

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: ICFIID - July 1, 2018

Rule Number(s): 5123:2-7-01 (Rescind), 5123-7-01 (New), 5123:2-7-10 (Rescind), 5123:2-7-12 (Rescind), 5123-7-12 (New), 5123:2-7-20 (Rescind), 5123-7-20 (New), 5123:2-7-24 (Rescind), 5123-7-24 (New), 5123:2-7-25 (Rescind), 5123-7-25 (New), 5123:2-7-26 (Rescind), 5123:2-7-27 (Rescind), 5123-7-27 (New), 5123:2-7-28 (Rescind), 5123:2-7-30 (Rescind), 5123-7-30 (New), and 5123-7-33 (New)

Date: March 26, 2018 (REVISED April 9, 2018)

Rule Type:

☒ New
☐ Amended

☒ 5-Year Review
☒ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFIID) are residential facilities licensed by the Department which provide all aspects of care and support for individuals with developmental disabilities who reside therein. Approximately 5,600 Ohioans with developmental disabilities live at the approximately 440 ICFIID.

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In December 2015, the Department began working with ICFIID program stakeholders to redesign the ICFIID reimbursement system. These efforts resulted in statutory changes being effected by House Bill 24 of the 132nd General Assembly. Based on House Bill 24 and as a result of five-year rule review, the Department is revising administrative rules governing the ICFIID program. Although the Department is rescinding existing rules and adopting new replacement rules, amended versions of the rules are being provided so stakeholders can readily see what is changing:

- Rule 5123:2-7-01 (Definitions) is being rescinded and replaced by new rule 5123-7-01 (Definitions). Rule 5123:2-7-01 sets forth definitions used in Chapter 5123:2-7 of the Administrative Code. New rule 5123-7-01 sets forth definitions used in Chapters 5123:2-7 and 5123-7 of the Administrative Code. The rules were added to this package based on post-clearance feedback from ICFIID program stakeholders.
- Rule 5123:2-7-12 (Cost Report and Chart of Accounts) is being rescinded and replaced by new rule 5123-7-12 (Cost Report and Chart of Accounts). The rule sets forth standards and requirements for an ICFIID to submit cost reports and maintain supporting documents and records. New rule 5123-7-12 includes provisions regarding accumulated depreciation from existing rule 5123:2-7-24. No changes are being made to the appendix to the rule at this time.
- Rule 5123:2-7-20 (Resident Assessment Classification and Case Mix Payment System) is being rescinded and replaced by new rule 5123-7-20 (Resident Assessment Classification and Case Mix Payment System Based on Administration of the Individual Assessment Form). The rule sets forth a method and process for determining the per resident/per day rate paid to an ICFIID for direct care costs based on assessment of residents' needs by administration of the Individual Assessment Form. Revisions are necessary to make clear that for a period of three years, an ICFIID shall assess residents using two instruments (the Individual Assessment Form and the Ohio Developmental Disabilities Profile).
- Rule 5123:2-7-24 (Cost of Ownership, Efficiency Incentive, and Reporting of Accumulated Depreciation) is being rescinded and replaced by new rule 5123-7-24 (Cost of Ownership Payment) which includes only provisions regarding cost of ownership payments. Provisions in existing rule 5123:2-7-24 regarding accumulated depreciation are being incorporated to new rule 5123-7-12.
- Rule 5123:2-7-25 (Nonextensive Renovation) is being rescinded and replaced by new rule 5123-7-25 (Nonextensive Renovation). The rule defines "nonextensive renovation" and sets forth a process for calculating the per-bed cost. New rule 5123-7-25 carries forth the requirements regarding nonextensive renovation from existing rule 5123:2-7-25 but makes clear that no new nonextensive renovations will be approved on or after the effective date of the new rule (projected to be July 1, 2018).
- Rules 5123:2-7-27 (Prospective Rate Reconsideration on the Basis of Possible Calculation Errors) and 5123:2-7-28 (Prospective Rate Reconsideration on the Basis of Extreme Hardship Upon Admission of a Resident from a State-Operated Developmental Center) are being rescinded and replaced by new rule 5123-7-27 (Prospective Rate

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Reconsideration) which addresses all types of prospective rate reconsiderations.

- Rule 5123:2-7-30 (Exception Review Process) is being rescinded and replaced by new rule 5123-7-30 (Exception Review Process). The rule sets forth the process by which the Department shall conduct exception reviews related to the Individual Assessment Form data submitted by an ICFIID. New rule 5123-7-30 includes clarification that exception reviews may be conducted on-site at the ICFIID or via a desk review and a new provision to prevent Department staff who conducted an exception review from processing a related request for reconsideration.

One new rule is being adopted:

- Rule 5123-7-33 (Resident Assessment Classification and Case Mix Payment System Based on Administration of the Ohio Developmental Disabilities Profile) sets forth a method and process for determining the per resident/per day rate paid to an ICFIID for direct care costs based on assessment of residents' needs by administration of the Ohio Developmental Disabilities Profile. The format of rule 5123-7-33 aligns with new rule 5123-7-20 and sets forth that for a period of three years, an ICFIID shall assess residents using two instruments (the Individual Assessment Form and the Ohio Developmental Disabilities Profile).

Two existing rules are being rescinded and will not be replaced:

- Rule 5123:2-7-10 (Outlier Services for Behavioral Redirection and Medical Monitoring) sets forth requirements for serving residents whose care needs are not adequately measured by the resident assessment classification system. The rule is unnecessary as ICFIID no longer provide the behavioral redirection and medical monitoring services addressed therein.
- Rule 5123:2-7-26 (Active Treatment Day Programming) is being rescinded. The rule is unnecessary as the appendix to existing rule 5123:2-7-12 (and new rule 5123-7-12) includes the cost centers for active treatment day programming and existing rule 5123:2-3-04 sets forth requirements for day programming for residents of ICFIID.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

5124.03

3. 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.

Yes; rules are necessary for the state to participate in the Medicaid ICFIID program.

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

Not applicable. The rules do not exceed federal requirements.

5. 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)?

Section 5124.03 of the Revised Code requires the Department to adopt rules to implement the ICFIID program. Chapter 5123-7 rules ensure that ICFIID operate and are reimbursed in a uniform manner in accordance with federal and state regulations.

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

The Department measures the success of rules governing the ICFIID program in terms of the health and welfare of individuals who reside at ICFIID and Ohio's compliance with the federal ICFIID program.

Development of the Regulation

7. 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.*

In December 2015, the Department convened the ICFIID Reimbursement Workgroup. The Workgroup met monthly from January 2016 until October 2017. In November 2017, the Workgroup began having weekly conference calls. The ICFIID Reimbursement Workgroup is comprised of representatives of:

- Advocates
- Families of individuals residing in ICFIID
- The Academy
- Advocacy and Protective Services, Inc.
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Department of Medicaid
- Ohio Developmental Disabilities Council
- Ohio Health Care Association/Ohio Centers for Intellectual Disabilities
- Ohio Provider Resource Association
- Values and Faith Alliance

On November 2, 2016, Department staff conducted a webinar introducing and providing background regarding redesign of the ICFIID reimbursement system.

In 2017, Department staff conducted four regional public forums regarding forthcoming changes to the ICFIID reimbursement system:

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- March 7 (Franklin County)
- March 8 (Hamilton County)
- March 9 (Summit County)
- March 10 (Lucas County)

At least 133 people attended.

On March 15, 2017, an article regarding modernization of the ICFIID reimbursement system with links to related materials was published in the Department's *Pipeline Weekly* newsletter (<http://dodd.ohio.gov/Communications/Lists/Posts/Post.aspx?ID=532>) which is disseminated to approximately 17,500 subscribers.

On March 16, 2017, DODD Director John Martin discussed modernization of the ICFIID reimbursement system with individuals and families who receive services in a Facebook live chat. Approximately 90 people participated in the live chat which had more than 1,700 views in the week following.

Through the Department's rule clearance process, the rules and the Business Impact Analysis were disseminated to representatives of the following organizations for review and comment:

Advocacy and Protective Services, Inc.
 The Arc of Ohio
 Autism Society of Central Ohio
 Councils of Governments
 Disability Housing Network
 Disability Rights Ohio
 Down Syndrome Association of Central Ohio
 Family Advisory Council
 The League
 Ohio Association of County Boards Serving People with Developmental Disabilities
 Ohio Department of Medicaid
 Ohio Developmental Disabilities Council
 Ohio Health Care Association/Ohio Centers for Intellectual Disabilities
 Ohio Provider Resource Association
 Ohio Self Determination Association
 Ohio SIBS (Special Initiatives by Brothers and Sisters)
 Ohio Superintendents of County Boards of Developmental Disabilities
 Ohio Waiver Network
 People First of Ohio
 Values and Faith Alliance

The rules and the Business Impact Analysis were posted at the Department's *Rules Under Development* webpage (<http://dodd.ohio.gov/RulesLaws/Pages/Rules-Under-Development.aspx>) during the clearance period (March 26 to April 1, 2018). No written comments were submitted during the clearance period.

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On April 2, 2018, Department staff discussed the rules with ICFIID program stakeholders via a conference call. On April 5, 2018, Peter Van Runkle, Executive Director of the Ohio Health Care Association, submitted written comments.

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

Input provided by members of the ICFIID Reimbursement Workgroup was incorporated to redesign the ICFIID rate model in a manner that maximizes payment for currently unreimbursed costs, incentivizes efficient delivery of high-quality services, and minimizes the incidence of ICFIID receiving a lower rate.

Based on stakeholder feedback, paragraph (L)(2) of rule 5123-7-30 was revised to prevent Department staff who conduct an exception review from processing a related request for reconsideration submitted by the ICFIID.

Based on post-clearance feedback from stakeholders:

- Existing rule 5123:2-7-01 to be rescinded and new rule 5123-7-01 to be adopted were added to the package.
- References to "efficiency incentive" were removed from rule 5123-7-24.
- Rule 5123-7-30 was revised to make clear that Department staff who conduct exception reviews must be trained in administration of the Individual Assessment Form and that an exception review will be conducted on-site at an ICFIID when requested by the ICFIID.
- An appendix was added to rule 5123-7-33 to include point values assigned to responses to questions on the Ohio Developmental Disabilities Profile.
- Many technical corrections and clarifications suggested by Peter Van Runkle were incorporated throughout the rules.

9. 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?

In accordance with House Bill 64 of the 131st General Assembly, the Department selected an entity to develop a plan to redesign the ICFIID reimbursement system. The selected entity, Public Consulting Group (PCG), recommended using the Ohio Developmental Disabilities Profile (ODDP) instead of the Individual Assessment Form (IAF) as the instrument to gauge the acuity of ICFIID residents for purposes of reimbursement. PCG selected a random sample of ICFIID to determine the effects of transitioning from the IAF to the ODDP. Department staff assessed residents of the sample group using the ODDP and PCG conducted a time study of direct care staff time and activities required to support the residents who were assessed. PCG used the data collected to calibrate scoring to accurately reflect resource use.

10. What alternative regulations (or specific provisions within the regulation) did the

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Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

The Department and members of the ICFIID Reimbursement Workgroup discussed various alternative methods for determining ICFIID reimbursement rates including adjustment of the ceilings for direct care and indirect care. The Department presented rate modeling based on the various methods and the Workgroup reached consensus on the selected method.

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

No. The Department is required to adopt rules to implement standards, requirements, and procedures governing the ICFIID program. The federal Centers for Medicare and Medicaid Services requires Ohio to administer Medicaid programs in a manner that ensures statewide-ness. The rules establish federally-compliant standards of accountability for Ohio's ICFIID.

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

The rules apply to operation of ICFIID. The Department is charged with regulating the ICFIID program and consults with the Ohio Department of Medicaid with regard to rules governing the program.

13. 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.

The Department will communicate information about the changes to all ICFIID in advance of the effective date of the rule actions. Department staff will provide guidance and technical assistance directly to staff of ICFIID to ensure the rules are understood and implemented consistently throughout the state.

Adverse Impact to Business

14. 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.

There are approximately 440 ICFIID which are subject to the rules.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for

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compliance).

The adverse impact of the rules as they currently exist, includes potential fines or termination of an ICFIID's Medicaid provider agreement for non-compliance, reduction in payment rate in accordance with Section 5124.106 of the Revised Code, expenditure of staff resources necessary for compliance, and requirements to maintain and report information.

c. Quantify the expected adverse impact from the regulation.

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.

With exception of new rule 5123-7-33, the rules already exist. In accordance with House Bill 24 of the 132nd General Assembly, new rule 5123-7-33 sets forth that during a three-year period, the ICFIID resident assessment classification system is transitioning from the Individual Assessment Form to the Ohio Developmental Disabilities Profile. Changes being made to existing rules are not expected to increase adverse impact on ICFIID.

Most ICFIID engage accounting firms to submit data on their behalf; the Department does not have access to details regarding those arrangements. The method for submitting cost reports via the Medicaid Information Technology System set forth in rule 5123-7-12 is not changing.

Paragraph (I)(2) of rule 5123-7-12 sets forth that failure to retain required financial, statistical, or medical records to the extent that filed cost reports are unauditable renders an ICFIID liable for the greater of \$1,000 per audit or 25% of the amount by which the undocumented cost increased the Medicaid payments to the ICFIID during the fiscal year.

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

Section 5124.03 of the Revised Code requires the Department to adopt rules to implement the ICFIID program. The rules establish uniform requirements to be followed by ICFIID throughout Ohio.

Regulatory Flexibility

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

5123-7-12:

- Paragraphs (F)(2) and (F)(3) afford an ICFIID the opportunity to provide additional information and documentation and revise cost reports before the Department issues a preliminary determination of whether reported costs are allowable.
- Paragraph (G) permits an ICFIID to amend cost reports to correct material errors or include additional information.
- Paragraph (H)(3) affords an ICFIID whose records have been found to be unauditably 60 days to provide necessary documentation and avoid paying a penalty.
- Paragraph (H)(5) allows an ICFIID to make records available at alternative locations.

5123-7-20:

- Paragraph (C) provides that the Department shall calculate the per resident/per day rate for direct care costs based on administration of the Individual Assessment Form and the Ohio Developmental Disabilities Profile.
- Paragraph (G)(3) affords an ICFIID the opportunity to correct errors or omissions in its Individual Assessment Form data.

5123-7-27:

- The rule itself establishes an opportunity for an ICFIID to request that the Department reconsider its per diem payment rate.

5123-7-30:

- Paragraph (C)(2) sets forth that an ICFIID selected for exception review may be able to resolve the Department's concerns and avert a review.
- Paragraph (L)(1) provides an opportunity for an ICFIID to request a reconsideration of the Department's exception review findings.

5123-7-33:

- Paragraph (C) provides that the Department shall calculate the per resident/per day rate for direct care costs based on administration of the Individual Assessment Form and the Ohio Developmental Disabilities Profile.

17. 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?

It is the policy of the Department to waive penalties for first-time or isolated paperwork or procedural regulatory noncompliance whenever appropriate. The Department believes the waiver of these penalties is appropriate under the following circumstances:

1. When failure to comply does not result in the misuse of state or federal funds;
2. When the regulation being violated, or the penalty being implemented, is not a regulation or penalty required by state or federal law; and

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3. When the violation does not pose any actual or potential harm to public health or safety.

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

Staff of the Department's Division of Medicaid Development and Administration are available to answer questions and provide technical assistance as necessary.