

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: Room and Board

Rule Number(s): 5123:2-3-11 (proposed new rule)
5123:2-3-18 (existing rule to be rescinded)

Date: July 27, 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 Rescinded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.

Rules in Chapter 5123:2-3 of the Administrative Code govern residential facilities licensed by the Ohio Department of Developmental Disabilities pursuant to Section 5123.19 of the Revised Code (i.e., licensees). Section 5123.19 defines "residential facility" as a home or 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

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- A dwelling in which the only residents with developmental disabilities are in independent living arrangements or are being provided supported living.

Existing rule 5123:2-3-18 (to be rescinded) and proposed new replacement rule 5123:2-3-11 identify components of Room and Board and establish standards and procedures for determining the amount of earned income and unearned income retained by a resident of a residential facility as personal funds and the amount of Room and Board for which the individual is responsible. Room and Board is a calculation of the actual costs incurred by a licensee to provide services, a portion of which may be defrayed by funds from the local county board of developmental disabilities. Room and Board funds support individuals with developmental disabilities in securing affordable housing that meets their needs.

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

5123.04, 5123.19

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program? If yes, please briefly explain the source and substance of the federal requirement.

No.

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 rule does 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?

The Department measures the success of the rule by a reduction in the number of local-level disagreements regarding Room and Board.

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.

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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

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 new Chapter 5123:2-3 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). During the course of this group's work, it was determined that redevelopment of the Room and Board rule required additional dialogue and it was set aside so that the other Chapter 5123:2-3 rules were not delayed.

In 2015, the Department convened a group to discuss the Room and Board rule at three additional meetings (August 28, 2015, October 6, 2015, and March 17, 2016) which included representatives of:

- The Arc of Ohio
- Councils of Governments
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Provider Resource Association
- Ohio Waiver Network

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

- Advocacy and Protective Services, Inc.
- The Arc of Ohio

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- 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 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 rules and 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?

The Department suggested in 2014 that a rule governing Room and Board was not necessary. Representatives of county boards of developmental disabilities and licensees indicated a rule was necessary to help reduce conflict over Room and Board and better serve people with developmental disabilities.

Paragraphs (B)(9) and (B)(10): Stakeholders requested that the rule be clearer with regard to patient liability (i.e., that it must be satisfied in accordance with the Ohio Department of Medicaid rule).

Paragraph (B)(10): Stakeholders requested that the rule acknowledge an individual's obligation for medical co-payments.

Paragraph (B)(12): Stakeholders provided feedback about which costs should be calculated in determination of Room and Board and suggested contemporary wording to describe the costs (e.g., changing "cost of local television reception" to "the cost of television and internet services"). Stakeholders determined initially to classify costs as "individual-specific expenses," "residential facility fixed costs," and "residential facility variable costs" and then ultimately decided to make only two categories: "individual-specific expenses" and

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"residential facility costs."

Paragraph (B)(12)(a)(iv): Stakeholders said the rule should explicitly state that staff wages to accompany an individual to social or recreational events could not be calculated as Room and Board.

Paragraph (C)(2): Stakeholders suggested that the amount personal funds to be retained by an individual be increased from \$75 to \$100 per month.

Paragraph (C)(3): Stakeholders asked that non-routine earned income or unearned income could be applied to past Room and Board for 12 months instead of 6 months as specified in the existing rule and asked that the wording make clear that a county board of developmental disabilities is permitted to recoup the amount.

Paragraph (C)(7): Stakeholders said the rule should compel county boards of developmental disabilities and licensees to work together to resolve disagreements.

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 licensee costs as well as forms and procedures used by licensees and county boards of developmental disabilities to calculate Room and Board were shared and reviewed. Review of this information revealed that various methods are used successfully and paragraph (C)(5) was added to permit flexibility.

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 rescinding existing rule 5123:2-3-18 without bringing forth a new replacement rule. County boards of developmental disabilities and licensees agreed that a replacement rule was needed. The Department facilitated several meetings to develop a new replacement 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; the rule sets forth general requirements to guide calculation and negotiation of Room and Board between licensees and county boards of developmental disabilities.

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

The Department is charged with promulgating rules for residential facilities. (In this case,

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the rule does not apply to Intermediate Care Facilities for Individuals with Intellectual Disabilities which are also governed by rules of the Ohio Department of Health and federal regulations.)

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.

Staff of the Department's Office of Provider Compliance and Review will be trained on the new rule to ensure consistency and predictability of compliance reviews conducted at county boards of developmental disabilities and residential facilities. The Department will collaborate with the Ohio Association of County Boards Serving People with Developmental Disabilities and the Ohio Provider Resource Association to provide training necessary for smooth implementation of the new rule throughout Ohio.

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 rule applies to the approximately 650 residential facilities licensed by the Department that are not Intermediate Care Facilities for Individuals with Intellectual Disabilities.

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

Paragraph (C)(6) requires a licensee to enter into a contract with the county board of developmental disabilities regarding the amount of Room and Board to be paid to the licensee.

Paragraph (C)(7) requires a licensee to share information with the county board of developmental disabilities.

Paragraph (E) requires a licensee to calculate and document the earned income and unearned income of the individuals it serves.

Paragraph (F)(1) requires an individual's payee (which might be the licensee) to provide information pertaining to the individual's earned income and unearned income to the county board of developmental disabilities.

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

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"representative business." Please include the source for your information/estimated impact.

Calculating and documenting the earned income and unearned income of residents of the licensed residential facility and negotiating the Room and Board amount to be paid to the licensee by the county board of developmental disabilities will take staff time, which will vary based on the number of individuals a licensee serves, the circumstances of the individuals a licensee serves, and the method agreed upon by the licensee and county board of developmental disabilities to calculate Room and Board.

The rule already exists. The proposed new rule does not increase adverse impact. It is anticipated that some clarification provided by the new rule will make the process less acrimonious, which may result in less time spent by licensees in the Room and Board negotiation process.

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. Licensees and county boards of developmental disabilities agreed that a rule was needed.

Regulatory Flexibility

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

Yes; paragraph (C)(5) allows for flexibility in the method adopted by licensees and county boards of developmental disabilities for determining Room and Board payment.

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

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regulation?

The Department will collaborate with residential facilities and county boards of developmental disabilities to ensure affected entities are trained. Staff of the Department's Office of Provider Standards and Review will be available to answer questions and provide technical assistance.