CSI - Ohio
The Common Sense Initiative

Business Impact Analysis

Agency Name:	OHIO DEPARTMENT OF AGING
Package Title:	LONG-TERM CARE CONSULTATION PROGRAM
Rule Numbers:	Chapter 173-43
Date:	November 14, 2017
Rule Types:	☑ **5-Year Review** Chapter 173-43 ☐ **Rescinded** ☐ **New** ☑ **Amended** Chapter 173-43 ☐ **No change**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

   ORC §173.42 requires ODA to adopt Chapter 173-43 to implement ODA's rules for the Long-Term Care Consultation Program. As stated in 173-43-01, "The program provides information to individuals and their representatives about options available to meet their long-term care needs and factors to consider when making long-term care decisions."

   Below, is an itemization of the chapter's rules:

   - 173-43-01 introduces the chapter and defines terms used in the chapter.
   - 173-43-02 regulates the process and general standards for providing long-term care consultations. It is the only rule in the chapter to directly regulate nursing facilities. It is subject to the Common-Sense Initiative (CSI).
   - 173-43-03 establishes a list of which persons whom the program shall offer a consultation and a list of persons exempt from any requirement to be offered a consultation. It does not regulate any Ohio business and is, therefore, not subject to CSI.
   - 173-43-04 establishes the time frames in which the program administrator—a designee of ODA—shall offer a consultation. It does not regulate any Ohio business and is, therefore, not subject to CSI.

- 173-43-05 establishes the requirements for a person to become certified to provide the consultations on behalf of ODA's designee, the program administrator. It does not regulate any Ohio business and is, therefore, not subject to CSI.

ODA believes it is wise to see the effects of the recently-launched Ohio Benefits Long-Term Services and Supports (OBLTSS) Program before proposing substantive amendments to this chapter. But, because ORC §106.03 requires ODA to review the chapter before each rule's review deadlines, ODA plans to proceed with a review now. After reviewing the chapter's rules top-to-bottom, ODA proposes to amend the rules with only non-substantive amendments. In a future round of rule development, ODA may use the flexibility afforded by HB49's amendments to propose substantive amendments.

Specific Amendments

ODA proposes to add "Long-term care consultation program:" to the beginning of each rule's title. This serves as a sort-of chapter title. It aids the public in finding one of the rules when googling for it because search engines may be better at searching for website content (*e.g.*, The name of the rule in a link) rather than the content on a .pdf document on the other end of the link. Additionally, it aids the public in identifying any one as belonging to the Long-Term Care Consultation Program when viewed apart from the entire chapter.

ODA proposes to delete the unnumbered introductory paragraphs in the rules. They are unnecessary—especially after ODA's amendments to the chapter titles.

Since January 1, 2013, Chapter 173-9 has been requiring responsible parties to review databases and checking criminal records on applicants for, and employees in, paid direct-care positions which offer long-term care consultations. Therefore, ODA proposes for 173-43-05(A)(5) to reflect that Chapter 173-9's requirements is upon responsible parties, not the persons applying for, or hoping to retain, their paid direct-care positions. Additionally, ODA proposes to add "or a database review" after "criminal record" to reflect Chapter 173-9's requirement to both review databases and checking criminal records.

ODA proposes to update the chapter's terminology and format to the following ODA standards:

- Consistently using the following terminology:
  - "Of this rule," not "of the rule" when a rule refers to itself.
  - "Shall," not "must" or "will." [1]
  - "Current, valid license," not "valid license."
  - "Provide," not "perform."
  - "Requirements," not "criteria."
- Deleting unnecessary occurrences of that.
- Deleting "but is not limited to" when occurring after "includes," because the extra words do not change the meaning of "includes."
- Replacing lists in the format of multi-paragraph run-on sentences with lists in the format of paragraphs separated by periods, not semicolons, and beginning with "...all the following," "one or more of the following," or similar words.

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

ORC §§ 173.01, 173.02, 173.42

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.

The rules do not implement federal requirements.

[1] *Rule Drafting Manual*, §§ 5.8.3, 5.8.5.

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)?

ORC §173.42(B) requires ODA to "develop" the program and §173.42(C) requires ODA to administer the program, but gives ODA the option to designate regional program administrators., which requires ODA to adopt rules. §173.42(L) requires ODA to adopt rules to implement the program described in §173.42.

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

ODA monitors its designees, the program administrators, for compliance.

Program administrators monitor staff certified to provide long-term care consultations.

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 October 18, 2017, ODA emailed the following stakeholders to inform them of an opportunity to review this rule and other rules then provide ODA with recommendations for improving this rule and other rules:

- 1 Provider: National Church Residences (NCR).
- 4 Provider Associations:
  - LeadingAge Ohio.
  - Ohio Academy of Senior Health Sciences, Inc.
  - Ohio Council for Home Care and Hospice.
  - Ohio Health Care Association.
- 1 Association Representing Many Program Administrators: Ohio Association of Area Agencies on Aging (O4A).
- 1 State Long-Term Care Ombudsman who advocates on behalf of nursing home residents and individuals receiving home and community-based services.

This is the content of the email:

> State law requires ODA to review every rule before its 5-year deadline. It's now time for ODA to review its rules on long-term care consultations. Since the rules were last amended, 2 events have happened:
>
> - The state launched the Ohio Benefits Long-Term Services and Supports (OBLTSS) Program.
> - HB49 amended the statutes creating the Long-Term Care Consultation Program, but none of the amendments require amending OAC Chapter 173-43. Instead, they give ODA flexibility to amend the rules of that chapter.
>
> At this time, ODA believes the current rules work and contain almost no dated references. It also seems wise to see how well OBLTSS works before determining how to amend ODA's rules. Therefore, ODA proposes to review the rules for basic language clean up, but not any substantive amendments.
>
> Does your organization agree? Do your organization recommend any substantive/non-substantive amendments to any rule in Chapter 173-43?

If possible, please let us know by the end of this week.

Thank you for your time.

"End of this week," would have been October 22, 2017.

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

In response to ODA's email invitations on October 18, 2017 to review, and comment upon this chapter's rules, and ODA received 2 comments from 2 stakeholders. ODA lists those comments, and ODA's responses, in the table below.

	COMMENTS	ODA'S RESPONSES
1	Thanks for the heads up as usual. I do think this is a more prudent approach. In these very first weeks of OBLTSS we have heard the new system makes it more difficult to offer LTC consultations. Waiting to see if the bugs get worked out makes sense. LTC consultations have been an important service for offering help that can result in reducing need for Medicaid LTC and just in improving people's lives during a LTC crisis. *O4A*	Thank you.
2	As always, thank you for reaching out. We agree with ODA's approach especially as it relates to evaluating OBLTSS prior to substantive rule changes. *LeadingAge Ohio*	Thank you.

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 did not review this chapter's rules according to 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. It is only proposing non-substantive amendments, which ODA believes will make the rules easier for the public to identify and which eliminate misunderstandings caused if rules aren't updated to use standard terminology and format.

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 §173.42 only authorizes ODA (*i.e.*, not any other state agency) to adopt rules to develop this 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.

Before the amended rule takes effect, ODA will post it on ODA's website. ODA will also send an email to subscribers of our rule-notification service to feature the rule.

Through its regular monitoring activities, ODA will monitor program administrators for compliance and program administrators will monitor staff who provide long-term care consultations.

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 of Ohio's nursing facilities. Presently, Ohio has almost 1,000 nursing facilities.[2]

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

Direct Impact: 173-43-02 is the only rule in the chapter to directly regulate nursing facilities. It requires nursing facilities to do the following:

- Only admit as a resident an individual who has been offered a consultation, as required by ORC §173.42(K).
- For individuals who have entered the nursing facility, but who have not yet been admitted as residents, the nursing facility shall determine if the individual is required to be offered a consultation, then, do either of the following:
  - Report information to the program administrator of residents who must be offered a consultation.
  - Keep records when determining a resident is exempt from the requirement to be offered a consultation.
- Allow consultants to enter the nursing facility to provide consultations, as required to do by ORC §173.42(M).

Indirect Impact: By nature, the consultations inform individuals of home and community-based options available to them. The consultations do not, in themselves, have any adverse impact upon nursing facilities. However, the decision of an informed individual on whether he or she wants to receive care in a home and community-based setting or an institutional setting would have a direct impact upon a nursing facility any time the individual chooses to receive home and community-based care instead of becoming a resident of the facility.

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 adverse impact consists of the administrative time necessary to report information to the program administrator about residents who must be offered consultations and keeping records to show those who are not required to be offered consultations.

[2] OHIO DEPT. OF AGING, *Long-Term Care Consumer Guide* (as viewed on this webpage, Mar. 24, 2017).

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

ORC §173.42 prohibits nursing facilities from admitting individuals as residents unless they have had a consultation and gives consultants authority to enter nursing facilities to offer such consultations. 173-43-02 requires nursing facilities to report basic information on residents to facilitate these matters. The basic information includes identifying individuals in the facility and whether each individual has received a consultation, must be offered a consultation, or are exempt from the requirement to be offered a consultation.

Regulatory Flexibility

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

The rules treat all nursing facilities the same, regardless of their size. ODA does not discriminate between nursing facilities based upon the size of their business or organization. Nursing facilities regulated by these rules are typically small businesses according to ORC §119.14.

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 complies with the requirement in §119.14 to exempt small businesses from penalties for first-time paperwork violations if the business timely corrects the violation, but not if the violation is ineligible for such an exemption according to §119.14(C).

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

ODA and its designees are available to help nursing facilities of all sizes with their questions. Any person may contact Tom Simmons, ODA's policy development manager, with questions about the rules.

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