



# Common Sense Initiative

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

Joseph Baker, *Director*

## MEMORANDUM

**TO:** Tommi Potter, Ohio Department of Medicaid

**FROM:** Caleb White, Business Advocate

**DATE:** August 31, 2023

**RE:** CSI Review – HCBS Policy Unwinding PHE (OAC 5160-44-11, 5160-44-12, 5160-44-13, 5160-44-14, 5160-44-16, 5160-44-17, 5160-44-17, 5160-44-22, 5160-44-26, 5160-44-27, 5160-44-31, and 5160-46-04)

On behalf of Lt. Governor Jon Husted, 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 Department as provided for in ORC 107.54.

### Analysis

This rule package consists of nine amended, two rescinded, and two new rules proposed by the Ohio Department of Medicaid (ODM) as a part of the statutory five-year review process. This rule package was submitted to the CSI Office on July 24, 2023, and the public comment period was held open through July 31, 2023. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on July 24, 2023.

Due to the ending of the federal public health emergency related to the COVID-19 pandemic and with it the provided flexibilities the Centers for Medicare and Medicaid Services (CMS) to ODM during the state of emergency through Appendix K, the rules contained in in this package are being amended in response to the ending of the Appendix K flexibilities adopted during the pandemic.

The rules in this package govern various services offered by ODM as a part of their Home and Community-Based Services (HCBS) programs for individuals in the nursing facility-based level of care. Ohio Administrative Code (OAC) 5160-44-11 sets forth the definitions, service description, meal specifications, limitations, and provider qualifications surrounding ODM's home delivered

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meals. This rule is to be rescinded and replaced with a rule of the same number. This new rule covers the same topics as the rescinded rule but newly defines the standard, kosher, and therapeutic meal types, eliminates the term “special diet” and allows for more flexibility for individuals to select reduced calorie, reduced sugar, reduced sodium, gluten-free, and vegetarian diet meals due to personal preference. Changes are also proposed to rewrite the language for clarity.

OAC 5160-44-12 sets forth the definitions of services, provider requirements, and specifications for home maintenance and chore services. This rule is amended to expand the allowable services under this program to include the removal of environmental hazards, home modification tasks, both warranty and maintenance tasks for adaptive assistance devices, and to allow this service to be combined with other waiver services. This rule is also amended to remove provider deeming language, to allow for this service to be utilized 180 days prior to an individual’s transition from an institutional setting into the community, and to update and streamline the rule’s language. OAC 5160-44-13 outlines the service description, authorization process, authorized cost amount, service limitations, and provider requirements for the home modifications program. This rule is to be rescinded and replaced with a rule of the same number. This new rule covers the same topics as the rescinded rule but allows for this service to be combined with other waiver services and rewrites the rule’s language in a more condensed, updated, and streamlined manner. OAC 5160-44-14 outlines the community integration program and provides the definitions of services, provider requirements, and program specifications. This rule is amended to decrease the years of experience required for a community integration supervisor from three years to two years and to update and streamline language.

OAC 5160-44-16 sets forth the service description, equipment specifications, personal emergency response systems (PERS) limitations, and PERS requirements surrounding the PERS services provided by ODM. This rule is amended to remove provider deeming language in addition to streamlining and updating the rule language. OAC 5160-44-17 sets forth the service description, provider qualifications and clinical record keeping requirements for the out-of-home respite service provided by ODM. This rule is amended to remove provider deeming language as well as to update and streamline language.

OAC 5160-44-22 outlines the service description, limitations, provider qualifications, provider requirements, and clinical record keeping requirements for waiver nursing services. This rule is amended to add a limitation that prohibits the use of waiver nursing services from being used as a substitute for similar services which are available through third-party insurers, community supports, and other available resources when it is determined these services are sufficient to meet the individual’s needs. Additionally, the amendments to this rule also permit spouses and relatives to serve as direct care workers for certain waiver services, remove provider deeming language, allow for required visits from Registered Nurses (RNs) and Licensed Practical Nurses (LPNs) to evaluate

waiver nursing services to be conducted via telehealth and require these assessments to be billed using the state plan nursing assessment code. In addition to these more substantial changes, this rule is also amended to update and streamline the rule language.

OAC 5160-44-26 provides the definitions of services, provider requirements, and specifications for community transition services. This rule is amended to expand the allowable basic household expenses, prohibit the service from covering furnishing arrangements owned or leased by a waiver provider if they are inherent to the service already provided, remove a flexibility allowing a signature to be obtained at a later date, remove provider deeming language, and update and streamline the rule language. OAC 5160-44-27 outlines the service description, definitions, individual expectations, provider qualifications, provider requirements, and clinical record keeping requirements related to home care attendant services. This rule is amended to remove the requirement for continuing education hours, remove a flexibility allowing for CPR and First Aide training to be obtained over the internet, remove a requirement for clinical records to be stored at the provider's place of business and for a separate record to be maintained in an individual's home if the clinical record is accessible in the home, and reinstate a requirement for face-to-face RN home care attendant service visits to be conducted in person twice a year but permit all other visits to be done via telehealth. This rule is also amended to modify a signature flexibility to require the signature to be obtained within three business days of the delivery, remove provider deeming language, and update and streamline the rule language.

OAC 5160-44-31 outlines the provider conditions of participation for the services outlined in this rule package and sets forth what a provider shall or shall not do while providing services to individuals. This rule is amended to permit the parent of minor children, spouses, and relatives to serve as direct care workers for certain waiver services, modify a signature flexibility to require the signature to be obtained within three business days of the delivery, as well as streamline and update the rule language.

OAC 5160-46-04 describes the definitions of Ohio Home Care waiver services, provider requirements, specifications for the delivery of these services. This rule is amended to decrease in-service continuing education requirements, reinstate a restriction on solely internet-based requirements, modify RN in person visit requirements, exclude the requirement for a discharge summary if an individual passes away, reinstate a restriction preventing the service to be provided remotely or in the home of an individual, remove provider deeming language, allow the service to be combined with other waiver services, and update and streamline the language.

During early stakeholder outreach, ODM engaged the Ohio Department of Developmental Disabilities and Ohio Department of Aging to develop these rules. Additionally, ODM held nine stakeholder outreach webinars which were attended by over 1,000 individuals. ODM provided an

overview of the anticipated appendix K changes and requested feedback. ODM also developed an email to receive feedback from stakeholders and waiver participants, and these comments were considered during the development of these rules. Additionally, ODM sent out an email to stakeholders on June 21, 2023, with draft copies of the rules requesting feedback and has developed a webpage dedicated to updates on the changes to the Appendix K flexibilities. As a result of early stakeholder outreach, ODM made changes to the rules to allow individuals to select home delivered meals due to meal preference, added environmental hazards, warranty, and maintenance plans to the list of allowable tasks under home and maintenance services, removed and decreased a requirement for continuing education hours, allowed more flexibility on clinical record keeping, allowed more flexibility when obtaining delivery signatures, allowed for some spouses and relatives to serve as direct care workers for certain waiver services, and allowed for more waiver services to be combined with other waiver services. Additionally, prior to the filing of these rules, Meals on Wheels of Southwest Ohio and Northern Kentucky and the Council on Aging of Southwest Ohio contacted CSI to raise concerns about certain restrictions surrounding the provision of therapeutic meals. The stakeholders stated that these restrictions cause an excessive burden to providers as diet orders are often difficult to obtain in a timely manner, leading to delays in being able to provide therapeutic meals to consumers. Following further discussion with the stakeholders, CSI, and the Ohio Department of Aging, ODM determined to revise the rules to allow providers to provide a therapeutic diet to a consumer without a diet order if the meal is chosen at the consumer's preference.

During the CSI public comment period, ODM received four comments on the package with one commenter expressing support for the added flexibility of home delivered meals and another asking for clarification on there to find the most up to date version of the rules.

Another commenter from Simply EZ pointed out that some religious, cultural, or ethnic meals can be more costly to produce and should be included in the Kosher category to reflect this. This commenter also suggested a reference update and asked if the rule should note what specifically delivered items are permitted to be delivered under this rule. ODM responded to this commenter by updating a reference in the rule and committing to taking the commenter's other suggestions into account going forward as they are currently reviewing feedback to determine if further edits are needed to this rule.

The last comment came from an individual, who thanked ODM for several changes but asked for the maximum weekly direct care hours as set forth in OAC 5160-44-32 to be removed for family members, legal guardians, and parents of adult children, asked for clarification on a signature requirement in OAC 5160-44-31, and asked for clarification on the administration of medications permitted under 5160-46-04. ODM responded by thanking the commenter for their feedback and updated a rule not included in this package to bring it in line with the signature requirement in OAC 5160-44-31. ODM also clarified that medication administration is outside of the scope of practice for

a personal care aide in nursing facility waiver programs and that while parents who are classified under this title can still provide medication to their children, they are not permitted to do so while they are being paid as a personal care aide. ODM also stated they would take the commenter's other suggestions under advisement when considering future changes.

The business community impacted by the rules includes all nursing facility-based waiver service providers within the PASSPORT, Assisted Living, Ohio Home Care, and MyCare Waiver Programs. While they can differ based on the type of business or provider, the adverse impacts created by the rules include additional delivery costs, the implementation of training plans, the submission of fixed cost proposals, the documentation of records, the cost of permitting and pre-job inspections, the cost of obtaining certifications, approvals, and licenses, the notification and reporting requirements, the provision of replacement coverage, the costs associated with becoming ODM-approved or an Ohio Department of Aging-certified provider, the maintenance of a valid Medicaid provider agreement, and the requirement to obtain collision/liability services. ODM also notes that the participation in the HCBS waiver program is optional and at the provider's discretion but added that compliance with program requirements is required for providers who choose to participate. ODM states that the adverse impacts to business are justified as the assurance of HCBS waiver participants' health and welfare is integral to the Ohio HCBS waiver programs - both at the state and federal levels.

### **Recommendations**

Based on the information above, the CSI Office has no recommendations on this rule package.

### **Conclusion**

The CSI Office concludes that ODM should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.