

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS  
FINAL BILL ANALYSIS**

**BILL #:** HB 6047 Florida ABLE Program  
**SPONSOR(S):** Roach  
**TIED BILLS:** IDEN./SIM. BILLS: SB 1300

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Market Reform Subcommittee	14 Y, 0 N	Grabowski	Crosier
2) Health Care Appropriations Subcommittee	11 Y, 0 N	Nobles	Clark
3) Health & Human Services Committee	17 Y, 0 N	Grabowski	Calamas
<b>FINAL HOUSE FLOOR ACTION:</b>			
110	Y's 0	N's	<b>GOVERNOR'S ACTION:</b> Approved

**SUMMARY ANALYSIS**

HB 6047 passed the House on April 25, 2019, and subsequently passed the Senate on May 3, 2019.

The ABLE program provides a tax-advantaged approach for certain individuals with disabilities to build financial resources without losing state or federal benefit eligibility. Federal and state law authorizes ABLE accounts for individuals with disabilities who meet certain criteria, and allows those individuals to spend distributions on "qualified disability expenses".

Federal and state law authorizes the Medicaid program to recover the costs of certain medical assistance provided to a beneficiary from his or her estate, upon the death of the beneficiary. Ch. 2018-10, L.O.F., modified the Medicaid recovery requirements for individuals with an ABLE account. That law limited the ability of the state Medicaid program to recoup Medicaid funds expended on behalf of an ABLE account holder from an ABLE account. The change made under ch. 2018-10, L.O.F., is scheduled to expire on July 1, 2019.

The bill repeals section 11 of Chapter 2018-10, Laws of Florida, and makes permanent the limitation on Medicaid recoupment of funds from ABLE accounts.

The bill has an indeterminate negative fiscal impact on the state Medicaid program, and has no fiscal impact on local government.

The bill was approved by the Governor on June 7, 2019, chapter 2019-96, Laws of Florida. The effective date of this bill is June 30, 2019.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Background

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.<sup>1</sup> 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.

#### State and Federal Programs for Individuals with Disabilities

Individuals with disabilities may qualify for state or federal assistance. The Social Security Disability Insurance (SSDI)<sup>2</sup> and Supplemental Security Income<sup>3</sup> (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.<sup>4</sup>

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.<sup>5</sup> 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, 2019, the maximum monthly SSI benefit rate is \$771 for an eligible individual and \$1,157 for an eligible individual with an eligible spouse.<sup>6</sup>

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.<sup>7</sup> Standard services include case management, homemaker, home health aide, personal care, adult day health services,

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<sup>1</sup> 42 U.S.C. s. 12102

<sup>2</sup> 42 U.S.C. ss. 401-433.

<sup>3</sup> 42 U.S.C. ss. 1381 note-1385 note.

<sup>4</sup> See <http://www.socialsecurity.gov/disability/professionals/bluebook/general-info.htm> (last accessed March 16, 2019).

<sup>5</sup> 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 March 16, 2019).

<sup>6</sup> Generally, the maximum monthly payment changes yearly due to changes in the Consumer Price Index. The 2019 schedule is available at: <http://www.socialsecurity.gov/OACT/COLA/SSI.html> (last accessed March 16, 2019).

<sup>7</sup> See Florida Agency for Health Care Administration, [http://ahca.myflorida.com/medicaid/hcbs\\_waivers/index.shtml](http://ahca.myflorida.com/medicaid/hcbs_waivers/index.shtml) (last accessed March 16, 2019).

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.<sup>8</sup>

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.<sup>9</sup> For example, the iBudget Florida waiver specifically serves persons with developmental disabilities. As of December 2018, approximately 34,000 individuals were enrolled on the iBudget Florida waiver receiving services, and approximately 22,000 were on the enrollment waitlist.<sup>10</sup>

### Federal ABLE Act of 2014

The federal Achieving a Better Life Experience Act (ABLE) of 2014 became law on December 19, 2014<sup>11</sup> authorizing states to implement ABLE programs. An ABLE program would provide 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”.<sup>12</sup> 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.<sup>13</sup>

#### *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:

- 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.<sup>14</sup> 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 may 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.<sup>15</sup>

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<sup>8</sup> Florida Medicaid 1915(b) Managed Care Waiver Long-Term Care Program. Submitted to U.S. Department of Health and Human Services on June 17, 2016. Available at [https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/FL\\_Long-Term-Managed-Care\\_FL-17.pdf](https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/FL_Long-Term-Managed-Care_FL-17.pdf) (last accessed March 16, 2019).

<sup>9</sup> Id.

<sup>10</sup> Agency for Persons with Disabilities, Agency Overview Presentation to House Children, Families, and Seniors Subcommittee, January 10, 2019. On file with Staff of the Health Market Reform Subcommittee.

<sup>11</sup> Public Law 113-295, 26 U.S.C. 529A.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

## *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.

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.<sup>16,17</sup> 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.<sup>18</sup>

### Florida ABLE Program

The Florida ABLE Program and its associated trust fund were established by law in 2015.<sup>19</sup>

The ABLE Trust Fund is administered by Florida ABLE, Inc., a direct-support organization which is established by statute.<sup>20</sup> The trust fund holds appropriations and moneys acquired from private sources or other governmental sources for the Florida ABLE program. The trust fund also holds moneys held in ABLE accounts. The priority of expending trust fund assets is first to make payment to, or on behalf of, designated beneficiaries of the Florida ABLE program and then to pay administrative and operational costs of the Florida ABLE program.<sup>21</sup>

Trust fund assets are maintained, expended, and invested only for the purposes of the Florida ABLE program. Florida ABLE, Inc., may, however, make investments in bonds, notes, or other obligations of the state, a state agency, or instrumentality of the state. Any year-end balance remains in the trust fund.<sup>22</sup> Trust fund assets are exempt from the investment requirements of s. 17.57, F.S., and may be invested pursuant to s. 215.47, F.S.

### *2018 Medicaid Recovery Revision*

Federal<sup>23</sup> and state<sup>24</sup> law requires the Medicaid program program to recover the costs of certain medical assistance provided to a beneficiary from his or her estate, upon the death of the beneficiary. Medicaid estate recovery applies to Medicaid beneficiaries, age 55 and over, who have received certain services, like nursing home care or home- and community-based long-term care, and related hospital and prescription drug services. Medicaid is designed to be a safety net for individuals who lack the

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<sup>16</sup> Id.

<sup>17</sup> The recovery is reduced by the amount of any premiums paid by or on behalf of the designated beneficiary to a Medicaid buy-in program. 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.

<sup>18</sup> Supra note 11.

<sup>19</sup> Chs. 2015-56 and 2015-57, L.O.F.

<sup>20</sup> S. 1009.986(3), F.S.

<sup>21</sup> S. 1009.988, F.S.

<sup>22</sup> Id.

<sup>23</sup> 42 U.S.C. 1396p.

<sup>24</sup> S. 409.910(11), F.S.

resources to pay for such care, but the program is also vulnerable to fraud and abuse by beneficiaries.<sup>25</sup>

Chapter 2018-10, Laws of Florida, prohibited the state Medicaid program from recovering any Medicaid expenditures from personal ABLE accounts. Section 10 of Chapter 2018-10, L.O.F., deleted the following recovery authorization language from s. 1009.986(7), F.S.:

*(a) Upon the death of the designated beneficiary, the Agency for Health Care Administration and the Medicaid program for another state may file a claim with the Florida ABLE program 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. Funds in the ABLE account of the deceased designated beneficiary must first be distributed for qualified disability expenses followed by distributions for the Medicaid claim authorized under this paragraph. Any remaining amount shall be distributed as provided in the participation agreement.*

This language was replaced with the following prohibition on recovery:

*(a) Unless prohibited by federal law, upon the death of a designated beneficiary, funds in the ABLE account must first be distributed for qualified disability expenses then transferred to the estate of the designated beneficiary or an ABLE account of another eligible individual specified by the designated beneficiary or by the estate of the designated beneficiary.*

*(b) Except as required by federal law, the state Medicaid program may not file a claim for Medicaid recovery of funds in an ABLE account.*

This change has the effect of ensuring that funds in ABLE accounts are used strictly in support of qualified disability expenses. Section 11 of Chapter 2018-10, L.O.F., specifies that the revised language included in s. 1009.986(7), F.S., will expire on July 1, 2019 and revert to the text that was in place on June 30, 2016, authorizing Medicaid recoveries from ABLE accounts after that date.

### **Effect of the Bill**

HB 6047 repeals the language in Section 11 Chapter 2018-10, Laws of Florida, which required the text of section 1009.986(7), F.S., to expire and revert back to the law that was in existence on June 30, 2016. The bill allows the current requirements in s. 1009.986(7), F.S. to remain in effect indefinitely, which prohibits Florida Medicaid from filing claims for the recovery of Medicaid funds in an ABLE account, except as required by federal law.

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<sup>25</sup> U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, "Medicaid Estate Recovery," April 2005. Available at <https://aspe.hhs.gov/basic-report/medicaid-estate-recovery> (last accessed May 7, 2019).

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill has an indeterminate negative impact on revenues collected by AHCA. If Section 11 of ch. 2018-10, L.O.F., were allowed to expire as scheduled, the Florida Medicaid program would have greater authority to recoup Medicaid costs by accessing ABLE accounts.

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.