Ohio Department of Aging

John Kasich, Governor
Bonnie K. Burman, Sc.D., Director

MEMORANDUM of RESPONSE

NUTRITION RULES

To: Mark Hamlin, Director of Regulatory Policy, CSIO
Sydney King, Regulatory Policy Advocate, CSIO

From: Tom Simmons, Policy Development Manager

Date: April 18, 2016, *revised* May 3, 2016, *revised* July 20, 2016.

Thank you for reviewing ODA's proposals for OAC 173-3-06.1, Chapter 173-4, 173-39-02.1, 173-39-02.2, 173-39-02.10, and 173-39-02.14. Because CSIO recommended ODA proceed without further amendments, ODA will file the rules with JCARR to begin the legislature's portion of the rule-review process.

Thank you for your work.

The President signed the Older Americans Act Reauthorization Act of 2016 into law a day after ODA made the original filing of the nutrition rules. Thank you for reviewing the rules again in light of the Reauthorization Act.

ODA previously informed your office that the Reauthorization Act wouldn't require any amendments to the nutrition rules other than to update the version of the Older Americans Act that many rules reference. Even the new language about local foods wouldn't ODA to substantively revise the nutrition rules because (1) ODA's rules don't prohibit or limit using local foods, (2) the Reauthorization Act only encourages (*vs.*, "require") AAAs to procure for locally-grown foods, and (3) the Reauthorization Act only encourages procuring for locally-grown foods "where feasible." Fortunately, the rich soils of Ohio produce enough food to make this feasible. Local companies and non-profits already capitalize on the local-food trend. For example, Kenyon College approached ODA to promote their farm-to-table food program. They want to expand from just feeding students to also feeding elders. Like all providers, Kenyon College would need to bid for an AAA-provider agreement through free and open competition when their area agency on aging begins the next round of competition.

In addition to updating references to the Older Americans Act, ODA also informed your office that ODA plans to replace "home-delivered meals" in OAC173-39-02.1(B) with "ADS" and to upload a revised public hearing notice for a public hearing at the same location on the same time and day indicated on the original notice.

Because CSIO recommended that ODA proceed with the revised filings, on May 2, 2016, ODA proceeded with the revised filings.

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On May 3, 2016, ODA made subsequent revised filings to OAC 173-3-06.1, 173-4-03, 173-4-05, 173-4-08, and 173-39-02.1 to make technical corrections to the punctuation in the "statutory authority," "rule amplifies," and "prior effective dates" sections of these rules and to replace "section" in the "rule amplifies" section of OAC173-4-09 with "sections." None of the technical corrections affected the adverse impact reviewed by CSIO in the BIA.

ODA intends to refile the presently to-be-refiled rules. In doing so, ODA would be proposing a list of amendments, most of which are responses to testimony at ODA's May 25, 2016 public hearing. Below is a list of the amendments and their anticipated effect upon adverse impact.

RULES	PROPOSED AMENDMENTS	EFFECT UPON ADVERSE IMPACT
173-3-06.1 Older Americans Act: adult day service.	ODA proposes to require, instead of permit, providers to invite consumers to participate in the interdisciplinary care conferences about the consumer's care.	*MINIMAL INCREASE IN ADVERSE IMPACT* The proposed amendment would lead to better health outcomes and more consumer satisfaction with the provider. It would also only require the provider to *invite* the consumer. The minimal increase in adverse impact is the act of invitation. The rule would not require the consumer to participate. After the public hearing, ODA consulted with ADS providers and provider associations. Oxford Senior Center indicated it always invites consumers, but to date, no consumer has ever accepted the invitation to participate in the conference. So long as the amendment only requires providers to invite consumers (*vs.*, require consumers to participate), Summit Adult Day Services, Senior Resource Connection, and O'Neill Center saw no issues with the proposal. The O'Neill Center further commented on the ease of inviting consumers by saying the following: "As an organization who has provided adult daycare for 25 years, this appears completely reasonable. An invitation is easily extended through a variety of ways." Meals on Wheels of Fairfield County indicated that an invited consumer may need transportation to attend the conference which could be an adverse impact. However, ODA believes Older Americans Act funds and the PASSPORT

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		Program cover such transportation expenses, which means they wouldn't be adverse impacts upon a provider. Better yet, the provider could easily schedule the conference for a time during which the consumer is normally present in the adult day center to avoid a need for additional transportation to the adult day center, which could be covered by Older Americans Act funds or the PASSPORT Program. Overall, ODA believes the minimal burden of inviting a consumer would be would be offset by the reduced caregiving costs resulting from improved health outcomes and consumer satisfaction.
173-3-06.1 Older Americans Act: adult day service.	ODA proposes to convert remaining uses of "furnish" to "provide."	*NO CHANGE TO ADVERSE IMPACT*
173-3-06.1 Older Americans Act: adult day service.	ODA proposes to standardize the qualifications various ways a person may qualify to be an activities director for an adult day center when the services are paid by funds from the Older Americans Act or PASSPORT Programs. For example, if a person qualifies, under OAC3701-17-07 to be an activity director in a nursing home, ODA's current rules for the Older Americans Act program deem the person to also be qualified to be an activity director in an adult day center. Meanwhile, ODA's current certification rules (which apply to the PASSPORT Program) would require the person to qualify by other means because it makes no mention of the ODH rule. The proposed amendment would allow any person who qualifies to be an activity director under the ODH rule to do so in *both* the Older Americans Act and PASSPORT Programs without meeting any additional qualifications.	*FURTHER REDUCTION OF ADVERSE IMPACT* The proposed amendment would lead to better health outcomes and more consumer satisfaction with the provider. It would also only require the provider to *invite* the consumer. The rule would not require the consumer to participate. After the public hearing, ODA consulted with ADS providers and provider associations. So long as the amendment allows a person to qualify to be an activity director if he or she meets one, not all, of the qualifications, the Ohio Health Care Association, LeadingAge Ohio, Senior Health Sciences, and Summit Adult Day Services have no issues with standardizing the various ways a person may qualify to be an activity director. Senior Resource Connection said, "It makes sense to standardize."
173-4-01 Older Americans Act nutrition program: introduction and definitions.	ODA proposes to insert a missing period at end of a sentence.	*NO CHANGE TO ADVERSE IMPACT*

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173-4-02 Older Americans Act: nutrition program: meals eligible for payment.	From ¶(B)(3), ODA proposes to remove "if the volunteer services are provided in the consumer's residence during the mealtime" because §339(H) of the Older Americans Act permits paying for volunteers' meals whether the volunteer was delivering meals to elders or preparing elders' meals for delivery.	*NO CHANGE TO ADVERSE IMPACT, POTENTIAL BENEFIT TO PROVIDERS* The proposed amendment would not require any additional expenditure or work on the provider's part. Instead, the proposed amendment may benefit providers because feeding volunteers with meals paid with Older Americans Act funds may help providers to retain long-term volunteers.
173-4-03 Older Americans Act: nutrition program: consumer enrollment.	In ¶¶ (B)(1), (B)(2), (B)(3), (B)(3)(a), and (B)(3)(e), ODA proposes to replace occurrences of "assess" with "verify." "Assess" is a loaded word that implied a more-comprehensive evaluation. ODA only intends for providers to verify that consumers' meals meet the requirements in OAC173-4-02 before a provider enrolls the consumer.	*FURTHER REDUCTION OF ADVERSE IMPACT* ODA's proposed amendment would make it clear that ODA does not require providers to conduct comprehensive health assessments to determine if a consumer's meals meet the requirements for being paid for by Older Americans Act funds.
173-4-03 Older Americans Act: nutrition program: consumer enrollment.	ODA proposes to revise the rule to clarify that when consumers are discharged before the provider has an opportunity to verify eligibility, the provider may temporarily deem the discharge order to be sufficient verification under limited conditions. For example, a registered nurse conducts all verifications on weekdays during normal business hours. Meanwhile, an area hospital often discharges its patients on Friday evenings (*i.e.*, after the provider's nurse is able to verify if Older Americans Act funds may pay for home-delivered meals). If the hospital discharge papers indicate that the consumer requires home-delivered meals after discharge and that the consumer meals would meet the requirements for payment, then Older Americans Act funds may pay for the consumer's meals provisionally (*i.e.*, until Monday when the provider's registered nurse can conduct the customary eligibility verification.	*NO CHANGE TO ADVERSE IMPACT* Although the proposed amendment would only clarify what the rule already states, doing so would make it obvious that, if an area hospital's discharge papers suffice, Older Americans Act funds may pay for delivering meals during times when the provider is unable immediately to verify eligibility by typical means.

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173-4-04 Older Americans Act: nutrition program: person direction.	ODA proposes to revise the rule's language to clearly indicate that person-direction is one requirement on which an AAA shall score a provider's bid. It is not the only requirement on which an AAA shall score a bid. Otherwise, a provider could win a bid even if its meals cost $1,000 each because the provider offered more person direction than the next-best bid.	*NO CHANGE TO ADVERSE IMPACT* The refiled language would not increase the cost of compliance to providers. Instead, the refiled language would better foster competitive bidding by ensuring that providers with low responsive bids would not lose a round of competitive bidding to a provider who offers the most person direction at an extraordinarily high price.
173-4-05 Older Americans Act: nutrition program: nutrition projects.	Proposed new OAC173-4-05(A)(3) requires AAAs to indicate in every AAA-provider agreement which responsibilities of a nutrition project go to each provider. One provider may deliver meals, while another screens consumers. Additionally, OAC173-4-05 requires providers to offer to screen consumers but OAC173-4-09 requires screening consumers. The latter is supported by 45 C.F.R. 1321.65(a), which requires providers to provide the AAA, "in a timely manner, with statistical and other information which the area agency requires in order to meet its planning, coordination, evaluation and reporting requirements established by the State under §1321.13." Thus, ODA proposes to replace 173-4-05(A)(4)(a) "In the AAA-provider agreement…the AAA shall indicate if the provider shall conduct nutrition health screenings on consumers." Additionally, ODA proposes to eliminate the requirement in OAC173-4-09 to screen a consumer no later than one month after the provider provides the first meal to the consumer. This latter amendment would reduce adverse impacts upon providers.	*FURTHER REDUCTION OF ADVERSE IMPACT* No longer requiring providers to conduct nutrition health screenings before the end of the first month of meal provision reduces the adverse impact upon providers of screening consumers who were just recently verified to be eligible for meals.

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173-4-05 Older Americans Act: nutrition program: nutrition projects.	In ¶(A)(8)(a), ODA proposes replacing the requirement to offer consumers menus approved by a dietitian to a requirement "For meals that are paid, in whole or in part, with Older Americans Act funds, to only offer meals identified on dietitian-approved menus, meals the consumer requests that are comprised of meal components from multiple meals in dietitian-approved menus, or meals the consumer assembles from a do-it-yourself serving option (e.g., a taco bar) if the dietitian drafts instructions for consumers on various ways the consumers may choose to combine ingredients to achieve the nutritional adequacy required under paragraphs (A)(9)(a) and (A)(9)(b) of the rule, while acknowledging that section 339 of the Older Americans Act allows providers to adjust the nutritional-adequacy requirements under paragraphs (A)(9)(a) and (A)(9)(b) of the rule, to the maximum extent practicable, to meet any special dietary needs of consumers and to allow consumers flexibility when compiling using do-it-yourself meals that are appealing to the consumers.	*NO CHANGE TO ADVERSE IMPACT* The proposed new language would make no change upon the adverse impact already reviewed by CSIO because it only reinforces the requirements for providers to offer nutritional adequacy in the Act and to also offer flexibility from the nutritional adequacy required by the same Act. The language would also not prevent a provider from serving consumers meals that are not from dietitian-approved menus when those meals aren't paid, in whole or in part, with Older Americans Act funds.
173-4-05.3 Older Americans Act: nutrition program: congregate dining projects based in restaurants or grocery stores.	ODA proposes to delete "driver" in ¶(F)(1)(b).	*NO CHANGE TO ADVERSE IMPACT* The proposed amendment corrects a drafting error and would not require any additional expenditure or work on the provider's part.
173-4-09 Older Americans Act: nutrition program: nutrition health screening.	ODA proposes to amend the rule to clarify that providers would only be required to refer consumers to providers of home and community-based goods and services if the screening determines the consumer to be at high nutritional risk. ODA also eliminated the need to document referrals made to providers of home and community-based goods and services. ODA also moved the requirement to screen each consumer in a nutrition project to OAC173-4-05 and changed it to require to *offer* screenings *at least annually* instead of a requirement to screen no later than one month after the first meal and annually thereafter. This represents 2 further reductions in adverse impact.	*FURTHER REDUCTION OF ADVERSE IMPACT* The proposed amendments would not document to whom referrals were made and to no longer require screening consumers no later than one month after receiving the first meal from a nutrition project.

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173-4-09 Older Americans Act: nutrition program: nutrition health screening.	ODA proposes to amend the rule to remove language that said "in the provider agreement, the AAA shall indicate whether the AAA or the provider is responsible for...." §307(a)(8)(A) of the Older Americans Act prohibits AAAs from directly providing services, so an AAA would be prohibited from stating that it performed any such duties in an AAA-provider agreement.	*NO CHANGE TO ADVERSE IMPACT* The proposed amendment eliminates a potential contradiction and reinforces existing federal law.
173-39-02.1 ODA certified providers: adult day service.	Require, instead of permit, providers to invite consumers to participate in the interdisciplinary care conferences about the consumer's care.	*NO CHANGE TO ADVERSE IMPACT* Please review ODA's response to the same issue for OAC173-3-06.1.
173-39-02.1 ODA certified providers: adult day service.	ODA proposes to standardize the qualifications various ways a person may qualify to be an activities director for an adult day center when the services are paid by funds from the Older Americans Act or PASSPORT Programs. For example, if a person qualifies, under OAC3701-17-07 to be an activity director in a nursing home, ODA's current rules for the Older Americans Act program deem the person to also be qualified to be an activity director in an adult day center. Meanwhile, ODA's current certification rules (which apply to the PASSPORT Program) would require the person to qualify by other means because it makes no mention of the ODH rule. The proposed amendment would allow any person who qualifies to be an activity director under the ODH rule to do so in *both* the Older Americans Act and PASSPORT Programs without meeting any additional qualifications.	*FURTHER REDUCTION OF ADVERSE IMPACT* Please review ODA's response to the same issue for OAC173-3-06.1.

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173-39-02.10 ODA provider certification: nutritional consultations.	ODA proposes to shorten the sentence in ¶(B)(3)(b) to make the sentence read more clearly. It would go from, "The provider shall not provide a consultation to an individual's authorized representative or caregiver unless the licensed healthcare professional also ordered a consultation to the individual's authorized representative or caregiver to improve the individual's well-being," to "The provider shall not provide a consultation to an individual's authorized representative or caregiver unless the licensed healthcare professional ordered the consultation to improve the individual's well-being."	*NO CHANGE TO ADVERSE IMPACT*