

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: Adult Day Services (to be effective October 1, 2016)

Rule Number(s): New: 5123:2-9-13

Rescind: 5123:2-9-44

Rescind & New: 5123:2-2-05, 5123:2-9-14, 5123:2-9-15, 5123:2-9-16,
5123:2-9-17, 5123:2-9-18, and 5123:2-9-19

Date: June 3, 2016

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Rescinded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.

The Individual Options, Level One, and Self-Empowered Life Funding (SELF) waivers are Medicaid Home and Community-Based Services (HCBS) waivers available to Ohioans with disabilities so they may receive services in their own homes as an alternative to receiving services in an institutional setting. The Medicaid 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. The state has discretion to design a waiver program to address the needs of the waiver's target

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

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. An individual with developmental disabilities is enrolled in a specific Medicaid waiver based on his or her needs. Approximately 19,900 individuals are enrolled in the Individual Options Waiver; approximately 14,500 individuals are enrolled in the Level One Waiver; and approximately 680 individuals are enrolled in the SELF Waiver. Additional information about the waivers administered by the Ohio Department of Developmental Disabilities is available at: <http://dodd.ohio.gov/IndividualFamilies/ServiceFunding/Pages/WaiverTypes.aspx>.

In March 2012, Governor Kasich signed Executive Order 2012-05K (available at <http://www.governor.ohio.gov/Portals/0/executiveOrders/Executive%20Order%202012-05K.pdf>) which created Ohio's Employment First Policy and an Employment First Taskforce comprised of the Ohio Departments of Developmental Disabilities, Education, Job and Family Services, Medicaid, Mental Health and Addiction Services, and the Opportunities for Ohioans with Disabilities Agency. The Executive Order established community employment as the priority and preferred outcome for working-age Ohioans with disabilities and provided the philosophical foundation for re-engineering Ohio's system of employment services and supports.

Continuing to build on the Employment First Policy, Ohio is seeking approval from the federal Centers for Medicare and Medicaid Services (CMS) to restructure the non-residential adult day services available to individuals with developmental disabilities with the goal of increasing services that provide opportunities and outcomes for individuals to obtain and maintain community employment and engage in their communities to the fullest possible extent. Restructuring involves replacing eight existing rules with seven new rules and adopting a rule for a new Career Planning service:

New Rule	Replaces Existing Rule(s)
5123:2-2-05 Employment First	5123:2-2-05 Employment First
5123:2-9-13 Career Planning Under the Individual Options, Level One, and SELF Waivers	[None exists.]
5123:2-9-14 Vocational Habilitation Under the Individual Options, Level One, and SELF Waivers	5123:2-9-14 Vocational Habilitation Under the Individual Options, Level One, and SELF Waivers

New Rule	Replaces Existing Rule(s)
5123:2-9-15 Individual Employment Support Under the Individual Options, Level One, and SELF Waivers	5123:2-9-15 Supported Employment-Community Under the Individual Options and Level One Waivers 5123:2-9-44 Integrated Employment Under the SELF Waiver
5123:2-9-16 Group Employment Support Under the Individual Options, Level One, and SELF Waivers	5123:2-9-16 Supported Employment-Enclave Under the Individual Options, Level One, and SELF Waivers
5123:2-9-17 Adult Day Support Under the Individual Options, Level One, and SELF Waivers	5123:2-9-17 Adult Day Support Under the Individual Options, Level One, and SELF Waivers
5123:2-9-18 Non-Medical Transportation Under the Individual Options, Level One, and SELF Waivers	5123:2-9-18 Non-Medical Transportation Under the Individual Options, Level One, and SELF Waivers
5123:2-9-19 General Requirements for Adult Day Support, Career Planning, Group Employment Support, Individual Employment Support, Non-Medical Transportation, and Vocational Habilitation	5123:2-9-19 General Requirements for Adult Day Support, Non-Medical Transportation, Supported Employment-Community, Supported Employment-Enclave, and Vocational Habilitation

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

5166.21 (In accordance with Section 5166.21 of the Revised Code and an Interagency Agreement with the Ohio Department of Medicaid, the Ohio Department of Developmental Disabilities is responsible for promulgating rules regarding Medicaid waivers it administers.)

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 implement Medicaid HCBS waivers. Existing rules must be revised and one new rule is being adopted to reflect changes being made to the adult day services in the

federally-approved waivers.

- 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 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)?**

Rules are required to implement Medicaid waivers approved by CMS. Ohio is seeking CMS approval to restructure adult day services available to individuals enrolled in the Individual Options, Level One, and SELF waivers to expand opportunities for individuals to obtain and maintain community employment and engage in their communities to the fullest possible extent.

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

The Department measures the success of rules governing Department-administered Medicaid waivers generally in terms of the number of individuals enrolled in and receiving services through the waivers, the health and welfare of individuals enrolled in the waivers, individuals' satisfaction with the services they receive, and Ohio's compliance with the Medicaid HCBS program and the approved waivers. With regard to rules specifically governing adult day services, an increase in the number of individuals who achieve community employment would indicate success.

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 2013, the Department convened the Strategic Planning Leadership Group comprised of representatives from:

Advocacy and Protective Services, Inc.
The Arc of Ohio
Autism Society of Ohio
Down Syndrome Association of Central Ohio
The League
Ohio Association of County Boards Serving People with Developmental Disabilities
Ohio Department of Medicaid

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

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

The Strategic Planning Leadership Group met monthly from November 2013 to November 2014 to examine trends and issues, conduct in-depth analyses of data, and learn about best practices pertaining to issues of critical importance to the system of services for people with developmental disabilities. The Group generated 24 ten-year benchmarks summarized in a Final Report (<http://dodd.ohio.gov/OurFuture/Documents/SPLG%20Final%20Report.pdf>); two benchmarks are driving the Department's work on adult day services. The first is that transition-age students have multiple opportunities and experiences to explore work and education. The second is that 50% of the adults with developmental disabilities served achieve employment and participate in non-work activities within their communities. In conjunction with the Strategic Planning Leadership Group, four Open Forums offered opportunities for people with developmental disabilities, families, service providers, and staff of county boards of developmental disabilities from across Ohio to engage in conversations and generate feedback for the Strategic Planning Leadership Group's consideration.

In July and August 2014, the Department sponsored six regional forums for stakeholders to discuss possible options for redesigning the funding system that supports employment opportunities for people with developmental disabilities:

July 23 - Findlay
July 24 - Medina
July 28 - Urbana
July 29 - Pickerington
August 12 - Batavia
August 13 - Circleville

Approximately 600 people participated in the regional forums and their feedback was used to further refine the principles guiding design of a system that supports community employment and integration. The guiding principles are available at the Ohio Employment First website: http://www.ohioemploymentfirst.org/up_doc/OHIO_DODD_Guiding_Principles_for_Funding_SystemFINAL.pdf

In the wake of the six regional forums, the Department engaged two nationally recognized employment experts to facilitate the Funding System Redesign Work Group. The Work Group included representatives of:

Butler County Board of Developmental Disabilities
Cuyahoga County Board of Developmental Disabilities
Fairfield County Board of Developmental Disabilities

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

Goodwill Columbus
Ohio Association of County Boards Serving People with Developmental Disabilities
Ohio Association of Adult Services
Ohio Association of People Supporting Employment First
Ohio Centers for Autism and Low Incidence
Ohio Department of Medicaid
Ohio Provider Resource Association
Ohio Superintendents of County Boards of Developmental Disabilities
Ohio Valley Goodwill Industries
Opportunities for Ohioans with Disabilities Agency
Vinton County Board of Developmental Disabilities
Wood County Board of Developmental Disabilities

The Group examined and discussed all facets of employment for individuals with developmental disabilities including service definitions, staffing ratios, funding, payment rates, and implementation during meetings on:

October 6, 2014
October 20, 2014
October 30, 2014
November 10, 2014
November 24, 2014
December 17, 2014
January 29, 2015
February 26-27, 2015
March 24, 2015
April 21, 2015
June 30, 2015
October 13, 2015
January 13, 2016

Through the Department's rules clearance process, the rules and the Business Impact Analysis form will be disseminated to representatives of the following organizations for review and comment:

Advocacy and Protective Services, Inc.
The Arc of Ohio
Autism Society of Central 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

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

Ohio Department of Medicaid
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

The rules and the Business Impact Analysis form will be posted at the Department's *Rules Under Development* webpage (<http://dodd.ohio.gov/RulesLaws/Pages/Rules-Under-Development.aspx>) during the clearance period.

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

Stakeholders gave input to nearly every aspect of the rules including service definitions, provider qualifications, staffing, payment rates, and implementation. Stakeholder input informed and frequently directed development of the new 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?

The National Core Indicators (NCI) is a collaboration among participating National Association of State Directors of Developmental Disability Services member state agencies and the Human Services Research Institute, with the goal of developing a systematic approach to performance and outcome measurement. Through the collaboration, participating states (including Ohio) pool their resources and knowledge to create performance monitoring systems, identify common performance indicators, work out comparable data collection strategies, and share results. Many of the state agencies use NCI as a key component within their quality management systems. Data collected during the 2014-2015 survey revealed that only 14% of the respondents had a paying job in the community and over half (58%) who did not have a paying job said they would like one. Further, only 32% of those without a job had "employment" identified as a goal in their individual service plans.

Historically, people with disabilities, particularly developmental disabilities, have experienced unemployment, underemployment, and poverty at rates that far surpass their peers without disabilities. Additionally, people with disabilities are less likely to find steady or satisfying employment. The 2013 American Community Survey (<https://www.census.gov/programs-surveys/acs/about.html>) indicated that only 24.2% of

people with cognitive disabilities are employed as compared to 73.8% of people without disabilities.

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?

Initial recommendations from the Funding System Redesign Work Group included:

- Terminating the Vocational Habilitation service, replacing it with integrated prevocational services, eliminating the option of paying a sub-minimum wage, limiting the service to 24 months, and reducing the maximum service group size from 16 to four individuals.
- Terminating the Supported Employment-Community service and creating a new individualized employment support service with a performance-based reimbursement model.
- Modifying the Supported Employment-Enclave service to eliminate the option of paying a sub-minimum wage, limiting the service to 24 months, and reducing the maximum service group size from 16 to four individuals.
- Terminating the Adult Day Support service, replacing it with integrated community supports, and reducing the maximum service group size from 16 to four individuals.

The Department considered these recommendations intended to more quickly advance the system toward universal competitive integrated employment. Based on feedback from a broad range of system stakeholders, however, the Department is instead pursuing an incremental approach to effect system change. For example, the Vocational Habilitation service is being maintained and language was incorporated into the rules for Vocational Habilitation and Group Employment Support to reinforce adherence to federal requirements for paying a sub-minimum wage.

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.*

CMS requires Ohio to implement Medicaid waivers in a uniform, statewide manner. For the first time, however, a performance-based reimbursement model is being implemented for a service available through a Department-administered waiver (i.e., for some components of the new Career Planning service).

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

The rules apply to adult day services available to individuals enrolled in Medicaid waivers administered by the Department; other agencies do not make rules regarding Department-

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

administered waivers.

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 have been actively engaged in development of the new services and related rules beginning in 2014. Information about transition to the new services is being widely disseminated via the Department's publications and listservs and through a series of informational webinars (the first conducted April 13, 2016). The Department is collaborating with county boards of developmental disabilities and providers of services to conduct training regarding the new services throughout the state.

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 providers of Medicaid HCBS to individuals with developmental disabilities enrolled in the Individual Options Waiver, Level One Waiver, and SELF Waiver. The potential scope of the impacted business community includes Agency Providers and Independent Providers certified to provide the services affected by the proposed rule changes:

<u>Service</u>	<u>Agency Providers</u>	<u>Independent Providers</u>
Adult Day Support	779	[Not applicable]
Integrated Employment	286	84
Non-Medical Transportation	1,120	1,250
Supported Employment-Community	655	73
Supported Employment-Enclave	592	[Not applicable.]
Vocational Habilitation	676	[Not applicable.]

The number of providers actively providing services (as evidenced by recent claims for reimbursement) may be significantly smaller.

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

The existing and proposed new rules require providers to apply to the Department for

approval to provide Medicaid HCBS and to have a Medicaid Provider Agreement with the Ohio Department of Medicaid. Providers are subject to sanctions if they fail to comply with the rules. The rules require providers to maintain documentation and submit information to the Department regarding the services they provide.

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 existing rules set forth requirements for providers of services (including provider qualifications, provision of services, and service documentation). The revisions being made to the rules are being made in a manner to minimize adverse impact to providers. Providers of existing services will be deemed eligible to provide the new comparable services (e.g., providers of Supported Employment-Community and Integrated Employment will need take no action to be certified to provide the new Individual Employment Support service).

A provider that is already certified to provide one or more services may, for a reduced application fee, apply to add one or more services (such as the new Career Planning service) for the remainder of the term of the provider's existing certification. The application fees for provider certification are set forth in paragraph (L)(2) of existing rule 5123:2-2-01 (*Provider Certification*) and vary depending on the type of provider (i.e., Independent Provider, Small Agency Provider, or Large Agency Provider).

	Initial or Renewal Certification (3-Year Term)	Adding Career Planning to Remainder of Term of Existing Certification
Independent Provider	\$ 125	\$ 25
Small Agency Provider (Serves 50 or Fewer Individuals)	\$ 800	\$ 75
Large Agency Provider (Serves 51 or More Individuals)	\$ 1,600	\$ 150

Certified providers of other services under the Individual Options, Level One, and SELF waivers are not required to become certified to provide Career Planning unless they choose to do so.

Changes to staff training requirements will be implemented in a manner to minimize costs for providers; the Department currently offers a web-based Supported Employment course at no cost and is developing additional courses that will be available at no cost to train direct services staff.

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

The new rules are intended to increase services that will provide opportunities and outcomes for individuals with developmental disabilities to obtain and maintain community employment and engage in their communities to the fullest possible extent.

Regulatory Flexibility

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

Yes:

- Paragraph (C)(6) of rule 5123:2-9-13 exempts providers of some sub-components of Career Planning from certain staff training requirements.
- Paragraphs (C)(8) and (C)(9) of rule 5123:2-9-13 exempt staff with at least one year of experience from certain staff training requirements.
- Paragraphs (C)(5) and (C)(6) of rule 5123:2-9-14 exempt staff with at least one year of experience from certain staff training requirements.
- Paragraphs (C)(6) and (C)(7) of rule 5123:2-9-15 exempt staff with at least one year of experience from certain staff training requirements.
- Paragraphs (C)(5) and (C)(6) of rule 5123:2-9-16 exempt staff with at least one year of experience from certain staff training requirements.
- Paragraphs (C)(5) and (C)(6) of rule 5123:2-9-17 exempt staff with at least one year of experience from certain staff training requirements.
- Paragraph (G) of rule 5123:2-9-17 sets forth alternative requirements for providers of Adult Day Support that are certified by the Ohio Department of Aging.
- Paragraph (C)(2) of rule 5123:2-9-18 exempts operators of commercial vehicles that provide Non-Medical Transportation from certain staff training requirements required by rule 5123:2-2-01.

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.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

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

The Department is partnering with county boards of developmental disabilities and providers of services to offer statewide training on the new services. Staff of the Department's Employment First Policy, Medicaid Policy, Provider Certification, Provider Payment and Support, and Office of Provider Standards and Review are available to provide guidance and technical assistance as needed.

The Department is developing a virtual community of practice to encourage statewide, cross-system collaboration regarding Employment First. Participants will gain knowledge through a process of information-sharing, mentorship, and experience to achieve the following objectives:

- Shift the paradigm to one that truly recognizes and embraces the contributions and capabilities of people with developmental disabilities;
- Increase employment outcomes for individuals with developmental disabilities;
- Increase access to employment-based and community-based services and supports;
- Promote the importance of and access to meaningful, integrated day activities for individuals with developmental disabilities;
- Support skill development for providers of services;
- Offer resources and tools across systems;
- Assist providers in transforming facility-based services to community-based employment and day supports;
- Align state and local policies, procedures, and planning across schools, county boards, vocational rehabilitation, mental health, and workforce development to improve community employment and integrated day outcomes;
- Better prepare youth and adults for community-based employment;
- Increase engagement with businesses; and
- Strengthen community awareness about the capabilities of workers with disabilities.