



Common Sense Initiative

Mike DeWine, Governor
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Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Developmental Disabilities

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Regulation/Package Title (a general description of the rules' substantive content):

Transportation Services

Rule Number(s): Rescind: 5123:2-9-18 and 5123:2-9-19

New: 5123-9-18 and 5123-9-19

Amend: 5123-9-24

Date of Submission for CSI Review: August 15, 2019

Public Comment Period End Date: August 29, 2019

Rule Type/Number of Rules:

✓ New/ 2 rules

✓ Amended/ 1 rule (FYR? No)

☐ No Change/____ rules (FYR? ____)

✓ Rescinded/ 2 rules (FYR? No)

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

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determines that it does, it must complete a business impact analysis and submit the rule for CSI review.

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 recognized that the Non-Medical Transportation service available to individuals enrolled in the Department's waivers needs improvement to meet the transportation needs of Ohioans with developmental disabilities. Investments of \$26.3 million will allow for a modernized transportation reimbursement system so people with developmental disabilities can get to work and participate in activities in their communities. As a result, the Department is proposing actions involving the rule

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governing the Non-Medical Transportation service, a related rule that contains requirements for multiple waiver services including Non-Medical Transportation, and the rule governing the Transportation service:

- Rule 5123:2-9-18 (Home and Community-Based Services Waivers - Non-Medical Transportation Under the Individual Options, Level One, and SELF Waivers) is being rescinded and replaced by a new rule of the same title numbered 5123-9-18. The rule defines Non-Medical Transportation and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. New rule 5123-9-18 reflects restructuring of the service delivery mode and payment rates.
- Rule 5123:2-9-19 (Home and Community-Based Services Waivers - General Requirements for Adult Day Support, Career Planning, Group Employment Support, Individual Employment Support, Non-Medical Transportation, and Vocational Habilitation) is being rescinded and replaced by a new rule of the same title numbered 5123-9-19. New rule 5123-9-19 reflects increases to the Non-Medical Transportation budget limitations which are included in Appendix B to the rule.
- Rule 5123-9-24 (Home and Community-Based Services Waivers - Transportation Under the Individual Options, Level One, and SELF Waivers) is being amended. The rule defines Transportation and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. The rule is being amended to align the payment rates for Transportation with the new payment rates for Non-Medical Transportation at the per-mile rate.

Although the Department is rescinding existing rules 5123:2-9-18 and 5123:2-9-19 and adopting new replacement rules, versions of the rules identifying, via underline and strikethrough, the proposed revisions are being provided so stakeholders can readily see what is changing.

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.

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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?**

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.

A proposal for improving the Non-Medical Transportation service was developed by a group of system stakeholders, including representatives of county boards of developmental disabilities and providers of services, that began working together in 2015. The Non-Medical Transportation Workgroup was facilitated by the Ohio Association of County Boards Serving People with Developmental Disabilities and included representatives of:

Ability Works, Inc.

Alpha Group

BHN (Belmont/Harrison/Noble) Alliance

Capabilities, Inc.

Council for Community Living

Franklin County Board of Developmental Disabilities

Fulton County Board of Developmental Disabilities/Triangle Processing

Goodwill Columbus

Hamilton County Board of Developmental Disabilities

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Koinonia Enterprises
Licking County Board of Developmental Disabilities
Medina County Board of Developmental Disabilities
Ohio Association of Adult Services
Ohio Association of County Boards Serving People with Developmental Disabilities
Ohio Department of Developmental Disabilities
Ohio Provider Resource Association
Ohio Superintendents of County Boards of Developmental Disabilities
Provider Support Group, Inc.
Summit County Board of Developmental Disabilities

The Ohio Provider Resource Association convened its own Non-Medical Transportation Committee comprised of members who provided recommendations and feedback to the larger Non-Medical Transportation Workgroup throughout the process.

Representatives of the Non-Medical Transportation Workgroup shared the group's work with stakeholders at a variety of venues including:

- Superintendents [of County Boards of Developmental Disabilities] Executive Committee (September 8, 2017)
- Ohio Association of County Boards Serving People with Developmental Disabilities Annual Convention (November 29, 2017)
- Ohio Waiver Network (April 10, 2018)
- Provider Support Group and Ohio Association of Adult Services (May 3, 2018)
- Ohio Provider Resource Association Board (June 26, 2018)
- Ohio Provider Resource Association Members (June 28, 2018)
- County Board of Developmental Disabilities Business Managers (July 25, 2018)
- Ohio Association of County Boards Serving People with Developmental Disabilities Board (August 13, 2018)

The proposal developed by the Non-Medical Transportation Workgroup was presented at the Department's Waiver Workgroup meeting on April 23, 2018. The proposal and the Non-Medical Transportation rule were discussed at subsequent meetings of the Waiver Workgroup on July 30, September 24, and November 19, 2018. 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

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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 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 Council on 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

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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?

The proposed rule actions directly respond to input from stakeholders who requested that the Non-Medical Transportation service be improved to:

- Build transportation capacity for employment support;
- Increase flexibility;
- Incentivize and align Non-Medical Transportation with federal Centers for Medicare and Medicaid requirements for community-based services; and
- Reduce complexity in authorizing, providing, and accessing the service.

Specific stakeholder recommendations implemented in rule 5123:2-9-18 include:

(B)(15)(a): Craft the definition of "modified vehicle" to include a vehicle permanently modified to address an individual's behavioral needs (as well as an individual's physical needs).

(B)(16): Permit Non-Medical Transportation for transporting an individual to or from community-based activities that are included as part of adult day services programs, a volunteer activity, a post-secondary educational program, and an internship or practicum. Make sure it is clear that transportation among the various activities and locations is included.

Former (C)(4)(d) and former (C)(5)(e): Eliminate the requirement for drug testing of drivers prior to certification as an Independent Provider or employment by an Agency Provider.

(D)(1): Maintain the per-mile and per-trip rate payment system for Non-Medical Transportation.

(D)(2): Explicitly state that an individual's needs may be met through a combination of Non-Medical Transportation modes (i.e., per-trip, per-mile, and commercial vehicles).

(E)(2) and former (D)(3), former (D)(4), former (D)(5): Apply the vehicle equipment and inspection requirements only to modified vehicles and vehicles equipped to transport five or more passengers.

Former (H)(1)(i): Eliminate the requirement to document the number of miles in each trip when Non-Medical Transportation is provided at the per-trip rate.

(J)(3) and Appendix A: Implement a higher payment rate for Non-Medical

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Transportation at the per-mile rate when it is provided in a modified vehicle.

The Department also implemented stakeholders' recommendation to align payment rates for the Transportation service (in the Appendix to rule 5123-9-24) with payment rates for Non-Medical Transportation at the per-mile rate.

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 Non-Medical Transportation Workgroup examined data regarding transportation costs and service utilization to develop rate models and establish budget limitations for Non-Medical Transportation. Provider representatives who served on the Non-Medical Transportation Workgroup submitted data regarding provider costs to transport individuals in the community based on vehicle type used (sedan, mini-van, or modified shuttle). The Workgroup also gathered national data from sources such as the American Automobile Association, Inc. This data was used to calculate the cost of transporting people in the community.

The Non-Medical Transportation Workgroup surveyed providers of Non-Medical Transportation regarding vehicles used, average fleet size, average ridership per fixed route, and number of people served who require modified vehicles to accommodate wheelchairs. The Workgroup used this data to determine baseline assumptions for the average cost, duration, and ridership for commutes to and from services and community employment activities.

The Non-Medical Transportation Workgroup then used service utilization data provided by the Department to begin modeling the costs, rates, and financial impacts of the current reimbursement model and the proposed reimbursement model. Data assumptions used in financial impacts were a combination of empirical data furnished by Workgroup provider representatives and projections of service usage correlated with the proposed reimbursement structure.

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?

The Department considered an alternative proposal submitted by a county board of developmental disabilities that called for maintaining the existing per-mile and per-trip service structure and provider qualifications with addition of two new rate add-ons:

- The Community Integration rate add-on for transporting groups of less than five people in vehicles with less than eight-passenger capability; and
- The Community Accessibility rate add-on for transporting an individual in a modified vehicle.

The Department concluded that the alternative proposal was more costly than the proposal submitted by the Non-Medical Transportation Workgroup and added administrative

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complexity due to incorporation of the rate add-on structure.

The Department considered modifying the payment rate for Non-Medical Transportation at the per-trip rate. Based on opposition voiced by several providers of the service, however, payment rates for Non-Medical Transportation at the per-trip rate are not changing.

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.

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 disseminate information regarding the changes to the Non-Medical Transportation and Transportation services through its *Memo Monday* and *Pipeline* publications, webinars, and Facebook 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 3,000 persons who subscribe to the Department's Rules Notification listserv. The Department's information technology applications, provider certification system, regulatory tools, and interpretive/guidance materials will be updated to reflect the changes. Staff of the Department's Division of Medicaid Development and Administration will provide training and technical assistance as necessary.

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.**

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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 rules apply to providers of Non-Medical Transportation and Transportation to individuals enrolled in the Individual Options, Level One, and SELF waivers. The Non-Medical Transportation service may be provided by Agency Providers (an entity which employs staff to provide services), Independent Providers (a self-employed person who provides services and does not employ anyone else to provide the services), and operators of commercial vehicles (i.e., buses, light rail transit, livery vehicles, and taxicabs that are available for public use). Providers are certified for providing the service at the per-mile rate and/or at the per-trip rate. A single provider may be certified for both modes. Certified providers of Non-Medical Transportation include:

| | Agency Providers | Independent Providers | Operators of Commercial Vehicles |
|----------------------|-------------------------|------------------------------|---|
| Per-Mile Rate | 1,127 | 1,144 | 198 |
| Per-Trip Rate | 1,020 | 743 | 213 |

In total, there are approximately 2,500 unique (unduplicated) providers of Non-Medical Transportation.

The Transportation service may be provided by Agency Providers, Independent Providers, and operators of commercial vehicles. Certified providers of Transportation include:

| Agency Providers | Independent Providers | Operators of Commercial Vehicles |
|-------------------------|------------------------------|---|
| 1,381 | 4,880 | 174 |

More than 2,000 providers are certified to provide both Non-Medical Transportation and Transportation. Certified providers will remain authorized to provide the services and will not be required to take any action regarding their certification.

The rules as they already exist require providers of Non-Medical Transportation and Transportation 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 to the Department and maintain service documentation regarding the services they provide. Providers are subject to sanctions if they fail to comply with the rules.

Provider costs (in terms of dollars and provider time) associated with submitting information to the Department and maintaining service documentation vary based on factors such as the volume of services provided, the number of individuals served, and the number of staff employed, and are unknown to the Department. Failure to comply with rules may result in a

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provider being required to return payment and/or being subject to an adverse action, including revocation of certification. The costs of such sanctions vary based on the specific circumstances and cannot be projected by the Department.

New rule 5123-9-18 reflects payment rate increases for providers of Non-Medical Transportation at the per-mile rate. The payment rates for Non-Medical Transportation at the per-trip rate are not changing.

Amended rule 5123-9-24 reflects payment rate increases for providers of Transportation.

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. The changes proposed to the Non-Medical Transportation and Transportation services are intended to ensure individuals have access to services they need to participate fully in their communities and that the structure and payment rates for the services are rational and fair to providers of services throughout Ohio.

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?

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The Department's information technology applications, provider certification system, regulatory tools, and interpretive/guidance materials will be updated to reflect the changes being made to Non-Medical Transportation and Transportation. Staff of the Department's Division of Medicaid Development and Administration are available to provide technical assistance and training as necessary.