



*Empowering Elders.  
Strengthening Communities.*

**Mike DeWine**, Governor  
**Ursel J. McElroy**, Director

**PUBLIC-COMMENT PERIOD**  
**ODA PROVIDER CERTIFICATION: ASSISTED LIVING SERVICE**

SEPTEMBER 5, 2019

ODA reviewed rule 173-39-02.16 of the Administrative Code and now proposes to rescind the rule and to adopt a new rule in its place.<sup>1</sup>

Please feel free to review the proposed new rule and its business impact analysis (BIA) and offer recommendations for improving the rule or BIA. Submit recommendations to [rules@age.ohio.gov](mailto:rules@age.ohio.gov) no later than **Wednesday, September 18, 2019** at 11:59PM.

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<sup>1</sup> Although ODA will file this rule with JCARR as a new rule, for the public-comment period, ODA shows the rule as an amended rule.



## 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):

### ASSISTED LIVING SERVICE

This rule establishes requirements for ODA-certified assisted living providers on providing the assisted living service.

Rule Number: 173-39-02.16

Date of Submission for CSI Review: September 5, 2019

Public Comment Period End Date: September 18, 2019

**Rule Type/Number of Rules:**

New/ 1 rules

Amended/ 0 rules (FYR? )

No Change/ 0 rules (FYR? )

Rescinded/ 1 rules (FYR?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?

Please review the next page.

**The rule:**

- 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.*

**OVERVIEW**

The Ohio Dept. of Health (ODH) licenses residential care facilities (RCFs). ODA certifies licensed RCFs who voluntarily decide to apply for certification to participate in the Assisted Living Program. Today, 51% of Ohio's licensed RCFs are so certified.<sup>1</sup>

In the same way that hospitals have separate bills for facility charges and professional charges, RCFs have separate facility and service charges. Individuals residing in the RCF pay for the facility charges. The Assisted Living Program pays for the service charges. Therefore, this rule applies to the assisted living service.

ODA proposes to rescind the current rule and to adopt a new rule of the same number in its place. The proposed new rule is substantially similar to the current rule, although the order or paragraphs differs.

**SPECIFIC AMENDMENTS**

**Title**

ODA proposes to add "ODA provider certification" to the beginning of the rule's title.

**Definitions**

As indicated in the table below, ODA proposes to (1) consolidate the components of the definition of "assisted living service" in (A) and under (B)(1) of the current rule, and (2) update the description of those components.

DEFINITION COMPONENTS IN CURRENT RULE	UPDATED DEFINITION COMPONENTS IN PROPOSED NEW RULE
"Personal care service" in (A) and (B)(1)(b)(i)(a).	Part of "Hands-on assistance, supervision, and/or cuing of ADLs and IADLs" in (A)(1)(b)(i).
"Supportive service" in (A).	
"A housekeeping service, a laundry service for personal and non-personal laundry," and "another supportive service" in (B)(1)(b)(i)(b).	
"A nursing service" in (A).	"Nursing activities, including the following:

<sup>1</sup> For more details, see ODA's response to #14a.

DEFINITION COMPONENTS IN CURRENT RULE	UPDATED DEFINITION COMPONENTS IN PROPOSED NEW RULE
<p>"A nursing service that includes all of the following:</p> <p>(i) A health assessment, including the initial health assessment under paragraph (C) of rule 3701-17-58 of the Administrative Code and the subsequent health assessment required under paragraph (D) of rule 3701-17-58 of the Administrative Code;</p> <p>(ii) Monitoring of the consumer according to the standards of practice for the consumer's condition;</p> <p>(iii) Medication management; and,</p> <p>(iv) Part-time, intermittent skilled nursing care, as described in rule 3701-17-59.1 of the Administrative Code, when not available to the consumer through a third-party payer." in (B)(1)(b)(i)(g).</p>	<p>(a) Initial and subsequent health assessments under rule 3701-16-08 of the Administrative Code.</p> <p>(b) Monitoring the individual according to the standards of practice for the individual's condition.</p> <p>(c) Medication management according to rule 3701-16-09 of the Administrative Code.</p> <p>(d) 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" in (A)(1)(b)(ii).</p> <p>But not including the following:<sup>2</sup></p> <p>(a) "Twenty-four-hour skilled nursing care" in (A)(1)(c)(iii).</p> <p>(b) "One-on-one supervision of an individual" in (A)(1)(c)(iv).</p>
"Coordination of meals" in (A).	
"The coordination of three meals per day provided in accordance with paragraph (B) of rule 3701-17-60 of the Administrative Code, including special diets, as defined in rule 3701-17-50 of the Administrative Code" in (B)(1)(b)(i)(d)	"Coordinating three meals per day and snacks according to rule 3701-16-10 of the Administrative Code" in (B)(1)(b)(iii).
"Social and recreational programming" in (A).	
"Social and recreational programming" in (B)(1)(b)(i)(e).	"Coordinating the social, recreational, and leisure activities required under rule 3701-16-11 of the Administrative Code" in (A)(1)(b)(iv)
"A non-medical transportation service" in (A).	
"A scheduled, non-medical transportation services, as agreed upon by the consume and the provider" in (B)(1)(b)(i)(f)	"Scheduled non-medical transportation, as agreed upon by the individual and provider" in (A)(1)(b)(v).
"A routine maintenance service" in (B)(1)(b)(i)(b)	"Any maintenance required under rule 3701-16-15 of the Administrative Code" in (A)(1)(b)(vi).
"On-duty response service" in (A).	
"On-duty response service on a twenty-four-hours-per-day basis to meet, in a timely manner the consumer's unpredictable care needs, supervisory needs, emotional needs, reasonable request for services, and to adequately assist the consumer in performing all activities of daily living" in (B)(1)(b)(i)(c)	"The resident call system required under rule 3701-16-14 of the Administrative Code" in (A)(1)(b)(vii)

ODA proposes to delete the definition of "on duty" from this rule because the term does not appear in the proposed new rule and is replaced by "resident call system" and the cross-reference to [3701-16-14](#). In [3701-16-05](#), ODH requires RCFs to have at least one staff member on duty at all times to respond to requests from individuals through the resident call system.

As indicated in the table below, ODA proposes to (1) relocate and (2) update the following definitions:

<sup>2</sup> These provide part of ODA's clarification to the meaning of "part-time intermittent skilled nursing care." See also, ODA's response to #8.

DEFINITIONS IN CURRENT RULE	UPDATED DEFINITIONS IN PROPOSED NEW RULE
"Medication management' includes knowing what medications a consumer is self-managing, ordering medication, medication reminders, and medication administration" in (D)(1).	"Medication management' includes knowing what medications an individual is self-managing, assistance with self-administration of medication, ordering medication, medication reminders, and medication administration" in (A)(2).
"Staff member' has the same meaning as in rule 3701-17-50 of the Administrative Code" in (D)(4).	"Staff member' and 'staff' have the same meanings as in rule 3701-16-01 of the Administrative Code" in (A)(3).
"Personal care service' has the same meaning as in rule 3701-17-50 of the Administrative Code" in (D)(3).	[defined within the only paragraph in which used] "...personal care services, as defined in rule 3701-16-01 of the Administrative Code" in (B)(7)(c).

### Terminology

Throughout the rule, ODA proposes to update the following terms:

- "Capacity to provide" and "sufficient number of" → "Adequate staffing levels"
- "Consumer" → "individual."
- "Facility" → "RCF" (*cf.*, [173-39-01](#))
- "Residential living unit" and "Private residential living unit" → "resident unit" (*cf.*, [3701-16-01](#)) and "single-occupancy resident unit" (*cf.*, R.C. §[173.548](#))
- "Review of the service plan," "assess," and "quarterly" → "Quarterly assessments," "assess," "quarterly," and activities plan."<sup>3</sup>
- "Service plan" → "person-centered service plan" and "person-centered planning process established in rule [5160-44-02](#) of the Administrative Code."<sup>4</sup>

### RCF Licensure

ODA proposes to highlight R.C. Chapter [3721](#) and A.C. Chapters [3701-13](#) and [3701-16](#) in the requirement to maintain compliance with ODH's licensure laws.

### Resident Units

To comply with federal requirements to offer services to individuals enrolled in Medicaid waiver program only in RCFs with the characteristics of home- and community-based settings, ODA's current rule requires offering the assisted living service in RCFs having home- and community-based characteristics that give the individual choices on privacy and socialization. ODA proposes to retain this flexibility in the rule, with proposed updates, as follows:

- ODA proposes to continue allowing RCFs to give individuals options on sharing their resident units. As indicated in the table below, ODA proposes to remove a requirement for offering such units, but also proposes to add a new requirement for doing so in its place.

REQUIREMENTS TO OFFER DOUBLE-OCCUPANCY UNIT IN CURRENT RULE	UPDATED REQUIREMENTS TO OFFER DOUBLE-OCCUPANCY UNIT IN PROPOSED NEW RULE
"The provider shall only allow a consumer to share a private, residential living unit if:" in (B)(2)(a)(ii).	"The provider shall only provide a double-occupancy resident unit to an individual if all the following have occurred:" in (B)(2)(b)(i)(b).
NA	"The individual is offered and declines an available single-occupancy resident unit" in (B)(2)(b)(i)(b)(j). <sup>5</sup>

<sup>3</sup> The activities plan is a plan the provider's RN develops and redevelops on how to provide activities to the individual.

<sup>4</sup> The person-centered service plan is a plan ODA's designee develops with the individual to say, in part, what services (*e.g.*, the assisted-living service) are authorized and what activities within that service (*e.g.*, 3 meals per day) are authorized for the individual.

<sup>5</sup> ODA's proposal protects individuals from being given only the choice between a (1) sharing a double-occupancy resident unit with a stranger or (2) not moving into the RCF or remaining in the RCF after enrolling in the Assisted Living Program.

REQUIREMENTS TO OFFER DOUBLE-OCCUPANCY UNIT IN CURRENT RULE	UPDATED REQUIREMENTS TO OFFER DOUBLE-OCCUPANCY UNIT IN PROPOSED NEW RULE
"The consumer requests to share his/her unit" in (B)(2)(a)(ii)(a).	"The individual requested a double-occupancy resident unit" in (B)(2)(b)(i)(b)(ii).
"The consumer shares his/her unit with a person with whom the consumer has an existing relationship" in (B)(2)(a)(ii)(b).	"The individual elected to reside in a double-occupancy unit and chose a roommate and the individual and roommate agreed to the living arrangement" in (B)(2)(b)(i)(b)(iii). <sup>6</sup>
"The consumer's case manager verifies that the conditions of paragraphs (B)(2)(a)(ii)(a) and (B)(2)(a)(ii)(b) of this rule are met and authorizes sharing the unit in the individual's service plan" in (B)(2)(a)(ii)(c).	"The requirements of paragraphs (B)(2)(b)(i)(b)(i) to (B)(2)(b)(i)(b)(iii) of this rule are documented by ODA or its designee in the individual's person-centered service plan" in (B)(2)(b)(i)(b)(iv).

- b. ODA proposes to continue requiring locks on resident units to be under the control of the individual unless the RCF retains records showing a physician diagnosed the individual as an individual who would likely experience adverse effects to their health or welfare by having such control. ODA proposes to require these records to be documented in the individual's person-centered service plan.
- c. ODA proposes to continue requiring each resident unit to include a bathroom with a toilet, sink, and shower/bathtub, all of which are in working order. To this requirement, ODA proposes no substantial changes.
- d. ODA proposes to continue requiring each resident unit to have identifiable space, separate from the sleeping area, that provides seating for the individual and one or more visitors for socialization. To this requirement, ODA proposes no substantial changes.

**Availability**

ODA proposes to cross-reference ODH's staffing requirements in [3701-16-05](#) rather than restate them or add to them.

**Minors**

ODA does not propose to make any substantive changes to the limited flexibility to use minors, but does propose to make a non-substantive change to cross-reference ODH's prohibition on minors providing personal care in [3701-16-06](#) rather than continue to restate ODH's prohibition in this rule.

**Initial Qualifications for Staff Members**

As indicated in the table below, ODA proposes to split one of the subject areas on which to train staff into two areas.

SUBJECT AREA IN CURRENT RULE	UPDATE TO SUBJECT AREA IN PROPOSED NEW RULE
"Intermittent cuing, redirecting, and environmental cues for cognitively-impaired consumers and/or behaviorally-impaired consumers" in (B)(3)(d)(iii).	"Cuing, prompting, and other means of effective communication" in (B)(5)(c).
	"Common behaviors for cognitively-impaired individuals, behaviorally-impaired individuals, or other individuals and strategies to redirect or de-escalate those behaviors" in (B)(5)(d).

**Continuing Education**

ODA proposes to cross-reference ODH's requirements for continuing education in [3701-16-06](#) and make verification of successful completion of those requirements available to ODA and its designee upon request.

**Quarterly Assessments**

ODA does not propose to make any substantive changes to the requirements on assessments.

<sup>6</sup> ODA's proposal provides more "fluidity" for individuals who may want to share a resident unit with a stranger. See also ODA's response to #8.

**Subcontracting**

ODA does not propose to make any substantive changes to the limited flexibility to use subcontractors.

**Citations**

ODA proposes to update citations to rules of ODH and Ohio Dept. of Medicaid (ODM).

**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. §§ [173.01](#), [173.02](#), [173.391](#), [173.54](#) and [173.543](#).

**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 Assisted Living Program, [42 CFR 441.352](#) requires ODA to assure CMS in the waiver application that ODA established adequate requirements for RCFs (*i.e.*, adopted this rule) and that ODA monitors the RCFs to assure they comply with those requirements (*i.e.*, comply with this rule).

**5. If the regulation 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 #3, which require ODA to establish the standards for ODA-certified assisted living providers.

**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 ensures necessary safeguards are in place to protect the health and safety of individuals receiving services from ODA-certified assisted living providers.

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

ODA and its designees monitor ODA-certified assisted-living providers to ensure compliance for the continued health and safety of individuals receiving the assisted-living service from them. The rule is judged as being successful when ODA and its designees find few violations from structural compliance reviews<sup>7</sup> 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.

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<sup>7</sup> Cf. 173-39-04

## **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.*

On February 28, 2019, ODA sent each of the following organizations an email announcing that ODA was reviewing this rule and asking for any comments, questions, or recommendations for amendments concerning the rule:

- Catholic Social Services.
- LeadingAge Ohio.
- National Church Residences.
- Ohio Association of Area Agencies on Aging.
- Ohio Assisted Living Association.
- Ohio Council for Home Care and Hospice.
- Ohio Health Care Association.
- Ohio Academy for Senior Health Sciences.
- Ohio Jewish Communities.
- State Long-Term Care Ombudsman.

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

To ODA's February 28, 2019 email, ODA received a response from only one stakeholder: Jean Thompson of the Ohio Assisted Living Association.

Ms. Thompson asked for clarification on what "part-time intermittent skilled nursing" means. On September 5, 2019, ODA gave Ms. Thompson an emailed response saying that to clarify the meaning of "part-time intermittent skilled nursing care," ODA proposes to reference [3701-16-09.1\(A\)](#).

Ms. Thompson also asked for consideration of "more fluid" wording on the requirements to meet before a provider may offer a double-occupancy resident unit to an individual. On September 5, 2019, ODA gave Ms. Thompson an emailed response saying that ODA must comply with federal requirements to offer services to individuals enrolled in the Assisted Living Program only in RCFs with the characteristics of home- and community-based settings, which involves giving the individual choices on privacy and socialization. ODA proposes to no longer require limiting the sharing of a resident unit to only those with whom the individual has an existing relationship, which would allow the individual to choose to share a resident unit with a person with whom they have no prior relationship.

### **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?**

ODA obtained the data used in ODA's response to #16a from ODA and ODH databases and to #16c from an ODA database. ODA cites the ODH database in footnotes to #16a and #16c.

ODA obtained data from the Centers for Disease Control (CDC), which ODA cites in its response to #17.

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**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?**

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 Medicaid waiver programs, such as the Medicaid-funded component of the Assisted Living Program.

**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.***

ODA did not consider performance-based regulations when considering whether to amend this rule.

**14. 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.

**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.**

Before the proposed new rule takes effect, ODA will post it on ODA's website. ODA will also send an email to subscribers of our rule-notification service to feature the rule.

Through its regular monitoring activities, ODA and its designees will monitor certified RCFs for compliance.

**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**

In 2018, 388 RCFs were certified by ODA to provide the assisted-living service to individuals enrolled in either the state-funded or Medicaid-funded component of the Assisted Living Program. As of April 3, 2019, 379 (or 51%) of Ohio's 745<sup>8</sup> RCFs are ODA-certified.

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

ODA's proposal to add "snacks" to the definition of "assisted living service" may appear to create a new requirement for RCFs to provide snacks, but it does not. In [3701-16-10](#), ODH already requires RCFs providing meals to also "offer a nourishing snack" and "make snacks available twenty-four hours a day" unless they permit residents to have food in their resident units.

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<sup>8</sup> OHIO DEPT. OF HEALTH, [Health Care Provider Report & Information Extract](#), April 3, 2019.

ODA's proposal to add "assistance with self-administration of medication" to the definition of "medication management," may appear to create a new requirement for RCFs to provide such assistance, but it does not. The assisted living service already includes personal care (or assistance with ADLs), which includes assistance with self-administration of medication.<sup>9</sup>

ODA proposes for the following requirements to remain substantively the same in this rule:

- Resident units must include bathrooms.
- Resident units must include social space.
- RCFs must have common areas.
- RCFs must maintain adequate staffing levels.
- RCFs have restrictions on using minors to provide the medication management, transportation, or personal care without on-site supervision.<sup>10</sup>

Only two of ODA's proposals may impact an RCF's adverse impact:

- ODA's proposal to no longer prohibit sharing a resident unit with strangers may permit RCFs to reduce their expenses by housing such individuals in double-occupancy resident units. However, ODA also proposes to require the RCF to offer each individual an available single-occupancy unit as an option, would prohibit an RCF from attempting to reduce expenses by only offering double-occupancy rooms with strangers to individuals.
- ODA's proposal requiring physician documentation in the individual's person-centered services plan if a physician's diagnosis of an individual warrants not giving the individual control of the locks to the resident unit. This would require a provider not already providing ODA's designee with such documentation to do so. ODA's designee, in turn, would add the documentation to the individual's person-centered services plan.

**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 amount ODA pays RCFs for services is an all-inclusive rate for the assisted-living service. It's intended to cover the daily costs incurred in providing the assisted-living service (e.g., costs related to the employees, such as orientation and training). The costs incurred as a result of this rule are likely calculated as part of a provider's operational budgets—the cost of doing business and clerical jobs, such as retaining records and updating policies.

RCFs set the prices they bill to the Assisted Living Program for the assisted-living service, so long as those prices do not exceed the maximum allowed price per day. In the appendix to [5160-1-06.5](#) in use in 2018, ODM established the maximum-allowable payment of Medicaid funds for each service offered in the Assisted Living Programs. The table below compares the average price billed to the program in 2018 to the maximum ODM allowed in 2018.

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<sup>9</sup> See also 173-39-02.11.

<sup>10</sup> 3701-16-06 also prohibits using minors to provide personal care without on-site supervision.

2018				
ASSISTED LIVING SERVICE	UNIT DURATION	UNITS PAID	AVERAGE BILLED	MAXIMUM ALLOWABLE
Tier 1	1 day	3,373	\$40.03/day	\$49.98/day
Tier 2	1 day	32,422	\$54.33/day	\$60.00/day
Tier 3	1 day	1,057,665	\$66.14/day	\$69.98/day

ODA's proposal to no longer prohibit sharing a resident unit with a stranger after first offering the individual a single-occupancy unit, may permit RCFs to reduce their expenses by housing willing individuals in double-occupancy resident units. Because ODA is uncertain how many individuals enrolled in the program will choose to share a double-occupancy resident units with a stranger over having their own single-occupancy unit or over another double-occupancy unit with a person with whom they have an existing relationship, ODA cannot estimate how many providers are likely to benefit from the proposal.

ODA's proposal to require physician documentation of a diagnosis warranting not giving the individual control of the locks to the individual's resident unit to be documented in the individual's person-centered service plan would require a RCF to provide (e.g., via email, fax) such documentation to ODA's designee, a transaction which may take up to a minute to complete.

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

ODA is required to develop rules establishing requirements for ODA-certified providers and to ensure the health and safety of individuals enrolled in ODA-administered waiver programs, such as the Assisted Living Program.

RCFs voluntarily apply for ODA certification. Certification is not required for licensure as a RCF, but is required to be paid by the Assisted Living Program for providing the assisted-living service to individuals enrolled in that program. Therefore, compliance with this rule is only required if an RCF voluntarily chooses to participate in the Assisted Living Program as an ODA-certified provider. Any provider wanting paid by the Assisted Living Program must weigh the costs to qualify to be an ODA-certified provider and the costs to provide the service against the income from individuals in the program who pay for the accommodations and from the program which pays for the service.

The adverse impacts of the current rule are being covered by the amount providers are currently being paid by the Assisted Living Program. As previously noted, RCFs have on average billed less than the maximum-allowable rate for the assisted-living service.<sup>11</sup>

All currently-certified RCFs already meet this rule's requirements for resident units on occupancy (i.e., sharing a resident unit), locks, bathrooms, and space for socialization. The following national norms reveal that most RCFs that have not applied for certification are likely able to be certified:

- Only 27% of individuals living in RCFs share a resident unit.<sup>12</sup>
- 77% of RCFs allow residents to lock their resident units from inside the unit.<sup>13</sup>
- 87% of RCFs have a bathroom inside the resident unit.<sup>14</sup>

<sup>11</sup> See the table in #14.c.

<sup>12</sup> [Residential Care Communities and Their Residents in 2010: A National Portrait](#), UNITED STATES DEPT. OF HEALTH AND HUMAN SERVICES: CENTERS FOR DISEASE CONTROL AND PREVENTION, March, 2016, Figure 8-1, p. 64.

<sup>13</sup> *Ibid*, Figure 8-3, p. 66.

<sup>14</sup> *Ibid*, Figure 8-3, p. 66.

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- 91% of RCF residents had visitors and 67% had visitors at least once per week.<sup>15</sup>

This rule's requirements for adequate staffing levels mirrors that of ODH in 3701-16-05 and ensure the individuals residing in the RCF are able to have their unpredictable care needs met.

This rule's restrictions on using minors for medication management, transportation, and personal care ensure these critical activities are performed by responsible adult staff.

This rule's requirements for initial staff qualification require training necessary to ensure the health, safety, and independence of individuals residing in RCFs.

This rule's requirement for continuing education merely cross-references ODH's requirements for continuing education.

This rule's requirements for assessments also ensures the health, safety, and independence of individuals residing in RCFs.

### **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 waiver programs, the rule treats 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 is concerned primarily about protecting the health and safety of individuals receiving services from ODA-certified providers through compliance with this rule. 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.

#### **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 the rule.

Additionally, ODA maintains an [online rules library](#) to help providers find rules regulating them. Providers may access the online library 24 hours per day, 365 days per year.

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<sup>15</sup> *Ibid*, Figure 8-6, p. 69.

173-39-02.16

ODA provider certification: ~~Assisted~~ assisted living service.

~~(A) "Assisted living service" means a service that promotes aging in place by supporting a consumer's independence, choice, and privacy through the provision of one or more components of the service which are a personal care service, a supportive service, an on-duty response service, coordination of meals, social and recreational programming, a non-medical transportation service, and a nursing 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:

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

(ii) Nursing activities, including the following:

(a) 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) 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.

(iv) Coordinating the social, recreational, and leisure activities required under rule 3701-16-11 of the Administrative Code to promote community participation and integration.

(v) Scheduled non-medical transportation, as agreed upon by the individual and provider, to support access to services and resources in the community.

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

(vii) 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 or one-on-one supervision of an individual.

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

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

(B) Requirements for an ODA-certified provider of the assisted living service (service) ~~in addition to the conditions of participation under rule 173-39-02 of the Administrative Code:~~

~~(1) In general:~~

~~(a) Type of provider: Only a residential care facility that the Ohio department of health licenses under rules 3701-17-50 to 3701-17-68 of the Administrative Code and that ODA certifies as an assisted living provider may provide the service.~~

~~(b) Components of the service:~~

~~(i) The provider shall maintain the capacity to provide each of the components of the service and shall provide any one or more components of the service that the consumer's case manager authorizes in the consumer's service plan, except as provided in paragraph (B)(1)(b)(ii) of the rule. The components of the service are as follows:~~

~~(a) A personal care service;~~

- ~~(b) A housekeeping service, a laundry service for personal and non-personal laundry, a routine maintenance service, or another supportive service;~~
- ~~(c) An on-duty response service on a twenty-four-hours-per-day basis to meet, in a timely manner, the consumer's unpredictable care needs, supervisory needs, emotional needs, reasonable requests for services, and to adequately assist the consumer in performing all activities of daily living;~~
- ~~(d) The coordination of three meals per day provided in accordance with paragraph (B) of rule 3701-17-60 of the Administrative Code, including special diets, as defined in rule 3701-17-50 of the Administrative Code;~~
- ~~(e) Social and recreational programming;~~
- ~~(f) A scheduled, non-medical transportation service, as agreed upon by the consumer and the provider; and,~~
- ~~(g) A nursing service that includes all of the following:
  - ~~(i) A health assessment, including the initial health assessment under paragraph (C) of rule 3701-17-58 of the Administrative Code and the subsequent health assessment required under paragraph (D) of rule 3701-17-58 of the Administrative Code;~~
  - ~~(ii) Monitoring of the consumer according to the standards of practice for the consumer's condition;~~
  - ~~(iii) Medication management; and,~~
  - ~~(iv) Part-time, intermittent skilled nursing care, as described in rule 3701-17-59.1 of the Administrative Code, when not available to the consumer through a third-party payer.~~~~
- ~~(ii) The provider may subcontract with a subcontractor to furnish one or more, but not all, of the components of the service that the case manager authorizes for the consumer.~~
- ~~(e) Review of the service plan: The provider's registered nurse or licensed practical nurse shall:~~

- ~~(i) Contact each consumer quarterly to assess, then document the consumer's satisfaction with his/her service plan, and whether the service plan continues to meet his/her needs;~~
- ~~(ii) Document, at least quarterly, whether each consumer's service delivery records show that the consumer is receiving the services as the case manager authorized them in the consumer's service plan; and,~~
- ~~(iii) Document, at least quarterly, whether staff members are providing personal care as required under paragraph (D) of rule 3701-17-59 of the Administrative Code.~~

(1) Requirements for every ODA-certified provider: The provider shall comply with the requirements in rule 173-39-02 of the Administrative Code for every provider and for every assisted living provider.

(2) ~~Facility requirements~~ RCF qualifications:

(a) Licensure: The provider shall maintain a current, valid RCF license from ODH and maintain compliance with Chapter 3721. of the Revised Code and Chapters 3701-13 and 3701-16 of the Administrative Code.

~~(a)(b) Residential living~~ Resident units:

(i) Single- vs. double-occupancy resident units:

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

~~(ii)(b)~~ (b) The provider shall only ~~allow~~ provide a double-occupancy ~~resident unit to a consumer to share a private, residential living unit~~ an individual if all the following have occurred:

(i) The individual is first offered and declined a single-occupancy resident unit.

~~(a)(ii)~~ (ii) The ~~consumer~~ individual ~~requests to share his/her~~ requested a double-occupancy resident unit;

~~(b)(iii)~~ The ~~consumer shares his/her unit with a person with whom the consumer has an existing relationship~~ individual elected to reside in a double-occupancy unit and chose a roommate and the individual and roommate agreed to the living arrangement; ~~and;~~

~~(e)(iv)~~ The ~~consumer's case manager verifies that the conditions requirements~~ of paragraphs ~~(B)(2)(a)(ii)(a) (B)(2)(b)(i)(b)(i) and to (B)(2)(a)(ii)(b) (B)(2)(b)(i)(b)(iii)~~ of this rule are ~~met and authorizes sharing the unit~~ documented by ODA or its designee in the consumer's individual's person-centered service plan.

(c) If an individual who shares a double-occupancy unit no longer wishes to share a resident unit with the previously-chosen roommate, the provider shall work with the individual, ODA, or ODA's designee, and any other person identified by the individual, which may include, but is not limited to the state long-term care ombudsman, to seek new resident unit options.

~~(iii)(ii)~~ Lock: ~~The~~ Each resident unit shall have a lock that allows the ~~consumer 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 ~~that~~ the ~~consumer's individual's~~ diagnosis indicates ~~that~~ the ~~consumer's individual's~~ ability to lock the resident unit is likely to have an adverse effect on the consumer's individual's health or welfare;

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

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

~~(b)(c)~~ Common areas: The provider shall provide common areas ~~that are~~

accessible to the ~~consumer~~ 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) ~~Staffing and staff qualifications~~ 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.

~~(a) Nurses: The provider shall retain, either directly or through the use of a subcontractor, the services of a registered nurse or a licensed practical nurse as those terms are defined in Chapter 4723. of the Revised Code.~~

~~(b) On-duty response staff: The provider shall furnish a sufficient number of on-duty staff members to meet the on-duty response service requirement under paragraph (B)(1)(b)(i)(e) of this rule.~~

~~(e)~~ (4) Minors: The provider shall not allow any staff member ~~who is~~ under eighteen years of age to do any of the following:

~~(i)~~ (a) Assist with medication management;

~~(ii)~~ (b) Provide a transportation ~~service; or,~~

~~(iii)~~ (c) Provide ~~hands-on assistance with bathing, toileting, or transferring personal care (other than assistance with self-administration of medication)~~ without on-site supervision, in accordance with rule 3701-16-06 of the Administrative Code.

~~(d)~~ (5) ~~Training requirements: Initial staff qualifications:~~ The provider shall ~~document that, before each~~ only permit a staff member ~~provides to provide his/her first this service to a consumer, he/she if the staff member is trained successfully completed training~~ in the following subject areas:

~~(i)~~ (a) Principles and philosophy of assisted living;

~~(ii)~~ (b) The aging process;

~~(iii)~~ (c) ~~Intermittent cuing, Cuing, redirecting, prompting, and environmental cues for cognitively impaired consumers and/or behaviorally impaired~~

~~consumers;~~ other means of effective communication.

(d) Common behaviors for cognitively-impaired individuals, behaviorally-impaired individuals, or other individuals strategies to redirect or de-escalate those behaviors.

~~(iv)~~(e) Confidentiality;

~~(v)~~(f) The consumer-service plan person-centered planning process; and, established in rule 5160-44-02 of the Administrative Code, which includes supporting full access of individuals to the greater community.

~~(vi)~~(g) The consumer's individual's right to assume responsibility for decisions related to his/her his or her care.

(6) In-service training: The provider shall ensure 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 activities plan, and whether the activities plan continues to meet his or her needs.

(b) Document, at least quarterly, 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, at least quarterly, whether staff are providing personal care to the individual in the manner in which rule 3701-16-09 of the Administrative Code requires 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 with this chapter.

(C) Units and rates:

- (1) One unit of assisted living service is ~~equal to~~ one day.
- (2) ODM establishes ~~The the~~ maximum-allowable rates allowable for a unit of ~~the~~ service ~~are established~~ in the appendix to rule ~~5101:3-1-06.5~~ 5160-1-06.5 of the Administrative Code.
- (3) Rule 5160-33-07 of the Administrative Code establishes the rate-setting methodology for a unit of the service.

~~(D) Definitions for this rule:~~

- ~~(1) "Medication management" includes knowing what medications a consumer is self-managing, ordering medication, medication reminders, and medication administration.~~
- ~~(2) "On duty" (as in "on-duty staff") has the same meaning as in rule 3701-17-50 of the Administrative Code.~~
- ~~(3) "Personal care service" has the same meaning as in rule 3701-17-50 of the Administrative Code.~~
- ~~(4) "Staff member" has the same meaning as in rule 3701-17-50 of the Administrative Code.~~