



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):

Provider Certification

Rule Number(s): 5123:2-2-01 (Rescind), 5123-2-08 (New), and 5123-2-09 (New)

Date of Submission for CSI Review: November 10, 2020

Public Comment Period End Date: November 24, 2020

Rule Type/Number of Rules:

☒ New/ 2 rules

☐ Amended/ ____ rules (FYR? ____)

☐ No Change/ ____ rules (FYR? ____)

☒ Rescinded/ 1 rule (FYR? Yes)

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.

Rule 5123:2-2-01 (Provider Certification) establishes procedures and standards for certification of providers of supported living, including Medicaid-funded Home and Community-Based Services provided in accordance with Section 5123.045 of the Revised Code. "Supported living" is defined in Section 5126.01 of the Revised Code and means services provided to an individual with a developmental disability through any public or private resources that enhance the individual's community life and advance the individual's quality of life by providing the support necessary to enable the individual to live in a residence of the individual's choice. The rule governs two types of providers in Ohio's developmental disabilities service delivery system:

- Agency providers (entities that employ staff who provide the services) and
- Independent providers (self-employed persons who provide the services and do not employ, either directly or through contract, anyone else to provide the services).

Rule 5123:2-2-01 is due for five-year review. In response to stakeholder requests in 2019, the Department convened a Provider Certification Workgroup to comprehensively review the rule and make recommendations to the Department. Based on recommendations of the Workgroup, the Department is rescinding rule 5123:2-2-01 and adopting two replacement rules:

- 5123-2-08 (Provider Certification - Agency Providers) and
- 5123-2-09 (Provider Certification - Independent Providers).

- 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, 5123.1611

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- 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.**

The approved Medicaid Home and Community-Based Services waivers administered by the Department require providers of services to be certified by the Department.

- 5. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

Not applicable.

- 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)?**

Section 5123.1611 of the Revised Code requires the Director of the Ohio Department of Developmental Disabilities to adopt rules establishing (among other things):

- The application process for obtaining a supported living certificate under section 5123.161 of the Revised Code;
- The certification standards a person or government entity must meet to obtain a supported living certificate;
- The certification fee for a supported living certificate;
- The period of time a supported living certificate is valid;
- The process for renewing a supported living certificate under section 5123.164 of the Revised Code; and
- The renewal fee for a supported living certificate.

- 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 provider certification in terms of the health and welfare of individuals who receive supported living services delivered by certified providers and individuals' satisfaction with the services they receive.

- 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.

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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 Department convened the Provider Certification Workgroup to comprehensively review rule 5123:2-2-01 and make recommendations. The Workgroup included representatives of:

- The Arc of Ohio
- Association of People Supporting Employment First
- Autism Society of Ohio
- Cincinnati Children's Hospital Medical Center
- Coalition for Community Living
- Down Syndrome Association of Central Ohio
- Ohio Alliance of Direct Support Professionals
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Department of Medicaid
- Ohio Family to Family
- Ohio Health Care Association
- Ohio Provider Resource Association
- Ohio Superintendents of County Boards of Developmental Disabilities
- Ohio Self Determination Association
- Ohio Waiver Network
- People First of Ohio
- United Health Care Action Network of Ohio
- Values and Faith Alliance

Workgroup members determined to make two subgroups, one to address agency provider certification and one to address independent provider certification. Anita Allen of the Ohio Provider Resource Association led the agency provider subgroup. David Lewis of The Arc of Ohio led the independent provider certification subgroup. The Workgroup met eight times in 2019 (March 27, April 24, May 29, June 26, July 31, August 28, September 25, and October 30) and once in 2020 (January 29).

On August 17, 2020, the draft rules were shared with Workgroup members in advance of the rule clearance process.

Through the rule clearance process, the rules 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

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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 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?

Members of the Provider Certification Workgroup suggested rule 5123:2-2-01 be replaced with two rules, one for agency providers and one for independent providers.

Workgroup members also made suggestions regarding:

- Identifying the head of an agency provider as a "Director of Operations" instead of "Chief Executive Officer;"
- Qualifications of the Director of Operations of an agency provider;
- Creating a path for a family member of an individual with developmental disabilities to qualify as a Director of Operations of an agency provider;
- Training requirements for the Director of Operations of an agency provider;
- Content and timing of training for staff of agency providers, including allowing an agency provider to deliver the Department-provided training curriculum to its employees;
- Requiring direct support professionals working for agency providers to be trained in only the components of rule 5123-17-02 that apply to them in their role;
- Structuring the agency provider rule to make it easier to follow;
- Training requirements for independent providers; and
- Improvements to the application process.

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Based on feedback provided by members of the Workgroup after their review of versions of the rules shared on August 17, 2020, the requirement for an independent provider and the Director of Operations of an agency provider to hold government-issued identification was clarified and wording regarding implementation of an individual's services was revised.

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 Provider Certification Workgroup examined data regarding first-year citations of agency providers and discussed possible indicators that a provider may be growing too quickly and/or may be in jeopardy of failing. Based on this discussion, requirements intended to ensure an agency provider is viable and fiscally solvent (e.g., certificate of good standing from Secretary of State, access to operating capital, and liability insurance) were included in rule 5123-2-08. Workgroup members also examined data regarding revenue generated by application fees to inform its recommendations regarding application fees. Much discussion ensued with some members wanting to reduce or eliminate fees and some members wanting to increase fees. Ultimately, the Workgroup determined to maintain the existing fees.

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 including a requirement for agency providers to hold a surety bond but determined instead to require an agency provider to have a line of credit.

The Department considered allowing agency providers to hire persons who are sixteen or seventeen years of age to provide services in a limited capacity. Based on feedback from some system stakeholders, this concept was not incorporated.

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 administer Medicaid programs in a manner that ensures state-wideness. The rule establishes federally-compliant standards of accountability for Ohio's providers of Home and Community-Based Services.

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

New rules 5123-2-08 and 5123-2-09 are replacing existing rule 5123:2-2-01. Rule 5123:2-2-01 has been in place since 2009. The Department's authority and responsibility to make rules regarding certification date back to 1989.

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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.

Existing certifications will remain in place. As set forth in existing rule 5123:2-2-01, new rules 5123-2-08 and 5123-2-09 require the Department to notify a certified provider 90 days prior to certification expiration and describe the procedures for submitting the certification renewal application. The Department will allow providers time to come into compliance with new training requirements.

The Department will distribute information about the rules via the Department's publications, written guidance, and live chats or webinars to ensure that certified providers are aware of the new rules and the process for obtaining renewal certification. Department staff charged with implementing the new rules and monitoring provider compliance have been involved throughout the rule development process.

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 rules govern agency providers and independent providers that deliver supported living services to individuals with developmental disabilities. As of July 28, 2020, there were more than 10,700 certified providers:

Agency Providers	2,031
Independent Providers	8,686

Initial and renewal certification is issued for a three-year term. Approval to add a service to an existing certification is granted for the remaining term of the certification. In 2019, the Department processed more than 5,600 applications:

Initial Certification	1,871
Renewal Certification	2,786
Add Service to Existing Certification	954

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The adverse impact of replacement rules 5123-2-08 and 5123-2-09 is similar to the adverse impact of existing rule 5123:2-2-01 and includes the time it takes an applicant to gather and submit information and documents and complete the application process via the Department's Provider Services Management System and the cost of the application fees specified in the rules.

The Department developed the Provider Services Management System to make the application process as efficient as possible. Department staff estimate that applying for initial agency provider certification takes an applicant two to four hours to scan and upload documents and complete the application process. Department staff estimate that applying for initial independent provider certification takes an applicant one to two hours to scan and upload documents and complete the application process. Submitting an application for renewal certification is expected to take less time as applicants are familiar with the process.

The application fees for certification vary by the type of provider:

- The application fee for an independent provider seeking initial certification or renewal certification is \$125.
- The application fee for a small agency provider (i.e., one that serves 50 or fewer individuals) seeking initial certification or renewal certification is \$800.
- The application fee for a large agency provider (i.e., one that services 51 or more individuals) seeking initial certification or renewal certification is \$1,600.

The application fees for adding a service to an existing certification are:

- \$25 for an independent provider,
- \$75 for a small agency provider, and
- \$150 for a large agency provider.

Rule 5123-2-08 includes several new requirements for agency providers:

- Paragraph (C)(4) requires an agency provider to have a continuing line of credit of at least \$10,000. This requirement was added in lieu of requiring a surety bond.
- Paragraph (C)(8) requires an agency provider to notify the Department within seven days of any bankruptcy petition for which the agency provider is the subject.
- Paragraph (D)(3) sets forth requirements for board members of an agency provider that is governed by a board of directors. This requirement was added to ensure board members are in position to fulfil their role.
- Paragraph (L)(4) sets forth requirements for volunteers that serve more than 40 hours per year. The requirements are similar to existing requirements for volunteers engaged by licensed residential facilities and county boards of developmental disabilities.

Several of these requirements are designed to ensure that the agency provider's business is operated in a fiscally sound manner so that disruptions to services for individuals are minimized. The requirements for volunteers was supported as a way to provide additional

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safety measures when volunteers are in significant ongoing contact with individuals as part of the program offered by the agency provider.

The rules set forth that the Department may deny, suspend, or revoke a provider's certification for good cause. The impact of such an action varies based on multiple factors which are unique to each situation.

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

Section 5123.1611 of the Revised Code requires the Director of the Ohio Department of Developmental Disabilities to adopt rules.

Regulatory Flexibility

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

Yes; paragraph (T) of rule 5123-2-08 and paragraph (N) of rule 5123-2-09 authorize the Department to waive a provision of the rule for good cause when the health and safety of individuals with developmental disabilities will not be adversely affected.

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?

Department staff are available to provide technical assistance with the provider certification process. Additional tools and resources are available at the Department's website:

<https://dodd.ohio.gov/wps/portal/gov/dodd/providers/initial-renewal-certification/certification-recertification>

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