

## **\*\*\*Proposed Amendments - August 15, 2019\*\*\***

### **5123-9-40 Home and community-based services waivers - administration of the self-empowered life funding waiver.**

#### (A) Purpose

This rule implements the self-empowered life funding waiver, a component of the medicaid home and community-based services program administered by the department pursuant to section 5166.21 of the Revised Code. Individuals enrolled in the self-empowered life funding waiver exercise participant direction through budget authority and/or employer authority.

#### (B) Definitions

- (1) "Adult" means an individual who is at least twenty-two years old or an individual who is under twenty-two years old and no longer eligible for educational services based on his or her graduation, receipt of a diploma or equivalency certificate, or permanent discontinuation of educational services within parameters established by the Ohio department of education.
- (2) "Agency with choice" means a service arrangement in which an agency provider acts as a co-employer with an individual. Under this arrangement, the individual is responsible for hiring, managing, and dismissing staff. The agency with choice enables the individual to exercise choice and control over services while relieving him or her of the burden of carrying out financial matters and other legal responsibilities associated with the employment of workers. The agency with choice is considered the employer of staff who are selected, hired, and trained by the individual and assumes responsibility for:
  - (a) Employing and paying staff who have been selected by the individual;
  - (b) Reimbursing allowable services;
  - (c) Withholding, filing, and paying federal, state, and local income and employment taxes; and
  - (d) Providing other supports to the individual as described in the individual service plan.
- (3) "Budget authority" means the individual has the authority and responsibility to manage his or her budget. This authority supports the individual in determining the budgeted dollar amount for each waiver service that will be provided to the

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individual and making decisions about the acquisition of waiver services that are authorized in the individual service plan (e.g., negotiating payment rates to providers within the applicable range as specified in rules adopted by the department).

- (4) "Child" means an individual who is under twenty-two years old and eligible for educational services.
- (5) "Co-employer" means either an agency with choice or a financial management services entity under contract with the state that functions as the employer of staff recruited by the individual. The individual directs the staff and is considered their co-employer. The agency with choice or a financial management services entity conducts all necessary payroll functions and is legally responsible for the employment-related functions and duties for individual-selected staff with the individual based on the roles and responsibilities identified in the individual service plan for the two co-employers. The co-employer may function solely to support the individual's employment of workers or it may provide other employer-related supports to the individual, including providing traditional agency-based staff.
- (6) "Common law employer" means the individual is the legally responsible and liable employer of staff selected by the individual. The individual hires, supervises, and discharges staff. The individual is liable for the performance of necessary employment-related tasks and uses a financial management services entity under contract with the state to perform necessary payroll and other employment-related functions as the individual's agent in order to ensure that the employer-related legal obligations are fulfilled.
- (7) "County board" means a county board of developmental disabilities.
- (8) "Department" means the Ohio department of developmental disabilities.
- (9) "Employer authority" means the individual has the authority to recruit, hire, supervise, and direct the staff who furnish supports. The individual functions as the common law employer or the co-employer of these staff.
- (10) "Financial management services" means services provided to an individual who directs some or all of his or her waiver services. When used in conjunction with budget authority, financial management services includes, but is not limited to, paying invoices for waiver goods and services and tracking expenditures against the individual's budget. When used in conjunction with employer authority, financial management services includes, but is not limited to, operating a payroll service for individual-employed staff and making required payroll withholdings. Financial management services also includes acting as

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the employer of staff on behalf of an individual under the co-employer model of employer authority.

- (11) "Home and community-based services" has the same meaning as in section 5123.01 of the Revised Code.
- (12) "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. An individual may designate another person to assist with development of the individual service plan and budget, selection of residence and providers, and negotiation of payment rates for services; the individual's designee shall not be employed by a county board or a provider, or a contractor of either.
- (13) "Individual service plan" means the written description of services, supports, and activities to be provided to an individual.
- (14) "Participant direction" means the individual has authority to make decisions about some or all of his or her waiver services and accepts responsibility for taking a direct role in managing the services. Participant direction includes the exercise of budget authority and employer authority as set forth in paragraph (H) of this rule.
- (15) "Provider" means a person or agency certified or licensed by the department that has met the provider qualification requirements to provide the specific self-empowered life funding waiver service and holds a valid medicaid provider agreement with the Ohio department of medicaid.
- (16) "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.
- (17) "Support broker" means a person who is responsible, on a continuing basis, for providing an individual with representation, advocacy, advice, and assistance related to the day-to-day coordination of services (particularly those associated with participant direction) in accordance with the individual service plan. The support broker assists the individual with the individual's responsibilities regarding participant direction, including understanding employer authority and budget authority, locating and selecting providers, negotiating payment rates, and keeping the focus of the services and support delivery on the individual and his or her desired outcomes. The support broker, working in

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conjunction with the service and support administrator, assists the individual with creating the individual service plan, developing the waiver budget, and doing day-to-day monitoring of the provision of services as specified in the individual service plan.

- (18) "Waiver eligibility span" means the twelve-month period following either an individual's initial waiver enrollment date or a subsequent eligibility redetermination date.

### (C) Financial management services entity

The state shall contract with an entity to provide financial management services to individuals enrolled in the self-empowered life funding waiver.

### (D) Application for the self-empowered life funding waiver

The county board is responsible for explaining to individuals requesting home and community-based services the services available through the self-empowered life funding waiver benefit package including the type, amount, scope, and duration of services and any applicable benefit package limitations.

### (E) Criteria for enrolling in the self-empowered life funding waiver

To be enrolled in the self-empowered life funding waiver:

- (1) The individual must meet the eligibility criteria for enrollment in home and community-based services waivers set forth in rule 5123:2-9-01 of the Administrative Code;
- (2) The individual or the individual's guardian or the individual's designee must be willing and able to perform the duties associated with participant-direction (i.e., development of the individual service plan and budget, selection of residence and providers, and negotiation of payment rates for services); and
- (3) The individual or the individual's guardian or the individual's designee is required to exercise budget authority or employer authority, in accordance with paragraph (H)(1) or (H)(2) of this rule, for at least one service the individual receives under the waiver.

### (F) Self-empowered life funding waiver enrollment, continued enrollment, and disenrollment

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An individual who meets the criteria specified in paragraph (E) of this rule or the individual's guardian or the individual's designee, as applicable, shall be informed by the county board of the following:

- (1) All services available under the self-empowered life funding waiver, as delineated in paragraph (G) of this rule, and any choices that the individual may make regarding those services;
- (2) Any feasible alternative to the waiver; and
- (3) The right to choose either institutional or home and community-based services.

### (G) Self-empowered life funding waiver benefit package

The self-empowered life funding waiver benefit package is comprised of the following services:

- (1) Adult day support in accordance with rule 5123:2-9-17 of the Administrative Code;
- (2) [Assistive technology in accordance with rule 5123-9-12 of the Administrative Code](#);
- (~~2~~) (~~3~~) Career planning in accordance with rule ~~5123:2-9-13~~ [5123-9-13](#) of the Administrative Code;
- (~~3~~) (~~4~~) Clinical/therapeutic intervention in accordance with rule 5123-9-41 of the Administrative Code;
- (~~4~~) (~~5~~) Community respite in accordance with rule 5123-9-22 of the Administrative Code;
- (~~5~~) (~~6~~) Functional behavioral assessment in accordance with rule 5123-9-43 of the Administrative Code;
- (~~6~~) (~~7~~) Group employment support in accordance with rule 5123:2-9-16 of the Administrative Code;
- (~~7~~) (~~8~~) Individual employment support in accordance with rule 5123:2-9-15 of the Administrative Code;

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- ~~(8)~~ (9) Non-medical transportation in accordance with rule ~~5123:2-9-18~~ 5123-9-18 of the Administrative Code;
- ~~(9)~~ (10) Participant-directed goods and services in accordance with rule 5123-9-45 of the Administrative Code;
- ~~(10)~~ (11) Participant-directed homemaker/personal care in accordance with rule ~~5123:2-9-32~~ 5123-9-32 of the Administrative Code;
- ~~(11)~~ (12) Participant/family stability assistance in accordance with rule 5123-9-46 of the Administrative Code;
- ~~(12) Remote monitoring in accordance with rule 5123:2-9-35 of the Administrative Code;~~
- ~~(13) Remote monitoring equipment in accordance with rule 5123:2-9-35 of the Administrative Code;~~
- (13) Remote support in accordance with rule 5123-9-35 of the Administrative Code;
- (14) Residential respite in accordance with rule 5123-9-34 of the Administrative Code;
- (15) Support brokerage in accordance with rule 5123-9-47 of the Administrative Code;
- (16) Transportation in accordance with rule ~~5123:2-9-24~~ 5123-9-24 of the Administrative Code;
- (17) Vocational habilitation in accordance with rule 5123:2-9-14 of the Administrative Code; and
- (18) Waiver nursing delegation in accordance with rule 5123:2-9-37 of the Administrative Code.

### (H) Participant direction

The self-empowered life funding waiver is designed to support individuals who want to direct their services through exercise of budget authority and/or employer authority.

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(1) Individuals enrolled in the self-empowered life funding waiver may exercise budget authority for:

(a) Assistive technology;

~~(a)~~ (b) Clinical/therapeutic intervention;

~~(b)~~ (c) Community respite;

~~(c)~~ (d) Functional behavioral assessment;

~~(d)~~ (e) Participant-directed goods and services;

~~(e)~~ (f) Participant-directed homemaker/personal care;

~~(f)~~ (g) Participant/family stability assistance;

~~(g) Remote monitoring;~~

~~(h) Remote monitoring equipment;~~

(h) Remote support;

(i) Residential respite; and

(j) Support brokerage.

(2) Individuals enrolled in the self-empowered life funding waiver may exercise employer authority for:

(a) Functional behavioral assessment;

(b) Participant-directed goods and services;

(c) Participant-directed homemaker/personal care;

(d) Participant/family stability assistance; and

(e) Support brokerage.

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- (3) Individuals enrolled in the self-empowered life funding waiver may not exercise either budget authority or employment authority for:
  - (a) Adult day support;
  - (b) Career planning;
  - (c) Group employment support;
  - (d) Individual employment support;
  - (e) Non-medical transportation;
  - (f) Transportation;
  - (g) Vocational habilitation; or
  - (h) Waiver nursing delegation.

### (I) Benefit limitations

- (1) The cost of services available under the self-empowered life funding waiver shall not exceed the following overall benefit limitations:
  - (a) Adult -- ~~forty~~ forty-five thousand dollars per waiver eligibility span.
  - (b) Child -- ~~twenty-five~~ thirty thousand dollars per waiver eligibility span.
- (2) The following services are subject to specific benefit limitations:
  - (a) Payment for support brokerage shall not exceed eight thousand dollars per waiver eligibility span.
  - (b) An individual may receive only one functional behavioral assessment per waiver eligibility span, the cost of which shall not exceed one thousand five hundred dollars.
- (3) The benefit limitations in appendix B to rule ~~5123:2-9-19~~ 5123-9-19 of the Administrative Code apply to adult day support, career planning, group employment support, individual employment support, non-medical transportation, and vocational habilitation provided under the self-empowered life funding waiver.

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### (J) Individual service plan requirements

- (1) All services shall be provided to an individual enrolled in the self-empowered life funding waiver pursuant to a written individual service plan that meets the requirements set forth in rule 5123:2-1-11 of the Administrative Code.
- (2) The individual service plan is subject to approval by the department and the Ohio department of medicaid pursuant to section 5166.21 of the Revised Code. Notwithstanding the procedures set forth in this rule, the Ohio department of medicaid may in its sole discretion, and in accordance with section 5166.05 of the Revised Code, direct the department or the county board to amend individual service plans for individuals if the Ohio department of medicaid determines that such services are medically necessary and the procedures set forth in Chapter 5160-1 of the Administrative Code would not accommodate a request for such medically necessary services.

### (K) Service documentation

- (1) Services under the self-empowered life funding waiver shall not be considered delivered unless the provider maintains service documentation.
- (2) A provider shall maintain all service documentation in an accessible location. The service documentation shall be available, upon request, for review by the centers for medicare and medicaid services, the Ohio department of medicaid, the department, a county board or regional council of governments that submits to the department payment authorization for the service, and those designated or assigned authority by the Ohio department of medicaid or the department to review service documentation.
- (3) A provider shall maintain all service documentation for a period of six years from the date of receipt of payment for the service or until an initiated audit is resolved, whichever is longer.
- (4) If a provider discontinues operations, the provider shall, within seven calendar days of discontinuance, notify the county boards for the counties in which individuals to whom the provider has provided services reside, of the location where the service documentation will be stored, and provide each such county board with the name and telephone number of the person responsible for maintaining the records.
- (5) Claims for payment a provider submits for services delivered shall not be considered service documentation. Any information contained on the submitted claim shall not be substituted for any required service documentation information

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that the provider is required to maintain to validate payment for medicaid services.

### (L) Payment standards

- (1) Services provided under the self-empowered life funding waiver shall be subject to the payment standards set forth in rules adopted by the department.
- (2) Rule ~~5123:2-9-06~~ [5123-9-06](#) of the Administrative Code does not apply to services provided under the self-empowered life funding waiver.
- (3) Payment for services constitutes payment in full. Payment shall be made when:
  - (a) The service is identified in an approved individual service plan;
  - (b) The service is recommended for payment through the payment authorization process; and
  - (c) The service is provided by a provider selected by an individual enrolled in the self-empowered life funding waiver.
- (4) Payment for services shall not exceed amounts authorized through the payment authorization process for the individual's corresponding waiver eligibility span.
- (5) When a service is also available on the state plan, state plan services shall be billed first. Only services in excess of what is covered under the state plan shall be authorized.
- (6) Claims for payment shall be submitted to the department or the financial management services entity in the format prescribed by the department. The department or the financial management services entity, as applicable, shall inform county boards of the billing information submitted by providers in a manner and at the frequency necessary to assist the county boards to manage the waiver expenditures being authorized.
- (7) Claims for payment shall be submitted within three hundred thirty calendar days after the service is provided. Payment shall be made in accordance with the requirements of rule 5160-1-19 of the Administrative Code. Claims for payment shall include the number of units of service.

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- (8) Providers shall take reasonable measures to identify any third-party health care coverage available to the individual and file a claim with that third party in accordance with the requirements of rule 5160-1-08 of the Administrative Code.
- (9) For individuals with a monthly patient liability for the cost of self-empowered life funding waiver services, as defined in rule ~~5160:1-6-07~~ [5160:1-6-07.1](#) of the Administrative Code, and determined by the county department of job and family services for the county in which the individual resides, payment is available only for the waiver services delivered to the individual that exceed the amount of the individual's monthly patient liability. Verification that patient liability has been satisfied shall be accomplished as follows:
  - (a) The department shall provide notification to the appropriate county board identifying each individual who has a patient liability for waiver services and the monthly amount of the patient liability.
  - (b) The county board shall assign the waiver services to which each individual's patient liability shall be applied and assign the corresponding monthly patient liability amount to the provider that provides the preponderance of waiver services. The county board shall notify each individual and waiver service provider, in writing, of this assignment.
  - (c) Upon submission of a claim for payment, the designated waiver service provider shall report the waiver service to which the patient liability was assigned and the applicable patient liability amount on the claim for payment using the format prescribed by the department.
- (10) The department, the Ohio department of medicaid, the centers for medicare and medicaid services, and/or the auditor of state may audit any funds a provider receives pursuant to this rule, including any source documentation supporting the claiming and/or receipt of such funds.
- (11) Overpayments, duplicate payments, payments for services not rendered, payments for which there is no documentation of services delivered or the documentation does not include all the required items as set forth in rules adopted by the department, or payments for services not in accordance with an approved individual service plan are recoverable by the department, the Ohio department of medicaid, the auditor of state, or the office of the attorney general. All recoverable amounts are subject to the application of interest in accordance with rule 5160-1-25 of the Administrative Code.

(M) Due process rights and responsibilities

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- (1) An applicant for or recipient of self-empowered life funding waiver services may use the process set forth in section 5160.31 of the Revised Code and rules implementing that statute, for any purpose authorized by that statute. The process set forth in section 5160.31 of the Revised Code is available only to applicants, recipients, and their lawfully appointed authorized representatives. Providers shall have no standing in an appeal under this section.
- (2) An applicant for or recipient of self-empowered life funding waiver services shall use the process set forth in section 5160.31 of the Revised Code and rules implementing that statute for any challenge related to the type, amount, scope, or duration of services included in or excluded from an individual service plan.

### (N) Ohio department of medicaid authority

The Ohio department of medicaid retains final authority to establish payment rates for self-empowered life funding waiver services; to review and approve each service identified in an individual service plan that is funded through the self-empowered life funding waiver and the payment rate for the service; and to authorize the provision of and payment for waiver services through the payment authorization process.

### (O) Monitoring, compliance, and quality assurance

The Ohio department of medicaid shall conduct periodic monitoring and compliance reviews related to the self-empowered life funding waiver in accordance with Chapter 5166. of the Revised Code. Reviews may consist of, but are not limited to, physical inspections of records and sites where services are provided and interviews of providers, recipients, and administrators of waiver services. A financial management services entity under contract with the state, self-empowered life funding waiver providers, the department, and county board shall furnish to the Ohio department of medicaid, the centers for medicare and medicaid services, and the medicaid fraud control unit or their designees any records related to the administration and/or provision of self-empowered life funding waiver services. Individuals enrolled in the self-empowered life funding waiver shall cooperate with all monitoring, compliance, and quality assurance reviews conducted by the Ohio department of medicaid, the department, the county board, the centers for medicare and medicaid services, and the medicaid fraud control unit or their designees.