CSI - Ohio
The Common Sense Initiative

Business Impact Analysis

Agency Name: OHIO DEPARTMENT OF AGING

Package Title: ODA PROVIDER CERTIFICATION: ENHANCED COMMUNITY LIVING

Rule Number: 173-39-02.20

Date: February 27, 2017, *Revised June 5, 2017.*

Rule Types:
- ☑ **5-Year Review**
- ☐ **Rescinded**
- ☐ **New**
- ☑ **Amended**
- ☐ **No change**

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

OVERVIEW

OAC173-39-02.20 regulates providers when they provide enhanced community living (ECL) to individuals enrolled in the PASSPORT Program.

ODA has conducted a 5-year review of the rule. ODA's proposed amendments would add clarity to the rule and update its terminology, but not add any requirements for ODA-certified ECL providers.

SPECIFIC AMENDMENTS

ODA proposes to use the standardized language in (B)(1) which it uses in other more-recently-amended rules when referring to requirements for every ODA-certified provider in OAC173-39-02.

ODA proposes to move the limitation on ECL when other similar services are provided to be a part of the definition of ECL in (A).

ODA proposes to move a paragraph requiring providers to maintain the "capacity" (i.e., "adequate staffing levels") from one of the early subparagraphs of (B) to a sub-paragraph of (B)(4), the paragraph on staffing levels.

ODA proposes to delete a paragraph on not furnishing services in excess of what the case manager authorizes because this duplicates language in OAC173-39-02.

ODA proposes to delete a paragraph prohibiting providing the service if the provider is not listed in the service order because a similar requirement appears in OAC173-39-02.

ODA proposes to delete at least one requirement to retain records for monitoring because the requirement for this also appears in OAC173-39-02.

ODA proposes to delete requirements under (B)(5)(a) of the rule on which providers ODA would certify to provide ECL.ODA proposes to eliminate the requirements to be (1) a certified Medicare provider and (2) a certified Medicaid provider. This should make it easier for more providers to qualify to provide ECL. In (B)(5)(a)(ii), ODA proposes to require providers to be a *legal* entity (*vs.*, just an entity) distinct from the housing site owner and property manager so the site is not subject to ODH's nursing home licensure, ODH's RCF licensure, or ODMHAS' residential facility licensure. ODA also proposes to require safeguards to be in place to prevent any unremedied conflict of interest.

ODA proposes to add a helpful paragraph informing readers that the rate-setting methodology is regulated by OAC5160-31-07, not this rule. This paragraph is commonly found in rules regulating services in OAC Chapter 173-39.

ODA proposes to move the 3 definitions at the end of the rule to paragraphs under (A).

ODA also proposes to make basic terminology amendments, including the following:

- Adding *ODA provider certification* to the beginning of the rule's title.
- Deleting unnecessary uses of *that*.
- Replacing uses of *consumers* with *individuals*.
- Replacing *capacity* with *adequate staffing levels.*
- Replacing uses of *furnish* with *provide.*
- Replacing uses of *service plan* with *activity plan.*[1]

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

ORC§§ 173.01, 173.02, 173.391, 173.52, 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.

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 ECL and cited OAC173-39-02.20. Because CMS authorized a waiver that included ECL, as regulated by OAC173-39-02.20, the state is responsible for maintaining OAC173-39-02.20.

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 by retaining or amending the rule.

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 ODA listed in its response to BIA question #2, especially ORC§173.391.

[1] This rule regulates providers. Providers make *activity* plans. This rule doesn't regulate case managers. Case managers make person-centered services plans.

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.

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 September 8, 2016, ODA emailed the 4 providers for which it had email addresses to announce the review of the rule and to ask if the providers had suggestions for amending the rule.

From May 8 to May 21, 2017, ODA published the draft rule and this BIA 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?

ODA received zero responses from its September 8, 2016 email.

During the online public-comment period, ODA received comments from 2 providers.

COMMENTS	ODA'S RESPONSES
(B)(2)(g)(i)(*b*) [now (B)(5)(a)(ii)] We respectfully request that the original language of the newly-numbered provision OAC 173-39-02.20(B)(2)(g)(i)(b) be maintained, as follows: "An entity distinct from the housing site owner and property manager so that the site is not subject to licensure as defined in Chapters 3721. and 3722. of the Revised Code." We feel that this this language more specifically protects housing owners from licensure requirements, and more clearly permits organizations that have both affordable housing and PASSPORT businesses (albeit distinct and separate business entities) to provide the ECL service in that housing at the election of eligible waiver recipient residents. For example, the broad umbrella of the National Church Residences organization offers a myriad of services across the continuum of care to low income seniors, including affordable housing and home care services such as PASSPORT via distinct business entities and operational systems, and very much looks forward to the opportunity to offer ECL services to our eligible residents should they choose. Thank you in advance for your consideration of this request. Should you have any questions or concerns, please don't hesitate to contact me. Very truly yours, Megan C. Kelley, Esq. Director of Public Policy & Government Relations National Church Residences	All provider-owned and controlled HCBS settings are subject to the new federal requirements for provider-owned and controlled settings. (cf., OAC5160-44-01)

COMMENTS	ODA'S RESPONSES
(B)(2)(f) The Enhanced Community Living Service would better serve the consumers on the Passport waiver if they were also inclusive of smaller more rural areas including Medicare Certified agencies as well as the housing site needing to be served by the agency. The rule as it stands requiring 7 days a week with 6 hours a day minimum is only able to be achieved in large housing sites with a large amount of consumers being able to be enrolled on the waiver. While I agree that the Medicare Certified agency SHOULD be able to staff the minimum required hours/days, I don't feel that having enough consumers on the waiver to justify the hours should be a requirement. We have a housing site in which we have 5 consumers who wish to participate in the ECL, but the average weekly hours they receive is only 6 per individual currently through the Passport waiver. The way the rule is written, 7 days a week with a 6 hour minimum, we would need enough consumers/hours for 42 per week. 5 consumers receiving an average of 6 total hours per week would only be 30 hours per week, which is restricting them from having the ECL program in place. The rule would serve consumers better if there was a lower minimum requirement to participate in the ECL, while still being cost effective to the program. Thank you Teresa L. Doseck RN, HCS-D Owner New Vision Nursing and Home Care LLC	Adequate staffing levels are determined by the provider to assure that individuals in a multi-family housing site have access to care. The minimum requirement for providers is to maintain at least 1 staff member in the site (i.e., *maintain adequate staffing levels*) to cover individuals' scheduled and unscheduled needs for 6 hours per day.

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. Please review ODA's response to #3.

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?

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.

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. OAC173-39-02 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;

In 2015, ODA had certified 5 providers to provide ECL, but only 2 of the certified providers did so.

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

OAC173-39-02.20 requires providers to do the following:

1. Maintain adequate staffing levels 7 days per week, 6 hours per day.
2. Develop and adjust the person-centered service plan.
3. Be ~~Medicare certified, Medicaid certified, and~~ ODA-certified, but not a licensed facility (e.g., ~~such as~~ a licensed nursing home).
4. Meet staff and supervisor qualifications.
5. Provide orientation and continuing education to staff. Generally, a provider can obtain the training necessary from training websites. The rule does not restrict the provider from seeking all employee training online.
6. Verify the provision of services.
7. Retain records.

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 PASSPORT Program's payment of Medicaid funds for ECL is an all-inclusive payment covering all aspects of providing ECL, including employee training. In Appendix A to OAC5160-1-06.1, ODM establishes the maximum-possible payment of Medicaid funds the PASSPORT Program would make for ECL. In 2015, although ODA certified 5 providers, only 2 billed for providing ECL.

CALENDAR YEAR 2015			
# OF PROVIDERS ODA-CERT. ECL PROVIDERS BILLING	15-MINUTE UNITS BILLED	MAXIMUM-POSSIBLE PAYMENT PER UNIT	AVERAGE PROVIDER CHARGE PER UNIT
2	25,538	$5.06	$5.04

The fees for initial training and continuing education would vary because training organizations aren't required to use standard fees for their classes. A provider may obtain the training necessary to provide ILA activities online. 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 $17.99 per class or $47.99 for a full year of unlimited continuing education courses.

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. Thus, the regulatory burden of providing ECL, including employee training, is reasonable compared to the health and safety of

individuals who receive ECL. Additionally, ODA does not place any limits on the amount of training that employees may take online.

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 discriminate between providers based upon the size of their business or organization. Providers regulated by this rule are typically small businesses according to ORC§119.14. ODA (and its designees) are available to help providers of all sizes with their questions. Any person may contact Tom Simmons, ODA's policy development manager, with questions about the rule.

Additionally, ODA maintains an online rules library to help providers find rules regulating them. Providers may access the online library 24 hours per day, 365 days per year.