



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):

Waiver Simplification

Rule Number(s): Amend: 5123-9-06, 5123-9-18, 5123-9-19, 5123-9-20, 5123-9-23, 5123-9-25, 5123-9-29, 5123-9-35, 5123-9-40, 5123-9-41, 5123-9-43, 5123-9-45, and 5123-9-46

Adopt: 5123-9-26

Rescind: 5123-9-27

Date of Submission for CSI Review: February 15, 2022

Public Comment Period End Date: March 1, 2022

Rule Type/Number of Rules:

☒ New/ 1 rule

☒ Amended/ 13 rules (FYR? no)

☐ No Change/____ rules (FYR? ____)

☒ Rescinded/ 1 rule (FYR?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

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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 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 February 1, 2022, more than 42,000 individuals were enrolled in HCBS waivers administered by the Department:

- Individual Options Waiver = 24,268
- Level One Waiver = 15,720
- Self-Empowered Life Funding Waiver = 2,124

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

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

The Department engaged stakeholders to participate in the design, development, and implementation of changes to simplify and improve services available to individuals enrolled in the Department's HCBS waivers. As a result of this effort, the Department is amending 13

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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:
 - Add an overall annual benefit limitation for services provided under the Level One Waiver.
 - 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:
 - Make clear that the referenced budget limitations apply only to services provided under the Individual Options Waiver.
- 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 the services. The rule is being amended to:
 - Make clear that the budget limitations in Appendix B apply only to services provided under the Individual Options Waiver.
 - Update a citation to an administrative rule.
- Rule 5123-9-20 (Home and Community-Based Services Waivers - Money Management Under the Individual Options and Level One Waivers) defines Money Management 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:
 - Eliminate a reference to a Level One Waiver payment limitation for specific services.
 - Update citations to administrative rules.
- Rule 5123-9-23 (Home and Community-Based Services Waivers - Environmental Accessibility Adaptations Under the Individual Options and Level One Waivers) defines Environmental Accessibility Adaptations 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:
 - Eliminate a reference to a Level One Waiver payment limitation for specific services.
 - Update citations to administrative rules.

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- Rule 5123-9-25 (Home and Community-Based Services Waivers - Specialized Medical Equipment and Supplies Under the Individual Options and Level One Waivers) defines Specialized Medical Equipment and Supplies 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:
 - Eliminate a reference to a Level One Waiver payment limitation for specific services.
 - Update citations to administrative rules.
- Rule 5123-9-29 (Home and Community-Based Services Waivers - Home-Delivered Meals Under the Individual Options and Level One Waivers) defines Home-Delivered Meals 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:
 - Add the service to the Self-Empowered Life Funding Waiver.
 - Align requirements and payment rates with a similar service available through the Ohio Department of Aging PASSPORT program.
 - Eliminate a reference to a Level One Waiver payment limitation for specific services.
 - Update citations to administrative rules.
- Rule 5123-9-35 (Home and Community-Based Services Waivers - Remote Support Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers) defines Remote 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:
 - Eliminate a reference to a Level One Waiver payment limitation for specific services.
 - Update citations to administrative rules.
- Rule 5123-9-40 (Home and Community-Based Services Waivers - Administration of the Self-Empowered Life Funding Waiver) implements the Self-Empowered Life Funding Waiver, a component of the Medicaid Home and Community-Based Services program administered by the Department pursuant to Section 5166.21 of the Revised Code. The rule is being amended to:
 - Eliminate a reference to budget limitations in rule 5123-9-19.
 - Update citations to administrative rules.
- Rule 5123-9-41 (Home and Community-Based Services Waivers - Clinical/Therapeutic Intervention Under the Self-Empowered Life Funding Waiver) defines Clinical/Therapeutic Intervention 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:
 - Add the service to the Level One Waiver.
 - Increase payment rates for providers of the service.
 - Update citations to administrative rules.

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- Rule 5123-9-43 (Home and Community-Based Services Waivers - Functional Behavioral Assessment Under the Self-Empowered Life Funding Waiver) defines Functional Behavioral Assessment 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:
 - Add the service to the Level One Waiver.
 - Update citations to administrative rules.
- Rule 5123-9-45 (Home and Community-Based Services Waivers - Participant-Directed Goods and Services Under the Self-Empowered Life Funding Waiver) defines Participant-Directed Goods and 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:
 - Add the service to the Level One Waiver.
 - Clarify what is covered under the service.
 - Update citations to administrative rules.
- Rule 5123-9-46 (Home and Community-Based Services Waivers - Participant/Family Stability Assistance Under the Self-Empowered Life Funding Waiver) defines Participant/Family Stability Assistance 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:
 - Add the service to the Level One Waiver.
 - Update citations to administrative rules.

Also, as a result of this work, the Department is:

- Adopting new rule 5123-9-26 (Home and Community-Based Services Waivers - Self-Directed Transportation Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers). The rule defines the new Self-Directed Transportation service and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service.
- Rescinding rule 5123-9-27 (Home and Community-Based Services Waivers - Emergency Assistance Under the Level One Waiver). The rule sets forth coverage and eligibility for emergency assistance provided to individuals enrolled in the Level One Waiver. The rule is no longer necessary as the service-specific payment limitations that might prevent an individual enrolled in the Waiver from being able to access additional units of services needed during an emergency situation are being eliminated.

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. The federal Centers for Medicare and Medicaid Services requires states to adopt rules 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.

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In February 2021, the Department convened the Waiver Simplification and Improvement Subcommittee of the Waiver Workgroup. The Subcommittee included advocates, county boards of developmental disabilities, and providers of services called upon to participate in the design, development, and implementation of changes to simplify and improve services available to individuals enrolled in the Level One and Self-Empowered Life Funding waivers. Members of the Subcommittee included:

Christine Brown	The Ohio State University Nisonger Center
Dana Charlton	Ohio Self Determination Association
Lisa Comes	Ohio Association of County Boards of Developmental Disabilities
Karin Crabbe	Franklin County Board of Developmental Disabilities
Stacie DelliQuadri	Trumbull County Board of Developmental Disabilities
Jacqueline George	Ohio Department of Medicaid
Angie Gerding	Advocacy and Protective Services, Inc.
Rachel Hayes	Ohio Provider Resource Association
Tonya Hitchens	Guernsey County Board of Developmental Disabilities
Susan Hussein	Ohio Department of Medicaid
Debbie Jenkins	Ohio Health Care Association
Monica May	Clermont County Board of Developmental Disabilities
Ruth Smith	Trumbull County Board of Developmental Disabilities
Lori Stanfa	Ohio Association of County Boards of Developmental Disabilities
Gary Tonks	The Arc of Ohio
Annette Wood	Ohio Waiver Network
Kim Wynn	Clermont County Board of Developmental Disabilities
Allison Zuhosky	Franklin County Board of Developmental Disabilities

Subcommittee members committed to sharing the work and progress of the group with the stakeholders they represent to ensure sufficient opportunity for frequent feedback from a wide range of perspectives. The Subcommittee met 12 times in 2021: February 22, March 8, March 22, April 5, April 19, May 3, May 17, June 7, June 14, June 21, June 28, and July 12. Notes from the Subcommittee meetings are posted at the Department's website (https://dodd.ohio.gov/waivers-and-services/waivers/Waiver_Workgroup).

To gather perspectives and ideas of people with disabilities and their families and other interested people regarding what is working well, what needs improvement, and what services should be available to persons enrolled in Level One and Self-Empowered Life Funding waivers, four virtual town hall meetings were conducted in April 2021:

<u>Date</u>	<u>Host(s)</u>
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April 5	The Arc of Ohio and People First of Ohio
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- April 6 Interagency Work Group on Autism, Ohio Center for Autism and Low Incidence, and Autism Society of Ohio
- April 7 The University of Cincinnati Center for Excellence in Developmental Disabilities
- April 9 Ohio Self Determination Association

Additionally, a survey was conducted from February 12 through April 16, 2021. Data from the town hall meetings and the survey were integrated and analyzed. More than 800 people with disabilities, family members, and stakeholders within the developmental disability system gave feedback through one of these methods. The town hall/survey results are posted at the Department's website (<https://dodd.ohio.gov/waivers-and-services/all-waivers-and-services-resources/waiverimprovementswhatyoutoldus>).

Information about the Waiver Simplification and Improvement project is posted at the Department's website (https://dodd.ohio.gov/waivers-and-services/waivers/Waiver_Workgroup). Project information and updates were shared via the Department's publications, including:

[Pipeline, February 3, 2021](#)

[Family Connection, February 10, 2021](#)

[Memo Monday, March 22, 2021](#)

[Memo Monday, April 5, 2021](#)

[Family Connection, April 14, 2021](#)

[Memo Monday, April 20, 2021](#)

[Memo Monday, December 27, 2021](#)

[Memo Monday, February 14, 2022](#)

The Department convenes a Waiver Workgroup to discuss, consider, and develop the HCBS waivers administered by the Department. 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 Health Care Association/Ohio Centers for Intellectual Disabilities
Ohio Provider Resource Association
Ohio Self Determination Association
Ohio Waiver Network

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The rules were discussed with the Waiver Workgroup on July 26, 2021, September 27, 2021, November 29, 2021, and January 31, 2022.

Information regarding amendments being made to the Individual Options, Level One, and Self-Empowered Life Funding waivers is posted at the Department's website (https://dodd.ohio.gov/waivers-and-services/waivers/Waiver_Amendments_2022). As part of the waiver amendment process, the public may comment on the proposed amendments from February 8 through March 10, 2022. Comments may be submitted by email, United States mail, phone, courier, or in-person.

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 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?

Stakeholders indicated that flexibility within an individual's waiver budget is critical and suggested that the Level One Waiver payment limitations for "buckets" of specific services unnecessarily restrict access to services; the payment limitations are being eliminated from rules 5123-9-20, 5123-9-23, 5123-9-25, 5123-9-29, and 5123-9-35.

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Stakeholders pushed for development of a flexible, self-directed transportation service that includes ride-sharing services enjoyed by the general public. The resulting service, Self-Directed Transportation, is being implemented via new rule 5123-9-26.

Advocates and providers of services asked that requirements and payment rates for Home-Delivered Meals be more closely aligned with a similar service available through the Ohio Department of Aging PASSPORT program. Rule 5123-9-29 is being amended as requested.

Stakeholders indicated they wanted four services added to the Level One Waiver benefit package:

- Clinical/Therapeutic Intervention
- Functional Behavioral Assessment
- Participant-Directed Goods and Services
- Participant/Family Stability Assistance

Rules 5123-9-41, 5123-9-43, 5123-9-45, and 5123-9-46 are being amended accordingly.

Individuals and families who receive services, as well as Service and Support Administrators employed by county boards of developmental disabilities, expressed concerns regarding the approval process for Participant-Directed Goods and Services. As a result, amendments are being made to rule 5123-9-45 to clarify what is covered under the service.

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 gathered from four virtual town hall meetings and a survey informed the work of the Waiver Simplification and Improvement Subcommittee.

Service utilization data were analyzed to determine the Level One Waiver annual benefit limitation in paragraph (E) of rule 5123-9-06 and the annual limit of \$2,500 for Participant-Directed Goods and Services set forth in paragraph (F)(3) of rule 5132-9-45.

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 adding additional services (e.g., Money Management and Specialized Medical Equipment and Supplies) to the Self-Empowered Life Funding Waiver but based on feedback from stakeholders, determined only two services would be added: Home-Delivered Meals and the new Self-Directed Transportation service.

The Department considered removing transportation by commercial operators as a component of the Non-Medical Transportation service described in rule 5123-9-18, but ultimately determined that the component should be maintained so as not to limit access to

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persons choosing not to access the new Self-Directed Transportation service.

The Department considered various annual benefit limitations for the Level One Waiver and arrived at \$45,000 for adults and \$30,000 for children based on analysis of service utilization data.

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?

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 will continue to share information via its website, listservs, and publications. 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:

- 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. Most services are provided by 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). Remote Support is provided exclusively by Agency Providers.

	Agency Providers	Independent Providers
Clinical/Functional Intervention	55	12
Environmental Accessibility Adaptations	125	29
Functional Behavioral Assessment	37	7
Home-Delivered Meals	15	0
Money Management	186	236
Participant/Family Stability Assistance	74	21
Remote Support	315	[not applicable]
Specialized Medical Equipment and Supplies	112	10

The rule changes do not require any action on the part of providers holding certification to provide services as a provider certified to provide a specific service may provide the service under any waiver administered by the Department. Additionally, in accordance with paragraph (C)(2)(c) of rule 5123-9-26 governing the new Self-Directed Transportation service, providers of two existing services (Non-Medical Transportation and Transportation, which are not part of this package) will be deemed eligible to provide the new Self-Directed Transportation service:

	Agency Providers	Independent Providers
Non-Medical Transportation	1,553	2,948
Transportation	1,715	6,340

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

- Having to be certified by the Department to provide services;
- Submitting an application and supporting information and documents to obtain and maintain certification 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.

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The actual adverse impact varies widely among providers based on factors such as whether the provider is an Agency Provider or an Independent Provider, the nature and number of individuals served by a provider, the number of specific services provided, the volume of services provided, and for Agency Providers, the number of staff employed.

The intent of the proposed rule actions is to expand access to services needed by Ohioans with developmental disabilities, which presents enhanced opportunities for providers of services to expand their businesses and income.

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

The Ohio Revised Code and the federal Centers for Medicare and Medicaid Services require the Department to promulgate rules governing Medicaid HCBS for the waivers it administers.

Regulatory Flexibility

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

No; the federal Centers for Medicare and Medicaid Services requires Ohio to implement Medicaid-funded programs in a uniform, statewide manner.

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 are available to provide technical assistance and training as needed.

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