



Common Sense Initiative

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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):

HCBS Regulatory Relief

Rule Number(s): 5123-9-06, 5123-9-14, 5123-9-17, 5123-9-33

Date of Submission for CSI Review: July 2, 2021

Public Comment Period End Date: July 12, 2021

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☐ Rescinded/ ____ rules (FYR?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.

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

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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 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 enrolls in a specific waiver based on his or her needs. As of July 1, 2021, nearly 42,000 individuals were enrolled in HCBS waivers administered by the Department:

- Individual Options Waiver = 24,235
- Level One Waiver = 15,625
- Self-Empowered Life Funding Waiver = 2,112

Additional information about the waivers administered by the Department is available at:

<https://dodd.ohio.gov/wps/portal/gov/dodd/waivers-and-services/welcome/>

On June 17, 2021, pursuant to Executive Order 2021-07D, the Department emergency-filed rules governing HCBS waivers to continue to provide regulatory relief throughout the developmental disabilities service delivery system after the COVID-19 state of emergency was lifted. This package follows the emergency filing to typical-file four of the rules to ensure the same regulatory relief is available on an ongoing basis:

- Rule 5123-9-06 (Home and Community-Based Services Waivers - Documentation and Payment for Services Under the Individual Options and Level One Waivers) is being amended. The rule establishes standards governing documentation and payment for

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services under the Individual Options Waiver and Level One Waiver components of the Medicaid program that the Ohio Department of Developmental Disabilities administers pursuant to section 5166.21 of the Revised Code. Paragraph (D), which sets forth payment limitations under the Level One Waiver, is being removed so that people whose situations have changed due to the pandemic may continue to access their available Waiver funding to receive the services they actually need. Additional amendments are being made to:

- update citations to administrative rules and
 - eliminate paragraph (M).
- Rule 5123-9-14 (Home and Community-Based Services Waivers - Vocational Habilitation Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) is being amended. The rule defines Vocational Habilitation and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. Paragraphs (B)(21) and (D)(5) are being revised and new paragraph (D)(6) added so people can continue to receive Vocational Habilitation through virtual support. A definition of "virtual support" is being added as paragraph (B)(20). Additional amendments are being made to:
 - remove redundant training requirements,
 - replace the Community Integration Rate Modification with an enhanced payment rate for providing services in an integrated community setting,
 - update citations to administrative rules, and
 - eliminate paragraph (G).
 - Rule 5123-9-17 (Home and Community-Based Services Waivers - Adult Day Support Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) is being amended. The rule defines Adult Day Support and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. Paragraphs (B)(1) and (D)(4) are being revised and new paragraph (D)(5) added so people can continue to receive Adult Day Support through virtual support. A definition of "virtual support" is being added as paragraph (B)(20). Additional amendments are being made to:
 - remove redundant training requirements,
 - replace the Community Integration Rate Modification with an enhanced payment rate for providing services in an integrated community setting,
 - update citations to administrative rules, and
 - eliminate paragraph (H).
 - Rule 5123-9-33 (Home and Community-Based Services Waivers - Shared Living Under the Individual Options Waiver) is being amended. The rule defines Shared Living and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. Paragraphs (D)(10) and (F)(5) are being revised to permit an individual to receive Shared Living and Homemaker/Personal Care

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on the same day as long as the services are not delivered at the same time or by the same person. This is necessary to permit additional flexibility to people receiving services and their caregivers. Additional amendments are being made to:

- update citations to administrative rules and
- eliminate paragraph (H).

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, 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)?

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

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.

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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.

On May 19, 2021, Department staff presented proposed amendments of rules 5123-9-14 and 5123-9-17 to the Adult Day Support Core Team which includes:

- Jason Abodeely, Sunshine Communities
- Rick Black, Ohio Association of County Boards Serving People with Developmental Disabilities
- Lisa Comes, Ohio Association of County Boards Serving People with Developmental Disabilities
- Kristen Henry, Advocacy and Protective Services, Inc.
- Debbie Jenkins, Ohio Health Care Association/Ohio Centers for Intellectual Disabilities
- Jeff Johnson, Weaver Industries, Inc.
- Peter Moore, Ohio Provider Resource Association
- Dan Ottke, Clermont County Board of Developmental Disabilities
- Kathy Phillips, Ohio Waiver Network
- Jacqueline Romer-Sensky, The JRS Group, Ltd.
- Lori Stanfa, Ohio Association of County Boards Serving People with Developmental Disabilities
- Court Sturts, Crawford County Board of Developmental Disabilities
- Gary Tonks, The Arc of Ohio
- Emily Turner, Goodwill Ohio

Two groups provided feedback:

Ohio Association of County Boards Serving People with Developmental Disabilities
Ohio Provider Resource Association

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 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. Stakeholders requested that adjustments made to these rules and the resulting flexibility benefited the system and should be continued.

Stakeholders expressed concern that the Level One Waiver payment limitations set forth in paragraph (D) of rule 5123-9-06 unreasonably restrict access to necessary services; the payment limitations are being eliminated. The decision to replace the Community Integration Rate Modification available to providers of Vocational Habilitation and Adult Day Support with an enhanced payment rate for providing the services in integrated community settings was the result of stakeholder input. The definition of "virtual support" was refined based on stakeholder feedback.

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 the COVID-19 pandemic on individuals with developmental disabilities and the service delivery system informed decisions to grant regulatory relief initially and support continued flexibility being proposed through amendment of the rules through the typical rule-filing process.

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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?

The Department considered contrary suggestions regarding the Vocational Habilitation and Adult Day Support service modes and payment rates submitted by various stakeholder groups and tried to strike a balance so that the rules and the flexibility they provide may be advanced quickly with recognition that additional adjustments may be indicated in the future.

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. Department staff collaborate with staff of the Ohio Department of Medicaid to ensure 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 will continue to provide related information through resources and support posted at its website and via listservs, publications, and webinars. 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. Department staff are available to provide additional 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:

- Identify the scope of the impacted business community; and**
- Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and**

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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 providers of HCBS waiver services. Vocational Habilitation and Adult Day Support are provided by Agency Providers (entities that employ staff to provide services). Shared Living is provided by Agency Providers and Independent Providers (self-employed persons who provide services and do not employ anyone else to provide the services).

	Agency Providers	Independent Providers
Vocational Habilitation	559	(not applicable)
Adult Day Support	815	(not applicable)
Shared Living	1,001	5,300

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

- Having to be certified by the Department prior to providing services;
- Submitting an application and supporting information and documents to become certified to provide services;
- Submitting information and maintaining documentation about services provided;
- Being subject to denial, suspension, or revocation of certification 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 beyond the COVID-19 state of emergency, for the purpose of supporting individuals with developmental disabilities and providers of services and ultimately, to ensure the continued viability of the service delivery system.

The proposed rule actions provide more flexibility 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 increase flexibility for providers of services and thereby reduce the adverse impact.

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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 beyond the COVID-19 state of emergency. The amendments increase flexibility for 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 in the Division of Medicaid Development and Administration and the Office of System Support and Standards will continue to provide technical assistance and training as needed.