

## \*\*\*Proposed Revisions - November 22, 2021\*\*\*

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

#### (A) Purpose

This rule establishes standards 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

For the purposes of this rule, the following definitions apply:

- (1) "Agency provider" ~~means an entity that directly employs at least one person in addition to the chief executive officer for the purpose of providing services for which the entity must be certified in accordance with rule 5123:2-2-01 of the Administrative Code~~ has the same meaning as in rule 5123-2-08 of the Administrative Code.
- (2) "County board" means a county board of developmental disabilities.
- (3) "Department" means the Ohio department of developmental disabilities.
- (4) "Home and community-based services" has the same meaning as in section 5123.01 of the Revised Code.
- (5) "Immediate family member" means a spouse, parent or stepparent, child or stepchild, sibling or stepsibling, grandparent, or grandchild.
- (6) "Independent provider" ~~means a self-employed person who provides services for which he or she must be certified in accordance with rule 5123:2-2-01 of the Administrative Code and does not employ, either directly or through contract, anyone else to provide the services~~ has the same meaning as in rule 5123-2-09 of the Administrative Code.
- (7) "Individual" means a person with a developmental disability or for purposes of giving, refusing to give, or withdrawing consent for services, ~~his or her~~ the person's guardian in accordance with section 5126.043 of the Revised Code or other person authorized to give consent.
- (8) "Individual service plan" means the written description of services, supports, and activities to be provided to an individual.
- (9) "Individual-specific expenses" means standard monthly costs other than rent (e.g., household goods and supplies, food, minor equipment, and medical equipment) that 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.

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- (10) "Intermediate care facility for individuals with intellectual disabilities" has the same meaning as in section 5124.01 of the Revised Code.
- (11) "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 in accordance with ~~a residency agreement meeting the requirements set forth in paragraph (F) of this rule~~ or a lease or a residency agreement.
- (12) "Lease" means a written rental agreement meeting the requirements for rental agreements set forth in Chapter 5321. of the Revised Code.
- ~~(13) "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 individuals, including space and fixtures for sleeping, cooking, eating, living, bathing, and sanitation. [Term no longer used.]~~
- ~~(14)~~ (13) "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.
- ~~(15)~~ (14) "Provider-controlled residential setting" means a residence 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;
  - (c) An immediate family member of an owner or a management employee of the individual's agency provider;
  - (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) 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, or an immediate family member of the individual's agency provider; or
  - (f) An owner or a management employee of the individual's agency provider.
- ~~(16)~~ (15) "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,

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utilities, and furniture.

~~(17)~~ (16) "Residency agreement" means a written agreement between an individual and a landlord which establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy of a residence. A residency agreement is not required when the use and occupancy of the residence is subject to a lease.

~~(18)~~ (17) "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.

~~(19)~~ (18) "Roommate" means a person with whom one shares a bedroom.

~~(20)~~ (19) "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.

(20) "Shared living" has the same meaning as in rule 5123-9-33 of the Administrative Code.

### (C) 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. An individual receiving services shall have opportunities to access age-appropriate activities, engage in meaningful employment and non-work activities, and pursue activities with persons of ~~his or her~~ the individual's 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,~~ **[Redundant – addressed in paragraph (C)(3)(c).]** 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~~ shall be considered to enable the individual to live and work in settings which promote access to and participation in the broader community.

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

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

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- (b) Supplement and not supplant existing natural supports;
- (c) Support the individual in a cost-effective manner and 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;
  - (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) 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 located in a building on the grounds of or immediately adjacent to a publicly-operated facility that provides inpatient institutional treatment.

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

A provider of home and community-based services shall:

- (1) Meet the requirements set forth in Chapter [5123-9](#) or 5123:2-9 of the Administrative Code for the services delivered; and
- (2) 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~~ [the](#) community as identified in the individual service plan.

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

An individual enrolled in a home and community-based services waiver shall:

- (1) 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;
- (2) 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 or different types of service;
- (3) Use services in accordance with ~~his or her~~ [the](#) individual service plan; and
- (4) 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.

### (F) Requirement for residency agreement or lease

- ~~(1) Each individual living in a residential facility or a provider-controlled residential setting shall have a residency agreement that meets the requirements set forth in paragraph (F)(3) of this rule or a lease consented to by both the individual and the landlord.~~
- ~~(2) When the individual and the landlord enter into a lease, the lease shall not have terms contradictory to the provisions set forth in paragraph (F)(3)(f) of this rule.~~
- ~~(3) When the individual and the landlord enter into a residency agreement, the residency agreement shall include:~~

- [\(1\) Each individual living in a residential facility or shared living setting shall have a residency agreement consented to by both the individual and the landlord that includes:](#)

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- (a) Name and contact information of the landlord.
- (b) A statement that the residence is, as applicable, a residential facility or a ~~provider-controlled residential~~ shared living setting ~~that includes an explanation of the relationship between the landlord and the provider of residential services.~~
- (c) ~~In a residential facility,~~ An explanation of the relationship between the landlord and the provider of home and community-based services and a statement regarding whether or not the individual may choose a provider other than the residential facility or shared living provider to deliver home and community-based services.
- ~~(d) In a provider-controlled residential setting, a statement that the individual may choose any provider to deliver services without changing the terms of the residency agreement.~~
- ~~(e)~~ (d) 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 residence by individuals residing in the residence;
  - (iii) Is responsible for keeping the residence in a safe condition that meets local health and safety codes; and
  - (iv) Has a right to reasonable access to the residence in order to complete the terms of the residency agreement.
- ~~(f)~~ (e) Unless otherwise specified in the individual service plan and implemented in accordance with rule 5123-2-06 of the Administrative Code, a statement that the individual:
  - (i) Has a right to select ~~his or her~~ the individual's roommates;
  - (ii) Has a right to privacy and security including locks and keys to ~~his or her living unit~~ the individual's bedroom;
  - (iii) Has a right to decorate ~~his or her living unit~~ the individual's bedroom;
  - (iv) Has a right to have visitors of ~~his or her~~ the individual's choosing at any time;
  - (v) Has the freedom and support to control ~~his or her~~ the individual's schedule and activities; and
  - (vi) Has a right to access food at any time.
- ~~(g)~~ (f) A statement that the individual is responsible for timely monthly payment of the rent or ~~his or her~~ the individual's share of the rent, as applicable, to the

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landlord. When determined to be appropriate by the individual with the support of the team, the residency agreement may designate a person or responsible party to ensure timely payment to the landlord.

~~(h)~~ (g) 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) In a residential facility, shall include the cost of providing furnishings, equipment, and supplies required by ~~Chapter~~ Chapters 5123-3 and 5123:2-3 of the Administrative Code; and
- (iv) Shall not include items that are reimbursable under the medicaid program.

~~(i)~~ (h) Individual-specific expenses:

- (i) Which shall reflect only items that are available exclusively from the landlord and determined to be needed by the individual with the support of ~~his or her~~ the team;
- (ii) Which shall reflect only items that the individual has been unable to access or utilize through other available resources; and
- (iii) The cost of which may be shared equally when two or more residents agree to share use of the item.

~~(j)~~ (i) A statement that the individual has a right to terminate the residency agreement:

- (i) 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; or
- (ii) With cause upon five-day advance written notice to the landlord if the landlord has breached an obligation or failed to satisfy required conditions under the residency agreement.

~~(k)~~ (j) In a ~~provider-controlled residential~~ shared living setting, a statement that the landlord has a right to terminate the residency agreement:

- (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; or
- (ii) With cause upon five-day advance written notice to the individual if the individual has breached an obligation or failed to satisfy required conditions under the residency agreement or chooses to leave or otherwise vacates the

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residence (e.g., upon incarceration).

~~(4)~~ (k) In a residential facility, a statement that the residential facility shall terminate services in accordance with rule 5123:2-3-05 of the Administrative Code.

~~(4) A modification to the rights set forth in paragraph (F)(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.~~

(2) Each individual living in a provider-controlled residential setting shall have a lease consented to by both the individual and the landlord that includes:

(a) A statement that the residence is a provider-controlled residential setting including an explanation of the relationship between the landlord and the provider of home and community-based services.

(b) A statement that the individual may choose any provider to deliver home and community-based services.