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ABLE National Resource Center
Achieving a Better Life Experience Act

"Medicaid and ABLE: A Look at the Recently Released CMS Guidance"

Presented by

Chris Rodriguez, Director, ABLE National Resource Center

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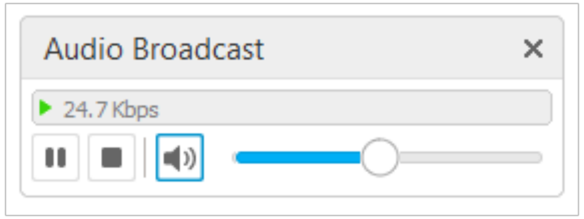

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Presenters and Guests

- Presenter
  - Christopher J. Rodriguez, Director, ABLE National Resource Center
  - Marty Ford, Senior Executive Officer, Public Policy, Arc of the United States
- Guest Panelists
  - Morris Klein, Esq., Fellow, National Academy of Elder Law Attorneys
  - Kathleen McGrath, Founder KF McGrath LLC and Former Director of the Pennsylvania ABLE Program

Agenda

- ABLE History and Basics
- Medicaid Guidance on ABLE
    - Background
    - Eligibility to Participate in a Qualified ABLE Program
    - Treatment of Funds in an ABLE Account
    - Contributions to ABLE Accounts
    - Distributions from ABLE Accounts
    - Post-Eligibility Treatment of Income
    - Transfers of ABLE Account Funds to States and Estate Recovery
- ABLE National Resource Center
- Questions and Answers
- ABLE Congressional Briefing Announcement

History of ABLE

What is ABLE?

The Stephen Beck, Jr. Achieving a Better Life Experience (ABLE) Act (PL 113-295) amends the federal tax code to add Section 529A in order to:

create a new option for eligible people with disabilities

to save money in a tax-exempt account

that may be used for qualified disability expenses

while still keeping their eligibility for federal public benefits.

History of ABLE

- Kitchen table idea from parents in Northern VA to counter challenges in US system ($2000 asset limitation)
- Nine year massive cross-disability grassroots effort
  - Social media campaigns, traditional media, change.org petition
  - Many in-person meetings with elected officials to share our personal stories

ABLE Becomes Law - December 2014

- **One of most bipartisan bills in history**
  - **85% of the entire US Congress supported the ABLE Act**
    - **381 out of 435 in the US House of Representatives**
    - **78 out of 100 in the US Senate**
- Authorized (did not require) states to establish ABLE programs
- States acted very quickly to pass state ABLE laws and set up ABLE programs
  - June 2016: First ABLE account available
  - To date, 28 states have launched ABLE programs (most available nationwide)

ABLE Basics

Basic Characteristics

- There are eligibility requirements related to opening an ABLE account that speak to the age in which the individual first experienced his/her disability and related to the severity of such disability
- An eligible individual in not obligated to enroll in their state of residence
- The "Designated beneficiary" is the account owner (although another person such as a parent, guardian, or person with power of attorney may be allowed signature authority over the account).
- Funds in the account may be used for "qualified disability related expenses"
- Assets in, and distributions for qualified disability related expenses, will be disregarded or given special treatment when determining eligibility for *most* federal means-tested benefits (including Social Security and Medicaid)
- Multiple individuals may contribute to an individual's ABLE account
- There is a $14,000 annual contribution limit (all contributors combined)

Who is eligible to be an ABLE account beneficiary?

To be eligible, individuals must meet two requirements:

1) Age requirement: must be disabled before age 26; AND
2) Severity of disability:
   - Have been determined to meet the disability requirements for Supplemental Security Income (SSI) or Social Security disability benefits (Title XVI or Title II of the Social Security Act) and are receiving those benefits,

     OR

   - Submit a "disability certification" assuring that the individual holds documentation of a physician's diagnosis and signature, and confirming that the individual meets the functional disability criteria in the ABLE Act (related to the severity of disability described in Title XVI or Title II of the Social Security Act).

What may funds from an ABLE account be used for?

- Distributions from an ABLE account may be made for **"qualified disability expenses"**.
- "Qualified disability expenses" are expenses that relate to the designated beneficiary's blindness or disability and are for the benefit of that designated beneficiary in maintaining or improving his or her health, independence, or quality of life.
- The term "qualified disability expenses" should be broadly construed to permit the inclusion of basic living expenses and should <u>not</u> be limited to:
    - expenses for items for which there is a medical necessity, or
    - which provide no benefits to others in addition to the benefit to the eligible individual.

Qualified disability expenses may include the following:

- Education, housing, transportation, employment training and support, assistive technology, personal support services, health, prevention & wellness, financial management and administrative services, legal fees, funeral and burial expenses and basic living expenses
- Distributions for non-qualified expenditures will be subject to tax consequences and may affect eligibility for federal means-tested benefits.

How do ABLE account assets impact eligibility for federal benefits?

ABLE assets will be disregarded or receive favorable treatment when determining eligibility for *most* federal means-tested benefits:

- ***Supplemental Security Income(SSI):*** For SSI, only the first $100,000 in ABLE account assets will be disregarded.
    - SSI payments (monthly cash benefit) will be ***suspended*** (not terminated) if the beneficiary's account balance exceeds $100,000, but SSI benefits (eligibility) will not be terminated. *Funds above $100,000 will be treated as resources.*

Impact on Federal Benefits (cont.)

- ***Medicaid:*** ABLE assets are disregarded in determining Medicaid eligibility
  - Medicaid benefits are NOT suspended if the ABLE account balance exceeds $100,000 (that is only applicable to the SSI cash benefit)
  - ***Medicaid Payback:*** Any assets remaining in the ABLE account when a beneficiary dies, subject to outstanding qualified disability expenses, can be used to reimburse a state for Medicaid payments made on behalf of the beneficiary after the creation of the ABLE account (the state would have to file a claim for those funds)

Tax Treatment of ABLE Accounts

- Contributions to an ABLE account are made with post-tax dollars.
- ABLE account earnings grow tax-free and are tax-exempt
- Some states have deductions for contributions to ABLE accounts by in-state residents:
  - Iowa, Maryland, Michigan, Missouri, Montana, Nebraska, Ohio, Oregon, Pennsylvania, South Carolina, Virginia, Wisconsin (out-of-state), Utah (credit)

ABLE programs that have launched - *28 states and counting!*

- ***Nationwide programs:*** Alabama, Alaska, Colorado, Kansas, Indiana, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, North Carolina, Ohio, Oregon (nationwide option for nonresidents), Rhode Island, Pennsylvania, Tennessee, Virginia, Washington, D.C.
- ***In-state programs*** (limited to in-state residents only): Georgia, Florida, Kentucky, Louisiana, Missouri, New York, Oregon (option for state residents), Vermont

Medicaid Guidance Regarding ABLE

Medicaid Guidance on ABLE

- The Center for Medicare and Medicaid Services (CMS) released State Medicaid Director Letter (SMD) # 17-002 on September 7th, 2017 titled: "Implications of the ABLE Act for State Medicaid Programs"

Purpose

- This letter provides guidance to states on the treatment of funds in, contributions to, and distributions from an ABLE account, under section 103, for purposes of Medicaid eligibility.
- The letter also address the treatment of funds in an ABLE account for purposes of the post-eligibility treatment of income, and the disposition of amounts remaining in a Medicaid beneficiary's ABLE account upon the death of the beneficiary.

6 Areas of Focus

- Background
- Eligibility to Participate in a Qualified ABLE Program
- Treatment of Funds in an ABLE Account
- Contributions to ABLE Accounts
- Distributions from ABLE Accounts
- Post-Eligibility Treatment of Income
- Transfers of ABLE Account Funds to States and Estate Recovery

Background

- The purpose of the ABLE Act is to permit people with disabilities to save money in and withdraw funds from their ABLE accounts to pay for disability-related expenses, in support of their efforts to maintain health, independence and quality of life.
- The law states that ABLE accounts should **"supplement, but not supplant"** benefits available to ABLE account beneficiaries under Medicaid, the Supplemental Security Income program (SSI), and other programs.
- Section 103 of the ABLE Act provides that, for the purpose of determining an individual's eligibility to receive, or the amount of, any assistance provided by a needs-based federal program (such as Medicaid), amounts in, contributions to, and certain distributions from, ABLE accounts shall be disregarded.

Eligibility to Participate in a Qualified ABLE Program

- Re-iterates who is qualified to open an ABLE account, and thus is eligible for the benefits/treatments that are associated with being an ABLE account owner (including those having to do with treatment of funds by a Medicaid program).
- No inference may be drawn from a disability certification for the purposes of establishing eligibility for Medicaid.
- State Medicaid agencies should presume that an ABLE program established by a state is a qualified program in the absence of evidence to the contrary.

Treatment of Funds in an ABLE Account

- State Medicaid agencies must disregard all funds in an ABLE account in determining the resource eligibility of Medicaid applicants and beneficiaries who are subject to a resource test.
- Earnings on the account should also be excluded from income for when determining eligibility into the Medicaid program.

Contributions to ABLE Accounts

- Third party contributions to an ABLE account are disregarded as income (or a resource in the following month, if not spent) when determining Medicaid eligibility, including contributions from a special needs trust and/or a pooled trust.
- The designated beneficiaries of an ABLE account can contribute their own income or resources to their ABLE account. If an ABLE account beneficiary transfers some of his or her own (otherwise countable) resources to his or her ABLE account, the effect would be a corresponding reduction in total countable resources.
- By contrast, if a beneficiary of an ABLE account transfers some of his or her income in the month received to his or her ABLE account, the effect would not be a reduction in countable income.

Contributions to ABLE Accounts (Continued)

- It is possible that a third party who has made a contribution to an ABLE account of someone else may apply for Medicaid and seek coverage of long-term services and supports (LTSS). Section 103 of the ABLE Act does not provide for any special treatment of contributions made to an ABLE account benefiting another person.

Distributions from ABLE Accounts

- As long as distributions from an ABLE account are used for QDEs of the designated beneficiary, they are not included as income for purposes of determining Medicaid eligibility.
- Distributions from an ABLE account that are not for QDEs (and/or distributions that exceed the QDE cost) do not fall within the scope of the protection afforded by section 103, and may be countable as income with respect to Medicaid eligibility.
- States should continue to disregard ABLE account distributions retained after the month of receipt unless used for a non-qualifying expense.

Post-Eligibility Treatment of Income

- The requirement that affected individuals apply most of their total available income to the cost of LTSS before federal financial participation for medical assistance is available is referred to as post-eligibility treatment of income (PETI).
- For purposes of PETI, states should disregard from an individual's total income any ABLE account distributions that are used for a QDE. To the extent that a distribution is counted as income in determining the individual's eligibility for other Medicaid benefits, discussed above, the distribution also would be counted for purposes of PETI.

Transfers of ABLE Account Funds to States and Estate Recovery

- Section 529A(f) requires that certain amounts remaining in an ABLE account upon the death of the account beneficiary, subject to any outstanding payments due for QDEs, shall be distributed to a state that provided medical assistance to the beneficiary after the establishment of the ABLE account upon the filing of a claim for payment by such state ("section 529A claim").
- The amount that may be so distributed is limited to the excess of the total medical assistance paid for the account beneficiary after the establishment of the ABLE account

Transfers of ABLE Account Funds to States and Estate Recovery (Continued)

- The Treasury's and IRS's NPRM does not propose mandating that states file section 529A claims.
- **However**, even in the absence of a Treasury and IRS mandate regarding claims against ABLE accounts, pursuant to section 1917(b) of the Act, states are required to seek recovery against the estates of certain deceased Medicaid beneficiaries.

Transfers of ABLE Account Funds to States and Estate Recovery (Continued)

- Thus, consistent with section 1917(b) of the Act, states are required to seek recovery of funds in an ABLE account that have become part of an estate subject to recovery under the statute.
  - The specific individuals whose estates state Medicaid agencies must seek recovery from are those who received Medicaid at the age of 55 or older, or who received coverage for certain LTSS and were subject to PETI rules.
- If the estate of an ABLE account beneficiary is not subject to Medicaid estate recovery, states have discretion whether to file a section 529A claim against the ABLE account of a deceased individual who had been enrolled in a Medicaid Buy In program.

Resource

- You can find a short summary of SMD# 17-002 on the ABLE National Resource Center website (including a link to the actual letter) at: http://www.ablenrc.org/news/center-medicare-and-medicaid-services-cms-releases-guidance-able-accounts

A comparison of ABLE and Special Needs Trusts

Morris Klein, Esq.
Bethesda, MD 20814

November 9, 2017

ABLE vs. SNT

	ABLE	3party SNT	Self-Settled SNT	Pooled SNT
Funding	Anyone	Anyone except B.	Beneficiary ("B")	B
Restrictions	Disabled before 26	None	B under 65	B under 65 in many states, all states if SSI paying
Who establishes	B, parent, guardian	Anyone except B.	B, parent, guardian, court	B, parent, guardian, court
When establish	During B's life	During Grantor's life or will / trust	During B's life	During B's life
Trustee	B.	Anyone except B.	Anyone except B	The pooled SNT

ABLE vs. SNT

	ABLE	3party SNT	Self-Set-tled SNT	Pooled SNT
Beneficiary	Only B	B and anyone else	B and anyone else	Only B
Customized docs needed?	No	Yes	Yes	No
Medicaid payback	Yes, for care after estab-lished	No	Yes, for care during B.'s life	Yes, for care during B's life, or trust keeps $$

ABLE National Resource Center

The ABLE National Resource Center

The ABLE National Resource Center (ANRC) is a collaborative whose supporters share the goal of accelerating the design and availability of ABLE accounts for the benefit of individuals with disabilities and their families. We bring together the investment, support and resources of the country's largest and most influential national disability organizations.

www.ablenrc.org

Question and Answers

ABLE Congressional Briefing

This briefing will provide Members of Congress and ABLE related stakeholders with a progress report on ABLE Act implementation nationwide, including an in depth look at what we know to date about account owner demographics, number of accounts open, contribution levels and other significant data points. The briefing will also highlight successes, examine implementation challenges, and look into the future with respect to legislative recommendations to strengthen ABLE.

This briefing is hosted by the ABLE National Resource Center (ANRC), sponsored by Senator Robert "Bob" Casey, Representative Pete Sessions and Representative Cathy McMorris Rodgers, in collaboration with the Consortium for Citizens with Disabilities (CCD) Financial Security Taskforce and the National Association of State Treasurers (NAST) ABLE Committee.

Date/Time: December 4th, 2017

Location: Room 325 of the Russell Senate Office Building, Washington D.C.

For more information please visit: https://www.eventbrite.com/e/the-able-act-a-progress-report-congressional-briefing-tickets-39560424294

Contact us!

Christopher J. Rodriguez

Director

ABLE National Resource Center

crodriguez@ndi-inc.org

Kathleen McGrath

Founder

KF McGrath LLC

kfmcgrath@kfmcgrath.com

Marty Ford

Senior Executive Officer, Public Policy

The Arc of the United States

Ford@thearc.org

Morris Klein, Esq.

Fellow

National Academy of Elder Law Attorneys

morrisklein@morrisklein.com