

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: July 1 HCBS

Rule Number(s): 5123:2-9-22 (rescind), 5123-9-22 (new), 5123:2-9-30 (rescind),
5123-9-30 (new), 5123:2-9-34 (rescind), and 5123-9-34 (new)

Date: March 6, 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Rescinded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.

The Individual Options, Level One, and Self-Empowered Life Funding (SELF) waivers are Medicaid Home and Community-Based Services (HCBS) waivers available to Ohioans with disabilities so they may receive services in their own homes as an alternative to receiving services in an institutional setting. The Medicaid HCBS waiver program is authorized by Section 1915(c) of the Social Security Act. The program permits a state to furnish an array of services that assist Medicaid beneficiaries to live in the community. The state has discretion to design a waiver program to address the needs of the waiver's target population. Waiver services complement and/or supplement the services that are available to participants through the Medicaid State Plan and other federal, state, and local public

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programs as well as the support that families and communities provide. An individual with developmental disabilities is enrolled in a specific Medicaid HCBS waiver based on his or her needs. As of March 1, 2018, more than 39,000 individuals were enrolled in waivers administered by the Department:

- Individual Options Waiver = 22,921
- Level One Waiver = 14,733
- SELF Waiver = 1,657

Additional information about the waivers administered by the Department is available at: <http://dodd.ohio.gov/IndividualFamilies/ServiceFunding/Pages/WaiverTypes.aspx>.

The Department has an administrative rule for each service available under a Medicaid HCBS waiver. The rules are structured similarly with major paragraph rankings for definitions, provider qualifications, requirements for service delivery, documentation of services, and payment standards. The Department is proposing actions involving several rules governing waiver services:

- Existing rule 5123:2-9-22 (Home and Community-Based Services Waivers - Community Respite under the Individual Options, Level One, and SELF Waivers) is being rescinded and replaced by a new rule of the same title numbered 5123-9-22. The appendix to the rule is being revised to reflect a payment rate increase for providers of the service.
- Existing rule 5123:2-9-30 (Home and Community-Based Services Waivers - Homemaker/Personal Care Under the Individual Options and Level One Waivers) is being rescinded and replaced by a new rule of the same title numbered 5123-9-30. The rule and the appendix to the rule are being revised to reflect the availability of a payment rate increase (i.e., the staff competency rate modification) when qualified staff deliver the service.
- Existing rule 5123:2-9-34 (Home and Community-Based Services Waivers - Residential Respite Under the Individual Options, Level One, and SELF Waivers) is being rescinded and replaced by a new rule of the same title numbered 5123-9-34. The appendix to the rule is being revised to reflect a payment rate increase for providers of the service.

The new replacement rules also reflect "clean-up" revisions to align definitions with those used in newer rules and to correct references to administrative rules.

Although the Department is rescinding the existing rules and adopting new replacement rules, versions of the rules identifying (via underline and strikethrough) the revisions being made are being provided so stakeholders can readily see what is changing.

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

5166.21 (In accordance with Section 5166.21 of the Revised Code and an Interagency Agreement with the Ohio Department of Medicaid, the Ohio Department of Developmental Disabilities is responsible for promulgating rules regarding Medicaid HCBS waivers it administers.)

- 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; the rules implement Medicaid HCBS waivers. Rules codify requirements of the federally-approved waivers.

- 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 the federal requirement.

- 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)?**

Rules are required to implement Medicaid HCBS waivers approved by the federal Centers for Medicare and Medicaid Services.

- 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 Medicaid HCBS waivers in terms of the number of individuals enrolled in and receiving services through the waivers, the health and welfare of individuals enrolled in the waivers, individuals' satisfaction with the services they receive, and Ohio's compliance with the federal Medicaid HCBS program and the approved waivers.

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.

Amendments to the Individual Options, Level One, and SELF waivers were required to effect the changes reflected in the new rules. The Department follows an established protocol to advance-publish information about amendments being made to a waiver to inform individuals and families who receive services, county boards of developmental disabilities, provider associations, advocates, and the general public. A Public Notice and Request for Comment announcement is distributed via email using multiple listservs and is posted at the Department's website and the website of each county board of developmental disabilities. The announcement includes information about how to obtain a copy of a waiver and the

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proposed amendments. Through this protocol, the public has an opportunity to provide input prior to submission of a waiver amendment to the federal Centers for Medicare and Medicaid Services. There are five methods (email, U.S. mail, phone, courier or in-person, and fax) for the public to provide input on a proposed waiver amendment and/or request a non-electronic copy. The formal public comment period for the waiver amendments reflected in the rules was January 24 through February 23, 2018.

The staff competency rate modification for qualified providers of Homemaker/Personal Care (rule 5123-9-30) was developed by a specially convened workgroup that met three times (October 20, 2017, November 29, 2017, and February 2, 2018). The workgroup included representatives of:

- Advanced Billing & Consulting Services
- Accel Consulting
- Brittco Software
- Champaign Residential Services, Inc.
- Grace Works
- Ohio Health Care Association
- Ohio Provider Resource Association
- Ohio Valley Residential Services
- Primary Solutions, Inc.
- Residential Management Systems, Inc.
- Solana Software and Services

The staff competency rate modification for Homemaker/Personal Care was also discussed at meetings of the Department's Waiver Workgroup three times in 2017 (August 25, September 25, and November 27) and one time in 2018 (January 29). The Waiver Workgroup includes representatives of:

- Advocacy and Protective Services, Inc.
- The Arc of Ohio
- 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 Superintendents of County Boards of Developmental Disabilities
- Ohio Waiver Network
- Values and Faith Alliance

The rate increases for Community Respite (rule 5123-9-22) and Residential Respite (rule 5123-9-34) were requested by providers of services and discussed at the Waiver Workgroup meeting on January 29, 2018.

Through the Department's rules clearance process, the rules and the Business Impact Analysis form are 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 form are posted at the Department's *Rules Under Development* webpage (<http://dodd.ohio.gov/RulesLaws/Pages/Rules-Under-Development.aspx>) during the clearance period.

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

The proposed rule actions are in direct response to input from stakeholders.

- Providers delivering respite services requested that the Department consider increasing payment rates for Community Respite (5123-9-22) and Residential Respite (5123-9-34) to reflect increases applied to similar waiver services.
- Stakeholders broadly expressed support for a mechanism which incentivizes retention and training for direct care staff providing Homemaker/Personal Care (5123-9-30) to reduce attrition to comparable jobs. Staff turnover directly impacts the quality of care experienced by individuals who receive services and is recognized as a barrier to successful service delivery of Homemaker/Personal Care in the developmental disabilities system.

9. What scientific data was used to develop the rule or the measurable outcomes of the

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rule? How does this data support the regulation being proposed?

Department staff applied rate increases to the direct care staff wage portion of the Community Respite and Residential Respite services to determine the impact of increasing payment rates. As a maximum number of days per year an individual may receive Community Respite (60 days) and Residential Respite (90 days) is specified, the payment rate increase is not expected to have a significant impact on individuals' budgets.

Department staff used data made available by the Bureau of Labor Statistics, Occupational Employment Statistics Program (<https://www.bls.gov/oes/>) to determine the Homemaker/Personal Care staff competency rate modification that increases eligible provider direct wages between the 75th and 90th percentiles for personal care aides nationally. This increase has a larger impact for Ohio workers because Ohio's cost-of-living is slightly below the national average.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

Department staff considered a variety of requirements for training and professional experience for eligibility for the Homemaker/Personal Care staff competency rate modification. The parameters in rule 5123-9-30 were agreed upon by the stakeholder groups.

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 federal Centers for Medicare and Medicaid Services requires Ohio to implement Medicaid HCBS waivers in a uniform, statewide manner.

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

The rules apply to services available to individuals enrolled in the Individual Options, Level One, and SELF waivers administered by the Department; other agencies do not make rules regarding Department-administered waivers.

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 implement the new rules to coincide with federal approval for the requested amendments to the Individual Options, Level One, and SELF waivers.

Information about the waiver amendments has been widely disseminated and was posted for public comment from January 24 through February 23, 2018. The Department will disseminate information regarding the new services through its *Memo Monday* and *Pipeline* publications, webinars, and live chats. The final-filed rules will be posted at the Department's website and directly disseminated to county boards of developmental disabilities and the approximately 2,900 persons who subscribe to the Department's Rules Notification listserv. The Department's provider certification system, regulatory tools, and interpretive/guidance materials will be updated to reflect the new rules. Staff of the Department's Division of Medicaid Development and Administration are available to provide technical assistance as necessary.

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;

The rules apply to providers of Medicaid HCBS to individuals enrolled in the Individual Options, Level One, and SELF waivers. Homemaker/Personal Care may be provided by Agency Providers (an entity which employs staff to provide services) and Independent Providers (a self-employed person who provides services and does not employ anyone else to provide the services). Community Respite and Residential Respite are provided exclusively by Agency Providers.

Service	Agency Providers	Independent Providers
Homemaker/Personal Care	1,683	8,025
Community Respite	404	[not applicable]
Residential Respite	398	[not applicable]

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

The rules as they already exist require providers of the services to be certified by the Department and hold a Medicaid Provider Agreement from the Ohio Department of Medicaid. The rules require providers to maintain service documentation and submit information to the Department regarding the services they provide. Providers are subject to sanctions if they fail to comply with the rules.

The revisions being made at this time increase the payment rates for Community Respite and Residential Respite services provided to individuals enrolled in HCBS waivers and may be an incentive for providers to expand their business. The new staff competency rate modification for Homemaker/Personal Care presents an

opportunity for providers of the service to receive additional payment based upon professional experience and training of the persons delivering the service and improves the wage which an Agency Provider may offer to recruit and retain direct care staff.

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.

An Agency Provider of Homemaker/Personal Care that seeks to receive the staff competency rate modification for agency staff members who qualify will be responsible for reviewing, verifying, and maintaining documentation that demonstrates that the staff members meet the criteria; there may be administrative costs associated with this requirement which will vary based on the provider's operation.

An Independent Provider of Homemaker/Personal Care who seeks to receive the staff competency rate modification will be required to submit a request with supporting documentation to the Department, to demonstrate that he or she meets the qualifications. Department staff estimate that submitting this information will take an Independent Provider less than one hour.

The Department is offering free training modules at its website (<http://dodd.ohio.gov/Training/Pages/default.aspx>) for Independent Providers and the direct care staff of Agency Providers who are interested in fulfilling the training component of the staff competency rate modification for Homemaker/Personal Care.

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

The rules are intended to ensure services provided to individuals enrolled in Medicaid HCBS waivers are compliant with federal requirements and to ensure the health and safety of individuals with developmental disabilities who are enrolled in the waivers.

Regulatory Flexibility

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

No; providers of the services must meet requirements in the federally-approved Medicaid HCBS waivers.

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
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?

The Department's provider certification system, regulatory tools, and interpretive/guidance materials will be updated to reflect the new services. Staff of the Department's Division of Medicaid Development and Administration are available to provide technical assistance as necessary.