



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Joseph Baker, Director

Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Developmental Disabilities

Rule Contact Name/Contact Information: Becky.Phillips@dodd.ohio.gov, (614) 644-7393

Regulation/Package Title (a general description of the rules' substantive content):

Home and Community-Based Services and Settings

Rule Number(s): 5123-9-02 (Amend)

Date of Submission for CSI Review: July 28, 2023

Public Comment Period End Date: August 11, 2023

Rule Type/Number of Rules:

- | | |
|---|---|
| <input type="checkbox"/> New/ ____ rules | <input type="checkbox"/> No Change/ ____ rules (FYR? ____) |
| <input checked="" type="checkbox"/> Amended/ 1 rule (FYR? No) | <input type="checkbox"/> Rescinded/ ____ rules (FYR?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.

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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 5123-9-02 (Home and community based services waivers - ensuring the suitability of services and service settings) establishes standards to ensure that the three Medicaid Home and Community-Based Services (HCBS) waivers administered by the Ohio Department of Developmental Disabilities maximize opportunities for enrolled individuals to access the benefits of community living and receive services in the most integrated setting. The HCBS waiver program is authorized by Section 1915(c) of the Social Security Act.

HCBS waivers are 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. 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 5, 2023, more than 43,000 individuals were enrolled in HCBS waivers administered by the Department:

- Individual Options Waiver = 24,765
- Level One Waiver = 16,508
- Self-Empowered Life Funding Waiver = 1,947

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

The Department is amending paragraph (C)(5)(a) of rule 5123-9-02 to permit short-term provision of three specific waiver services (i.e., Homemaker/Personal Care, Participant-Directed Homemaker/Personal Care, and Shared Living) to individuals in acute care hospitals in accordance with administrative rules governing those services. The administrative rules governing the specific services establish parameters for provision of the services in acute care hospitals, for example:

- The service is necessary to ensure smooth transition between the acute care hospital and

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- the individual's home and to preserve the individual's functional abilities;
- The service is not a substitute for services the acute care hospital provides or is obligated to provide, and
- The individual may receive the service in an acute care hospital on no more than 30 days per waiver eligibility span.

Additional amendments are being made to rule 5123-9-02 to:

- Revise the definition of "related to" in paragraph (B)(15) to mirror the amendment being made to the definition of the term in the rule for the Shared Living service (5123-9-33);
- Correct citations to the Revised Code and the Administrative Code; and
- Align wording with newer rules.

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.

Authorize: 5123.04, 5123.19

Amplify: 5123.04, 5123.19, 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 rule implements federal requirements regarding HCBS settings characteristics.

5. If the regulation implements a federal requirement, but 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)?

The rule is necessary to ensure that individuals enrolled in HCBS waivers receive services in accordance with federal regulations.

7. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

The success of the rule is measured in terms of achieving compliance with 42 CFR 441.301 (c)(4) and (c)(5) for individuals enrolled in HCBS waivers administered by the Department.

8. Are any of the proposed rules contained in this rule package being submitted pursuant

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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.

On July 18, 2023, the draft rule was shared with members of the Waiver Workgroup for review and feedback. The Waiver Workgroup includes representatives of:

- Advocates
- 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

Through the Department's rules clearance process, the rule and the Business Impact Analysis form will be 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 Council for 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

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Ohio Self Determination Association
Ohio SIBS (Special Initiatives by Brothers and Sisters)
Ohio Statewide Independent Living Council
Ohio Superintendents of County Boards of Developmental Disabilities
Ohio Waiver Network
People First of Ohio
Values and Faith Alliance

The rule and the Business Impact Analysis form will be posted at the Department's website during the clearance period for feedback from the general public:

<https://dodd.ohio.gov/forms-and-rules/rules-under-development/proposed+rules+for+review>

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

Rules 5123-9-30, 5123-9-32, and 5123-9-33 were disseminated for clearance May 26 through June 12, 2023. Representatives of diverse stakeholder groups expressed support for proposed amendments permitting the services governed by those rules (i.e., Homemaker/Personal Care, Participant-Directed Homemaker/Personal Care, and Shared Living) to be provided, within established parameters, in an acute care hospital.

In July 2023, a staff member of the Ohio Department of Medicaid pointed out that rule 5123-9-02 needed to be amended to accommodate the amendments being made to rules 5123-9-30, 5123-9-32, and 5123-9-33. Amendments to rule 5123-9-02 were drafted and shared with members of the Waiver Workgroup on July 18. A member of the Waiver Workgroup who responded to the Department's request to review proposed amendments to rule 5123-9-02 indicated the amendments made sense and aligned with amendments being made to rules 5123-9-30, 5123-9-32, and 5123-9-33.

Members of the Waiver Workgroup earlier suggested that descriptive definitions of terms are more helpful to individuals served and families than defining a term to have the same meaning as in another administrative rule. The definitions of "agency provider" and "independent provider" in paragraph (B) were amended based on this input.

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?

Outcomes of provider compliance reviews conducted in 2017 through 2021 indicate rule 5123-9-02 has been effective in ensuring residential and day services are delivered in settings compliant with federal regulations governing HCBS. Very few citations (< 2%) were issued based on questions regarding service settings asked during compliance reviews.

12. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not

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appropriate? If none, why didn't the Agency consider regulatory alternatives?
Alternative regulations may include performance-based regulations, which define the requirement outcome, but do not dictate the process the regulated stakeholders must use to comply.

None; the proposed amendments to paragraph (C)(5)(a) are necessary to support provision of three specific HCBS (Homemaker/Personal Care, Participant-Directed Homemaker/Personal Care, and Shared Living) in an acute care hospital on a limited basis, as recently approved by the federal Centers for Medicare and Medicaid Services (CMS). CMS requires Ohio to implement Medicaid-funded programs in a uniform, statewide manner.

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

The rule already exists. 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.

14. 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 rule already exists. Information regarding proposed amendments to the rule will be posted at the Department's website and disseminated to stakeholder representatives for clearance. The final-filed rule will be posted at the Department's website and disseminated to county boards of developmental disabilities and the approximately 4,000 persons who subscribe to the Department's administrative rules notifications. Staff of the Division of Medicaid Administration and the Office of Compliance are available to provide technical assistance should any be needed.

Adverse Impact to Business

15. Provide a summary of the estimated cost of compliance with the rule(s). Specifically, please do the following:

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

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 rule implements federal regulations governing HCBS settings and impacts providers of

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services to individuals enrolled in HCBS waivers administered by the Department. Section 5123.045 of the Revised Code sets forth that a provider of HCBS must be certified pursuant to Section 5123.161 of the Revised Code or licensed pursuant to section 5123.19 of the Revised Code.

Paragraph (F)(1) requires individuals living in provider-controlled residential settings to have leases. "Provider-controlled residential setting" is defined in paragraph (B)(14) of the rule. The number of provider-controlled residential settings is unknown to the Department.

Paragraph (F)(2) requires individuals living in licensed residential facilities or Shared Living settings when the caregiver is not related to the individual to have residency agreements.

This requirement impacts:

- Approximately 650 licensed residential facilities that provide HCBS,
- Potentially 1,113 certified agency providers of Shared Living, and
- Potentially 6,001 certified independent providers of Shared Living.

Preparing and securing signatures on residency agreements or leases takes provider time. The amount of time and related costs will vary among providers depending on the nature and complexity of a provider's operations, the wages paid to staff who perform these duties, and the number of individuals served by the provider who reside in a setting that requires a residency agreement or lease.

16. Are there any proposed changes to the rule that will reduce a regulatory burden imposed on the business community? Please identify. (Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors).

The definition of "related to" in paragraph (B)(15) is being modified to include "grandchild" to align with the definition of the term in the rule governing the Shared Living service (5123-9-33). Expanding the definition has the effect of exempting one additional type of relationship between a Shared Living caregiver and the person served from being required to have a residency agreement in accordance with paragraph (F)(2) of the rule.

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

Ohio must comply with 42 CFR 441.301.

Regulatory Flexibility

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

No; the purpose of the rule is to establish federally-compliant statewide standards.

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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 waiving 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 Administration and the Office of Compliance are available to provide technical assistance as needed. Questions may be submitted at any time to:

Division of Medicaid Administration
waiverpolicyta@dodd.ohio.gov
800-617-6733 option 0

Office of Compliance
compliance@dodd.ohio.gov
800-617-6733 option 6