MEMORANDUM

TO: Tom Simmons, Policy Development Manager, Ohio Department of Aging

FROM: Danielle Dillard, Regulatory Policy Advocate

DATE: November 27, 2018

RE: **CSI Review – Provider Certification Disciplinary Actions (OAC 173-39-05, 173-39-05.1, 173-39-06, 173-39-07, 173-39-08)**

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) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

Analysis

This rule package consists of one amended rule and four rescinded rules submitted by the Ohio Department of Aging (Department) as part of the statutorily required five-year review. The rule package was submitted to the CSI Office on October 19, 2018, and the comment period remained open until October 28, 2018. Seven comments were received during this time, and responses to those comments were received on November 8, 2018.

Ohio Administrative Code (OAC) 173-39-05.1, 173-39-06, 173-39-07, and 173-39-08 are being rescinded because the requirements covered by these rules are established in other existing provisions. OAC 173-39-05 is being amended to better reflect the requirements in the authorizing statute. Rather than divide disciplinary actions into levels, the amended rule will divide disciplinary actions into actions that the Department may impose, and actions that a Department designee may impose.

As part of early stakeholder outreach, the Department notified twelve entities representing providers, provider associations, and other associations related to aging. It received three comments from stakeholders, requesting that the Department include failure to submit evidence of compliance as a reason for disciplinary action; authorize designees to remove individuals from

receiving services from noncompliant providers; and, amend OAC 173-39-08 to require the same appeals and adjudication procedures as the Certificate of Need Program. The Department noted that rules already allow authorized designees to suspend individuals for failure to submit evidence. With regard to removing individuals from providers, the Department stated that it has no plans to authorize designees to take that kind of action. Finally, the Department noted that it is required to comply with ORC Chapter 119 for notices and adjudication hearings, and cannot amend OAC 173-39-08 to reflect stakeholder requests. The rule package as submitted to CSI reflects all stakeholder input from early outreach.

Seven comments were received during the CSI public comment period. Several issues were addressed, including a number of clarification questions on topics like whether designees must use certified mail, why disciplinary actions are no longer categorized by level, which disciplinary actions offer providers a right to appeal, and the differences between the rule and forms the Department uses for structural compliance reviews. The Department answered all clarification questions, and responded to a few suggestions. Only two of the comments resulted in revisions to the rules.

One commenter requested that the rules use only calendar days instead of business days. The Department revised the rules to use calendar days, and extended deadlines accordingly; deadlines that were previously five business days were extended to seven calendar days. Commenters also requested that the Department align the deadlines for responding with evidence of compliance, regardless of whether the activity resulting in noncompliance was injurious or not. The Department declined to make this change, noting that the deadlines correspond to urgency rather than difficulty. Providers have a shorter deadline to show evidence of compliance if an injury or threat to the health or safety of individuals is involved, and a longer deadline if no injury or threat is involved. Lastly, the Department revised the rules to clarify that its designees shall not impose subsequent disciplinary action against a provider related to the same conduct as a pending disciplinary action. This was in response to multiple requests to clarify designee abilities within the rules.

The rules impact certified providers who are not in compliance with the rules. The Department may require these providers to develop and implement a plan of correction, or provide evidence of compliance to remedy an area of noncompliance. Providers who do not effectively correct areas of noncompliance are subject to further disciplinary action that may ultimately result in revocation of the provider's certification. Monetary costs of compliance will vary based on the offense committed. For example, if staff members in direct-care positions have not undergone background checks, then the provider will incur the cost of obtaining background checks for those staff members. The Department justifies any adverse impact by noting that the rules are necessary to ensure the health and safety of individuals receiving services from Department-certified providers.

Recommendations

For the reasons discussed above, the CSI Office does not have any recommendations for this rule package.

Conclusion

Based on the above comments, the CSI Office concludes that the Ohio Department of Aging should proceed with the formal filing of this rule package with the Joint Committee on Agency Rule Review.