



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

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MEMORANDUM

DATE: October 24, 2016

TO: Ms. Kimberly Xavier, DMMA
Planning & Policy Development Unit

FROM: Ms. Jamie Wolfe, Chairperson
State Council for Persons with Disabilities

RE: 20 DE Reg. 283 [(DMMA Final ABLE Act Regulation (10/1/16))]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA's) final regulation regarding Achieving a Better Life Experience Act of 2014 ("ABLE" Act). SCPD commented on the proposed version of this regulation in May, 2016. The SCPD's comments and DMMA's response are included in the attached August 16, 2016 DMMA memo. The memo "mirrors" the DMMA analysis in the published regulation. The final regulation was published as 20 DE Reg. 283 in the October 1, 2016 issue of the Register of Regulations. SCPD has the following observations.

First, the Council recommended amending the definition of "person with signature authority" to clarify that a competent individual could simply opt to not exercise signature authority. The Division agreed and adopted a conforming revision.

Second, the Council recommended the addition of "consortium of states" in the definition of "ABLE program". The Division agreed and adopted suggested language verbatim.

Third, the Council recommended expanding the definition of "eligible individual" to include persons participating in a consortium arrangement. DMMA expanded the definition to include residents of all states in which an ABLE program is established.

Fourth, the Council recommended adding a reference to "consortium ABLE program". DMMA agreed and adopted suggested language verbatim.

Fifth, the Council recommended reconsideration of a residency requirement. DMMA noted that its amended definition of "eligible individual" expanded eligibility to a resident of any state in

which an ABLE program is established.

Sixth, the Council identified a grammatical error. DMMA corrected the reference.

Seventh, the Council identified a grammatical error. DMMA corrected the reference.

Eighth, the Council questioned the less favorable treatment of distributions for housing. The Division responded that the approach was based on SSI policy which treats distributions for housing expenses differently than distributions for other expenses.

SCPD certainly appreciates the Division's consideration in adopting many of SCPD's recommendations.

cc: Mr. Stephen Groff
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

20reg283 dmma-able act 10-24-16



**DELAWARE HEALTH
AND SOCIAL SERVICES**

Division of Medicaid & Medical Assistance

Telephone: (302) 255-9500

DATE: August 16, 2016

TO: Daniese McMullin-Powell
Chairperson
State Council for Persons with Disabilities
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Dover, DE 19901

FROM: Glyne Williams, DMMA
Planning, Policy and Quality Unit

RE: 19 DE Reg. 982 [DMMA Proposed ABLE Account Regulation (5/1/16)]

Thank you for your recent memorandum regarding the Division of Medicaid and Medical Assistance (DMMA) notice soliciting comments on its proposal to adopt regulations implementing the Achieving a Better Life Experience Act of 2014 ("ABLE" Act). The proposed regulation was published as 19 DE Reg. 982 in the May 1, 2016 issue of the Register of Regulations. DMMA has considered your comments and responds as follows.

You write,

The Act authorizes the establishment of a special account for the benefit of a qualifying individual with a disability. Funds in such an account, which will not be a countable resource and distributions from such a fund for a qualified disability expense (QDE), are not countable income for public benefits programs. Implementing State legislation was adopted in 2015 and is codified at 16 Del.C. §§9601A- 9608A. New State legislation (H.B. 358) was introduced on May 4, 2016.

SCPD has the following observations on the proposed regulation.

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 ABLÉ account for a designated beneficiary. If the designated beneficiary is not able to exercise signature authority over his or her ABLÉ account, or chooses to establish an ABLÉ 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). However, SCPD understands that 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 ABLÉ 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 ABLÉ 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., ABLÉ Act of 2014, is filed.

Fourth, for similar reasons, DMMA could consider amending §20330.2.1.2.2 as follows: "The State or consortium ABLÉ 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 ABLÉ 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 ABLÉ 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 ABLÉ Account Contributions

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 the person's own income to contribute to an ABLÉ 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 ABLÉ Account Balance

Exclude the balance of a designated beneficiary's ABLÉ 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 ABLÉ 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 ABLÉ account (within the meaning of section 529A of the Internal Revenue Code of 1986) of such individual, any contributions to the ABLÉ 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 ABLÉ 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).

Thank you again for your review and feedback related to the proposed additions to Medicaid LTC eligibility policy addressing ABLÉ accounts. DMMA is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given.

Cc: Stephen M. Groff, Director, DMMA