

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: Waiver Nursing Services and Personal Care Aide Services
Rate Increases (to be effective January 1, 2017)

Rule Number(s): 5123:2-9-39, 5123:2-9-56, and 5123:2-9-59

Date: September 15, 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 Rescinded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 Department is proposing to amend two rules governing a service named "Waiver Nursing Services" under the Individual Options and Transitions Developmental Disabilities waivers and one rule governing a service named "Personal Care Aide Services" under the Transitions Developmental Disabilities Waiver. The Individual Options and Transitions Developmental Disabilities 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

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

CSIOhio@governor.ohio.gov

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 participants through the Medicaid State Plan and other federal, state, and local public programs as well as the support that families and communities provide. As of September 1, 20,280 individuals were enrolled in the Individual Options Waiver and 1,200 individuals were enrolled in the Transitions Developmental Disabilities Waiver.

Rules 5123:2-9-39 and 5123:2-9-59 define Waiver Nursing Services and set forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. Rule 5123:2-9-56 defines Personal Care Aide Services and sets forth provider qualifications, requirements for service delivery and documentation of services, and payment standards for the service. The rules are being amended to increase the payment rates for the services to align with payment rates set forth in rule 5160-46-06 for similar services available under the Ohio Home Care Waiver administered by the Ohio Department of Medicaid. An additional amendment is being made to paragraph (E)(6) of rule 5123:2-9-39 based on stakeholder feedback. An additional amendment is being made to paragraph (B)(13)(f) of rule 5123:2-9-59 to remove a reference to an Ohio Department of Medicaid rule that has been rescinded.

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

5123.04

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.

The rules set forth requirements for services available under Medicaid HCBS waivers to ensure the services are delivered in accordance with the federally-approved waivers. The Department has an administrative rule for each service available under a Medicaid waiver.

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)?

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

CSIOhio@governor.ohio.gov

Rules are required to implement Medicaid waivers approved by the Centers for Medicare and Medicaid Services (CMS).

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

The Department measures the success of regulations 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.

Staff of the Ohio Department of Medicaid discussed forthcoming changes in payment rates for Waiver Nursing Services and Personal Care Aide Services with its HCBS Rules Workgroup on August 24, 2016. The HCBS Rules Workgroup includes representatives of:

- Individuals enrolled in waivers
- CareSource
- CareStar
- Council on Aging
- Disability Rights Ohio
- Midwest Care Alliance
- Ohio Council for Home Care and Hospice
- Ohio Department of Aging
- Ohio Department of Developmental Disabilities
- Ohio Olmstead Task Force
- Public Consulting Group

Staff of the Ohio Department of Developmental Disabilities discussed forthcoming changes in payment rates for Waiver Nursing Services and Personal Care Aide Services at a meeting of its Waiver Workgroup on August 29, 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

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

CSIOhio@governor.ohio.gov

Ohio Provider Resource Association
Ohio Self Determination Association
Ohio Superintendents of County Boards of Developmental Disabilities
Ohio Waiver Network
Values and Faith Alliance

Through the Department's rules clearance process, the rules and Business Impact Analysis 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 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 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?

In 2015, when the Ohio Departments of Medicaid and Developmental Disabilities made changes to the payment rate structure for Waiver Nursing Services and Personal Care Aide Services, stakeholders provided input that the rates (especially for Licensed Practical Nurses and Independent Providers) were too low. Based upon ongoing evaluation and analysis, the Ohio Department of Medicaid determined to increase the payment rates for providers of the services.

Based on feedback from the Ohio Council for Home Care and Hospice, the department is proposing an amendment to paragraph (E)(6) of rule 5123:2-9-39.

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 proposed payment rates reflect the modified rate structure for Waiver Nursing Services and Personal Care Aide Services developed previously by the Ohio Department of Medicaid and its stakeholder group. The rates are being modified in response to feedback from individuals and families who receive services and providers of services. Adjustments to the payment rates for Waiver Nursing Services include:

- Increasing the wage component of the LPN rate from the 25th percentile to the 50th percentile; and
- Increasing the wage component of the RN rate from the 10th percentile to the 15th percentile.

The payment rates for Personal Care Aide Services are being increased 3% across the board.

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 did not consider alternative regulations. The purpose of the proposed amendments to the rules is to align payment rates for the same service provided under multiple Medicaid waivers.

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. The proposed amendments to the rules are intended to maintain federally-compliant statewide standards.

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

The Ohio Department of Developmental Disabilities is responsible for promulgating rules regarding Medicaid waivers it administers. There are no duplicate 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.

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

CSIOhio@governor.ohio.gov

The Department will communicate changes in payment rates to individuals and families who receive the services, providers of the services, and county boards of developmental disabilities. The Ohio Department of Medicaid's Medicaid Information Technology System will be modified to reflect the new payment rates. Department staff will confer with staff of the Ohio Department of Medicaid to ensure that information and technical assistance provided to the regulated community are accurate and consistent. The new payment rates will apply uniformly to all claims for payment for Waiver Nursing Services and Personal Care Aide Services provided on or after the effective date of the rules (projected to be January 1, 2017).

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;

Rules 5123:2-9-39 and 5123:2-9-59 apply to approximately 1,332 providers (1,159 Independent Providers and 173 Agency Providers) currently approved to provide Waiver Nursing Services.

Rule 5123:2-9-56 applies to approximately 2,255 providers (1,890 Independent Providers and 365 Agency Providers) currently approved to provide Personal Care Aide Services.

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

The rules require persons and entities to apply to the Department for certification to provide the services and/or to have a Medicaid Provider Agreement with the Ohio Department of Medicaid. There is an application fee for applying for certification to provide the service; the application fee is set forth in rule 5123:2-2-01 (*Provider Certification*). Providers are subject to sanctions if they fail to comply with the rules. The rules require providers to maintain documentation for 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 proposed amendments are being made to increase payment rates for providers of

the services and are not expected to affect the adverse impact of the rules.

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

The waivers must meet the federal guidelines under which Ohio's waivers are permitted to operate.

Regulatory Flexibility

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

No; providers of Waiver Nursing Services and Personal Care Aide Services must comply with the requirements set forth in the rules.

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.

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

Staff of the Department's Medicaid Policy, Provider Certification, and Provider Payment and Support units are available to provide technical assistance should any be necessary.