

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Developmental Disabilities

Regulation/Package Title: Provider Certification

Rule Number(s): 5123:2-2-01

Date: March 6, 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Rescinded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.

The Ohio Department of Developmental Disabilities is proposing to rescind existing rule 5123:2-2-01 (*Provider Certification*) and bring forth a new rule of the same number and title. The rule establishes procedures and standards for certification of providers of Supported Living services (defined in Section 5126.01 of the Revised Code) including Home and Community-Based Services provided in accordance with Section 5123.045 of the Revised Code. Section 5123.045 requires that a person or entity providing Medicaid Home and Community-Based Services be certified under Section 5123.161 of the Revised Code or licensed as a residential facility under Section 5123.19 of the Revised Code.

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The rule has been restructured to make it easier to read. The requirements for independent provider certification and the requirements for agency provider certification, which are combined in the existing rule, are presented in distinct paragraphs in the new rule. Provisions regarding provider background investigations have been updated to align with newer rule 5123:2-2-02 (*Background Investigations for Employment*) and to reflect new processes being implemented under the leadership of the Office of Health Transformation. Recommendations made by a panel reviewing the health and safety system for individuals with developmental disabilities who receive services as well as the workgroup convened to develop the new rule have been incorporated. Timelines for the Department to process applications for provider certification have been reduced to reflect current practice. The list of services for which some providers are exempted from some provisions of the rule has been updated. The term of initial provider certification has been increased from one year to three years. Citations to the Administrative Code and Revised Code have been updated.

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

5123.04, 5123.1610

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program? If yes, please briefly explain the source and substance of the federal requirement.

The approved Medicaid Home and Community-Based Services waivers administered by the Department require providers of services to be certified by the Department.

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 a 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)?

Section 5123.1610 of the Revised Code requires the Department to adopt rules to establish a process and standards for obtaining and renewing Supported Living certification and the standards that must be met to provide Supported Living. The federally-approved Medicaid Home and Community-Based Services waivers require providers to be certified by the Department as one component of ensuring health and welfare of individuals served.

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

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The Department will measure success when only providers that meet the requirements for providing a service are certified by the Department.

Development of the Regulation

- 7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation. *If applicable, please include the date and medium by which the stakeholders were initially contacted.***

In January 2014, the Department convened a panel of stakeholders to review Ohio's health and safety system for individuals with developmental disabilities who receive services.

Panel membership included:

Disability Rights Ohio;

Three representatives identified by the advocacy community;

Three representatives identified by providers; and

Three representatives identified by county boards of developmental disabilities.

The Panel met four times and made multiple recommendations regarding provider certification.

The Department convened a group of stakeholders representing the following organizations to participate in development of the new Provider Certification rule. The rule workgroup met two times in 2014 (October 29 and December 2).

The Arc of Ohio

Ohio Association of County Boards Serving People with Developmental Disabilities

Ohio Health Care Association

Ohio Provider Resource Association

Ohio Self Determination Association

Ohio SIBS (Special Initiatives by Brothers and Sisters)

Ohio Waiver Network

People First of Ohio

Values and Faith Alliance

Through the Department's rules clearance process, the proposed new rule 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

Family Advisory Council

The League

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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 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?

The panel convened to review the health and safety system for individuals with developmental disabilities made multiple recommendations:

- The Panel recommended that each independent provider meet with a representative of the county board of developmental disabilities when selected to provide services to ensure the provider understands his or her responsibilities. This suggestion was incorporated as paragraph (C)(1)(k).
- The Panel recommended that providers be required to complete training to ensure that they understand and are committed to the role and responsibilities of being a provider. A requirement to complete the training was included in paragraphs (C)(2)(a) and (C)(2)(b) for independent providers and in paragraphs (D)(1)(h) and (D)(1)(i) for chief executive officers of agency providers.
- The Panel made specific recommendations to ensure the integrity of agency provider organizations. In response, the definition of "agency provider" in paragraph (B)(1) was revised to include a requirement that the agency employ at least one person in addition to the chief executive officer. Paragraph (D)(2) was added to make clear that the chief executive officer or other person designated to be responsible for administration must be actively engaged in the day-to-day operation of the agency. Paragraph (D)(4) was added to require the agency provider to notify the Department if the chief executive officer or other person responsible for administration is a related party of a person or government entity for which the Department refused to issue/renew or revoked certification. Paragraph (D)(5) was added to require the agency provider to notify the Department when the chief executive officer or other person responsible for administration leaves the agency's employ. Paragraph (D)(6) was added to require the agency provider to identify persons owning a financial interest of five or more percent. Paragraph (D)(8)(b) was

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added to require the agency provider to hold a certificate of good standing from the Ohio Secretary of State. Paragraph (D)(11) was added to require the agency provider to maintain comprehensive general liability insurance.

Members of the rule workgroup suggested that the Department reconsider its initial plan to make the rule applicable to licensed residential facilities that also provide Medicaid Home and Community-Based Services. The Department heeded this suggestion. The workgroup also suggested the minimum age for the chief executive officer of an agency provider be increased from 18 to 21. This suggestion was incorporated in paragraph (D)(1)(a). Representatives of county boards of developmental disabilities suggested the timeline set forth in paragraphs (G)(4) and (G)(5)(a) for the Department to notify a provider of the provider's Medicaid provider number was too long; the timeline was adjusted from 20 to 10 days.

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?

Paragraph (D)(10) was added to require agency providers to establish internal compliance systems as provider compliance review data revealed that some providers were not performing background checks well or billing accurately. The Department considered historical data regarding suspension and revocation of provider certification. Based on patterns and indicators common among struggling providers, paragraph (D)(13) was added to require an agency provider to be current in payment of payroll taxes, workers' compensation premiums, and unemployment compensation premiums.

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?

For the purpose of streamlining rules, the Department considered making rule 5123:2-2-01 applicable to licensed residential facilities that also provide Medicaid Home and Community-Based Services; this strategy was rejected by some stakeholders.

Two members of the rule workgroup suggested that the Department eliminate the requirement set forth in paragraphs (C)(1)(c) and (D)(17)(d) for direct care workers to hold a high school diploma or GED. The Department determined that lowering the standard was not in the best interest of individuals who receive services. The referenced paragraphs deem eligible direct care workers who were engaged in service delivery when the requirement to hold a high school diploma or GED was put in place in 2009. Further, paragraph (N)(1) authorizes the Department to waive a requirement of the rule; for good cause on a case-by-case basis, the Department has waived and will continue to waive this requirement when good cause is shown.

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; Section 5123.1610 of the Revised Code requires the Department to adopt rules to establish a process and standards for obtaining and renewing Supported Living certification and the standards that must be met to provide Supported Living.

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

The rule governs providers of Supported Living services provided to individuals with developmental disabilities. Section 5123.1610 of the Revised Code requires the Department to adopt rules to establish a process and standards for obtaining and renewing Supported Living certification and the standards that must be met to provide Supported Living. There are no other rules in this area.

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.

Representatives of provider organizations and county boards of developmental disabilities were engaged to develop the rule and have already shared drafts of the rule with their members so there is general awareness that a new rule is forthcoming. The Department will disseminate the final-filed rule via multiple electronic distribution lists. The Department administers the provider certification application process and will modify its web-based provider portal to ensure it aligns with the new rule. Staff of the Department's Provider Certification Unit and the Office of Provider Standards and Review are available to answer questions and provide technical assistance to stakeholders as needed. Staff of these units consult with one another to ensure Department practices and technical assistance are consistent.

Adverse Impact to Business

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

a. Identify the scope of the impacted business community;

The rule applies to approximately 8,600 independent providers (i.e., a self-employed person who does not employ, either directly or through contract, anyone else to provide the services) and approximately 2,300 agency providers (i.e., an entity that directly employs at least one person in addition to the chief executive officer for the purpose of providing services) that hold Supported Living certification to provide

services to individuals enrolled in Medicaid Home and Community-Based Services administered by the Department. In 2013, the Department received 5,051 applications for provider certification:

	Independent Providers	Agency Providers
Initial Certification	1,441	219
Renewal Certification	1,949	596
Add Service	505	341

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

A provider of Supported Living services, including Home and Community-Based Services, must be certified by the Department. Becoming certified requires submission of information and documents and payment of an application fee. The Department may deny, suspend, or revoke a provider's certification for good cause.

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 Department developed the web-based Provider Certification Wizard to make the application process as easy as possible. Department staff estimate that it takes an applicant for initial independent provider certification two to four hours to gather and submit information and documents. Department staff estimate that it takes an applicant for initial agency provider certification four to six hours to gather and submit information and documents. Submitting an application for renewal certification is anticipated to take less time as applicants are familiar with the process. Applicants for provider certification are required to pay application fees as follows:

- The application fee for an independent provider seeking initial certification or renewal certification is \$125.
- The application fee for a small agency provider (i.e., one that serves 50 or fewer individuals) seeking initial certification or renewal certification is \$800.
- The application fee for a large agency provider (i.e., one that services 51 or more individuals) seeking initial certification or renewal certification is \$1,600.

Application fees for adding one or more services during the term of existing provider certification are:

- \$25 for an independent provider;
- \$75 for a small agency provider; and
- \$150 for a large agency provider.

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

Section 5123.1610 of the Revised Code requires the Department to adopt rules to establish a process and standards for obtaining and renewing Supported Living certification and the standards that must be met to provide Supported Living. The federally-approved Medicaid Home and Community-Based Services waivers require providers of waiver services to be certified by the Department as one component of ensuring the health and welfare of individuals served.

Regulatory Flexibility

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

Paragraph (N) of the rule authorizes the Department to waive a specific provision of the rule when requested in writing with justification that demonstrates that the health and safety of individuals with developmental disabilities will not be adversely affected.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

It is the policy of the Department to waive penalties for first-time or isolated paperwork or procedural regulatory noncompliance whenever appropriate. The Department believes the waiver of these penalties is appropriate under the following circumstances:

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

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

Staff of the Department's Provider Certification Unit and Office of Provider Standards and Review will provide applicants and certification holders with technical assistance as necessary. The Department posts related information and materials at its website and disseminates targeted messages to providers via an electronic distribution list. Larger county boards of developmental disabilities have staff available to assist potential providers to become certified.