

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

Agency Name

Division

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**173-39-05**

Rule Number

**NEW**

TYPE of rule filing

Rule Title/Tag Line

**Disciplinary actions.****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: **HB153**General Assembly: **129**Sponsor: **Amstutz**

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, 5111.89**

5. Statute(s) the rule, as filed, amplifies or implements: **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 adopt this new rule as part of a larger rule package.

ODA is proposing to amend Chapter 173-39 of the Administrative Code. In doing so, ODA has 3 basic goals:

1. To implement H.B. No. 153's changes to section 173.391 of the Revised Code into Chapter 173-39 of the Administrative Code. H.B. No. 153's amendments to

section 173.391 of the Revised Code take effect on September 29, 2011. The amendments will change the disciplinary actions against non-compliant certified providers. ODA must now incorporate the changes into the Administrative Code. ODA proposes to do so by replacing rule 173-39-05 of the Administrative Code with a new rule, adopting new rule 173-39-05.1 of the Administrative Code, and amending rule 173-39-06 of the Administrative Code. (At the same time, ODA is also proposing to amend rule 173-39-08 of the Administrative Code.) ODA proposes to adopt these rule proposals on September 29, 2011, the same day that H.B. No. 153's amendments take effect.

2. 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.

3. To comply with Governor Kasich's Executive Order 2011-01K "Implementing Common Sense Business Regulation" and S.B. No. 2 (129th G.A.):

a. ODA is proposing to adopt the new rules after interested parties and the general public have had opportunities to provide input:

i. Interested parties and the general public had the opportunity to testify to the finance committees of the Ohio House of Representatives and the Ohio Senate as those legislative bodies considered public testimony on the amendments that H.B. No. 153 proposed to make to section 173.391 of the Administrative Code.

ii. From June 30, 2011 to July 11, 2011, ODA posted the proposed amended rules on <http://aging.ohio.gov/information.rules/proposed.aspx> for a public-comment period.

b. After reviewing and proposing amendments to the rule, ODA has determined that:

i. The proposed amendments to Chapter 173-39 of the Administrative Code regarding disciplinary measures do not burden any Ohio business that complies with Chapter 173-39 of the Administrative Code. They also do not burden an Ohio business that does not comply with Chapter 173-39 of the Administrative Code beyond the disciplinary actions prescribed by section 173.391 of the Revised Code, as amended by H.B. No. 153.

ii. ODA made the rules as easy to read as the subject matter allowed, gave non-disciplinary actions a rule of their own so that the each rule remained a one-topic rule, added numerous sub-headings to the rules to make thumbing through the rules easy, wrote in the active voice so the language clearly identified who is responsible for what action.

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 three levels of disciplinary actions that ODA (or ODA's designee) may take against a non-compliant provider. The rule also explains that a provider may not appeal some disciplinary actions.

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 July 14, 2011, ODA revise-filed the rule to:

1. Replace "designinee" in paragraph (B)(2)(a)(ii) of the rule with "designee."
2. Replace "The provider has irregular financial records" in paragraph (B)(2)(a)(iii) of the rule with "The provider fails to retain all records required under rule 173-39-02 of the Administrative Code or fails to comply with the service-verification requirements under rules 173-39-02.1 to 173-39-02.21 of the Administrative Code, for any service the provider provides that is regulated by rules 173-39-02.1 t 173-39-02.21 of the Administrative Code."

3. Replace paragraph (C)(1)(a) of the rule, which said, "The provider (or an employee of the provider) lacks the qualifications required under Chapter 173-39 of the Administrative Code to furnish the service the provider (or employee of the provider) is furnishing, especially the requirements under Chapter 173-39 of the Administrative Code to meet the criminal records check requirements under rule 173-9-01 of the Administrative Code, regardless of whether the provider (or employee) has obtained a current, valid license, certificate, permit, or certification from another state." The revised language says, "A government entity of this state, other than ODA, has terminated or refused to renew any of the following held by, or has denied any of the following sought by, a provider that ODA has certified: a provider agreement, license, certificate, permit, or certification. This applies regardless of whether the provider has entered into a provider agreement in, or holds a license, certificate, permit, or certification issued by, another state." The revised language corresponds to the language used in H.B. No. 153's amendments to section 173.391 of the Revised Code--in particular, the new language in division (E)(2)(a) of section 173.391 of the Revised Code.

4. Add a new paragraph (C)(1)(b) of the rule that says, "The provider has failed to enter into or renew a provider agreement with ODA's designee." The new paragraph corresponds to the language used in H.B. No. 153's amendments to section 173.391 of the Revised Code--in particular, the new language in division (E)(2)(e) of section 173.391 of the Revised Code.

5. Revise this RSFA.

On July 18, 2011, ODA revise-filed the rule to:

1. Replace "t" in paragraph (B)(2)(a)(iii) of the rule with "to."
2. Upload a revised public-hearing notice.
3. Revise this RSFA.

On August 10, 2011, ODA revise-filed the rule to:

1. Delete paragraph (B)(1)(ii) of the rule, which said that ODA may impose a level-one disciplinary action against any provider who fails to pay its employees. Then, merge paragraphs (B)(1)(a) and (B)(1)(a)(i) of the rule into one paragraph.
2. Replace "forty-five" in paragraph (B)(1)(b)(ii) of the rule with "seven."
3. Delete paragraph (B)(1)(a)(iii) of the rule, which said, "Hold and review: ODA (or ODA's designee) may withhold reimbursing a provider for the cost of services the provider has furnished until ODA (or ODA's designee) has completed the hold-and-review process described in rule 5101:3-1-27.2 of the Administrative Code." ODA is deleting this because it already has the authority to hold and review and such an action is not a disciplinary action.

4. Replace paragraph (B)(1)(a)(iv) [now (B)(1)(a)(iii)] of the rule, which said, "Suspension of referrals: ODA (or ODA's designee) may discontinue referring consumers to the provider" with "Ceasing referrals: ODA (or ODA's designee) may cease to refer consumers to the provider until ODA (or ODA's designee) determines that the provider complies with all requirements under Chapter 173-39 of the Administrative Code." ODA took the same action in paragraph (B)(2)(b)(ii) of the rule.
5. Delete "any of" from paragraph (B)(2)(a) of the rule.
6. Replace "but, after completing a remedial check, ODA (or ODA's designee) determines that the provider or the provider's employee would have been hireable in a position to provide direct care under rule 173-9-01 of the Administrative Code" in paragraph (B)(2)(a)(ii) of the rule with "except as provided in paragraph (B)(3)(a)(iii) of the rule."
7. Replace paragraph (B)(2)(b)(iii) of the rule, which said, "Suspension: ODA may suspend the provider's certification until the provider furnishes ODA with evidence of compliance with the requirement for which ODA issued the level-two disciplinary action" with "Ceasing referrals and removing consumers: ODA may cease to refer consumers to the provider and may remove consumers from the provider until ODA determines that the provider complies the requirement for which ODA issued the level-two disciplinary action."
8. Replace "the consumer records" in paragraph (B)(3)(a)(i)(c) of the rule with "one or more consumer records."
9. Replace "the employee records" in paragraph (B)(3)(a)(i)(d) of the rule with "one or more employee records."
10. Replace paragraph (B)(3)(a)(iii) of the rule, which said, "Criminal records check: The provider fails to meet the criminal records check requirements under rule 173-9-01 of the Administrative Code, and, after completing a remedial check, ODA (or ODA's designee) determines that the provider or the provider's employee would not have been hireable in a position to provide direct care under rule 173-9-01 of the Administrative Code." The new language says, "Criminal records check: The provider fails to conduct a criminal records check according to paragraphs (C) and (G) of rule 173-9-01 of the Administrative Code."
11. Replace "No hearings" in paragraph (C)(1) of the rule with "No appeals."
12. Remove "hold a hearing to" from paragraph (C)(1) of the rule.
13. Remove the comma between "issued by" and "another state" in paragraph (C)(1)(a) of the rule.
14. Insert new paragraph (C)(1)(e) of the rule, which says, "ODA (or ODA's

designee) has ceased to refer consumers to the provider."

15. Insert new paragraph (C)(1)(f) of the rule, which says, "ODA has removed consumers from the provider's care."

16. Replace "Hearings" at the beginning of paragraph (C)(2) of the rule with "Appeals."

17. Replace "For any disciplinary action not subject to the conditions in paragraph (C)(1) of this rule, ODA is required to hold a hearing, if the provider request a hearing, to give the provider an opportunity to appeal the disciplinary action if the provider appeals a disciplinary action" in paragraph (C)(2) of the rule with "Except as otherwise provided in section 173.391 of the Revised Code, ODA is required to give a provider an opportunity to appeal a disciplinary action that is not subject to the conditions in paragraph (C)(1) of this rule or paragraph (A) of rule 173-39-05.1 of the Administrative Code."

18. Upload a revised public-hearing notice.

19. 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 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.

Although ODA operates the Medicaid-funded component of the Assisted Living Program, the Choices Program, PACE, and the Medicaid-funded component of the PASSPORT Program, including matters involving disciplinary actions against non-compliant providers, H.B. No. 153 moved the funding for these programs to budget line item GRF-600-525, which is under JFS, not ODA. Therefore, ODA estimates that the proposed amendment of this rule will have no impact upon the biennial budget that the Ohio General Assembly established for ODA in H.B. No. 153.

Additionally, the Ohio General Assembly factored H.B. No. 153's amendments to section 173.391 of the Revised Code into the impact upon GRF-600-525 and ODA's biennial budget.

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 associated with the proposed adoption of this new rule for any provider who complies with the rules of Chapter 173-39 of the Administrative Code.

For a provider who does not comply with Chapter 173-39 of the Administrative Code, Section 173.391 of the Revised Code gives ODA the authority to take disciplinary actions against the providers, which will incur a cost to the non-compliant provider.

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
<b>No</b>	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>

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.

ODA estimates that there is no cost of compliance associated with the proposed adoption of this new rule for any provider who is a government entity so long as the government-operated provider complies with the rules of Chapter 173-39 of the Administrative Code.

For a government-operated provider that does not comply with Chapter 173-39 of the Administrative Code, Section 173.391 of the Revised Code gives ODA the authority to take disciplinary actions against non-compliant providers, which will cost the non-compliant provider.

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.



ODA estimates that there is no cost of compliance associated with the proposed adoption of this new rule for any provider who is a government entity so long as the government-operated provider complies with the rules of Chapter 173-39 of the Administrative Code.

For a government-operated provider that does not comply with Chapter 173-39 of the Administrative Code, Section 173.391 of the Revised Code gives ODA the authority to take disciplinary actions against non-compliant providers, which will cost the non-compliant provider.

(a) Personnel Costs

Not applicable.

(b) New Equipment or Other Capital Costs

Not applicable.

(c) Operating Costs

Not applicable.

(d) Any Indirect Central Service Costs

Not applicable.

(e) Other Costs

ODA estimates that there is no cost of compliance associated with the proposed adoption of this new rule for any provider who is a government entity so long as the government-operated provider complies with the rules of Chapter 173-39 of the Administrative Code.

For a government-operated provider that does not comply with Chapter 173-39 of the Administrative Code, Section 173.391 of the Revised Code gives ODA the authority to take disciplinary actions against non-compliant providers, which will cost the non-compliant provider.

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.

Beginning on September 29, 2011, each political subdivision that operates a provider agency is subject to H.B. No. 153's amendments to section 173.391 of the Revised Code and this proposed new rule. If a political subdivision is not compliant with Chapter 173-39 of the Administrative Code, the political subdivision will need to pay for or absorb the disciplinary actions that ODA or ODA's designee gives the provider and do so by the standard means by which it pays for or absorbs penalties it pays for non-compliance with any statute or regulation (e.g., revenue the political subdivision generates from its provider agency, property taxes, local income taxes, local sales taxes).

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

The adoption of this proposed new rule should have a negligible impact upon a government subdivision's economic development.