Ohio | Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

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Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Medicaid (ODM)

Rule Contact Name and Contact Information:

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Regulation/Package Title: Permanent filing of behavioral health rules

SUBJECT TO BUSINESS IMPACT ANALYSIS:

5160-8-05, 5160-27-04, 5160-27-12

NOT SUBJECT TO BUSINESS IMPACT ANALYSIS, INCLUDED FOR INFORMATION ONLY:

5160-27-05, 5160-27-08

Date of Submission for CSI Review: 8/31/2020

Public Comment Period End Date: 9/7/2020

Rule Type/Number of Rules:

New/ rules	**No Change/____ rules (FYR? ___)**
Amended/___3_ rules (FYR? _No__)	**Rescinded/__ rules (FYR?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. Language requiring a face to face intervention between the provider and recipient is removed.

   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. Revised language relaxes the fidelity review requirements that provider teams

have to meet in order to render the service. Language is removed that prohibits the billing of the service when it is not rendered in an in-person setting.

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.**

   5160-8-05: 5164.02, 5164.02 , 5164.03

   5160-27-04: 5162.02, 5164.02, 5164.02 , 5164.03

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.

   The existing rules as well as proposed changes to the rules are not necessitated by federal law. The proposed revisions to the rules are being made to improve access to needed services in response to the COVID19 pandemic. The proposed revisions to the rules were previously implemented via an emergency filing effective June 12, 2020. and therefore, need be replaced by these rules in order to ensure regulatory consistency.

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

   These rules, as well as the proposed changes in the rules, do not include provisions that are addressed in federal requirements, therefore they do not exceed any federal requirements. ODM, to support the effective and efficient administration of the Medicaid program and for the safety of Medicaid recipients, places desired policy provisions and requirements in OAC rule so they may be enforceable.

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 state requirements that support the effective, efficient operation of the Medicaid program by stating requirements practitioners must following to support the safe provision of the ACT service as well as other behavioral health services to Medicaid recipients. The proposed revisions to the rules already in effect, remove service provision requirements that improve access to services for recipients.

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

consumer utilization of behavioral health services and 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.

While the following organizations and providers did not specifically review and provide comments on the rules in this package, their comments support the policies stated by the proposed revisions in the rules.

The following organizations submitted a letter, dated Jun 2, 2020, to state governors requesting that current state policies expanding the use of telehealth be continued:

American Psychological Association
American Psychiatric Association
National Association of Social Workers
National Alliance on Mental Illness
Mental Health America

The following Ohio based organizations and providers have contacted ODM asking if ODM will continue, via this proposed rule filing, the current telehealth and related policies:

Friel and Associates
Miami Valley Women's Center
Access Counseling Services
Family Life Counseling and Psychiatric Services
Samaritan Behavioral Health
New Visions Unlimited
Child Guidance and Family Solutions
Case Western Reserve University
The Ohio Council of Behavioral Health & Family Services Providers

Since March 2020, ODM has participated in a behavioral health task force that includes a variety of stakeholders. During every meeting comments have been made concerning

telehealth and the desire of providers to continue having it available as a service provision tool.

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

The group of five organizations previously mentioned urged state governors to keep in place current telehealth policies that would support the continuity of services to individuals who are currently making use of telehealth in order to receive needed services.

Eight of the other nine organizations and providers mentioned previously, through their contact with ODM, support the continued use of telehealth as a service provision tool. The other organization, Case Western, contacted ODM about the need to remove the requirement for minimum provider team fidelity scores and to remove the face to face service delivery requirement. The proposed rule revisions would continue the current policy of removing service provision requirements that have been relaxed due to the COVID-19 pandemic.

In April 2020, ODM, along with the Ohio Department Mental Health and Addiction Services, conducted a survey of stakeholders who responded that the use of telehealth was crucial in the provision of services and critical to their being able to stay in business.

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 these 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 makes use of OAC rules to state policies and regulations so it may enforce and, when necessary, conduct program integrity activities regarding the provision of services to Medicaid recipients.

The proposed revisions to existing rules were previously implemented via an emergency filing effective June 12, 2020. and therefore, need be replaced by these rules in order to continue ODM's policy of relaxing service provision requirements for providers due to the COVID-19 pandemic.

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, as the agency charged with administrating the Ohio Medicaid program, is the only entity authorized to enact the regulations in these rules. ODM staff review the rules to check for the duplication of regulations. Also, as the services described in the rules are behavioral health in nature, OhioMHAS, Ohio's regulatory body for mental health and addiction treatment services, reviewed the rules.

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 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.

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;

The rules, already in effect, and proposed revisions to the rules, will impact those behavioral health providers that render the services addressed in the rules and provided to Medicaid recipients.

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

The rules, already in effect, and proposed revisions to the rules, describe services that behavioral health providers, that choose to participate in the Medicaid program, may voluntary render to Medicaid recipients. Therefore, a provider chooses whether it wishes to be impacted by an adverse impact requirement by making the choice to render any one of the services described in the rules.

In some situations, a provider may have to request prior authorization in order to receive authorization to render a service. This request could require the provider to submit information to be reviewed. This is to confirm that the provision of a service is medically necessary and potentially beneficial to the Medicaid recipient. There is no cost to the provider to request a prior authorization and the reviewing vendor for ODM must meet stated decision-making timeframes.

Some individual practitioners will need to submit information to ODM in order to obtain a provider agreement which is required in order to render services to Medicaid recipients and

receive reimbursement. The requirement to obtain a provider agreement is needed to support Medicaid program integrity by holding providers accountable to specific standards and requirements they must meet.

In order to be a Medicaid provider, practitioners that are eligible to participate in the Medicare program must do so unless the practice is pediatric in nature, then the practitioner must meet Medicare requirements with the exception of serving Medicare recipients.

Some behavioral health practitioners must be appropriately licensed, usually by a state board, in order to render clinical services. A licensure requirement in rule indicates that an individual has meet board created standards which supports the appropriate provision of services to recipients.

The proposed revisions to the rules currently in effect, do not apply any new adverse impacts but rather removes or relaxes some service provision requirements in order to improve access, to recipients, of needed services.

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 of any adverse impact in the existing rules is difficult because of the significant variance of business design, number of service locations, agency workforce, client caseload, and business acumen among Ohio's Medicaid enrolled providers of behavioral health services. While there is no financial cost to a practitioner to apply for a Medicaid provider agreement or for a prior authorization request to render a service, there would be a time cost for staff to go online and enter required information into a website. The time required for either should be less than 30 minutes. The source of this information is the ODM provider enrollment section and a vendor of ODM, Permedion.

The financial cost for a provider to obtain a license is variable, depending on the board granting the license.

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

These existing rules state requirements that support the effective and efficient operation of the Medicaid program and support the safe and appropriate provision of the described services to Medicaid recipients. The proposed revisions to the existing rules improve access to services for recipients and, through this permanent filing of current emergency filed rules, continue the desired policy revisions past the expiration date of the emergency filed rules. They help prevent the provision of unnecessary services to Medicaid recipients, and hold providers accountable to specific Medicaid requirements to support the safe and effective provision of 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.