

# Achieve a Better Living Experience ABLÉ Accounts

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**The ABLÉ Act was signed into law by President Obama on December 19, 2014, as part of the Tax Increase Prevention Act of 2014 (Public Law 113-295). Unlike most of the other programs relating to persons with special needs, the ABLÉ Act is a tax law. The ABLÉ Act amended the Internal Revenue Code to add section 529A – Qualified ABLÉ Programs.**

Section 529A made ABLÉ accounts exempt from income taxation if they met the requirements set out in Internal Revenue Code (Code), § 529A(b), which reads, in part:

The term “qualified ABLÉ 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 ABLÉ 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 ABLÉ account for purposes of this section,

(C) Which allows for the establishment of an ABLÉ account only for a designated beneficiary who is a resident of such state or a resident of a contracting state, and

(D) Which meets the other requirements of this section.<sup>1</sup>

The other requirements include

(a) No portion of the ABLÉ account can be used a security for a loan.

(b) Distributions shall be income-taxable to the distributee (but are not considered income for other purposes, such as SSI and Medicaid eligibility).

(c) The person who established the ABLÉ account must be entitled to benefits based on blindness or disability under Title II or XVI of the Social Security Act, and such blindness or disability occurred before the date on which the individual attained age 26, or files (or is filed by a parent or guardian) a disability certification that the person is blind or disabled under the Social Security definition and that the disability or blindness occurred before age 26. The certification must be accompanied by a confirming diagnosis signed by a doctor.

<sup>1</sup> Code §529A (b)(1)

(d) The funds can only be used for qualified disability expenses. Qualified disability expense means any expenses **related to the eligible individual's blindness or disability**, made for the benefit of the designated beneficiary, including: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses approved by treasury regulations. Internal Revenue Code, §529A(e)(5).

**IMPORTANT NOTE:** Unlike funds in a special needs trust, ABLE account funds should not be used for things not related to the person's blindness or disability. Thus, the ABLE account utility is limited compared to a special needs trust. In the absence of firm guidance as to what would be considered a Qualified Disability Expense, we must use caution in making any expenditures from an ABLE account.

**However**, there is some support that the use of ABLE funds is broader than the term "Qualified Disability Expense" would imply. Both the IRS and the Social Security Administration appear to take a broad view of the types of expenses that are "related to the individual's blindness or disability."

The Secretary of the Treasury (IRS is part of the Treasury Department) is required under the Internal Revenue Code, §529A(g) to prescribe regulations and guidance on the operation of ABLE Act. In 2015, IRS issued proposed regulations. While the proposed regulations are not in effect, as we are awaiting the final regulations, they give us insight into the IRS position on Qualified Disability Expenses. In the part of the proposed regulation's preamble, explaining the actual regulatory language, the IRS states:

...the Treasury Department and the IRS conclude that the term 'qualified disability expenses' should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to

the eligible individual. For example, expenses for common items such as smart phones could be considered qualified disability expenses if they are an effective and safe communication or navigation aid for a child with autism.

In addition, the Social Security Administration, in its internal operations manual, Called the Program Operational Systems Manual (POMS) has picked up on the IRS Proposed Regulation's idea of "basic living expenses." Here is an excerpt from SSA POMS SI 01130.740 – Achieving a Better Life Experience (ABLE) Accounts, at Paragraph B.8 (Emph. added)

## 8. Qualified disability expenses

Qualified disability expenses (QDEs) are expenses related to the blindness or disability of the designated beneficiary and for the benefit of the designated beneficiary. In general, a QDE includes, but is not limited to, an expense for:

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

Therefore, although we do not yet have definitive treasury regulations setting out the scope of permissible qualified disability expenses, it appears that both the IRS and the SSA are taking a pretty liberal view.

(e) Upon the death of the ABLE account beneficiary, **Medicaid must be paid back for any expenses it incurred for the benefit of the beneficiary.**

There are other limitations which affect the utility of an ABLÉ account:

(a) The total amount that can be held in an ABLÉ account cannot exceed the maximum amount that can be held in a 529 education account in the state in which the ABLÉ account is opened.

(b) The total amount that can be contributed to an ABLÉ account from all sources in any given year cannot exceed the annual gift tax exemption (currently, \$15,000). For example, if 10 people (including the beneficiary) wanted to contribute to the ABLÉ account this year, their combined total contribution can only be \$15,000. So, it may take many years before the aggregate contributions get anywhere near the maximum amount allowed in the ABLÉ account. There is one exception to the \$15,000 annual contribution limitation. As of 2018, the beneficiary can contribute up to an additional \$12,060 (in 2018) to the account from the beneficiary's own earned income. This would allow a total of \$27,060 to be put into the ABLÉ account.

(c) Only the first \$100,000 in the ABLÉ account is not counted for purposes of the SSI resource test. If the assets in the ABLÉ account exceed \$100,000, the beneficiary's SSI payments will be suspended until the balance in the account returns to \$100,000 or less, but Medicaid will continue since, for purposes of the Medicaid resource test, the entire amount of the ABLÉ account is not counted for Medicaid eligibility.

(d) An individual can only have one ABLÉ account.

If your state does not have an ABLÉ account program, you can sign up with an ABLÉ account in any state, not only the state of residence. This may prove helpful, since we anticipate different states may have differences in

their ABLÉ accounts. One state's account may be better suited for one person than that of another state. As of March 1, 2018, 33 states have opened ABLÉ accounts. Many states have signed legislation authorizing the opening of ABLÉ accounts but are still in the process of setting them up.<sup>2</sup> Note that some states, such as Florida, only allow residents of that state to open an ABLÉ account in that state. The ABLÉ National Resource Center has launched a website which will allow you to find out some of the features of the different states. The website is [www.ablenrc.org](http://www.ablenrc.org).

Although the use of ABLÉ accounts is somewhat limited, there are several reasons why you should always consider an ABLÉ account as part of a special needs plan. First, it allows funds to be available to the person with disabilities without having an impact on needs-based government benefits that are income-tested, such as SSI and Medicaid. For example, if a special needs trust pays for shelter, it is considered in-kind support and maintenance, which will reduce SSI by up to one-third. However, if the special needs trust contributes the annual limit to the ABLÉ account, the beneficiary can withdraw the funds and use them for rent or food without an impact on SSI.<sup>3</sup> An ABLÉ account can coordinate nicely with a special needs trust to provide funds that will not be considered income to the person with disabilities, allowing for greater flexibility in meeting daily needs.

In addition, many persons with disabilities enjoy a certain boost in self-esteem when they have access to funds. Some ABLÉ accounts have debit cards. The person with disabilities who has a car can pay for her gas with the debit card, and doesn't have to ask for a distribution from the special needs trust.

<sup>2</sup> The following states HAVE NOT implemented their own ABLÉ account programs as of May 1, 2018: Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Maine, Mississippi, New Jersey, North Dakota, Oklahoma, South Dakota, Utah, Washington and Wisconsin.

<sup>3</sup> Note that if money is withdrawn from an ABLÉ account for housing-related expenses, it must be used in the month in which the housing expense is to be paid. The same is not true for non-housing-related expenses, such as food. See, POMS SI 01130.740.



The SpecialCare program provides access to information, specialists and financial products and services that can help improve the quality of life for people with disabilities and special needs. The program's holistic approach involves a person with special needs' network of advisors, including a Special Care Planner or other financial professional that specializes in working with special needs, in the development of a life care plan that can help the person with special needs maintain the lifestyle that he or she needs.

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