

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: OHIO DEPARTMENT OF AGING

Package Title: KOSHER OPTION

Rule Number(s): 173-39-02.19

Date: September 8, 2014, *Revised* on September 29, 2014

Rule Types:

☒ 5-Year Review: 173-39-02.19

☐ New: None

☒ Amended: 173-39-02.19

☐ Rescinded: None

☐ No change: None

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.

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.

In 2009, House Bill No. 1 of the 128th General Assembly enacted section 173.402 of the Revised Code, which House Bill No. 59 of the 130th General Assembly renumbered to be section 173.524 of the Revised Code.

The section says that any consumers who are enrolled in the PASSPORT Program may request to have their home-delivered meals be kosher.

To implement this requirement into rules, ODA adopted rule 173-39-02.19 of the Administrative Code in 2009. The rule made the following 3 requirements:

- Any consumer who is enrolled in the PASSPORT Program has the option to choose a kosher home-delivered meal if the consumer's case manager has authorized a home-delivered meal. This prevented the PASSPORT Program from reimbursing a provider for delivering kosher meals to Consumer X if Consumer X's case manager did not authorize home-delivered meals for Consumer X.
- Providers of kosher home-delivered meals shall comply with the requirements for all home-delivered meals "as much as possible" in rule 173-39-02.14 of the Administrative Code. "As much as possible" comes from section 173.524 of the Revised Code. It gives the provider flexibility in meeting nutrient requirements and other requirements in rule 173-39-02.14 of the Administrative Code in order to comply with "kosher practices for meal preparation and dietary restrictions."
- Providers shall only furnish kosher home-delivered meals that are kosher according to a recognized kosher certification or kosher establishment under orthodox rabbinic supervision. ODA consulted with Ohio Jewish Communities to develop the language for this.

ODA plans to make two technical amendments to the rule. ODA has been systematically replacing occurrences of "PASSPORT administrative agency" ("PAA") with "ODA's designee." ODA proposes to do the same with this rule. Likewise, ODA has been replacing many occurrences of the verb "to provide" with "to furnish." Lastly, ODA replaced "a...meal" with "the meals" in paragraph (C) of the rule.

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

Section 173.01 of the Revised Code gives ODA general authority to adopt rules to "govern the operation of services and facilities for the elderly that are provided, operated, contracted for, or supported by the department."

Section 173.02 of the Revised Code gives ODA general authority to adopt rules to regulate services provided through programs that it administers, including rules that "develop and strengthen the services available" for Ohio's aging.

Section 173.391 of the Revised Code requires ODA to adopt rules to govern the requirements for providers when those providers are furnishing good or services to

consumers through ODA-administered programs on the basis of provider certification.¹

Section 173.52 of the Revised Code requires ODA to adopt rules to implement the Medicaid-funded component of the PASSPORT Program.

Section 173.522 of the Revised Code requires ODA to adopt rules to implement the state-funded component of the PASSPORT Program.

3. Does the regulation implement a federal requirement? Yes ☐ or No ☒.

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? Yes ☐ or No ☒.

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

The rule implements a state, not federal, requirement.

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

The rule implements a state, not 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)?

The rule has the following public purposes:

- Compliance with section 173.542 of the Revised Code.
- Preventing the PASSPORT Program from reimbursing a provider for delivering kosher meals to Consumer X if Consumer X's case manager did not authorize home-delivered meals for Consumer X
- Allowing providers to have flexibility in meeting nutrient requirements and other requirements in rule 173-39-02.14 of the Administrative Code in order to comply with "kosher practices for meal preparation and dietary restrictions."
- Delineating between kosher and non-kosher meals by requiring kosher meals to be certified as kosher according to a recognized kosher certification or kosher establishment under orthodox rabbinic supervision.

¹ Versus doing business with ODA-administered programs on the basis of provider agreements (*i.e.*, contracts and grants).

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

Through its regular monitoring activities under rule 173-39-04 of the Administrative Code, PASSPORT Administrative Agencies (PAAs) monitor each provider of kosher home-delivered meals for compliance with the rule.

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.

BUSINESS STAKEHOLDER OUTREACH: On August 26, ODA contacted Ohio Jewish Communities; Mobile Meals, Inc. and 3 providers of kosher home-delivered meals: the Jewish Family Service Association of Cleveland, Mobile Meals, and Senior Resource Connection. ODA asked if they recommended making changes to the rule.

NON-BUSINESS STAKEHOLDER OUTREACH: On August 26, ODA contacted the PAAs through the Ohio Association of Area Agencies on Aging. ODA asked if the PAAs recommended making changes to the rule.

ODA'S PUBLIC-COMMENT PERIOD: Before ODA filed the rules with the Joint Committee on Agency Rule Review (JCARR) to begin the legislature's formal rule-review process, ODA published the rule proposals and this BIA on its website for a public-comment period. The period began on September 8 and ended on September 21. The responses appear in #8 of this BIA.

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

BUSINESS STAKEHOLDER OUTREACH: Only Ohio Jewish Communities responded to ODA's request. They said, "we are ok for no changes in the rule."

NON-BUSINESS STAKEHOLDER OUTREACH: Only the Western Reserve Area Agency for Aging (PAA10A) commented as follows:

This implies that the any consumer is entitled to this meal type whether the consumer keeps Kosher or not. Often the request has stemmed from a general belief that the food is "cleaner". I have a provider who is waiting for approval since they have " all these people that need their kosher food" and we know that the provider tells them what to request. I am concerned about providers taking advantage of the system for a higher reimbursement rate.

There should be no exception to compliance with the HDM rule. The phrase "as much as possible" may undermine the primary intent of providing at least one nutritionally sound meal for the consumer. This leaves room for the provider to send meals anyway they wish, regardless of our standards.

ODA should be responsible for approval of this kind certification since most of us do not know what evidence of compliance should look like

In response, ODA said the following:

Most of your concerns are on the rule language that followed the statutory language. The General Assembly adopted the following language in section 173.524 of the Revised Code:

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An individual enrolled in the PASSPORT program may request that home-delivered meals provided to the individual under the PASSPORT program be kosher. If such a request is made, the department of aging or the department's designee shall ensure that each home-delivered meal provided to the individual under the PASSPORT program is kosher. In complying with this requirement, the department or department's designee shall require each entity that provides home-delivered meals to the individual to provide the individual with meals that meet, as much as possible, the requirements established in rules adopted under sections 173.52 and 173.522 of the Revised Code [PASSPORT Program sections] governing the home-delivered meal service while complying with kosher practices for meal preparation and dietary restrictions.

An entity that provides a kosher home-delivered meal to a PASSPORT program enrollee pursuant to this section shall be reimbursed for the meal at a rate equal to the rate for home-delivered meals furnished to PASSPORT program enrollees requiring a therapeutic diet.

The statute opens the door for kosher meals to "an individual." The statute also gave us "as much as possible."

The Ohio Jewish Communities asked legislators for the above section. When ODA implemented the rule [in 2009], ODA asked the Ohio Jewish Communities how they recommended distinguishing kosher from non-kosher. They gave us the language in the rule.

At this time, we'll collect the feedback on the rule that we asked from providers, PAAs, and the Ohio Jewish Communities. Then, ODA will decide what direction it will take with the rule.

Only the legislature can change the statute.

ODA'S PUBLIC-COMMENT PERIOD:

173-39-02.19 Kosher option	
BUSINESS COMMENTS	ODA's RESPONSES
I am writing you concerning the draft of Kosher option code number 173_39_02.19. The draft I received reads " The provider shall furnish evidence to the PAA that a home delivered kosher meal that it provides is certified as kosher by a recognized kosher certification or a kosher establishment under orthodox rabbinic supervision". As you are well aware there are many levels of Kosher supervision and we commend you for choosing the highest common denominator, orthodox rabbinic supervision which will allow for all clients needs to be satisfied. My concern is that the language at the beginning of the sentence makes reference to a recognized kosher certification but does not at all define what that means. I believe it is crucial that the beginning of the sentence read " by a recognized orthodox kosher certification" which would be consistent with the end of the sentence and allow for all kosher clients needs to be serviced. I am available for any further questions you may have regarding this matter. ... Thank you for your consideration of this matter.	Thank you for contributing to ODA's rule development by submitting a comment on the kosher option rule. We'll look into your suggested amendment as we prepare for the next stage of rule development. [2 nd response follows] Thanks (again) for contributing to our rule-development process. ODA believes that you may have misunderstood the meaning of our current rule language. The rule allows providers to furnish home-delivered meals that are certified as kosher by (1) a recognized kosher certification <i>or</i> (2) a kosher establishment under orthodox rabbinic supervision. The rule doesn't require all kosher meals to have orthodox rabbinic supervision. ODA does not plan to amend the rule to require only one type of kosher over another. [3 rd response follows]
[Follow-up email] I appreciate the clarification. I have 2 follow up questions. How does one determine recognized? Who is recognizing it? Additionally as I mentioned in my original e-mail Orthodox supervision is not a matter of choosing one	ODA has no authority to determine whether one type of kosher certification/supervision is all-encompassing or not is not. The First Amendment to the United States Constitution prohibits the establishment of a religion. Stated another way, ODA has no authority to evaluate kosher certification/supervision organizations to determine the ones that ODA will endorse.

<p>over the other, but encompasses the highest common denominator which would allow all of the clients needs to be satisfied. Allowing a lesser standard ultimately causes that not of all the clients needs are being met. Thank you for your time. I appreciate your efforts on behalf of all the seniors in our state.</p> <p>Rabbi Avrohom Weinrib Rabbinic Administrator Cincinnati Kosher</p>	<p>Additionally, the state law that requires the PASSPORT Program to make a kosher option doesn't limit that option to one type of certification/supervision.</p>
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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?

ODA compiled utilization, cost, and provider demographics from its databases.

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?

ODA would have considered amending the language in the rule that determines what is kosher, but reaffirmed that they find keeping the language the same is OK.

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.

Section 173.524 of the Revised Code gives consumers who are enrolled in the PASSPORT Program the option to choose kosher home-delivered meals vs., non-kosher home-delivered meals. Because it gives consumers an option, the rule that implements this option does not have performance measures.

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

Sections 173.52, 173.522, and 173.524 of the Revised Code authorize ODA, not another state agency, to adopt rules to implement the kosher option for the Medicaid-funded and state-funded components of the PASSPORT Program.

Additionally, no other state agency has adopted a rule to implement the kosher option for the Medicaid-funded or state-funded components of the PASSPORT Program.

- 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.**

PUBLICATION:

ODA publishes all proposed and currently-effective rules in the [Online Rules Library](#) on ODA's website. Before a rule takes effect, ODA publishes the soon-to-be-effective rule in the Rules Library. Then, to any subscriber of our rule-notification service, ODA emails a notice that the soon-to-be-effective rule is published.

Any person may subscribe to receive email notifications of soon-to-be-effective ODA rules.



MONITORING PROVIDERS:

Through its regular monitoring activities under rule 173-39-04 of the Administrative Code, PASSPORT Administrative Agencies (PAAs) monitor each provider of kosher home-delivered meals for compliance with it's the rule.

Adverse Impact to Business

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

- **Identify the scope of the impacted business community;**

Rule 173-39-02.19 of the Administrative Code directly impacts the providers who furnish kosher home-delivered meals consumers who are enrolled in the PASSPORT Program.

For June, 2014, 5 providers furnished 1,474 kosher home-delivered meals to 51 consumers who were enrolled in the PASSPORT Program.

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

The adverse impacts upon the providers identified in #14a are as follows:

- Planning menus.
- Purchasing the services of a dietitian or hiring a dietitian.
- Purchasing kosher certification/supervision services.
- Purchasing food from food suppliers.
- Processing the food.
- Packaging the meal, which includes stamping dates on the packages.
- Delivering the meal, which includes the cost of gasoline.
- Service verification, which involves using technology or collecting a handwritten signature from the consumer.

- **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.

For June, 2014, providers of kosher home-delivered meals furnished 1,474 to 51 consumers who were enrolled in the PASSPORT Program. Appendix A to rule 5160-1-06.1 of the Administrative Code establishes the maximum possible rate at \$9.33 per meal; however, for June, 2014, providers billed for the meals at an average cost of \$8.52 per meal. The price that the PASSPORT Program pays the provider for the meals is all-inclusive. It includes all expenses incurred in the process of planning, purchasing, processing, packaging, delivering, and accounting for the meals.

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

Appendix A to rule 5160-1-06.1 of the Administrative Code establishes the maximum possible rate for kosher home-delivered meals at \$9.33/meal and establishes the maximum possible rate for regular home-delivered meals at \$6.60/meal. Because the possible reimbursement rate for the kosher option is 41% higher than that of regular meals, ODA wanted to be certain that only consumers whose case managers authorized home-delivered meals had the kosher option and that ODA purchased kosher meals that were actually kosher. Otherwise, ODA did not add any regulations to the rule that were not present in section 173.524 of the Revised Code.

Regulatory Flexibility

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

Neither sections 173.391 or 173.524 of the Revised Code authorize ODA to adopt rules that create different standards for provider agreements based upon the size of a provider's workforce.

Additionally, most providers of home-delivered meals are small businesses.

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?

ODA would comply with section 119.14 of the Revised Code because it would exempt from penalties an act of non-compliance with the rules for first-time paperwork violations if the first-time act does not reveal a significant pattern of non-compliance.

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

As ODA previously mentioned, most providers of home-delivered meals are small businesses. The staff at PAAs and ODA are available to help home-delivered meal 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 (rules@age.ohio.gov).

