

# CSI - Ohio

The Common Sense Initiative

## Business Impact Analysis

**Agency Name:** Ohio Department of Developmental Disabilities

**Regulation/Package Title:** Residential Facilities & Personal Funds

**Rule Number(s):**

Existing rules to be rescinded: 5123:2-3-01, 5123:2-3-02, 5123:2-3-03, 5123:2-3-04, 5123:2-3-05, 5123:2-3-07, 5123:2-3-08, 5123:2-3-09, 5123:2-3-10, 5123:2-3-11, 5123:2-3-12, 5123:2-3-13, 5123:2-3-14, 5123:2-3-15, 5123:2-3-16, 5123:2-3-17, 5123:2-3-19, 5123:2-3-20, 5123:2-3-21, 5123:2-3-22, 5123:2-3-23, 5123:2-3-24, 5123:2-3-26, and 5123:2-19-01

Proposed new replacement rules: 5123:2-3-01, 5123:2-3-02, 5123:2-3-03, 5123:2-3-04, 5123:2-3-05, 5123:2-3-06, 5123:2-3-07, 5123:2-3-08, 5123:2-2-09, 5123:2-3-10, and 5123:2-2-07

**Date:** June 26, 2015

**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☒ Rescinded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.*

Rules in Chapters 5123:2-3 and 5123:2-19 of the Administrative Code govern residential facilities licensed by the Ohio Department of Developmental Disabilities pursuant to Section 5123.19 of the Revised Code. Section 5123.19 defines "residential facility" as a home or facility, including an Intermediate Care Facility for Individuals with Intellectual Disabilities

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(Intermediate Care Facility), in which an individual with a developmental disability resides, except that it does not mean:

- The home of a relative or legal guardian in which an individual with a developmental disability resides;
- A respite care home certified under section 5126.05 of the Revised Code;
- A county home or district home operated pursuant to Chapter 5155. of the Revised Code; or
- A dwelling in which the only residents with developmental disabilities are in independent living arrangements or are being provided supported living.

The Department engaged a group of stakeholders to comprehensively review the existing rules and develop new rules. As a result, 24 existing rules have been consolidated and reorganized into 10 new rules. A crosswalk of existing and proposed new rules is included as an appendix to this document.

Also related to this work, a new rule (5123:2-2-07) that applies broadly to the entire developmental disabilities service delivery system including residential facilities will replace existing rule 5123:2-3-14 (*Personal Funds of the Individual*).

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

5123.04, 5123.19, 5123.191, 5124.02

**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.**

Yes; the rules govern operation of residential facilities that provide Medicaid-funded Home and Community-Based Services and residential facilities that are Medicaid-funded Intermediate Care Facilities.

**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 rules do not exceed federal requirements.

**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 5123.19 of the Revised Code requires the Department to adopt rules for licensing and regulating the operation of residential facilities.

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

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The Department will measure success when individuals who reside in residential facilities are healthy and safe and residential facilities are operated in accordance with applicable federal and state requirements.

### **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.***

In 2009, a group of system stakeholders began meeting regularly to discuss strategies for safeguarding the funds of individuals with developmental disabilities. In 2010, the group recommended and helped draft new rule 5123:2-2-07 (*Personal Funds of the Individual*). The group included representatives of:

- Families of individuals who receive services
- Clearwater Council of Governments
- Consumer Support Services-Ohio
- Cuyahoga County Board of Developmental Disabilities
- Dungarvin Ohio, LLC
- Franklin County Board of Developmental Disabilities
- GentleBrook
- Hamilton County Board of Developmental Disabilities
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Provider Resource Association
- ResCare, Inc.

In 2014, the Department convened a panel of stakeholders to review Ohio's health and safety system for individuals with developmental disabilities who receive services. Panel membership included:

- Disability Rights Ohio;
- Three representatives identified by the advocacy community;
- Three representatives identified by providers; and
- Three representatives identified by county boards of developmental disabilities.

The Panel met four times in 2014 (January 22, February 13, March 21, and May 1) and made multiple recommendations regarding providers of services.

Also in 2014, the Department convened a small stakeholder group to conduct an initial review of existing Chapter 5123:2-3 rules and develop recommendations for the structure of new rules to set the framework for discussion with a larger group of stakeholders. This initial group included representatives of:

- County Boards of Developmental Disabilities
- Ohio Department of Health
- Ohio Health Care Association/Ohio Centers for Intellectual Disabilities

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The group met in person or via teleconference nine times in 2014 (March 20, April 3, May 8, May 22, July 21, August 7, August 14, August 21, and August 28).

In September 2014, the Department convened a second larger stakeholder group, the Residential Facility Rules Workgroup, to review the recommendations of the initial group and further develop the new rules. The second group included representatives of:

- The Arc of Ohio
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Department of Health
- Ohio Health Care Association
- Ohio Provider Resource Association
- Ohio Self Determination Association
- Ohio SIBS (Special Initiatives by Brothers and Sisters)
- Ohio Waiver Network
- People First of Ohio
- Values and Faith Alliance

The group met five times in 2014 (September 12, October 6, October 27, December 2, and December 18) and twice in 2015 (January 15 and February 11).

Through the Department's rules clearance process, the proposed new rules and the Business Impact Analysis will be disseminated to representatives of the following organizations:

- Advocacy and Protective Services, Inc.
- The Arc of Ohio
- Autism Society of Ohio
- Councils of Governments
- Disability Housing Network
- Disability Rights Ohio
- Down Syndrome Association of Central Ohio
- Family Advisory Council
- The League
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Developmental Disabilities Council
- Ohio Health Care Association
- Ohio Provider Resource Association
- Ohio Self Determination Association
- Ohio SIBS (Special Initiatives by Brothers and Sisters)
- Ohio Superintendents of County Boards of Developmental Disabilities
- Ohio Waiver Network
- People First of Ohio
- Values and Faith Alliance

During the clearance period, the proposed new rules and Business Impact Analysis will be posted at the Department's *Rules Under Development* webpage

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(<http://dodd.ohio.gov/RulesLaws/Pages/Rules-Under-Development.aspx>)  
for feedback from the general public.

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

Throughout development of the rules, stakeholders provided suggestions which were incorporated into the drafts. As rule development concluded, members of the Residential Facility Rules Workgroup were given another pre-clearance opportunity to provide feedback. Additional revisions were made based on their comments.

5123:2-3-01

Members of the Residential Facility Rules Workgroup suggested that utilization of RAPBACK needed to be phased in in a manner that does not create an economic hardship for residential facilities. Paragraphs (D)(2)(a) and (D)(2)(b) were added to incorporate this suggestion.

Members of the Residential Facility Rules Workgroup suggested that persons currently employed as Administrators of residential facilities should not be required to comply with new training requirements. Paragraphs (E)(2)(g) and (E)(2)(h) were revised to make this clear.

Members of the Residential Facility Rules Workgroup suggested that only volunteers working directly with residents of a residential facility should be subject to background investigations; paragraph (I) of the rule was revised accordingly.

5123:2-3-02

A member of the Residential Facility Rules Workgroup pointed out that the Department had inadvertently omitted a requirement for residential facilities to conduct a minimum number of fire drills. This provision was restored as paragraph (E)(10).

5123:2-3-04

Members of the Residential Facility Rules Workgroup helped to redefine "community participation" in paragraph (B)(1).

Members of the Residential Facility Rules Workgroup suggested revisions to paragraphs (G)(3) and (G)(4) to make clear that the provisions were applicable only when individuals receiving services had been assessed to need assistance with management of personal possessions.

Members of the Residential Facility Rules Workgroup discussed at length and provided suggestions regarding community participation and provision of day activities at Intermediate

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Care Facilities. Paragraph (H)(4) was revised several times during the workgroup's deliberations.

Members of the Residential Facility Rules Workgroup suggested that residential facilities should be permitted to maintain records regarding medication and treatment and records regarding major unusual incidents off-site. Paragraph (I) was adjusted accordingly.

Representatives of residential facilities suggested that records specified in paragraph (I)(2) might be made available to the Department at a location other than the residential facility. The paragraph was revised to say the operator would provide the specified records at the residential facility or another location mutually agreed upon by the operator and the Department.

#### 5123:2-3-05

Representatives of Intermediate Care Facilities suggested that 30-day advance notice of termination of services might not be practical when a resident must move to a Nursing Facility. In response, the definition of "emergency" in paragraph (B)(4) was revised to address situations in which an individual is leaving the residential facility due a change in his or her medical needs.

Paragraph (D)(6) was added at the suggestion of the Residential Facility Rules Workgroup to make clear that the operator need not maintain services if the resident waives his or her rights to appeal transfer or termination of services.

#### 5123:2-3-06

Based on feedback from members of the Residential Facility Rules Workgroup, licensure fees set forth in paragraph (J) were lowered from those originally proposed by the Department.

#### 5123:2-3-07

The wording in paragraph (C)(1) was adjusted to align with existing rule after provider representatives pointed out that the Department had [inadvertently] changed the standard.

#### 5123:2-3-08

Paragraphs (D)(5) and (D)(6) were revised to make clear that existing residential facilities on adjoining property sites and facilities with more than one distinct and separate physical structure on the same property site would be "grandfathered."

A requirement for toilet and bathing facilities to be provided at a ratio of one for every four residents was included in paragraph (F)(4)(a) based on discussion of the Residential Facility Rules Workgroup.



**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?**

Data regarding misappropriation of individuals' funds indicated requirements that applied broadly to the entire developmental disabilities service delivery system to establish parameters and procedures for handling money were indicated. System stakeholders agreed and in 2010, participated in a workgroup to develop proposed new rule 5123:2-2-07 (*Personal Funds of the Individual*).

**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?**

The Department considered combining general requirements for licensed residential facilities providing Home and Community-Based Services with general requirements for certified agencies providing Home and Community-Based Services. A few stakeholders were not supportive of this concept and the Department abandoned this approach.

The Department considered elimination of existing rule provisions that "grandfather" the location of day services. The Department reconsidered its position based on discussion with stakeholders.

**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.***

No; these rules set the minimum standards all facilities must achieve. There is an ongoing workgroup looking at quality incentives.

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

Department staff collaborated with staff of the Ohio Department of Health (which certifies Intermediate Care Facilities) to ensure the rules do not duplicate or conflict with rules of the Ohio Department of Health governing Intermediate Care Facilities.

**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 will provide training to regulated entities to ensure a smooth transition throughout Ohio. Staff of the Department's Office of Provider Compliance and Review will be trained on the new rules to ensure the consistency and predictability of compliance reviews conducted at residential facilities.

## **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 Chapter 5123:2-3 rules apply to the approximately 1,090 residential facilities licensed by the Department, of which approximately 430 are Intermediate Care Facilities. Proposed new rule 5123:2-2-07 impacts all providers of specialized services including licensed residential facilities, certified independent providers, and certified agency providers.

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

- Rule 5123:2-3-01 requires a residential facility to be licensed by the Department and to obtain approval to provide Medicaid Home and Community-Based Services.
- Rule 5123:2-3-01 sets forth requirements for background investigations and training of residential facilities staff that have associated costs (e.g., enrollment of staff in RAPBACK and First Aid and CPR training for staff).
- Rules 5123:2-3-01, 5123:2-3-02, 5123:2-3-04, 5123:2-3-06, 5123:2-3-08, and 5123:2-2-07 require providers of services to report information and/or provide records to the Department.
- Paragraph (D) of rule 5123:2-3-05 requires a residential facility to provide advance written notice if it intends to transfer an individual to another facility or terminate an individual's services.
- Paragraph (G) of rule 5123:2-3-06 imposes sanctions for failure to comply with rules governing operation of residential facilities.
- Paragraph (M) of rule 5123:2-2-07 requires a provider to restore lost funds to an individual under some circumstances.
- Paragraph (J) of rule 5123:2-3-06 requires payment of licensure fees.

#### **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.*

Enrolling staff in RAPBACK costs \$5 per month per employee. Paragraph (D)(2)(a) of rule 5123:2-3-01 allows residential facilities to phase-in RAPBACK for existing staff when the next required Bureau of Criminal Identification and Investigation (BCII) criminal records check is due in accordance with the existing five-year schedule. Phasing in RAPBACK in this manner is expected to be cost-neutral because once an employee is enrolled in RAPBACK, there is no need to request

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another criminal records check by BCII. Enrolling employees in RAPBACK ensures the provider receives notification when an employee is charged or convicted of a disqualifying offense.

Paragraph (I) of rule 5123:2-3-01 includes a new requirement for volunteers who provide more than 40 hours of service working directly with residents to undergo background investigations. The Department cannot quantify the effect of this change as it is not known how many residential facilities engage volunteers and how many residential facilities that engage volunteers already conduct background investigations even though they are not currently required by rule to do so.

Paragraph (C)(3) of currently effective rule 5123:2-3-07 (*Employment and Staffing*) requires at least one person who has current certification in First Aid and CPR to be present when individuals are being served by the licensee. Paragraph (F)(1)(h) of proposed new rule 5123:2-3-01 requires all staff in direct services positions to have First Aid and CPR certification. The Department does not have data on how many staff of residential facilities currently have First Aid and CPR certification and therefore cannot quantify the effect of this change. The cost of having staff obtain First Aid and CPR certification, however, may be offset for residential facilities other than Intermediate Care Facilities by elimination of the requirement in paragraph (B)(6) of currently effective rule 5123:2-3-07 for direct services staff and support staff to be tested for tuberculosis. (Staff of Intermediate Care Facilities are required by federal rule to undergo tuberculosis testing.)

The licensure fees set forth in paragraph (J) of rule 5123:2-3-06 vary based on the term of the license and the size of the residential facility.

Three-year license:

- \$300 for a facility with 15 or fewer beds
- \$1,500 for a facility with 16 or more beds

One-year license:

- \$100 for a facility with 15 or fewer beds
- \$500 for a facility with 16 or more beds

Although ensuring compliance with the rules requires residential facility staff time, it is not anticipated that ensuring compliance with the proposed new rules will require any more or less staff time than ensuring compliance with the currently effective rules.

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

Section 5123.19 of the Revised Code requires the Department to adopt rules for licensing and regulating the operation of residential facilities. The number of discrete requirements has been reduced while maintaining those essential to health and safety.

## **Regulatory Flexibility**

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

Yes:

- Paragraph (D)(2)(a) of rule 5123:2-3-01 allows residential facilities to phase-in enrollment of existing staff in RAPBACK in a manner that is intended to make the requirement cost neutral.
- Paragraphs (E)(2)(e), (E)(2)(f), (E)(2)(g), and (E)(2)(h) of rule 5123:2-3-01 exempt existing Administrators of residential facilities from some new requirements for education, experience, and training.
- Paragraph (H)(4) of rule 5123:2-3-04 permits an Intermediate Care Facility that was providing day activities in or on the grounds to continue to provide day activities at that same location.
- Paragraphs (D)(5) and (D)(6) of rule 5123:2-3-08 permit existing residential facilities on adjoining property sites and residential facilities with more than one distinct and separate physical structure licensed on the same property site to continue to so operate.
- Rule 5123:2-3-10 provides a means for a licensee to request a waiver of a condition or specific requirement in Chapter 5123:2-3 of the Administrative Code or a rule in other chapters of the Administrative Code.

### **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:

- When failure to comply does not result in the misuse of state or federal funds;
- When the regulation being violated, or the penalty being implemented, is not a regulation or penalty required by state or federal law; and
- 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?**

The Department will provide training for all affected entities. Staff of the Department's Office of Provider Standards and Review and Division of Medicaid Development and Administration will be available to answer questions and provide technical assistance.

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**Appendix**  
**Rules Governing Residential Facilities**  
**Crosswalk**

<b>Existing Rule Number and Title</b>	<b>Has Been Incorporated Into New Rule Number and Title</b>
5123:2-3-01 Definitions	The rule is not being replaced. Definitions of terms used in new rules have been incorporated within each new rule.
5123:2-3-02 Licensure Application, Issuance, Survey, Renewal, and Sanction Procedures	5123:2-3-01 Administration and Operation  5123:2-3-06 Compliance Reviews, Issuance of Licenses, and Adverse Actions
5123:2-3-03 Establishing a Term License	5123:2-3-06 Compliance Reviews, Issuance of Licenses, and Adverse Actions
5123:2-3-04 General Requirements	5123:2-3-01 Administration and Operation
5123:2-3-05 Admission, Discharge, and Transfer	5123:2-3-05 Admission, Termination of Services, and Transfer
5123:2-3-07 Employment and Staffing	5123:2-3-01 Administration and Operation
5123:2-3-08 Staff Training	5123:2-3-01 Administration and Operation
5123:2-3-09 Medication	The rule is not being replaced. Medication is addressed in Chapter 5123:2-6 of the Administrative Code. A reference to Chapter 5123:2-6 is included in proposed new rule 5123:2-3-01.
5123:2-3-10 Physical Environment Requirements	5123:2-3-02 Physical Environment Standards, Fire Safety, and Emergency Response Planning
5123:2-3-11 Fire Safety and Emergency Response Plans	5123:2-3-02 Physical Environment Standards, Fire Safety, and Emergency Response Planning  5123:2-3-01 Administration and Operation (staff training provisions)
5123:2-3-12 Food, Clothing, and Personal Items	5123:2-3-04 Provision of Services and Maintenance of Service Records
5123:2-3-13 Individual Records	5123:2-3-04 Provision of Services and Maintenance of Service Records

<b>Existing Rule Number and Title</b>	<b>Has Been Incorporated Into New Rule Number and Title</b>
5123:2-3-14 Personal Funds of the Individual	5123:2-2-07 Personal Funds of the Individual
5123:2-3-15 Procedures to Waive Licensure Rule Requirements	5123:2-3-10 Procedures to Waive Rule Requirements
5123:2-3-16 Emergency Removal of Individuals From a Residential Facility	5123:2-3-07 Immediate Removal of Individuals From a Residential Facility
5123:2-3-17 Individual Plan	5123:2-3-03 Person-Centered Planning
5123:2-3-19 Licensed Providers of Waiver Services	5123:2-3-01 Administration and Operation
5123:2-3-20 Receipt, Investigation, and Disposition of Complaints	5123:2-3-06 Compliance Reviews, Issuance of Licenses, and Adverse Actions
5123:2-3-21 Public Notification Program of Adverse Action Taken by the Department	5123:2-3-06 Compliance Reviews, Issuance of Licenses, and Adverse Actions
5123:2-3-22 Licensing Fees for Residential Facilities	5123:2-3-06 Compliance Reviews, Issuance of Licenses, and Adverse Actions
5123:2-3-23 Issuance of Interim Licenses	5123:2-3-08 Development of Licensed Residential Beds
5123:2-3-24 Participation of Individuals in Day Activities	5123:2-3-04 Provision of Services and Maintenance of Service Records
5123:2-3-26 Development of Licensed Residential Beds	5123:2-3-08 Development of Licensed Residential Beds
5123:2-19-01 Standards for Evaluating Applicants as Potential Receivers of Residential Facilities	5123:2-3-09 Standards for Evaluating Potential Receivers