*** Revisions in Response to Testimony ***

5123:2-9-03 Home and community-based services waivers - overtime and limit on number of hours in a work week an independent provider may provide ~~home and community-based services in a work week~~ services.

(A) Purpose

This rule sets forth procedures related to overtime worked by independent providers, places a limit on the number of hours in a work week an independent provider may provide ~~home and community-based services in a work week~~ services under a home and community-based services medicaid waiver component administered by the Ohio department of developmental disabilities, and establishes a process and the circumstances under which the limit may be exceeded.

(B) Definitions

(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.

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

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

(4) "Emergency" means an unanticipated and sudden absence of an individual's ~~independent provider, agency provider,~~ provider or natural supports due to illness, incapacity, or other cause.

(5) "Home and community-based services" has the same meaning as in section 5123.01 of the Revised Code.

(6) "Home and community-based services medicaid waiver component" has the same meaning as in section 5166.01 of the Revised Code.

(7) "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.

(8) "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.

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

(10) "Overtime" means hours worked in excess of forty in a work week.

~~(10)~~ (11) "Provider" means an agency provider or an independent provider.

~~(11)~~ (12) "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.

(13) "Waiver eligibility span" means the twelve-month period beginning with the individual's initial waiver enrollment date or a subsequent eligibility re-determination date.

~~(12)~~ (14) "Work week" means the seven consecutive days beginning on Sunday at 12:00 a.m. and ending on Saturday at 11:59 p.m. of each week.

(C) Overtime

The department, county boards, individuals who receive services, and independent providers shall work collaboratively to efficiently use available resources and to the extent possible, reduce the need for overtime. To that end, an independent provider shall inform an individual's service and support administrator of the number of persons for whom the independent provider provides any medicaid-funded services as an independent provider anywhere in the state and the number of hours of services the independent provider provides in a work week for each such person:

(1) When the independent provider is selected by the individual to provide services;

(2) When notifying the service and support administrator in accordance with paragraph (D)(4) of this rule; and

(3) At other times upon request of the service and support administrator.

~~(C)~~ (D) Limit on providing ~~home and community-based~~ services in a work week

(1) Beginning ~~July 1, 2017~~ February 1, 2018, after an independent provider has worked ~~forty~~ sixty hours in a work week providing any medicaid-funded services as an independent provider, that independent provider may ~~only~~ provide additional units of services under a home and community-based services medicaid waiver component administered by the department as an independent provider in that work week ~~if~~ only:

(a) When authorized by the service and support administrator for the individual for whom the additional services are provided in accordance with paragraph ~~(D)~~ (D)(3) of this rule; or

(b) Due to an emergency.

(2) Individuals receiving services under a home and community-based services medicaid waiver component administered by the department and their independent providers and service and support administrators shall take all measures necessary to achieve compliance with the limit established in paragraph ~~(C)(1)~~ (D)(1) of this rule by ~~July 1, 2017~~ February 1, 2018.

~~(D) Authorization to exceed limit~~

~~(1) Whenever possible, an independent provider shall request authorization to exceed the limit established in paragraph (C)(1) of this rule prior to providing the services.~~

~~(2) When requesting authorization and at other times upon the request of a service and support administrator, an independent provider shall inform the service and support administrator of the number of persons for whom the independent provider provides any medicaid-funded services as an independent provider anywhere in the state and the number of hours of services the independent provider provides in a work week for each such person.~~

~~(3) The service and support administrator shall review the request and decide whether to authorize the independent provider to exceed the limit in accordance with the assessment and person-centered planning process set forth in rule 5123:2-1-11 of the Administrative Code. The service and support administrator may only authorize an independent provider to exceed the limit in the following circumstances:~~

~~(a) An emergency;~~

~~(b) A shortage of other available independent providers or agency providers;~~

~~(c) An individual is traveling for vacation or other reasons and it is not feasible for more than one provider to travel with the individual to provide needed care; or~~

~~(d) A situation where requiring additional independent providers or agency providers would place an individual at risk of harm due to the specialized needs of the individual, for example:~~

~~(i) An individual with a compromised immune system may be put at risk by having multiple providers; or~~

~~(ii) The independent provider is the only provider that has been trained by the nurse on delegated tasks or trained by the behavioral specialist to implement unique behavioral support strategies in which case, the independent provider could be authorized to exceed the limit until additional providers are trained.~~

~~(4) A service and support administrator may only authorize an independent provider to exceed the limit on a time-limited basis, as specified in the individual service plan. A service and support administrator may extend the period for which an independent provider is authorized to exceed the limit only when circumstances continue to necessitate such authorization. The service and support administrator shall not authorize the independent provider to exceed the limit pursuant to paragraph (D)(3)(b) of this rule unless the service and support administrator has approved and the parties have begun to implement a time-limited plan that will eliminate the circumstances requiring the independent provider to provide the additional units of service.~~

~~(5) A service and support administrator may authorize an independent provider to exceed the limit pursuant to paragraph (D)(3) of this rule even though the cost would cause an individual to exceed the budget limitations applicable to the home and community-based services medicaid waiver component in which the individual is enrolled. When the service and support administrator's authorization to exceed the limit pursuant to paragraph (D)(3) of this rule causes the cost of services to exceed the individual's funding range, the service and support administrator shall ensure a request for prior authorization is initiated in accordance with rule 5123:2-9-07 of the Administrative Code.~~

(3) As part of the assessment and person-centered planning process set forth in rule 5123:2-1-11 of the Administrative Code, an individual and his or her team shall identify known or anticipated events or circumstances that will necessitate an individual's independent provider to exceed the limit established in paragraph (D)(1) of this rule.

(a) When known or anticipated events or circumstances will necessitate an individual's independent provider to exceed the limit, the events and circumstances, including authorization for the independent provider to exceed the limit for these specific events and circumstances, shall be addressed in the individual service plan. Examples of known or anticipated events or circumstances include:

(i) Scheduled travel or surgery of the individual, the individual's family member, or the individual's provider;

(ii) Holidays or scheduled breaks from school;

(iii) The individual has a compromised immune system and may be put at risk by having additional providers;

(iv) The independent provider is the only provider that has been trained by a nurse on delegated tasks or trained by a behavioral specialist to implement unique behavioral support strategies; and

(v) A shortage of other available providers.

(b) When an individual requests that an independent provider be authorized to routinely exceed the limit due to a shortage of other available providers, the individual shall provide documentation demonstrating the individual's efforts to identify additional providers. When good faith efforts to identify additional providers have not been effective, the service and support administrator may authorize the independent provider to exceed the limit as specified in the individual service plan, for the duration of the individual's waiver eligibility span.

(c) When, pursuant to paragraph (D)(3)(a)(iv) or (D)(3)(a)(v) of this rule, the service and support administrator authorizes an independent provider to exceed the limit, the service and support administrator shall work with the individual and the individual's team to develop and implement a plan to eliminate the circumstances that necessitate the independent provider to exceed the limit.

(4) When an emergency necessitates an individual's independent provider to exceed the limit established in paragraph (D)(1) of this rule, the independent provider shall notify the individual's service and support administrator in accordance with the county board's written procedure described in paragraph (D)(5) of this rule, within seventy-two hours of the events or circumstances creating the emergency and report the hours the independent provider worked that exceeded the limit.

(5) On or before January 1, 2018, a county board shall implement a written procedure for an individual's independent provider to notify the individual's service and support administrator when an emergency requires the independent provider to exceed the limit established in paragraph (D)(1) of this rule. The county board shall notify independent providers at least thirty calendar days in advance of revising the written procedure.

(E) Violations of this rule

(1) 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 shall not be interpreted to permit an independent provider to violate this rule.

(2) An independent provider who violates the requirements of this rule may be subject to denial, suspension, or revocation of certification pursuant to rule 5123:2-2-01 of the Administrative Code.

(F) Informal appeal process

(1) When, as part of the assessment and person-centered planning process set forth in rule 5123:2-1-11 of the Administrative Code, a service and support administrator denies authorization for an independent provider to exceed the limit established in paragraph (D)(1) of this rule, the individual may appeal the decision through the process set forth in rule 5123:2-1-12 of the Administrative Code.

(2) Initiation of an appeal in accordance with paragraph (F)(1) of this rule shall not limit an individual's ability to exercise his or her due process rights in accordance with paragraph (G) of this rule.

~~(F)~~ (G) Due process rights and responsibilities

(1) Applicants for and recipients of services under a home and community-based services medicaid waiver component administered by the department 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 that section.

(2) Applicants for and recipients of services under a home and community-based services medicaid waiver component administered by the department 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, level, scope, or duration of services included in or excluded from an individual service plan. A county board's denial of authorization for an independent provider to exceed the limit established in paragraph ~~(C)(1)~~ (D)(1) of this rule does not necessarily result in a change in the level of services received by an individual.