

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: HCBS Waiver (to be effective October 1, 2016)

Rule Number(s): 5123:2-9-06, 5123:2-9-20, 5123:2-9-21, 5123:2-9-22, 5123:2-9-24,
5123:2-9-30, 5123:2-9-31, 5123:2-9-34, 5123:2-9-35, 5123:2-9-40, and
5123:2-9-42

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 Rescinded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 population. Waiver services complement and/or supplement the services that are available to

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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>.

Ohio is seeking approval from the federal Centers for Medicare and Medicaid Services (CMS) to modify the HCBS waivers administered by the Department effective October 1, 2016. As a result, the Department is creating one new rule and making revisions to ten existing rules:

<u>Number</u>	<u>Title</u>	<u>Description of Modification</u>
5123:2-9-06	<i>Home and Community-Based Services Waivers - Documentation and Payment for Services Under the Individual Options and Level One Waivers</i>	Revise definitions and other provisions to reflect Money Management service and new adult day services.
5123:2-9-20	<i>Home and Community-Based Services Waivers - Money Management Under the Individual Options and Level One Waivers</i>	Proposed new rule to govern new Money Management service.
5123:2-9-21	<i>Home and Community-Based Services Waivers - Informal Respite Under the Level One Waiver</i>	Include reference to Money Management service.
5123:2-9-22	<i>Home and Community-Based Services Waivers - Community Respite Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers</i>	Include reference to Money Management service. Remove reference to \$25,000 service-specific budget limitation.
5123:2-9-24	<i>Home and Community-Based Services Waivers - Transportation Under the Individual Options and Level One Waivers</i>	Include reference to Money Management service.

<u>Number</u>	<u>Title</u>	<u>Description of Modification</u>
5123:2-9-30	<i>Home and Community-Based Services Waivers - Homemaker/ Personal Care Under the Individual Options and Level One Waivers</i>	Revise definition of Homemaker/ Personal Care service to incorporate language that supports use of the service to advance individuals' integration in and access to the greater community in accordance with CMS requirements for HCBS and to reflect more contemporary language. Add requirement for agency providers to implement a process for monitoring overtime worked by direct services staff. Include reference to Money Management service.
5123:2-9-31	<i>Home and Community-Based Services Waivers - Homemaker/ Personal Care Daily Billing Unit for Sites Where Individuals Enrolled in the Individual Options Waiver Share Services</i>	Remove references to Independent Providers who will no longer use the Homemaker/Personal Care Daily Billing Unit. (Independent Providers may continue to provide Homemaker/ Personal Care and submit claims for payment in fifteen-minute billing units in accordance with rule 5123:2-9-30.)
5123:2-9-34	<i>Home and Community-Based Services Waivers - Residential Respite Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers</i>	Include reference to Money Management service. Remove reference to \$25,000 service-specific budget limitation.
5123:2-9-35	<i>Home and Community-Based Services Waivers - Remote Monitoring and Remote Monitoring Equipment Under the Individual Options, Level One, and Self-Empowered Life Funding Waivers</i>	Remove reference to \$25,000 service-specific budget limitation.
5123:2-9-40	<i>Home and Community-Based Services Waivers - Administration of the Self-Empowered Life Funding Waiver</i>	Remove reference to \$25,000 service-specific budget limitation. Update services in Waiver benefit package.

<u>Number</u>	<u>Title</u>	<u>Description of Modification</u>
5123:2-9-42	<i>Home and Community Based Services Waivers - Community Inclusion Under the Self-Empowered Life Funding Waiver</i>	Remove reference to \$25,000 service-specific budget limitation. Change from hourly to fifteen-minute billing units.

Additional revisions are being made to the rules to correct references to forms, the Revised Code, the Administrative Code, and the Ohio Department of Medicaid.

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. Rules must be revised to reflect changes being made to 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 modify the waivers it administers. Rules must be revised to reflect changes being made.

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 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.

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.

Revisions being made to the Homemaker/Personal Care service set forth in rule 5123:2-9-30 are the result of discussions by the HCBS Transition Plan Committee, formed in 2014 to recommend strategies to ensure Ohio's compliance with federal requirements for HCBS. The Committee met monthly from May to November and was comprised of stakeholders from across Ohio's developmental disabilities system, including:

- 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

Amendments being made to the Individual Options, Level One, and SELF waivers were discussed at meetings of the Waiver Workgroup on July 27, 2015, August 31, 2015, and February 29, 2016, and May 23, 2016. Drafts of the revised Homemaker/Personal Care rule and the proposed new rule for the Money Management service were shared with this group on February 29 and May 23, 2016. The Waiver Workgroup includes representatives of:

Advocacy and Protective Services, Inc.
The Arc of Ohio
Ohio Association of County Boards Serving People with Developmental Disabilities
Ohio Department of Medicaid
Ohio Developmental Disabilities Council
Ohio Health Care Association/Ohio Centers for Intellectual Disabilities
Ohio Provider Resource Association
Ohio Self Determination Association
Ohio Superintendents of County Boards of Developmental Disabilities
Ohio Waiver Network
Values and Faith Alliance

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Pursuant to 42 C.F.R. 441.301 and 441.304, the Ohio Department of Medicaid posted notice at its website, from May 9 to June 8, 2016, of amendments being made to the Individual Options, Level One, and SELF waivers that are proposed to be effective October 1, 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
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?

Many of the revisions being made are the result of stakeholder input:

- Individuals receiving Homemaker/Personal Care and advocacy groups asked that the archaic words used to define the service be replaced with more contemporary language that emphasizes use of the service to support community access.
- System stakeholders requested that the Department create a stand-alone Money Management service to be used by providers who support individuals in managing personal and financial affairs outside of the context of homemaking and personal care.
- Individuals who receive services and county boards of developmental disabilities asked

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that the \$25,000 service-specific budget limitation in the SELF Waiver be eliminated as it was impeding choice and access to necessary services.

- A limitation on overtime for direct care staff had been proposed but stakeholders recommended a more flexible approach to ensure that agency providers manage overtime.
- New regulations implemented by the U.S. Department of Labor required overtime to be paid to independent providers of HCBS. As a result, independent providers must now track the number of hours worked each week in order to determine when an overtime claim should be submitted. Due to this requirement, independent providers are no longer able to utilize the Homemaker/Personal Care daily billing unit.

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 on major unusual incidents involving misappropriation informed requirements for providers of the new Money Management service. The 2014 report is available at the Department's website: (<http://dodd.ohio.gov/HealthandSafety/Documents/2014%20MUI%20ANNUAL%20REPORT%20FINAL.pdf>). Provider fatigue is sometimes a contributing factor in major unusual incidents which supports paragraph (D)(7) of rule 5123:2-9-30.
- Department staff reviewed data from counties who were using the existing Homemaker/Personal Care service to pay providers who were offering only money management services. This information indicated that the payment rate for Money Management needed to be comparable to Homemaker/Personal Care.
- SELF Waiver utilization data confirmed that some enrolled adults who had not reached the overall annual benefit limitation (i.e., \$40,000) had reached the \$25,000 service-specific budget limitation on Community Inclusion, Community Respite, Remote Monitoring, and Residential Respite. The data suggest that the service-specific budget limitation is an unnecessary barrier to individuals accessing needed services.

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 initially proposed limiting the number of hours direct services staff of agency providers could provide HCBS, but based on stakeholder feedback, instead incorporated a requirement in paragraph (D)(7) of rule 5123:2-9-30 that agency providers implement a process for monitoring overtime.
- The Department considered other service-specific benefit limitations in the SELF Waiver (i.e., payment for Support Brokerage may not annually exceed \$8,000 and an individual may annually receive only one Functional Behavioral Assessment which shall not exceed \$1,500), but concluded that these provisions would remain in place.

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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 implement Medicaid waivers in a uniform, statewide manner.

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

The rules apply to services available to individuals enrolled in the Individual Options, Level One, and SELF waivers administered by the Department; other agencies do not make rules regarding Department-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 discussions regarding amendments being made to the waivers. Information about the amendments is being widely disseminated via the Department's publications and listservs. The Department is collaborating with county boards of developmental disabilities and providers of services to ensure awareness throughout the state. Training on the new Money Management service will be offered in August and September.

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, Level One, and SELF waivers. 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>
Community Inclusion-Personal Assistance	625	2,566
Community Inclusion-Transportation	450	1,097
Community Respite	326	[Not applicable]

<u>Service</u>	<u>Agency Providers</u>	<u>Independent Providers</u>
Homemaker/Personal Care	1,442	5,783
Homemaker/Personal Care Daily Billing Unit	494 *	25 *
Informal Respite	1	2,989
Remote Monitoring	230	35
Residential Respite	318	[Not applicable]
Transportation	1,120	3,677

* Number utilizing daily billing unit in Fiscal Year 2016.

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 rules require providers to apply to the Department for approval to provide Medicaid HCBS 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.

A provider that is already certified to provide one or more of the services will not be required to take any action to remain certified to provide the services.

A person (Independent Provider) or entity (Agency Provider) that wishes to provide the new Money Management service will be required to apply to the Department to become certified. The application fees for provider certification are set forth in 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). 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 Money Management) for the remainder of the term of the provider's existing certification.

	Initial or Renewal Certification (3-Year Term)	Adding an Additional Service 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 waivers are not required to become certified to provide Money Management unless they choose to do so.

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

Revisions to the rules are intended to ensure services provided to individuals enrolled in HCBS waivers are compliant with federal requirements, to ensure the health and safety of individuals with developmental disabilities, and increase access to and utilization of needed services for individuals enrolled in the SELF Waiver.

Regulatory Flexibility

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

Yes:

- Paragraph (C)(3) of rule 5123:2-9-20 exempts providers of Money Management from meeting certain staff training requirements. Paragraph (C)(5) exempts otherwise qualified providers from taking a Department-administered competency test.
- Paragraph (C)(2) of rule 5123:2-9-24 exempts operators of commercial vehicles from meeting certain staff training requirements required by rule 5123:2-2-01.
- Paragraph (D)(1)(c) of rule 5123:2-9-35 exempts staff of providers of Remote Monitoring from meeting certain staff training requirements.
- Paragraph (D)(3) of rule 5123:2-9-42 exempts operators of commercial vehicles from meeting 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;

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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?

The Department is developing online training for direct care staff which will be made available at no charge. Staff of the Department's Division of Medicaid Development and Administration and Office of Provider Standards and Review are available to provide guidance and technical assistance as needed.