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Achieving a Better Life Experience (ABLE) Accounts

ABLE Accounts can be Used by Individuals with Disabilities to Save Money to Support Independence, Employment, and Pay for or Leverage Funding for Assistive Technology

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I. Introduction

The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act became law on December 19, 2014 when the legislation was signed by then President Barrack Obama.[1] The ABLE account is considered a tax-advantaged account to save funds for the disability-related expenses of a "designated beneficiary," who must meet a test for disability or blindness with an onset before age 26. As this was written in early September 2017, active ABLE accounts existed in 28 states.[2]

This publication will: describe what an ABLE account is; who is eligible; how much can be saved each year; the mechanics of saving and spending (including the ability to purchase a range of goods and services, including assistive technology (AT) devices) through the use of account money; and the role an ABLE account can play for a person who is moving toward self-supporting employment. It will also explain how deposits and monies held in an ABLE account are treated by the Supplemental Security

[1] Internal Revenue Code, Section 529A, 26 U.S.C. 529A; 80 Federal Register 35602-01, amending 26 CFR Parts 1, 25, 26, and 301 (proposed regulations of June 22, 2015); Social Security Program Operations Manual System (POMS) SI 01130.740 (March 2016), https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130740; Center for Medicare and Medicaid Services, State Medicaid Director Letter, SMD #17-002, *Implications of the ABLE Act for State Medicaid Programs (Sept. 7, 2017), http://www.medicaid.gov/federal-policy-guidance/federal-policy-guidance.html*.
[2] See ABLE National Resource Center, http://www.ablenrc.org/, and map on their home page showing states with active ABLE accounts shaded in blue.

Income (SSI) program, Medicaid, and a range of other programs. Case examples are used to show how ABLE, SSI, and other benefit programs work together. A special emphasis of this publication will be on using an ABLE account to fund AT outright and on using special ABLE rules to maintain eligibility for funding sources that will pay for AT.

Throughout this document frequent references are made, in footnotes, to the legislation and the proposed regulations of June 22, 2015.[3] Readers are cautioned that when the ABLE regulations are published as final some provisions could change. Therefore, if in doubt about issues like what qualifies as a qualified disability expenses (QDE), it is always best to communicate with those administering the ABLE account that is holding the financial resources for the designated beneficiary.

II. ABLE Account Basics

A. What is an ABLE account? How is it established? What if your state does not currently have an ABLE program?

An ABLE account offers a "designated beneficiary" a way to save money, to pay for needs related to his or her disability, through the contributions of the beneficiary and others. Any individual who meets the disability criteria, described below, can establish an account in a state that offers ABLE accounts. Even if an individual lives in a state that does not currently offer ABLE accounts, he or she can set up an account in any state that has a national program.[4] For example, the states of Nevada, Minnesota, and Tennessee have national ABLE programs.[5] In fact, the majority of currently active programs accept accounts from throughout the country.[6]

The proposed ABLE regulations would allow a person to close an account in one state and make a "program-to-program" transfer of the money into an account from another state, so long as the person has no more than one active ABLE account at the same time[7]:

Example: Eva lives in state which did not have an ABLE program as of February 2017 when she wanted to open an account. In February 2017, she

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[3] See note 1.

[4] The Consolidated Appropriations Act of 2016, P.L. 114-113, HR 2029, Dec. 118, 2015, eliminated the requirement that ABLE accounts be established only in the ABLE account beneficiary's state of residence. The IRS reports that this change will be addressed in the final ABLE regulations. See *IRS Tax Benefit for Individuals With Disabilities: IRC Section 529A*, https://www.irs.gov/government-entities/federal-state-local-governments/tax-benefit-for-disability-irc-section-529a.

[5] See https://savewithable.com/nv/home.html (ABLE Nevada program), https://savewithable.com/mn/home.html (Minnesota ABLE Plan), and http://www.abletn.gov/ (ABLE Tennessee).

[6] When you click on a state with an active ABLE program on the ABLE National Resource Center site (note 2), part of that state's ABLE profile will state whether they have a national program.

[7] See proposed regulations, 26 CFR 1.529 A-1(b)(12), allowing a program-to-program transfer of the entire account balance from one state program to another for the same beneficiary. This specific provision does not appear in the ABLE Act.

opened up an account in a state which offered a national account. In August 2017, her state officially started its ABLE program. Eva then closed her account in the out-of-state program and made a program-to-program transfer of all her funds in that program's account into a newly-opened ABLE account in her state. (See a more detailed case example, involving Eva, in part III, below.)

B. What are the ABLE disability criteria? How is disability established?

The designated beneficiary can establish disability in one of two ways:

- By showing he or she is currently eligible for Social Security Disability Insurance (SSDI) or SSI disability benefits, based on a disability that began before age 26; or

- By certifying, or having a parent or guardian certify that the individual has a medically determinable impairment "which results in marked and severe functional limitations" that has lasted or is expected to last for 12 consecutive months, or is likely to result in death, with the disability or blindness occurring before age 26.[8]

The law provides that the certification of disability must be filed with the Secretary of the Treasury.[9] Interim Guidance, issued by the Internal Revenue Service (IRS) on November 20, 2015 pending final regulations, provides that the disability certification is deemed to have been filed with the Treasury Secretary once the state ABLE program has received the certification. This guidance goes on to provide that the certification requirements are met if the individual, the individual's agent under power of attorney, or his/her parent or guardian certify, under penalty of perjury, that they have the "signed physician's diagnosis" and that the signed diagnosis will be retained and provided to the ABLE program or IRS upon request.[10]

C. Who may contribute to an ABLE account? What are the annual contribution limits?

Any "person" can contribute to an individual's ABLE account, including the designated beneficiary.[11] A person, as defined by IRS rules, includes a trust or estate.[12] The maximum combined contributions for a calendar year cannot exceed the current year's IRS gift tax exempt amount, $14,000 in 2017.[13]

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[8] 26 USC 529A(e). See proposed regulations, 26 CFR 1.529 A-2(e)(2), noting that the term "marked and severe limitations" means the standard of disability for children under 18 claiming SSI benefits based on disability.
[9] 26 USC 529A(e)(1).
[10] See IR-2015-130, pp.8-9, available at https://www.irs.gov/uac/newsroom/new-irs-guidance-to-simplify-able-program-administration. See also, proposed regulations, 26 CFR 1.529 A-2(e).
[11] 26 USC 529A(b)(1)(A); proposed regulations, 26 CFR 1.529A-2(a)(4).
[12] 26 USC 7701(a)(1) (defines "person" to include an individual, trust, estate, partnership, or corporation); POMS SI 01130.740 B(2); CMS SMD # 17-002 (note 1), p. 4.
[13] See 26 USC 529A(b)(2)(B); proposed regulations, 26 CFR 1.529A-2.

D. What are the overall limits of money that can be retained in an ABLE account?

The dollar limits of what can be retained in an ABLE account will vary state-by-state. For example, Nebraska's account limit is $360,000, Nevada's limit is $370,000, and Michigan's limit is $500,000.[14] A state's ABLE account limits cannot exceed the limits established for the state's section 529 college savings account. However, the law would appear to allow a state's ABLE program to have lower account limits than those set for their 529 college savings accounts.[15]

E. How can money in an ABLE account be used for "Qualified Disability Expenses"?

The designated beneficiary is permitted to withdraw money from the ABLE account to meet Qualified Disability Expenses (QDEs). Although the law characterizes them as expenses "related to the blindness or disability of the designated beneficiary and for the benefit of the designated beneficiary,"[16] comments to the proposed regulations note that "the Treasury Department and the IRS conclude that the term 'qualified disability expenses' should be broadly construed to permit the inclusion of basic living expenses and should not be limited to items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual."[17] An example from the proposed regulations illustrates this point:

> "**Example.** B, an individual, has a medically determined mental impairment that causes marked and severe limitations on her ability to navigate and communicate. A smart phone would enable B to navigate and communicate more safely and effectively, thereby helping her to maintain her independence and to improve her quality of life. Therefore, the expense of buying, using, and maintaining a smart phone that is used by B would be considered a qualified disability expense."[18]

This proposed expansion of the QDE definition and this example are exciting news for individuals with disabilities who more and more are relying on both smart phones and tablets with available apps to allow them to overcome the limitations created by a disability and accomplish tasks that might not be possible without the electronic device. Typically, these everyday items cannot be funded as durable medical equipment (DME) by the two major health insurance programs, Medicaid and Medicare.

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[14] See https://www.enablesavings.com/ (Nebraska), https://savewithable.com/nv/home.html (Nevada), and https://www.miable.org/ (Michigan).
[15] See 26 USC 529A(b)(6), requiring a qualified ABLE program to have safeguards to prevent aggregate contributions in excess of the state limits established under 26 USC 529(b)(6).
[16] 26 USC 529A(e)(5).
[17] See proposed regulations, 26 CFR 1.529A-2(h)(1) and comments, 80 Fed. Reg. at 35608.
[18] Proposed regulations, 26 CFR 1.529A-2(h)(2).

This is because their DME definitions do not allow funding for equipment that is useful in the absence of illness or injury.[19]

Section 529A(e)(5) of the law provides a list of expenses that would be considered QDEs, including:

- Education, employment training and support;
- Housing, transportation;
- Assistive technology and personal support services;
- Health, prevention and wellness;
- Financial management and administrative services, expenses for ABLE account oversight and monitoring;
- Legal fees; and
- Funeral and burial.[20]

The law then goes on to add "other expenses" approved by the Treasury Secretary,[21] interpreted by the proposed regulations to include basic living expenses.[22]

Clearly, ABLE account funds can be used to purchase or contribute to the cost of a variety of AT devices that an individual may need. The individual with a disability or designated beneficiary of the ABLE account should always look to other funding sources first, relying on ABLE funds to pay for those items that cannot be funded, for example, through Medicaid, Medicare, a private insurance plan, a special education program, or a state vocational rehabilitation agency.[23] If the final regulations provide that there need not be a showing of medical necessity for an ABLE account QDE, the use of ABLE account funds would be appropriate, for example, when a funder like Medicaid does not find the requested AT to be medically necessary and the individual chooses to use the ABLE account for the purchase rather than pursue a time-consuming appeal.

F. How does an ABLE account affect continued SSI eligibility?

The Supplemental Security Income (SSI) program provides cash payments to children and adults with disabilities who have limited income and resources. The SSI program has issued policy provisions governing the treatment of money put into ABLE

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[19] See federal Medicaid regulation, 42 CFR 440.70(b)(3)(ii), providing that medical equipment and appliances "are items that are primarily and customarily used to serve a medical purpose [and] generally are not useful to an individual in the absence of a disability, illness or injury…"; see federal Medicare regulation, 42 CFR 414.202, containing almost identical language in its definition of durable medical equipment.
[20] 26 USC 529A(e)(5)
[21] *Id*.
[22] Proposed regulations, 26 CFR 1529A-2(h), 80 Fed. Reg. 35614-15; Interim Guidance, IR-2015-130, note 10, p. 3.
[23] See *Work, Assistive Technology and Transition-Aged Youth: Funding for Work-Related Assistive Technology Through Special Education Programs, State Vocational Rehabilitation Agencies, Medicaid, Medicare and SSI's Plan for Achieving Self Support*, http://www.nls.org/files/What's%20New/WorkATandTAY.pdf, providing a summary of what AT devices those programs can potentially fund.

accounts and the funds held in ABLE accounts, the status of SSI and Medicaid when the total value of an ABLE account exceeds $100,000, and the use of ABLE account funds to meet designated disability expenses.[24] These provisions provide that:

- Contributions of income of the designated beneficiary still count as income for SSI, while the contributions from all others are excluded and not counted as income of the beneficiary;

- Earnings from the ABLE account are excluded by SSI and not counted as income or against SSI resource limits; and

- Up to $100,000 of the account balance is excluded by SSI and not counted toward the $2,000 SSI resource limit.[25]

ABLE Account Distributions: The SSI policy provides that ABLE account distributions are not income of the designated beneficiary for SSI purposes, but a "conversion of a resource from one form to another … regardless of whether the distributions are for non-housing QDEs, housing QDEs, or non-qualified expenses."[26] The exclusion of housing-related QDEs from income is extremely important, as ordinarily the payment of housing expenses (e.g., rent, mortgage, property taxes, utility costs) by a third party, including a trust, would be considered in-kind income and could reduce the SSI payment by up to one-third of the SSI Federal Benefit Rate (i.e., up to a $245 per month reduction in 2017).[27]

When ABLE account balance exceeds $100,000: As already noted, SSI eligibility is not affected so long as the ABLE account balance does not exceed $100,000. No designated beneficiary is expected to exceed the $100,000 limit in the near future because of the yearly $14,000 cumulative limit on contributions. However, individuals with disabilities need to understand these provisions for future planning purposes.

When the account balance is more than $100,000, the SSI program will count any of the excess money toward the $2,000 resource limit. SSI policy calls for indefinite cash benefit suspension and continuing eligibility for Medicaid during periods of excess resources attributable to an ABLE account.[28] Ordinarily, if an individual exceeded SSI's $2,000 resource limit for 12 consecutive months, he or she would be terminated from SSI with a new application needed if countable resources went below $2,000 in a future

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[24] See POMS SI 01130.740 (updated March 2016), https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130740.
[25] See 20 CFR 416.1205, establishing the $2,000 non-exempt resource limit for SSI.
[26] POMS SI 01130.740 C.4. Readers must keep in mind, however, that the use of ABLE funds for non-qualified expenses may have adverse tax consequences. See 26 USC 529A(c), providing that ABLE account distributions will be included with the designated beneficiary's gross federal income to the extent not used to pay for QDEs. See also 26 USC 529A(c)(3)(A), providing that any federal tax imposed by virtue of a non-QDE distribution will be increased by 10 percent.
[27] POMS SI 00835.200 *et seq*.
[28] POMS SI 01130.740 D.1.a.

month.[29] This special ABLE policy allows SSI to be suspended for 12 months or longer, allowing the designated beneficiary to return to SSI payment status in any future months in which countable resources, including the ABLE account balance in excess of $100,000, are within the $2,000 limit.

Note: Although not specifically addressed in the POMS, the indefinite suspension of SSI related to ABLE account funds in excess of $100,000 would not apply if the SSI beneficiary accumulated more than $2,000 of non-exempt resources independent of the ABLE account. In that case, the SSI payments would be suspended under regular SSI rules and SSI would be terminated if excess resources resulted in an SSI suspension of at least 12 consecutive months.

The retention of Medicaid during the period of indefinite suspension is very important to any individual who will need continuing Medicaid to cover a range of expenses, including expenses for AT devices. The Medicaid retention provision is important for the individual who is no longer dependent on the modest SSI payment they were getting but who needs Medicaid for AT and other health-related costs. It is also important to the individual who is no longer getting SSI payments due to the budgeting of earnings and retains Medicaid through the 1619(b) work incentive.[30]

G. What is the impact of the ABLE account on other federally-authorized benefits?

The Treasury Department has said that "[in] general, neither the ABLE account nor distributions from the account are treated as income or resources of a designated beneficiary … in determining that designated beneficiary's qualification for federal benefits [other than SSI and Medicaid]."[31] However, no provision in the law or the proposed regulations references how any specific federal benefit program will implement this provision. As this is written, the only federal benefit programs, other than SSI, that have established a regulation or policy for treatment of ABLE accounts are the Medicaid program and the Supplemental Nutrition Assistance Program (SNAP), still referred to by many as the food stamp program.

Federal Policy Governing State Medicaid Programs: On September 7, 2017 CMS, through its Center for Medicaid and CHIP Services, issued a Dear State Medicaid Director Letter, SMD # 17-002, regarding *Implications of the ABLE Act for State Medicaid Programs*.[32] This federal policy applies to individuals who access Medicaid through Modified Adjusted Gross Income (MAGI)-based methodologies for counting of income and resources, and to those who access Medicaid through Non-MAGI methodologies. While the principles covered in this policy generally apply to both categories, our focus is on the Non-MAGI population which includes individuals with

[29] POMS SI 02301.201.
[30] See part II.G, below, for more detail on 1619(b).
[31] Interim Guidance, IR-2015-130, note 10, p. 2.
[32] See note 1.

disabilities who access Medicaid through the State program rather than through SSI eligibility.

SMD # 17-002 reinforces principles already covered in the SSI section, above, and applies those principles to Medicaid. This policy provides that a State Medicaid Program, in determining both initial and continuing eligibility, must:

- Exclude third party contributions to an ABLE account, including contributions made by a trust, and not count them as income or resources of the ABLE account's designated beneficiary. (Income of the designated beneficiary that is contributed to the ABLE account is still counted as that individual's income.)

- Exclude all funds in an ABLE account and not count them as resources of the designated beneficiary.

- Not count distributions from the ABLE account as income of the designated beneficiary so long as they are used for QDEs.

The SNAP or Food Stamp Program: The SNAP program is operated through the U.S. Department of Agriculture (USDA). The USDA's January 2017 regulations provide that assets retained in an ABLE account are considered by the SNAP program to be excluded resources.[33]

We will limit the discussion below to the interrelationship between ABLE accounts and five key federally-authorized programs that can support a range of healthcare services (including AT) or support a work goal through a range of funding for services, including funding for AT. These programs include: section 1619(b) Medicaid; Medicaid's Buy-in Program for working individuals; the Medicare Savings Programs; the State Vocational Rehabilitation Agency; and SSI's Plan for Achieving Self Support (PASS). Each of these programs should be required to ignore the resources held in an ABLE account when making financial eligibility determinations.

The Section 1619(b) Medicaid Program: An SSI beneficiary who earns significant money through a job or self employment, and loses the right to an SSI payment through the budgeting of wages, will typically be able to retain Medicaid through the work incentive known as section 1619(b).[34] Section 1619(b) Medicaid is considered a non-cash SSI benefit and the 1619(b) eligibility criteria requires that non-exempt resources remain below the SSI program's $2,000 resource limit.[35] Since continued 1619(b) eligibility is based, in part, on SSI policies governing what resources

[33] 7 CFR 273.8(e)(2)(ii).
[34] 42 USC 1382h(b); POMS SI 02302.010 C. Annual earned income limits for 1619(b) will vary state-by-state. POMS SI 02302.200.
[35] POMS SI 02302 C.1.b. Readers must keep in mind that 1619(b) Medicaid eligibility is based on SSI policy and not on federal CMS policy even though methodologies for counting income and resources may be very similar.

are exempt, any ABLE account balance of $100,000 or less will be treated as an exempt resource under 1619(b). Importantly, even if the account balance exceeds $100,000, leading to an indefinite suspension of SSI payments, SSI's ABLE policy provides for the continuation of Medicaid during periods of excess resources attributable to an ABLE account.[36] Thus, an individual can save substantial money in an ABLE account without jeopardizing Medicaid eligibility under 1619(b) – even if the balance is well in excess of $100,000.

The Medicaid Buy-In Program: This powerful work incentive, created as part of the Ticket to Work and Work Incentives Improvement Act of 1999,[37] allows working individuals with disabilities to qualify for Medicaid at countable earnings levels set by individual states. For example, a number of states set their countable income limits at 250 percent of the federal poverty level.[38] This federally-optional program now exists in more than 40 states.

Federal criteria governing Medicaid Buy-In programs requires that SSI rules are to be applied for counting of income and resources unless specific provisions enacted by a state provide for more liberal rules.[39] Since the ABLE-related SSI rules discussed above are now a part of SSI's income and resource rules, a Medicaid Buy-In program should be required, for example, to follow the rules that allow for exclusion of ABLE accounts even if more than $100,000 to allow an individual to retain Medicaid.

Medicare Savings Programs (MSPs): MSPs provide for Medicaid agency payment of Medicare Part B premiums and, in some cases, copayments if a financial needs test is met.[40] States, in determining countable income and resources for MSP eligibility, must follow all SSI income and resource exclusion rules.[41] Since ABLE account resources, up to $100,000, are now exempt in the SSI program they will also be exempt in determining MSP eligibility. This means that a Medicare beneficiary can retain a very significant balance in his or her ABLE account and qualify for the Qualified Medicare Beneficiaries program, for example, which would pay for both Part B

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[36] POMS SI 00130.740 D.1.a.

[37] 42 USC 1396a(a)(10)(A)(ii)(XV) and 1396o(g). A few early state Medicaid Buy-In programs were created pursuant to section 4733 of the Balanced Budget Act of 1997, Pub. L. No. 105-33.

[38] See, e.g., the Medicaid Buy-In programs of New York, https://www.health.ny.gov/health_care/medicaid/program/buy_in/docs/working_people_with_disabilities.pdf and Iowa, http://dhs.iowa.gov/ime/members/medicaid-a-to-z/mepd.

[39] See Dear State Medicaid Director letter (Aug. 29, 2000) and enclosure attached to letter (allowing states to establish their own income and resource limits, with an option to impose no limits at all; to the extent that a state establishes an income and/or resource limit "SSI methodologies apply in determining eligibility, including the SSI earned income disregard of $65 plus one-half of the remainder"), https://www.medicaid.gov/Federal-Policy-Guidance/downloads/smd082900.pdf.

[40] See Medicare Savings Program section of Medicare.gov website, https://www.medicare.gov/your-medicare-costs/help-paying-costs/medicare-savings-program/medicare-savings-programs.html, summarizing the three MSPs: the Qualified Medicare Beneficiaries (QMB) program, the Specified Low-Income Beneficiaries (SLMB) program, and the Qualified Individuals (QI-1) program.

[41] See 42 USC 1396d(p)(1)(B) (requiring that income determinations in the QMB program, and by extension the other MSP programs, be made using SSI rules) and 1396d(p)(1)(C) (requiring that asset determinations, for states with an asset test, be made using SSI rules); see also POMS HI 00815.023 B (SSI earned income exclusions apply).

premiums and the 20 percent copayment on any AT device covered by Medicare as durable medical equipment.[42]

State Vocational Rehabilitation (VR) Agency's Financial Need Requirements: An SSI or SSDI beneficiary automatically meets the VR agency's financial need criteria for receipt of funding for a range of services, including AT devices and services used to support a vocational goal.[43] Since individuals can now retain SSI cash payment status notwithstanding ABLE account resources up to $100,000, financial eligibility for VR agency funding will continue as well for those individuals.[44]

SSI's Plan to Achieve Self Support (PASS): The PASS allows for exclusion of both income and resources to be used to support an approved work goal.[45] Since up to $100,000 in an ABLE account is an exempt resource for SSI purposes, there is no requirement that an individual exhaust the ABLE funds before using the PASS to purchase goods and services needed to support a work goal. To the extent that the PASS savings will not be enough to support the work goal in an individual case, an ABLE account distribution could be used to supplement those funds available in the PASS, for example, to pay for needed AT.

H. What happens to funds in an ABLE account when a beneficiary dies?

The Medicaid Payback Provision: Upon his or her death, the state in which the designated beneficiary lived may file a claim to all or a portion of funds in the account. The state of residence can receive up to the amount which the state spent on the beneficiary through its Medicaid program, less any premiums paid by or on behalf of the beneficiary under any state's Buy-In program.[46] The state may recoup Medicaid-related expenses from the time the ABLE account was opened.[47] In light of the payback provisions, individuals with disabilities and parents will want to be thoughtful about how much to accumulate in an account.[48]

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[42] See Medicare Savings Program section of Medicare.gov website, note 36.

[43] See 34 CFR 361.54(b)(3)(ii) (providing that individuals "determined eligible for Social Security benefits under Titles II [SSDI] and XVI [SSI] of the Social Security Act" must be exempt from the financial needs test.

[44] For a detailed overview of services/funding available through a State VR Agency, see *Work, Assistive Technology and State Vocational Rehabilitation Agencies: The Vocational Rehabilitation Agency's Obligation to Fund AT to Support Employment Preparation*, http://www.nls.org/files/Disability%20Law%20Hotlines/National%20AT%20Advocacy/VRFundingofAT2013.pdf.

[45] See Social Security POMS, SI 00870.001 *et seq*., https://secure.ssa.gov/apps10/poms.nsf/lnx/0500870000. See *Plan for Achieving Self-Support: An SSI Work Incentive and Approach to Self-Directing Vocational Rehabilitation to Support a Range of Work Goals*, http://www.nymakesworkpay.org/docs/PASS-1.3.pdf.

[46] The provision allowing for the Medicaid payback, 26 USC 529A(f) does not provide details on what it means by a Buy-In program. SMD # 17-002 points this out and indicates that CMS is working with the Treasury and IRS to provide clarification on this language. See SMD # 17-002, note 1, p. 7.

[47] 26 USC 529A(f); proposed regulations, 26 CFR 1.529A-2(p).

[48] There may be circumstances in which a trust could be preferred for accumulating larger sums of money if the trust does not have a similar payback provision that is triggered by the death of the beneficiary. See Marcus, J. & Varnet, T, *Special Needs Planning Tools: A Comparison of 529 ABLE Accounts, Pooled Special Needs Trusts, and Special Needs Trusts,*

I. Can an ABLE Account be set up for a very young child?

There is no minimum age for setting up an ABLE account. In fact, many children are, at a very young age, diagnosed with disabilities that would meet the disability criteria for an ABLE account. Parents, if they or other family members are able to contribute, may want to set up an ABLE account for their child as early as age four or five, or at even a younger age. If the child is currently getting SSI, the parents/other family members may view the ABLE account as part of a plan for meeting the child's future needs. Even if the child is not currently eligible for SSI because of parental income, the parents may anticipate SSI eligibility when the child is 18 and set up an ABLE account, knowing that the account's assets will not interfere with SSI and Medicaid eligibility. In both these examples, the ABLE account would be in place to cover future needs not otherwise covered by private insurance, SSI, Medicaid, or other government programs.

III. Case Scenario: Combining the Range of Work Incentives, Other Benefits and the ABLE Account

This case scenario shows how a young adult with a disability might be able to benefit from an ABLE account as part of the overall plan to move through college and into employment. As laid out below, the hypothetical Eva is able to retain SSI and Medicaid while starting an ABLE account. She is able to move money into that account from a Special Needs Trust while retaining eligibility for her state vocational rehabilitation agency to cover tuition and a range of other costs related to obtaining her credentials to teach at a public school. Upon graduating from college and starting full-time employment, Eva is able to retain Medicaid through the 1619(b) work incentive despite significant assets held by the Special Needs Trust and in the ABLE account.

A. The Case of Eva

Eva is 21 years old, gets SSI of $735 monthly, and qualifies for Medicaid in her state automatically as an SSI beneficiary. Eva was spinal cord injured from a playground accident at age 12. She is a full-time wheelchair user and lives with her parents.

Medicaid paid for Eva's power wheelchair and pays for prescription medications and home health aide services, among other things. Eva will graduate from college in 2019 and expects to earn $35,000 or more as an entry-level math teacher. Eva hopes to retain Medicaid when she goes to work full-time and have Medicaid pay for ongoing home health services and a replacement power wheelchair when needed. Presently, $185,000 remains in a Special Needs Trust set up for Eva from a lawsuit settlement (related to the playground accident).

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http://www.msba.org/uploadedFiles/MSBA/Member_Groups/Sections/Elder_Law_and_Disability_Rights/Comparison%20of%20529%20ABLE%20Accounts%20Article.pdf.

B. January 2017: Eva's long-term plan to move into her own apartment.

Eva currently resides in an accessible ranch home with her parents. She plans to move into an accessible apartment in August 2017 and remain there for her last two years of college, possibly remaining in the apartment when she gets her first job. The rent for this apartment will be $950 per month including utilities.

Because Eva's only income, while attending college, is $735 per month in SSI, she believes that she may have to get a student loan to help pay for the rent. She has learned that if her trust paid for the rent, her SSI payment would be reduced by about $245 per month.

How might an ABLE account help in this situation? Eva resides in a state that, as of January 2017, does not yet have an ABLE program in place.

C. February - July 2017: Eva sets up an ABLE account in a state with a national program; trust deposits money into account.

As permitted by ABLE policy, in February 2017 Eva opens an ABLE account in a state that operates a national program. She does so with an initial deposit of $250 to start the account.[49] In late July, her trust makes a deposit of $13,750 into the ABLE account, making the total contributions for the calendar year $14,000 which is the annual limit for contributions.

The ABLE account is then used to pay her first month's rent on the new apartment, $950, since rent expenses are considered Qualified Disability Expenses. As explained above, a distribution from an ABLE account to pay for rent, mortgage, property taxes, or a range of other housing expenses will not be counted by the SSI program as income to the designated beneficiary who gets the value of these distributions.[50] This avoids the usual SSI rule that would attribute third party payments for housing expenses as in-kind income. If the trust had paid for the rent directly, her SSI payments could be reduced by up to $245 per month, i.e., by up to one-third of the SSI federal benefit rate for 2017.

Based on consultations with her work incentives counselor, Eva plans to continue using ABLE account money to pay for her monthly rent since there will be no reduction to her SSI payment as a result. She also plans to ask the trustee

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[49] Using the state-by-state links on the National ABLE Resource Center website, note 2, readers can see the minimum initial deposit needed to open an ABLE account in the various states.

[50] Any security deposit needed to rent the apartment should also qualify as a QDE, though not specifically addressed in any ABLE policies to date.

of her trust to make periodic distributions into the ABLE account to allow for ongoing rent and other housing expenses to be paid.

D. August 2017: Eva's state starts its own ABLE program. Eva closes her original account and opens new ABLE account in her state.

In early August 2017, Eva's state of residence announces the availability of ABLE accounts in her state. Eva closes the out-of-state account, opens up a new ABLE account in her state, and makes a program-to-program transfer of the entire existing ABLE account money into the new account.[51] Although Eva has had a very satisfactory relationship with the out-of-state ABLE program, she prefers to have her account handled through an in-state institution.

E. August 2017: The State Vocational Rehabilitation Agency approves sponsorship for Eva's 2017-18 college program, agreeing to pay for tuition and related expenses because Eva remains an SSI beneficiary.

As is their customary practice, during the summer of 2017 the State VR agency reviews Eva's progress and issues a new Individualized Plan for Employment (IPE)[52] to cover the 2017-18 school year. In the new IPE the VR agency agrees to pay for tuition, books, and college fees. Because Eva continues to receive SSI payments, she is considered exempt from the VR agency's financial needs test and will have her college expenses covered, as spelled out in the IPE, with no obligation on Eva's part to cover all or a portion of those expenses. Since the exemption from any financial needs test is based solely on Eva's status as an SSI beneficiary,[53] in effect the VR agency is required to not consider the money now available in Eva's ABLE account.

F. Summer of 2018: Trust is used to purchase a new van. VR agency pays for van modifications to allow Eva to drive from her wheelchair. ABLE account pays for van insurance.

During the spring of 2018, the VR agency paid for a driving evaluation which determined that Eva is capable of driving a modified van from her wheelchair. The trust paid just under $29,000 to purchase the van and the State VR agency agreed to pay $41,500 for van modifications to allow Eva to get into and out of the vehicle and drive while seated in her wheelchair. The van will be

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[51] Currently, state-to-state transfers are not addressed in either the ABLE Act or the IRS's Interim Guidance, but would be permitted under the proposed regulations. The author has inquiries out to determine whether state ABLE programs are implementing these transfers without official policy to say they are allowed.
[52] 29 USC 722(b).
[53] See part II.G.

needed during her last year of college to travel to student teaching assignments and job interviews. It will then be available to travel to and from work when she finds a job in the teaching field.

Eva uses money from her ABLE account to pay for her first six months of vehicle insurance. Since she does not expect to have much income, other than her SSI payments, until after graduation in May 2019 Eva plans to meet with the trustee of the trust to discuss using money from the trust to pay for van insurance and maintenance during her last year of college and until she finds a job. Although insurance and maintenance should meet the standards as ABLE account QDEs, with the $14,000 limit on contributions to the ABLE account most of that money will be reserved for rent payments, other housing costs, and educational expenses not covered through the VR agency.

G. September 2019: Eva starts full-time employment. She retains Medicaid through the 1619(b) work incentive despite a $10,000 balance in her ABLE account and nearly $115,000 in her trust.

Eva graduated from college in May 2019 and started work as a math teacher at a public school in September 2019, earning $36,000 per year. This rate of pay is enough to make her ineligible for SSI payments. However, she is able to retain Medicaid through the section 1619(b) work incentive.[54] Although Eva will be covered by a private insurance plan through her employer, Medicaid will still be needed to cover the many hours of home health services she will continue to need. Medicaid might also be needed to cover other items not covered by the private insurance plan.

Since 1619(b) is considered an SSI non-cash benefit, Eva must keep her countable resources below $2,000. As discussed above, since ABLE account funds up to $100,000 will be considered exempt by SSI rules, the money in Eva's ABLE account will be considered exempt for 1619(b) purposes as well. Additionally, the principal held in a Special Needs Trust will not be considered a resource for SSI or 1619(b) purposes so long as the trustee has no discretion to use those funds for food or shelter.[55]

IV. Conclusion

ABLE accounts are a very new tool available to children and adults with disabilities to save for future needs not otherwise covered by a range of private

[54] See part II.G, above. The majority of states have 1619(b) financial eligibility thresholds that would allow for Medicaid eligibility when an individual earns $36,000 per year. POMS SI 02302.200.

[55] See POMS SI 00120.203 B. for a discussion of when SSI will consider the money held in a trust to be not counted as a resource for SSI purposes.

and government-funded programs. Those who are keeping a watchful eye on ABLE account developments remain concerned that the Department of Treasury, as of early September 2017, had still not finalized its proposed regulations that were published in June 2015. Our best recommendation to readers is to periodically check the ABLE National Resource Center's website[56] for any news on publication of final regulations, new IRS or other federal agency ABLE policies, or any other relevant developments. Finally, if in doubt about issues like what qualifies as a QDE, it is always best to communicate with those administering the ABLE account that is holding the financial resources for the designated beneficiary.

[56] See note 2.