

# CSI - Ohio

The Common Sense Initiative

## Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: Residential Development

Rule Number(s): 5123:2-3-15 (Rescind and New), 5123:2-3-26 (New),  
and 5123:2-16-01 (Rescind)

Date: May 11, 2012

### Rule Type:

☒ New

☐ Amended

☒ 5-Year Review

☒ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

### Regulatory Intent

1. Please briefly describe the draft regulation in plain language.  
*Please include the key provisions of the regulation as well as any proposed amendments.*

This package involves two rules: *Development of Licensed Residential Beds* and *Procedures to Waive Licensure Rule Requirements*.

The Department is proposing a new rule for standards and procedures governing the development of residential facilities subject to licensure under section 5123.19 of the Ohio Revised Code. The Department is proposing to rescind existing rule 5123:2-16-01 (*Development of Licensed Residential Beds*) and to bring forth a new rule of the same title numbered 5123:2-3-26.

#### What is Not Changing

- In accordance with section 5123.196 of the Ohio Revised Code, there continues to be a moratorium on the number of licensed beds.
- An existing facility shall be permitted to operate at the capacity at which it is licensed.
- An applicant who has obtained approval for a development proposal shall be permitted to proceed with approved development.
- General conditions such as:
  - Intermediate Care Facilities are limited to a capacity of eight; waiver-funded facilities are limited to a capacity of four.
  - Licensed residential facilities shall not exist on adjoining property sites.
  - No more than one distinct and separate physical structure may be licensed on the same property site.
  - Individual apartments within an apartment building or complex may be licensed individually.

#### What is New

- The total number of beds licensed in an apartment building or complex shall not exceed 20% of the total number of bedrooms in the building or complex.
- The rule includes factors the Department shall consider in its review of development proposals.
- County boards shall not assume ownership of a residential facility unless there is no other qualified and willing licensee.
- The rule will be renumbered from 5123:2-16-01 to 5123:2-3-26.
- The rule requires fewer definitions because, as part of Chapter 5123:2-3, it incorporates definitions in existing rule 5123:2-3-01 (*Definitions*).

In conjunction with proposing the new rule for residential development, the Department is proposing to rescind existing rule 5123:2-3-15 (*Procedures to Waive Licensure Rule Requirements*) and to bring forth a new rule of the same number and title. The rule permits the Department to waive a condition or specific requirement of a rule pertaining to operation of a residential facility. The existing rule specifies that a waiver of a condition or requirement shall be time-limited. The new rule contemplates that some waivers may be granted for an indefinite period of time (e.g., a waiver of requirements related to the square footage of a physical structure which will not likely change over time) and also allows the Department to establish other conditions for the waiver.

**2. Please list the Ohio statute authorizing the Agency to adopt this regulation.**

5123:2-3-15 (Procedures to Waive Licensure Rule Requirements)  
5123.04, 5123.19

5123:2-3-26 (Development of Licensed Residential Beds)  
5123.04, 5123.042, 5123.19

**3. 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.*

5123:2-3-15 (Procedures to Waive Licensure Rule Requirements)  
No.

5123:2-3-26 (Development of Licensed Residential Beds)  
Yes; please see paragraph (D)(8). When licensed beds are funded through a Home and Community-Based Services (HCBS) program, the development must meet the definition of an HCBS setting in accordance with guidelines established by the federal Centers for Medicare and Medicaid Services.

**4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

Not applicable; the federal requirement is not exceeded.

**5. 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)?**

Section 5123.042 of the Revised Code requires the Department to adopt rules to establish uniform standards under which a person or agency shall submit plans for the development of residential services. In accordance with section 5123.19 of the Revised Code, the Department is charged with licensing residential facilities for individuals with developmental disabilities.

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

The desired outcome is that individuals with developmental disabilities living in residential facilities licensed by the Department are healthy and safe. Success is achieved when:

- Licensed facilities are operated by viable and well-qualified licensees.
- The goal of community integration (i.e., less congregation) is advanced.

## **Development of the Regulation**

- 7. 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.***

The following stakeholder representatives were invited to engage in discussion of the rules via meetings/conference calls beginning in September 2011:

- Anita Allen, Ohio Provider Resource Association
- Dennis Allen, Hattie Larlham
- Dana Charlton, Ohio Self Determination Association
- Amber Gibbs, Cuyahoga County Board of Developmental Disabilities
- Sadie Hunter, People First of Ohio
- Gina Kerman, Koinonia Homes
- Nancy Richards, Clearwater Council of Governments
- Tom Rickels, Midwest Health and Innovations
- Lori Stanfa, Ohio Association of County Boards Serving People with Developmental Disabilities

The draft rules were shared with this group in advance of dissemination for official rules clearance. The rules were sent to the group on January 18, 2012; comments were requested by January 31, 2012. No comments were received.

Through the Department's official rules clearance, draft rules will be sent to the following organizations:

- Advocacy and Protective Services, Inc.
- The Arc
- Autism Society of Ohio
- Councils of Governments
- The League
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Developmental Disabilities Council
- Ohio Legal Rights Service
- Ohio Provider Resource Association
- Ohio Self Determination Association
- Ohio Superintendents of County Boards of Developmental Disabilities
- People First of Ohio

When draft rules are disseminated via the official rules clearance process, they are simultaneously posted at the Department's *Rules Under Development* webpage (<https://doddportal.dodd.ohio.gov/rules/underdevelopment/Pages/default.aspx>).

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

During meetings/conference calls that commenced in September 2011, stakeholders provided feedback on elements of the existing rules that were out-of-date and provided suggestions on parameters to achieve desired outcomes. Stakeholders' suggestions were incorporated into the draft rules.

**9. 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?**

Not applicable.

**10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

5123:2-3-15 (Procedures to Waive Licensure Rule Requirements)

The substantive revision to the proposed new rule (i.e., to permit waivers of conditions or requirements for an indefinite period of time) will allow some flexibility.

5123:2-3-26 (Development of Licensed Residential Beds)

The Department and the stakeholder workgroup considered alternative ways to describe residential development to foster agreed-upon desired outcomes that are in the best interest of individuals with developmental disabilities (e.g., living in community-integrated settings, smaller service settings, and newer buildings).

In accordance with section 5123.196 of the Revised Code, a moratorium on the number of licensed residential beds precluded consideration of an alternative to paragraph (C) of the rule.

**11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

5123:2-3-15 (Procedures to Waive Licensure Rule Requirements)

This rule provides a procedure for waiving a specific condition or requirement of other administrative rules; the rule itself promotes performance-based regulation.

5123:2-3-26 (Development of Licensed Residential Beds)

Yes; the emphasis of discussion was achieving the desired outcome (i.e., individuals with developmental disabilities reside in modern and safe homes that are part of the community instead of in large congregate settings or settings that are isolated from the community). Placing parameters on new residential development is viewed as the vehicle for achieving this outcome.

Provisions were included to provide flexibility, so that the Department may consider proposals that enhance the quality of life for individuals living in the licensed facilities (e.g., replacing a large, aging building with several smaller, new buildings).

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

The Department is the entity charged with regulating licensed residential facilities for individuals with developmental disabilities. This regulation, therefore, does not duplicate an existing Ohio regulation.

**13. 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 Department's Office of Provider Standards and Review monitors licensed residential facilities through regular site visits and provision of technical assistance. Requests for residential development approval and waivers of licensure rules include review and analysis by staff of the Office of Provider Standards and Review and the Division of Legal Services.

**Adverse Impact to Business**

**14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

**a. Identify the scope of the impacted business community;**

The rules apply to the approximately 1,100 residential facilities licensed by the Department under section 5123.19 of the Revised Code.

**b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**

Submitting a request for a waiver under rule 5123:2-3-15 or a development proposal under rule 5123:2-3-26 requires the applicant's time to prepare the request and respond to related questions from the Department. A development proposal may include a site visit by Department personnel.

**c. Quantify the expected adverse impact from the regulation. *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.***

While an applicant's efforts to plan residential development may take time, the amount of time devoted to submitting a request via the Department's process is minimal. Complex requests may involve meetings with Department staff and/or a site visit with the goal of working with the applicant to develop a proposal that achieves the desired outcomes.

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

The Department is charged with regulating facilities licensed under section 5123.19 of the Revised Code to ensure the health and safety of individuals who reside therein. Ensuring the health and safety of individuals with developmental disabilities is of paramount importance.

**Regulatory Flexibility**

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

Yes; rule 5123:2-3-15 (*Procedures to Waive Licensure Rule Requirements*) affords an opportunity for a licensee to request a waiver of a condition or specific requirement of a rule in Chapter 5123:2-3 of the Administrative Code. The proposed new version of this rule permits a rule waiver to be indefinite; the existing version of this rule requires rule waivers to be time-limited which may not make sense in the case of a request to waive an indefinite condition (e.g., the square footage of a physical structure that will not likely change over time).

**17. 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 the waiver of these penalties is appropriate under the following circumstances:

1. When failure to comply does not result in the misuse of state or federal funds;
2. When the regulation being violated, or the penalty being implemented, is not a regulation or penalty required by state or federal law; and
3. When the violation does not pose any actual or potential harm to public health or safety.

**18. What resources are available to assist small businesses with compliance of the regulation?**

Department staff of the Office of Provider Standards and Review and the Division of Legal Services are available and routinely provide technical assistance to licensed entities.