

**Common Sense  
Initiative****Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor**Carrie Kuruc**, Director

## Business Impact Analysis

**Agency, Board, or Commission Name:** Ohio Department of Developmental Disabilities**Rule Contact Name/Contact Information:** Becky.Phillips@dodd.ohio.gov, 614-644-7393**Regulation/Package Title (a general description of the rules' substantive content):**

Direct Support Professionals Rate Increase

**Rule Number(s):** 5123-9-06, 5123-9-30, 5123-9-32, and 5123-9-40**Date of Submission for CSI Review:** August 15, 2019**Public Comment Period End Date:** August 29, 2019**Rule Type/Number of Rules:**☐ New/\_\_\_ rules☒ Amended/ 4 rules (FYR? No)☐ No Change/\_\_\_ rules (FYR? \_\_\_)☐ Rescinded/\_\_\_ rules (FYR? \_\_\_)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

### **Reason for Submission**

1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.

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**Which adverse impact(s) to businesses has the agency determined the rule(s) create?  
The rule(s):**

- ☒ a. Requires a license, permit, or any other prior authorization to engage in or operate a line of business.
- ☒ b. Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.
- ☒ c. Requires specific expenditures or the report of information as a condition of compliance.
- ☐ d. Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.

### **Regulatory Intent**

**2. 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 developmental 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. 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 programs as well as the support that families and communities provide. An individual with developmental disabilities is enrolled in a specific waiver based on his or her needs. As of August 1, 2019, more than 40,000 individuals were enrolled in waivers administered by the Department:

- Individual Options Waiver = 23,546
- Level One Waiver = 15,059
- SELF Waiver = 1,793

Additional information about the waivers administered by the Department is available at:  
<https://dodd.ohio.gov/wps/portal/gov/dodd/waivers-and-services/waivers/>

House Bill 166 of the 133rd General Assembly represents a historic investment in Direct Support Professionals, the people who provide critical homemaking and personal care services to Ohioans with developmental disabilities. An investment of \$253 million will bring the average reimbursement rate for Direct Support Professionals who provide homemaking and personal care services to \$12.82 by January 1, 2020, and to \$13.23 by January 1, 2021. This is the largest investment in system history. As a result, the Department is amending four rules governing waivers administered by the Department:

- Rule 5123-9-06 (Home and Community-Based Services Waivers - Documentation and Payment for Services Under the Individual Options and Level One Waivers) establishes

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standards governing documentation and payment for services. Paragraph (D) sets forth service limitations for the Level One Waiver. Paragraph (D)(1) sets forth that an annual limitation of \$5,325 applies to the following services used alone or in combination by an individual enrolled in a Level One Waiver:

- Community Respite;
- Homemaker/Personal Care;
- Informal Respite;
- Money Management;
- Participant-Directed Homemaker/Personal Care;
- Remote Support;
- Residential Respite; and
- Transportation.

The limitation is being increased to \$6,750 to accommodate the increased payment rates for Homemaker/Personal Care and Participant-Directed Homemaker/Personal Care. The funding ranges for individuals enrolled in the Individual Options Waiver, contained in Appendix A to the rule, are also being increased to ensure individuals can continue to receive the same level of services.

- Rule 5123-9-30 (Home and Community-Based Services Waivers - Homemaker/Personal Care Under the Individual Options and Level One Waivers) defines Homemaker/Personal Care and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the services. The rule is being amended to increase the rates paid to providers of the service and to clarify the provision of On-Site/On-Call Homemaker/Personal Care (i.e., when a provider of Homemaker/Personal Care must be available in a person's residence to provide care should it become necessary but is not required to remain awake). Additional amendments are being made to:
  - Update a citation to an administrative rule;
  - Align the definition of "fifteen-minute billing unit" with the manner in which it is actually operationalized;
  - Eliminate the definition of "service and support administrator" because the term is not used in the rule;
  - Add a statement that a provider of Homemaker/Personal Care delivered in fifteen-minute billing units shall utilize electronic visit verification in accordance with Ohio Department of Medicaid rule 5160-1-40 (Electronic Visit Verification); and
  - Add a provision that the Department may be required to pay Independent Providers a rate that exceeds the rates specified in the rule if necessary to comply with an increase to minimum wage pursuant to the Ohio Constitution.
- Rule 5123-9-32 (Home and Community-Based Services Waivers - Participant-Directed Homemaker/Personal Care Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) defines Participant-Directed Homemaker/Personal Care and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the services. The rule is being amended to increase the rates paid to providers of the service and to clarify the provision of On-Site/On-Call Participant-Directed Homemaker/Personal Care (i.e., when a provider of Participant-Directed Homemaker/Personal Care must be available in a person's

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residence to provide care should it become necessary but is not required to remain awake). Additional amendments are being made to:

- Update a citation to an administrative rule;
  - Align the definition of "fifteen-minute billing unit" with the manner in which it is actually operationalized; and
  - Eliminate the definition of "service and support administrator" because the term is not used in the rule.
- Rule 5123-9-40 (Home and Community-Based Services Waivers - Administration of the Self-Empowered Life Funding Waiver) implements the Waiver, a component of the Medicaid HCBS program administered by the Department pursuant to Section 5166.21 of the Revised Code. The rule is being amended to increase the benefit limitations to accommodate the increased payment rates for Participant-Directed Homemaker/Personal Care. Paragraph (I)(1) sets forth that the annual cost of services for individuals enrolled in the Waiver shall not exceed \$40,000 for an adult or \$25,000 for a child. The limitations are being increased to \$45,000 and \$30,000, respectively. Additional amendments are being made to:
    - Update the list of services available to individuals enrolled in the Waiver; and
    - Update citations to administrative rules.

**3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

5123.04, 5123.045, 5123.049, 5123.16, 5123.161, 5123.1611, and 5166.21

**4. 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.

**5. 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.

**6. 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.

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

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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.

**8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

*If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.*

No.

**Development of the Regulation**

**9. 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.*

The proposed amendments were discussed at meetings of the Department's Waiver Workgroup on February 25, April 29, June 24, and July 25, 2019. 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

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 Rights Ohio

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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 form are 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/proposed-rules-for-review-and-comment>

Amendments to the Individual Options, Level One, and SELF waivers are required to effect the changes reflected in the 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, providers of services, 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 proposed amendments. Through this protocol, the public has an opportunity to provide input prior to Ohio's 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 is August 15 through September 14, 2019.

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

Homemaker/Personal Care and Participant-Directed Homemaker/Personal Care provide essential supports to individuals with developmental disabilities. These services advance an individual's independence within his or her home and community and help the individual meet daily living needs. Individuals and families who receive the services and the developmental disabilities service delivery system have been united regarding the need to increase the rate paid to providers of Homemaker/Personal Care and Participant-Directed

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Homemaker/Personal Care. A broad array of stakeholders supported increased funding for Direct Support Professional wages included in House Bill 166 of the 133rd General Assembly.

Stakeholders, including providers of services and county boards of developmental disabilities, asked the Department to clarify concepts regarding On-Site/On-Call services. In response, the Department incorporated suggestions made by stakeholders to revise the definition of On-Site/On-Call, found in paragraph (B)(19) of rule 5123-9-30 and paragraph (B)(20) of rule 5123-9-32, and wording regarding payment standards, found in paragraph (F) of each rule.

**11. 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?**

The Department utilizes data published by the United States Bureau of Labor Statistics to develop the reimbursement rate model for Homemaker/Personal Care. The data are used to develop a rate on par with wages paid to workers in similar occupations.

**12. 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?**

None. The Department is amending the rules to increase the rates paid to providers of services, increase the budget for services individuals receive to ensure individuals enrolled in waivers are able to maintain the level of services they have, and incorporate stakeholders' suggestions regarding On-Site/On-Call services.

**13. 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.

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

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. Department staff collaborate with staff of the Ohio Department of Medicaid when developing rules governing waivers.

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**15. 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 widely communicate information about the amendments through its *Memo Monday* and *Pipeline* publications. The final-filed rules will be posted at the Department's website and directly disseminated to providers of services, county boards of developmental disabilities, and the approximately 3,000 persons who subscribe to the Department's Rules Notification listserv.

**Adverse Impact to Business**

**16. 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; and**
- b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and**
- 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 amendments being made to the rules impact providers of two services (Homemaker/Personal Care and Participant-Directed Homemaker Personal Care) to individuals enrolled in Medicaid HCBS waivers administered by the Department. The services are provided by Agency Providers (an entity that 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). There are more than 8,700 providers of Homemaker/Personal Care and more than 7,100 providers of Participant-Directed Homemaker/Personal Care:

	<u>Agency Providers</u>	<u>Independent Providers</u>
Homemaker/Personal Care	1,509	7,269
Participant-Directed Homemaker/Personal Care	939	6,252

(This count is not unduplicated as a provider may be certified for both services.)

The rules 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 submit information and maintain service documentation regarding the services provided. Providers are subject to sanctions if they fail to comply with the rules.

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The amendments being made to the rules increase the rate paid to providers of the services and will result in increased revenue for providers. The amendments are not expected to increase the adverse impact of the rules on providers of services. A provider of services is not required to take any action as a result of the amendments being made. Services provided on or after the effective date of the rules will be reimbursed at the new higher rates.

**17. 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**

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

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

**19. 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 when:

1. Failure to comply does not result in the misuse of state or federal funds;
2. The regulation being violated, or the penalty being implemented, is not a regulation or penalty required by state or federal law; and
3. The violation does not pose any actual or potential harm to public health or safety.

**20. 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 provide technical assistance as necessary.