

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/HB 935	FINAL HOUSE FLOOR ACTION:	
SPONSOR(S):	Health & Human Services Committee; Rodrigues, R. and others	117 Y's	0 N's
COMPANION BILLS:	CS/SB 642	GOVERNOR'S ACTION:	Approved

SUMMARY ANALYSIS

CS/HB 935 passed the House on April 24, 2015, as CS/SB 642.

The federal Achieving a Better Life Experience Act of 2014 (ABLE Act) authorized states to establish ABLE programs or contract with other states to administer such programs if certain conditions are met. ABLE programs provide a tax-advantaged approach for certain individuals with disabilities to build financial resources for disability-related expenses without losing state or federal benefit eligibility, similar to 529 college savings plans.

CS/SB 642 creates the Florida Achieving a Better Life Experience (ABLE program). The bill requires the Florida Prepaid College Board to create Florida ABLE, Inc., as a direct support organization that is organized as a not-for-profit corporation and requires it to implement the Florida ABLE Program on or before July 1, 2016. Florida ABLE, Inc., would operate under a contract with the Florida Prepaid College Board.

The bill allows an ABLE account to be established for an individual with significant disabilities which occurred before age 26. Other persons, such as family members, could contribute funds to an ABLE account. ABLE account balances have no effect on Medicaid eligibility, and balances below \$100,000 will not affect the individual's eligibility for Supplemental Security Income. Earnings of, and distributions from, ABLE accounts do not count as taxable income.

The bill allows ABLE account funds to be used only for qualified disability expenses as authorized under federal law, such as education, housing, transportation, employment training and support, assistive technology, health, prevention and wellness, financial management, legal fees, and other expenses.

The bill makes the Agency for Health Care Administration a creditor of the ABLE accounts, allowing the Agency to recover funds expended to provide Medicaid services upon the death of the individual.

The bill provides a \$2,166,000 recurring and \$1,220,000 nonrecurring appropriation to the Department of Education to fund the program. Revenues from account fees are indeterminate.

Because the bill allows assets placed in ABLE accounts to be exempt from Medicaid eligibility determinations, the impact on increased Medicaid enrollments may be impacted, but is indeterminate. (SEE FISCAL COMMENTS).

The bill was approved by the Governor on May 21, 2015, ch. 2015-56, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

Disability is defined by federal law as a physical or mental impairment that substantially limits one or more major life activities, such as caring for oneself, performing manual tasks, seeing, hearing, sleeping, walking, standing, learning, reading, thinking, communicating, and working.¹ Disabilities may be lifelong, requiring significant expenditures for services and supports to address them over the lifespan of an individual. The additional costs experienced by an individual due to a disability vary based on the individual's unique circumstances. Costs may include out-of-pocket health care, behavioral therapy, speech therapy, physical therapy, occupational therapy, educational services, transportation, caregivers, and other services.

These costs may present financial challenges to individuals with disabilities. These individuals may also face significant barriers in finding and retaining employment which may affect income and assets.

In Florida, the estimated disability prevalence rate in 2012 for individuals ages 21-64 was approximately 10.3 percent.² Approximately 28.1 percent of those individuals were living below the federal poverty line, as compared to approximately 14 percent of individuals without a disability.³ The estimated employment rate of those individuals with disabilities was 29.4 percent in 2012, as compared to 73.8 percent of those without a disability⁴, highlighting the impacts of barriers to regular employment individuals with disabilities can face.

State and Federal Programs for Individuals with Disabilities

Individuals with disabilities may qualify for state or federal assistance. The Social Security Disability Insurance (SSDI)⁵ and Supplemental Security Income⁶ (SSI) programs are two such programs, administered by the federal Social Security Administration. Under these programs, disability is defined as the inability to engage in substantial gainful activity due to a medically determinable physical or mental impairment expected to result in death or last at least 12 months. An applicant must meet strict medical requirements to qualify for disability benefits.⁷

The SSDI program provides cash payments to individuals who have contributed to the Social Security system and meet certain minimum work requirements. The amount of assistance under the SSDI program varies depending on age and average earnings. SSI is a means-tested program for aged, blind, or disabled individuals who meet certain income and resource limitations. There are no contribution or minimum work requirements.⁸ The SSI program provides cash payments assuring a minimum income for aged, blind, or disabled individuals who have very limited income and assets. Effective January 1, 2015, the maximum monthly SSI benefit rate is \$733 for an eligible individual and \$1,100 for an eligible individual with an eligible spouse.⁹ The countable resource limit (maximum assets

¹ 42 U.S.C. s. 12102

² Cornell University, *2012 Disability Status Report: Florida*, available at <http://www.disabilitystatistics.org> (last viewed March 30, 2015).

³ *Id.*

⁴ *Id.*

⁵ 42 U.S.C. ss. 401-433.

⁶ 42 U.S.C. ss. 1381 note-1385 note.

⁷ See <http://www.socialsecurity.gov/disability/professionals/bluebook/general-info.htm> (last accessed February 23, 2015).

⁸ The definition of disability for disabled children receiving SSI benefits is slightly different from the definition for adults. See criteria at: <http://www.ssa.gov/ssi/text-eligibility-ussi.htm#disabled-child> (last accessed on February 23, 2015).

⁹ Generally, the maximum monthly payment changes yearly due to changes in the Consumer Price Index. The 2015 schedule is available at: <http://www.socialsecurity.gov/OACT/COLA/SSI.html> (last accessed February 23, 2015).

that may be held)¹⁰ for SSI eligibility is \$2,000 for individuals and \$3,000 for couples with exclusions.¹¹ In December 2013, there were 547,594 SSI recipients (aged, blind, or disabled) and 551,858 disabled workers that were recipients of SSDI in Florida.¹²

In contrast to the SSDI and SSI programs that provide cash assistance, Medicaid waiver programs provide individuals with disabilities support services. The Medicaid Home and Community Based Services waiver (HCBS) is a program approved and partially funded by the federal government. Waiver programs are authorized by Title XIX of the Social Security Act, Section 1915(c), and operated and partially funded by the state. It provides services in the home for persons who would otherwise require institutional care in a hospital, nursing facility, or intermediate care facility.¹³ Standard services include case management, homemaker, home health aide, personal care, adult day health services, habilitation (both day and residential), and respite care. States can also propose “other” types of services that may assist in diverting and/or transitioning individuals from institutional settings into their homes and community.¹⁴

Florida has a number of HCBS waivers serving several distinct disability groups, such as individuals with cystic fibrosis, Familial Dysautonomia, developmental disabilities, AIDS, traumatic brain injury, and spinal cord injury.¹⁵ For example, the iBudget Florida waiver specifically serves persons with developmental disabilities. As of December 2014, approximately 30,000 individuals were enrolled on the iBudget Florida waiver receiving services, and approximately 21,000 were on the enrollment waitlist.¹⁶

Federal ABLE Act of 2014

The federal ABLE Act became law on December 19, 2014,¹⁷ authorizing states to implement ABLE programs. An ABLE program provides a tax-advantaged approach for certain individuals with disabilities to build financial resources without losing state or federal benefit eligibility. The law authorizes ABLE accounts for individuals with disabilities who meet certain criteria, who may spend distributions on “qualified disability expenses.”¹⁸ The purposes of the federal ABLE Act are to encourage and assist individuals and families in saving to support individuals with disabilities in maintaining health, independence, and quality of life, and provide secure funding for disability-related expenses that will supplement, but not supplant, other sources.¹⁹

Eligible Individuals

The federal ABLE Act provides that an individual is eligible to establish an ABLE account for a taxable year if during such taxable year:

¹⁰ The countable resource limit includes assets that can be easily converted to cash and used for food and shelter; such as bank accounts, stocks, bonds, second homes and vehicles. However, assets such as an individual’s primary home, household goods, and one vehicle are exempt from that limit.

¹¹ 20 C.F.R. s. 416.1201 and 20 C.F.R. ss. 416.1210-416.1239.

¹² Social Security Administration *Annual Statistical Supplement, 2014* available at:

<http://www.socialsecurity.gov/policy/docs/statcomps/supplement/2014/5j.pdf> and

<http://www.socialsecurity.gov/policy/docs/statcomps/supplement/2014/7b.pdf> (last accessed February 23, 2015).

¹³ See Florida Agency for Health Care Administration, http://ahca.myflorida.com/medicaid/hcbs_waivers/index.shtml (last accessed February 23, 2015)

¹⁴ See Medicaid.gov: Keeping America Healthy, <http://www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/home-and-community-based-services-1915-c.html> (last accessed February 24, 2015)

¹⁵ *Supra.* at Note 10

¹⁶ Agency for Persons with Disabilities. Quarterly Report on Agency Services to Floridians with Developmental Disabilities and Their Costs: Second Quarter Fiscal Year 2014-15, February 2015

¹⁷ H.R. 5771, Division B, Title I. Public Law 113-295.

¹⁸ *Id.*

¹⁹ *Id.*

The individual is 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 the individual attained age 26; or a disability certification with respect to such individual has been filed with the Secretary of the Treasury for the taxable year.

Qualified Disability Expenses

ABLE account funds may be used only for qualified disability expenses.²⁰ These include any expenses related to the eligible individual's blindness or disability that are made for the benefit of the designated beneficiary. These funds could be used for 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 which are authorized pursuant to regulations to be adopted by the Secretary of the U.S. Department of Treasury.^{21,22}

Tax Advantages of ABLE Accounts

Earnings in, and distributions from, an ABLE account for qualified disability expenses do not count as taxable income of either the contributor or the designated beneficiary.²³ However, the federal ABLE Act limits aggregate contributions during a taxable year to the annual gift-tax exclusion amount (\$14,000 for 2015).²⁴ If the funds withdrawn from a qualified ABLE account are equal or less than the qualified disability expenses of the designated beneficiary, no amount is counted in the designated beneficiary's gross income. However, funds withdrawn that exceed qualified disability expenses would be included in the beneficiary's gross income and would thus be subject to federal income tax, as well as an additional 10-percent tax.²⁵

Amounts in an ABLE account may be rolled over without income tax liability to another ABLE account for the same beneficiary or another ABLE account for the designated beneficiary's brother, sister, stepbrother or stepsister who is also an eligible individual.²⁶ Taxes may apply, however, to a change of designated beneficiary during any taxable year unless, as of the beginning of the year, the new beneficiary is both an eligible individual for the taxable year and a brother, sister, stepbrother or stepsister of the former beneficiary.²⁷

ABLE Accounts and Federal Program Eligibility

Generally, any amount in an ABLE account, and any distribution for qualified disability expenses, would be disregarded for determining eligibility for and the amount of any assistance or benefit authorized by any federal means-tested program with respect to any period an individual maintains, makes contributions to, or receives distributions from such ABLE account. However, in the case of the SSI program, distributions for housing expenses and ABLE account balances in excess of \$100,000 may not be disregarded. If an individual's ABLE account balance exceeds \$100,000, the individual's SSI benefits would be suspended until the balance falls below \$100,000. However, Medicaid eligibility would not be affected.

²⁰ Supra. at Note 17.

²¹ Id.

²² The Secretary of the U.S. Department of Treasury is required to issue regulations or other guidance to implement the federal ABLE Act no later than six months after the date of enactment of the act. The date of enactment was December 19, 2014, and thus regulations are to be promulgated by June 19, 2015.

²³ Supra. at Note 17.

²⁴ See Internal Revenue Service information at <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Whats-New-Estate-and-Gift-Tax> (last visited February 23, 2015).

²⁵ Supra. at Note 17.

²⁶ Id.

²⁷ Id.

If the designated beneficiary dies, the ABLE account is subject to Medicaid recovery for the total amount of medical assistance provided for the designated beneficiary under the Medicaid program, less any premiums paid by or on behalf of the designated beneficiary to a Medicaid buy-in program.^{28,29} Prior to the Medicaid payback, funds in the ABLE account of the deceased designated beneficiary would be distributed for the payment of qualified disability expenses rendered before the designated beneficiary's death.³⁰

State ABLE Program

The federal ABLE Act authorizes the states to create and implement ABLE programs. A state ABLE program must meet many requirements to be qualified, such as:

- A designated beneficiary may only have one ABLE account.
- Only designated beneficiaries who are either residents of the state maintaining such ABLE program or residents of a contracting state³¹ may establish accounts.
- Contributions must be made in cash.
- The program must account separately for each designated beneficiary.
- Designated beneficiaries may make investment directions a maximum of two times in any calendar year.
- The program may not pledge any interest in the program as a security for a loan.
- The program must establish adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary in excess of the amount established by the state under s. 529(b)(6) of the Internal Revenue Code.
- The program must comply with federal reporting requirements.

Florida Prepaid College Board and 529 Educational Savings Plans

The Florida Prepaid College Board was created in 2002 to administer the Florida Prepaid College Program and the Florida College Savings Program.³² The Florida College Savings Program was created to promote and enhance the affordability of higher education in the state and enable persons to contribute funds that are combined and invested to pay the higher education expenses of a designated beneficiary.³³ The Florida College Savings Program is a tax-advantaged account that allows the tax-free accumulation and distribution of cash assets for qualified educational expenses under s. 529 of the Internal Revenue Code. These plans are very similar to the tax advantaged disability savings plans envisioned by the federal ABLE Act under s. 529A of the Internal Revenue Code.

Direct-Support Organizations

A direct-support organization (DSO) is a not-for-profit corporate entity created by a state agency or program to provide support and conduct programs and activities for the benefit of that agency or program.

Section 20.058, F.S., requires that any law creating or authorizing the creation of a DSO must state that the creation of or authorization for the DSO be repealed on October 1 of the fifth year after enactment, unless reviewed and saved from repeal through reenactment by the Legislature. Section 215.981, F.S., imposes audit requirements on state agency DSOs.

Effect of Proposed Changes

²⁸ Id.

²⁹ Florida does not currently have a Medicaid buy-in program. Legislation was passed in 2001 authorizing a Medicaid buy-in program, subject to appropriation (Ch. 2001-104, Laws of Fla.). It was repealed, effective July 1, 2002, without appropriation.

³⁰ Supra. at Note 17

³¹ The federal ABLE Act allows a state that has not established an ABLE program to enter into a contract with a state that has established an ABLE program to provide ABLE accounts to its residents.

³² Ch. 2002-387, Laws of Fla.

³³ Id.

CS/SB 642 creates the Florida Achieving a Better Life Experience (ABLE) Act. The Florida ABLE Act would establish the Florida ABLE program, to provide a means for individuals with disabilities to build financial resources without losing their eligibility for state and federal benefits, and encourage individuals and families in saving for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life. The bill provides a statement that the Legislature intends to establish a qualified ABLE program in Florida that is consistent with federal law and maximizes program efficiency and effectiveness. The bill also provides definitions and requirements for operation consistent with the federal ABLE Act.

Structure and Organization of the ABLE program

The bill requires the Florida Prepaid College Board to establish the Florida ABLE program by creating Florida ABLE, Inc., (Florida ABLE), a not-for-profit direct support organization. Florida ABLE would receive, hold, invest, and administer property and make expenditures for the Florida ABLE Program.

Florida ABLE must establish and administer the Florida ABLE Program on or before July 1, 2016. Before doing so, it must obtain a legal opinion that the Florida ABLE program complies with s. 529A of the Internal Revenue Code (the federal ABLE Act), complies with federal securities law, and qualifies for tax exemptions under such law.

The bill allows Florida ABLE to contract to participate in the ABLE program of another state if Florida does not establish a qualified ABLE program. Florida may also contract with other states that do not have an authorized ABLE program to allow those states to participate in the Florida ABLE program.

The bill requires the Agency for Health Care Administration, the Agency for Persons with Disabilities, the Department of Children and Families, and the Department of Education to assist Florida ABLE in providing public information and outreach about the Florida ABLE program.

The bill requires that on or before November 1, 2015, Florida ABLE provide to the Governor, President of the Senate, and Speaker of the House of Representatives a status report and recommendations on the establishment of the Florida ABLE program.

Oversight by Florida Prepaid College Board

Florida ABLE would operate under a written contract with Florida Prepaid that requires the articles of incorporation and bylaws of Florida ABLE to be approved by Florida Prepaid. Florida ABLE would be required to submit an annual budget to Florida Prepaid for its approval. Florida Prepaid would be required to certify annually that Florida ABLE is complying with contract terms and acting in accordance with statute and in the best interest of the state.

The bill allows Florida ABLE to use the resources of Florida Prepaid and would require Florida ABLE to pay reasonable consideration to Florida Prepaid for use of its products and services. Florida ABLE must authorize Florida Prepaid to solicit proposals, contract, or subcontract, or amend Florida Prepaid contractual service agreements for the benefit of Florida ABLE. Florida Prepaid would also maintain the website of Florida ABLE.

Board of Directors of Florida ABLE

The bill designates the Florida ABLE board of directors, as follows:

- The chair of Florida Prepaid, who serves as chair of Florida ABLE board;
- An advocate for persons with disabilities appointed by the President of the Senate;

- An advocate for persons with disabilities appointed by the Speaker of the House of Representatives;
- A person with expertise in accounting, risk management, or investment management appointed by Florida Prepaid;
- A person with expertise in accounting, risk management, or investment management appointed by the Governor.

One of the two advocates for persons with disabilities must be an advocate for persons with developmental disabilities as defined in s. 393.063, F.S., which include intellectual disability, cerebral palsy, autism, spina bifida, and Prader-Willi syndrome.

Appointees to the board would serve for terms not exceeding three years and could be reappointed. Board members would serve without compensation and could be reimbursed for travel expenses pursuant to s. 112.061, F.S. The board must meet at least quarterly and upon the call of the chair.

Operation of the ABLE program

Participation Agreements

The bill requires the Florida ABLE program to enter into participation agreements with qualified beneficiaries in order to set up an ABLE account. The bill sets forth mandatory provisions of participation agreements including provisions prohibiting beneficiaries from establishing accounts in violation of federal law (such as establishing more than one account) or in excess of federal law (currently, the maximum annual contribution is \$14,000 per year). The bill allows participation agreement to be amended to increase or decrease the level of participation, change beneficiaries, and for other authorized purposes. The participation agreement must allow the involuntary liquidation of an ABLE account if a material misrepresentation is made.

The participation agreement would not be a debt of the state but rather an obligation of the Florida ABLE program. The obligation of Florida ABLE would be limited to the amount in the Florida ABLE Trust Fund.

The Florida ABLE program would be required to inform participants of changes to the tax or securities status of their participation agreements and interests in the ABLE program.

Comprehensive Investment Plan

The bill requires Florida ABLE to establish a comprehensive investment plan for the ABLE program. The bill allows Florida ABLE to place Florida ABLE program assets in investment products, but only in proportions designated in the investment plan and in compliance with federal and state laws and regulations. Designated beneficiaries may not direct investment of their contributions unless specific fund options are offered by Florida ABLE. The federal ABLE Act prohibits direction of investments by beneficiaries more than two times in a calendar year. The comprehensive investment plan is subject to the approval of Florida Prepaid.

Auditing and Reporting

Florida ABLE is required to prepare an annual report providing a detailed accounting of the Florida ABLE program and describing the financial condition of the program. Copies of the report must be submitted to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the minority leaders of each legislative chamber. The report must be made available to designated beneficiaries. Florida ABLE program accounts would also be subject to an annual audit by the Auditor General.

State Interaction with Florida ABLE

Under the bill, the state pledges to designated beneficiaries that their vested rights will not be limited or altered until the program's obligations are met and discharged. Limiting or altering rights may be done if adequate provision is made by law to protect designated beneficiaries pursuant to the obligations of Florida ABLE.

The Florida ABLE program would continue in existence until terminated by law by the Legislature. The bill specifies that the state may terminate the program if it is financially infeasible, in which case account funds must be returned in accordance with the participation agreement.

ABLE account funds of a deceased beneficiary would first be distributed for qualified disability expenses followed by distributions for a Medicaid claim. Any remaining amount would be distributed pursuant to the participation agreement.

Rulemaking Authority

The bill requires Florida Prepaid to adopt rules to administer the Florida ABLE program. The rules must include the governance and operating procedures for Florida ABLE; the conditions for Florida ABLE to use the property, facilities, or personnel of Florida Prepaid; the procedures for determining that an ABLE account has been abandoned; and the provisions necessary for the Florida ABLE program to retain status as a qualified ABLE program, tax exempt status, or other similar status for the program or participants under the Internal Revenue Code.

Direct-Support Organization Repeal

In accordance with s. 20.058, F.S., the Florida ABLE DSO would be repealed October 2, 2020, unless reviewed and saved from repeal by the Legislature.

Finally, the bill makes conforming changes in ss. 222.22 and 1009.971, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Florida ABLE, Inc., may realize revenue from fees charged to designated beneficiaries for such purposes as establishing and managing their accounts. However, since the number of accounts that will be established is unknown and a fee structure has not been determined, the amount of revenue is indeterminate.

2. Expenditures:

The Florida Prepaid College Board estimates the costs for FY 2015-2016 associated with the implementation of the Florida ABLE program would be \$3,386,000. This cost estimate anticipates starting the program as early as April 1, 2016, but no later than July 1, 2016.

The cost estimate includes expenditures for accounting/auditing, legal fees, marketing, records administration, trustee, consulting, investment management, salary and benefits, travel, communications, and miscellaneous overhead.³⁴

Description	FY 2015-16		
	Recurring	Non-Recurring	Total
Accounting/Auditing	\$15,000		\$15,000
Banking & Lockbox	21,000		21,000
Legal	150,000	100,000	250,000
Marketing Agent	1,250,000	520,000	1,770,000
Records Administrator	200,000	550,000	750,000
Trustee	25,000		25,000
Investment Consultant	75,000		75,000
Investment Management	0		0
Other Professional Consulting	125,000	50,000	175,000
Florida Prepaid - HR Service Charge	225,000		225,000
SBA-Admin Service Charges	20,000		20,000
Travel	20,000		20,000
Communications	31,000		31,000
Freight	1,000		1,000
Insurance & Surety Bonds	1,500		1,500
Office Materials & Supplies	2,000		2,000
Other Charges & Obligations	2,000		2,000
Printing	2,500		2,500
Total	\$2,166,000	\$1,220,000	\$3,386,000

Marketing costs are discretionary to implementation.

The Bill provides a \$2,166,000 recurring and \$1,220,000 nonrecurring appropriation to the Department of Education for transfer to the program.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The Florida ABLE program will assist individuals with disabilities in saving money in tax-advantaged accounts without losing their eligibility for state and federal benefits. The bill would allow an indeterminate number of individuals to save additional assets or resources in these accounts and use the funds to pay for qualified disability expenses.

³⁴ ABLE Program Budget Detail, Kevin Thompson, Executive Director, Florida Prepaid College Board; on file with Children, Families & Seniors Subcommittee staff.

D. FISCAL COMMENTS:

The Congressional Budget Office (CBO) expects that enacting the ABLE Act would increase the number of disabled adults under the age of 65 who enroll in Medicaid because they could hold cash assets in an ABLE account that would not count against Medicaid eligibility. Because a beneficiary of an ABLE account must have a disability that occurred before he reached age 26, CBO does not expect an increase in the number of elderly individuals who enroll in Medicaid. Additionally, the CBO does not expect that establishment of ABLE accounts would increase the number of children and nondisabled adults enrolled in Medicaid because those individuals are not required to meet an asset test under current law.³⁵

³⁵ Congressional Budget Office Cost Estimate, H.R. 647, September 23, 2014, as ordered reported by the House Committee on Ways and Means on July 31, 2014.