

Concise Explanatory Statement

365-220 Rulemaking 2019

December 2019

1. Reason for Rule Adoption
2. Difference between the Proposed and Adopted Rule
3. Comments Received Regarding the Proposed Rule – Summary and Response

Rule or Topic	Comment	Agency Response
DDETF	The independent Developmental Disabilities Endowment Trust Fund (DDETF) governing board elected to update the rules to correct an inconsistency not found in the master trust agreement	Supportive of the changes

RCW 34.05.325(6)(a) Before it files an adopted rule with the code reviser, an agency shall prepare a concise explanatory statement of the rule:

(i) Identifying the agency's reasons for adopting the rule;

Clarify WAC 365-220-070 and 365-220-075 to have consistent language regarding reversion of state match when an account is closed. Remove erroneous transfer language regarding the Achieving a Better Life Experience (ABLE) program in WAC 365-220-100.

The inconsistency in WAC 365-220-070 and 365-220-075 prevents the program from capturing all the state match funds that should revert to the program upon an account closing for any reason. The original developer of the DDETF account management system Individual Trust Account Reporting System (ITARS) did not code the state match reversion algorithms in the system correctly due to the inconsistencies in WACs. The program is at risk for litigation consequently. Moreover, ITARS is not as precise and accurate as it needs to be for recording individual account balances and reversion amounts upon account closure. The WAC edits provide clarity around the various account closure scenarios and the consequential reversion of the state match to the program.

The program can provide disbursements to the ABLE account for the same beneficiary. These are not transfers to an ABLE account. The incorrect verb use of “transfer” has been replaced with “disbursement or distribution” in the DDETF master trust agreement and joinder agreements with WAC 365-220-100 still needing to be corrected.

(ii) Describing differences between the text of the proposed rule as published in the register and the text of the rule as adopted, other than editing changes, stating the reasons for differences; and

Changes in WAC 365-220-070 and 365-220-075 included a format edit that moved the proposed section (3) language about the state match reversion to section (2) options A and C. Although a bit repetitive, the change provides the clarity needed for each appropriate option versus qualifying all three options (A-C) when section (2) option B needed no qualification.

Changes in WAC 365-220-100 included deleting the newest language from the previous rulemaking regarding transferring funds to an ABLE account not requiring governing board approval. Since WAC 365-220-025 defines ABLE as an eligible disbursement, moving money to an ABLE account is not a transfer, and the whole sentence in WAC 365-220-100 is irrelevant and therefore deleted. Further, the proposed last sentence in this section is deleted since disbursements for allowable and eligible expenditures include any state match funds available to the beneficiary. The sentence is irrelevant in the context of a disbursement to an ABLE account. The proposed language and previous change were not necessary because these are not transfers of funds to ABLE accounts. The original language about how to initiate a funds transfer is still pertinent.

(b) The agency shall provide the concise explanatory statement to any person upon request or from whom the agency received comment.

Four comments were received. Responses were drafted.

Comment #1:

Hello Devin,

My name is Robert Garrison and I reside in Kennewick. I received an email from the State Department of Commerce earlier today regarding disability endowment funds. I DON'T think I'll be able to attend the hearing in Olympia on November 12. My general comments are... If these new rule changes apply to the new ABLE accounts that were implemented last year... I no longer have an ABLE account. The main reason for this is that I do not yet live independently and really have no reason to use the funds in the account on a daily basis. I initially just wanted to set it up as a savings account. However I discovered overtime that there were several fees extracted from the account that I felt were punitive because I thought the idea behind such an account was being able to save as much money as one could in the event that a disabled person needed that money if they should lose their support system or find themselves on their own. I know that with ABLE accounts, the annual limit is \$15,000 but my dad just wanted to put \$500 in there just to try it out and see if the account would gain any appreciable interest. I went for the cash only option because I don't trust independent companies to put any of my money in mutual funds or low risk stocks and bonds. My family went through the dot-com bubble in the 90's and lost quite a bit of money so I've never really trusted the stock market. I have offered these comments as a way of saying that perhaps if the rules governing ABLE accounts were changed so that the fees could be charged less often per year and not make an account holder feel that they were being nicked-and-dimes out of their initial deposit, then I might consider another ABLE account in the future but not at the present time

After only giving a cursory review of the language changes regarding endowment funds, I'm not sure if my comments are even germane or helpful to what your department is undertaking at the present time but I thought they might be helpful when considering possible revised guidelines in the future. I appreciate you taking the time to reach out to me to notify me about the meeting. I just thought I'd give my feedback on ABLE accounts in general. Thank you so much for your time.

Sincerely,

Robert Garrison
Kennewick, WA.

Proposed Response #1:

Mr. Garrison,
Thank you for your comments on WAC 365-220.

I am sorry to hear you feel that the fees charged to support the ABLE program were greater than you had hoped. Washington State has some of the lowest fees for ABLE accounts in the nation. I only know of Florida with lower fees than us. I hope you will make use of a Washington state ABLE account in the future.

Comment #2:

I might write a comment letter later as I only glanced at the email and the link. We have 2 trust fund accounts for my son Nathan. The self-settled one receives state matching funds (not yet vested). We also opened an ABLE account for Nathan this year. I saw that one of the proposed changes would be effective in a disbursement of funds from the trust fund to his ABLE account. In such a move, the State matching funds and interest would be returned to the State. In a situation where those funds are fully vested, it seems fair to leave them with the recipient (and not return them to the State). If the other proposed changes (e.g. return same funds back to the State upon death of beneficiary(?)) involve the beneficiary/holder being unable to utilize the funds, I am probably fine with returning the funds to the State.

If you have input, please do provide it--both upward as well as back to me. But I will look it over and submit a comment letter. I'm sure I won't make it to the public hearing.

Thanks,
Mike Wolanek

Proposed Response #2:

Mr. Wolanek,
Thank you for your comments on WAC 365-220. DDETF disbursements to an ABLE account for the same beneficiary will include state matching funds and earnings. We will draft language to make that clearer.

For your third-party trust account (mom and dad's money), those funds can never be used to pay the state for Medicaid recovery. However, you could choose to leave some of the final assets to the state's DDETF program as one of the final remainder beneficiaries to your son's account.

For your self-settled trust account (Nathan's money), those funds can be recovered by the state DSHS to pay for Medicaid services delivered to your son. Additionally, you could choose to leave some of the final assets to the state's DDETF program as one of the final remainder beneficiaries to your son's account.

The state can only recover medicaid costs from first party money (your son's assets) never against his relatives, friends, etc. I hope this helps.

Comment #3:

We are concerned about proposed language which might permit/require the disbursement of first party trust funds to third party trust funds. First party trusts must always recognize the state as the secondary beneficiary of such trusts (the money originally comes from the primary beneficiary). Third party trusts must take all necessary steps to ensure that first party money never enters the account (no part of the third party trust can be from the primary beneficiary).

The proposed language should NOT contain language which permits or requires the mixing of first party and third party trust funds. Payment of first party trust funds into a third party Medicaid Qualified Special Needs Trust or other third party trust could result in a piercing of that third party trust - removing protections against state liens against the third party trust. The state must ensure that it does not create a conflict of interests in its regulations.

Suspicious minds might see an intentional pathway being created by the state to serve the state's financial motivations to create a "tar pit" here. Please correct the language so that no appearance of a conflict of interests is created. Thank you.

Loren M. Freeman, Freeman & Associates

Proposed Response #3:

Mr. Freeman,
Thank you for your comments on WAC 365-220.

The rule is intended to allow disbursements from either type of DDETF trust account to an ABLE account as approved by CMS in their letter SMD # 17-002 to state directors dated September 7, 2017.

It does not allow first party money from an ABLE Account to be distributed or disbursed to a third-party Medicaid Qualified Special Needs Trust. One of the duties of the trust manager is to prevent those types of deposits so the veil of the trust is not pierced.

CMS does allow for third party trust money to be disbursed to an ABLE account. However, that changes that money to first party funds as soon as it hits the ABLE account. That holds true for other deposits into an ABLE account from third parties. All money in an ABLE account is considered first party funds.

I hope this helps.

Comment #4:

Use of the word "transfer" in 365-220-100 when disburse is the correct verb to use

Proposed Response #4:

Ms. Roberts,
Thank you for your comments on WAC 365-220.

I will ensure the permanent rules will use the verb disburse instead of transfer.