

5123-9-11

**Home and community-based services waivers - free choice of providers.**

(A) Purpose

This rule establishes the responsibilities of a county board of developmental disabilities for assuring an individual's right to obtain home and community-based services from any qualified and willing provider in accordance with 42 C.F.R. 431.51 as in effect on the effective date of this rule and sections 5123.044 and 5126.046 of the Revised Code.

(B) Definitions

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

- (1) "Adult day support" has the same meaning as in rule 5123-9-17 of the Administrative Code.
- (2) "Agency provider" means an entity that ~~employs persons for the purpose of providing services for which the entity must be certified under rules adopted by the department~~ directly employs at least one person in addition to a director of operations for the purpose of providing services for which the entity is certified in accordance with rule 5123-2-08 of the Administrative Code.
- (3) "Career planning" has the same meaning as in rule 5123-9-13 of the Administrative Code.
- (4) "County board" means a county board of developmental disabilities.
- (5) "Department" means the Ohio department of developmental disabilities.
- (6) "Group employment support" has the same meaning as in rule ~~5123:2-9-16~~ 5123-9-16 of the Administrative Code.
- (7) "Home and community-based services" has the same meaning as in section 5123.01 of the Revised Code.
- (8) "Homemaker/personal care" has the same meaning as in rule 5123-9-30 of the Administrative Code.
- (9) "Independent provider" means a self-employed person who provides services for which ~~he or she must be certified under rules adopted by the department~~

~~and who~~ the person is certified in accordance with rule 5123-2-09 of the Administrative Code and does not employ, either directly or through contract, anyone else to provide the services.

- (10) "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.
  - (11) "Individual employment support" has the same meaning as in rule ~~5123:2-9-15~~ 5123-9-15 of the Administrative Code.
  - (12) "Non-medical transportation" has the same meaning as in rule 5123-9-18 of the Administrative Code.
  - (13) "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~~ 5123-5-02 of the Administrative Code.
  - (14) "Vocational habilitation" has the same meaning as in rule 5123-9-14 of the Administrative Code.
- (C) Notification of free choice of providers, assistance with the provider selection process, and procedural safeguards
- (1) The county board ~~shall~~ will notify each individual at the time of enrollment in a home and community-based services waiver and at least annually thereafter, of the individual's right to choose any qualified and willing provider of home and community-based services. The notification ~~shall~~ will specify that:
    - (a) The individual may choose agency providers, independent providers, or a combination of agency providers and independent providers;
    - (b) The individual may choose providers from all qualified and willing providers available statewide and is not limited to those currently providing services in a given county;
    - (c) When a provider offers more than one service, the individual may choose to receive only one of the offered services from that provider.

- (d) The individual may choose to receive services from a different provider at any time;
  - (e) An individual choosing to receive homemaker/personal care in a licensed residential facility is choosing both the place of residence and the homemaker/personal care provider, but maintains free choice of providers for all other home and community-based services and the right to move to another setting at any time if a new homemaker/personal care provider is desired; and
  - (f) The service and support administrator will assist the individual with the provider selection process if the individual requests assistance.
- (2) A service and support administrator ~~shall~~ will assist an individual enrolled in a home and community-based services waiver with one or more of the following, as requested by the individual:
- (a) Accessing the department's website to conduct a search for qualified and willing providers;
  - (b) Providing the individual with the department's guide to interviewing prospective providers;
  - (c) Sharing objective information with the individual about providers that includes reports of provider compliance reviews conducted in accordance with section 5123.162 or 5123.19 of the Revised Code, approved plans of correction submitted by providers in response to compliance reviews, number of individuals currently served, and any information about services offered by the provider to meet the unique needs of a specific group of individuals such as aging adults, children with autism, or individuals with intense medical or behavioral needs;
  - (d) Utilizing the statewide, uniform format to create a profile that ~~shall include~~ includes the type of services and supports the individual requires, hours of services and supports required, the individual's essential service preferences, the funding source of services, and any other information the individual chooses to share with prospective providers;
  - (e) Making available to all qualified providers in the county that have expressed an interest in serving additional individuals, the individual-specific profile created in accordance with paragraph

- (C)(2)(d) of this rule to identify willing providers of the service;
- (f) Contacting providers on the individual's behalf;
- (g) Developing provider interview questions that reflect the characteristics of the individual's preferred provider; and
- (h) Scheduling and participating as needed in interviews of prospective providers. If the individual chooses to interview the county board as a prospective provider, the service and support administrator ~~shall~~ will disclose to the individual that the service and support administrator is employed by the same agency. The service and support administrator may participate in this interview as directed by the individual.
- (3) The county board ~~shall~~ will document the alternative home and community-based services settings that were considered by each individual and ensure that each individual service plan reflects the setting options chosen by the individual.
- (4) The county board ~~shall~~ will document that each individual has been offered free choice among all qualified and willing providers of home and community-based services.
- (5) If a county board receives a complaint from an individual regarding the free choice of provider process, the county board ~~shall~~ will respond to the individual within thirty calendar days and provide the department with a copy of the individual's complaint and the county board's response. The department ~~shall~~ will review the complaint and the county board's response and take actions it determines necessary to ensure that each individual has been afforded free choice among all qualified and willing providers of home and community-based services.
- (6) The county board ~~shall~~ will notify the department if the county board becomes aware of a provider conditioning willingness to provide a home and community-based service to an individual on being selected by that individual to provide another service.
- (D) Additional requirements that apply when a county board provides home and community-based services

(1) So long as a county board is a provider of home and community-based services, the county board ~~shall~~ will:

(a) Ensure administrative separation between county board staff doing assessments and service planning and county board staff delivering direct services.

(b) Establish and implement annual benchmarks for recruitment of sufficient providers of adult day support, career planning, group employment support, individual employment support, non-medical transportation, and vocational habilitation. Benchmarks are subject to approval by the department. The county board ~~shall~~ will report progress on achieving benchmarks to the department twice per year in accordance with the schedule and format established by the department.

~~(c) Implement annual benchmarks for reducing by one-third in calendar years 2021, 2022, and 2023, the number of individuals for whom the county board provides adult day support, career planning, group employment support, individual employment support, non-medical transportation, and vocational habilitation as of the effective date of this rule. The county board shall report in writing to the department on April first and October first of calendar years 2021, 2022, and 2023, progress made, including a detailed explanation of actions the county board is taking to ensure achievement of the established benchmarks.~~

~~(d)~~(c) Refrain from providing adult day support, career planning, group employment support, individual employment support, non-medical transportation, or vocational habilitation to an individual for whom the county board was not already providing the service prior to ~~the effective date of this rule~~ November 19, 2020.

(2) In accordance with Ohio's home and community-based services waiver amendments approved by the federal centers for medicare and medicaid services on May 22, 2020 and 42 C.F.R. 441.301(c)(1)(vi) in effect on the effective date of this rule, a county board ~~shall~~ must cease providing home and community-based services on or before February 28, 2024.

(E) Commencement of services

The county board ~~shall~~ will adopt written procedures to ensure that home and community-based services begin in accordance with the date established in the individual service plan. The procedures ~~shall~~ will include a requirement for the county board to monitor the service commencement process and implement

corrective measures if services do not begin as indicated.

(F) Department training and oversight

- (1) The department ~~shall~~ will periodically provide training and assistance to familiarize county boards and individuals with the rights and responsibilities set forth in this rule.
- (2) The department ~~shall~~ will investigate or cause an investigation when an individual alleges that ~~he or she~~ the individual is being denied free choice of providers for home and community-based services.
- (3) The department ~~shall~~ will utilize the accreditation process in accordance with rule 5123-4-01 of the Administrative Code to monitor county board compliance with requirements of this rule.

(G) Due process and appeal rights

- (1) Any recipient of or applicant for home and community-based services may utilize the process set forth in section 5101.35 of the Revised Code, in accordance with division 5101:6 of the Administrative Code, for any purpose authorized by that statute and the rules implementing the statute, including being denied the choice of a provider who is qualified and willing to provide home and community-based services. The process set forth in section 5101.35 of the Revised Code is available only to applicants, recipients, and their lawfully authorized representatives.
- (2) Providers ~~shall~~ may not utilize or attempt to utilize the process set forth in section 5101.35 of the Revised Code. ~~Providers shall not~~ or appeal or pursue any other legal challenge to a decision resulting from the process set forth in section 5101.35 of the Revised Code.
- (3) The county board ~~shall~~ will inform the individual, in writing and in a manner the individual can understand, of the individual's right to request a hearing in accordance with division 5101:6 of the Administrative Code.
- (4) The county board ~~shall~~ will immediately implement any final state hearing decision or administrative appeal decision relative to free choice of providers for home and community-based services issued by the Ohio department of medicaid, unless a court of competent jurisdiction modifies such a decision as the result of an appeal by the medicaid applicant or recipient.

~~(H) Authority of director to modify provisions of this rule~~

~~During the COVID-19 state of emergency declared by the governor, the director of the department may modify the requirements in paragraph (C)(2) of this rule to allow a service and support administrator to assist an individual as described in paragraphs (C)(2)(a) to (C)(2)(h) of this rule, to the extent possible during the emergency, by using telephone, video conference, electronic communication, or other means.~~