

14 NYCRR Part 522
Express Terms

A new Part 522 is added to Title 14 NYCRR to read as follows:

PART 522

**DIRECTORS OF MENTAL HYGIENE FACILITIES
AS REPRESENTATIVE PAYEES**

(Statutory Authority: Mental Hygiene Law §§7.09, 29.23, 33.07, 43.03,
20 C.F.R. §404.2040[d])

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§ 522.1 Background and intent.

(a) The Social Security Administration is a Federal government agency that administers two major benefit programs. The largest of these programs is the Retirement, Survivors, and Disability Insurance program (Social Security). The other is the Supplemental Security Income (SSI) program.

(b) The Social Security program protects employees and their families from a loss of earnings because of retirement, death, or disability. Social Security benefits are based on the earnings of an employee who has paid into the system by paying Federal Insurance Contributions Act tax for a specified period of time. An employee, or his or her family, can receive Social Security benefits based on retirement, disability, or death.

(c) The SSI program is a federal income maintenance program for aged, blind, and disabled persons with little or no income or resources. To receive SSI payments, a person must be age 65 or older, blind or disabled and must have limited income and resources.

(d) The Veterans Administration is a Federal government agency that administers benefit programs for veterans.

(e) The Social Security Administration Representative Payee Payment Program and the Veterans Administration provide assistance to persons who are unable to manage their federal benefits, permitting payment of the benefits to designated fiduciaries, referred to as “representative payees” by the SSA and as “fiduciaries” by the Veterans Administration, who receive and manage payments on behalf of beneficiaries. Other state and federal benefit programs may approve similar arrangements to assist beneficiaries who are not capable of handling their own benefits.

(f) In some cases, facility directors who serve as representative payees may receive lump sum retroactive benefits on behalf of a beneficiary; in other cases, facility directors may learn about a windfall payment due to an individual who is receiving services from the facility. In both situations, the payments may, in combination with other resources of the individual, render the individual ineligible for government benefits on which the individual relies or plans to rely upon discharge from the facility. In these cases, a Medicaid exception trust or similar device may provide a mechanism to preserve the assets for the benefit of the individual without rendering the individual ineligible for the needed benefits.

(g) The purpose of this regulation is to implement the provisions of Mental Hygiene Law Section 33.07(e) regarding the management and protection of monthly benefits and retroactive awards received by facility directors in the capacity of representative payee; the use of Medicaid exception trusts, including special needs trusts and similar devices; notice to qualified persons as defined by Mental Hygiene Law 33.16 regarding the intent of a facility director to apply to be an individual’s representative payee; and the appropriate establishment and maintenance of a discharge account for future needs of individuals for whom directors serve as fiduciaries.

§ 522.2 Applicability.

This Part shall apply to all facilities operated or licensed by the Office of Mental Health.

§ 522.3 Legal base.

(a) Section 7.09 of the Mental Hygiene Law authorizes the Commissioner to adopt regulations necessary and proper to implement any matter under his or her jurisdiction.

(b) Section 29.23 of the Mental Hygiene Law authorizes directors of facilities operated by the Office of Mental Health to receive or obtain funds or certain personal property due or belonging to individuals receiving services from their facilities up to an amount or value not exceeding twenty-five thousand dollars, and to seek to place, to the extent permissible by law, funds in excess of the appropriate eligibility level for government benefits into a Medicaid exception trust, including a special needs trust or similar device, after the needs of the individual have been met. The statute also mandates the director to seek to establish such a trust when the director receives a windfall payment on behalf of an individual which, in combination with other funds held on behalf of such person, would cause the individual to become ineligible for government benefits.

(c) Section 33.07 of the Mental Hygiene Law requires the Commissioner of the Office of Mental Health to promulgate regulations regarding the management and protection of funds received by facility directors as representative payees for individuals receiving services from their facilities. The statute also mandates the director of a facility operated by the Office of Mental Health to seek to establish a Medicaid exception trust, including a special needs trust or similar device, when the director receives a lump sum retroactive benefit, as defined in the statute, in his or her capacity as representative payee on behalf of an individual which, in combination with other funds held on behalf of such person, would cause the individual to become ineligible for government benefits.

(d) 20 C.F.R. Section 404.2040(d) provides that representative payees may not be required to use benefit payments to satisfy a debt of the beneficiary, if the debt arose prior to the first month for which payments are certified to a payee. If the debt arose prior to this time, a payee may satisfy it only if the current and reasonably foreseeable needs of the beneficiary are met.

(e) Section 43.03 of the Mental Hygiene Law recognizes that although the Commissioner of the Office of Mental Health is authorized to reduce or waive fees in cases of inability to pay or other reason, the patient, and any fiduciary or representative payee holding assets for him or her, or on his or her behalf are jointly and severally liable for the fees for services rendered to the patient.

§ 522.4 Definitions. For purposes of this Part:

(a) *Beneficiary* means an individual who is receiving Social Security or other federal benefits.

(b) *Discharge Account* means an account established for the benefit of an individual to facilitate his or her discharge from a facility into a less restrictive environment (e.g., for a security deposit on an apartment or utilities, the purchase of home furnishings).

(c) *Facility* means "facility" as defined in Mental Hygiene Law Section 1.03(6).

- (d) *Facility director* means the executive director of a State-operated psychiatric center or the executive director of a facility licensed by the Office of Mental Health.
- (e) *Fiduciary* means a person or entity who is authorized to hold money and property in trust for another individual and who has a legal duty to manage and use those assets in the best interests of the individual.
- (f) *Lump sum retroactive benefit* means a lump sum retroactive payment of a federal or state benefit that exceeds the expected monthly recurring amount for a reason other than a delay in processing an application, changing a representative payee or similar administrative delay.
- (g) *Medicaid exception trust* means a trust that contains the assets of the beneficiary and meets the criteria set forth in 42 U.S.C. Section 1396p(d)(4) and N.Y. Social Services Law Section 366.2(b)(2)(iii) such that both the principal and income of such trust is considered exempt for purposes of determining the beneficiary's eligibility for Medicaid and/or Supplemental Security Income.
- (h) *Office* means the New York State Office of Mental Health.
- (i) *Qualified Person* means a qualified person as defined in Mental Hygiene Law Section 33.16.
- (j) *Representative payee* means an individual or organization appointed by the Social Security Administration to receive and manage the Social Security or SSI benefits of another person or, for purposes of this regulation, any individual or organization appointed by a federal or state benefit program to receive and manage the benefits of another person as a fiduciary.
- (k) *Similar device* means an individual or pooled discretionary trust, funded pursuant to an agreement authorized by Mental Hygiene Law Section 43.03(b) by the Office of Mental Health or a fiduciary holding assets for the beneficiary, which maintains the beneficiary's eligibility for government benefits and, upon the beneficiary's death, provides for the remainder interest to be paid to the State for the unpaid cost of care and maintenance provided by the Office during the beneficiary's lifetime.
- (l) *Social Security Benefits* means benefits paid as retirement, survivors, and disability insurance pursuant to Title II of the Social Security Act.
- (m) *SSI Benefits* means Supplemental Security Income (SSI) benefits paid by the Social Security Administration under Title XVI of the Social Security Act for aged, blind, and disabled persons with little or no income or resources.

(n) *Treatment team* means the interdisciplinary team comprised of clinical staff that is responsible for developing and implementing a treatment plan for a patient or resident.

(o) *Windfall payment* means a one-time payment to a patient in a facility operated by the Office, such as a gift, an inheritance, lottery winnings, or court-ordered judgment or settlement.

§ 522.5 Determination of need for representative payee.

(a) When a question is raised as to whether a beneficiary is capable of managing his or her benefits, the treatment team or, in the case of a facility licensed by the Office, staff assigned to the beneficiary shall meet to determine whether a physician should examine the beneficiary and assess the beneficiary's capacity to manage or direct the management of benefits in his or her own best interest. This meeting shall be documented in the beneficiary's clinical or other appropriate record.

(b) In the event that the beneficiary has been referred for examination, a physician shall conduct the examination and notify the facility director regarding the physician's determination as to whether the beneficiary is capable of managing or directing the management of benefits in his or her own best interest.

(c) A facility director shall not apply to serve as fiduciary or representative payee for a beneficiary who is receiving services from a facility and does not already have a representative payee unless:

- (1) a physician determines that the beneficiary is not capable of managing or directing the management of benefits in his or her own best interest, which determination shall be documented in the beneficiary's clinical or other appropriate record; and
- (2) notice of the facility director's intent has been provided pursuant to Section 522.6(a) of this Part or, if notice has not been provided, the reason for not providing notice is documented in the beneficiary's clinical or other appropriate record.

§ 522.6 Notice to qualified persons of intent and application for representative payee status.

(a) Whenever a facility director intends to apply to be a fiduciary or representative payee of a beneficiary who is receiving services from the facility, the facility director shall give written notice to qualified persons, including the beneficiary, of the facility director's intent to make such application in a manner

consistent with federal and state laws governing the confidentiality of individually identifying health information.

- (1) The notice shall be provided at least five business days before the facility director applies to become fiduciary or representative payee.
 - (2) If the beneficiary would lose any benefits because of a delay in the facility director's application to become fiduciary or representative payee, the facility director may proceed with the application without prior notice or without the lapse of five business days. In such instances, the facility director shall provide the notice as soon as practicable after making the application or within the maximum time which is practicable between the notice and the application.
 - (3) A facility director shall not be required to provide notice pursuant to this section if the treating practitioner, as defined in Section 33.16 of the Mental Hygiene Law, determines that notice to a particular qualified person, including the beneficiary, would be clinically contraindicated or the beneficiary objects to such notice;
 - (4) The notice shall be deemed to have been provided if hand delivered or mailed by first class mail to the last known address of the recipient(s) of the notice.
 - (5) The notice to beneficiaries shall include information that the Mental Hygiene Legal Service is available to advise patients or facility residents regarding the application process.
- (b) When a facility director submits an application to the Social Security Administration or other federal or state agency to serve as a beneficiary's representative payee, he or she shall provide written notice of the application in a manner consistent with federal and state laws governing the confidentiality of individually identifying health information, to:
- (1) the existing representative payee, if any; and
 - (2) in the case of facilities operated by the Office, the Mental Hygiene Legal Service of the judicial department in which the facility is located.
- (c) During the application process or following the appointment of a facility director as a beneficiary's representative payee, the facility shall ensure that the beneficiary is apprised of his or her right at any time to request to be his or her own payee, or to request a change in representative payee. Such request shall be directed to the Social Security Administration or whichever federal or state program made the appointment.

§ 522.7 Required policies and procedures.

(a) Any facility director who serves or may serve as representative payee for beneficiaries receiving services from such facility shall establish policies and procedures which address the management and use of funds paid to the director as representative payee, consistent with the fiduciary responsibilities of a representative payee pursuant to the governing requirements of Social Security or other federal law and the comparable duty under State law. At a minimum, such policies and procedures shall include provisions for:

- (1) establishment and maintenance of beneficiary accounts (in interest bearing accounts where practicable) with individual patient accounting to segregate balances and permit the application of interest earned, if any, on a pro-rated basis;
- (2) internal controls that keep the beneficiary accounts and funds secure, prevent identity theft, provide specific authorization for check signatories, and document receipts and disbursements;
- (3) the use of petty cash, including requirements for documenting expenditures by receipts and the reconciliation of cash provided;
- (4) the opportunity for beneficiaries, or someone authorized to act on their behalf, to review deposits to and disbursements from their accounts at least quarterly; and
- (5) designation of an appropriate staff member to act as a liaison between the facility director and the beneficiary.

(b) For facilities operated by the Office, such policies and procedures shall also include provisions requiring the facility to consider:

- (1) the establishment of an appropriate Discharge Account if funds are available from accumulated Social Security or other federal benefits and/or other resources or income of the beneficiary; provided, however, that such Discharge Account, in addition to other resources held by the beneficiary, shall not exceed the monetary limits necessary to maintain his or her eligibility for government benefits in the community; and
- (2) the use of a Medicaid exception trust or similar device where legally mandated or deemed necessary and appropriate by the Office of Mental Health. To determine whether and/or what type of Medicaid exception trust or similar device may be necessary and appropriate, the following factors shall be considered along with

any other factors relevant to the particular beneficiary's circumstances:

- (i) the beneficiary's current and future needs, including a burial fund;
- (ii) the amount of the resources to be placed in trust;
- (iii) the beneficiary's age, current diagnosis and functional capacity (including capacity to manage his or her funds);
- (iv) the beneficiary's prognosis for discharge into the community;
- (v) the beneficiary's need for government benefit eligibility in the community;
- (vi) the availability and willingness of a family member, friend, guardian or other appropriate individual to serve as trustee of such a trust or as a liaison to such a trust;
- (vii) the impact of anticipated costs to establish and maintain the trust and guardianship, if any, on the amount of trust resources that will be available to the beneficiary;
- (viii) the eligibility of the beneficiary to establish a trust; and
- (ix) the availability of a pooled community trust in which beneficiary is eligible to participate.