

Rule Summary and Fiscal Analysis (Part A)**Department of Aging**

Agency Name

Division

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173-39-01

Rule Number

AMENDMENT

TYPE of rule filing

Rule Title/Tag Line

Introduction and definitions.**RULE SUMMARY**

1. Is the rule being filed consistent with the requirements of the RC 119.032 review? **Yes**

2. Are you proposing this rule as a result of recent legislation? **No**

3. Statute prescribing the procedure in accordance with the agency is required to adopt the rule: **119.03**

4. Statute(s) authorizing agency to adopt the rule: **173.02, 173.391, 5111.89**

5. Statute(s) the rule, as filed, amplifies or implements: **173.39, 173.391, 173.403, 173.431, 5111.89**

6. State the reason(s) for proposing (i.e., why are you filing,) this rule:

ODA is proposing to amend rules 173-39-01, 173-39-02, 173-39-02.11, 173-39-03, and 173-39-04 of the Administrative Code and to adopt new rule 173-42-06 of the Administrative Code. In doing so, ODA has 5 basic goals:

1. To increase consumer choice by allowing consumers to hire consumer-directed personal care providers for the personal care service through the PASSPORT program on a statewide basis. [Before the refiling of this rule on February 4, 2011, ODA called these providers "consumer-directed individual providers." To avoid confusion with the consumer-directed individual providers in the Choices Program

and independent providers "IPs" in ODJFS' waiver programs, ODA will now call the providers "consumer-directed personal care providers." In doing so, the proposed new rules give PASSPORT consumers a new right to choose a method by which to receive their personal care: either from an agency-provider method or a consumer-directed method.

2. To implement a rule on the choices and responsibilities bestowed upon a consumer who directs a consumer-directed personal care provider under the PASSPORT program.
3. To comply with section 119.032 of the Revised Code, which requires each state agency to review each rule on or before the rule's designated review date.
4. To comply with Governor Strickland's Executive Order 2008-04S: "Implementing Common Sense Business Regulation," which requires each state agency to write easier-to-read and easier-to-comprehend rules to promote transparency in the agency's regulations. (Because the process of adopting this proposed new rule spans two gubernatorial administrations, it is also ODA's goal to comply with Governor Kasich's new Executive Order 2011-01K "Establishing the Common Sense Initiative.") As a result, ODA's proposed new or amended language:
 - a. Complies with Chapter 5 of the Legislative Service Commission's "Rule Drafting Manual," as found on http://www.lsc.state.oh.us/rules/rdm06_06.pdf
 - b. Incorporates recommendations from "Advanced Legal Drafting" by Bryan A. Garner (Dallas: LawProse, Inc. (c) 2007)
 - c. Incorporates recommendations from "Plain English Writing Tips," as found on http://business.ohio.gov/docs/RegReform_PlainEnglishWritingTips.pdf.
5. To format the new language in ODA's rules in the same way, rule after rule, in a manner that corresponds with the cooperative effort of other agencies that participate that also participate in the consolidation exploration team of the Executive Medicaid Management Agency (EMMA), which Governor Strickland created with Executive Order 2007-36S.

In addition to the 5 basic goals stated above, ODA is also proposing to amend the rule in ways detailed in items #7 and #11 of Part A of this RSFA.

7. If the rule is an AMENDMENT, then summarize the changes and the content of the proposed rule; if the rule type is RESCISSION, NEW or NO CHANGE, then summarize the content of the rule:

This rule introduces Chapter 173-39 of the Administrative Code and defines terms used in that chapter.

In addition to implementing the goals stated in item #6 of Part A of this RSFA as the basic reasons for proposing to amend this rule, ODA's proposed amended rule:

1. Replaces "PAA" with "ODA's designee" throughout the rule and to combine the definitions of the two terms under "ODA's designee." ODA is doing this throughout all of its rules on a rule-by-rule basis.
2. Replaces the verbs "provide" and "deliver" (and their inflections) with "furnish" (and its inflections) throughout the rule, as ODA is doing throughout all of its rules on a rule-by-rule basis.
3. Defines the term "activity plan" in response to comments submitted by the Ohio Council for Home Care and Hospice during ODA's public-comment period.
4. Clarifies that "authorized representative" is a person who is not the consumer's paid caregiver.
5. Replaces the definition of "consumer signature" with a clearer definition.
6. Places the definition "nursing facility" in alphabetical order amongst the other definitions.
7. Removes the extra space after "173-39-02.17" in paragraph (B)(25)(a) of the rule.
8. Removes two unnecessary definitions from the rule: "dietary reference intakes" and "special review." (Please see item #11 of Part A of this RSFA for more information.)
9. Revises paragraphs (B)(24)(c) and (B)(24)(e) of the rule so that they define the non-agency provider, not the consumer-directed individual provider, as a provider who provides the alternative meal service under rule 173-39-02.2 of the Administrative Code and the pest-control service under rule 173-39-02.3 of the Administrative Code.

8. If the rule incorporates a text or other material by reference and the agency claims the incorporation by reference is exempt from compliance with sections 121.71 to 121.74 of the Revised Code because the text or other material is **generally available** to persons who reasonably can be expected to be affected by the rule, provide an explanation of how the text or other material is generally available to those persons:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

9. If the rule incorporates a text or other material by reference, and it was

infeasible for the agency to file the text or other material electronically, provide an explanation of why filing the text or other material electronically was infeasible:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

10. If the rule is being **rescinded** and incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material, provide an explanation of why filing the text or other material was infeasible:

Not Applicable.

11. If **revising** or **refiling** this rule, identify changes made from the previously filed version of this rule; if none, please state so:

On November 24, 2010, ODA revised this rule to:

1. Replace the definition for "ODA's designee" with "'ODA's designee' has the same meaning as "PASSPORT administrative agency in section 173.42 of the Revised Code. The current PASSPORT administrative agencies are the area agencies on aging listed in rule 173-2-04 of the Administrative Code plus 'Catholic Social Services of the Miami Valley.'" This gives the term the same definition found in the definitions for "ODA's designee" in proposed new or amended rules 173-35-01, 173-37-01, 173-42-01, and 143-44-04 of the Administrative Code.

2. Revise this RSFA.

On February 4, 2011, ODA refiled this rule to:

1. Replace the definition of "consumer signature" with this: "'Consumer's signature' means the consumer's signature or that of the consumer's caregiver, which may include a handwritten signature; initials; stamp or mark; or electronic signature that represents the consumer's acknowledgement, including acknowledgement that he or she received a service. ODA's designee documents the consumer's signature of choice (i.e., handwritten, initials, stamp or mark, or electronic) in the consumer's record and communicates it to the provider."

2. Remove the definition for "dietary reference intakes." In Chapter 173-39 of the Administrative Code, the term is only used in paragraph (B)(1)(b)(i) of rule 173-39-02.14 of the Administrative Code, which took effect on January 1, 2011. It is customary to define the term only used once in the paragraph where it is used. Paragraph of the Administrative Code explains that dietary reference intakes are amounts "that the food and nutrition board of the institute of medicine of the national academy of sciences established." Thus the term is explained in use and does not require a formal definition. (Note: Rule 173-39-02.1 of the Administrative

Code, as filed with JCARR, no longer references dietary reference intakes. Instead, paragraph (B)(1)(j)(ii) of the rule references rule 173-39-02.14 of the Administrative Code.)

3. Remove an extra period at the end of the definition of "ODA's designee."

4. Delete the extra space after "173-39-02.17" in paragraph (B)(24)(a) of the rule.

5. Replace the definition of "consumer-directed individual provider" in paragraph (B)(24)(c) of the rule with "means a person who is the employee of the consumer, that a consumer directly supervises, and that ODA certifies to furnish the home care attendant service under rule 173-39-02.4 of the Administrative Code for the choices program." The definition no longer says, "who is not the spouse, parent, or step-parent of the consumer; and who does not serve as the consumer's legal guardian, authorized representative, or power of attorney" because this is a rule that defines terms, not provides mandates. The very same provisions are found in paragraphs (D)(4)(g) of proposed amended rule 173-39-02 of the Administrative Code, so nothing is lost by shortening this definition.

6. Define "consumer-directed personal care provider." (See paragraph (B)(24)(d) of the rule.)

7. Indicate in paragraph (B)(24)(e) of the rule that the non-agency provider, not the consumer-directed individual provider under paragraph (B)(24)(c) of the rule, is one who ODA certifies to provide an alternative meal service and a pest-control service. (Midwest Care Alliance and JFS raised these issues during the public-comment period for rules 173-39-02.2 and 173-39-02.3 of the Administrative Code, which are part of a related rule project.)

8. Delete the definition of "special review" because ODA does not use that term in Chapter 173-39 of the Administrative Code.

9. Revise this RSFA.

12. 119.032 Rule Review Date: **11/18/2010**

(If the rule is not exempt and you answered NO to question No. 1, provide the scheduled review date. If you answered YES to No. 1, the review date for this rule is the filing date.)

NOTE: If the rule is not exempt at the time of final filing, two dates are required: the current review date plus a date not to exceed 5 years from the effective date for Amended rules or a date not to exceed 5 years from the review date for No Change rules.

FISCAL ANALYSIS

13. Estimate the total amount by which *this proposed rule* would **increase / decrease** either **revenues / expenditures** for the agency during the current biennium (in dollars): Explain the net impact of the proposed changes to the budget of your agency/department.

This will have no impact on revenues or expenditures.

\$0.00

The Ohio General Assembly established ODA's biennial budget. ODA will implement the rule within the fiscal parameters the General Assembly established and will adjust expenditures so that it does not exceed those parameters. Thus, the proposed amended rule is cost-neutral. It has no impact upon the amount of revenue ODA receives or the amount of revenue ODA spends during the biennium.

ODA's proposed new consumer-direction option will allow the PASSPORT program to maintain cost-neutrality. ODA's analysis indicates that, through an agency provider (the only option today), a PASSPORT consumer receives an average of 60 hours of the personal care service per month at an average rate of \$16.15 per hour. This results in an average expenditure on personal care of \$969.17 per month per consumer. ODA's proposed new consumer-direction option will give a PASSPORT consumer the option to direct his or her own personal care service at a lower cost. If the PASSPORT consumer using this option receives 60 hours of the personal care service per month at the \$12.72 per hour rate proposed in ODJFS' rule 5101:3-1-06.1 of the Administrative Code, the average expenditure on personal care for that consumer will be \$763.20 per month per consumer, or \$205.97 less per month than if the consumer received the personal care service through an agency provider. ODA will redirect the \$205.97 per month per consumer difference to support the PASSPORT program's administrative expenses, including case-management expenses, and care for other PASSPORT consumers.

ODA projects that the initial demand from PASSPORT consumers to choose to direct their own personal care service will be slow: less than 1% of the current PASSPORT consumers for the remainder of this fiscal year and 3.6% of the PASSPORT consumers for the next fiscal year. Therefore, ODA projects a minimal impact to the PASSPORT program's current operations.

(Because this rule is only a rule that introduces Chapter 173-39 of the Administrative Code and provides definitions used in that chapter, the element of this rule that is a component of the new consumer-direction option is the definition of "consumer-directed personal care provider.")

14. Identify the appropriation (by line item etc.) that authorizes each expenditure necessitated by the proposed rule:

GRF-490-423 Long-Term Care Budget - State.

3C40-490-623 Long-Term Care Budget.

4J40-490-610 PASSPORT/Residential State Supplement.

4U90-490-602 PASSPORT Fund.

15. Provide a summary of the estimated cost of compliance with the rule to all directly affected persons. When appropriate, please include the source for your information/estimated costs, e.g. industry, CFR, internal/agency:

once adopted, the proposed amendment of rules 173-39-01, 173-39-02, 173-39-02.11, 173-39-03, and 173-39-04 of the Administrative Code, and the proposed adoption of rule 173-42-06 of the Administrative Code, as well as the Center for Medicare and Medicaid Service's recent approval of Ohio's request to amend the PASSPORT Medicaid waiver, give PASSPORT consumers the option to choose a new method by which to receive the personal care service. Once these rules are adopted, consumers may use the new option to choose the consumer-directed method to receive the service instead of the agency-furnished method.

While this new option does not create a new cost to agency providers who furnish personal care services, it could create a new "cost" in the form of a potential loss of market share. Currently, agency providers furnish 100% of the PASSPORT program's personal care services. After the rules are adopted, ODA estimates that they will lose a small share of the market.

If a consumer who currently receives the personal care service from an agency provider begins to direct his or her own personal care service, the agency provider will no longer spend dollars caring for the consumer, but will also no longer be reimbursed for caring for the consumer. Instead, the PASSPORT program will reimburse the consumer-directed personal care provider.

ODA projects that the initial demand from PASSPORT consumers to choose to direct their own personal care service will be slow: less than 1% of the current PASSPORT consumers for the remainder of this fiscal year and 3.6% of the PASSPORT consumers for the next fiscal year. Therefore, ODA projects that agency providers will see a minimal loss of caseload.

Additionally, because the PASSPORT program is growing as the population of seniors continues to increase, the agency providers may see no loss of consumers whatsoever.

16. Does this rule have a fiscal effect on school districts, counties, townships, or municipal corporations? **Yes**

You must complete Part B of the Rule Summary and Fiscal Analysis in order to comply

with Am. Sub. S.B. 33 of the 120th General Assembly.

17. Does this rule deal with environmental protection or contain a component dealing with environmental protection as defined in R. C. 121.39? **No**

Rule Summary and Fiscal Analysis (Part B)

1. Does the Proposed rule have a fiscal effect on any of the following?

(a) School Districts	(b) Counties	(c) Townships	(d) Municipal Corporations
No	Yes	Yes	Yes

2. Please provide an estimate in dollars of the cost of compliance with the proposed rule for school districts, counties, townships, or municipal corporations. If you are unable to provide an estimate in dollars, please provide a written explanation of why it is not possible to provide such an estimate.

Once adopted, the proposed amendment of rules 173-39-01, 173-39-02, 173-39-02.11, 173-39-03, and 173-39-04 of the Administrative Code, and the proposed adoption of rule 173-42-06 of the Administrative Code, as well as the Center for Medicare and Medicaid Service's recent approval of Ohio's request to amend the PASSPORT Medicaid waiver, give PASSPORT consumers the option to choose a new method by which to receive the personal care service. Once these rules are adopted, consumers may use their new option to choose the proposed consumer-directed method for receiving personal care rather than the agency-furnished method.

While this new option does not create a new cost to government entities who furnish personal care services as an agency provider, it could create a new "cost" in the form of a potential loss of market share. If a consumer who currently receives the personal care service from a government begins to direct his or her own personal care service, the government's agency will no longer spend dollars caring for the consumer, but will also no longer be reimbursed for caring for the consumer.

Instead, the PASSPORT program will reimburse the consumer-directed personal care provider. Currently, agency providers (government-owned and privately-owned together) furnish 100% of the PASSPORT program's personal care services. After the rules are adopted, ODA estimates that they will lose a small share of the market. If a consumer who currently receives the personal care service from a government operating as an agency provider begins to direct his or her own personal care service, the government-owned agency provider will no longer spend dollars caring for the consumer, but will also no longer be reimbursed for caring for the consumer. Instead, the PASSPORT program will reimburse the consumer-directed personal care provider.

ODA projects that the initial demand from PASSPORT consumers to choose to

direct their own personal care service will be slow: less than 1% of the current PASSPORT consumers for the remainder of this fiscal year and 3.6% of the PASSPORT consumers for the next fiscal year. Therefore, ODA projects that government-owned agency providers may see a minimal loss of caseload.

Additionally, because the PASSPORT program is growing as the population of seniors continues to increase, the government-owned agency providers may see no loss of consumers whatsoever.

3. If the proposed rule is the result of a federal requirement, does the proposed rule exceed the scope and intent of the federal requirement? **No**
4. If the proposed rule exceeds the minimum necessary federal requirement, please provide an estimate of, and justification for, the excess costs that exceed the cost of the federal requirement. In particular, please provide an estimate of the excess costs that exceed the cost of the federal requirement for (a) school districts, (b) counties, (c) townships, and (d) municipal corporations.

Not Applicable.

5. Please provide a comprehensive cost estimate for the proposed rule that includes the procedure and method used for calculating the cost of compliance. This comprehensive cost estimate should identify all of the major cost categories including, but not limited to, (a) personnel costs, (b) new equipment or other capital costs, (c) operating costs, and (d) any indirect central service costs.

Although the proposed changes to this rule create no new "costs" for governments, there may be a minimal loss of market share for government-owned agencies that furnish personal care due to competition in the marketplace. (Please see item #2 on Part B of this RSFA.)

(a) Personnel Costs

The proposed changes to this rule create no new personnel costs for governments.

(b) New Equipment or Other Capital Costs

The proposed changes to this rule create no new equipment or other capital costs for governments.

(c) Operating Costs

The proposed changes to this rule create no new operating costs for governments.

(d) Any Indirect Central Service Costs

The proposed changes to this rule create no new indirect central service costs for governments.

(e) Other Costs

Although the proposed changes to this rule create no new "costs" for governments, there may be a minimal loss of market share for government-owned agencies that furnish personal care due to competition in the marketplace. (Please see item #2 on Part B of this RSFA.)

6. Please provide a written explanation of the agency's and the local government's ability to pay for the new requirements imposed by the proposed rule.

Although the proposed changes to this rule create no new "costs" for governments, there may be a minimal loss of market share for government-owned agencies that furnish personal care due to competition in the marketplace. (Please see item #2 on Part B of this RSFA.)

7. Please provide a statement on the proposed rule's impact on economic development.

ODA estimates that the adoption of this proposed new rule will have a positive impact upon economic development. The PASSPORT program provides in-home and community-based alternatives to Medicaid payment of nursing facilities. Because participating in the PASSPORT program saves much taxpayer money in comparison to residing in a nursing facility, this lessens the need for entitlement spending, which, in turn, can lead to economic development.

By allowing the PASSPORT program's consumers to direct their personal care services, ODA is providing another option for consumers to choose other than the Medicaid payment of nursing facilities.