

5123:2-9-11

HCBS waivers - free choice of provider.(A) Purpose

The purpose of this rule is to establish procedures for individuals to choose qualified and willing providers of home and community-based services in accordance with provisions set forth in sections 5126.046 and 5123.044 of the Revised Code. This rule clarifies the department's role in assuring the free choice of provider processes are adhered to and is intended to emphasize the right of individuals to choose any qualified provider of home and community-based services. Nothing in this rule shall have the effect or shall be interpreted as limiting that choice.

(B) Application

(1) This rule applies to all county boards; to all persons responsible for service and support administration in accordance with section 5126.15 of the Revised Code when assisting individuals/guardians who may be eligible for services through a county board to select home and community-based service providers; and to qualified providers of home and community-based services. This rule is applicable to qualified providers of home and community-based services when these services are provided in a facility licensed by the department in accordance with section 5123.19 of the Revised Code. The requirements of this rule supersede the requirements contained in paragraphs (C)(4), (C)(5), (C)(6), (C)(7) and (G)(1)(a) of rule 5123:2-3-05 of the Administrative Code.

(2) Notwithstanding paragraph (G)(1) of this rule, the SSA shall follow the provider choice process set forth in paragraphs (H) and (I) of this rule for each service specified in an ISP, at the time of an individual's enrollment in a home and community-based services program, annually at the time of re-determination, and at any other time the individual/guardian expresses an interest in or makes a request to choose a new, different or additional provider.

(C) Definitions

(1) "County board" means a county board of mental retardation and developmental disabilities established under Chapter 5126. of the Revised Code or a regional council of government comprised of two or more county boards and formed under section 5126.13 of the Revised Code.

(2) "Department" means the Ohio department of mental retardation and developmental disabilities as established by section 121.02 of the Revised Code.

(3) "Guardian" means a guardian appointed by the probate court under Chapter 2111. of the Revised Code. If the individual is a minor for whom no guardian has been appointed under that chapter, "guardian" means the individual's

parents. If no guardians have been appointed for a minor and the minor is in the legal or permanent custody of a government agency or person other than the minor's natural or adoptive parents, "guardian" means that government agency or person. "Guardian" also includes an agency under contract with the department for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code.

- (4) "Home and community-based services" means medicaid funded home and community-based services provided under a medicaid component the department administers pursuant to section 5111.871 of the Revised Code, as described and modified through rules promulgated by ODJFS and the department.
- (5) "Individual" means a person with mental retardation or other developmental disability who is eligible to receive home and community-based services as an alternative to receiving services in an intermediate care facility for the mentally retarded under the applicable waiver. A guardian may take any action on behalf of the individual, make choices for an individual, or may receive notice on behalf of an individual to the extent permitted by applicable law.
- (6) "ISP" means the individual service plan, a written description of the services, supports and activities to be provided to an individual.
- (7) "ODJFS" means the Ohio department of job and family services as established by section 121.02 of the Revised Code.
- (8) "Qualified provider" means an agency or individual certified by the department to provide home and community-based services and who has a medicaid agreement with ODJFS that covers the services.
- (9) "Service and support administration" means the duties performed by individuals employed or under contract with a county board to provide service and support administration as identified in section 5126.15 of the Revised Code.
- (10) "SSA" means service and support administrators who are certified in accordance with rules adopted by the department under Chapter 5123:2-5 of the Administrative Code and who provides the functions of service and support administration.
- (11) "Willing provider" means a qualified provider who, in accordance with the provider choice process contained in paragraphs (H) and (I) of this rule, agrees to provide home and community-based services. When determining willingness to provide federally funded waiver services to an individual, neither the provider nor any person acting on behalf of the provider shall discriminate, by reason of race, color, religion, sex, age, handicap, national origin or ancestry, against any individual eligible to receive home and

community-based services.

(D) Decision-making responsibility

- (1) An individual shall be responsible for making all decisions regarding free choice of providers unless the individual has a guardian, in which case the guardian shall be responsible for making such decisions.
- (2) Individuals, including those with guardians, have the right to participate in decisions regarding the free choice of providers.
- (3) An individual who does not have a guardian or an individual's guardian may designate another person, including a member of the individual's family, to participate in the process of making decisions regarding free choice of providers in accordance with paragraph (P) of rule 5123:2-1-11 of the Administrative Code.

(E) Provider lists

- (1) The department shall create and maintain on its website lists of all providers of home and community-based services who meet the requirements of paragraph (C)(8) of this rule. The department shall update the list at least monthly. Providers shall update their information at the frequency and in the manner determined by the department.
- (2) The SSA shall utilize the lists of providers created by the department to assist the individual in identifying potential providers, in accordance with paragraph (H) of this rule.

(F) Notification process

- (1) Annually, the county board shall provide to each individual, guardian and/or person designated by the individual the following information in writing and in a form and manner the individual can understand:
 - (a) A description of the individual's right to choose any qualified provider from among all those available statewide and not limited to those who provide services currently in a given county.
 - (b) Procedures the SSA will follow, in accordance with paragraph (H) of this rule, to assist an individual/guardian in the selection of providers of home and community-based services. The procedures shall be based upon written guidance developed and approved by the department and ODJFS and shall be made available to each individual without modification of the guidance provided.
 - (c) A description of information available on the department's website

pertaining to providers of home and community-based services and instructions to access the information.

(d) A description of the individual's hearing rights pursuant to section 5101.35 of the Revised Code that are contained in a handbook developed and approved by the department and ODJFS.

(2) The county board shall maintain documentation to verify compliance with the requirements of paragraph (F)(1) of this rule, including the list of individuals contacted, the date(s) on which the notification occurred, and the text of the notification.

(G) Provider choice options available to an individual

(1) When an individual/guardian identifies and/or chooses a qualified provider who is also willing to provide home and community-based services to the individual, the SSA shall honor the individual's/guardian's request and shall not utilize the provider selection process set forth in paragraphs (H) and (I) of this rule. The SSA shall document this selection.

(2) An individual/guardian may choose homemaker/personal care services providers under the home and community-based services waivers through two options:

(a) If an individual currently resides in a facility licensed by the department in accordance with section 5123.19 of the Revised Code in which the operator is certified to provide home and community-based services, or desires to reside in a licensed facility in the future, the individual/guardian is choosing both the place of residence and the homemaker/personal care services provider. To change providers of homemaker/personal care services, with assistance provided by the SSA, the individual/guardian shall:

(i) Obtain the agreement of the licensee to permit another provider of homemaker/personal care services to provide services within the licensed home; or

(ii) Relocate from the licensed home.

(b) If the individual resides in any other setting in which it is permissible to receive home and community-based services, the individual/guardian may choose any qualified and willing provider using the processes described in this rule.

(H) Responsibilities of the county board in the choice process

Except as provided in paragraph (G)(1) of this rule, the county board shall adhere to

the following processes to assist an individual/guardian to choose qualified providers of home and community-based services:

- (1) The county board shall inform the individual/guardian of the department's website containing the list of providers qualified to provide home and community-based services.
- (2) The county board shall assist the individual/guardian to access the website, if assistance is needed.
- (3) The county board shall assist the individual/guardian, if requested by the individual/guardian, to obtain outcomes of past internal and/or external monitoring reviews of home and community-based services provided.
- (4) Following the individual's/guardian's review of the list of qualified providers and identification of the individual's/ guardian's preliminary consideration of a qualified provider, the county board shall contact the provider(s) selected preliminarily by the individual to determine the provider's interest in providing services to the individual. This contact shall be made within five working days following the county board's receipt of the preliminary provider selections by the individual/guardian, unless the individual/ guardian or a person designated by the individual/guardian wishes to contact the provider(s) directly.

(I) Responsibilities of the SSA, provider, and individual in the choice process

- (1) If at any time during the process protected health information is requested, the SSA shall obtain a HIPAA-compliant release of information from the individual/guardian before such information shall be provided.
- (2) At the time of the initial contact with the provider(s) who is the preliminary choice of the individual, the SSA shall describe the services and supports desired by the individual and the anticipated frequency, duration, and location of the services to be delivered.
- (3) The provider shall inform the SSA of the provider's preliminary determination to proceed with the selection process within two working days following this initial contact by the SSA.
- (4) In each instance when the provider has indicated a preliminary interest in providing waiver services to the individual, the SSA shall assure that the individual/guardian is aware of his/her opportunity to meet with the provider. If the individual/guardian indicates the desire for this meeting, if requested, the SSA shall assist the individual/guardian to meet with the provider at a place and time acceptable to both parties.

- (5) When an agency provider has agreed to be available for consideration by an individual/guardian, if requested by the individual/guardian, the agency shall make available:
- (a) Description of all home and community-based services the provider is certified to provide;
 - (b) Qualifications of the chief executive officer of the agency;
 - (c) Written policies and procedures related to the provision of the home and community-based services desired by the individual; and
 - (d) Additional information the provider elects to make available, including outcomes of past internal and/or external monitoring reviews of the home and community-based services provided.
- (6) When an individual provider has agreed to be available for consideration by an individual/guardian, if requested by the individual/guardian, the provider shall make available:
- (a) A description of all home and community-based services the provider is certified to provide; and
 - (b) Additional information the provider considers to be relevant, including past experiences providing services and supports.
- (7) Unless the individual/guardian does not desire to have a meeting, within three working days following the meeting with the individual/guardian, the provider shall inform the county board whether the provider is interested in pursuing the referral.
- (8) If the provider is not interested in pursuing the referral, the county board shall notify the individual/guardian within two working days and resume the provider choice process with an alternative provider.
- (9) Nothing in this rule shall be construed to prohibit an individual/guardian from engaging simultaneously in the provider selection process with more than one provider.
- (10) If the provider is interested in pursuing the referral, the county board shall forward information to the provider sufficient to enable the provider to determine whether he/she can provide the desired waiver services and meet the health and welfare needs of the individual within the standards governing payment for the home and community-based services. This information shall be released within three working days following the county board's receipt of an indication of interest by the provider and only upon consent from the

individual/guardian.

- (a) When the potential provider indicates that supplemental information and/or assessments are needed to enable the provider to evaluate the service delivery strategy that will best support the individual and reach a conclusion concerning the provider's willingness to serve the individual, based upon the reasonableness of the request, the individual/guardian shall determine the type and extent of supplemental information to be provided.
- (b) The county board shall obtain the individual's consent to obtain the supplemental information. When consent is obtained, the county board shall initiate activities needed to obtain the information. In no instance shall the county board forward the supplemental material to the provider more than twenty working days following the date on which the individual's/guardian's consent was obtained.
- (11) The potential provider shall inform the individual/guardian and the county board of the provider's determination to serve or not to serve the individual within five working days following receipt of the information described in paragraph (I)(10) of this rule or receipt of the supplemental information authorized for release, as described in paragraphs (I)(10)(a) and (I)(10)(b) of this rule, whichever is the later date. This communication shall be made in a form and manner the individual can understand. The notification also shall be made in writing to the county board.
- (12) Any timelines contained in paragraphs (H) and/or (I) of this rule may be extended with the written consent of the individual/guardian, county board and the involved waiver service provider.
- (13) The county board shall utilize all elements of the checklist described in appendix A to this rule to document compliance with the activities and timelines contained in paragraphs (G) to (I) of this rule. The checklist shall be completed in each instance when an individual engages in the free choice of a provider process, as described in paragraph (B)(2) of this rule. The county board shall retain completed checklists as a part of the individual's service record.

(J) Initiating services

- (1) The SSA shall assist the individual in making arrangements for initiation of home and community-based services with the chosen provider.
- (2) The SSA shall document the chosen provider and the type, frequency, duration, and location of home and community-based services on the individual's ISP. The ISP shall indicate ratios at which services are to be delivered when individuals share waiver services.

(K) Due process and appeal rights for individuals

- (1) Any recipient 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-level designation 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 a home and community-based service. 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 not utilize or attempt to utilize the process set forth in section 5101.35 of the Revised Code. Providers shall not 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 inform the individual or guardian, in writing and in a manner the individual can understand, of the individual's right to request a hearing in accordance with division-level designation 5101:6 of the Administrative Code.
- (4) The county board shall immediately implement any final state hearing decision or administrative appeal decision relative to free choice of provider for HCBS waiver services issued by ODJFS, unless a court of competent jurisdiction modifies such a decision as the result of an appeal by the medicaid applicant or recipient.

(L) Department training and oversight

- (1) The department shall provide periodic training and assistance to familiarize individuals with the rights and responsibilities contained in this rule and to enable county boards and providers of home and community-based services to meet their respective obligations when implementing the rule.
- (2) The department shall assure the county board's compliance with this rule and initiate appropriate remedial action, when warranted, in accordance with sections 5123.044 and 5126.055 of the Revised Code.
- (3) The department shall investigate or cause an investigation of complaints when it is alleged by the individual/guardian that the individual is being denied free choice of a provider of home and community-based services. On receipt of these complaints, the department shall do either of the following:
 - (a) Conduct an independent review or investigation of the complaint in accordance with section 5123.14 of the Revised Code;

(b) Request that an independent review or investigation of the complaint be conducted by a county board that is not implicated in the report, a regional council of government, or any other entity authorized to conduct such investigations.

(4) The department shall conduct an individual quality assurance review, at the frequency determined by the department, in accordance with rule 5123:2-12-01 of the Administrative Code to verify through an interview process with the individual, guardian and involved family members the extent of their participation in the choice of a provider.

(5) The department shall utilize the accreditation process in accordance with rule 5123:2-4-01 of the Administrative Code to monitor county board compliance with requirements of this rule.

(M) Assistance to parties interested in becoming providers

(1) The county board shall refer all parties interested in becoming a provider of home and community-based services to the department's website.

(2) The department shall include on the website a description of the entire certification process including an application for certification as a home and community-based service provider.

(3) The department shall assist all parties interested in becoming providers.

(4) The county board shall not require current or potential providers of home and community-based services to meet standards and/or training expectations that exceed or are separate from the provider certification requirements adopted by the department and contained in the Ohio Administrative Code.

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Certification

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