

The ABLE Case Summary Series

Maximizing the Use of an ABLE Account Without Jeopardizing a Range of Other Benefits

This is the second 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 As this is written, more than 30 states have established ABLE programs, allowing eligible individuals with disabilities to open ABLE accounts. ABLE accounts offer qualified individuals with disabilities an opportunity to save funds, in a dedicated account, to meet “qualified disability expenses” that will allow them to improve health, independence and quality of life.

Many ABLE account beneficiaries may be receiving/benefiting from a range of government benefits or service programs. Our first case summary focused on cash payments through either the Social Security or Supplemental Security Income (SSI) disability program. This article will discuss the following additional programs: Medicaid, including the section 1619(b) and Medicaid Buy-In work incentives; Medicare Savings Programs; State Vocational Rehabilitation Agencies; and the Supplemental Nutrition Assistance Program (SNAP). Since SSI rules are relevant to most of these programs, we will review the SSI rules again. After explaining how eligibility for each of the other programs may be affected, or not affected by an ABLE

¹ 26 USC 529A.

²80 Federal Register 35602-01.

account, we use a case scenario to show how the ABLE account and the benefit programs can work together.

How the SSI Program Treats ABLE Accounts

The SSI program's 2016 ABLE policy³ describes how it treats contributions to an ABLE account, resources held in the account, and distributions from the account to pay for Qualified Disability Expenses (QDEs):

- Contributions made by the designated beneficiary, from his or her monthly income (i.e., income other than SSI), still count as income (subject to any SSI income exclusions) and may result in a reduction to the SSI payment. Contributions from all others are excluded and not counted as income of the beneficiary.
- Up to \$100,000 of the account balance is excluded by SSI and not counted toward the \$2,000 SSI resource limit.
 - When the value of an ABLE account exceeds \$100,000 and the amount above \$100,000, combined with other resources, results in countable resources above \$2,000, SSI payments are indefinitely suspended.
 - When the SSI payment is suspended due to excess ABLE account resources, Medicaid eligibility continues.
- When distributions are made to pay for QDEs, including QDEs for housing (e.g., for rent or mortgage payments), those distributions will not be considered income to the beneficiary in determining SSI eligibility or payment amount.

This is discussed in more detail in our earlier Case Summary, *The Impact of an ABLE Account on Social Security and SSI Disability Benefits* [CREATE HOT LINK].

Impact of an ABLE Account on Key Federally-Authorized Benefits

The Internal Revenue Service has said, in Interim Guidance, issued on November 20, 2015 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."⁴ However, no provision in the law or the

³ Social Security Program Operations Manual Systems (POMS) SI 001130.740, <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130740>.

⁴See IRS Notice 2015-81, p. 2, www.irs.gov/uac/newsroom/new-irs-guidance-to-simplify-able-program-administration.

proposed regulations references how any specific federal program will implement this provision. As this is written, the federal benefit programs that have established a regulation or policy for treatment of ABLE accounts are SSI, Medicaid, and the Supplemental Nutrition Assistance Program (SNAP).

Federal Policy Governing State Medicaid Programs: The Center for Medicare and Medicaid Services (CMS) issued a September 7, 2017, Dear State Medicaid Director Letter, SMD # 17-002, regarding *Implications of the ABLE Act for State Medicaid Programs*.⁵ This federal policy applies to individuals who access Medicaid through Modified Adjusted Gross Income (MAGI)-based criteria for counting of income and resources, and to those who access Medicaid through Non-MAGI criteria. While the principles covered in this policy generally apply to both categories, our focus is on the Non-MAGI population which includes individuals with disabilities who access Medicaid through the State program rather than through SSI eligibility.

SMD # 17-002 reinforces SSI's ABLE-related policies and applies them to Medicaid. It 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 account's designated beneficiary. (Income of the designated beneficiary that is contributed to the ABLE account is still counted by Medicaid 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 U.S. Department of Agriculture's January 2017 regulations provide that assets retained in an ABLE account are considered by the SNAP program to be excluded resources.⁶

Section 1619(b) Medicaid: An SSI beneficiary who loses the right to an SSI payment through the budgeting of wages can typically retain Medicaid

⁵See www.medicaid.gov/federal-policy-guidance/federal-policy-guidance.html.

⁶ 7 CFR 273.8(e)(2)(ii).

through the section 1619(b) work incentive.⁷ Section 1619(b) is considered a non-cash SSI benefit and its eligibility criteria requires that non-exempt resources, such as the beneficiary's savings or checking account, remain below the SSI program's \$2,000 resource limit.⁸ Since continued 1619(b) eligibility is based, in part, on SSI policies governing what resources are exempt, an ABLE account balance of \$100,000 or less will be treated as an exempt resource under 1619(b). Even if the account balance exceeds \$100,000, SSI policy provides for the continuation of Medicaid during periods of excess resources attributable to an ABLE account.⁹ Thus, substantial ABLE account assets will not jeopardize 1619(b) Medicaid eligibility – even if the balance is more than \$100,000.

The Medicaid Buy-In Program: This work incentive, created as part of the Ticket to Work and Work Incentives Improvement Act of 1999,¹⁰ allows working individuals with disabilities to qualify for Medicaid at countable earnings levels set by individual states. For example, many states set their countable income limits at 250 percent of the federal poverty level.¹¹ This federally optional program now exists in more than 40 states.

Federal criteria require states to apply SSI rules for counting of income and resources unless specific state buy-in provisions provide for more liberal rules.¹² Since the ABLE-related SSI policy, discussed above, is now a part of SSI's income and resource rules, a Medicaid Buy-In program should be required, for example, to exclude an ABLE account balance even if more than \$100,000 to allow an individual to retain Medicaid.

Medicare Savings Programs (MSPs): These include the Qualified Medicare Beneficiaries (QMB) program, the Specified Low-Income Beneficiaries (SLMB) program, and the Qualified Individuals (QI-1) program. MSPs provide for Medicaid agency payment of Medicare Part B premiums and, in some cases, copayments if a financial needs test is met.¹³ States, in

⁷ 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.

⁸ POMS SI 02302 C.1.b. Note that 1619(b) eligibility is based on SSI policy and not on CMS policy even though policies for counting income and resources may be similar.

⁹ POMS SI 00130.740 D.1.a.

¹⁰ 42 USC 1396a(a)(10)(A)(ii)(XV) and 1396o(g).

¹¹ See, e.g., the Medicaid Buy-In programs of New York, 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>.

¹² See Dear State Medicaid Director letter (Aug. 29, 2000), www.medicaid.gov/Federal-Policy-Guidance/downloads/smd082900.pdf.

¹³ See www.medicare.gov/your-medicare-costs/help-paying-costs/medicare-savings-program/medicare-savings-programs.html. A fourth MSP, that is rarely used, is the Qualified Disabled and Working Individuals (QDWI) program. It can pay for Medicare

determining countable income and resource eligibility, must follow all SSI income and resource exclusion rules.¹⁴ 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 QMB program, for example, which would pay for both Part B premiums and the 20 percent copayment on a wheelchair covered by Medicare Part B as durable medical equipment.

State Vocational Rehabilitation (VR) Agency's Financial Need

Requirements: A state VR agency is permitted to have a financial needs test in determining eligibility for a wide range of services, including expensive items like college tuition or a vehicle modification. An SSI or SSDI beneficiary is exempt from the VR agency's financial need criteria.¹⁵ 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.¹⁶

The Case of OMAR

Omar, age 34, experienced mental health challenges in his late teens and has received SSI payments since age 21. He currently receives SSI of \$750 per month. He lives in a state in which Medicaid is automatic for SSI beneficiaries. Medicaid pays for Omar's mental health treatment and some very expensive prescription medications.

Omar's grandmother recently gave each of her six grandchildren a total of \$29,000, describing this as an "early inheritance." She gave each of them

Part A premiums, for those who have lost eligibility for cost-free Part A coverage through working after exhausting eligibility under the Extended Period of Medicare Coverage. See POMS SI 01715.005 A.7.

¹⁴ See 42 USC 1396d(p)(1)(B) (regarding income determinations) 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).

¹⁵ 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.

¹⁶ 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/VR%20FundingofAT2013.pdf>.

\$14,000 in December 2017 and \$15,000 in March 2018. In Omar's case, the two deposits were placed directly by his grandmother into Omar's ABLE account that was set up to protect this money.¹⁷

Omar poses a series of questions (analysis follows each question):

1. His grandmother was told that the money held in his ABLE account is not counted toward SSI's \$2,000 resource limit. However, he has friends who were cut off SSI and assessed large overpayments with much less than \$29,000 in the bank. Will the ABLE account balance have any impact on SSI or Medicaid?

Analysis: There will be no impact on either SSI or Medicaid eligibility. SSI is a means-tested benefit and countable resources are subject to SSI's \$2,000 limit. However, up to \$100,000 that is held in an ABLE account is exempt under SSI policy and will not count toward the resource limit. Since his Medicaid derives from his SSI eligibility, his Medicaid will continue.

2. Omar will start college soon, with a goal of becoming a paralegal. He was told his state vocational rehabilitation agency can pay for tuition, books, and transportation to and from the college campus if he meets the VR agency's financial need criteria. Will the \$29,000 in his ABLE account affect his financial eligibility for VR agency funding for the items described?

Analysis: Omar's ABLE account assets will not affect his financial eligibility for VR agency services. Under federal regulations governing state VR agencies, an individual who receives either SSI or SSDI benefits is exempt from the VR agency's financial needs test. Since Omar is expected to continue getting SSI when he begins college, despite the funds held in his ABLE account, he will be exempt from the VR agency's financial needs test.

3. Shortly after he starts college, Omar's mother retires and he qualifies for Childhood Disability Benefits on her Social Security record, as his disability occurred before age 22. His Social Security will be \$620 per month, with a \$150 monthly SSI payment, and automatic Medicaid will

¹⁷ The grandmother has gifted money to her grandchildren, based on the federal gift tax exempt amounts for 2017 and 2018. Contribution limits to an ABLE account are based on the exempt gift tax exempt amounts.

continue. It is now two years later and Omar is eligible for Medicare. He wants to take the optional Medicare Part B (Supplemental Medical Insurance), with a monthly premium of \$134 or more,¹⁸ as two of his doctors do not accept Medicaid and he would avoid late enrollment penalties by not waiting to enroll in Part B. With \$770 in combined SSDI and SSI monthly benefits, he would qualify for the QMB Medicare Savings Plan to pay for his Part B premiums.¹⁹ However, he learns that the MSPs in his state have countable asset limits of \$7,560. If Omar still retains \$29,000 in his ABLE account, will that disqualify him for QMB or another MSP (SLMB or QI-1) to pay his Part B premiums?

4. *Analysis: The assets held in Omar's ABLE account will not count in determining QMB eligibility or eligibility for the other two MSPs. This is because all three MSPs are required to follow SSI rules for determining countable income and resources. Since the SSI program excludes ABLE account balances in determining countable resources, the MSPs must do likewise.*
5. Omar is now in his last year of college and will graduate in May with a degree in paralegal studies. He is about to accept a job at an advocacy agency making a \$24,000 per year to start. He understands he will lose his SSI cash payments after he starts this job, but hopes to retain Medicaid through the 1619(b) work incentive. A work incentives counselor has explained that the 1619(b) eligibility threshold in his state is \$36,559²⁰ and his countable resources must stay below the SSI program's \$2,000 limit. Omar has managed to retain about \$23,000 in his ABLE account. Can Omar qualify for 1619(b) even though he has \$23,000 in the ABLE account?

Analysis: The \$23,000 in the ABLE account will not affect Omar's eligibility for 1619(b) Medicaid. Although a 1619(b) beneficiary must have countable resources within SSI's \$2,000 limit, ABLE account balances of up to \$100,000 are exempt and not counted toward that limit. In Omar's case, since his expected annual earnings will be below his state's 1619(b) threshold of \$36,559, he will be eligible for 1619(b) so long as his other, countable resources stay within the \$2,000 limit.

Conclusion

¹⁸ \$134 is the monthly premium for newly eligible Medicare beneficiaries for 2018.

¹⁹ The 2018 monthly countable income limit of \$1,012 is likely to rise each year.

²⁰ Section 1619(b) state eligibility thresholds range between a low of \$26,962 and a high of \$66,308. POMS SI 02302.200.

Individuals with disabilities who set aside money in an ABLE account can do so without jeopardizing key federally-based benefits like those discussed in this case summary. In the near future we hope that other key benefit programs, like the federal housing subsidy programs, will enact policies that give ABLE accounts protected treatment.

Dated: February 2018