

Sup Ct

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:)
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)
)

Case No. 2009-0121

THE GUARDIANSHIP OF
JOHN SPANGLER

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On Appeal from the Geauga County
Probate Court of Appeals, Eleventh
Appellate District

Court of Appeals
Case Nos. 2007-G-2800
2007-G-2802

MERIT BRIEF OF
APPELLANT GEAUGA COUNTY BOARD OF DEVELOPMENTAL DISABILITIES

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STATEMENT OF THE CASE AND FACTS

A. Background on John Spangler

Appellee John Spangler (“John”) is currently 21 years old. He suffers from autism, mitochondrial disease, and mild mental retardation. As John has grown older, his behaviors have become more difficult, with periodic bouts of violent and destructive behavior. *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at ¶2 (App. C)¹. John’s mother, Gabriele Spangler (“Mrs. Spangler”), testified that John “has intermittent explosive disorder. When he explodes, he has no comprehension of what’s going on. * * *” (T. 6/15/06 p. 7; Supp. p. 6 (for explanation of reference see fn. 1)). Mrs. Spangler has made “frantic calls” to staff of Appellant Geauga County Board of Developmental Disabilities (“Gauga County DD Board”), backed by letters from physicians from the Cleveland Clinic “saying that he [could not] be left alone with her and her daughter in the home because he [was] aggressive, especially in the earlier part towards his mother.” (T. 6/15/06 p. 17; Supp. p. 16). At times, John presented such a threat to Mrs. Spangler and her daughter Michelle that they locked themselves in a bedroom (T. 6/19/06 pp. 6, 27; Supp. pp. 27, 31), had to call the Sheriff and have John probated. (T. 6/15/06 p. 7; Supp. p. 6; 6/19/06 p. 27; Supp. p. 31).

¹ The following abbreviations are used throughout this brief:

“**2800 Rec. #**” refers to the record number designation in the numbered docket for 11th Dist. Court of Appeals Case No. 2007-G-2800 filed in the Supreme Court by the Geauga County Clerk of Courts on June 16, 2009.

“**2802 Rec. #**” refers to the record number designation in the numbered docket for 11th Dist. Court of Appeals Case No. 2007-G-2802 filed in the Supreme Court by the Geauga County Clerk of Courts on June 16, 2009.

“**App.**” refers to the Appendix to this Merit Brief of the Geauga County DD Board.

“**Supp.**” refers to the Supplement filed with this Brief in accordance with S.Ct.Prac.R. VII.

“**T. [date]**” refers to transcripts which included in **2800 Rec. #7** and **2802 Rec. #6**. Transcripts are identified by the date of hearing.

B. Initial Guardianship Proceedings

In early June, 2006, John experienced a particularly severe behavior problem which caused him to be involuntarily hospitalized at a local psychiatric unit. Mrs. Spangler recalled that John “for example, threw stuff out of his window and broke my windshield. I have pictures. * * * He pokes holes in his wall. He urinated, I had feces all over my carpets upstairs * * *.” (T. 6/15/06 p. 8; Supp. p. 7). Appellees Gabriele and John Spangler (“the Spanglers”), with the cooperation and participation of the Geauga County DD Board, moved John from the psychiatric unit to the Warrensville Developmental Center (a state institution for individuals with mental retardation and developmental disabilities) for 60-90 days for stabilization and evaluation. (T. 4/24/07 pp. 33-34; Supp. Pp. 45-46).

About six days after John was placed in Warrensville, the Spanglers removed John from Warrensville because of reports that John had been sexually assaulted by a roommate and had allegedly suffered other physical and verbal abuse. The Spanglers put John in a hotel with the Devlins, a couple who had been hired privately by the Spanglers as caretakers for John,² because the Spanglers still did not feel safe having John at home. (T. 4/24/07 p. 39; Supp. p. 51).

On June 15, 2006, Mrs. Spangler requested an emergency guardianship order so she could “bring charges against these people [at Warrensville], get a restraining order to them so they do not call or come to my house.” She wanted to prevent John from being exposed to the investigations by Warrensville staff arising from the assault and other incidents at Warrensville. (T. 6/15/06 pp. 15, 17; Supp. pp. 14, 16). Judge Forrest W. Burt, acting in the absence of

² The Devlins originally provided on-site supervision for John in the Spangler’s home. (T. 4/24/07 p. 33; Supp. p. 45). During the proceedings for emergency and full guardianship, the Spanglers were paying for the services privately, pending approval of the Devlins’ application to be certified providers for John’s care. Once certified, the Devlins were paid through Medicaid. David Devlin’s testimony on his relationship with the Spanglers is at (T. 6/13/07 pp. 314-421; Supp. pp 59-166).

Probate Court Judge Charles E. Henry, heard Mrs. Spangler's motion for emergency guardianship. Judge Burt issued a temporary order appointing Mrs. Spangler as emergency guardian on June 15, 2006. (T. 6/15/06 p. 22; Supp. p. 21). Judge Burt cautioned Mrs. Spangler that she should cooperate in the investigations by Warrensville staff. (T. 6/15/06 p. 23; Supp. p. 22).

Four days later, on June 19, 2006, Judge Henry held a hearing on the emergency guardianship application in accordance with R.C. 2111.02(B)(3).³ Staff members from the Geauga County DD Board were present and testified in support of appointing the Spanglers as emergency guardians. Mrs. Spangler did not object to the Geauga County DD Board's participation at the hearing. The court granted the temporary emergency guardianship and set the matter for a full guardianship hearing. (T. 6/19/06 p. 33; Supp. p. 34). In doing so, the court made the following comments:

I'm going to give some consideration to appointing a guardian ad litem to go out and do investigation as to whether you're the most suitable guardians or not. It's very important that he has someone who cares a lot about him, and obviously you do.

* * *

But you do have to be making good decisions. And I will be attempting to judge the decisions that you're making.

If you're not making decisions that are in your son's best interests, in terms of placement, I would consider appointing someone other than you and your husband to be your son's guardian.

I am concerned. And I hope you can see it from my perspective. You were just in here a couple of weeks ago telling me, insisting that your son be removed from your home because you were at risk, your daughter was at risk. You had brought in these caretakers to take care of them, and that was not enough, it wasn't sufficient. He needed to be removed right now.

³ R.C. 2111.02(B)(3) allows for appointment of an emergency guardian for not more than 72 hours. The emergency order may be extended for up to thirty days after notice and hearing. *Id.*

Now you're telling me, you know, he has to be at home. It's the only place for him, and you have the same two caretakers that are going to be providing care for him.

From where I'm sitting, I'm concerned because I'm getting conflicting messages from you, as to what's appropriate for him. So I'm just laying this out for because I want you to know I'm not certain that this is going to be a good arrangement, and you're going to have to demonstrate that it's a good arrangement by making good decisions for your son. And at some point in time I feel like you're not making good decisions for your son, I will have to consider appointing someone else * * *.

(T. 6/19/06 pp. 32-33; Supp. pp. 33-34).

Judge Henry conducted the full guardianship hearing on July 18, 2006. Once again, Geauga County DD Board staff appeared and testified in support of the Spanglers' application for guardianship. (T. 7/18/06 p. 13; Supp. p. 38). The Spanglers did not object to the Geauga County DD Board's participation in the guardianship proceedings. At that point, John had moved out of the hotel and into a home with the Devlins. (T. 7/18/06 p. 8; Supp. p. 37). After reviewing testimony from the Geauga County DD Board staff and reviewing the living arrangements, the Court granted the Spanglers' application to be co-guardians of the person of John. (T. 7/18/06 p. 18; Supp. p. 39).

C. Emergency Motion to Remove

John remained with the Devlins, in the Devlins' home, during the months after full guardianship was granted. Mr. Devlin, a former police officer (T. 6/13/07 p. 328; Supp. p. 73), noted that from July 2006 to October 2006, Mrs. Spangler's frequent and unscheduled visits created some friction. (T. 6/13/07 pp. 321-322; Supp. pp. 66-67). At times, John would become upset after seeing his mother; he would become "distracted" and would urinate himself after his mother left. (T. 6/13/07 pp. 322-323; Supp. pp. 67-68).

In October of 2006, the Devlins and John moved to a different residence. (T. 6/13/07 p. 323; Supp. p. 68). Mrs. Spangler came to visit less often after the move. Id. On or about

October 24, 2006, John returned from an outing and went to bed. At about 10:30 pm that night, Mr. Devlin discovered Mrs. Spangler in his hallway talking on her cell phone. There had been no prior notice of a visit and no announcement that she had come in to the Devlin's house. She went into John's bedroom, got him out of bed and walked him around the house in the dark. She then used the Devlin bathroom without closing the door. (T. 4/24/07 pp. 71-73; Supp. pp. 54-56; T. 6/13/07 pp. 324-326; Supp. pp. 69-71). Mr. Devlin observed that Mrs. Spangler was intoxicated while she was in his house. (T. 6/13/07 p. 328; Supp. p. 73).

Mr. Devlin stated that John was "confused" about having been awakened and "agitated by the fact that she used the restroom with the door open." (T. 6/13/07 p. 326; Supp. p. 71). Mr. Devlin became concerned about John's safety because of her behavior in his house and her state of intoxication. (T. 6/13/07 pp. 328, 338; Supp. pp. 73, 83).

Mr. Devlin called the police to have Mrs. Spangler removed; the police came and arrested Mrs. Spangler. (T. 6/13/07 p. 326; Supp. p. 71). The Devlins sent their two-week notice to the Geauga County DD Board and to Judge Henry resigning as providers for John. (T. 4/24/07 pp. 71-72; Supp. p. 54-55).

This incident led the Geauga County DD Board to file the emergency motion on October 25, 2007 to remove the Spanglers as John's guardians and to appoint Advocacy and Protective Services ("APSI")⁴ as emergency guardian. The Probate Court granted the motion ex parte on the same day and set the matter for hearing on October 31, 2009. *In the Matter of the Guardianship of John Spangler*, (Aug. 15, 2007), Geauga Probate Court No. 06 PG 000245, (App. E) at p. 1.

⁴ APSI is an agency created to provide guardianship and other protective services to individuals with mental retardation or developmental disabilities. APSI has a contract with ODDD and operates under authority of R.C. 5123.55-59.

The Spanglers, their counsel, and the Geauga County DD Board appeared for the October 31, 2007 hearing. There was no objection, prior to or during the hearing, to the Geauga County DD Board's participation in the hearing nor was there any objection to the Geauga County DD Board's filing of the emergency motion to remove. Counsel for the Spanglers reported that they had reached an agreement with the Geauga County DD Board which included the following elements:

- APSI would continue as temporary guardian for six months;
- The Spanglers would each undergo a drug and alcohol assessment;
- The Spanglers would meet with counselors to discuss their issues;
- The Spanglers would each undergo a psychiatric assessment.

(T. 10/31/07 pp. 5-7; Supp. pp. 41-43).

D. Proceedings after Motion to Remove

Despite their earlier agreement to have APSI continue as John's temporary guardian for six months, the Spanglers filed an emergency motion in Probate Court to remove APSI as temporary guardian after only three months. The motion was filed on January 24, 2007. The Spanglers also sought an order restoring themselves as guardians. That same day, APSI moved to dismiss the Spangler's motion and to join the Geauga County DD Board as a party. *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at ¶6 (App. C). The Probate Court set the matter for hearing in April, 2007.

The Spanglers moved to dismiss the Geauga County DD Board for lack of standing and lack of authority to file the original motion to remove the guardians on April 20, 2007. *Id.* ¶8. This was six months after the Geauga County DD Board filed the motion. On June 4, 2007,

counsel for John appeared in the case. John's counsel then filed a motion to dismiss the Geauga County DD Board from the case for lack of standing. *Id.* ¶11.

Judge Henry ruled on April 25, 2007 that the Geauga County DD Board could participate as a party in the proceedings. *In the Matter of the Guardianship of John Spangler*, (Aug. 15, 2007), Geauga Probate Court No. 06 PG 000245, (App. F); *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at ¶10 (App. C). Judge Henry took testimony from the parties over three full days (April 24, June 13 and July 24, 2007), and met with John and his counsel in camera on August 9, 2007. During the hearing, Judge Henry heard extensive testimony from Geauga County DD Board staff, staff from the facility where John was then living, and from therapists and other witnesses on behalf of the Spanglers.

Judge Henry concluded:

Over the past year John's mother has frequently been at odds with case workers and care providers that are providing services for John. She has repeatedly, impulsively sought changes in John's placements and services without giving due consideration to the opinion of professionals working with John and without having first secured alternative more appropriate services.

Joseph and Gabriele Spangler seem not to appreciate that there are times when John's contact with family members serves as a trigger for John's violent and destructive behaviors. There is disagreement at times between family members and care providers over the nature and extent of contact that John should have with various family members.

Over the course of the past year Joseph Spangler has shown that he is either unable or unwilling to intercede objectively and assertively in disputes that have arisen between care providers and his wife.

Based on evidence presented at the time of the hearing, the Court finds that there is good cause and that it is in John's best interest that the removal of Gabriele and Joseph Spangler as guardians for John Spangler continue and that ASPI continue as the legal guardian for the person of John Spangler. In reaching this decision the Court acknowledges that it is the strong preference of the Court to appoint a suitable family member to serve as the guardian of a ward when a suitable family member is available.

In this case, neither Gabriele nor Joseph Spangler are suitable to serve as John Spangler's guardian. There may come a time in the future when John's parents can demonstrate enough emotional stability that they can thoughtfully and rationally interact with service providers in a manner that they can take over the responsibility of serving as their son's guardian. However, at the present time there is a need for an objective guardian that can intercede on behalf of John Spangler to settle conflicts between service providers and John's parents and at times limit contact between John and his parents and other family members so as to avoid unnecessary disruptions in John's services and placements.

It is ordered that ASPI continue on as the guardian of the person of John Spangler. Said appointment is indefinite.

In the Matter of the Guardianship of John Spangler, (Aug. 15, 2007), Geauga Probate Court No. 06 PG 000245, at p. 4 (App. E).

With respect to motions to dismiss the action because the Geauga County DD Board lacked standing, Judge Henry held that the Geauga County DD Board “has an obligation to bring to this Court's attention situations in which it perceives that a guardian is not acting in the ward's best interest.” *Id.* at 3. The Geauga County DD Board thereby had standing “to file a petition for the removal of a guardian when the agency perceives the actions or omissions of the guardian are interfering with the ability of the ward to receive services and putting the ward at risk of physical or emotional harm.” *Id.*

E. Proceedings before the Eleventh District Court of Appeals

Both the Spanglers and John filed notices of appeal separately and with separate counsel. The Spanglers and John focused their argument on the absence of authority of the Geauga County DD Board to have filed the initial motion to remove the Spanglers as guardian. *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at ¶16-18 (App. C). The Spanglers also asserted that the decision of the Probate Court was contrary to the manifest weight of the evidence. *Id.* at ¶21. The Spangler's challenged their inability to access court transcripts. *Id.* at ¶22.

Neither the Spanglers nor John appealed the Probate Court's order granting the motion to join the Geauga County DD Board as a party. *Id.* at ¶76.

The Ohio Association of County Boards of Mental Retardation and Developmental Disabilities filed leave to participate as amicus curiae on behalf of the Geauga County DD Board. The motion for leave to file was accepted without objection by the Spanglers or John. *In the Matter of Guardianship of John Spangler*, 11th Dist. No. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at p. 1. (App. D).

The Court of Appeals reversed the decision of the Probate Court. Judge O'Toole wrote an opinion; Judge Trapp concurred in part with Judge O'Toole's opinion and concurred only in part in the judgment. Judge Cannon dissented. *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at p. 1, ¶67, ¶83, (App. C).

Judge O'Toole's opinion stated that the Geauga County DD Board lacked the authority, express or implied, to file a motion in the trial court to replace Mr. Spangler as John's guardian and, further, lacked the standing to do so. *Id.* at ¶57, 59. Judge O'Toole explained:

In this case, GCBMRDD has no claim to make; it has no right or duty requiring judicial enforcement. It has no "personal stake" in the controversy, as its duties revolve around providing and funding treatment for developmentally disabled persons such as John. Statutorily, it has the power, in proper case and following proper procedure, to override a guardian's wishes in a particular instance -- but not to petition for a guardian's removal.

Id. ¶61. Because Judge O'Toole found that there was neither authority nor standing for the Geauga County DD Board to have filed the initial motion, the Judge found merit in the Spangler's argument that there was no basis for filing or granting the Geauga County DD Board's ex parte motion to remove the Spanglers as guardians. *Id.* at ¶62. These rulings precluded as moot any discussion about whether the appointment of APSI was against the

manifest weight of the evidence. *Id.* The Eleventh District Court of Appeals did not address the suitability of the Spanglers as be guardians for their son. *Id.*

Judge Trapp agreed that the case should be reversed and remanded, but for different reasons. *Id.* ¶67. She concluded that the Geauga County DD Board was an interested party. *Id.* at ¶75. Judge Trapp further concluded that the Geauga County DD Board was not authorized to file the motion to remove because the Revised Code did not specifically grant such authority to any interested party. *Id.* at ¶74-75. Judge Trapp agreed with Judge O'Toole that the Geauga County DD Board did not have standing as a next friend or real party in interest. *Id.* at ¶79. She further concluded that the only remedy available to any Geauga County DD Board was the process set forth in R.C. 5126.33 et seq. *Id.* at ¶78.

In his dissent, Judge Cannon noted that the Spanglers had initially agreed with the Geauga County DD Board's motion to have APSI act as an emergency guardian and signed an agreed entry. (Emphasis in original). *Id.* at ¶84. Further, Judge Cannon noted that the Spanglers waited a full six months after the Geauga County DD Board filed its motion to remove before they challenged the board's standing. *Id.*

Judge Cannon stated that "R.C. 2111.13(C) permits an 'interested party' to file objections to a guardian's actions. I believe the general duties of the board are sufficient to deem the board an "interested party" and object to the guardian with the probate court." *Id.* at ¶87. He agreed with the position of the amicus that "that the procedure set forth in R.C. 5126.33 is not the board's exclusive remedy. In fact, that section clearly establishes that the type of complaint

contemplated by that statute does not apply to this situation. It only applies when the board is seeking protective services for the adult.” Id. at ¶88. In summary, Judge Cannon concluded:

Anyone can ask the probate court to address problems with a guardian. Thus, it is difficult to believe that the Legislature intended to ban the very board created to look after the best interests of persons with mental retardation or developmental disabilities from performing this action.

Id. at ¶96. Judge Cannon noted that counsel for the Spanglers had conceded in oral argument that the Geauga County DD Board could have properly written a letter to the Probate Court with the same information as in the Board’s motion and “the end result would have been the same.”

Id. at ¶97. By adopting the majority rule, we are telling the probate court, with wide and plenary powers over guardianship matters, to whom it can and cannot listen.” Id.

ARGUMENT

I. Proposition of Law No. I: A County Board of Developmental Disabilities has the Authority and the Duty to Request the Probate Court to take Action to Protect the Health, Safety and Welfare of the Citizens of Ohio.

The Geauga County DD Board had a duty to take appropriate steps to protect John's health and safety, duties which should be liberally construed. The Geauga County DD Board's action in filing a motion to remove John's guardian was a proper exercise of that duty. The Supreme Court of Ohio recognizes that a county Board of Developmental Disabilities ("DD Board") has implied authority to file actions which are necessary to implement legal mandates imposed on DD Boards. There are numerous Ohio statutes and rules, as well as court cases, which require DD Boards to protect the health and safety of individuals under the care of such DD Boards. Ohio law explicitly recognizes a DD Board's broad authority to initiate any proceeding in which the DD Board has an interest.

A. County Boards of Developmental Disabilities have an explicit legal duty to protect the health, safety and welfare of individuals under care of the Boards

DD Boards have a fundamental duty to ensure that individuals under their care and supervision –individuals like John– are kept safe. This duty is particularly evident when the individual, like John, receives Waiver services funded by Medicaid.⁵

⁵ Waivers began in 1981 as a component of the Medicaid program to "provide the states latitude to create new approaches for providing health care services financed by Medicaid." See 42 C.F.R. §430.25(b). *Martin v. Taft*, (S.D. Ohio 2002), 222 F.Supp.2d 940, 954. Waivers are designed to allow individuals who would otherwise require institutional care to be served in the community at a lower average cost than the cost of an institutional setting. 42 U.S.C. §1396n(c)(2)(D), cited in *Martin*, 222 F.Supp.2d at 954. John Spangler has an Individual Options Waiver, (T. 6/19/06 pp. 18-20), which is subject to the requirements of Ohio Adm.Code 5123:2-13-02. A condition of eligibility for the Individual Options Waiver is that the services are sufficient to meet the individual's health and welfare needs. Ohio Adm.Code 5123:2-13-02(B)(4).

The majority in the Eleventh District Court of Appeals opinion failed to properly recognize the scope of the Geauga County DD Board's duty to John Spangler. Further, the majority failed to understand the implications of the duty. Judge O'Toole quoted only the general authority of DD Boards in R.C. 5126.05(A). *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at ¶29-39 (App.C). Judge O'Toole's opinion did acknowledge the numerous statutes and regulations which require DD Boards to protect health and safety of individuals under their care.

1. General duty of the County Boards of Developmental Disabilities to protect health, safety and welfare

Ohio statutes require DD Boards to “monitor the [Medicaid supported] services provided to the individual [with DD] and *ensure* the individual's health, safety and welfare.” R.C. 5126.055(A)(4) (emphasis added). One major tool for implementing this duty is Service and Support Administration (“SSA”) services (similar to case management services) which DD Boards must provide to all county residents. R.C. 5126.05(A)(8); R.C. 5126.15. SSA workers must monitor the implementation of service plans for each individual (R.C. 5126.15(B)(7)) and verify that the plans are implemented in a manner to protect the health, safety and welfare of the individual. Ohio Adm.Code 5123:2-1-11(N)(1)(a). This fundamental duty to protect health, safety and welfare is reiterated in Ohio Adm.Code 5123:2-9-04(C)(9) which states that DD Boards “shall monitor the services provided to the individual to *ensure* the individual's health, safety, and welfare.” (Emphasis added).

In order to obtain and maintain accreditation, DD Boards must develop and implement policies which “protect individuals from harm to self or others by creating safeguards for their health and safety and the health and safety of others.” Ohio Adm.Code 5123:2-4-01(C)(1)(f)(iii). The duty to protect the health and safety of individuals under a DD Board's care is reflected in

the requirements applicable to residential services which the DD Board provides. “Residential Services” provided by DD Boards is defined to include “housing, food, clothing, habilitation, staff support, and related support services *necessary for the health, safety, and welfare of the individuals.*” R.C. 5126.01(O). “Supported Living” services include services provided for as long as twenty-four hours a day to eligible individuals with DD through any public or private resources. R.C. 5126.01(U)(2). Supported Living services include “Housing, food, clothing, habilitation, staff support, professional services, and any related support services *necessary to ensure the health, safety, and welfare of the individual receiving the services.*” R.C. 5126.01(U)(2)(a). (Emphasis added).

The central role of DD Boards in protecting individuals with developmental disabilities is further emphasized in the statutes relating to reports of abuse, neglect or abuse of such individuals. R.C. 5123.61 requires specified persons, including all persons connected to DD Boards, to report actual or suspected abuse or neglect to either law enforcement or to the local DD Board. R.C. 5123.61(C)(1). Law enforcement officials are required to inform the local DD Board of any such reports, unless the incidents are alleged to have occurred in a state-operated facility. R.C. 5123.61(C)(4). Upon receipt of a report of suspected abuse or neglect, DD Boards must conduct an investigation. R.C. 5123.61(J). In an emergency, the statute requires a face-to-face contact by DD Board staff with the alleged victim within one hour of receipt of the report. R.C. 5123.61(G)(4).

2. The Geauga County Board of Developmental Disabilities has an express duty to take action to prevent harm

If there are indications that an individual such as John Spangler is at risk, the Geauga County DD Board, like all DD Boards which oversee residential services, must take “immediate actions as necessary to maintain the health, safety, and welfare of the individuals receiving the

services.” R.C. 5126.14(D). Ohio rules confirm that, when individuals, like John, are at risk, DD Boards must “take necessary action, in accordance with applicable requirements, to ensure the health, safety and welfare of individuals served.” Ohio Adm.Code 5123:2-9-04(C)(9). The rule goes on to state that a DD Board “may take immediate action to ensure the health, safety and welfare of an individual receiving [Medicaid waiver services] where there is substantial risk of immediate harm to the individual only as expressly provided for in law.” Ohio Adm.Code 5123:2-9-04(J). The code clarifies that “[n]othing in this rule shall limit the authority of county boards to take immediate action to ensure an individual's health, safety, and welfare as provided for under law.” *Id.*

Rules governing investigations of reports of abuse or neglect specify that “immediately upon receipt of a report or notification of an allegation, the county board shall: (a) [e]nsure that all reasonable measures necessary to protect the health and safety of any at-risk individual have been taken.” Ohio Adm.Code 5123:2-17-02(D)(4)(a).

In addition to the clear requirements in statute and rule, Ohio courts have found that DD Boards have a common law duty to protect individuals under their care. See, e.g., *Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 150 Ohio App.3d 383, 2002-Ohio-6344, 781 N.E.2d 1034; *aff'd Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2. In *Ridley*, the Hamilton County DD Board was aware that one of the individuals under its care had a history of overdressing in very hot weather. *Id.* at ¶5.

During a particularly extreme heat wave, the individual not only refused to remove his clothes, but sealed his door and window. His SSA worker failed to check on his status for three

weeks. When the SSA worker finally made contact, the worker discovered that the client had died of heat exhaustion. Id. at ¶6.

The First District Court of Appeals found that a DD Board owed a duty to protect a client from foreseeable harm even when a client may have refused services. Id. at ¶15-17. The Appellate Court then found that while the Board was entitled to immunity as a political subdivision, the individual workers were not. Id. at ¶31, ¶37. This Honorable Court affirmed. *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2.

3. County Board of Developmental Disabilities are subject to sanctions for failure to protect health and safety

If a DD Board fails to effectively protect the health and safety of individuals under their case, the DD Board may be subject to loss of control over its programs. If the Ohio Department of Developmental Disabilities (“ODDD”) finds “serious health and safety issues within the programs and services offered by the board,” the department may “appoint an administrative receiver.” R.C. 5126.081(F). See also, Ohio Adm.Code 5123:2-4-01(D)(4) (“if the board fails to correct health and safety violations identified, the department may implement administrative intervention, including appointment of an administrative receiver.”).

B. The Supreme Court of Ohio should liberally construe laws requiring County Board of Developmental Disabilities to protect health, safety and welfare

It is axiomatic that DD Boards, as creatures of statute, have only the powers and authority defined by the legislature. See *Davis v. State Dir. of Public Serv.* (1933), 127 Ohio St. 261, 187 N.E. 867; see, also, *Ebert v. Stark Cty. Bd. of Mental Retardation* (1980), 63 Ohio St.2d 31, 406 N.E.2d 1098. However, the 11th District Court of Appeals erred in holding that the statutes governing DD Boards and requiring DD Boards to protect the health, safety and welfare of developmentally disabled individuals must be construed narrowly. The effect of such a holding

would render the remedial goals of these statutes unachievable and would severely hamper the ability of the DD Boards to fulfill their legislated objective.

The legislature specifically addresses the standard for statutory interpretation remedial laws in R.C. 1.11, which states in relevant part:

Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.

R.C. 1.11. In *State ex rel. Holdridge v. Industrial Commission*, this Honorable Court discussed the definition of remedial legislation:

[T]he authorities agree that, in general terms, substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress.

(1967), 11 Ohio St.2d 175, 178, 228 N.E.2d 621 (citations omitted). In *Elek v. Huntington National Bank*, this Court held that R.C. Chapter 4112, enacted to protect victims of discrimination by providing them the right to pursue a civil action, is remedial legislation and must be liberally construed. (1991), 60 Ohio St.3d 135, 137, 573 N.E.2d 1056. This Honorable Court found that, as such, R.C. 4112.99, which governs victims of handicap discrimination but did not specifically provide them with a legal remedy, must be interpreted, in light of the purpose of the entire Chapter, to afford those victims the same right provided to others. *Id.*

The legal requirements for DD Boards to protect health, safety and welfare, *supra*, provide a critical tool for individuals with developmental disabilities to protect and enforce their rights, including the right to be free from harm. See R.C. 5123.62. These statutes include, for example, the establishment of SSAs, who are required to monitor the implementation of service plans for each individual (R.C. 5126.15(B)(7)) and to verify that the plans are implemented in a manner to protect the health, safety and welfare of the individual. Ohio Adm.Code 5123:2-1-11(N)(1)(a). The statutes and rules are thus remedial in nature and should be broadly construed.

C. The Supreme Court of Ohio recognizes implied authority for the County Board of Developmental Disabilities to implement the Board's statutory duties

The Supreme Court of Ohio has recognized a DD Board's authority to take legal action to carry out its mandated functions. In the face of prior challenges to a DD Board's authority to bring a legal action, this Court has not been guided solely by the presence of explicit statutory language granting such authority. This Court has been guided by common law and precedents. The Eleventh District Court of Appeals opinion made no mention of these cases. Their failure to do so is a failure to acknowledge critical and long-standing Ohio court precedents.

This Honorable Court recognized the standing of a DD Board to bring a legal action in *Cuyahoga Cty. Bd. of Mental Retardation v. Cuyahoga Cty. Bd. of Commrs.* (1975), 41 Ohio St.2d 103, 106, 322 N.E.2d 885. The respondents in that case argued, inter alia, that the Cuyahoga County DD Board did not have either authority or standing to file a mandamus action to require the Cuyahoga County Commissioners to place a voter-approved levy on the tax list. In response to the Commissioners' argument that there was no explicit statutory authority to file a mandamus action, the Court cited with approval the ruling of the Eighth District Court of Appeals which held:

"The statute gives the BMR [board of mental retardation] the power to make contracts; enjoins it by law to provide the necessary funds for its facilities, programs, and services; and commands the county commissioners to make appropriations sufficient to enable the board to perform its functions and duties. These clearly mandated powers and duties of necessity imply the right to sue for their enforcement and permit, *if not require*, the BMR to bring an action in mandamus to compel appropriation and delivery of the funds necessary for administering its programs. * * *"

(Emphasis sic.) Id. at 106.

This Court held that "the power can necessarily be inferred from R.C. 5126.03 [currently R.C. 5126.04], allowing the board of mental retardation to bring an action in mandamus to compel the board of county commissioners to perform its statutory duty." Id. Accord, *State ex*

rel Fairfield Cty. Bd. of Mental Retardation & Developmental Disabilities v. Fairfield Cty. Budget Comm. (1984), 10 Ohio St.3d 123, 461 N.E.2d 1297 (County MR/DD Board granted mandamus to require collection of entire amount approved by voters).

In *Hamilton County Board of MR/DD v. Professionals Guild of Ohio* (1989), 46 Ohio St.3d 147, 545 N.E.2d 1260, the State Employment Relations Board ("SERB") and the union argued that the MR/DD Board lacked standing to appeal a SERB decision which set aside the results of a union election. SERB and the union argued that a Chapter 119 appeal could only be filed by a "party adversely affected by the decision." R.C. 119.12. "Party" is defined in R.C. 119.01(G) as "the person whose interests are the subject of an adjudication by an agency." "Person" is defined in R.C. 119.01(F) as "a person, firm, corporation, association, or partnership."

SERB and the union asserted that, since the language of the statute did not explicitly cover a public entity such as the MR/DD Board, the MR/DD Board had no authority or standing to file or pursue the appeal. The Supreme Court rejected this argument and held that the MR/DD Board "is a 'person' entitled to appeal an order of the SERB pursuant to R.C. 119.12." *Id.*, 46 Ohio St.3d 147 at paragraph one of the syllabus. The Supreme Court observed:

This court has previously entertained appeals from various state board decisions by local county boards such as MRDD. We have recognized that such appeals may be brought under R.C. 119.12 if the proceedings of the state administrative agency are quasi-judicial in nature. [citations omitted] * * *

We thus have recognized, albeit *sub silentio*, that local county boards such as MRDD are "persons" within the meaning of the R.C. 119.12 appeal provision.

Id. at 150. In ruling that the MR/DD Board had a right to appear as a person, this Court necessarily recognized the authority of the Board to file the appeal, even in the absence of any explicit statutory authority stating the Board could do so.

D. County Boards of Developmental Disabilities are granted express authority to initiate legal actions

The authority of a DD Board to file actions is further supported by R.C. 305.14(C) which shows clear legislative intent to allow a DD Board to initiate “any action” in which the DD Board has “an interest”:

(C) Notwithstanding division (A) of this section and except as provided in division (D) of this section, a county board of mental retardation and developmental disabilities * * * may, without the authorization of the court of common pleas, employ legal counsel * * * to represent it * * * in *the prosecution or defense of any action or proceeding* in which the board * * * is a party or has an interest.

R.C. 305.14(C). (Emphasis added.) This broad grant of authority contains no limitation on the type of action which a DD Board may initiate, nor is there language in this section to support the Eleventh District Court of Appeal’s conclusion that a DD Board can only use R.C. 5126.33 as a tool to implement its duties.

E. The Eleventh District Court of Appeals erred in ruling that RC 5126.33 is the only tool available to County Boards of Developmental Disabilities to protect the health and safety of individuals under their care

R.C. 5126.33 is a valuable and necessary tool for DD Boards in carrying out their duties but the section has no relevance or applicability in this case involving the removal of an unsuitable guardian. The language of R.C. 5126.33 establishes its purpose: to implement a service plan which will address abuse, neglect or exploitation when consent cannot be obtained because the individual involved is incapable of giving consent. The statute imposes significant restrictions on the scope of the order and limits the duration of the order to one year at most and is thus of no value under the circumstances of this case.

There is no basis in the language of that statute or in any other section of Ohio Codes to support the Eleventh District Court of Appeal’s conclusion that R.C. 5126.33 is the exclusive remedy available to DD Boards to protect the health, safety and welfare of individuals under

their care and supervision. There is no basis in any statute or case which justifies Judge O'Toole's logical leap that the level of detail in R.C. 5126.33 means that the legislature "has effectively banned such boards from seeking the removal of a guardian." *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978 at ¶57. (App. C).

1. Scope and Limitations of R.C. 5126.33.

R.C. 5126.33 is part of a larger set of provisions in the Revised Code (R.C. 5126.30 through 5126.34) which establish procedures for DD Boards to follow in response to reports of abuse or neglect which the DD Board receives under R.C. 5123.61. R.C. 5126.33 and related statutes focus on how a DD Board can obtain and implement a service plan that is necessary to prevent abuse, neglect or exploitation in situations where consent cannot be obtained.

The duty to report abuse/neglect of an individual with developmental disabilities is articulated in R.C. 5123.61.⁶ R.C. 5126.31 states that the DD Board "shall review reports of abuse and neglect made under section 5123.61 of the Revised Code . . . to determine whether the person who is the subject of the report is an adult with mental retardation or a developmental disability *in need of services to deal with the abuse or neglect.*" R.C. 5126.31(A). (Emphasis added). The DD Board, inter alia, must conduct a face to face visit and "determine whether the adult needs services." R.C. 5123.61(B)(6). If the DD Board determines that the adult needs services, the DD Board "shall arrange for the provision of services for the prevention, correction or discontinuance of abuse or neglect or of a condition resulting from abuse or neglect for any adult who has been determined to need the services *and consents to receive them.*" R.C. 5126.31(C). (Emphasis added). The individual may consent even if the individual is under

⁶ R.C. 5126.31 mirrors the duty to report child abuse in R.C. 2151.421 and the duty to report abuse of adults who are 60 or over in R.C. 5101.61.

guardianship. R.C. 5126.31(C)(2). The services may be implemented *only as long as the adult consents*. R.C. 5126.31(D). (Emphasis added).

If consent for necessary services cannot be obtained because the individual is incapacitated,⁷ then the DD Board must use the procedures R.C. 5126.33 to get a court order “authorizing the board to arrange services” developed under R.C. 5126.31(C). R.C. 5126.33(A). R.C. 5126.33 imposes substantial limits on the basis, scope and duration of any order implementing services. No order can be issued unless there is clear and convincing evidence, *inter alia*, that there is a substantial risk to the adult of immediate physical harm or death. R.C. 5126.33(D)(1)(c). No order can be issued if there is a person “authorized by law or court order to give consent for the adult.” R.C. 5126.33(D)(1)(e). The scope of the court’s order is limited, *inter alia*, to the elements of the proposed service plan which are available locally. R.C. 5126.33(D)(3). The order for services cannot extend beyond one year. *Id.*

2. R.C. 5126.33 cannot provide relief in the circumstances of this case.

These limitations make R.C. 5126.33 useless as a remedy under the circumstances of this case.

- John’s guardian was legally able to give consent but chose not to do so. Her legal authority to consent to services will preclude any order under R.C. 5126.33(D)(1)(e).
- The guardian’s actions were clearly contrary to John’s best interest and placed him at risk of serious emotion harm, but did not expose John to “substantial risk ... of immediate *physical* harm or *death*” (emphasis added). There would thus be no authority to issue an order under R.C. 5126.33(D)(1)(c).
- Even if the court did enter an order, the order would be for services in the proposed service plan, and could not address the guardian’s behavior. R.C. 5126.33(D)(3).

⁷ “Incapacitated” means “lacking understanding or capacity, with or without the assistance of a caretaker, to make and carry out decisions regarding food, clothing, shelter, health care, or other necessities, but does not include mere refusal to consent to the provision of services.” R.C. 5126.30(G).

- The probate court's order, if entered, would have expired in October, 2008 and, under the express language of the statute could not be renewed. R.C. 5126.33(D)(3).

3. Nothing in the Revised Code states that R.C. 5126.33 is the exclusive remedy available to County Boards of Developmental Disabilities to protect an individual's health, safety and welfare

DD Boards have an explicit obligation to protect the health, safety and welfare of persons and must take "immediate actions as necessary to maintain the health, safety, and welfare of the individuals receiving the services." R.C. 5126.14(D). Nothing in any section of statute or rule states that a DD Board's authority to implement this duty is limited to procedures under R.C. 5126.33. The Eleventh District Court of Appeals opinions did not and could not cite any authority for their premise that the exclusive remedy is R.C. 5126.33.

The Ohio legislature did not put any language to support such a restriction in R.C. 5126.33 in its original legislation or in subsequent amendments. The legislature is clearly able and willing to define exclusive remedies. See, *e.g.*, R.C. 4125.04, 4123.46, 4123.54(H)(1) (Workers' Compensation); R.C. 24.341(Whistleblowers); R.C. 101.15(E)(5) (Legislative committee meetings); R.C. 1349.34(I) (Predatory lending remedies); R.C. 1776.50(E) (procedures for judgment creditor of a partner, or partner's transferee, to satisfy a judgment out of the judgment debtor's economic interest in the partnership); R.C. 2952.21(J) (procedures for collateral challenge to validity of conviction or sentence); R.C. 5145.163(F) (Compensation for injuries to prisoners); R.C. 5313.10 (termination of land installment contract).

The failure of the legislature to include such language demonstrates that there was never an intent to make R.C. 5126.33 an exclusive tool for DD Boards to protect persons served by such boards.

II. Proposition of Law No. II: A Board of Developmental Disabilities has Standing to File a Motion in a Probate Court to Remove an Unsuitable Guardian.

A. The duty of a Board of Developmental Disabilities to protect persons under their care endows the Board with standing to file motions to remove a guardian

1. General Standards for Standing

This Honorable Court has defined standing as "a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Ohio Pyre, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 325, 2007-Ohio-5024, 875 N.E.2d 550, at ¶27. Specific to asserting the rights of third parties, a litigant must generally pursue its own claims, and lacks standing to assert the rights of another. *City of N. Canton v. City of Canton*, 114 Ohio St.3d 253, 2007-Ohio-4005, 871 N.E.2d 586, at ¶14. In general, a political subdivision lacks standing to assert the rights of a third party. *City of E. Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, 870 N.E.2d 705, at ¶21. However, this Honorable Court has acknowledged that the federal courts recognize an exception to this rule when a claimant (i) suffers its own injury in fact, (ii) possesses a sufficiently "close" relationship with the person who possesses the right," and (iii) shows some "hindrance" that stands in the way of the claimant seeking relief. *Id.*, citing *Kowalski v. Tesmer* (2004), 543 U.S. 125, 129-130, 125 S.Ct. 564, 160 L.Ed.2d 519; see, also, *Ohio Contr. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088, citing *Hunt v. Washington State Apple Advertising Comm.* (1977), 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383.

In *City of E. Liverpool*, this Honorable Court found that the City of East Liverpool had standing to assert an equal protection claim on behalf of its citizens with respect to a law on an alternative method of tax apportionment to municipalities. The Court found that East Liverpool satisfied the criteria set forth in the exception above. *Id.* at ¶22. First, the Court found that East Liverpool suffered a direct injury to its own treasury because if it "is deprived of its voice in

determining the nature of the alternative method of apportionment, the city may have less money to furnish services to its citizens.” Id. at ¶23. Second, the Court found a close relationship between the city and its citizens as they have an interdependent interest in the city’s treasury. Id. at ¶24. Third, the Court found that the efforts by the city’s citizens to assert their own claims were hindered because their equal protection suits were denied for lack of standing. Id. at ¶25. Finally, the Court found that East Liverpool had statutory authority to represent and act on its citizens’ behalf in connection with budget-commission and Board of Tax Appeals proceedings and found that the authority extended to constitutional claims based on the rights of its citizens since those rights were “closely related” to the city’s own interests. Id. at ¶26.

2. The Geauga County DD Board has standing under general principles

Applying these principles, the Geauga County DD Board has standing allowing the Board to assert the rights of the individuals for whom it provides services. Any DD Board would suffer injury if it failed to protect the health and safety of individuals under their care. The Geauga County DD Board would suffer injury for failure to protect John as DD Boards are subject to sanctions if, as described supra, the ODDD finds “serious health and safety issues with the programs and services offered by the board,” or “if the board *fails to correct health and safety violations identified.*” R.C. 5126.081(F). (Emphasis added.) Ohio Adm.Code 5123:2-4-01(D)(4). If the opinion of the Eleventh District Court of Appeals is allowed to stand, the DD Boards, including the Geauga County DD Board, would lose their “voice” in guardianship proceedings to ensure the safety and well being of the individuals they serve, and by statutory, regulatory and common law are obligated to protect from harm.

There is a close relationship between a DD Board and the individuals it serves. In the case at hand, John, if mentally able, would have the right to object to the removal of his guardian as the removal affects his care and well being. John, however, has been adjudicated

incompetent. His adjudication and the facts of this case necessitate the intervention of an interested party.

The Geauga County DD Board provides John with Medicaid waiver services for which John has previously given his consent. *Supra*. Through the provision of such services, the Geauga County DD Board has not only an interest in John's safety and welfare, but an affirmative duty to protect his safety and welfare. Both John and the Geauga County DD Board have an interdependent interest in the services and the care provided to him through John's Medicaid services and any other services subject to a DD Board's purview. Through removal proceedings a DD Board essentially seeks to protect the interests of the individuals it serves as well as its "closely related" interests in upholding its purpose under the relevant statutory and regulatory law set forth in the above sections. Thus, the Geauga County DD Board satisfies the second criteria of having a "close" relationship with John.

Third, any effort by John to petition for the removal of the Spanglers as guardians of his person would be hindered by the fact that he was adjudged incompetent. John is unable to raise such an objection on his own behalf. An interested party, like a DD Board, was necessary to intervene on his behalf. At the time the removal petition was filed, no attorney had been appointed for John. Consequently, the only people authorized to speak on John's behalf were in fact the very guardians that were causing him harm. John's ability to object to his guardians' removal was completely hindered. Therefore, the Geauga County DD Board, pursuant to its duties to protect John's welfare, was the appropriate party to bring a motion for removal of the guardians.

Under the above analysis, it is evident that the Geauga County DD Board had standing to bring a motion to remove the Spanglers as guardians of John in order to adequately protect John's health, safety and welfare as required under Ohio law.

B. County Boards of Developmental Disabilities are interested parties and as such have standing to file a motion to remove a guardian

As an interested person to John's guardianship proceedings, the Geauga County DD Board also has standing to seek removal of a guardian of a person. Motions to remove a guardian are recognized and reviewed under R.C. 2109 governing fiduciaries. *In re Constable*, 2007-Ohio-3346 at ¶7 (citations omitted). The specific statutory authorization for removal of a guardian is supplied by R.C. 2109.24, which provides in pertinent part, "[t]he court may remove any such fiduciary, after giving such fiduciary not less than ten days' notice, for habitual drunkenness, neglect of duty, incompetency, fraudulent conduct, because the interest of the trust demands it, or for any other cause authorized by law." R.C. 2109.24 defines a fiduciary as "any person * * * appointed by and accountable to the probate court and acting in a fiduciary capacity for any person." R.C. 2109.01. The plain language of R.C. 2109 applies to the removal of a guardian of the person, a fiduciary appointed by and accountable to the probate court. *In re Constable*, 2007-Ohio-3346 at ¶7.

Pursuant to R.C. 2109.24, the probate court may take action to remove a fiduciary on its own motion. *Id.* at ¶8, citing, *Guardianship of Herr* (Sept. 2, 1998), Richland App. No. 98-CA-16-2, 1998 Ohio App. LEXIS 4746 *3. Although the statute fails to specify a procedure for doing so, Ohio courts have recognized that an interested person may move for the removal of a guardian under [R.C. 2109.04]. *Id.*, see *In re Estate of Rice*, 161 Ohio App.3d 847, 2005-Ohio-3301, 832 N.E.2d 139; *In the Matter of the Estate of Schmidt* (Nov. 27, 1995), Butler App. Nos.

CA95-01-013 and CA95-01-014, 1995 Ohio App. LEXIS 5168; *In re Marshall* (1946), 78 Ohio App. 1, 46 Ohio Law Abs. 344, 65 N.E.2d 523.

Neither R.C. 2111 nor R.C. 2109 provides a specific statutory provision that defines the term "interested party." However, courts have defined the term broadly. The court in *In re Constable*, found that:

In *In re Weingart*, Cuyahoga App. No. 79489, 2002 Ohio 38, a stepbrother, niece, nephew, and "longtime friend" were considered interested parties with standing to petition for the removal of a guardian. In *In re Guardianship of Tittington* (P.C. 1958), 82 Ohio Law Abs. 563, 162 N.E.2d 628, an attorney, who did not personally see or even know his prospective ward, was found to be an interested party where the attorney had been advised on "sufficiently good authority" that the proposed ward was mentally incapacitated. Other cases have found a sister, and a stranger when the ward had no close relatives, to have sufficient interest to participate in the guardianship proceeding. See *Hopkins v. Barger*, 21 Ohio Law Abs. 386; *In re Oliver's Guardianship* (C.P. 1909), 20 Ohio Dec. 64, 9 Ohio N.P. (n.s.) 178.

2007-Ohio-3346 at ¶9. In fact, a review of Ohio case law reveals no instance in which a moving party was found to be uninterested for purposes of participating in a guardianship proceeding.

Id.

Notably, Ohio probate courts have held that DD Boards are considered interested parties with standing to bring a motion to remove a guardian. In *In re Riccardi*, Sandusky App. No. S-04-024, 2006-Ohio-24, Elizabeth Riccardi was found incompetent by the Probate Court of Sandusky County. Mary Riccardi was appointed guardian but, within a year, the Sandusky County DD Board filed a motion to remove Mary as guardian because of her erratic decisions and frequent changes in Elizabeth's residential placement. The guardian filed a motion to dismiss the petition of the DD Board alleging that the DD Board lacked standing.

The Magistrate rejected the motion to dismiss, finding that the DD Board had obligations to Elizabeth under R.C. 5126.15(B) that "appeared fiduciary in nature and as such [the DD Board] had standing as a next friend and real party in interest to file a petition to remove the

guardian.” Id. at ¶7. The probate court affirmed that the DD Board had standing and proceeded to remove Mary as guardian. Id. Mary appealed the decision to the Sixth District Court of Appeals which then dismissed her appeal on grounds that the objections to the report of the magistrate were not timely filed. The Sixth District Court of Appeals observed that “substantial justice has been done” by granting the guardian’s removal. Id. at ¶20.

In this case, the Geauga County DD Board petitioned the Geauga Probate Court to remove the Spanglers as guardians of John in order to prevent harm to John. The Geauga County DD Board has an affirmative duty to protect John’s health, safety and welfare. Consequently, the Geauga County DD Board must take “immediate action *as necessary* to maintain the health, safety, and welfare of the individuals receiving the services.” R.C. 5126.14(D). (Emphasis added). The Board’s duty to John continues even if John refuses its services. The nature of the Geauga County DD Board’s duties to John and to those individuals under its purview is that of a fiduciary and protector. As such, the removal of a potentially harmful guardian, is one of the DD Board’s necessary actions to protect the health, safety and welfare of an individual. If a DD Board is deemed unable to institute such removal proceedings, DD Boards will be unable to fulfill their purpose and their duties to individuals such as John.

In her Eleventh District Court of Appeals concurring opinion, Judge Trapp correctly agreed that a DD Board could be an interested party. *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at ¶75 (App. C). However, her assertion that an interested party has no authority to file a motion to remove a guardian should be rejected because such a proposition has no basis in probate law as it stands. Id. at ¶73-75. Furthermore, such a proposition leads to the untenable conclusion that nobody can attempt to remove an unsuitable guardian except the probate court: and only on its own motion.

III. Proposition of Law No. III: A Probate Court has Authority to Initiate and Conduct Proceedings to Remove a Guardian Based on a Motion from a Board of Developmental Disabilities

The DD Board's authority to request the probate court to remove an unsuitable guardian is matched by the probate court's own broad authority in guardianships. The jurisdiction of the probate court is statutorily defined, *Corron v. Corron* (1998), 40 Ohio St.3d 75, 77, 531 N.E.2d 708, and the statutory grant of authority is far-reaching:

The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by statute.

R.C. 2101.24(C). Matters properly before the probate court include those listed in R.C. 2101.24(A) and include the power "[t]o appoint and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts." R.C. 2101.24(A)(4).

"The laws relating to the jurisdiction of the probate court are remedial and must be liberally construed." *In re Rauscher* (1987), 40 Ohio App.3d 106, 108, 531 N.E.2d 745. Considering this and the fact that the probate court is the superior guardian of all wards within its jurisdiction, guardianship matters are, in a sense, always "before the Probate Court." R.C. 2111.50(A); *In re Guardianship of Jadwisiak* (1992), 64 Ohio St.3d 176, 180, 593 N.E.2d 1379. Hence, "[a] guardianship proceeding is not an ordinary civil proceeding in which there is a party plaintiff and party defendant." *In re Guardianship of Elizabeth Friend* (Dec. 16, 1993), 8th Dist. No. 64018, 1993 Ohio App. LEXIS 6025 at *15, unreported. The usual pleading rules do not apply, and "[t]he probate court's primary responsibility in choosing who shall serve as guardian is to ensure that the person appointed will act in the best interests of the ward." *Id.* at *8, citing R.C. 2111.13. Once it appoints a guardian, the probate court must ensure that "the guardian acts to protect the person and estate of a ward as directed by law." *Id.*, citations omitted.

With its focus on the best interests of the ward, the probate court's plenary power allows it to act "on its own motion" – and without considerations of standing. *In the matter of Brookelyn L. Hoke*, 10th Dist. No. 02AP-1398, 2003-Ohio-4704 at ¶7. In so doing, the probate court is effectuating the "state's interest in the guardianship." *In re Guardianship of Jadwisiak*, 64 Ohio St.3d at 180. As discussed in the dissenting opinion in the Eleventh District Court of Appeals, a letter to a probate court can initiate a removal proceeding. See *In the Matter of the Guardianship of John Spangler*, 11th Dist. Nos. 2007-G-2800 and 2007-G-2802, 2008-Ohio-6978, at ¶97 (App. C). So too can a motion. In taking evidence at such proceedings, probate courts are guided by the ultimate goal: accomplishing that, which insures the best interests of the ward. Probate courts are less focused on traditional notions of standing and authority to act.

In *In re Guardianship of Elizabeth Friend*, the Cuyahoga County Probate Court demonstrated the flexibility associated with its plenary powers. The Cuyahoga County Probate Court rejected the application of a family friend, Mr. Somers, to be appointed guardian of the ward's estate, as he was the executor of her estate rendering him legally incompetent to be guardian as well. *Id.* 1993 Ohio App. LEXIS 6025 at *9-10. On his appeal, he assigned as error the trial court's decision to allow the Department of Human Services to participate in the guardianship application, to put on witnesses and to introduce documents and evidence. Mr. Somers objected because the Department had not complied with R.C. 5101.65 and R.C. 5101.66 – statutes governing petitions for protective services and notice requirements for said petitions.

The Eighth District Court of Appeals agreed that no protective services petition had been filed. The court nevertheless ruled that "the trial court acted within its plenary powers in allowing an attorney from the department" to participate in the proceedings. *Id.* at *12. The appellate court noted that the grant of "plenary power at law and in equity" authorized the

probate court “to take that action which is necessary to fully dispose of any matter properly before it.” *Id.* This meant that in a guardianship proceeding, the probate court could allow a protective agency to participate in the guardianship hearing, notwithstanding the availability of some other statutory procedure that the protective agency chose not to follow.

Similarly, the Geauga County Probate Court acted well within its plenary powers to consider the Geauga County DD Board’s motion to remove Gabriele Spangler as guardian, given the availability of other protective remedies for the Board. To uphold the Eleventh District Court of Appeals plurality opinion would restrain the plenary authority of probate courts to act in the best interests of its wards. Upholding the Eleventh District Court of Appeals opinion would undermine legislative protections intended to enable probate courts to provide for Ohio’s incompetent citizens.

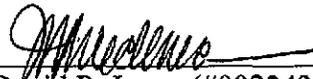
CONCLUSION

The primary issue in this case is whether courts should expect that the Ohio Revised Code will answer each and every administrative concern that a DD Board has about its disabled clientele. Or whether courts should both recognize and give deference to administrative interpretations and practices of DD Boards. Practices that are reasonably exercised in furtherance of the DD Board's responsibility to protect and promote the health and well-being of individuals with developmental delays.

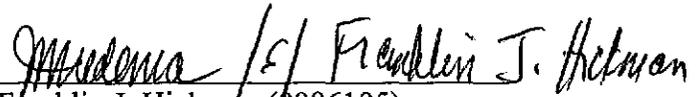
The Eleventh District Court of Appeals ruling that County Boards of Developmental Disabilities lack authority and standing to request the probate court to appoint or change a guardian for incapacitated clients upsets settled practices of DD Boards throughout the state of Ohio. The Eleventh District Court of Appeal's ruling deprives these disabled individuals of needed supervisory protections. Additionally, the decision of the Appellate Court thwarts the intention of our state's legislature. The public's interest, specifically the interests of the disabled citizens of this state, will be best served if this Honorable Court reverses the Eleventh District Court of Appeals ruling.

For the reasons stated above, the Supreme Court of Ohio should reverse the decision of the Eleventh District Court of Appeals in this matter.

Respectfully Submitted,



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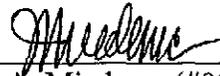
PROOF OF SERVICE

A copy of the foregoing Merit Brief of Appellant Geauga County Board of Developmental Disabilities with Appendix and Supplement were served upon the following by ordinary U.S.

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**APPENDIX
TO MERIT BRIEF OF GEAUGA COUNTY BOARD OF
DEVELOPMENTAL DISABILITIES**

A. Notice of Appeal to the Supreme Court1

**B. Judgment Entry of Court of Appeals, *In the Matter of the Guardianship of John Spangler*,
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IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

THE GUARDIANSHIP OF
JOHN SPANGLER

:
:
: On Appeal from the
: Geauga County Probate Court
: of Appeals, Eleventh
: Appellate District
:
:
: Court of Appeals
: Case Nos. 2007-G-2800
: 2007-G-2802

09-0121

NOTICE OF APPEAL OF
APPELLANT GAUGA COUNTY BOARD OF MENTAL RETARDATION
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BOARD
APP. A

FILED
JAN 20 2009
CLERK OF COURT
SUPREME COURT OF OHIO
BOARD APP. I

Notice of Appeal of Appellant Geauga County Board of Mental Retardation and
Developmental Disabilities

Appellant Geauga County Board of Mental Retardation and Developmental Disabilities hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment of the Geauga County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 06PG000245, on December 31, 2008.

This case is one of public and great general interest.

Respectfully Submitted,

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Proof of Service

A copy of the foregoing Notice of Appeal of Appellant Geauga County Board of Mental Retardation and Developmental Disabilities was served upon the following by ordinary U.S.

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FILED
IN COMMON PLEAS COURT

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
GEAUGA COUNTY, OHIO

2007 AUG 15 PM 4:07

PROBATE DIVISION
DIVISION
GEAUGA COUNTY, OHIO

IN THE MATTER OF:)	CASE NO. 06PG000245
)	
THE GUARDIANSHIP OF)	JUDGE CHARLES E. HENRY
JOHN SPANGLER)	
)	JUDGMENT ENTRY

This matter came on for hearing on the motion filed by the Geauga County Board of Mental Retardation and Developmental Disabilities (GCBMRDD) asking for the removal of Gabriele Spangler and Joseph Spangler as guardians for John Spangler, and the motion filed by Gabriele Spangler and Joseph Spangler asking for the removal of Advocacy and Protection Services, Inc. (ASPI) as temporary guardian for Joseph Spangler. Hearings on said motions took place on April 25, 2007, June 13, 2007, and July 24, 2007. The Court conducted an in camera interview with John Spangler on the 9th day of August, 2007. After considering evidence presented at the time of the hearings, the Court makes the following findings of fact and conclusions of law:

John Spangler, date of birth November 12, 1987 is a nineteen year old young man who has been diagnosed with autism, mitochondrial disease, and mild mental retardation. Joseph's mother, Gabriele Spangler, was appointed as Joseph's emergency guardian of the person on the 15th day of June, 2006. After conducting a hearing on the emergency guardianship application, the emergency guardianship was extended by Judgment Entry filed on the 19th day of June, 2006 with special instructions to the guardian to complete the individual service plan process and cause a copy of the ward's individual service plan to be filed with the Court. The emergency guardian was ordered to cooperate with county and state agencies in order to secure funding for services.

The permanent guardianship of the person was established by Judgment Entry filed on the 18th day of July, 2006 appointing both Joseph Spangler and Gabriele Spangler, John Spangler's parents, as guardians for his person.

On the 25th day of October, 2006 the Court granted an emergency ex parte motion filed by GCBMRDD to remove the guardians and appointed APSI as the temporary guardian of John Spangler pending further hearing. The Court scheduled a hearing on the

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EXHIBIT

emergency motion to take place on the 31st day of October, 2006. Prior to the commencement of the hearing, the parties entered into an agreement which was approved by the Court whereby the Court continued APSI as temporary guardian. Joseph and Gabriele Spangler were ordered to complete psychiatric assessments and drug and alcohol assessments and cause the assessments to be forwarded to the Court prior to the next scheduled pretrial. By agreement of the parties, the matter was then scheduled for a pretrial to take place on the 24th day of April, 2007.

On January 24, 2007 Gabriele and Joseph Spangler filed an emergency motion for the removal of APSI as guardian of Joseph Spangler. By Judgment Entry filed the 7th day of February, 2007, the Court converted the pretrial scheduled for the 24th day of April, 2007 to a full hearing on the issue of whether Joseph and Gabriele Spangler would be permitted to continue to serve as guardians for John Spangler or whether the Court would continue the appointment of APSI as John Spangler's permanent guardian. During the course of the proceeding, Gabriele Spangler withdrew her request to continue on as guardian and asked that Joseph Spangler be permitted to serve as John's sole guardian.

There is very little statutory guidance regarding the removal of a guardian for an incompetent ward. Ohio Revised Code Section 2111.46 provides broad authority for the Probate Court to remove a guardian of a minor for "good cause". The Courts have interpreted general language contained in a previous version of Ohio Revised Code Section 2109.24 which allowed for the removal of a fiduciary "because the interest of the trust demands it", as granting broad discretion to the Probate Court for determining when it is in the best interest of an incompetent ward to remove a guardian. However, Ohio Revised Code Section 2109.24 was amended effective January 1, 2007. The general language contained in the previous version of the statute was amended to refer specifically to the property interest that the fiduciary was responsible for administering. This language can no longer be relied on as a grant of broad discretionary authority to the Court for determining when a guardian of the person of the ward can be removed.

Ohio Revised Code Section 2111.50 codifies that the Probate Court is the superior guardian of wards who are subject to its jurisdiction. Ohio Revised Code Section

EXHIBIT
A-2

2151.50 (A)(2)(a) provides that "for good cause shown", the Probate Court may limit or deny, by order or rule, any power that is granted to the guardian by a section of the Ohio Revised Code or relevant decisions of the courts of this state. It stands to reason, that if the Court, for good cause shown, can limit or deny any power that is granted to the guardian, the Court, for good cause shown, has the authority to deny all of the power that it has granted to the guardian and cause that guardian to be removed.

John Spangler, through counsel, and Gabriele and Joseph Spangler have asked the Court to dismiss the motion filed by GCBMRDD due to the agency's lack of standing. They argue specifically that the agency is neither an interested party nor next of kin. However, this Court finds that Ohio Revised Code Section 5126.15 (B) imposes obligations on the agency owed to John Spangler that are fiduciary in nature and as such the agency has standing as a next friend and real party of interest to file a petition for the removal of a guardian when the agency perceives the actions or omissions of the guardian are interfering with the ability of the ward to receive services and putting the ward at risk of physical or emotional harm. GCBMRDD has an obligation to bring to this Court's attention situations in which it perceives that a guardian is not acting in the ward's best interest.¹ The motions to dismiss for lack of standing were denied by the Court.

John Spangler is a young man who resided with his parents until he turned eighteen years old. Throughout John's life, John's mother has taken the lead in advocating for services for John. His mental disabilities cause him to need almost constant supervision and care. When he began to reach the age of puberty, his family reports that he became more and more difficult to manage. His condition causes him to need a great deal of structure and consistency in his life. He does not deal well with change. When John gets upset, he can act out violently. He has been known to cause significant property damage. One of the primary reasons he was placed outside of his parents' home was because of concern he may do harm to his mother and his younger sister. Certain events can trigger these violent episodes, including, on occasion, contact with family members, particularly his mother.

¹ This same issue was discussed in a decision decided by the Sixth District Court of Appeals, but was not decided on the merits because the case was decided on other procedural issues. See In Re: Guardianship of Ricardi, Sixth District Court of Appeals, 2006-Ohio-24. See also In Re: Guardianship of Bussey, Eighth District Court of Appeals, 2004-Ohio-6617 in which Cuyahoga County Dept. of Senior and Adult Services was permitted to intervene in a guardianship proceeding as an interested party.

Over the past year John's mother has frequently been at odds with case workers and care providers that are providing services for John. She has repeatedly, impulsively sought changes in John's placements and services without giving due consideration to the opinion of professionals working with John and without having first secured alternative more appropriate services.

Joseph and Gabriele Spangler seem not to appreciate that there are times when John's contact with family members serves as a trigger for John's violent and destructive behaviors. There is disagreement at times between family members and care providers over the nature and extent of contact that John should have with various family members. Over the course of the past year Joseph Spangler has shown that he is either unable or unwilling to intercede objectively and assertively in disputes that have arisen between care providers and his wife.

Based on evidence presented at the time of the hearing, the Court finds that there is good cause and that it is in John's best interest that the removal of Gabriele and Joseph Spangler as guardians for John Spangler continue and that ASPI continue as the legal guardian for the person of John Spangler. In reaching this decision the Court acknowledges that it is the strong preference of the Court to appoint a suitable family member to serve as the guardian of a ward when a suitable family member is available. In this case, neither Gabriele nor Joseph Spangler are suitable to serve as John Spangler's guardian. There may come a time in the future when John's parents can demonstrate enough emotional stability that they can thoughtfully and rationally interact with service providers in a manner that they can take over the responsibility of serving as their son's guardian. However, at the present time there is a need for an objective guardian that can intercede on behalf of John Spangler to settle conflicts between service providers and John's parents and at times limit contact between John and his parents and other family members so as to avoid unnecessary disruptions in John's services and placements.

It is ordered that ASPI continue on as the guardian of the person of John Spangler. Said appointment is indefinite. The Court orders and instructs ASPI to sign releases necessary so that John's parents can fully participate in treatment team meetings so long as John's parents' participation in those meetings are not disruptive. This is not to be interpreted as preventing John's parents from expressing their opinions regarding John's



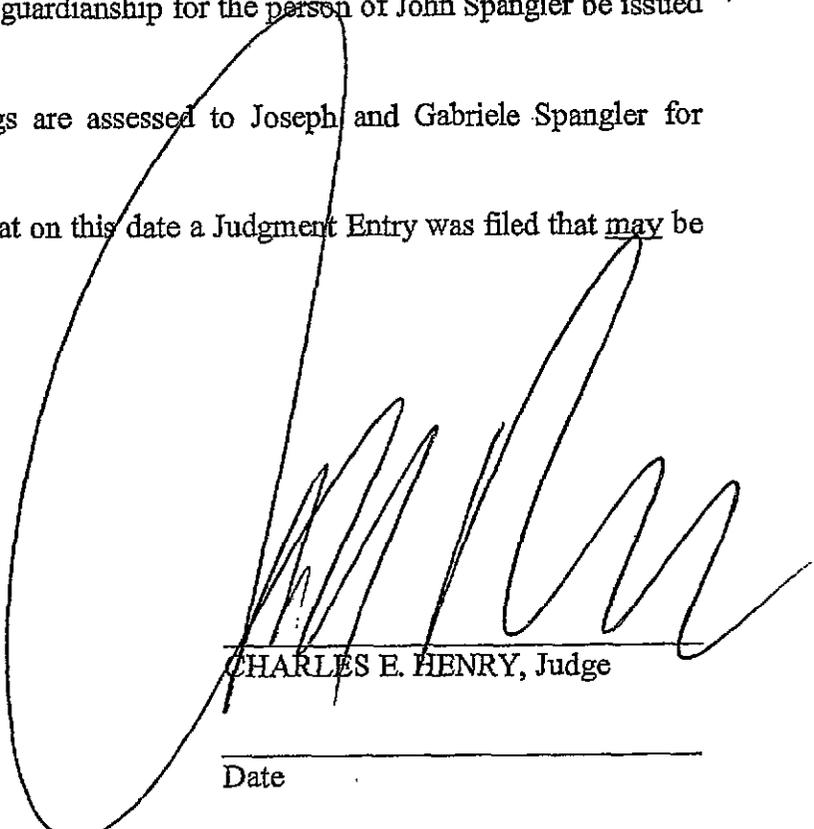
needs. ASPI shall also sign necessary releases so that John's parents can receive periodic updates on John's progress in treatment and so that they can be timely made of aware of any critical incidents involving John.

It is ordered that letters of guardianship for the person of John Spangler be issued to ASPI.

Costs of these proceedings are assessed to Joseph and Gabriele Spangler for which execution may now render.

You are hereby notified that on this date a Judgment Entry was filed that may be an "appealable" order.

IT IS SO ORDERED.



CHARLES E. HENRY, Judge

Date

cc: Prosecutor
Derek Hamalian
Shane Egan
Pamela Makowski

EXHIBIT
A-5

BOARD APP. 8

FILED

IN COURT OF APPEALS

DEC 31 2008

STATE OF OHIO DENISE M. KAMINSKI
CLERK OF COURTS,
COUNTY OF GEauga GEauga COUNTY

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

IN THE MATTER OF THE
GUARDIANSHIP OF
JOHN SPANGLER

JUDGMENT ENTRY

CASE NOS. 2007-G-2800
and 2007-G-2802

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Geauga County Court of Common Pleas, Probate Division, is reversed and this matter is remanded for further proceedings consistent with this opinion.

It is further ordered that appellees are assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

Colleen Mary O'Toole

JUDGE COLLEEN MARY O'TOOLE

MARY JANE TRAPP, J., concurs in part and concurs in judgment only in part with Concurring Opinion,

TIMOTHY P. CANNON, J., dissents with Dissenting Opinion.

BOARD
APP. B

12/674

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

IN THE MATTER OF THE
GUARDIANSHIP OF
JOHN SPANGLER

FILED OPINION
IN COURT OF APPEALS

DEC 31 2008

CASE NOS. 2007-G-2800
and 2007-G-2802

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

Civil Appeal from the Court of Common Pleas, Probate Division, Case No. 06 PG 000245.

Judgment: Reversed and remanded.

Pamela W. Makowski, 503 South High Street, #205, Columbus, OH 43215 (For Appellant, Mother, Gabriele Spangler and Father, Joseph M. Spangler).

Shane Egan, 4110 North High Street, Columbus, OH 43214 (For Appellee, Advocacy and Protection Services, Inc.)

David P. Joyce, Geauga County Prosecutor, and *J.A. Miedema*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellee, Geauga County Board of Mental Retardation and Developmental Disabilities).

Derek S. Hamalian and *Jason C. Boylan*, Ohio Legal Rights Service, 50 West Broad Street, #1400, Columbus, OH 43215-2999 (For Appellant, John Spangler).

COLLEEN MARY O'TOOLE, J.

{¶1} John Spangler, Gabriele Spangler, and Joseph Spangler appeal from the judgment entry of the Geauga County Court of Common Pleas, Probate Division, denying their motions to dismiss the Geauga County Board of Mental Retardation and Developmental Disabilities ("GCBMRDD") from this case, denying Joseph's continuance

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APP. C

BOARD APP. 10

as sole guardian for John, and continuing, indefinitely, Advocacy and Protection Services, Inc. ("APSI") as John's guardian. We reverse and remand.

{¶2} John Spangler (d/o/b November 12, 1987) suffers from autism, mitochondrial disease, and mild mental retardation. Evidence presented in a lengthy hearing before the trial court, commencing April 24, 2007, and continuing June 13, 2007 and July 24, 2007 indicates that John, as he has grown older, has had a problem controlling his temper, and has periodic bouts of violent and destructive behavior. There have been conflicts between his parents – Gabriele and Joseph – and various service providers about appropriate care for John, his parents expressing dissatisfaction with the service providers, and the service providers concerned that his parents demands for new placements, etc., interfere with the structured regimen most conducive to John's wellbeing.

{¶3} John lived with his parents until reaching majority. Due largely to his fits of violent behavior, he was eventually placed outside the home. By a judgment entry filed June 15, 2006, his mother was appointed emergency guardian of his person. This emergency guardianship was extended by a judgment entry filed June 19, 2006. Permanent guardianship of his person was granted to both Mr. and Mrs. Spangler by a judgment entry filed July 18, 2006.

{¶4} October 25, 2006, GCBMRDD filed an ex parte motion to remove Mr. and Mrs. Spangler as John's guardians for alleged breach of duty. Specifically, GCBMRDD was concerned about Gabriele's expressed intention to remove John from the home of his then-caregivers, Mr. and Mrs. Devlin. The trial court granted the motion that same

day, and appointed APSI as John's temporary guardian. Hearing was set for October 31, 2006.

{¶5} October 31, 2006, the trial court memorialized an agreement reached between the parties in a judgment entry. Mr. and Mrs. Spangler agreed to APSI continuing as temporary guardian of John's person, and agreed to submit psychiatric and drug and alcohol assessments of themselves to the trial court prior to the next pretrial. This was scheduled for April 24, 2007.

{¶6} January 24, 2007, Mr. and Mrs. Spangler moved the trial court to remove APSI as John's temporary guardian, for allegedly breaching its fiduciary duty to provide him a safe environment, and to have Mr. Spangler appointed guardian. January 25, 2007, the trial court ordered the Spanglers to supplement this motion. That same day, APSI moved the trial court to dismiss the Spangler's motion, join GCBMRDD as a party, and appoint a guardian ad litem. The Spanglers opposed this motion February 2, 2007.

{¶7} February 7, 2007, the trial court filed a judgment entry converting the scheduled April 24, 2007 pretrial into a full hearing on whether to continue APSI as John's guardian, or to appoint the Spanglers. April 19, 2007, the Spanglers and APSI jointly moved the trial court to reconvert the April 24 hearing into a pretrial.

{¶8} April 20, 2007, the Spanglers moved the court to dismiss the GCBMRDD motion which had originally removed them as John's guardians for lack of standing to file such motion. The Spanglers contended it was outside the statutorily defined powers of a county board of mental retardation to attempt to seek the removal of an incompetent's guardian. GCBMRDD opposed April 23, 2007.

{¶9} As noted above, hearing commenced April 24, 2007, and continued June 13, 2007, and July 24, 2007.

{¶10} April 25, 2007, the trial court joined GCBMRDD as a party for purposes of prosecuting its motion to remove the Spanglers as John's guardians.

{¶11} June 4, 2007, counsel for John appeared in the case. Discovery ensued; and, June 13, 2007, John filed to dismiss GCBMRDD from the case, for lack of standing.

{¶12} August 15, 2007, the trial court filed its judgment entry. Finding the conduct of John's parents in constantly seeking new or different services for him hindered, rather than helped, his care, the trial court granted GCBMRDD's motion to remove the Spanglers as John's guardians, and denied their motion to remove APSI. APSI was continued indefinitely as guardian of John's person.

{¶13} September 13, 2007, the Spanglers noticed appeal. It was given case number 2007-G-2800. September 24, John noticed appeal. It was given case number 2007-G-2802. October 18, 2007, the Spanglers filed an amended notice of appeal, adding APSI as a party thereto.

{¶14} October 29, 2007, this court dismissed John's appeal, sua sponte, as untimely filed pursuant to App.R. 4(A). November 8, 2007, John moved to reinstate his appeal as timely pursuant to App.R. 4(B)(1). That same day, John moved to consolidate his appeal with that of his parents. We granted each motion by a judgment entry filed November 26, 2007.

{¶15} April 16, 2008, the Ohio Association of County Boards of Mental Retardation and Developmental Disabilities ("OACBMRDD") moved for leave to file an

amicus curiae brief, instanter. By a judgment entry filed May 14, 2008, we granted leave; and ordered the Spanglers and John to file their replies within ten days. May 20, 2008, the OACBMRDD filed for leave to participate in oral argument, which leave we granted by a judgment entry filed July 7, 2008.

{¶16} John notices a single assignment of error on appeal:

{¶17} "The Probate Court improperly denied Appellant John Spangler's Motion to Dismiss Appellee [GCBMRDD] because [GCBMRDD] lacked standing under the Ohio Revised Code to see the removal of Appellant's Guardians."

{¶18} Mr. and Mrs. Spangler assign four errors on appeal:

{¶19} "[1.] Whether the trial court erred in permitting [GCBMRDD] to file a motion for removal of the guardians as it was not a party in the case, did not have statutory authority to do so, and such a motion was beyond the statutory authority of the Court.

{¶20} "[2.] Whether the trial court erred in granting the emergency motion to remove the guardian as there was no basis presented for the filing of such a motion.

{¶21} "[3.] Whether the trial court's ruling was against the manifest weight of the evidence as there was no evidence that the original guardians had failed to provide services for the ward.

{¶22} "[4.] Whether the Probate Court erred by denying counsel the right to listen to the prior testimony tape upon written request."

{¶23} We consider John's assignment of error, and his parent's first assignment of error, together. Essentially, each challenges whether a county board of mental retardation has the power to move a probate court to remove a guardian for an incompetent person. We find they do not.

{¶24} County boards of mental retardation are creatures of statute, created to supervise services for the mentally and developmentally challenged. Regarding such bodies, the Supreme Court of Ohio has held:

{¶25} "It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly. Authority that is conferred by the General Assembly cannot be extended by the administrative agency. *Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 379, ***.

{¶26} "Such grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective. In short, the implied power is only incidental or ancillary to an express power, and, if there be no express grant, if follows, as a matter of course, that there can be no implied grant.

{¶27} "In construing such grant of power, particularly administrative power through and by a legislative body, the rules are well settled that the intention of the grant of power, as well as the extent of the grant, must be clear; that in case of doubt that doubt is to be resolved not in favor of the grant but against it.' *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47, ***." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, at ¶38-40.

{¶28} Consequently, to discover whether a county board of mental health, such as GCBMRDD, may move a probate court to remove the guardian of an incompetent's person, we must look to the powers and duties conferred upon such boards, to see whether by express or implied grant, such power exists.

{¶29} The powers and duties imposed upon county boards of mental retardation are set forth at R.C. 5126.05(A), which provides:

{¶30} "(A) Subject to the rules established by the director of mental retardation and developmental disabilities pursuant to Chapter 119. of the Revised Code for programs and services offered pursuant to this chapter, and subject to the rules established by the state board of education pursuant to Chapter 119. of the Revised Code for programs and services offered pursuant to Chapter 3323. of the Revised Code, the county board of mental retardation and developmental disabilities shall:

{¶31} "(1) Administer and operate facilities, programs, and services as provided by this chapter and Chapter 3323. of the Revised Code and establish policies for their administration and operation;

{¶32} "(2) Coordinate, monitor, and evaluate existing services and facilities available to individuals with mental retardation and developmental disabilities;

{¶33} "(3) Provide early childhood services, supportive home services, and adult services, according to the plan and priorities developed under section 5126.04 of the Revised Code;

{¶34} "(4) Provide or contract for special education services pursuant to Chapters 3317. and 3323. of the Revised Code and ensure that related services, as defined in section 3323.01 of the Revised Code, are available according to the plan and priorities developed under section 5126.04 of the Revised Code;

{¶35} "(5) Adopt a budget, authorize expenditures for the purposes specified in this chapter and do so in accordance with section 319.16 of the Revised Code, approve attendance of board members and employees at professional meetings and approve

expenditures for attendance, and exercise such powers and duties as are prescribed by the director;

{¶36} "(6) Submit annual reports of its work and expenditures, pursuant to sections 3323.09 and 5126.12 of the Revised Code, to the director, the superintendent of public instruction, and the board of county commissioners at the close of the fiscal year and at such other times as may be reasonably requested;

{¶37} "(7) Authorize all positions of employment, establish compensation, including but not limited to salary schedules and fringe benefits for all board employees, approve contracts of employment for management employees that are for a term of more than one year, employ legal counsel under section 309.10 of the Revised Code, and contract for employee benefits;

{¶38} "(8) Provide service and support administration in accordance with section 5126.15 of the Revised Code;

{¶39} "(9) Certify respite care homes pursuant to rules adopted under section 5123.171 (5123.17.1) of the Revised Code by the director of mental retardation and developmental disabilities."

{¶40} Obviously, the power to move the probate court to remove an incompetent's guardian is not expressly granted by R.C. 5126.05. Does any section of R.C. Chapter 5126 imply such a grant? We think not.

{¶41} R.C. 5126.31 empowers the boards to review, investigate, and remediate cases involving the abuse or neglect of mentally retarded or developmentally disabled adults. Significantly, R.C. 5126.33 provides a detailed description of the procedure such boards must follow if it cannot obtain consent for a service plan for a mentally

retarded or developmentally disabled adult, pursuant to R.C. 5126.31(C). In relevant part, R.C. 5126.33 provides:

{¶42} "(A) A county board of mental retardation and developmental disabilities may file a complaint with the probate court of the county in which an adult with mental retardation or a developmental disability resides for an order authorizing the board to arrange services described in division (C) of section 5126.31 of the Revised Code for that adult if the adult is eligible to receive services or support *** and the board has been unable to secure consent. The complaint shall include:

{¶43} "(1) The name, age, and address of the adult;

{¶44} "(2) Facts describing the nature of the abuse, neglect, or exploitation and supporting the board's belief that services are needed;

{¶45} "(3) The types of services proposed by the board, as set forth in the protective service plan described in division (J) of section 5126.30 of the Revised Code and filed with the complaint;

{¶46} "(4) Facts showing the board's attempts to obtain the consent of the adult or the adult's guardian to the services.

{¶47} "(B) The board shall give the adult notice of the filing of the complaint and in simple and clear language shall inform the adult of the adult's rights in the hearing under division (C) of this section and explain the consequences of a court order. This notice shall be personally served upon all parties, and also shall be given to the adult's legal counsel, if any, and the legal rights service. The notice shall be given at least twenty-four hours prior to the hearing, although the court may waive this requirement upon a showing that there is a substantial risk that the adult will suffer immediate

physical harm in the twenty-four hour period and that the board has made reasonable attempts to give the notice required by this division.

{¶48} "(C) Upon the filing of a complaint for an order under this section, the court shall hold a hearing at least twenty-four hours and no later than seventy-two hours after the notice under division (B) of this section has been given unless the court has waived the notice. All parties shall have the right to be present at the hearing, present evidence, and examine and cross-examine witnesses. The Ohio Rules of Evidence shall apply to a hearing conducted pursuant to this division. The adult shall be represented by counsel unless the court finds that the adult has made a voluntary, informed, and knowing waiver of the right to counsel. ***

{¶49} "(D)(1) The court shall issue an order authorizing the board to arrange the protective services if it finds, on the basis of clear and convincing evidence, all of the following:

{¶50} "(a) The adult has been abused, neglected, or exploited;

{¶51} "(b) The adult is incapacitated;

{¶52} "(c) There is a substantial risk to the adult of immediate physical harm or death;

{¶53} "(d) The adult is in need of the services;

{¶54} "(e) No person authorized by law or court order to give consent for the adult is available or willing to consent to the services.

{¶55} "****."

{¶56} Further, pursuant to division (D) of R.C. 5126.33, the probate court may, in extreme necessity, order a change in the mentally retarded or developmentally disabled

adult's residence; and, pursuant to division (1)(2), it may issue an ex parte order in an emergency.

{¶57} By providing this extremely detailed statutory provision whereby county boards of mental retardation may seek to remedy perceived problems in the treatment of their clients, we believe the General Assembly has effectively banned such boards from seeing the removal of a guardian, such as occurred in this case. There is no way such a power can be implied from this provision: indeed, the fact that a board of mental retardation can seek an order overriding the wishes of a guardian, cf. R.C. 5126.33, indicates that the power to seek a guardian's removal is beyond a board of mental retardation's authority.

{¶58} In this case, the trial court found GCBMRDD to be a fiduciary of John's, pursuant to its extensive authority to provide services under R.C. 5126.15. As such, the trial court further found GCBMRDD to be John's "next best friend" and a "real party in interest" to the proceeding. We are somewhat dubious that GCBMRDD can be described as a fiduciary to its clients. R.C. 2109.01 defines the term "fiduciary" to include: "an agency under contract with the department of mental retardation and developmental disabilities for the provision of protective service ***, appointed by and accountable to the probate court as guardian or trustee with respect to mentally retarded or developmentally disabled persons." GCBMRDD was not appointed as John's guardian by the trial court; and it is no more accountable to that court than any other state agency regularly appearing in probate proceedings.

{¶59} Consequently, GCBMRDD lacked standing to move the trial court to replace Mr. Spangler as John's guardian. In *Ohio Pyro, Inc. v. Ohio Dept. of*

Commerce, 115 Ohio St.3d 375, 2007-Ohio-5024, at ¶27, the Supreme Court explained the concept of "standing" as follows:

{¶60} "'Standing' is defined at its most basic as '(a) party's right to make a legal claim or seek judicial enforcement of a duty or right.' Black's Law Dictionary (8th Ed.2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, ***. "(T)he question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" (Citations omitted.) *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, ***, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, ***." (Parallel citations omitted.)

{¶61} In this case, GCBMRDD has no claim to make; it has no right or duty requiring judicial enforcement. It has no "personal stake" in the controversy, as its duties revolve around providing and funding treatment for developmentally disabled persons such as John. Statutorily, it has the power, in proper case and following proper procedure, to override a guardian's wishes in a particular instance – but not to petition for a guardian's removal.

{¶62} John's first assignment of error, as well as the first assignment of error of his parents, have merit. Our disposition of these assignments further dictates we find merit in Mr. and Mrs. Spangler's second assignment of error; there was no basis for filing, or granting, the ex parte motion to make APSI temporary guardian of John. In

consequence, we deem moot Mr. and Mrs. Spangler's third assignment of error (challenging the manifest weight of the evidence used in removing them as John's guardians indefinitely).

{¶63} By their fourth assignment of error, Mr. and Mrs. Spangler allege error in the trial court refusing their counsel access to the tape recording of the April 24, 2007 hearing, in order to prepare for the June 13, 2007 hearing. The Spanglers allege written request for access to the tape was made to the trial court, but we find neither any request, nor denial, in the record on appeal. Consequently, we decline to consider the assignment. Cf. App.R. 16(A)(7).

{¶64} The judgment of the Geauga County Court of Common Pleas, Probate Division, is reversed, and this matter is remanded for further proceedings consistent with this opinion.

{¶65} It is the further order of this court that appellees are assessed costs herein taxed.

{¶66} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, J., concurs in part and concurs in judgment only in part with Concurring Opinion,

TIMOTHY P. CANNON, J., dissents with Dissenting Opinion.

MARY JANE TRAPP, J., concurs in part and concurs in judgment only in part with Concurring Opinion.

{¶67} While I concur that this matter must be reversed and remanded, I do so upon narrower grounds than the majority. The majority finds that a county board of

mental retardation and developmental disabilities does not have either an express grant of authority to file a motion to remove a guardian under R.C. 5126.05(A) or implied grant of authority to file such a motion. I believe the focus of the standing analysis should instead be on the rights and remedies provided to the various concerned individuals and entities in guardianship matters in R.C. Chapters 2109 and 2111.

{¶68} The analysis employed by the Supreme Court of Ohio in its recent decision *In Re Guardianship of Santrucek*, 2008-Ohio-4915, while used to determine who has standing to appeal a decision of a probate court in a guardianship proceeding, is cogent to the analysis we undertake in this case.

{¶69} In *Santrucek*, the court held that "[a] person who has not filed an application to be appointed a guardian, or who otherwise has not been made a party to the guardianship proceedings, has no standing to appeal." *Id.* at syllabus.

{¶70} The court began its analysis with the observation that "[b]ecause guardianship proceedings are not adversarial, but are in rem proceedings involving only the probate court and the ward, the requirements for standing to appeal are more elaborate. See *In re Guardianship of Love* (1969), 19 Ohio St.2d 111." *Id.* at ¶5 (parallel citations omitted). The same may be said as to the requirements for standing of interested persons or interested parties in a guardianship proceeding, be it either the establishment or the termination of a guardianship for an incompetent.

{¶71} The court in *Santrucek* found that the out-of-state daughter of the prospective ward clearly had an interest in the outcome of the guardianship proceedings. But although the daughter filed a motion challenging the subject matter jurisdiction of the Ohio probate court, she did not file a Civ.R. 24 motion to intervene.

{¶72} The court noted, as is applicable to this case, that "nonparties are limited in the types of motions they may file." Id. at ¶9. The court explained that "[t]he creation of a guardianship is a significant event, and family, friends, or even concerned neighbors could all potentially be affected by the outcome of a guardianship proceeding. Not all such persons will have a legally sufficient interest to allow them to become parties to the proceedings, however." Id. at ¶11.

{¶73} The pivotal questions in this case vis-a-vis the standing question are what was the status of the board at the time it filed its motion to remove and what was the board's legally sufficient interest?

{¶74} Clearly the board cannot meet the definition of "next-of-kin" found in the code section applicable to guardianships, R.C. 2111.01(E), which defines "next-of-kin" to be any person who would be entitled to inherit from the ward. Inasmuch as a guardian for John had already been appointed in an earlier proceeding, the board was not a "guardian", as defined at R.C. 2111.01(A). Although the term "interested party" is not defined in R.C. 2111.01, we find it used throughout those code chapters dealing with guardianships and fiduciaries, but in those applicable code sections we find only twelve limited areas¹ where interested parties may have standing in a guardianship proceeding and only eight of these eight sections actually empower an interested party

1. R.C. 2111.02 (seek a guardianship); R.C. 2111.13 (object to medical treatment); R.C. 2111.141 (entitled to notice of hearing on report of investigator); R.C. 2111.471 (file a motion to transfer jurisdiction); R.C. 2111.49 (request a hearing on the continuation of a guardianship); R.C. 2109.33 (file a motion taking exception to an accounting); R.C. 2109.36 (file a motion relative to distribution of assets); R.C. 2109.69 (file a petition to enforce payment or distribution); R.C. 2101.38 (file a motion when the probate judge is interested); R.C. 2109.04 (file a motion to require a bond); R.C. 2109.35 (file a motion to vacate order settling account); and R.C. 2127.19 (file an application to release the liens in a land sale).

to file a motion of any description.² Moreover, when R.C. 2109.24, the fiduciary removal statute, refers to "persons having an interest in the estate", it does so only in the final paragraph, and our court has held that this last paragraph applies only to the removal of testamentary trustees. *In re Estate of Veroni* (Dec. 31, 1998), 11th Dist. No. 97-L-119, 1998 Ohio App. Lexis 6365, *16.

{¶75} While the board clearly was not a party to this case at the time it filed the ex parte motion to remove the Spanglers as John's guardians, it may be reasonably argued that the board was an "interested party" at the time the ex parte motion to remove was filed. As an arguably interested party though, the board was limited in what it could file, as noted above.

{¶76} It is also clear that the board was later joined as a party upon the motion of the temporary guardian, APSI. The granting of the joinder motion was not specifically appealed. While I fail to see how APSI or the board for that matter demonstrated any of the grounds for joinder or intervention, i.e. that in its absence complete relief could not be accorded among those already parties, or that the board claimed an interest relating to the subject of the action and was so situated that the disposition of the action in its absence may either impair or impede its ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the board's claimed interest; any failure to assign this as error is not fatal.

2. R.C. 2111.471 (file a motion to transfer jurisdiction); R.C. 2111.49 (request a hearing on the continuation of a guardianship); R.C. 2109.33 (file a motion taking exception to an accounting); R.C. 2109.36 (file a motion relative to distribution of assets); R.C. 2101.38 (file a motion when the probate judge is interested); R.C. 2109.04 (file a motion to require a bond); R.C. 2109.35 (file a motion to vacate order settling account); and R.C. 2127.19 (file an application to release the liens in a land sale).

{¶77} As the majority in *Santrucek* noted, "intervenors have standing only to the extent necessary to protect the interest that justifies the intervention. This restriction on standing is particularly relevant in the context of an in rem guardianship proceedings, which, at its basic level, involves the court and the ward *** and *inherently limits any interest or standing of a third party.* *** " (Emphasis added.) Id. at ¶12.

{¶78} The board had a statutory remedy in this case, R.C. 5126.33, which authorizes the board to file a complaint in the probate court for an order authorizing the board to arrange appropriate services for the disabled individual. This statutory procedure even allows for an ex parte order. The interest of the board in assuring that services are provided to a disabled adult even when consent cannot be obtained are protected by this complaint procedure. But instead of using a scalpel to cure the perceived problems in assuring John received services, the board used an ax, and that ax is not a part of the board's armament under our probate code.

{¶79} I do agree with the majority that the trial court's determination that the board had standing as a next friend and real party in interest based upon statutorily imposed obligations "on the agency owed to John Spangler that are fiduciary in nature" is not well-grounded in law. The trial court did tacitly acknowledge that such an argument has yet to be accepted on its merits by any court in this state.

{¶80} As explained in the Staff Notes to Civ.R. 17, "[t]he real party in interest principle does not refer to 'capacity to sue.' Assume that a minor is negligently injured. The minor is a real party in interest, but he does not have the capacity to sue. The minor sues under Rule 17(B) by his next friend, an adult, who does have the capacity to sue."

{¶81} In John Spangler's case, John was and remains even as an incompetent the real party in interest because "[a] real party in interest is the person who, by substantive law, possesses the right to be enforced." *Brown v. Wright*, 2d Dist. No. 20560, 2006-Ohio- 38, at ¶11. John had duly appointed guardians, and if a conflict arose between the ward's interests and those of his guardian, the court could have appointed a guardian ad litem pursuant to Civ.R. 17(B) and Civ.R. 73.

{¶82} I agree with the majority that the board failed to establish its standing as a real party in interest.

TIMOTHY P. CANNON, J., dissenting.

{¶83} I respectfully dissent.

{¶84} First, the procedural posture in this case reveals a disturbing delay by the Spanglers from the time the board filed the initial request to the time they voiced any objection of record. The board filed a request to remove Mr. and Mrs. Spangler as guardians on October 25, 2006. A hearing was set for October 31, 2006. At that hearing, the parties, including Mr. and Mrs. Spangler, entered into an agreement allowing APSI to serve as John's temporary guardian. A hearing was set for April 24, 2007. The Spanglers filed a request to dismiss the board's motion because of lack of standing on April 20, 2007, almost six full months after the board had originally brought this issue to the attention of the court. However, even if that motion had been summarily granted, the status of the case would have been placement of John with APSI under the October 31, 2006 *agreed* entry. Nevertheless, a hearing commenced

on April 24, 2007. The following day, the trial court added the board as a party to the case. Two additional days of hearings occurred, on June 13, 2007 and July 24, 2007, before the trial court reached its conclusion that it would be in the best interest of John Spangler to remain under the guardianship of APSI.

{¶85} Second, I disagree with the way the lead opinion has framed the issue in this case. I do not believe focusing on what "powers" have been conferred to county boards of mental retardation and developmental disabilities is the proper inquiry. Rather, I believe the simple question in this case is whether the board had the "right" or "ability" to request the probate court to take action in the best interest of the ward.

{¶86} "A county board of mental retardation and developmental disabilities exists to serve the needs of the mentally retarded and developmentally disabled residents of a given county. The board has a duty to set up an individual plan for each resident, to provide services to the resident, and to ensure that those services are being carried out." *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities*, 150 Ohio App.3d 383, 2002-Ohio-6344, at ¶15.

{¶87} R.C. 2111.13(C) permits an "interested party" to file objections to a guardian's actions. I believe the general duties of the board are sufficient to deem the board an "interested party" and object to the guardian with the probate court.

{¶88} The majority holds that the board's authority and "power" is limited to the complaint procedure set forth in R.C. 5126.33. The lead opinion states that it believes the detailed procedure in R.C. 5126.33 is evidence that the "General Assembly has effectively banned such boards from seeking the removal of a guardian ***." I agree with the amicus brief that the procedure set forth in R.C. 5126.33 is not the board's

exclusive remedy. In fact, that section clearly establishes that the type of complaint contemplated by that statute does not apply to this situation. It only applies when the board is seeking protective services for the adult. R.C. 5126.33(D)(1) sets forth what the trial court must find in order to issue an order for protective services:

{¶89} "The court shall issue an order authorizing the board to arrange the protective services if it finds, on the basis of clear and convincing evidence, all of the following:

{¶90} "(a) The adult has been abused, neglected, or exploited;

{¶91} "(b) The adult is incapacitated;

{¶92} "(c) There is a substantial risk to the adult of immediate physical harm or death;

{¶93} "(d) The adult is in need of the services;

{¶94} "(e) No person authorized by law or court order to give consent for the adult is available or willing to consent to the services."

{¶95} In this case, the board felt the guardians were not fulfilling their duty and it would be in the best interest of the ward to have them removed. There was no allegation that there was an "immediate risk of physical harm or death." Therefore, a R.C. 5126.33 complaint would not be appropriate. However, I believe it is inappropriate to suggest the board is without remedy if it feels the guardian is not doing his or her job and that the best interest of the ward would be served if a new guardian is appointed.

{¶96} Anyone can ask the probate court to address problems with a guardian. Thus, it is difficult to believe that the Legislature intended to ban the very board created

to look after the best interests of persons with mental retardation or developmental disabilities from performing this action.

{¶97} At oral argument, the Spanglers' counsel acknowledged that *anyone* can write to the probate court, as the superior guardian of the ward pursuant to R.C. 2111.50(A)(1), and request anything with regard to the guardianship. Thereafter, the probate court has the discretion to grant or deny the request, or set the matter for a hearing. Further, counsel agreed that the board could have sent a letter to the probate court with the same information contained in its motion and the end result would have been the same. By adopting the majority rule, we are telling the probate court, with wide and plenary powers over guardianship matters, to whom it can and cannot listen. As the trial court noted, R.C. 5126.15 imposes obligations and duties upon the board. These duties are owed to John Spangler, not his parents.

{¶98} Finally, I believe the majority needs to provide further guidance for the trial court upon remand. The majority has remanded the matter for further proceedings but has not expressly indicated to the trial court what actions would be appropriate. After a lengthy and thorough set of hearings, the trial court made a finding that "neither Gabriele nor Joseph Spangler are suitable to serve as John Spangler's guardian." What is the probate court supposed to do now? Return John to his parents' control – just because the majority does not feel it was appropriate for the board to bring John's plight to the attention of the court?

{¶99} I would give great deference to the trial court after its exhaustive efforts to determine what is in John's best interest, and, thus, I would affirm the trial court's order.

STATE OF OHIO
COUNTY OF GEAUGA

)
FILED
IN COURT OF APPEALS

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

IN THE MATTER OF
THE GUARDIANSHIP OF
JOHN SPANGLER

MAY 14 2008
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

JUDGMENT ENTRY

CASE NOS. 2007-G-2800
and 2007-G-2802

On April 16, 2008, the Ohio Association of County Boards of Mental Retardation and Developmental Disabilities, by and through its counsel, Franklin J. Hickman, filed with this court a motion for leave to file an amicus curiae brief in support of appellee, Geauga County Board of Mental Retardation and Developmental Disabilities, pursuant to App.R. 17. The amicus curiae brief was filed with this court on April 16, 2008.

No brief or memorandum in opposition to this motion has been filed.

Upon consideration, the Ohio Association of County Boards of Mental Retardation and Developmental Disabilities' motion for leave to file an amicus curiae brief in support of appellee, Geauga County Board of Mental Retardation and Developmental Disabilities, is hereby granted instanter.

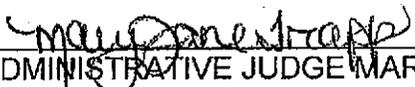
In addition, if the Ohio Association of County Boards of Mental Retardation and Developmental Disabilities wishes to participate in oral argument, a motion for leave to argue must be filed within ten days from the date of this judgment entry. As part of this motion, counsel for the Association must be able to

BOARD
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indicate that he has contacted counsel for appellee about this matter, and that counsel for appellee has expressly consented to forego a portion of its allotted time for oral arguments so that the Association can present its separate argument. If such consent has not been obtained from counsel for appellee, counsel for the Association shall not be allotted additional time, beyond the typical thirty-minute period, to argue unless extraordinary circumstances can be established.

Appellants are granted leave to file a reply brief to the amicus curiae brief of the Ohio Association of County Boards of Mental Retardation and Developmental Disabilities within ten days from the date of this judgment entry.

The clerk of courts is instructed to serve all counsel of record and Attorney Franklin J. Hickman with a time-stamped copy of this judgment entry.


ADMINISTRATIVE JUDGE MARY JANE TRAPP

12/4/66

emergency motion to take place on the 31st day of October, 2006. Prior to the commencement of the hearing, the parties entered into an agreement which was approved by the Court whereby the Court continued APSI as temporary guardian. Joseph and Gabriele Spangler were ordered to complete psychiatric assessments and drug and alcohol assessments and cause the assessments to be forwarded to the Court prior to the next scheduled pretrial. By agreement of the parties, the matter was then scheduled for a pretrial to take place on the 24th day of April, 2007.

On January 24, 2007 Gabriele and Joseph Spangler filed an emergency motion for the removal of APSI as guardian of Joseph Spangler. By Judgment Entry filed the 7th day of February, 2007, the Court converted the pretrial scheduled for the 24th day of April, 2007 to a full hearing on the issue of whether Joseph and Gabriele Spangler would be permitted to continue to serve as guardians for John Spangler or whether the Court would continue the appointment of APSI as John Spangler's permanent guardian. During the course of the proceeding, Gabriele Spangler withdrew her request to continue on as guardian and asked that Joseph Spangler be permitted to serve as John's sole guardian.

There is very little statutory guidance regarding the removal of a guardian for an incompetent ward. Ohio Revised Code Section 2111.46 provides broad authority for the Probate Court to remove a guardian of a minor for "good cause". The Courts have interpreted general language contained in a previous version of Ohio Revised Code Section 2109.24 which allowed for the removal of a fiduciary "because the interest of the trust demands it", as granting broad discretion to the Probate Court for determining when it is in the best interest of an incompetent ward to remove a guardian. However, Ohio Revised Code Section 2109.24 was amended effective January 1, 2007. The general language contained in the previous version of the statute was amended to refer specifically to the property interest that the fiduciary was responsible for administering. This language can no longer be relied on as a grant of broad discretionary authority to the Court for determining when a guardian of the person of the ward can be removed.

Ohio Revised Code Section 2111.50 codifies that the Probate Court is the superior guardian of wards who are subject to its jurisdiction. Ohio Revised Code Section

EXHIBIT
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2151.50 (A)(2)(a) provides that “for good cause shown”, the Probate Court may limit or deny, by order or rule, any power that is granted to the guardian by a section of the Ohio Revised Code or relevant decisions of the courts of this state. It stands to reason, that if the Court, for good cause shown, can limit or deny any power that is granted to the guardian, the Court, for good cause shown, has the authority to deny all of the power that it has granted to the guardian and cause that guardian to be removed.

John Spangler, through counsel, and Gabriele and Joseph Spangler have asked the Court to dismiss the motion filed by GCBMRDD due to the agency’s lack of standing. They argue specifically that the agency is neither an interested party nor next of kin. However, this Court finds that Ohio Revised Code Section 5126.15 (B) imposes obligations on the agency owed to John Spangler that are fiduciary in nature and as such the agency has standing as a next friend and real party of interest to file a petition for the removal of a guardian when the agency perceives the actions or omissions of the guardian are interfering with the ability of the ward to receive services and putting the ward at risk of physical or emotional harm. GCBMRDD has an obligation to bring to this Court’s attention situations in which it perceives that a guardian is not acting in the ward’s best interest.¹ The motions to dismiss for lack of standing were denied by the Court.

John Spangler is a young man who resided with his parents until he turned eighteen years old. Throughout John’s life, John’s mother has taken the lead in advocating for services for John. His mental disabilities cause him to need almost constant supervision and care. When he began to reach the age of puberty, his family reports that he became more and more difficult to manage. His condition causes him to need a great deal of structure and consistency in his life. He does not deal well with change. When John gets upset, he can act out violently. He has been known to cause significant property damage. One of the primary reasons he was placed outside of his parents’ home was because of concern he may do harm to his mother and his younger sister. Certain events can trigger these violent episodes, including, on occasion, contact with family members, particularly his mother.

¹ This same issue was discussed in a decision decided by the Sixth District Court of Appeals, but was not decided on the merits because the case was decided on other procedural issues. See In Re: Guardianship of Ricardi, Sixth District Court of Appeals, 2006-Ohio-24. See also In Re: Guardianship of Bussey, Eighth District Court of Appeals, 2004-Ohio-6617 in which Cuyahoga County Dept. of Senior and Adult Services was permitted to intervene in a guardianship proceeding as an interested party.

Over the past year John's mother has frequently been at odds with case workers and care providers that are providing services for John. She has repeatedly, impulsively sought changes in John's placements and services without giving due consideration to the opinion of professionals working with John and without having first secured alternative more appropriate services.

Joseph and Gabriele Spangler seem not to appreciate that there are times when John's contact with family members serves as a trigger for John's violent and destructive behaviors. There is disagreement at times between family members and care providers over the nature and extent of contact that John should have with various family members. Over the course of the past year Joseph Spangler has shown that he is either unable or unwilling to intercede objectively and assertively in disputes that have arisen between care providers and his wife.

Based on evidence presented at the time of the hearing, the Court finds that there is good cause and that it is in John's best interest that the removal of Gabriele and Joseph Spangler as guardians for John Spangler continue and that ASPI continue as the legal guardian for the person of John Spangler. In reaching this decision the Court acknowledges that it is the strong preference of the Court to appoint a suitable family member to serve as the guardian of a ward when a suitable family member is available. In this case, neither Gabriele nor Joseph Spangler are suitable to serve as John Spangler's guardian. There may come a time in the future when John's parents can demonstrate enough emotional stability that they can thoughtfully and rationally interact with service providers in a manner that they can take over the responsibility of serving as their son's guardian. However, at the present time there is a need for an objective guardian that can intercede on behalf of John Spangler to settle conflicts between service providers and John's parents and at times limit contact between John and his parents and other family members so as to avoid unnecessary disruptions in John's services and placements.

It is ordered that ASPI continue on as the guardian of the person of John Spangler. Said appointment is indefinite. The Court orders and instructs ASPI to sign releases necessary so that John's parents can fully participate in treatment team meetings so long as John's parents' participation in those meetings are not disruptive. This is not to be interpreted as preventing John's parents from expressing their opinions regarding John's

EXHIBIT
A-4

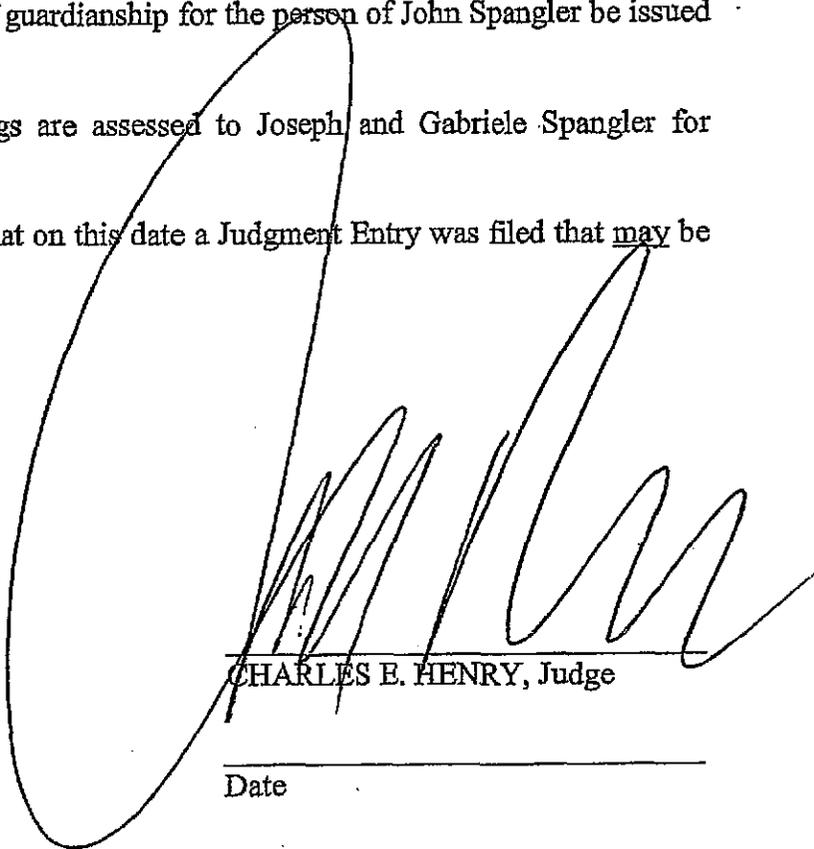
needs. ASPI shall also sign necessary releases so that John's parents can receive periodic updates on John's progress in treatment and so that they can be timely made of aware of any critical incidents involving John.

It is ordered that letters of guardianship for the person of John Spangler be issued to ASPI.

Costs of these proceedings are assessed to Joseph and Gabriele Spangler for which execution may now render.

You are hereby notified that on this date a Judgment Entry was filed that may be an "appealable" order.

IT IS SO ORDERED.



CHARLES E. HENRY, Judge

Date

cc: Prosecutor
Derek Hamalian
Shane Egan
Pamela Makowski

EXHIBIT
A-5

FILED
IN COMMON PLEAS COURT

**IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
GEAUGA COUNTY, OHIO**

2007 APR 25 AM 9:08

PROBATE-JUVENILE
DIVISION
GEAUGA COUNTY, OHIO

IN THE MATTER OF:)

CASE NO. 06PG000245

THE GUARDIANSHIP OF)
JOHN SPANGLER)

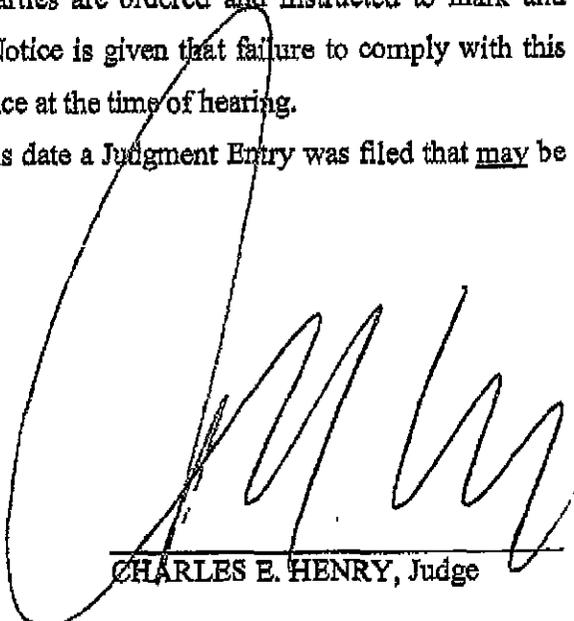
JUDGE CHARLES E. HENRY

JUDGMENT ENTRY

This matter came on for hearing on the motion for hearing on the issue of whether Joseph and Gabriele Spangler shall be permitted to serve as guardians for John Spangler or whether the Court shall continue the appointment of Advocacy Protection Services as John Spangler's permanent guardian. Prior to the commencement of the hearing, the Court joined Geauga County Board of MR/DD as a party for purposes of prosecuting its Motion for Removal of Joseph and Gabriele Spangler as guardians for John Spangler. The motion filed by Joseph and Gabriele Spangler to dismiss said motion was denied. The Court orders that the matter be scheduled for further hearing to take place on the 13th day of June, 2007 at 9:30 A.M. The parties are ordered and instructed to mark and exchange exhibits prior to the hearing. Notice is given that failure to comply with this order may result in the exclusion of evidence at the time of hearing.

You are hereby notified that on this date a Judgment Entry was filed that may be an "appealable" order.

IT IS SO ORDERED.



CHARLES E. HENRY, Judge

- cc: ✓Shane Egan
- ✓Prosecutor
- ✓Pamela Makowski

BOARD
APP. F

§ 305.14. Employment of legal counsel

(A) The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

(B) The board of county commissioners may also employ legal counsel, as provided in *section 309.09 of the Revised Code*, to represent it in any matter of public business coming before such board, and in the prosecution or defense of any action or proceeding in which such board is a party or has an interest, in its official capacity.

(C) Notwithstanding division (A) of this section and except as provided in division (D) of this section, a county board of mental retardation and developmental disabilities or a public children services agency may, without the authorization of the court of common pleas, employ legal counsel to advise it or to represent it or any of its members or employees in any matter of public business coming before the board or agency or in the prosecution or defense of any action or proceeding in which the board or agency in its official capacity, or a board or agency member or employee in the member's or employee's official capacity, is a party or has an interest.

(D) (1) In any legal proceeding in which the prosecuting attorney is fully able to perform the prosecuting attorney's statutory duty to represent the county board of mental retardation and developmental disabilities or public children services agency without conflict of interest, the board or agency shall employ other counsel only with the written consent of the prosecuting attorney. In any legal proceeding in which the prosecuting attorney is unable, for any reason, to represent the board or agency, the prosecuting attorney shall so notify the board or agency, and, except as provided in division (D)(2) of this section, the board or agency may then employ counsel for the proceeding without further permission from any authority.

(2) A public children services agency that receives money from the county general revenue fund must obtain the permission of the board of county commissioners of the county served by the agency before employing counsel under division (C) of this section.

HISTORY:

RS § 845; S&S 89; S&C 244; 74 v 133; 78 v 121; 91 v 142; 97 v 304; 99 v 337; GC § 2412; 108 v Ptl, 251; Bureau of Code Revision, 10-1-53; 137 v H 316 (Eff 10-25-78); 142 v S 155 (Eff 6-24-88); 148 v H 448. Eff 10-5-2000.

§ 2101.24. Jurisdiction of probate court

(A) (1) Except as otherwise provided by law, the probate court has exclusive jurisdiction:

(a) To take the proof of wills and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other state, territory, or country. If the probate judge is unavoidably absent, any judge of the court of common pleas may take proof of wills and approve bonds to be given, but the record of these acts shall be preserved in the usual records of the probate court.

(b) To grant and revoke letters testamentary and of administration;

(c) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

(d) To appoint the attorney general to serve as the administrator of an estate pursuant to *section 2113.06 of the Revised Code*;

(e) To appoint and remove guardians, conservators, and testamentary trustees, direct and control their conduct, and settle their accounts;

(f) To grant marriage licenses;

(g) To make inquests respecting persons who are so mentally impaired as a result of a mental or physical illness or disability, or mental retardation, or as a result of chronic substance abuse, that they are unable to manage their property and affairs effectively, subject to guardianship;

(h) To qualify assignees, appoint and qualify trustees and commissioners of insolvents, control their conduct, and settle their accounts;

(i) To authorize the sale of lands, equitable estates, or interests in lands or equitable estates, and the assignments of inchoate dower in such cases of sale, on petition by executors, administrators, and guardians;

(j) To authorize the completion of real estate contracts on petition of executors and administrators;

(k) To construe wills;

(l) To render declaratory judgments, including, but not limited to, those rendered pursuant to *section 2107.084 [2107.08.4] of the Revised Code*;

(m) To direct and control the conduct of fiduciaries and settle their accounts;

(n) To authorize the sale or lease of any estate created by will if the estate is held in trust, on petition by the trustee;

(o) To terminate a testamentary trust in any case in which a court of equity may do so;

(p) To hear and determine actions to contest the validity of wills;

(q) To make a determination of the presumption of death of missing persons and to adjudicate the property rights and obligations of all parties affected by the presumption;

(r) To hear and determine an action commenced pursuant to *section 3107.41 of the Revised Code* to obtain the release of information pertaining to the birth name of the adopted person and the identity of the adopted person's biological parents and biological siblings;

(s) To act for and issue orders regarding wards pursuant to *section 2111.50 of the Revised Code*;

(t) To hear and determine actions against sureties on the bonds of fiduciaries appointed by the probate court;

(u) To hear and determine actions involving informed consent for medication of persons hospitalized pursuant to *section 5122.141 [5122.14.1] or 5122.15 of the Revised Code*;

(v) To hear and determine actions relating to durable powers of attorney for health care as described in division (D) of *section 1337.16 of the Revised Code*;

(w) To hear and determine actions commenced by objecting individuals, in accordance with *section 2133.05 of the Revised Code*;

(x) To hear and determine complaints that pertain to the use or continuation, or the withholding or withdrawal, of life-sustaining treatment in connection with certain patients allegedly in a terminal condition or in a permanently unconscious state pursuant to division (E) of *section 2133.08 of the Revised Code*, in accordance with that division;

(y) To hear and determine applications that pertain to the withholding or withdrawal of nutrition and hydration from certain patients allegedly in a permanently unconscious state pursuant to *section 2133.09 of the Revised Code*, in accordance with that section;

(z) To hear and determine applications of attending physicians in accordance with division (B) of *section 2133.15 of the Revised Code*;

(aa) To hear and determine actions relative to the use or continuation of comfort care in connection with certain principals under durable powers of attorney for health care, declarants under declarations, or patients in accordance with division (E) of either *section 1337.16 or 2133.12 of the Revised Code*;

(bb) To hear and determine applications for an order relieving an estate from administration under *section 2113.03 of the Revised Code*;

(cc) To hear and determine applications for an order granting a summary release from administration under *section 2113.031 [2113.03.1] of the Revised Code*;

(dd) To hear and determine actions relating to the exercise of the right of disposition, in accordance with *section 2108.90 of the Revised Code*;

(ee) To hear and determine actions relating to the disinterment and reinterment of human remains under *section 517.23 of the Revised Code*.

(2) In addition to the exclusive jurisdiction conferred upon the probate court by division (A)(1) of this section, the probate court shall have exclusive jurisdiction over a particular subject matter if both of the following apply:

(a) Another section of the Revised Code expressly confers jurisdiction over that subject matter upon the probate court.

(b) No section of the Revised Code expressly confers jurisdiction over that subject matter upon any other court or agency.

(B) (1) The probate court has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to issue writs and orders, and to hear and determine actions as follows:

(a) If jurisdiction relative to a particular subject matter is stated to be concurrent in a section of the Revised Code or has been construed by judicial decision to be concurrent, any action that involves that subject matter;

(b) Any action that involves an inter vivos trust; a trust created pursuant to *section 5815.28 of the Revised Code*; a charitable trust or foundation; subject to divisions (A)(1)(u) and (z) of this section, a power of attorney, including, but not limited to, a durable power of attorney; the medical treatment of a competent adult; or a writ of habeas corpus.

(2) Any action that involves a concurrent jurisdiction subject matter and that is before the probate court may be transferred by the probate court, on its order, to the general division of the court of common pleas.

(C) The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code.

(D) The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law.

HISTORY:

GC §§ 10501-53, 10501-55; 114 v 320; Bureau of Code Revision, 10-1-53; 125 v 903(960); 127 v 27 (Eff 9-9-57); 129 v 7 (Eff 10-5-61); 130 v 611 (Eff 10-14-63); 136 v S 145 (Eff 1-1-76); 136 v S 466 (Eff 5-26-76); 137 v H 1 (Eff 8-26-77); 137 v S 112 (Eff 11-1-77); 137 v H 505 (Eff 1-1-79); 140 v H 84 (Eff 3-19-85); 141 v S 135 (Eff 3-13-86); 143 v S 46 (Eff 1-1-90); 143 v H 764 (Eff 4-10-91); 144 v S 1 (Eff 10-10-91); 144 v S 124 (Eff 4-16-93); 146 v H 167 (Eff 11-15-95); 148 v H 313. Eff 8-29-2000; 151 v H 426, § 1, eff. 10-12-06; 151 v H 416, § 1, eff. 1-1-07.

§ 2109.01. Fiduciary, defined

"Fiduciary," as used in Chapters 2101. to 2131. of the Revised Code, means any person, other than an assignee or trustee for an insolvent debtor or a guardian under *sections 5905.01 to 5905.19 of the Revised Code*, appointed by and accountable to the probate court and acting in a fiduciary capacity for any person, or charged with duties in relation to any property, interest, trust, or estate for the benefit of another; and includes an agency under contract with the department of mental retardation and developmental disabilities for the provision of protective service under *sections 5123.55 to 5123.59 of the Revised Code*, appointed by and accountable to the probate court as guardian or trustee with respect to mentally retarded or developmentally disabled persons.

HISTORY:

GC § 10506-1; 114 v 320(364); Bureau of Code Revision, 10-1-53; 134 v H 290 (Eff 3-23-72); 138 v H 900 (Eff 7-1-80); 141 v S 129 (Eff 3-13-86); 143 v S 46 (Eff 1-1-90); 143 v H 569. Eff 7-1-91; 152 v H 499, § 1, eff. 9-12-08.

§ 2111.50. Court is superior guardian and guardians must obey all orders; determination of ward's best interest

(A) (1) At all times, the probate court is the superior guardian of wards who are subject to its jurisdiction, and all guardians who are subject to the jurisdiction of the court shall obey all orders of the court that concern their wards or guardianships.

(2) (a) Subject to divisions (A)(2)(b) and (c) of this section, the control of a guardian over the person, the estate, or both of his ward is limited to the authority that is granted to the guardian by the Revised Code, relevant decisions of the courts of this state, and orders or rules of the probate court.

(b) Except for the powers specified in division (E) of this section and unless otherwise provided in or inconsistent with another section of the Revised Code, the probate court may confer upon a guardian any power that this section grants to the probate court in connection with wards.

(c) For good cause shown, the probate court may limit or deny, by order or rule, any power that is granted to a guardian by a section of the Revised Code or relevant decisions of the courts of this state.

(B) In connection with any person whom the probate court has found to be an incompetent or a minor subject to guardianship and for whom the court has appointed a guardian, the court has, subject to divisions (C) to (E) of this section, all the powers that relate to the person and estate of the person and that he could exercise if present and not a minor or under a disability, except the power to make or revoke a will. These powers include, but are not limited to, the power to do any of the following:

(1) Convey or release the present, contingent, or expectant interests in real or personal property of the person, including, but not limited to, dower and any right of survivorship incident to a survivorship tenancy, joint tenancy, or tenancy by the entireties;

(2) Exercise or release powers as a trustee, personal representative, custodian for a minor, guardian, or donee of a power of appointment;

(3) Enter into contracts, or create revocable trusts of property of the estate of the person, that may not extend beyond the minority, disability, or life of the person or ward;

(4) Exercise options to purchase securities or other property;

(5) Exercise rights to elect options under annuities and insurance policies, and to surrender an annuity or insurance policy for its cash value;

(6) Exercise the right to an elective share in the estate of the deceased spouse of the person pursuant to section 2107.45* of the Revised Code;

(7) Make gifts, in trust or otherwise, to relatives of the person and, consistent with any prior pattern of the person of giving to charities or of providing support for friends, to charities and friends of the person.

(C) Except for the powers specified in division (D) of this section, all powers of the probate court that are specified in this chapter and that relate either to any person whom it has found to be an incompetent or a minor subject to guardianship and for whom it has appointed a guardian and all powers of a guardian that relate to his ward or guardianship as described in division (A)(2) of this section, shall be exercised in the best interest, as determined in the court's or guardian's judgment, of the following:

(1) The person whom the probate court has found to be an incompetent or a minor subject to guardianship;

(2) The dependents of the person;

(3) The members of the household of the person.

(D) If the court is to exercise or direct the exercise, pursuant to division (B) of this section, of the power to make gifts in trust or otherwise, the following conditions shall apply:

(1) The exercise of the particular power shall not impair the financial ability of the estate of the person whom the probate court has found to be an incompetent or a minor subject to guardianship and for whom the court has appointed a guardian, to provide for his foreseeable needs for maintenance and care;

(2) If applicable, the court shall consider any of the following:

(a) The estate, income, and other tax advantages of the exercise of a particular power to the estate of a person whom the probate court has found to be an incompetent or a minor subject to guardianship and for whom the court has appointed a guardian;

(b) Any pattern of giving of, or any pattern of support provided by, the person prior to his incompetence;

(c) The disposition of property made by the will of the person;

(d) If there is no knowledge of a will of the person, his prospective heirs;

(e) Any relevant and trustworthy statements of the person, whether established by hearsay or other evidence.

(E) (1) The probate court shall cause notice as described in division (E)(2) of this section to be given and a hearing to be conducted prior to its exercise or direction of the exercise of any of the following powers pursuant to division (B) of this section:

(a) The exercise or release of powers as a donee of a power of appointment;

(b) Unless the amount of the gift is no more than one thousand dollars, the making of a gift, in trust or otherwise.

(2) The notice required by division (E)(1) of this section shall be given to the following persons:

(a) Unless a guardian of a ward has applied for the exercise of a power specified in division (E)(1) of this section, to the guardian;

(b) To the person whom the probate court has found to be an incompetent or a minor subject to guardianship;

(c) If known, to a guardian who applied for the exercise of a power specified in division (E)(1) of this section, to the prospective heirs of the person whom the probate court has found to be an incompetent or a minor subject to guardianship under *section 2105.06 of the Revised Code*, and any person who has a legal interest in property that may be divested or limited as the result of the exercise of a power specified in division (E)(1) of this section;

(d) To any other persons the court orders.

(F) When considering any question related to, and issuing orders for, medical or surgical care or treatment of incompetents or minors subject to guardianship, the probate court has full *parens patriae* powers unless otherwise provided by a section of the Revised Code.

HISTORY:

143 v S 46. Eff 1-1-90.

§ 5123.61. Duty to report abuse, neglect, and other major unusual incidents

(A) As used in this section:

(1) "Law enforcement agency" means the state highway patrol, the police department of a municipal corporation, or a county sheriff.

(2) "Abuse" has the same meaning as in *section 5123.50 of the Revised Code*, except that it includes a misappropriation, as defined in that section.

(3) "Neglect" has the same meaning as in *section 5123.50 of the Revised Code*.

(B) The department of mental retardation and developmental disabilities shall establish a registry office for the purpose of maintaining reports of abuse, neglect, and other major unusual incidents made to the department under this section and reports received from county boards of mental retardation and developmental disabilities under *section 5126.31 of the Revised Code*. The department shall establish committees to review reports of abuse, neglect, and other major unusual incidents.

(C) (1) Any person listed in division (C)(2) of this section, having reason to believe that a person with mental retardation or a developmental disability has suffered or faces a substantial risk of suffering any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of that person, shall immediately report or cause reports to be made of such information to the entity specified in this division. Except as provided in *section 5120.173 [5120.17.3] of the Revised Code* or as otherwise provided in this division, the person making the report shall make it to a law enforcement agency or to the county board of mental retardation and developmental disabilities. If the report concerns a resident of a facility operated by the department of mental retardation and developmental disabilities the report shall be made either to a law enforcement agency or to the department. If the report concerns any act or omission of an employee of a county board of mental retardation and developmental disabilities, the report immediately shall be made to the department and to the county board.

(2) All of the following persons are required to make a report under division (C)(1) of this section:

(a) Any physician, including a hospital intern or resident, any dentist, podiatrist, chiropractor, practitioner of a limited branch of medicine as specified in *section 4731.15 of the Revised Code*, hospital administrator or employee of a hospital, nurse licensed under Chapter 4723. of the Revised Code, employee of an ambulatory health facility as defined in *section 5101.61 of the Revised Code*, employee of a home health agency, employee of an adult care facility licensed under Chapter 3722. of the Revised Code, or employee of a community mental health facility;

(b) Any school teacher or school authority, social worker, psychologist, attorney, peace officer, coroner, or residents' rights advocate as defined in *section 3721.10 of the Revised Code*;

(c) A superintendent, board member, or employee of a county board of mental retardation and developmental disabilities; an administrator, board member, or employee of a residential facility licensed under *section 5123.19 of the Revised Code*; an administrator, board member, or employee of any other public or private provider of services to a person with mental retardation or a developmental disability, or any MR/DD employee, as defined in *section 5123.50 of the Revised Code*;

(d) A member of a citizen's advisory council established at an institution or branch institution of the department of mental retardation and developmental disabilities under *section 5123.092 [5123.09.2] of the Revised Code*;

(e) A clergyman who is employed in a position that includes providing specialized services to an individual with mental retardation or another developmental disability, while acting in an official or professional capacity in that position, or a person who is employed in a position that includes providing specialized services to an individual with mental retardation or another developmental disability and who, while acting in an official or professional capacity, renders spiritual treatment through prayer in accordance with the tenets of an organized religion.

(3) (a) The reporting requirements of this division do not apply to members of the legal rights service commission or to employees of the legal rights service.

(b) An attorney or physician is not required to make a report pursuant to division (C)(1) of this section concerning any communication the attorney or physician receives from a client or patient in an attorney-client or physician-patient relationship, if, in accordance with division (A) or (B) of *section 2317.02 of the Revised Code*, the attorney

or physician could not testify with respect to that communication in a civil or criminal proceeding, except that the client or patient is deemed to have waived any testimonial privilege under division (A) or (B) of *section 2317.02 of the Revised Code* with respect to that communication and the attorney or physician shall make a report pursuant to division (C)(1) of this section, if both of the following apply:

(i) The client or patient, at the time of the communication, is a person with mental retardation or a developmental disability.

(ii) The attorney or physician knows or suspects, as a result of the communication or any observations made during that communication, that the client or patient has suffered or faces a substantial risk of suffering any wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client or patient.

(4) Any person who fails to make a report required under division (C) of this section and who is an MR/DD employee, as defined in *section 5123.50 of the Revised Code*, shall be eligible to be included in the registry regarding misappropriation, abuse, neglect, or other specified misconduct by MR/DD employees established under *section 5123.52 of the Revised Code*.

(D) The reports required under division (C) of this section shall be made forthwith by telephone or in person and shall be followed by a written report. The reports shall contain the following:

(1) The names and addresses of the person with mental retardation or a developmental disability and the person's custodian, if known;

(2) The age of the person with mental retardation or a developmental disability;

(3) Any other information that would assist in the investigation of the report.

(E) When a physician performing services as a member of the staff of a hospital or similar institution has reason to believe that a person with mental retardation or a developmental disability has suffered injury, abuse, or physical neglect, the physician shall notify the person in charge of the institution or that person's designated delegate, who shall make the necessary reports.

(F) Any person having reasonable cause to believe that a person with mental retardation or a developmental disability has suffered or faces a substantial risk of suffering abuse or neglect may report or cause a report to be made of that belief to the entity specified in this division. Except as provided in *section 5120.173 [5120.17.3] of the Revised Code* or as otherwise provided in this division, the person making the report shall make it to a law enforcement agency or the county board of mental retardation and developmental disabilities. If the person is a resident of a facility operated by the department of mental retardation and developmental disabilities, the report shall be made to a law enforcement agency or to the department. If the report concerns any act or omission of an employee of a county board of mental retardation and developmental disabilities, the report immediately shall be made to the department and to the county board.

(G) (1) Upon the receipt of a report concerning the possible abuse or neglect of a person with mental retardation or a developmental disability, the law enforcement agency shall inform the county board of mental retardation and developmental disabilities or, if the person is a resident of a facility operated by the department of mental retardation and developmental disabilities, the director of the department or the director's designee.

(2) On receipt of a report under this section that includes an allegation of action or inaction that may constitute a crime under federal law or the law of this state, the department of mental retardation and developmental disabilities shall notify the law enforcement agency.

(3) When a county board of mental retardation and developmental disabilities receives a report under this section that includes an allegation of action or inaction that may constitute a crime under federal law or the law of this state, the superintendent of the board or an individual the superintendent designates under division (H) of this section shall notify the law enforcement agency. The superintendent or individual shall notify the department of mental retardation and developmental disabilities when it receives any report under this section.

(4) When a county board of mental retardation and developmental disabilities receives a report under this section and believes that the degree of risk to the person is such that the report is an emergency, the superintendent of the board or an employee of the board the superintendent designates shall attempt a face-to-face contact with the person with mental retardation or a developmental disability who allegedly is the victim within one hour of the board's receipt of the report.

(H) The superintendent of the board may designate an individual to be responsible for notifying the law enforcement agency and the department when the county board receives a report under this section.

(I) An adult with mental retardation or a developmental disability about whom a report is made may be removed from the adult's place of residence only by law enforcement officers who consider that the adult's immediate removal is essential to protect the adult from further injury or abuse or in accordance with the order of a court made pursuant to *section 5126.33 of the Revised Code*.

(J) A law enforcement agency shall investigate each report of abuse or neglect it receives under this section. In addition, the department, in cooperation with law enforcement officials, shall investigate each report regarding a resident of a facility operated by the department to determine the circumstances surrounding the injury, the cause of the injury, and the person responsible. The investigation shall be in accordance with the memorandum of understanding prepared under *section 5126.058 [5126.05.8] of the Revised Code*. The department shall determine, with the registry office which shall be maintained by the department, whether prior reports have been made concerning an adult with mental retardation or a developmental disability or other principals in the case. If the department finds that the report involves action or inaction that may constitute a crime under federal law or the law of this state, it shall submit a report of its investigation, in writing, to the law enforcement agency. If the person with mental retardation or a developmental disability is an adult, with the consent of the adult, the department shall provide such protective services as are necessary to protect the adult. The law enforcement agency shall make a written report of its findings to the department.

If the person is an adult and is not a resident of a facility operated by the department, the county board of mental retardation and developmental disabilities shall review the report of abuse or neglect in accordance with *sections 5126.30 to 5126.33 of the Revised Code* and the law enforcement agency shall make the written report of its findings to the county board.

(K) Any person or any hospital, institution, school, health department, or agency participating in the making of reports pursuant to this section, any person participating as a witness in an administrative or judicial proceeding resulting from the reports, or any person or governmental entity that discharges responsibilities under *sections 5126.31 to 5126.33 of the Revised Code* shall be immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of such actions except liability for perjury, unless the person or governmental entity has acted in bad faith or with malicious purpose.

(L) No employer or any person with the authority to do so shall discharge, demote, transfer, prepare a negative work performance evaluation, reduce pay or benefits, terminate work privileges, or take any other action detrimental to an employee or retaliate against an employee as a result of the employee's having made a report under this section. This division does not preclude an employer or person with authority from taking action with regard to an employee who has made a report under this section if there is another reasonable basis for the action.

(M) Reports made under this section are not public records as defined in *section 149.43 of the Revised Code*. Information contained in the reports on request shall be made available to the person who is the subject of the report, to the person's legal counsel, and to agencies authorized to receive information in the report by the department or by a county board of mental retardation and developmental disabilities.

(N) Notwithstanding *section 4731.22 of the Revised Code*, the physician-patient privilege shall not be a ground for excluding evidence regarding the injuries or physical neglect of a person with mental retardation or a developmental disability or the cause thereof in any judicial proceeding resulting from a report submitted pursuant to this section.

HISTORY:

RC § 5123.98, 135 v S 336 (Eff 7-1-75); 137 v H 219 (Eff 11-1-77); *RC § 5123.61*, 138 v H 900 (Eff 7-1-80); 141 v H 66 (Eff 3-6-86); 142 v H 403 (Eff 3-16-89); 143 v H 569 (Eff 7-1-91); 145 v S 21 (Eff 10-29-93); 146 v H 670 (Eff 12-2-96); 147 v H 606 (Eff 3-9-99); 148 v S 171. Eff 11-22-2000; 150 v S 178, § 1, eff. 1-30-04.

§ 5126.01. Definitions

As used in this chapter:

* * *

(O) "Residential services" means services to individuals with mental retardation or other developmental disabilities to provide housing, food, clothing, habilitation, staff support, and related support services necessary for the health, safety, and welfare of the individuals and the advancement of their quality of life. "Residential services" includes program management, as described in *section 5126.14 of the Revised Code*.

* * *

(U) (1) "Supported living" means services provided for as long as twenty-four hours a day to an individual with mental retardation or other developmental disability through any public or private resources, including moneys from the individual, that enhance the individual's reputation in community life and advance the individual's quality of life by doing the following:

(a) Providing the support necessary to enable an individual to live in a residence of the individual's choice, with any number of individuals who are not disabled, or with not more than three individuals with mental retardation and developmental disabilities unless the individuals are related by blood or marriage;

(b) Encouraging the individual's participation in the community;

(c) Promoting the individual's rights and autonomy;

(d) Assisting the individual in acquiring, retaining, and improving the skills and competence necessary to live successfully in the individual's residence.

(2) "Supported living" includes the provision of all of the following:

(a) Housing, food, clothing, habilitation, staff support, professional services, and any related support services necessary to ensure the health, safety, and welfare of the individual receiving the services;

(b) A combination of lifelong or extended-duration supervision, training, and other services essential to daily living, including assessment and evaluation and assistance with the cost of training materials, transportation, fees, and supplies;

(c) Personal care services and homemaker services;

(d) Household maintenance that does not include modifications to the physical structure of the residence;

(e) Respite care services;

(f) Program management, as described in *section 5126.14 of the Revised Code*.

HISTORY:

138 v S 160 (Eff 10-31-80); 143 v H 257 (Eff 8-3-89); 143 v H 697 (Eff 7-17-90); 143 v H 569 (Eff 7-1-91); 145 v H 694 (Eff 11-11-94); 146 v H 629 (Eff 3-13-97); 149 v H 94 (Eff 6-6-2001); 149 v H 405. Eff 12-13-2001; 150 v H 95, § 1, eff. 6-26-03; 151 v H 66, § 101.01, eff. 7-1-05; 151 v S 10, § 1, eff. 9-5-05; 151 v H 699, § 101.01, eff. 3-29-07.

§ 5126.04. Priorities for facilities, programs, services; individual habilitation or service plans; responsibility of other governmental entities unaffected; provision of educational services

(A) Each county board of mental retardation and developmental disabilities shall plan and set priorities based on available resources for the provision of facilities, programs, and other services to meet the needs of county residents who are individuals with mental retardation and other developmental disabilities, former residents of the county residing in state institutions or placed under purchase of service agreements under *section 5123.18 of the Revised Code*, and children subject to a determination made pursuant to *section 121.38 of the Revised Code*.

Each county board shall assess the facility and service needs of the individuals with mental retardation and other developmental disabilities who are residents of the county or former residents of the county residing in state institutions or placed under purchase of service agreements under *section 5123.18 of the Revised Code*.

Each county board shall require individual habilitation or service plans for individuals with mental retardation and other developmental disabilities who are being served or who have been determined eligible for services and are awaiting the provision of services. Each board shall ensure that methods of having their service needs evaluated are available.

(B) (1) If a foster child is in need of assessment for eligible services or is receiving services from a county board of mental retardation and developmental disabilities and that child is placed in a different county, the agency that placed the child, immediately upon placement, shall inform the county board in the new county all of the following:

- (a) That a foster child has been placed in that county;
- (b) The name and other identifying information of the foster child;
- (c) The name of the foster child's previous county of residence;

(d) That the foster child was in need of assessment for eligible services or was receiving services from the county board of mental retardation and developmental disabilities in the previous county.

(2) Upon receiving the notice described in division (B)(1) of this section or otherwise learning that the child was in need of assessment for eligible services or was receiving services from a county board of mental retardation and developmental disabilities in the previous county, the county board in the new county shall communicate with the county board of the previous county to determine how services for the foster child shall be provided in accordance with each board's plan and priorities as described in division (A) of this section.

If the two county boards are unable to reach an agreement within ten days of the child's placement, the county board in the new county shall send notice to the Ohio department of mental retardation and developmental disabilities of the failure to agree. The department shall decide how services shall be provided for the foster child within ten days of receiving notice that the county boards could not reach an agreement. The department may decide that one, or both, of the county boards shall provide services. The services shall be provided in accordance with the board's plan and priorities as described in division (A) of this section.

(C) The department of mental retardation and developmental disabilities may adopt rules in accordance with Chapter 119. of the Revised Code as necessary to implement this section. To the extent that rules adopted under this section apply to the identification and placement of children with disabilities under Chapter 3323. of the Revised Code, the rules shall be consistent with the standards and procedures established under *sections 3323.03 to 3323.05 of the Revised Code*.

(D) The responsibility or authority of a county board to provide services under this chapter does not affect the responsibility of any other entity of state or local government to provide services to individuals with mental retardation and developmental disabilities.

(E) On or before the first day of February prior to a school year, a county board of mental retardation and developmental disabilities may elect not to participate during that school year in the provision of or contracting for educational services for children ages six through twenty-one years of age, provided that on or before that date the board gives notice of this election to the superintendent of public instruction, each school district in the county, and the educational service center serving the county. If a board makes this election, it shall not have any responsibility for or authority to provide educational services that school year for children ages six through twenty-one years of age. If a board does not make an election for a school year in accordance with this division, the board shall be deemed to have elected to partic-

ipate during that school year in the provision of or contracting for educational services for children ages six through twenty-one years of age.

(F) If a county board of mental retardation and developmental disabilities elects to provide educational services during a school year to individuals six through twenty-one years of age who have multiple disabilities, the board may provide these services to individuals who are appropriately identified and determined eligible pursuant to Chapter 3323. of the Revised Code, and in accordance with applicable rules of the state board of education. The county board may also provide related services to individuals six through twenty-one years of age who have one or more disabling conditions, in accordance with section 3317.20 and Chapter 3323. of the Revised Code and applicable rules of the state board of education.

HISTORY:

146 v H 629 (Eff 3-13-97); 147 v H 770. Eff 7-1-98; 152 v H 119, § 101.01, eff. 9-29-07; 152 v H 214, § 1, eff. 5-14-08.

§ 5126.05. Powers and duties of county board

(A) Subject to the rules established by the director of mental retardation and developmental disabilities pursuant to Chapter 119. of the Revised Code for programs and services offered pursuant to this chapter, and subject to the rules established by the state board of education pursuant to Chapter 119. of the Revised Code for programs and services offered pursuant to Chapter 3323. of the Revised Code, the county board of mental retardation and developmental disabilities shall:

- (1) Administer and operate facilities, programs, and services as provided by this chapter and Chapter 3323. of the Revised Code and establish policies for their administration and operation;
- (2) Coordinate, monitor, and evaluate existing services and facilities available to individuals with mental retardation and developmental disabilities;
- (3) Provide early childhood services, supportive home services, and adult services, according to the plan and priorities developed under *section 5126.04 of the Revised Code*;
- (4) Provide or contract for special education services pursuant to Chapters 3317. and 3323. of the Revised Code and ensure that related services, as defined in *section 3323.01 of the Revised Code*, are available according to the plan and priorities developed under *section 5126.04 of the Revised Code*;
- (5) Adopt a budget, authorize expenditures for the purposes specified in this chapter and do so in accordance with *section 319.16 of the Revised Code*, approve attendance of board members and employees at professional meetings and approve expenditures for attendance, and exercise such powers and duties as are prescribed by the director;
- (6) Submit annual reports of its work and expenditures, pursuant to *sections 3323.09 and 5126.12 of the Revised Code*, to the director, the superintendent of public instruction, and the board of county commissioners at the close of the fiscal year and at such other times as may reasonably be requested;
- (7) Authorize all positions of employment, establish compensation, including but not limited to salary schedules and fringe benefits for all board employees, approve contracts of employment for management employees that are for a term of more than one year, employ legal counsel under *section 309.10 of the Revised Code*, and contract for employee benefits;
- (8) Provide service and support administration in accordance with *section 5126.15 of the Revised Code*;
- (9) Certify respite care homes pursuant to rules adopted under *section 5123.171 [5123.17.1] of the Revised Code* by the director of mental retardation and developmental disabilities.

(B) To the extent that rules adopted under this section apply to the identification and placement of children with disabilities under Chapter 3323. of the Revised Code, they shall be consistent with the standards and procedures established under *sections 3323.03 to 3323.05 of the Revised Code*.

(C) Any county board may enter into contracts with other such boards and with public or private, nonprofit, or profit-making agencies or organizations of the same or another county, to provide the facilities, programs, and services authorized or required, upon such terms as may be agreeable, and in accordance with this chapter and Chapter 3323. of the Revised Code and rules adopted thereunder and in accordance with *sections 307.86 and 5126.071 [5126.07.1] of the Revised Code.*

(D) A county board may combine transportation for children and adults enrolled in programs and services offered under section 5126.12 with transportation for children enrolled in classes funded under section 3317.20 or units approved under *section 3317.05 of the Revised Code.*

(E) A county board may purchase all necessary insurance policies, may purchase equipment and supplies through the department of administrative services or from other sources, and may enter into agreements with public agencies or nonprofit organizations for cooperative purchasing arrangements.

(F) A county board may receive by gift, grant, devise, or bequest any moneys, lands, or property for the benefit of the purposes for which the board is established and hold, apply, and dispose of the moneys, lands, and property according to the terms of the gift, grant, devise, or bequest. All money received by gift, grant, bequest, or disposition of lands or property received by gift, grant, devise, or bequest shall be deposited in the county treasury to the credit of such board and shall be available for use by the board for purposes determined or stated by the donor or grantor, but may not be used for personal expenses of the board members. Any interest or earnings accruing from such gift, grant, devise, or bequest shall be treated in the same manner and subject to the same provisions as such gift, grant, devise, or bequest.

(G) The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties, and may utilize any available local, state, and federal funds for such purpose.

HISTORY:

RC § 5126.03, 132 v S 169 (Eff 10-25-67); 133 v H 1078 (Eff 7-16-70); 134 v H 815 (Eff 2-3-72); 134 v H 494 (Eff 7-12-72); 137 v H 1 (Eff 8-26-77); 138 v H 900 (Eff 7-1-80); RC § 5126.05, 138 v S 160 (Eff 10-31-80); 139 v H 1 (Eff 8-5-81); 140 v H 702 (Eff 4-4-85); 141 v H 238 (Eff 7-1-85); 141 v H 724 (Eff 11-27-85); 141 v S 322 (Eff 7-1-86); 142 v S 155 (Eff 6-24-88); 142 v H 403 (Eff 12-15-88); 143 v H 257 (Eff 8-3-89); 143 v S 336 (Eff 4-10-90); 143 v H 697 (Eff 7-17-90); 143 v H 569 (Eff 11-11-90); 144 v S 156 (Eff 1-10-92); 145 v H 694 (Eff 11-11-94); 146 v H 117 (Eff 6-30-95); 146 v H 274 (Eff 8-8-96); 146 v H 629 (Eff 3-13-97); 147 v H 770 (Eff 7-1-98); 149 v H 94 (Eff 6-6-2001); 149 v H 405. Eff 12-13-2001; 152 v H 119, § 101.01, eff. 9-29-07.

§ 5126.055. Medicaid local administrative authority; determination that implementation is deficient

(A) Except as provided in *section 5126.056 [5126.05.6] of the Revised Code*, a county board of mental retardation and developmental disabilities has medicaid local administrative authority to, and shall, do all of the following for an individual with mental retardation or other developmental disability who resides in the county that the county board serves and seeks or receives home and community-based services:

(1) Perform assessments and evaluations of the individual. As part of the assessment and evaluation process, the county board shall do all of the following:

(a) Make a recommendation to the department of mental retardation and developmental disabilities on whether the department should approve or deny the individual's application for the services, including on the basis of whether the individual needs the level of care an intermediate care facility for the mentally retarded provides;

(b) If the individual's application is denied because of the county board's recommendation and the individual requests a hearing under *section 5101.35 of the Revised Code*, present, with the department of mental retardation and developmental disabilities or department of job and family services, whichever denies the application, the reasons for the recommendation and denial at the hearing;

(c) If the individual's application is approved, recommend to the departments of mental retardation and developmental disabilities and job and family services the services that should be included in the individual's individualized service plan and, if either department approves, reduces, denies, or terminates a service included in the individual's individualized service plan under *section 5111.871 [5111.87.1] of the Revised Code* because of the county board's recommendation, present, with the department that made the approval, reduction, denial, or termination, the reasons for the recommendation and approval, reduction, denial, or termination at a hearing under *section 5101.35 of the Revised Code*.

(2) In accordance with the rules adopted under *section 5126.046 [5126.04.6] of the Revised Code*, perform the county board's duties under that section regarding assisting the individual's right to choose a qualified and willing provider of the services and, at a hearing under *section 5101.35 of the Revised Code*, present evidence of the process for appropriate assistance in choosing providers;

(3) If the county board is certified under *section 5123.161 [5123.16.1] of the Revised Code* to provide the services and agrees to provide the services to the individual and the individual chooses the county board to provide the services, furnish, in accordance with the county board's medicaid provider agreement and for the authorized reimbursement rate, the services the individual requires;

(4) Monitor the services provided to the individual and ensure the individual's health, safety, and welfare. The monitoring shall include quality assurance activities. If the county board provides the services, the department of mental retardation and developmental disabilities shall also monitor the services.

(5) Develop, with the individual and the provider of the individual's services, an effective individualized service plan that includes coordination of services, recommend that the departments of mental retardation and developmental disabilities and job and family services approve the plan, and implement the plan unless either department disapproves it;

(6) Have an investigative agent conduct investigations under *section 5126.313 [5126.31.3] of the Revised Code* that concern the individual;

(7) Have a service and support administrator perform the duties under division (B)(9) of *section 5126.15 of the Revised Code* that concern the individual.

(B) A county board shall perform its medicaid local administrative authority under this section in accordance with all of the following:

(1) The county board's plan that the department of mental retardation and developmental disabilities approves under *section 5123.046 [5123.04.6] of the Revised Code*;

(2) All applicable federal and state laws;

(3) All applicable policies of the departments of mental retardation and developmental disabilities and job and family services and the United States department of health and human services;

(4) The department of job and family services' supervision under its authority under *section 5111.01 of the Revised Code* to act as the single state medicaid agency;

(5) The department of mental retardation and developmental disabilities' oversight.

(C) The departments of mental retardation and developmental disabilities and job and family services shall communicate with and provide training to county boards regarding medicaid local administrative authority granted by this section. The communication and training shall include issues regarding audit protocols and other standards established by the United States department of health and human services that the departments determine appropriate for communication and training. County boards shall participate in the training. The departments shall assess the county board's compliance against uniform standards that the departments shall establish.

(D) A county board may not delegate its medicaid local administrative authority granted under this section but may contract with a person or government entity, including a council of governments, for assistance with its medicaid local administrative authority. A county board that enters into such a contract shall notify the director of mental retardation and developmental disabilities. The notice shall include the tasks and responsibilities that the contract gives to the person or government entity. The person or government entity shall comply in full with all requirements to which the county board is subject regarding the person or government entity's tasks and responsibilities under the contract. The county board remains ultimately responsible for the tasks and responsibilities.

(E) A county board that has medicaid local administrative authority under this section shall, through the departments of mental retardation and developmental disabilities and job and family services, reply to, and cooperate in arranging compliance with, a program or fiscal audit or program violation exception that a state or federal audit or review discovers. The department of job and family services shall timely notify the department of mental retardation and developmental disabilities and the county board of any adverse findings. After receiving the notice, the county board, in conjunction with the department of mental retardation and developmental disabilities, shall cooperate fully with the department of job and family services and timely prepare and send to the department a written plan of correction or response to the adverse findings. The county board is liable for any adverse findings that result from an action it takes or fails to take in its implementation of medicaid local administrative authority.

(F) If the department of mental retardation and developmental disabilities or department of job and family services determines that a county board's implementation of its medicaid local administrative authority under this section is deficient, the department that makes the determination shall require that county board do the following:

(1) If the deficiency affects the health, safety, or welfare of an individual with mental retardation or other developmental disability, correct the deficiency within twenty-four hours;

(2) If the deficiency does not affect the health, safety, or welfare of an individual with mental retardation or other developmental disability, receive technical assistance from the department or submit a plan of correction to the department that is acceptable to the department within sixty days and correct the deficiency within the time required by the plan of correction.

HISTORY:

149 v H 94 (Eff 6-6-2001); 149 v H 405, Eff 12-13-2001; 151 v H 66, § 101.01, eff. 7-1-05; 152 v H 119, § 101.01, eff. 6-30-07, 9-29-07; 152 v H 405, § 1, eff. 9-1-08.

§ 5126.081. Board accreditation system

(A) In addition to the rules adopted under division (A)(2) of *section 5126.08 of the Revised Code* establishing standards for the administration, provision, arrangement, and operation of programs and services by county boards of mental retardation and developmental disabilities, the department of mental retardation and developmental disabilities shall establish a system of accreditation for county boards of mental retardation and developmental disabilities to ensure that the boards are in compliance with federal and state statutes and rules. The department shall adopt rules in accordance with Chapter 119. of the Revised Code governing the system of accreditation. The rules shall include appropriate time-lines for compliance when a board is found to be not in compliance and appropriate actions to be taken by boards in complying with the accreditation requirements.

(B) Prior to accrediting a board, the department shall conduct a comprehensive, on-site review of the board. During the review, the department shall document the board's compliance with the department's accreditation requirements. After completing the review, the department shall conduct an exit conference with the president of the board, the superintendent of the board, and any other officials the board asks to have present. The department shall discuss its findings from the review with the board's representatives and provide a written report of its findings not later than thirty days following the exit conference. If the department finds that the board is in compliance with the requirements for accreditation, the department shall issue evidence of accreditation to the board.

Accreditation may be granted for periods of up to five years and may be renewed. Not less than once prior to the date a board's accreditation is scheduled to expire, the department shall conduct a comprehensive, on-site review of the board.

Each board shall conduct an annual audit of itself to evaluate its compliance with the requirements for accreditation. The department may conduct an interim review of any new program or service initiated by a board after its last comprehensive review. The department may conduct other reviews and investigations as necessary to enforce this section.

(C) If the department determines through its review of a board that the board is not in compliance with the requirements for accreditation, the department shall, except as provided in division (F) of this section, grant the board an opportunity to correct the matters in which it is not in compliance. The department shall grant the board an appropriate length of time to comply with the requirements prior to taking any action to deny accreditation to the board. To avoid denial of accreditation, the board superintendent shall prepare a plan of correction to remediate the matters specified in the department's written report as not being in compliance with the requirements for accreditation. The superintendent shall submit the plan to the board for review, and the board shall review the plan. If the board believes that the plan is sufficient to correct the matters, the board shall approve the plan by resolution and submit the plan to the department for its review. The department shall review the plan of correction. If the department approves the plan, the board shall commence action to implement the plan. The department shall, as necessary, conduct follow-up reviews of the board to determine whether it has met the requirements for accreditation. If the plan of correction submitted by a board is disapproved, the department shall inform the board of the reasons for disapproval and may grant the board an opportunity to submit a revised plan of correction.

A board may request technical assistance from the department, other boards, or professional organizations in preparing plans of correction and in implementing plans of correction.

(D) If, after being given the opportunity to implement a plan of correction, a board continues to fail to meet the requirements for accreditation, the department shall issue an order denying accreditation to the board. The department may deny accreditation to the board for all or part of the programs or services offered by the board.

The department shall simultaneously notify all of the following officials in the county: the members of the board of county commissioners, the senior probate judge, the county auditor, and the president and superintendent of the county board of mental retardation and developmental disabilities. The notice shall identify the programs and services that have been denied accreditation, the requirements for accreditation with which the board is not in compliance, and the responsibilities of the county officials to contract under division (E)(1) of this section to have the board's programs and services administered by another party or become subject to administrative receivership under division (E)(2) of this section.

(E) (1) When a board is denied accreditation, the department shall first give the board the option of contracting to have the board's programs and services that were denied accreditation administered by an accredited county board of

mental retardation and developmental disabilities or another qualified entity subject to the approval of the department. The board may contract with more than one board that has been accredited. When a board enters into a contract, the board shall, by resolution, give the contractor full administrative authority over the programs and services that the contractor will administer.

(2) If a board fails to exercise its option of entering into a contract under division (E)(1) of this section sooner than thirty days after the department denies accreditation, the department shall appoint an administrative receiver of the board's programs and services that were denied accreditation. The department may appoint employees of the department, management personnel from county boards of mental retardation and developmental disabilities, or individuals from other entities as necessary to meet its needs for appointing an administrative receiver, except that individuals from other entities may be appointed only when qualified department employees or board management personnel are unavailable. The department may not appoint an individual who is employed by or affiliated with an entity that is under contract with the board. The administrative receiver shall assume full administrative responsibility for the board's programs and services that were denied accreditation.

(3) The board or entity that contracts with a board under division (E)(1) of this section, or the administrative receiver appointed under division (E)(2) of this section, shall develop and implement a plan of correction to remediate the matters that caused the department to deny accreditation. The contractor or administrative receiver shall submit the plan to the department, and the department shall review the plan. If the plan is approved by the department, the contractor or administrative receiver shall commence action to implement the plan. The contractor or administrative receiver shall report to the department any findings it can make pertaining to issues or circumstances that are beyond the control of the board and result in the unlikelihood that compliance with the requirements for accreditation can be achieved unless the issues or circumstances are remediated.

(4) For purposes of divisions (E)(1) and (2) of this section, the department shall require the board that has been denied accreditation to transfer control of state and federal funds it is eligible to receive for the board's programs and services that have been denied accreditation in an amount necessary for the contractor or administrative receiver to fulfill its duties in administering the programs and services for the board. The transfer of control of funds does not cause any programs and services of the board that are accredited to lose their accreditation. If the board refuses to transfer control of funds, the department may withhold state and federal funds from the board in an amount necessary for the contractor or administrative receiver to fulfill its duties. The amount transferred or withheld from a board shall include reimbursements for the personnel of the contractor or administrative receiver, including amounts for time worked, travel, and related expenses.

A contractor or administrative receiver that has assumed the administration of a board's programs and services has the right to authorize the payment of bills in the same manner that a board may authorize payment of bills under this chapter and *section 319.16 of the Revised Code*.

(F) When the department's review of a board reveals serious health and safety issues within the programs and services offered by the board, the department shall order the board to correct the violations immediately or appoint an administrative receiver.

(G) At any time a board can demonstrate that it is capable of assuming its duties in compliance with the department's requirements for accreditation, the department shall reverse its order denying accreditation and issue evidence of accreditation to the board.

A board may appeal the department's denial of accreditation or refusal to reverse a denial of accreditation only by filing a complaint under *section 5123.043 [5123.04.3] of the Revised Code*. If in its appeal the board can demonstrate that it is capable of assuming its duties in compliance with the department's requirements for accreditation, the department shall reverse its order denying accreditation and shall issue evidence of accreditation to the board.

(H) All notices issued to a board by the department under this section shall be delivered to the board's president and superintendent.

(I) A board's president may designate another member of the board as the individual to be responsible for fulfilling all or part of the president's responsibilities established under this section.

HISTORY:

147 v H 215 (Eff 6-30-97); 148 v H 538. Eff 9-22-2000; 151 v S 10, § 1, eff. 9-5-05.

§ 5126.14. Administrative oversight of programs

The entity responsible for the habilitation management included in adult day habilitation services, the program management included in residential services, and the program management included in supported living shall provide administrative oversight by doing all of the following:

(A) Having available supervisory personnel to monitor and ensure implementation of all interventions in accordance with every individual service plan implemented by the staff who work with the individuals receiving the services;

(B) Providing appropriate training and technical assistance for all staff who work with the individuals receiving services;

(C) Communicating with service and support administration staff for the purpose of coordinating activities to ensure that services are provided to individuals in accordance with individual service plans and intended outcomes;

(D) Monitoring for unusual and major unusual incidents and cases of abuse, neglect, exploitation, or misappropriation of funds involving the individual under the care of staff who are providing the services; taking immediate actions as necessary to maintain the health, safety, and welfare of the individuals receiving the services; and providing notice of unusual and major unusual incidents and suspected cases of abuse, neglect, exploitation, or misappropriation of funds to the county board of mental retardation and developmental disabilities;

(E) Performing other administrative duties as required by state or federal law or by the county board of mental retardation and developmental disabilities through contracts with providers.

HISTORY:

149 v H 94 (Eff 9-5-2001); 149 v H 405. Eff 12-13-2001.

§ 5126.15. Service and support administration

(A) A county board of mental retardation and developmental disabilities shall provide service and support administration to each individual three years of age or older who is eligible for service and support administration if the individual requests, or a person on the individual's behalf requests, service and support administration. A board shall provide service and support administration to each individual receiving home and community-based services. A board may provide, in accordance with the service coordination requirements of 34 C.F.R. 303.23, service and support administration to an individual under three years of age eligible for early intervention services under 34 C.F.R. part 303. A board may provide service and support administration to an individual who is not eligible for other services of the board. Service and support administration shall be provided in accordance with rules adopted under *section 5126.08 of the Revised Code*.

A board may provide service and support administration by directly employing service and support administrators or by contracting with entities for the performance of service and support administration. Individuals employed or under contract as service and support administrators shall not be in the same collective bargaining unit as employees who perform duties that are not administrative.

Individuals employed by a board as service and support administrators shall not be assigned responsibilities for implementing other services for individuals and shall not be employed by or serve in a decision-making or policy-making capacity for any other entity that provides programs or services to individuals with mental retardation or developmental disabilities. An individual employed as a conditional status service and support administrator shall perform the duties of service and support administration only under the supervision of a management employee who is a service and support administration supervisor.

(B) The individuals employed by or under contract with a board to provide service and support administration shall do all of the following:

(1) Establish an individual's eligibility for the services of the county board of mental retardation and developmental disabilities;

(2) Assess individual needs for services;

(3) Develop individual service plans with the active participation of the individual to be served, other persons selected by the individual, and, when applicable, the provider selected by the individual, and recommend the plans for approval by the department of mental retardation and developmental disabilities when services included in the plans are funded through medicaid;

(4) Establish budgets for services based on the individual's assessed needs and preferred ways of meeting those needs;

(5) Assist individuals in making selections from among the providers they have chosen;

(6) Ensure that services are effectively coordinated and provided by appropriate providers;

(7) Establish and implement an ongoing system of monitoring the implementation of individual service plans to achieve consistent implementation and the desired outcomes for the individual;

(8) Perform quality assurance reviews as a distinct function of service and support administration;

(9) Incorporate the results of quality assurance reviews and identified trends and patterns of unusual incidents and major unusual incidents into amendments of an individual's service plan for the purpose of improving and enhancing the quality and appropriateness of services rendered to the individual;

(10) Ensure that each individual receiving services has a designated person who is responsible on a continuing basis for providing the individual with representation, advocacy, advice, and assistance related to the day-to-day coordination of services in accordance with the individual's service plan. The service and support administrator shall give the individual receiving services an opportunity to designate the person to provide daily representation. If the individual declines to make a designation, the administrator shall make the designation. In either case, the individual receiving services may change at any time the person designated to provide daily representation.

HISTORY:

142 v H 403 (Eff 12-15-88); 144 v S 156 (Eff 1-10-92); 145 v H 152 (Eff 7-1-93); 145 v H 694 (Eff 11-11-94); 146 v H 117 (Eff 6-30-95); 149 v H 94 (Eff 6-6-2001); 149 v H 405. Eff 12-13-2001; 150 v H 95, § 1, eff. 9-26-03; 151 v S 87, § 1, eff. 4-14-06; 152 v H 119, § 101.01, eff. 6-30-07.

§ 5126.31. Case review and investigation

(A) A county board of mental retardation and developmental disabilities shall review reports of abuse and neglect made under *section 5123.61 of the Revised Code* and reports referred to it under *section 5101.611 [5101.61.1] of the Revised Code* to determine whether the person who is the subject of the report is an adult with mental retardation or a developmental disability in need of services to deal with the abuse or neglect. The board shall give notice of each report to the registry office of the department of mental retardation and developmental disabilities established pursuant to *section 5123.61 of the Revised Code* on the first working day after receipt of the report. If the report alleges that there is a substantial risk to the adult of immediate physical harm or death, the board shall initiate review within twenty-four hours of its receipt of the report. If the board determines that the person is sixty years of age or older but does not have mental retardation or a developmental disability, it shall refer the case to the county department of job and family services. If the board determines that the person is an adult with mental retardation or a developmental disability, it shall continue its review of the case.

(B) For each review over which the board retains responsibility under division (A) of this section, it shall do all of the following:

(1) Give both written and oral notice of the purpose of the review to the adult and, if any, to the adult's legal counsel or caretaker, in simple and clear language;

(2) Visit the adult, in the adult's residence if possible, and explain the notice given under division (B)(1) of this section;

(3) Request from the registry office any prior reports concerning the adult or other principals in the case;

(4) Consult, if feasible, with the person who made the report under *section 5101.61 or 5123.61 of the Revised Code* and with any agencies or persons who have information about the alleged abuse or neglect;

(5) Cooperate fully with the law enforcement agency responsible for investigating the report and for filing any resulting criminal charges and, on request, turn over evidence to the agency;

(6) Determine whether the adult needs services, and prepare a written report stating reasons for the determination. No adult shall be determined to be abused, neglected, or in need of services for the sole reason that, in lieu of medical treatment, the adult relies on or is being furnished spiritual treatment through prayer alone in accordance with the tenets and practices of a church or religious denomination of which the adult is a member or adherent.

(C) The board shall arrange for the provision of services for the prevention, correction or discontinuance of abuse or neglect or of a condition resulting from abuse or neglect for any adult who has been determined to need the services and consents to receive them. These services may include, but are not limited to, service and support administration, fiscal management, medical, mental health, home health care, homemaker, legal, and residential services and the provision of temporary accommodations and necessities such as food and clothing. The services do not include acting as a guardian, trustee, or protector as defined in *section 5123.55 of the Revised Code*. If the provision of residential services would require expenditures by the department of mental retardation and developmental disabilities, the board shall obtain the approval of the department prior to arranging the residential services.

To arrange services, the board shall:

(1) Develop an individualized service plan identifying the types of services required for the adult, the goals for the services, and the persons or agencies that will provide them;

(2) In accordance with rules established by the director of mental retardation and developmental disabilities, obtain the consent of the adult or the adult's guardian to the provision of any of these services and obtain the signature of the adult or guardian on the individual service plan. An adult who has been found incompetent under Chapter 2111. of the Revised Code may consent to services. If the board is unable to obtain consent, it may seek, if the adult is incapacitated, a court order pursuant to *section 5126.33 of the Revised Code* authorizing the board to arrange these services.

(D) The board shall ensure that the adult receives the services arranged by the board from the provider and shall have the services terminated if the adult withdraws consent.

(E) On completion of a review, the board shall submit a written report to the registry office established under *section 5123.61 of the Revised Code*. If the report includes a finding that a person with mental retardation or a develop-

mental disability is a victim of action or inaction that may constitute a crime under federal law or the law of this state, the board shall submit the report to the law enforcement agency responsible for investigating the report. Reports prepared under this section are not public records as defined in *section 149.43 of the Revised Code*.

HISTORY:

142 v H 403 (Eff 3-16-89); 148 v H 471 (Eff 7-1-2000); 148 v S 171 (Eff 11-22-2000); 149 v H 94 (Eff 6-6-2001); 149 v S 191. Eff 3-31-2003.

§ 5126.33. Complaint; hearing; protective service plan; change of residential setting

(A) A county board of mental retardation and developmental disabilities may file a complaint with the probate court of the county in which an adult with mental retardation or a developmental disability resides for an order authorizing the board to arrange services described in division (C) of *section 5126.31 of the Revised Code* for that adult if the adult is eligible to receive services or support under *section 5126.041 [5126.04.1] of the Revised Code* and the board has been unable to secure consent. The complaint shall include:

(1) The name, age, and address of the adult;

(2) Facts describing the nature of the abuse, neglect, or exploitation and supporting the board's belief that services are needed;

(3) The types of services proposed by the board, as set forth in the protective service plan described in division (J) of *section 5126.30 of the Revised Code* and filed with the complaint;

(4) Facts showing the board's attempts to obtain the consent of the adult or the adult's guardian to the services.

(B) The board shall give the adult notice of the filing of the complaint and in simple and clear language shall inform the adult of the adult's rights in the hearing under division (C) of this section and explain the consequences of a court order. This notice shall be personally served upon all parties, and also shall be given to the adult's legal counsel, if any, and the legal rights service. The notice shall be given at least twenty-four hours prior to the hearing, although the court may waive this requirement upon a showing that there is a substantial risk that the adult will suffer immediate physical harm in the twenty-four hour period and that the board has made reasonable attempts to give the notice required by this division.

(C) Upon the filing of a complaint for an order under this section, the court shall hold a hearing at least twenty-four hours and no later than seventy-two hours after the notice under division (B) of this section has been given unless the court has waived the notice. All parties shall have the right to be present at the hearing, present evidence, and examine and cross-examine witnesses. The Ohio Rules of Evidence shall apply to a hearing conducted pursuant to this division. The adult shall be represented by counsel unless the court finds that the adult has made a voluntary, informed, and knowing waiver of the right to counsel. If the adult is indigent, the court shall appoint counsel to represent the adult. The board shall be represented by the county prosecutor or an attorney designated by the board.

(D) (1) The court shall issue an order authorizing the board to arrange the protective services if it finds, on the basis of clear and convincing evidence, all of the following:

(a) The adult has been abused, neglected, or exploited;

(b) The adult is incapacitated;

(c) There is a substantial risk to the adult of immediate physical harm or death;

(d) The adult is in need of the services;

(e) No person authorized by law or court order to give consent for the adult is available or willing to consent to the services.

(2) The board shall develop a detailed protective service plan describing the services that the board will provide, or arrange for the provision of, to the adult to prevent further abuse, neglect, or exploitation. The board shall submit the plan to the court for approval. The protective service plan may be changed only by court order.

(3) In formulating the order, the court shall consider the individual protective service plan and shall specifically designate the services that are necessary to deal with the abuse, neglect, or exploitation or condition resulting from abuse, neglect, or exploitation and that are available locally, and authorize the board to arrange for these services only. The court shall limit the provision of these services to a period not exceeding six months, renewable for an additional six-month period on a showing by the board that continuation of the order is necessary.

(E) If the court finds that all other options for meeting the adult's needs have been exhausted, it may order that the adult be removed from the adult's place of residence and placed in another residential setting. Before issuing that order, the court shall consider the adult's choice of residence and shall determine that the new residential setting is the least restrictive alternative available for meeting the adult's needs and is a place where the adult can obtain the necessary requirements for daily living in safety. The court shall not order an adult to a hospital or public hospital as defined in section 5122.01 or a state institution as defined in *section 5123.01 of the Revised Code*.

(F) The court shall not authorize a change in an adult's placement ordered under division (E) of this section unless it finds compelling reasons to justify a change. The parties to whom notice was given in division (B) of this section shall be given notice of a proposed change at least five working days prior to the change.

(G) The adult, the board, or any other person who received notice of the petition may file a motion for modification of the court order at any time.

(H) The county board shall pay court costs incurred in proceedings brought pursuant to this section. The adult shall not be required to pay for court-ordered services.

(I) (1) After the filing of a complaint for an order under this section, the court, prior to the final disposition, may enter any temporary order that the court finds necessary to protect the adult with mental retardation or a developmental disability from abuse, neglect, or exploitation including, but not limited to, the following:

(a) A temporary protection order;

(b) An order requiring the evaluation of the adult;

(c) An order requiring a party to vacate the adult's place of residence or legal settlement, provided that, subject to division (K)(1)(d) of this section, no operator of a residential facility licensed by the department may be removed under this division;

(d) In the circumstances described in, and in accordance with the procedures set forth in, *section 5123.191 [5123.19.1] of the Revised Code*, an order of the type described in that section that appoints a receiver to take possession of and operate a residential facility licensed by the department.

(2) The court may grant an ex parte order pursuant to this division on its own motion or if a party files a written motion or makes an oral motion requesting the issuance of the order and stating the reasons for it if it appears to the court that the best interest and the welfare of the adult require that the court issue the order immediately. The court, if acting on its own motion, or the person requesting the granting of an ex parte order, to the extent possible, shall give notice of its intent or of the request to all parties, the adult's legal counsel, if any, and the legal rights service. If the court issues an ex parte order, the court shall hold a hearing to review the order within seventy-two hours after it is issued or before the end of the next day after the day on which it is issued, whichever occurs first. The court shall give written notice of the hearing to all parties to the action.

HISTORY:

142 v H 403 (Eff 3-16-89); 148 v S 171. Eff 11-22-2000; 150 v S 178, § 1, eff. 1-30-04.

5123:2-1-11. Service and support administration.

(A) Purpose The purpose of this rule is to define the responsibilities of a county board for service and support administration and to establish a process for individuals who receive service and support administration to have an identified service and support administrator who is a single point of accountability.

(B) Decision-making responsibility (1) An individual shall be responsible for making all decisions regarding the provision of services, including requesting services and giving, refusing to give, or withdrawing consent for services, 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 that affect their lives and to have their needs, desires, and preferences considered.

(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 services provided to the individual in accordance with paragraph (P) of this rule.

(C) Definitions (1) "Assessment" means the gathering of comprehensive information concerning each individual's preferences, personal goals, needs, and abilities, health status and other available supports.

(2) "Alternative services" means the various programs, services, and supports, regardless of funding source, that exist as part of the MRDD service system and other service systems including, but not limited to:

- (a) Services provided directly by the county board;
- (b) Services by non-county board providers and funded by the county board;
- (c) Services provided and funded outside the MRDD system; or
- (d) Services provided at the state level.

(3) "Budgets for services" means the projected cost required to implement the ISP regardless of funding source.

(4) "County board" means a county board of mental retardation and developmental disabilities as established under Chapter 5126. of the Revised Code.

(5) "Circle of support" means one or more persons who agree to meet on a regular basis to help the individual to identify and accomplish personal visions or goals. The majority of persons in a circle of support are not paid to be there and are involved because they care about the individual and they have made a commitment to work together on behalf of the individual.

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

(7) "Direct support staff" means a person in a direct services position as defined in division (A)(2) of *section 5126.281 of the Revised Code*.

(8) "Emergency intervention" is the immediate response to an unanticipated event that requires an immediate change in an individual's existing situation and/or ISP to ensure health and safety.

(9) "Feasible alternatives" means alternatives that come with HCBS waiver enrollment as approved by the centers for medicare and medicaid services in the waiver document.

(10) "Guardian" means the guardian of the person of a minor or an adult. If no guardian of the person has been appointed for a minor, "guardian" means either parent of a minor unless the parents are separated or divorced or their marriage has been dissolved or annulled, in which case "guardian" means the parent who is the residential parent and legal custodian of the minor. If no guardian of the person has been appointed for a minor and the minor is in the legal or permanent custody of a person or government agency, "guardian" means that person or government agency.

(11) "Habilitation management" means the following administrative oversight functions within adult day habilitation services as described in *section 5126.14 of the Revised Code*:

(a) Having available supervisory personnel to monitor and ensure implementation of all interventions in accordance with every ISP implemented by the staff who work with the individuals receiving the services;

(b) Providing appropriate training and technical assistance for all staff who work with the individuals receiving services;

(c) Communicating with service and support administration staff for the purpose of coordinating activities to ensure that services are provided to individuals in accordance with ISPs and intended outcomes;

(d) Monitoring for unusual and major unusual incidents and cases of abuse, neglect, exploitation, or misappropriation of funds; taking immediate actions as necessary to maintain the health, safety, and welfare of the individuals receiving the services; and providing notice of unusual and major unusual incidents and suspected cases of abuse, neglect, exploitation, or misappropriation of funds to the county board; and

(e) Performing other administrative duties as required by state or federal law or by contracts with the county board.

(12) "HCBS" means home and community-based services as defined in *section 5126.01 of the Revised Code*.

(13) "HCBS waiver" means an HCBS waiver administered by the department in accordance with *section 5111.871 of the Revised Code*.

(14) "HMG" means "Help Me Grow," an Ohio family and children first initiative directed by the Ohio department of health and coordinated on the county level by the family and children first council. HMG is Ohio's birth through two system designed to implement requirements of IDEA, Part C under 34 C.F.R. part 303. HMG creates, nourishes and maintains a coordinated, community-based infrastructure that promotes transdisciplinary, family-centered services and supports to eligible expectant parents, newborns, infants and toddlers, and their families.

(15) "ICF/MR" means an intermediate care facility for the mentally retarded.

(16) "Individual" means a person with mental retardation and/or developmental disabilities.

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

(18) "Medicaid case management services" has the same meaning as in *section 5126.01 of the Revised Code*.

(19) "MRDD" means mental retardation and developmental disabilities.

(20) "Program management" means the following administrative oversight functions within residential services and supported living as described in *section 5126.14 of the Revised Code*:

(a) Having available supervisory personnel to monitor and ensure implementation of all interventions in accordance with every ISP implemented by the staff who work with the individuals receiving the services;

(b) Providing appropriate training and technical assistance for all staff who work with the individuals receiving services;

(c) Communicating with service and support administration staff for the purpose of coordinating activities to ensure that services are provided to individuals in accordance with ISPs and intended outcomes;

(d) Monitoring for unusual and major unusual incidents and cases of abuse, neglect, exploitation, or misappropriation of funds; taking immediate actions as necessary to maintain the health, safety, and welfare of the individuals receiving the services; and providing notice of unusual and major unusual incidents and suspected cases of abuse, neglect, exploitation, or misappropriation of funds to the county board; and

(e) Performing other administrative duties as required by state or federal law or by contracts with the county board.

(21) "ODJFS" means the Ohio department of job and family services as established by *section 121.02 of the Revised Code*.

(22) "Service and support administration" has the same meaning as in *section 5126.01 of the Revised Code*, and pursuant to *section 5126.15 of the Revised Code*, includes a set of mandated functions to be provided by the county

board. Service and support administration supports individuals in determining and pursuing goals and maintains the individual as the focus while coordinating services across multiple systems.

(23) "Service and support administrator" means a person, regardless of title, employed by or under subcontract 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.

(24) "Single point of accountability" means the identified service and support administrator who is responsible to an individual for the effective implementation and coordination of his or her ISP process.

(25) "Team" means the individual's circle of support, the service and support administrator who is the single point of accountability for the individual, the person designated under paragraph (P) of this rule to provide daily representation, direct support staff, providers, licensed or certified professionals and other persons chosen by the individual to help the individual think through possibilities and decisions. The purpose of the team is to provide written and/or verbal information relevant to the development of the ISP for the individual. Team members may be invited by the individual to actively participate in the development of the ISP.

(D) Eligibility for service and support administration **(1)** A county board shall provide service and support administration to the following:

(a) Each individual, regardless of age, who is applying for or enrolled in an HCBS waiver;

(b) Each individual three years of age or older who is eligible for county board services, and requests, or a person on the individual's behalf requests pursuant to paragraph (B) of this rule, service and support administration;

(c) An individual residing in an ICF/MR is eligible for service and support administration related to moving the individual from the ICF/MR to anon-ICF/MR community setting.

(2) A county board may provide service and support administration to the following:

(a) In accordance with the service coordination requirements of *34 C.F.R. 303.23*, an individual under three years of age eligible for early intervention services under *34 C.F.R. part 303*;

(b) An individual who is not eligible for other services of the board.

(E) A county board shall provide service and support administration in accordance with the requirements of *section 5126.15 of the Revised Code*. A county board may provide service and support administration by directly employing service and support administrators or by subcontracting with qualified entities for the performance of service and support administration.

(1) Only a service and support administration supervisor, a service and support administrator, or a conditional status service and support administrator who holds the appropriate certification in accordance with rule 5123:2-5-02 of the Administrative Code may provide service and support administration.

(2) Any person who is employed to assist a service and support administration supervisor, a service and support administrator, or a conditional status service and support administrator in the performance of their duties shall have a registered service level service and support administration registration in accordance with rule 5123:2-5-02 of the Administrative Code.

(3) Persons employed or under subcontract as service and support administrators shall not be in the same collective bargaining unit as employees who perform duties that are not administrative.

(4) The county board shall provide adequate supervision to persons employed to perform the functions of service and support administration. A conditional status service and support administrator shall perform the duties of service and support administration only under the supervision of a management employee who is a service and support administration supervisor or a professional employee who is a service and support administrator.

(5) Persons employed or under subcontract as service and support administrators shall not be assigned responsibilities for implementing other services for individuals and shall not be employed by or serve in a decision-making or policy-making capacity for any other entity that provides programs or services to individuals.

(F) Notwithstanding the requirements of paragraph (E) of this rule, persons employed or under subcontract with a county board who meet the requirements established by the Ohio department of health for service coordinators in the

HMG system may provide service and support administration in accordance with the service coordination requirements of 34 C.F.R. 303.23 to an individual under three years of age eligible for early intervention services under 34 C.F.R. part 303.

(G) Single point of accountability (1) A county board shall identify a service and support administrator for each individual receiving service and support administration who shall be the single point of accountability for the individual and who shall perform the following duties:

- (a) Assess the individual's need for services in accordance with paragraph (I) of this rule;
- (b) Develop and revise the individual's ISP in accordance with paragraph (J) of this rule;
- (c) Establish the individual's budget for services in accordance with paragraph (K) of this rule;
- (d) Assist the individual in choosing providers in accordance with paragraph (L) of this rule;
- (e) Ensure that the individual's services are effectively coordinated and provided by appropriate providers in accordance with paragraph (M) of this rule;
- (f) Monitor the implementation of the individual's ISP in accordance with paragraph (N) of this rule;
- (g) Ensure that the individual has a designated person to provide daily representation in accordance with paragraph (P) of this rule.

(2) The single point of accountability may perform the duties set forth in paragraph

(G) (1) of this rule with the assistance of appropriate others on the individual's team. In order to receive such assistance, the single point of accountability shall:

- (a) Maintain the responsibility to ensure that activities performed on behalf of the individual are completed in accordance with the ISP and to the benefit and satisfaction of the individual;
- (b) Ensure that the person providing the assistance has a clear understanding of the expectations and desired outcomes of the task(s);
- (c) Maintain contact with the person providing assistance as frequently as necessary to monitor the completion of the assigned task(s);
- (d) Retain responsibility for all decision-making regarding service and support administration functions and the communication of any such decisions to the individual.

(3) A person who provides assistance pursuant to paragraph (G)(2) of this rule is not required to have a registered service level service and support administration registration in accordance with rule 5123:2-5-02 of the Administrative Code unless the person is employed to provide such assistance.

(4) A county board may assign the responsibility for eligibility determinations and quality assurance reviews to a person(s) employed by or under subcontract with the county board to provide service and support administration who does not perform other service and support administration duties. In such a case, the results and information from eligibility determinations and quality assurance reviews shall be shared in a timely manner with the individual, the individual's guardian, the person designated under paragraph (P) of this rule to provide daily representation, and the service and support administrator who is the single point of accountability for the individual in order to facilitate the coordination of services and supports.

(H) Eligibility determinations The persons employed by or under subcontract with a county board to provide service and support administration shall establish an individual's eligibility for the services of the county board. The person performing this duty for an individual shall:

(1) Establish the individual's eligibility for the services provided or administered by the county board in accordance with rules adopted by the department.

(2) Explain to the individual, in conjunction with the process of recommending eligibility determination and/or assisting in making application for enrollment in an HCBS waiver or any other medicaid service, and in accordance with rules adopted by the department, the following:

- (a) Alternative services available to the individual;

- (b) Due process and appeal rights;
- (c) Right to choose any qualified and willing provider.

(3) At the time the individual is being recommended for enrollment in an HCBS waiver:

- (a) Explain to the individual:
 - (i) Choice of waiver enrollment as an alternative to ICF/MR placement;
 - (ii) Feasible alternatives available upon enrollment in an HCBS waiver;and

(b) Make a recommendation to ODJFS or its designee, in accordance with rule 5101:3-3-15.3 of the Administrative Code, as to whether the individual meets the criteria for an ICF/MR level of care in accordance with rule 5101:3-3-07 of the Administrative Code.

(I) Assessments The persons employed by or under subcontract with a county board to provide service and support administration shall assess individual needs for services. The service and support administrator who is the single point of accountability for an individual shall perform this duty and shall:

(1) After the initial request for services and at least annually thereafter, complete or coordinate and ensure the completion of assessments. The assessment process shall include all types of assessments based upon input obtained from the individual, the individual's guardian, the person designated under paragraph (P) of this rule to provide daily representation, and the individual's team.

(a) The information obtained shall include the individual's likes, dislikes, priorities, and desired outcomes, as well as what is important to and for the individual, including skill development, health, safety, and welfare needs, as applicable.

(b) The completion of assessments and evaluations by licensed or certified professionals is not required annually, but shall be done at a time dictated by the needs of the individual.

(2) Recommend to the department and ODJFS, the continued need for an ICF/MR level of care for an individual enrolled in an HCBS waiver for the annual redetermination in accordance with rule 5101:3-3-15.5 of the Administrative Code.

(J) ISP development The persons employed by or under subcontract with a county board to provide service and support administration shall develop ISPs. If an ISP includes HCBS waiver services or medicaid case management services, those services shall be subject to approval by the department and ODJFS. If either department approves, reduces, denies, or terminates HCBS waiver services, or medicaid case management services included in an ISP, the service and support administrator who is the single point of accountability for the individual shall communicate with the individual to ensure compliance with paragraphs (J)(3) and (S) of this rule. That person shall also:

(1) Ensure that the development or revision of the ISP:

(a) Occurs with the active participation of the individual to be served and other persons selected by the individual, and, when applicable, the provider(s) selected by the individual;

(b) Addresses the results of the assessment process pursuant to paragraph (I) of this rule and of the monitoring conducted pursuant to paragraph (N) of this rule;

(c) Focuses on the individual's strengths, interests and talents;

(d) Integrates all sources of supports, including alternative services, available to meet the needs and desired outcomes of the individual;

(e) Occurs in accordance with rules adopted by the department.

(2) Certify by signature and date that an ISP meets the following criteria for approval. This approval shall occur prior to implementation.

(a) All ISPs shall:

(i) Assist the individual to engage in meaningful, productive activities and develop community connections; and

(ii) Indicate the provider, the frequency, and the funding source for each service and activity; and
(iii) Specify which services will be coordinated among which providers and across all appropriate settings for the individual.

(b) An ISP that includes HCBS waiver services shall:

(i) Meet the requirements of paragraph (J)(2)(a) of this rule;

(ii) Indicate the provider type; and

(iii) With respect to that portion of the ISP that pertains to HCBS waiver services, meet the requirements of paragraph (C)(2) of rule 5123:2-9-04 of the Administrative Code.

(3) Review and revise the ISP as appropriate under any of the following circumstances:

(a) At the request of the individual or a member of the individual's team;

(b) Whenever the individual's assessed needs, circumstances or status changes;

(c) As a result of ongoing monitoring of ISP implementation, quality assurance reviews, and/or identified trends and patterns of unusual incidents or major unusual incidents; or

(d) With respect to HCBS waiver services and medicaid case management services, if a service is reduced, denied, or terminated by the department or ODJFS.

(4) Provide a complete copy of the ISP to the individual or his or her guardian and a copy of relevant sections of the ISP to the individual's providers.

(5) Provide an individual with written notification and explanation of the individual's right to a medicaid fair hearing if the ISP process results in a recommendation for the approval, reduction, denial, or termination of an HCBS waiver service or medicaid case management service. Notice shall be provided in accordance with *section 5101.35 of the Revised Code*.

(6) Provide an individual with written notification and explanation of the individual's right to use the administrative resolution of complaint process if the ISP process results in the reduction, denial, or termination of a service other than an HCBS waiver service or medicaid case management service. Such written notice and explanation shall also be provided to an individual if the ISP process results in an approved service that the individual does not want to receive, but is necessary to ensure the individual's health, safety, and welfare. Notice shall be provided in accordance with rule 5123:2-1-12 of the Administrative Code.

(K) Budget for services The persons employed by or under subcontract with a county board to provide service and support administration shall establish budgets for services. The service and support administrator who is the single point of accountability for an individual shall establish a recommendation for and obtain approval of budgets for services based on the ISP for the individual and the individual's assessed needs and preferred ways of meeting those needs. Funding of services for individuals enrolled in an HCBS waiver shall be subject to rule 5123:2-9-06 of the Administrative Code.

(L) Provider selection The persons employed by or under subcontract with a county board to provide service and support administration shall through objective facilitation assist individuals in choosing providers. The service and support administrator who is the single point of accountability for an individual shall perform this duty and shall:

(1) Ensure that individuals are given the opportunity to select service providers from all willing and qualified providers in accordance with applicable state and federal laws and regulations;

(2) Assist individuals, as necessary, to work with their provider(s) to resolve concerns involving the direct support staff assigned to work with them.

(M) Coordinating services The persons employed by or under subcontract with a county board to provide service and support administration shall ensure that services are effectively coordinated and provided by providers, as identified in the ISP, by facilitating communication with the individual and among providers across all settings and systems. The person who is the single point of accountability for an individual shall perform this duty and shall directly communicate with all providers of residential and day program services through their employees who are designated as responsible for habilitation management and program management and to the designated staff of all other providers including, but

not limited to, transportation services providers. Relevant sections of the ISP shall be shared with providers. Such communication, as applicable, shall include, but not be limited to, the following:

(1) ISP revisions;

(2) Relocation plans of the individual, including information necessary to determine the health, safety, and welfare factors of the proposed living situation;

(3) Hospitalizations, incarcerations, or other changes in individual status that result in suspension or disenrollment from services including, but not limited to, services under an HCBS waiver;

(4) Coordination activities to ensure that services are provided to individuals in accordance with their ISPs and desired outcomes;

(5) Results of the monitoring conducted pursuant to paragraph (N) of this rule.

(N) Monitoring ISP implementation The persons employed by or under subcontract with a county board to provide service and support administration shall, in accordance with policies and procedures that shall be established by the board and any protocols that may be established by the department, establish and implement an ongoing system of monitoring the implementation of an individual's ISP. The service and support administrator who is the single point of accountability for an individual shall perform this duty in accordance with the following requirements:

(1) The purpose of this monitoring shall be to verify:

(a) The health, safety and welfare of the individual;

(b) Consistent implementation of services;

(c) Achievement of the desired outcomes for the individual as stated in the ISP; and

(d) That services received are those reflected in the ISP.

(2) Areas to be monitored, as applicable to each individual, shall include, but not be limited to, the following:

(a) Behavior support;

(b) Emergency intervention;

(c) Identified trends and patterns of unusual incidents and major unusual incidents and the development and implementation of prevention and/or risk management plans;

(d) Results of quality assurance reviews; and

(e) Other individual needs as determined by the assessment process conducted pursuant to paragraph (I) of this rule.

(3) If this monitoring indicates areas of provider non-compliance with continuing certification standards for providers certified as HCBS waiver providers, the county board shall conduct provider compliance reviews in accordance with rule 5123:2-9-08 of the Administrative Code.

(O) Quality assurance reviews (1) The persons employed by or under subcontract with a county board to provide service and support administration shall conduct quality assurance reviews. The person performing this duty for an individual shall:

(a) Conduct quality assurance reviews in accordance with rules adopted by the department.

(b) Conduct quality assurance reviews that result in outcomes at two levels:

(i) Identification of areas of concern and recommendations necessary to achieve desired outcomes for the individual as stated in the ISP;

(ii) Identification of trends and patterns common to a significant number of individuals that indicate possible need for modification of an agency and/or county board system to achieve desired outcomes for individuals.

(2) The person performing this duty shall not conduct quality assurance reviews for an individual for whom he/she is the service and support administrator who is the single point of accountability.

(3) If a quality assurance review indicates areas of provider non-compliance with continuing certification standards for providers certified as HCBS waiver providers, the county board shall conduct provider compliance reviews in accordance with rule 5123:2-9-08 of the Administrative Code.

(P) Designated person to provide daily representation (1) Each individual receiving service and support administration shall have a designated person to provide daily representation who is responsible on a continuing basis for providing the individual with representation, advocacy, advice and assistance related to the day-to-day coordination of services in accordance with the ISP.

(a) The role of the person designated is to assist the individual to keep the service and support delivery system focused on his/her desired outcomes.

(b) The person designated shall be willing to interact regularly with the individual in order to maintain or develop a relationship that will allow him/her to fulfill this role.

(c) A designated person who is not legally responsible shall not receive any privileged information without consent of the individual.

(d) Neither the service and support administrator who is the single point of accountability for the individual nor any other person providing service and support administration shall be the person designated.

(2) The service and support administrator who is the single point of accountability for an individual shall ensure that the individual has a person designated to provide daily representation and shall:

(a) Give the individual an opportunity, at least annually, to designate such person.

(b) Make the designation if the individual declines to do so, taking into consideration the designated person's credibility with the individual, the person's understanding of the individual's desired outcomes, and the person's reliability. If an individual has no such person involved in his/her life, actions shall be specified in the ISP that will lead to the development of a circle of support for the individual.

(c) Document the person designated, by name, in the individual's ISP.

(d) Permit an individual to change at any time the person designated to provide daily representation.

(3) Paragraphs (P)(1) and (P)(2) of this rule are not intended to prevent an individual from representing himself or herself or advocating on behalf of himself or herself.

(Q) Emergency intervention The county board shall, in coordination with the provision of service and support administration, make an on-call emergency response system available twenty-four-hours per day, seven days per week. Persons who are available for the on-call emergency response system shall:

(1) Provide emergency intervention directly or through immediate linkage with the service and support administrator who is the single point of accountability for the individual or primary provider.

(2) Be trained and have the skills to identify the problem; determine what immediate response is needed to alleviate the emergency and ensure health and safety; and identify and contact the person(s) to take the needed action.

(3) Notify the provider(s) and the service and support administrator(s) who is the single point of accountability for the individual(s) to assure adequate follow-up. The county board's investigative agent under *section 5126.221 of the Revised Code* shall also be notified as determined necessary by the nature of the emergency.

(4) Document the emergency in accordance with county board procedures.

(R) Records Records shall be maintained on individuals receiving service and support administration and shall include, at a minimum, the following:

(1) Identifying data;

(2) Information identifying guardianship, trusteeship, or protectorship;

(3) Date of request for services from the county board;

(4) Evidence of eligibility for county board services;

(5) Assessment information relevant to the request for services and the planning process for supports and services;

(6) Current ISP;

(7) Current budget for support and services;

(8) Documentation of provider selection process;

(9) Quality assurance review summary reports;

(10) Documentation of unusual incidents;

(11) Major unusual incident investigation summary reports;

(12) The name of the service and support administrator who is the single point of accountability for the individual;

(13) The name of the person designated to provide daily representation;

(14) Emergency information;

(15) Personal financial information, when appropriate;

(16) Release of information and consent forms;

(17) Case notes which include coordination of services and monitoring activities.

(S) Due process Due process shall be afforded to each individual receiving service and support administration pursuant to either rule 5123:2-1-12 of the Administrative Code for services other than HCBS waiver services and medicaid case management services or *section 5101.35 of the Revised Code* for HCBS waiver services and medicaid case management services.

(T) Department monitoring and technical assistance The department shall monitor compliance with this rule by county boards and their subcontract agencies in accordance with *sections 5123.044 and 5126.055 of the Revised Code*. Technical support, as determined necessary by the department, shall be provided upon request and through regional and statewide trainings.

(U) ODJFS monitoring of medicaid case management services For all medicaid eligible recipients, ODJFS retains final authority to monitor the provision of medicaid case management services in accordance with rule 5101:3-48-01 of the Administrative Code.

History: Prior Effective Dates: 8/23/85 (Emer.), 11/22/85 (Emer.), 1/18/86, 3/11/88, 3/3/90, 11/18/95; Replaces: 5123:2-1-11; Effective: 07/01/2005.

5123:2-4-01. County board accreditation.

(A) The purpose of this rule is to define the procedures the department will follow to implement an accreditation system as required by *section 5126.081 of the Revised Code*. Implementation of the accreditation system is intended to ensure that county boards are in compliance with federal and state statutes and rules.

(B) Definitions

(1) "Accreditation requirements" and "requirements for accreditation" mean the criteria adopted by the department that measure county boards' compliance with federal and state statutes and rules.

(2) "Accredited" means the department has conducted and completed an on-site review of the board and has determined the board to be in compliance with the requirements for accreditation.

(3) "Administrative receiver" means an entity designated by the department to administer the board's programs and services.

(4) "Board" or "county board" means a county board of mental retardation and developmental disabilities established under Chapter 5126. of the Revised Code.

(5) "Comprehensive review" means an on-site review conducted by representatives of the department at the board and includes every program and service provided directly or through contract by the board. The purpose of the review is to measure the board's compliance with the department's requirements for accreditation.

(6) "Contractor" means an entity under contract with the board to administer the board's programs or services.

(7) "Day" means a calendar day, unless otherwise identified as a business day. A "business day" means Monday through Friday, excluding any days designated as a state holiday.

(8) "Department" means the Ohio department of mental retardation and developmental disabilities.

(9) "Domain" means a compilation of requirements that are categorically similar in their management and implementation.

(10) "Draft interim summary" means the report sent by the department to the superintendent of the county board and the board president that identifies the areas of noncompliance as identified by the accreditation team during the pre-survey and on-site review.

(11) "Interim review" means a review of a board conducted by representatives of the department during the effective dates of the accreditation period.

(12) "Plan of correction" means the county board's written response to the items of noncompliance identified through the department review process and submitted to the county board in the review report. The plan of correction will identify the methods, responsible parties, and timelines within which these items will be addressed and/or corrected.

(13) "Qualified entity" means a person or organization other than the affected county board that has demonstrated the necessary knowledge and skills to effectively manage areas out of compliance that were identified by the accreditation team.

(14) "Review report" means the official description of the county board's status in relation to its compliance with accreditation requirements as determined through a review process.

(C) Accreditation domains and requirements

The following criteria comprise the domains that will determine the compliance of county boards with accreditation requirements:

(1) Health, safety, and welfare domain and requirements

(a) The county board ensures the compliance of board-operated services and those provided by contract agencies with all applicable health and safety requirements in federal and state statutes and rules.

(b) The county board ensures that employees of the board and their contract agencies are appropriately registered, certified, and/or licensed in accordance with all applicable federal and state statutes and rules.

(c) The county board ensures compliance with all applicable federal and state statutes and rules regarding background investigation requirements for any applicant for employment with the board in any position and for persons employed in direct service positions by contract agencies of the county board.

(d) The county board ensures compliance with all applicable requirements in federal and state statutes and rules permitting board workers to perform delegated nursing tasks, inclusive of giving or applying prescribed medications.

(e) The county board implements a system of reporting, investigating, tracking, and monitoring all major unusual incidents and unusual incidents in accordance with all applicable federal and state statutes and rules.

(f) In accordance with all applicable federal and state statutes and rules, the county board develops and implements written policies and procedures that:

(i) Support and assist individuals receiving services from the county board or its contract agencies;

(ii) Reduce behaviors that place individuals or others at physical risk; and

(iii) Protect individuals from harm to self or others by creating safeguards for their health and safety and the health and safety of others.

(2) Rights domain and requirements

In accordance with all applicable federal and state statutes and rules,

(a) The county board uses an administrative resolution of complaints process to resolve complaints involving the programs, services, policies, or administrative practices of the county board or the agencies acting under contract with the board;

(b) The county board implements a system and safeguards to preserve confidentiality of information for individuals served.

(c) The county board ensures the provision and documentation of case management and service coordination; and

(d) The county board promotes the dignity and protects the rights of individuals served.

(3) Service planning and delivery domain and requirements

In accordance with all applicable federal and state statutes and rules,

(a) The county board maintains, lists, and verifies the changing needs and preferences of individuals waiting for all services, programs, and supports offered to eligible individuals by the board or its contract agencies when resources are lacking to meet these needs;

(b) The county board provides early intervention services to eligible individuals;

(c) The county board ensures the provision of supported living to eligible individuals;

(d) The county board ensures the provision of services and supports to eligible adults;

(e) The county board complies with all home and community-based services (HCBS) waiver requirements and assurances;

(f) The county board ensures that transportation services and options are available to all eligible individuals; and

(g) The county board uses a planning process to identify service needs and to determine program goals.

(4) Administration domain and requirements

(a) The county board utilizes the Ohio eligibility determination instrument (OEDI) or the children's Ohio eligibility determination instrument (COEDI) for the purpose of determining the eligibility of individuals for services

provided directly by the board or its contract agencies in accordance with all applicable federal and state statutes and rules.

(b) The county board members serve in accordance with all applicable federal and state statutes and rules.

(c) In accordance with all applicable federal and state statutes and rules, the county board monitors contract agencies providing services and supports to ensure their compliance with all applicable federal and state statutes and rules.

(d) In accordance with all applicable federal and state statutes and rules, the county board reports accurate information in response to the department's requests, including completion of individual information forms.

(e) The county board establishes an ethics council or policy to address direct service contracting issues in accordance with all applicable federal and state statutes and rules.

(f) The county board seeking reimbursement from the community alternative funding system (CAFS) adheres to all applicable federal and state statutes and rules.

(g) The county board ensures that family resource services are available to assist individuals and families in accordance with all applicable federal and state statutes and rules.

(h) The county board complies with all applicable Title XX requirements in federal and state statutes and rules.

(i) The county board completes preadmission screening and resident review for mental retardation and developmental disabilities (PASRR-MR/DD) evaluations and submits data to the department in a timely manner, provides specialized services to eligible residents of nursing facilities, and arranges for the relocation of eligible individuals who are placed inappropriately in nursing facilities in accordance with all applicable federal and state statutes and rules.

(D) Accreditation reviews

(1) The department shall conduct reviews of the county boards to determine compliance with department accreditation requirements.

(a) Following initial accreditation, the department shall conduct a comprehensive review not less than one time prior to the date the board's accreditation is scheduled to expire.

(b) The department may conduct other reviews and investigations as necessary to ensure compliance with accreditation requirements.

(c) The department may conduct interim reviews of any new program or service initiated by the board after its most recent review.

(2) The department shall notify the board prior to conducting any type of review unless serious health and safety issues, as defined by the department, exist within the programs and services offered by the board.

(a) The notification for a comprehensive review will include a list of documents to be submitted by the board to the department and timelines for their submittal prior to the scheduled review date.

(b) Failure of the board to provide requested documents to the department in accordance with identified timelines may result in a finding of noncompliance with the related requirement(s).

(c) The department shall notify the board at least forty-five days prior to initiating a comprehensive review and no less than forty-eight hours prior to initiating an interim review.

(d) The department shall invite the submission of comments by constituents and contracting entities regarding the board's efficiency and effectiveness in complying with the requirements for accreditation.

(3) An exit conference may be held on-site at the conclusion of a comprehensive review but shall be held no more than five business days following the completion of the on-site review. By mutual agreement between the department and the superintendent of the board, the exit conference may be scheduled more than five business days after completion of the on-site review.

(a) Exit conferences shall be conducted by the department with the president of the board or another board member serving as the president's designee, the superintendent of the board, and any other staff members and/or officials the board invites.

(b) The purpose of the exit conference is to provide the board with an oral summary of the board's compliance status with the requirements for accreditation. Any finding(s) of noncompliance with accreditation requirements shall be presented at the exit conference.

(4) The department shall order the board to immediately correct any issues determined by the department to represent a serious threat to the health and safety of individuals participating in the programs and services offered by the board. If the board fails to correct health and safety violations identified, the department may implement administrative intervention, including appointment of an administrative receiver.

(5) The department shall provide, by certified mail, a draft interim summary of its findings to the superintendent and the board president no later than thirty days following the exit conference.

(E) Noncompliance with accreditation requirements

(1) The department shall identify violations of specific requirements in the draft interim summary and the review reports prepared for the board.

(2) The board shall have the opportunity to dispute any of the information contained in the draft interim summary. Disputes must be in writing and sent by the board to the department within ten days by certified mail following receipt of the draft interim summary. The draft interim summary shall remain a draft and not a public record under *section 149.43 of Revised Code* until the review report is released in accordance with paragraph (D)(3) of this rule.

(a) The board shall submit to the department the specific items in the draft interim summary that are disputed, the reason for the board's disagreement, and any substantiating information.

(b) The department shall respond in writing to the superintendent and the board president by certified mail within fifteen days following receipt of the disputed findings and shall indicate the disposition of the contested citations.

(c) The department's response shall be reflected in the review report.

(3) The department shall send the review report to the board president and the superintendent within sixty days of the exit conference when the draft interim summary is not disputed, or within seventy-five days of the exit conference when responding to contested citations contained in the draft interim summary.

(4) The review report shall contain a recommended term of accreditation, which shall be awarded upon timely and proper submittal of the plan of correction by the board.

(5) The department may grant the board a decision abeyance of up to ninety days to take appropriate action to correct citations that will prevent the board from achieving a minimum of one year accreditation.

(6) The county board shall submit to the department the written plan of correction within forty-five days of receipt of the review report. The department may deny accreditation for failure of a board to submit a plan of correction by the specified date contained within the review report.

(a) A copy of the board's resolution approving the plan of correction shall be forwarded to the department with the plan of correction. The superintendent shall also sign the resolution as an indication of concurrence.

(b) Within thirty days of receipt of the board's plan of correction, the department shall forward to the board written approval or disapproval of the plan of correction.

(c) The board shall initiate implementation of the plan of correction immediately upon notification by the department that the plan of correction has been approved.

(d) If the entire plan or a portion(s) of the plan of correction developed by the board is disapproved, the department shall inform the board of the reasons for the disapproval. The department shall grant the board an opportunity to submit a revised plan of correction within fifteen days of the board's receipt of rejection of the plan of correction unless the health, safety, and welfare requirements are involved. If the board has not met the requirements contained within the health, safety, and welfare domain, as determined by the department, the department shall issue an order denying accreditation.

(e) The department may conduct follow-up reviews to ensure the board's compliance with requirements for accreditation.

(F) Accreditation of a board

(1) The department shall issue a certificate of accreditation once it is determined that the board is in compliance with the department's accreditation requirements.

(2) Accreditation may be granted for periods up to five years, and may be renewed.

(3) The term of accreditation granted to a board shall be dependent upon the degree of compliance with accreditation requirements contained within the domains established by the department's accreditation unit.

(a) A board shall be granted a one-year accreditation when compliance with requirements contained within the health, safety and welfare domain are determined by the department to have been achieved.

(b) A board shall be granted a two-year accreditation when compliance is determined by the department with requirements identified in paragraph (F)(3)(a) of this rule and also selected requirements within the rights, service planning and delivery, and administration domains.

(c) A board shall be granted a three-year accreditation when compliance is determined by the department with requirements identified in paragraphs (F)(3)(a) and (F)(3)(b) of this rule and additional requirements contained within the rights, service planning and delivery, and administration domains not already included in paragraph (F)(3)(b) of this rule.

(d) A board shall be granted a four-year accreditation when compliance is determined by the department with requirements identified in paragraphs (F)(3)(a) to (F)(3)(c) of this rule and the remaining requirements not already included in paragraphs (F)(3)(b) and (F)(3)(c) of this rule contained within the rights, service planning and delivery, and administration domains.

(e) A board shall be granted a five-year accreditation when the department determines compliance with requirements identified in paragraph (F)(3)(d) of this rule and one of the following:

(i) The department determines compliance with best practice standards established by the department in accordance with *section 5126.082 of the Revised Code*; or

(ii) The department determines that the board has maintained either accreditation from the commission on accreditation of rehabilitation facilities (CARF) or the accreditation council (AC) for no less than a three-year period prior to the accreditation on-site review in program and service areas designated by the department.

(G) Issuance of an order denying accreditation

(1) The department shall issue an order proposing to deny or rescind accreditation in conformance with division (D) of *section 5126.081 of the Revised Code* only after the board has exhausted all opportunities afforded by the department to correct deficiencies as defined in paragraph (E) of this rule.

(2) Simultaneously, by certified mail, the department shall notify the following officials in the county of its order proposing to deny and/or rescind accreditation: The members of the board of county commissioners, the probate judge, the county auditor, the president of the board or another board member serving as his or her designee, and the superintendent of the board.

(3) The order shall identify the matters in which the board is not in compliance with accreditation requirements, and the responsibilities of the board to contract under division (E)(1) of *section 5126.081 of the Revised Code* to have the programs and services administered by another party or become subject to administrative receivership under division (E)(2) of *section 5126.081 of the Revised Code*.

(H) Appointment of administrative receivers or contractors

(1) The board shall be given the option by the department of contracting for the administration of programs and services subject to the approval of the director with one or more accredited county board(s) or a qualified entity.

(2) The board shall execute the contract option with another approved entity within thirty days following receipt of the department's notice of the order proposing to deny or rescind accreditation.

(3) If a board does not contract the administration of programs and services identified not in compliance with accreditation requirements within thirty days of receiving the order, the department shall take action to appoint an administrative receiver.

(4) In accordance with division (E)(2) of *section 5126.081 of the Revised Code*, the department may appoint management personnel from other county boards, employees of the department, or persons from other entities as administrative receiver. Persons from other entities may be appointed only when no qualified department employees or board personnel are available.

(I) Duties of administrative receivers or contractors

(1) The administrative receiver shall assume full administrative responsibility for the programs and services identified not in compliance with the requirements for accreditation.

(2) When the board enters into a contract, the board, by formal resolution, shall grant the contractor full administrative authority according to division (E)(1) of *section 5126.081 of the Revised Code* for the program(s) and service(s) that the contractor will administer.

(3) The administrative receiver or contractor shall develop a plan of correction to remediate the programs and services identified not in compliance that caused the department to deny or rescind accreditation.

(a) Within ninety days of appointment, the administrative receiver or contractor shall submit to the department for review a plan of correction accepted by the board that specifically addresses those areas not in compliance with the requirements for accreditation.

(b) The department shall respond in writing within thirty days indicating approval or disapproval of the submitted plan of correction.

(c) If the department approves the plan, the administrative receiver or contractor and the board shall commence action to implement the plan immediately.

(d) If the plan of correction developed by the administrative receiver or contractor is disapproved, the department shall inform the administrative receiver or contractor and the board of the reasons for the disapproval and may grant the board and administrative receiver or contractor an opportunity to submit a revised plan of correction.

(e) If the department grants the board and administrative receiver or contractor an opportunity to submit a revised plan of correction, it shall be received by the department no later than thirty days following notification of disapproval.

(4) The administrative receiver or contractor shall report to the department any findings pertaining to issues or circumstances beyond the control of the board and resulting in the likelihood that compliance with the requirements for accreditation cannot be achieved unless the issues or circumstances are remedied.

(5) The administrative receiver or contractor may at any time request the department to conduct a review to determine:

(a) If the board is in compliance with accreditation requirements; and

(b) If the board is capable of assuming its duties to administer designated programs and services.

(6) When, as a result of a review by the department, the board is found to be in compliance with requirements, the department shall reverse its order proposing to deny or rescind accreditation, and issue evidence of accreditation to the board.

(J) Reimbursement of contractor and/or administrative receiver expenses

(1) The board shall reimburse the contractor or administrative receiver for all reasonable expenses, including amounts for time worked, travel, and related expenses.

(2) The board, with department approval, shall negotiate with the contractor to determine allowable costs for services rendered.

(3) The department and the administrative receiver shall negotiate to determine allowable costs for services rendered when any administrative receiver is appointed by the department.

(4) Department employees shall not be additionally reimbursed by the board for their time worked, if appointed by the department as the contractor or administrative receiver.

(K) A contractor or administrative receiver that has assumed the administration of a board's programs and services has the right to authorize the payment of bills in the same manner that a board may authorize payment of bills under Chapter 5126. and *section 319.16 of the Revised Code*.

(L) Appealing a department decision

(1) A board may appeal the department's decision regarding a proposed denial or rescission of accreditation or refusal to reverse a denial of accreditation by filing a complaint as outlined under *section 5123.043 of the Revised Code* and rule 5123:2-17-01 of the Administrative Code.

(2) All board appeals to the department shall be in writing and shall be submitted within thirty days of the receipt of the department's written notification of intention to issue a denial or rescission of accreditation or refusal to reverse a denial of accreditation.

(3) Once the department receives an appeal from the board, the procedures and timelines noted in rule 5123:2-17-01 of the Administrative Code shall be followed.

(4) If in its appeal, the department agrees the board can assume its duties in compliance with the department's requirements for accreditation, the department shall:

- (a)** Reverse its order denying or rescinding accreditation or refusing to reverse a denial of accreditation; and
- (b)** Issue accreditation to the board.

(5) If the board does not appeal in accordance with paragraphs (L)(1) and (L)(2) of this rule, the department's order proposing to deny or rescind accreditation or refusing to reverse a denial of accreditation shall become effective thirty days after the board receives the department's written notification of the order.

(6) The department shall issue all notices pertaining to accreditation to the members of the board of county commissioners, the probate judge, the county auditor, the president of the board or another board member serving as his or her designee, and the superintendent of the board.

(M) Board annual self-audits

The board shall conduct annual self-audits using the department's designated format to evaluate its compliance with department standards. Self-audits are subject to review by the department during the accreditation process.

History:Eff 4-12-01.

5123:2-9-04. Medicaid local administrative authority.

(A) This rule identifies the duties of the medicaid local administrative authority (MLAA) and serves to outline the requirements for home and community-based services waiver administration by a county board that has MLAA in accordance with *section 5126.055 of the Revised Code*. Nothing in this rule shall be construed to limit the duties, obligations or requirements imposed on a county board as specified in Chapters 5111., 5123., and 5126. of the Revised Code and the Ohio Administrative Code, including but not limited to *sections 5111.041, 5126.055, and 5126.057 of the Revised Code*.

(B) Definitions

(1) "Applicable requirements" means:

(a) Federal and state laws and regulations that govern the conduct of the MLAA and/or the 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 home and community-based services to eligible individuals, which is administered by ODMRDD pursuant to an interagency agreement between ODMRDD and ODJFS.

(2) "County board" means a county board of mental retardation and developmental disabilities established under Chapter 5126. of the Revised Code.

(3) "Home and community-based services (HCBS)" has the same meaning as in *section 5126.01 of the Revised Code*.

(4) "Individual" means a person with mental retardation or other developmental disability who is eligible to receive HCBS as an alternative to placement in an intermediate care facility for the mentally retarded under the applicable HCBS waiver. A guardian or authorized representative as defined in rule 5101:1-2-01 of the Administrative Code may take any action on behalf of an individual, may make choices for an individual or may receive notice on behalf of an individual to the extent permitted by applicable law.

(5) "Individual service needs addendum" means an individual service needs addendum as described in *section 5126.035 of the Revised Code*.

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

(7) "MLAA" means a county board with medicaid local administrative authority pursuant to *section 5126.055 of the Revised Code*.

(8) "ODJFS" means the Ohio department of job and family services as established by *section 121.02 of the Revised Code*.

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

(10) "PAWS" means payment authorization for waiver services.

(11) "Provider" means a person who has a medicaid provider agreement issued by ODJFS and is certified by ODMRDD to provide HCBS.

(12) "Service and support administration" means the functions listed in *section 5126.15 of the Revised Code*.

(13) "Service contract" means a contract for HCBS under *section 5126.035 of the Revised Code* between the MLAA and the provider.

(C) Duties of MLAA for HCBS

(1) The MLAA shall perform assessments and evaluations of the individual in accordance with division (A)(1) of *section 5126.055 of the Revised Code*.

(2) ISPs shall be developed for each individual in accordance with applicable requirements and shall:

(a) Be written.

(b) Be developed by the person(s) employed by, or contracting with, the county board that is responsible for service and support administration with the active participation of the individual, other persons chosen by the individual, and, where applicable, the individual's provider in accordance with *sections 5126.055 and 5126.15 of the Revised Code*.

(c) Describe, regardless of funding source, medical and other services identified through the assessment process to be furnished to the recipient, the service frequency, the service duration, the type of provider who will furnish each service, and the completion and approval date(s) of the ISP.

(d) Be the fundamental tool by which the MLAA and state will ensure the health, safety, and welfare of the individuals served under the waiver. As such, it will be subject to periodic review and update. These reviews will take place to determine the appropriateness and adequacy of the services, and to ensure that the services furnished are consistent with the nature and severity of the individual's disability;

(e) Be updated annually. The ISP shall be updated more frequently if there is a change in the individual's condition, if the individual chooses a new provider or types of services. The county board shall convene an ISP meeting within ten working days of a request from an individual for a review of the ISP.

(f) Be subject to the approval of ODMRDD and ODJFS in accordance with *sections 5111.871 and 5126.055 of the Revised Code*.

(g) Identify the county board representative(s) responsible for service and support administration.

(h) Maximize the use of natural supports and generic resources.

(i) Be maintained in accordance with rule 5101:3-1-17.2 of the Administrative Code.

(3) If the individual has been identified by ODMRDD as an individual to receive priority for HCBS pursuant to division (D)(3) of *section 5126.042 of the Revised Code*, the MLAA shall assist ODMRDD in expediting the transfer of the individual from an intermediate care facility for the mentally retarded or nursing facility to HCBS.

(4) In accordance with *section 5126.046 of the Revised Code*, the MLAA shall assist the individual(s) to choose a qualified and willing provider of the services and, at a hearing under *section 5101.35 of the Revised Code*, present evidence of the process for appropriate assistance in choosing providers.

(5) A provider is qualified to provide HCBS to an individual if the following requirements are met:

(a) The provider is certified by ODMRDD for the services.

(b) The provider is eligible to enter into or has entered into a service contract with the MLAA in accordance with rule 5123:2-9-05 of the Administrative Code.

(c) The provider has a medicaid provider agreement with ODJFS that covers the services.

(6) Contract for services

(a) The MLAA shall contract for services with service providers chosen by the individual in accordance with *sections 5126.035 and 5126.055 of the Revised Code* and rule 5123:2-9-05 of the Administrative Code.

(b) The service contract is a two-party contract between the MLAA and the provider.

(c) In the event that an employee of the county board is selected to provide an applicable HCBS waiver service (i.e., homemaker personal care or informal respite) in accordance with the individual options or level one waiver, the provisions of *section 5126.033 of the Revised Code* must be adhered to and the ethics council of the county board must approve a contract with the employee separate and apart from the employee's employment with the board.

(d) Pursuant to *section 5126.046 of the Revised Code*, the county board may provide any adult service when selected by an individual, including applicable waiver services as included with a waiver and which constitute adult services as defined in *section 5126.01 of the Revised Code*.

(7) If the MLAA is a county board that is certified under *section 5123.045 of the Revised Code* to provide the services and agrees to provide the services to the individual and the individual chooses the county board to provide the services in accordance with *section 5126.046 of the Revised Code*, the county board may furnish, in accordance with the county board's medicaid provider agreement and for the authorized reimbursement rate, the services the individual requires. The ISP shall be the full scope of the contractual requirement for such services and the individual shall have the right to change providers in accordance with *section 5126.046 of the Revised Code*. Pursuant to division (A)(6) of *section 5126.055 of the Revised Code*. ODMRDD shall provide monitoring of such services in addition to the monitoring that the board shall do of its own employees pursuant to applicable regulations.

(8) The MLAA shall monitor the services provided to the individual to ensure the individual's health, safety, and welfare. Monitoring by the MLAA shall include compliance by the provider with quality assurance activities, certification standards and provider adherence to applicable requirements. ODMRDD shall promulgate rules or use existing rules for MLAA monitoring of compliance with standards. Monitoring by the MLAA shall be conducted with strict adherence to rules governing monitoring as established by ODMRDD. If the county board provides the services, then ODMRDD shall also monitor the services provided by the county board.

(9) The MLAA shall take necessary action, in accordance with applicable requirements, to ensure the health, safety and welfare of individuals served.

(10) The MLAA shall take action in accordance with rule 5123:2-8-18 of the Administrative Code if it determines that a deficiency or violation of applicable requirements related to provider certification standards has occurred, but has not resulted in, and is not reasonably likely to result in, a risk to the individual's health, safety, or welfare. The MLAA shall conduct quality assurance reviews in accordance with *section 5126.431 of the Revised Code* and rule 5123:2-12-01 of the Administrative Code for individuals who receive HCBS in accordance with the definition of supported living in *section 5126.01 of the Revised Code*.

(11) The MLAA shall have an investigative agent conduct investigations under section 5123.313 of the Revised Code that concern the individual.

(12) The MLAA shall have a service and support administrator perform the duties under division (B)(9) of *section 5126.15 of the Revised Code* that concern the individual.

(13) The MLAA shall develop and maintain a file for each individual, which, at a minimum, includes the following information:

(a) Copies of required assessments;

(b) Initial and subsequent ISPs, including evidence of the ISP's approval date;

(c) Evidence of ICF/MR level of care determination and redetermination of eligibility at a minimum of each twelve months;

(d) ODMRDD's confirmation of PAWS;

(e) Patient liability amounts and identification of HCBS provider(s) to whom each amount is assigned in accordance with paragraph (M)(2) of rule 5123:1-2-08, paragraph (L) of rule 5123:1-2-11 of the Administrative Code, paragraph (K)(2) of rule 5123:2-8-16 of the Administrative Code, or paragraph (H)(3) of rule 5123:2-9-06 of the Administrative Code, as applicable.

(f) Evidence of an ISP review at a minimum of every twelve months to determine the appropriateness and adequacy of the services, and to ensure that the services furnished will ensure the individual's health, safety and welfare and are consistent with the nature and severity of the individual's disability.

(g) Evidence that the individual was provided appropriate prior notice of any action to approve, reduce, deny, or terminate HCBS and notice of an opportunity for a fair hearing in accordance with rule 5101:6-2-04 of the Administrative Code.

(h) Identification of the person employed by or under contract with the county board that is responsible for overall service and support administration for the individual.

(14) The county board shall perform its medicaid local administrative authority in accordance with applicable requirements.

(15) The MLAA shall abide by all terms and conditions set forth in the federally approved waiver document, including any appendices and attachments. ODMRDD shall assure that each MLAA has a current copy of the HCBS waivers and shall provide training to the MLAA on the terms, conditions, appendices and attachments of each waiver. ODMRDD shall also make such training available to providers.

(16) The MLAA shall maintain current knowledge of state and federal requirements related to HCBS waivers, using information as provided by ODMRDD and ODJFS.

(17) The MLAA may not delegate its medicaid local administrative authority granted under *section 5126.055 of the Revised Code*, but may contract with a person or government entity, including a council of governments, for assistance with its medicaid local administrative authority. The MLAA that enters into such a contract shall notify the director of ODMRDD. The notice shall include the tasks and responsibilities that the contract gives to the person or government entity. The person or government entity shall comply in full with all requirements to which the MLAA is subject regarding the person or government entity's tasks and responsibilities under the contract. The MLAA remains ultimately responsible for tasks and responsibilities.

(18) The MLAA shall, through ODMRDD and ODJFS, reply to, and cooperate in arranging compliance with, a program or fiscal audit or program violation exception that a state or federal audit or review discovers as required by division (F) of *section 5126.055 of the Revised Code*. The MLAA, in conjunction with ODMRDD, shall cooperate fully with ODJFS and shall timely prepare and send to ODMRDD a written plan of correction or response to any adverse findings. The MLAA is liable for any adverse findings that result from an action that the MLAA takes or fails to take in its implementation of medicaid local administrative authority.

(19) The MLAA shall correct all deficiencies in the manner and times required by division (G) of *section 5126.055 of the Revised Code*.

(20) The MLAA shall pay to ODMRDD an annual fee equal to one per cent of the total value of all medicaid paid claims for home and community-based services for which the MLAA contracts or provides itself as required by *section 5123.0412 of the Revised Code*. The ODMRDD shall utilize this fee in accordance with *section 5123.0412 of the Revised Code*.

(21) A county board that has MLAA shall pay the nonfederal share of HCBS waiver expenditures as required by *section 5126.057 of the Revised Code* and rule 5123:2-9-02 of the Administrative Code, unless ODMRDD is required to pay the nonfederal share under division (C)(2) of *section 5123.047 of the Revised Code*.

(22) The MLAA shall submit a PAWS form to ODMRDD in the format required by ODMRDD within fourteen days of authorization of new services or modification to existing services. Upon receiving confirmation from ODMRDD, the MLAA shall provide a copy of the PAWS to the individual and any service providers that the individual has chosen within fourteen days.

(23) The MLAA shall issue a notice of hearing rights to an individual in accordance with *section 5101.35 of the Revised Code* when the MLAA recommends the approval, reduction, denial, or termination of the individual's HCBS and such recommendation is not reversed by ODMRDD or ODJFS.

(D) Responsibilities of the ODMRDD for medicaid waiver administration functions

(1) ODMRDD shall oversee MLAA activities to ensure compliance with applicable laws. If ODMRDD determines that the MLAA is deficient in its administration of medicaid waiver services, then ODMRDD may take appropriate actions authorized by applicable law including, but not limited to, division (G) of *section 5126.055 of the Revised Code* or *section 5126.056 of the Revised Code* to ensure MLAA compliance with applicable laws.

(2) (a) If a county board's medicaid local administrative authority for HCBS is terminated in accordance with *section 5126.056 of the Revised Code*, ODMRDD shall do either of the following:

(i) Contract under *section 5126.056 of the Revised Code* with another county board that has not had any of its medicaid local administrative authority terminated or another entity to perform waiver administrative activities in accordance with this rule.

(ii) Appoint under *section 5126.056 of the Revised Code* an administrative receiver to perform waiver administrative activities in accordance with this rule.

(b) A county board whose medicaid local administrative authority for HCBS has been terminated in accordance with *section 5126.056 of the Revised Code* shall comply with its duties under that statute.

(3) ODMRDD and ODJFS shall seek federal financial participation (FFP) at fifty per cent of total cost for HCBS waiver administration provided in accordance with this rule subject to allowance by federal government.

(a) ODMRDD and ODJFS shall not seek FFP for HCBS waiver administration claims if either agency determines that all or part of the claims do not comply with standards set forth in federal law and OMB circulars and other directives or guidelines issued by the federal government.

(b) ODMRDD and ODJFS shall not seek FFP for HCBS waiver administration claims for any county board that does not have a contract with ODMRDD obligating the county board to abide by federal law including but not limited to the requirements set forth in federal law, OMB circulars, and other directives or guidelines issued by the federal government. The contract required shall be in the form as set forth in appendix A to this rule.

(4) Claims for FFP for HCBS waiver administration activities performed in accordance with this rule shall comply with the following requirements:

(a) The MLAA shall identify the employees and/or persons paid under contract who perform HCBS waiver administration activities and identify for each whether such activities are one hundred per cent or less than one hundred per cent of their time.

(b) The MLAA shall accurately reflect in the employee position description and/or the terms of the contract with the contract entity the HCBS waiver administration activities for which FFP is claimed.

(c) The MLAA shall not claim FFP for HCBS waiver administration, activities billed as targeted case management or service coordination according to rules 5123:2-15-41 and 5101:3-37-19 of the Administrative Code.

(d) The MLAA shall meet the documentation requirements described in paragraph (E) of this rule and the cost reporting requirements described in paragraph (F) of this rule.

(e) The MLAA shall not claim reimbursement as HCBS waiver administration activities functions or services that are not expressly set forth in paragraph (C) of this rule.

(f) The superintendent of a county board shall sign a certification with each claim submission that the claim has been reviewed, and that the claim is in compliance with this rule and federal law, OMB circulars, and other directives or guidelines issued by the federal government.

(5) The MLAA shall be responsible for repayment of any FFP it received for HCBS waiver administration activities if the FFP is required to be repaid to the federal government as the result of a federal or state audit. The MLAA shall immediately reimburse ODMRDD or ODJFS if either state agency is required to repay FFP to the federal government for incorrect payments to the county board for HCBS waiver administrative activities, or if the claims are otherwise denied or deferred by the federal government.

(6) ODMRDD shall assure that PAWS forms appropriately submitted by the MLAA are entered into the medicaid payment system within ten working days of receipt from the county board so that providers are able to receive payment in a timely manner.

(7) If ODMRDD receives from a provider repayment of payments for HCBS under a service contract, ODMRDD shall refund to or otherwise credit the MLAA with the nonfederal share of the repayment if the MLAA paid the nonfederal share.

(E) Documentation requirements for MLAA's for reimbursement of salaries and benefits of persons who perform HCBS waiver administration activities

(1) "Total salary cost," defined as base wages plus fringe benefits, shall be reimbursed on an ongoing basis in accordance with paragraph (E) of this rule.

(2) When MLAA employees and/or persons paid under a contract with a MLAA spend less than one hundred per cent of their time performing HCBS waiver administration activities for which FFP is claimed, each person shall complete a department-approved HCBS waiver activity form. The purpose of the HCBS waiver activity form is to allocate total salary cost between HCBS waiver administration activities and other MLAA activities performed by the person.

(3) The MLAA shall select for all persons who spend less than one hundred per cent of their time performing HCBS waiver administration activities either the periodic or continuous methodology to document the amount of time spent in the performance of these activities.

(a) A periodic methodology requires HCBS waiver administration activities to be documented for one week each month as specified by the department.

(b) A continuous methodology requires HCBS waiver administration activities to be documented on a daily basis.

(c) The MLAA may elect to change this methodology on January first of each year upon providing written notification to the department.

(d) HCBS waiver administration activities provided under these conditions shall be documented in quarter-hour increments.

(4) Clerical/support staff shall document their performance of HCBS waiver administration activities for which FFP is claimed using the HCBS waiver activity form. Documentation is to be completed following completion of the administration activity.

(5) Supporting documentation shall verify that the HCBS waiver administration activity noted on the waiver activity form occurred. The documentation may include, but is not limited to, individual's records, copies of ISPs, employee calendars, appointment schedules, mileage records, copies of letters, and activity check lists.

(6) To obtain FFP reimbursement, the MLAA shall submit an invoice, department-approved employee rosters, and supporting activity sheets to the department on a monthly basis.

(7) The MLAA shall ensure that all necessary financial and statistical data supporting the claim for reimbursement is made available to ODMRDD, ODJFS, the United States department of health and human services, and any other state or federal agency having audit authority.

(8) The MLAA shall maintain all records and forms necessary to fully disclose the extent of services provided and related business transactions for a period of seven years from the date of receipt of payment, or for six years after any initiated audit is completed and adjudicated, whichever is longer.

(9) ODMRDD shall provide training, at least annually, to MLAA's on proper methods for documentation and billing of FFP.

(F) Cost reporting requirement for MLAA's for allowable waiver administration overhead and other costs

(1) Total overhead and other costs shall be reimbursed on an annual basis in accordance with paragraph (F) of this rule.

(a) "Overhead costs" are defined as the approved portion of administration, capital, and building service costs allocated to HCBS waiver administration activities.

(b) "Other costs" are defined as travel, equipment less than five hundred dollars, equipment repairs, supplies, liability insurance, advertisement, printing, and other miscellaneous expenses directly assignable to HCBS waiver administration activities.

(2) The MLAA shall identify and report all HCBS waiver administration activity costs on the operating and expenditure report submitted to ODMRDD pursuant to *section 5126.12 of the Revised Code*.

(3) An annual reconciliation shall be performed by ODMRDD for all medicaid allowable overhead costs and other costs as reported for waiver administration activities.

(4) All HCBS waiver administration costs reported shall be subject to audit and final cost settlement. ODMRDD or ODJFS may audit any funds a county board or contractor receives for waiver administration, including any source documentation supporting the receipts and disbursements associated with such funds.

(G) Medicaid recipient and medicaid applicant appeals

(1) Any recipient of or applicant for HCBS may utilize the process set forth in *section 5101.35 of the Revised Code* for any purpose authorized by that statute or rules promulgated implementing that statute. The process set forth in

section 5101.35 of the Revised Code is available only to applicants, recipients, and their lawfully appointed 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) Applicants for and recipients of HCBS shall use the process set forth in *section 5101.35 of the Revised Code* for any challenge to the type, amount, scope or duration of services included or excluded from an ISP or an individual service needs addendum. Providers shall have no standing in an appeal under *section 5101.35 of the Revised Code*, or in any other forum to challenge the type, amount, scope or duration of services included or excluded from an ISP or an individual service needs addendum.

(4) The MLAA shall implement any final state hearing decision or administrative appeal decision issued by ODJFS, unless a court of competent jurisdiction modifies such decision as the result of an appeal by the medicaid applicant or recipient.

(H) Provider challenges to the MLAA's actions in the performance of its duties

(1) Any action proposed or initiated by the MLAA regarding a service contract for non-medicaid services shall not be governed by this rule.

(2) A provider shall follow the procedures set forth in rule 5123:2-8-18 of the Administrative Code to challenge any recommendations, determinations, or corrective action plans issued by the MLAA resulting from the MLAA's monitoring. Those procedures shall be the exclusive remedies for resolving any such provider challenge.

(3) Except as provided in paragraphs (H)(2) and (I) of this rule, a provider may follow the procedures set forth in *section 5126.036 of the Revised Code* to challenge any of the following:

(a) Recommendations, determinations, or corrective action plans issued by the MLAA relating to or resulting from any of its duties enumerated in paragraph (C) of this rule.

(b) An action the MLAA has taken or has not taken that is required by a service contract for HCBS.

(c) The MLAA's refusal to enter into a service contract for HCBS with the provider.

(d) The MLAA's termination of a service contract for HCBS between the provider and the MLAA.

(I) Provider certification disputes and medicaid provider agreement disputes

(1) Providers of HCBS may pursue all remedies for disputes regarding their certification or their medicaid provider agreements available to them under Chapter 119. of the Revised Code as presently authorized by law.

(2) No action taken by the MLAA shall constitute an adjudication entitling a HCBS provider with the right to pursue a remedy under Chapter 119. of the Revised Code. Any recommendation by the MLAA for decertification of a provider shall be referred to ODMRDD for any action it determines is necessary.

(J) Immediate corrective action by the MLAA to ensure health, safety, and welfare

The MLAA may take immediate action to ensure the health, safety and welfare of an individual receiving HCBS where there is substantial risk of immediate harm to the individual only as expressly provided for in law. Nothing in this rule shall limit the authority of county boards to take immediate action to ensure an individual's health, safety, and welfare as provided for under law.

(K) Federal financial participation (FFP)

(1) The MLAA shall not authorize payment for HCBS prior to the approval date of the ISP including approval of emergency services.

(2) The MLAA shall ensure that FFP is not claimed for the cost of room and board, except when provided as part of respite care in a facility approved by ODMRDD that is not a private residence.

(3) FFP shall not be claimed for waiver services furnished to recipients while they are inpatients of a hospital, a nursing facility, or an ICF/MR (except for respite or institutional respite appropriately provided in a licensed facility).

5123:2-13-02. Individual options waiver - Eligibility criteria for initial and continued enrollment.

(A) The purpose of this rule is to establish eligibility criteria for initial and continued enrollment in the individual options waiver.

(B) Eligibility criteria In order to be eligible for the individual options waiver, the individual shall meet the following criteria:

(1) Except as provided in paragraph (B)(2) of this rule, the individual must be determined to have an ICF/MR level of care pursuant to rule 5101:3-3-07 of the Administrative Code and choose to receive home and community-based waiver services as an alternative to services provided in an ICF/MR.

(2) The individual is not required to be determined to have an ICF/MR level of care pursuant to rule 5101:3-3-07 of the Administrative Code if either of the following apply:

(a) The individual resides in a general nursing facility, requires specialized services as determined in accordance with rule 5123:2-14-01 of the Administrative Code and chooses to receive home and community-based waiver services as an alternative to services provided in a general nursing facility.

(b) The individual was deinstitutionalized from a general nursing facility as a result of the preadmission screening and resident review process mandated by Pub. L. 100-203, Nursing Home Reform Act, Omnibus Budget Reconciliation Act (OBRA), 1987, as amended by OBRA, 1990, 42 U.S.C. Section 1396(e)(7) and requires specialized services as determined in accordance with rule 5123:2-14-01 of the Administrative Code.

(3) The individual must meet the financial medicaid eligibility criteria set forth in Chapter 5101:1-39 of the Administrative Code.

(4) The individual's health and welfare needs, met by formal supports, informal supports and home and community-based services, must be assured.

(5) The projected annual cost of home and community-based services for the individual must not cause the aggregate cost cap for home and community-based services set forth in the individual options waiver as approved by the centers for medicare and medicaid services to be exceeded. If the annual cost of an individual's home and community-based services is projected to cause the aggregate cost cap to be exceeded, the individual shall be denied enrollment.

(C) Other requirements An individual who is eligible for the individual options waiver must, in addition to the requirements of this rule, meet all requirements set forth in any rule governing a specific individual options waiver service in order to receive that service.

History:6-2-95 (Emer.); 8-31-95; 12-7-95; 8-18-96; 7-12-97; Replaces: part of 5123:1-2-04, eff. 6-21-04.

5123:2-17-02. Incidents adversely affecting health and safety.

(A) Purpose This rule establishes the requirements for managing incidents adversely affecting health or safety and implements a continuous quality improvement process in order to prevent or reduce the risk of harm to individuals.

(B) Application This rule applies to county boards, developmental centers, and providers. Nothing in this rule relieves any person of the responsibility to comply with *section 5123.61 of the Revised Code*, which requires the reporting of abuse, neglect, and misappropriation.

(C) Definitions (1) "Administrative investigation" means the gathering and analysis of information related to a major unusual incident so that appropriate action can be taken to address any harm or risk of harm and prevent future occurrences.

(2) "Agency provider" means a provider, certified or licensed by the department, that employs staff to deliver services to individuals and who may subcontract the delivery of services.

(3) "At-risk individual" means an individual whose health or safety is adversely affected or whose health or safety may reasonably be considered to be in danger of being adversely affected.

(4) "County board" means a county board of mental retardation and developmental disabilities as established under Chapter 5126. of the Revised Code or a regional council of governments as established under Chapter 167. of the Revised Code when it includes at least one county board.

(5) "County board as a provider" means the county board when acting as the provider to the individual who is the subject of the incident.

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

(7) "Developmental center" means an ICF/MR under the managing responsibility of the department.

(8) "ICF/MR" means an intermediate care facility for the mentally retarded.

(9) "Incident tracking system" (ITS) means the department's on-line system for reporting major unusual incidents.

(10) "Individual" means a person with mental retardation or other developmental disability.

(11) "Individual provider" means a provider certified by the department who is self-employed and not an agency and who personally delivers services to individuals and who may not subcontract the delivery of services.

(12) "Investigative agent" means an employee of a county board or a person under contract with a county board who is certified by the department to conduct investigations of major unusual incidents.

(13) "Major unusual incident" (MUI) means the alleged, suspected, or actual occurrence of an incident when there is reason to believe the health or safety of an individual may be adversely affected or an individual may be placed at a reasonable risk of harm as listed in this paragraph, if such individual is receiving services through the MR/DD service delivery system or will be receiving such services as a result of the incident. Major unusual incidents (MUIs) include the following:

(a) Abuse. "Abuse" means any of the following when directed toward an individual:

(i) Physical abuse. "Physical abuse" means the use of physical force that can reasonably be expected to result in physical harm or serious physical harm as those terms are defined in *section 2901.01 of the Revised Code*. Such force may include, but is not limited to, hitting, slapping, pushing, or throwing objects at an individual.

(ii) Sexual abuse. "Sexual abuse" means unlawful sexual conduct or sexual contact as those terms are defined in *section 2907.01 of the Revised Code* and the commission of any act prohibited by *section 2907.09 of the Revised Code* (e.g., public indecency, importuning, and voyeurism).

(iii) Verbal abuse. "Verbal abuse" means purposefully using words or gestures to threaten, coerce, intimidate, harass, or humiliate an individual.

(b) Attempted suicide. "Attempted suicide" means a physical attempt by an individual that results in emergency room treatment, in-patient observation, or hospital admission.

(c) Death. "Death" means the death of an individual.

(d) Exploitation. "Exploitation" means the unlawful or improper act of using an individual or an individual's resources for monetary or personal benefit, profit, or gain.

(e) Failure to report. "Failure to report" means that a person, who is required to report pursuant to *section 5123.61 of the Revised Code*, has reason to believe that an individual has suffered or faces a substantial risk of suffering any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse (including misappropriation) or neglect of that individual, and such person does not immediately report such information to a law enforcement agency, a county board, or, in the case of an individual living in a developmental center, either to law enforcement or the department. Pursuant to division (C)(1) of *section 5123.61 of the Revised Code*, such report shall be made to the department and the county board when the incident involves an act or omission of an employee of a county board.

(f) Known injury. "Known injury" means an injury from a known cause that is not considered abuse or neglect and that requires immobilization, casting, five or more sutures or the equivalent, second or third degree burns, dental injuries, or any injury that prohibits the individual from participating in routine daily tasks for more than two consecutive days.

(g) Law enforcement. "Law enforcement" means any incident that results in the individual being charged, incarcerated, or arrested.

(h) Medical emergency. "Medical emergency" means an incident where emergency medical intervention is required to save an individual's life (e.g., Heimlich maneuver, cardiopulmonary resuscitation, intravenous for dehydration).

(i) Misappropriation. "Misappropriation" means depriving, defrauding, or otherwise obtaining the real or personal property of an individual by any means prohibited by the Ohio Revised Code, including Chapters 2911. and 2913. of the Revised Code.

(j) Missing individual. "Missing individual" means an incident that is not considered neglect and the individual cannot be located for a period of time longer than specified in the individual service plan and the individual cannot be located after actions specified in the individual service plan are taken and the individual cannot be located in a search of the immediate surrounding area; or circumstances indicate that the individual may be in immediate jeopardy; or law enforcement has been called to assist in the search for the individual.

(k) Neglect. "Neglect" means when there is a duty to do so, failing to provide an individual with any treatment, care, goods, supervision, or services necessary to maintain the health or safety of the individual.

(l) Peer-to-peer acts. "Peer-to-peer acts" means acts committed by one individual against another when there is physical abuse with intent to harm; verbal abuse with intent to intimidate, harass, or humiliate; any sexual abuse; any exploitation; or intentional misappropriation of property of significant value.

(m) Prohibited sexual relations. "Prohibited sexual relations" means an MR/DD employee engaging in consensual sexual conduct or having consensual sexual contact with an individual who is not the employee's spouse, and for whom the MR/DD employee was employed or under contract to provide care at the time of the incident and includes persons in the employee's supervisory chain of command.

(n) Rights code violation. "Rights code violation" means any violation of the rights enumerated in *section 5123.62 of the Revised Code* that creates a reasonable risk of harm to the health or safety of an individual.

(o) Unapproved behavior support. "Unapproved behavior support" means the use of any aversive strategy or intervention implemented without approval by the human rights committee or behavior support committee or without informed consent.

(p) Unknown injury. "Unknown injury" means an injury of an unknown cause that is not considered possible abuse or neglect and that requires treatment that only a physician, physician's assistant, or nurse practitioner can provide.

(q) Unscheduled hospitalization. "Unscheduled hospitalization" means any hospital admission that is not scheduled unless the hospital admission is due to a condition that is specified in the individual service plan or nursing care plan indicating the specific symptoms and criteria that require hospitalization.

(14) "MR/DD employee" means any of the following:

- (a)** An employee of the department.
- (b)** An employee of a county board.
- (c)** An employee in a position that includes providing specialized services to an individual.

(15) "Primary person involved" (PPI) means the person alleged to have committed or to have been responsible for the abuse, exploitation, failure to report, misappropriation, neglect, prohibited sexual relations, rights code violation, or suspicious or accidental death.

(16) "Provider" means any person or entity that provides specialized services and that is subject to certification, licensure, or regulation by the department regardless of source of payment. "Provider" includes a county board providing services and a county board contracting entity as defined in *section 5126.281 of the Revised Code* when providing specialized services.

(17) "Specialized services" means any program or service designed and operated to serve primarily individuals, including a program or service provided by an entity licensed or certified by the department.

(18) "Unusual incident " (UI) means an event or occurrence involving an individual that is not consistent with routine operations, policies and procedures, or the care or individual service plan of the individual, but is not an MUI. Unusual incidents (UIs) include, but are not limited to, medication errors; falls; peer-to-peer incidents that are not MUIs; overnight relocation of an individual due to fire, natural disaster, or mechanical failure; and any injury to an individual that is not an MUI.

(19) "Working day" means Monday, Tuesday, Wednesday, Thursday, or Friday except when that day is a holiday as defined in *section 1.14 of the Revised Code*.

(D) Reporting requirements (1) All incidents of possible abuse, including misappropriation, or neglect, of any individual, as defined in *section 5123.61 of the Revised Code*, shall be reported to the local law enforcement entity with jurisdiction and the county board or the to the public children's services agency and the county board. The county board shall report these incidents on ITS and indicate the entity or entities notified.

(2) Reports of MUIs involving abuse, neglect, exploitation, misappropriation, or death shall be filed in all cases regardless of where the incident occurred, and all requirements of this rule shall be followed. Reports regarding the remaining categories of MUIs shall be filed and the requirements of this rule followed only when the incident occurs in a program operated by a county board or when the individual is being served by a licensed or certified provider.

(3) Immediately upon identification or notification of an MUI, the provider or county board, when acting as the provider for the individual, shall take all reasonable measures to ensure the health and safety of any at-risk individuals. The provider and county board shall discuss any disagreements regarding reasonable measures in order to resolve them. If the provider and county board are unable to agree on reasonable measures to ensure the health and safety of at-risk individuals, the department shall make the determination. Such measures shall include:

(a) Immediate and ongoing medical attention, as appropriate;

(b) Removal of an employee from direct contact with any at-risk individual when the employee is alleged to have been involved in abuse or neglect until such time as the provider has reasonably determined that such removal is no longer necessary;

(c) Other necessary measures to protect the health and safety of at-risk individuals.

(4) Immediately upon receipt of a report or notification of an allegation, the county board shall:

(a) Ensure that all reasonable measures necessary to protect the health and safety of any at-risk individual have been taken;

(b) Determine if additional measures are needed;

(c) Notify the department if the circumstances in paragraph (I) of this rule that require a department-directed investigation are present. Such notification shall take place on the first working day the county board becomes aware of the incident.

(5) The provider or county board staff shall immediately, but no later than four hours after discovery of the incident, notify the county board through means identified by the county board of the following incidents or allegations:

- (a) Abuse.
- (b) Exploitation.
- (c) Misappropriation.
- (d) Neglect.
- (e) Suspicious or accidental death.
- (f) When the provider has received inquiries from the media regarding an MUI.

(6) For all MUIs, including those listed in paragraph (D)(5) of this rule, all agency providers and county boards as a provider shall submit a written incident report to the county board no later than three p.m. the next working day following initial knowledge of a potential or determined MUI. The report shall be submitted in a format prescribed by the department. Individual providers shall make the notification to the county board contact person designated to receive or manage these reports, no later than three p.m. the next working day following initial knowledge of a potential or determined MUI.

(7) The county board shall enter preliminary information regarding the incident on the ITS and in the manner prescribed by the department by three p.m. on the working day following notification by the provider or becoming aware of the MUI.

(8) When a provider has placed an employee on leave or otherwise taken protective action pending the outcome of the investigation, the county board or department, as applicable, shall keep the provider apprised of the status of the investigation so that the provider can resume normal operations as soon as possible consistent with the health and safety of any at-risk individuals.

(9) If the provider is a developmental center, all reports required by this rule shall be made directly to the department or as specified by the department.

(10) The county board shall have a system that is available twenty-four hours a day, seven days a week, to receive and respond to all reports required by this rule. The county board shall communicate this system in writing to all providers in the county and to the department.

(E) Alleged criminal acts The provider or county board shall immediately report to the law enforcement entity having jurisdiction of the location where the incident occurred, any allegation of abuse, including misappropriation, or neglect, which may constitute a criminal act. The county board shall ensure that the notification has been made.

(F) Abused or neglected children All allegations of abuse or neglect as defined in *section 2151.03* and *section 2151.031 of the Revised Code* of an individual under the age of twenty-one years shall be immediately reported to the local public children's services agency. The notification may be made by the provider or the county board. The county board shall ensure that the notification has been made.

(G) Notification requirements (1) The provider, including a county board as a provider, shall make the following notifications, as applicable, when the incident or discovery of the incident occurs when such provider has responsibility for the individual. The notification shall be made on the same day the incident or discovery of the incident occurs and include immediate actions taken.

- (a) Guardian or advocate selected by the individual or other person whom the individual has identified.
- (b) Service and support administrator serving the individual.
- (c) Licensed or certified residential provider.
- (d) Staff or family living at the individual's home who have responsibility for the individual's care.

(2) All notifications or efforts to notify shall be documented. The county board shall ensure that all required notifications have been made.

(3) Notification shall not be made if the person to be notified is the PPI, the PPI's spouse, or the PPI's significant other.

(4) Notification to a person is not required when the report comes from such person or in the case of a death when the family is already aware of the death.

(5) In any case where law enforcement has been notified of an alleged crime, the department may provide notification of the incident to any other provider, developmental center, or county board for whom the PPI works, for the purpose of ensuring the health and safety of any at-risk individual. The notified provider or county board shall take such steps necessary to address the health and safety needs of any at-risk individual and may consult the department in this regard. The department shall inform any notified entity as to whether the incident is substantiated. Providers, developmental centers, or county boards employing a PPI shall notify the department when they are aware that the PPI works for another provider.

(H) General investigation requirements (1) All MUIs require an investigation meeting the requirements established in either appendix A or appendix B to this rule. Investigations shall be conducted by investigative agents certified under rule 5123:2-5-07 of the Administrative Code.

(2) Each county board shall employ at least one investigative agent or contract with a person or governmental entity for the services of an investigative agent. An investigative agent shall be certified by the department. All investigative agents shall annually receive department-approved training. Except for department-directed investigations as provided for in paragraph (1) of this rule, the investigative agent is responsible for conducting investigations for all MUIs.

(3) Developmental center investigators are considered certified investigative agents for the purpose of this rule.

(4) County board staff may assist the investigative agent by gathering documents or entering information into the ITS or other administrative or clerical duties that are not specific to the investigative agent role.

(5) Except when law enforcement or the public children's services agency is conducting the investigation, the investigative agent shall conduct all interviews for MUIs unless the investigator determines the need for assistance with interviewing an individual. For an MUI occurring at an ICF/MR, the investigative agent may utilize interviews conducted by the ICF/MR or conduct his/her own interviews. If the investigative agent determines the information is reliable, the investigative agent may utilize other information received from law enforcement, the public children's services agency, or providers in order to meet the requirements of this rule. If a requirement cannot be met, the investigative agent shall document that the requirement cannot be met and the reason(s) therefore.

(6) Except when law enforcement or the public children's services agency has been notified and is considering conducting an investigation, the county board shall immediately, but no later than twenty-four hours after the discovery of any of the incidents listed below, commence and document the initiation of the investigation. If law enforcement or the public children's services agency notifies the county board that it has declined to investigate, the county board shall commence the investigation within twenty-four hours of such notification. "Commencing an investigation" means any of the actions defined as such in appendix A to this rule.

(a) Abuse.

(b) Exploitation.

(c) Misappropriation.

(d) Neglect.

(e) Prohibited sexual relations.

(f) Rights code violation.

(g) Suspicious or accidental death.

(h) Any other MUI that the county board determines should be initiated immediately or within twenty-four hours.

(7) For all MUIs other than those listed in paragraph (H)(6) of this rule, the county board shall commence an investigation within a reasonable amount of time based upon the initial information received or obtained and consistent with the health and safety of all at-risk individuals, but no later than three working days from notification or identification by the county board.

(8) If the provider is an ICF/MR, the ICF/MR shall meet all applicable federal regulations, including 42 C.F.R. 483.420 (dated October 1, 2005).

(9) An ICF/MR is required to conduct an investigation regardless of where an incident involving an individual of the ICF/MR occurs. If the MUI involves an individual who resides in an ICF/MR, including a developmental center, and the incident occurs at a program operated by a county board, it is the responsibility of the ICF/MR to complete an investigation and assure that the investigation complies with federal guidelines. The investigative agent may utilize information from the ICF/MR investigation to meet the requirements of this rule or conduct a separate investigation. Copies of the full investigation shall be provided to the ICF/MR and the county board. All requirements in this rule shall be met. The department shall resolve any conflicts that arise. This paragraph shall not affect the responsibility of an ICF/MR to investigate all reports of abuse or neglect and to conduct an investigation in accordance with all applicable federal regulations, including 42 C.F.R. 483.420 (dated October 1, 2005).

(10) When an agency provider, excluding a developmental center, conducts an internal review of an incident for which an MUI has been filed, the agency shall submit the results of its internal review of the incident, including statements and documents, to the county board within fourteen calendar days of the agency becoming aware of the incident.

(11) All MR/DD employees shall cooperate with administrative investigations conducted by entities authorized to conduct investigations. Providers and county boards shall respond to requests for information within the timeframe requested. The timeframes identified shall be reasonable.

(12) The investigative agent shall complete a report of the investigation and submit it for closure in the ITS within thirty working days unless the department grants an extension.

(13) The report shall follow the format prescribed by the department. The investigative agent shall include the initial allegation, a list of persons interviewed and documents reviewed, a summary of each interview and document reviewed, and a findings and conclusions section which shall include the cause and contributing factors to the incident and the facts that support the findings and conclusions.

(14) The county board may request extensions of the time period for submission of the report. The department shall grant such extensions for good cause. If an extension is granted, the department may require submission of interim reports and may identify alternative actions to assist with the timely conclusion of the report.

(I) Department-directed investigations (1) The department shall conduct the administrative investigation when the MUI includes an allegation against:

(a) The superintendent of a county board or developmental center.

(b) The executive director or equivalent of a regional council of governments.

(c) A management employee who reports directly to the superintendent of the county board, the superintendent of a developmental center, or executive director or equivalent of a regional council of governments.

(d) An investigative agent.

(e) A service and support administrator.

(f) An MUI contact employed by a county board.

(g) A current member of a county board.

(h) A person having any known relationship with any of the persons specified in paragraphs (I)(1)(a) to (I)(1)(g) of this rule when such relationship may present a conflict of interest or the appearance of a conflict of interest.

(i) An employee of a county board when it is alleged that the employee is responsible for an individual's death, has committed sexual abuse, engaged in prohibited sexual activity, or committed physical abuse or neglect resulting in emergency room treatment or hospitalization.

(2) A department-directed investigation or investigation review may be conducted following the receipt of a request from a county board, developmental center, provider, individual, or guardian if the department determines that there is a reasonable basis for the request.

(3) The department may conduct a review or investigation of any MUI or may request that a review or investigation be conducted by another county board, a regional council of governments, or any other governmental entity authorized to conduct an investigation.

(J) Written summaries (1) No later than five calendar days following the county board's, developmental center's, or department's recommendation via the ITS that the report be closed, the county board or developmental center shall provide a written summary of the investigation including the allegations, the facts and findings, including as applicable, whether the case was substantiated or unsubstantiated, and preventive measures implemented in response to the incident to:

(a) The individual or individual's legal guardian or an advocate selected by the individual, as applicable;

(b) The licensed or certified provider and provider at the time of the incident; and

(c) The service and support administrator serving the individual or other person selected by the individual to coordinate services for the individual.

(2) In the case of an individual's death, the written summary shall be provided to the individual's family, only upon request by the individual's family.

(3) The written summary shall not be provided to the PPI, the PPI's spouse, or the PPI's significant other. No later than five working days following the closure of a case, the county board shall make a reasonable attempt to notify the PPI as to whether the MUI has been substantiated, unsubstantiated/insufficient evidence, or unsubstantiated/unfounded.

(4) Except for an ICF/MR, if a service and support administrator is not assigned, a county board designee shall be responsible for ensuring the preventive measures are implemented based upon the written summary.

(5) An individual, individual's guardian, individual's advocate, or provider may dispute the findings by submitting a letter of dispute and supporting documentation to the county board superintendent, or to the director of the department if the department has conducted the investigation, within fifteen calendar days following receipt of the summary. An individual may receive assistance from any person selected by the individual to prepare a letter and provide supporting documentation.

(6) The superintendent or designee or the director or designee, as applicable, shall consider the letter of dispute, the supporting documentation, and any other relevant information and issue a determination within thirty calendar days of such submission and take action consistent with such determination, including confirming or modifying the findings or directing that more information be gathered and the findings be reconsidered.

(7) In cases where the letter of dispute has been filed with the county board, the disputant may dispute the final findings made by the county board by filing those findings and any documentation contesting such findings as are disputed with the director of the department within fifteen calendar days of the county board determination. The director will issue a decision within thirty calendar days.

(K) Review, prevention, and closure of MUIs (1) County boards and agency providers shall implement a written procedure for the internal review of all MUIs and shall be responsible for taking all reasonable steps necessary to prevent the reoccurrence of MUIs.

(2) The individual's team, including the county board and agency provider, shall collaborate on the development of preventive measures to address the causes and contributing factors to the incident. The team members shall jointly determine what constitutes reasonable steps necessary to prevent the reoccurrence of MUIs. If there is no service and support administrator, individual team, or agency provider involved with the individual, a county board designee shall ensure that preventive measures as are reasonably possible are fully implemented.

(3) The department shall review reports submitted by a county board or developmental center for incidents listed in paragraph (K)(4) of this rule. The department may review any other report and may obtain additional information necessary to consider the report, including copies of all investigation reports that have been prepared. Such additional information shall be provided within the time period specified by the department.

(4) The department shall review and close reports regarding all incidents listed below:

- (a)** Abuse.
- (b)** Death.
- (c)** Exploitation.
- (d)** Failure to report.
- (e)** Misappropriation.
- (f)** Missing individual.
- (g)** Neglect.
- (h)** Peer-to-peer acts.
- (i)** Prohibited sexual relations.
- (j)** Rights code violation.
- (k)** Unapproved behavior support.
- (l)** Unknown injury.
- (m)** An incident that is the subject of a director's alert.
- (n)** Any MUI investigated by the department.

(5) The county board shall review and close reports regarding all incidents listed below:

- (a)** Attempted suicide.
- (b)** Known injury.
- (c)** Law enforcement.
- (d)** Medical emergency.
- (e)** Unscheduled hospitalization.

(6) The department may review any case to ensure it has been properly closed and shall conduct sample reviews to ensure proper closure by the county board. The department may reopen any investigation that does not meet requirements of this rule. The county board shall provide any information deemed necessary by the department to close the case.

(7) The department and the county board shall consider the following criteria when determining whether to close a case:

- (a)** Whether sufficient reasonable measures have been taken to ensure the health and safety of any at-risk individual;
- (b)** Whether a thorough investigation has been conducted consistent with the standards for protocol and non-protocol investigations;
- (c)** Whether the team, including the county board and provider, collaborated on developing preventive measures to address the causes and contributing factors;
- (d)** That the county board has ensured that the preventive measures have been implemented to prevent recurrence;
- (e)** Whether the incident is part of a pattern or trend as flagged through ITS requiring some additional action;
- (f)** Whether all requirements set forth in statute or rule, including appendix A and appendix B to this rule, have been satisfied.

(8) As soon as possible, but no later than five working days after a case is closed, the county board shall provide notification to the provider that the case was closed.

(L) Analysis of MUI trends and patterns (1) All agency providers including county boards as providers shall send the county board a quarterly report regarding MUI trends and patterns. The county board shall review all individual providers quarterly for MUI trends and patterns. The semi-annual review shall be cumulative for the first two quarters and include an in-depth analysis. Each review periods shall include the preventive measures taken to address the trends and patterns.

(2) All reviews and analyses shall be completed with thirty calendar days following the end of the quarter.

(3) County boards shall conduct the analysis and follow-up for all entities operated by county boards such as workshops, schools, transportation, and for all individual providers. The county board shall send its analysis and follow-up actions to the department by August thirty-first for the semi-annual review and by February twenty-eighth for the annual review.

(4) Each agency provider shall send its analysis and follow-up actions to the county board for all programs operated in the county by August thirty-first for the semi-annual review and by February twenty-eighth for the annual review. The county board shall keep the analysis and follow-up actions on file and make them available to the department upon request.

(5) The county board and department shall review the analysis to ensure that all issues have been reasonably addressed to prevent reoccurrence.

(6) The county board shall ensure that trends and patterns of MUIs are included and addressed in the affected individual's service plan.

(7) Each county board or as applicable, each council of governments to which the county board belongs, shall have a committee that reviews trends and patterns of MUIs. The committee shall be made up of a reasonable representation of the county board(s), provider agencies, families, and other stakeholders deemed appropriate by the committee.

(8) The role of the committee shall be to review and share the county or council of governments aggregate data prepared by the county board or council of governments to identify trends, patterns, or areas for improving the quality of life for individuals supported in the county or counties.

(9) The committee shall meet each September to review and analyze data for the first six months of the calendar year and each March to review and analyze data for the preceding calendar year. The county board or council of governments shall send the aggregate data prepared for the meeting to all participants ten calendar days in advance of the meeting. The county board or council of governments shall hold the first meeting no later than September 30, 2007.

(10) The county board or council of governments shall record and maintain minutes of each meeting, distribute the minutes to members of the committee, and make the minutes available to any person upon request.

(11) The department shall ensure follow-up actions identified by the committee have been implemented.

(12) The department shall prepare a report on trends and patterns identified through the process of reviewing MUIs. The department shall periodically, but at least semi-annually, review this report with a committee appointed by the director of the department which shall consist of at least six members who represent various stakeholder groups, including Ohio legal rights service and the Ohio department of job and family services. The committee shall make recommendations to the department regarding whether appropriate actions to ensure the health and safety of individuals served have been taken. The committee may request that the department obtain additional information as may be necessary to make recommendations.

(M) UI requirements (1) Each agency provider and county board as a provider shall develop and implement a policy and procedure that:

(a) Identifies what is to be reported as a UI which shall include UIs as defined by this rule;

(b) Requires anyone who becomes aware of a UI to report it to the person designated by the provider who can initiate proper action;

(c) Requires the report to be made no later than twenty-four hours after the occurrence of the incident;

(d) Requires appropriate actions be taken to protect the health and safety of any at-risk individuals.

(2) The agency provider and county board as a provider shall ensure that all staff are trained and knowledgeable regarding the policy and procedure.

(3) If the UI occurs at a site operated by the county board or at a site operated by an entity with which the county board contracts, the county board or contract entity shall notify the licensed provider or staff or family, as applicable, at the individual's home. The notification shall be made the same day that the incident is discovered.

(4) Individual providers shall make reports to the person designated by the county board on the day the UI is discovered. The county board shall designate a person responsible for logging these incidents.

(5) Each agency provider and county board as a provider shall review all UIs as necessary, but no less than monthly, to ensure appropriate preventive measures have been implemented and trends and patterns identified and addressed as appropriate.

(6) The UI reports, documentation of identified trends and patterns, and corrective action shall be made available to the county board and department upon request.

(7) Each agency provider and county board as a provider shall maintain a log of all UIs. The log shall include, but not be limited to, the name of the individual, a brief description of the incident, any injuries, time, date, location, and preventive measures.

(8) The county board shall review, on a monthly basis, a representative sampling of provider logs, individual provider log(s), and logs where the county board is a provider for the purpose of ensuring that all MUIs required to be reported have been reported and that trends and patterns have been identified and addressed. The sampling shall be made available to the department for review upon request.

(9) When the county board is a provider of relevant services, the department shall review, on a monthly basis, a representative sampling of county board logs. The county board shall submit the specified logs to the department upon request. The department shall review the logs to ensure all MUIs have been reported and trends and patterns have been identified and addressed.

(10) The agency provider and the county board as a provider shall ensure that trends and patterns of UIs are included and addressed in each individual's service plan.

(N) Oversight (1) The department shall conduct such reviews of county boards and providers as necessary to ensure the health and safety of individuals and compliance with the requirements of this rule. Failure to comply with the requirements of this rule may be considered by the department in any regulatory capacity, including certification, licensure, and accreditation.

(2) The department shall provide access to the ITS to the single state medicaid agency and the Ohio legal rights service in accordance with *section 5123.604 of the Revised Code*.

(O) Access to records (1) Reports made under *section 5123.61 of the Revised Code* and this rule are not public records as defined in *section 149.43 of the Revised Code*. Records may be provided to parties authorized to receive them in accordance with *sections 5123.613 and 5126.044 of the Revised Code*, to any governmental entity authorized to investigate the circumstances of the alleged abuse or neglect, misappropriation, or exploitation and to any party to the extent that release of a record is necessary for the health or safety of an individual.

(2) A county board shall not review, copy, or include in any report required by this rule personnel records of an employee that are confidential under state or federal statutes or rules, including medical and insurance records, workers' compensation records, employment eligibility verification (I-9) forms, and social security numbers.

(3) A county board may review, but not copy, personnel records that include confidential information about an employee which may include, but is not limited to, payroll records, performance evaluations, disciplinary records, correspondence to employees regarding status of employment, and criminal records checks. The county board may include in reports required by this rule information about the results of the review of personnel records specified in this paragraph.

(4) A county board may review and copy personnel records prepared in connection with the provider's daily operations, such as training records, timesheets, and work schedules.

(5) Upon the department's request, the provider shall provide to the department copies of personnel records that are not confidential.

(6) The provider may redact any confidential information contained in a record as identified in paragraph (O)(2) of this rule before the copies are provided to the county board or the department.

(7) Any party entitled to receive a report required by this rule may waive receipt of the report. Any waiver of receipt of a report shall be made in writing.

(P) Training (1) All agency providers and county boards shall ensure their staff are trained on the requirements of this rule regarding the identification and reporting of MUIs and UIs prior to unsupervised contact with any individual and in all cases, no later than thirty calendar days after employment. Thereafter, all employees shall receive training during each calendar year which shall include a review of health and safety alerts released since the previous calendar year's training.

(2) All individual providers shall follow the requirements for initial training on the provisions of this rule according to their certification requirements and shall receive annual training from the date of certification on identification and reporting of MUIs and UIs and health and safety alerts released since the previous calendar year's training.

(3) All agency providers and county boards shall ensure that all staff responsible for administrative compliance with this rule receive training on all applicable requirements of this rule at the time of employment or no later than ninety calendar days from the time of employment and each calendar year thereafter. The training shall include the review of health and safety alerts released since the previous calendar year's training.

(4) The county board shall ensure that staff responsible for conducting investigations receive initial and annual department-approved training.

(5) The department shall provide technical assistance and training to providers and county boards as necessary. The department shall periodically monitor compliance with the provisions of this rule.

History:Replaces: 5123:2-17-02, 5123:2-17-04.

Effective: 07/01/2007.