CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: **Ohio Department of Mental Health and Addiction Services**

Regulation/Package Title: **Residential Facilities**

Rule Number(s): **OAC Chapters 5122-30, 5122-33, and 5122-35**

Date: **November 4, 2015, Revised March 03, 2016**

Rule Type:

X New **X 5-Year Review**

X Amended **X Rescinded**

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.

   The Department of Mental Health and Addiction Services (Department) has historically regulated residential facilities which were operated for persons with mental disabilities. The Department has also been given the regulatory authority of two other types of facilities, adult foster homes and adult care facilities, which were previously regulated by other agencies. Changes to the statutory language regarding residential facilities occurred in H.B. 59 of the

130th General Assembly, and the manner in which facilities were categorized has been changed. Until now there have been three separate O.A.C. chapters regulating residential facilities under the Department's authority. This rule package brings all rules regarding residential facilities under the Department's regulating authority up to date with current statutory authority and standardizes requirements across all facilities as much as possible. Going forward O.A.C. Chapter 5122-30 will be the chapter containing all residential facility rules. O.A.C. Chapters 5122-33 and 5122-35 are being rescinded in their entirety as part of this package.

The Department is also rescinding as part of this package rules 5122-31-01 and 5122-31-02. These rules are no longer appropriate or applicable to the residential facility and RSS systems. Rule 5122-31-01 sets forth the responsibilities of mental health boards and providers in working with passport agencies in placing RSS recipients in residential facilities. This rule no longer reflects how individuals enter the RSS program and chose facilities in which to live. Rule 5122-31-02 is no longer necessary, as it dates to a time when Adult Care Facilities were regulated by another agency's procedures for coordinating care needed to be set forth in rule. The material in this rule is now either no longer needed or covered elsewhere.

The key provisions of O.A.C. Chapter 5122-30 are as follows:

5122-30-01 and 5122-30-02 – have been updated to reflect the current R.C. 5119.34.

5122-30-03 – This rule is the definitions rule for the chapters, and has been updated to include the required definitions from Chapters 5122-33 and 5122-35. The definitions are also updated to be consistent with the changes to how facilities are defined in R.C. 5119.34, and include define the statutory categories of residential facilities as class one, two, or three facilities for regulatory purposes.

5122-30-04 – This rule is the combined licensure and application procedure for all residential facilities. The rule requires an application to indicate the category of facility and other pertinent information, provides an indication of the waiver process, and eliminates the requirements of the affiliation agreement. This rule also sets forth the license fees, a one hundred fifty dollar fee for class one facilities, and a seventy-five dollar fee for class two and three facilities.

5122-30-05 – This rule sets forth conditions under which the Department issues licenses. Under the consolidated rule structure class one facilities will be licensed for three years, and class two and three facilities shall be licensed for two years. A full license may be converted by the Department to a probationary license in order to give the facility an opportunity to correct deficiencies, after which the full license is restored. The rule also sets for the

conditions under which a license may be denied or revoked, including providing false or misleading information to the Department.

5122-30-06 – This rule applies to unlicensed facilities and is unchanged in substance from its current form. The rule amplifies the Department's statutory authority to investigate any facility that is believed to be operating as a residential facility but which does not have a license.

5122-30-07 – This is the waiver standards rule and remains unchanged in substance from the current rule.

5122-30-09 – This rule states that the Department shall set maximum resident and household capacity on the facility license. The rule has been rewritten to be simpler to read by eliminating a paragraph.

5122-30-10 – This rule states the fine scale as set forth by R.C. 5119.34 and is being updated to be consistent with the new statutory language.

5122-30-11 – This rule states the requirements for inspections required of facilities at initial licensure and at license renewal. New to the rule is a requirement that heating and cooling systems be inspected within twelve months prior to license renewal. Also new to the rule is clarification that a certificate of occupancy may exempt a facility from certain inspection requirements, reducing the number of inspections required for some facilities.

5122-30-12 – This rule sets forth safety requirement for residential facilities and has been updated in cooperation with the Office of the Ohio State Fire Marshal. Facilities shall be held to the requirements of the board of building standards and the state fire code. Fire extinguishers and smoke detectors are required to be tested and inspected in accordance with the state fire code. Other safety items regarding portable heaters and bathrooms have been updated.

5122-30-13 – This rule sets forth nutrition standards and reflects updates from all three prior residential facility rule chapters. Paragraph (D) sets forth requirements for food that shall be made available to residents outside of normal mealtimes, proper substitutes for milk, and the how home canned products should be utilized. Paragraph (G) requires a record of meals be kept for thirty days. Paragraphs (H) through (P) are set forth safety requirements regarding food storage and preparation, including the location of where meals are prepared.

5122-30-14 – This rule sets forth the standards for sleeping and living space. Paragraph (A) sets forth the bedroom requirements for the new facility categories. Bedrooms are to have enough room for wheelchairs and walkers, and are to be shared only with other residents. Paragraphs (J) and (K) are additions from Chapters 5122-33 and 5122-35, and require adequate living and dining space for residents.

5122-30-15 – This rule sets forth standards for housekeeping and maintenance of the facility. Pillows have been added to the items to be provided to residents, as well as clarifying that toilet paper shall always be available. Disposable dinnerware is now allowed in crisis stabilization units. The requirement that the facility be rodent and pest free is now enforced with a Department option to require professional treatment if necessary.

5122-30-16 – This rule is the incident notification and risk management rule for residential facilities. Incidents are required to be treated the same, regardless of the category of facility. Paragraphs (D) through (F) clarify the language regarding required reporting for children and the elderly. The form name for reporting to the Department has been removed; it is now an appendix to this rule.

5122-30-17 – This rule has been updated with current R.C. 5119.34 citations.

5122-30-18 – This rule has been updated to reflect the current terminology regarding telecommunication relay services.

5122-30-19 – This rule sets forth requirements for facility administration. The rule has been updated to include an executive director or a CEO. Paragraph (C) requires that the facility either own the residence or have a long term lease. Paragraphs (D) and (E) are provisions to protect residents from the utility fraud and the loss of utility service.

5122-30-20 – This rule sets forth the requirements for both the operator and staff of the facility, including minimum health and physical ability requirements. Staff shall have adequate training for the type of facility and it shall be renewed as set forth by rule.

5122-30-21 – This rule sets forth the staffing requirements for facilities. The rule prescribes the minimum amount of staff for each facility class, including time of day and type of resident provisions. This includes continuous staffing for class one and two facilities that have resident children.

5122-30-22 and 22.1 - These rules set forth the resident rights and the procedures for posting and responding to reports of violations of rights. The rules are divided between class one and class two and three facilities.

5122-30-23 – This rule sets forth the recordkeeping requirements for facilities. Required records include medical records, diagnoses, personal care service plans, and notations of provisions of services. The facility must also keep records regarding employees and required inspections and tests.

5122-30-24 – This rule sets forth the requirements for the resident agreement signed between each resident and the facility. The agreement sets forth the expected services that are to be provided to the resident and provides a record of expectations.

5122-30-25 – This rule sets forth the circumstances under which skilled nursing care may be provided at facilities.

5122-30-26 – This rule sets forth the provision of personal care services in class one and two facilities. Personal care services are enumerated and may be provided in accordance with the resident's needs and wishes. The facility shall provide the documented needed personal care services or transfer the resident to a facility that can provide the services.

5122-30-27 – This rule sets forth a resident's transfer and discharge rights. A resident may not be discharged from a facility without reason and without notice. Under certain circumstances the resident will have a right to appeal the discharge.

5122-30-28 – The rule sets forth the procedures under which class one facilities may assist with the self-administration of medication. Staff who have been trained in medication administration may assist by reminding or helping to applying or consume medication in limited circumstances. Medication must be kept in locked containers except during administration.

5122-30-29 – This rule sets for the provision of mental health services in class one facilities. These facilities provide mental health services as part of their function and must meet the requirements of this rule which includes a requirement that the facility be a Department certified service provider.

5122-30-30 – This rule sets forth the social and leisure activities requirements for facilities. Residential facilities are required to provide certain access to basic activities.

5122-30-31 – This rule sets forth the requirements for criminal records checks and exclusions from ownership, management, and employment of facilities.

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

   R.C. 5119.34

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.

   No.

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

   Not applicable.

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 Department is required by R.C. 5119.34 license residential facilities, and to establish rules that establish minimum standards for health, safety, adequacy, and cultural competency of treatment of and services for persons in residential facilities.

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

   The Department will inspect facilities as required by R.C. 5119.34 and monitor for compliance with the health and safety requirements of these rules. The rules are considered successful when residents are in a healthy and safe living environment.

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.

   Ohio Alliance for Recovery Providers – April, 2015

   The Ohio Council of Behavioral Health & Family Services Providers – April, 2015

   Ohio Adult Care Facilities Association – May, 2015

   The Department originally submitted this rule package for CSI review on November 4, 2015, and took public comments through November 25, 2015. The Department received comments from Disability Rights Ohio, The Ohio Council of Behavioral Health & Family Services Providers, and the Ohio Association of County Behavioral Health Authorities.

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

   Stakeholder input has generally been positive. At meetings with the stakeholder groups the need for education about changes in the rules was emphasized and as a result an active training program will be a part of the implementation of these rules. Additionally, the Department has kept the focus on simplifying the rule structure, reducing three disparate administrative code chapters that cover one statutory code section to one chapter with internal consistency. By making the residential rules as flat as possible all facilities will be able to identify which rules apply to their particular category quickly and easily.

After the initial comment period and the comments received by the Department, the opportunity was taken to revise the rules where appropriate to meet the concerns of stakeholders. While not meeting all concerns raised, the Department has carefully reviewed all comments received and attempted to strike a balance between all stakeholder concerns. The following rules have been modified:

5122-29-02

5122-29-03

5122-29-04

5122-29-05

5122-29-09

5122-29-10

5122-29-12

5122-29-14

5122-29-17

5122-29-18

5122-29-20

5122-29-21

5122-29-22

5122-29-22.1

5122-29-23

5122-29-26

5122-29-27

5122-29-28

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?**

   Not applicable.

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?**

The Department considered alternatives from among the three legacy regulatory schemes covering residential facilities. The best alternatives from the existing OhioMHAS rules, and the rules formerly adopted by the Department of Aging and the Department of Health were incorporated into the final version.

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.**

    Where appropriate, and health and safety are not compromised, performance based rules are used. The rules are written with a focus on outcome based language such as "adequate" and "appropriate," in order to allow providers to seek the most efficient way to provide facilities and services. Some rules are more prescriptive to address health and safety concerns, and are written to give the provider clear and accurate guidance on how certain procedures are to be conducted or services provided.

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

    The Chapter applies only to those facilities that are residential facilities as defined by R.C. 5119.34.

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.**

    Currently, the rules regarding these facilities are in three chapters and are no longer consistent with the statutory authority. As a result there is a lack of consistency and predictably. The Department will provide education materials to all currently licensed facilities and work with them in identifying deficiencies and developing plans of correction.

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;**
       Any residential facility as defined by R.C. 5119.34
    b. **Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**

Facilities will incur a licensing fee of either seventy-five or one hundred fifty dollars at each license renewal. The authority to levy fines exists in R.C. 5119.34, and is repeated in rule; however fines are rarely used as an enforcement tool.

Due to the way the types of facilities have been consolidated in statute, the rules have been revised to simplify the regulatory structure. At the same time, health and safety practices at all types of facilities have been reviewed and updated. While facilities will experience a lighter regulatory burden in some areas, some facility types will encounter new requirements. Where new regulatory requirements are being introduced, the health and safety of residents is the objective of the rule and the impact to the operator is taken into consideration.

Of particular note, rule 5122-30-12 does not contain new requirements for facilities formerly regulated under this Chapter, however ACFs and AFHs that have more than nine residents may need to upgrade to integrated smoke and fire alarm systems. Costs for such systems are based on the square feet, and range from $1-$2 per square foot to $3-$4 per square foot for more complex systems. Monthly monitoring fees tend to fall in the $50-$60 range, and typically include an annual inspection of the system.

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.

Based on current licensure totals, the Department expects to issue approximately 150 class one licenses, 788 class two licenses, and 5 class three licenses. The licensing fee structure is a $150 fee for class one licenses and a $75 fee for class two and three licenses.

The consolidation of the rules into one standard for all facilities will have an impact on some facilities. However, class one facilities are generally larger, more institutional settings that will be in compliance with the changes to Chapter 5122-30. The majority of licensed facilities are the ACFs currently regulated under Chapter 5122-33. Most changes to Chapter 5122-30 are items that are brought from the ACF rules and will not constitute a change for those facilities either.

The Department is taking this opportunity to integrate health and safety standards, such as regular inspections of building facilities and use of the Ohio building standards and fire code. Where possible these changes are tailored to fit the type of

facility, taking into account the physical health of the residents and the number of residents expected to live at the facility.

It is not practical to provide accurate numbers for every facility; as each will vary depending on their licensing category, current physical condition of the facility, and the nature of upgrades or repairs an operator chooses to take on to correct any deficiencies. The Department will be working with all operators to identify problem areas and develop practical solutions.

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

The Department is required by R.C. 5119.34 to adopt rules regarding the licensure of residential facilities for the protection of client's health and safety.

Regulatory Flexibility

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

No, the rules are intended to protect the health and safety of the clients and the size of the provider business is generally not a consideration in that area.

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?

Penalties with regards to this rule package are a denial, suspension, or revocation of licensure. The Department works with providers to insure that violations are presenting a risk to health and safety before moving forward with any disciplinary action.

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

The Department's Office of Licensure and Certification can provide assistance to any provider.