



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):

HCBS Rate Increases

Rule Number(s):

Amend: 5123-9-06, 5123-9-13, 5123-9-14, 5123-9-17, 5123-9-18, 5123-9-19, 5123-9-21, 5123-9-22, 5123-9-24, 5123-9-30, 5123-9-32, 5123-9-33, 5123-9-34, and 5123-9-39

Rescind: 5123:2-9-15 and 5123:2-9-16

Adopt: 5123-9-15 and 5123-9-16

Date of Submission for CSI Review: September 1, 2021

Public Comment Period End Date: September 15, 2021

Rule Type/Number of Rules:

☒ **New/ 2 rules**

☒ **Amended/ 14 rules (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☒ **Rescinded/ 2 rules (FYR?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.

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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.***

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 September 1, 2021, more than 42,000 individuals were enrolled in HCBS waivers administered by the Department:

- Individual Options Waiver = 24,293
- Level One Waiver = 15,680
- Self-Empowered Life Funding Waiver = 2,121

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

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Amended Substitute House Bill 110 of the 134th General Assembly provided funding for rate increases for providers of HCBS. As a result, the Department is amending 14 rules:

- Rule 5123-9-06 (Home and Community-Based Services Waivers - Documentation and Payment for Services Under the Individual Options and Level One Waivers) establishes standards governing documentation and payment for 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. The rule is being amended to increase the funding ranges for individuals enrolled in the Individual Options Waiver to accommodate the payment rate increases being made to services available under the Waiver and update citations to administrative rules.
- Rule 5123-9-13 (Home and Community-Based Services Waivers - Career Planning Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) defines Career Planning 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 increase the payment rates for the service, remove training requirements that are now addressed in rule 5123-2-08 (Provider Certification - Agency Providers) and rule 5123-2-09 (Provider Certification - Independent Providers), align wording with newer rules, and update citations to administrative rules.
- Rule 5123-9-14 (Home and Community-Based Services Waivers - Vocational Habilitation Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) defines Vocational Habilitation 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 increase the payment rates for the service, add service codes, adjust the group size for services provided in an integrated community setting, and update citations to administrative rules.
- 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) defines Adult Day Support 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 increase the payment rates for the service, add service codes, adjust the group size for services provided in an integrated community setting, and update citations to administrative rules.
- Rule 5123-9-18 (Home and Community-Based Services Waivers - Non-Medical Transportation Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) defines Non-Medical 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 increase the payment rates for the service and update citations to administrative rules.
- Rule 5123-9-19 (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) establishes general requirements governing provision of and payment for Adult Day Support, Career Planning, Group Employment Support, Individual Employment Support,

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Non-Medical Transportation, and Vocational Habilitation provided to individuals enrolled in HCBS waivers administered by the Department. The rule is being amended to increase the budget limitations for these services and update citations to administrative rules.

- Rule 5123-9-21 (Home and Community-Based Services Waivers - Informal Respite Under the Level One Waiver) defines Informal Respite 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 increase the payment rates for the service, align wording with newer rules, remove a definition of a term not used in the rule, remove a reference to a Level One Waiver payment limitation, and update citations to administrative rules.
- Rule 5123-9-22 (Home and Community-Based Services Waivers - Community Respite Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) defines Community Respite 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 increase the payment rates for the service, align wording with newer rules, remove a reference to a Level One Waiver payment limitation, and update citations to administrative rules.
- Rule 5123-9-24 (Home and Community-Based Services Waivers - Transportation Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) 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 increase the payment rates for the service, remove a reference to a Level One Waiver payment limitation, and update citations to administrative rules.
- 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 service. The rule is being amended to increase the payment rates for the service and update citations to administrative rules.
- 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 service. The rule is being amended to increase the payment rates for the service and update citations to administrative rules.
- Rule 5123-9-33 (Home and Community-Based Services Waivers - Shared Living Under the Individual Options Waiver) defines Shared Living 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 increase the payment rates for the service, remove a sentence from paragraph (D)(3) that has caused confusion, and update citations to administrative rules.

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- Rule 5123-9-34 (Home and Community-Based Services Waivers - Residential Respite Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) defines Residential Respite 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 increase the payment rates for the service, remove paragraph (G) that applied during the COVID-19 pandemic, and update citations to administrative rules.
- Rule 5123-9-39 (Home and Community-Based Services Waivers - Waiver Nursing Services Under the Individual Options Waiver) defines Waiver Nursing Services 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 increase the payment rates for the service, better align with Ohio Department of Medicaid rules, and update citations to administrative rules.

Also based on House Bill 110, and in accordance with its established course of renumbering rules to remove the division number, the Department is rescinding two rules and adopting replacement rules:

- Rule 5123:2-9-15 (Home and Community-Based Services Waivers - Individual Employment Support Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) is being rescinded and replaced by rule 5123-9-15 of the same title. The rule defines Individual Employment Support and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. New rule 5123-9-15 reflects increases to payment rates for the service, elimination of training requirements that are now addressed in rule 5123-2-08 (Provider Certification - Agency Providers) and rule 5123-2-09 (Provider Certification - Independent Providers), wording aligned with newer rules, and updated citations to administrative rules.
- Rule 5123:2-9-16 (Home and Community-Based Services Waivers - Group Employment Support Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) is being rescinded and replaced by rule 5123-9-16 of the same title. The rule defines Group Employment Support and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. New rule 5123-9-16 reflects increases to payment rates for the service, elimination of training requirements that are now addressed in rule 5123-2-08 (Provider Certification - Agency Providers), wording aligned with newer rules, and updated citations to administrative rules.

Although the Department is rescinding the existing rules and adopting replacement rules, versions of the rules that indicate the revisions being made are 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, 5166.21

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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.

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.

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 plan for increasing payment rates for HCBS as funded by House Bill 110 of the 134th

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General Assembly was discussed with stakeholders:

On July 19, 2021, at a meeting of the Adult Day Support Core Team which includes representatives of:

- Advocacy and Protective Services, Inc.
- The Arc of Ohio
- Ohio Association of County Boards of Developmental Disabilities
- Ohio Association of Goodwill Industries
- Ohio Health Care Association/Ohio Centers for Intellectual Disabilities
- Ohio Provider Resource Association
- Ohio Waiver Network
- Values and Faith Alliance

On July 26, 2021, at a meeting of the Waiver Workgroup which includes representatives of:

- Advocacy and Protective Services, Inc.
- The Arc of Ohio
- Ohio Association of County Boards of 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

On August 26, 2021, at a meeting of Service and Support Directors of county boards of developmental disabilities.

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
- Down Syndrome Association of Central Ohio
- Family Advisory Council
- The League
- Ohio Association of County Boards of Developmental Disabilities
- Ohio Department of Medicaid
- Ohio Developmental Disabilities Council
- Ohio Health Care Association/Ohio Centers for Intellectual Disabilities

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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?

Individuals and families who receive services, county boards of developmental disabilities, and providers of services support increasing wages for Direct Support Professionals, the front-line workers who provide care and support to Ohioans with developmental disabilities. Increasing payment rates is a critical component of recruiting and retaining qualified staff to fill these important jobs. A broad array of stakeholders supported increased funding for payment rates included in House Bill 110 of the 134th General Assembly.

On July 19, 2021, members of the Adult Day Support Core Team provided specific feedback regarding provisions of the Adult Day Support and Vocational Habilitation rules and reached consensus that on January 1, 2021, the group size for providing Adult Day Support and Vocational Habilitation services in an integrated community setting would be revised from five to four individuals.

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?

Analyses of data reveal that wages paid to Direct Support Professionals in Ohio's developmental disabilities service delivery system are lower than wages paid for other jobs that require far less responsibility. Ohio's developmental disabilities service delivery system is experiencing a workforce shortage that is jeopardizing availability of critical services to Ohio's citizens with developmental disabilities. Increasing payment rates for providers of HCBS is an essential component of the response to this crisis.

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 various strategies to increase payment rates and ultimately determined that one-time increases of approximately four percent was the most practical way

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to maximize the impact of the appropriation for the services requested by stakeholders during the budget process.

- 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 the 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 will adjust its information technology systems to implement the new payment rates. Information regarding the payment rate increases will be provided through resources posted at the Department's 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. Staff of the Division of Medicaid Development and Administration are available to provide technical assistance as needed.

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.

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The rules apply to providers of HCBS waiver services. Services are provided by providers certified by the Department. Some services are provided by both Agency Providers (entities that employ staff to provide services) and Independent Providers (self-employed persons who provide services and do not employ anyone else to provide the services); some services are provided only by Agency Providers. Informal Respite is provided only by Independent Providers.

Service	Certified Agency Providers	Certified Independent Providers
Adult Day Support	801	(not applicable)
Career Planning	229	47
Community Respite	387	(not applicable)
Group Employment Support	333	(not applicable)
Homemaker/Personal Care	1,752	9,455
Individual Employment Support	445	127
Informal Respite	(not applicable)	5,163
Non-Medical Transportation	1,592	2,727
Participant-Directed Homemaker/Personal Care	1,127	6,482
Residential Respite	590	(not applicable)
Shared Living	1,020	5,366
Transportation	1,758	6,551
Vocational Habilitation	529	(not applicable)
Waiver Nursing Services	398	347

The rules as they already exist 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.

The amendments/revisions being made to the rules increase the rates paid to providers of the services and will result in increased revenue for providers. The amendments/revisions are not expected to increase the adverse impact of the rules on providers of services. 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?

Rules are required to implement the federally-approved HCBS waivers. The changes being made to the rules will increase revenue for providers of HCBS.

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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 increase payment rates to providers of 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 of the Division of Medicaid Development and Administration are available to provide technical assistance as needed.