

# **MEDICAID AND PERSONS WITH DISABILITIES**

## ***Special Medicaid Eligibility Provisions for Persons with Disabilities***

**James R. Sheldon, Jr., Supervising Attorney  
National Assistive Technology Advocacy Project  
Neighborhood Legal Services, Inc.  
295 Main Street, Room 495  
Buffalo, New York 14203  
Tel. (716) 847-0650 ext. 262; fax 716-847-0227  
TDD (716) 847-1322  
E-mail: [jsheldon@nls.org](mailto:jsheldon@nls.org); web site: [www.nls.org](http://www.nls.org)**

**March 2004**

# TABLE OF CONTENTS

|      |   |    |
|------|---|----|
| I.   | Introduction.....   | 1  |
| A.   | What is Medicaid? .....   | 1  |
| B.   | Distinguish from Medicare .....   | 1  |
| C.   | Why is Medicaid Important to Persons with Disabilities? .....   | 2  |
| D.   | What Services Will Medicaid Cover? .....  | 3  |
| E.   | “Required Services” Include:.....   | 3  |
| F.   | The Following Are “Optional Services” That May Be Included in Your State’s Medicaid Plan: .....   | 4  |
| G.   | Which of the Covered Services in a State (i.e., Required and Optional) Are Most Important to Persons with Disabilities? .....               | 5  |
| H.   | Why is it Important to Identify Special Medicaid Provisions, and Special Categories of Medicaid Eligibility? .....                          | 6  |
| II.  | In Most States Medicaid Eligibility is Automatic for Supplemental Security Income (SSI) Recipients .....                                    | 7  |
| A.   | SSI is Authorized by Title XVI of the Social Security Act. 42 U.S.C. §§ 1381 <i>et seq.</i> ; 20 C.F.R. Part 416.....                       | 7  |
| B.   | Recipients of SSI Will Automatically Qualify for Medicaid in 39 States and the District of Columbia. 42 U.S.C. § 1396a(a)(10)(A)(i).....    | 7  |
| C.   | Distinguishing SSI from SSDI .....  | 8  |
| III. | Working with SSI’s Income and Resource Rules - Obtaining or Retaining SSI Benefits Will Ensure Continuation of Medicaid in Most States..... | 8  |
| A.   | Understanding the Basic SSI Definitions of “income” and “Resources” .....   | 8  |
| B.   | Children under Age 18 .....   | 9  |
| C.   | Creative Structuring or Restructuring of a Child Support Agreement Can Save SSI and Medicaid.....   | 9  |
| D.   | How to Keep Resources Below SSI’s \$2,000 Limit.....  | 10 |
| E.   | Some Special Issues Regarding Income and Resource Rules.....  | 12 |
| F.   | Cafeteria Plans Are a Way to Reduce Countable Income for SSI Purposes.....  | 13 |
| G.   | Ensuring SSI (and Medicaid) Eligibility Through Payment at the Highest Available SSI Rate.....  | 14 |
| IV.  | Use of Work Incentive Provisions to Preserve SSI and Medicaid Eligibility .....   | 14 |
| A.   | SSI’s Budgeting Rules Allow Numerous Deductions from Earned Income. ....  | 14 |
| B.   | Elaboration on Special Deductions from Income .....   | 15 |
| C.   | Resource Materials Available on SSI Work Incentives .....   | 16 |

|       |  |    |
|-------|--|----|
| V.    | Four Special Provisions Allow Former SSI Recipients to Continue Getting Medicaid Automatically After Losing SSI .....  | 17 |
| A.    | Recipients of Social Security Widow's/Widower's Benefits.....  | 17 |
| B.    | Recipients of Social Security Disabled Adult Child's Benefits .....  | 17 |
| C.    | The Pickle Amendment.....  | 18 |
| D.    | The Section 1619(b) Program: Continued Medicaid for Persons Who Lose SSI Due to Wages .....  | 18 |
| VI.   | Obtaining Medicaid Through The Federal Adoption Assistance Program .....   | 19 |
| A.    | Federally funded adoptions are governed by the federal Adoption Assistance and Child Welfare Act of 1980. 42 U.S.C. §§ 620-28, 670-676. ....   | 19 |
| B.    | States are authorized to enter into adoption assistance agreements with parents "who adopt a child with special needs." <i>Id.</i> §§ 673(a)(1)(B), 675(3). ....                                     | 20 |
| C.    | For children with disabilities, the child is held to meet the criteria as a child with special needs if the child meets all the eligibility requirements for SSI. <i>Id.</i> § 673(a)(2)(A)(ii)..... | 20 |
| D.    | Automatic Medicaid eligibility. If the following criteria is met, the adopted child with a disability is automatically eligible for Medicaid [ <i>Id.</i> § 673(b)(1)]:.....                         | 20 |
| E.    | Automatic Medicaid Eligibility, at state option .....  | 20 |
| VII.  | Obtaining Medicaid Through the "Medically Needy" or "Spend Down" (i.e., "Share of Cost") Program .....   | 21 |
| A.    | The Medically Needy Program (Hereafter Referred to as Spend Down) Is an Option Exercised by Approximately Two Thirds of the States.....  | 21 |
| B.    | How Does the Spend Down Work? .....  | 21 |
| C.    | For Individuals in States in Which Medicaid is Automatic For SSI Recipients, the Medicaid Agency Must Follow SSI's Rules for .....   | 22 |
| D.    | W .....  | 22 |
| E.    | Medical Expenses Paid or Incurred by State or Local Government Programs Must Be Deducted From Income in Determining Medicaid Eligibility .....   | 22 |
| VIII. | Home and Community-Based (HCB) Waivers.....  | 22 |
| A.    | These Are an Optional Service Added in 1981. ....  | 22 |
| B.    | These Waivers Are Typically Referred to as Section 1915(c) Waivers....   | 22 |
| C.    | T .....  | 22 |
| D.    | Representative Services Available under HCB Waivers:.....  | 22 |
| IX.   | The Optional Medicaid Buy-In Program.....  | 22 |
| A.    | Background: This Optional Program Was Created by Section 4733 of the   |    |

|    |  |    |
|----|--|----|
|    | Balanced Budget Act Amendments of 1997 .....   | 22 |
| B. | How the Ticket to Work and Work Incentives Improvement Act of 1999<br>Makes Buy-in Program More Attractive ..... | 22 |

## I. Introduction

### A. What is Medicaid?

1. Medicaid, also known as Medical Assistance, is a cooperative federal-state program authorized by Title XIX of the Social Security Act. 42 U.S.C. §§ 1396 et seq.
2. Medicaid is a health insurance program, designed to serve persons with limited income and resources.
  - a. As noted in the sections below, there are several special provisions which either allow a state's Medicaid program to waive income and resource rules, or that permit eligibility at much higher levels of income.
  - b. Administration of Medicaid will occur at the state level, with the state Medicaid agency often delegating decision making either to other state agencies, or to county or local Medicaid units.
3. As explained below, Medicaid can pay for a wide range of health-related costs for both children and adults with disabilities.

### B. Distinguish from Medicare

1. Medicare, a federal health insurance program authorized by Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395 *et seq.*, is most frequently associated with the receipt of Social Security benefits. *Id.*
2. Adults with disabilities can establish eligibility in three ways:
  - a. After 24 months of eligibility for Social Security Disability Insurance (SSDI) benefits;
  - b. After 24 months of eligibility for Railroad Retirement disability benefits [*id.* § 426(b)]; or
  - c. If suffering from kidney disease and not receiving SSDI benefits, upon entering end stage renal disease or developing an impairment that requires regular dialysis or kidney transplantation to maintain life. *Id.* §§ 426-1, 1395c, 1395rr; 42 C.F.R. § 406.13(b).
  - d. There is also a class of Medicare-Qualified Federal Employees who can qualify for benefits. SSA's Program Operations Manual Systems (POMS) HI 00835.001.

3. Medicare is, for a majority of persons with disabilities, an inferior health insurance plan compared to Medicaid. Compared to most state Medicaid programs:
  - a. Medicare provides much more limited home health care benefits.
  - b. Medicare provides more limited coverage of community-based care.
  - c. Medicare currently provides no coverage for prescription drugs for persons living in the community. (Depending on what happens in Congress in the upcoming year or years, some form of prescription coverage could be added to Medicare.)
  - d. Typically, Medicare provides more limited coverage for the wide range of durable medical equipment (or assistive technology devices) than Medicaid.
  - e. Medicare requires payment of premiums (for Part B coverage), deductibles and co-payments that are typically not required by Medicaid.
    - (1) A state's Medicaid agency may, subject to income eligibility requirements, pay for the Part B premiums, deductibles and co-payments.
    - (2) This is generally done under the Qualified Medicare Beneficiaries program or the Selected Low-Income Medicare Beneficiaries program.<sup>1</sup>

**C. Why is Medicaid Important to Persons with Disabilities?**

1. Medicaid is typically the only or primary health insurance plan for persons with disabilities who have limited income.
2. An increasing number of individuals with disabilities are looking to Medicaid as their primary health insurance plan, notwithstanding higher levels of income. Medicaid may be available to those individuals through state-specific Medicaid waivers, through optional Medicaid buy-in programs, or through the section 1619(b) provisions, all discussed below.

---

<sup>1</sup>For links to state websites related to QMB and SLMB, go to the federal Medicare website at: [www.medicare.gov/Contacts/Related/MSPs.asp](http://www.medicare.gov/Contacts/Related/MSPs.asp).

3. A lack of adequate health insurance is often cited as a primary barrier to both the ability to live in the community and the ability to succeed in employment.

**D. What Services Will Medicaid Cover?**

1. This will vary, state-by-state, as individual states are given great leeway on what optional categories of service to cover.
2. Although participation in Medicaid is voluntary, once a state chooses to participate in the program it must comply with federal Medicaid requirements. One such requirement is that a state must offer each category of “required services.”

Note: Under a Home and Community Based Services Waiver program, a state Medicaid program may cover some optional services that are not otherwise included in its regular state plan. Under the waiver, the state may also cover other services that are not otherwise available as either required or optional services. See section VI, below.

**E. “Required Services” Include:**

1. Inpatient Hospital Care
2. Outpatient Hospital Care
3. Physician’s Services
4. Laboratories and X-Ray Services
5. Nurse Midwife Services
6. Rural Health Clinic Services
7. Prenatal Care
8. Family Planning Services
9. Skilled Nursing Facility Services For Persons Over Age 21
10. Home Health Care Services to Persons Over 21, Eligible For Skilled Nursing Services (Includes Medical Supplies and Equipment)
11. Pediatric and Family Nurse Practitioner Services
12. Early and Periodic Screening, Diagnosis and Treatment (EPSDT) for

Persons Under Age 21 [See section I.G.3, below.]

13. Vaccines for Children
14. Federally Qualified Health Center (FQHC)

**F. The Following Are “Optional Services” That May Be Included in Your State’s Medicaid Plan:**

1. Podiatrist Services
2. Optometrist Services and Eyeglasses
3. Chiropractor Services
4. Private Duty Nursing
5. Clinic Services
6. Dental Services
7. Physical Therapy
8. Occupational Therapy
9. Speech, Hearing and Language Therapy
10. Prescribed Drugs
11. Dentures
12. Prosthetic Devices
13. Diagnostic Services
14. Screening Services
15. Preventive Services
16. Rehabilitative Services
17. Transportation Services
18. Services for Persons Age 65 or Older in Mental Institutions
19. Intermediate Care Facility Services

20. Intermediate Care Facility Services for Persons with Mental Retardation/Developmental Disabilities and Related Conditions
21. Inpatient Psychiatric Services for Persons under Age 22
22. Christian Science Schools
23. Nursing Facility Services for Persons under Age 21
24. Emergency Hospital Services
25. Personal Care Services
26. Hospice Care
27. Case Management Services
28. Respiratory Care Services
29. Home and Community Bases Services for Individuals with Disabilities and Chronic Medical Conditions [See section VI, below.]

Note: Many of the Required and Optional Services Are Defined at 42 C.F.R. §§ 440.1-440.185.

**G. Which of the Covered Services in a State (i.e., Required and Optional) Are Most Important to Persons with Disabilities?**

The most important Medicaid-funded services tend to be those that are both the most expensive and not usually covered through employer-funded health insurance programs. These include:

1. *Inpatient hospital care* - for persons who have predictable expenses for periodic hospitalization
2. *Home health care services* - importantly, this required service includes “medical supplies and equipment,” the category typically used to fund a wide range of assistive technology
3. *EPSDT* - for children under age 21. For children with severe disabilities, this opens the door to every optional service category under Medicaid. This ensures that any of the expensive services, potentially covered by Medicaid, will be covered for the child when such services are medically necessary. 42 U.S.C. § 1396d(r)(5).

4. *Private duty nursing* - this very expensive service is seldom available on an ongoing basis through traditional health insurance plans.
5. *Physical therapy; occupational therapy; speech, hearing and language therapy* - each of these services can be expensive and, when needed on an ongoing basis, is not available through many traditional private insurance plans. Under each of these categories, funding is available for necessary equipment and supplies, providing potential funding for expensive assistive technology.
6. *Prosthetic devices* - this has also been used to fund expensive assistive technology, i.e., to the extent that the device replaces or replaces the functioning of a non-functioning part of the body.
7. *Intermediate care facilities* - these very expensive residential programs enable many persons with disabilities to move from institutions into more community-based living environments.
8. *Personal care services* - this service is what allows many individuals with disabilities to live independently in the community.
9. *Clinic services* - to the extent that this category and other optional categories (e.g., *case management services*) are available to provide community-based mental health treatment, this allows persons with mental illness diagnoses to avoid the need for more segregated inpatient treatment.

**H. Why is it Important to Identify Special Medicaid Provisions, and Special Categories of Medicaid Eligibility?**

1. Medicaid, which was established by Title XIX of the Social Security Act in 1965, has always been one of the most complex and highly regulated of all benefit programs.
  - a. Given the importance of Medicaid to persons with disabilities, it is important to understand Medicaid in general.
  - b. We will not attempt to cover every potential issue that may affect one's potential eligibility for Medicaid.
2. During the past 15 to 20 years, a number of new ways have been created to qualify for Medicaid.
  - a. For example, the Medicaid provisions in Title XIX have been amended to create the optional waiver programs and the optional Medicaid buy-in program.

- b. The SSI provisions in Title XVI of the Social Security Act have been amended over the years to create four separate classes of former SSI recipients eligible for continued Medicaid.
3. Most of the special Medicaid provisions are not well publicized or well understood. The result is that many individuals who could be eligible never obtain eligibility.

## **II. In Most States Medicaid Eligibility is Automatic for Supplemental Security Income (SSI) Recipients**

### **A. SSI is Authorized by Title XVI of the Social Security Act. 42 U.S.C. §§ 1381 *et seq.*; 20 C.F.R. Part 416.**

1. SSI is a Welfare or Needs-based Program.
2. In Order to Qualify, Individuals Must:
  - a. Meet "income" and "resources" tests;
  - b. Be aged, blind or disabled.
3. SSI may be a person's only source of income or it may be received in addition to some other type of income, such as Social Security.

### **B. Recipients of SSI Will Automatically Qualify for Medicaid in 39 States and the District of Columbia. 42 U.S.C. § 1396a(a)(10)(A)(i).**

1. If the SSI check is as little as \$1, Medicaid eligibility is automatic.
  - a. In most states, an SSI application is also a Medicaid application and no additional action is needed to ensure Medicaid eligibility.
  - b. However, the following states require a separate Medicaid application, even though eligibility will be automatic based on receipt of SSI: Alaska, Idaho, Kansas, Nebraska, Nevada, Oregon, Utah, and the Northern Mariana Islands.
2. In 11 states, known as section 209(b) states, Medicaid eligibility is not automatic for SSI recipients. These states use their own Medicaid eligibility criteria which differs from SSI eligibility criteria. *Id.* § 1396a(f).

3. The states which exercise the 209(b) option include: Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia. SSA Program Operations Manual System (POMS) SI 01715.020.

### **C. Distinguishing SSI from SSDI**

1. Social Security is authorized by Title II of the Social Security Act. 42 U.S.C. § 401 *et seq.*; 20 C.F.R. Part 404.
2. Social Security is an insurance program for individuals who meet an earnings (i.e., "insured status") test.
3. Benefits are available for the insured worker and, in many cases, the worker's dependents or survivors.
4. Social Security Disability Insurance (SSDI) is the benefit paid to persons with disabilities meeting the Social Security criteria.
5. Recipients of SSDI payments will qualify for Medicare after a 24-month waiting period. Medicaid, however, will not be automatic for SSDI recipients. Medicaid eligibility will have to be established independently.
  - a. If SSDI benefits are low enough an individual may also qualify for an SSI supplement.
  - b. The SSI supplement, even if very small, will qualify the individual for automatic Medicaid in most states. See section II.C, above.

## **III. Working with SSI's Income and Resource Rules - Obtaining or Retaining SSI Benefits Will Ensure Continuation of Medicaid in Most States**

Since SSI will often become the individual's ticket to automatic Medicaid, working with SSI's eligibility provisions to obtain or retain eligibility becomes a critical way of ensuring Medicaid eligibility in many cases. The following are some of the more important examples of how this can be done.<sup>2</sup>

### **A. Understanding the Basic SSI Definitions of "income" and "Resources"**

---

<sup>2</sup>Pursuant to federal Medicaid regulations, 42 C.F.R. §§ 435.601, 435.831(b) and 435.845, all of the rules discussed in this section, governing what gets counted by SSI as income or as a resource, should also govern what gets counted by a state's "medically needy" Medicaid program in states in which all SSI recipients are automatically eligible for Medicaid. See section VI.C, below.

1. Definition of income: Anything received in cash or in kind that can be used to meet needs for food, clothing or shelter. 20 C.F.R. § 416.1102.<sup>3</sup>
2. Definition of a resource: Cash or other liquid assets or real or personal property that an individual owns and could convert to cash which can be used to provide for food, clothing or shelter. *Id.* § 416.1201(a).
3. Basic strategy to use these rules to ensure SSI eligibility
  - a. Make maximum use of any exclusions from income and resources (i.e., things that meet the income or resources definition but are specifically excluded).
  - b. Structure (or restructure) the receipt of any money flowing to the SSI applicant or recipient so that it would not meet SSI's definition of income or resources. (Specific examples are discussed below in the context of child support settlements, structure of gifts and inheritances, and reducing earned income through cafeteria plans.)

**B. Children under Age 18**

1. If a child is under age 18, the SSI program will consider the income and resources of the parent(s) who resides in the same household as the child (i.e., the parental income is “deemed” available to the child).
2. At age 18, the income and resources of a parent are no longer considered available to the child.
3. A few dollars less in parental income (i.e., income “deemed available” to the child) can mean thousands of dollars in health care coverage through SSI-based Medicaid.

**C. Creative Structuring or Restructuring of a Child Support Agreement Can Save SSI and Medicaid.**

1. Keep in mind the basic definition of income. A monthly allotment of cash will meet that definition.
  - a. Under SSI's rules for counting child support, two thirds of child support received in a month will be counted to reduce the SSI

---

<sup>3</sup>On January 6, 2004, the Social Security Administration published proposed regulations in the Federal Register, 69 Fed. Reg. 554, that would eliminate “clothing” from the definition of income.

check to which the child would otherwise be entitled. *Id.* § 416.1124(c)(11).

- b. If the monthly payment for child support is high enough, the child will not be eligible for SSI. Nor will the child be entitled to the automatic Medicaid that goes along with SSI in most states.
2. If the child support obligation is restructured, so that the money is paid directly to a vendor (or vendors) for goods or services other than food, clothing or shelter, that payment will no longer count against the child as income (i.e., it no longer meets the SSI definition of income).
    - a. Some examples of goods and services that can be purchased in this manner: telephone bill, cable T.V., internet service fees, car payment, car insurance, private school tuition, home repairs (but not rent, mortgage, taxes, heat or electric bills), a home cleaning service, computer equipment, and dance lessons.
  3. For a detailed discussion of this topic, see James R. Sheldon, Jr. & Diana M. Straube, *Supplemental Security Income and the Family Law Attorney: Using Creative Alimony, Child Support and Property Settlements to Maximize SSI, Medicaid and Create Funding for Assistive Technology*, 33 Clearinghouse Rev. 148 (July-August 1999). This has also been published as a 25-page booklet by the National Assistive Technology Advocacy Project. Copies can be obtained by contacting the authors or by visiting the Neighborhood Legal Services website [[www.nls.org/ssifmaty.htm](http://www.nls.org/ssifmaty.htm)].

**D. How to Keep Resources Below SSI's \$2,000 Limit.**

1. An SSI recipient is allowed no more than \$2,000 in non-exempt assets. *Id.* § 416.1205(c).
2. Why is this important?
  - a. Many unsuspecting SSI recipients will obtain or save money in excess of \$2,000.
  - b. By doing so, they lose eligibility for SSI and the right to automatic Medicaid in most states.
3. An SSI recipient should consider using extra assets to purchase "exempt assets." The following is a list of some of the key exempt assets as provided in 20 C.F.R. § 416.1210:

- a. Residential home regardless of value;
- b. Automobile up to \$4,500 of its current market value;
- c. Total value of an automobile if it is necessary for the employment of someone in the household, for medical reasons, or is specially modified for a person with a disability;
- d. Property essential for self-support;
- e. Resources necessary to fulfill an approved Plan for Achieving Self Support [see section IV.B.3, below];
- f. Life insurance:
  - (1) Term insurance (i.e., without cash surrender value) of any amount is excluded;
  - (2) The cash surrender value of life insurance with a face value of less than \$1,500 is excluded;
  - (3) The cash surrender value of life insurance with a face value of more than \$1,500 is counted;
- g. Burial spaces;
- h. Burial funds up to \$1,500 for an individual and \$3,000 for a couple.
- i. NOTE: In the states of California, New York, Vermont and Wisconsin, the Social Security Administration has approved SSI waivers establishing an exempt "Independence Account" as part of its State Partnership Initiative (SPI) demonstration project in those states. Under this waiver, an SSI recipient who is participating in the SPI project may save up to \$8,000 per year out of earned income in an exempt account and later withdraw money, without penalty, for any purpose. Contact the author of this outline if you would like more information on this special SSI waiver.<sup>4</sup>

---

<sup>4</sup>This and three other SSI waivers (see, e.g., section IV.A.5.a, below) are discussed in the Spring 2001 issue of *The Benefits Planner*, available on the Social Security section of the Neighborhood Legal Services website, [www.nls.org.planner/spring01.htm](http://www.nls.org.planner/spring01.htm).

## **E. Some Special Issues Regarding Income and Resource Rules**

### **1. Gifts and estates**

- a. If a friend, relative or other person gives an SSI recipient a cash gift, or provides for them in their will with a cash gift, the money will be income in the month of receipt and a countable resource thereafter. If more than \$2,000 is retained, it will make the person ineligible for SSI and automatic Medicaid.
- b. A knowledgeable giver will arrange to provide for the SSI recipient by avoiding gifts of cash, and favoring the purchase of items other than food, clothing or shelter.

### **2. Fund raisers**

- a. Family, friends and various organizations often run special events to raise money to meet the special expenses of a person with a disability.
- b. If the money raised is provided directly to the person with a disability or his or her parent(s), the money is treated by SSI the same as a gift (income in the month of receipt and a resource thereafter). The well-intentioned fund raising event could result in ineligibility for SSI and Medicaid.
- c. These problems can be avoided, for example, by having the church or community organization running the special event agree to hold the proceeds to be used for later purchase of goods and services other than food, clothing and shelter.

### **3. Personal injury settlements**

- a. These create the same pitfalls that are created by the gift, the fund raiser, and the child support settlement (see section III.C, above).
- b. Subject to state laws governing personal injury settlements, adverse effects on SSI eligibility can be avoided by one or more of the following methods:
  - (1) Having the settlement direct that the proceeds are to be held by a third party and used only for specific enumerated purchases (other than food, clothing or shelter);

- (2) Structuring the payout of proceeds to ensure that payments come, periodically (e.g., every few years), as a number of large lump sums.
  - (a) The recipient can then plan to spend the proceeds on more expensive exempt resources, such as a home purchase, home repairs, or vehicle purchase.
  - (b) While this does not totally avoid adverse consequences, it limits the months of SSI and Medicaid ineligibility.
- (3) Subject to state and federal laws governing trusts, have the proceeds put into a trust in which the trustee's distributions are strictly limited (not to be used for food, clothing, shelter or medical services available through Medicaid) in order to avoid adverse effects on SSI and Medicaid. These are sometimes referred to as "special needs trusts."

**F. Cafeteria Plans Are a Way to Reduce Countable Income for SSI Purposes.**

1. "Cafeteria plans," sometimes referred to as flexible spending accounts, are a special exclusion from wages authorized by section 125 of the Internal Revenue Code.
2. If an employer offers this alternative to its employees, the employee may designate a certain amount of pay that is then set aside to cover items not otherwise covered by health insurance.
  - a. This can be used to cover traditional medical costs such as health insurance premiums, co-payments on doctor visits and prescription purchases, and uncovered services such as chiropractor visits.
  - b. It can also be used to cover expenses that have nothing to do with medical needs, such as dependent child care and parking fees.
3. Any money deducted from pay for this purpose is not considered income for purposes of federal income taxes. Nor will it be considered income by the SSI program. See Program Operations Manual Systems (POMS) SI 00820.102.

4. For a person with earned income (i.e., wages) just above SSI's limits, the flexible spending account/cafeteria plan can be used to ensure continuation of SSI and Medicaid eligibility.
5. The cafeteria plan is also a way to reduce earned income below the section 1619(b) Medicaid threshold (see section V.D, below) or to reduce countable income for medically needy income eligibility (see section VII.B, below).

**G. Ensuring SSI (and Medicaid) Eligibility Through Payment at the Highest Available SSI Rate**

1. SSI payments are based on a federal benefit rate (FBR) and optional state supplement.
  - a. For 2004 the monthly FBR is \$564 for an individual, \$846 for a couple and \$376 for an individual receiving in-kind support and maintenance.
    - (1) When a person is receiving in-kind support and maintenance, the FBR is reduced by one-third in calculating the SSI check.
    - (2) This is sometimes called the "One-Third Reduction Rule." 20 C.F.R. § 416.1131.
  - b. Many states supplement the federal benefit rate with an "optional state supplement." New York, for example, supplements the monthly federal benefit rate by \$87 for a person living alone and by \$23 for a person living with others. (Most states would not distinguish between persons living alone and those living with others.)
2. The actual monthly SSI check is determined by subtracting countable income from the applicable SSI rate.
3. Those facing the "one-third reduction rule," can avoid it by either paying their fare share of household expenses, or by working out a business relationship to pay rent or "room and board." In some cases, this will mean the difference between getting SSI (and Medicaid) or no SSI at all.

**IV. Use of Work Incentive Provisions to Preserve SSI and Medicaid Eligibility**

**A. SSI's Budgeting Rules Allow Numerous Deductions from Earned Income.**

The following are allowed as deductions from earned income (i.e., wages from employment or self-employment). They permit SSI eligibility (and automatic Medicaid) at higher levels of income.

1. Student earnings (for full-time students under age 22) up to \$1,370 per month, but not more than \$5,520 per calendar year in 2004<sup>5</sup>;
2. Any portion of the monthly \$20 general income exclusion not applied to unearned income;
3. \$65 per month;
4. Impairment-related work expenses;
5. One-half of remaining earned income in a month;
  - a. NOTE: In California, New York and Wisconsin, SSA has approved an SSI waiver for demonstration project participants (see section III.D.3.i, above), allowing for three fourths of the remaining earned income to be disregarded.
6. Blind work expenses;
7. Amounts set aside in a Plan for Achieving Self Support.

**B. Elaboration on Special Deductions from Income**

1. Impairment-Related Work Expenses (IRWEs) [20 C.F.R. §§ 404.1576, 416.976]
  - a. IRWEs are expenses related to a disability that allow an individual to work.
  - b. In order to be deductible from earned income, they must be paid by the individual.
  - c. Examples include special transportation expenses, expenses for medication, and purchase of modified computer equipment.

---

<sup>5</sup>The student earned income exclusion was increased by regulation, effective January 2001. For 2002 and later years, it is now indexed based on the consumer price index. 20 C.F.R. § 416.1112(c)(2). Previously, the exclusion was \$400 per month, but not more than \$1,620 per year.

2. Blind Work Expenses (BWEs) [20 C.F.R. § 416.1112(c)(3); POMS SI 00820.510]
  - a. BWEs are very similar to IRWEs as they cover disability-related expenses that allow a person to work. Examples include guide dog expenses and the cost of readers if paid by the individual.
  - b. BWEs also cover a range of expenses, such as payroll deductions for income taxes, that are not related to the disability.
3. SSI'S Plan For Achieving Self Support (PASS)
  - a. The PASS allows an SSI recipient or applicant to set aside or exclude income that would otherwise be counted in calculating the SSI check.
  - b. The excluded income and/or resources must be used toward the person's vocational objective. [42 U.S.C. § 1382a(b)(4)(A)(iii) and (B)(iv), 1382b(a)(4); 20 C.F.R. §§ 416.1180-.1182; POMS SI 00870.001 *et seq* (July 2000).]
    - (1) A very wide range of goods and services can be purchased with money set aside in a PASS (e.g., college tuition, a vehicle purchase or a computer purchase).
    - (2) Money obtained through gifts, fund raisers, child support obligations, or personal injury settlements will not be counted by SSI as either income or a resource if paid directly into a special account set up through an approved PASS.
  - c. Importantly, the PASS provisions can allow a person who is not currently an SSI recipient (such as a person who receives SSDI only) to become eligible for SSI through these special deductions. This will also make the person eligible for Medicaid in most states.

### **C. Resource Materials Available on SSI Work Incentives**

1. *Benefits Management for Working People with Disabilities: An Advocate's Manual*, J. Sheldon & E. Lopez-Soto, Eds. (Greater Upstate Law Project, 2004 edition available in May 2004). This 190-page manual contains 12 separate chapters related to work and

benefits, including a new chapter on Medicaid. The manual contains extensive citations to law, regulation, policy and case law. It is available for purchase by calling Neighborhood Legal Services (NLS) at 716-847-0650 ext. 271 (ask for Wilma) or by visiting the NLS website at [www.nls.org](http://www.nls.org).

2. *Work Incentives for Persons with Disabilities Under the Social Security and SSI Programs* 35 Clearinghouse Rev. 759 (March-April 2002). This is also as part of our National Assistive Technology Advocacy Project's *Funding of Assistive Technology* booklet series. Hard copies are available by calling Wilma at 716-847-0650 ext. 271 and can be accessed on the NLS website at [www.nls.org/wkboklet.htm](http://www.nls.org/wkboklet.htm).
3. Regarding the PASS, see J. Sheldon and E. Lopez-Soto, *PASS: SSI's Plan for Achieving Self Support*, 30 Clearinghouse Rev. 1101 (March-April 1997). Copies of this article are available by calling NLS or visiting our website (see [www.nls.org/pass-art.htm](http://www.nls.org/pass-art.htm)). A full chapter of the *Benefits Management* manual (see above) is devoted to the PASS. A shorter article is available in a newsletter format: see [www.nls.org/planner/summer02.htm](http://www.nls.org/planner/summer02.htm).

## **V. Four Special Provisions Allow Former SSI Recipients to Continue Getting Medicaid Automatically After Losing SSI**

### **A. Recipients of Social Security Widow's/Widower's Benefits**

1. If a person loses SSI when he or she becomes entitled to widows or widowers benefits under Social Security, the person will remain automatically eligible for Medicaid if SSI eligibility would continue in the absence of the widow's or widower's benefits.
2. Eligibility continues only for so long as the person remains ineligible for Medicare. 42 U.S.C. § 1383c(d).

### **B. Recipients of Social Security Disabled Adult Child's Benefits**

1. Recipients of Social Security Child's Insurance Benefits, often referred to as Disabled Adult Child's (DAC) benefits, can continue eligibility for automatic Medicaid if, after July 1, 1987, the person lost SSI due to entitlement to or an increase in DAC benefits. 42 U.S.C. § 1383c(c).
2. In New York, this provision was the subject of a statewide, class action lawsuit. *McMahon v. Perales*, filed in 1991, and fully settled over nearly 10 years of litigation, challenged the failure of the New York's State Medicaid Agency and the Social Security Administration

to properly implement this provision. The state Medicaid agency has, in settlement of the litigation, adopted new regulations and policies. A similar lawsuit, *Carter v. Willis-Miller*, was successfully litigated in West Virginia.

- a. There is a very good chance that a similar problem may exist in your state.
- b. Persons having questions about the lawsuit should call the author of this outline who was originally a co-counsel on this litigation.
- c. For an excellent reference on this issue, see Munger, J., *Categorical Medicaid Eligibility for Recipients of Disabled Adult Child Social Security Disability Benefits*, 29 CLEARINGHOUSE REV. 1044 (March 1996).

### **C. The Pickle Amendment**

1. This protects certain persons who lost SSI because of cost of living increases in Social Security benefits since April 1977. Automatic eligibility continues if the person would be eligible for SSI under present eligibility standards if Social Security cost of living expenses since April 1977 are disregarded. 42 U.S.C. § 1396a(note); 42 C.F.R. § 435.135.
2. For a more detailed explanation of the Pickle Amendment, see Bonnyman, G. "Medicaid Eligibility in a Time Warp," 22 Clearinghouse Rev. 120 (June 1988) and "A Quick and Easy Method of Screening for Medicaid Eligibility under the Pickle Amendment," updated and published each year in Clearinghouse Review.

### **D. The Section 1619(b) Program: Continued Medicaid for Persons Who Lose SSI Due to Wages**

1. Section 1619(b) provides Medicaid for individuals who lose SSI benefits because earnings become too high to continue receiving cash benefits. 42 U.S.C. § 1382h; 20 C.F.R. § 416.264 - .269; POMS SI 02302.010 B.
2. Under 1619(b) criteria, automatic Medicaid will continue if the person would continue to be eligible for SSI if the wages were ignored and if annual income is less than a specified income threshold.
3. The income threshold

- a. This will change every calendar year and will be different in each state, based on the state's unique SSI rate and expenditures under its Medicaid program.
  - b. You can find the 1619(b) eligibility thresholds for your state by consulting SSA's POMS manual, POMS SI 02303.200N. The POMS manual can be found on SSA's web site, [www.ssa.gov/representation](http://www.ssa.gov/representation).
  - c. E.g., for 2004 the "general threshold" for 1619(b) ranges from a low of \$18,719 in Alabama to a high of \$42,390 in Connecticut.
  - d. A higher, "individualized threshold" can be established if individual medical or other expenses are high enough. POMS SI 02302.050.
4. Example of how 1619(b) works:
- a. Henry receives SSI benefits of \$564 per month in a state that pays the federal benefit rate with no state supplement. He goes to work and earns \$1,500 gross per month or \$18,000 per year.
  - b. Using SSI's formula for budgeting income, Henry's monthly countable income will be \$707.50. Since this is more than the \$564 SSI rate, he will lose his SSI check.
  - c. Henry will retain Medicaid under 1619(b) in most cases, so long as \$18,000 is less than his state's threshold of eligibility<sup>6</sup> and he remains otherwise eligible for SSI.
5. A more comprehensive discussion of section 1619(b) is contained in the *Benefits Management* manual and in the article covering work incentives (see information on these publications at section IV.C, above).

## **VI. Obtaining Medicaid Through The Federal Adoption Assistance Program**

### **A. Federally funded adoptions are governed by the federal Adoption Assistance and Child Welfare Act of 1980. 42 U.S.C. §§ 620-28, 670-676.**

---

<sup>6</sup>Only the Northern Mariana Islands has a 2004 threshold of eligibility that is less than \$18,000 per year.

**B. States are authorized to enter into adoption assistance agreements with parents “who adopt a child with special needs.” *Id.* §§ 673(a)(1)(B), 675(3).**

**C. For children with disabilities, the child is held to meet the criteria as a child with special needs if the child meets all the eligibility requirements for SSI. *Id.* § 673(a)(2)(A)(ii).**

1. For such children, the state “may make adoption assistance payments to such [adoptive] parents directly through the State agency or through another public or nonprofit agency, in amounts to be determined.” *Id.* § 673(a)(1)(B)(ii).
2. These payments are commonly referred to as “adoption subsidy payments.”
3. States have leeway to make adoption assistance payments based on individual circumstances, but they cannot be higher than foster care payments would have been if the child had remained in or entered a foster home. *Id.* § 673(a)(3).
4. In the case of adopted children with disabilities, states may continue the adoption assistance payments under the child is 21. *Id.* § 673(a)(4).

NOTE: The law provides that a child with a disability will not be considered a child with special needs unless: (a) the state has determined that the child cannot or should not return to the home of his or her natural parents; (b) the state has determined that because of the child’s disability (or other special factors, such as ethnic background) it is reasonable to conclude that the child cannot be adopted without providing adoption assistance; and (c) a reasonable but unsuccessful effort has been made to place the child without providing adoption assistance or Medicaid. *Id.* § 673(c).

**D. Automatic Medicaid eligibility. If the following criteria is met, the adopted child with a disability is automatically eligible for Medicaid [*Id.* § 673(b)(1)]:**

1. The child meets the criteria of “child with special needs” by meeting the eligibility requirements for SSI.
2. There must be an adoption assistance agreement in effect, even if adoption assistance payments are not being made pursuant to that agreement.

**E. Automatic Medicaid Eligibility, at state option**

1. States may choose to provide Medicaid coverage for children who are receiving benefits from state or local (non-federal) adoption assistance programs. 42 U.S.C. §§ 1396a(a)(10)(A)(ii), 1396d(a)(1).

**VII. Obtaining Medicaid Through the “Medically Needy” or “Spend Down” (i.e., “Share of Cost”) Program**

**A. The Medically Needy Program (Hereafter Referred to as Spend Down) Is an Option Exercised by Approximately Two Thirds of the States.**

1. Medically needy individuals are those who would qualify for Medicaid, including individuals who are disabled, but have income or resources above limits set by their state. 42 U.S.C. § 1396a(a)(10)(C).
2. Since Medicaid eligibility workers often do not explain the spend down program to applicants or recipients, it is important that you:
  - a. Find out if your state offers this option; and
  - b. Take steps to educate yourself on how it works.
  - c. At a minimum, you should keep up to date on your state’s medically needy eligibility levels for various sized families.

**B. How Does the Spend Down Work?**

1. Each state will set its own medically needy income level based on family size.
  - a. For example, New York has set its 2004 medically needy level at \$659 per month for a household of one.
  - b. All individuals meeting the federal (i.e., SSI) definition of disability, who have incomes and resources below the medically needy level, automatically qualify for Medicaid.
2. Individuals with income above the medically needy level do not automatically qualify for Medicaid.
  - a. They must first meet a “spend down” or “share of cost” test.
  - b. The spend down is the amount by which the individual’s income exceeds the medically needy level after subtracting allowable deductions.

- c. Consider this example: In New York, a single adult with a disability receives a monthly SSDI check of \$779. Since this exceeds the state's medically needy level of \$659, the Medicaid agency will disregard the first \$20 as an unearned income exclusion and the individual will face a \$100 spend down (i.e., their countable income exceeds the medically needy level by \$100).
- d. The spend down acts like a deductible or insurance premium that must be paid or incurred before the insurance program, i.e., Medicaid, begins coverage.

**C. For Individuals in States in Which Medicaid is Automatic For SSI Recipients, the Medicaid Agency Must Follow SSI's Rules for Counting of Income and Resources**

- 1. See 42 C.F.R. §§ 435.831 (income), 435.601 and 435.845 (resources).
- 2. In these states, the rules (or "methodologies") used in determining eligibility for persons who are blind or disabled can be no more restrictive than those employed by the SSI program. 42 U.S.C. § 1396a(a)(10)(C)(i)(III); see *Addis v. Whitburn*, 153 F.2d 836 (7th Cir. 1998); *Camacho v. Perales*, 786 F.2d 32 (2d Cir. 1986).
- 3. In states using more restrictive income and resource rules than those of SSI (i.e., section 209(b) states), those rules can be no more restrictive than those used under the state's Medicaid plan in effect on January 1, 1972. See, e.g., 42 C.F.R. § 435.831(b)(3)(regarding income determinations).
- 4. For those states in which these mandates apply, the implications are very significant for those Medicaid applicants and recipients who are working or have vocational plans.
  - a. This is because all of the SSI work incentives (see section IV, above) must be available to reduce what would otherwise be countable income and resources.
  - b. For example, as explained in section IV.A. and B, the following monthly income disregards must be allowed when determining income eligibility or the amount of an individual's spend down:
    - (1) The \$1,370 student earned income exclusion for students under age 22;

- (2) The \$20 general income exclusion;
- (3) The \$65 earned income exclusion;
- (4) Impairment related work expenses;
- (5) One-half of remaining earned income;
- (6) Blind work expenses; and
- (7) Amounts set aside in a Plan for Achieving Self Support (PASS).

- c. The availability of a “Medicaid PASS,” almost unheard of in state Medicaid programs, opens up some interesting possibilities for funding items related to self-support.

Example: Consider Mary, age 38, who is spinal cord injured. She resides in New York which has a one-person medically needy income level of \$659 per month and resource limit of \$3,950. She receives \$1,029 in SSDI benefits each month. After the first \$20 of her SSDI is excluded, Mary's monthly income is \$350 above the one-person Medicaid limit of \$659.

Mary proposes to set aside \$250 per month (\$3,000 per year) in a PASS to save toward the purchase of a modified van and a laptop computer to pursue a career in accounting. If approved by Medicaid, Mary's countable income is reduced from \$1,009 to \$759 and her spend down is reduced from \$350 to \$100 per month. If Mary sets aside \$350 in an approved PASS her spend down will be eliminated. Mary can also reduce her countable resources below the \$3,950 limit by designating part of her savings toward PASS expenses.

Like its SSI counterpart, a Medicaid PASS can fund a wide range of items, including child care, equipment or supplies to start a business (including a business operated from the home), and modifications to vehicles or buildings to allow use by a the person with a disability. So long as the cost is connected to the long-term vocational goal, it should be allowed under Medicaid's PASS.

NOTE: The author's agency has had two Medicaid PASSes approved using these provisions.

#### **D. What Bills or Expenses Will be Counted Toward the Spend Down?**

Nearly any medical expense that is paid or incurred can be used to meet a Medicaid spend down requirement, even if it is for goods or services not covered by your state plan. However, the Medicaid applicant/recipient will need to keep good records. The following is a list of typical expenses that may be used:

1. Health insurance premiums and co-payments
2. Doctor bills
3. Mental health bills (including a psychiatrist's services and mental health counseling services)
4. Dental bills
5. Home health care
6. Prescriptions drugs
7. Eyeglasses and optometry bills
8. Over-the-counter drugs or purchases related to health care

**E. Medical Expenses Paid or Incurred by State or Local Government Programs Must Be Deducted From Income in Determining Medicaid Eligibility**

1. Medical expenses incurred or paid by a program of the state or a political subdivision (i.e., county, city, school district) must be counted as medical expenses under the spend down provisions. 42 U.S.C. § 1396a(a)(17)(D).
2. Potential examples of such expenses might be for services provided by a state agency serving a specific disability population, like an office of mental health or developmental disabilities. Services like physical or occupational therapy, provided by special education programs, might also qualify under these provisions.
3. How might this provision work?
  - a. Consider the case of Kevin, age 18, who has cerebral palsy and receives \$879 in Social Security Disabled Adult Child's benefits. He is not eligible for SSI and is eligible for Medicaid with an \$200 per month spend down.

- b. Kevin receives physical therapy and occupational therapy at his public school as special education services, at a cost of \$175 per month to the school. These \$175 in school-based medical expenses will reduce the spend down to \$25 per month. This means that for \$25 per month, Kevin's parents can obtain Medicaid coverage for him. This will now provide a payment source for a power wheelchair, prescription drugs, doctor visits, home health care, and a range of other services.

## **VIII. Home and Community-Based (HCB) Waivers**

### **A. These Are an Optional Service Added in 1981.**

1. A state need not implement any particular waiver.
2. Today, all states participate in HCB waivers to varying degrees.

### **B. These Waivers Are Typically Referred to as Section 1915(c) Waivers.**

1. They allow states, with approval of the federal Centers for Medicare and Medicaid Services (CMS)(formerly the Health Care Financing Administration), to waive statewideness, comparability and certain income and resource requirements of the Medicaid Act. 42 U.S.C. § 1396n(c).
2. *Waiver of statewidedness*
  - a. Ordinarily, the state's Medicaid plan must offer comparable coverage in all regions of a state.
  - b. A waiver could be approved that will offer a level of Medicaid coverage in one or more sections of the state that is not available to recipients statewide.
3. *Waiver of comparability*
  - a. Ordinarily, the state's Medicaid plan must treat all similarly situated recipients equally.
  - b. A waiver could select a targeted group of Medicaid recipients (such as persons with traumatic brain injury, for example) and offer them a scope of services not available to persons who have different disabilities but similar needs.
4. *Waiver of certain income and resource rules*

- a. A waiver can be implemented which exempts certain populations from the general income and resource requirements.
- b. For example, the Katie Becket waiver (see section VI.C.1, below) allows a Medicaid program to disregard parental income and resources for children.

**C. These Waiver Programs Are Structured to Provide an Alternative to Institutional Care and Often Provide Greater Access to Assistive Technology and Other Expensive Services than That Which Is Available under Other Covered Services Within the State Plan.**

For example, one of the original waiver programs, known as the “Katie Becket” waiver, allows the Medicaid program to disregard the income and resources of parents for children with severe disabilities who meet the requirements for institutional care.

**D. Representative Services Available under HCB Waivers:**

1. Case management
2. Homemaker services
3. Home health aide services
4. Personal care services
5. Adult day health
6. Habilitation
7. Respite
8. Home modifications
9. Partial hospitalization and psycho-social rehabilitation for persons with psychiatric diagnoses.

NOTE: Some of the listed services are optional services that a state may not cover in its regular state plan. Others are services that are not otherwise available as either required or optional services.

**IX. The Optional Medicaid Buy-In Program**

The enhancements to the optional Medicaid buy-in program have been touted as some of the more important provisions of the Ticket to Work and Work Incentives Improvement Act of 1999. As this document is written, the buy-in exists in the following 26 states: Alaska, Arkansas, California, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Minnesota, Missouri, Mississippi, Nebraska, New Hampshire, New Jersey, New York, New Mexico, Oregon, Pennsylvania, South Carolina, Utah, Vermont, Washington, Wisconsin, and Wyoming. A very similar program, approved as a section 1115 waiver, is being implemented in Massachusetts. The following states have Medicaid buy-in programs that are in various states of pre-implementation: Arizona, Colorado, Nevada, Oklahoma, Rhode Island, Texas, and Virginia. *Id.*<sup>7</sup>

**A. Background: This Optional Program Was Created by Section 4733 of the Balanced Budget Act Amendments of 1997.**

1. States can choose whether or not to offer the buy-in. Subject to federal criteria, a state can choose to structure the buy-in as it sees fit.
2. Largely due to fears of rising Medicaid costs, only five or six states had initiated buy-in programs through the date the Ticket to Work and Work Incentives Improvement Act was signed (12/17/99).
3. A “buy-in” to Medicaid is designed to provide health insurance to working people with disabilities who, because of relatively high earnings, cannot qualify for Medicaid under another provision.
4. Key federal eligibility criteria for Buy-In
  - a. Eligible individuals must be in a family whose net income is less than 250 percent of the federal poverty level. A single individual is in a family of one.
  - b. Except for the individual’s earnings, the person with a disability would be considered eligible for SSI benefits. This includes the definition of disability.
  - c. Each state determines its own definition of a “family.”
  - d. All SSI exclusions apply to the determination of family income, including the earned income exclusions.
  - e. Individuals are not required to have been on SSI to be eligible for this new Buy-In provision.

---

<sup>7</sup>See the Social Security Administration (SSA) website at: [www.ssa.gov/work/ResourcesToolkit/Health/states.html](http://www.ssa.gov/work/ResourcesToolkit/Health/states.html).

- f. The State must make a disability determination if an individual was not an SSI recipient.
- g. Substantial gainful activity (i.e., in 2004 earnings in excess of \$810 monthly) is not an eligibility consideration.
- h. States can increase the resource limits to as high as \$14,000.
- i. States can charge premiums or other cost-sharing charges.

**B. How the Ticket to Work and Work Incentives Improvement Act of 1999 Makes Buy-in Program More Attractive**

1. One option builds on the existing provision and allows states to offer a Medicaid buy-in to persons with disabilities who work and have earnings between 250 and 450 percent of the poverty level.
  - a. Participating states will be allowed to set income limits and require cost-sharing and premiums, based on income, on a sliding scale. A state could require some individuals to pay the full premium as long as the premiums do not exceed 7.5 percent of the individual's total income.
  - b. States must require a 100 percent premium payment for individuals with adjusted gross incomes greater than \$75,000 unless states choose to subsidize the premium using their own funds.
2. A second option allows states to cover individuals who continue to have a severe disability, but lose eligibility for SSI or SSDI because their medical condition improves.