

I heard that Illinois changed the Illinois ABLE account law to “get rid” of the required “pay back” on death of the beneficiary? True, **HOWEVER it will **NOT APPLY** to most individuals with intellectual and/or developmental disabilities, as well as to many others!**

Illinois [Public Act 100-713](#) leads some to believe there is no longer a “pay-back” or “claw back” from an ABLE Account on the death of the Beneficiary. The truth is that the new law does **NOT** apply to most individuals with I/DD. In accordance with the CMS (The Federal Agency governing State Medicaid programs), which stated in a letter dated 9/7/17 ([see attached](#)), that:

“pursuant to section 1917(b) of the Act, **states are required to seek recovery** against the estates of **certain deceased Medicaid beneficiaries.** ¹⁵”

¹⁵ **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 Long-Term Services and Supports and were subject to PETI rules.**

The federal CMS definition of **Long-Term Services and Supports** is:

- Care provided in the home, in community-based settings, or in facilities, such as nursing homes;
- Care for older adults and people with disabilities who need support because of age; physical, cognitive, developmental, or chronic health conditions; or other functional limitations that restrict their abilities to care for themselves;
- A wide range of services to help people live more independently by assisting with personal and healthcare needs and activities of daily living, such as eating, taking baths, managing medication, grooming, walking, getting up and down from a seated position, using the toilet, cooking, driving, getting dressed, and managing money.

The **PETI rules specifically apply to all HCBS Medicaid waiver enrollees** and section 1115 Medicaid waiver participants. **Illinois’ nine HCBS (1915(c)) Medicaid Waivers and the one 1115 waivers are:**

- IL Supportive Living Program
- IL Waiver for Adults w/DD
- IL HCBS Waiver for Persons with Brain Injury
- IL HCBS Waiver for Children that are Medically Fragile, Technology Dependent
- IL HCBS Waiver for Persons w/HIV or AIDS
- IL HCBS Waiver for Persons Who are Elderly
- IL Persons with Disabilities
- IL Support Waiver for Children and Young Adults with Developmental Disabilities
- IL Residential Waiver for Children and Young Adults with Developmental Disabilities
- Illinois Behavioral Health Transformation - 1115

So, the truth is that any individual with I/DD who has an Illinois ABLE account, who receives such services through one of the above 10 Illinois Medicaid Waivers, including children, **ARE still subject to a **payback!****

In addition the Illinois amendment, Public Act 100-713, provides that child support and maintenance (Court ordered in a divorce) can be ordered by court directly to an ABLE Account, **unless prohibited by law**, which is contrary to the SSA position and the SSI POMS (SSI Regulations, but **NOT** law) which require it to be paid by court order to a d4A or C Special Needs Pay Back Trust and **NOT** to an ABLE Account in order for it not to impact SSI.



SMD# 17-002

**RE: Implications of the ABLÉ Act for
State Medicaid Programs**

September 7, 2017

Dear State Medicaid Director:

The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (the ABLÉ Act), enacted as Division B of Pub. L. No. 113-295, and as amended by the Protecting America from Tax Hikes Act of 2015 (Pub. L. No. 114-113), enables individuals with disabilities to save money in tax-advantaged accounts which they can later use for meeting their disability-related needs, with limited impact on their eligibility for certain means-tested benefits.¹ The purpose of this letter is to provide guidance to states on the implications of the ABLÉ Act for state Medicaid programs.

Background

The ABLÉ Act amended the Internal Revenue Code of 1986 to create section 529A (“Qualified ABLÉ Programs”), permitting states to establish ABLÉ programs within which people with disabilities can open accounts that will generally be exempt from taxation. The purpose of the ABLÉ Act is to permit people with disabilities to save money in and withdraw funds from their ABLÉ accounts to pay for disability-related expenses, in support of their efforts to maintain health, independence and quality of life. The law states that ABLÉ accounts should “supplement, but not supplant” benefits available to ABLÉ account beneficiaries under Medicaid, the Supplemental Security Income program (SSI), and other programs.²

Section 103 of the ABLÉ Act (hereinafter referred to as “section 103”) 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, ABLÉ accounts shall be disregarded. This letter provides guidance to states on the treatment of funds in, contributions to, and distributions from an ABLÉ account, under section 103, for purposes of Medicaid eligibility. We also address the treatment of funds in an ABLÉ account for purposes of the post-eligibility treatment of income, and the disposition of amounts remaining in a Medicaid beneficiary’s ABLÉ account upon the death of the beneficiary.

Eligibility to Participate in a Qualified ABLÉ Program

¹ State agencies should apply the guidance set forth in this letter to the Children’s Health Insurance Program (CHIP) where applicable to determine the income of the family unit to which the applicant belongs.

² ABLÉ Act, section 101(2)

Section 103 applies to individuals who have an ABLÉ account in a *qualified* ABLÉ program. Eligibility for an ABLÉ account is open to an individual of any age who has blindness or a disability, provided, however, that the individual’s blindness or disability occurred before the age of 26. An individual is permitted to have only one ABLÉ account. The individual may open the account in the program of the state of which the individual is a resident, or in another state’s ABLÉ program. The determination of eligibility for an ABLÉ account is the responsibility of the ABLÉ program in which an individual seeks to establish the account.

Under section 102(a) of the ABLÉ Act (codified at 26 U.S.C. §529A(e)), an individual is eligible for an ABLÉ account if the individual is receiving SSI or Social Security Disability Insurance (SSDI) benefits based on a disability or blindness that occurred before age 26. Alternatively, an individual (or a parent or guardian acting on the individual’s behalf) may establish eligibility by filing a disability certification (and obtaining a signed physician’s diagnosis) with the qualified ABLÉ program indicating that the individual has a medically determinable impairment meeting certain criteria that occurred before age 26. However, while sufficient to establish eligibility to participate in an ABLÉ program, section 102(a) of the ABLÉ Act provides that “no inference” may be drawn from a disability certification for purposes of establishing eligibility for Medicaid.

Although the statute refers to “qualified” ABLÉ programs, the ABLÉ Act does not provide for formal federal certification of a state ABLÉ program as a “qualified” program. Moreover, the Department of Treasury and Internal Revenue Service (IRS) have not proposed to establish a formal certification process in a proposed rule that is designed to implement the ABLÉ act.³ We have concluded that state Medicaid agencies should presume that an ABLÉ program established by a state is a qualified program in the absence of evidence to the contrary (CMS will issue additional guidance if a formal certification process for ABLÉ programs is established).

Treatment of Funds in an ABLÉ Account

Generally, an account containing funds that a Medicaid applicant or beneficiary can access is considered a resource in determining Medicaid eligibility if a resource test is applied, as is generally the case in determining eligibility for individuals excepted from application of Modified Adjusted Gross Income (MAGI)-based methodologies. Section 103 requires that funds in an ABLÉ account, including earnings on the account (*e.g.*, interest), be disregarded in determining eligibility for Medicaid and other federal need-based programs.⁴ We interpret section 103 to mean that state Medicaid agencies must disregard all funds in an ABLÉ account in determining the resource eligibility of Medicaid applicants and beneficiaries who are subject to a resource test.⁵ Additionally, although earnings generated by funds in an account generally will

³ “Guidance Under Section 529A: Qualified ABLÉ Programs,” 80 F.R. 35602 (June 22, 2015). We note that a proposed rule does not have the force of law and is not legally effective. Moreover, an agency may make changes from a proposed rule based on the timely public comments and other factors. The Department of Treasury and IRS have not issued a final rule at this time.

⁴ We interpret section 103 to apply to an individual’s ABLÉ account, regardless of whether the individual opens his or her ABLÉ account in the state of which the individual is a resident or in another state’s ABLÉ program.

⁵ Section 103(a)(1) and (2) state that, “in the case of the supplemental security income program . . . , a distribution for housing expenses . . . shall not be so disregarded,” and “any amount . . . in [an] ABLÉ account shall be considered a resource to the designated beneficiary to the extent that such amount exceeds \$100,000.” However, while SSI methodologies are typically applied for non-MAGI eligibility determinations, these limitations on the

be countable income in determining eligibility for both MAGI and non-MAGI based eligibility groups, the disregard required under the ABLE Act applies “notwithstanding any other provision of Federal law,” which we interpret as including the general prohibition on application of disregards in determining income eligibility using MAGI-based methods under section 1902(e)(14)(B) of the Social Security Act (“the Act”). Accordingly, under section 103, earnings on the account should be excluded from income for both individuals subject to and those excepted from application of MAGI-based methodologies.⁶

Contributions to ABLE Accounts

Contributions by a Third Party

For MAGI and SSI-based eligibility determinations, under section 103, third party contributions to an ABLE account are disregarded in determining Medicaid eligibility. This is different than the treatment of such contributions in determining financial eligibility using SSI-based methodologies and, in narrow circumstances, different than the treatment of such contributions under MAGI-based methodologies.

Under SSI-based methodologies, applied to most non-MAGI eligibility groups, money contributed by a third party to an account which an individual can access generally is considered countable income in the month in which the contribution is received and, if not spent, a resource in the month following. Per section 103, however, third party contributions to an ABLE account are not counted either as income or included in total resources of the account beneficiary.

For MAGI-based individuals, a third-party contribution to an account that is accessible to the individual would generally qualify as a gift which usually is not taxable to the gift recipient. Even in the rare circumstance in which a gift could be subject to a gift tax lien against the recipient (e.g., where the donor does not pay a tax due on gifts), section 103 directs that its disregards apply “notwithstanding any other provision of Federal law,” which means the third party contribution must be disregarded in a MAGI-based income determination.⁷

disregard of distributions from or funds in an ABLE account are expressly described as applying exclusively “in the case of the [SSI] program.” In fact, section 103(b)(2), entitled “No Impact on Medicaid Eligibility,” requires that SSI beneficiaries whose benefits are suspended on the basis of resources exceeding the \$100,000 limit shall be considered to be receiving SSI for purposes of Medicaid eligibility. Therefore, we interpret section 103 to require that states, in determining Medicaid eligibility of ABLE account beneficiaries, disregard distributions used for housing expenses (provided the expense is a qualified disability expense, as discussed below), and all funds in an ABLE account, regardless of the amount in the account.

⁶ For SSI-based individuals, we also interpret the disregard to apply to the ABLE accounts of individuals whose income or resources are deemed available to a Medicaid applicant. Under the SSI program’s rules, which apply in most states to individuals who seek Medicaid on the basis of being 65 years old or older, or having blindness or a disability, the income and resources of a spouse or parent (a “deemor”) are generally disregarded in the applicant’s SSI eligibility determination where such income or resources would be disregarded if received or owned exclusively by the SSI applicant. We consider this to be the most reasonable approach, as we believe it would be inconsistent with the ABLE Act’s goals to count as available to a Medicaid applicant the ABLE account of the applicant’s deemor.

⁷ Section 529A(b)(2)(B) of the Internal Revenue Code generally limits aggregate annual contributions to an individual’s ABLE account to the annual gift tax exclusion, which means a third-party’s accepted contribution to an ABLE account, when it is the third party’s only gift during the taxable year, will not be taxable to either the donor or ABLE account beneficiary.

Some ABLE account beneficiaries may also be a beneficiary of a special needs trust (SNT) or pooled trust, as described in section 1917(d)(4) of the Act. Distributions from such trusts made on behalf of the trust beneficiary to the beneficiary’s ABLE account should be treated the same as contributions to ABLE accounts from any other third party. Thus, while disbursements from an SNT or pooled trust can be considered in some circumstances income to the trust beneficiary,⁸ disbursements from an SNT or pooled trust to the ABLE account of the trust beneficiary are not counted as income under section 103. Therefore, states should disregard as income a distribution from an SNT or pooled trust that is deposited into the ABLE account of the SNT or pooled trust beneficiary.

Contributions by the ABLE Account Beneficiary

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. This is because how an individual uses income generally does not change its designation as income at the point of its receipt, and there is nothing in the ABLE Act which supersedes this general rule. Consistent with this interpretation, the Treasury’s and IRS’s NPRM does not propose that income contributed to an ABLE account by the designated beneficiary reduces the individual’s taxable income. Similarly, SSA’s Program Operations Manual System (POMS) directs that income contributed to an ABLE account by the account beneficiary is counted as available income.⁹ Therefore, income contributed to an ABLE account by the applicant or beneficiary him- or herself is not disregarded from income, unless the state utilizes its authority under section 1902(r)(2) of the Act and 42 CFR §435.601(d) (regarding less restrictive methodologies), if available.¹⁰

Contributions by Third Parties who Apply for Medicaid

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. Thus, for example, a contribution from a grandfather to the ABLE account of his grandchild, whether from the grandfather’s income or resources, would constitute a transfer of assets from the grandfather to his grandchild’s account which may need to be evaluated under the requirements in section 1917(c)(1) of the Act (depending on when the transfer occurred), if the grandfather subsequently seeks Medicaid coverage of LTSS. The

⁸ This determination is generally made under the rules of SI 01120.200 of the Social Security Administration’s Program Operations Manual System (POMS) (“Trusts, General – Including Trusts Established Prior to 1/1/00, Trusts Established with the Asset of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act,” available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120200>)).

⁹ See “Achieving a Better Life Experience (ABLE) Accounts, Program Operations Manual Systems, SI 01130.740 available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501130740>

¹⁰ Per section 1902(e)(14)(B) of the Act, states cannot disregard in MAGI-based eligibility determinations income as a less restrictive methodology under the authority of section 1902(r)(2) of the Act and 42 CFR §435.601(d).

amount transferred by the grandfather to his grandchild’s ABLÉ account would not be an exempt transfer by virtue of section 103 in the determination of the grandfather’s eligibility for Medicaid coverage of LTSS.¹¹

Distributions from ABLÉ Accounts

Like *funds in* and *contributions to* ABLÉ accounts, *distributions from* ABLÉ accounts are not included in the beneficiary’s taxable income or counted as income in eligibility determinations for federal programs such as Medicaid as long as they are used for “qualified disability expenses” (QDEs). Section 529A(e)(5) of the Internal Revenue Code broadly defines QDEs as any expenses related to the eligible individual’s blindness or disability which may include, but are not limited to, expenses incurred for education, housing, transportation, employment training and support, and assistive technology. The Treasury’s and IRS’s NPRM explains that QDEs can include ones not identified in the statute, and that the term should be broadly construed “in order to implement the legislative purpose” of the ABLÉ Act.¹² As long as distributions from an ABLÉ account are used for QDEs of the designated beneficiary, they are not included as income for purposes of determining Medicaid eligibility for MAGI-based and non-MAGI eligibility categories.

In some cases, however, ABLÉ account beneficiaries may receive distributions that exceed their QDEs in a taxable year or are paid toward expenses that do not qualify as QDEs. Distributions from an ABLÉ account that are not for QDEs do not fall within the scope of the protection afforded by section 103, and may be countable as income under both MAGI-based and non-MAGI financial methodologies. The extent to which distributions exceeding total QDEs are countable as income for Medicaid eligibility purposes depends on whether the individual is being evaluated for eligibility under a MAGI-based or non-MAGI category.

Treatment of Distributions Exceeding QDEs for Non-MAGI Determinations

For individuals whose financial eligibility is determined using SSI-based methodologies, receipt of cash from a resource, whether the resource itself is counted or excluded, generally is not considered to be income, but rather the conversion of a resource from one form to another. The protection afforded under section 103, however, does not require that distributions from an ABLÉ account be used within the month the distribution is made, or within any particular time frame. Accordingly, a distribution from an ABLÉ account may be countable as a resource only if (1) it is retained beyond the month in which the distribution is made and (2) it is used for something other than a QDE in that or a subsequent month. Thus, we interpret section 103 to mean that states should continue to disregard ABLÉ account distributions retained after the month of receipt unless used for a non-qualifying expense.

For example, if an SSI-based individual receives an ABLÉ account distribution in August, but does not spend the distribution until December (and uses the distribution for a QDE in that month), the amount of the distribution is not counted in any month. If the individual uses the

¹¹ Section 1917(c) would not apply to a Medicaid applicant’s contribution of income or resources to his or her own ABLÉ account, as the individual retains the ability to use the funds for his or her own needs.

¹² 80 F.R. at 35608.

distribution in December for a non-QDE, the distribution would be counted as a resource in the month of December.

Treatment of Distributions Exceeding QDEs for MAGI-Based Eligibility

A portion of ABLER account distributions which exceed the QDEs incurred by the account beneficiary in a taxable year is taxable and therefore, per section 1902(e)(14)(A) of the Act and 42 CFR §435.603(e), included in determining MAGI-based income eligibility. The taxable portion will be determined based upon Department of Treasury and IRS rulemaking. Based on the formula proposed and preamble discussion in Treasury's and IRS's NPRM, we expect that, in nearly all circumstances, the taxable portion of such distributions will be *de minimus*,¹³ nonetheless, however small, the taxable portion is included in an individual's MAGI-based income. Under 42 CFR §435.945(a), states may accept self-attestation of income for which no electronic data for verification purposes is available. Because the amount of taxable income from ABLER account distributions exceeding QDEs is likely to be negligible, a state may want to consider exercising the option to take self-attestation. If additional verification is necessary, documentation should only be required in accordance with 42 CFR §435.952. Pursuant to 42 CFR §435.945(j), a state must update its verification plan to reflect its procedure for verifying taxable income from ABLER account distributions.

Post-Eligibility Treatment of Income

Under regulations at 42 CFR §435.700 *et. seq.* and §435.832, the extent of medical assistance provided to certain individuals receiving LTSS in institutions or through home and community-based services (HCBS) waivers under sections 1915(c) or (d) of the Act is reduced by the amount of the individual's available income. Under these regulations, the Medicaid agency determines the beneficiary's total income. After making certain deductions, the individual is required to apply the remaining income toward the cost of LTSS received. 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).

Under long-standing CMS policy, reflected in section 3701.2 of the State Medicaid Manual, all income is taken into account for purposes of PETI, including types or amounts of income that are not counted in making an initial eligibility determination. Consistent with this policy, distributions from an ABLER account, including earnings, typically would be counted. However, section 103 of the ABLER Act provides that its provisions apply "notwithstanding any other provision of Federal law." Accordingly, for purposes of PETI, states should disregard from an individual's total income any ABLER 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 ABLER Account Funds to States and Estate Recovery

¹³ See 80 Fed. Reg. at 35607.

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 over the amount of premiums paid from the ABLE account or paid by or on behalf of the beneficiary to a Medicaid “Buy-In program” under the state’s Medicaid plan.¹⁴

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.¹⁵ 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. 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.

CMS is committed to realizing the goals of the ABLE program and facilitating the program’s implementation. If you have questions about this guidance, please contact Gene Coffey at 410-786-2234, or gene.coffey@cms.hhs.gov, or contact your SOTA team lead.

Sincerely,

/s/

Brian Neale
Director

cc:

National Association of Medicaid Directors
National Academy for State Health Policy
National Governors Association
American Public Human Services Association
Association of State Territorial Health Officials
Council of State Governments
National Conference of State Legislatures
Academy Health

¹⁴ Neither the ABLE Act nor the Treasury’s and IRS’s NPRM define a Medicaid “buy in” program. We are working with the Treasury and IRS to provide clarification to stakeholders on the scope of this language.

¹⁵ 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.