

## The Common Sense Initiative

## Business Impact Analysis

**Agency Name:** OHIO DEPARTMENT OF AGING**Package Title:** ONE SET OF STANDARDS FOR SIX SERVICES**Rule Numbers:** 173-39-02.6 (PERS), 173-39-02.9 (home modification),  
173-39-02.14 (home-delivered meals), 173-39-02.22 (waiver nursing),  
173-39-02.23 (out-of-home respite), 173-39-02.24 (home care attendant)**Date:** September 11, 2018**Rule Types:**  
☒ **5-Year Review** All of the above  
☒ **Rescinded** All of the above  
☒ **New** All of the above  
☐ **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**

The Ohio Department of Medicaid (ODM) proposes to incrementally adopt one chapter of rules (OAC Chapter 5160-44) that will become the single set of service standards for providers serving individuals through all Medicaid waiver programs operated by the Ohio Department of Aging (ODA) and ODM. This is part of ODM's larger strategy to develop a uniform set of rules to benefit providers who serve individuals enrolled in multiple Medicaid waiver programs.

One set of service standards already exist for three services. In 2014, ODM began to make available to any individual enrolled in either the Preadmission Screening System Providing Options and Resources Today (PASSPORT) Program or the Ohio Home Care Waiver any services available to enrollees of the other program. For the PASSPORT Program, this meant a new ability to authorize three services: waiver nursing, out-of-home respite, and home care attendant services. Instead of adopting new rules to establish the certification requirements for those providers, ODA adopted 173-39-02.22, 173-39-02.23, and 173-39-02.24 to require providers to meet the standards for those three services in 5160-46-04.

ODM proposes to adopt one set of service standards for three more services (5160-44-16 for personal emergency response systems, 5160-44-13 for home modification, and 5160-44-11 for home-delivered meals).

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### RULE-BY-RULE

#### 173-39-02.6

The current rule, which ODA proposes to rescind, requires ODA-certified providers of personal emergency response systems (PERS) to comply with the following:

- The requirements in 173-39-02 for every certified provider (*e.g.*, conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing PERS (*e.g.*, service verification).

ODA's proposed new rule requires ODA-certified providers of PERS to comply with the following:

- The requirements in 173-39-02 for every certified provider (*e.g.*, conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing PERS in ODM's proposed new 5160-44-16 (*e.g.*, service verification). For more information on ODM's proposed new rule, please review ODM's rule and its BIA.

#### 173-39-02.9

The current rule, which ODA proposes to rescind, requires ODA-certified providers of minor home maintenance, modification, and repair to comply with the following:

- The requirements in 173-39-02 for every certified provider (*e.g.*, conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing minor home maintenance, modification, and repair (*e.g.*, service verification).

ODA's proposed new rule requires ODA-certified providers of minor home maintenance, modification and repair to comply with the following:

- The requirements in 173-39-02 for every certified provider (*e.g.*, conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing home maintenance and repair (*e.g.*, service verification).
- Specific requirements for providing home modification in ODM's proposed new 5160-44-13 (*e.g.*, service verification). For more information on ODM's proposed new rule, please review ODM's rule and its BIA.

#### 173-39-02.14

The current rule, which ODA proposes to rescind, requires ODA-certified providers of home-delivered meals to comply with the following:

- The requirements in 173-39-02 for every certified provider (*e.g.*, conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing home-delivered meals (*e.g.*, service verification).

ODA's proposed new rule requires ODA-certified providers of home-delivered meals to comply with the following:

- The requirements in 173-39-02 for every certified provider (*e.g.*, conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing home-delivered meals in ODM's proposed new 5160-44-16 (*e.g.*, service verification). For more information on ODM's proposed new rule, please review ODM's rule and its BIA.

#### 173-39-02.22

The current rule, which ODA proposes to rescind, requires ODA-certified providers of waiver nursing to comply with the following:

- The requirements in 173-39-02 for every certified provider (*e.g.*, conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing waiver nursing in ODM's current rule 5160-46-04.

ODA's proposed new rule requires ODA-certified providers of waiver nursing to comply with the following:

- The requirements in 173-39-02 for every certified provider (*e.g.*, conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing waiver nursing in ODM's proposed new 5160-44-22 (*e.g.*, service verification). For more information on ODM's proposed new rule, please review ODM's rule and its BIA.

### 173-39-02.23

The current rule, which ODA proposes to rescind, requires ODA-certified providers of out-of-home respite to comply with the following:

- The requirements in 173-39-02 for every certified provider (e.g., conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing out-of-home respite in ODM's current rule 5160-46-04.

ODA's proposed new rule requires ODA-certified providers of out-of-home respite to comply with the following:

- The requirements in 173-39-02 for every certified provider (e.g., conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing out-of-home respite in ODM's proposed new 5160-44-17 (e.g., service verification). For more information on ODM's proposed new rule, please review ODM's rule and its BIA.

### 173-39-02.24

The current rule, which ODA proposes to rescind, requires ODA-certified providers of home care attendant service to comply with the following:

- The requirements in 173-39-02 for every certified provider (e.g., conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing home care attendant service in ODM's current rule 5160-46-04.1.

ODA's proposed new rule requires ODA-certified providers of home care attendant service to comply with the following:

- The requirements in 173-39-02 for every certified provider (e.g., conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Specific requirements for providing home care attendant service in ODM's proposed new 5160-44-27 (e.g., service verification). For more information on ODM's proposed new rule, please review ODM's rule and its BIA.

## 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 order for the Centers for Medicare and Medicaid Services (CMS) to approve Ohio's application for a Medicaid waiver authorizing the State to launch and maintain the PASSPORT Program, 42 CFR 441.352 requires ODA to assure CMS in the waiver application that ODA established adequate requirements for providers (i.e., adopted these rules) and that ODA monitors the providers to assure they comply with those requirements (i.e., comply with these rules).

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

The rules exist to comply with the state laws mentioned in ODA's response to #2, which establish the requirements for ODA-certified providers.

## 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)?

These regulations ensure necessary safeguards are in place to protect the health and safety of individuals receiving services from ODA-certified providers.

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

ODA and its designees monitor providers to ensure compliance for the continued health and safety of individuals receiving services from ODA-certified providers. The rules are judged as being successful when ODA and its designees find few violations from structural reviews or investigations of alleged incidents.

**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.*

Since May of 2013, ODM has been convening its HCBS Rules Workgroup to solicit stakeholder input on ODM's rules. For 15 such meetings, ODA joined ODM in soliciting input from providers and provider associations on this rule project, including the following stakeholders:

Providers	Associations Representing Providers	Other Organizations
1. Home Care by Black Stone 2. Senior Resource Connection 3. Simply-EZ Home-Delivered Meals 4. Valued Relationships, Inc.	1. LeadingAge Ohio 2. Ohio Academy of Senior Health Sciences, Inc. 3. Ohio Assisted Living Assn. 4. Ohio Assn. of Senior Centers 5. Ohio Council for Home Care and Hospice 6. Ohio Health Care Assn.	1. Ohio Assn. of Area Agencies on Aging 2. Public Consulting Group 3. State Long-Term Care Ombudsman

In 2017, these meetings were held on Jan. 25; Feb. 22; May 10; June 7, 21; Aug. 8; and Oct. 25. In 2018, these meetings were held on Jan. 24; Feb. 9; Apr. 12; May 10; June 15; July 12; and Aug. 2, 9.

ODM hosted these meetings in the Lazarus Building and allowed participation via conference call.

For more information, please review ODM's BIA(s) for rules 5160-44-11, 5160-44-13, 5160-44-16, 5160-44-17, 5160-44-22, and 5160-44-27.

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

Stakeholders were favorable towards the strategy for developing one set of service standards.

For stakeholder input on ODM's proposed new rules, please review ODM's BIA(s) for rules 5160-44-11, 5160-44-13, 5160-44-16, 5160-44-17, 5160-44-22, and 5160-44-27.

**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 obtained data on the volume of providers and the amounts providers charge the PASSPORT Program from its databases. Find them in ODA's response to #14 of this BIA.

**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 is statutorily tasked with developing rules establishing the requirements for ODA-certified providers. Additionally, these rules meet the federal requirement to establish adequate requirements for providers to assure the health and safety of individuals enrolled in ODA-administered waiver programs.

**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 these rules.

**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 to develop requirements for ODA-certified providers of services to individuals 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 proposed new rules take effect, ODA will post them 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 and its designees will monitor providers for compliance.

**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;**

As indicated in the table below, so far this year, the following number of providers are certified and operating in the PASSPORT Program.

2018 YEAR TO DATE	
SERVICE	# OF CERTIFIED PROVIDERS
Personal Emergency Response Systems	56
Home Modification	118
Home-Delivered Meals	94
Waiver Nursing	166
Out-of-Home Respite	0
Home Care Attendant Service	0

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

The adverse impact of ODA's proposed new rules is the requirement to comply with other rules. These rules will require ODA-certified providers to comply with the following:

- 173-39-02, which requires every ODA-certified provider to meet certain requirements (e.g., conducting background checks and complying with state and federal laws and regulations governing individuals' confidentiality).
- Requirements for providing the specific service in ODM's proposed new rules (e.g., service verification). For more information on ODM's proposed new rules, please review ODM's BIA(s) for rules 5160-44-11, 5160-44-13, 5160-44-16, 5160-44-17, 5160-44-22, and 5160-44-27.

**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 amount ODA pays providers for services is an all-inclusive rate. It's intended to cover the daily costs incurred in service provision plus costs related to the employees, such as orientation and training. The costs incurred as a result of these rules are likely calculated as part of a provider's operational budgets - the cost of doing business and clerical jobs, such as retaining records and updating policies and procedures.

Providers set the prices they bill to the PASSPORT Program, so long as those prices do not exceed the maximum allowed per unit. In the appendix to OAC [5160-1-06.1](#), for PERS, home modification, or home-delivered meals; [5160-46-06](#) for waiver nursing and out-of-home respite, and [5160-46-06.1](#) for home care attendant services, ODM establishes the maximum-possible payment of Medicaid funds for each service offered in the PASSPORT Program. The table below compares the average price billed to the program to the maximum allowed.

2018 YEAR TO DATE				
SERVICE	UNIT DURATION	UNITS PAID	AVERAGE BILLED PER UNIT	MAXIMUM ODM ALLOWS PER UNIT
Personal Emergency Response Systems	1 Installation	565	\$28.60	\$31.78
Personal Emergency Response Systems	1 month	16,429	\$27.69	\$31.78
Home Modification	1 job	1,060	\$1,232.05	\$7,837.40
Home-Delivered Meals regular	1 meal	1,971,393	\$6.08	\$6.60
Home-Delivered Meals therapeutic	1 meal	10,136	\$8.63	\$9.33
Home-Delivered Meals kosher	1 meal	23,028	\$8.79	\$9.33
Waiver Nursing	ODM establishes rates according to formulas in 5160-46-06			
Out-of-Home Respite	ODM establishes rates according to formulas in 5160-46-06			
HCAS	ODM establishes rates according to formulas in 5160-46-06.1			

Because providers on average bill less than the maximum-possible rate, the adverse impacts of the current rules are being covered by the amount providers are currently being paid by the PASSPORT Program.

ODM is proposing to establish new rates for the services in 5160-1-06.1 which takes into consideration the providers' certification requirements and cost of doing business. For more information on ODM's proposed new rules, please review ODM's BIA(s) for rules 5160-1-06.1, 5160-44-11, 5160-44-13, 5160-44-16, 5160-44-17, 5160-44-22, and 5160-44-27.

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

ODA is required to develop rules establishing requirements for ODA-certified providers and to ensure the health and safety of individuals enrolled in ODA-administered waiver programs.

Providers voluntarily apply for ODA certification. Certification is not required to engage in providing a service unless a provider wants paid for providing that service by a program, such as the PASSPORT Program, for which ORC § 173.391 requires providers to be certified. Therefore, compliance with these regulations is only required if a provider voluntarily chooses to participate in an ODA-administered waiver program.

**Regulatory Flexibility**

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

Because the primary purpose of these rules is to ensure the health and safety of individuals enrolled in ODA-administered waiver programs, 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?**

ODA is concerned primarily about protecting the health and safety of individuals receiving services from ODA-certified providers through compliance with these rules. Whenever possible, ODA or its designees will treat administrative violations that do not involve health and safety as opportunities for improvement through warning notices and solicitation of corrective action.

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

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 rules.

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.