

**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):**

Emergency Rules Follow-Up

Rule Number(s):Amend: 5123-2-04, 5123-8-01, 5123-9-06, 5123-9-31, 5123-9-34, 5123-10-01,
5123-10-02, 5123-10-03, 5123-14-01, 5123-17-02Rescind: 5123:2-2-06, 5123:2-3-10, 512:2-6-07, 5123:2-9-14, 5123:2-9-17, 5123:2-9-33,
5123:2-9-39

New: 5123-2-06, 5123-3-10, 5123-6-07, 5123-9-14, 5123-9-17, 5123-9-33, 5123-9-39

Date of Submission for CSI Review: August 3, 2020**Public Comment Period End Date:** August 14, 2020**Rule Type/Number of Rules:**☒ New/ 7 rules☒ Amended/ 10 rules (FYR? no)☐ No Change/____ rules (FYR? ____)☒ Rescinded/ 7 rules (FYR?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.

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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.**

**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.***

On June 11, 2020, pursuant to Executive Order 2020-23D, the Department emergency-filed rules to provide regulatory relief throughout the developmental disabilities service delivery system in response to the COVID-19 pandemic. This package follows-up the emergency filing to typical-file 17 of the rules to ensure the same regulatory relief is available during the duration of the state of emergency declared in response to COVID-19.

Ten of the 17 rules are being amended:

Rule	Title	Description of Amendments
5123-2-04	Compliance reviews of certified providers	Adding paragraph (H) to permit, during the COVID-19 state of emergency, suspension or alteration of the scheduling of routine compliance reviews and submission and review of plans of correction. Adding a definition of "department" which was unintentionally omitted from the currently effective rule.

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Rule	Title	Description of Amendments
5123-8-01	Developmental disabilities level of care	Adding paragraph (E) to permit, during the COVID-19 state of emergency, assessments to be conducted via telephone or video conference.
5123-9-06	Home and community-based services waivers - documentation and payment for services under the individual options and level one waivers	Adding paragraph (M) to permit, during the COVID-19 state of emergency: <ul style="list-style-type: none"> • Suspension of the prior authorization process, the Level One Waiver payment limitations, and the requirement that county boards of developmental disabilities complete a cost projection; and • Modification of requirements to allow use of the cost projection tool to be optional rather than mandatory. Correcting citations to administrative rules.
5123-9-31	Home and community-based services waivers -homemaker/ personal care daily billing unit for sites where individuals enrolled in the individual options waiver share services	Adding paragraph (H) to permit, during the COVID-19 state of emergency, suspension of the adjustment made to the payment rate when services provided are more than 3% below projected services. Correcting citations to administrative rules.
5123-9-34	Home and community-based services waivers - residential respite under the individual options, level one, and self-empowered life funding waivers	Adding paragraph (G) to permit, during the COVID-19 state of emergency, modification of the limitation on Residential Respite days per waiver eligibility span from 90 to 180, authorization of additional Residential Respite days based on risk to health and welfare, and suspension of the Level One Waiver payment limitation. Correcting citations to administrative rules.
5123-10-01	Early intervention program - procedural safeguards	Adding paragraph (M) to permit, during the COVID-19 state of emergency, waiving the requirements to use specified early intervention forms if the required information, notice, or consent described in a form is otherwise provided or secured and documented in writing.

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Rule	Title	Description of Amendments
5123-10-02	Early intervention program - eligibility and services	<p>Adding paragraph (Q) to permit, during the COVID-19 state of emergency:</p> <ul style="list-style-type: none"> • Waiving the requirements to use specified early intervention forms if the required information, notice, or consent described in a form is otherwise provided or secured and documented in writing; • Waiving the requirement for periodic review to change methods of delivering services or the locations of services; • Waiving the requirement that children determined to be eligible have eligibility determined annually when doing so is not feasible; • Waiving the requirement that the parent and early intervention service coordinator be physically present at the Individualized Family Services Plan meeting to allow them to participate by telephone or video conference; and • Modification of the limitation that restricts availability of an interim Individualized Family Service Plan.
5123-10-03	Early intervention program - system of payments	<p>Adding paragraph (I) to permit, during the COVID-19 state of emergency, waiving the requirements to use specified early intervention forms if the required information, notice, or consent described in a form is otherwise provided or secured and documented in writing.</p>
5123-14-01	Preadmission screening and resident review for nursing facility applicants and nursing facility residents with developmental disabilities	<p>Revising paragraph (C)(1) to permit assessments to be conducted in person, by video conference, or by telephone.</p>

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Rule	Title	Description of Amendments
5123-17-02	Addressing major unusual incidents and unusual incidents to ensure health, welfare, and continuous quality improvement	<p>Adding paragraph (Q) to permit, during the COVID-19 state of emergency:</p> <ul style="list-style-type: none"> • Service and Support Administrators and employees of agency providers to conduct interviews working under the guidance of an Investigative Agent; and • Extension of timelines to reach a preliminary finding, enter incident report into the Incident Tracking System, and provide written summary of investigation of Category A and Category B major unusual incidents.

In the case of seven rules, the Department is rescinding the existing rule and adopting a new replacement rule of a different number in accordance with the Department's established course of renumbering rules to eliminate the division number. Although the Department is rescinding existing rules and adopting new replacement rules, versions of the rules identifying, via underline and strikethrough, the revisions being made are provided so stakeholders can readily see what is changing. The seven rules being rescinded/adopted include:

Existing Rule	New Rule	Title	Description of Revisions
5123:2-2-06	5123-2-06	Behavioral support strategies that include restrictive measures	Revising paragraph (L) so that a written request submitted by a county board of developmental disabilities or a provider is not necessary for the Director to waive provisions of the rule. Correcting citations to administrative rules.
5123:2-3-10	5123-3-10	Licensed residential facilities - procedures to waive rule requirements	Revising paragraphs (A) and (C) so that a written request submitted by a licensee is not necessary for the Director to waive provisions in rules governing residential facilities.
5123:2-6-07	5123-6-07	General provisions and compliance for performance of health-related activities and administration of prescribed medication	Adding paragraph (I) to permit, during the COVID-19 state of emergency, suspension of quality assessment reviews. Correcting citations to administrative rules.

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Existing Rule	New Rule	Title	Description of Revisions
5123:2-9-14	5123-9-14	Home and community-based services waivers - vocational habilitation under the individual options, level one, and self-empowered life funding waivers	Adding paragraph (G) to permit, during the COVID-19 state of emergency, Vocational Habilitation to be delivered virtually, through video technology, or on behalf of an individual and in an individual's home. Correcting citations to administrative rules.
5123:2-9-17	5123-9-17	Home and community-based services waivers - adult day support under the individual options, level one, and self-empowered life funding waivers	Adding paragraph (H) to permit, during the COVID-19 state of emergency, Adult Day Support to be delivered virtually, through video technology, or on behalf of an individual and in an individual's home. Correcting citations to administrative rules.
5123:2-9-33	5123-9-33	Home and community-based services waivers - shared living under the individual options waiver	Adding paragraph (H) to permit, during the COVID-19 state of emergency, Shared Living to be billed on the same day as Homemaker/Personal Care as long as the services are not delivered at the same time or by the same person. Correcting citations to administrative rules.
5123:2-9-39	5123-9-39	Home and community-based services waivers - waiver nursing services under the individual options waiver	Adding paragraph (H) to permit, during the COVID-19 state of emergency, visits to be conducted by video conference technology or telephone. Correcting citations to administrative rules. Eliminating references to services that no longer exist.

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.

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Rule	Statutes
5123-2-04	5123.04, 5123.19, 5126.05, 5126.08
5123-8-01	5123.04, 5124.03
5123-9-06	5123.04, 5123.049
5123-9-31	5123.04, 5123.049, 5123.1611
5123-9-34	5123.04, 5123.049, 5123.1611
5123-10-01	5123.04, 5123.0421
5123-10-02	5123.04, 5123.0421
5123-10-03	5123.04, 5123.0421
5123-14-01	5123.021, 5123.04
5123-17-02	5123.04, 5123.19, 5123.612, 5126.311, 5126.313, 5126.34
5123:2-2-06 / 5123-2-06	5123.04, 5123.19, 5124.03, 5126.08
5123:2-3-10 / 5123-3-10	5123.04, 5123.19, 5124.03
5123:2-6-07 / 5123-6-07	5123.04, 5123.45, 5123.46
5123:2-9-14 / 5123-9-14	5123.04, 5123.049, 5123.1611
5123:2-9-17 / 5123-9-17	5123.04, 5123.049, 5123.1611
5123:2-9-33 / 5123-9-33	5123.04, 5123.049, 5123.1611
5123:2-9-39 / 5123-9-39	5123.04, 5123.049

- 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 Home and Community-Based Services (HCBS) waivers and the Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFIID) program. Rules codify requirements of the federally-approved HCBS waivers and the ICFIID program.

- 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)?

The Revised Code requires the Department to promulgate rules. Rules are required to implement Medicaid HCBS waivers and the ICFIID program.

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-funded programs in terms of the health and welfare of individuals served, individuals' satisfaction with the services they receive, and Ohio's compliance with the federal programs.

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 changes made via the emergency-filed rules were in direct response to regulatory relief requested by individuals and families who receive services, county boards of developmental disabilities, and providers of services.

The rules governing Medicaid Home and Community-Based Services waivers were discussed at a meeting of the Waiver Workgroup on July 27, 2020. 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

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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 website 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-rules-for-review-and-comment>

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

At the onset of the COVID-19 pandemic, individuals and families who receive services, county boards of developmental disabilities, and providers of services (directly and through organizations that represent them) contacted the Department to request regulatory relief. Stakeholder input was the impetus for the relief provided through the emergency-filed rules and now with typical-filed rules.

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?

Data regarding the impact of COVID-19 on individuals with developmental disabilities and the service delivery system informed decisions to grant regulatory relief.

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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?

Based on stakeholder input, the Department considered additional relief which ultimately could not be provided (e.g., allowing more than four persons with developmental disabilities to receive services in an unlicensed setting). Some of these alternatives were not appropriate because the requirements are based in the Revised Code or federal regulations.

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-funded programs in a uniform, statewide manner.

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

The rules already exist. 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. Section 5124.03 of the Revised Code requires the Department to promulgate rules necessary to implement the ICFIID program. Department staff collaborated with staff of the Ohio Department of Medicaid, the Ohio Department of Aging, and the Ohio Department of Mental Health and Addiction Services to ensure the rules align with state initiatives and federal regulations.

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 implemented regulatory relief through the filing of emergency rules and provided related information through COVID-19 resources and support posted at its website (<https://dodd.ohio.gov/wps/portal/gov/dodd/about-us/our-programs/resource-dodd-covid-19-support>) and via listservs, publications, and webinars. The final-filed rules in this package 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. Department staff are available to provide additional technical assistance and training as necessary.

Adverse Impact to Business

16. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

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- 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 rules apply to certified providers of HCBS and licensed residential facilities:

Certified Agency Providers	2,031
Certified Independent Providers	8,686
Licensed Residential Facilities (ICFIID)	446
Licensed Residential Facilities (Not ICFIID)	650

The adverse impact of the rules as they currently exist includes:

- Having to be approved (i.e., certified or licensed) by the Department prior to providing services;
- Submitting an application and supporting information and documents to become certified or licensed to provide services;
- Submitting information and maintaining documentation about services provided;
- Being subject to denial, suspension, or revocation of certification or license for failing to comply with rules; and
- Staff time required to comply with requirements of rules.

The intent of the proposed rule actions is to continue to provide regulatory relief during the COVID-19 state of emergency, for the purpose of supporting individuals with developmental disabilities and entities that provide services and ultimately, to ensure the continued viability of the service delivery system.

The proposed rule actions relieve providers of existing requirements, thereby reducing the adverse impact to businesses.

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

The changes being made to the rules are in response to a global pandemic which significantly affected Ohioans' lives and the developmental disabilities service delivery system. The proposed rule actions reduce the adverse impact to businesses.

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Regulatory Flexibility

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

The intent of the rule actions is to provide regulatory relief to help support Ohioans with developmental disabilities and providers of services during the COVID-19 state of emergency. The relief aids people who receive services and businesses that provide services.

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 throughout the Department will continue to provide technical assistance and training as needed.