



## Common Sense Initiative

**Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor

**Sean McCullough**, Director

### Business Impact Analysis

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

**Rule Contact Name/Contact Information:** Becky.Phillips@dodd.ohio.gov, 614-644-7393

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

Home and Community-Based Services and Settings

**Rule Number(s):** 5123:2-9-02 (Rescind) and 5123-9-02 (New)

**Date of Submission for CSI Review:** May 5, 2022

**Public Comment Period End Date:** May 19, 2022

**Rule Type/Number of Rules:**

☒ New/ 1 rule

☐ Amended/\_\_\_\_ rules (FYR? \_\_\_\_)

☐ No Change/\_\_\_\_ rules (FYR? \_\_\_\_)

☒ Rescinded/ 1 rule (FYR? Yes)

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.

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**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.*

Rule 5123:2-9-02 (Home and Community Based Services Waivers - Ensuring the Suitability of Services and Service Settings) establishes standards to ensure that the Medicaid Home and Community-Based Services (HCBS) waivers administered by the Ohio Department of Developmental Disabilities maximize opportunities for enrolled individuals to access the benefits of community living and receive services in the most integrated setting. The HCBS waiver program is authorized by Section 1915(c) of the Social Security Act.

HCBS waivers are available to Ohioans with developmental disabilities so they may receive services in their own homes as an alternative to receiving services in an institutional setting. 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. An individual with developmental disabilities enrolls in a specific waiver based on his or her needs. As of May 2, 2022, more than 42,000 individuals were enrolled in HCBS waivers administered by the Department:

- Individual Options Waiver = 24,269
- Level One Waiver = 15,837
- Self-Empowered Life Funding Waiver = 2,105

Additional information about the waivers administered by the Department is available at:

<https://dodd.ohio.gov/wps/portal/gov/dodd/waivers-and-services/welcome/>

Rule 5123:2-9-02 is due for five-year review. In accordance with its established course of renumbering rules to remove the division number, the Department is rescinding rule 5123:2-9-02 and adopting replacement rule 5123-9-02 of the same title. Although the Department is rescinding the existing rule and adopting a replacement rule, a version of the rule that indicates the revisions being made is provided so stakeholders can readily see what is changing.

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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, 5166.21

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.*

Yes; the rule implements federal requirements regarding HCBS settings characteristics.

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 rule does not exceed the federal requirement.

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)?

The rule is necessary to ensure that individuals enrolled in HCBS waivers receive services in accordance with federal regulations.

7. 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 in terms of achieving compliance with 42 CFR 441.301 (c)(4) and (c)(5) for individuals enrolled in HCBS waivers administered by the Department.

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.*

Prior to development of rule 5123:2-9-02 in 2014, the Department convened a group of stakeholders from across Ohio's developmental disabilities system to recommend strategies

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for compliance with 42 CFR 441.301(c)(4). The group included:

- Advocates
- Advocacy and Protective Services, Inc.
- The Arc of Ohio
- Ohio Association of County Boards of Developmental Disabilities
- Ohio Department of Medicaid
- Ohio Provider Resource Association
- Ohio Self Determination Association
- Ohio Superintendents of County Boards of Developmental Disabilities
- Ohio Waiver Network
- People First of Ohio
- Values and Faith Alliance

On November 29, 2021, the draft rule was discussed at a meeting of the Waiver Workgroup which includes representatives of:

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

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

- Advocacy and Protective Services, Inc.
- The Arc of Ohio
- Autism Society of Central Ohio
- Councils of Governments
- Disability Rights Ohio
- Down Syndrome Association of Central Ohio
- Family Advisory Council
- The League
- Ohio Association of County Boards of 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

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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 rule and the Business Impact Analysis form will be posted at the Department's website during the clearance period for feedback from the general public:

<https://dodd.ohio.gov/forms-and-rules/rules-under-development/proposed+rules+for+review>

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

Stakeholders indicated rule 5123:2-9-02 was confusing in the manner it addresses leases and residency agreements. The rule was restructured to better distinguish between a lease (as described in Chapter 5321. of the Revised Code) and a residency agreement (as defined in the rule and applicable to residential facilities licensed by the Department and Shared Living settings when the caregiver is not related to the individual receiving services).

Stakeholders provided information about situations potentially operating outside of the federal requirements that were inadvertently overlooked when rule 5123:2-9-02 was initially developed. Paragraph (B)(14)(e) was modified to address these situations.

A stakeholder's suggestion to remove references to congregate and non-congregate settings was incorporated in paragraph (C)(2).

**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?**

Outcomes of provider compliance reviews conducted in 2017 through 2021 indicate the rule has been effective in ensuring residential and day services are delivered in settings compliant with federal regulations governing HCBS. During this period, only 135 citations resulted from the 11,637 times questions regarding service settings were asked:

Question	Cited / Asked
Are day waiver services provided in a non-residential setting?	1 / 1,637 0.06%
Are waiver services being provided in a setting that is NOT in a publicly-operated or privately-operated facility that also provides inpatient institutional OR in a building on the grounds of or adjacent to a publicly-operated facility that provides inpatient institutional treatment?	2 / 3,692 0.05%
Are waiver services delivered in a manner which supports each individual's full participation in the greater community, considering individual choices, preferences, and needs?	127 / 2,920 4.35%

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Question	Cited / Asked
In all residential waiver settings, does the individual have the freedom to: <ul style="list-style-type: none"> <li>• select roommates</li> <li>• privacy and security including locks and keys to living unit</li> <li>• decorate living unit</li> <li>• have visitors of choosing at any time</li> <li>• control schedule and activities</li> <li>• access food at any time?</li> </ul>	5 / 2,880 0.17%
Are the provider's buildings, vehicles, or other public items free from signs showing that services are given to people with developmental disabilities?	0 / 508 0%
<b>Total</b>	135 / 11,637 1.16%

**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?**

None; the Department considered and implemented suggestions made by stakeholders.

**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?**

The rule already exists. 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 the Medicaid HCBS waivers it administers. Department staff collaborate with staff of the Ohio Department of Medicaid to ensure rules align with state initiatives and federal regulations.

**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.**

The rule already exists. Information regarding proposed revisions to the rule will be posted at the Department's website and disseminated to stakeholder representatives for clearance. The final-filed rule will be posted at the Department's website and disseminated to county boards of developmental disabilities and the approximately 3,000 persons who subscribe to the Department's rules notification listserv. Staff of the Division of Medicaid Development and Administration and the Office of System Support and Standards are available to provide

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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.*

The rule implements federal regulations governing HCBS settings and impacts providers of services to individuals enrolled in HCBS waivers administered by the Department. Section 5123.045 of the Revised Code sets forth that a provider of HCBS must be certified pursuant to Section 5123.161 of the Revised Code or licensed pursuant to section 5123.19 of the Revised Code.

Paragraph (F)(1) requires individuals living in licensed residential facilities or Shared Living settings when the caregiver is not related to the individual to have residency agreements. This requirement impacts:

- Approximately 650 licensed residential facilities that provide HCBS,
- Potentially 1,018 certified agency providers of Shared Living, and
- Potentially 5,278 certified independent providers of Shared Living.

Paragraph (F)(2) requires individuals living in provider-controlled residential settings to have leases. "Provider-controlled residential setting" is defined in paragraph (B)(14) of the rule. The number of provider-controlled residential settings is unknown to the Department.

Preparing and securing signatures on residency agreements or leases takes provider time. The amount of time and related costs will vary among providers depending on the nature and complexity of a provider's operations, the wages paid to staff who perform these duties, and the number of individuals served by the provider who reside in a setting that requires a residency agreement or lease.

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

Ohio must comply with 42 CFR 441.301.

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## **Regulatory Flexibility**

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

No; the purpose of the rule is to establish federally-compliant statewide standards.

**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 Division of Medicaid Development and Administration and the Office of System Support and Standards are available to provide technical assistance as needed.