



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Joseph Baker, Director

MEMORANDUM

TO: Becky Phillips, Ohio Department of Developmental Disabilities

FROM: Caleb White, Business Advocate

DATE: July 17, 2023

RE: **CSI Review – Post Pandemic Flexibility (OAC 5123-2-08, 5123-2-09, 5123-8-01, 5123-9-30, 5123-9-31, 5123-9-32, 5123-9-33, and 5123-9-34)**

On behalf of Lt. Governor Jon Husted, 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 Department as provided for in ORC 107.54.

Analysis

This rule package consists of seven amended rules, one new rule, and one rescinded rule proposed by the Ohio Department of Developmental Disabilities (DODD) as part of the statutory five-year review process. This rule package was submitted to the CSI Office on May 26, 2023, and the public comment period was held open through June 12, 2023. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on May 26, 2023.

The rules contained in in this package are being amended in response to the ending of the federal public health emergency as well as additional Appendix K flexibilities provided by the Centers for Medicare and Medicaid Services (CMS) during the COVID-19 pandemic. Amendments in these rules are being proposed to remove references to the temporary flexibilities CMS will no longer allow after the conclusion of the federal public health emergency.

Ohio Administrative Code (OAC) 5123-2-08 establishes the procedures and standards outlined in statute for the certification of agency providers of supported living services, which includes home and community-based services (HCBS) and provides definitions for these procedures and standards. This rule also contains four appendices which outline the directors of operations and direct support

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professionals as well as a list of exemptions for direct support professionals regarding the requirements of this rule and a list of exemptions for agency providers regarding application fees. This rule is amended to clarify how applicants and certification holders can submit applications, documents, and information, and to offer an agency provider an alternative to having a line of credit by allowing a bank account in the agency provider's name with sufficient funds to also satisfy this requirement. The rule is also amended to permit some direct support professionals to provide services to a minor child or spouse and prohibit direct support professionals from providing services to the minor child or spouse of the agency provider's owner and prohibit the parent of a minor child or spouse served by the agency provider from serving as that agency's Director of Operations. Finally, the rule is amended to clarify training requirements in the appendices and update the language and correct citations. OAC 5123-2-09 establishes the procedures and standards relating to the certification of independent providers of supported living services which includes HCBS and contains four appendices which outline the training requirements for different types of independent providers and lists the types of independent providers which are exempt from application fees. This rule is amended to clarify how provider certification holders and applicants submit applications, information, and documents, to adjust training requirements in the appendices for clarity, and to streamline and update the rule's language.

OAC 5123-8-01 establishes the criteria and process used to determine if an individual requires the level of care that is necessary to qualify for Medicaid-funded services from either an Intermediate Care Facility for individuals with Intellectual Disabilities or through enrollment in an HCBS waiver. This rule is amended to eliminate a paragraph which authorized the DODD director to waive some of the rule's provisions during the COVID-19 pandemic and to update and streamline the rule's language.

OAC 5123-9-30 defines Homemaker/Personal Care and establishes the provider qualifications and requirements for both the delivery and documentation of the services as well as the payment standards for this service; additionally, this rule also contains appendices which establish the billing units, service codes, and payment rates for Homemaker/Personal Care services as well as the cost of doing business categories. This rule is amended to allow Homemaker/Personal Care to be provided for an individual in an acute care hospital, to increase the payment rates for Homemaker/Personal Care services, and to update and streamline the rule's language. OAC 5123-9-31 establishes the billing unit for Homemaker/Personal Care when individuals share the same agency provider's services at the same site as a part of the HCBS Individual Options Waiver and contains an appendix which establishes the service codes for Homemaker/Personal Care daily billing units. This rule is amended to eliminate a paragraph which authorized the DODD director to waive some of the rule's provisions during the COVID-19 pandemic and to clarify, update and streamline language. OAC 5123-9-32 defines participant-directed Homemaker/Personal Care and sets forth provider qualifications, requirements for service delivery and documentation of services, as well as payment standards for

the service. This rule also contains two appendices which set forth the billing units, service codes, and payment rates for Participant-Directed Homemaker/Personal Care. This rule is amended to allow up to sixteen hours of Participant-Directed Homemaker/Personal Care to be provided to an individual in an acute care hospital, increase the payment rates for Participant-Directed Homemaker/Personal Care, and to update and streamline the rule's language. OAC 5123-9-33 defines Shared Living and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. This rule also contains three appendices which set forth the billing units, service codes, payment rates, and the cost-of-doing business categories for Shared Living. This rule is amended to allow Residential Respite to be provided to an individual on the same day as Shared Living care under certain conditions, to eliminate a provision which was adopted during the COVID-19 state of emergency which permitted Homemaker/Personal Care to be provided on the same day as Shared Living, to permit Shared Living care to be provided to an individual in an acute care hospital, to create additional exemptions to allow individuals who live with their caregivers to receive Homemaker/Personal Care instead of Shared Living care, increase payment rates for Shared Living providers, and to update and streamline the rule's language. OAC 5123-9-34 is to be rescinded and replaced with a new rule with the same number and title. This new rule defines Residential Respite and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. This rule also contains two appendices which set forth the billing units, service codes, and payment rates for Residential Respite. This new rule differs from the existing rule by creating a fifteen-minute billing unit for Residential Respite, clarifying that individuals receiving Shared Living may also receive Residential Respite and allowing these individuals to receive Residential Respite on the same day as Shared Living care is provided, to increase payment rates for Residential Respite providers, and to update and streamline the rule's language.

During early stakeholder outreach, DODD shared their plans to revise their rules in response to the ending of the Appendix K flexibilities with the Waiver Workgroup which included representatives from Advocacy and Protective Services, Inc., the Ohio Association of County Boards of Developmental Disabilities, the Ohio Council for Home Care and Hospice, the Ohio Department of Medicaid, the Ohio Developmental Disabilities Council, the Ohio Health Care Association/Ohio Centers for Intellectual Disabilities, the Ohio Provider Resource Association, the Ohio Self Determination Association, the Ohio Superintendents of County Boards of Developmental Disabilities, the Ohio Waiver Network, and the Values and Faith Alliance.

As a result of the feedback from the Waiver Workgroup DODD amended their rules to provide an alternative option for an agency provider to establish financial solvency, extend the current practice permitting the parent of a minor child or a spouse to provide services within the parameters outlined in the Ohio Department of Medicaid's proposed rule (OAC 5160-44-32), permit a provider of Homemaker/Personal Care and Shared Living to provide services while an individual is in an acute

care hospital, permit Residential Respite to be provided on the same day as Shared Living, add a clearer definition for primary legal residence, add additional situations to the exemptions for Shared Living to allow these individuals to receive Homemaker/Personal Care instead of Shared Living, add a fifteen-minute billing unit to Residential Respite which allows for Residential Respite to be provided the same day as Shared Living, and increase payment rates for homemaker/personal, Shared Living, and Residential Respite care providers.

During the CSI public comment period, DODD received comments from 32 individuals with some in support of the changes and others seeking clarification or raising concerns. In response to these comments DODD made clarifying changes to their rules, changes to align the rules with the Ohio Department of Medicaid's proposed rule (OAC 5160-44-32), changes to account for the newly created fifteen-minute billing units, limit the amount Homemaker/Personal Care that may be provided to those in acute hospital care to thirty days per waiver eligibility span, and restored a pre-pandemic provision which clarified that an individual in a Shared Living setting can receive Homemaker/Personal Care on the same day as Shared Living Care.

The business community impacted by the rules includes agency and independent providers certified by DODD to provide homemaker and personal care, Shared Living, and Residential Respite services as well as intermediate care facilities for individuals with intellectual disabilities (ICFIID) and non-ICFIID residential facilities. The adverse impacts created by the rules include the time spent obtaining certifications, application fees, and the potential suspension, denial, or revocation of the certification for both agency and independent care providers as well as the time associated with completing a level of care review for individuals seeking admission to an ICFIID. DODD states that the adverse impacts to business are justified to extend flexibility for Ohioans with developmental disabilities receiving services and the providers of those services.

Recommendations

Based on the information above, the CSI Office has no recommendations on this rule package.

Conclusion

The CSI Office concludes that DODD should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.