

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

Agency Name

Division

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173-42-06

Rule Number

NEW

TYPE of rule filing

Rule Title/Tag Line

Consumer choices and responsibilities.**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: **173.02**

5. Statute(s) the rule, as filed, amplifies or implements: **Section 1902(a)(23) of the Social Security Act; 42 CFR 431.51**

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

ODA is proposing to amend rules 173-39-01, 173-39-02, 173-39-02.11, 173-39-03, and 173-39-04 of the Administrative Code and to adopt new rule 173-42-06 of the Administrative Code. In doing so, ODA has 5 basic goals:

1. To increase consumer choice by allowing consumers to hire consumer-directed personal care providers for the personal care service through the PASSPORT program on a statewide basis. [Before the February 4, 2011 refiling of this rule, ODA called these providers "consumer-directed individual providers."] In doing so, the proposed new rules give PASSPORT consumers a new right to choose a

method by which to receive their personal care: either from an agency-provider method or a consumer-directed method.

2. To implement a rule on the choices and responsibilities bestowed upon a consumer who directs a consumer-directed personal care provider under the PASSPORT program.
3. To comply with section 119.032 of the Revised Code, which requires each state agency to review each rule on or before the rule's designated review date.
4. To comply with Governor Strickland's Executive Order 2008-04S: "Implementing Common Sense Business Regulation," which requires each state agency to write easier-to-read and easier-to-comprehend rules to promote transparency in the agency's regulations. (Because the process of adopting this proposed new rule spans two gubernatorial administrations, it is also ODA's goal to comply with Governor Kasich's new Executive Order 2011-01K "Establishing the Common Sense Initiative.") As a result, ODA's proposed new or amended language:
 - a. Complies with Chapter 5 of the Legislative Service Commission's "Rule Drafting Manual," as found on http://www.lsc.state.oh.us/rules/rdm06_06.pdf
 - b. Incorporates recommendations from "Advanced Legal Drafting" by Bryan A. Garner (Dallas: LawProse, Inc. (c) 2007)
 - c. Incorporates recommendations from "Plain English Writing Tips," as found on http://business.ohio.gov/docs/RegReform_PlainEnglishWritingTips.pdf.
5. To format the new language in ODA's rules in the same way, rule after rule, in a manner that corresponds with the cooperative effort of other agencies that participate that also participate in the consolidation exploration team of the Executive Medicaid Management Agency (EMMA), which Governor Strickland created with Executive Order 2007-36S.

In addition to the 5 basic goals stated above, ODA is also proposing to adopt this new rule to implement the changes detailed in item #11 of this RSFA.

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:

In order to implement basic goal #2 stated in item #6 of Part A of this RSFA, ODA proposes to adopt this new rule which:

1. Repeats a right granted to consumers by the Social Security Act that allows any consumer in the PASSPORT program to choose to obtain a service under the PASSPORT program under certain conditions.

2. States that a consumer has a right to make informed choices that may impact his or her life.
3. Lists the consumer's responsibilities related to his or her service plan.
4. Lists the consumer's responsibilities related to furnishing services.
5. States that an authorized representative may represent the consumer for any purpose under the rule.
6. Defines terms used in the rule.

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:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

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:

This response left blank because filer specified online that the rule does not incorporate a text or other material by reference.

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:

On February 4, 2011, ODA refiled this rule to:

1. Replace "consumer-directed individual provider" in paragraphs (A)(1), (A)(1)(e), (B)(1)(c), (B)(1)(d), (C)(3), (C)(3)(a), (C)(3)(a), and (E)(1) of the rule with "consumer-directed personal care provider." [Note: This rule does not mention

assisted living providers of the Assisted Living Program or the consumer-directed individual providers of the Choices Program, because this rule only pertains to consumers who are enrolled in the PASSPORT program.]

2. Replace "orders" as the term occurs in paragraphs (A)(1)(c) and (B)(2) of the rule with "authorizes." ODA made this revision in response to testimony that the Ohio Council for Home Care and Hospice provided during the public hearing.
3. Insert "to" in between "according" and "this rule" in paragraph (A)(2) of the rule.
4. Insert "developing a" before "service plan" in paragraph (B) of the rule.
5. Replace the first three sentences of paragraph (B)(1)(b) of the rule, which said, "If the consumer chooses to receive a service from a consumer-directed individual provider, the case manager shall assess the consumer's strengths and weaknesses related to his or her ability to direct a consumer-directed individual provider. The case manager shall retain records supporting the determination. The case manager shall allow the consumer to direct a consumer-directed individual provider...", with "If the consumer chooses to receive a service from a consumer-directed personal care provider, the case manager shall assess the consumer's strengths and weaknesses (and/or, if the consumer has an authorized representative, the authorized representative's strengths or weaknesses) related to his or her ability to direct a provider. The case manager shall retain records supporting the determination. The case manager shall allow the consumer to direct a provider...".
6. Insert "requirements" after "record-retention" in paragraph (B)(1)(b)(xi) of the rule.
7. Insert after the first occurrence of "consumer" in paragraph (B)(1)(c) of the rule the following words: " (and/or, the consumer's authorized representative)"
8. Replace "procedures" in paragraph (B)(2) of the rule with "interventions." ODA made this revision in response to testimony that the Ohio Council for Home Care and Hospice provided during the public hearing.
9. Replace "Responsibilities related to furnishing services" in paragraph (C) of the rule with, "consumer's responsibilities related to the provider furnishing services."
10. Insert "nor request that the provider's staff furnish a service" in paragraph (C)(1)(a) after the words, "The consumer shall not aid the provider's staff in furnishing a service." ODA made this revision in response to testimony that the Ohio Council for Home Care and Hospice provided during the public hearing.
11. Replace the words "provider's staff" in paragraph (D)(2)(a) of the rule with "Provider." (Note: A non-agency provider does not have staff.)
12. Insert "unless the provider is already informed of the consumer's upcoming absence" in paragraph (C)(3)(g) of the rule. ODA made this revision in response to

testimony that the Ohio Council for Home Care and Hospice provided during the public hearing.

13. Delete ", if any," from paragraph (C)(3)(i) of the rule. Also, replace "The consumer may participate provide the continuing education" at the end of the same paragraph with, "(The consumer may participate in the continuing education.)"

14. Insert "assist the consumer to" before "retain records" in paragraph (C)(3)(j) of the rule.

15. 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

The Ohio General Assembly established ODA's biennial budget. ODA will implement the rule within the fiscal parameters the General Assembly established and will adjust expenditures so that it does not exceed those parameters. Thus, the proposed amended rule is cost-neutral. It has no impact upon the amount of revenue ODA receives or the amount of revenue ODA spends during the biennium.

ODA's proposed new consumer-direction option will allow the PASSPORT program to maintain cost-neutrality. ODA's analysis indicates that, through an agency-provider (the only option today), a PASSPORT consumer receives an average of 60 hours of the personal care service per month at an average rate of \$16.15 per hour. This results in an average expenditure on personal care of \$969.17 per month per consumer. ODA's proposed new consumer-direction option will give

a PASSPORT consumer the option to direct his or her own personal care service at a lower cost. If the PASSPORT consumer using this option receives 60 hours of the personal care service per month at the \$12.72 per hour rate proposed in ODJFS' rule 5101:3-1-06.1 of the Administrative Code, the average expenditure on personal care for that consumer will be \$763.20 per month per consumer, or \$205.97 less per month than if the consumer received the personal care service through an agency provider. ODA will redirect the \$205.97 per month per consumer difference to support the PASSPORT program's administrative activities and care for other PASSPORT consumers.

ODA projects that the initial demand from PASSPORT consumers to choose to direct their own personal care service will be slow: less than 1% of the current PASSPORT consumers for the remainder of this fiscal year and 3.6% of the PASSPORT consumers for the next fiscal year. Therefore, ODA projects a minimal impact to the PASSPORT program's current operations.

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ODA designates PAAs to perform case-management activities for the agency providers and for the consumer-directed individual providers of the Choices Program. After ODA adopts this rule, it will also designate the PAAs to perform case-management activities for consumers who direct consumer-directed personal care providers. If the addition of consumer-directed personal care results in an overall increase in the number of consumers who choose to direct their own care, the PAAs may see an increase in expenses in their case-management expenses. Yet, after ten years of allowing the PAAs to provide case-management services to

consumers who use the consumer-directed home care attendant service under the Choices Program, the PAAs have not needed to adjust the case-management ratio ceiling of 1 case manager for every 60 consumers. Again, ODA will implement the rule within the fiscal parameters the General Assembly established and will adjust expenditures so that it does not exceed those parameters. Because ODA may use PASSPORT funds for administrative expenses, ODA will maintain this cost neutrality by paying the PAAs with PASSPORT funds.

ODA projects that the initial demand from PASSPORT consumers to choose to direct their own personal care service will be slow: less than 1% of the current PASSPORT consumers for the remainder of this fiscal year and 3.6% of the PASSPORT consumers for the next fiscal year. Therefore, ODA projects a minimal impact to the PASSPORT program's current operations.

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

GRF-490-423 Long-Term Care Budget - State.

3C40-490-623 Long-Term Care Budget.

4J40-490-610 PASSPORT/Residential State Supplement.

4U90-490-602 PASSPORT Fund.

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:

once adopted, the proposed amendment of rules 173-39-01, 173-39-02, 173-39-02.11, 173-39-03, and 173-39-04 of the Administrative Code, and the proposed adoption of rule 173-42-06 of the Administrative Code, as well as the Center for Medicare and Medicaid Service's recent approval of Ohio's request to amend the PASSPORT Medicaid waiver, give PASSPORT consumers the option to choose a new method by which to receive the personal care service. Once these rules are adopted, consumers may use the new option to choose the consumer-directed method to receive the service instead of the agency-furnished method.

While this new option does not create a new cost to agency providers who furnish personal care services, it could create a new "cost" in the form of a potential loss of market share. Currently, agency providers furnish 100% of the PASSPORT program's personal care services. After the rules are adopted, ODA estimates that they will lose a small share of the market.

If a consumer who currently receives the personal care service from an agency

provider begins to direct his or her own personal care service, the agency provider will no longer spend dollars caring for the consumer, but will also no longer be reimbursed for caring for the consumer. Instead, the PASSPORT program will reimburse the consumer-directed personal care provider.

ODA projects that the initial demand from PASSPORT consumers to choose to direct their own personal care service will be slow: less than 1% of the current PASSPORT consumers for the remainder of this fiscal year and 3.6% of the PASSPORT consumers for the next fiscal year. Therefore, ODA projects that agency providers will see a minimal loss of caseload.

Additionally, because the PASSPORT program is growing as the population of seniors continues to increase, the agency providers may see no loss of consumers whatsoever.

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**