

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: OHIO DEPARTMENT OF AGING

Package Title: MISCELLANEOUS UPDATES (CSIO)

Rule Number(s): 173-4-06, 173-39-01, 173-39-02.1, 173-40-04

Date: November 4, 2016. Revised on November 21, 2016.

Rule Types:

☒ **5-Year Review:** 173-4-06, 173-39-01, 173-39-02.1, 173-40-04

☐ **Rescinded:** None

☐ **New:** None

☒ **Amended:** 173-4-06, 173-39-01, 173-39-02.1, 173-40-04

☐ **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.

ODA proposes to amend the following rules:

OAC173-4-06 regulates the handling of diet orders in AAA-provider agreements for meals paid with Older American Act funds. ODA proposes to (1) replace the unfortunate occurrence of “regime” with “regimen” and (2) clearly require providers to only honor diet orders for a dysphagia nutritive regimen “if the diet order *indicates whether the consumer requires thickening agents in his or her drinks, soups, etc.*” instead of “if the diet order requires *the meals to have* thickening agents.” This should prevent any possible misconception that diet orders must require every item in a meal to have a thickening agent. The current rule was adopted on September 1, 2016. This would amend the recently-adopted rule.

OAC173-39-01 introduces OAC Chapter 173-39 and defines terms used in the chapter. ODA proposes to (1) amend the definition of “individual” so the term has the same meaning as “individual” in rule OAC5160-31-02 and (2) define “ODA-certified provider,” which is a term used throughout the Chapter. The current rule was adopted on July 1, 2016. This would amend the recently-adopted rule.

OAC173-39-02.1 regulates adult day services (ADS) when they are provided to an enrollee of the PASSPORT Program by an ODA-certified provider. ODA proposes to (1) replace the unfortunate occurrence of “meal delivery” in (B)(6)(a) with “ADS session” and (2) replace “ODA (or ODA’s designee)” in (B)(6)(a)(iii) with “ODA or its designee.” The current rule was adopted on September 1, 2016. This would amend the recently-adopted rule.

OAC173-40-04 requires providers of goods and services to individuals enrolled in the state-funded component of the PASSPORT Program to be an ODA-certified provider. ODA proposes list the program name at the beginning of the rule’s title. This assists the public when using internet search engines to search for the rule.

The amendments are not substantive and would not change a provider’s practice or change the adverse impact upon a provider.

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

For OAC173-4-06: ORC §§ [173.01](#), [173.02](#), [173.392](#); Section 305(a)(1)(C) of the [Older Americans Act of 1965](#), 70 Stat. 210, 42 U.S.C. 3001, as amended by the Older Americans Act Reauthorization Act of 2016; 45 C.F.R 1321.11 (July 1, 2016).

For OAC173-39-01: ORC §§ [173.01](#), [173.02](#), [173.391](#), [173.52](#), and [173.522](#).

For OAC173-39-02.1: ORC §§ [173.01](#), [173.02](#), [173.391](#), [173.52](#), and [173.522](#).

For OAC173-40-04: ORC §§ [173.01](#), [173.02](#), [173.391](#), and [173.522](#).

- 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.

For OAC173-4-06: The rule implements an aspect of a federally-funded program. The only federal requirements implemented in the rule

For OAC173-39-01: Terms defined in the rule may relate to federal requirements, but the rule itself does not implement any federal requirements. It merely introduces OAC Chapter 173-39 and defines terms used in the chapter.

For OAC173-39-02.1: 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 it adopted a rule on ADS and cited OAC173-39-02.6. Because CMS authorized a waiver that included ADS, as regulated by OAC173-39-02.1, the state is responsible for maintaining OAC173-39-02.1.

For OAC173-40-04: The rule does not implement a federal requirement. In 1986, the Ohio General Assembly, not the state, created the PASSPORT Program as a state-funded program. Today, the Ohio General Assembly has divided the program into 2 components: (1) Medicaid-funded component created under ORC§173.52 and (2) state-funded component created under ORC§173.522.

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

ODA is not exceeding 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 rules exist because the Ohio General Assembly and the U.S. Congress enacted laws authorizing ODA to adopt the rules.

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

ODA and its designees will monitor the providers for compliance with the rules. However, ODA's proposed amendments to the rule will not create new adverse impacts upon providers and require no additional monitoring from ODA or its designees.

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 August 23, 2016, Mobile Meals, Inc. (of Akron) asked ODA for clarification on OAC173-4-06 because the rule seemed to require providers to honor only diet orders for *meals* requiring thickening agents.

On November 3, 2016, ODA offered a 2-day opportunity to provide early input on the non-substantive amendments to OAC173-4-06 and to make other recommendations. ODA offered this to 2 providers (Wesley Community Services and Senior Resource Connection).

On November 3, 2016, ODA offered a 2-day opportunity to provide early input on the non-substantive amendments to OAC 173-39-01, 173-39-02.1, and 173-40-04, to indicate if the amendments were actually substantive, and to make other recommendations. ODA offered this to 4 provider associations (Ohio Health Care Association, Ohio Academy of Senior Health Sciences, Inc., Ohio Association of Senior Centers, and Ohio Council for Home Care and Hospice) and Ohio Association of Area Agencies on Aging.

For all rules: From November 4 to November 20, 2016 at 11:59PM, ODA published the BIA and proposed amendments to the rules on its website for an online public-comment period.

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

For OAC173-4-06: In response to the inquiry of Mobile Meals, Inc., ODA is proposing to amend the rule to clearly require providers to only honor diet orders for a dysphagia nutritive regimen “if the diet order *indicates whether the consumer requires thickening agents in his or her drinks, soups, etc.*” instead of “if the diet order requires *the meals to have* thickening agents.” This should prevent any possible misconception that diet orders must require every item in a meal to have a thickening agent.

On November 3, Senior Resource Connection indicated its support for the amendments to OAC173-4-06. At the time of printing, ODA received no input from other stakeholders. This may be due to the benign nature of the amendments ODA proposes for the rules.

For all rules: During the online public-comment period, zero persons commented upon the rules.

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 is not proposing to amend the rules 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 did not consider any alternative regulations.

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?

For OAC173-4-06: ORC§[173.01](#) designates ODA as "the sole state agency to administer funds granted by the federal government under the 'Older Americans Act of 1965,' 79 Stat. 219, 42 U.S.C. 3001, as amended." The Ohio General Assembly only designated rule-making authority for Older Americans Act programs to the sole state agency.

For OAC 173-39-01, 173-39-02.1 173-40-04: ORC§[173.391](#) only authorizes ODA (*i.e.*, not any other state agency) to develop requirements for ODA-certified providers of goods and services to individuals who are enrolled in ODA-administered programs. ORC§[173.522](#) only authorizes ODA (*i.e.*, not any other state agency) to develop requirements for the state-funded component 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.

For all rules: 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.

For OAC173-4-06: Through its regular monitoring activities under OAC[173-2-07](#), ODA will work with its designees, the AAAs, to ensure that the regulation is applied uniformly.

For OAC 173-39-01, 173-39-02.1 173-40-04: Through its regular monitoring activities, ODA and its designees, the PAAs, will monitor providers for compliance. OAC[173-39-02](#) requires all providers to allow ODA and its designees to monitor.

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;

For OAC173-4-06: ODA's March, 2015 poll of AAAs revealed very few nutrition providers provide very few diet-order-related meals paid with Older Americans Act funds. AAA5, for example, reported that no providers in PSA5 used Older Americans Act funds to pay for such meals.¹

For OAC 173-39-01, 173-39-02.1 173-40-04: Through its regular monitoring activities, ODA and its designees, the PAAs, will monitor providers for compliance. OAC[173-39-02](#) requires all providers to allow ODA and its designees to monitor.

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

For OAC173-4-06: The rule doesn't require providers to provide therapeutic diets, medical meals, or food for special dietary use. If a provider chooses to serve such meals and wants paid by Older Americans Act funds for those meals, the rule would apply. If a provider decides to provide such meals, the provider may only do so if it attains a diet order from a licensed healthcare professional whose scope of practice includes ordering meals with a therapeutic diet, medical meals, or meals for special dietary use. It is the responsibility of the licensed healthcare professional, not the provider, to order such diets, so the adverse impact

For OAC173-39-01: The rule has no adverse impact. It merely introduces OAC Chapter 173-39 and defines terms used in the chapter.

For OAC173-39-02.1: The PASSPORT Program's payment of Medicaid funds for ADS is an all-inclusive payment that includes all aspects of providing the goods and services, including employee training. Generally, a provider can obtain the training necessary from training websites. The rule does not restrict the provider from seeking all training online.

For OAC173-40-04: If a provider voluntarily decides to serve individuals enrolled in the state-funded component of the PASSPORT Program, ODA requires the provider to be certified according to OAC173-39-03. (*cf.*, ORC§§ 173.39, 173.391)

¹ Overall, meals with a therapeutic diet represent an insignificant percentage of the meals provided. For comparison, the number of meals with a therapeutic diet purchased by the PASSPORT Program represented only 2/3 of 1% of the total number of home-delivered meals provided to individuals enrolled in the program in 2015.

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.

For OAC173-4-06: The rule doesn't require providers to provide therapeutic diets, medical meals, or food for special dietary use. If a provider chooses to serve such meals and wants paid by Older Americans Act funds for those meals, the rule would apply. If a provider decides to provide such meals, the provider may only do so if it attains a diet order from a licensed healthcare professional whose scope of practice includes ordering meals with a therapeutic diet, medical meals, or meals for special dietary use. It is the responsibility of the licensed healthcare professional, not the provider, to order such diets, but the provider won't be paid with Older Americans Act funds for a diet-order-related meal until a licensed healthcare professional provides a diet order to the provider. ODA's proposed amendments to the rule create no additional adverse impacts.

For OAC173-39-01: The rule creates no adverse impact. ODA's proposed amendments to the rule also create no adverse impacts.

For OAC173-39-02.1: In the appendix to OAC[5160-1-06.1](#), the Ohio Department of Medicaid establishes the maximum-possible payments of Medicaid funds the PASSPORT Program would make for ADS. As previously stated, the PASSPORT Program's payment of Medicaid funds for ADS is an all-inclusive payment that includes all aspects of providing the goods and services, including training.

The training fees would vary because training organizations aren't required to use standard fees for the training classes that they offer. As previously stated, a provider can obtain the training necessary to furnish the choices home care attendant service from training websites. [CareStar](#) and [Collins Learning](#) and are examples of online vendors.

- CareStar's fees are typically \$7.00 per course, but the price drops to \$5.75 per course if the courses are purchased in bundles of 12.
- Collins Learning's fees for "personal care home administrator" classes are \$14.99 per class or \$99.00 per year for unlimited access to online training.

The courses from online vendors such as Collins Learning and CareStar may be used for initial training and continuing education. Again, the rule does not restrict the provider from seeking all training online.

ODA's proposed amendments to the rule creates no additional adverse impacts to providers. It merely corrects an unfortunate error in one paragraph and updates terminology in another paragraph.

For OAC173-40-04: The cost to become a certified provider is the cost of completing an application, meeting the requirements for every provider in OAC173-39-02, and the

requirements to provide any service regulated in OAC Chapter 173-39. There is no charge to apply. Practically, because individual's in the state-funded component of the program generally transition to the Medicaid-funded component of the program, and because the state-funded component generally enrolls individuals for up to 90 days, there is no incentive for a provider to become ODA certified, but to only serve individuals in the state-funded component. Thus, ODA-certified providers are more likely to rightly view their certification as enabling them to serve individuals regardless of whether they're on the state-funded or Medicaid-funded components of the program.

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

For OAC173-4-06: The version of the rule adopted on September 1, 2016 made providing diet-order-related meals easier for providers by eliminating preferential language for physician-ordered diets to (1) increase the pool of qualified, licensed professionals who could make diet orders, which in turn, made it easier for providers to attain diet orders, and (2) prevent individuals from needing to make office visits to their physicians to obtain diet orders, which would increase costs to individuals and their insurance plans, which may include Medicare and Medicaid. This adverse impact reduction remains in the rule as being presently amended. The amendments create no adverse impact.

For OAC173-39-01: The rule creates no adverse impact. The amendments to the rule create no adverse impact.

For OAC173-39-02.1: ODA is not making any burdens upon providers that the provider would not face in the normal course of duty. Thus, the regulatory burden of providing ADS, creating and retaining records related to ADS, and retaining records that document how the provider qualifies to provide ADS is reasonable compared to the health and safety of individuals who receive long-term care. It also seems reasonable to expect providers' employees to be adequately trained to provide minor home modification, maintenance, or repair. The low costs of training make doing so affordable. Additionally, ODA does not place any limits on the amount of training that a provider may take online.

For OAC173-40-04: Individuals may only be enrolled in the state-funded component of the PASSPORT Program for a maximum of 90 days. It's is a temporary assistance program offering home and community-based services to nursing-home-eligible individuals enrolled in the program. Both components of the PASSPORT Program are geared to allow the individuals to retain as much of their independence as possible and to avoid preventable admissions into nursing homes or other institutions. Therefore, it makes sense for ODA to not jeopardize individuals' health and safety by having separate sets of providers as they transition between the state-funded component and the Medicaid-funded component. Accordingly, ODA requires the providers serving individuals enrolled in the state-funded component to be ODA-certified, just like they are for the Medicaid-funded component. The result is the same pool of providers make continuity of care possible between the two components of the program.

If ODA didn't require ODA certification under ORC§173.391, which allows any willing and qualified provider to provide services, the providers operating in the state-funded component would be the winning bidders for contracts or grants under ORC§173.392. This would not result in an ability to offer continuity to the individuals enrolled in the program.

Regulatory Flexibility

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

The rules treat all providers the same, regardless of their size.

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?

ORC§[119.14](#) 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 offer different discriminate between responsible parties, applicants, or employees based upon the size of the business or organization. The majority of businesses that this rule regulates are small businesses according to ORC§119.14.

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 its designees are available to help providers with their questions.

Additionally, any person may contact [Tom Simmons](#), ODA's policy development manager, with questions about the rules.