Ohio | Department of Developmental Disabilities

Proposed New Rule 5123:2-9-02 (Home and Community-Based Services - ~~Administration~~ Ensuring the Suitability of Services and Service Settings)

Clearance Period: June 26 - July 13, 2015

Comments Received with Department's Responses

Comment	By Whom	Department's Response
This is the first time that stakeholders have seen this rule in this form. It appears that the Department combined two concepts: administration of Home and Community-Based Services programs and the requirement for a lease or residency agreement for provider-owned and provider-controlled facilities. We have had no discussion regarding this rule in this form. We saw pieces of the rule but the last time that any stakeholders saw those pieces was on February 11, 2015 when the Department told stakeholders that they were sending the draft residency and lease agreements out to other stakeholders for thoughts and comments. We were not of the understanding that the February meeting was the last meeting regarding the residency/lease discussion. We had many questions at that time that remain unanswered today.	Anita Allen, Vice President, Ohio Provider Resource Association	While we disagree with your characterization of the rule development process, we agreed that it was important to discuss the concepts with stakeholders and did so again on August 18, 2015. We benefited from this additional dialogue and the responses to clearance comments reflect our discussion at that meeting. As a result of that discussion, the title and paragraph (A) were revised to better reflect the content of the rule.
As the administrators in Columbus continue to try and make stiffer/stricter/more specific rules/ requirements that apparently are an effort to cover every possibility, every situation for every individual, those same rules fail to take into account the myriad of needs, abilities, and individuals they hope to protect. The rule fails to recognize the fact that those individuals (moderate, severe, profound range) are not able to make all their own decisions choices. Those individuals who have been determined (accurately) to be incompetent by the Probate Court and who have been appointed guardians have been done so for good reason. At a minimum, your proposed rule needs to make it a point to include "individual or their guardian" in all statements that currently state only "individual." The rule should also point out that those individuals with court appointed guardians cannot legally sign/agree to a Residential Agreement without their guardian's concurrence. The proposed residential agreement in very few cases is appropriate for those living in Family homes. I make this statement based on years of familiarity with all residential settings from Developmental Centers to Intermediate Care Facilities for Individuals with Intellectual Disabilities to Group Homes: You will not find the caliber of care provided individuals living in Family Homes (foster or related), anywhere, ever. What DODD should be directing their efforts on is doing everything possible to help develop, support, and assist the creation and maintenance of those types of living arrangements. This rule as written, specifically the extensive requirements of the proposed "Residential Agreement," are quite unnecessary and even insulting to Family and Foster Home providers. Keep in mind that not all individuals are high functioning and independent to the degree that they should be treated as "boarders."	Greg Eppich, Father/Guardian/ Caregiver	In response to your comments, paragraph (B)(9) was revised as indicated: "Individual" means a person with a developmental disability or for purposes of giving, refusing to give, or withdrawing consent for services, his or her guardian in accordance with section 5126.043 of the Revised Code or other person authorized to give consent. Also, paragraph (B)(18) was revised as indicated: "Provider-owned residential setting" means a residential facility ~~or the home owned or leased by a provider of adult family living or adult foster care~~. We will address specific requirements for shared living settings when we revisit rules for Adult Family Living and Adult Foster Care in 2016.

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(B)(17): We are concerned that the definition of "provider-controlled residential setting" is too broad. The way that the rule is written, we believe that there could be situations where the nexus between service provider and landlord could be drawn under this definition but that the service provider would have little to no control over the landlord. Yet, this rule requires that the service provider ensure that the landlord comply with this rule even though the nexus between the two is tenuous at best. We conveyed these concerns several times to the Department in our meetings. For instance, a service provider and a landlord could share the same lawn service or a secretary, and this would create a provider-owned or controlled setting and somehow the service provider will have to ensure that the landlord comply with certain requirements. We think that the rule as written could have a detrimental impact on the availability of housing as landlords who are unrelated entities to service providers under more commonly used related party definitions will not want to provide housing if they believe that the Department will have jurisdiction over their businesses. We just can't see that the rule as drafted is what the federal government meant when they asked states to implement this requirement. We would ask that the Department rethink its position.	Anita Allen, Vice President, Ohio Provider Resource Association	In response to your comments, paragraph (B)(17) was revised as indicated: "Provider-controlled residential setting" means a residential setting where the landlord is: (a) An entity that is owned in whole or in part by the individual's independent provider; (b) An immediate family member of the individual's independent provider; ~~(a)~~ (c) An immediate family member of an owner or a management employee of the individual's agency provider; ~~(b) A management employee of the individual's agency provider; or~~ ~~(c)~~ (d) Affiliated with the individual's agency provider, meaning the landlord: (i) Employs a person who is also an owner or a management employee of the agency provider; or ~~(ii) Engages a person to perform administrative duties who is an employee of the agency provider; or~~ ~~(iii)~~ (ii) Has, serving as a member of its board, a person who is also serving as a member of the board of the agency provider; (e) An entity that is owned in whole or in part by an owner or a management employee of the individual's agency provider; or (f) An owner or a management employee of the individual's agency provider.

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(G): In sum, we understand that the new [federal Centers for Medicare and Medicaid Services] Home and Community-Based Services rule requires the residency agreement or lease for provider-owned or provider-controlled facilities, but the Department has taken a very sweeping view of provider-owned or controlled and this will cause much confusion. We need more discussion and consensus about what is really required and the practical implications of implementation. Stakeholders were led to believe that the discussion about these issues was just beginning. Accordingly, we suggest that the Department pull this rule, regroup with stakeholders including entities that provide housing for their input and views as well.	Anita Allen, Vice President, Ohio Provider Resource Association	In response to your comments and based on our discussion with you in August, paragraph (B)(20) was revised as indicated: "Residency agreement" means a written agreement ~~or lease~~ between an individual and a landlord which establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy of the residential setting. A residency agreement is not required when the use and occupancy of the residential setting is subject to a written rental agreement that meets the requirements set forth in Chapter 5321. of the Revised Code. Also, paragraph (G)(1) was revised as indicated: Each individual living in a provider-controlled residential setting or a provider-owned residential setting shall have a written rental agreement that meets the requirements set forth in Chapter 5321. of the Revised Code or a residency agreement that meets the requirements set forth in paragraph (G)(3) of this rule consented to by both the individual and the landlord ~~that includes the following:~~. Additionally, at our meeting in August: • Representatives of the Ohio Provider Resource Association agreed to draft a standard template for residency agreements. • The group agreed that an addendum to the residency agreement clarifying the guardian's role would be acceptable.
(G): We understand that the [federal Centers for Medicare and Medicaid Services] Home and Community-Based Services rule now requires an agreement for provider-owned or provider-controlled settings. Our members are concerned about the many, very specific components required within the residency agreements. We strongly recommend that a standardized statewide residency agreement be developed that all providers could utilize. Perhaps the original document that the Ohio Provider Resource Association had developed last year could be adapted to meet the requirements of the rule and be approved by DODD? We also have concerns about the logistics of the residency agreement for individuals that have legal guardians. There are questions about the legal authority of a guardian of the person to sign a lease. As an example, Advocacy and Protective Services Inc. will not sign lease agreements for their wards. Who will sign the residency agreements for individuals who have been deemed incompetent and have a legal guardian? In addition, there may be implications for other stakeholders as it relates to these requirements. We would suggest DODD pull the rule and set up a meeting with the original work group to discuss some of the practical implications for implementation.	Lori Stanfa, Medicaid Services Coordinator, Ohio Association of County Boards Serving People with Developmental Disabilities	
(G): Overall I believe the rule is a positive step but I am not sure if it alleviates APSI's concerns and I do not see anything in the rule that would make me feel comfortable with a blanket proclamation that APSI reps are allowed to sign a Residential Agreement (subject to the alternative suggestion I propose below). I have a hard time delineating anything in the rule that distinguishes a Residential Agreement from a Lease Agreement. Clearly there are mandatory provisions that must be in a Residential Agreement that are not required to be in a Lease Agreement (but the reality is that most well-drafted Lease Agreements already contain the provisions required in a Residential Agreement). My answer would be very different if the Residential Agreement were a standardized form that was prepared by the DODD (essentially a fill-in-the-blank) type document. However, if the DODD is leaving it up to individual parties to draft the Residential Agreements then they really are no different from a Lease and would need to be reviewed on a case by case basis (again excepting out my proposal below). Subsection G is helpful in terms of allowing a Guardian of the Person to clarify who is paying rent. That takes me back to the drafting point. If well-drafted and clear that APSI is consenting to the placement but not agreeing to be responsible for rent—then I have no problem with APSI signing Residential Agreements. But again, this hinges on how the document is drafted and we do not want Reps trying to interpret and determine whether they can sign each Residential Agreement. PROPOSAL: One alternative that may work for the DODD and APSI if this Rule is adopted is that APSI could develop a short Addendum that it attaches to all Residential Agreements. If the rule is adopted, I would have no problem with drafting an Addendum and telling APSI Reps that anytime they are presented with a Residential Agreement, they are allowed to sign it if the Addendum is attached and also signed by the Landlord. The Addendum would be drafted by me and would clearly delineate that pursuant to Subsection G, APSI is signing only as Guardian of the Person and while APSI is consenting to the placement, APSI is not responsible for the payment of rent. That would supersede any poorly drafted language in the Residential Agreement and provide APSI with the comfort of knowing it is acting within the scope of its authority.	Karla Rinto, Executive Director, Advocacy and Protective Services, Inc. (APSI)	

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(G)(3)(c) & (G)(3)(d): We do not believe that (G)(3)(c) is clear and that (G)(3)(d) is lawful. Under current licensure standards, when an individual chooses a residential facility, they are choosing the service provider so we think that this section is unnecessary and causes confusion. With regard to (d), the federal Home and Community-Based Services rule makes it clear that even in an unlicensed setting, when an individual chooses the residence, they are choosing the service provider, so we do not believe that this section of the rule is correctly stated. In light of the above, we request that these sections be deleted.	Anita Allen, Vice President, Ohio Provider Resource Association	Paragraph (G)(3)(c) simply requires that the residency agreement specify whether or not an individual living in a licensed residential facility may select an alternative provider. Some licensed residential facilities permit this arrangement. An individual receiving Home and Community-Based Services in a provider-controlled setting is entitled to free choice of provider and paragraph (G)(3)(d) requires that the residency agreement say so.
(G)(3)(e) & (G)(3)(h): Given how broad the definition of "provider-controlled residential setting" is, we question how a service provider would have control over what rent a landlord would charge, yet that is exactly what is required of the service provider in (G)(1)(h). We are also concerned about the physical plant requirements found in (G)(3)(e). Is the Department contemplating a three-party lease? What if the landlord refuses to sign? Will the service provider be cited? We asked these questions and never got a straight answer.	Anita Allen, Vice President, Ohio Provider Resource Association	In response to your concerns and in accordance with our discussion in August, the definition of "provider-controlled residential setting" in paragraph (B)(17) of the rule has been clarified to identify these affiliations.
(G)(3)(h)(iv) & (G)(3)(i): In division (G)(3)(h)(iv), there is a reference to a proposed rule "Licensed Residential Facilities - Physical Environment Standards rule" (room and board rule) which has yet to be adopted and finalized. These rules should be considered contemporaneously. As we do not have a final version of the other referenced rule, we cannot approve of this rule. Our comment directly above also applies to (G)(3)(i) because these requirements of the rule apply to the room and board rule which has not been finalized. We cannot approve of the portions of this rule that cross reference the room and board rule without seeing the final room rule.	Anita Allen, Vice President, Ohio Provider Resource Association	The reference in paragraph (G)(3)(h)(iv) of proposed new rule 5123:2-9-02 is to proposed draft rule 5123:2-3-02 (*Licensed Residential Facilities- Physical Environment Standards*), not to the *Room and Board* rule (5123:2-3-18). Proposed new rule 5123:2-3-04 was posted for clearance simultaneously with proposed new rule 5123:2-9-02. Paragraph (G)(3(i) describes "individual-specific expenses" which are to be addressed in the residency agreement.
(G)(3)(j): We have concerns about (j) and which termination provisions apply when. We would like to understand these requirements as they relate to the Medicaid requirements relative to 30-day notice to Medicaid clients. We had many questions about these issues and the different possible scenarios (licensed, unlicensed, two-party agreement, three-party agreement, etc.) and were not provided solid answers from the Department.	Anita Allen, Vice President, Ohio Provider Resource Association	We believe we worked through these issues at our meeting on August 18.