



Common Sense Initiative

Mike DeWine, Governor
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Business Impact Analysis

Agency, Board, or Commission Name: Ohio Department of Developmental Disabilities

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

Licensed Residential Facilities

Rule Number(s):

Rescind: 5123:2-3-01, 5123:2-3-02, 5123:2-3-04, 5123:2-3-05, 5123:2-3-06, 5123:2-3-07, 5123:2-3-08, 5123:2-3-09, 5123:2-3-11

New: 5123-3-01, 5123-3-02, 5123-3-04, 5123-3-05, 5123-3-06, 5123-3-07, 5123-3-08, 5123-3-09, 5123-3-11

Date of Submission for CSI Review: February 14, 2022

Public Comment Period End Date: February 28, 2022

Rule Type/Number of Rules:

☒ **New/ 9 rules**

☐ **Amended/ ____ rules (FYR? ____)**

☐ **No Change/ ____ rules (FYR? ____)**

☒ **Rescinded/ 9 rules (FYR? 8 yes, 1 no)**

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

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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?
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.

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. Section 5123.19 defines "residential facility" as a home or facility, including an Intermediate Care Facility for Individuals with Intellectual Disabilities, 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
- A dwelling in which the only residents with developmental disabilities are in independent living arrangements or are being provided supported living.

The Department licenses two types of residential facilities:

- Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFIID) which are also certified by the Ohio Department of Health in accordance with federal regulations.
- Non-ICFIID residential facilities that provide services primarily to individuals enrolled in Medicaid Home and Community-Based Services (HCBS) waivers.

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Eight rules in Chapter 5123:2-3 are due for five-year review:

- 5123:2-3-01 (Licensed Residential Facilities - Administration and Operation) sets forth requirements for administration and operation of residential facilities licensed in accordance with Section 5123.19 of the Revised Code. The rule is being rescinded and replaced by new rule 5123-3-01 of the same title. New rule 5123-3-01 reflects revisions to:
 - Realign requirements for residential facilities with those for certified agency providers set forth in currently effective rule 5123-2-08 (Provider Certification - Agency Providers).
 - Clarify the roles of licensees and operators.
 - Eliminate provisions regarding swimming pools and annual facility inspections as the provisions are being relocated to new rule 5123-3-02.
 - Eliminate provisions regarding enrollment of staff in the Ohio Attorney General's Retained Applicant Fingerprint Database which is addressed in currently effective rule 5123-2-02 (Background Investigations for Employment).
 - Update citations to the Administrative Code.
- 5123:2-3-02 (Licensed Residential Facilities - Physical Environment Standards, Fire Safety, and Emergency Response Planning) establishes minimum physical environment and safety standards to ensure that individuals living in residential facilities are provided a safe, healthy, and homelike living environment that meets their specific needs. The rule is being rescinded and replaced by new rule 5123-3-02 of the same title. New rule 5123-3-02 reflects revisions to:
 - Incorporate physical space and usage requirements currently set forth in rules 5123:2-3-01 and 5123:2-3-08.
 - Align emergency reporting requirements with current practice.
 - Update citations to the Administrative Code.
- 5123:2-3-04 (Licensed Residential Facilities - Provision of Services and Maintenance of Service Records) establishes standards to ensure that services provided in residential facilities focus on achievement of outcomes that are important to and important for individuals served, that individuals are involved in development and delivery of their services, that the confidentiality of individuals' records is maintained, and that individuals' records are readily accessible for service delivery and for review by the Department. The rule is being rescinded and replaced by new rule 5123-3-04 (Licensed Residential Facilities - Admission of Residents, Provision of Services, and Maintenance of Service Records). New rule 5123-3-04 reflects revisions to:
 - Incorporate provisions related to admission of residents currently set forth in rule 5123:2-3-05.
 - Clarify elements of a summary to be prepared when a resident leaves a residential facility.
 - Align wording with wording used in newer rules.
 - Update citations to the Administrative Code.

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- 5123:2-3-05 (Licensed Residential Facilities - Admission, Termination of Services, and Transfer) establishes uniform policies for admission, termination of services, and transfer of individuals applying for admission to, or living in, residential facilities. The rule is being rescinded and replaced by new rule 5123-3-05 (Licensed Residential Facilities - Transfer and Termination of Services). New rule 5123-3-05 reflects revisions to:
 - Eliminate provisions related to admission of residents as the provisions are being relocated to new rule 5123-3-04.
 - Clarify that a "transfer" is an action initiated by the operator of a residential facility.
 - Include additional details regarding the process for a resident to appeal transfer or termination of services.
 - Update citations to the Administrative Code.

- 5123:2-3-06 (Licensed Residential Facilities - Compliance Reviews, Issuance of Licenses, and Adverse Actions) sets forth processes for reviews conducted by the Department to ensure compliance by residential facilities, the issuance of licenses for residential facilities operating in accordance with Chapters 5123. and 5124. of the Revised Code, and adverse actions for residential facilities not operating in accordance with Chapters 5123. and 5124. of the Revised Code. The rule is being rescinded and replaced by new rule 5123-3-06 of the same title. New rule 5123-3-06 reflects revisions to:
 - Align the process for compliance reviews of residential facilities with the process for certified agency providers set forth in currently effective rule 5123-2-04 (Compliance Reviews of Certified Providers).
 - Clarify that licensure fees are to be paid by electronic check or credit card to align with current practice.
 - Update citations to the Administrative Code.

- 5123:2-3-07 (Licensed Residential Facilities - Immediate Removal of Residents) establishes a process by which the Director of the Department may order the immediate removal of a resident of a residential facility when conditions present an immediate danger of physical or psychological harm to the resident and all other available interventions have proved ineffective or infeasible. The rule is being rescinded and replaced by new rule 5123-3-07 of the same title. New rule 5123-3-07 reflects revisions to:
 - Eliminate paragraph (F) which is redundant.
 - Update citations to the Administrative Code.

- 5123:2-3-08 (Licensed Residential Facilities - Development and Renovation) establishes uniform standards and procedures governing the development and renovation of residential facilities. The rule is being rescinded and replaced by new rule 5123-3-08 of the same title. New rule 5123-3-08 reflects revisions to:
 - Eliminate provisions related to physical space and usage requirements as the provisions are being relocated to new rule 5123-3-02.

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- Incorporate details regarding the feasibility analysis conducted prior to issuance of an initial or modified license.
- Clarify that licensure fees are to be paid by electronic check or credit card and are non-refundable to align with current practice.
- Update citations to the Administrative Code.
- 5123:2-3-09 (Licensed Residential Facilities - Standards for Evaluating Potential Receivers) establishes standards for evaluating potential receivers of residential facilities. The rule is being rescinded and replaced by new rule 5123-3-09 of the same title. New rule 5123-3-09 reflects revisions to:
 - Update citations to the Administrative Code.

One additional rule is included in this package so it may be renumbered:

- 5123:2-3-11 (Licensed Residential Facilities - Room and Board) identifies components of room and board and establishes standards and procedures for determining the amount of earned income and unearned income retained by an individual as personal funds and the amount of room and board for which an individual is responsible when residing in a residential facility other than an ICFIID. The rule is being rescinded and replaced by new rule 5123-3-11 of the same title. New rule 5123-3-11 reflects revisions to:
 - Add "For the purposes of this rule, the following definitions apply:" to paragraph (B).
 - Update a citation to the Administrative Code.
 - Eliminate paragraph (H) that addressed implementation of rule 5123:2-3-11 when it went into effect in 2018.

No changes are being made to the substance of the rule.

In accordance with the Department's established course of renumbering rules to eliminate division numbers, the Department will be rescinding existing rules and adopting new replacement rules. Although the Department will be adopting new rules, versions of the rules showing revisions in underline and strikethrough are provided so stakeholders can readily see what is changing.

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.

5123.04, 5123.19, 5124.03

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.

Medicaid-funded services are subject to federal regulations. Services provided by residential facilities are funded by Medicaid. Provisions of the rules support federal regulations governing Medicaid-funded services for individuals enrolled in HCBS waivers and individuals who reside in ICFIID.

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5. **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.

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)?**

Sections 5123.04, 5123.19, and 5124.03 of the Revised Code require the Department to promulgate rules. Rules are required to ensure Ohio is compliant with the Revised Code and federal regulations governing Medicaid-funded services provided to individuals who reside in ICFIID and those who are enrolled in Department-administered HCBS waivers.

7. **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 residential facilities in terms of the number of individuals receiving services, the health and welfare of individuals receiving services, individuals' satisfaction with the services they receive, and Ohio's compliance with the federal Medicaid program and the approved HCBS waivers.

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.

During the week of February 7, 2022, Department staff reached out via telephone to representatives of the following groups to provide an overview of changes being proposed:

The Arc of Ohio

Ohio Association of County Boards Serving People with Developmental Disabilities

Ohio Health Care Association/Ohio Centers for Intellectual Disabilities

Ohio Provider Resource Association

Ohio Waiver Network

Values and Faith Alliance

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Through the Department's rules clearance process, the rules and the Business Impact Analysis form are 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 Centers for Intellectual Disabilities
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 are posted at the Department's website during the clearance period for feedback from the general public:

<https://dodd.ohio.gov/wps/portal/gov/dodd/forms-and-rules/rules-under-development/2-proposed-rules-for-review-and-comment>

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

Stakeholders asked that requirements for training of residential facility staff be realigned with requirements for staff of certified agency providers set forth in rule 5123-2-08 (Provider Certification - Agency Providers). Staff training required by new rule 5123-3-01 has been realigned.

Stakeholders suggested that all provisions related to the physical space and usage should be relocated to a single rule. In response to this suggestion, provisions currently included in rules 5123:2-3-01 and 5123:2-3-08 were incorporated into new rule 5123-3-02.

Stakeholders asked that emergency reporting requirements set forth in new rule 5123-3-02 be aligned with more recent guidance regarding emergencies and resident relocation issued by the Department. The requirements were revised accordingly.

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Individuals served and residential facilities have experienced delays in obtaining medications, records, and personal belongings when an individual relocates to a new residential setting. New rule 5123-3-04 reflects clearer language intended to minimize delays.

Individuals subject to transfer or termination of services by a residential facility and residential facilities have in some cases indicated that the administrative appeal process timelines are unrealistic. New rule 5123-3-05 permits a mediator to hold a mediation open when additional time is needed for an individual to transition to another residence.

Stakeholders asked that the compliance review process for residential facilities be more closely aligned with the process for certified agency providers set forth in rule 5123-2-04 (Compliance Reviews of Certified Providers). Paragraphs (D) and (E) of new rule 5123-3-06 were reworded to align with paragraphs (C)(3) and (D) of rule 5123-2-04.

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?

None. The focus of the review of Chapter 5123:2-3 rules was incorporating stakeholder feedback and clarifying points that have caused confusion over the past five years.

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?

The Department considered removing some provisions but determined the Revised Code requires the provisions to be addressed in Department rules.

13. 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 federal Centers for Medicare and Medicaid Services requires Ohio to implement Medicaid-funded programs in a uniform, statewide manner.

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

In accordance with Section 5123.19 of the of the Revised Code the Department is responsible for promulgating rules regarding residential facilities licensed by the Department. Section 5124.03 of the Revised Code requires the Department to adopt rules to implement Chapter 5124. which governs ICFIID. Department staff collaborate with staff of the Ohio Department of Medicaid when developing rules governing Medicaid-funded services.

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15. 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.

Information regarding the revisions being made to the rules will be provided through resources posted at the Department's website and via listservs, publications, and webinars. The final-filed rules will be posted at the Department's website and directly disseminated to county boards of developmental disabilities and the approximately 3,000 persons who subscribe to the Department's rules notification listserv. The Department will adjust its compliance review tools and guidance materials to reflect revisions made to the rules. Staff of the Department's Office of System Support and Standards and Division of Residential Resources are available to provide technical assistance as needed.

Adverse Impact to Business

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

Scope of Impacted Business Community

The rules apply to the 1,070 residential facilities licensed by the Department, of which 421 are ICFIID.

Type of Residential Facility	Number
ICFIID	421
Non-ICFIID	649

Nature of Adverse Impact

In addition to provider staff time to comply with the requirements generally, the adverse impact of the rules as they already exist includes:

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Rules 5123-3-01, 5123-3-02, 5123-3-04, 5123-3-06, and 5123-3-08 require providers of services to report information and/or provide records to the Department.

Rule 5123-3-01 requires a residential facility to:

- Be licensed by the Department and when applicable, obtain approval from the Ohio Department of Medicaid to provide Medicaid Home and Community-Based Services.
- Conduct background investigations and train residential facilities staff that have associated costs (e.g., enrollment of staff in Rapback and First Aid/CPR training).

Paragraph (D) of rule 5123-3-05 requires a residential facility to provide advance written notice if it intends to transfer an individual to another facility or terminate an individual's services.

Paragraph (G) of rule 5123-3-06 imposes sanctions for failure to comply with rules governing operation of residential facilities.

Paragraph (J) of rule 5123-3-06 requires payment of licensure fees.

Expected Adverse Impact

Enrolling staff in Rapback costs \$5 per year per employee. Enrolling employees in Rapback ensures the residential facility receives notification should an employee be charged or convicted of a disqualifying offense. Enrolling employees in Rapback is more economical than requesting periodic criminal records checks by the Bureau of Criminal Identification and Investigation.

Some of the training that must be completed by staff of residential facilities is made available by the Department free-of-charge. Some training is provided or arranged by the residential facility. Some residential facilities provide training in-house. Some may pay for their staff to complete the training provided by another entity. The associated costs will vary based on the arrangements made for training and the number of staff trained.

The licensure fees set forth in paragraph (J) of rule 5123-3-06 have been in place since 2016. The fees remain unchanged. Fees vary based on the term of the license and the size of the residential facility.

Three-year license:

- \$300 for a facility with 15 or fewer beds
- \$1,500 for a facility with 16 or more beds

One-year license:

- \$100 for a facility with 15 or fewer beds
- \$500 for a facility with 16 or more beds

Although ensuring compliance with the rules requires residential facility staff time, it is not anticipated that ensuring compliance with the proposed new rules will require any more or

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less staff time than ensuring compliance with the currently effective rules. The cost of staff time to comply with the requirements of the rules varies widely by residential facility based on multiple factors such as the nature and number of residents served and wages paid to staff.

17. 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 governing operation of residential facilities.

Regulatory Flexibility

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

Existing rule 5123-3-10 (Licensed Residential Facilities - Procedures to Waive Rule Requirements) allows the Department to waive a condition of Chapter 5123-3 of the Administrative Code or rules in other chapters governing licensed residential facilities.

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?

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 when:

1. Failure to comply does not result in the misuse of state or federal funds;
2. The regulation being violated, or the penalty being implemented, is not a regulation or penalty required by state or federal law; and
3. The violation does not pose any actual or potential harm to public health or safety.

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

Staff of the Department's Office of System Support and Standards and Division of Residential Resources are available to provide technical assistance as needed.