

# **\*\*\* Proposed Amendments - June 26, 2014 \*\*\***

## **5123:2-18-01 Trusts for supplemental services.**

### (A) Purpose

The purpose of this rule is to define ~~those~~ supplemental services that may be provided through a trust and to establish standards for the maintenance and distribution to a beneficiary of assets of a trust authorized by section ~~1339.51~~ 5815.28 of the Revised Code.

### (B) Definitions

(1) "Ascertainable standard" includes a standard in a trust instrument requiring the trustee to provide for the care, comfort, maintenance, welfare, education, or general well-being of the beneficiary.

(2) "County board" means a county board of developmental disabilities.

~~(2)~~ (3) "Department" means the Ohio department of ~~mental retardation and~~ developmental disabilities.

~~(3)~~ (4) "Director" means the ~~chief executive officer of the department as established by section 121.03 of the Revised Code~~ director of the Ohio department of developmental disabilities or his or her designee.

~~(4)~~ (5) "Disability" has the same meaning as in section ~~1339.51~~ 5815.28 of the Revised Code.

~~(5)~~ (6) "Supplemental services" mean services specified in paragraph (C) of this rule that are provided to an individual with a disability in addition to services the individual is eligible to receive under programs authorized by federal or state law.

~~(6)~~ (7) "Supplemental services fund" means the fund created in the state treasury pursuant to section 5123.40 of the Revised Code.

~~(7)~~ (8) "Supplemental services trust" means a trust created pursuant to section ~~1339.51~~ 5815.28 of the Revised Code for the purpose of providing supplemental services to an individual with a disability.

### (C) Supplemental services

(1) "Supplemental services" are expenditures, items, or services which meet the following criteria:

- (a) The services are in addition to services an individual with a disability is eligible to receive under programs authorized by federal or state law or regulations or other third-party resources, and the services do not supplant services which would otherwise be available without the existence of the trust;

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- (b) The services are in addition to basic necessities for such items as essential food, clothing, shelter, education, and medical care, and the services are in addition to other items provided pursuant to an ascertainable standard; and
  - (c) The services are paid for with funds distributed pursuant to a trust which meets the requirements of section ~~1339.51~~ 5815.28 of the Revised Code or with funds distributed from the supplemental services fund ~~created in section 5123.40 of the Revised Code~~, and the services would not be available without payment from the trust or fund.
- (2) Supplemental services which meet the criteria outlined in paragraph (C)(1) of this rule may include, but are not limited to, the following:
- (a) Reimbursement for attendance at or participation in recreational or cultural events;
  - (b) Travel and vacations;
  - (c) Participation in hobbies, sports, or other activities;
  - (d) Items beyond necessary food and clothing (e.g., funds for dining out occasionally, for special foods periodically delivered, or for an article of clothing such as a coat which is "extra" but which is desirable because it is newer, or more stylish, ~~etc.~~);
  - (e) Cosmetic, extraordinary, experimental, or elective medical or dental care, ~~if not available through other third party sources~~;
  - (f) Visiting with friends, ~~companionship~~ or family;
  - (g) Exercise equipment, or special medical equipment ~~if not available through other third party sources~~;
  - (h) The cost differential between a shared room and a private room ~~difference in rent between a shared bedroom and a private bedroom~~;
  - (i) Equipment or services for the individual's private use such as telephones, smart phones, cable television, televisions, radios, and other sound equipment, and cameras, computers, computer software, internet service, video recorders, and video games for private use by the individual;
  - (j) Membership in clubs or other organizations such as book clubs, health clubs, ~~recreational clubs~~ and community service organizations;
  - (k) Subscriptions to magazines and newspapers;

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- (l) Small, irregular amounts of personal spending money, including reasonable funds for the occasional purchase of gifts for family and friends, or for donations to charities or churches;
  - (m) Personal advocacy;
  - (n) Services of a representative payee or conservator;
  - (o) Guardianship or other protective service listed in section 5123.55 of the Revised Code;
  - (p) Counseling and guidance;
  - (q) Someone to visit the individual periodically and monitor the services he or she receives;
  - (r) Intervention or respite when the person is in crisis;
  - (s) Vocational rehabilitation or habilitation, ~~if not available through other third party sources~~;
  - (t) Reimbursement for attendance at or participation in meetings, conferences, seminars, or training sessions;
  - (u) Reimbursement for the time and expense for a companion or attendant necessary to enable the individual to access or receive supplemental services including, but not limited to, travel and vacations and attendance at meetings, conferences, seminars, or training sessions;
  - (v) Items which medicaid and other governmental programs do not cover or have denied payment or reimbursement for, even if those items include basic necessities such as physical or mental health care or enhanced versions of basic care or equipment (e.g., ~~wheelchair~~, mobility or communication devices), and items which are not included for payment by the per diem of the facility in which the beneficiary lives; and
  - (w) Other expenditures used to provide dignity, purpose, optimism, and joy to the beneficiary of a supplemental services trust.
- (3) Supplemental services also specifically include expenses for burial and related services for an individual, not otherwise paid for, and in an amount not to exceed ~~five~~ ten thousand dollars. Such burial services may be purchased by the trustee in an irrevocable prepaid burial contract while the beneficiary is alive, or paid by the trustee after the death of the beneficiary.
- (D) Standards for maintenance of the trust

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- (1) The trustee shall give notice about the existence of the trust in the following circumstances:
  - (a) In the case of a testamentary trust, the trustee shall notify the director ~~of the department~~ of the creation of the trust, the situs of the assets, the court which exercises jurisdiction over the trust, and the case/docket number of the case in that court upon the death of the testator/settlor and the subsequent creation of the trust pursuant to the testator's last will and testament.
  - (b) In the case of a living trust, the trustee shall notify the director ~~of the department~~ of the creation of the trust, the situs of the assets, and, if relevant, the court which exercises jurisdiction over the trust and the case/docket number of the case in that court at such time that the trustee takes action and begins to disburse trust funds on behalf of the beneficiary of the trust.
- (2) It shall not be necessary for the trustee to submit reports to the department concerning the status of the trust or distributions made from the supplemental services trust until the death of the beneficiary of the trust. The trustee shall make such reports as otherwise required by statute or the relevant court.
- (3) The trust may confer discretion upon the trustee and may contain specific instructions or conditions governing the exercise of the trustee's discretion.
- (4) The department shall not impose any limitation as to the suitability of placing trust assets into different types of investments beyond that established by the trust instrument itself and any further requirements imposed by the court if a court has jurisdiction over the trust.
- ~~(5) Multiple trusts for the same beneficiary may be combined for purposes of administrative convenience pursuant to section 1339.67 of the Revised Code. Reformation of the trust shall be at the discretion of the court if a court has jurisdiction over the trust and in accordance with applicable law.~~
- ~~(6)~~ (5) The limitation imposed upon the amount of the trust by section ~~1339.51~~ 5815.28 of the Revised Code applies only to the initial funding of the trust. Trust assets, including interest, may be retained and accumulated beyond the amount of the statutory limitation imposed at the time of the creation of the trust.
- ~~(7)~~ (6) If the trust is funded to the maximum amount of the statutory limitation in section ~~1339.51~~ 5815.28 of the Revised Code at the time of its creation, the person who created the trust (i.e., the settlor) may not later add subsequent or periodic additional amounts to the trust by other arrangements such as other trust instruments or policies of insurance unless the original trust assets are entirely depleted, and then no more than the amount of the original trust corpus.

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- ~~(8)~~ (7) Parties other than the settlor who have no obligation to support the beneficiary may add funds to an established supplemental services trust by means of gift, bequest, or otherwise without limitation as to amount. Such funds, once added, shall not later be subject to withdrawal by the party which provided those funds.
- ~~(9)~~ (8) The trustee shall carry a bond or other form of insurance payable from trust assets to guarantee against any possible loss of trust assets unless specifically waived by the testator or waived by law. The bond or other insurance shall be equal to the value of the trust assets.
- ~~(10)~~ (9) The trustee shall not commingle assets of a supplemental services trust with his own assets or with the assets of any other person or entity. However, trust assets of more than one supplemental services trust for more than one beneficiary, or trust assets from more than one trust created by the same testator, may be combined as long as a bookkeeping system or computer records can be used to determine the amounts of principal and interest available and earned by each beneficiary or each trust at any time upon reasonable notice.
- ~~(11)~~ (10) Trusts which were in existence prior to the passage of former section 1339.51 of the Revised Code and this rule shall not be deemed to qualify as a supplemental services trust unless the trust meets the requirements of the statute and rule(s) as created.
- (E) Standards for distribution of the trust
- (1) During the lifetime of the beneficiary, the trustee shall:
- (a) Avoid any expenditures which would jeopardize the beneficiary's eligibility for medicaid, supplemental security income (~~SSI~~), or other forms of public assistance.
  - (b) Expend trust assets only for supplemental services as defined in this rule.
  - (c) Whenever possible, pay directly for the supplemental services and not give funds directly to the beneficiary to make such payments. However, the trustee may distribute small, irregular amounts of personal spending money directly to the beneficiary, especially when the beneficiary is capable of managing small amounts of cash or is learning about the use of money pursuant to his or her individual plan or individual service plan.
  - (d) Attempt to obtain a written denial of payment from medicaid or other third-party payor when there is a doubt whether a particular service qualifies as a supplemental service.
  - (e) When a residential provider is receiving a per diem payment for items or services which otherwise might quality qualify as a supplemental service, attempt to

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ascertain the unavailability of per diem funds for that purpose prior to making an expenditure.

- (2) The beneficiary of a supplemental services trust shall not have any authority to compel the trustee under any circumstances to furnish the beneficiary with minimal or other maintenance or support, to make payments from principal or income, or to convert trust assets into cash, whether pursuant to an ascertainable standard or otherwise.
- (3) Upon the death of the beneficiary, the trustee shall:
  - (a) Notify the director ~~of the department~~ of the death of the beneficiary, and if a testamentary trust is involved, notify the probate court that has jurisdiction over the trust;
  - (b) Ensure that burial expenses for the beneficiary have been paid to the extent allowed in paragraph (C)(3) of this rule;
  - (c) Submit a the portion (i.e., at least fifty per cent) of the remaining trust assets pursuant to the terms of the trust specified in the trust instrument, which shall not be less than fifty per cent of such assets, to the ~~state treasurer~~ director for deposit to the supplemental services fund ~~for individuals with mental retardation or other developmental disability; and~~
  - (d) ~~Notify the director's office of the department that such payment has been made to the state treasurer and the amount of such payment; and~~
  - (e) (d) Distribute the remaining trust assets pursuant to the terms of the trust and the direction of the court if a court has jurisdiction over the trust.
- (4) The trustee shall have the authority to pay all taxes, assessments, costs, and other expenses arising in connection with the administration of the trust estate, including reasonable compensation to the trustee, its agents, and attorneys, upon approval by the court if a court has jurisdiction over the trust.
- (F) In the event it is determined by a state or federal court, the social security administration, the department of health and human services or another federal agency that any expenditures from a supplemental services trust would render a beneficiary ineligible for supplemental security income (~~SSI~~), medicaid, or similar programs and thus defeat the purpose of this rule and the enabling legislation, and if no funds have been disbursed on behalf of the beneficiary, the trustee shall terminate the trust and distribute the trust assets according to the terms of the trust as if the ~~life~~ live beneficiary was deceased. However, if funds have been disbursed on behalf of the beneficiary, the trustee is required to submit an amount equal to the disbursements made on behalf of the beneficiary for medical care by the state from the date the trust vests, but not more than

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fifty per cent of the trust corpus, to the state treasurer for deposit to the supplemental services fund.

### (G) Distribution of funds from the supplemental services fund

- (1) County boards ~~of mental retardation and developmental disabilities~~ are eligible to receive funds from the supplemental services fund ~~created in section 5123.40 of the Revised Code~~ provided by a settlor who was a resident of that county. In such cases where the settlor was not an Ohio resident, the county board would be eligible for such funds if the beneficiary of the trust which provided the funds was a resident of that county.
- (2) At such times as ~~is~~ are convenient, but no later than the fifteenth of December of each year, the department shall notify the counties that are eligible to receive distributions pursuant to this rule for the purpose of providing supplemental services to eligible individuals of those counties.
- (3) A county board shall distribute funds from the supplemental services fund only for supplemental services as defined in paragraph (C) of this rule and pursuant to standards for distribution as delineated in paragraphs (E)(1) and (E)(2) of this rule.
- (4) Requests for distributions from a county board that receives funds pursuant to this rule may be submitted by an eligible individual, or on behalf of the eligible individual by the individual's guardian, family member, advocate, service and support administrator, or by the individual's ~~individual service plan team or equivalent team~~.
- (5) Eligibility for distribution shall be determined by section ~~1339.51~~ 5815.28 of the Revised Code and this rule.
- (6) In order to be eligible for payments by a county board or its contract agency under this rule, the individual must reside in the county served by the county board and must be eligible to receive services from the county board. Individuals who live in a developmental center operated by the department are eligible for such payments from the county board for the county of legal residence as defined in section 5123.01 of the Revised Code. An individual who is a beneficiary of a supplemental services trust established pursuant to section ~~1339.51~~ 5815.28 of the Revised Code is not eligible for payments by a county board or its contract agency under this rule. Unless the allocation of a county board is less than two thousand dollars, no more than one-tenth of a county board's allotment from the supplemental services fund shall be expended for the benefit of any one individual unless specifically approved in writing by the superintendent of the county board.

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- (7) The county board or contract agency shall not be required to make payments under this rule that exceed the amount of funds received from the supplemental services fund.
- (8) No administrative costs may be taken by a county board or its contract agency from the allocation of supplemental services funds.
- (9) The county board shall submit a written report to the department by the fifteenth of August of each year after the fiscal year in which funds were received from the supplemental services fund, or for years in which there was a carry-over from funds received in prior fiscal years. The report shall indicate how many individuals benefited from the funds and generally the types of items and/or services that were purchased by the funds. A county board ~~which~~ that received an allocation from the supplemental services fund but failed to submit the required report shall not be eligible for subsequent allocations until the report is submitted.
- (10) A county board ~~which~~ that fails to expend the funds received pursuant to this rule within twelve months after receipt shall return those funds to the department for deposit in the industrial and entertainment fund established under section 5123.29 of the Revised Code and rule 5123-9-08 of the Administrative Code for the benefit of individuals in developmental centers operated by the department.
- (11) The county board shall provide information to persons, families, and agencies in the community to make them aware of the supplemental services program when the county board receives funds for distribution.
- (12) The state treasurer may receive and accept funds for deposit into the supplemental services fund by way of gift, bequest, or otherwise in addition to funds received pursuant to the operation of sections ~~1339.51~~ 5815.28 and 5123.40 of the Revised Code. Such funds received shall be made available first to the county from which they came if they came from an Ohio resident, and then to individuals of developmental centers operated by the department. All assets shall be distributed from the supplemental services fund pursuant to this rule, no matter what their source.

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