



## Common Sense Initiative

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

**Joseph Baker**, Director

### Business Impact Analysis

**Agency, Board, or Commission Name:** OHIO DEPT. OF AGING

**Rule Contact Name and Contact Information:** Tom Simmons [rules@age.ohio.gov](mailto:rules@age.ohio.gov)

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

#### ODA PROVIDER CERTIFICATION: ADULT DAY SERVICE

Chapter 173-39 of the Administrative Code establishes the requirements to become, and to remain, an ODA-certified provider.

**Rule Number(s):** 173-39-02.1

**Date of Submission for CSI Review:** June 30, 2023.

**Public Comment Period End Date:** June 13, 2023 at 11:59PM.

**Rule Type/Number of Rules:**

☐ New/ # rules

☐ No Change/ # rules (FYR? ☐)

☒ Amended/ 1 rule (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☐ Rescinded/ # rules (FYR?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?**

Please review the next page.

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**The rule(s):**

- ☐ a. Require 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 173-39-02.1 of the Administrative Code establishes the specific requirements to become, and to remain, an ODA-certified provider of an adult day service.

ODA's proposals to amend this rule will result in amending approximately more than 50% of the rule, so ODA proposes to rescind the rule and to adopt a new rule in its place to comply with the 50% guideline in §4.3.1 of LSC's [Rule Drafting Manual](#).

ODA's proposed new rule will achieve the following:

1. No longer offer in-home option in the definition of "adult day service" in paragraph (A) of this rule or refer an in-home option throughout this rule. ODA originally offered this option as a means to keep adult day providers from going out of business during the early stages of the COVID-19 public health emergency (PHE). ODA has no record of any providers currently using that option which was confirmed by stakeholders. (See ODA's response to question #11.)
2. Include references to rule 173-39-02.18 of the Administrative Code instead of rule 173-39-02.13 of the Administrative Code because ODA will rescind rule 173-39-02.13 of the Administrative Code on July 1, 2023.
3. No longer include the misplaced requirement for a case manager to conduct an assessment, because this rule regulates certified providers, but does not regulate case managers.
4. No longer include the requirement for providers to complete performance reviews of each staff member.
5. Use significantly fewer regulatory restrictions (e.g., "shall") to comply with R.C. §§ [106.03](#) and [121.951](#).<sup>1</sup> This proposal includes some of the substantive changes noted above. This proposal also includes numerous non-substantive changes which account for a majority of the differences between the proposed new rule and the rule being proposed for rescission.

Lastly, the proposed new rule contains additional non-substantive improvements compared to the rule being proposed for rescission.

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<sup>1</sup> Senate Bill 9 (134<sup>th</sup> G.A.).

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

R.C. §§ [121.07](#), [173.01](#), [173.02](#), [173.39](#), [173.391](#), [173.52](#), and [173.522](#).

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.*

In order for the Centers for Medicare and Medicaid Services (CMS) to approve Ohio's application for a Medicaid waiver authorizing the state to launch and maintain the PASSPORT Program, [42 C.F.R. 441.352](#) requires ODA to establish provider-certification requirements to safeguard the health and welfare of individuals who receive services through the program.

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

This rule exists to comply with the state laws mentioned in ODA's response to #2. Those state laws require ODA to adopt rule to establish requirements for provider certification and the PASSPORT Program.

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)?**

This rule exists to comply with the state laws mentioned in ODA's response to #2. Those state laws require ODA to adopt this rule to establish requirements for provider certification and the PASSPORT Program.

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

ODA and its designees monitor providers to ensure compliance for the continued health and safety of individuals receiving services from ODA-certified providers. [173-39-04] ODA will judge the proposed amendments to this rule to be a success when ODA and its designees find few violations against it during structural compliance reviews or investigations of alleged incidents.

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.*

ODA's guide [Participating in ODA's Rule Development](#) and the [main rules webpage](#) on ODA's website encourage stakeholders and the general public to give input on improving ODA's rules and provide contact information for doing so. From

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this rule's effective date to the date of this BIA, ODA has received no input from stakeholders or the general public on this rule via this method.

On May 17, 2022, ODA emailed the following stakeholders to explain how artificial intelligence has added a new dimension to interpreting rules, define *regulatory restrictions*, declare the need to reduce regulatory restrictions, explain how ODA can reduce regulatory restrictions by eliminating duplicate uses of regulatory restrictions, provide stakeholders with an opportunity to make recommendations on ODA's plan, and provide stakeholders with an opportunity to make recommendations on eliminating any regulatory restriction in any chapter of ODA's rules:

- Catholic Social Services of the Miami Valley.
- LeadingAge Ohio.
- Ohio Assisted Living Association (OALA).
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Adult Day Healthcare Association (OADHA).
- Ohio Association of Area Agencies on Aging (O4A).
- Ohio Association of Medical Equipment Suppliers (OAMES).
- Ohio Association of Senior Centers (OASC).
- Ohio Council for Home Care and Hospice (OCHCH).
- Ohio Health Care Association (OHCA).
- Ohio Jewish Communities.
- State Long-Term Care Ombudsman.

On October 19, 2022, ODA sent an email to the following stakeholders to ask if any of their members were using the in-home option:

- LeadingAge Ohio.
- Ohio Adult Day Healthcare Association (OADHA).
- Ohio Association of Area Agencies on Aging (O4A).
- Ohio Health Care Association.

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

In response to its May 17, 2022 emails, ODA received 0 recommendations from stakeholders on this chapter of rules.

In response to ODA's October 18, 2022 emails, LeadingAge Ohio and OADHA indicated that they were unaware of any adult day provider that was using the in-home option.

## **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?**

Individuals enrolled in the PASSPORT and Assisted Living Programs have a higher risk for contracting COVID-19 than the general population. Accordingly, the flexibility in this rule for providers to provide ADS in individual's homes was based on guidelines from the Centers for Disease Control and Prevention (CDC) on reducing in-person interaction in congregate settings to limit exposure to COVID-19 (*i.e.*, social distancing). Because the COVID-19 public health emergency has ended, and because no provider is currently using this option, ODA is no longer proposing to retain this flexibility.

## **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?**

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R.C. [§173.391](#) requires ODA to adopt rules to establish requirements for ODA-certified providers. Additionally, federal rules require ODA to establish adequate requirements for providers to assure the health and safety of individuals enrolled in ODA-administered programs.

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

R.C. [§173.391](#) authorizes only ODA to develop standards for ODA-certified providers of services to individuals enrolled in ODA-administered programs.

**14. 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.**

Before the proposed amendments to this rule takes effect, ODA will post them on ODA's website. ODA will also send an email to subscribers of our rule-notification service to feature the rule.

Through regular monitoring activities, ODA and its designees will monitor ODA-certified providers for compliance. [173-39-04]

**Adverse Impact to Business**

**15. 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**

Every ODA-certified provider of an adult day service.

**b. Quantify and identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance, etc.).**

*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 following are the adverse impacts of this rule:

- General requirements to become and to remain an ODA-certified provider. These include compliance with (1) requirements established in rule 173-39-02 of the Administrative Code (e.g., providing ODA with contact information), (2) requirements on topics (e.g., background checks) that are referenced in rule 173-39-02 of the Administrative Code, but established outside of that rule (e.g., R.C. [§173.38](#)), and (3) requirements on topics (e.g., records retention) that are established in rule 173-39-02 of the Administrative Code and also outside of that rule (e.g., [45 C.F.R. 75.361](#)).
- Requirements unique to an adult day service (e.g., transportation requirements; service requirements including assessments, an interdisciplinary care conference, activity plans, etc.; center requirements for accessibility, medication storage, toilets, etc.; staff qualifications and training requirements).

The amount the PASSPORT Program pays providers for a service is an all-inclusive rate. It's intended to cover the daily costs incurred in the service plus employee-related costs. The costs incurred as a result of this rule are likely calculated as part of a provider's operational budget—the cost of doing business and clerical duties, such as retaining records and updating policies.

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Providers set the prices they bill to the PASSPORT Program. In turn, the PASSPORT Program pays each provider the amount the provider bills, so long as the price billed does not exceed the maximum that the Ohio Dept. of Medicaid (ODM) allows per unit. In the appendix to rule [5160-1-06.1](#) of the Administrative Code, ODM establishes the units of service for the PASSPORT Program and the maximum-allowable payment for each unit.

**16. Are there any proposed changes to the rules that will reduce a regulatory burden imposed on the business community? Please identify. (*Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors.*)**

Yes. ODA proposes to no longer require providers to complete performance reviews of each staff member.

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

ODA is required to develop rules establishing requirements for ODA-certified providers and to ensure the health and safety of individuals enrolled in ODA-administered programs.

Providers voluntarily apply for ODA certification. Certification is not required to provide a service unless a provider wants a government program that requires certification to pay the provider. Compliance with this rule is only required if a provider voluntarily chooses to participate in a program requiring certification, such as the PASSPORT and Assisted Living Programs.

**Regulatory Flexibility**

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

Because the primary purpose of this rule is to ensure the health and safety of individuals enrolled in ODA-administered programs, this rule treats all providers the same, regardless of their size.

**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?**

ODA's primary concern is the health and safety of individuals receiving services from ODA-certified providers. Whenever possible, ODA or its designees will treat administrative violations that do not involve health and safety as opportunities for improvement through warning notices and solicitation of corrective action.

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

ODA and its designees are available to help providers of all sizes with their questions. Any person may contact [Tom Simmons](#), ODA's policy development manager, with questions about this rule.

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