

Hearing Date: 5/16/2019

Today's Date: 6/4/2019

Agency: Ohio Department of Medicaid

Rule Number(s): 5160-43-06, 5160-44-05, 5160-45-05, 5160-58-05.3

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If no comments at the hearing, please check the box. ☐

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List organizations or individuals giving or submitting testimony before, during or after the public hearing and indicate the rule number(s) in question.

1. ODM received a letter prior to the public hearing from the The Legal Aid Society of Columbus (LASC) regarding OAC rule 5160-44-05.

2. ODM received a joint letter prior to the public hearing from The Ohio Assisted Living Association (OALA) and Ohio Health Care Association (OHCA) regarding OAC rule 5160-44-05.

3. ODM received a letter prior to the public hearing from the Ohio Attorney General (OAG) regarding OAC rule 5160-44-05.

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## Hearing Report and Summary

### **Consolidated Summary of Comments Received**

Please review all comments received and complete a consolidated summary paragraph of the comments and indicate the rule number(s).

The OAG commented on OAC rule 5160-44-05, section (F) related to the apparent omission of “missed visits” by providers from the list of Reportable Incidents. The OAG commented that “Missed visits” is the #1 catalyst for provider fraud referrals originating in the bi-weekly meetings with ODM and its partner agencies, Medicaid managed care plans, and contract case management agencies and the incident investigations resulting therefrom.

The OALA and OHCA jointly commented on OAC rule 5160-44-05. They suggested the rule seems to be more relevant to unlicensed settings than Assisted Living, where definitions and rules are already established and in place; leading potentially to duplication of effort and confusion. For example, there are already definitions of incident and abuse in RCF regulation and abuse and reporting requirements in Ohio law and rules for Assisted Living. They requested that Assisted Living should be carved out and the rule should be for individuals on waivers who are not living in a licensed environment or Assisted Living requirements/procedures should be separately addressed in certain circumstances. Specific comments included suggestions to narrow the scope of certain incidents, revisions to the substantiation of an incident, concern about sharing the findings of investigations, and suggestions to add better clarity.

The LASC commented on OAC rule 5160-44-05. Suggested revisions included removing the portion directed at PASSPORT and Assisted Living, and instead, update those rules. Additional comments were suggested to add the individual’s authorized representative where the individual was mentioned, revisions to add clarity and consistency, adding in several incident types, whistleblower protections for those reporting incidents, and adding language regarding the conclusion of investigations from the current Ohio Home Care Waiver (OHCW) incident management rule.

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### **Incorporated Comments into Rule(s)**

Indicate how comments received during the hearing process were incorporated into the rule(s). If no comments were incorporated, explain why not.

ODM and ODA met in-person with OAG to discuss their concerns. "Missed visits" that do not rise to the level of an incident as defined in the proposed incident management rule will continue to be reported to ODM and, although they are not included as a reportable incident per the proposed rule, they will be captured in the same ODM incident management system, and follow a more direct path to the provider oversight contractor who will investigate "missed visits" as a provider non-compliance concern.

OALA and OHCA comments were each given careful consideration and deliberation jointly by ODA and ODM. The CMS-approved waivers are the basis for establishing this rule and do not necessarily coincide with RCF rules. Assisted Living is one of the four Medicaid home and community-based waivers to which this rule will apply and the creation of this rule included very strong consideration of the incident requirements currently in place for the ODA waivers, which includes the Assisted Living waiver. Several suggestions to narrow the scope of an incident could not be adopted at this time because they would create the potential that some incidents would go unreported, and as such, potentially place recipients' health and welfare at risk. Suggested revisions to the substantiation of incidents were not consistent with requirements of the CMS-approved waivers, and suggested revisions regarding the sharing of the findings of an investigation were not incorporated because the proposed rule does not present a change to the ODA requirements that are currently in place. ODA and ODM did incorporate the following comments as suggested by OALA and OHCA:

- \* The rule has been revised as suggested to incorporate their comment on paragraph (E)(1) regarding the deletion of "or, could reasonably be expected to result" from the definition of "abuse".
- \* The rule has been revised as suggested to incorporate their comment on paragraph (E)(6)(d) regarding the removal of 'wandering' from this incident type.
- \* The rule has been revised by adding the suggested clarity to the definition of "health and safety action plan" so that it applies throughout the rule to address their comment on paragraph (F)(2) and questions about the entity responsible for developing the health and safety action plan.
- \* The rule has been revised to incorporate their comment on paragraph (G)(1) to add reference to the specific paragraphs containing the incidents required to be reported.

LASC comments on 5160-44-05 were deliberated upon in conjunction with ODA. The rule was revised as suggested to incorporate the comment regarding paragraph (E), by adding the following language after the first sentence of that section: "The outcome should be documented and entered into the incident management system." This will align with the same sentence under (F). There are currently no OAC rules governing PASSPORT and Assisted Living; rather, incident management is handled by practices and requirements established in the CMS-approved waiver but have not been established in OAC rules. The proposed rule will establish

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incident management OAC rule requirements that will bring alignment and consistency among the NF-based ODA and ODM waivers. Suggestion to add reference to the individual's authorized representative is understood and was not added to the proposed rule at this time; ODM is open to further discussion with ODA concerning this suggestion for future rule revision. Regarding investigation closure language from current OHCW rule and the inclusion of several OHCW incident types; three of the four suggested incidents are included in the proposed rule. They have been moved to different areas for a more logical fit with the new rule, and some were revised for better clarity in application. As noted in the OAG section, occurrences of provider requirement violations that do not rise to the level of an incident per the proposed rule will continue to be reported to ODM and be captured in the same ODM incident management system, following a more direct path to the provider oversight contractor. The suggested whistleblower protections were determined to be outside the scope of this rule. ODA and ODM considered all current incident management OAC rule language, practices, and requirements in establishing the proposed rule that will work across each of the ODA and ODM NF-based waivers with considering the best use of Medicaid resources with the least amount of burden to individuals and providers.