

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

Agency Name

Division

Tom Simmons

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173-39-02

Rule Number

NEW

TYPE of rule filing

Rule Title/Tag Line

Conditions of participation.**RULE SUMMARY**

1. Is the rule being filed consistent with the requirements of the RC 119.032 review? **No**

2. Are you proposing this rule as a result of recent legislation? **Yes**

Bill Number: **HB1**General Assembly: **128**Sponsor: **Sykes**

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**

5. Statute(s) the rule, as filed, amplifies or implements: **173.39, 173.391, 173.402**

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

TRANSPARENCY AND EASE OF COMPREHENSION: Because there is a long list of conditions in current rule 173-39-02 of the Administrative Code that an assisted living provider must meet in order to participate in the program, and because the requirements are not listed in an as-identical-as-possible manner to the rule's requirements for other types of providers, ODA is proposing to rescind rule 173-39-02 of the Administrative Code and to replace it with a new rule under the same number that: organizes the conditions for each type of provider, including assisted living providers, into topics (e.g., "service provision," "consumer safety,"

"monitoring," and reimbursement."); and presents the requirements for an assisted living provider in language that is as identical as possible to the requirements for an agency provider or a non-agency provider.

In the proposed new rule, ODA uses language that complies with the Legislative Service Commission's "Rule Drafting Manual" (http://www.lsc.state.oh.us/rules/rdm06_06.pdf) and that follows the recommendations from "Advanced Legal Drafting" by Bryan A. Garner (Dallas: LawProse, Inc. (c) 2007). This results in language that uses the active, not passive (i.e., "shall be") voice; uses the singular, unless the plural is necessary; is less verbose; and uses less legalese.

These actions make the proposed new rule easier to comprehend than the current version of rule 173-39-02 of the Administrative Code and promotes transparency regarding regulations, in compliance with Governor Strickland's Executive Order 2008-04S: Implementing Common Sense Business Regulation.

PROGRAMMATIC CHANGES to PROMOTE THE HEALTH AND SAFETY of THE CONSUMER: In comparison to the rule of the same number that ODA is proposing to rescind, ODA is proposing the following changes in this proposed new rule:

1. An assisted living provider shall not provide any services under the assisted living program to a person who is not enrolled in the program.
2. A provider may provide a service that is not authorized by the consumer's service plan, but ODA (or ODA's designee) only reimburses the provider for providing a service that is authorized by the consumer's service plan.
3. An assisted living provider shall acknowledge that any statute or rule that regulates the assisted living program supersedes any clause in the facility's resident agreement that may contradict the statute or rule.
4. An assisted living provider shall transfer or discharge a consumer under the terms of section 3721.16 of the Revised Code. Additionally, if the provider terminates its residential care facility license or provider certification, it shall provide written notification to the consumer and ODA's designee at least ninety days before terminating services to the consumer.
5. A provider shall maintain a minimum of one million dollars in commercial liability insurance and maintain insurance coverage for consumer loss due to theft or property damage and provide written instructions that any consumer may use to obtain reimbursement for a loss due to employee theft or property damage.
6. The Assisted Living Program shall not pay for any service provided to an applicant before the PAA enrolls the applicant into the program. The program does not currently pay for any service provided before enrollment; so, rather than create

a prohibition against paying for the services, ODA is proposing new language to add clarity to the matter.

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 proposed new rule presents the conditions of participation for a provider under one of the Medicaid waiver programs that ODA administers.

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 June 29, 2009, ODA revise-filed the proposed new rule to:

1. Replace six occurrences of "care plan" with "service plan." Because "service plan," not "care plan," is a term that ODA defines in rules 173-38-01 and 173-39-01 of the Administrative Code, ODA wants to consistently use "service plan" throughout Chapters 173-38 and 173-39 of the Administrative Code.

2. Revise this RSFA.

On July 2, 2009, ODA revise-filed the proposed new rule to revise this RSFA.

On July 28, 2009, ODA revise-filed the proposed new rule to:

1. Delete "and" as it occurred before "rule 173-39-02.18" in paragraph (B)(1)(a) of the rule. Then, at the end of the paragraph, insert the words, "; and rule 173-39-02.19 of the Administrative Code, if providing a home-delivered meal service with a kosher diet."

2. Replace paragraph (B)(1)(f) of the rule, which said, "The provider shall adopt and implement ethical standards of care by requiring workers to deliver services professionally, respectfully, and legally; and that prohibits, during the provision of authorized services, unprofessional, disrespectful, or illegal behavior, including:" with the words, "The provider shall adopt and implement ethical standards to require workers to provide services in a professional, respectful, and legal manner and not engage in any unprofessional, disrespectful, or illegal behavior including the following unprofessional, disrespectful, or illegal behavior:".

3. Replace paragraph (B)(1)(f)(iv) of the rule which said, "Consuming alcohol, medicine, drugs, or other chemical substances not in accordance with the legal, valid, prescribed use, or in any way that impairs the provider in the delivery of services to the consumer." with two paragraphs, paragraph (B)(1)(f)(iv) and (B)(1)(f)(v), as follows: "(iv) Consuming alcohol during the delivery of services to the consumer." and "(v) Consuming medicine, drugs, or other chemical substances not in accordance with the legal, valid, prescribed use, or in any way that impairs the provider in the delivery of services to the consumer."

4. Replace paragraph (B)(3) of the rule, which says, "Confidentiality: The provider shall comply with the medicaid confidentiality regulations under 42 C.F.R. 431.300 to 431.307 and the Health Insurance and Accountability Act (HIPPA) regulations under 45 C.F.R. parts 160, 162, and 164." with the words, "Confidentiality: The provider shall comply with all state and federal laws and regulations governing consumer confidentiality including, but not limited to, 42 C.F.R. 431.300 to 431.307, and 45 C.F.R. parts 160, 162, and 164."

5. Replace paragraph (C)(1)(f) of the rule, which said, "The provider shall provide services professionally, respectfully, and legally; and that prohibits, during the provision of authorized services, unprofessional, disrespectful, or illegal behavior, including:" with the words, "The provider shall provide services in a professional, respectful, and legal manner and shall not engage in any unprofessional, disrespectful, or illegal behavior including the following unprofessional, disrespectful, or illegal behavior".

6. Replace paragraph (C)(1)(f)(iv) of the rule, which said, "Consuming alcohol, medicine, drugs, or other chemical substances not in accordance with the legal,

valid, prescribed use, or in any way that impairs the provider in the delivery of services to the consumer." with two paragraphs, paragraph (C)(1)(f)(iv) and (C)(1)(f)(v), as follows: "(iv) Consuming alcohol during the delivery of services to the consumer." and "(v) Consuming medicine, drugs, or other chemical substances not in accordance with the legal, valid, prescribed use, or in any way that impairs the provider in the delivery of services to the consumer."

7. Replace paragraph (C)(3) of the rule, which said, "Confidentiality: The provider shall comply with the medicaid confidentiality regulations under 42 C.F.R. 431.300 to 431.307 and the Health Insurance and Accountability Act (HIPPA) regulations under 45 C.F.R. parts 160, 162, and 164." with the words, "Confidentiality: The provider shall comply with all state and federal laws and regulations governing consumer confidentiality including, but not limited to, 42 C.F.R. 431.300 to 431.307, and 45 C.F.R. parts 160, 162, and 164."

8. Replace paragraph (D)(1)(g) of the rule, which said, "The provider shall provide services in a professional, respectful, and legal manner and not engage in any unprofessional, disrespectful, or illegal behavior including:" with the words, "The provider shall provide services in a professional, respectful, and legal manner and shall not engage in any unprofessional, disrespectful, or illegal behavior including the following unprofessional, disrespectful, or illegal behavior:".

9. Replace paragraph (D)(1)(g)(i) of the rule, which said, "Consuming alcohol, medicine, drugs, or other chemical substance not in accordance with the legal, valid, prescribed use, or in any way that impairs the provider in the delivery of services to the consumer." with two paragraphs (D)(1)(g)(i) and (D)(1)(g)(ii) of the rule, as follows: "(i) Consuming alcohol during the delivery of services to the consumer." and "Consume medicine, drugs, or other chemical substance not in accordance with the legal, valid, prescribed use, or in any way that impairs the provider in the delivery of services to the consumer."

10. Replace paragraph (D)(3) of the rule, which said, "Confidentiality: The provider shall comply with the medicaid confidentiality regulations under 42 C.F.R. 431.300 to 431.307 and the Health Insurance and Accountability Act (HIPPA) regulations under 45 C.F.R. parts 160, 162, and 164." with the words, "Confidentiality: The provider shall comply with all state and federal laws and regulations governing consumer confidentiality including, but not limited to, 42 C.F.R. 431.300 to 431.307, and 45 C.F.R. parts 160, 162, and 164."

11. Replace paragraph (E)(1)(g) of the rule, which said, "The provider shall transfer or discharge a consumer under the terms of section 3721.16 of the Revised Code. Additionally, if the provider terminates its residential care facility license or provider certification, it shall provide written notification to the consumer and ODA's designee at least ninety days before terminating services to the consumer." with two paragraphs, (E)(1)(g) and (E)(1)(h) as follows: "(g) The provider shall transfer or discharge a consumer under the terms of section 3721.16 of the Revised

Code." and "If the provider terminates its medicaid provider agreement with ODJFS, pursuant to section 3721.19 of the Revised Code, it shall provide written notification to the consumer and ODA's designee at least ninety days before terminating services to the consumer."

12. Replace paragraph (E)(3) of the rule, which said, "Confidentiality: The provider shall comply with the medicaid confidentiality regulations under 42 C.F.R. 431.300 to 431.307 and the Health Insurance and Accountability Act (HIPPA) regulations under 45 C.F.R. parts 160, 162, and 164." with the words, "Confidentiality: The provider shall comply with all state and federal laws and regulations governing consumer confidentiality including, but not limited to, 42 C.F.R. 431.300 to 431.307, and 45 C.F.R. parts 160, 162, and 164."

13. In paragraph (E)(6)(d) of the rule, after the words, "The assisted living program shall not pay for any service provided to an applicant before the PAA enrolls the applicant into the program," insert the words "and before case manager authorizes the service in the consumer's service plan"

14. Revise this RSFA.

On August 27, 2009, ODA refiled the proposed new rule to:

1. Delete "temporarily" from paragraph (E)(6)(e) of the rule.
2. Replace the language in paragraph (B)(6)(b) of the rule, which said, "ODA (or ODA's designee) may review the evidence under paragraph (B)(5)(b) of this rule to see if the provider complies with all requirements before paying the provider" with the following words: "ODA's obligation to reimburse the provider for the costs of services provided as a certified long-term care provider is subject to the hold and review process described in rule 5101:3-1-27.2 of the Administrative Code." ODA also made similar changes in paragraphs (C)(6)(b) and (E)(6)(b) of the rule.
3. Update this RSFA.

On September 8, 2009, ODA refiled the proposed new rule to:

1. Combine the concept in paragraphs (B)(1)(f)(xi)(b) and (B)(1)(f)(xi)(c) of the rule into one paragraph and add examples of activities that may distract the provider from service delivery in the area of non-care-related socialization with a person other than the consumer. The examples are "a visit from a person who is not providing care to the consumer; making or receiving a personal telephone call; or, sending or receiving a personal text message or email." ODA made a similar change in paragraphs (C)(2)(f)(xi)(b) and (C)(1)(f)(xi)(c) of the rule and also in paragraphs (D)(1)(g)(vi)(b) and (D)(1)(g)(vi)(c) of the rule.
2. Delete "or" as it occurred before "step-parent" in paragraph (B)(4)(f) of the rule and add ", legal guardian, or authorized representative" after "step-parent" in the

same paragraph. ODA made a similar change in paragraphs (C)(4)(a) and (E)(4)(d) of the rule.

3. Revise this RSFA.

12. 119.032 Rule Review Date:

(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

ODA does not estimate that the proposed adoption of this new rule will have any impact upon the biennial budget established for ODA by the Ohio General Assembly.

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:

ODA estimates that there is no cost of compliance for any directly-affected consumer as a result of the proposed adoption of this new rule. ODA estimates that there is no cost of compliance for any directly-affected assisted living provider as a result of the proposed adoption of this new rule, unless (1) the provider would need to discontinue discharging a consumer who leaves the residential care facility for a temporary hospital stay in order to rent/offer the private, residential unit to a private-pay consumer; (2) the provider would need to discontinue the practice of collecting an additional fee when the consumer is not in residence; (3) the provider would need to discontinue the practice of billing the Assisted Living Program for services that it provides to consumers who are not yet enrolled into the Assisted Living Program; (4) the provider would need to discontinue the practice of billing for services provided to consumers of the Assisted Living Program that are not authorized by the case manager in the consumer's service plan; and, (5) the provider has not been maintaining \$1,000,000 in commercial liability insurance.

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**