

**John Kasich**, Governor  
**Bonnie K. Burman**, Director

## AGENCY MEMORANDUM OF RESPONSE

To: Mark Hamlin, Director of Regulatory Policy, CSI Office, Lt. Governor's Office  
Paula Steele, Regulatory Policy Advocate, CSI Office, Lt. Governor's Office

From: Tom Simmons, Policy Manager and Regulatory Ombudsman

Re: Adult Day Services

Date: June 5, 2013 (Revised on August 26, 2013)

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Thank you for reviewing ODA's proposed rescission of rules 173-3-06.1 and 173-39-02.1 of the Administrative Code, and the proposed adoption of new rules 173-3-06.1 and 173-39-02.1 of the Administrative Code.

Because your office did not make any recommendations concerning the rule package, ODA will now proceed with filing the above mentioned rule proposals with JCARR.

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On June 21, 2013, ODA revise-filed the rules above to add to explain in the RSFAs how the federal laws that ODA incorporated into the rules and cited in the rules are readily available to the public. ODA updated the RSFA with this information.

The revisions regarded the practice of rule filing and not changes to the rules themselves. As such, the revisions should not alter the adverse impact described in the BIA that the Common-Sense Initiative Office previously reviewed.

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On June 24, 2013, ODA revise-filed the rules above to upload a new public-hearing notice and new agency memorandum of response into the Register of Ohio. To resolve a scheduling conflict with another meeting, ODA rescheduled the hearing from July 9, 2013 at 1:00PM to July 11, 2013 at 11:00AM and needed to upload a new public-hearing notice to properly inform the public of this. At the same time, ODA corrected the "Re:" line of this memorandum which formerly said "Assisted Living and Community Transition Services,"

but now correctly says “Adult Day Services.” ODA also updated the RSFA with this information.

The revisions regarded the practice of rule filing and not changes to the rules themselves. As such, the revisions should not alter the adverse impact described in the BIA that the Common-Sense Initiative Office previously reviewed.

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On June 25, 2013, ODA revise-filed the rules above to upload into the Register of Ohio a new public-hearing notice that listed the programs affected by the rule proposals and that no longer listed the previously-scheduled hearing date. ODA also uploaded a revised version of this memorandum that explains the revisions made on each date.

The revisions regarded the practice of rule filing and not changes to the rules themselves. As such, the revisions should not alter the adverse impact described in the BIA that the Common-Sense Initiative Office previously reviewed.

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On July 10, 2013, ODA revise-filed the new rules above to make numerous revisions to the wording of the rule. All of the revisions are listed in detail in items #11 on the RSFAs for new rules 173-3-06.1 and 173-39-02.1 of the Administrative Code. None of the revisions change the policy in the rule, just the choice of words that ODA uses to express the policy. Therefore, the revisions should not alter the adverse impact described in the BIA that the Common-Sense Initiative Office previously reviewed.

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On July 19, 2013, ODA refiled the rule to more clearly limit the nurse staffing-level requirement in paragraph (B)(3)(c) of the rule to the enhanced and extensive levels of ADS. At ODA's public hearing on July 11, 2013, Mike Turner of Athens County and Deborah Ruffin of Choices Adult Day Center raised concern that the current and proposed new versions of rule 173-3-06.1 of the Administrative Code clearly indicate that there is a basic level of ADS that the rule regulates. However, all of the requirements in the rule apply to every ADS provider, even if the provider only furnishes basic ADS but not enhanced ADS or intensive ADS. One area of particular concern was staffing ratios.

Basic ADS does not require an every-day, throughout-the-day frequency of tasks that fall within a nurse's scope of practice. Presently, ADS providers who only furnish only basic ADS do not believe that the rule requires them to have a nurse on duty any time a consumer is present because the tasks that fall within the nurse's scope of practice are not frequently necessary. However, they have asked for stronger language to reinforce this point of view.

In response to the comments of Mr. Turner and Ms. Ruffin, ODA is amending paragraph (B)(3)(c) of the rule to limit the requirement for a nurse to be present any time a consumer is present to a requirement to have a nurse present any time a consumer who receives enhanced ADS or intensive ADS is present. To accomplish this, ODA will delete "when a

consumer is present to provide services within the nurse's scope of practice" and insert "whenever a consumer who receives enhanced ADS or intensive ADS is present."

ODA will also insert a missing comma after "nutrition consultation" in paragraph (B)(1)(g) of the rule.

These revisions should not change the adverse impact upon Ohio businesses nor change the figures presented to the CSI Office in the business impact analysis.

Please let us know if you have any questions.

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On July 25, 2013, ODA refiled the rule 173-3-06.1 of the Administrative Code.

Previously, on July 19, ODA refiled the rule to more clearly limit the nurse staffing-level requirement in paragraph (B)(3)(c) of the rule. ODA did this because the components of the basic-level of ADS that fall within a nurse's scope of practice are not needed every day a basic-ADS-only center is open. Yet, when ODA refiled the rule with the amended language, it had an unintended adverse action for providers of enhanced ADS.

Then, on July 25, 2013, the Alzheimer's Association of Northwest Ohio notified ODA the July 19 amendment would create an adverse impact upon their ADS centers. The association has two centers that perform only the enhanced-level of ADS. The centers are open for 9 and 10 hours a day, respectively, but do not need to provide components of enhanced ADS during each of the 9 or 10 hours per day that they are open for business. As a result, they keep a nurse on call, but only when a nurse is not needed.

Before the revision, the paragraph only required the provider to have a nurse present when a component of the service was necessary that required the nurse's scope of practice. Therefore, ODA has refiled the rule again to make it clear that (1) ODA does not intend to require nurse staffing levels for basic ADS, but that (2) the required nurse staffing levels for enhanced and intensive ADS only applies when a component of the service is needed that requires a nurse's scope of practice.

Before the July 19 amendment, paragraph (B)(3)(c) of the proposed new rule said, "The provider shall have one RN, or LPN under the direction of an RN, present when a consumer is present to provide services within the nurse's scope of practice."

After the July 19 amendment, the paragraph said, "The provider shall have one RN, or LPN under the direction of an RN, present whenever a consumer who receives enhanced ADS or intensive ADS is present."

After the July 25 amendment, the paragraph now says, "The provider shall have one RN, or LPN under the direction of an RN, present whenever a consumer who receives enhanced ADS or intensive ADS requires components of enhanced ADS or intensive ADS that fall within a nurse's scope of practice."

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This subsequent revision should not create an adverse impact upon any provider.

Please let us know if you have any questions.

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On August 26, 2013, ODA refiled proposed new rules 173-3-06.1 and 173-39-02.1 of the Administrative Code to remove "regardless of the funding source for each individual's ADS" from the language regarding the requirement to maintain adequate square footage and toilets.

This subsequent revision should not create an adverse impact upon any provider.

ODA may further analyze this matter for a future rule proposal.

Please let us know if you have any questions.

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