

TO BE RESCINDED

5123:2-9-08 **HCBS waivers - Compliance reviews of certified HCBS waiver providers.**

(A) Purpose and scope

This rule governs compliance reviews conducted by the department and the county board to assure compliance by certified providers with certification standards. This rule applies to all certified providers, including certified providers licensed in accordance with section 5123.19 of the Revised Code.

(B) Definitions

- (1) "Applicable requirements" means:
- (a) Federal and state laws and regulations which govern the conduct of the county board and/or certified provider, including, but not limited to Chapters 4723., 5111., 5123., and 5126. of the Revised Code and all administrative rules promulgated under the authority of these statutes.
 - (b) Requirements set forth in any waiver, approved under the authority of section 1915(c) of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C.A. 1396n, as amended, under which federal reimbursement is provided for designated HCBS to eligible individuals, which is administered by the department pursuant to an interagency agreement between the department and ODJFS.
- (2) "Certification revocation" means the revocation of a certified provider's certification to serve one or more individuals in one or more counties.
- (3) "Certification suspension" means either of the following:
- (a) Suspension of a certified provider's certification to serve one or more individuals in one or more counties for a specified time period; or
 - (b) Suspension of a certified provider's certification to serve additional individuals in one or more counties.
- (4) "Certified provider" means a certified provider for HCBS waiver services.
- (5) "Compliance review" means department or county board reviews of certified providers for the purpose of determining provider compliance with applicable

requirements in order to ensure the health, safety, and welfare of the individual.

- (6) "County board" means a county board of mental retardation and developmental established under Chapter 5126. of the Revised Code.
- (7) "Managerial responsibilities and duties" includes formulating policy, responsibly directing the implementation of policy, assisting in the preparation for the conduct of collective negotiations, administering collectively negotiated agreements, or having a major role in personnel administration.
- (8) "Management staff" means a person employed in a position having supervisory or managerial responsibilities and duties.
- (9) "Non-management staff" means a person employed in a position not having supervisory or managerial responsibilities and duties, but does not include an individual as defined in rule 5123:2-8-01 of the Administrative Code.
- (10) "Protocol" means the forms, instructions for the completion of written documentation and process developed by the department used by the county board and/or the department to conduct compliance monitoring in accordance with this rule. A protocol does not create provider standards or qualifications.
- (11) "Supervisory responsibilities and duties" includes the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment.

(C) Compliance reviews

(1) Regular reviews

- (a) The department shall coordinate with the county board the completion of compliance reviews of certified providers who billed for services during the previous calendar year. Compliance reviews of certified providers shall be conducted so that each certified provider is reviewed once during the term of their certification, but at least once every five years. Reviews by the county board shall not include those providers licensed by the department in accordance with section 5123.19 of the Revised

Code.

- (b) The department shall conduct reviews of waiver recipients living in licensed residential facilities in accordance with section 5123.19 of the Revised Code and administrative rules promulgated under its authority.
- (c) The department in its discretion may conduct or arrange through the county board, a compliance review of any certified provider who has not billed for services within the time frame set forth in paragraph (C)(1) of this rule.
- (d) These reviews may include on-site and/or desk reviews of certified providers.

(2) Special reviews

- (a) The department or county board may conduct the following special compliance reviews:
 - (i) Department reviews of recommendations by the county board in accordance with paragraph (D) of this rule
 - (ii) Look-behind reviews of certified providers. A "look-behind review" is a review by the department of a sample of certified providers reviewed by the county board during the previous calendar year to verify conformance with the review requirements outlined in this rule. A certified provider or county board may request the department to conduct a look-behind review.
 - (iii) Reviews, including reviews pertaining to the health, safety or welfare of an individual, which results from a complaint and/or unusual or major unusual incident that may indicate the certified provider's failure to comply with applicable standards.
- (b) The department may conduct reviews at its own discretion.
- (c) These reviews may include on-site and/or desk reviews of the certified provider.

- (3) The department shall conduct compliance reviews of any county board when any of the circumstances under paragraph (E)(1) of this rule exist. Such

compliance reviews shall be conducted in accordance with the provisions of this rule.

- (4) The department shall develop protocols for the implementation of compliance reviews. The department and the county board shall use the protocols developed by the department for compliance reviews and the county board may not change or augment the protocols. The protocols shall include, but may not be limited to, the following components:
 - (a) The method for selecting a sample of certified providers to be reviewed;
 - (b) The types and scope of reviews that may be conducted;
 - (c) The process and procedures for notifying certified providers of upcoming reviews;
 - (d) The elements of provider compliance, which shall be the applicable requirements;
 - (e) The elements of a written compliance report to a certified provider that shall include the explanation of any deficiencies, the process to develop and implement a plan of compliance, and an explanation of the due process afforded to a certified provider as described in this rule;
 - (f) The criteria for conducting announced and unannounced reviews;
 - (g) Any forms or methods of documentation approved by the department.
- (5) The department shall make the protocols available to any party requesting it and shall include the protocols in any training outlined in paragraph (G) of this rule.

(D) Compliance responsibilities of the county board

- (1) Throughout any compliance review conducted by an county board, the county board shall have the burden of proving any findings or conclusions contained in any preliminary or final reports issued by the county board.
- (2) The county board shall monitor the services provided to the individual to ensure the individual's health, safety, and welfare. Monitoring by the county board shall include compliance by the provider with certification standards and

provider adherence to applicable requirements. Compliance reviews by the county board shall be conducted in accordance with administrative rules and the protocols established by the department.

- (3) An county board shall conduct compliance reviews in accordance with the protocols established by the department and the provisions of paragraph (C) of this rule. Procedures following a compliance review conducted by the county board shall be as follows:
 - (a) Within twenty-one calendar days after the completion of the review or the identification of a violation or deficiency of provider qualifications or standards, the county board shall deliver written notice of the violation or deficiency to the certified provider along with the requirement for the submittal of a plan of compliance from the certified provider. The preliminary report shall be completed in a format prescribed by the protocols established by the department.
 - (b) The certified provider shall have an opportunity to provide a written response to the preliminary report within fourteen calendar days from receipt of the report. If the certified provider does not respond within the fourteen days, the report shall be final and not subject to appeal by the certified provider. The certified provider's response shall include one of the following:
 - (i) If the preliminary report indicates no deficiencies, the certified provider shall be asked to provide a written acknowledgement of receipt of the report to the county board.
 - (ii) The certified provider shall concur with the deficiencies identified in the preliminary report and submit a plan of compliance to correct the deficiencies. In the event the plan of compliance requires changes to an individual's service plan, such changes shall be made in accordance with applicable requirements. If the service plan results in additional services to be provided by the certified provider, it shall include the manner in which the certified provider is to be paid for those services.
 - (iii) The certified provider shall object to any comments or deficiencies identified in the preliminary report and supply information to support the objections.
 - (c) If the county board concurs with the certified provider's response, the county board shall amend its preliminary report accordingly within

seven calendar days of receipt of the certified provider's response and send a copy of the report to the certified provider, the department, and the individual, guardian, and/or to the parent of a minor child who participated in the review.

- (d) If the county board does not concur with any or all of the objections raised in the certified provider's response and/or with the certified provider's proposed plan of compliance, the county board shall meet with the certified provider within seven calendar days of receiving the certified provider's response in an attempt to reach a consensus on areas of disagreement.
- (e) Within seven calendar days after the conclusion of the meeting, or if the certified provider chooses not to participate in such a meeting, the county board shall prepare and mail to the certified provider a compliance review report. The report shall include the following:
 - (i) All findings of non-compliance by the county board;
 - (ii) Any objections raised by the certified provider;
 - (iii) The basis upon which the county board made its decision not to accept the certified provider's objection; and
 - (iv) A plan of compliance developed by the county board if the county board and certified provider cannot agree on a plan of compliance.
- (f) If the certified provider objects to any of the findings in the report, including a plan of compliance developed by the county board, the certified provider may submit a written appeal to the department within seven calendar days of the certified provider's receipt of the report.
- (g) Upon receipt of the certified provider's appeal of the county board's report, the department shall initiate a review and may request input from the certified provider and/or the county board during the course of its review.
- (h) The department shall conclude a review of the report of the county board within fourteen calendar days of receiving the report from the county board. The review shall consider the findings and recommendations of the county board and the response from the certified provider. The

department shall notify the county board and the certified provider, in writing, of its determination of the appeal. If the appeal by the provider is in regard to a finding of a deficiency or violation of applicable standards as a result of a review conducted by the county board, the department shall:

- (i) Issue a written decision as to the substantiation of the finding; and
 - (ii) Direct the certified provider to submit an acceptable plan of compliance to the department within seven calendar days if the department substantiates the finding of non-compliance.
- (i) The department shall send the plan of compliance to the county board. The county board shall be responsible for verifying the implementation of any plan of compliance and notifying the department when a certified provider has completed its plan of compliance.
- (j) If the certified provider fails to comply with the plan of compliance, the county board shall notify the department within five calendar days of the date the plan of compliance was to be completed. The county board shall provide its recommendation for any action to be taken by the department under applicable requirements, which may include, but is not limited to, a recommendation that the department initiate certification suspension or revocation proceedings pursuant to paragraph (H) of this rule.
- (k) A certified provider shall not be subject to any adverse action for acting in accordance with a plan of compliance approved by a county board. However, the department shall require the certified provider to comply with applicable rules in the event the plan of compliance is determined to be erroneous.
- (l) An county board shall not be considered to be deficient in its responsibilities if it has acted in accordance with paragraph (D) of this rule.
- (m) Reports or findings issued under paragraph (D) of this rule may be introduced in any proceeding initiated by the department under paragraph (H) of this rule; however, no findings contained in any report issued under this paragraph shall be deemed conclusively established for the purposes of any such proceedings. The department shall be required to prove in accordance with Chapter 119. of the Revised Code any findings it intends to raise for consideration in a proceeding the

department initiates under paragraph (H) of this rule. The certified provider shall be permitted to contest in accordance with Chapter 119. of the Revised Code any such findings or conclusions in such proceedings under paragraph (H) of this rule.

- (n) The timelines outlined in paragraph (D) of this rule may be extended by the mutual written consent of the county board and the provider.
- (E) The county board as a certified provider shall be treated in the same manner as any other certified provider and shall be held responsible for all subcontracted services in the same manner as any other certified provider.
- (1) When any of the circumstances listed in this paragraph exist, the department shall arrange for the review of the county board, and the county board's responsibilities for compliance reviews shall be limited:
 - (a) The county board is a county board that is a certified provider, the county board shall not conduct a compliance review of the county board's compliance with the continuing certification standards for the services the board is certified to provide;
 - (b) The provider is a council of governments formed by two or more county boards and the county board is a member of such council;
 - (c) The county board provides funding to the provider in excess of five hundred dollars other than through a contract to provide services to an individual;
 - (d) The county board appoints or approves the appointment of the majority of the provider's board members;
 - (e) The county board appoints or approves the appointment of the majority of the provider's officers;
 - (f) The majority of the provider's management staff are employees of the county board who are acting within the scope of their employment by the county board;
 - (g) The majority of the provider's non-management staff are employees of the county board who are acting within the scope of their employment by the county board;

- (h) The county board furnishes to the provider at less than fair market price any office space or other physical facility, materials, equipment, supplies, or utilities that has a fair market value in excess of five hundred dollars.
- (2) Nothing in this rule shall be construed to limit the authority of the county board to protect an individual's health, safety, or welfare under sections 5126.31 and 5126.33 of the Revised Code, to conduct quality assurance reviews under section 5126.43 of the Revised Code and rule 5123:2-12-01 of the Administrative Code, or to ensure compliance and quality of services provided by its subcontractors in circumstances where the county board is providing services as a certified provider under authority of its contract with the subcontractors and provider certification requires the certified provider to complete.

(F) Compliance reviews conducted by the department

- (1) Throughout any compliance review conducted by the department, the department shall have the burden of proving any findings contained in any preliminary or final reports issued by the department.
- (2) The department shall conduct reviews in accordance with the protocols established by the department and the provisions of paragraph (C) of this rule. Procedures following a compliance review conducted by the department shall be as follows:
 - (a) When the department conducts a compliance review, a report shall be issued to the certified provider within twenty-one calendar days of the conclusion of the review. The report shall be completed in conformance with the protocol established by the department. A copy of the report shall be sent to the county board of the county where the certified provider provides waiver services and to the individual, guardian, and/or to the parent of a minor child who participated in the review.
 - (b) The certified provider may appeal any deficiencies in the report by submitting a written statement with supporting documentation to the department within fourteen calendar days of the issuance of the report. The department shall make a determination on the appeal, in writing, within fourteen calendar days of receipt of the appeal. The certified provider may file a written appeal with the director of the department or the director's designee within seven calendar days after the date of the determination by the department. The director of the department or the

director's designee shall make a determination on the appeal of the certified provider within fourteen calendar days of the receipt of the appeal. The decision of the director or the director's designee shall be the final administrative appeal within the department. The department shall provide a copy of the notification to the individual, guardian, and/or to the parent of a minor child who participated in the review.

- (c) The certified provider who has received a copy of a report listing any deficiencies shall submit a plan of compliance to the department within fourteen calendar days of receipt of the report. The plan shall include how the certified provider will correct any deficiencies and the timelines for completion. The department shall approve or disapprove the plan as follows:
 - (i) If the department accepts the certified provider's plan of compliance, the department shall notify the certified provider of such acceptance within seven calendar days of receipt of the plan of compliance and send a copy to the county board.
 - (ii) If the department does not accept the plan of compliance, the department shall notify the certified provider in an attempt to develop an acceptable plan of compliance with the certified provider within seven calendar days of receipt of the plan of compliance. The department or the certified provider may contact the county board for assistance in developing an acceptable plan of compliance.
 - (iii) The department may direct the certified provider to implement a plan of compliance developed by the department when the certified provider does not submit an acceptable plan of compliance to the department or when conditions present a risk to an individual's health, safety or welfare. A copy of the plan of compliance developed by the department shall be sent to the county board.
 - (d) The county board may provide comments to the department throughout the department's compliance review process outlined in paragraph (F) of this rule, which may include, but is not limited to, a recommendation that the department initiate certification suspension or revocation proceedings pursuant to paragraph (H) of this rule.
- (3) The timelines outlined in paragraph (F) of this rule may be extended by the mutual written consent of the department and the provider.

- (4) Reports or findings issued under paragraph (F) of this rule may be introduced in any proceeding initiated by the department under paragraph (H) of this rule; however, no findings contained in any report issued under this paragraph shall be deemed conclusively established for the purposes of any such proceedings. The department shall be required to prove in accordance with Chapter 119. of the Revised Code any findings it intends to raise for consideration in a proceeding the department initiates under paragraph (H) of this rule. The certified provider shall be permitted to contest in accordance with Chapter 119. of the Revised Code any such findings in such proceedings.

(G) Training

- (1) The department shall provide or arrange for initial training to county boards and certified providers regarding the requirements and procedures outlined in this rule.
- (2) Any employees or agents of the department or the county board whose responsibilities include conducting compliance reviews in accordance with this rule shall complete the initial training in the requirements and procedures outlined in this rule prior to conducting reviews.
- (3) The department shall provide documentation of a person's completion of this training to the county board. The county board shall maintain a list of the persons in its county that have completed this training and are able to conduct reviews in accordance with this rule.
- (4) The department may require persons who have received the initial training to receive continuing training in the implementation of this rule in a manner prescribed by the department.

(H) Certification suspension or revocation

- (1) The department may initiate certification suspension or revocation proceedings if the department finds one or more of the following:
 - (a) Substantial violation(s) of applicable requirements which violation(s) present a risk to an individual's health and welfare; or
 - (b) A pattern of non-compliance with either plans of compliance that have been accepted by the county board or those plans of compliance that the

department has approved in accordance with this rule; or

- (c) A pattern of continuing non-compliance with applicable requirements; or
 - (d) A licensed provider has had their license revoked by the licensing authority; or
 - (e) Other good cause, including misfeasance, malfeasance, nonfeasance, confirmed abuse or neglect, financial irresponsibility, or other conduct the director determines is injurious to individuals being served. The department may gather and evaluate information from a variety of sources, including the county board and provider, in making such a determination.
- (2) Certification suspension or revocation proceedings under paragraph (H) of this rule shall be conducted in accordance with Chapter 119. of the Revised Code.
- (a) When the director of the department initiates certification revocation proceedings, no opportunity for submitting a plan of compliance shall be given.
 - (b) When the director initiates certification suspension proceedings, an opportunity for submitting a plan of compliance may be given.
 - (c) A letter shall be sent by certified mail, return address requested, to the certified provider by the director notifying the certified provider of the initiation of certification suspension or revocation proceedings. The letter shall include:
 - (i) The reasons for the proposed suspension or revocation;
 - (ii) The certified provider's right to a hearing in accordance with Chapter 119. of the Revised Code.
- (3) When the department issues a notice of its intent to suspend or revoke a certified provider's certification:
- (a) Written notice shall be given to ODJFS; and
 - (b) Written notice of that intent shall be given by the department to the county board for each county in which the proposed suspension or revocation

is proposed to be effective.

- (4) Each county board that is notified in writing by the department of its intent to suspend or revoke a certified provider's certification shall so notify in writing each individual in the county board's county who is receiving the waiver services for which the provider's certification is proposed to be suspended or revoked, the individual's guardian if the individual is an adult for whom a guardian has been appointed, and the individual's parent or guardian if the individual is a minor. The department shall prepare and sign the letter, which the county board shall send without modification or augmentation.
- (5) The department may suspend or revoke a certified provider's certification regardless of whether some or all of the deficiencies enumerated in accordance with this rule that prompted the department's intent to suspend or revoke the certification have been corrected at the time of the hearing.
- (6) When the department suspends or revokes a certified provider's certification the certified provider shall comply with the department's adjudication order within thirty days of the date of the mailing of the order.
- (7) Written notice of the certified provider's suspension or revocation shall be given to ODJFS and to the county board for each county in which the suspension or certification is effective.
- (8) Each county board that is notified in writing by the department of its suspension or revocation of a certified provider's certification shall so notify in writing each individual in the county board's county who is receiving the waiver services for which the provider's certification is suspended or revoked, the individual's guardian if the individual is an adult for whom a guardian has been appointed, and the individual's parent or guardian if the individual is a minor.
- (9) If a certified provider does not request a hearing within thirty calendar days of the date of the department's notice to suspend or revoke the certified provider's certification, the department shall issue an adjudication order suspending or revoking the certified provider's certification and shall follow the procedures set forth in paragraphs (H)(7) and (H)(8) of this rule. If a certified provider's certification is suspended or revoked, the certified provider shall comply with the adjudication order within thirty days of the date of the mailing of the order.
- (10) If the department issues an adjudication order that suspends a provider's certification for a specified time period, the suspension shall be lifted at the

end of that time period, provided that the provider demonstrates to the department's satisfaction that the conditions that led to the suspension have been corrected.

- (11) If the department issues an adjudication order that suspends a provider's certification to serve additional individuals, the department shall lift the suspension if the provider demonstrates to the department's satisfaction that the conditions that led to the suspension have been corrected.

Effective:

R.C. 119.032 review dates: 11/30/2012

Certification

Date

Promulgated Under: 119.03
Statutory Authority: 5111.871, 5123.04, 5123.045, 5123.19, 5126.05,
5126.08, 5126.431
Rule Amplifies: 5111.871, 5123.04, 5123.045, 5123.19, 5126.05,
5126.08, 5126.431
Prior Effective Dates: 10/16/2003, 07/08/2004, 07/01/2005