



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM



DATE: May 17, 2007

TO: Ramona Foley, Assistant Director
Children, Adults and Families, Department of Human Services

FROM: *KHS* Kamala H. Shugar, Assistant Attorney in Charge
Human Services Section

SUBJECT: OAR 413-200-0335

You asked whether OAR 413-200-0335, adopted March 20, 2007, violates state law, federal law and the Second Amendment as stated in a letter from Representative Jerry Krummel to DHS Assistant Director for CAF, Ramona Foley, dated May 9, 2007 (attached).

It appears that Legislative Counsel is correct: OAR 413-200-0335 violates ORS 166.170, which requires an express statutory authorization "to regulate in any manner whatsoever the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition." OAR 413-200-0335(3) regulates the storage and transportation of firearms and ammunition. If the firearm statute, ORS 166.170(1), controls and the statute giving DHS authority to "adopt such rules as it deems necessary or advisable to protect the best interests of children in foster homes," ORS 418.640(1), gives way, child welfare may not adopt any rule that in any way regulates "the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition."

A Certificate of Approval to Operate a Foster Home for Children is a privilege and a person who holds a certificate elects not to engage in otherwise lawful behaviors in order to qualify for certificate. For example, a foster parent, in accepting a certificate of approval, agrees not to give foster children that DHS places in the home access to "hunting and sporting equipment, such as knives, spears, arrows, hunting sling shots, bows, and martial arts weapons." See OAR 413-200-0335(4) (A certified family "must store" the enumerated items "in a safe and secure manner and inaccessible to a child or young adult.")

However, in this instance, ORS 166.170 controls. Inconsistent statutes can be resolved by the "specific" controlling the "general" (as opposed to the method that Legislative Counsel used, the "later" controlling the "earlier"). The firearm statute (ORS 166.170) is arguably more specific than the foster-care-standards statute (ORS 418.640(1)). This is consistent with the position that the Court of Appeals noted in *Starrett v. City of Portland*, 196 Or. App. 534 (2004), namely that

the Oregon Legislature has reserved to itself through ORS 166.170 the exclusive authority to regulate various activities pertaining to firearms, unless a governmental entity is expressly authorized by state statute to do so. That opinion went on to hold that a private person or entity that leases or owns property has the property rights to exclude from the property persons who carry concealed handguns pursuant to a license to do so, notwithstanding the fact that the property is rented or leased from a city or other governmental entity. Thus, a foster parent could independently choose not to permit guns on property which is lawfully owned or possessed by the foster parent, but DHS cannot as a condition of receiving a foster care certificate of approval require the foster parent to permit or prohibit access to firearms or ammunition.

If ORS 166.170(1) controls, then DHS may not, at this time, regulate firearms in certified homes because there is no statute expressly authorizing DHS to protect children in those homes in that manner.

Because you requested an immediate response to Representative Krummel's letter, I have not prepared a more thorough analysis of applicable laws, cases and rules.

Please contact me if I can be of any further assistance.