

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: Developmental Disabilities Level of Care

Rule Number(s): 5123:2-8-01 (New), 5123:2-7-06 (Rescind)

Date: January 22, 2015

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Rescinded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.

Rule 5123:2-8-01 is a proposed new rule that will replace one Ohio Department of Developmental Disabilities rule:

- 5123:2-7-06 (*Intermediate Care Facilities - Level of Care Review Process*)

and three Ohio Department of Medicaid rules:

- 5160-3-07 (*Intermediate Care for Individuals with Developmental Disabilities*);
- 5160-3-15.3 (*Level of Care Review Process for Intermediate Care Facilities*); and
- 5160-3-15.5 (*ICF Level of Care Determination Process for Home and Community-Based Medicaid Waivers Administered by the Ohio Department of Developmental Disabilities*).

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The proposed new rule sets forth the criteria and process used to determine whether a person has the level of care necessary to receive Medicaid-funded services as a resident of an Intermediate Care Facility or through enrollment in a Home and Community-Based Services waiver administered by the Ohio Department of Developmental Disabilities.

The criteria and process are being delineated in an Ohio Department of Developmental Disabilities rule because the Department is responsible for overseeing a statewide system of supports and services for people with developmental disabilities and their families.

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

5123.04, 5124.03

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.

Yes. The rule implements 1902 (a)(30)(A) of the Social Security Act and 42 C.F.R. 435, Subpart C and is necessary to safeguard against unnecessary institutionalization and to ensure that only eligible individuals participate in components of the Medicaid program.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Not applicable. The rule does not exceed the federal requirement.

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)?

The rule is required pursuant to 1902 (a)(30)(A) of the Social Security Act and 42 C.F.R. 435, Subpart C and is necessary to safeguard against unnecessary institutionalization and to ensure that only eligible individuals participate in components of the Medicaid program.

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

The Department will measure success when only those individuals who are eligible for Medicaid-funded services are determined to have a Developmental Disabilities Level of Care.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review

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of the draft regulation. *If applicable, please include the date and medium by which the stakeholders were initially contacted.*

The Ohio Department of Medicaid convened representatives of the following organizations to discuss level of care, including plans to rescind existing Ohio Department of Medicaid rules and create a new Ohio Department of Developmental Disabilities rule:

- Academy of Senior Health Sciences, Inc.
- American Association of Retired Persons
- Area Agencies on Aging
- CareSource
- CareStar
- Catholic Social Services of Miami Valley
- Centers for Independent Living
- County Boards of Developmental Disabilities
- County Departments of Job and Family Services
- Disability Rights Ohio
- Leading Age Ohio
- Linking Employment, Abilities, and Potential
- Midwest Care Alliance
- Ohio Council for Home Care and Hospice
- Ohio Council of Behavioral Health and Family Services Providers
- Ohio Department of Aging
- Ohio Department of Health
- Ohio Department of Mental Health and Addiction Services
- Ohio Health Care Association
- Ohio Hospital Association
- Ohio Long Term Care Ombudsmen
- Ohio Olmstead Task Force
- Ohio Provider Resource Association
- Providers of Ohio Department of Medicaid Home and Community-Based Services
- Public Consulting Group, Inc.
- Transitional Living Centers, Inc.

The Department formed a level of care rule workgroup in January 2012. The workgroup met monthly during 2012 and periodically in 2013 and included representatives of the following organizations:

- The Arc
- Disability Rights Ohio
- Ohio Association of County Boards Serving People with Developmental Disabilities
- Ohio Department of Medicaid
- Ohio Health Care Association
- Ohio Provider Resource Association

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

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
The League
Ohio Association of County Boards Serving People with Developmental Disabilities
Ohio Developmental Disabilities Council
Ohio Health Care Association
Ohio Provider Resource Association
Ohio Self Determination Association
Ohio SIBS (Special Initiatives by Brothers and Sisters)
Ohio Superintendents of County Boards of Developmental Disabilities
Ohio Waiver Network
People First of Ohio
Values and Faith Alliance

During the clearance period, the proposed new rule, the rule to be rescinded, and the Business Impact Analysis will be posted at the Department's *Rules Under Development* webpage (<https://doddportal.dodd.ohio.gov/rules/underdevelopment/Pages/default.aspx>) for feedback from the general public.

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

Over the course of a year, members of the level of care rule workgroup provided input on the components of the new level of care assessment tool, definitions used in the new rule, training requirements for personnel completing the assessment, and timelines for completing assessments.

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?

From May 2013 through February 2014, the Department conducted a pilot project to assess the impact of using the new level of care assessment tool to determine eligibility for receiving services through enrollment in a Home and Community-Based Services waiver or as a resident of an Intermediate Care Facility. The tool was piloted by personnel from public and private Intermediate Care Facilities, as well as by employees of county boards of

developmental disabilities. Assessments were completed for 418 individuals. The assessments were evaluated by Truven Analytics who aided the Department to develop the scoring algorithm for the tool and for ensuring maintenance of eligibility for services. Truven Analytics concluded that the tool achieved 100% maintenance of eligibility when factoring in margin of error.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

The Department considered promulgating two separate rules for the Developmental Disabilities Level of Care, one that set forth the criteria and one that set forth the process. The Department instead determined that a simpler approach would be to make one rule that addresses both criteria and process.

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; federal regulations require that the process for determination of eligibility for Medicaid services be uniform statewide.

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

This rule is replacing existing rules. Department staff collaborated with staff of the Ohio Department of Medicaid to coordinate bringing forth new rule 5123:2-8-01 and rescinding the existing Ohio Department of Medicaid rules. The agencies will make their respective rule actions effective on the same date (projected to be July 1, 2015).

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.

The Department will provide training to Intermediate Care Facilities and county boards of developmental disabilities to ensure a smooth transition throughout Ohio. The planned effective date for the new rule is July 1, 2015, to allow sufficient time to complete necessary training.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

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- a. **Identify the scope of the impacted business community;**
- b. **Identify the nature of the adverse impact (e.g., license 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.

- a. The scope of the impacted business community is 420 Intermediate Care Facilities that choose to participate as Ohio Medicaid providers.
- b. The proposed new rule requires Intermediate Care Facilities to complete an initial level of care review for individuals seeking admission to the facility and an annual redetermination for each resident of the facility. Under existing rules, Intermediate Care Facilities are required to complete the initial level of care review for each individual seeking admission, but are not required to complete an annual redetermination for each resident. The impact of completing the annual redeterminations will be offset by elimination of an existing requirement for Intermediate Care Facilities to complete a full assessment (which includes submitting an updated psychological evaluation and an updated medical evaluation) each time a resident returns to the facility after a hospital or convalescent stay or moves from one to another of the provider's Intermediate Care Facilities.

Staff of Intermediate Care Facilities who are evaluators for purposes of making a recommendation to the Department as to whether or not a person meets the criteria for the Developmental Disabilities Level of Care are required to complete Department-approved training.

- c. In the existing level of care review process, the Intermediate Care Facility completes and faxes Ohio Department of Medicaid form 03697 (Level of Care Assessment) to the Department for review. The new level of care review will be completed by the Intermediate Care Facility and submitted to the Department via an automated electronic process. For purposes of determining the impact of completing Ohio Department of Medicaid form 03697 as utilized in the existing process, the Department reached out to several Intermediate Care Facilities for estimates of the cost of completing and submitting the form. Responses indicated that the cost for submitting one 03697 form is approximately \$15 based on the average hourly rate of \$19.08 for a Qualified Intellectual Disability Professional completing the form. It takes approximately 45 minutes to complete the form. On average, the form is completed approximately nine times per year per Intermediate Care Facility. The Department is in the process of automating the level of care review process. Completing and submitting the level of care review via the automated system is expected to take no more time (and may

actually take less time) than the current paper form process. The automated system will be completed in advance of the new rule's effective date (projected to be July 1, 2015).

The Department will provide training to staff of Intermediate Care Facilities via a web-based curriculum at no cost to Intermediate Care Facilities. The web-based approach is being used to allow staff to complete the training at a time that does not disrupt operations of the Intermediate Care Facility and to eliminate the need for travel time and expense.

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

The rule is required to comply with 1902 (a)(30)(A) of the Social Security Act and 42 C.F.R. 435, Subpart C.

Regulatory Flexibility

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

No. Every Intermediate Care Facility must complete the level of care review process prior to admitting an individual to the facility and annually for each resident of the facility.

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?

The Department will provide training for all affected entities. Staff of the Department's Division of Medicaid will be available to answer questions and provide technical assistance.