



Department of
Developmental Disabilities

Mike DeWine, Governor
Jeff Davis, Director

Hearing Summary Report

Hearing Date: 11/22/2019

Today's Date: 11/27/2019

Rule Numbers: Rescind: 5123:2-9-18, 5123:2-9-19
New: 5123-9-18, 5123-9-19
Amend: 5123-9-24

If no comments at hearing, please check the box. ☐

List organizations or individuals giving or submitting testimony before, during or after the public hearing and indicate the rule number(s) in question.

- Lisa Claus (5123-9-18)
- Debbie Jenkins, Policy Director, Ohio Health Care Association (5123-9-18)
- Robert Lambert (5123-9-18 and 5123-9-24)
- Tom Rickels, President, Ohio Waiver Network (5123-9-18, 5123-9-19, and 5123-9-24)
- Tiffany Smetana, CEO and Owner, Solid Rock On Which We Stand, LLC (5123-9-18 and 5123-9-24)
- Lori Stanfa, Senior Policy Analyst, Ohio Association of County Boards Serving People with Developmental Disabilities (5123-9-18)
- Christine Touvelle, Policy Analyst, Ohio Provider Resource Association (5123-9-18)

Consolidated Summary of Comments Received

Please review all comments received and complete a consolidated summary paragraph of the comments and indicate the rule number(s).

Rules Generally

On behalf of the Ohio Waiver Network, we would like to congratulate the Department and all the stakeholders that worked so diligently on Non-Medical Transportation in rules 5123-9-18, 5123-9-19,

and 5123-9-24. This will be an immense benefit to individuals with developmental disabilities having greater opportunities in their communities. (Tom Rickels)

Department's Response: Thank you; we appreciate your support and participation in efforts to improve the services.

5123-9-18 (Non-Medical Transportation)

In the support of increasing community integration due to federal mandates, person-centered plans should support the use of funds budgeted for mileage and not be withheld due to a definition flaw of "medical necessity." By definition, Non-Medical Transportation is not a medical necessity. (Tom Rickels)

Department's Response: "Medical necessity" is a Medicaid principle that applies to all services funded through Medicaid Home and Community-Based Services waivers. The name, "Non-Medical Transportation," was intended to distinguish the service from "Medical Transportation," a Medicaid State Plan service required pursuant to 42 C.F.R. 451.53.

The Ohio Provider Resource Association (OPRA) is grateful for the efforts of Director Davis, the Department of Developmental Disabilities, and local County Boards of Developmental Disabilities for bringing the Non-Medical Transportation service additional funding through the state budget process. OPRA continues to believe the various changes should help ensure that individuals with developmental disabilities have full access to their communities. OPRA is thankful for the revisions the Department made based on OPRA and other stakeholder's comments made during the public commenting period for this rule. (Christine Touvelle)

Department's Response: Thank you; we appreciate your support and participation in efforts to improve the services.

(B)(5): Reconsider definition of "commercial vehicles." Any vehicle used to transport people for money is a commercial vehicle. (Robert Lambert)

Department's Response: The definitions in paragraph (B) apply only to this rule. For purposes of this rule, the distinction is that commercial vehicles are transportation modes available for use by the general public and not specialized services for people with developmental disabilities. We are maintaining the definition as the word, "commercial," and the concept of operators of commercial vehicles are embedded in the federally-approved waivers. The paragraph was tweaked as indicated by underline and strikethrough:

"Commercial vehicles" means buses, light rail transit, livery vehicles, and taxicabs that are available for ~~public use~~ by the general public.

(B)(15): We have been told by vehicle makers that a warranty is void if the vehicle is modified. Consider using a different word than "modified." (Robert Lambert)

Department's Response: The definitions in paragraph (B) apply only to this rule; the rule does not pertain to nor govern manufacturers of vehicles. We are maintaining the word, "modified," as it is embedded in the federally-approved waivers.

(B)(15)(b)(iv): We would like "and tested" to be removed. (Robert Lambert)

Department's Response: Based on your suggestion, the paragraph was revised as indicated by underline and strikethrough:

~~On each day the vehicle is used to provide non-medical transportation, be~~ Be inspected, and tested on each day the vehicle is used to provide non-medical transportation, by the first driver of the vehicle and prior to transporting an individual in a wheelchair, to ensure the permanent fasteners, safety harnesses or belts, and access ramp or hydraulic lift are working prior to transporting an individual in a wheelchair. The daily inspection shall be documented by the driver that conducts the inspection.

(B)(16)(d): I am writing in support of the rule change which will greatly benefit my son as it would allow him to receive transportation services to get to and from his college classes. (Lisa Claus)

Department's Response: Thank you; we appreciate your support and must give credit to self-advocates, who advanced this idea.

(B)(18): We disagree with the definition of "passenger." In order to qualify for the per trip rate under the new rule, we'd need to operate a 5+ passenger vehicle. By the new rule's standards, this means a vehicle with 6+ seats, as the rule lists the definition of passenger as a "traveler in a vehicle who does not participate in its operation." This eliminates the ability to use smaller SUVs, such as a Ford Escape or Ford Edge, which are described by Ford as 5 passenger vehicles (1 driver plus 4 additional occupants). Many of our clients have community employment jobs throughout our rural area in Geauga County. Since they do not all work together at the same location, we are transporting them on a 1:1 basis. This new rule eliminates our ability to provide Non-Medical Transportation in a sustainable way in vehicles such as the models I've described above. Again, with the decrease in Non-Medical Transportation per-mile rate coupled with the rule changes that list a 5+ passenger versus the current rule which lists the Non-Medical Transportation per-mile rate eligible in an 8 passenger or less vehicle, this proposed change will make it difficult to provide Non-Medical Transportation to those who rely on it. (Tiffany Smetana)

Department's Response: The rule does not require Non-Medical Transportation at the per-trip rate to be provided in a 5+ passenger vehicle. Paragraph (E) requires a vehicle equipped to transport five or more passengers to have certain equipment, be inspected daily by the provider, and be inspected annually by the Ohio State Highway Patrol or a certified mechanic.

(D)(2): We recommend revising the paragraph as indicated. (Debbie Jenkins, Lori Stanfa, and Christine Touvelle)

An individual's non-medical transportation needs may be met through a combination of non-medical transportation at the per-trip rate, non-medical transportation at the per-mile rate, and/or non-medical transportation provided by operators of commercial vehicles at the usual and customary fare. An agency provider shall bill the per-trip rate when transporting to and from an individual's place of residence and a location specified in (B)(16)(a) to (B)(16)(f). An independent provider may bill the per-trip or per-mile rate when transporting to and from an individual's place of residence and a location specified in (B)(16)(a) to (B)(16)(f). Per-trip payment is limited to transportation to and from an individual's place of residence and a location specified in (B)(16)(a) to (B)(16)(f).

Department's Response: The goal of modifying the Non-Medical Transportation service is to expand opportunities for individuals who rely on the service to fully access their communities. To that end, we want to ensure the rule does not limit or disrupt effective arrangements between individuals served and providers. Based on your suggestion, paragraph (D)(2) was revised as indicated by underline and new paragraphs (D)(2)(a) and (D)(2)(b) were added to establish the concepts you proposed as a "default" while ensuring an individual has flexibility to make other arrangements that better meet his or her needs:

(D)(2): An individual's non-medical transportation needs may be met through a combination of non-medical transportation at the per-trip rate, non-medical transportation at the per-mile rate, and/or non-medical transportation provided by operators of commercial vehicles at the usual and customary fare. Unless otherwise specified in an individual service plan:

(a) Non-medical transportation at the per-trip rate shall be authorized for transporting an individual between the individual's residence and a location specified in paragraphs (B)(16)(a) to (B)(16)(f) of this rule.

(b) Non-medical transportation at the per-mile rate shall be authorized for transporting an individual in circumstances other than circumstances described in paragraph (D)(2)(a) of this rule.

(E)(1): We would like the requirement to comply with local laws removed. (Robert Lambert)

Department's Response: Whether or not our rule requires an entity to comply with applicable laws is immaterial; any citizen or business must comply with applicable laws. For that reason, and in response to your comment, however, paragraphs (E)(1) and (E)(2) of the rule as originally filed on October 17, 2019 were eliminated.

(E)(2): We believe daily inspection of vehicles is overkill. If daily inspection is required it should not be mandated to occur in the morning as some staff work second or split shifts. We would like "and tested" to be removed. (Robert Lambert)

Department's Response: The requirement for inspection on each day the vehicle is used to provide Non-Medical Transportation was maintained. As written, the paragraph requires the inspection to be conducted by the first driver of the day, which may or may not be in the morning. Based on your suggestion, the paragraph was revised as indicated by strikethrough:

Be inspected ~~and tested~~, on each day the vehicle is used to provide non-medical transportation, by the first driver of the vehicle and prior to transporting an individual, to ensure the lights, windshield washer/wipers, emergency equipment, mirrors, horn, tires, and brakes are working. The ~~daily~~ inspection shall be documented by the driver that conducts the inspection.

(H)(1)(c): We do not think license plate number should be required. This seems redundant and time-consuming. What matters is type of vehicle. (Robert Lambert)

Department's Response: We need a method to verify that the billing is appropriate for the specific vehicle used to provide the service. We are therefore, maintaining the requirement (that exists in currently effective rule 5123:2-9-18) for the license plate number of the vehicle. In response to your comment, however, the requirement for the type of vehicle (i.e., modified or non-modified) included as paragraph (H)(1)(c) of the rule as originally filed on October 17, 2019 was eliminated.

Appendix: When considering the proposed rate changes Non-Medical Transportation, we fail to see where the Department's 20+ million-dollar investment lies. While there can be some value in allowing a provider to bill \$19.70/trip for a 5+ passenger or modified van, rather than a 9+ as listed in the current rule, the choice to either bill that or bill per mile doesn't add up. You're proposing a decrease in the per mile rate from \$1.29 [for Cost-of-Doing-Business Category 6] to \$0.58/mile [for transporting one individual in a non-modified vehicle], yet calling it an increase? To suggest that as a residential provider, we can now also simultaneously bill for Homemaker/Personal Care, does not increase our level of reimbursement. It ends up being virtually the same as if we had simply billed \$1.29, but under the new rule, we'd be made to track additional information for billing (now, Homemaker/Personal Care time), and bill from two different pools of budgets; one for Homemaker/Personal Care and the other for Non-Medical Transportation per-mile. I have done the math based on the new rule and rates for all of our clients who receive Non-Medical Transportation per mile from us and the result is the same: no increase. This will not only have zero impact on providers, in terms of an increase in transportation revenue, but will cost us more time to bill both Homemaker/Personal Care and Non-Medical Transportation in this way. In a time when it's costing us more than ever to operate our fleet of 12 vehicles (which range in size from 4-15 passenger), these changes are not the 20+ million-dollar reprieve we've been so eagerly anticipating since the budget passed in July. The cost of everything is going up! Gas, repair and maintenance of the vehicles, and most concerning, the cost of insurance. Many insurance companies are starting to decline offering coverage to our field, due to the liability. To see the proposed changes to this rule is extremely concerning to us and the future of our transportation department. (Tiffany Smetana)

Department's Response: Payment for Non-Medical Transportation at the per-mile rate in currently effective rule 5123:2-9-18 was modeled to cover the cost of operating the vehicle including the cost of the driver and does not increase for transporting more people. Since the cost of the driver is built into the per-mile rate in currently effective rule 5123:2-9-18, no other services are permitted to be billed by the provider during the same time that Non-Medical Transportation is being provided. Payment for Non-Medical Transportation at the per-mile rate in proposed new rule 5123-9-18 is intended to cover the cost of operating the vehicle excluding the cost of the driver, recognizes the higher costs associated with operating a modified vehicle, and incentivizes providing Non-Medical Transportation in smaller groups. We believe that most providers will receive an increase in reimbursement because the proposed new rule allows a provider of Non-Medical Transportation to bill for Homemaker/Personal Care, Participant-Directed Homemaker/Personal Care, or any of the array of adult day and employment services during the same time that Non-Medical Transportation is provided.

5123-9-24 (Transportation)

(B)(7)(b): The definition of a "modified vehicle" has been "...equipped to be used upon public streets and highways for transportation of individuals who require use of a wheelchair..." however the rule does not state that someone utilizing a wheelchair has to be present to get the higher rate and/or individuals who use this van with or without a person who utilizes a wheelchair get the higher rate. Was that your intention? (Tom Rickels)

Department's Response: No. At least one person being transported must require the use of a modified vehicle for the modified vehicle rate to apply. Please see paragraphs (D)(1) and (F)(2) which make this clear.

(B)(7)(b)(iv): We would like "and tested" to be removed. (Robert Lambert)

Department's Response: Based on your suggestion, the paragraph was revised as indicated by underline and strikethrough:

On Be inspected, on each day the vehicle is used to provide ~~non-medical~~ ["non-medical" stricken to correct a drafting error] transportation, ~~be inspected and tested~~ by the first driver of the vehicle and prior to transporting an individual in a wheelchair, to ensure the permanent fasteners, safety harnesses or belts, and access ramp or hydraulic lift are working ~~prior to transporting an individual in a wheelchair.~~ The ~~daily~~ inspection shall be documented by the driver that conducts the inspection.

(E)(3): We do not think license plate number should be required. This seems redundant and time-consuming. What matters is type of vehicle. (Robert Lambert)

Department's Response: We need a method to verify that the billing is appropriate for the specific vehicle used to provide the service. We are therefore, maintaining the requirement for the license plate number of the vehicle. In response to your comment, however, the requirement for the type of vehicle (i.e., modified or non-modified) included as paragraph (E)(3) of the rule as originally filed on October 17, 2019 was eliminated.

Appendix: Regarding the proposed rate increase for rule 5123:9-24, while we are pleased to see a consideration to increase the rates, we don't feel that the current, nor the proposed new rates accurately reimburse providers for the Transportation services they are providing. Specifically, if you consider the new proposed rate for 1 individual (\$0.58/mile) versus for 2 individuals (\$0.29/individual/mile), the rate of reimbursement per mile to transport 2 individuals equals \$0.58/mile; the same as a provider would be reimbursed for 1 individual. While we agree with cost sharing, we feel that a provider should be reimbursed more per mile to provide for 2 individuals. As such, if you consider the reimbursement rate for 3 individuals (\$0.29/individual/mile = \$0.87/mile) versus the reimbursement rate for 4 individuals (\$0.22/individual/mile = \$0.88/mile, here again you are reimbursing the provider a mere one cent for a 4th individual! Because you are proposing the same rates for Non-Medical Transportation per-mile, again, there is no incentive to transport more individuals. We are effectively providing more services for the same amount of pay! Not to mention that when we then enter our billing into eMBS [the Medicaid billing system], it's twice the work; entering miles transported for two individuals rather than one yet obtaining the same yield. When one reviews the reimbursement structure of Homemaker/Personal Care or On-Site/On-Call, the rate increases as the number of individuals served increases. As such, we would argue that the increase between 1-2 individuals served and 3-4 individuals served for Transportation services be structured accordingly. The more individuals we transport, the more liability we carry (our exorbitant insurance rates reflect this!). (Tiffany Smetana)

Department's Response: The proposed new payment rates for Transportation are intended to cover the cost of operating the vehicle, recognize the higher costs associated with operating a modified vehicle, and incentivize providing Transportation in smaller groups. We regret that you are dissatisfied with the proposed new rates which reflect an increase over the current rates of approximately 28% for Transportation provided in a non-modified vehicle and approximately 120% for Transportation provided in a modified vehicle.

Incorporated Comments into Rule(s)

Indicate how comments received during the hearing process were incorporated into the rule(s). If no comments were incorporated, explain why not.

The comments were incorporated as indicated above.