Ohio | Department of Developmental Disabilities

Proposed New Rules 5123:2-3-01 through 5123:2-3-10
(Governing Licensed Residential Facilities)
Clearance Period: June 26 - July 13, 2015
Comments Received with Department's Responses

Chapter 5123:2-3 Rules Generally

Comment	By Whom	Department's Response
My sister lives in a licensed facility, and she and I are often times frustrated by her inability to live the life she chooses. We appreciate the person-centered language. Also, it may now be easier to insist that she be able to participate in her life. It would appear that her home will need to be better adapted for her to be able to do things like laundry or help out at meal time. One of my long-standing frustrations is that she spends 80% of her monthly income for room and board. In her home, there is $8,400 a month that goes to the "running" of the home. It is ludicrous that she would be served Hamburger Helper. The proposed rule talks about her ability to choose food she prefers. Unfortunately the rule doesn't specify that the staff hired actually have to know how to cook! I think the proposals move services further away from institutionalized care.	Linda Woodard	Thank you for your support. We hope the new rules advance the system as you suggest.

5123:2-3-01 Administration and Operation

Comment	By Whom	Department's Response
(C)(10): The current language is: "The operator shall maintain comprehensive general liability insurance in the amount of at least five hundred thousand dollars." This amount is quite low and should instead be, at a minimum, $1 million dollars. There should also be language requiring the provider and insurer to notify the department of any change in coverage.	Marcy Samuel, Director of Program Operations, Franklin County Board of Developmental Disabilities	We are, to the maximum extent possible, trying to align requirements for providers of services across the system. The requirement in proposed new rule 5123:2-3-01 aligns with a requirement for certified agency providers in newly promulgated rule 5123:2-2-01 (*Provider Certification*).

Comment	By Whom	Department's Response
(D)(2): Although Rapback is positively perceived and used by many of our members, it is a new unfunded mandate that will increase both real (as in fees) and administrative costs. It is a system that needs to be monitored and maintained. We appreciate the additional language allowing for a phase in. However, some of our smaller and mid-sized members report that Rapback is not cost neutral and will cost several hundred dollars a year more to implement than what they currently have in place. Members who wish to utilize Rapback continue to report problems getting signed up and using the portal. It does not appear that the system is completely functional yet. We would like for Rapback to remain voluntary. OPRA was very supportive of Rapback through the planning, pilot, and implementation phases. Our support was based in large part, in Rapback being voluntary.	Anita Allen, Vice President, Ohio Provider Resource Association	The Health and Safety Panel unanimously recommended that providers be required to enroll staff in Rapback. We recognize there may be an initial administrative adjustment to implement Rapback, but we do not understand how providers will incur additional cost. Under existing rule 5123:2-2-02 (*Background Investigations for Employment*), providers must have the Bureau of Criminal Identification and Investigation (BCII) conduct a criminal records check at hire and at least every five years thereafter. Enrolling an employee in Rapback costs $5 per year and once the employee is enrolled, the residential facility will not have to request another criminal records check from BCII and will receive immediate notification if the employee is charged or convicted of a prohibited offense. We earlier incorporated paragraph (D)(2)(a) to allow phase-in of Rapback for existing staff so the effect would be cost-neutral. We will allow time for residential facilities to come into compliance with the new requirements to enroll staff in Rapback as we have for certified agency providers under newly promulgated rule 5123:2-2-01 (*Provider Certification*).
(F)(1)(c): The high school diploma or GED requirement is new for Intermediate Care Facilities (ICF) and eliminates potential staff hires in an already extremely tight labor market. The Department's desire to align staffing requirements across service settings does not recognize the inherent differences in the ICF and waiver systems and is placing additional and unnecessary burdens on ICF.	Anita Allen, Vice President, Ohio Provider Resource Association	Requiring a high school diploma or GED is reasonable for direct services staff, regardless of setting. It is not our intent to disrupt current staffing arrangements at residential facilities; as written, paragraph (F)(1)(c) "grandfathers" existing staff of residential facilities who do not have a diploma or GED.

(F)(1)(h): Under current law, at least one staff on shift in a direct service position shall hold certification in First Aid and CPR. The Department has changed this to a requirement for all staff. This is an unnecessary requirement and will result in additional costs to providers. CPR/First Aid certification is required within 30 days of hire. We would like this extended to 60 days. It is often difficult to schedule these courses without some advance notification to the trainer. Again, Intermediate Care Facilities (ICF) should be exempted.	Anita Allen, Vice President, Ohio Provider Resource Association	In response to your comments, paragraph (F)(1)(h) was replaced by new paragraphs (F)(1)(h) and (F)(1)(i): (h) Obtains, within sixty days of hire, and thereafter maintains valid "American Red Cross" or equivalent certification in first aid which includes an in-person skills assessment completed with an approved trainer. Until such time that a staff member obtains certification in first aid, he or she may provide direct services only when there is another staff member who holds valid certification in first aid present. (i) Obtains, within sixty days of hire, and thereafter maintains valid "American Red Cross" or equivalent certification in cardiopulmonary resuscitation which includes an in-person skills assessment completed with an approved trainer. Until such time that a staff member obtains certification in cardiopulmonary resuscitation, he or she may provide direct services only when there is another staff member who holds valid certification in cardiopulmonary resuscitation present. An intermediate care facility for individuals with intellectual disabilities that has nursing staff onsite twenty-four hours per day, seven days per week may, in accordance with rule 5123:2-3-10 of the Administrative Code, request a waiver of the requirement for all direct services staff to hold certification in cardiopulmonary resuscitation. The Department would expect an ICF requesting a waiver of the requirement for all direct services staff to hold CPR certification to: 1. Provide the number of non-nursing staff who will hold CPR certification and explain how the ICF determined this number based on resident needs and facility staffing patterns; 2. Establish a policy and demonstrate that sufficient staff hold CPR certification to ensure residents have opportunities to explore and experience community participation in accordance with proposed new rule 5123:2-3-04 (*Provision of Services and Maintenance of Service Records*); and 3. Show that the ICF has processes in place to ensure that 1 and 2 (above) are met.

5123:2-3-02 Physical Environment Standards, Fire Safety, and Emergency Response Planning

Comment	By Whom	Department's Response
(D)(4): During the pre-clearance process, we asked: What if an individual chooses a futon and wishes to purchase one for his/her own use? Is this prohibited if it is a choice? The response was that the licensee had to provide a bed, but nothing prohibited the individual from purchasing a futon. If the individual chooses to sleep in something DODD considers a hideaway bed, is the provider required to have a bed on premises for the individual in addition to the futon?	Anita Allen, Vice President, Ohio Provider Resource Association	Existing rule 5123:2-3-10 (*Physical Environment Requirements*) requires the licensee to provide each individual with a bed that is sturdy, safe, and in good condition and sets forth that "hideaway beds and rollaway beds shall not be used." The Department has always regarded futons and sleeper sofas as "hideaway beds" and thought it helpful to say so in paragraph (D)(4) of proposed new rule 5123:2-3-02. The provider must have documentation to show that the individual was offered a bed and selected an alternative.

5123:2-3-04 Provision of Services and Maintenance of Service Records

Comment	By Whom	Department's Response
(E)(2)(e): During the pre-clearance process, we noted that it is impossible for a provider to insure in Homemaker/ Personal Care transportation. The additional cost and administrative time is prohibitive. Are Direct Service Professionals expected it have vehicle inspections? By what entity? Who bears the cost? We suggest that the currently existing language be continued as it leaves it up to the provider to provide vehicles according to the provider's own policies and procedures which may vary based on the type and size of provider. If this is to be dictated as a new unfunded mandate on the provider community, then we need to revisit the rate paid for transportation.	Anita Allen, Vice President, Ohio Provider Resource Association	In response to your comments, paragraph (E)(2)(e) was revised as indicated: ~~Ensure that vehicles used to transport individuals are accessible to the individuals and maintained in a safe manner.~~ Develop and maintain written policies and procedures regarding vehicle accessibility, vehicle maintenance, and requirements for vehicle drivers.

Comment	By Whom	Department's Response
(F)(1) & (F)(2): During the pre-clearance process, we noted that these two provisions could actually be in conflict with one another. Some food preferences might be in conflict with dietary restrictions. Language should be added that recognizes this fact. The Department's response to our pre-clearance comments did not address the issue. The Department noted that the 'concepts' that are contained in the current rule are carried forward into the revised proposed rule. This is not the case. We believe that the meanings have been changed. Rather than tinker with something that is not broken and cause confusion, we recommend that the current language in 5123:2-3-12 remain.	Anita Allen, Vice President, Ohio Provider Resource Association	The wording in paragraph (F)(1) of proposed new rule 5123:2-3-04 differs from paragraph (B)(1) of existing rule 5123:2-3-12 (*Food, Clothing, and Personal Items*) in that it emphasizes person-centered/person-driven services. An individual's preferences and support needs are identified through the person-centered planning process. In response to your concerns, however, paragraph (F)(1) was revised as indicated: The operator shall offer individuals daily meals and snacks that meet the individuals' <u>nutritional needs and</u> preferences as identified by the individual. The wording in paragraphs (B)(8) and (F)(2) of proposed new rule 5123:2-3-04 mirrors paragraph (B)(2) of existing rule 5123:2-3-12 (*Food, Clothing, and Personal Items*).
(F)(3): As we noted in our pre-clearance comments, this provision differs from the current rule and does not take into account the ability of an individual to actually prepare food. In addition, larger Intermediate Care Facilities have dietary departments that prepare meals according to specialized diets. Language should be included that recognizes these situations. As noted in our previous comment above, a simple fix would be to continue the current existing language in 5123:2-3-12 since everyone seems to understand it.	Anita Allen, Vice President, Ohio Provider Resource Association	In response to your comments, paragraph (F)(3) was revised as indicated: Meals shall ~~be planned and prepared by individuals with support of staff as needed and~~ provide for variety, substitutions, and accommodation of individuals' personal preferences and religious beliefs. <u>Individuals shall participate in meal planning and preparation to the extent of their interest and ability to do so.</u>

Comment	By Whom	Department's Response
(H)(2): As discussed in our pre-clearance comments, under current rules, this provision provides an exception for community participation if it would be contraindicated. The proposed rule changes it to medically contra-indicated only. The proposal is a very narrow exception and we do not recall any discussion about this. Community participation is sometimes behaviorally contra-indicated and language is needed that recognizes this. We recommend that the current rule language remain.	Anita Allen, Vice President, Ohio Provider Resource Association	The proposed rule is consistent with the existing rule. Paragraph (C) of existing rule 5123:2-3-24 (*Participation of Individuals in Day Activities*) sets forth that an Intermediate Care Facility may provide day activities on-site when the individual's service plan indicates the reasons why delivering day activities off-site would be contraindicated; the Department's established practice is to require a medical diagnosis (which would include a significant psychiatric diagnosis) to support that participating in off-site day activities is contraindicated. The Department understands that it would be a rare circumstance for any medical diagnosis to entirely preclude an individual from participating in any community activities.
(H)(3): During the pre-clearance process, we noted that the imposition of requirements on providers to provide other day activity provider choices to residents should not apply to Intermediate Care Facilities (ICF). Under federal and state law, ICF are responsible for active treatment 24/7 including day activities. The resident's choice for active treatment which includes day activities is fulfilled by choosing the ICF. As a result, free choice of provider outside of the ICF does not apply. The Department made a change but the change still contains a requirement that ICF provide choices of "other providers" for day activities. As you know, many ICF residents were once served by other day service providers until the active treatment rate no longer covered the costs. The active treatment component of the rate has not changed and inflationary pressures have made the situation worse. There are very few day service providers willing to serve ICF residents for the funding available. This pressure resulted in many ICF agencies developing their own day programs. An increase in funding would open up more options. In the meantime, the Department's proposal violates state and federal law and should be removed.	Anita Allen, Vice President, Ohio Provider Resource Association	Paragraphs (H)(1) and (H)(3) have already been modified in response to your pre-clearance comments. Paragraph (H)(3) as written does not require an Intermediate Care Facility to provide access to services by other providers.

5123:2-3-05 Admission, Termination of Services, and Transfer

Comment	By Whom	Department's Response
(B)(4): During the pre-clearance process, regarding an emergency, we noted that the new language appears to require the operator to document attempts to provide, obtain, and/or coordinate the services necessary to ensure the health and safety of the resident, other residents and staff at the facility. The requirement for documentation of previous occurrences fails to take into account situations where an emergency may present itself but there were no previous occurrences which lead to the emergency situation. For instance, if someone has a stroke and they are no longer appropriate for the Intermediate Care Facility, we assume that this would be an emergency situation. In sum, the definition of emergency appears to require documentation of previous events which may not be related to the emergency situation that presents itself. The Department's response did not address the issue. Since the Department is defining an emergency so narrowly, will the provider be cited or the discharge not upheld if they do what is right and what they see as an emergency but the situation is outside the definition of an emergency? The Department's definition of emergency is too narrow and suggests that there had to be a previous incident or some previous cause that the provider could control which precipitated the emergency which is not always the case. We suggest that the definition of emergency as it exists in current law be retained. We do not know why the current definition is not sufficient and no explanation has been provided.	Anita Allen, Vice President, Ohio Provider Resource Association	Existing rule 5123:2-3-05 (*Admission, Discharge, and Transfer*) contains an internal contradiction in that the definition of "emergency" in paragraph (B)(2) is similar to a reason to discharge described in paragraph (D)(1)(c). In response to your pre-clearance comments, we added paragraph (B)(4)(b) of proposed new rule 5123:2-3-05 to make clear that a change in an individual's level of care is an emergency and as such, not subject to 30-day advance notice of transfer or termination of services. All of the antecedent events or remedial actions taken (e.g., law enforcement involvement, major unusual incidents, provision of short-term respite, or psychological evaluations conducted) would constitute the documentation of the operator's attempts to provide, obtain, and/or coordinate the services necessary to ensure the health and safety of residents and staff.

5123:2-3-06 Compliance Reviews, Issuance of Licenses, and Adverse Actions

Comment	By Whom	Department's Response
As noted in our comments in the pre-clearance process, under Section 5123:2-3-06, the term license and licensure survey tool have been deleted and the new compliance reviews for licensed facilities will be conducted in accordance with a compliance protocol which takes the place of the licensure survey tool. Today, the license survey tool is promulgated as an attachment to the administrative rule. Accordingly, we believe that the new compliance protocol should remain part of the administrative rule process. The term license and licensure survey tool are currently found at Section 5123:2-3-03 and Appendix A of that same rule respectively, but are noticeably absent under the proposal. The Department is proposing to post the protocol on their web site but this is not meaningful due process. The creation of the web site compliance protocol and any subsequent changes will not be subject to notice, public input and due process as is required under the current administrative rule process governing the survey tool. We propose that the Department keep the tool/protocol as an appendix to the rule so that all stakeholders can have meaningful input and due process in the rulemaking process as is the case today with the survey tool.	Anita Allen, Vice President, Ohio Provider Resource Association	Several years ago, based on feedback from the Ohio Provider Resource Association and others, we began sending the compliance review tool to a residential facility 90 days in advance of the facility's compliance review. We also provide specific rule citations for every finding of non-compliance. We are committed to providing advance notice of at least 60 days to providers if we plan to modify the tool/protocol.
(F)(1): How will the Department determine whether a one-year or three-year term is granted? Is there some protocol that the Department will use in making this determination? Is it totally up to the Department's discretion? Please explain.	Anita Allen, Vice President, Ohio Provider Resource Association	A residential facility will receive a three-year license except in the rare cases when the Department initiates proceedings to refuse to renew the license in accordance with paragraph (G)(1)(c). In accordance with paragraph (G)(1)(c)(iv)*(a)*, the Department may issue a one-year license when, after the Department initiates proceedings to refuse to renew the license, the licensee submits and implements a satisfactory plan of correction.

Comment	By Whom	Department's Response
(I)(1): This differs from current rule. If voluntarily surrendered, we would like to retain the licenses for possible future use in another location. We would like the voluntary language removed.	Anita Allen, Vice President, Ohio Provider Resource Association	Nothing compels a licensee to voluntarily surrender a license. A licensee wishing to retain a license would merely refrain from surrendering the license to the Department.
(E)(3): As noted in our previous comments, under Section 5123:2-3-06, the Department has reduced the time-frames for appeals of citations from a compliance review citation from 30 to 14 days. The current law under Section 5123:2-3-02(J)(6) requires that providers have 30 days to respond to the Department citations. The only reason that the Department gave for shortening the timelines associated with provider appeals was that the Department wants similar timelines for licensure appeals as are associated with supported living certification. We are opposed to shortening the current timelines associated with providers exercising their rights. The Department has shortened the time-lines for the provider to request reconsideration from 20 to 14 days. Why the change? The current requirements are found at Section 5123:2-3-02 (Q)(5)(c). We ask that all current timelines for provider appeals and plans of correction be maintained.	Anita Allen, Vice President, Ohio Provider Resource Association	The licensee must respond to each citation with either a plan of correction or an appeal. Therefore, before submitting a plan of correction the licensee must determine which, if any, citations are going to be appealed. Fourteen days is a reasonable period of time to respond to citations with either a plan of correction or an appeal. The "request for reconsideration" process described in paragraph (Q)(5) of existing rule 5123:2-3-02 (*Licensure Application, Issuance, Survey, Renewal, and Sanction Procedures*) includes submission of a plan of correction. In proposed new rule 5123:2-3-06, two steps have been combined. If a licensee wants the Department to reconsider proposed refusal to renew the license, the licensee must simply submit a plan of correction instead of requesting reconsideration **and** submitting a plan of correction.

Comment	By Whom	Department's Response
As discussed in our previous comments, in the proposed Section 5123:2-3-06, the Department has changed the terminology of licensure surveys to compliance reviews because the supported living standards are going to be the predominant standards. Again, we need to understand who will be conducting the compliance reviews as under the law, today, County Boards are prohibited from conducting compliance reviews of residential facilities under OAC 5123:2-2-04(C)(2). In discussions over the past several months, the Department has stated that it believes that County Boards may someday conduct the compliance reviews of residential facilities (both ICF and waiver homes). This is a strong departure from current practice. OPRA has concerns about County Boards taking on this function as this is a State function and is non-delegable. Further, several County Boards are license holders of ICF residential care licenses. This creates a conflict of interest. This needs much more discussion. With regard to licensed HCBS facilities, currently, County Boards are prohibited from conducting any surveys or compliance reviews regarding licensed facilities. In fact, today it is clear that supported living standards do not apply to licensed facilities. The supported living rule regarding provider supported provider certification Section 5123:2-2-01(a) provides that "this rule does not apply to a person or government entity licensed as a residential facility under Section 5123.19 of the Revised Code." Thus, under today's standards, licensed facilities and certified supported living providers are governed by mutually exclusive laws. This will bring them together all under supported living standards. Under the new definition section, the "Department" is defined as "the Ohio Department of Developmental Disabilities or its designee." As we mentioned, with regard to licensed facilities, only the Department may conduct surveys or compliance reviews and not any designee. The definition section opens this up and makes it unclear as to whether County Board will have a role with regard to licensed facilities. This is unacceptable with regard to any licensed facility – including group homes or ICFs. Second, with regard to ICFs, it is troubling that the supported living standard will be the predominate standard. Many of the supported living standards are inapplicable to ICFs today as is evident from our comments. We ask that the Department reconsider these inconsistencies.	Anita Allen, Vice President, Ohio Provider Resource Association	Although division (H)(1) of Section 5123.19 of the Ohio Revised Code authorizes the Director of the Department to assign to a county board of developmental disabilities the responsibility to conduct any survey or inspection under Section 5123.19, the Department has no plans at this time to have county boards conduct reviews of licensed residential facilities that provide waiver services and **no plans whatsoever to have county boards conduct reviews of Intermediate Care Facilities**.

5123:2-3-07 Immediate Removal of Residents

Comment	By Whom	Department's Response
(C)(1) to (C)(6): As we commented in the pre-clearance process, it appears that the department's role is minimal and there is no duty on the department to conduct its own independent investigation. Rather, it appears that the department will rely solely on the county board to conduct the investigation and to inform the department about their opinion. This is not acceptable. There have been situations over the past year where county boards have conducted investigations which were not warranted at all. Providers were then required to spend thousands of dollars to try to undo an unwarranted county investigation. If the department is going to take the extreme step to remove someone from a facility, the department must have a role in seeing what is actually going on in the facility. The Department says, in its response to our previous comment, that it would conduct its own investigation, so it is curious as to why it would want to change the language that says that it will conduct its own investigation. Why not keep the language as is?	Anita Allen, Vice President, Ohio Provider Resource Association	Proposed new rule 5123:2-3-07 is being removed from the package to afford time for additional consideration.

5123:2-3-08 Development of Licensed Residential Beds

Comment	By Whom	Department's Response
General: The Department has moved many of the provisions contained in the Physical Environment rule to the development rule –thereby taking those requirements out of the licensure process and subsuming them in the development process which affords less due process than does the licensure process. There has not been any meaningful discussion about these types of changes. **(B)(5):** The definition of "development" has been revised to include "renovation" and remove "replacement." Replacement: Under the current 5123:2-3-26(B)(7) and (F)(4), a "replacement" of assigning licensed beds to a different licensee when a license is revoked, terminated or not renewed or voluntarily surrendered is permitted when the Department determined the beds are needed to provide services to the individuals who reside in the residential facility in which the beds are located. It appears that this option has been eliminated. What will happen to these beds when a license is revoked or a provider voluntarily goes out of business? Can they no longer sell the beds? Renovation – As mentioned, this is new in the draft development rule. The definition of "renovation" in this new rule is what is currently found in 5123:2-3-02(B)(1). While the definition is not new, the process is different. Renovations are currently not subject to development approval by the Department. Currently, under 5123:2-3-02(G), a licensee is just required to notify the Department 30 days prior to its intent to begin a renovation, and the Department is to let the licensee know within 14 days if any new inspections and/or a licensure survey will be needed following the renovations. Although the development proposal process for renovations is separate for the process for modifications (see Section (H)) and mirrors the language from 5123:2-3-02(G), renovations will presumably now be subject to the Department's discretion and approval as part of the broad development process and standards in the development rule. Further, since "renovation" is defined so broadly, providers could be burdened with submitting a development proposal for almost any renovation. This could be very cumbersome on providers and the Department in reviewing the proposals as well.	Anita Allen, Vice President, Ohio Provider Resource Association	Renovations are **not** subject to the review process required for development. To make this clearer, the title of the rule was revised as indicated: Licensed Residential Facilities - Development ~~of Licensed Residential Beds~~ and Renovation Also, paragraph (A) was revised as indicated: This rule establishes uniform standards and procedures governing the development and renovation of residential facilities subject to licensure in accordance with section 5123.19 of the Revised Code. No person or government agency may apply for a license to operate a residential facility without first obtaining development approval in accordance with this rule. Also, paragraph (B)(5) was revised as indicated: "Development" means an applicant's plan for the operation of a licensed residential facility including a plan for modification ~~or renovation~~ which is subject to approval of the department. With regard to selling licensed beds, the proposed new rule does not change anything: • When a licensee goes out of business, the licensee may sell the beds. • When a license is revoked, the former licensee may not sell the beds.

Comment	By Whom	Department's Response
(E)(1): The first of the "Feasibility Requirements" is new language not present in any current rule. It requires the interior and exterior of the facility to be configured in a manner that is (a) accessible to residents, (b) can accommodate the assessed needs and degree of ability of the residents, and (c) provides for service delivery that is age-appropriate. There are no definitions as to what these requirements mean. Please clarify.	Anita Allen, Vice President, Ohio Provider Resource Association	We believe these requirements are straight forward.
(E) & (F): "Feasibility Requirements" have been added as Section (E). These "feasibility requirements" are just all of the construction and building requirements for licensure under 5123:2-3-10(B)(1) through (B)(7), one fire safety requirement under 5123:2-3-11(C)(3) (requiring two means of exit), two (out of the eight) of the interior and exterior physical condition requirements under 5123:2-3-10(E)(2), and three other building requirements under 5123:2-3-10(H) through (J). Also added were space and usage licensure requirements and requirements for kitchen and dining and bathroom and laundry under 5123:2-3-10(D). So, although a large part of the physical environment requirements in 5123:2-3-10 are present in the draft rule, they are not all included. We ask that the Department explain why some are included and not others. Also, why are the licensure requirements in Sections (E)-(F) included in the development rule? They are not referenced in the standards/what the Department should consider in reviewing development proposals in Section (G). How are they going to be used? Sanctions for violations of these licensure requirements (like suspension of admissions or licensure revocation) give providers Chapter 119 appeal rights under 5123:2-02, but the process to waive requirements under the development rule does not afford providers a Chapter 119 hearing. This is troubling and needs further explanation. 5123:2-3-08(J) provides that the provisions of this rule may be waived pursuant to 5123:2-3-10 (which is predominantly unchanged from the old 5123:2-3-15); this rule offers no due process rights whatsoever as the Director's decision to grant or deny the waiver is final and not appealable. Please explain the change.	Anita Allen, Vice President, Ohio Provider Resource Association	We incorporated standards for the physical structure that are not likely to change over time (e.g., square footage of living area) and therefore, not routinely reviewed for compliance. We included requirements that we thought were important. The physical environment requirements set forth in paragraphs (E) and (F) of proposed new rule 5123:2-3-08 are incorporated by reference into paragraph (C)(1) of proposed new rule 5123:2-3-02. A facility cited for being out of compliance with one of the physical environment requirements would be cited under rule 5123:2-3-02 and would **most certainly** have appeal rights set forth in paragraph (E) of proposed new rule 5123:2-3-06.

Comment	By Whom	Department's Response
(F)(4)(a): The bathroom and laundry requirement requires that the facility provide for toilet and bathing facilities at a minimum of 1:4. It cites 5123:2-3-10(D)(4) as the basis for this requirement. However, 5123:2-3-10(D)(4) does not require the 1:4 ratio, only that they be appropriate in number, size and design to meet the needs of the individuals and on each floor with bedrooms. Please explain why this is included. Has the Department surveyed the field or otherwise analyzed its own survey files to understand the impact that this new requirement will have on providers and consumers?	Anita Allen, Vice President, Ohio Provider Resource Association	The Residential Facility Rules Workgroup arrived at the 1:4 ratio after discussion at multiple meetings.
(H): The new rule also includes "non-extensive" renovations under 5123:2-7-25 as part of the renovations requiring development approval at Section (H). 5123:2-7-25 is for non-extensive renovations for Intermediate Care Facilities only, and this rule pertains to cost reporting, not Department approvals for the renovations. Moreover, no discussions were had with stakeholders regarding adding "renovations" to the development process and rule. We ask that the Department reconsider such a broad change.	Anita Allen, Vice President, Ohio Provider Resource Association	In response to your comments, paragraph (H)(1) was revised as indicated: When the licensee proposes to make a renovation to a residential facility, ~~including a renovation that is part of a non-extensive renovation made pursuant to rule 5123:2-7-25 of the Administrative Code,~~ the licensee shall notify the department in writing no less than thirty days in advance of beginning such renovation. Also, paragraph (H)(3) was revised as indicated: The department shall provide a written response to the licensee within fourteen days after receiving all the information it needs to determine whether new inspections and/or a licensure compliance review is required following the renovation. ~~A response provided by the department to a licensee regarding a non-extensive renovation made pursuant to rule 5123:2-7-25 of the Administrative Code meets the requirements of this paragraph.~~

Comment	By Whom	Department's Response
As we have mentioned before, the Department's "development proposal process" imposes Certificate of Need (CON)-like criteria to DD licensed beds. This draft rule even further expands the Department's authority to grant and deny development proposals by including renovations, even non-extensive renovations, in Section (H). Today, there is no CON requirement for residential beds, nor any statutory authority for the Department to impose a CON process to the development and renovation of licensed beds. The imposition of a rule that requires providers to meet a CON-like standard exceeds the Department's statutory authority. Accordingly, this would likely violate the first JCARR prong because it would exceed the scope of the Department's statutory authority regarding licensed residential beds. The Department has responded to our previous comment and denies that this is a CON process because they are "not allocating resources or permits based on availability of existing facilities or cost limitations." We question the accuracy of this statement in light of the proposed rule and the recent state budget changes. There is a bed moratorium for licensed residential beds, so there is an allocation of resources based on only existing resources. Further, with the Department making decisions based on "feasibility" in this rule and in the state budget bill relative to financial viability, bed capacity, and bedroom capacity, we question how Department decisions are not being based on cost limitations. Clearly, as this proposal and the state budget language demonstrate, over the past several years, the Department believes it has a role in the development process that differs from its role previously. If the Department insists on pursuing this route, we suggest that, at a minimum, the development process afford providers a more thorough due process procedure, as is required for adverse actions taken by the Department for licensure purposes. We would like the opportunity to discuss these issues with the Department. As we previously mentioned, we have had no discussion regarding the development rule since February 2015 (prior to the budget bill being introduced).	Anita Allen, Vice President, Ohio Provider Resource Association	The process for approval of a renovation has not changed. The requirements in paragraph (H) of proposed new rule 5123:2-3-08 align with paragraph (G) of existing rule 5123:2-3-02 (*Licensure Application, Issuance, Survey, Renewal, and Sanction Procedures*). We were trying to reduce the steps a provider must take by tying together nonextensive renovation described in existing rule 5123:2-7-25 (*Intermediate Care Facilities - Nonextensive Renovation*) with proposed new rule 5123:2-3-08. In response to your comments, however, references to "nonextensive renovation" were removed.

Comment	By Whom	Department's Response
(I)(4) & (I)(5): These sections provide a person/government agency shall apply for a license (after obtaining development approval or placing a licensed bed on hold for future development) "in a manner prescribed by the department." Language in the current rule provides that licensure can be applied for in accordance with 5123:2-3-02 (regarding licensure application). Why was this language changed? Is the Department going to change the licensure process? This gives the Department broad discretion and is an unknown that should be clarified.	Anita Allen, Vice President, Ohio Provider Resource Association	In response to your comments, paragraph (I)(4) was revised as indicated: A person or government agency desiring to operate a residential facility shall, ~~upon~~ after obtaining development approval pursuant to this rule and establishing the facility, ~~apply for a license in a manner prescribed by~~ notify the department in writing to request issuance of the initial license no less than thirty days prior to the date of the planned opening of the facility. The department shall issue the initial license to the licensee within twenty days of determining the residential facility is in compliance with all requirements and collection of the licensure fee which shall be based on the number of licensed beds at the residential facility, that is: (a) Three hundred dollars for a residential facility with fifteen or fewer beds; and (b) One thousand five hundred dollars for a residential facility with sixteen or more beds. (5) The department may issue an interim license when it determines initiation or continuation of services at the residential facility is appropriate pending completion of the development process (e.g., while a licensee is awaiting certification by the Ohio department of health as an intermediate care facility for individuals with intellectual disabilities). A new paragraph (B)(6) was added to define "initial license" to mean written approval by the department to a licensee to operate a residential facility for a period of three years.