*** Proposed New Rule - January 10, 2014 ***

5123:2-2-XX Behavior support.

(A) Purpose

The purpose of this rule is to provide direction to persons and entities responsible for developing or implementing specialized services for individuals with developmental disabilities to ensure that individuals are supported in a positive and responsive manner with respectful solutions that recognize individuals' rights, promote individuals' personal growth and emotional wellbeing, and ensure individuals' health and welfare.

(B) Scope

This rule applies to persons and entities that provide specialized services regardless of source of payment, including, but not limited to:

(1) County boards and entities under contract with county boards;

(2) Residential facilities licensed pursuant to section 5123.19 of the Revised Code, including intermediate care facilities;

(3) Providers of supported living certified pursuant to section 5123.161 of the Revised Code; and

(4) Providers of services funded by medicaid home and community-based services waivers administered by the department.

(C) Definitions

(1) "County board" means a county board of developmental disabilities.

(2) "Department" means the Ohio department of developmental disabilities.

(3) "Director" means the director of the Ohio department of developmental disabilities or his or her designee.

(4) "Individual" means a person with a developmental disability.

(5) "Individual plan" or "individual service plan" means the written description of services, supports, and activities to be provided to an individual.

(6) "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; alternatives to the action, treatment, or service; consequences of not receiving 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.

(7) "Provider" means any person or entity that provides specialized services.

(8) "Qualified intellectual disability professional" has the same meaning as in 42 C.F.R. 483.430 as in effect on the effective date of this rule.

(9) "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.

(10) "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.

(11) "Team," as applicable, has the same meaning as in rule 5123:2-1-11 of the Administrative Code or means an interdisciplinary team as that term is used in 42 C.F.R. 483.440 as in effect on the effective date of this rule.

(D) Philosophy of positive support

(1) Individuals shall be supported in a positive, whole-person approach that promotes dignity, respect, and trust and recognizes that individuals with developmental disabilities are equal citizens with the same rights and personal freedoms granted to Ohio's citizens without developmental disabilities. Services and supports shall be based on an understanding of the individual and the reasons for his or her actions and evidence-based practices for promotion of positive outcomes and reduction of actions posing a risk to the individual or others. The foundation of this approach is creation of supportive and caring environments that enhance individuals' quality of life.

(2) There are two tiers of support:

(a) Positive measures which shall be universally available for all individuals. Effort is directed at:

(i) Ensuring individuals are in environments where they have access to preferred activities and are less likely to engage in unsafe actions due to boredom, frustration, lack of effective communication, or unrecognized health problems;

(ii) Supporting opportunities for individuals to exercise choice in matters affecting their everyday life; and

(iii) Teaching and supporting individuals to self-manage and make choices that yield positive outcomes and achievement of the individuals' goals.

(b) Restrictive measures set forth in paragraph (I) of this rule used in situations when an individual's actions pose immediate risk of harm. "Immediate risk of harm" means there exists a direct and serious risk of harm to the individual or another person. For immediate risk of harm, the individual must be capable of causing harm to self or others and the individual must be causing harm or very likely to begin causing harm. Effort is directed at:

(i) Mitigating immediate risk of harm; and

(ii) Reducing and ultimately eliminating the need for restrictive measures.

(E) Development of a risk reduction strategy

(1) The strategy for reducing risk of unsafe actions and ensuring the individual's needs are met shall be addressed as an integral part of the individual plan or individual service plan, as applicable.

(2) When a risk reduction strategy is deemed necessary by the team, the qualified intellectual disability professional or the service and support administrator, as applicable, shall ensure the risk reduction strategy is developed with the active participation of the individual and the team and incorporated into the individual plan or individual service plan.

(3) Risk reduction strategies for supporting the individual shall:

(a) Be individualized;

(b) Consider the individual's experiences, strengths, unmet needs, medical history, and history of specialized services;

(c) Be designed in a manner that promotes healing, recovery, and emotional wellbeing based on understanding and consideration of the individual's history of traumatic experiences as a means to gain insight into origins and patterns of the individual's actions;

(d) Support the individual's needs across all settings;

(e) Align with the philosophy of positive support set forth in paragraph (D) of this rule;

(f) Be data-driven with the goal of improving outcomes for the individual over time and describe behaviors to be increased or decreased in terms of baseline data about behaviors to be increased or decreased;

(g) Foster self-direction by providing the individual with choice and control;

(h) Recognize the role environment plays in behavior;

(i) Provide emotional support for the individual;

(j) Capitalize on the individual's strengths to meet challenges and needs;

(k) Focus on learning and practicing behaviors that improve outcomes for the individual;

(l) Include de-escalation measures as appropriate;

(m) Reinforce skills and practices that reduce harmful outcomes;

(n) Identify training and support for the individual's providers to help them learn to be caring and effective team members;

(o) Delineate measures to be implemented; and

(p) Identify persons responsible for implementation.

(4) An individual's risk reduction strategy shall be reviewed and reconsidered at least every twelve months and more frequently at the request of the individual or a member of the team or whenever the individual plan or individual service plan is revised.

(5) A risk reduction strategy that includes restrictive measures set forth in paragraph (I) of this rule requires:

(a) Documentation that demonstrates that positive and less restrictive measures have been employed and have been determined ineffective;

(b) A risk reduction assessment conducted within the past twelve months that clearly describes:

(i) The behavior that poses immediate risk of harm;

(ii) The level of harm that could reasonably be expected to occur with the behavior;

(iii) When the behavior is likely to occur;

(iv) The individual's unmet interpersonal, environmental, medical, mental health, and emotional needs that may be contributing to the behavior; and

(v) Steps to be taken to mitigate the behavior and address associated needs.

(c) Review and approval by the human rights and ethical oversight committee in accordance with paragraph (M) of this rule prior to implementation and whenever the risk reduction strategy is revised but no less than once per year. A qualified intellectual disability professional or service and support administrator seeking approval from the human rights and ethical oversight committee for a risk reduction strategy shall submit a written rationale based upon the risk reduction assessment that clearly indicates immediate risk of harm to the individual or others described in observable and measurable terms.

(d) Informed consent of the individual or the individual's guardian if one exists.

(e) The qualified intellectual disability professional or service and support administrator, as applicable, to provide an individual or the individual's guardian, as applicable, with written notification and explanation of the individual's or guardian's right to seek administrative resolution if he or she is dissatisfied with the risk reduction strategy or the process used for its development.

(f) Review and reconsideration by the qualified intellectual disability professional or service and support administrator, individual, and team at least every ninety days to determine and document the effectiveness of the risk reduction strategy and whether the strategy should be continued, discontinued, or revised. A decision to continue the risk reduction strategy shall be based upon review of up-to-date information which indicates the immediate risk of harm to the individual or others is still present.

(F) Additional requirements for development of a risk reduction strategy for an individual with a history of violent or sexually aggressive behavior or current court-ordered community controls

The risk reduction strategy for an individual with a history of violent or sexually aggressive behavior or current court-ordered community controls (such as mandated sex offender registration, drug testing, or participation in mental health treatment) shall:

(1) Be developed by:

(a) Persons who meet provider qualifications, professional licensure, and scope of practice requirements for mental health assessment pursuant to rule 5122-29-30 of the Administrative Code; or

(b) Persons who hold a bachelor's or graduate-level degree from an accredited college or university and have at least five years of paid, full-time (or equivalent part-time) experience in developing and implementing behavior support plans and/or risk reduction strategies.

(2) Be based on verification and documentation of the nature of the history;

(3) Identify needed services and supports to assist the individual in meeting court-ordered community controls;

(4) Outline necessary coordination with other entities (such as courts, prisons, hospitals, and law enforcement) charged with the individual's care, confinement, or reentry to the community; and

(5) Specify steps to be taken to ensure the safety of the individual and others.

(G) Provision of services and supports

(1) Services and supports shall be provided in a manner that reflects the philosophy of positive support set forth in paragraph (D) of this rule.

(2) Services and supports shall be provided with sufficient safeguards and supervision to ensure the health, welfare, and rights of individuals receiving services.

(3) Restrictive measures set forth in paragraph (I) of this rule shall never be used for punishment, retaliation, convenience of providers, or as a substitute for specialized services.

(4) Each person providing specialized services to an individual with a risk reduction strategy shall successfully complete training in the components of the risk reduction strategy prior to serving the individual.

(5) Each person providing specialized services shall successfully complete, prior to providing services and annually thereafter, training in the provisions governing rights of individuals as enumerated in section 5123.62 of the Revised Code and the requirements of rule 5123:2-17-02 of the Administrative Code.

(6) Each provider shall maintain a record of the date, time, and antecedent factors regarding utilization of a restrictive measure set forth in paragraph (I) of this rule; the provider shall share the record with the individual and the individual's team whenever the individual's risk reduction strategy is being reviewed or reconsidered.

(H) Prohibited measures

The following measures are prohibited and shall not be used:

(1) Prone restraint. "Prone restraint" means a method of intervention where an individual's face and/or frontal part of his or her body is placed in a downward position touching any surface for any amount of time.

(2) Use of a manual restraint or mechanical restraint that has the potential to inhibit or restrict an individual's ability to breathe.

(3) Use of a manual restraint or mechanical restraint that causes pain or harm to an individual.

(4) Disabling of an individual's assistive technology such as a wheelchair or communication device.

(5) Denial of breakfast, lunch, dinner, snacks, or beverages.

(6) Placing an individual in a room with no light.

(7) Subjecting an individual to damaging or painful sound.

(8) Application of electric shock to an individual's body.

(9) Subjecting an individual to any humiliating or derogatory treatment.

(10) Squirting an individual with any substance as an inducement or consequence for behavior.

(11) Time-out involving individuals who are adults. "Time-out involving individuals who are adults" means as a consequence for behavior, confining an individual who is an adult in a room or area and preventing the individual from leaving the room or area by applying physical force or by closing a door or other barrier, including placement in such a room or area when a care giver remains in the room or area with the individual. "Time-out" does not include periods in an unlocked room or area when the individual's presence in the room or area is completely voluntary and there are no adverse consequences if the individual refuses to go to or stay in the room or area.

(12) Restriction of an individual's rights as enumerated in section 5123.62 of the Revised Code when there is no immediate risk of harm (such as attempts to control an individual's habits regarding eating, smoking, or following directions).

(I) Restrictive measures that require prior approval by the human rights and ethical oversight committee

(1) The following restrictive measures are methods of last resort and may be used only when an individual's behavior poses an immediate risk of physical harm to self or others, for the sole purpose of reestablishing safety, and with prior approval by the human rights and ethical oversight committee in accordance with paragraph (M) of this rule:

(a) Manual restraint. "Manual restraint" means use of a hands-on method, but never in a prone restraint, to control an identified behavior by restricting the movement or function of an individual's head, neck, torso, one or more limbs, or entire body, using sufficient force to cause the possibility of injury. "Manual restraint" does not include a method used during a medical procedure that is routinely used during a medical procedure for patients without developmental disabilities.

(b) Mechanical restraint. "Mechanical restraint" means use of a device, but never in a prone restraint, to control an identified behavior by restricting an individual's movement or function, including a device used in any vehicle except a seat belt of a type found in an ordinary passenger vehicle or an age-appropriate child safety seat. "Mechanical restraint" does not include a device used during a medical procedure that is routinely used during a medical procedure for patients without developmental disabilities.

(2) The following restrictive measures are methods of last resort and may be used only when an individual's behavior poses an immediate risk of physical, emotional, or psychological harm to self or others, for the sole purpose of reestablishing safety, and with prior approval by the human rights and ethical oversight committee in accordance with paragraph (M) of this rule:

(a) Medication for behavior control, which shall be prescribed by and under the supervision of a licensed physician who is involved in development of the individual's risk reduction strategy.

(b) Restriction of an individual's rights as enumerated in section 5123.62 of the Revised Code.

(3) Use of a restrictive measure shall cease immediately once the immediate risk of harm has passed.

(J) Time-out involving individuals who are children

(1) “Time-out involving individuals who are children” means a behavioral intervention in which a child, for a limited and specified time, is separated from others in a non-locked room or area for the purpose of self-regulating and controlling his or her own behavior and is not physically restrained or prevented from leaving the room or area by physical barriers.

(2) Time-out involving individuals who are children that meets the conditions set forth in paragraph (J)(1) of this rule may be implemented without prior approval by the human rights and ethical oversight committee.

(K) Supporting individuals in school settings

Notwithstanding this rule, individuals receiving services in a setting governed by the Ohio department of education shall be supported in accordance with administrative rules and policies of the Ohio department of education.

(L) Unapproved restrictive measure

(1) A restrictive measure set forth in paragraph (I) of this rule used in a crisis situation (e.g.,

to prevent an individual from running into traffic) without prior approval by the human rights and ethical oversight committee shall be reported as an unapproved behavior support major unusual incident in accordance with rule 5123:2-17-02 of the Administrative Code.

(2) Nothing in this rule shall be construed to prohibit or prevent any person from intervening in a crisis situation as necessary to ensure a person's immediate health and safety.

(M) Human rights and ethical oversight committees

(1) Each county board or county board jointly with one or more providers and each intermediate care facility shall establish a human rights and ethical oversight committee to safeguard individuals' rights and protect individuals from physical, emotional, and psychological harm.

(2) The human rights and ethical oversight committee shall be comprised of no less than six members and shall include:

(a) At least two individuals who receive specialized services or who are eligible to receive specialized services;

(b) At least two family members or guardians of individuals who receive specialized services;

(c) At least one representative of county boards; and

(d) At least one representative of providers.

(3) All information and documents provided to the human rights and ethical oversight committee and all discussions of the committee shall be confidential and shall not be shared or discussed with anyone other than the individual and his or her guardian and the individual's team.

(4) The human rights and ethical oversight committee shall review, approve, reject, monitor, and reauthorize any strategies that include restrictive measures set forth in paragraph (I) of this rule. In this role, the human rights and ethical oversight committee shall:

(a) Ensure that the planning process outlined in this rule has been followed and that the individual or the individual's guardian, as applicable, has provided informed consent and been afforded due process.

(b) Ensure that the proposed restrictive measures are necessary to reduce immediate risk of harm to the individual or others.

(c) Ensure that the overall outcome of the risk reduction strategy promotes the physical, emotional, and psychological wellbeing of the individual while reducing the risk of

physical, emotional, and/or psychological harm to the individual or others.

(d) Ensure that a restrictive measure is temporary in nature and occurs only in specifically defined situations based on the level of immediate risk of harm to the individual or others.

(e) Verify that any risk reduction strategy that includes restrictive measures also incorporates actions designed to enable the individual to feel safe, respected, and valued while emphasizing choice, self-determination, and an improved quality of life.

(f) Communicate the committee's determination in writing to the qualified intellectual disability professional or service and support administrator submitting the request for approval.

(5) The human rights and ethical oversight committee shall have a process in place to review and approve an emergency response (i.e., use of a restrictive measure set forth in paragraph (I) of this rule determined to be necessary and appropriate when an individual's behavior that causes immediate risk of harm to self or others was not anticipated, and therefore, not addressed in the individual's risk reduction strategy) that is needed to respond to immediate risk of harm to an individual or others.

(6) Members of the human rights and ethical oversight committee shall receive department-approved training within three months of appointment to the committee in the following topics:

(a) Introduction to developmental disabilities;

(b) The rights of individuals as enumerated in section 5123.62 of the Revised Code;

(c) Positive culture;

(d) Confidentiality;

(e) Role of guardian and section 5126.043 of the Revised Code;

(f) This rule;

(g) Informed consent;

(h) Effect of traumatic experiences on behavior;

(i) Self-advocacy and self-determination; and

(j) Court-ordered community controls and the role of court, county board, and human rights and ethical oversight committee.

(N) Reporting of manual restraint, mechanical restraint, medication for behavior control, and restriction of an individual's rights

Within five working days of approval by the human rights and ethical oversight committee of a risk reduction strategy that includes restrictive measures set forth in paragraph (I) of this rule, the county board or intermediate care facility shall notify the department in a format prescribed by the department.

(O) Analysis of risk reduction strategies that include restrictive measures

(1) Each county board and each intermediate care facility in collaboration with its human rights and ethical oversight committee shall compile and analyze data regarding risk reduction strategies that include restrictive measures set forth in paragraph (I) of this rule for purposes of evaluating the effectiveness of risk reduction strategies at mitigating immediate risk of harm. Data compiled and analyzed shall include, but is not limited to:

(a) Nature and frequency of immediate risk of harm that triggered development of risk reduction strategies that include restrictive measures set forth in paragraph (I) of this rule;

(b) Nature and number of risk reduction strategies reviewed, approved, rejected, and reauthorized by the human rights and ethical oversight committee;

(c) Nature and number of restrictive measures implemented;

(d) Duration of risk reduction strategies that include restrictive measures set forth in paragraph (I) of this rule implemented; and

(e) Effectiveness of risk reduction strategies that include restrictive measures set forth in paragraph (I) of this rule in terms of increasing or decreasing behaviors as intended.

(2) County boards and intermediate care facilities shall make the data and analyses available to the department upon request.

(P) Department oversight

(1) The department shall take immediate action as necessary to protect the health and welfare of individuals which may include, but is not limited to:

(a) Suspension of a risk reduction strategy not developed, implemented, documented, or monitored in accordance with this rule or where trends and patterns of data suggest the need for further review;

(b) Provision of technical assistance in development or redevelopment of a risk

reduction strategy; and

(c) Referral to other state agencies or licensing bodies, as indicated.

(2) The department shall compile and analyze data regarding risk reduction strategies for purposes of determining methods for enhancing risk reduction efforts and outcomes, reducing the frequency of restrictive measures, and identifying technical assistance and training needs. The department shall make the data and analyses available.

(3) The department may periodically select a sample of risk reduction strategies for review to ensure that risk reduction strategies are developed, implemented, and monitored in accordance with this rule.

(4) The department shall conduct reviews of county boards and providers as necessary to ensure the health and welfare of individuals and compliance with this rule. Failure to comply with this rule may be considered by the department in any regulatory capacity, including certification, licensure, and accreditation.

(Q) Waiver of provisions of this rule

For adequate reasons and when requested in writing by a county board or provider, the director may waive a condition or specific requirement of this rule except that the director shall not permit use of a prohibited measure as set forth in paragraph (H) of this rule. The director shall grant or deny a request for a waiver within ten working days of receipt of the request or within such longer period of time as the director deems necessary and put whatever conditions on the waiver as are determined to be necessary. Approval to waive a condition or specific requirement of this rule shall not be contrary to the rights, health, or safety of individuals receiving services. The director's decision to grant or deny a waiver is final and may not be appealed.