

**Legal Update**  
**Ohio Association of Special Needs Professionals, an affiliated department of OEA**  
**February 25, 2023**  
**Rachel M. Reight**  
**Baasten, McKinley & Co., L.P.A.**

**New Director**

Kim Hauck – New Ohio Department of Developmental Disabilities Director  
-Visited all 88 County DD’s since appointment

Vacancy rates among DSPs has increased over the last three years. From 2018 to 2020, DSPs have seen an 11 percent increase in vacant part-time positions (16% to 27%) and a four percent increase in vacant full-time positions (13% to 17%). This represents approximately 8,400 vacancies in the DSP workforce of approximately 40,000. (DODD, +2020 DSP Compensation Survey)

**Employment Requirements Waiver**

For good cause shown, Ohio Adm. Code 5123-2-08(J)(1)(b) and Ohio Adm. Code 5123:2-3-01(F)(1)(c) (effective 12/1/22 this will be replaced with Ohio Adm. Code 5123-3-01(F)(2)) are waived effective September 30, 2022, through September 30, 2023. During this time, agency providers and licensed facilities are permitted to hire direct support professionals without a high school diploma or GED. The agency or licensed facility must confirm the direct support professional meets all other qualifications and must continue to ensure individuals with developmental disabilities receive quality services provided by capable staff. Direct support professionals hired during this time without a high school diploma or GED will be permitted to work for the same agency after the waiver period if they maintain continuous employment with that agency and comply with all other applicable statutes and rules. Rendered this 13 day of September 2022.

**OAC 5123-2-06 – Effective October 1, 2022**

Restrictive measures (including restriction of rights) may only be implemented in two scenarios:

- Direct and serious risk of harm to self or others
- Likelihood that legal sanction would occur if action was not taken by DSP
  - i.e., eviction, arrest, incarceration, etc.

**\*includes mobilities devices**

**\*must cease once risk of harm or potential for legal sanction has subsided**

**\*Time outs are limited to 30 minutes per incident or 1 hour total per 24 hours**

Other significant changes:

-Use of chemical restraint is only to be used when a clear risk of harm to self or others, and other measures are not effective. (Not intended to interfere with doctor patient relationship/prescriptions)

-If medication causes blunt suppression, team may meet to reconsider medicine/dosage.

-Can only restrict food and/or drink when medically necessary. As such, a proper diagnosis and immediate harm need to be shown before food and drink can be withheld. Minimal intervention is the goal.

-“Shock Therapy” or electroconvulsive therapy. Now rare, and more targeted. Must be performed by licensed personnel.

New definition of chemical restraint:

(1) "Chemical restraint" means the use of medication in accordance with scheduled dosing or pro re nata ("PRN" or as needed) for the purpose of causing a general or non-specific blunt suppression of behavior (**i.e., the effect of the medication results in a noticeable or discernible difference in the individual's ability to complete activities of daily living**) or for the purpose of treating sexual offending behavior.

(a) A behavioral support strategy may include chemical restraint only when an individual's actions pose risk of harm or an individual engages in a precisely-defined pattern of behavior that is very likely to result in risk of harm.

(b) A medication prescribed for the treatment of a physical or psychiatric condition in accordance with the standards of treatment for that condition and not for the purpose of causing a general or non-specific blunt suppression of behavior, is presumed to not be a chemical restraint.

(c) "Chemical restraint" does not include a medication that is routinely prescribed in conjunction with a medical procedure for patients without developmental disabilities.

Prohibited measures:

- Prone restraint
- Mechanical/Manual Restraint that has the potential to restrict breathing or that may be medically contraindicated
- Mechanical/Manual Restraint that causes pain or harm
- Disabling communication device(s)
- Denial of food (except above exceptions)
- Placing in room with no light
- Subjecting to Damaging or painful sound

- Humiliating or derogatory treatment
- Squirting individuals with anything to induce proper behavior or as a punishment
- Use restrictive measures for punishment or retaliation

### **Medicaid Waivers**

The Level One Waiver is a Medicaid waiver for people with developmental disabilities who meet certain eligibility criteria. The waiver allows people to stay in their homes and get support, rather than require them to live in an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID).

- Budget; \$45,000 for adult, \$30,000 for children
- Will update at first redetermination after July 1, 2022
- Participant Directed Goods and Services (PDGS) - \$2500 cap

The Self-Empowered Life Funding Waiver is usually called the SELF Waiver for short. The SELF Waiver is a good fit for people who want to manage some of their services. If you have a SELF Waiver, you can be in charge of hiring and training the people who provide your services. You can manage your budget for the services you want.

- No cap for PDGS
- Home delivered meals added after July 1, 2022
  - Up to twice a day
  - May request kosher, standard or therapeutic (ex. Low sodium)

Pools, Spas, saunas, food, items of general utility, and internet service are prohibited under PDGS

Items over \$10,000 require DODD approval

### **OAC 5123-3-01**

#### **Direct Service Providers Training in first 30 days – Must be complied with starting March 1, 2023**

- Person-Centered planning and provision services
- Facilitating community-participation and integration
- Provisions of rule 5123-17-02 relevant to DSP's duties, including review of Health and Welfare Alerts
- Empathy-based care

Specific training for each facility with respect to fire safety equipment and emergency response plans

#### **Annual DSP Training (Calendar year)**

- 2 hours of DODD training relevant to DSP's duties

-6 hours of provided by operator/employer

- Major unusual and unusual incident reporting (MUI/UI) and prevention
- Health and welfare alerts
- Emergency response
- Services provided: Quality care, health and safety, and positive behavior support

### **Support Staff**

**\*Must Work in a residential facility (if they work in office with no residents, not required)**

- Must be within 30 days: Fire safety, operation of fire safety equipment, and emergency response plan
- Must be annually: DODD rights of individuals, MUI and UI reporting and prevention, Health and welfare alerts

Training requirements are now found in appendices:

- Appendix A – Administrators
- Appendix B – DSP
- Appendix C – Support Staff
- Appendix D – Volunteers

### **Technology First**

5123-2-01: Technology First Policy

Each county board and each intermediate care facility for people with intellectual disabilities will develop and implement a written local policy to enact the technology first policy:

- Within 180 days after rule effective date for county boards and existing intermediate care facilities (ICFs)
- Within 180 days of licensure of a new ICF

The Technology First Policy will ensure that technology solutions will:

- 1) Address ability to increase capacity for use of technology solutions and outline specific steps, as applicable, to be taken including, when applicable, establishment of benchmarks for increasing the number of individuals who benefit from the use of technology solutions.
- 2) Identify strategies for increasing the level of knowledge, skill, and comfort of staff related to assessing how technology may help meet needs or achieve outcomes and the use of technology solutions.
- 3) Annually review and update, as applicable, its goals and objectives related to increasing the use of technology solutions by individuals served.

### **HB 169 of 2021**

On December 23, 2021, Governor Mike DeWine signed HB 169 into law. Among other investments, the bill invests \$529 million of American Rescue Plan Act (ARPA) home and

community-based services (HCBS) for provider relief across multiple systems including \$210 million specifically for waiver providers in the developmental disability system. The bill also invests \$60 million for ICF provider relief payments to support frontline staff.

This \$210 million for HCBS provider relief payment will reflect 10 percent of claims submitted and paid for services delivered from 11/1/2020 through 10/31/2021. Once the Appendix K approval is received, DODD will issue these one-time payments as quickly as possible. Both agency and independent providers who have billed for the following services are included in the HCBS provider relief payments:

- Career Planning
- Vocational Habilitation
- Independent Employment Support
- Group Employment Support
- Adult Day Support
- Non-Medical Transportation
- Informal Respite
- Community Respite
- Transportation
- Homemaker/Personal Care and On-Site/On-call HPC
- Homemaker/Personal Care Services - Daily Billing Unit
- Participant-Directed HPC
- Shared Living
- Residential Respite

### **Ohio 811 Program**

The Ohio 811 Program is a demonstration program administered by the Ohio Housing Finance Agency (OHFA). This program allows extremely low-income households comprised of one or more adults with a disability to live in an integrated setting through rental subsidy and access to supportive services.

This program is not available to the public. OHFA works with the Ohio Department of Medicaid, the Ohio Department of Developmental Disabilities and the Ohio Department of Mental Health & Addiction Services to place individuals eligible for community-based, long-term care services on a statewide waiting list for apartments.

The Ohio Housing Locator maintains a listing of affordable rental housing properties throughout the state. The Coalition on Homelessness and Housing in Ohio (COHHIO) offers a Resource Guide to organizations with housing and homelessness resources. OHFA also provides links to HUD eviction guidance and legal resources on our Housing Assistance Information page.

### **Community Capital Assistance Program**

The Community Capital Assistance Program administers funds made available by the state used to develop community housing for people with developmental disabilities who are or will be receiving waiver services including:

- people leaving a state-operated developmental center,
- people leaving a private or county-operated intermediate care facility,
- people who prefer to live in their community but who have complex care needs that make it difficult to
  - receive services outside of a developmental center or intermediate care facility,
  - and
  - people on a county board of developmental disabilities Waiting List for waiver services.

When capital housing funds are available, applications for funding may be submitted to DODD by county boards of developmental disabilities, nonprofits, and housing corporations.

Applications for funding can include settings that:

- are licensed or non-licensed settings (not intermediate care facilities),
- have four or fewer people living together,
- or
- are single family homes, duplexes, quad-plexes, or condos/

Applications may not include settings that are mobile homes or trailers, or units that are located next to one another, if it gives the appearance of clustering.

When funds are available, DODD will fund up to 120% of a county's median home value as determined by the Ohio Development Services Agency. The purchase price of the home cannot exceed 110% of the appraised value of the home per OAC 5123-1-03.

Funds from the department are directed to the county board of developmental disabilities, which will have a contract with a local nonprofit housing corporation that owns and manages the property.

Funding is based on projected housing development and project cost and cannot exceed 90% of the project cost.

Funding is also available for renovations and accessibility modifications for existing homes owned by a nonprofit housing corporation. Renovation and accessibility projects may be funded up to 35% of appraised home value.

### **New Ohio Incident Tracking and Monitoring System**

New APP launched for The Ohio Incident Tracking and Monitoring System, or OhioITMS, is an online reporting system for tracking, monitoring, and providing oversight involving health and welfare incident management. Protecting vulnerable victims is a critical component within the service delivery model for Ohio. OhioITMS provides the technical structure and support to enhance our quality improvement, health and welfare efforts. The work you do every day is critical to positive outcomes. Thank you for all you do to keep individuals healthy and safe.

***Portage Cnty. Educators Ass'n for Developmental Disabilities-Unit B, OEA/NEA v. State Emp. Rels. Bd., 2022-Ohio-3167***

Protesters/strikers can protest at the homes of board members.

-“4117.11(B)(7) thus cannot survive the strict scrutiny applicable to content-based regulations of expressive activity that is protected by the First Amendment.”

***State v. Goins, 2022-Ohio-985, ¶ 26, 187 N.E.3d 42, 51, appeal not allowed, 2022-Ohio-2490, ¶ 26, 167 Ohio St. 3d 1467, 191 N.E.3d 438***

The court concluded that the prosecution had presented sufficient evidence to prove Goins failed to review patient’s aftercare instructions and fill his pain-medication prescription was a "substantial" or "contributing" factor in causing patient’s serious physical harm. The court found that patient's serious physical harm was a foreseeable consequence of Goins' conduct, as an ordinarily prudent person would have anticipated that a failure to provide necessary medical care could result in serious physical harm to the vulnerable patient.

***Bowie v. Ohio Department of Developmental Disabilities***, Appellant was a direct support professional for M.T., an individual with profound disabilities who was non-verbal. Appellant was accused of pulling and pushing M.T. multiple times while walking from one location to another. On or about July 10, 2020, DODD issued a Notice of Opportunity for Hearing informing her that it was going to determine if the Appellant should be placed on the abuser registry pursuant to R.C. §5123.52.

- R.C. §5123.52 provides: (A) The department of developmental disabilities shall establish a registry of developmental disabilities employees consisting of the names of individuals included in the registry pursuant to section 5123.51 of the Revised Code.

\* \* \*

(D)(1) ...no person or government entity shall hire, contract with, or employ as a developmental disabilities employee an individual who is included in the registry.

(E) Information contained in the registry is a public record...

(C)(1) the department shall appoint an independent hearing officer to conduct any hearing conducted ... except that, if the hearing is regarding an employee of the department who is represented by a union, the department and a representative of the union shall jointly select the hearing officer.

(2)(a) ... no hearing shall be conducted ... until any criminal proceeding or collective bargaining arbitration concerning the same allegation has concluded. (there is an exception to this rule allowing the criminal matter to proceed in tandem if the prosecutor consents).

- (3) In conducting a hearing ..., the hearing officer shall do all of the following:
- (a) Determine whether there is clear and convincing evidence that the developmental disabilities employee has done any of the following:
    - (i) Misappropriated property of one or more individuals with developmental disabilities that has a value, either separately or taken together, of one hundred dollars or more.
    - (ii) Misappropriated property ...
    - (iii) Misappropriated prescribed medication ...
    - (iv) Knowingly abused such an individual;
    - (v) Recklessly abused or neglected such an individual, with resulting physical harm;
    - (vi) Negligently abused or neglected such an individual, with resulting serious physical harm;
    - (vii) Recklessly neglected such an individual, creating a substantial risk of serious physical harm;
    - (viii) Engaged in sexual conduct or had sexual contact with an individual with a developmental disability ...
    - (ix) Unreasonably failed to make a report ...
    - (x) Been convicted of or entered a plea of guilty to any of the following ...

The hearing officer found that the worker knowingly abused the individual with disabilities.

**Arbitration.** Whether the Employer violated Articles 12 and 18 in its probationary removal of the Grievant? If so, what is the appropriate remedy?

### **Article 12. Probationary Periods Non-Probationary Staff**

A. **The probationary period for all bargaining unit positions, except for Operations Department staff and Administrative Assistants, will be two years. ...The BDD may remove a probationary staff member during the probationary period; however, the staff member is entitled to challenge the removal through the grievance procedure for violations of the evaluation procedure.** In addition, the staff member will be entitled to the reasons for the removal. ...

B. The time period of temporary appointment to any bargaining unit position will be counted towards fulfillment of the probationary period as stipulated in Section A, above, if there is continuous service between the temporary and permanent assignment. In addition, occasional substitutes who are assigned on an indefinite basis will have their time on their last indefinite assignment counted towards fulfillment of the probationary period if they are appointed to fill a position on a



permanent basis and there is continuous service between the indefinite assignment and the permanent appointment.

C. At any other time during a staff member's employment, the BDD can remove for cause in accordance with the applicable laws of Ohio. The staff member will be permitted to grieve and arbitrate the removal under Article 7. Grievance Procedure.

### **Article 18. Performance Review Evaluation**

A. The staff member's current position description will be the basis for the Performance Review/Evaluation.

**B. There will be at least one Performance Review each year for the first three years of a staff member's employment, utilizing the Board's designated Performance Management Evaluation Tool as in Appendix B.** Should the Board change the Performance Management Tool during the course of this contract, the Board shall meet and confer with the Bargaining Unit Leadership prior to implementation. Beginning in the fourth year of employment, a staff member will have a Performance Review every three years. A supervisor may conduct a Performance Review in those years that a staff member is not scheduled for a Performance Review. A staff member may request an annual Performance Review. The Performance Review will include a conference with the supervisor.

**C. A Performance Review includes a fair and objective review of work competencies the Board deems necessary including, but not limited to, Job Knowledge and Expertise; Quality of Work; Relationship with Persons Served; Communication and Interpersonal Skills in areas specific to job duties as contained in a staff member's position description.** If 3 applicable, a review of productivity expectations as referenced in Article 18A may be included in the Performance Review. The productivity status (significantly below expectations, below expectations, meets expectations).

Grievant's position: The Grievant filed the grievance because: 1) the Employer did not conduct a performance review for her first year of employment; 2) the performance review was not fair and objective, as the comments contradicted each other and did not reflect her performance for the entire year; 3) there were no measurements to gauge improvement; 3) the materials she received did not inform her of her improvement; and 4) her supervisor never signed the work plan.

Employer's Position: The Grievant was removed during her probationary period in accordance with the contract and the Association failed to prove otherwise. As the moving party, the Association has the burden of proof. It must demonstrate that the removal violated the evaluation procedures and cannot do so. Article 18 requires the Employer to conduct "at least one performance review each year..." for probationary employees. The evaluation must include a fair

and objective review of a probationary employee's job performance based upon their position description.

Decision: The Arbitrator understands why the Association argues its case so vigorously. Here, the Grievant was a 13-year employee of the County. As the Association notes, the Grievant was employed with the County longer than her supervisor. She was familiar with many of the County's policies, procedures, and practices. A number of witnesses thought she was performing satisfactorily and were surprised by her removal.

While there must be at least one performance review each year, it is not specific as to the timing of the review. The first sentence spells out that there will be at least one review each year "for" the first three years. The parties could have negotiated that the review occurred "in" or "during" each year. They did not. The Arbitrator finds that Article 18.B does not require that each review occur during that year of employment. Here, that means that the Grievant's first review did not have to be during her first year of employment. This makes sense in that waiting until the year is completed allowed the review to cover her entire first year of employment.

### **Social Media**

- Types of social media
- Potential for abuse and/or misuse
- First Amendment Analysis:
  - o Whether speech may be 'fairly characterized' as addressing matters of 'public concern.'
  - o Whether the school board's interest in the effective and efficient fulfilment of its responsibilities to the public outweighs the employee's free speech rights.
  - o Whether the employee is speaking as a citizen or as an employee.

### **Texting**

- Public records on private devices
- Do you want to maintain public records on your private devices?