

**MEMORANDUM**

TO: Bryan Stout, Ohio Department of Medicaid

FROM: Tess Eckstein, Regulatory Policy Advocate

DATE: December 6, 2016

RE: CSI Review – BLTCSS Assisted Living Waiver (OAC 5160-33-04, 5160-33-05, and 5160-33-07)

On behalf of Lt. Governor Mary Taylor, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

Analysis

This rule package consists of three amended rules being proposed by the Ohio Department of Medicaid (ODM). The rule package was submitted to the CSI Office on November 10, 2016, and the comment period remained open until November 17, 2016. A revised BIA was submitted on December 1. Each of the rules deals with the assisted living waiver program: 5160-33-04 authorizes components of the program's enrollment process; 5160-33-05 establishes conditions of participation for businesses wishing to participate in the program; and 5160-33-07 describes rate-setting methodologies used to determine provider rates for services available through the program. Amendments are being proposed to each rule to enable the state to maintain federal approval to administer the assisted living waiver. Specifically, amendments update outdated references and an effective date, and make minor edits to language for consistency with other rules.

Rules 5160-33-04 and 5160-33-07 primarily impact the Ohio Department of Aging's (ODA) designees (i.e., the 13 PASSPORT Administrative Agencies (PAAs)). Rule 5160-33-04 also impacts the county departments of job and family services (CDJFS), which make eligibility determinations for individuals wishing to enroll in the waiver program, as well as individuals completing applications for Medicaid or waiver eligibility. Rule 5160-33-05 affects residential care facilities licensed by the Ohio Department of Health (ODH) who seek Medicaid

reimbursement for services furnished through the assisted living waiver program. Potential adverse impacts vary by rule. Rule 5160-33-04 requires PAAs to initiate contact with individuals to complete the enrollment process, conduct in-person eligibility assessments, and when applicable, provide assistance to initiate an application for Medicaid. If an individual is determined to be eligible, the PAA must establish a program enrollment date and authorize the provision of waiver services. Rule 5160-33-05 requires applicable businesses to obtain ODA certification as assisted living providers before obtaining Medicaid provider agreements. To do this, a business must submit an application and supporting documentation, prepare for and participate in an on-site inspection, educate staff on waiver program rules, review the contract with the ODA designee, and pay the Medicaid provider enrollment fee. Finally, rule 5160-33-07 requires PAAs to authorize assisted living services, determine rates for assisted living services for each individual through an assessment of that individual's service needs, and negotiate and approve a per-job bid rate for community transition services.

ODM provides funding to PAAs to cover the activities required by rules 5160-33-04 and 5160-33-07, so financial impact from them is minimal. Furthermore, the BIA claims that the rules are justified because they ensure transparency, accountability, consistency, and quality outcomes for individuals. For example, rule 5160-33-05 ensures the health and safety of individuals enrolled in the assisted living waiver program by verifying that businesses have capacity to appropriately furnish waiver services.

In addition to discussing the proposed rules during a monthly ODM Home and Community-Based Services (HCBS) Rules Workgroup meeting, the rules were emailed to the appropriate stakeholder group, along with a request for input on the draft regulation, in July 2016. From the meeting and distributions, ODM received feedback that resulted in technical edits to the rule language. ODM also received a recommendation to simplify the ODA certification process referenced in rule 5160-33-05. Since the certification process is established in OAC 173-39-03, no changes were made to the rule. During the CSI public comment period, one comment was submitted. It recommended that language be added to rule 5160-33-04 to allow for an individual to receive an in-person assessment to determine eligibility for the assisted living waiver program before that individual submits an application for Medicaid benefits. A recent case concerning the operation of Ohio's assisted living waiver, *Price v. Ohio Medicaid Director*, determined that such a procedure exists and held that "an individual's ability to obtain a pre-application assessment and service plan ameliorated whatever coverage gap that otherwise would be caused by the lack of retroactivity in assisted living waiver benefits." The comment furthermore expressed that, currently, when an individual tries to file a pre-application request for an in-person assessment and service plan, the individual is told by ODA's designee that no such procedure exists.

Rather than change the rule itself, to eliminate possible misunderstanding when a pre-application assessment is requested, ODA issued a Notice of Instruction to the PASSPORT Administrative Agencies on November 18, 2016. This notice clarified that the completion of a pre-application assessment is consistent with current practice for conducting an in-person assessment of non-financial assisted living waiver eligibility criteria. Therefore, a request for a pre-application

assessment should be treated in the same manner as a request for an in-person assessment and conducted regardless of whether the individual has begun the Medicaid application process. The CSI Office reached out to the interested stakeholder who had submitted the comment to determine whether ODM's response satisfied her concerns. While the rule as written does not expressly allow for the mentioned procedure, the commenter acknowledged that it also does not prohibit it. Consequently, as long as the process detailed in the Notice of Instruction is actually followed by the Administrative Agencies, it should ameliorate whatever coverage gap exists by the lack of retroactivity in assisted living waiver benefits.

After the CSI public comment period ended, another comment was submitted by an Area Agency on Aging through the Ohio Association of Area Agencies on Aging (O4A). It recommended increases in reimbursement rates, community transition services funding, and personal needs allowance. While ODM will consider these recommendations as it works to make decisions regarding the assisted living waiver, it did not implement any rate changes as part of this review because rate changes require more than simply revising the rules. Since the waiver is currently in effect, modifications would require a waiver amendment, thereby requiring ODM to submit an amendment to the Centers for Medicare and Medicaid Services (CMS) for its review and approval. No additional comments were submitted indicating that the rules are overly burdensome. Therefore, the CSI Office determines the purpose of the rules to be justified.

Recommendations

For the reasons discussed above, the CSI Office does not have any recommendations for this rule package.

Conclusion

Based on the above comments, the CSI Office concludes that the Ohio Department of Medicaid should proceed with the formal filing of this rule package with the Joint Committee on Agency Rule Review.

cc: Mark Hamlin, Lt. Governor's Office