ABLE NATIONAL RESOURCE CENTER
ACHIEVING A BETTER LIFE EXPERIENCE ACT

The ABLE Case Summary Series

ABLE Accounts and Qualified Disability Expenses: Expenses That Do or Do Not Meet QDE Criteria

This is the fourth in a six-part Case Summary Series to explore ways to benefit from an ABLE account that complement continued eligibility for selected public benefits and programs and/or use of special needs trusts. The purpose of the series is to help current or future ABLE account owners and beneficiaries understand better the possibilities of an ABLE account complementing other strategies to improve health, independence and quality of life.

Introduction

The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act is found in section 529A of the Internal Revenue Code and became a law in December 2014.[1] Proposed ABLE regulations were published by the Department of the Treasury on June 22, 2015 and have not been issued as final.[2] ABLE accounts offer qualified individuals with disabilities an opportunity to save funds, in a dedicated account, to meet "qualified disability expenses"[3] that will allow them to "maintain health, independence and quality of life."[4] The first state ABLE programs were introduced in June of 2016. As this is written, almost 30,000 individuals have established an ABLE account in one of the more than 40 states that have established and maintained active ABLE programs. Over $144 million in assets are in ABLE (529A) accounts.

This article focuses on ABLE account distributions for Qualified Disability Expenses (QDEs). We go through several QDE categories, provide examples of what most likely will or will not meet the QDE criteria, and suggest strategies for documenting account purchases and the need for the items purchased. Many real-life examples are taken from questions and anecdotes gathered by ABLE National Resource Center staff.

IRS Policy Allows Individuals and ABLE Programs to Rely on the 2015 Proposed Regulations Pending Publication of Final Regulations

The proposed regulations were published by the IRS on June 22, 2015, with a comment period lasting through September 21, 2015 and a public hearing occurring during

[1] 26 USC 529A.
[2] Proposed 26 CFR Parts 1, 25, 26, and 30, 80 Federal Register 35602-01.
[3] 26 USC 529A(e)(5).
[4] ABLE Act section 101, 26 USC 529A NOTE (1).

October 2015. As this is written, nearly three and a half years have passed and final regulations are not yet published. The good news is that the IRS has stated, in comments to the proposed regulations, that the proposed regulations can be relied upon while we await publication of final regulations:

> "Until the issuance of final regulations, taxpayers and qualified ABLE programs may rely on these proposed regulations."[5]

What the ABLE Act and IRS Policy Say about QDEs

Although the law characterizes QDEs as expenses "related to the blindness or disability of the designated beneficiary and for the benefit of the designated beneficiary,"[6] 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."[7] 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 smartphone 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 smartphone that is used by B would be considered a qualified disability expense."[8]

This is exciting news for individuals with disabilities who often rely on both smartphones and tablets, with available apps, to overcome disability-related limitations and accomplish tasks that might not be possible without the device. Typically, these everyday items cannot be funded as durable medical equipment (DME) by two major health insurance programs, Medicaid and Medicare. This is because their DME definitions do not include equipment that is useful to the general public in the absence of illness or injury.[9]

The ABLE Act's list of QDEs includes (but is not limited to): education; employment training and support; housing; transportation; assistive technology and personal support

[5] 80 Federal Register at 35609. See also an IRS press release, IR-2015-91 (June 19, 2015), www.irs.gov/newsroom/news-releases-for-june-2015.

[6] 26 USC 529A(e)(5).

[7] See comments to proposed regulations, 80 Fed. Reg. at 35608 (emphasis added); and see proposed regulation, 26 CFR 1.529A-2(h)(1)

[8] Proposed regulation, 26 CFR 1.529A-2(h)(2).

[9] 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…"; and Medicare regulation, 42 CFR 414.202, containing almost identical language to define DME.

services, health, prevention and wellness; financial management and administrative services; expenses for ABLE account oversight and monitoring; legal fees; and funeral and burial.[10] The law goes on to add "other expenses" approved by the Treasury Secretary,[11] interpreted by the proposed regulations to include "basic living expenses."[12] Again, the IRS has stated that individuals and ABLE programs can rely on the proposed regulations until final regulations are published.

To supplement, but not supplant: Section 101 of the ABLE Act makes it clear that the purpose of the law is to "supplement, but not supplant" other available benefits:

> "[The purpose is to] provide funding for disability-related expenses … that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program …, the [SSI] program …, the beneficiary's employment, and other sources."[13]

The ABLE account owner should always look to other funding sources first, relying on ABLE funds to pay for items that cannot be funded, for example, through Medicaid, Medicare, a private insurance plan, a special education program or a state vocational rehabilitation agency (VR).[14]

Potential ABLE Account Distributions Using Key QDE Categories

Distributions are allowed for qualified disability expenses, which the law says "means any expenses related to the eligible individual's blindness or disability …"[15] The proposed regulations go beyond this narrow interpretation, however, concluding 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.***"[16]

Neither the law nor the proposed regulations insert the term "disability-related" in front of its list of QDEs, clearly suggesting that QDEs for things like education, transportation and housing expenses should permit distributions for things that would be needed with or without a disability. In fact, the Social Security Administration, in its SSI ABLE policy,

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[10] 26 USC 529A(e)(5).

[11] *Id*.

[12] Proposed regulations, 26 CFR 1529A-2(h), 80 Fed. Reg. 35614-15; Interim Guidance, IR-2015-130, note 10, p. 3, https://www.irs.gov/newsroom/new-irs-guidance-to-simplify-able-program-administration.

[13] 26 USC 529A NOTE(2).

[14] See Sheldon, J. & Hager, R., *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 assistive technology devices those programs can potentially fund.

[15] 26 USC 529A(e)(5).

[16] Proposed regulations, 26 CFR 1.529A-2(h)(1) and comments, 80 Fed. Reg. at 35608.

interprets housing expenses broadly to include such things as rent, mortgage, property taxes, utility bills, water bills and sewer charges.[17]

Education Expenses:

For school-aged children this could include, for example, private school tuition, a special tutoring program or a summer program. For adults, it could include tuition, fees, books, transportation costs and a laptop computer to support college or community college attendance.

The items for children could potentially be funded by a public school's special education program, if needed, to ensure the child benefits from that program. If the student and family find themselves in a dispute with the school district over a particular program or service, some may opt to use the ABLE account to ensure timely delivery of the service.

The items for adults could potentially be funded by a state vocational rehabilitation agency to allow the person to achieve a vocational goal. However, if the VR agency has established an Order of Selection – i.e., serving only those with the "most significant disabilities" first and putting others on a waiting list[18] – the ABLE account, combined with available scholarships and grants, could allow the person to immediately begin a program, with the potential for VR agency funding for subsequent expenses once the person's spot on the waiting list is reached.

Some items or services needed by a SSI or SSDI recipient who is pursuing a work goal could be incorporated into a Plan to Achieve Self Support (PASS). A PASS is a SSA work incentive which allows a beneficiary to set aside income (other than SSI) or resources for the items or services needed to achieve a feasible and viable work goal. The income or resources receive favorable treatment when determining the amount of SSI payable. Using a PASS for work goal-related expenses by certain SSI or SSDI beneficiaries may be an alternative to using ABLE funds for this purpose.

Items most likely to be outside the QDE criteria include: a cruise or trip to an all-inclusive resort where some educational activity takes place; or a trip to what is best described as a vacation hotspot (e.g., spring break in Florida) based on an assertion that educational activity will take place during the trip.

Suggested strategies: The ABLE account owner should maintain records of all account distributions. If an activity is likely to get scrutinized in a potential audit by the IRS or the SSI program (if receiving SSI payments), obtain and keep any documents that describe the educational nature of the activity. For example, if a two-day Spanish-language and culture class occurs within a longer seven-day vacation, a good practice is to take only the cost of the two-day class as an ABLE account distribution.

The ABLE account owner should investigate all potential funding sources before using ABLE funds.

[17] Social Security Program Operations Manual Systems (POMS) SI 001130.740 B.9.

[18] The Order of Selection is authorized by federal regulations governing VR agency services. 34 CFR 361.36.

Employment, Training and Support Expenses:

This could include cost of items needed to do a job (e.g., work boots, work uniforms if not provided by the employer, a screen reader or magnification device) or to establish a business (e.g., advertising costs, office furniture, computer equipment). This could also include costs associated with a vocational training program, including tuition, travel expenses to the training, course materials, and any required tools or supplies. These costs should qualify as QDEs even if not specifically designed for an individual with a disability. See our comments in the Education section, above, concerning the potential for the VR agency or a beneficiary using a PASS to fund these expenses to support a vocational goal.

Housing Expenses:

Since neither the ABLE Act nor proposed regulations elaborate on what fits under this category, a good place to look for guidance is the SSI ABLE policy. That policy includes rent, mortgage payments, property taxes, property insurance required by the mortgage holder, heat and electric costs, water and sewer costs and garbage removal, without any suggestion that the cost need be connected to the person's disability or blindness.[19]

What about a disability-related home modification or repairs to the roof? A definite yes to the home modification, but the ABLE account owner should look into whether a Medicaid waiver might be able to cover this expense through the waiver's "environmental modification" or "assistive technology" category (if available through the waiver). Repairs to the roof or other repairs to keep the home in reasonable condition should also qualify as a QDE.

An individual with a disability who is seeking employment, within the context of an Individual Plan for Employment, may be provided with reasonable or modest home modifications by a state vocational rehabilitation agency. The modification may be limited to those home features critical to participation in training to achieve an employment outcome.

What about installation of a hot tub? It depends. If the ABLE account owner has a physical disability and his or her physician recommends hot tub or whirlpool therapy as a standard and proven medical intervention, this should meet the QDE criteria. If there is no physical disability and no physician is willing to recommend the hot tub for medical reasons, this is not likely to meet the QDE criteria.

Suggested Strategies: When an ABLE account distribution is made to pay for one or more housing costs, the actual housing cost must be paid *in the same month as the distribution* to avoid the distribution being attributed to the account owner as a resource

[19] POMS SI 001130.740 B.9. For non-housing QDEs, the SSI program does not count the distribution as a resource if held into the following month before spent for the item.

by the SSI program.[20] If the account will regularly be used to pay for housing costs, a good strategy is to have automatic debit payments or automatic bill pay made from your account (if offered by the ABLE program). This will avoid the distribution being counted as a resource and will ensure that a good record of the account expenditures is kept.

The ABLE account owner should investigate all potential funding sources before using ABLE funds.

Transportation Expenses:

There are numerous categories of disability-specific costs that would fit here, including modifications to a vehicle (e.g., a hydraulic lift for wheelchair access, hand controls for driving), a wheelchair van service and paratransit costs. If these costs are related to a state VR agency-supported program, we direct the reader to the discussion, above, of potential VR agency support for the service.

What if transportation costs are not disability-related? So long as the costs are reasonable and could alternatively be categorized as either "employment expenses" or "basic living expenses," this should meet the QDE criteria. The purchase of a vehicle, a down payment or a monthly vehicle loan payment, to allow the account owner to have transportation for day-to-day needs should meet also QDE criteria.

What about renting a limousine to transport the ABLE account owner and friends for a safe night out on the town? While some might suggest this meets the broad purposes of the ABLE Act – to promote independence and quality of life – this is not the kind of expense we recommend for use of ABLE funds.

Assistive Technology (AT) and Personal Support Services:

Since neither the ABLE Act nor the proposed regulations establish a definition for AT, we suggest looking at the definition of AT device in the federal AT Act:

> "The term 'assistive technology device' means any item, piece of equipment or product system, whether acquired commercially, off the shelf, modified or customized, that is used to increase, maintain or improve functional capabilities of individuals."[21]

Examples of items that would meet this definition include a manual or power wheelchair, a hospital bed or specially designed crib, a speech generating device and a hydraulic lift for transfers to and from a wheelchair in the home. While all of these would qualify as QDEs under the AT category, the ABLE account should first look to Medicaid, Medicare or a private insurance policy for coverage of an item before using ABLE account funds to purchase the item.

[20] See POMS SI 001130.740 D.2., providing that a distribution for a housing expense that is retained into the next month will be a countable resource for SSI purposes until spent.
[21] 29 USC 3002(4).

We assume that personal support services might include the services of a personal care aid to meet the needs of a person with a disability both within and outside the home. Since personal care services are optional for adults under Medicaid, the ABLE account might be the perfect way to fund this service in a state that does not cover these services in its Medicaid program.

What about personal support services for travel to social or recreational activities? On the assumption that the person cannot travel without the aide services, what qualifies as a QDE is a judgment call. We believe an account distribution to pay for an aide for travel to church, a wedding, a medical appointment or a tutoring session would qualify as a QDE. We would not be comfortable with using the ABLE account to pay for the same aide to allow the person to go to a casino.

Does this mean we do not support persons with disabilities engaging in legal gambling activity if that is their choice? No, but we worry that this will be a place where the IRS and ABLE programs will draw a line. Our recommendation is to use the ABLE account for things more clearly falling within QDE criteria and then use other money to pay for expenses related to an activity like gambling or to some of the other things we suggest do not qualify as QDEs. Using ABLE account funds to attend a baseball or football game are in more of a gray area. Here too, we would suggest trying to use ABLE funds for items least likely to be disputed, while paying for other things with non-ABLE funds.

Health, Prevention and Wellness:

The more traditional medical costs should not be in dispute as QDEs. This would include actual bills for healthcare providers, copayments and payments toward health insurance premiums. As we look beyond traditional costs, the best case is always one in which a doctor or other healthcare specialist has recommended the item or the service. For example, if the doctor has recommended a specially designed recumbent bike for an individual with paralysis to stimulate circulation, and prevent further atrophy of muscles, this should qualify as a QDE. Although some categories of expense, like massage therapy, chiropractic services, or acupuncture may still not be widely covered by public and private health insurance providers, if the account owner can obtain a letter from a doctor or therapist recommending an item or treatment, the expense is less likely to be questioned in the future.

Here again, since neither the ABLE Act nor the proposed regulations offer specific guidance for what fits under these categories, ABLE account owners should exercise caution and avoid expenses that are unlikely to be viewed as contributing to health, wellness or the avoidance of health-related problems.

Basic Living Expenses:

This term does not appear in the ABLE Act, but does appear in the proposed regulations as described above and is in the SSI policy related to ABLE accounts.[22]

[22] POMS SI 001130.740 B.8.

Since the IRS has stated that ABLE programs and individuals can rely on guidance from the proposed regulations, until final regulations are published,[23] we can assume that "basic living expenses" can be approved as QDEs. This potentially opens the door to anything that might be viewed as a necessity, including food, non-food grocery items and anything else that does not easily fit into other QDE categories.

What about food? This clearly can be viewed as a basic living expense. ABLE account owners should look first to potential eligibility for Supplemental Nutrition Assistance Payments (SNAP, also called food stamps) to meet food needs. We recommend viewing the ABLE account as a supplement for what would otherwise be covered by a combination of SSI payments and SNAP payments, if eligible for either program.

If using this category to justify an ABLE account distribution, we recommend ABLE account owners only pay for costs that most would view as necessities. Does this mean we should not view this as covering a restaurant meal? Our best advice is to use the ABLE account only for necessities, unless future guidance suggests otherwise. Hopefully, by using the ABLE account for necessities most likely to be accepted as QDEs, it will free up other money to pay for the restaurant meal.

What If the IRS or the SSI Program Later Says a Distribution Did Not Qualify as a QDE?

Any detailed discussion on this issue is beyond the scope of this relatively short article. A few points can be made, however.

Federal taxation: If it is determined that a distribution did not qualify as a QDE, the following would be the tax consequences: any part of the distribution that represents ABLE account earnings would be considered part of the ABLE account owner's taxable income for the tax year in question. The proposed regulations outline the complicated process of determining the percentage of the distribution that would be included in the account owner's taxable income.[24]

SSI income and resource treatment: SSI policy says that no ABLE account distribution counts as income to the account owner, even if for a non-qualified expense.[25] A distribution is not counted toward the SSI resource limit, even if held into the month following receipt, so long as the money is identifiable and the SSI beneficiary still intends to use it for a QDE *unless it is a distribution to pay for a housing QDE*. If the distribution is for a housing QDE, and not used for that expense in the same month it is distributed, the SSI policy authorizes treating that sum as a countable resource in the following month(s) until spent for the intended housing expense.[26] Again, as noted

[23] See note 12, above.
[24] See proposed regulation, 26 CFR 1.529A-3 (includes process for determining the additional 10 percent penalty that is added).
[25] POMS SI 01130.740 C.4.
[26] POMS SI 01130.740 C.4.a. & b.

above, the person can avoid this by using a debit card to pay the housing expenses, if that option is available.

Conclusion

This article has presented a detailed discussion on Qualified Disability Expenses under the ABLE Act and proposed regulations. Since there is almost no guidance to date in the Act, the proposed regulations or IRS policy statements to know what is or is not covered by a particular QDE category, we have urged ABLE account owners and those working with them to be thoughtful about what expenses to cover with an account distribution. We also recommend investigating all no-cost services and supports which may be available in the community or state and “blending and braiding” programs and services when available.

Wherever possible, we urge account owners to rely on account distributions to cover things clearly falling within one of the QDE categories outlined above, recommended by a healthcare provider, or which most people would view as a “basic living expense” necessity. Hopefully, with ABLE funds used for things clearly meeting the QDE criteria, money is freed up from the monthly paychecks or SSI payments to cover things we might not view as QDEs.

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