

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: Home and Community-Based Services Waiver Administration

Rule Number(s): 5123:2-9-02

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☐ Rescinded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.

Proposed new rule 5123:2-9-02 establishes standards that govern administration of the Medicaid Home and Community-Based Services (HCBS) waivers administered by the Ohio Department of Developmental Disabilities. HCBS waivers are available to Ohioans with developmental disabilities so they may receive services in their own homes as an alternative to receiving services in an institutional setting. The HCBS waiver program is authorized by Section 1915(c) of the Social Security Act. The program permits a state to furnish an array of services that assist Medicaid beneficiaries to live in the community.

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The state has discretion to design a waiver to address the needs of the waiver's target population. Waiver services complement and/or supplement the services that are available to participants through the Medicaid State Plan and other federal, state, and local public programs as well as the support that families and communities provide. The Department administers four HCBS waivers:

<u>Enrollment as of June 1, 2015</u>	
Individual Options	18,047
Level One	14,169
Transitions Developmental Disabilities	2,845
Self-Empowered Life Funding	457
Total	35,518

Information about the waivers is available at the Department's website (<http://dodd.ohio.gov/IndividualFamilies/ServiceFunding/Pages/WaiverTypes.aspx>). An individual with developmental disabilities is enrolled in a specific Medicaid waiver based on his or her needs.

On January 16, 2014, the United States Department of Health and Human Services Centers for Medicare and Medicaid Services (CMS) published 42 CFR 441.301(c) (4)-(6) in the Federal Register which details new requirements that settings must meet in order to be eligible for reimbursement for Medicaid HCBS provided under section 1915(c) of the Social Security Act. The final rule required states to submit a Transition Plan describing the actions that will be taken to ensure initial and ongoing compliance with the regulations. Ohio submitted its Transition Plan (<http://www.healthtransformation.ohio.gov/LinkClick.aspx?fileticket=qXFVktSs6Y%3d&tabid=125>) to CMS on March 13, 2015. The Plan included adopting and implementing an overarching waiver administration rule that details requirements for CMS HCBS settings characteristics.

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

5123.04, 5123.19, 5166.21

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 rule implements federal requirements regarding HCBS settings characteristics and is a component of Ohio's federally-mandated HCBS Transition Plan.

4. If the regulation includes provisions not specifically required by the federal

government, please explain the rationale for exceeding the federal requirement.

The rule does not exceed the federal requirement.

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)?

The rule is necessary to ensure that individuals enrolled in Medicaid HCBS waivers receive services in accordance with federal regulations.

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

The Department will measure the success of the regulation in terms of achieving full compliance with 42 CFR 441.301(c) (4)-(6) for all individuals enrolled in HCBS waivers administered by the Department.

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 May 2014, the Department convened the Transition Plan Committee, to determine the primary areas of focus for the HCBS Transition Plan and to recommend strategies for compliance. The group was comprised of stakeholders from across Ohio's developmental disabilities system and included:

- Self-advocates
- Advocacy and Protective Services, Inc.
- The Arc of Ohio
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Department of Medicaid
- Ohio Provider Resource Association
- Ohio Self Determination Association
- Ohio Superintendents of County Boards of Developmental Disabilities
- Ohio Waiver Network
- People First of Ohio
- Values and Faith Alliance

The Transition Plan Committee met monthly from May to November. The Residential Settings subcommittee of this group met in July and September to draft the proposed new rule. The subcommittee included:

- Self-advocates
- The Arc of Ohio

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- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Provider Resource Association

Another group convened by the Department to review rules governing licensed residential facilities reviewed and made recommendations for the language regarding provider-controlled and provider-owned residential settings in paragraph (G) of the proposed rule. The group met five times in 2014 (September 12, October 6, October 27, December 2, and December 18) and two times in 2015 (January 15 and February 11) and 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

Through the Department's official rules clearance process, the draft rule and the Business Impact Analysis are being disseminated to representatives of:

- 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

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During the clearance period, the rule and the Business Impact Analysis will be posted at the Department's *Rules Under Development* webpage (<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?

Stakeholders provided insight regarding how things work "in the real world" and helped reword provisions throughout the rule for better understanding and implementation.

More specifically, stakeholders:

- Refined the definition of "provider-controlled residential setting" in paragraph (B)(19) and suggested that the rule define "immediate family member" which was added as paragraph (B)(9).
- Provided input and reworked several times, language regarding what should and should not be included in a residency agreement described in paragraph (G)(1).
- Recommended the circumstances in which an individual or landlord may terminate a residency agreement as set forth in paragraphs (G)(1)(j), (G)(1)(k), (G)(1)(l), and (G)(1)(m).
- Discussed at length and made suggestions regarding modification of an individual's service plan which were incorporated into paragraphs (G)(1)(f) and (G)(2).

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?

In advance of preparation of Ohio's HCBS Transition Plan describing the actions that will be taken to ensure initial and ongoing compliance with federal regulations regarding characteristics of HCBS settings, the Department surveyed providers of services in residential and non-residential settings.

Residential Settings

The survey targeted 7,500 individuals residing in approximately 2,500 settings. The actual survey results yielded responses for 2,163 settings in which approximately 7,000 individuals reside. When combining presumed compliant locations with the settings that were surveyed, 90.9% are believed to be in compliance with the CMS HCBS regulations. Of settings surveyed, 5.9% (578 settings serving 2,045 individuals) do not currently meet all of the HCBS characteristics but could become compliant with modifications. The Department will be further reviewing and determining appropriate next steps for 75 settings serving 335 individuals (approximately 1% of the population enrolled in Department-administered waivers) identified through a combination of survey results and previous on-site compliance reviews by the Department as potentially having the effect of isolating individuals and four settings serving a total of 31 individuals (.1% of the

population enrolled in Department-administered waivers) which survey respondents indicated cannot meet HCBS requirements.

Non-Residential Settings

Surveys were distributed to providers of facility-based work and non-work services. (Settings in which integrated community employment services are provided were assumed to be compliant with HCBS characteristics, and therefore, not included in the survey.) Survey responses were received from 464 settings serving more than 25,000 individuals. Survey results indicated that 50 of the 464 settings, or 8.4%, believe that, while they do not have the qualities of an institution, some improvement could be made for how services are delivered. These self-assessments by providers indicate a relatively low number of settings have the qualities of an institution. The Department will be further reviewing and determining appropriate next steps for 19 settings (4.1%) presumed to have the effect of isolating individuals and 13 settings (2.8%) which survey respondents indicated cannot meet HCBS requirements.

Survey findings indicate that additional effort is warranted to be sure providers understand expectations and to ensure Ohio's compliance with federal regulations regarding HCBS setting characteristics.

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 making the language regarding provider-controlled and provider-owned residential settings in paragraph (G) of the proposed rule a standalone rule in Chapter 5123:2-3 of the Administrative Code (for licensed residential facilities). Based on guidance from CMS, the Department concluded that the requirement applies more broadly, and thus, included it in this 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.*

No; CMS requires Ohio to administer Medicaid programs in a manner that ensures statewideness. The purpose of the rule is to establish federally-compliant statewide standards of accountability.

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

The Department is responsible for promulgating rules regarding Medicaid HCBS waivers administered by the Department. Department staff worked closely with staff of the Ohio

Department of Medicaid to develop Ohio's HCBS Transition Plan and will ensure there is no duplication.

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.

Stakeholders' suggestions regarding system training are being incorporated into training to support implementation of the new rule. The Department will work with individuals enrolled in HCBS waivers and their families, advocacy groups, county boards of developmental disabilities, and provider associations to develop and deliver training. Department staff will continue to work closely with staff of the Department of Medicaid to ensure that information, training, and technical assistance provided is consistent throughout the developmental disabilities service delivery system.

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;

Section 5123.045 of the Revised Code sets forth that a provider of HCBS must be certified under Section 5123.161 of the Revised Code or licensed under section 5123.19 of the Revised Code. The new rule impacts all providers of services to individuals enrolled in HCBS waivers administered by the Department, including:

- Certified agency providers (approximately 2,000)
- Certified independent providers (approximately 8,300)
- Licensed residential facilities that provide HCBS (approximately 650).

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

All providers of HCBS must be authorized (i.e., certified under Section 5123.161 of the Revised Code or licensed under Section 5123.19 of the Revised Code) to provide services to individuals enrolled in HCBS waivers. Failure to comply with the proposed new rule could result in suspension of a provider's ability to provide services to additional individuals or revocation of a provider's certification or license.

Paragraph (G)(1) of the rule requires providers of services in provider-owned residential settings (i.e., licensed residential facilities that provide HCBS and certified providers of two specific HCBS services--Adult Family Living and Adult Foster Care) and providers of services in provider-controlled residential settings as defined

in paragraph (B)(19) of the rule, to enter into residency agreements with the individuals they serve.

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.

The new requirement for residency agreements will apply to:

- Licensed residential facilities that provide HCBS (approximately 650),
- Certified providers of Adult Family Living (approximately 600),
- Certified providers of Adult Foster Care (approximately 1,850), and
- Certified providers providing services in provider-controlled residential settings (number unknown).

Preparing and securing signatures on residency agreements will take provider staff time; the amount of time will vary depending on the nature and complexity of provider operations and the number of individuals served by the provider.

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

Ohio must comply with 42 CFR 441.301(c) (4)-(6) to continue to operate its HCBS waiver programs.

Regulatory Flexibility

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

No; the purpose of the rule is to establish federally-compliant statewide standards.

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

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safety.

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

Staff of the Department's Division of Medicaid Development and Administration and Office of Provider Standards and Review are available to provide training and technical assistance as needed.