CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: OHIO DEPARTMENT OF AGING

Package Title: ODA PROVIDER CERT: SOCIAL WORK COUNSELING

5-YEAR RULE REVIEW: PROPOSED AMENDMENTS

Rule Number(s): Rule 173-39-02.12 of the Administrative Code

Date: July 22, 2015, Revised August 13, 2015

Rule Types:

☑	**5-Year Review:**	173-39-02.12
☐	**New:**	None
☑	**Amended:**	173-39-02.12
☐	**Rescinded:**	None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.

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Regulatory Intent

1. Please briefly describe the regulations in plain language.
Please include the key provisions of the regulation as well as any proposed amendments.

The rule governs the furnishing of the social work counseling service by ODA-certified providers.

ODA proposes to make the following substantive amendments:

- ODA proposes to replace the requirement for providers to *furnish* individuals with copies of their treatment plans with a requirement for providers to *offer* individuals copies of their treatment plans. If the individual declines to retain a copy of his or her treatment plan, the amendment would also require the provider to retain a record that an offer to furnish a copy was made, but that the individual declined.

- ODA proposes to remove the requirement for providers to retain advance directives in the clinical record.

- *Revised*: The current rule only allows a registered nurse (RN) who holds a certificate of authority from the Ohio Board of Nursing in psych-mental health nursing specialty to furnish the service if the RN is furnishing the service as a non-agency provider. ODA proposes to also allow an RN of this sort to furnish the service if the RN works for an agency provider.

ODA proposes to make the following non-substantive amendments:

- ODA proposes to add “ODA provider certification:” to the rule’s title to indicate that the rule regulates ODA-certified providers who perform a social work counseling service. ODA proposes to add the same words to all rules in the chapter in other rule filings. An analysis of ODA’s website traffic shows that most people who view the rules on ODA’s website find the rules through Google, Yahoo, and Bing. Adding “chapter” terms to rule titles may increase the odds of finding the correct rules and increase the odds of interpreting a found rule in its context.

- ODA proposes to replace all occurrences of “consumer” with “individual.” ODA also proposes to make this change in the remaining rules in the chapter in other rule filings.

- ODA proposes to replace the subheading “Minimum requirements” with “Requirements” because ODA is not authorized to adopt a rule that, in turn, authorizes extra-rule requirements that are not incorporated into the rule by reference. This means that a state agency that proposes extra-rule requirements needs to attach those extra requirements to the rule unless the requirements are readily available to the general public free of charge (*e.g.*, a

federal law), in which case, the state agency would simply cite the incorporated extra requirement in the rule's text.

- ODA proposes to delete the paragraph on records retention and monitoring because it duplicates requirements in rule 173-39-02 of the Administrative Code.

- ODA proposes to add a helpful citation on rate-setting methodologies so that providers know where to find the rule. Rule 5160-31-07 of the Administrative Code currently regulates providers whether or not ODA adds this helpful citation.

- Other, simple non-substantive amendments.

None of the proposed amendments would require new, or increased, regulatory burdens upon providers.

2. Please list the Ohio statute authorizing the Agency to adopt these regulations.

- 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 establish certification requirements.

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

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

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.

In Ohio's application to the Centers for Medicare and Medicaid Services (CMS) for a waiver to authorize the Medicaid-funded component of the PASSPORT Program, Ohio indicated that ODA adopted a rule on counseling and cited rule 173-39-02.12

of the Administrative Code. Because CMS authorized a waiver that included counseling, as regulated by rule 173-39-02.12 of the Administrative Code, the state is responsible for maintaining rule 173-39-02.12 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.**

   The rules do not exceed any federal requirements.

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 exists to comply with the state laws that ODA listed in its response to #2.

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.

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.

On April 8, 2015, ODA reached out to a provider, a provider association, and a provider board to announce that ODA was reviewing the rule and to ask if they had comments to offer. The provider, association, and board were as follows:

- Mark Kevin Rossman, LISW, a non-agency (*i.e.*, self-employed) provider who has been furnishing—in multiple regions—counseling to individuals in the PASSPORT Program since the 1990s.

- Danielle Smith, executive director of the **National Association of Social Workers, Ohio Chapter**.

- Brian Carnahan, executive director of the **Counselor, Social Worker, and Marriage and Family Therapist Board**.

On April 8, ODA also contacted Joyce Boling, RN, BS, the Chief of Quality Management at the Ohio District 5 Area Agency on Aging, and Amy Hoh, the manager of procurement and provider services at the Council on Aging of Southwest Ohio.

The online public-comment period began on July 22, 2015 and ended on August 9, 2015. ODA initiates its online public-comment periods by sending an email notice to its 1,755 listserv subscribers[1] for rule-development notices.

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

On April 8, 2015, Joyce Boling of the Ohio District 5 Area Agency on Aging, made the following recommendations:

> After receiving comments from my staff, here are our thoughts:
>
> We have seen some providers who have a treatment plan separate from the assessment while others have one combined document. Although this has not been a problem, we feel that more clarification regarding what needs to be in the treatment plan would be beneficial. The rule only requires "method of treatment and the recommended number of counseling sessions". Some include goals while others do not.
>
> Section (B)(4)(a)(vii) requires that the clinical record include "Advanced directives, including a do not resuscitate order or medical power of attorney..." We interpret that to mean a copy of the DNR or POA document. Many of our providers document in the record that the consumer has identified that they have a DNR or a POA, but do not have a copy. We feel that is sufficient.

[1] As of April 27, 2015.

> Section (B)(3)(c) requires the provider to furnish the consumer with the treatment plan unless there are clinical indications against... Providers have stated that often the consumer does not want a copy of their treatment plan when offered. We feel that the provider should be permitted to document (could be signed by the consumer if that seems appropriate) that it was offered, but refused.
>
> Although the rule does require revision to the treatment plan as necessary, we had a unique situation that perhaps could be addressed in the rule. An agency had furnished service for a period of time for the consumer, there was then a 6 month lapse in service; however, when they restarted service, they did not complete a new assessment and treatment plan or document a review of the previous plan. Some language regarding this type of situation with a lapse in service would be helpful.
>
> I think that covers it. Please let me know if you have questions, and thank you for giving us the opportunity to comment.
>
> Sorry, one more thing. We would like to see that the provider's signature is included for service verification, not just the name. THANKS!

In response to the area agency's comments, ODA offers the following responses:

- Regarding retaining advance directives in the clinical records, ODA has now determined to remove the requirement to retain such directives in the clinical record.

- Regarding furnishing treatment plans to individuals, ODA determined to amend the rule to require *offering*, not *furnishing*, the plan to individuals. The amendment would require that, if the provider offers a plan that is refused, that the provider should retain a record that indicates that the individual refused the opportunity to retain a copy of his or her treatment plan.

- Regarding reassessments for unique situations, ODA determined to not propose amendments to the rule regarding unique situations.

On April 9, 2015, Brian Carnahan of the Counselor, Social Worker, and Marriage and Family Therapist Board commented that the possible replacement of "social worker counselor service" with "counselor" seemed appropriate because "'counseling' is mentioned in all of the scopes of practice, so it's use should be fine." He also said that he didn't believe the Board would have issues with replacing "family caregiver" with "family" and "caregiver"; replacing "minimum requirements" with "requirements"; replacing "consumer" with "individual"; replacing the language on service verification that requires written signatures, which may be electronic, with service verification that only requires written signatures if the provider doesn't use electronic verification; deleting records-retention requirements that duplicate requirements in rule 173-39-02 of the Administrative Code; or adding a helpful citation to ODM's rate-setting methodology rule (5160-31-07).

On April 21, 2015, Mark Kevin Rossman, a counseling provider, informed ODA that the requirements for billing and records retention for the PASSPORT program are on

par with private insurers and other forms of coverage. He also said that that billing the program for counseling has become much easier over the years.

Mr. Rossman's only request was for the state to consider allowing coverage for counseling to individuals who are no longer eligible for Medicaid programs (*e.g.*, the state has terminated their coverage due to an increase in their assets or income). ODA explained that H.B.64 (131st G.A.) would repeal the existing language from section 173.522 of the Revised Code to eliminate eligibility for the state-funded component of the PASSPORT Program for those who lose their Medicaid eligibility. ODA explained that this is not a matter that rules can resolve if legislation says otherwise.

During the online public-comment period that runs from July 22 to August 9, ODA received the following comment:

PUBLIC COMMENT	ODA's RESPONSE
O4a members have one comment regarding OAC 173-39-02.12 ODA Provider Certification: Social Work Counseling Service. This question is not relative to a proposed change, but a request for clarification/consideration. Section (B)(5)(b)(i) includes that the service may be furnished by "a registered nurse (RN) who holds a certificate of authority from the Ohio Board of Nursing in psych-mental health nursing specialty". However, this type of professional is not included as able to furnish service through an agency provider. Was that intentional? Thanks for the opportunity to comment. Beth Kowalczyk Chief Policy and Operating Officer Ohio Association of Area Agencies on Aging	Thanks for raising this issue. After consulting with the CSWMFT Board, ODA has decided to allow psychiatric nurses *who work for agency providers* to furnish the service. After all, we already allow them to do so if they are non-agency providers.

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 measured outcomes in 2014 by analyzing data in its databases to answer #14.

ODA is not proposing to amend the chapter based upon scientific data.

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 had considered proposing to replace all occurrences of "social work counseling service" and most occurrences of "service" in the rule with "counseling" to conform to CMS guidance on taxonomy. ODA had thought that universal term "counseling"

would be more appropriate than "social work counseling service" because any of the following professionals may furnish counseling, not just social workers: licensed professional clinical counselors (LPCCs), licensed professional counselors (LPCs), licensed psychologists (MAs or PhDs), independent marriage and family therapists (IMFTs), licensed independent social workers (LISWs), licensed social workers (LSWs), marriage and family therapists (MFTs), and registered nurses (RNs) who hold a certificate of authority from the Ohio Board of Nursing in psych-mental health nursing specialty. However, before ODA can change the taxonomy, ODA must first change the name of the service in the Medicaid waiver application to CMS. Therefore, ODA is no longer proposing to replace the term.

ODA considered modifying the list of possible recipients of the service to the following 3 individuals identified in the Medicaid waiver application to CMS: (1) the individual, (2) the individual's caregivers, and (3) the individual's family members. At the present time, ODA will retain the current rule language that only offers counseling to individuals and the individual's family caregivers. The term "family caregivers" would include family members and caregivers who are not family members.[2]

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.

ODA did not consider performance-based regulations when considering whether to amend this rule.

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

Section 173.391 of the Revised Code gives ODA the authority to develop the requirements for ODA-certified providers of counseling to individuals who are enrolled in ODA-administered 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.

Before the rules would take effect, ODA will post them on ODA's website. ODA also sends an email to subscribers of our rule-notification service to feature the rules.

Through its regular monitoring activities, ODA and its designees will monitor providers for compliance. Rule 173-39-02 of the Administrative Code requires all providers to allow ODA (or ODA's designees) to monitor.

[2] "Family caregiver" is a term used in the Older Americans Act that simply means "caregiver" and is not limited to family members.

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;

In calendar year 2014, 74 providers were certified by ODA to furnish counseling. This is an unduplicated count of the providers that were eligible to furnish counseling. That year, the PASSPORT Program[3] reimbursed 45 these ODA-certified providers for furnishing 84,885 15-minute units of service to 1,600 individuals.

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

The rule's adverse impact consists of furnishing counseling sessions, creating and retaining records related to the counseling,[4] and retaining records that document how the provider qualifies to furnish counseling.

ODA's proposed amendments to the rule would not increase a provider's adverse impact. In fact, ODA's proposal to no longer require retaining advance directives in the clinical record would reduce a provider's adverse impact.

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 furnishing counseling come from recently-reported actual costs that providers have billed to the state-funded and Medicaid-funded components of the PASSPORT Program.

In 2014, the average rate for a 15-minute unit of counseling an individual who is enrolled in PASSPORT Program[5] was $13.77.

In Appendix A to rule 5160-1-06.1 of the Administrative Code,[6] the Ohio Department of Medicaid (ODM) established the maximum-possible reimbursement rate at $16.26 for a 15-minute unit of counseling. This is an

[3] Both the state-funded and Medicaid-funded components.
[4] An assessment, treatment plan, clinical record, and service verification.
[5] Both the state-funded and Medicaid-funded components.
[6] The most-recent effective date for rule 5160-1-06.1 of the Administrative Code is July 1, 2014.

all-inclusive rate that reimburses a provider for complying with all requirements in the rule.[7]

Therefore, on average, providers charged rates that reached 84.7% of the maximum-possible rate that ODM would allow.

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

ODA is not making any burdens upon providers that the provider would not face in the normal course of duty—regardless of the payer of the services. The regulatory burden is minimal compared to the need to ensure the health and safety of the individuals who receive long-term care services.

[7] Furnishing counseling sessions, creating and retaining records related to the counseling, and retaining records that document how the provider qualifies to furnish counseling.

Regulatory Flexibility

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

The rule treats all providers the same, regardless of their size, except that a non-agency provider—by nature—is a self-employed provider who has no supervision.

Virtually all counseling providers 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?

Section 119.14 of the Revised Code establishes the exemption for small businesses from penalties for first-time paperwork violations.

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

ODA does not discriminate between responsible parties, applicants, or employees based upon the size of the business or organization. In fact, the majority of businesses that this rule regulates are small businesses according to section 119.14 of the Revised Code.

ODA maintains an online rules library to assist all providers (and the general public) to find the rules that regulate them. Providers (and the general public) may access the online library 24 hours per day, 365 days per year.

ODA (and ODA's designees) are available to help providers with their questions.

Additionally, any person may contact Tom Simmons, ODA' policy manager and regulatory ombudsman, with questions about the rules.