

*****Proposed New Rule*****
Post-Clearance Revisions - October 29, 2015

5123:2-9-02 Home and community-based services waivers - ~~administration~~ ensuring the suitability of services and service settings.

(A) Purpose

This rule establishes standards ~~that govern administration of~~ to ensure that home and community-based services waivers administered by the Ohio department of developmental disabilities maximize opportunities for enrolled individuals to access the benefits of community living and receive services in the most integrated setting.

(B) Definitions

- (1) ~~"Adult family living" has the same meaning as in rule 5123:2-9-32 of the Administrative Code.~~
- (2) ~~"Adult foster care" has the same meaning as in rule 5123:2-9-33 of the Administrative Code.~~
- (3) (1) "Agency provider" means an entity that employs persons for the purpose of providing services for which the entity must be certified under rules adopted by the department.
- (4) (2) "Back-up plan" means delineation of measures to be taken to ensure continuity of care and identification of persons responsible for providing care to an individual in the event that the individual's routine provider is unavailable.
- (5) (3) "County board" means a county board of developmental disabilities.
- (6) (4) "Department" means the Ohio department of developmental disabilities.
- (7) (5) "Developmental disabilities level of care" means the level of care required for admission to an intermediate care facility for individuals with intellectual disabilities or enrollment in a home and community-based services waiver that requires that institutional level of care.
- (8) (6) "Home and community-based services" has the same meaning as in section 5123.01 of the Revised Code.
- (9) (7) "Immediate family member" means a spouse, parent or stepparent, child or stepchild, sibling or stepsibling, grandparent, or grandchild.
- (10) (8) "Independent provider" means a self-employed person who provides services for which he or she must be certified under rule 5123:2-2-01 of the Administrative Code and does not employ, either directly or through contract, anyone else to provide the services.

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- (11) (9) "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.
- (12) (10) "Individual service plan" means the written description of services, supports, and activities to be provided to an individual.
- (13) (11) "Individual-specific expenses" means standard monthly costs other than rent (e.g., household goods and supplies, food, minor equipment, and medical equipment) which are not reimbursable through medicaid, that are paid by the individual to the landlord and that have been identified as needed and requested by the individual to be provided by the landlord.
- (14) (12) "Informed consent" means a documented written agreement to allow a proposed action, treatment, or service after full disclosure provided in a manner the individual or his or her guardian understands, of the relevant facts necessary to make the decision. Relevant facts include the risks and benefits of the action, treatment, or service; the risks and benefits of the alternatives to the action, treatment, or service; and the right to refuse the action, treatment, or service. The individual or his or her guardian, as applicable, may revoke informed consent at any time.
- (15) (13) "Intermediate care facility for individuals with intellectual disabilities" has the same meaning as in section 5124.01 of the Revised Code.
- (16) (14) "Landlord" means the owner, lessor, or agent of the owner contracted by the owner to manage the premises or to receive rent or room costs under the a written rental agreement meeting the requirements set forth in Chapter 5321. of the Revised Code or a residency agreement meeting the requirements set forth in paragraph (G) of this rule.
- (17) (15) "Living unit" means a dwelling place or any self-contained area or part thereof that comprises complete living facilities for a family, an individual, or a group of roommates, including space and fixtures for sleeping, cooking, eating, living, bathing, and sanitation.
- (18) (16) "Natural supports" means the personal associations and relationships typically developed in the community that enhance the quality of life for individuals. Natural supports may include family members, friends, neighbors, and others in the community or organizations that serve the general public who provide voluntary support to help an individual achieve agreed upon outcomes through the individual service plan development process.

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~~(19)~~ (17) "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

~~(e)~~ (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.

~~(20)~~ (18) "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.~~

~~(21)~~ (19) "Rent" means the standard charge to the individual to cover the individual's use of the property, living space, and structure, and where applicable, the appliances, utilities, and furniture.

~~(22)~~ (20) "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.

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- ~~(23)~~ (21) "Residential facility" means a residential facility licensed by the department in accordance with section 5123.19 of the Revised Code other than an intermediate care facility for individuals with intellectual disabilities.
- ~~(24)~~ (22) "Residential setting" means a place of residence, not including a temporary respite setting, in which the individual has chosen both the residence and a provider to provide services within the setting.
- ~~(25)~~ (23) "Roommate" means a person with whom one shares a bedroom.
- ~~(26)~~ (24) "Service and support administrator" means a person, regardless of title, employed by or under contract with a county board to perform the functions of service and support administration and who holds the appropriate certification in accordance with rule 5123:2-5-02 of the Administrative Code.
- ~~(27)~~ (25) "Service documentation" means all records and information on one or more documents, including documents that may be created or maintained in electronic software programs, created and maintained contemporaneously with the delivery of services, and kept in a manner as to fully disclose the nature and extent of services delivered that shall include the items delineated in service-specific rules in Chapter 5123:2-9 of the Administrative Code to validate payment for medicaid services.
- ~~(28) "Shared living" has the same meaning as "adult foster care."~~
- ~~(29) "Significant change of condition" means that the individual has experienced a change in physical or mental condition or functional abilities which may result in a change in the individual's level of care.~~
- ~~(30)~~ (26) "Specialized services" means any program or service designed and operated to serve primarily individuals with developmental disabilities, including a program or service provided by an entity licensed or certified by the department. If there is a question as to whether a provider or entity under contract with a provider is providing specialized services, the provider or contract entity may request that the director of the department make a determination. The director's determination is final.

(C) Individual service plan

- (1) The person-centered planning process set forth in rule 5123:2-1-11 of the Administrative Code shall be used to develop the individual service plan for each individual enrolled in a home and community-based services waiver.
- (2) Each individual service plan shall reflect:
 - (a) All components specified in rule 5123:2-1-11 of the Administrative Code;

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(b) The providers chosen by the individual in accordance with rule 5123:2-9-11 of the Administrative Code; and

(c) An individualized back-up plan.

(3) Each individual service plan shall be finalized with the informed consent of the individual or his or her guardian, as applicable, and signed by all persons responsible for its implementation.

(D) Home and community-based services

(1) The purpose of home and community-based services is to support full community participation and achievement of individual-specific outcomes. Services shall provide opportunities for an individual to access age-appropriate activities, engage in competitive employment and meaningful non-work activities, and pursue activities with persons of his or her choosing and in settings not created exclusively for individuals with disabilities.

(2) The service and support administrator shall provide the individual with a description of all services and service setting options available through the waiver in which the individual is enrolled. Each individual shall be afforded the opportunity to choose among services or a combination of services and settings that address the individual's assessed needs in the least restrictive manner, promote the individual's autonomy, and minimize the individual's dependency on paid support staff. Services and service setting options (such as technology-based supports, intermittent or drop-in staffing, shared living arrangements, and integrated employment services) with potential to enable the individual to live and work in non-congregate settings shall be explored in accordance with the individual's assessed needs, before congregate settings are considered.

(3) The individual shall receive home and community-based services that:

(a) Are appropriate to meet the needs and desired outcomes identified in the individual service plan;

(b) Supplement and not supplant existing natural supports;

(c) Support the individual in the least restrictive and most cost-effective manner available; and

(d) Are not otherwise available through other resources, including:

(i) Unpaid supports;

(ii) Private insurance;

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- (iii) Community resources;
 - (iv) Special education or related services as defined in section 602 of the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. 1401 as in effect on the effective date of this rule;
 - (v) Vocational rehabilitation services funded under section 110 of the Rehabilitation Act of 1973, 29 U.S.C. 730 as in effect on the effective date of this rule;
 - (vi) Medicare; or
 - (vii) The medicaid state plan.
- (4) Home and community-based services funds shall not be used to provide modifications to the physical structure of a residential facility unless the modifications are necessary to meet the needs of an established resident of the residential facility or the modifications are portable and clearly identified as the property of the individual.
- (5) Except for the provision of short-term respite services as approved by the centers for medicare and medicaid services, home and community-based services shall not be provided in:
- (a) Hospitals;
 - (b) Institutions for mental diseases;
 - (c) Intermediate care facilities for individuals with intellectual disabilities;
 - (d) Nursing facilities; or
 - ~~(e) Settings located in a building that is a publicly operated or privately operated facility that also provides inpatient institutional treatment;~~
 - ~~(f) Settings in a building on the grounds of or immediately adjacent to a public facility that provides inpatient institutional treatment; or~~
 - ~~(g)~~ (e) Other locations that have been determined by the secretary of the United States department of health and human services or the department as having the qualities of an institution and the effect of isolating individuals from the broader community.
- (6) Absent a determination by the centers for medicare and medicaid services that the settings are suitable, home and community-based services shall not be provided in:

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(a) Settings located in a building that is a publicly-operated or privately-operated facility that also provides inpatient institutional treatment; or

(b) Settings in a building on the grounds of or immediately adjacent to a public facility that provides inpatient institutional treatment.

(E) Requirements for providers of home and community-based services

- (1) A provider of home and community-based services shall meet the qualifications set forth in Chapter 5123:2-9 of the Administrative Code for the services delivered.
- (2) A provider of home and community-based services shall deliver services in accordance with each individual's choices, preferences, and needs and in a manner that supports each individual's full participation in his or her community as identified in the individual service plan.

(F) Requirements for individuals enrolled in home and community-based services waivers

- (1) To be eligible for enrollment in a home and community-based services waiver administered by the department, an individual shall have a developmental disabilities level of care determined in accordance with rule 5123:2-8-01 of the Administrative Code.
- (2) An individual enrolled in a home and community-based services waiver shall:
 - (a) Communicate, as applicable, to the independent provider and/or assigned staff of the agency provider and the agency provider management staff, personal preferences about the duties, tasks, and procedures to be performed;
 - (b) Communicate to the service and support administrator any significant change that may affect the provision of services or result in a need for more or fewer hours of service;
 - (c) Use services in accordance with his or her individual service plan; and
 - (d) Cooperate with the county board in the county board's performance of medicaid local administrative authority in accordance with section 5126.055 of the Revised Code.

(G) Provider-controlled residential settings and provider-owned residential settings

- (1) 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

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requirements set forth in paragraph (G)(3) of this rule consented to by both the individual and the landlord that includes the following:

- (2) When the individual and the landlord enter into a rental agreement that meets the requirements set forth in Chapter 5321. of the Revised Code, the rental agreement shall not have terms contradictory to the provisions set forth in paragraph (G)(3)(f) of this rule.
- (3) When the individual and the landlord enter into a residency agreement, the residency agreement shall include:
- (a) Name and contact information of the landlord.
 - (b) A statement of the landlord and service provider relationship (i.e., that it is a provider-controlled residential setting or a provider-owned residential setting).
 - (c) ~~When the landlord is a residential facility~~ In a provider-owned residential setting, a statement regarding whether or not the individual may choose a different provider to deliver services while living in the residential setting.
 - (d) ~~When the landlord is an unlicensed residential setting other than one where an individual receives adult family living or adult foster care~~ In a provider-controlled residential setting, a statement that the individual may choose a different provider to deliver services while living in the residential setting.
 - (e) A statement that the landlord:
 - (i) Is responsible for maintaining in good working order all electrical, plumbing, sanitary, heating, ventilating, and air conditioning systems.
 - (ii) Shall ensure barrier-free ingress and egress to and from the residential setting by individuals residing in the residential setting.
 - (iii) Is responsible for keeping the residential setting in a safe condition that meets local health and safety codes.
 - (iv) Has a right to reasonable access to the residential setting in order to complete the terms of the residency agreement.
 - (f) A statement that, unless otherwise specified in the individual service plan, the individual:
 - (i) Has a right to select his or her roommates.

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- (ii) Has a right to privacy and security including locks and keys to his or her living unit.
 - (iii) Has a right to decorate his or her living unit.
 - (iv) Has a right to select other providers for any service not associated with the residential setting.
 - (v) Has a right to have visitors of his or her choosing at any time.
 - (vi) Has the freedom and support to control his or her schedule and activities.
 - (vii) ~~Shall have~~ Has a right to access to food at any time.
- (g) A statement that the individual is responsible for timely monthly payment of the rent or his or her share of the rent, as applicable, to the landlord. If needed, the residency agreement may designate a person or responsible party to ensure timely payment to the landlord.
- (h) The rent amount which:
- (i) Shall be reasonable and comparable to community standards.
 - (ii) Shall be determined based upon the accommodations provided and not upon an individual's assets, resources, or ability to pay.
 - (iii) Shall be the same for individuals in the residential setting with similar accommodations except that rent may be reduced for a specific individual by the amount of a rent subsidy granted to that individual.
 - (iv) In a ~~residential facility~~ provider-owned residential setting, shall include the cost of providing furnishings, equipment, and supplies required by paragraph (D) of rule 5123:2-3-02 of the Administrative Code [proposed new *Licensed Residential Facilities - Physical Environment Standards* rule].
 - (v) Shall not include items that are reimbursable under the medicaid program.
- (i) Individual-specific expenses:
- (i) Which shall reflect only items that are available exclusively from the landlord as determined to be needed by the individual ~~and/or guardian~~, with the support of the team.

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- (ii) Which shall reflect only items for which the individual ~~and/or guardian~~, with the support of the team, has been unable to access or utilize other available resources.
- (iii) The cost of which may be shared equally when two or more residents of the residential setting agree to share use of the item.
- (j) A statement that the individual has a right to terminate the residency agreement without cause upon thirty-day advance written notice to the landlord unless the individual and the landlord mutually agree in writing to an alternative plan.
- (k) A statement that the individual has a right to terminate the residency agreement for cause upon five-day advance written notice to the landlord if: ~~(i) The the landlord has breached an obligation or failed to satisfy required conditions under the residency agreement; or,~~
 - (ii) ~~The landlord, provider, or another member of the residential setting has been charged with a felony offense.~~
- (l) ~~Except when the landlord is a residential facility~~ In a provider-controlled residential setting, a statement that the landlord has a right to terminate the residency agreement ~~without~~:
 - (i) Without cause upon thirty-day advance written notice to the individual unless the individual and the landlord mutually agree in writing to an alternative plan.
- (m) ~~Except when the landlord is a residential facility, a statement that the landlord has a right to terminate the residency agreement for~~
 - (ii) With cause upon five-day advance written notice to the individual if: ~~(i) The the individual chooses to leave or otherwise vacates the residential setting (e.g., upon incarceration); or,~~
 - (ii) ~~The individual or another member of the residential setting has been charged with a felony offense.~~
- (n) (m) ~~When the landlord is a residential facility~~ In a provider-owned residential setting, a statement that the residential facility shall terminate services in accordance with rule 5123:2-3-05 of the Administrative Code [proposed new *Licensed Residential Facilities - Admission, Termination of Services, and Transfer rule*].

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- ~~(2)~~ (4) A modification to the rights set forth in paragraph ~~(G)(1)(f)~~ (G)(3)(f) of this rule shall be addressed in the individual service plan and implemented in accordance with rule 5123:2-2-06 of the Administrative Code.