Ohio | Common Sense Initiative

Mike DeWine, Governor
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Business Impact Analysis

Agency, Board, or Commission Name: __Ohio Department of Medicaid_____

Rule Contact Name and Contact Information:

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Regulation/Package Title (a general description of the rules' substantive content):

__Behavioral Health Services_____

Rule Number(s): __5160-8-05, 5160-27-01, 5160-27-03, 5160-27-04, 5160-27-08

Date of Submission for CSI Review: 8/20/2019

Public Comment Period End Date: 8/27/2019

Rule Type/Number of Rules:

- ☐ **New/___ rules**
- **XAmended/__5__ rules (FYR? No)**
- ☐ **No Change/____ rules (FYR? ___)**
- ☐ **Rescinded/____ rules (FYR? ___)**

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing

regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Reason for Submission

1. **R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

   Which adverse impact(s) to businesses has the agency determined the rule(s) create?

   The rule(s):

   a. ☒ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**

   b. ☐ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**

   c. ☒ **Requires specific expenditures or the report of information as a condition of compliance.**

   d. ☒ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

Regulatory Intent

2. **Please briefly describe the draft regulation in plain language.**
   Please include the key provisions of the regulation as well as any proposed amendments.

Rule 5160-8-05 entitled "Behavioral health services-other licensed professionals" sets forth general Medicaid policy regarding the provision of behavioral health services by specified providers. The rule states related definitions, provider requirements, and services the providers may render. Reimbursement policy is stated as well as provider billing limitations and service provision documentation requirements. The proposed revisions include an updated policy related to behavioral health services performed in an inpatient or outpatient hospital setting and clarify reimbursement provisions.

Rule 5160-27-01 entitled "Eligible provider for behavioral health services" sets forth the requirements for behavioral health services provided by community mental health and substance use disorder treatment providers. The proposed revision provides for a registered nurse to perform a nursing regimen, in accordance with Section 4723.01 of the Ohio Revised Code, without an order.

Rule 5160-27-03 entitled "Reimbursement for community behavioral health services" sets forth the general reimbursement policy for behavioral health services provided by community mental health and substance use disorder treatment providers. The proposed revisions increase the reimbursement rate to one hundred per cent of the Medicaid maximum for evaluation and management and psychiatric diagnostic evaluation services when rendered by Certified Nurse Practitioners, Certified Nurse Specialists, or Physician Assistants. It also increases the reimbursement rate for crisis services for mental health (MH) and substance use disorders (SUD) as well as for group psychotherapy and group therapeutic behavioral services (TBS) for MH and group counseling for SUD. Smoking cessation counseling as well as allowed place of service codes are being added. New language states the third party payment policy for behavioral health providers. Finally, another proposed revision removes existing language regarding health homes as the service is no longer in effect.

Rule 5160-27-04 entitled "Mental health assertive community treatment service" states activities that constitute the service as well as eligibility requirements to receive the service. Provider requirements are stated as well as provider billing policy and prior authorization requirements. New language refines the face-to-face requirement for provider and Medicaid recipient interactions and additional new language clarifies who may serve on a treatment team for the service as well as who is eligible to receive the service.

Rule 5160-27-08 entitled "Mental health therapeutic behavioral services and psychosocial rehabilitation" states activities that constitute both of these services. Limitations on the provision of both services are stated as well as service provision documentation requirements. The proposed revision permits licensed mental health practitioners to render the therapeutic behavioral service.

3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.

Ohio Revised Code sections 5162.02, 5162.05, 5164.02

4. **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.

   Yes. These rules contribute to Ohio Medicaid being able to meet federal requirements including the National Correct Coding Initiative, program integrity requirements of the Affordable Care Act, third party liability requirements, and the Mental Health Parity and Addiction Equity Act.

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

   The regulations outlined in these five rules implement federal requirements as they apply to the provision of behavioral health services in Ohio but do not exceed the provisions allowed under federal law.

6. **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 rules serve to make Ohio compliant with applicable federal requirements, improve access to behavioral health services, and stabilize the behavioral health care system in Ohio. The amendments to the five rules are in response to stakeholders' comments and ODM policy decisions, which require codification in Ohio Administrative Code rules.

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

   The major information sources for reviewing outcome measures will be Medicaid claims and reports from key stakeholders. Some examples of outcome measures include:

   - Changes in Medicaid spending for mental health and substance use disorder treatment services
   - Changes in consumer utilization of mental health and substance use disorder treatment services
   - Changes in the provider network and any impact on consumer access to care
   - Comparison of Medicaid behavioral health spending to predicted budget models.
   - Improved health outcomes of Medicaid consumers receiving behavioral health services

8. **Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**
   If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.
   No

Development of the Regulation

9. **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.

   The proposed rules were posted on the ODM website on July 31, 2019 where comments could be made. Stakeholders were also made aware of the proposed rules via the automatic notification system used to inform those who have registered of ODM actions. The only comment received was from Teresa Lampl with The Ohio Council of Behavioral Health & Family Services Providers.

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

    The Ohio Council mentioned the collaborative work that occurred between stakeholders and ODM to create the proposed rules. The Ohio Council fully supports the proposed changes to the rules.
    Based on these comments ODM is proceeding with the proposed changes to the rules.

11. **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?**

    Ohio Medicaid claims data were the main source of information used to guide the policy and budget models that undergird the rules. This data was used to determine the fiscal impact on ODM.

12. **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?**

    Alternative regulations were not applicable. ODM codifies regulations for the provision of behavioral health services through the use of rules in the Ohio Administrative Code. The

proposed amendments to these rules, which stabilize the behavioral health system and improve access to services, implement policies that were requested by stakeholders. In addition, these rules support the integrity of the Medicaid program and the safety of Medicaid recipients.

The amendments were previously implemented via an emergency filing effective August 1, 2019, and therefore need be replaced by these rules in order to ensure regulatory consistency and continued coverage and payment for specific behavioral health services.

13. **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.***

    ODM did not consider a performance-based regulation, because the nature of the regulations described in these rules do not lend themselves to a performance-based standard.

14. **What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

    ODM's staff reviewed the rules prior to submitting them in the rule filing process. ODM partnered with OhioMHAS, Ohio's regulatory body for mental health and addiction treatment services, in the development of the policies reflected in these rules and to ensure that these rules are not duplicative.

15. **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.**

    ODM's implementation of the regulations reflected in these rules required changes to Medicaid's provider payment system, MITS, as well as Medicaid managed care plan payment systems. ODM staff, including provider support staff, will be trained to assist providers when required. Providers will be notified through their advocacy organizations as well as via an ODM transmittal letter.

Adverse Impact to Business

16. **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; and**

    The proposed rule package will affect approximately 820 provider agencies of mental health and/or substance use disorder treatment in Ohio who are Medicaid providers. Future Medicaid mental health and/or substance use disorder treatment providers will also

be affected. Additionally, Medicaid managed care plans will also be affected by these rules.

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

Information Technology and Billing System Updates
Participating Ohio Medicaid provider agencies are required to update their information technology and claims payment systems when needed to successfully submit claims for payment for services. While this impact could increase expenses for a provider, the updates in providers' billing systems will permit providers to bill for and receive increased reimbursement for some of the services they render as permitted by the proposed rule amendments.

Coordination of Health Care Benefits/Third Party Liability
All Ohio behavioral health providers who are enrolled as Ohio Medicaid providers are required to ensure that Medicaid is the payer of last resort for health care services to patients with commercial or Medicare health insurance coverage. Provider agency billing systems must be capable of submitting service claims for patients with third party coverage to the appropriate health care payer before they are submitted to Ohio Medicaid for cost sharing. While this impact could increase expenses for a provider, this is a reality that applies to all Medicaid providers.

Federally Required Program Integrity Provisions
Provider agencies are required to register with Ohio Medicaid their employed or contracted physicians, nurse practitioners, physician assistants, psychologists, and counselors or social workers with independent scopes of practice. Practitioner registration is accomplished by enrolling these practitioners in Ohio Medicaid as rendering practitioners. Once actively enrolled in Ohio Medicaid, provider agencies must ensure their practitioners are affiliated with their agencies in the Medicaid Information Technology System (MITS). This ensures claims are paid based on the credentials of the rendering practitioner. While this impact constitutes a reporting of information and could increase expenses for a provider, these are existing requirements and are not a result of the proposed rule amendment language.

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.

Quantifying the cost is difficult because of the significant variance of business design, number of service locations, agency workforce, client caseload, and business acumen among Ohio's 820 Medicaid enrolled providers of behavioral health services as well as Medicaid managed care plans.

While a provider may experience costs due to having to update a billing system these costs would result in a billing system that would permit the provider to bill for and receive increased reimbursement for services rendered as permitted by the proposed rule amendment language. Any costs due to this adverse impact could vary depending on various factors such as if the provider uses its own billing system (and the complexity of the system) or if the provider uses a third party to conduct its billing activities.

While a provider may experience costs due to having to bill other insurers prior to billing Medicaid, , cost resulting from the need to update its billing system could vary depending on various factors such as if the provider uses its own billing system (and the complexity of the system) or if the provider uses a third party to conduct its billing activities.

While a provider may experience costs as a result of the need to report information associated with practitioner registration with Ohio Medicaid, these costs will permit MITS and Medicaid Managed Care Plans to reimburse the provider for services rendered. Costs due to the reporting of information would likely involve staff time compiling and distributing provider specific information as needed.

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

These rules support Ohio Medicaid's compliance with several federal requirements including the National Correct Coding Initiative (NCCI), program integrity requirements of the Affordable Care Act, the Mental Health Parity and Addiction Equity Act, and third party liability requirements As a result, Ohio's behavioral health provider agencies who have chosen to participate in the Ohio Medicaid program will be required to comply with the aforementioned federal health care requirements.

Failure to implement these rules will leave Ohio Medicaid at risk of audit and decreased funding since Ohio's Medicaid program operates under the authority of the Federal Centers for Medicare and Medicaid Services (CMS). These rules are necessary to assure ongoing

federal approval of Ohio's Medicaid program and federal financial participation which funds approximately 60% of all Ohio Medicaid spending. The proposed rule amendments increase reimbursement to providers for some services and permit flexibility as to how services are rendered, thus increasing access to services. The proposed rule amendments implement requests made by stakeholders and permit impacted providers to render services appropriately. In addition, the amendments to these rules were previously implemented through an emergency filing effective August 1, 2019, and therefore need to be replaced by these rules in order to ensure regulatory consistency and continued coverage and payment for specific behavioral health services.

Regulatory Flexibility

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

No, to ensue uniform and consistent treatment of Medicaid providers, ODM is not able to make exemptions or provide alternative means for compliance for small businesses.

19. 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?

This regulation does not apply to this rules package because it does not impose any fine or penalty for a paperwork violation

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

All Medicaid providers in need of technical assistance can contact the Medicaid Provider Assistance telephone line at 1-800-686-1516. Behavioral health providers impacted by the revisions in the proposed rules have a unique email address available to them, BH-Enroll@medicaid.ohio.gov . Providers also have access to detailed information by visiting the dedicated internet site: bh.medicaid.ohio.gov.