

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

FINAL

ORDER

Financial Institution Accounts – Delaware Achieving a Better Life Experience (ABLE) Accounts

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance initiated proceedings to *amend* the Delaware Social Services Manual (DSSM) regarding Financial Institution Accounts, specifically, *to add language that exempts Achieving a Better Life Experience (ABLE) accounts from being counted towards the determination of eligibility for state or local assistance programs*. The Department’s proceedings to amend its regulations were initiated pursuant to 29 Delaware Code Section 10114 and its authority as prescribed by 31 Delaware Code Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code Section 10115 in the May 2016 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by May 31, 2016 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The purpose of this notice is to advise the public that Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Delaware Social Services Manual (DSSM) regarding Financial Institution Accounts, specifically, *to add language that exempts Achieving a Better Life Experience (ABLE) accounts from being counted towards the determination of eligibility for state or local assistance programs*.

Statutory Authority

- Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014, Pub. L. 113-295, 128 Stat. 4010
- 26 USC §529A, *Qualified ABLE programs*
- §201 of the Social Securities Act, *Federal old-age and survivors insurance trust fund and federal disability insurance trust fund*
- §1602 of the Social Securities Act, *Basic eligibility for SSI benefits*
- 16 **Del.C.** Ch. 96A §9601A-§9608A, *Delaware Achieving a Better Life Savings Accounts*

Background

The Federal government approved the Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014 in December of 2014. This act amends the federal tax code to allow Section 529 tax-exempt savings accounts, for disability-related expenses. These ABLE accounts can be used to help individuals and families save for qualified disability-related expenses of individuals with disabilities. The funds in these accounts are meant to supplement other benefits provided by State, Federal and private sources such as, but not limited to, Medicaid, Supplemental Security Income, and employment. In addition, the Stephen Beck, Jr., ABLE Act of 2014 specifies that the funds in these accounts, and qualified disability expenses withdrawn from these accounts, are not to be counted towards the determination of eligibility for state or local assistance programs.

An ABLE program can be established and maintained by a State or a State agency directly or by contracting with a private company. An eligible individual can open an ABLE account through the ABLE program in any State. However, an eligible individual can be the designated beneficiary of only one ABLE account, which must be administered by a qualified ABLE program.

26 USC §529A(b)(1) states that, the term "qualified ABLE program" means a program established and maintained by a State, or agency or instrumentality thereof-

- (A) under which a person may make contributions for a taxable year, for the benefit of an individual who is an eligible individual for such taxable year, to an ABLE account which is established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account,
- (B) which limits a designated beneficiary to 1 ABLE account for purposes of this section, and
- (C) which meets the other requirements of this section.

Delaware has published legislation addressing the implementation and administration of the Stephen Beck, Jr., ABLE Act of 2014, in Delaware under 16 **Del.C.** Ch. 96A, Delaware Achieving a Better Life Experience Savings Accounts. The purpose of 16 **Del.C.** Ch. 96A is to encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life.

Summary of Proposal

Purpose

To add language to the Delaware Social Services Manual (DSSM) that allows for ABLE accounts to be exempt from the 20330.2 Financial Institutions Accounts regulation when determining an individual's resource computation. Also, to add language to the DSSM regarding Delaware Achieving a Better Life Experience (ABLE) Savings Accounts.

Summary of Proposed Changes

If implemented as proposed, the amendment to the DSSM will accomplish the following, effective October 11, 2016:

Provide a provision that allows for ABLE accounts to be exempt from the countable resource computation of financial institutions accounts, as well as provide eligibility policy regarding the administration of Delaware ABLE accounts.

Public Notice

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input on the Delaware Social Services Manual provisions regarding Delaware Achieving a Better Life Experience (ABLE) Savings Accounts. Comments must be received by 4:30 p.m. on May, 31 2016.

Provider Manuals Update

Also, upon CMS approval, the applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates. DMAP provider manuals and official notices are available on the DMAP website: <http://www.dmap.state.de.us/home/index.html>

Fiscal Impact Statement

DMMA is proposing a revision of existing Long Term Care (LTC) program eligibility policy to address ABLE accounts. The proposed changes provide guidance about how ABLE accounts are viewed in the determination of eligibility for LTC benefits. There is no anticipated fiscal impact to the agency as a result of this proposed change in program eligibility policy.

Summary of Comments Received with Agency Response and Explanation of Changes

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following summarized observations:

First, in §20330.2.1.1, the definition of "person with signature authority" merits reconsideration. The first sentence reads as follows:

"Person with signature authority" means a person who can establish and control an ABLE account for a designated beneficiary who is a minor child or is otherwise incapable of managing an account.

The federal regulations do not require an adult to "be incapable of managing an account" to designate a "person with signature authority. See, e.g., the attached proposed regulation published at 80 Fed Reg. 35611 (June 22, 2015):

If the designated beneficiary is not able to exercise signature authority over his or her ABLE account or chooses to establish an ABLE account but not exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary.

[emphasis supplied] A "competent" adult can simply choose to not exercise signature authority.

Agency Response: DMMA appreciates the Council's perspective on the wording of this particular definition, which was taken from Supplemental Security Income (SSI) policy (see SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts), on which Medicaid Long-Term Care (LTC) eligibility policy is based. We have modified this definition for the final regulation, substituting the phrasing above for the original version.

"Person with signature authority" means a person who can establish and control an ABLE account for a designated beneficiary. If the designated beneficiary is not able to exercise signature authority over his or her ABLE account, or chooses to establish an ABLE account but not exercise signature authority,

references to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary.

Second, in §20330.2.1.1, the definition of “ABLE program” refers to a program established or maintained “by a State (or agency or instrumentality thereof)...” This is consistent with the proposed federal regulation. See 80 Fed Reg. at 35612(June 22, 2015). Many states are contemplating implementation through a consortium of states. Therefore, DMMA could consider expanding the reference as follows: “by a State or consortium of states (or agency or instrumentality thereof)...”

Agency Response: DMMA agrees with the suggested revision of this section of the proposed policy. We have revised the definition for the final regulation as follows:

“ABLE Program” means a program established and maintained by a State or consortium of states (or agency or instrumentality thereof) through which interested individuals can open ABLE accounts.

Third, for similar reasons, DMMA could consider amending the definition of “eligible individual” as follows: “a resident of this State, a contracting state, or a state participating in a consortium arrangement who is: ...”

Agency Response: DMMA agrees with the suggested broaden the language used in this definition. We have revised the definition for the final regulation as follows:

“Eligible Individual” means a resident of this State, or any state, in which an ABLE program is established who is:

- Entitled to benefits based on disability or blindness under Title II or XVI of the Social Security Act and such blindness or disability began before the age of twenty-six (26); or*
- An individual with respect to whom a disability certification, meeting the requirements of the Stephen Beck, Jr., ABLE Act of 2014, is filed.*

Fourth, for similar reasons, DMMA could consider amending §20330.2.1.2.2 as follows: “The State or consortium ABLE program that is administering the account.”

Agency Response: DMMA agrees with the suggested revision of this section of the proposed policy. We have revised this section for the final regulation as follows:

20330.2.1.2.2 The State or consortium ABLE program that is administering the account;

Fifth, in §20330.2.1.1, the definition of “eligible individual” requires the person to be a resident of Delaware or “a contracting state”. The proposed federal regulation would allow some persons (e.g. military) to keep an account even if the person is no longer a resident of the state. See attached 80 Fed Reg at 35608. Therefore, there is some “tension” between the “residency” requirement and the proposed federal regulation. Moreover, consistent with the attached January 11, 2016 article, Congress amended the law so an eligible person can open an account in any state, regardless of where the person resides.

Agency Response: DMMA appreciates the Council’s comment on this subject. However, we believe that the revised definition of “Eligible Individual” (see response to item three (3) above) is sufficiently broad to cover individuals who may be beneficiary of an ABLE Account, regardless of their state of residence.

Sixth, in §20330.2.1.3, second sentence, there is a plural pronoun (“their”) with a singular antecedent (“person”). This can be easily corrected by substituting “the person’s” for “their”.

Agency Response: DMMA agrees with the Council’s suggested revision. The final regulation will be revised as follows:

20330.2.1.3 ABLE Account Contributions

Contributions made to an ABLE account by persons other than the designated beneficiary shall not be excluded from the countable income of the person who makes the contribution. The fact that a person uses the person’s own income to contribute to an ABLE account does not mean that income is not countable for Medicaid purposes.

Seventh, in §20330.2.1.5, correct the grammar by substituting “the beneficiary’s” for “their”.

Agency Response: DMMA agrees with the Council’s suggested revision. The final regulation will be revised as follows:

20330.2.1.5 ABLE Account Balance

Exclude the balance of a designated beneficiary’s ABLE account from the beneficiary’s countable resource computation when determining the designated beneficiary’s eligibility.

Eighth, §§20330.2.1.6.1 and 20330.2.1.6.2 treat distributions for housing less favorably than other distributions. If a

housing distribution is made on May 31 and paid to a landlord on June 1, the entire housing distribution would be considered a countable resource for the month of June. This is an unreasonable approach.

Agency Response: DMMA appreciates the Council's feedback on this issue. However, LTC Medicaid eligibility policy is based on SSI policy. SSI policy treats distributions for housing expenses differently than other Qualified Disability Expenses (QDE). 26 USC §529A Treatment of ABLE Accounts Under Certain Federal Programs (a)(1) states the following:

"(a) Account Funds Disregarded for Purposes of Certain Other Means-Tested Federal Programs.- Notwithstanding any other provision of Federal law that requires consideration of 1 or more financial circumstances of an individual, for the purpose of determining eligibility to receive, or the amount of, any assistance or benefit authorized by such provision to be provided to or for the benefit of such individual, any amount (including earnings thereon) in the ABLE account (within the meaning of section 529A of the Internal Revenue Code of 1986) of such individual, any contributions to the ABLE account of the individual, and any distribution for qualified disability expenses (as defined in subsection (e)(5) of such section) shall be disregarded for such purpose with respect to any period during which such individual maintains, makes contributions to, or receives distributions from such ABLE account, except that, in the case of the supplemental security income program under title XVI of the Social Security Act [42 U.S.C. 1381 et seq.]- "(1) a distribution for housing expenses (within the meaning of such subsection) shall not be so disregarded

Therefore, DMMA's LTC eligibility policy addresses QDEs relating to housing expenses in accordance with SI 01130.740(D)(2).

DMMA is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the May 2016 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Delaware Social Services Manual (DSSM) regarding Financial Institution Accounts, specifically, *to add language that exempts Achieving a Better Life Experience (ABLE) accounts from being counted towards the determination of eligibility for state or local assistance programs*, is adopted and shall be final effective October 11, 2016.

Rita M. Landgraf, Secretary, DHSS
September 16, 2016

DMMA FINAL ORDER #16-016a

REVISIONS:

20330.2 Financial Institutions Accounts

Financial institution accounts which include savings accounts, checking accounts, certificates of deposit, etc., are an individual's resource if the individual owns the account and can use the funds for his or her support and maintenance. We determine whether an individual owns the account and can access the funds by looking at how the account is titled.

An exception to this policy would be for Achieving a Better Life Experience (ABLE) Savings Accounts. These accounts are not included in the countable resources computation. Please review 20330.2.1 for policy applicable to ABLE Savings Accounts.

If an individual is designated as sole owner by the account title, all of the funds are that individual's resource unless legal restrictions preclude the owner from using the funds for his or her support and maintenance. We do not provide an opportunity for the owner of an individually-held account to rebut the presumption of 100% ownership.

If the account is in the name of a Medicaid applicant/recipient and another Medicaid applicant/recipient, assume all account funds belong to each individual in equal shares. If the account is in the name of a Medicaid applicant/recipient and another individual who is not applying for Medicaid or who is not a Medicaid recipient, then assume all of the funds belong to the Medicaid applicant/recipient.

If the applicant or recipient disagrees with the ownership presumption on jointly-held accounts, we give the individual the opportunity to rebut the presumption. Rebuttal is a procedure which permits an individual to furnish evidence and establish that some or all of the funds in a jointly-held account do not belong to him or her. Obtain the individual's statement on a form containing the penalty clause regarding who owns the funds, why there is a joint account, who has made deposits to and withdrawals from the account, and how withdrawals have been spent. Inform the individual that he or she must submit the following evidence within 30 days:

A corroborating statement from the other account holder(s). If the other account holder is incompetent or a minor, have the individual submit a corroborating statement from anyone aware of the circumstances surrounding establishment of the account; account records showing deposits, withdrawals and interest paid

for the months that ownership is an issue; if the individual owns none of the funds, evidence showing that he or she can no longer withdraw funds from the account; if the individual owns only a portion of the funds, evidence showing removal from the account of the individual's funds or removal of the funds owned by the other account holder(s) and redesignation of the account.

Any funds that the evidence establishes were owned by the other account holder(s) are not and were not the individual's resources. The effect of a successful rebuttal is retroactive as well as prospective.

DMMA FINAL ORDER #16-016b

NEW:

20330.2.1 Delaware Achieving a Better Life Experience (ABLE) Savings Accounts

Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014,
Pub. L. 113-295, 128 Stat. 4010

The Stephen Beck, Jr., Achieving a Better Life Experience Act (ABLE Act) of 2014 established a tax-advantaged account that can be used to save funds for the disability-related expenses of the account's designated beneficiary. The designated beneficiary must be blind or disabled by a condition that began prior to the individual's twenty-sixth (26th) birthday.

Eligible individuals can be the designated beneficiary of only one ABLE account. The Delaware Achieving a Better Life Experience (ABLE) Program is administered by the ~~[Achieving a Better Life Experience (ABLE) Plans Management]~~ Board as per 16 Delaware Code Ch. 96A.

Funds in qualifying ABLE accounts, and qualified disability expenses withdrawn from these accounts, are not to be counted towards the determination of eligibility for state or local assistance programs.

20330.2.1.1 Definitions

The following terms, when used in this regulation, have the following meaning unless the context indicates otherwise:

"**ABLE Program**" means a program established and maintained by a State **[or consortium of states]** (or agency or instrumentality thereof) through which interested individuals can open ABLE accounts.

"**Contributions**" means the deposit of funds into an ABLE account. Any person can contribute to an ABLE account. (Note that "person," as defined by the Internal Revenue Code, includes an individual, trust, estate, partnership, association, company, or corporation.) However, the Internal Revenue Service (IRS) limits the total annual contributions any ABLE account can receive from all sources to the amount of the per-donee gift-tax exclusion in effect for a given calendar year.

"**Designated beneficiary**" means the eligible individual who established and is the owner of the ABLE account.

"**Distributions**" means the withdrawal or issuance of funds from an ABLE account. The designated beneficiary or the person with signature authority determines when distributions are made. Distributions may be made only to or for the benefit of the designated beneficiary.

"**Eligible Individual**" means a resident of this State ~~[or a contracting state or any state in which an ABLE program is established,]~~ who is:

- Entitled to benefits based on disability or blindness under Title II or XVI of the Social Security Act, and such blindness or disability began before the age of twenty-six (26); or
- An individual with respect to whom a disability certification, meeting the requirements of the Stephen Beck, Jr., ABLE Act of 2014, is filed.

"**Person with signature authority**" means ~~[a person who can establish and control an ABLE account for a designated beneficiary who is a minor child or is otherwise incapable of managing the account. The person with signature authority must be the designated beneficiary's parent, legal guardian, or agent acting under power of attorney. We consider the designated beneficiary to be the owner of an ABLE account, regardless of whether someone else has signature authority over it,~~ a person who can establish and control an ABLE account for a designated beneficiary. If the designated beneficiary is not able to exercise signature authority over his or her ABLE account, or chooses to establish an ABLE account but not exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary.]

"**Qualified disability expense**" or "**QDE**" means an expense related to the blindness or disability of the designated beneficiary and that are for the benefit of the designated beneficiary. In general, a QDE includes, but is not limited to, the following types of expenses:

- Education;

- Housing;
- Transportation;
- Employment training and support;
- Assistive technology and related services;
- Health;
- Prevention and wellness;
- Financial management and administrative services;
- Legal fees;
- Expenses for professional ABLÉ account oversight and monitoring;
- Funeral and burial; and,
- Basic living expenses.

“Qualified disability expense for housing” means expenses for purposes of an ABLÉ account are the same as they are for in-kind support and maintenance purposes, except that they do not include food. QDEs for housing are payments for:

- Mortgage (including property insurance required by the mortgage holder);
- Real property taxes;
- Rent;
- Heating fuel;
- Gas;
- Electricity;
- Water;
- Sewer; and
- Garbage removal.

“Rollover” means the distribution of all or some of the funds from one ABLÉ account to the ABLÉ account of a member of the original, designated beneficiary’s family. For the purposes of a rollover, a member of the designated beneficiary’s family means a sibling, which includes step-siblings and half-siblings, whether by blood or by adoption.

20330.2.1.2 ABLÉ Account Verification

When documenting whether an applicant is the designated beneficiary of an ABLÉ account, obtain evidence that contains the following information:

- 20330.2.1.2.1 The name of the designated beneficiary;
- 20330.2.1.2.2 The State [or consortium] ABLÉ program that is administering the account;
- 20330.2.1.2.3 The name of the person who has signature authority (if different from the designated beneficiary);
- 20330.2.1.2.4 The unique account number assigned by the State to the ABLÉ account;
- 20330.2.1.2.5 The account opened date; and
- 20330.2.1.2.6 The first-of-the-month account balance or information sufficient to derive a first-of-the-month balance.

If the available evidence does not provide this information, contact the appropriate ABLÉ program to obtain it.

20330.2.1.3 ABLÉ Account Contributions

ABLÉ account funds must be excluded from the countable resource computation when determining the designated beneficiary’s eligibility. This includes rollovers from a family member’s ABLÉ account to a recipient’s ABLÉ account.

Contributions made to an ABLÉ account by persons other than the designated beneficiary shall not be excluded from the countable income of the person who makes the contribution. The fact that a person uses **[their the person’s]** own income to contribute to an ABLÉ account does not mean that income is not countable for Medicaid purposes.

20330.2.1.4 ABLÉ Account Earnings

The funds in an ABLÉ account are invested and can accrue interest, earn dividends, and otherwise appreciate in value. Such earnings increase the account’s balance. Exclude any earnings an ABLÉ account receives from the countable resource computation when determining the designated beneficiary’s eligibility.

20330.2.1.5 ABLÉ Account Balance

Exclude the balance of a designated beneficiary’s ABLÉ account from **[their the beneficiary’s]** countable resource computation when determining the designated beneficiary’s eligibility.

20330.2.1.6 ABLÉ Account Distributions

A distribution from an ABLÉ account is not considered income but rather a conversion of a resource from one form to

another. Distributions are evaluated based on the criteria below, to determine if they are to be excluded from the designated beneficiary's countable resources.

20330.2.1.6.1 Exclusion of Retained Distributions for Non-Housing Qualified Disability Expenses (QDE)

Distributions for QDEs not related to housing should be excluded as a resource if retained beyond the month received. This exclusion applies for as long as:

20330.2.1.6.1.1 The designated beneficiary maintains, makes contributions to, or receives distributions from the ABLE account.

20330.2.1.6.1.2 The distribution is unspent; and

20330.2.1.6.1.3 The distribution is identifiable.

(NOTE: Excludable funds commingled with non-excludable funds must be identifiable in order to be excluded.)

20330.2.1.6.2 Retained Distributions for Housing-Related Qualified Disability Expenses (QDE) or Expenses That Are Not QDEs

Distributions from a designated beneficiary's ABLE account for housing-related QDEs or for expenses that are not QDEs that are retained into the month following the month of receipt are countable as a resource. If the distribution is spent within the month of receipt it has no effect on eligibility.

20 DE Reg. 283 (10/01/16) (Final)