

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: ICFIID

Rule Number(s): Rescind: 5123:2-7-02, 5123:2-7-03, 5123:2-7-04, 5123:2-7-05; 5123:2-7-07, 5123:2-7-09, 5123:2-7-13, 5123:2-7-14, 5123:2-7-17, 5123:2-7-18, 5123:2-7-21, 5123:2-7-22, and 5123:2-7-23

New: 5123-7-02, 5123-7-04, 5123-7-05, 5123-7-09, 5123-7-14, 5123-7-18, 5123-7-21, 5123-7-22, and 5123-7-23

Amend: 5123-7-12 and 5123-7-33

Date: June 27, 2019

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☒ Rescinded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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The Department assumed administration of the ICFIID program from the Ohio Department of Job and Family Services in January 2013. At that time, the Department adopted 28 rules based on rules of the Ohio Department of Job and Family Services. Thirteen of the rules adopted in 2013 are due for five-year review:

- 5123:2-7-02 (Intermediate Care Facilities - Provider Agreements). The rule sets forth requirements for an operator of an ICFIID to have a Medicaid provider agreement. The Department is rescinding rule 5123:2-7-02 and adopting new replacement rule 5123-7-02 (Intermediate Care Facilities for Individuals with Intellectual Disabilities - Provider Agreement and Other Essential Requirements). New rule 5123-7-02 includes necessary provisions from rule 5123:2-7-03.
- 5123:2-7-03 (Intermediate Care Facilities - Institutions Eligible to Participate in Medicaid). The rule sets forth requirements that an operator of an ICFIID must meet to participate in the Ohio Medicaid program and receive payment for providing ICFIID services. The Department is rescinding rule 5123:2-7-03 and incorporating several necessary provisions into new rule 5123-7-02.
- 5123:2-7-04 (Intermediate Care Facilities - Payment During the Ohio Office of Medical Assistance Administrative Appeals Process for Termination of a Provider Agreement). The rule sets forth conditions for payment to an ICFIID during termination of the ICFIID's Medicaid provider agreement. The Department is rescinding rule 5123:2-7-04 and adopting new replacement rule 5123-7-04 (Intermediate Care Facilities for Individuals with Intellectual Disabilities - Payment During the Ohio Department of Medicaid Administrative Appeals Process for Termination of a Provider Agreement).
- 5123:2-7-05 (Intermediate Care Facilities - Payment During the State Survey Agency's Administrative Appeals Process for Termination or Non-Renewal of Medicaid Certification). The rule sets forth conditions for payment to an ICFIID during termination or non-renewal of the ICFIID's certification by the Ohio Department of Health. The Department is rescinding rule 5123:2-7-05 and adopting new replacement rule 5123-7-05 (Intermediate Care Facilities for Individuals with Intellectual Disabilities - Payment During the Ohio Department of Health Administrative Appeals Process for Termination or Non-Renewal of Medicaid Certification).
- 5123:2-7-07 (Intermediate Care Facilities - Resource Assessment Notice). The rule requires an ICFIID to furnish written notice of the individual's right to have a resource assessment performed by the county department of job and family services. The Department is rescinding rule 5123:2-7-07. There is no replacement rule. The rule is no longer necessary as resource assessment is performed by the county department of job and family services as part of the Medicaid application and eligibility determination process for each individual who applies for Medicaid benefits.
- 5123:2-7-09 (Intermediate Care Facilities - Personal Needs Allowance Accounts and Other Resident Funds). The rule sets forth requirements for an ICFIID with regard to managing, accounting for, and maintaining records related to the personal needs allowance accounts of residents of the ICFIID. The Department is rescinding rule 5123:2-7-09 and adopting new replacement rule 5123-7-09 (Intermediate Care Facilities

for Individuals with Intellectual Disabilities - Personal Needs Allowance). Much of the content of rule 5123:2-7-09 is no longer necessary because it pertains to ICFIID licensed by the Ohio Department of Health—none exist—or it is addressed in newer rule 5123:2-2-07 (Personal Funds of the Individual).

- 5123:2-7-13 (Intermediate Care Facilities - Rate Recalculations, Interest on Overpayments, Penalties, Repayment of Overpayments, and Deposit of Repayment of Overpayments). The rule describes the process for recalculating a provider's rate due to an amended cost report, a finding based on an audit, or a finding based on an exception review. The Department is rescinding rule 5123:2-7-13. There is no replacement rule as all provisions contained therein are addressed in Sections 5124.41, 5124.42, 5123.43, 5123.44, and 5123.45 of the Revised Code.
- 5123:2-7-14 (Intermediate Care Facilities - Debt Estimation, Debt Summary Report, and Successor Liability Agreements for Change of Operator, Facility Closure, Voluntary Termination, Involuntary Termination, or Voluntary Withdrawal). The rule sets forth procedures for estimating the debt an exiting operator of an ICFIID owes the Department and the federal Centers for Medicare and Medicaid Services at the time of a change of operator, facility closure, voluntary termination, involuntary termination, or voluntary withdrawal from the Medicaid program. The Department is rescinding rule 5123:2-7-14 and adopting new replacement rule 5123-7-14 (Intermediate Care Facilities for Individuals with Intellectual Disabilities - Debt Estimation, Debt Summary Report, and Successor Liability Agreements for Change of Operator, Facility Closure, Voluntary Termination, Involuntary Termination, or Voluntary Withdrawal).
- 5123:2-7-17 (Intermediate Care Facilities - Leased Staff Services). The rule sets forth conditions under which an ICFIID may be reimbursed for costs related to leased staff services. The Department is rescinding rule 5123:2-7-17. There is no replacement rule. An ICFIID may be reimbursed for costs related to leased staff services, as evidenced by the accounts described in the Appendix to rule 5123-7-12 for reporting costs of purchased services.
- 5123:2-7-18 (Intermediate Care Facilities - Capital Asset and Depreciation Guidelines). The rule sets forth requirements for depreciating the capital assets of an ICFIID. The Department is rescinding rule 5123:2-7-18 and adopting new replacement rule 5123-7-18 (Intermediate Care Facilities for Individuals with Intellectual Disabilities - Capital Assets and Depreciation) which includes a new paragraph to address salvage value. The Appendix to the rule (Estimated Useful Lives of Capital Assets) is being eliminated as it is outdated. New rule 5123-7-18 instead incorporates by reference the American Hospital Association's *Estimated Useful Lives of Depreciable Hospital Assets* to align with Ohio Department of Medicaid rule 5160-3-42.3 (Nursing Facilities: Capital Asset and Depreciation Guidelines). The Appendix to rule 5160-3-42.3 was eliminated in 2015.
- 5123:2-7-21 (Intermediate Care Facilities - Compensation Cost Limits, Reasonable Costs for Compensation, and Compensation Disallowances if Any for Owners and Relatives of Owners). The rule sets forth limits on compensation of owners and relatives of owners of an ICFIID. The Department is rescinding rule 5123:2-7-21 and adopting new

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replacement rule 5123-7-21 (Intermediate Care Facilities for Individuals with Intellectual Disabilities - Compensation Cost Limits for Owners and Relatives of Owners).

- 5123:2-7-22 (Intermediate Care Facilities - Compensation Cost Limits, Reasonable Costs for Compensation, and Compensation Disallowances if Any for Administrators). The rule sets forth limits on compensation of administrators of an ICFIID. The Department is rescinding rule 5123:2-7-22 and adopting new replacement rule 5123-7-22 (Intermediate Care Facilities for Individuals with Intellectual Disabilities - Compensation Cost Limits for Administrators Who Are Not Owners or Relatives of Owners).
- 5123:2-7-23 (Intermediate Care Facilities - Method for Establishing the Other Protected Costs Component of the Prospective Rate). The rule establishes procedures for establishing an ICFIID's other protected costs. The Department is rescinding rule 5123:2-7-23 and adopting new replacement rule 5123-7-23 (Intermediate Care Facilities for Individuals with Intellectual Disabilities - Method for Establishing Other Protected Costs).

The new replacement rules reflect the following revisions:

- References to "intermediate care facilities" were changed to "intermediate care facilities for individuals with intellectual disabilities" or "ICFIID."
- References to the "Ohio Office of Medical Assistance" were changed to the "Ohio Department of Medicaid."
- References to the Administrative Code and the Revised Code were updated.

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.

In addition to taking actions regarding the 13 rules due for five-year review, the Department is amending two existing rules governing the ICFIID program:

- 5123-7-12 (Intermediate Care Facilities for Individuals with Intellectual Disabilities - Cost Report and Chart of Accounts). The rule sets forth standards and requirements for an ICFIID to submit cost reports to the Department and maintain supporting documentation. The Appendix to the rule (Chart of Accounts) is being amended to replace account 8070 with new accounts 8071 and 8072.
- 5123-7-33 (Intermediate Care Facilities for Individuals with Intellectual Disabilities - Resident Assessment Classification System Based on Administration of the Ohio Developmental Disabilities Profile). The rule sets forth a method and process for determining the per resident/per day rate paid to an ICFIID for direct care costs using the Ohio Developmental Disabilities Profile. The Appendix to the rule (Point Values Assigned to Responses to Questions on the Ohio Developmental Disabilities Profile by Domain) is being amended to replace references to "retardation" with "developmental disabilities." No revisions are proposed to the text of the rule.

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 May 2019, the Department shared the rules in advance of clearance with representatives of:

Families
Advocacy and Protective Services, Inc.
Brady Ware & Company
Clark County Board of Developmental Disabilities
Echoing Hills

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Filling Homes
Graceworks Lutheran Services
HW & Co.
Jefferson County Board of Developmental Disabilities
Lake County Board of Developmental Disabilities
Ohio Department of Medicaid
Ohio Health Care Association/Ohio Centers for Intellectual Disabilities
Ohio Provider Resource Association
Plante Moran
Richland County Board of Developmental Disabilities
Rose-Mary Center
Senior Health Sciences
Sunshine Communities

Through the Department's rule clearance process, the rules and the Business Impact Analysis will be 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 Rights Ohio
Down Syndrome Association of Central Ohio
Family Advisory Council
The League
Ohio Association of County Boards Serving People with Developmental Disabilities
Ohio Council for Home Care and Hospice
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 will be posted at the Department's *Rules Under Development* webpage during the clearance period for feedback from the general public:
<https://dodd.ohio.gov/wps/portal/gov/dodd/forms-and-rules/rules-under-development/2-proposed-rule-actions-for-review-and-comment>

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

Providers of ICFIID services asked the Department to reconsider salvage value on capital assets. Historically, facilities have utilized a salvage value of ten percent; providers indicated that ten percent is not always realistic in light of the nature of ICFIID services. In response, new paragraph (E) of rule 5123-7-18 was added and sets forth that an ICFIID may utilize a salvage value of less than ten percent.

The Department incorporated suggestions offered by stakeholders to improve accuracy and clarity of rules 5123-7-02, 5123-7-08, and 5123-7-09.

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?

None. The 13 rules due for five-year review were reviewed in accordance with Section 106.03 of the Revised Code and shared with stakeholders prior to clearance. Two additional rules are being amended to make technical corrections.

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?

As part of the five-year review process for 13 rules in this package, the Department considered whether each rule was necessary and determined four rules were unnecessary and would not be replaced:

- 5123:2-7-03 (a few necessary provisions were incorporated into new rule 5123-7-02)
- 5123:2-7-07 (the rule describes an archaic process)
- 5123:2-7-13 (the rule adds nothing beyond what is already stated in statute)
- 5123:2-7-17 (the rule does not align with current practice)

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 shared proposed rules with stakeholders in advance of dissemination of the rules for clearance. The Department will communicate information about the rule changes to 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 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, and costs associated with staff resources necessary for compliance, training, and maintaining/reporting 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.

The costs of staff resources necessary for compliance, training, and maintaining/reporting information vary among ICFIID, based on factors such as size and physical configuration of facilities, number and nature of residents served, and number and salaries of staff employed. The rules already exist. Changes being made 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.

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.

Paragraph (B)(2) of rule 5123-7-12 allows an ICFIID to request an extension for submitting its cost report.

Paragraph (C) of rule 5123-7-18 permits use of several different methods to determine the useful life of a capital asset.

Paragraph (C) of rule 5123-7-33 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
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?

Department staff are available to answer questions and provide technical assistance as necessary.