264344

HEARING NOTES:
Please join the rule hearing no later than 15 minutes after the start time if you wish to testify (provide comments) on the proposed rules.

Everyone has a right to know about and use ODHS programs and services. ODHS provides free help. Some examples of the free help ODHS can provide are sign language and spoken language interpreters, written materials in other

languages, braille, large print, audio, or other formats. If you need help or have questions, please contact Kristina Krause at 503-339-6104, apd.rules@odhsoha.oregon.gov or 711 TTY at least five business days before the hearing.

RULEMAKING ACTION

List each rule number separately (000-000-0000) below. Attach proposed, tracked changed text for each rule at the end of the filing.

AMEND:

411-033-0010
411-033-0030

RULE SUMMARY:

Include a summary for each rule included in this filing.

The Oregon Department of Human Services (ODHS), Aging and People with Disabilities Program (APD) is proposing to permanently amend rules in OAR chapter 411, division 033 to add Electronic Visit Verification (EVV) requirements. The changes are summarized below.

Amend: OAR 411-033-0010
Rule Title: Definitions
Rule Change Summary: This rule is being amended to add the definition for Electronic Visit Verification (EVV) and documentation requirements.

Amend: OAR 411-033-0030
Rule Title: Medicaid In-Home Care Agency Provider Enrollment, Requirements and Payment
Rule Change Summary: This rule is being amended to add the requirements for Electronic Visit Verification as required by the 21st Century Cures Act. It also reflects slight numbering changes.

Other changes may be made to OAR 411-033-0010 and OAR 411-033-0030 to correct grammatical errors, ensure consistent terminology, address issues identified during the public comment period, and to improve the accuracy, structure, and clarity of the rule.

STATEMENT OF NEED

Need for Rule(s):

As mandated by Section 12006(a) of the 21st Century Cures Act, In-Home Care Agencies must comply with Electronic Visit Verification requirements. This means they must electronically verify visits conducted as part of personal care services. APD must adopt and amend rules in OAR chapter 411, division 033 to implement these requirements.

Other changes may be made to OAR 411-033-0010 and OAR 411-033-0030 to correct grammatical errors, ensure consistent terminology, address issues identified during the public comment period, and to improve the accuracy, structure, and clarity of the rule.

Documents Relied Upon, and where they are available:

21st Century Cures Act
https://www.congress.gov/114/bills/hr34/BILLS-114hr34enr.pdf

RACIAL EQUITY IMPACT STATEMENT

Required by HB 2993 (2021 Regular Session)
ORS 183.335(2)(a)(F)

According to the U.S. Census Bureau 2020, Oregon's 4.2 million population identifies their race in the following manner: 2% Black or African American; 6.5% American Indian or Alaskan Native, Asian, Native Hawaiian or Pacific Islander, 6% some other race alone, 13.9% identify as Hispanic or Latinx, and 75% White. 10% of Oregon's population identifies as two or more races. (See https://data.census.gov/cedsci/table?g=0400000US41&tid=DECENNIALPL2020.P1)

According to the same U.S. Census data, 3.8 million Oregonians with a computer have a broadband internet connection. Of the 3.8 million Oregonians, 2% identify as Black or African American, 6% identify as American Indian or Alaskan Native, Asian Native Hawaiian or Pacific Islander and 5% identify as some other race.

There are 171,000 individuals without an internet subscription in Oregon. Of these individuals 2% identify as Black or African American, 4% identify as American Indian or Alaskan Native, Asian Native Hawaiian or Pacific Islander and 6% identify as some other race.

Just under 90,000 individuals report that they do not have a computer in the household. Of these individuals 1.5% identify as Black or African American, 5% identify as American Indian or Alaskan Native, Asian Native Hawaiian or Pacific Islander and 6% identify as some other race.
(See https://data.census.gov/table/ACSST1Y2021.S2802?q=S2802:%20TYPES%20OF%20INTERNET%20SUBSCRIPTIONS%20BY%20SELECTED%20CHARACTERISTICS&g=040XX00US41)

The changes to OAR 411-033 rules are specific to the requirements for In Home Care Agencies (IHCAs) to implement Electronic Visit Verification (EVV) requirements enacted by the 21st Century Cures Act. IHCAs are not required by Aging and People with Disabilities (APD) to collect race and ethnicity data on their employees, nor does APD collect that information on IHCA owners, officers, directors or administrators. With disproportionate race populations in Oregon, these rule changes may affect those communities if the individual is also an IHCA owner, officer, director, administrator or an employee. Additionally, these rules rely heavily on the availability of technology for the IHCA employee. Given the disparities in the data on the availability of broadband internet versus no internet amongst racial groups, there may be some communities that are affected by limited access to technology.

FISCAL AND ECONOMIC IMPACT

Fiscal and Economic Impact:

The Fiscal and Economic Impact is stated below in the Department's statement of Cost of Compliance.

Statement of Cost of Compliance:
(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s).

State Agencies: The Department estimates there will be no fiscal impact to State Agencies.

Units of Local Government: The Department estimates there will be no fiscal impact to Local Governments.

Consumers: The Department estimates that there will be no fiscal impact to consumers.

Providers: For the purposes of this impact statement, In Home Care Agencies (IHCAs) are considered providers. Fiscal impact for IHCAs is stated in (2)(a)-(c).

Public: The Department estimates there will be no fiscal or economic impact on the public.

(2) Effect on Small Businesses:
(a) Estimate the number and type of small businesses subject to the rule(s);

As of November 2023, there were 106 licensed In-Home Care Agencies (IHCAs), a majority of which are considered small businesses. This rule change will have a fiscal impact on them as they must implement the Electronic Visit Verification (EVV) requirements.

(b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s);

The IHCAs may require additional staff to comply with the recordkeeping and administrative requirements of tracking EVV data and meeting the reporting requirements of the rules. Some of this cost may be included in the cost that an IHCA pays to an EVV provider.

(c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

The IHCA will have to pay a monthly or yearly cost to an EVV provider. This cost varies greatly depending on what services the IHCA elects to use from the provider, as well as the number of clients the agency serves. At minimum, the IHCA must be able to meet the requirements in rule. The IHCA may choose to use additional services or equipment from the EVV provider. The IHCA can choose the provider and package option that best meets their budget, while meeting the federal requirements. For example,

some IHCAs report a yearly fee of $1,000 based on their reported number of clients. Other agencies report a monthly fee of $250 per month based on their number of clients. In both cases, it was reported that the fee increases as the number of clients served increases beyond the range that was originally reported.

Describe how small businesses were involved in the development of these rule(s)?

A small business, or representative of a small business, as defined in ORS 183.310, participated on the Administrative Rule Advisory Committee. Small businesses will also be included in the public review and comment period.

Was an Administrative Rule Advisory Committee consulted? Yes, or no? Yes.

If not, why not?

Nakeshia Knight-Coyle, Director, Aging and People with Disabilities 01/18/2024

Signature Date

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

CHAPTER 411
DIVISION 33

IN-HOME CARE AGENCIES PROVIDING MEDICAID IN-HOME SERVICES

411-033-0010 Definitions

Unless the context indicates otherwise, the following definitions apply to the rules in OAR chapter 411, division 033:

(1) "AAA" means "Area Agency on Aging" as defined in this rule.

(2) "Activities of Daily Living (ADL)" mean those personal, functional activities required by an individual for continued well-being, which are essential for health and safety. Activities include eating, dressing, grooming, bathing, personal hygiene, mobility (ambulation and transfer), elimination (toileting, bowel, and bladder management), cognition, and behavior as defined in OAR 411-015-0006.

(3) "ADL" means "activities of daily living" as defined in this rule.

(4) "Aging and People with Disabilities" means the program area of Aging and People with Disabilities, within the Oregon Department of Human Services.

(5) "APD" means "Aging and People with Disabilities".

(6) "Area Agency on Aging (AAA)" means the Department designated agency charged with the responsibility to provide a comprehensive and coordinated system of services to individuals in a planning and service area. The term Area Agency on Aging is inclusive of both Type A and Type B Area Agencies on Aging as defined in ORS 410.040 and described in ORS 410.210 to 410.300.

(7) "Assessment" means an assessment as defined in OAR 411-015-0008.

(8) "Background Check" means a criminal background check and an abuse check under OAR chapter 407, division 007.

(9) "Business Days" means Monday through Friday and excludes Saturdays, Sundays, and state or federal holidays.

(10) "CA/PS" means the "Client Assessment and Planning System" as defined in OAR 411-030-0020.

(11) "Case Manager" or "CM" means a Department employee or an employee of the Department's designee that meets the minimum qualifications in OAR 411-028-0040 who is responsible for service eligibility, assessment of need, offering service choices to eligible individuals, person-centered service planning, service authorization and implementation, and evaluation of the effectiveness of Medicaid home and community-based services.

(12) "Comprehensive" means a licensing classification that describes an agency that provides personal care services, which may include medication reminding, medication assistance, medication administration, and nursing services (see OAR 333-536-0007).

(13) "Consumer" means an individual eligible for in-home services.

(14) "Cost Effective" means being responsible and accountable with Department resources. This is accomplished by offering less costly alternatives when providing choices that adequately meet an individual's service needs. Those choices consist of all available services under the Medicaid home and community-based service options, the utilization of assistive devices, natural supports, architectural modifications, and alternative service resources (see OAR 411-015-0005). Less costly alternatives may include resources not paid for by the Department.

(15) "Department" means the Oregon Department of Human Services (ODHS).

(16) "Enrolled In-Home Care Agency" means an incorporated entity or equivalent, licensed in accordance with OAR chapter 333, division 536 that

provides hourly enrolled in-home services to individuals receiving services through the Department or the Area Agency on Aging.

(17) “Electronic Visit Verification” or “EVV” means that with respect to personal care services, a system under which visits conducted as part of such services are electronically verified at the time of service with respect to:

(a) The type of service performed.

(b) The individual receiving services.

(c) The date of the service.

(d) The location of service delivery.

(e) The individual providing the service.

(f) The time the service begins and ends.

(18~~17~~) "Exception" means an approval for payment of a service plan that is granted to a specific individual that exceeds the assessed maximum hours of service as described in OAR 411-030-0070, for individuals residing in his or her own home.

(19~~18~~) "Exceptional Rate" or "Exceptional Payment" means the amount paid to a provider based on the approval of an exception. The approval of an exception is based on the service needs of the individual and is contingent upon the individual's service plan meeting the requirements in OAR 411-027-0020, OAR 411-027-0025, and OAR 411-027-0050.

(20~~19~~) "Homecare Worker" means a provider, as described in OAR 411-031-0040, that is directly employed by an individual to provide hourly services to the eligible individual. The term homecare worker does not include an employee of an in-home care agency who is providing in-home services.

(21~~20~~) "Hourly Services" means the in-home services, including activities of daily living and instrumental activities of daily living, that are provided at regularly scheduled times, not including live-in services.

(2221) "IADL" means "instrumental activities of daily living" as defined in this rule.

(2322) "ICP" means "Independent Choices Program" as defined in this rule.

(2423) "Independent Choices Program" means a self-directed in-home services program in which a participant is given a cash benefit to purchase goods and services identified in the participant's service plan and prior approved by the Department or the Area Agency on Aging.

(2524) "Individual" means a person age 65 or older, or an adult with a physical disability, applying for or eligible for services.

(2625) "In-Home Care Agency" or "IHCA" means an agency as defined in OAR 333-536-0005 that is primarily engaged in providing in-home care services for compensation to an individual in that individual's place of residence. "In-home care agency" does not include a home health agency or portion of an agency providing home health services.

(2726) "In-Home Services" as defined in OAR 411-030-0002 mean the activities of daily living and instrumental activities of daily living that assist an individual to stay in his or her own home or the home of a relative.

(2827) "In-Home Care Services" as defined in OAR 333-536-0005, means personal care services furnished by an in-home care agency, or an individual under an arrangement or contract with an in-home care agency, that are necessary to assist an individual in meeting the individual's daily needs, but do not include curative or rehabilitative services.

(2928) "Initial Screening" means a screening required by the in-home care agency licensing rules in OAR 333-536-0055 that is conducted to evaluate a prospective client's service requests and needs prior to accepting the individual for service. The extent of the screening shall be sufficient to determine the ability of the agency to meet those requests and needs based on the agency's overall service capability.

(3029) "Instrumental Activities of Daily Living (IADL)" mean those activities, other than activities of daily living, required by an individual to continue

independent living. The definitions and parameters for assessing needs in IADL are identified in OAR 411-015-0007.

(3130) "Liability" means the dollar amount an individual with excess income contributes to the cost of service pursuant to OAR 461-160-0610 and OAR 461-160-0620.

(3231) "Licensed" means an in-home care agency as defined in OAR 333-536-0005 that is currently licensed, certified, or registered by the proper authority within the State of Oregon.

(3332) "Mandatory Reporter" means all employees of an in-home health service, are required by statute (ORS 124.050 - 124.095) to report suspected abuse or neglect of a child, an older adult, a person with a physical disability or the resident of a licensed care facility, to the Department or to a law enforcement agency as required by OAR 411-020-0002.

(3433) "Medicaid OHP Plus Benefit Package" means only the Medicaid benefit packages provided under OAR 410-120-1210(4) (a) and (b). This excludes individuals receiving Title XXI benefits.

(3534) "Medicaid Performing Provider Number" means the numeric identifier assigned to an entity or person by the Department, following enrollment to deliver Medicaid funded services as described in these rules. The Medicaid Performing Provider Number is used by the rendering provider for identification and billing purposes associated with service authorizations and payments.

(3635) "Natural Supports" or "Natural Support System" means resources and supports (e.g., relatives, friends, neighbors, significant others, roommates, or the community) who are willing to voluntarily provide services to an individual without the expectation of compensation. Natural supports are identified in collaboration with the individual and the potential "natural support". The natural support is required to have the skills, knowledge, and ability to provide the needed services and supports.

(3736) "Nursing Services" means the provision of services that are defined in OAR 333-536-0005, that are deemed to be the practice of nursing as defined by ORS 678.010. These services include, but are not limited to the

delegation of specific tasks of nursing care to unlicensed persons in accordance with the Oregon State Board of Nursing rules in OAR chapter 851, division 047. Nursing services are not rehabilitative or curative, but are maintenance in nature.

(38~~37~~) "OHA" means the Oregon Health Authority.

(39~~38~~) "Person-Centered Service Plan" means the details of the supports, desired outcomes, activities, and resources required for an individual to achieve and maintain personal goals, health, and safety, as described in OAR 411-004-0030. The case manager completes the person-centered service plan. The person-centered service plan is the Medicaid Plan of Care.

(40~~39~~) "Personal Care Aid" means a person employed by an in-home care agency who provides assistance with activities of daily living or assistance with personal care tasks, household and supportive services, or medication services as authorized by OAR chapter 333 division 536.

(41~~40)~~ "Provider Enrollment Application and Agreement" refers to the conditions and agreements for being enrolled as a provider with the Oregon Department of Human Services, Aging and People with Disabilities (APD) or Office of Developmental Disability Services (ODDS), and to receive a provider number.

(42~~41~~) "Rate Schedule" means the Medicaid reimbursement rate schedule maintained by the Department in OAR 411-027-0170.

(43~~42~~) "Relative" means a person, excluding an individual's spouse, who is related to the individual by blood, marriage, domestic partnership, or adoption.

(44~~43~~) "Representative" means a person either appointed by an individual to participate in service planning on the individual's behalf or an individual's natural support with longstanding involvement in assuring the individual's health, safety, and welfare. A representative may not be a paid employee or the in-home care agency.

(4544) "Service Need" means the assistance an individual requires from another person for those functions or activities identified in OAR 411-015-0006 and OAR 411-015-0007.

(4645) "Service Plan" means a written, individualized plan for the delivery of services by the IHCA, developed by the IHCA in conjunction with the individual or the individual's legal representative, the DHS or AAA case manager reflecting the individual's capabilities, choices, and if applicable, measurable goals, and managed risk issues. The service plan defines the division of responsibility in the implementation of the services. The service plan must incorporate all elements identified in the person-centered service plan for which the IHCA is responsible to deliver.

(4746) "Spouse" means a person who is legally married to an individual as defined in OAR 461-001-0000.

(4847) "These Rules" mean the rules in OAR chapter 411, division 033.

(4948) "Work week" is defined as 12:00 a.m. on Sunday through 11:59 p.m. on Saturday.

Stat. Auth.: ORS 409.050, 410.070, 410.090, 413.085
Stats. Implemented: ORS 410.010, 410.020, 410.070, 413.085

411-033-0030 Medicaid In-Home Care Agency Provider Enrollment, Requirements, and Payment

(1) PROVIDER ENROLLMENT.

(a) Application and Agreement. A provider must be an enrolled Medicaid provider in order to be eligible to receive payment from the Department for claims in connection with services provided by an IHCA.

(b) The criteria for provider enrollment includes, but is not limited to:

(A) Meeting all program-specific requirements;

(B) Providing a copy of the IHCA agency’s current OHA Public Health issued comprehensive classified license;

(C) Obtaining a Medicaid Provider Number;

(D) Current Business registration and assumed business name (DBA), if applicable, with the Oregon Secretary of State's Corporations Division; and

(E) Completing a Medicaid Provider Enrollment Agreement.

(2) Staffing Requirements. According to OAR 333-536-0070, the agency owner or administrator shall ensure the agency has qualified and trained employees sufficient in number to meet the needs of the clients receiving services 365 days per year, including holidays.

(3) On-site Monitoring and Assessment.

(a) The IHCA shall provide to the Department~~DHS~~ or the AAA a quarterly summary report for each Medicaid individual, which includes documentation of client needs and services delivered. These records must be maintained by the IHCA to provide the records necessary to fully disclose the extent of the services, care, and supplies furnished to beneficiaries.

(b~~a~~) The IHCA shall provide a copy of all information and documents as requested by ~~DHS~~the Department or the AAA. This requested information may include, but is not limited to:

(A) Individual records (OAR 333-536-0085).

(B) Individual nursing services (OAR 333-536-0080).

(C) Quality improvement records (OAR 333-536-0090).

(D) Complaint investigation findings (OAR 333-536-0043).

(E) Organization, administration, and personnel records (OAR 333-536-0050).

(F) Individual surveys of services and payments (OAR 333-536-0041).

(G) The requested information shall be submitted to ~~DHS~~the Department or the AAA within five business days of the request. However, if the ~~requesting DHS~~ Department or AAA office indicates the request involves individual safety, well-being, or a protective service investigation, the information must be submitted within 24 hours of the request.

(c~~b~~) The IHCA shall cooperate with any ~~DHS~~ quality assurance visits regarding monitoring of any provision of IHCA services required by the Department.

(d~~c~~) The IHCA shall participate in individual conferences with the Department ~~DHS~~ or AAA case managers, as requested.

(4) Insurance Requirements. Insurance requirements are defined in the Provider Enrollment Agreement.

(5) Payment and Financial Reporting.

(a) The case manager shall authorize reimbursement for the service hours identified in the individual's Medicaid Management Information System (MMIS) plan of care.

(b) The IHCA shall comply with section 12006(a) of the 21st Century Cures Act using an electronic visit verification system that will verify, at the time of service, with respects to visits conducted as part of personal care services, the following:

(A) The type of service performed;

(B) The individual receiving the service;

(C) The date of the service;

(D) The location of the service delivery;

(E) The individual providing the service; and

(F) The time the service begins and ends.

(c) The IHCA must provide the department with a monthly report showing:

(A) The consumer(s) name.

(B) The consumer(s) Medicaid prime number.

(C) The date service(s) were provided.

(D) The location service(s) were provided.

(E) The start and end time of service(s) provided.

(F) The service(s) provided.

(G) An attestation that all claims submitted met EVV requirements.

(d) The IHCA must use MMIS to submit claims for reimbursement of Medicaid authorized services. All claims must be submitted no later than 12 months from date of service.

(e~~c~~) The IHCA shall be reimbursed --

(A) Only for services delivered to an individual.

(B) Only at the approved hourly rate for ADL and IADL services.

(C) For up to three hours at the ADL care rate, for the required, completed initial assessment.

(D) For community transportation mileage related to an assessed ADL or IADL need (e.g. shopping). Reimbursement for community transportation may not include mileage for an employee commuting to and from the individual's home. The IHCA employee must maintain valid driver's license, current vehicle registration and necessary auto insurance, if

transporting the Medicaid individual. Proof must be available upon the request of the Department.

(fd) IHCA's shall be reimbursed per the rates established in the rate schedule for home and community-based services in OAR 411-027-0170.

Stat. Auth.: ORS 409.050, 410.070, 410.090, 413.085
Stats. Implemented: ORS 410.010, 410.020, 410.070, 413.085