

Rule Summary and Fiscal Analysis (Part A)**Department of Aging**

Agency Name

Division

Tom Simmons

Contact

**50 West Broad Street 9th floor Columbus OH
43215-3363**

Agency Mailing Address (Plus Zip)

614-728-2548

Phone

Fax

tsimmons@age.ohio.gov

Email

173-3-06.1

Rule Number

NEW

TYPE of rule filing

Rule Title/Tag Line

Adult day service.**RULE SUMMARY**

1. Is the rule being filed consistent with the requirements of the RC 119.032 review? **No**

2. Are you proposing this rule as a result of recent legislation? **No**

3. Statute prescribing the procedure in accordance with the agency is required to adopt the rule: **119.03**

4. Statute(s) authorizing agency to adopt the rule: **173.01, 173.02, 173.04, 173.392, Section 305(a)(1)(C) of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006; 45 C.F.R. 1321.11 (October 1, 2012 edition)**

5. Statute(s) the rule, as filed, amplifies or implements: **173.04, 173.392, Sections 321(a)(2), (a)(5), (a)(7), and (A)(8) of the Older Americans Act of 1965, 79 Stat. 210, 42 U.S.C. 3001, as amended in 2006**

6. State the reason(s) for proposing (i.e., why are you filing,) this rule:

This rule proposal is part of a larger rule package on adult day services. ODA is proposing to rescind rules 173-3-06.1 and 173-39-02.1 of the Administrative Code and to replace them with new rules of the same number. Here are ODA's reasons for proposing this rule package:

UNIFORM RULES

Many ADS providers serve consumers who are enrolled in various ODA-administered programs. Rule 173-3-06.1 of the Administrative Code regulates the non-Medicaid-funded programs (Older Americans Act and Alzheimer's Respite Programs) while rule 173-39-02.1 of the Administrative Code regulates the Medicaid-funded programs (Choices and PASSPORT Programs). As a result, many ADS providers are simultaneously regulated by both rules.

ODA proposes to reduce the burden associated with complying with ODA's two sets of ADS regulations by adopting new language for rules 173-3-06.1 and 173-39-02.1 of the Administrative Code that is uniform in outline, terminology, and requirements. To achieve uniform language between the rules, ODA proposes the following changes:

1. Outline: Paragraph (B)(1) of one rule would match paragraph (B)(1) of the other rule and paragraph (B)(2) of one rule would match paragraph (B)(2) of the other rule, and so on.
2. Transportation: Both rules would give the provider an exception from the responsibility to provide transportation if the consumer or caregiver arranges for personal transportation from a source other than the ADS provider. Currently, only rule 173-3-06.1 of the Administrative Code allows this exception. Unifying the transportation exception in both rules would reduce the adverse impact.
3. Caregivers: Both rules would use the term "caregiver." Currently, rule 173-3-06.1 of the Administrative Code uses the term "family caregiver."
4. Initial Assessments: (A) Providers would only be required to include major life events in the social profile. Currently, rule 173-39-02.1 of the Administrative Code requires including life events (in general) in the social profile, which applied literally, would be excessive. Only requiring providers to include major life events in a consumer's social profile would reduce the adverse impact. (B) Both rules would state that a provider is not responsible for conducting an initial assessment--relief from an adverse impact--if the consumer receives case management and was recently assessed by the case manager. For a consumer who receives ADS that funded by the Older Americans Act, the consumer would only receive case management if the consumer receives care coordination. Thus, in rule 173-3-06.1 of the Administrative Code, but not rule 173-39-02.1 of the Administrative Code, ODA states places the language related to a case manager's assessment in the conditional. (i.e., "If a case manager assesses....")

5. Activity Plans: Both rules would use "activity plan." Currently, rule 173-39-02.1 of the Administrative Code uses "individualized care plan."

6. Non-Physician Professionals: Both rules would use the same language regarding employing physician assistants, clinical nurse specialists, certified nurse practitioners, and certified nurse-midwives to provide health assessments, activity plans, and plans of treatment. Both rules also use the same language regarding obtaining health assessments, activity plans, and plans of treatment from these professionals when they do not work for the provider. (See below under "PLANS OF TREATMENT" for information on the plan-of-treatment language.) Both rules would also use the same language regarding employing, or obtaining the services of, physician assistants, clinical nurse specialists, certified nurse practitioners, and certified nurse-midwives for interdisciplinary care conferences. Unifying the language would reduce the adverse impact.

7. Lunch: Both rules would call food "lunch" and "snacks" and call the times to eat "lunchtime" and "snacktime." Currently, rule 173-39-02.1 of the Administrative Code uses "lunchtime meal" and rule 173-3-06.1 of the Administrative Code uses "mealtime."

8. Separate Space and Staff: Both rules would use the same language when requiring ADS centers to have a separate, identifiable space and staff during all hours that they provide ADS if the center in which they provide ADS is also used for other services or programs. Currently, rule 173-3-06.1 of the Administrative Code requires "a separate, identifiable space for ADS staff and ADS activities..." while rule 173-39-02.1 of the Administrative Code requires "a separate, identifiable space and staff..."

9. Activities Directors: Both rules would define each position as "activities director." Currently, rule 173-3-06.1 of the Administrative Code defines the term as "Activity staff person who directs consumer activities." See below under "ACTIVITIES DIRECTORS" for more information.

PLANS OF TREATMENT

Ordering plans of treatment includes ordering therapeutic diets, nursing services, nutrition consultations, physical therapy, or speech therapy. Although Chapter 4730 of the Revised Code would allow a physician assistant to do so, and Chapter 4723 of the Revised Code would allow clinical nurse specialists, certified nurse practitioners, and certified nurse-midwives to do so, ODA's current ADS rules only allow physicians to order plans of treatment.

Therefore, ODA is proposing to amend rules 173-3-06.1 and 173-39-02.1 of the Administrative Code to allow physician assistants, clinical nurse specialists, certified nurse practitioners, and certified nurse-midwives to order plans of treatment for consumers receiving ADS.

This proposed new language would not create an adverse impact for any ADS provider. On the contrary, if an ADS provider's business model involves employing, or contracting with, medical professionals to develop plans of treatment in house, the proposed new language would allow the provider to employ, or contract with, physician assistants, clinical nurse specialists, certified nurse practitioners, or certified nurse-midwives to instead of physicians. Allowing ADS providers to employ, or contract with non-physician medical professionals should save the ADS providers funds. The Bureau of Labor Statistics reports that the average mean wages for Ohio-based physician assistants, nurse practitioners, and nurse midwives is 49%, 48%, and 47% (respectively) of the wages of Ohio-based physicians.

If an ADS provider's business model does not involve employing, or contracting with, medical professionals to develop plans of treatment in house, the consumers attending the ADS center would need to see a medical professional to obtain a plan of treatment. Therefore, the proposed new language would not create, nor reduce, an adverse impact upon such an ADS provider with this business model. However, for the physicians' offices that examine the consumers who attend such ADS centers, the proposed new language could lower the cost of doing business by allowing physician assistants in those offices to develop the plans of treatment.

ELECTRONIC RECORDS

ODA is proposing to amend rules 173-3-06.1 and 173-39-02.1 of the Administrative Code to explicitly permit providers to retain records electronically instead of on paper.

ADEQUATE SQUARE FOOTAGE AND TOILETS

In order to engage in business serving consumers who are enrolled in ODA-administered programs, the current versions of rules 173-3-06.1 and 173-39-02.1 of the Administrative Code require each ADS center to meet an adequate-space requirement of 60 square feet per consumer. ODA's 60-square-foot requirement is modest in light of the average square footage for ADS centers, which is 194 square feet per consumer.

For a provider that provides ADS to consumers who are enrolled in ODA's programs and also to other individuals, ODA is proposing to clarify that, regardless of the funding source for a consumer's ADS, an ADS center must have at least 60 square feet of space per consumer, excluding hallways, offices, rest rooms, and storage areas.

Example 1: If an ADS center wants to serve up to 20 consumers at any given time (10 of which would be enrolled in ODA-administered programs), the ADS center would need to multiply the total number of consumers served (not the total number of consumers who are enrolled in ODA-administered programs) by 60 to see how much square footage it must have to handle that consumer load. In doing so, it

would find that the ADS center that serves 20 consumers would need 1,200 square feet of space.

Example 2: If an ADS center has 1,200 square feet of space and wants to serve consumers who are enrolled in ODA-administered programs, it would need to divide its square footage by 60 to see how many consumers it could serve. In doing so, it would find that the ADS center could serve up to 20 consumers at a time.

Because the average ADS center has 194 square feet per consumer, and because ODA's current rules already require 60 square feet per consumer, every provider that is presently engaged in business serving consumers who are enrolled in ODA's programs should see no adverse impacts from the proposed new language on adequate square footage. The new language only clarifies the adequate-space requirement already in place.

Additionally, by following the same logic that ODA stated regarding adequate square footage, ODA is proposing to clarify the requirement already in place related to the number of working toilets. ODA is proposing to clarify that an ADS center must have at least 1 working toilet for every 10 consumers that it serves, regardless of the funding source for a consumer's ADS. As previously stated, an adequate number of toilets is more critical for consumers who receive ADS than the general population because 45% of the consumers who receive ADS require assistance with toileting. Providing assistance with toileting implies lengthier times on toilets, which implies a reduced availability of any given toilet, which indicates the need for an adequate supply of working toilets.

Because ODA's current rules already require one working toilet for every 10 consumers, every provider that is presently engaged in business serving consumers who are enrolled in ODA's programs should see no adverse impacts from the proposed new language on adequate toilets. The new language only clarifies the requirement already in place regarding the number of working toilets.

On August 26, 2013, ODA refiled the proposed new rule to remove "regardless of the funding source for each individual's ADS" from the language about adequate square footage and toilets. ODA may further analyze this matter for a future rule proposal.

ACTIVITIES DIRECTORS

In order to engage in business serving consumers who are enrolled in ODA-administered programs, the current versions of rules 173-3-06.1 and 173-39-02.1 of the Administrative Code require each provider to hire an activities director that meets specific qualifications that include a degree in recreational therapy or a related degree or 2 years of experience. However, the two rules are not uniform on every way in which a person may qualify for the activities-director position.

As of May 30, 2013, ODA relinquished its proposal to adopt uniform qualifications for activities directors. ODA may further analyze this matter for a future rule proposal.

NON-SUBSTANTIVE

ODA is also proposing to non-substantively amend the rules in order to:

1. Update the definitions of "adult day service" in both rules to make them uniform to one other and to better approximate the core service definition promoted by CMS, which is not substantially different than ODA's current definitions.
2. Update the citations of specific references to the Code of Federal Regulations in both rules pursuant to section 121.75 of the Revised Code. (e.g., "July 1, 2012 edition.")
3. Require providers to state how specific goals, objectives, and planned interventions listed in each consumer's activity plan meet the goals of the activity plan. The current versions of the rule require the provider to state how specific goals, objectives, and planned interventions enable the goals of the activity plan.
4. Replace the use of "direct-care staff" with "personal care staff." Eliminating the use of "direct care" in this rule may prevent confusion with the definition of "direct care" in rule 173-9-01 of the Administrative Code (regarding criminal records checks), which defines office work as direct care, even if the staff member has no in-person contact with consumers. Eliminating the use of "direct care" in this rule may also prevent confusion if Ohio establishes its proposed credentialing for direct-care staff and the definition of "direct care" for that project would differ from the use in this rule.

7. If the rule is an AMENDMENT, then summarize the changes and the content of the proposed rule; If the rule type is RESCISSION, NEW or NO CHANGE, then summarize the content of the rule:

This rule contains the requirements for providing an adult day service to a consumer who receives services funded by the Older Americans Act or Alzheimer's Respite Programs.

8. If the rule incorporates a text or other material by reference and the agency claims the incorporation by reference is exempt from compliance with sections 121.71 to 121.74 of the Revised Code because the text or other material is **generally available** to persons who reasonably can be expected to be affected by the rule, provide an explanation of how the text or other material is generally available to those persons:

The rules references the Older Americans Act of 1965, as amended in 2006, which is generally available to the public online.

Furthermore, ODA provides a full citation to the Older Americans Act of 1965, as amended in 2006, in rule 173-3-01 of the Administrative Code. The definition of the Act in that rule applies to all rules of Chapter 173-3 of the Administrative Code.

The rule also references the Code of Federal Regulations regarding ADA Accessibility Guidelines in Appendix A to 28 CFR, Part 36. All CFRs are generally available to the public through the through the U.S. Government Printing Office's website.

9. If the rule incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material electronically, provide an explanation of why filing the text or other material electronically was infeasible:

ODA did not file the text of the Older Americans Act of 1965, as amended in 2006, electronically because ODA merely made a citation to the federal law and the federal law is generally available to the public through the through the U.S. Government Printing Office's website.

ODA did not file the text of the Code of Federal Regulations electronically because ODA merely made a citation to the CFR and CFRs are generally available to the public through the through the U.S. Government Printing Office's website.

10. If the rule is being **rescinded** and incorporates a text or other material by reference, and it was **infeasible** for the agency to file the text or other material, provide an explanation of why filing the text or other material was infeasible:

Not Applicable.

11. If **revising** or **refiling** this rule, identify changes made from the previously filed version of this rule; if none, please state so. If applicable, indicate each specific paragraph of the rule that has been modified:

On June 21, 2013, ODA revise-filed the rule to update questions 8 and 9 of this RSFA regarding incorporating text or other material into the rule by reference. ODA did not amend the rule language as part of this revised filing.

On June 24, 2013, ODA revised-filed the rule to reschedule the public hearing. ODA moved the date from July 9 to July 11 to accommodate for a meeting organized by the Governor's Office of Health Transformation on July 9. ODA also uploaded into the Register of Ohio a revised public-hearing notice and revised

memorandum of response. ODA also updated this RSFA. ODA did not amend the rule language as part of this revised filing.

On June 25, ODA revise-filed the rule to upload into the Register of Ohio a revised public hearing notice and a revised memorandum of response for the CSI Office. ODA also updated this RSFA. ODA did not amend the rule language as part of this revised filing.

On July 10, 2013, ODA revise-filed the rule to:

1. Preface certain lists in the rule that are comprised of long sentences spread over multiple paragraphs with a phrase that follows this pattern: "...shall possess at least one/both/each/all of the following." ODA received multiple communications from Oxford Senior Center expressing concern that the formula "A, B, or C" could be interpreted to mean "A and B or C" instead of "A or B or C." To ensure that such formulas have only one reasonable interpretation, ODA is revising paragraphs (B)(1)(d)(ii), (B)(4)(b)(ii) [no need to say "demonstrate" because that is required again in paragraph (B)(4)(vi) of the rule], (B)(4)(b)(iii), (B)(4)(b)(iv), (B)(4)(c)(i), and (B)(5)(a) of the proposed new rule to add the previously-mentioned phrase. The result is "X shall possess at least one/both/each/all of the following: A, B, or [or "and"] C." (ODA adjusted sub-paragraphs accordingly.)
2. Update "GED" language in the sub-paragraphs to paragraphs (B)(4)(b)(iii) and (B)(4)(b)(iv) of the rule with this: "A high school equivalence diploma as defined in section 5107.40 of the Revised Code." ODA also revised the proposed new rule to list high school diplomas and high school equivalence diplomas in separate sub-paragraphs.
3. Consistently use "activity director" throughout the rule instead of "activities director" because the NCCAP calls the person who directs activities an "activity director," not an "activities director."
4. Replace "health or human service field" in paragraph (B)(4)(b)(iv)(b) of the rule with "health or human services field." (cf., www.nationalhumanservices.org/what-is-human-services)
5. Replace "the same number of hours" in paragraphs (B)(4)(c)(iii) of the rule with "eight hours."
6. Replace "the services" in paragraph (B) of the rule with "ADS."
7. Insert "once" before "every six months" in paragraph (B)(1)(h)(i) of the rule.
8. Replace "care" in paragraphs (B)(2)(a)(iii) and (B)(2)(a)(vi) of the rule with "ADS."
9. Delete the redundant occurrence of "ADS" before "center" in paragraph (B)(2)(d)(i) of the rule.

10. Replace "activity coordinator" in paragraph (B)(4)(b)(ii)(b) of the rule and "activities staff" in paragraph (B)(4)(b)(iii) of the rule with "activity assistant," which is the term used by NCCAP.
11. Replace "and" with "or" as it occurred between "health" and "human services field" in paragraph (B)(4)(b)(iv) of the rule.
12. Replace paragraphs (B)(4)(b)(iii)(b) and (B)(4)(b)(iv)(b) of the rule with the following, simplified paragraph: "At least two years of employment in a supervised position to furnish personal care, to furnish activities, or to assist with activities."
13. Delete the "staff member who furnishes personal care assistance" in paragraph (B)(4)(b)(iv) of the rule with "personal care aide."
14. Insert "of" after the rule number in paragraph (B)(4)(b)(v) of the rule.
15. Replace "personal care staff member" in paragraphs (B)(4)(c)(i) and (B)(4)(c)(ii) of the rule with "personal care aide."
16. Correct the punctuation in paragraph (B)(4)(c)(iv) of the rule to correctly separate the series of items in the second sentence. The result would read as follows: "In doing so, the provider shall list the instructor's title, qualifications, and signature; date and time of instruction; content of the instruction; and name and signature of ADS personal care staff completing the training."
17. Revise this RSFA.

On July 19, 2013, ODA refiled the rule to:

1. More clearly limit the nurse staffing-level requirement in paragraph (B)(3)(c) of the rule to the enhanced and extensive levels of ADS. At ODA's public hearing on July 11, 2013, Mike Turner of Athens County and Deborah Ruffin of Choices Adult Day Center raised concern that the current and proposed new versions of rule 173-3-06.1 of the Administrative Code clearly indicate that there is a basic level of ADS that the rule regulates. However, all of the requirements in the rule apply to every ADS provider, even if the provider only furnishes a basic ADS but not enhanced ADS or intensive ADS. One area of particular concern was staffing ratios.

Basic ADS does not require an every-day, throughout-the-day frequency of tasks that fall within a nurse's scope of practice. Presently, ADS providers who only furnish only basic ADS do not believe that the rule requires them to have a nurse on duty any time a consumer is present because the tasks that fall within the nurse's scope of practice are not frequently necessary. However, they have asked for stronger language to reinforce this point of view.

In response to the comments of Mr. Turner and Ms. Ruffin, ODA is amending paragraph (B)(3)(c) of the rule to limit the requirement for a nurse to be present any

time a consumer is present to a requirement to have a nurse present any time a consumer who receives enhanced ADS or intensive ADS is present. To accomplish this, ODA will delete "when a consumer is present to provide services within the nurse's scope of practice" and insert "whenever a consumer who receives enhanced ADS or intensive ADS is present."

2. Insert a comma after "nutrition consultation" in paragraph (B)(1)(g) of the rule.

3. Revise this RSFA.

On July 25, 2013, ODA refiled the rule 173-3-06.1 of the Administrative Code to amend paragraph (B)(3)(c) of the rule and to revise this RSFA.

Previously, on July 19, ODA refiled the rule to more clearly limit the nurse staffing-level requirement in paragraph (B)(3)(c) of the rule. ODA did this because the components of the basic-level of ADS that fall within a nurse's scope of practice are not needed every day a basic-ADS-only center is open. Yet, when ODA refiled the rule with the amended language, it had an unintended adverse action for providers of enhanced ADS.

Then, on July 25, 2013, the Alzheimer's Association of Northwest Ohio notified ODA the July 19 amendment would create an adverse impact upon their ADS centers. The association has two centers that perform only the enhanced-level of ADS. The centers are open for 9 and 10 hours a day, respectively, but do not need to provide components of enhanced ADS during each of the 9 or 10 hours per day that they are open for business. As a result, they keep a nurse on call, but only when a nurse is not needed.

Before the revision, the paragraph only required the provider to have a nurse present when a component of the service was necessary that required the nurse's scope of practice. Therefore, ODA has refiled the rule again to make it clear that (1) ODA does not intend to require nurse staffing levels for basic ADS, but that (2) the required nurse staffing levels for enhanced and intensive ADS only applies when a component of the service is needed that requires a nurse's scope of practice.

Before the July 19 amendment, paragraph (B)(3)(c) of the proposed new rule said, "The provider shall have one RN, or LPN under the direction of an RN, present when a consumer is present to provide services within the nurse's scope of practice."

After the July 19 amendment, the paragraph said, "The provider shall have one RN, or LPN under the direction of an RN, present whenever a consumer who receives enhanced ADS or intensive ADS is present."

After the July 25 amendment, the paragraph now says, "The provider shall have one RN, or LPN under the direction of an RN, present whenever a consumer who receives enhanced ADS or intensive ADS requires components of enhanced ADS

or intensive ADS that fall within a nurse's scope of practice."

On August 26, 2013, ODA refiled the proposed new rule to:

1. Remove "regardless of the funding source for each individual's ADS" from the language about adequate square footage and toilets. ODA may further analyze this matter for a future rule proposal.
2. Revise this RSFA.

12. 119.032 Rule Review Date:

(If the rule is not exempt and you answered NO to question No. 1, provide the scheduled review date. If you answered YES to No. 1, the review date for this rule is the filing date.)

NOTE: If the rule is not exempt at the time of final filing, two dates are required: the current review date plus a date not to exceed 5 years from the effective date for Amended rules or a date not to exceed 5 years from the review date for No Change rules.

FISCAL ANALYSIS

13. Estimate the total amount by which *this proposed rule* would **increase / decrease** either **revenues / expenditures** for the agency during the current biennium (in dollars): Explain the net impact of the proposed changes to the budget of your agency/department.

This will have no impact on revenues or expenditures.

\$0.00

ODA estimates that the proposed adoption of this new rule will have no impact upon the biennial budget that the Ohio General Assembly established for ODA in H.B. No. 153 or that was reviewed by H.B. No. 487 (129th G.A.).

14. Identify the appropriation (by line item etc.) that authorizes each expenditure necessitated by the proposed rule:

GRF-490-411 Senior Community Services.

GRF-490-414 Alzheimer's Respite.

3220-490-618 Federal Aging Grants.

3M40-490-612 Federal Independence Services.

15. Provide a summary of the estimated cost of compliance with the rule to all directly affected persons. When appropriate, please include the source for your information/estimated costs, e.g. industry, CFR, internal/agency:

ODA estimates that there is no cost of compliance to any person associated with the adoption of this proposed new rule. See the business impact analysis for detailed information--especially the details under question #14.

16. Does this rule have a fiscal effect on school districts, counties, townships, or municipal corporations? **No**

17. Does this rule deal with environmental protection or contain a component dealing with environmental protection as defined in R. C. 121.39? **No**

S.B. 2 (129th General Assembly) Questions

18. Has this rule been filed with the Common Sense Initiative Office pursuant to R.C. 121.82? **Yes**

19. Specific to this rule, answer the following:

A.) Does this rule require a license, permit, or any other prior authorization to engage in or operate a line of business? **Yes**

To be reimbursed for providing adult day services, an agency provider must agree to provide a service that complies with the rule. One requirement of the rule is to have a provider agreement with an area agency on aging that includes the mandatory clauses in rule 173-3-06 of the Administrative Code.

B.) Does this rule impose a criminal penalty, a civil penalty, or another sanction, or create a cause of action, for failure to comply with its terms? **No**

C.) Does this rule require specific expenditures or the report of information as a condition of compliance? **Yes**

The provider must retain records to verify how it provided adult day services to each consumer.