

**Common Sense
Initiative****Mike DeWine**, Governor
Jon Husted, Lt. Governor**Joseph Baker**, Director**MEMORANDUM**

TO: Selina Jackson, Ohio Department of Health

FROM: Michael Bender, Business Advocate

DATE: April 28, 2023

RE: **CSI Review – Nursing Home Residents’ Rights on Transfer or Discharge (OAC 3701-61-01, 3701-61-02, 3701-61-03, 3701-61-04, 3701-61-05, 3701-61-06, 3701-61-07, and 3701-61-08)**

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This rule package consists of one new rule, six amended rules, and two rescinded rules proposed by the Ohio Department of Health (ODH) as part of the statutory five-year review process. This rule package was submitted to the CSI Office on February 22, 2023, and the public comment period was held open through March 24, 2023. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on February 22, 2023.

Ohio Administrative Code (OAC) 3701-61-01 specifies definitions pertaining to nursing home transfers and discharges. The rule is amended to clarify what constitutes a resident transfer and a room change. OAC 3701-61-02 outlines the reasons for which a nursing home may transfer or discharge a resident and states that residents or their sponsors have the right to challenge a transfer or discharge. The rule is amended to update language and prohibit a nursing home from initiating a transfer or discharge if a resident has an ongoing appeal of denial of Medicaid with the Ohio Department of Medicaid (ODM) or has submitted an amended or substitute application that is accepted for review by ODM. OAC 3701-61-03 sets forth requirements for a nursing home with respect to providing notice to a resident and their sponsor or legal representative of any proposed

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transfer or discharge, as well as requirements regarding a hearing request. The rule is amended to update language and require the nursing home to provide multiple types of contact information as part of the notice.

OAC 3701-61-04 provides for hearings conducted by ODH in response to a request for determining whether a proposed transfer or discharge complies with applicable provisions of rule and law, in addition to providing for appeals of such determinations. The rule is amended to require notices to be sent via email and to update language and a citation. OAC 3701-61-05 sets forth the responsibilities of a nursing home when transferring or discharging a resident. The rule is amended to update language. OAC 3701-61-06 requires ODH to conduct investigations into complaints reported by residents of a nursing home and describes the process for doing so. The rule is amended to update language. OAC 3701-61-07 is rescinded because the criminal background check requirements for adult day care programs fall under the purview of the Ohio Department of Aging (ODA) and the criminal background check requirements for nursing homes are found in OAC 3701-13. A new rule with the same number is also being proposed. OAC 3701-61-07, the proposed new rule, requires a nursing home to provide reasonable notice to a resident when proposing a room change. OAC 3701-61-08 is rescinded due to its contents being moved to proposed new rule OAC 3701-61-07.

During early stakeholder outreach, ODH asked provider organizations, other state agencies, and state hearing officers to provide comments proposing amendments to the rules. This request was sent in January 2023 to Leading Age Ohio, the Ohio Academy of Senior Health Sciences, the Ohio Assisted Living Association, the Ohio Health Care Association, ODA, ODM, and the Office of the State Long-Term Care Ombudsman. ODH received comments from state hearing officers urging amendments to in-person hearing requirements and certified mail service, but these changes could not be made due to the statutory nature of these requirements. However, ODH did make revisions proposed by state hearing officers with respect to clarifications on room changes and transfers, denial of a resident's Medicaid application, and additional contact information that must be provided to hearing officers. During the CSI public comment period, ODH received one comment from the Office of the State Long-Term Care Ombudsman (Office).

The Office asked ODH to clarify that discharges because the safety of the residents is endangered in the home should be due to their clinical or behavioral status, incorporate email for notification and contact purposes if available, and provide clarity with respect to hearings being required to be conducted in the home, criminal records check requirements for adult day care facilities, and the meaning of "reasonable notice." ODH revised the rules to reflect the suggestions to clarify that discharges because of endangerment in the home should be due to the residents' clinical or behavioral status, incorporate email for notification and contact purposes when available, and change "reasonable notice" to "as much notice as possible." ODH explained to the Office that hearings were

often being conducted virtually due to the COVID-19 pandemic despite the requirement that they be conducted in the home but added that this would change with the ending of the state of emergency that was declared as a result of the pandemic. Furthermore, ODH informed the Office that the criminal records check requirements for adult day care facilities are captured in rules promulgated by ODA and ODM. Lastly, ODH also made some technical corrections to the rules.

The business community impacted by the rules includes nursing homes and licensed residential care facilities, of which ODH notes there are 939 and 796 respectively in Ohio. The adverse impacts created by the rules include providing notice to residents, hiring an attorney for a hearing or appeal, and a possible fine for violation of the transfer and discharge requirements. According to ODH, compliance with notification requirements should require less than an hour of work by administrative personnel at an average of \$18.13 per hour to \$29.75 per hour using Bureau of Labor Statistics. Additionally, employing an attorney to attend a hearing or appeal resulting from a proposed transfer will cost around \$58.92 per hour for approximately five hours of work. ODH also points out that there are additional penalties associated with federally certified facilities, but these are set by the Centers for Medicare & Medicaid Services within the U.S. Department of Health and Human Services. Furthermore, ODH has the ability to refer cases to the Ohio Attorney General if there is evidence of substantially less than adequate care or substantially unsafe conditions at a home. ODH states that the adverse impacts to business are justified to implement statutory requirements and to protect elderly and infirmed Ohioans from being transferred or discharged from their homes without valid reason.

Recommendations

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

Conclusion

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



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Joseph Baker, Director

MEMORANDUM

TO: Selina Jackson, Ohio Department of Health

FROM: Michael Bender, Business Advocate

DATE: August 31, 2023

RE: **CSI Review – Transfer and Discharge Responsibilities of the Home (OAC 3701-61-05)**

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 one amended rule proposed by the Ohio Department of Health (ODH) as 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 August 2, 2023. Unless otherwise noted below, this recommendation reflects the version of the proposed rule filed with the CSI Office on July 24, 2023.

Ohio Administrative Code (OAC) 3701-61-05 sets forth the responsibilities of a nursing home when transferring or discharging a resident. The rule is amended to update language, incorporate electronic mail communication, require the home from which the resident is transferred or discharged to ensure that proper arrangements are made for applicable medication, equipment, health care services, and other necessary services, and require the home to which the resident is transferred or discharged to meet the resident's applicable health care and safety needs.

During early stakeholder outreach, ODH asked provider organizations, other state agencies, and state

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hearing officers to provide comments proposing amendments to the rule. This request was sent in January 2023 to Leading Age Ohio, the Ohio Academy of Senior Health Sciences, the Ohio Assisted Living Association, the Ohio Health Care Association, the Ohio Department of Aging, the Ohio Department of Medicaid, and the Office of the State Long-Term Care Ombudsman (Office). The stakeholders did not offer any comments on the rule. During the CSI public comment period, ODH received one comment from the Office. The Office supported the changes made to ensure that proper arrangements accompanied the safe and orderly discharge. However, the Office expressed reservations about some of the proposed language changes, asserting that they were vague and could lead to confusion. ODH responded that the state hearing attorneys with whom it consulted agreed that the language changes would not threaten the rights of residents. The Office also requested clarification on both the timing by which a home or alternative setting is obligated to accept a resident and the thirty-day notice given to a resident of a proposed transfer or discharge. ODH replied that no further changes were needed in these areas, noting that the thirty-day notice requirement is set forth in statute and that the state hearing officers with whom ODH consulted agreed that decisions regarding timeframes can be addressed through education and guidance.

The business community impacted by the rule includes nursing homes and licensed residential care facilities, of which there are 939 and 796 respectively in Ohio. The adverse impacts created by the rule include providing notice to residents, hiring an attorney for a hearing or appeal, and a possible fine for violation of the transfer and discharge requirements. According to ODH, compliance with notification requirements should require less than an hour of work by administrative personnel at an average of \$18.13 to \$29.75 per hour using Bureau of Labor Statistics. Additionally, employing an attorney to attend a hearing or appeal resulting from a proposed transfer will cost around \$58.92 per hour for approximately five hours of work. ODH also points out that there are additional penalties associated with federally certified facilities, but these are set by the Centers for Medicare & Medicaid Services within the U.S. Department of Health and Human Services. Furthermore, ODH has the ability to refer cases to the Ohio Attorney General if there is evidence of substantially less than adequate care or substantially unsafe conditions at a home. ODH states that the adverse impacts to business are justified to implement statutory requirements and to protect elderly and infirmed Ohioans from being transferred or discharged from their homes without valid reason.

Recommendations

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

Conclusion

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