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The Honorable Jo Anne B. Barnhart
Commissioner of Social Security
P.O. Box 17703
Baltimore, MD 21235-7703

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RE: Community Legal Services' Comments to the Notice of Proposed Rulemaking on Representative Payment Under Titles II, VIII and XVI, 68 Fed. Reg. 55323 (Sept. 25, 2003)

Dear Commissioner Barnhart:

Community Legal Services ("CLS") appreciates the opportunity to comment on the Notice of Proposed Rulemaking pertaining to Representative Payments, 68 Fed. Reg. 55323 (Sept. 25, 2003). CLS is a public interest legal services agency that, among other services, provides individual legal representation in Supplemental Security Income ("SSI") claims. Through its longstanding relationship with the Social Security Administration ("SSA") and its representation of individual clients, CLS has maintained extensive knowledge of both the agency's administrative procedures and how these are implemented on a regular basis by the district offices, the state DDSs, and the OHA. Most recently, CLS played an integral role in the revisions of the Childhood Disability regulations in 2000, as well as participating in various Advanced Notices of Proposed Rulemakings for new Listings and section 301 regulations.

Representative Payment Generally

Although we recognize the wisdom, and often the necessity, of having benefit payments made to a representative, we also strongly advocate for the least interference in individual determinations by beneficiaries about how their benefits are used. We realize that the agency has in the past imposed too little accountability on representatives to explain the use made of benefits. However, we would be averse to having the agency go too far in the opposite direction by requiring burdensome accountability requirements on representatives, especially when the representative is the parent of a child beneficiary or the spouse of an adult claimant. While parents and spouses have a duty to faithfully use the benefits on behalf of their family members, they also have separate and independent legal obligations under state law to act on their behalf. Indeed, most family representatives take their obligation to provide sensible benefits

administration seriously and earnestly try to support the recipients in managing their expenses, so any onerous accounting burden could act as an indirect deterrent to representatives volunteering to undertake these obligations. Nevertheless, we have major concerns about the current payee system and do not believe that the proposed rules adequately will address systemic problems.

Direct Payment Should Be the Norm

The proposed regulations do not explain what would constitute “substantial harm” sufficient to justify an interruption in direct payment of benefits. For example, the “stress associated with handling his ... own financial affairs” may arise even for many non-disabled individuals and certainly should not suffice to result in a capable beneficiary requiring a representative payee, unless, of course they freely request such an arrangement.

Recognizing that there are certain categories of beneficiaries where a payee would be expected, we recommend that the presumption favor direct payment, and that the mechanism for challenging the need for a payee be better explained to beneficiaries whenever a situation warranting a payee arises. Procedures for reinstating direct payment for those whose condition improves, including the opportunity for a hearing before an ALJ, should be made explicit.

Resource Limits and Overpayments

All representative payees need to be better informed by SSA staff about the applicable resource and income rules. Government and some private agency payees, for example, sometimes are inclined to be frugal in allocating monthly benefits; consequently, they all too often unwittingly may surpass the resource limits for individual beneficiaries. The payee then runs up unnecessary and avoidable overpayments, while on a regular basis the beneficiary struggles to make ends meet.

We would urge not only better information but also an automatic waiver of overpayments in such cases. The appropriate remedy for oft repeated violations is getting rid of the agency as a representative, not the recovery of an overpayment from a poor recipient who has been forced to struggle on less than a full check, while excess assets have been built up.

Direct Providers of Services Have Potential Conflict of Interest As Payees

Some situations, for example, residential placements in boarding homes, are ripe with the potential for fraud and abuse. All too often, beneficiaries are not provided any of their benefits for their personal use. For instance, boarding home providers sometimes have preyed upon their boarders and viewed them as little more than a target for exploitation. In the past, SSA has accepted this system of inherent conflict of interest under the assumption that no other payees are

available, instead of investing in improving the system to control for potential conflicts of interest.

The proposed regulations do little to address the potential for abuse by some representative payees. We recommend that SSA develop some new classes of non-profit payees and ban those where there is inherent conflict of interest and the potential for abuse is obvious.

Even when the payee is a government entity or private entity with no interest in personal pecuniary gain, there is the danger that the payee will have divided loyalties between the agency and the beneficiary. For example, a foster care agency of a state may wish to maximize contributions from its foster children in order to hold down taxpayer subsidy, while the child may have other needs, including planning for the day when they will leave the foster care system. Rather than put an agency in the impossible position of having to serve both goals at once, it would be far superior to allow there to be an arm's length negotiation between the state agency and those acting on behalf of the child.

New Systems of Payees Should be Supported and Subsidized

SSA currently permits the deduction of \$25 from a beneficiary's monthly allotment to cover a payee's services. This not only penalizes the beneficiary, but also does not purchase any real accountability or protection for the beneficiary. Institutional payees, and indeed others, especially those who are payees for more than one beneficiary, should be offered/required to attend a training session that informs them of the rules of the program and their fiduciary duties.

One of the best models for payees is illustrated by the project being undertaken in Pennsylvania by two dozen Mental Health Associations. That project builds upon the extant case management system in which clients are helped to set up budgets and specifically consulted on how and when payments to them and to landlords, utilities, and so forth will be made. It adds a new process for financial accountability that is totally lacking in the current (and proposed) payee system. The Mental Health Association in Philadelphia, for instance, has in-house "account managers" who periodically report to a "business manager" within the association to establish real accountability. The system is fully computerized and has had, reportedly, the approval and respect of local and Regional SSA staff, who find it a model system. In Pennsylvania, direct providers of service also like this system as it ensures them that rent and utility costs will be paid.

We recommend that SSA should seek funds to subsidize one or more pilot projects to investigate the feasibility of using such non-profit institutions to fulfill this kind of intermediary function. We recommend that SSA eschew reliance on a failed system of direct providers of services being the preferred group of rep payees. SSA could begin with demonstration projects as a first step toward rejuvenating the inter-agency nexus of accountability. Although the Mental Health Association of Southeastern Pennsylvania serves mental health clients exclusively, SSA should

insure that individuals with other impairments where payees often are used, such as Mental Retardation or Alzheimer's, also are served in a similar manner.

Duties Should Be Better Defined and Explained to Representative Payees

In addition to better monitoring rep payees, SSA must provide better education to them about their responsibilities. Many representative payees, including agency payees, have a poor grasp of their fiduciary duties to the beneficiary, do not understand the scope and limitations of these duties, do not understand their reporting responsibilities, do not understand the rights of the beneficiaries, and do not understand the programmatic rules well enough to help beneficiaries avoid problems like improper overpayments or termination of benefits. Written and orally delivered materials need to be developed to fill this major gap.

SSA's Monitoring and Investigating Duties Should Be More Clearly Defined

Our experience with getting SSA to make a negligence finding for the purpose of reimbursement for the beneficiary for misused benefits is that there often are no records showing what SSA did to determine whether the payee was properly investigated and appointed, or whether the SSA monitored the payee's performance or properly responded to the beneficiaries' complaints of misuse. One would think that the lack of records would show that SSA had not done its job, but that is not always the case. Without explicit standards, procedures, and a paper trail on these issues, the whole process will be less than optimal.

Liability for Payee-Caused Overpayments Should Not Be Borne by Beneficiaries

Liability for overpayments caused by the actions of the representative payee should not transfer to the beneficiary. The determination of the need for a representative payee itself indicates that the beneficiary is incapable of handling his or her own financial affairs and lacks the ability to manage benefits efficiently. The determination of the need for a representative payee should suffice to excuse the beneficiary from any liability for how the benefits are used. At the very least, there should be a presumption of innocence of any liability for all beneficiaries when an overpayment results from decisions made by a payee.

Liability that attaches for misuse of funds by the representative payee should not negatively impact the payment of benefits to child beneficiaries who should be presumed to be without fault under 20 C.F. R. §§ 404.2041, 416.641. This particularly is the case for children for whom liability for overpayment or misapplication of funds would transfer upon reaching age 18 under POMS GN 00602.140; SI 02101.010; SI 02220.060. Holding the child beneficiary liable for misuse of dedicated funds is patently unfair to the child and clearly violates the spirit and purpose of the Act. This should be made explicit in the new regulations.

Logistics of Accountability

Currently, there are no complaint procedures for investigating difficulties that beneficiaries may have with representative payee behavior and use of benefits. We recommend that SSA incorporate in the regulations a requirement that beneficiary complaints are treated seriously and investigated promptly by the local DO staff.

Being mindful of the emphasis on accountability expected by Pub. L. No. 101-508, we recommend that there is an exception to the annual accounting requirements for parents of child beneficiaries under 20 C.F. R. §§ 404.2065, 416.665. There should be a presumption that parents are allocating the benefits in a responsible manner for the ordinary and necessary expenses of the child's well-being.¹ A general accounting that confirms this presumption would not be too burdensome but it is feared that a requirement for specific annual accounting in which parents must report every expenditure will place a too heavy burden on families and inadvertently delegate the discretion about family spending decisions to the district office staff. This would directly violate the spirit and purpose of the Act.

Thank you for this opportunity to comment.

Respectfully submitted,



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¹ The dedicated account rules will continue to apply, and thus the agency will maintain some specific accounting requirements for the extra-monthly benefits.