

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

Agency Name

Division

**Tom Simmons**

Contact

**50 West Broad Street 9th floor Columbus OH  
43215-3363**

Agency Mailing Address (Plus Zip)

**614-728-2548**

Phone

Fax

**tsimmons@age.ohio.gov**

Email

**173-39-02.21**

Rule Number

**AMENDMENT**

TYPE of rule filing

Rule Title/Tag Line

**Personal care service scheduling.****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: **173.01, 173.02, 173.391, 173.52, section 323.110 of H.B.59 (130th G.A.)**

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

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

**INTRODUCTION**

This rule filing is part of a larger rule project involving amendments to rules 173-39-02.4 and 173-39-02.21 of the Administrative Code.

**CONSUMER DIRECTION**

"Population studies report that, from 2005 to 2020, the [national] population age 85 and older will increase by 43 percent. ... Eighty-four percent of those age 50 and older want to remain in their homes as they age. If they need help with everyday activities such as bathing, dressing and eating, they want to choose who provides that help and control when and how they receive assistance." "When consumers direct their own services, they decide which agencies or individuals they will hire to provide those services (and have the authority to fire them if necessary) and when and how the services will be delivered."

#### THESE RULES: MEDICAID WAIVER PROGRAMS ONLY

There is more than one route for doing business with ODA-administered programs.

1. A consumer-directed provider may provide services to a consumer who is enrolled in the Choices or PASSPORT Programs. ODA began allowing consumer direction through the Choices program in 2001 and through the PASSPORT Program in 2011. A provider would only provide consumer-directed services through these two programs on the basis of being certified to provide the service.

2. A consumer-directed provider may provide services to a consumer who is receiving services through an Older Americans Act Program. Congress amended the Older Americans Act to allow for consumer-direction in 2006. A provider would only provide consumer-directed services through an Older Americans Act Program on the basis of entering into a provider agreement.

The amendments that ODA is proposing for rules 173-39-02.4 and 173-39-02.21 of the Administrative Code only pertain to providers who are certified to provide services to consumers enrolled in the Choices or PASSPORT Programs. The amendments do not pertain to consumer-directed providers under the Older Americans Act Programs.

#### 2 TYPES OF CONSUMER-DIRECTED PROVIDERS IN ODA'S MEDICAID WAIVER PROGRAMS

The Choices and PASSPORT Programs each use consumer-directed providers. However, each program uses a different type of consumer-directed provider:

1. Consumer-directed individual providers provide home care attendant services to consumers who are enrolled in the Choices Program.
2. Consumer-directed personal care providers provide personal care to consumers who are enrolled in the PASSPORT Program.

#### CONSUMERS ARE ALREADY CONSIDERED THE EMPLOYERS OF RECORD

2/3 of states that NASUAD polled in 2012 indicated that consumers are the employers of record for consumer-directed providers. Ohio's Choices and

PASSPORT Programs are in alignment these states.

#### WEEKLY HOURS ALREADY LIMITED

Ohio law prohibits the PASSPORT Program's consumer-directed personal care providers from (1) working for more than 5 consumers per week, (2) working for more than 40 hours per week for 1 consumer, and (3) working for more than 56 hours per week for 2-5 consumers. On June 30, 2011, ODA adopted rule 173-39-02.21 of the Administrated Code, in part, "to keep consumers [who are enrolled in the PASSPORT Program and] who direct a consumer-directed personal care provider from paying overtime."

Current Ohio law does not prohibit the Choices Program's consumer-directed individual providers from (1) working for more than 5 consumer-employers per week, (2) working for more than 40 hours per week for 1 consumer-employer, and (3) working for more than 56 hours per week for 2-5 consumer-employers. Yet, as ODA explains under #14 of the business impact analysis (BIA), virtually no consumer-directed individual providers are billing for more than 40 hours per week.

#### OCCASION

Section 119.032 of the Revised Code requires ODA to review each rule no later than the rule's assigned review date. Accordingly, ODA has reviewed rules 173-39-02.4 and 173-39-02.21 of the Administrative Code before their review date and is now proposing to amend the rules to create (1) uniform scheduling regulations in rule 173-39-02.21 of the Administrative Code; (2) to clarify who is the employer of record in rule 173-39-02.4 o the Administrative Code and to clarify that a provider may furnish services in addition to what the consumer's service plan authorizes, but the Choices and PASSPORT Programs will not reimburse the provider for those services; and (3) to make non-substantive improvements to both rules.

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:

#### UNIFORM SCHEDULING REGULATIONS

ODA is proposing to amend rule 173-39-02.21 of the Administrative Code to adopt scheduling limitations for consumer-directed individual providers that serve consumers who are enrolled in the Choices program so the requirements are uniform with the scheduling limitations for consumer-directed providers that serve consumers who are enrolled in the PASSPORT Program. The scheduling limitations prohibit (1) working for more than 5 consumer-employers per week, (2)

working for more than 40 hours per week for 1 consumer-employer (except in emergencies), and (3) working for more than 56 hours per week for 2-5 consumer-employers.

#### CLARIFICATION

ODA is proposing to amend rule 173-39-02.21 of the Administrative Code to indicate that a "provider may furnish a service that is not authorized by the consumer's service plan, but ODA (or ODA's designee) only reimburses the provider for furnishing a service that is authorized by the consumer's service plan." This is a standard in all Medicaid programs. ODA is taking this opportunity to make the matter explicit in this rule. In doing so, ODA is not creating any adverse impact.

#### NON-SUBSTANTIVE IMPROVEMENTS

ODA is proposing to amend rule 173-39-02.21 of the Administrative Code so that the title of the rule and the two defined terms in the rule reflect that the rule applies to two types of consumer-directed providers: (1) consumer-directed individual providers and (2) consumer-directed personal care providers. In doing so, this would create no adverse impact.

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. If applicable, indicate each specific paragraph of the rule that has been modified:

On October 1, 2013, ODA refilled rule 173-39-02.21 of the Administrative Code in order to incorporate post-filing developments in Medicaid programs. In the refilled rule, ODA is proposing to:

1. Change "home care attendant service" in in the title and throughout the rule to "choices home care attendant service" in order to differentiate this service from the home care attendant service found in other Medicaid wavier programs. As Medicaid waiver programs combine, different services with the same name will need to have different names.

2. Update this RSFA.

12. 119.032 Rule Review Date: **8/12/2013**

(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

Although ODA operates the Choices and PASSPORT Programs, H.B.153 (129th G.A.) moved the funding for the programs to budget line item GRF-600-525, which is under JFS [which becomes "ODM" on September 29], not ODA. Therefore, ODA estimates that the proposed adoption of this new rule will have no impact upon the biennial budget

that the Ohio General Assembly established for ODA in H.B. No. 153 or that was reviewed by H.B. No. 487 (129th G.A.).

Additionally, ODA estimates that the proposed adoption of this new rule will have no impact upon the biennial budget that the Ohio General Assembly established for JFS [ODM] in the above-mentioned bills.

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

GRF-600-525 Health Care/Medicaid (State and Federal)

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:

ODA estimates that there is no cost of compliance to any person associated with the adoption of this proposed new rule. See the business impact analysis (BIA) for detailed information--especially the details under question #14 of the BIA.

16. Does this rule have a fiscal effect on school districts, counties, townships, or municipal corporations? **No**

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

### **S.B. 2 (129th General Assembly) Questions**

18. Has this rule been filed with the Common Sense Initiative Office pursuant to R.C. 121.82? **Yes**

19. Specific to this rule, answer the following:

A.) Does this rule require a license, permit, or any other prior authorization to engage in or operate a line of business? **Yes**

To be reimbursed for providing home-care attendant service or a personal care service, an agency provider must agree to provide a service that complies with rules 173-39-02.21 of the Administrative Code.

B.) Does this rule impose a criminal penalty, a civil penalty, or another sanction,

or create a cause of action, for failure to comply with its terms? **Yes**

The same section of statute that authorizes ODA to adopt this rule (section 173.391 of the Revised Code) also requires ODA to adopt a rule on disciplinary actions that ODA may take against any non-compliant provider. In rule 173-39-05 of the Administrative Code, ODA adopted the possible disciplinary actions that ODA may take against a non-compliant provider.

C.) Does this rule require specific expenditures or the report of information as a condition of compliance? **No**