

## The Common Sense Initiative

## Business Impact Analysis

**Agency Name:** OHIO DEPARTMENT OF AGING**Package Title:** ODA PROVIDER CERTIFICATION  
DISCIPLINARY ACTIONS**Rule Numbers:** 173-39-05, 173-39-05.1, 173-39-06, 173-39-07, 173-39-08**Date:** October 19, 2018**Rule Types:**  
☒ **5-Year Review** 173-39-05, 173-39-05.1, 173-39-06, 173-39-07, 173-39-08  
☒ **Rescinded** 173-39-05, 173-39-05.1, 173-39-06, 173-39-07, 173-39-08  
☒ **New** 173-39-05  
☐ **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**

ORC § 173.391 requires ODA to adopt rules for determining which type of disciplinary action ODA may impose against ODA-certified providers. To meet this requirement, ODA adopted 173-39-05. ODA proposes to rescind this rule and adopt a new rule in its place.

ODA proposes to rescind rule 173-39-05.1 because ORC § 173.391(E) more fully covers its content. ODA also proposes to rescind rules 173-39-06, 173-39-07, and 173-39-08 because ORC Chapter 119 already establishes the requirements covered by those rules.

**173-39-05: CURRENT RULE VS. PROPOSED NEW RULE**

ODA proposes to adopt a new rule that more closely follows the requirements in ORC §173.391. Rather than divide disciplinary actions into levels, ODA's proposed new rule divides disciplinary actions into (1) actions ODA's designees may impose and (2) actions ODA may impose.

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

ORC §§ [173.01](#), [173.02](#), [173.391](#), [173.52](#), [173.522](#), [173.54](#), and [173.543](#).

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- 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 has 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)?**

[173-39-05](#)

This rule protects the health and safety of individuals receiving services from ODA-certified providers by establishing disciplinary actions that may be imposed against an ODA-certified provider for non-compliance.

[173-39-05.1](#), [173-39-06](#), [173-39-07](#), [173-39-08](#)

N/A: ODA proposes to rescind these rules as the processes described herein are established in ORC Chapter 119.

- 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.*

On Sept. 22, 2017, ODA sent an email to the stakeholders in the table below requesting feedback on ODA's proposals and additional recommendations for improving the rules.

PROVIDERS	PROVIDER ASSOCIATIONS	OTHER ASSOCIATIONS
1. Alzheimer's and Dementia Care Services 2. Home Care by Black Stone 3. National Church Residences (NCR). 4. Senior Resource Connection	5. LeadingAge Ohio 6. Ohio Assisted Living Assn. (OALA). 7. Ohio Assn. of Medical Equipment Services (OAMES). 8. Ohio Health Care Assn. (OHCA) 9. Ohio Council for Home Care and Hospice (OCHCH). 10. Ohio Jewish Communities (OJC).	11. Catholic Social Services of the Miami Valley (a PAA not represented by O4A) 12. The Ohio Association of Area Agencies on Aging (O4A).

**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 Sept. 27, 2017 email, ODA received 3 comments from 3 stakeholders.

- ODA received a request to include in 173-39-05 a provider's failure to submit evidence of compliance as a reason for further disciplinary actions. Both the current rule and the proposed new rule authorize ODA's designee to suspend referring individuals to the provider until the provider submits evidence of compliance to ODA's designee.
- ODA received a request to authorize ODA's designees in 173-39-05 to remove individuals from receiving services from a non-compliant provider. Both the current rule and the proposed new rule only authorizes ODA to remove individuals from a provider.
- ODA received a request to amend 173-39-08 to require the same appeals and adjudication procedures as the Certificate of Need Program. Per statute, ODA is required to comply with ORC Chapter 119 for notices and adjudication hearings.

**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 this rule based upon 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.

**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.***

Because 173-39-05 is a rule on disciplinary actions, it is inherently performance-based. Providers who remain compliant incur no disciplinary actions, while non-compliant providers do.

**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 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.

ODA also hosts webinars and in-person meetings with its designees to train them on implementing new rules.

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;**

Non-compliant ODA-certified providers. Compliant providers incur no adverse impact under these rules.

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

**173-39-05**

Non-compliant ODA-certified providers incur the adverse impact of developing and implementing a plan of correction or producing evidence of compliance to remedy an area of non-compliance.

Non-compliant providers who do not effectively correct an area of non-compliance incur further disciplinary actions, which if not corrected, ultimately end with the revocation of the provider's certification.

**173-39-05.1, 173-39-06, 173-39-07, 173-39-08**

N/A: ODA proposes to rescind these rules as the processes described herein are established in ORC Chapter 119.

**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.*

**173-39-05**

The quantification of an adverse impact under 173-39-05 depends upon the area of non-compliance to be corrected. For example, if staff members in direct-care positions have not undergone background checks, the provider incurs the cost of obtaining background checks (which are required under ORC § 173.38).

**173-39-05.1, 173-39-06, 173-39-07, 173-39-08**

N/A: ODA proposes to rescind these rules as the processes described herein are established in ORC Chapter 119.

**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. 173-39-05 protects the health and safety of individuals receiving services from ODA-certified providers by establishing disciplinary actions that may be imposed against an ODA-certified provider for non-compliance.

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.