

**MEMORANDUM**

**TO:** Tommi Potter, Ohio Department of Medicaid

**FROM:** Christopher Smyke, Regulatory Policy Advocate

**DATE:** August 8, 2018

**RE:** **CSI Review – Provider Screening and Application Fee (OAC 5160-1-17.8)**

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On behalf of Lt. Governor Mary Taylor, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) § 107.54, CSI has reviewed the abovementioned administrative rules and associated Business Impact Analysis (BIA). This memo represents CSI's comments to the Agency as provided for in ORC § 107.54.

**Analysis**

This rule package consists of one amended<sup>1</sup> rule submitted by the Ohio Department of Medicaid (ODM) for its statutorily-required five-year review. The rule was submitted on July 17, 2018 and the CSI public comment period closed on July 24, 2018 with two comments received. Medicaid issued a response to comments on July 25, 2018.

Ohio Administrative Code (OAC) 5160-1-17.8 sets forth screening requirements for potential Medicaid providers, based on level of risk. The rule also covers the provider application fee, including method of payment, exemptions, and the circumstances under which ODM may waive the fee. The new rule outlines disqualifying offenses and corresponding exclusionary periods from participating in Medicaid. The new rule is being proposed to replace an emergency filing.

Prior to filing with CSI, ODM posted a request for comments on its website and received comments from The Ohio Council of Behavioral Health and Family Service Providers (Ohio Council), the Medical Association Coalition, and the Ohio Counseling Association.

The Ohio Council suggested that ODM reduce the list of disqualifying offenses, requested

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<sup>1</sup> OAC 5160-1-17.8 is being amended to the extent that the Legislative Service Commission requires the Department to rescind the rule and replace it with a new rule of the same rule number.

clarifications to application and appendix language, and raised concern over potential conflict with OAC 5160-1-17.6(G)(2). All three stakeholders submitted comments expressing concern about a potential conflict between ODM's provider screening requirements and the authority of state professional licensing boards to regulate the practice of licensed individuals. The Medical Association Coalition made a comment related to OAC 5160-1-17.6(I)(1), which falls outside the scope of the current rulemaking. The BIA includes responses from ODM for all early stakeholder comments.

The BIA identifies the affected business community as any individual or organization who is either currently an Ohio Medicaid provider or applying to become a provider. The rule requires time to meet the screening requirements, as well as the monetary cost of submitting an application fee. The appendix to the rule lists which providers are subject to the fee. The fee for an organizational provider is \$569 and may be waived by ODM under certain circumstances. In addition, individuals with a 5 percent or greater control interest in a provider must submit to a Federal Bureau of Investigation and Ohio Bureau of Criminal Investigation background check within 30 days of the application submission; the \$60 per individual cost is assumed by the provider. If a provider is denied enrollment due to a failure to meet the screening requirements, they may request a hearing pursuant to Chapter 119 of the Revised Code. While a hearing would cost extra time to comply and furnish documentation, a hearing is held at no cost to the provider. The BIA justifies the proposed rule as necessary to protect the safety of Medicaid covered individuals, ensure the security of the Medicaid program and public funds, and to ensure compliance with federal regulations.

Two comments were received during the CSI public comment period. The Ohio Council reiterated its concerns regarding disqualifying offenses and professional boards. The National Association of Social Worker commented, echoing the Ohio Council's concerns that disallowing providers who have interacted with the criminal justice system is unnecessarily restrictive, indicating that professional licensing requirements are an adequate safeguard for public protection.

In its response to comments, ODM indicates that ORC 5164.34 establishes stringent requirements that would have prohibited providers with any criminal background. Recognizing that this policy is unnecessarily restrictive, the amended rule establishes a tiered approach to disqualifying offenses, with exclusionary periods commensurate with the severity of the offense. The amended rule allows individuals with an exclusionary offense to enroll as a provider if they receive a pardon or court-issued certificate of qualification for employment. In addition, ODM addresses the suggestion to exempt licensed professionals from screening requirements, asserting that while state licensing boards are charged with protecting public safety by regulating the practice of a profession, ODM is tasked with ensuring public funds are protected from potential fraud, waste, or abuse.

CSI staff followed up with ODM to seek additional clarification about provider disqualifying

offenses and screening requirements for providers who hold professional licenses. ODM indicated that the list of disqualifying offenses was developed in a joint effort among multiple state agencies to provide a consistent standard for all state agencies that administer Medicaid programs. ODM asserted that licensing boards vary in their individual processes to award licenses in light of previous convictions and that ODM recognizes a wide range of providers, so it needs a consistent standard to screen providers who hold a state-issued professional license.

The CSI office recognizes that state licensing boards screen and regulate applicants based on the full scope of practicing a given profession, while ODM screens strictly for participation in Medicaid programs to protect public funds from fraud, waste, and abuse. The Ohio Council has argued that the full weight of ODM's provider screening requirements have a needlessly adverse impact in the context of behavioral health, as licensed individuals who have shared life experiences with Medicaid recipients are a critical part of the provider workforce. These experiences often include interaction with the criminal justice system, which can preclude them from enrolling as providers. The CSI Office has determined that the Medicaid screening requirements unnecessarily exclude some behavioral health professionals from providing services. These professionals are uniquely qualified to provide peer supports to behavioral health patients in Ohio and, if licensed by a state board, have already been established as capable providers.

### **Recommendations**

For the reasons discussed above, and recognizing the unique challenges in the behavioral health field, the CSI Office recommends that ODM pursue an exemption for licensed behavioral health professionals to be able to enroll as providers.

### **Conclusion**

Based on the above comments, the CSI Office concludes that the Ohio Department of Medicaid should not proceed with the formal filing of this rule package with the Joint Committee on Agency Rule Review until it pursues an exemption for licensed professionals as described above.

Cc: Emily Kaylor, Lt. Governor's Office