

## Rule Summary and Fiscal Analysis

### Part A - General Questions

**Rule Number:** 173-39-02

**Rule Type:** Amendment

**Rule Title/Tagline:** ODA provider certification: requirements for providers to become, and to remain, certified.

**Agency Name:** Department of Aging

**Division:**

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#### I. Rule Summary

1. **Is this a five year rule review?** Yes
  - A. **What is the rule's five year review date?** 4/14/2023
2. **Is this rule the result of recent legislation?** Yes
  - A. **If so, what is the bill number, General Assembly and Sponsor?** SB 9 - 134 - McColley, Roegner
3. **What statute is this rule being promulgated under?** 119.03
4. **What statute(s) grant rule writing authority?** 121.07, 173.01, 173.02, 173.391, 173.52, 173.522, 173.54, 173.543
5. **What statute(s) does the rule implement or amplify?** 173.39, 173.391, 173.52, 173.522, 173.54, 173.543; 42 CFR 441.352
6. **Does the rule implement a federal law or rule in a manner that is more stringent or burdensome than the federal law or regulation requires?** No
  - A. **If so, what is the citation to the federal law or rule?** Not Applicable
7. **What are the reasons for proposing the rule?**

Each rule in Chapter 173-39 of the Administrative Code exists to comply with R.C. §173.391, which requires ODA to adopt rules to establish certification requirements and standards. This rule also exists to comply with 42 CFR 441.352, which requires ODA to provide satisfactory assurance to the Centers for Medicare and Medicaid Services (CMS) that ODA has implemented certification requirements for providers as a condition to CMS' authorization of the PASSPORT Program and the Assisted Living Program.

**8. Summarize the rule's content, and if this is an amended rule, also summarize the rule's changes.**

This rule establishes the general requirements to become and to remain an ODA-certified provider.

ODA proposes to amend this rule to achieve the following:

1. No longer require participant-directed providers to maintain a business site. [¶(A)(3)] For more information, please review ODA's response to BIA questions #9 and #10.
2. Move the requirement for the records to be accessible to HHS, the state auditor, and ODM from rule 173-39-04 to ¶¶ (A)(3)(b) and (B)(10)(c) of this rule.
3. Eliminate a flexibility related to the COVID-19 public health emergency (PHE). At the beginning of the PHE, ODA amended ¶(B)(2) of this rule to allow providers to collect an individual's handwritten or electronic signature on a date later than the date of service if the provider's only means to comply with service-verification requirements is to collect individual's handwritten or electronic signatures. The purpose for the amendment was to facilitate social distancing.
4. Refer to the incident-reporting requirements in rule 5160-44-05 of the Administrative Code rather than establish incident-reporting requirements in this rule and incorporate the requirement to report incidents under the paragraph on reporting significant changes. [¶(B)(3)(b)]
5. No longer exempt certain providers from the requirement to notify ODA's designee at least 30 days before the last day the provider provides services. [¶(B)(3)(e)(iv)]
6. Insert "failing to cooperate with or" before "treating ODA or its designee disrespectfully." [¶(B)(8)(f)]
7. No longer require agency providers to have previous experience to be certified, but continue to require the provider to have an active registration with the Ohio

Secretary of State. ¶(C)(1) For more information, please review ODA's response to BIA questions #9 and #10.

8. No longer repeat the specific requirements to become an ODA-certified participant-directed provider in ¶(C)(3) of this rule that are covered under rule 173-39-02.4 of the Administrative Code.

9. Delete ¶(E) of this rule because it is off the topic of the rule and R.C. §173.391 already allows providers to voluntarily relinquish their certification.

Senate Bill 9 (134th G.A.) requires state agencies to reduce the unnecessary use of regulatory restrictions ("may not," "must," "prohibit," "require," "shall," and "shall not") in rules which may prevent artificial intelligence from interpreting Ohio's rules to create an unfavorable business climate based on the volume of regulatory restrictions used in rules rather than the substantive content of those rules. Accordingly, ODA proposes to remove 32 unnecessary regulatory restrictions from this rule.

ODA proposes to make other non-substantive improvements to this rule.

9. **Does the rule incorporate material by reference? No**
10. **If the rule incorporates material by reference and the agency claims the material is exempt pursuant to R.C. 121.75, please explain the basis for the exemption and how an individual can find the referenced material.**

*Not Applicable*

11. **If revising or re-filing the rule, please indicate the changes made in the revised or re-filed version of the rule.**

ODA made a revised filing to improve this RSFA without amending the rule itself.

## **II. Fiscal Analysis**

12. **Please estimate the increase / decrease in the agency's revenues or expenditures in the current biennium due to this rule.**

This will have no impact on revenues or expenditures.

\$0.00

Amending this rule will not impact the biennial budget that the Ohio General Assembly established for ODA.

**13. What are the estimated costs of compliance for all persons and/or organizations directly affected by the rule?**

The costs of compliance for an ODA-certified provider are meeting the general requirements to become and to remain an ODA-certified provider. These include compliance with (1) requirements established in rule 173-39-02 of the Administrative Code (e.g., providing ODA with contact information), (2) requirements on topics (e.g., background checks) that are referenced in rule 173-39-02 of the Administrative Code, but established outside of that rule (e.g., R.C. §§ 173.38 and 173.381), and (3) requirements on topics (e.g., records retention) that are established in rule 173-39-02 of the Administrative Code and also outside of the rule (e.g., 45 C.F.R. 75.361). For more information, please review ODA's response to question #18 of this RSFA and questions #15, #16, and #17 of the BIA.

**14. Does the rule increase local government costs? (If yes, you must complete an RSFA Part B). No**

**15. Does the rule regulate environmental protection? (If yes, you must complete an RSFA Part C). No**

**16. If the rule imposes a regulation fee, explain how the fee directly relates to your agency's cost in regulating the individual or business.**

Not Applicable

### **III. Common Sense Initiative (CSI) Questions**

**17. Was this rule filed with the Common Sense Initiative Office? Yes**

**18. Does this rule have an adverse impact on business? Yes**

**A. Does this rule require a license, permit, or any other prior authorization to engage in or operate a line of business? No**

Providers voluntarily apply for ODA certification. Certification is not required to provide a service unless a provider wants a government program that requires certification (e.g., the PASSPORT Program) to pay the provider. Please review the BIA for additional information.

**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? No**

See section 173.391 of the Revised Code and rule 173-39-05 of the Administrative Code.

**C. Does this rule require specific expenditures or the report of information as a condition of compliance? Yes**

The costs of compliance for an ODA-certified provider are meeting the general requirements to become and to remain an ODA-certified provider. These include compliance with (1) requirements established in rule 173-39-02 of the Administrative Code (e.g., providing ODA with contact information), (2) requirements on topics (e.g., background checks) that are referenced in rule 173-39-02 of the Administrative Code, but established outside of that rule (e.g., R.C. §§ 173.38 and 173.381), and (3) requirements on topics (e.g., records retention) that are established in rule 173-39-02 of the Administrative Code and also outside of the rule (e.g., 45 C.F.R. 75.361).

The amount the PASSPORT and Assisted Living Programs pay providers for a service is an all-inclusive rate. It's intended to cover the daily costs incurred in the service plus employee-related costs. The costs incurred as a result of this rule are likely calculated as part of a provider's operational budget—the cost of doing business and clerical jobs, such as retaining records and updating policies and procedures.

Providers set the prices they bill to the PASSPORT and Assisted Living Programs. In turn, the PASSPORT and Assisted Living Programs pay each provider the amount the provider bills, so long as the price billed does not exceed the maximum that the Ohio Dept. of Medicaid (ODM) allows per unit. In the appendix to rule 5160-1-06.1 of the Administrative Code, ODM establishes the units of service for the PASSPORT Program and the maximum-allowable payment for each unit. In the appendix to rule 5160-1-06.5 of the Administrative Code, ODM establishes the units of service for the Assisted Living Program and the maximum-allowable payment for each unit.

**D. Is it likely that the rule will directly reduce the revenue or increase the expenses of the lines of business of which it will apply or applies? No**

**IV. Regulatory Restriction Requirements under S.B. 9. Note: This section only applies to agencies described in R.C. 121.95(A).**

**19. Are you adding a new or removing an existing regulatory restriction as defined in R.C. 121.95? Yes**

**A. How many new regulatory restrictions do you propose adding to this rule? 0**

**B. How many existing regulatory restrictions do you propose removing from this rule? 32**

1. (A)(2) The provider SHALL comply with sections 173.38 and 173.381 of the Revised Code and Chapter 173-9 of the Administrative Code.

2. (A)(2) The provider SHALL also comply with rule 5160-1-17.8 of the Administrative Code.

3. (A)(3)(b) The provider's business site(s) for providing services SHALL meet the HCBS setting requirements in rule 5160-44-01 of the Administrative Code.

4. (A)(8) The provider SHALL have an ODM-approved EVV system in place compliant with rule 5160-1-40 of the Administrative Code,....

5. (B)(3)(b) The provider SHALL notify ODA or its designee of an incident no later than one business day after the provider is aware of the incident.

6. (B)(6)(b) ...the provider SHALL NOT allow a volunteer to provide any service....

7. (B)(6)(c) ...the provider SHALL NOT allow a volunteer to provide any service....

8. (B)(7) The provider SHALL comply with the person-centered planning requirements in rule 5160-44-02 of the Administrative Code.

9. (B)(11)(a) The provider SHALL bill only for a service if the provider complies with the requirements....

10. (B)(11)(d) ...but ODA SHALL only pay the provider for providing services authorized by the individual's person-centered services plan.

11. (B)(12) The provider SHALL comply with all applicable federal, state, and local laws, rules and regulations....

12. (C)(1)(a) On the day the provider applies to become certified by ODA, the provider SHALL provide records to ODA verifying the provider has at least three months of experience providing the specific service for which it seeks certification from ODA to at least two Ohio adults in a HCBS setting.

13. (C)(1)(a) The provider's experience SHALL include all of the following related to providing those services:

14. (C)(1)(d) Additionally, if the provider has a governing board, the provider SHALL have written bylaws or an electronic record of written policies;...

15. (C)(1)(d) ...if the provider is incorporated, the provider SHALL have written articles of incorporation or an electronic record of written policies

16. (C)(1)(d) The policies, bylaws, or articles of incorporation SHALL include requirements for its employees to provide services in a manner compliant with paragraph (B)(8) of this rule.

17. (C)(3)(a) The provider SHALL be at least eighteen years of age.

18. (C)(3)(b) The provider SHALL have a valid social security number and at least one of the following current, valid, government-issued, photographic identification cards:

19. (C)(3)(c)(i) The provider SHALL read, write, and understand English at a level that enables the provider to comply with this rule and any rule in this chapter to which the provider is subject.

20. (C)(3)(c)(ii) The provider SHALL be able to effectively communicate with the individual.

21. (C)(4)(e) Additionally, if the provider has a governing board, the provider SHALL have written bylaws or an electronic record of bylaws;....

22. (C)(4)(e) ...if the provider is incorporated, the provider SHALL have written articles of incorporation or an electronic record of articles of incorporation.

23. (C)(4)(e) The policies, bylaws, or articles of incorporation SHALL include the following:

24. (C)(4)(e)(i) ...the provider SHALL...

- 25. (C)(4)(e)(i) ...REQUIRE its employees to comply with paragraph (B)(8) of this rule.
  - 26. (C)(4)(e)(ii) ...the provider SHALL also...
  - 27. (C)(4)(e)(ii) ...REQUIRE reporting abuse, neglect, or exploitation to ODA or its designee.
  - 28. (D)(4)(b)(i) The assisted living program SHALL NOT pay for any service the provider provides to an individual before ODA's designee enrolls the individual into the program....
  - 29. (D)(4)(c) The provider SHALL transfer or discharge an individual under the terms of section 3721.16 of the Revised Code.
  - 30. (E) ODA may certify a provider that was previously certified by ODA, but voluntarily withdrew its certification, but SHALL NOT certify a provider if ODA previously revoked the provider's certification with ODA.
  - 31. (C)(4)(e)(iii) ...the provider SHALL also...
  - 32. (C)(4)(e)(iii) ...REQUIRE reporting....
- C. If you are not removing existing regulatory restrictions from this rule, please list the rule number(s) from which you are removing restrictions.**
- D. Please justify the adoption of the new regulatory restriction(s).**

Not Applicable