

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Aging (ODA)

Regulation/Package Title: Assisted Living and Community Transition Services

Rule Number(s): Rules 173-39-02.16 and 173-39-02.17 of the Administrative Code

Date: March 12, 2013 (revised March 21, 2013 and March 25, 2013)

Rule Type:

☒ New (173-39-02.17)

☒ Amended (173-39-02.16)

☒ 5-Year Review (both rules)

☒ Rescinded (173-39-02.17)

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

H.B. 66 (126th G.A.) created the Assisted Living Program on July 1, 2006 to provide a setting that gives residents a home-like environment in a community living setting. The program helps people who need extra help or supervision in their day-to-day lives but who do not require the 24-hour care provided in a nursing facility. To be eligible for the program, a person must be age 21 or older, need hands-on assistance with certain activities of daily living such as dressing and bathing, be able to pay room and board, and meet the financial criteria for Medicaid eligibility. Examples of assisted living services are: personal care, housekeeping, laundry, assistance with medication, coordination of meals, and non-medical transportation.

The Assisted Living Program also provides community transition services to help nursing-facility residents move into an assisted living facility. Additionally, the PASSPORT Program provides community transition services to help nursing-facility residents move into personal residences. Examples of community transition services are the purchase of essential household furnishings, window coverings, household supplies, food preparation items, bed linens, or bath linens; fees or deposits to initiate utility services; and moving expenses.

ODA is proposing to amend rule 173-39-02.16 of the Administrative Code to:

- Clarify that the assisted living service includes *the coordination of* meals, not the meals themselves. For a resident enrolled in the Assisted Living Program, assisted living expenses fall into two categories: (1) room-and-board fees that the resident pays to the facility and (2) service expenses that the Assisted Living Program reimburses. According to rules 5101:3-33-01 and 3701-17-60 of the Administrative Code, meals are room-and-board expenses. Therefore, ODA is proposing to make a technical correction to clarify that the assisted living service includes the *coordination of* meals, not the meals themselves.
- Reword paragraphs (B) and (C) of the rule so that it is uniform with comparable paragraphs in other rules of Chapter 173-39 of the Administrative Code. In doing so, the paragraphs would reference the conditions of participation in rule 173-39-02 of the Administrative Code and refer to units and rates instead of just rates.

Section 119.032 of the Revised Code requires ODA to review each rule no later than the rule's assigned review date. In order to complete that review for rule 173-39-02.17 of the Administrative Code, ODA is proposing to rescind the rule and to simultaneously adopt a new rule of the same number because, in doing so, ODA would be amending over 50% of the rule. In the proposed new rule, ODA is proposing to:

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- Use the uniform taxonomy for “community transition services” supplied by the U.S. Administration on Aging for Medicaid home and community-based services.¹
- Adopt use a format and terminology that corresponds to more-recently adopted ODA rules. For example, ODA has been adding sub-headings to the beginnings of rule paragraphs to allow the readers to thumb through the rule quickly. (e.g., “Consumer choice.” Also, ODA has been replacing “document maintenance” language with “service verification” language that speaks of retaining records (which could be electronic), not maintaining documents.
- Explicitly state that providers are free to retain records electronically. This would give providers the flexibility to retain records in a manner that may be more suitable for 21st-century business operations. Additionally, using electronic records reduces the cost of records retention and the cost of delivering records to PASSPORT Administrative Agencies for monitoring purposes (i.e., email costs much less than the USPS).

This rule project does not regard (1) reimbursement rates in OMA’s [JFS’] rule 5101:3-1-06.5 of the Administrative Code, (2) possible provisions in pending H.B.59 (130th G.A.), including a rate increase, (3) renewal of the Assisted Living Medicaid waiver in 2014, (4) or enrollment and appeals issues related to the state-funded component or the Medicaid-funded component of the Assisted Living Program.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

- Section 173.391 of the Revised Code requires ODA to adopt rules to establish certification requirements and to evaluate if the services provided by providers are done in a quality manner that is advantageous to the consumers of the services.
- Sections 5111.89 and 173.40 of the Revised Code authorize ODA adopt rules for the Assisted Living and PASSPORT Programs.
- Sections 173.01 and 173.02 of the Revised Code give ODA general authority to adopt rules to regulate services provided through programs that it administers.

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

¹ National Association of States United for Aging and Disabilities. “Medicaid Home and Community Based Services (HCBS) Taxonomy: Training Module.” © 2012. Pg., 20.

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ODA's rule proposals for the assisted living service and the community transition service do not directly implement a federal requirement. However, in Ohio's application to the Centers for Medicare and Medicaid Services (CMS) for the waiver to authorize the Assisted Living Program, Ohio indicated that ODA adopted rules for the assisted living and community transition services and cited the rules by number. Because CMS authorized the Assisted Living Program in Ohio by approving the application, ODA is responsible for maintaining the regulations. The same is true for the PASSPORT Program. The approved waiver application specifically cites rules 173-39-02.16 and 173-39-02.17 of the Administrative Code.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

ODA's rule proposals for the assisted living service and the community transition service are not the result of a federal requirement.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

One public purpose is to comply with statutory mandates. Section 173.391 of the Revised Code requires ODA to adopt rules to establish certification requirements and to evaluate the services provided by providers are done in a quality manner that is advantageous to the consumers of the services. Additionally, sections 5111.89 and 173.40 of the Revised Code give ODA authority to adopt rules for the Assisted Living and PASSPORT Programs. Likewise, sections 173.01 and 173.02 of the Revised Code give ODA general authority to adopt rules to regulate services provided through programs that it administers.

ODA is proposing to amend rule 173-39-02.16 of the Administrative Code to clarify that the assisted living service includes *the coordination of* meals, not the meals themselves. For a resident enrolled in the Assisted Living Program, assisted living expenses fall into two categories: (1) room-and-board fees that the resident pays to the facility and (2) service expenses that the Assisted Living Program reimburses. According to rules 5101:3-33-01 and 3701-17-60 of the Administrative Code, meals are a room-and-board expense. Therefore, ODA is proposing to make a technical correction to clarify that the assisted living service includes the *coordination of* meals, not the meals themselves.

In rule 173-39-02.17 of the Administrative Code, ODA is implementing the uniform taxonomy for "community transition services" supplied by the U.S. Administration on Aging for Medicaid home and community-based services.² In doing so, ODA does not anticipate that it is creating any new requirements for businesses because the proposed definition is similar to the current definition. ("one-time expenses for setting up" vs., "non-recurring set-up expenses") NASUAD states that, "[b]y organizing a

² National Association of States United for Aging and Disabilities. "Medicaid Home and Community Based Services (HCBS) Taxonomy: Training Module." © 2012. Pg., 20.

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broad range of HCBS service into an orderly classification of services that is shared nationally, the HCBS Taxonomy will allow CMS and states to better understand what services are being provided within a state and in comparison to other states.”³ NASUAD said the new taxonomy would “[p]rovide national data regarding service availability, utilization, and expenditures.”⁴ NASUAD also said, “[i]f state services are called by a different name than what is in the HCBS Taxonomy, [the state] may need to change their service names and/or information to clarify where services fit into the taxonomy categories because if they do not match, national data will be skewed. States may choose to formally change the names or service description of long-time services provided to consumers.”⁵

In both of the above-mentioned rules, ODA is proposing to use format and terminology that correspond to more-recently adopted ODA rules. Doing so creates uniformity between ODA’s regulations for various services and employs the use of sub-headings that make the rule easier to follow (e.g., “Deadline,” “Consumer choice,” “Limitations,” and “Service verification”).

Lastly, in rule 173-39-02.17 of the Administrative Code, ODA is proposing to explicitly state that providers are free to retain records electronically. This would give providers the flexibility to retain records in a manner that may be more suitable for 21st-century business operations. Additionally, using electronic records reduces the cost of records retention and the cost of delivering records to PASSPORT Administrative Agencies for monitoring purposes (i.e., email costs much less than the USPS).

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

ODA (and ODA’s designees) will monitor the providers for compliance. (cf., Division (E)(5) of rule 173-39-02 of the Administrative Code and rule 173-39-04 of the Administrative Code.)

³ National Association of States United for Aging and Disabilities. “Medicaid Home and Community Based Services (HCBS) Taxonomy: Training Module.” © 2012. Pg., 2.

⁴ National Association of States United for Aging and Disabilities. “Online Training and HCBS Taxonomy.” © March 31, 2012. Pg., 7.

⁵ National Association of States United for Aging and Disabilities. “Medicaid Home and Community Based Services (HCBS) Taxonomy: Training Module.” © 2012. Pg., 2.

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Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

ODA contacted a significant number of stakeholders on multiple occasions to seek input on this 2-rule project.

- On February 25, 2013, ODA emailed 32 of the 293 providers certified to provide the community transition service—an 11% sample—to explain the Common-Sense Initiative. ODA also explained that ODA planned propose amendments to rule 173-39-02.17 of the Administrative Code that would (1) replace the definition with a universal definition that AoA is promoting for all 50 states; (2) reformat the rule to match newer rule formats, and (3) clearly indicate that providers can retain records electronically. ODA then asked the providers for their comments on the proposed amendments, on any additional amendments the providers suggest, and on the financial burden of complying with the rule.
- On February 25, 2013, ODA emailed the Ohio Assisted Living Association, the Ohio Council for Home Care and Hospice, and the Midwest Care Alliance to request the same information that it requested from the above providers.
- On February 27, 2013, the Ohio Assisted Living Association called with a question about confusing information in rule 173-39-02.16 of the Administrative Code. (See ODA's response to question #8 below for more information.)
- On March 1, 2013, National Church Residences of Chilicothe emailed ODA to say the following: "We have used the community transition program several times and have found it to be a fairly efficient process. We work closely with our local office and I feel we have very good communication which certainly helps. Thank you for seeking our input on this wonderful program for our seniors."
- On March 1, 2013, the Ohio Council for Home Care and Hospice emailed to indicate that, on behalf of their providers who furnish services to consumers enrolled in the PASSPORT Program, they have no recommendations on how to improve rule 173-39-02.17 of the Administrative Code.
- On March 2, 2013, Generations Healthcare Management emailed ODA to suggest new language for the rule. (See ODA's response to question #8 below for more information.)
- On March 5, 2013, ODA emailed the same 32 providers it emailed on February 25, 2013. This time, ODA announced that it would likely also review rule 173-39-02.16 of the Administrative Code.

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- On March 7, 2013, ODA emailed LeadingAge Ohio, National Church Residences, and the Ohio Health Care Association to announce the opportunity to suggest improvements to rules 173-39-02.16 and 173-39-02.17 of the Administrative Code.

Additionally, from Tuesday, March 12, 2013 to Sunday, March 17, 2013, ODA posted the rule proposals on its website to seek public comments. On March 12, 2013, ODA distributed an email to announce that ODA had placed the rules and the business impact analysis on our website to seek public comments. ODA distributed the email to the 1,332 subscribers of ODA's email notification service who indicated they wanted notices about rules.

During that public-comment period, ODA received 1 comment. The Ohio Association of Area Agencies on Aging submitted the comment, which regarded, not an ODA rule, but a rule that JFS had adopted. ODA will forward the comment to JFS.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

- INPUT: On February 27, 2013, the Ohio Assisted Living Association called ODA to because there appeared to be a technical error in rule 173-39-02.16 of the Administrative Code regarding meals.
- RESPONSE: ODA reviewed the rule and agreed there is a need to amend rule 173-39-02.16 of the Administrative Code is to clarify that the assisted living service includes *the coordination of* meals, not the meals themselves. For a resident enrolled in the Assisted Living Program, assisted living expenses fall into two categories: (1) room-and-board fees that the resident pays to the facility and (2) service expenses that the Assisted Living Program reimburses. According to rules 5101:3-33-01 and 3701-17-60 of the Administrative Code, meals are a room-and-board expense. Therefore, ODA is proposing to make a technical correction to clarify that the assisted living service includes the *coordination of* meals, not the meals themselves.
- FURTHER INPUT: On March 5, 2013, Jean Thompson of the Ohio Assisted Living Association indicated in an email that ODA's plan to make the technical correction to rule 173-39-02.16 of the Administrative Code seemed good.
- INPUT: On March 2, 2013, Generations Healthcare Management emailed ODA to state the following: "Thank you for the e-mail and consideration of provider input regarding ways to improve the CTS rule. I have spoken with the Directors of all three facilities that I operate including Crystal Waters, which are participants in the ODA assisted living program. Though, we have had limited experience in utilizing the CTS, due to most of our residents converting to Medicaid while living in the facility, we have had some frustrating experiences with the program. The Directors would like to see more Departmental guidance to the consumer in the proper use of the funds.

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Staff is sent on shopping sprees to buy unnecessary items for the consumer, such as cookware and home goods that the consumer would and in many cases can never use due to limited independent function. This is often times in lieu of more needed items such as linens, towels and sleep-wear which, the consumer deems to be too expensive. In other words the \$1,500.00 is often spent in an arbitrary matter. This causes valuable staff time and resources to maintain the receipts, shop and stock, with deference to color, style and utility of products the consumer will never use. A mainstream approach to this program that accounts for the provision of meals by the facility along with the consumer service plan would help to alleviate much administrative time and depletion of needed funds for the consumer. Thank you for your consideration.”

- **RESPONSE:** After reviewing the request from Generations Healthcare Management, On March 11, 2013, ODA emailed Generations Healthcare Management to say, “In response to your concern, ODA believes that rule 173-39-02.17 of the Administrative Code already requires the case manager to authorize any expense and prevents a provider from furnishing items in excess of what the case manager authorizes. Therefore, we’re uncertain that the rule requires a change in order to prevent the purchase of unnecessary items. However, if you are willing to supply information to ODA concerning authorizations of unnecessary items, ODA will conduct a retrospective review of those situations. ODA also wants to note that some items that seem unnecessary due to a consumer’s limited function could [be] of value to promote a home-like setting that enhances interaction with the consumer’s informal support system. For example, if a consumer is unable to cook without the assistance of a caregiver, but has a caregiver who will visit to cook with/for the consumer, it is reasonable for the case manager to authorize cookware for the consumer.”

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

No scientific data was used to develop the rules.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn’t the Agency consider regulatory alternatives?

As noted in #8 (above), one provider indicated a need to regulate unnecessary purchases of items for consumers. After reviewing the provider’s request, ODA has determined that the provider’s concern is with case-manager authorizations, not the rule. The rule says that a case manager authorizes the expenses and that the provider may not furnish items in excess of that the case manager authorizes. If the provider is willing, ODA will conduct a retrospective review of any reported occurrences of unreasonable authorizations.

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11. Did the Agency specifically consider a performance-based regulation? Please explain.

Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

The state is considering performance-based regulations. On February 21, 2013, the Governor's Office of Health Transformation announced that Ohio received a federal grant to advance health care payment innovation that would "accelerate the state's work to improve overall health system performance through payment innovation and service delivery improvements...to develop and implement evidence-based health care strategies that improve the health of individuals rather than simply treat disease."⁶ However, the review deadline for this rule will precede the outcomes of the state's efforts to develop and implement the evidence-based strategies. Therefore, the present review of rules 173-39-02.16 and 173-39-02.17 of the Administrative Code does not implement performance-based regulations.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

ODA reviewed the Ohio Administrative Code and found no duplication.

Sections 5111.89 and 173.40 of the Revised Code give ODA the authority to adopt rules for both the state-funded and Medicaid-funded components of the Assisted Living and PASSPORT Program. Section 173.391 of the Revised Code gives ODA the authority to develop requirements for providers that it certifies to provide assisted living services. No other state agency has this two-pronged authority to regulate these two services for the Assisted Living and PASSPORT Programs.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

ODA posts all proposed and currently-effective rules on its website. (<http://aging.ohio.gov/information/rules/default.aspx>) Before a rule takes effect, ODA posts it on its website and sends an email to any subscriber of our rule notification service.

ODA will work with its designees (PASSPORT administrative agencies) to ensure that the regulation is applied uniformly.

ODA and its designees will also monitor the providers for compliance. Rule 173-39-02 of the Administrative Code states that a condition of being an ODA-certified provider is allowing ODA or the PASSPORT administrative agency to monitor the provider.

⁶ Governor's Office of Health Transformation. "Ohio Receives Federal Grant to Advance Health Care Payment Innovation." Press release. © February 21, 2013.

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Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

At the end of December 2012, ODA's Assisted Living Program was reimbursing 258 assisted living providers for the assisted living services they provided to 3,899 consumers.

At the end of December 2012, ODA's Assisted Living Program was reimbursing 86 assisted living providers for the Community Transition services they provided to 198 consumers.⁷

At the end of December 2012, ODA's PASSPORT Program was reimbursing 2 PASSPORT providers for the Community Transition services they provided to 4 consumers.⁸

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

For rule 173-39-02.16, ODA's primary amendment makes a technical correction. The other two amendments are non-substantive. Therefore, ODA's proposed amendments to the rule do not create an adverse impact.

For rule 173-39-02.17 of the Administrative Code, ODA's proposed new language contains no substantive differences to the previous rule, minus one difference: ODA is proposing to explicitly state that providers are free to retain records electronically. This would give providers the flexibility to retain records in a manner that may be more suitable for 21st-century business operations. It could also reduce the cost of records retention and reduce the cost of delivering records to PASSPORT Administrative Agencies for monitoring purposes.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a "representative business." Please include the source for your information/estimated impact.

The best estimates for the cost of providing the services are the recently-reported actual costs that providers of the services have billed the Assisted Living Program and PASSPORT Program.

⁷ In item #7 of this business impact analysis, ODA states that ODA has certified 293 providers to provide the community-transition service. In item #14b, ODA states that only 88 providers (*i.e.*, 86 + 2) actually provided the service at the end of December, 2012. That means most providers who were certified to provide the service did not do so for a consumer of the Assisted Living or PASSPORT Programs.

⁸ *Ibid.*

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Assisted Living Services (Rule 173-39-02.16 of the Administrative Code)

In FY 2012, the average per-member per-month expense for assisted living services was \$1,426 (net client liability). This represents money paid *to* the impacted business community to reimburse them for their expenses.

In the appendix to rule 5101:3-1-06.5 of the Administrative Code, the Dept. of Job and Family Services established a maximum-allowable rate for the three tiers of assisted living services. The maximum-allowable rate for the lowest-tier service was \$49.98 per day (\$1,520 per month) and the maximum-allowable rate for the highest tier was \$69.98 per day (\$2,129 per month). Thus, the average expense per month was below the lowest and highest tiers allowable.

Notes: Although budget proposals are not part of this rule project, it is helpful to note that, for FY 2013, H.B.487 (129th G.A.) reduced the maximum-allowable rate for the lowest tier to \$48.48 per day (\$1,475 per month) and for the highest tier to \$67.88 per day (\$2,065 per month); but, for FY 2014, *pg.*, 11 of the LSC Red Book for the Department of Aging says that H.B.59 (130th G.A.) will increase the maximum-allowable rates by 3%, which will restore them to the FY 2012 levels.

Community Transition Services (Rule 173-39-02.17 of the Administrative Code)

In FY 2012, the average per-member per-month expense for community transition services for consumers in the Assisted Living Program was \$1,061 per job. This represents money paid *to* the impacted business community to reimburse them for their expenses.

In the appendix to rule 5101:3-1-06.5 of the Administrative Code, the Dept. of Job and Family Services established a maximum-allowable rate for the service as \$1,500 per job. Thus, the average expense per job in FY 2012 was significantly below the maximum-allowable rate.

In FY 2012, the average per-member per-month expense for community transition services to consumers in the PASSPORT Program was \$905 per job. This represents money paid *to* the impacted business community to reimburse them for their expenses.

In the appendix to rule 5101:3-1-06.1 of the Administrative Code, the Dept. of Job and Family Services established a maximum-allowable rate for the service as \$1,500 per job. Thus, the average expense per job in FY 2012 was significantly below the maximum-allowable rate.

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15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

The Assisted Living Program was created to provide a setting that gives residents a home-like environment in a community living setting. Not only does the service offer residents a more independent environment than a nursing facility, but it also costs the state fewer dollars. ODA complied with section 173.391 of the Revised Code by adopting a rules to establish certification requirements for providers of the service so that ODA may know that providers furnish the service in a quality manner that is advantageous to the consumers of the services and to the state, which saves funds any time this service is furnished successfully. In amending the rule, ODA is not proposing to adopt any unnecessary regulations that would create a new adverse impact on the regulated business community.

Likewise, the community transition service makes it possible for residents to move from a nursing facility to the independent environment of a home or an assisted living facility. ODA complied with section 173.391 of the Revised Code by adopting a rules to establish certification requirements for providers of the service so that ODA may know that providers furnish the service in a quality manner that is advantageous to the consumers of the services and to the state, which saves funds any time this service is furnished successfully. In doing so, ODA did not adopt any regulations that created any unnecessary adverse impact on the regulated business community.

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Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

Section 173.391 of the Revised Code does prescribe alternate means for compliance depending on the size of the business. The rules reflect this as well.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

Section 119.14 of the Revised Code establishes the exemption from penalties for first-time paperwork violations. The disciplinary actions adopted in rule 173-39-05 of the Administrative Code pursuant to section 173.391 of the Revised Code are subject to section 119.14 of the Revised Code.

18. What resources are available to assist small businesses with compliance of the regulation?

The staff at [PASSPORT administrative agencies](#) (PAAs) and ODA are available to help direct-care providers of any size with their questions about the statutes and rules. Providers may address their questions to the PAAs or to ODA, including ODA's [regulatory ombudsman](#).