

**PUBLIC-COMMENT PERIOD**  
**PROVIDER CERTIFICATION: ASSISTED LIVING SERVICE**  
September 15, 2023

ODA reviewed rule 173-39-02.16 of the Administrative Code and now proposes to amend it.

Please feel free to review the proposed amendments to this rule and its business impact analysis (BIA) and offer recommendations for improving the rule. Submit recommendations to [rules@age.ohio.gov](mailto:rules@age.ohio.gov) no later than **September 28, 2023 at 11:59PM**.

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Mission: Foster sound public policy, research, and initiatives that benefit older Ohioans



# Common Sense Initiative

Mike DeWine, Governor  
Jon Husted, Lt. Governor

Joseph Baker, Director

## Business Impact Analysis

Agency, Board, or Commission Name: **OHIO DEPT. OF AGING**

Rule Contact Name and Contact Information: Tom Simmons [rules@age.ohio.gov](mailto:rules@age.ohio.gov)

Regulation/Package Title (a general description of the rules' substantive content):

### **ODA PROVIDER CERTIFICATION: ASSISTED LIVING SERVICE**

Chapter 173-39 of the Administrative Code establishes the requirements to become, and to remain, an ODA-certified provider.

Rule Number(s): 173-39-02.16

Date of Submission for CSI Review: September 15, 2023.

Public Comment Period End Date: September 28, 2023 at 11:59PM.

#### Rule Type/Number of Rules:

☐ New/ # rules

☐ No Change/ # rules (FYR? ☐)

☒ Amended/ 1 rules (FYR? ☒)

☐ Rescinded/ # rules (FYR? ☐)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

#### Reason for Submission

1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.

Which adverse impact(s) to businesses has the agency determined the rule(s) create?

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**The rule(s):**

- a. ☐ Requires a license, permit, or any other prior authorization to engage in or operate a line of business.
- b. ☐ Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.
- c. ☒ Requires specific expenditures or the report of information as a condition of compliance.
- d. ☐ Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.

**Regulatory Intent**

**2. Please briefly describe the draft regulation in plain language.**

*Please include the key provisions of the regulation as well as any proposed amendments.*

Rule 173-39-02.16 of the Administrative Code establishes the specific requirements to become, and to remain, certified by the Ohio Department of Aging (ODA) to provide the assisted living service. ODA proposes to amend this rule to achieve the following:

- (1) Revise the definition of “assisted living service” to no longer include maintenance and the resident call system as part of this service. The Assisted Living Program pays for only health and social services<sup>1</sup> provided to individuals enrolled in the program. The individuals must pay for room and board. Maintenance and the resident call system are features of the facility which would be covered by room and board and are not part of the assisted living service.
- (2) Define “memory care” in a way that corresponds to the definition of “assisted living memory care service” in uncodified section 333.240 of [House Bill 33 \(135<sup>th</sup> G.A.\)](#).
- (3) Indicate that ODA certifies each provider of the assisted living service for either the basic assisted living service or memory care.
- (4) Indicate that if ODA certifies a provider for memory care that the provider may also directly provide, or arrange for, the basic service.
- (5) Require the provider to display the following on its website and its facility page in the [Long-Term Care Consumer Guide](#):
  - Whether the provider is certified to provide the basic assisted living service or both memory care and the basic assisted living service.
  - Whether the provider is currently accepting individuals who are enrolling in the Assisted Living Program or MyCare Ohio.<sup>2</sup>
- (6) Establish the following new requirements for ODA-certified memory care providers:
  - **Mission Statements:** Having a mission statement that includes how its memory care differs from its basic assisted living service.

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<sup>1</sup> CENTERS FOR MEDICARE AND MEDICAID SERVICES, [Medicaid Home and Community-Based Services \(HCBS\) Taxonomy Category and Subcategory Definitions](#) (Feb. 28, 2014), 2.

<sup>2</sup> [Rule 173-45-06 of the Administrative Code](#) requires providers to provide information to ODA for their facility page. This amendment makes displaying the information on the facility page a requirement for provider certification.

- **Activities:** Providing or arranging or at least 3 therapeutic, social, or recreational activities listed in rule 3701-16-11 of the Administrative Code per day with consideration given to each individual's preferences and designed to meet each individual's needs.
- **Outdoor Spaces:** Ensuing safe access to outdoor space for all individuals.
- **Resident Call System:** Assisting each individual who makes a call through the resident call system in person in fewer than 10 mins. after the individual initiates the call.
- **Medical Directors:** Having a medical director whose responsibilities include all of the following:
  - Meeting periodically with management, nursing, and other professional staff to discuss clinical and administrative issues.
  - Acting as a liaison between the attending physicians and other health professionals caring for the individual.
  - Being available to consult when an individual's personal physician is not available.
  - Assisting management and nursing staff in ensuring a safe and sanitary environment for individuals and staff by reviewing incidents, identifying environmental hazards to health and safety, and advising the provider on possible corrections or improvements to the facility's environment.
  - Promoting residents' rights adhering to the person-centered services plans and adopting the person-centered planning principles in rule 5160-44-02 of the Administrative Code.
- **Availability/Staffing:** Maintaining both of the following:
  - A sufficient number of registered nurses (RNs), or licensed practical nurses (LPNs) under the direction of an RN, on call available at all times for individuals receiving memory care.
  - A staffing ratio of at least 1 staff member who provides personal care services for up to every 10 individuals receiving memory care with at least 1 staff member who provides personal care services on each floor of the residential care facility (RCF) if the RCF provides memory care on multiple floors.
- **Initial Staff Qualifications:** Including the following topics in the training required by the Ohio Department of Health (ODH):
  - Overview of dementia: symptoms, treatment approaches, and progression.
  - Foundations of effective communication in dementia care.
  - Common behavior challenges and recommended behavior management techniques.
  - Current best practices in dementia care.
  - Missing resident prevention and response.
- **In-Service Training:** Including dementia care in each year's in-service training.

(7) Reduce the use of unnecessary regulatory restrictions (*e.g., shall*) to comply with R.C. §§ [106.03](#) and [121.951](#).<sup>3</sup> This proposal includes numerous non-substantive changes to this rule.

(8) Make additional non-substantive changes to this rule.

### 3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.

R.C. §§ [121.07](#), [173.01](#), [173.02](#), [173.39](#), [173.391](#), [173.54](#), [173.543](#), [173.547](#), [173.548](#)

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<sup>3</sup> Senate Bill 9 (134<sup>th</sup> G.A.).

- 4. 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.*

In order for the Centers for Medicare and Medicaid Services (CMS) to approve Ohio's application for a Medicaid waiver authorizing the state to launch and maintain the Medicaid-funded component of the Assisted Living Program, [42 C.F.R. 441.352](#) requires ODA to establish provider-certification requirements to safeguard the health and welfare of individuals who receive services through the program.

- 5. If the regulation implements a federal requirement, but includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

This rule exists to comply with the state laws mentioned in ODA's response to #2. Those state laws require ODA to adopt rules to establish requirements for provider certification and the Assisted Living Program.

- 6. 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)?**

This rule exists to comply with the state laws mentioned in ODA's response to #2. Those state laws require ODA to adopt rules to establish requirements for provider certification and the Assisted Living Program.

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

ODA and its designees monitor providers to ensure compliance for the continued health and safety of individuals receiving services from ODA-certified providers. [173-39-04] ODA will judge the proposed amendments to this rule to be a success when ODA and its designees find few violations against it during structural compliance reviews or investigations of alleged incidents.

- 8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

*If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.*

No.

### **Development of the Regulation**

- 9. 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.*

ODA's guide [Participating in ODA's Rule Development](#) and the [main rules webpage](#) on ODA's website encourage stakeholders and the general public to contact ODA's policy-development manager at [rules@age.ohio.gov](mailto:rules@age.ohio.gov) to give input on improving ODA's rules. From this rule's effective date to the date of this BIA, ODA received no email from stakeholder on this rule in that email inbox.

On May 17, 2022, ODA emailed the following stakeholders to explain how artificial intelligence has added a new dimension to interpreting rules, define *regulatory restrictions*, declare the need to reduce regulatory restrictions, explain how ODA can reduce regulatory restrictions by eliminating duplicate uses of regulatory restrictions, provide stakeholders with an opportunity to make recommendations on ODA's plan, and provide stakeholders with an opportunity to make recommendations on eliminating any regulatory restriction in any chapter of ODA's rules:

- Catholic Social Services of the Miami Valley.
- LeadingAge Ohio.
- Ohio Assisted Living Association (OALA).
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Adult Day Healthcare Association (OADHA).
- Ohio Association of Area Agencies on Aging (OAA).
- Ohio Association of Medical Equipment Suppliers (OAMES).
- Ohio Association of Senior Centers (OASC).
- Ohio Council for Home Care and Hospice (OCHCH).
- Ohio Health Care Association (OHCA).
- Ohio Jewish Communities.
- State Long-Term Care Ombudsman.

On August 25, 2023, ODA emailed an electronic survey to each of the 393 ODA-certified assisted living providers and informed the following provider associations of the email:

- LeadingAge Ohio.
- Ohio Academy of Senior Health Sciences, Inc.
- Ohio Assisted Living Association.
- Ohio Health Care Association.

Beginning on August 29, 2023, ODA and the Ohio Department of Medicaid (ODM) have been fielding comments on the proposed new Medicaid waiver application to CMS for the Assisted Living Program. Although this is not a comment period on this rule, it may shed light on this rule.

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

In response to its May 17, 2022 emails, ODA received 0 recommendations from stakeholders on this rule.

In response to ODA's invitation to participate in a survey on August 25, 2023, ODA received responses from 178 of the 393 certified providers, 116 (or over 65%) of which indicated that they provide memory care. 90 of those 116 providers (or, over 77%) indicated that they provided memory care in a special unit.

66 providers responded to a question on whether they use the term "memory care," "dementia care," or another term. 55 (or over 83%) used "memory care," which is the term that ODA proposes to use in its rules.

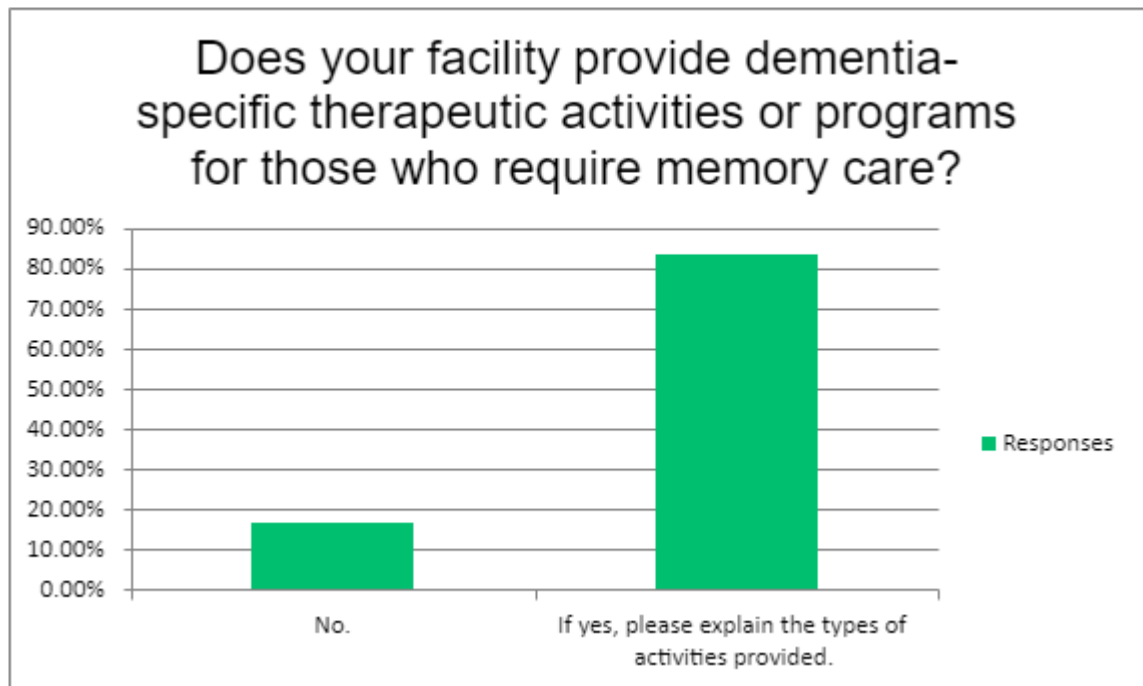
The following responses relate to ODA's proposed new memory-care requirements in this rule;

- **Mission Statements:** 51 providers responded to the question on memory care mission statements. Only 19 indicated that they did not have a mission statement that reflects the unique needs of those with dementia.<sup>4</sup>

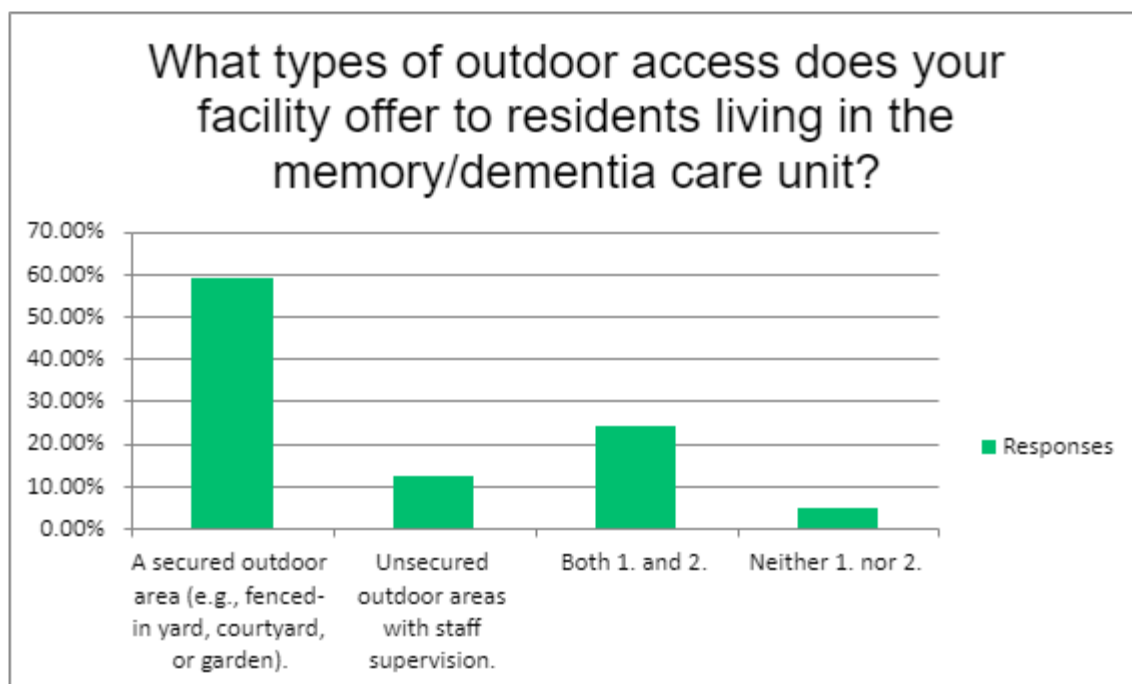
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<sup>4</sup> We do not have a graph for this topic.

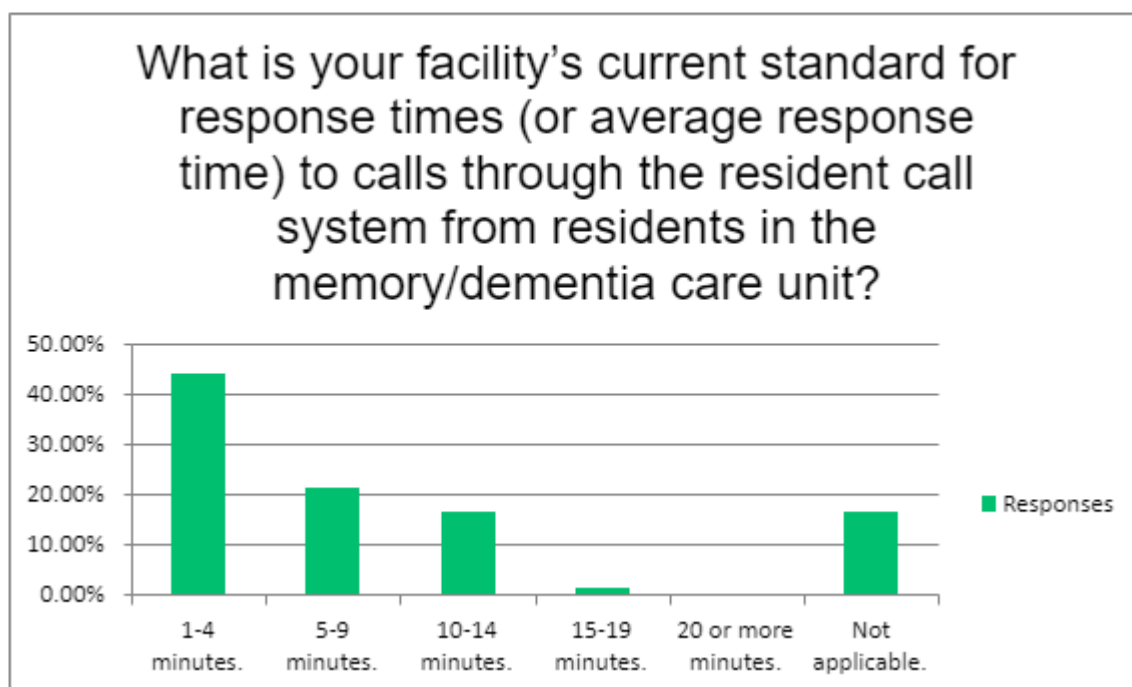
- **Activities:** 66 providers responded to a question on therapeutic activities. Over 83% of providers indicated that they provide specific therapeutic activities or programs as part of memory care, which means that over 83% of providers already meet ODA's proposed requirement to provide such activities in memory care.



- **Outdoor Spaces:** 66 providers responded to the question on outdoor access. All but 3 providers indicated that they provide the access to outdoor spaces that ODA proposes to require.

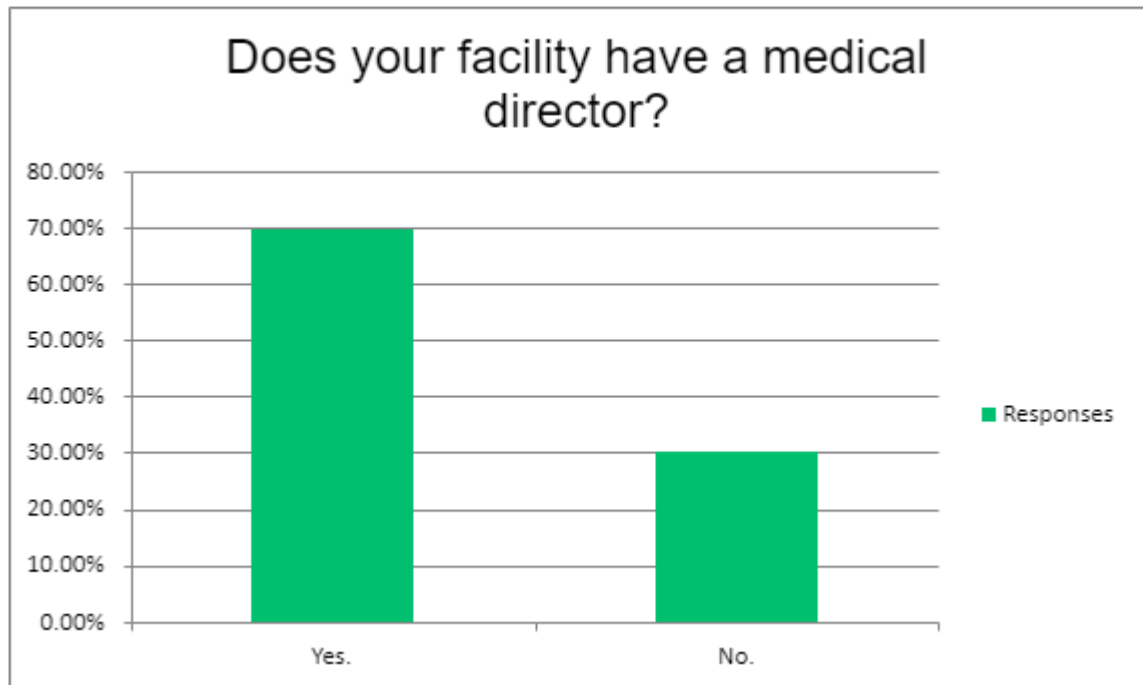


- Resident Call System:** 66 providers responded to the question on response times. Almost all providers indicated that they meet ODA's proposed 10-minute response deadline, with most responding in significantly fewer than 10 minutes.



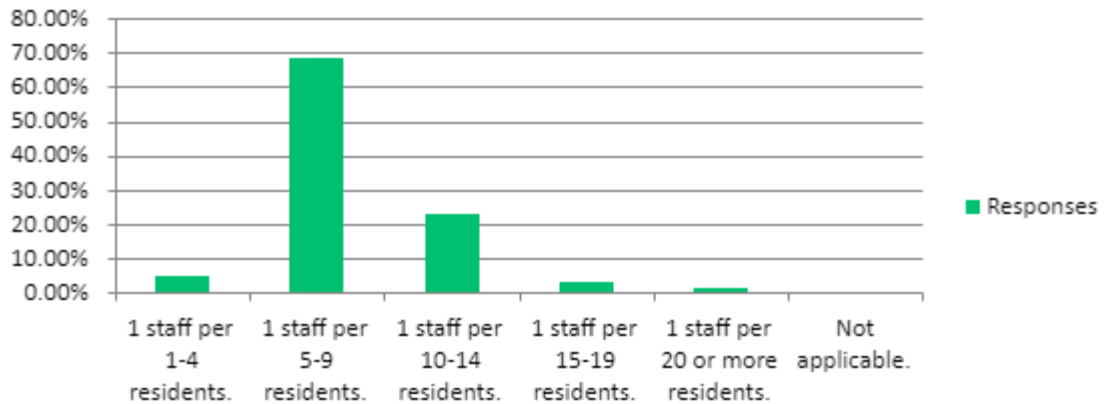
- Medical Directors:** 66 providers responded to the question on medical directors. Almost 70% of providers indicated that they have such a director.





- **Availability/Staffing:** 66 providers responded to the questions on staffing. Providers' responses indicate that most providers already meet or exceed the staffing ratios that ODA proposes to require for memory care.

During waking hours, what staffing (personal care services) ratio does your facility maintain in the memory/dementia care unit?

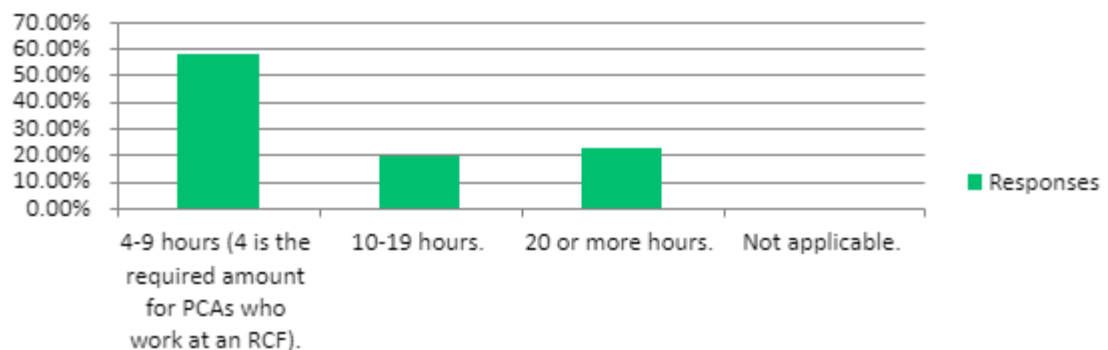


During non-waking hours, what staffing (personal care service) ratio does your facility maintain in the memory/dementia care unit?

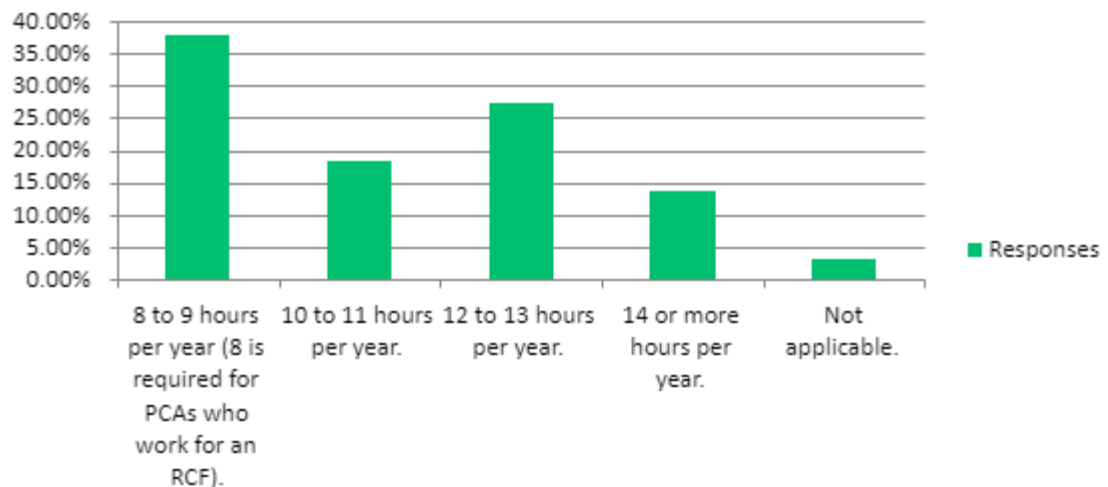


- **Staff Qualifications:** 66 providers responded to the questions on initial training and in-service training. Over 42% of providers provide/require more hours of initial training than ODH requires and most providers provide/require more hours of in-service training than ODH requires. ODA's proposals relate to topics, not hours.

How many hours of initial training does your facility provide/require for new staff (personal care aides) who work in the memory/dementia care unit or special focus secured unit?



How many hours of annual in-service training does your facility provide/require for its staff (personal care aides) who work in the memory/dementia care unit or special focus secured unit?



ODA also asked providers what topics were included in their initial training and annual in-service training. 54 providers responded with most mentioning dementia-related courses, including the following titles:

- Abuse (specific to dementia);
- Abuse Prevention in Persons with Dementia.

- Activities for Elderly, including elopement (specific to dementia).
- Aggression.
- Alzheimer's Disease.
- Alzheimer's Disease and Communication.
- Alzheimer's Disease and Related Disorders: ADL Care.
- Alzheimer's Disease and Related Disorders: Behavioral Management.
- Alzheimer's Disease and Related Disorders: Physical Environment.
- Alzheimer's Disease and Related Disorders: Communication.
- Alzheimer's/Dementia Care of Residents with Dementia in Assisted Living.
- Alzheimer's/Dementia Training and Behavior Management.
- Approach and Positive Interactions with Dementia.
- Behavioral Health and Older-Adult Dementia Care.
- Behavior Management (specific to dementia).
- Care of Residents with Dementia.
- Caring for the Cognitively Impaired.
- Challenging Behaviors: Care and Interventions for Individuals Experiencing Dementia.
- Comprehensive View of Alzheimer's Disease.
- Comprehensive View of Dementia.
- Confused and Disruptive Behaviors.
- Dementia.
- Dementia Approach.
- Dementia Behaviors.
- Dementia Capable Care.
- Dementia Care.
- Dementia Care training through Relias.
- Dementia Care: Challenging Behaviors and Direct Care Staff.
- Dementia Care: Normal Aging vs. Alzheimer's/Dementia.
- Dementia Care: Preventing Catastrophic Reactions.
- Dementia Care: Wandering.
- Dementia Live.
- Dementia Training.
- Dementia-Specific courses from Collins Learning.
- Dementia-Specific Medicine Modules.
- Different Types of Dementia.
- Dos and Don'ts with Dementia.
- Elopement Prevention.
- Filling the Day with Meaning.
- Food Service in Dementia Care.
- How to Work with Cognitively-Impaired Residents: Cueing, Redirecting, and Environmental Cues.
- I'm Still Here.
- Intermittent Cuing, Redirection, and Environmental Cues.
- Introduction to Dementia.
- It's All in the Approach.
- Managing Dementia-Related Behavior.
- Managing Elopement.
- Medications with Dementia.
- Music and Memory.
- Normal Aging vs. Alzheimer's/Dementia.
- Progression of Dementia.
- Resident Rights (specific to dementia).

- Sensory Deficits.
- Signs and Symptoms of Dementia.
- Sundowners.
- The Aging Process.
- The Journey of Dementia.
- The Process of Aging.
- Understanding Alzheimer's Disease.
- Understanding Dementia.
- Virtual Dementia Tour.
- Wanderers.
- Wandergard Systems.
- What is Dementia?

From August 29, 2023 until the time of the drafting of this BIA, ODA has not received any comments on the Medicaid waiver application that relate to this rule or memory care.

**11. 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?**

Please review ODA's response to question #10 regarding the August 2023 survey of providers.

**12. 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? *Alternative regulations may include performance-based regulations, which define the required outcome, but do not dictate the process the regulated stakeholders must use to comply.***

[R.C. §173.391](#) requires ODA to adopt rules to establish requirements for ODA-certified providers. Additionally, federal rules require ODA to establish adequate requirements for providers to assure the health and safety of individuals enrolled in ODA-administered programs.

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

[R.C. §173.391](#) authorizes only ODA to develop standards for ODA-certified providers of services to individuals enrolled in ODA-administered programs.

**14. 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.**

Before the proposed amendments to this rule take effect, the public will be able to access the rule in the Register of Ohio. Additionally, ODA will send an email to subscribers of our rule-notification service to feature the rule.

ODA and its designees regularly monitor ODA-certified providers for compliance. (cf. 173-39-04)

**Adverse Impact to Business**

**15. Provide a summary of the estimated cost of compliance with the rule(s). Specifically, please do the following:**

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**a. Identify the scope of the impacted business community, and**

Every ODA-certified provider of the assisted living service, which is currently 393 residential care facilities (RCFs).

**b. Quantify and identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance, etc.).**

*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 following are the unique<sup>5</sup> adverse impacts of this rule:

- **Public Information:** This rule requires the provider to display on its website and its facility page in the Long-Term Care Consumer Guide whether the provider is certified to provide the basic assisted living service or both memory care and the basic assisted living service and whether the provider is currently accepting individuals who are enrolling in the Assisted Living Program or MyCare Ohio. [Rule 173-45-06 of the Administrative Code](#) requires the provider to provide ODA with information for its facility page. What is new is ODA's proposal to consider doing so a requirement for certification.
- **Resident Units:** This rule establishes that a resident unit qualifies for this service only if the unit meets the rule's standards for (1) single occupancy, with an option for the individual to request to share the unit, (2) individual-controlled locks unless a physician determines that the individual's diagnosis indicates that an ability to control the lock to the resident unit is likely to have an adverse effect on the individual's health, (3) a bathroom, and (4) social space. These standards have been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006. In 2009, ODA limited the individual's ability to request to share the unit by allowing the individual to share only with a person with whom the individual had an existing relationship. ODA is not proposing to substantively amend these standards.
- **Common Areas:** This rule requires the provider to provide common areas that are accessible to the individual including a dining area (or areas) and an activity center (or centers) and allows a multi-purpose common area to serve as both a dining area and an activity center. This requirement has been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006.
- **Availability for the Basic Assisted Living Service:** This rule references the requirement to comply with rule 3701-16-05 of the Administrative Code regarding staffing levels and responding to individual's needs through the resident call system. These standards have been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006. ODA is not proposing to amend this requirement.
- **Minors:** This rule prohibits minors from assisting with medication management or transporting individuals.<sup>6</sup> This prohibition has been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006. ODA is not proposing to amend this prohibition.
- **Initial Staff Qualifications:** This rule requires the hours of initial training under rule 3701-16-06 of the Administrative Code to include the topics mentioned in this rule. This should not create any adverse impact greater than ODH's requirements. This requirement has been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006. ODA is not proposing to substantively amend this requirement.

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<sup>5</sup> "Unique" means not required by a law or rule other than this rule or [42 C.F.R. 441.352](#).

<sup>6</sup> This rule also prohibits minors from providing personal care without on-site supervision, but that is a reference to the prohibition in rule 3701-16-06 of the Administrative Code rather than a unique requirement of this rule.

- **In-Service Training:** This rule requires the hours of annual training under rule 3701-16-06 of the Administrative Code to include the topics mentioned in this rule. This should not create any adverse impact greater than ODH's requirements. ODA is not proposing to substantively amend this requirement.
- **Quarterly Assessments:** This rule requires an RN, or LPN under the direction of an RN, to assess the individual's satisfaction with the individual's activities plan on a quarterly basis. This requirement has been in this rule since March 31, 2006, which was before Ohio launched the Assisted Living Program on July 1, 2006. ODA is not proposing to substantively amend this requirement.
- **Subcontracting:** This rule gives providers flexibility to subcontract for one or more, but not all, service activities. Any adverse impact (e.g., on minors) would apply whether the work was provided through the provider or the provider's subcontractor. ODA is not proposing to substantively amend its subcontracting standard.
- **Mission Statements (only for memory care providers):** Results from ODA's August 2023 survey indicate that most providers already have a mission statement on memory care. The adverse impact of this proposed new requirement would be for providers who do not yet have such a mission statement to develop one.
- **Activities (only for memory care providers):** Results from ODA's August 2023 survey indicate that over 83% of providers already provide memory care to individuals who need memory care.
- **Outdoor Spaces (only for memory care providers):** Results from ODA's August 2023 survey indicate that only 4.5% of providers do not already provide individuals with access to outdoor spaces.
- **Resident Call System (only for memory care providers):** Results from ODA's August 2023 survey indicate that almost all providers meet ODA's proposed 10-minute response deadline with most providers responding in significantly fewer minutes.
- **Medical Directors (only for memory care providers):** ODA's August 2023 survey indicated that almost 70% of providers have a medical director. For providers whose RCF is located on a campus with a nursing home, this may involve using the medical director for the nursing home in the RCF. For stand-alone RCFs who provide memory care, but do not have/use a medical director, this would involve contracting for the services of a physician.
- **Availability/Staffing (only for memory care providers):** ODA's August 2023 survey indicated that most providers already provide more staff in facilities than ODA's proposed minimum staffing ratio for memory care.
- **Initial Staff Qualifications and In-Service Training (only for memory care providers):** ODA's August 2023 survey showed that over 42% of providers provide/require more hours of staff training than ODH's rules require. ODA is not proposing to add additional hours of training. ODA is proposing to require the training to cover specific topics relevant to memory care.

The amount the Assisted Living Program pays providers for this service is an all-inclusive rate. It's intended to cover the daily costs incurred in the service plus employee-related costs (e.g., training). The costs incurred as a result of this rule are likely calculated as part of a provider's operational budget—the cost of doing business and clerical duties, such as retaining records.

Providers set the prices they bill to the Assisted Living Program. In turn, the Assisted Living Program pays each provider the amount the provider bills, so long as the price billed does not exceed the maximum that the Ohio Dept. of Medicaid

(ODM) allows per unit. In the appendix to [rule 5160-1-06.5 of the Administrative Code](#), ODM establishes the units of service for the Assisted Living Program and the maximum-allowable payment for each unit.

**16. Are there any proposed changes to the rules that will reduce a regulatory burden imposed on the business community? Please identify. (*Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors*).**

A related proposal in the appendix to [rule 5160-1-06.5 of the Administrative Code](#) will establish a new assisted living base rate and a new memory care rate to comply with section 333.240 of [House Bill 33 \(135<sup>th</sup> G.A.\)](#). ODA and ODM will coordinate so that this rule and rule 5160-1-06.5 of the Administrative Code take effect on the same day. ODM informed ODA that its forthcoming proposed new rates may make the Assisted Living Program one of the highest-paying programs in the nation.<sup>7</sup> The proposed increase to the base rate will reduce (or pay for) any adverse impact to providing the basic service. The proposed new memory-care rate will reduce (or pay for) any adverse impact created by ODA's proposed new requirements for memory care.

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

ODA is required to establish rule requirements for ODA-certified providers and to ensure the health and safety of individuals enrolled in ODA-administered programs. Individuals with Alzheimer's disease or a related dementia have increased care needs. ODA's proposed new requirements will ensure that these individuals will receive that level of care.

ODA's August 2023 survey indicated that most providers already provide the memory care that ODA is proposing to require.

As previously mentioned, the forthcoming proposed base rate increase and new memory-care rate will pay for the adverse impact of providing the basic service and memory care.

Providers voluntarily decide to provide memory care. A provider can avoid the adverse impacts of the proposed new memory care requirements if the provider chooses to not provide memory care as an ODA-certified provider.

As always, providers voluntarily apply for ODA certification. Certification is not required to provide assisted living—whether basic or memory care—unless a provider wants the Assisted Living Program to pay the provider for the assisted living service. Many providers opt to forego certification and accept only individuals who pay with private funds.

**Regulatory Flexibility**

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

Because the primary purpose of this rule is to ensure the health and safety of individuals enrolled in ODA-administered programs, the rules treat all providers the same, regardless of their size.

**19. 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?**

ODA's primary concern is the health and safety of individuals receiving services from ODA-certified providers. Whenever possible, ODA or its designees will treat administrative violations that do not involve health and safety as opportunities for improvement through warning notices and solicitation of corrective action.

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<sup>7</sup> At the time of the drafting of this BIA, ODM has not yet revealed its proposed new rates.



## **20. What resources are available to assist small businesses with compliance of the regulation?**

ODA and its designees are available to help providers of all sizes with their questions. Any person may contact [Tom Simmons](#), ODA's policy development manager, with questions about this rule.

173-39-02.16

**ODA provider certification: assisted living service.**

(A) Definitions for this rule:

(1) "Assisted living service" means all of the following:

(a) A service promoting aging in place by supporting the individual's independence, choice, and privacy.

(b) A service that includes the following [activities](#):

(i) Hands-on assistance, supervision, and/or cuing of ADLs, IADLs, and other supportive activities.

(ii) Nursing activities, including the following:

(a) ~~The Initial~~ [initial](#) and subsequent health assessments under rule 3701-16-08 of the Administrative Code.

(b) Monitoring the individual according to the standards of practice for the individual's condition.

(c) Medication management according to rule 3701-16-09 of the Administrative Code.

(d) ~~The Part-time;~~ [part-time](#) intermittent skilled nursing care, ~~as described in rule 3701-16-09.1 of the Administrative Code;~~ when not available to the individual through a third-party payer.

(iii) Coordinating three meals per day and snacks according to rule 3701-16-10 of the Administrative Code with access to food according to rule 5160-44-01 of the Administrative Code.

(iv) Coordinating the social, recreational, and leisure activities ~~required~~ under rule 3701-16-11 of the Administrative Code to promote community participation and integration, including non-medical transportation to services and resources in the community.

~~(v) Any maintenance required under rule 3701-16-15 of the Administrative Code.~~

~~(vi) The resident call system required under rule 3701-16-14 of the~~

~~Administrative Code~~

(c) A service that does not include the following:

- (i) Housing.
- (ii) Meals.
- (iii) Twenty-four-hour skilled nursing care.
- (iv) One-on-one supervision of an individual.

(2) "Medication management" includes knowing what medications an individual is self-managing, assistance with self-administration of medication, ordering medication, medication reminders, and medication administration.

(3) "Memory care" means both of the following:

(a) An assisted living service that occurs in a resident unit that the provider designates to be a single-occupancy assisted living memory care unit, part of an assisted living memory care section of the RCF, or in an RCF that is entirely an assisted living memory care facility.

(b) The individual receiving the service has a documented diagnosis of any form of dementia.

~~(3)~~(4) "Resident call system" has the same meaning as in rule 3701-16-01 of the Administrative Code.

~~(4)~~(5) "Staff member" and "staff" have the same meanings as in rule 3701-16-01 of the Administrative Code.

(B) Certification level: ODA certifies each provider for either the basic assisted living service or memory care. If ODA certifies a provider to provide memory care, the provider may also directly provide, or arrange for, the basic service.

~~(B)~~(C) Requirements for an ODA-certified provider of the basic assisted living service ~~(service)~~:

(1) General requirements: The provider is subject to rule 173-39-02 of the Administrative Code.

(2) RCF qualifications:

(a) Licensure: Only a provider who maintains a current, valid RCF license from ODH and maintains compliance with Chapter 3721. of the Revised Code and Chapters 3701-13 and 3701-16 of the Administrative Code qualifies to provide this service.

(b) ~~Website:~~ Public information: The provider shall display the following on its website and on its facility page in the long-term care consumer guide:

(i) Whether the provider is currently certified by ODA to provide the basic assisted living service ~~under the assisted living program.~~

(ii) Whether the provider is certified by ODA to provide memory care.

~~(ii)~~(iii) Whether the provider is currently accepting individuals who are enrolling in the assisted living program or mycare Ohio.

(c) Resident units: A resident unit qualifies for this service only if the unit meets all the following standards:

(i) ~~Private resident unit:~~Occupancy:

(a) The ~~provider shall provide each individual with a private~~ resident unit is a single-occupancy resident unit designated solely for the individual, except as permitted under paragraph ~~(B)(2)(e)(i)(b)~~ (C)(2)(c)(i)(b) of this rule.

(b) The provider ~~shall only~~ may allow an individual to share a ~~private~~ single-occupancy resident unit only if all of the following conditions exist:

(i) The individual requests to share ~~his or her~~ the individual's unit~~;~~.

(ii) The individual shares ~~his or her~~ the individual's unit with a person with whom the individual has an existing relationship~~;~~and.

(iii) ODA's designee verifies that the conditions of

paragraphs ~~(B)(2)(e)(i)(b)(i)~~ (C)(2)(c)(i)(b)(i) and ~~(B)(2)(e)(i)(b)(ii)~~ (C)(2)(c)(i)(b)(ii) of this rule are met and authorizes sharing the unit in the individual's person-centered services plan .

~~(ii) Lock: Each resident unit shall have a lock that allows the individual to control access to the resident unit at all times, unless the provider maintains documentation from a physician, that is also documented in the individual's person-centered service plan in accordance with rule 5160-44-02 of the Administrative Code, that was issued within the previous three hundred sixty-five days in which the physician determines the individual's diagnosis indicates the individual's ability to lock the resident unit is likely to have an adverse effect on the individual's health or welfare.~~

(ii) Lock: The resident unit has a lock that allows the individual to control access to the resident unit at all times, unless all of the following conditions exist:

(a) A physician prescribes having no lock on the resident unit or removing the individual's ability to lock the resident unit because the individual's diagnosis indicates that the individual's ability to lock the resident unit is likely to have an adverse effect on the individual.

(b) The physician in paragraph (C)(2)(c)(ii)(a) of this rule issued the prescription within the past three hundred sixty-five days.

(c) The provider retains the prescription in paragraph (C)(2)(c)(ii)(a) of this rule.

(iii) Bathroom: ~~Each~~ The resident unit ~~shall include~~ includes a bathroom with a toilet, a sink, and a shower/bathtub, all of which are in working order.

(iv) Social space: ~~Each~~ The resident unit ~~shall include~~ includes identifiable space, separate from the sleeping area, that provides seating for the individual and one or more visitors for socialization.

(d) Common areas: The provider shall provide common areas accessible to the individual, including a dining area (or areas) and an activity center (or centers). A multi-purpose common area may serve as both a dining area and an activity center.

- (3) Availability: The provider shall maintain adequate staffing levels to comply with rule 3701-16-05 of the Administrative Code and to provide hands-on assistance, supervision, and/or cuing of ADLs in a timely manner in response to individual's unpredictable care needs, supervisory needs, emotional needs, and reasonable requests for services through the resident call system twenty-four hours per day.
- (4) Minors: Staff members under eighteen years of age do not qualify to do any of the following:
  - (a) Assist with medication management.
  - (b) Provide transportation.
  - (c) Provide personal care without on-site supervision, in accordance with rule 3701-16-06 of the Administrative Code.
- (5) Initial staff qualifications: Only a ~~person~~ staff member who successfully completes training in the following subject areas qualifies to provide this service:
  - (a) Principles and philosophy of assisted living.
  - (b) The aging process.
  - (c) Cuing, prompting, and other means of effective communication.
  - (d) Common behaviors for cognitively-impaired individuals, behaviorally-impaired individuals, or other individuals and strategies to redirect or de-escalate those behaviors.
  - (e) Confidentiality.
  - (f) The person-centered planning process ~~established~~ in rule 5160-44-02 of the Administrative Code, which includes supporting individuals' full access ~~of individuals~~ to the greater community.
  - (g) The individual's right to assume responsibility for decisions related to ~~his or her~~ the individual's care.

- (6) In-service training: The provider shall ensure that each employee providing this service successfully completes any training requirements in rule 3701-16-06 of the Administrative Code and makes verification of successful completion of those requirements available to ODA or its designee upon request.
- (7) Quarterly assessments: The provider's RN or LPN shall complete all of the following for each individual:
- (a) Contact the individual quarterly to assess and document the individual's satisfaction with ~~his or her~~ the individual's activities plan, and whether the activities plan continues to meet ~~his or her~~ the individual's needs.
  - (b) ~~Document, Report and retain records,~~ at least quarterly, on whether the individual's records demonstrate the individual is receiving activities as ODA or its designee authorized them in the individual's person-centered service plan.
  - (c) ~~Document, Report and retain records,~~ at least quarterly, on whether staff are providing personal care to the individual in the manner in which rule 3701-16-09 of the Administrative Code ~~requires~~ mandates for personal care services, as defined in rule 3701-16-01 of the Administrative Code.
- (8) Subcontracting: The provider may subcontract to provide one or more, but not all, of the service activities described in paragraphs (A)(1)(b) of this rule that ODA or its designee authorizes for the individual. The provider is responsible to assure that any service provided by a sub-contractor ~~is-compliant~~ complies with this chapter.

(D) Requirements for an ODA-certified provider of memory care:

- (1) The provider is subject to the standards in paragraphs (C)(1), (C)(2), (C)(4), (C)(6), (C)(7), and (C)(8) of this rule.
- (2) The provider qualifies for certification to provide memory care only if the provider meets all of the following standards:
- (a) The provider has a mission statement that includes how its memory care differs from its basic assisted living service.
  - (b) The provider provides or arranges for at least three therapeutic, social, or recreational activities listed in rule 3701-16-11 of the Administrative Code per day with consideration given to each individual's preferences

and designed to meet each individual's needs. The coordination of these activities is separate from the coordination in paragraph (A)(1)(b)(iv) of this rule.

(c) The provider ensures safe access at any time to outdoor space for all individuals.

(d) The provider assists each individual who makes a call through the resident call system in person in fewer than ten minutes after the individual initiates the call.

(e) The provider has a medical director whose responsibilities include all of the following:

(i) Meeting periodically with management, nursing, and other professional staff to discuss clinical and administrative issues.

(ii) Acting as a liaison between the attending physicians and other health professionals caring for the individuals.

(iii) Being available to consult when an individual's personal physician is not available.

(iv) Assisting management and nursing staff in ensuring a safe and sanitary environment for individuals and staff by reviewing incidents, identifying environmental hazards to health and safety, and advising the provider on possible corrections or improvements to the facility's environment.

(v) Promoting residents' rights, adhere to the person-centered service plans, and adopt the person-centered planning principles in rule 5160-44-02 of the Administrative Code.

(3) Availability: The provider qualifies for certification to provide memory care only if the provider meets all of the following standards:

(a) The requirements in paragraph (C)(3) of this rule.

(b) The provider has a sufficient number of RNs, or LPNs under the direction of an RN, on call available at all times for individuals receiving memory care.

(c) The provider maintains a staffing ratio of at least one staff member who provides personal care services for up to every ten individuals receiving memory care with at least one staff member who provides personal care services on each floor of the RCF if the RCF provides memory care on multiple floors.



(4) Initial staff qualifications: A staff member qualifies to provide memory care without in-person supervision only if the staff member successfully completes all of the following:

(a) The training under paragraph (C)(5) of this rule.

(b) Training on all of the following topics:

(i) Overview of dementia: symptoms, treatment approaches, and progression.

(ii) Foundations of effective communication in dementia care.

(iii) Common behavior challenges and recommended behavior management techniques.

(iv) Current best practices in dementia care.

(v) Missing resident prevention and response.

(5) In-service training: A staff member continues to qualify to provide memory care only if the staff member successfully completes dementia care training when complying with paragraph (C)(6) of this rule.

~~(C)~~(E) Units and rates:

(1) For the assisted living program, the appendix to rule 5160-1-06.5 of the Administrative Code lists the following:

~~(1)~~(a) ~~One~~ The unit of ~~assisted living~~ service ~~is~~ as one day.

~~(2)~~(b) ~~ODM establishes the~~ The maximum-allowable rates for a unit of a unit of basic assisted living service and a unit of memory care ~~in the appendix to rule 5160-1-06.5 of the Administrative Code.~~

~~(3)~~(2) For the assisted living program, Rule rule 5160-33-07 of the Administrative Code establishes the rate-setting methodology for a unit of ~~the~~ service.