



## Common Sense Initiative

**Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor

**Sean McCullough**, Director

### Business Impact Analysis

**Agency, Board, or Commission Name:** Ohio Department of Mental Health and Addiction Services (OhioMHAS)

**Rule Contact Name and Contact Information:**

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

Residential State Supplement (RSS) Rules

**Rule Number(s):** O.A.C. 5122-36-01 through 5122-36-05

**Date of Submission for CSI Review:** 4/15/2022

**Public Comment Period End Date:** 5/6/2022 (by 5 pm)

**Rule Type/Number of Rules:**

New/\_\_\_ rules

No Change/\_\_\_ rules (FYR? \_\_\_)

Amended/\_5\_ rules (FYR? yes\_\_\_)

Rescinded/\_\_\_ rules (FYR?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

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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.*

The Residential State Supplement (RSS) Program is Ohio's Optional State Supplementation Program authorized by the U.S. Social Security Administration. The Program provides financial assistance to adults with disabilities who wish to live in the community. Individuals who enroll in RSS have increased needs due to a disability that are not severe enough to require long-term care in an institution, such as a nursing home or hospital. RSS participants use RSS payments, which supplements their income, to pay for accommodations, supervision, and personal care services in eligible living arrangements (class two residential facilities and residential care facilities regulated by the Ohio Department of Health (ODH)) in the community.

5122-36-01 – Introduction and definitions

This rule sets forth the purpose of the RSS Program and definitions used for the Program. The rule is being amended to:

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--Clarify that OhioMHAS is the RSS administrative agency, but that area agencies on aging assist with level of care determinations and county departments of job and family services (CDJFSs) determine financial eligibility for the Program; and

--Eliminate the definition of “living arrangement.” This is no longer needed because a list of eligible living arrangements is in O.A.C. 5122-36-02.

#### 5122-36-02 – RSS non-financial eligibility

This rule specifies the non-financial criteria an individual must meet to qualify for the RSS Program.

The rule is being amended to:

--Clarify that an individual must meet all criteria in a Medicaid rule (O.A.C. 5160:1-5-01) to qualify for RSS, and that OhioMHAS is responsible for first determining non-financial eligibility while the appropriate CDJFS next determines financial eligibility;

--Codify the existing procedure OhioMHAS uses to collect an RSS payment paid to an individual who was determined ineligible for the Program or who had moved from an eligible living arrangement; and

--Specify that an RSS applicant must execute a release of information form permitting an exchange of information between not only OhioMHAS and the living arrangement operator and other care providers and key contacts, but also between these parties and the Ohio Department of Medicaid (ODM) and the Ohio Department of Job and Family Services (ODJFS).

#### 5122-36-03 – Application process

This rule sets forth the OhioMHAS portion of the application process for the RSS Program.

The rule is being amended to:

--Correct cross-references to ODM and OhioMHAS statutes; and

--Make non-substantive formatting changes.

#### 5122-36-04 – Responsibilities of the living arrangement

This rule sets forth the responsibilities of the participating living arrangements.

The rule is being amended to:

--Eliminate the requirement that an extenuating circumstance be present before a living arrangement must give a prorated portion of an RSS payment to an individual who leaves the living arrangement before the end of the month for which payment was made;

--Codify the existing procedure OhioMHAS uses to collect from a living arrangement an RSS payment the living arrangement had received when the individual to whom the payment related was ineligible for or had moved from the eligible living arrangement (this change would make this rule consistent with O.A.C. 5122-36-02); and

--Make non-substantive formatting changes.

#### 5122-36-05

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This rule sets forth how the amount of each RSS payment is determined and the amount of the allowable fee an individual receiving RSS payments pays to a living arrangement.

The rule is being amended to:

--Correct a cross-reference to a Medicaid rule; and

--Make non-substantive formatting changes.

**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.**

R.C. 5119.41 and 5119.41.

**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 Residential State Supplement (RSS) Program is Ohio's Optional State Supplementation (OSS) Program authorized by the U.S. Social Security Administration under 20 C.F.R. Part 416. States have discretion regarding how to administer their OSS programs within the parameters of these federal regulations. Ohio created the RSS Program in the 1980s to help individuals who were older adults or had disabilities and were at risk of institutionalization due to needing supports to live in the most integrated community setting. The RSS population changed from older adults to mostly individuals with behavioral health disabilities, resulting in OhioMHAS becoming the administrative agency in state fiscal year 2012.

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

Not applicable.

**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)?**

RSS provides financial assistance to adults who have increased needs due to a disability that is not severe enough to require long term care in an institution, such as a nursing home or hospital. Individuals use RSS, which supplements their income, to pay the monthly allowable fee (or "rent") for accommodations, supervision, and personal care services at eligible living arrangements in the community. The supplementary income provided by the RSS Program allows for individuals to remain in the least restrictive settings, benefitting both the individual and state.

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

OhioMHAS will measure the success of this rule by tracking the number of individuals assisted by the Program.

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**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.*

OhioMHAS posted the proposed changes to the RSS Program rules to its rules listserv on November 17, 2021. OhioMHAS received comments from the following stakeholders:

1. Terry Russell, Executive Director of NAMI Ohio and the Ohio Adult Care Facility Association
2. Jayne Wagner, RN, Associate Vice President Clinical Services – PASSPORT, Area Office on Aging of Northwestern Ohio, Inc. (along with partners Cindee Boaz (same office as Jayne) and Beth Kowalczyk, Ohio Association of Area Agencies on Aging)
3. Teresa Lampl, LISW-S, CEO, The Ohio Council of Behavioral Health & Family Services Providers
4. Cheri Walter, Chief Executive Officer, Ohio Association of County Behavioral Health Authorities

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

- Ellie Jazi, Community Transitions Administrator for OhioMHAS, met with Ms. Wagner and her associates on January 14, 2022, to discuss the concerns they had with the level of care requirements of the RSS Program. Ellie provided background and rationale, including that individuals do not need an additional assessment because they have been determined to be ready to discharge from a nursing facility to the community (making the RSS application more streamlined and person-centered and supporting the *Olmstead* decision to transition to the most integrated setting). Ellie said that Ms. Wagner and her associates were satisfied with her explanation, particularly the distinction that an individual must need *at least* a protective level of care.
- Mr. Russell, Ms. Lampl, and Ms. Walter asked for two things:
  1. Removal of a new provision in O.A.C. 5122-36-04 requiring a living arrangement that applies or intends to apply for Supplemental Nutrition Assistance Program (SNAP) benefits on behalf of an individual receiving RSS payments to submit an affidavit to OhioMHAS and ODJFS attesting that it meets federal requirements to do this.

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The federal requirements applicable to residents of a group living arrangement applying for SNAP benefits are in 7 C.F.R. 273.11(f)(1). An existing ODJFS rule, O.A.C. 5101:4-6-26(B), incorporates the federal requirements:

--The group living arrangement must be operated by a public agency or private organization that is considered non-profit as defined in 26 U.S.C. 501;

--The group living arrangement must not have more than 16 residents; and

--The group living arrangement must be certified or licensed by an agency of the state that is authorized under 42 U.S.C. 1382e or under standards determined by the Secretary of the U.S. Department of Agriculture.)

2. An increase in the allowable fee (specified in O.A.C. 5122-36-05) from \$1,100 per month to \$1,400 per month to account for increased costs of living and pandemic-related costs.

OhioMHAS had proposed the provision as a way of absolutely making sure a living arrangement was complying with the federal requirements. But OhioMHAS is removing this provision, recognizing that CDJFSs already – under O.A.C. 5101:4-6-26(F) -- have the responsibility to ensure that living arrangements applying for or intending to apply for SNAP benefits on behalf of RSS participants are complying.

A change to the amount of the allowable fee must be done in the context of budget deliberations. It is outside the scope of this five year review process.

**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?**

Not applicable.

**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?**

The changes presented reflect OhioMHAS's best effort to strike a balance between protecting individuals who receive RSS payments and not imposing undue burdens on eligible living arrangements.

**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.***

Not applicable.

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

The RSS Program is administered by OhioMHAS in cooperation with ODM. OhioMHAS has worked to ensure that there is no duplication across the Program.

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**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.**

OhioMHAS will communicate rule changes to RSS participants and eligible living arrangements. Technical assistance will be available for eligible living arrangement operators, as well as individuals interested in applying for RSS, enrolled individuals and their loved ones, legal guardians, representative payees, and others who provide services to RSS individuals.

**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**
- b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and**
- 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 regulated community for purposes of these rules are the eligible living arrangements that have RSS participants. These are class two residential facilities regulated by OhioMHAS and residential care facilities regulated by the Ohio Department of Health (see O.A.C. 5122-36-02(A)(5), as proposed). The licensure fee for a class two residential facility is \$75 biennially. The licensure fee for a residential care facility varies depending on the number of beds in the facility, and must be renewed annually:

50 beds or less: \$320; 51 - 100 beds: \$640; 101 - 150 beds: \$960; 151 - 200 beds: \$1,280; 201 - 250 beds: \$1,600; 251 - 300 beds: \$1,920

There is no separate fee for these living arrangements to be eligible to receive RSS payments.

OhioMHAS estimates that the eligible living arrangements would not incur additional costs beyond what they currently incur to comply with the existing rules.

O.A.C. 5122-36-04 is the rule that outlines the responsibilities of each eligible living arrangement. Generally, the nature of the adverse impact of complying with this rule would be the staff time to fulfill the responsibilities. Specifically, the following paragraphs impose a cost of compliance:

(A)(1) – An eligible living arrangement incurs costs when providing accommodations, supervision, and personal care services to RSS participants. For providing these items, an eligible living arrangement receives \$1100 per month.

(A)(2), (4), (5), (9), (10), (11), (12), and (13) and (B) – An eligible living arrangement would incur minimal administrative costs to fulfill the responsibilities specified in these paragraphs. For (A)(9),

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OhioMHAS must verify RSS participants are living in the facilities listed with the Program. The quarterly surveys may be returned by mail, fax, or encrypted email. The process should only take a few minutes of each facility operator's time each quarter.

(A)(14) and (15) – A living arrangement must provide transportation for each RSS participant. The living arrangement would need to acquire and maintain a vehicle for this purpose (and would incur motor vehicle fees and insurance and gas payments). However, the living arrangement is authorized under the rule to charge an RSS participant a usual and customary rate for this service.

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

RSS participants are largely adults with behavioral health conditions. As a steward of taxpayer dollars appropriated by the General Assembly, OhioMHAS has adopted the responsibilities in O.A.C. 5122-36-04 as a means to ensure that this vulnerable population receives the quality accommodations, supervision, and personal care services the General Assembly intended participants to receive.

**Regulatory Flexibility**

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

No, the business impact must apply evenly across all eligible living arrangements.

**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?**

The rules do not specify fines or penalties for paperwork violations.

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

OhioMHAS has staff who will reach out to eligible living arrangement operators to provide any information needed.