



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
Margaret M. O'Neill Bldg., Suite 1, Room 311
410 Federal Street
Dover, Delaware 19901
302-739-3621

The Honorable John Carney
Governor
MEMORANDUM

John McNeal
SCPD Director

DATE: May 23, 2017

TO: All Members of the Delaware State Senate
and House of Representatives

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

RE: H.B. 145 (ABLE Act Revision)

This legislation was introduced on April 25, 2017. As of May 8, it had been released by the House Health & Human Development Committee and placed on the Ready List for action by the full House.

As background, Congress enacted enabling legislation authorizing Achieving a Better Life Experience (ABLE) savings accounts in 2015. The accounts permit individuals with disabilities to accumulate funds to be applied to qualified disability expenses without jeopardizing eligibility for means-based federal programs such as SSI and Medicaid. See attached Delaware News Journal article, "Delaware family celebrates new law for disabled" (February 11, 2015). Delaware enacted implementing legislation (H.B. No. 60) a few months later. See attached article, "Delaware 19th state to enact ABLE legislation (June 14, 2015).

Upon the death of the ABLE account holder, the federal model allows states to recover the costs of Medicaid expenditures on the deceased's behalf made since the inception of the account. See attached excerpt from proposed federal regulation. This "claw back" provision is characterized as a "significant drawback for many families" since it deters family contributions to an ABLE account. See attached Reuters.com article, "The limitations of ABLE accounts for the disabled" (May 18, 2015). Recognizing the "downsides" to the "claw back" model, some states have opted to include an exemption from "claw back" recovery in their enabling legislation. For example, Pennsylvania included the following exemption in its 2016 enabling law (S.B. No. 879):

(d) Death of beneficiary. – Unless prohibited by Federal law, upon the death of a designated beneficiary, proceeds from an account may be transferred to the estate of a designated beneficiary, or to an account of another eligible individual specified by the designated beneficiary or the estate of the designated beneficiary. An agency or instrumentality of the Commonwealth may not seek payment under section 529A(f) of the Internal Revenue Code from the account or its proceeds for benefits provided to a designated beneficiary.

Delaware House Bill No. 145 adopts the Pennsylvania exemption almost verbatim. Compare lines 6-10. Therefore, it removes a disincentive for contributions to an ABLE account. It is also consistent with Delaware public policy in related contexts. For example, Delaware law authorizes the operation of the Delaware CarePlan Trust, a non-profit group trust for individuals with disabilities. See 12 Del.C. Ch. 40. That law requires the disregard of the participant’s interest in the trust “in assessing financial eligibility and liability under any program of government benefits or assistance.” See 12 Del.C. §4009. Moreover, the Delaware Employment First Act [19 Del.C. §§740-747) encourages remunerative employment by individuals with disabilities. Elimination of the “claw back” from ABLE accounts facilitates savings of earned income and accumulation of a “nest egg” in the safe harbor of an ABLE account.

The SCPD is endorsing the proposed legislation.

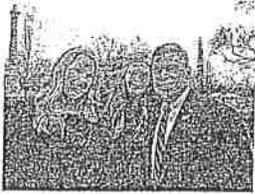
Thank you for your consideration and please contact SCPD if you have any questions regarding our position or observations on the proposed legislation.

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

HB 145 ABLE act revision 5-23-17

Delaware family celebrates new law for disabled

Nicole Gaudiano, News Journal Washington Bureau Published 6:19 p.m. ET Feb. 10, 2015 | Updated 10:37 a.m. ET Feb. 11, 2015



(Photo: H. DARR BEISER/USA TODAY)

WASHINGTON – Rick and Amy Kosmalski of Bear wanted their 8-year-old daughter to be able to save for her education and other needs, just as their son could.

But a Medicaid rule prevented Kayla, who has Down syndrome, from having more than \$2,000 in her name. Unlike her 2-year-old brother, Logan, Kayla couldn't use a tax-advantaged account to save money she received as gifts from relatives.

A new law changes that rule – and Kayla's future. On Tuesday, Kayla's family participated in an event hosted by Vice President Joe Biden to celebrate passage of the ABLÉ (Achieving a Better Life Experience) Act.

"She'll be able to save for and pay for the things that she needs to be the best person she can be," said Rick Kosmalski, a marketing manager at JPMorgan Chase & Co. "That's really what the ABLÉ Act does. It gives her more financial freedom in her life."

Amy Kosmalski said, "Now we'll finally be able to save for her future."

The Kosmalskis spent five years lobbying Congress for the law, signed by President Barack Obama. It allows eligible people with disabilities to establish ABLÉ accounts, which resemble qualified college-savings programs known as 529 plans, while protecting their eligibility for Medicaid and other federal benefits.

The accounts can be used to save for education, housing, transportation, employment training and other expenses. States still must take action to make the accounts available to residents.

Biden, speaking to advocates and parents of children with disabilities, said the law is "simply the right thing to do, but it's also in the economic interest of the country."

If it makes sense for families to set aside money in a 529 college-savings account, he asked, "Why in God's name does it not make as much sense for you to be able to do that to care for the needs of your children with disabilities?"

Biden, who represented Delaware in the Senate for 36 years, called "Princess Kayla" to the front of the room as he was speaking because of their home-state connection. Biden gave Kayla a stuffed animal, named after his dog, Champ, and signed her program. The Kosmalskis and a few other families met privately with Biden before the event.

"Kayla, like so many others here, has a chance at an incredibly bright future," he told the group gathered at the Eisenhower Executive Office Building.

[With Wilmington schools at crossroads, TNJ to host forum](#)

[\(http://www.delawareonline.com/story/news/education/2015/02/10/city-schools-crossroads-tnj-host-forum/23212233/\)](http://www.delawareonline.com/story/news/education/2015/02/10/city-schools-crossroads-tnj-host-forum/23212233/)

Kayla, a third-grader at Cedar Lane Elementary School, loves music, dancing, swimming and shopping. She goes by "Princess Kayla" on her business cards, which include her Twitter handle, blog, email and Instagram account. She counts former Delaware Attorney General Beau Biden and Delaware Gov. Jack Markell among her Twitter followers.

Her parents' goal has always been for her to live a productive and independent life, have a job someday and contribute to the community. They spent the first few years of her life focusing on her health and meeting her basic needs, such as signing her up for Medicaid. It was "devastating" to learn that Kayla's efforts to save money would cost her federal benefits, Rick Kosmalski said.

"It's hard enough that she has medical problems that you have to deal with and understand, but then there's financial problems that you never considered," he said.



(Photo: H. DARR BEISER/USA TODAY)

Rick Kosmalski is a National Down Syndrome Society board member and president of the 321foundation, a new nonprofit focusing on advocacy, education and support for people with Down syndrome.

The family's advocacy started five years ago with the National Down Syndrome Society's "Buddy Walk on Washington," a conference that brings the Down syndrome community together to push for key legislative issues.

The family held follow-up meetings in Delaware with members of the congressional delegation's staff. They also spent time tracking down people in other states who would lobby their own members of Congress.

"The issue at the top of the list was the ABLE Act," Rick Kosmalski said. "That was the thing that we saw to be the most achievable."

"Great moments" on the way to the bill's final passage include decisions by Rep. John Carney and Sen. Chris Coons to co-sponsor the bill last Congress, Kosmalski said.

But there were plenty of letdowns. Even as more co-sponsors signed onto the bill, that session of Congress ended, forcing the Kosmalskis to start over. They worried that would happen again last year as Congress delayed action until December.

But the House passed the measure 404-17 on Dec. 3 and the Senate followed suit, 76-16, on Dec. 16, just before recessing. Delaware's congressional lawmakers voted in favor.

The Kosmalskis were in the gallery for the House vote and watched the Senate vote on C-SPAN.

"It's so exciting," Rick Kosmalski said. "Everyone was taking screenshots of the TVs."

Coons, in a statement after the vote, said the law means families "will no longer need to choose between their family's present and their child's future."

The next step is for states to implement the law. Markell supports it and is awaiting federal guidance to implement it appropriately, said his spokesman, Jonathon Dworkin.

"We advocated for this law to help people with disabilities become more financially secure and embrace the opportunity to help implement it," Dworkin said in a statement. "It's also an important part of helping individuals to become employed and to receive the support they need in their employment."

Contact Nicole Gaudiano at ngaudiano@gannett.com. Follow her on Twitter @ngaudiano.

[Christiana Care to end key mental health services](http://www.delawareonline.com/story/news/health/2015/02/08/christiana-care-end-key-mental-health-services/23100989/)

[\(http://www.delawareonline.com/story/news/health/2015/02/08/christiana-care-end-key-mental-health-services/23100989/\)](http://www.delawareonline.com/story/news/health/2015/02/08/christiana-care-end-key-mental-health-services/23100989/)

Read or Share this story: <http://delonline.us/1DgOa8F>

<http://www.delawareonline.com/story/news/politics/2015/02/11/delaware-family-celebrates-law-change-d...> 5/1/2017



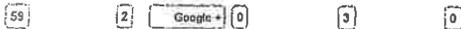
[WALK \(HTTPS://ACT.AUTISMSPEAKS.ORG/SITE/SPAGESERVER/\)](https://act.autismspeaks.org/site/spageserver/)

[DONATE \(HTTPS://ACT.AUTISMSPEAKS.ORG/SITE/DONATION2?/\)](https://act.autismspeaks.org/site/donation2?/)

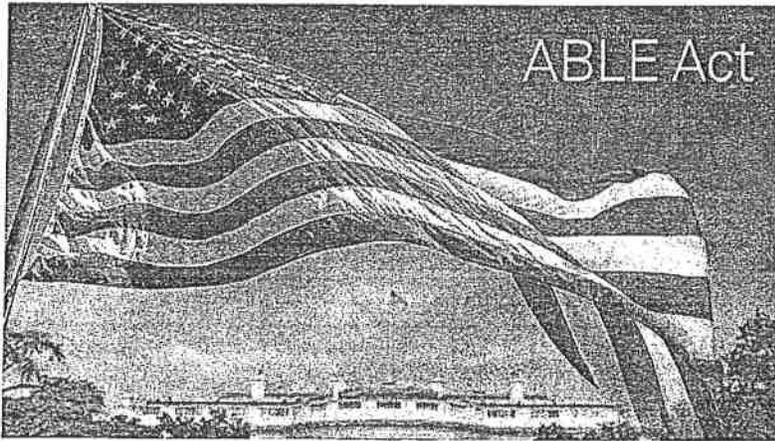
[SHOP \(HTTP://SHOP.AUTISMSPEAKS.ORG/?UTM_SOURCE=AUTI\)](http://shop.autismspeaks.org/?utm_source=auti)

[About Us \(/about-us\)](#) [Resource Guide \(/family-services/resource-guide\)](#) [What is Autism? \(/what-autism\)](#) [Screen Your Child \(/what-autism/diagnos/s/screen-your-child\)](#) [Tool Kit](#)

Delaware 19th state to enact ABLÉ legislation



June 14, 2015



Dover, DE- Governor Jack Markell has signed into law HB60, legislation that allows families to set up tax-free 529A savings accounts for disability-related expenses.

The Delaware ABLÉ law follows upon enactment by the federal government of the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014. The federal law allows ABLÉ account funds to be disregarded for means-tested federal programs such as SSI and Medicaid, which cap (usually at \$2,000) the amount an individual with a disability may save. Delaware's ABLÉ law was sponsored by Representative Melanie George Smith.

"ABLÉ's passage in Delaware would not have been possible without the multitude of champions in the General Assembly and the tremendous support of grassroots advocates across the state," said Stuart Spielman, Senior Policy Advisor and Counsel at Autism Speaks. "We, along with all of the Delaware families affected by autism, are extremely grateful to Governor Markell for signing the ABLÉ that will prove to be an invaluable financial tool for families across the state."

ABLÉ laws have been enacted in 19 states: Arkansas, Colorado, Delaware, Florida, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, North Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia. ABLÉ bills have now passed the legislatures in seven other states: Alabama, Connecticut, Hawaii, Illinois, Iowa, Missouri, and Texas.

Explore more: [Advocacy \(/section/advocacy\)](#), [ABLE \(/site-wide/able\)](#), [ABLE States \(/site-wide/able-states\)](#), [Advocacy \(/site-wide/advocacy\)](#), [Autism Votes \(/site-wide/autism-votes\)](#), [Delaware \(/site-wide/delaware\)](#)

Most Popular



as other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter. Qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit a disabled individual. A qualified ABLÉ program must establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions, and to permit the identification of the amounts distributed for housing expenses as that term is defined for purposes of the Supplemental Security Income program of the Social Security Administration.

(2) *Example.* The following example illustrates this paragraph (h):

Example. B, an individual, has a medically determined mental impairment that causes marked and severe limitations on her ability to navigate and communicate. A smart phone would enable B to navigate and communicate more safely and effectively, thereby helping her to maintain her independence and to improve her quality of life. Therefore, the expense of buying, using, and maintaining a smart phone that is used by B would be considered a qualified disability expense.

(i) *Separate accounting.* A program will not be treated as a qualified ABLÉ program unless it provides separate accounting for each ABLÉ account. Separate accounting requires that contributions for the benefit of a designated beneficiary and any earnings attributable thereto must be allocated to that designated beneficiary's account. Whether or not a program provides each designated beneficiary an annual account statement showing the total account balance, the investment in the account, the accrued earnings, and the distributions from the account, the program must give this information to the designated beneficiary upon request.

(j) *Program-to-program transfers.* A qualified ABLÉ program may permit a change of qualified ABLÉ program or a change of designated beneficiary by means of a program-to-program transfer as defined in § 1.529A-1(b)(14). In that event, subject to any contrary provisions or limitations adopted by the qualified ABLÉ program, rules similar to the rules of § 1.401(a)(31)-1, Q&A-3 and 4 (which apply for purposes of a direct rollover from a qualified plan to an eligible retirement plan) apply for purposes of determining whether an amount is paid in the form of a program-to-program transfer.

(k) *Carryover of attributes.* Upon a rollover or program-to-program transfer, all of the attributes of the former ABLÉ account relevant for purposes of

calculating the investment in the account and applying the annual and cumulative limits on contributions are applicable to the recipient ABLÉ account. The portion of the rollover or transfer amount that constituted investment in the account from which the distribution or transfer was made is added to investment in the recipient ABLÉ account. Similarly, the portion of the rollover or transfer amount that constituted earnings of the account from which the distribution or transfer was made is added to the earnings of the recipient ABLÉ account.

(l) *Investment direction.* A program will not be treated as a qualified ABLÉ program unless it provides that the designated beneficiary of an ABLÉ account established under such program may direct, whether directly or indirectly, the investment of any contributions to the program (or any earnings thereon) no more than two times in any calendar year.

(m) *No pledging of interest as security.* A program will not be treated as a qualified ABLÉ program unless the terms of the program, or a state statute or regulation that governs the program, prohibit any interest in the program or any portion thereof from being used as security for a loan. This restriction includes, but is not limited to, a prohibition on the use of any interest in the ABLÉ program as security for a loan used to purchase such interest in the program.

(n) *No sale or exchange.* A qualified ABLÉ program must ensure that no interest in an ABLÉ account may be sold or exchanged.

(o) *Change of residence.* A qualified ABLÉ program may continue to maintain the ABLÉ account of a designated beneficiary after that designated beneficiary changes his or her residence to another State.

(p) *Post-death payments.* A qualified ABLÉ program must provide that a portion or all of the balance remaining in the ABLÉ account of a deceased designated beneficiary must be distributed to a State that files a claim against the designated beneficiary or the ABLÉ account itself with respect to benefits provided to the designated beneficiary under that State's Medicaid plan established under title XIX of the Social Security Act. The payment of such claim (if any) will be made only after providing for the payment from the designated beneficiary's ABLÉ account of all outstanding payments due for his or her qualified disability expenses, and will be limited to the amount of the total medical assistance paid for the designated beneficiary after the establishment of the ABLÉ account (the

date on which the ABLÉ account, or any ABLÉ account from which amounts were rolled or transferred to the ABLÉ account of the same designated beneficiary, was opened) over the amount of any premiums paid, whether from the ABLÉ account or otherwise by or on behalf of the designated beneficiary, to a Medicaid Buy-In program under any such State Medicaid plan.

(q) *Reporting requirements.* A qualified ABLÉ program must comply with all applicable reporting requirements, including without limitation those described in §§ 1.529A-5 through 1.529A-7.

(r) *Effective/applicability dates.* This section applies to taxable years beginning after December 31, 2014.

§ 1.529A-3 Tax treatment.

(a) *Taxation of distributions.* Each distribution from an ABLÉ account consists of earnings (computed in accordance with paragraph (c) of this section) and investment in the account. If the total amount distributed from an ABLÉ account to or for the benefit of the designated beneficiary of that ABLÉ account during his or her taxable year does not exceed the qualified disability expenses of the designated beneficiary for that year, no amount distributed is includible in the gross income of the designated beneficiary for that year. If the total amount distributed from an ABLÉ account to or for the benefit of the designated beneficiary of that ABLÉ account during his or her taxable year exceeds the qualified disability expenses of the designated beneficiary for that year, the distributions from the ABLÉ account, except to the extent excluded from gross income under this section or any other provision of chapter 1 of the Internal Revenue Code, must be included in the gross income of the designated beneficiary in the manner provided under this section and section 72. In such a case, the earnings portion of the distribution includible in gross income is equal to the earnings portion of the distribution reduced by an amount that bears the same ratio to the earnings portion as the amount of qualified disability expenses during the year bears to the total distributions during the year. For this purpose, all amounts relevant under section 72 are determined as of December 31 of the year in which the designated beneficiary's taxable year begins, and all amounts distributed from an ABLÉ account to or for the benefit of the designated beneficiary during his or her taxable year are treated as one distribution. If an excess contribution or excess aggregate contribution is

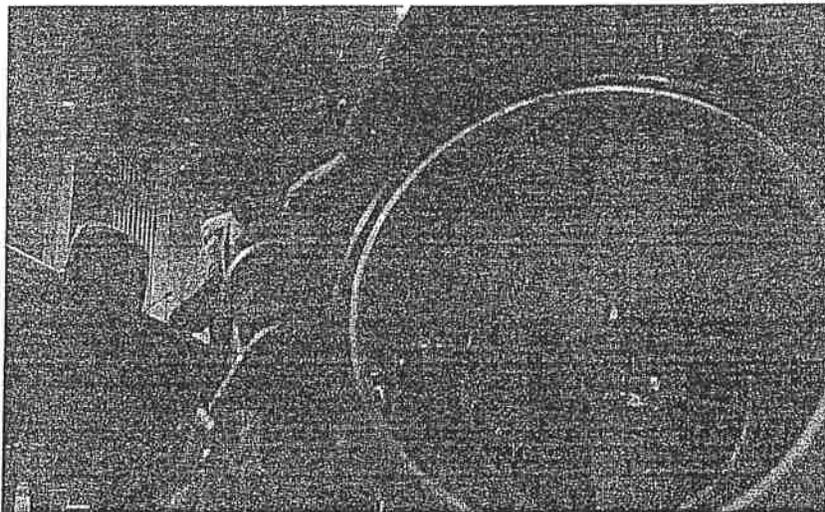
EDITION: UNITED STATES

The limitations of ABLE accounts for the disabled

OLD NAVY FREE SHIPPING ON ORDERS OF \$50+ **SHOP NOW**

MONEY | Mon May 18, 2015 | 8:19am EDT

The limitations of ABLE accounts for the disabled



U.S. Secretary of State John Kerry (L) testifies at the Senate Foreign Relations Committee regarding the "Convention on the Rights of Persons with Disabilities" in Washington November 21, 2013. REUTERS/Gary Cameron

MBD - MONEY MARKET
1.15% On balances of \$5,000 or more.
 APY [Learn More](#)

MY BANKING DIRECT
A Service of New York Community Bank, Member FDIC

TRENDING STORIES

- 1** South Korea says U.S. reaffirms it will pay THAAD costs; Trump calls Asia allies
- 2** Gunman kills one, injures others at San Diego pool party
- 3** U.S. Congress negotiators set spending plan to avert shutdown, bolster defense
- 4** Trump says China could have hacked Democratic emails
- 5** Mob in India lynches two Muslims over suspected cow theft

By Liz Weston | LOS ANGELES

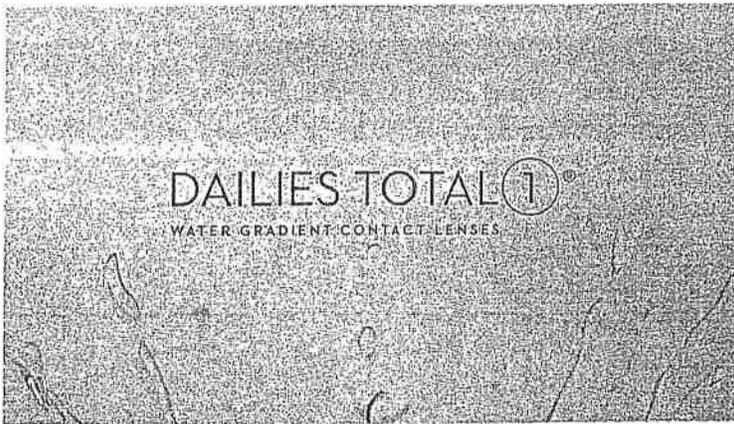
The limitations of ABLE accounts for the disabled

Nearly six million people with disabilities may benefit from new tax-free savings plans approved by Congress last year, but the accounts may not be as helpful or available as quickly as originally promised.

After a decade of lobbying by disability advocates, Congress passed The Achieving a Better Life Experience (ABLE) Act in the final hour before adjourning in December.

The ABLE Act allows families to set aside money that can be used tax-free for a disabled person's expenses without risking the loss of government benefits.

ADVERTISING



The beneficiary must have experienced the disability before age 26 to qualify for an ABLE account, which will be administered by the states' 529 college savings programs.

The National Down Syndrome Society has estimated that about 5.8 million individuals and families could benefit from the accounts.

Disability advocates had predicted that ABLE accounts would start becoming available later this year.

But one of the states that's farthest along in creating them, Virginia, will not be able to offer the accounts until "the first half of 2016," said Mary Morris, chief executive of the Virginia 529 College Savings Plan.

Another state, Massachusetts, plans to make an announcement "in late fall" about its program but currently is not committing to a roll-out date, said Martha Savery, communications director for the Massachusetts Educational Financing Authority.

'TREMENDOUS INTEREST'

So far, 11 states have enacted laws to create ABLE accounts, while six other states have passed bills and are waiting for gubernatorial signatures. Another 23 are considering such legislation, said Stuart Spielman, senior policy advisor and counsel at Autism Speaks, a research and advocacy group.

The 11 states that have laws in place include Arkansas, Kansas, Louisiana, Maryland, Massachusetts, Montana, North Dakota, Utah, Virginia, Washington and West Virginia.

"It's gratifying that there is tremendous interest in having this vehicle available," Spielman said. "The states have said, 'We really like this.'"

PICTURES

Families have to wait for their states to act, since the law allows them to open just one account per beneficiary and only in the state where the disabled person resides.

That contrasts with college savings plans, which don't limit where or how many accounts can be opened.

To further reduce the accounts' cost in lost tax revenue, Congress limited the amount that can be saved to \$14,000 each year and required that any money remaining in the accounts after the death of a disabled person be subject to reclamation by Medicaid.

Currently, people with disabilities cannot have more than \$2,000 in assets and still qualify for Medicaid, the government health program for the poor, and Supplemental Security Income, which provides stipends to low-income people who are elderly, blind or disabled.

With ABLE accounts, people could have up to \$100,000 in assets before their savings affects their ability to qualify for these benefits.

CLAWBACK DRAWBACK

ALSO IN MONEY

U.S. economic growth slower than France, 'terrible': BlackRock's Fink

NRG director wins strong shareholder support despite NYC opposition

But just as the estates of elderly people are subject to what is known as a "clawback" if they receive Medicaid benefits, the estates of disabled people who die with money in their ABLE accounts would also be subject to Medicaid claims.

That's a fairly significant drawback for many families, said financial planner, John W. Nadworny.

These families may prefer to save for their children in their own names and then set up a special needs trust in their wills to take care of their children after the parents' death, said Nadworny, director of special needs financial planning at Shepherd Financial Partners in Winchester, Massachusetts.

Still, ABLE accounts would be a boon for disabled people who want to save on their own without jeopardizing government benefits, Nadworny said.

And publicity about the accounts will help families focus on the need to save for children with disabilities, rather than simply hope the government will take care of them.

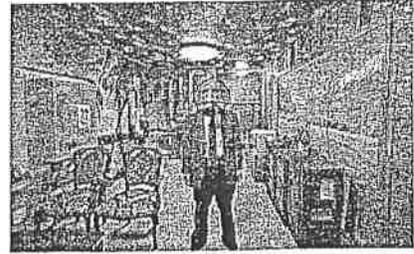
"The government will do the best it can" but benefits aren't guaranteed, said Nadworny, who co-authored the book, "The Special Needs Planning Guide: How to Prepare for Every Stage of Your Child's Life."

"This educates people that they have to save."

(Editing by Beth Pinsker and Bernadette Baum)

Our Standards: [The Thomson Reuters Trust Principles](#)

NEXT IN MONEY



Photos of the week

Care2

World's Largest Sign (Or beep) Free England Against Food Waste



5 Tips for Running a Biz What Every Office Worker Should Know Reduce Stress and Increase Productivity

SPONSORED TOPICS

