



Advocate

Newsletter of the National Assistive Technology Advocacy Project
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Funded through a grant received from the Rehabilitation Service Administration, U.S. Department of Education, to the Rehabilitation Engineering Society of North America (RESNA) (with a subcontract to Neighborhood Legal Services, Inc.) under contract number H224B050003. The opinions expressed herein do not necessarily reflect the position of the U.S. Department of Education, and no official endorsement by the U.S. Department of Education of the opinions expressed herein should be inferred.

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Volume X

Issue 2

Spring/Summer 2006

SSI'S PLAN FOR ACHIEVING SELF SUPPORT

Using the PASS to Purchase Items and Services, Including Assistive Technology, to Reach a Work Goal

The following example highlights the potential for the Supplemental Security Income (SSI) program's Plan for Achieving Self Support (PASS). It is April 2006 and you are meeting with Jason, who is 17 and will be 18 years old in three months. Jason is quadriplegic, uses a wheelchair for mobility, and lives with his parents and younger brother. He will soon start his last year of high school. Jason is a good student but receives some special education services, including occupational therapy, speech therapy, and adaptive physical education.

During your interview, you learn that Jason receives \$420 in Social Security survivor's benefits on the earnings record of his deceased father. He does not receive any SSI because the wages of his mother and stepfather, about \$60,000 combined, are too high.

Jason and his parents complain that the special education system refuses to buy him computer equipment to do school work at home. The computer, with an adapted keyboard and mouse, is needed because Jason has extreme difficulty writing and his parents must help him complete assignments. It will also be needed when he begins college next year, i.e., in the Fall of 2007. You give him a copy of the Spring 2002 issue of AT Advocate (available at: www.nls.org/av/spring02.htm) with the lead article, "Special Education Revisited: An Assistive Technology Funding Source for Students with Disabilities." You explain that an updated newsletter covering 2006 regulations, implementing the 2004 amendments to the

Individuals with Disabilities Education Act, or IDEA, will be out soon. You explain that assistive technology (AT), in the form of adapted computer equipment, may be a required

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special education service for Jason and that the school may be required to provide him a computer for home use. You also discuss practical concerns - - if their dispute is not resolved soon, Jason will not get much use of the computer before completing high school. Even if he gets the computer right away, it will be school property and he cannot keep it for college use (a progressive state vocational rehabilitation (VR) agency may arrange to purchase the computer for Jason from the school district).

They ask if there are other funding options. You explain that the state VR agency may be required to purchase the computer to help Jason achieve his vocational goal, but caution that it will be an uphill battle to get them to purchase the computer while Jason is still in high school. Jason and his parents then mention other items of need for attending college and after college: tuition, books, transportation, personal care assistance, and a new power wheelchair (already denied by the family's private insurance plan). They explain that a long-term goal is to obtain a modified van that Jason can drive from his wheelchair. You reiterate the need to apply to the state's VR agency and also suggest Medicaid to pay for the wheelchair and personal assistance services. You concede that the VR agency may not cover all tuition costs, may balk at the proposed computer package, and will not, in your state, pay for the van Jason is seeking to get back and forth to college and then to work. You also concede that Medicaid, like SSI, is unavailable (absent a Medicaid waiver program) because of the income of Jason's mother and stepfather.

Protection and Advocacy (P&A) advocates see clients like Jason every day. He comes to you with one problem - - in Jason's case, a special education dispute - - and then presents a series of other issues. When a client seeks funding for AT (or other expensive services), we should alert him or her to all potential funding sources. In Jason's case, it is clear that the special education system and the state VR agency should be considered as potential funding sources, along with Medicaid if he is a Medicaid recipient. We should also look into the possibility of appealing the private insurance refusal to pay for the power wheelchair.

Should SSI's PASS also be considered? As we explain below, this may be a possibility once Jason turns age 18 and the SSI program no longer considers the income of his parent and

stepparent available to him. It will then depend on the nature of Jason's vocational plans and the availability of income or a resource, other than SSI payments, to pay for expenses related to his vocational goal. This article will explain what a PASS is and how an individual with a disability can use the PASS to pay for items, including AT devices and services, that will help the individual achieve a long term vocational goal. This article fully updates and expands upon one that appeared in the Summer 2002 issue of *AT Advocate*.

What is SSI?

The SSI program provides cash benefits to persons with disabilities who have limited income and resources. Countable resources, such as money in the bank, cannot exceed \$2,000 for an individual. The 2006 SSI federal benefit rate (FBR) for individuals is \$603 per month. Although states may supplement the FBR and many do, the examples used below will use the \$603 FBR with no state supplement.

Using the example above, we know that Jason is not getting an SSI check even though he receives Social Security benefits in an amount that is less than the \$603 SSI rate. This is because the SSI program is counting (or "deeming") income from his mother and stepfather. However, this deeming of parental income will stop, in all states, when Jason turns 18 in three months.

We explain to Jason and his parents that he will become eligible for SSI on his 18th birthday (i.e., in July 2006). The SSI program will disregard the first \$20 of his Social Security benefits as an unearned income exclusion

LAWS, REGULATIONS AND POLICIES GOVERNING THE PASS

Statutes: 42 U.S.C. §§
1382a(b)(4)(a)(iii) & (b)(iv), 1382b(a)(4)

Regulations: 20 C.F.R. §§ 416.1112,
.1124, .1161, .1180-.1182, .1210 & .1225-
.1227

Policy: Program Operations Manual
Systems (POMS), SI 00870.001 *et seq.*

NOTE: The POMS provisions are the most important reference if you are preparing PASS proposals. The PASS-related provisions, along with all other POMS provisions, are easily accessible on SSA's website at www.ssa.gov/representation.

OTHER RESOURCES TO SUPPORT YOUR WORK ON PASSES

A very comprehensive treatise on the PASS was developed as part of Cornell University's policy and practice brief series. This article, *PASS: SSI's Plan for Achieving Self Support* (2003), co-authored by Jim Sheldon of our National AT Advocacy Project and Edwin J. Lopez-Soto of Cornell University, is 48 pages long and contains very extensive citations to law, regulation, and policy. It is available on Cornell's website at: www.ilr.cornell.edu/ped/dep/PP_12.pdf or <http://digitalcommons.ilr.cornell.edu/edicollect/48/>. The article also includes a practical discussion of the many issues one can encounter when developing PASS proposals.

(\$420 - 20 = \$400). The remaining income is subtracted from the FBR (\$603 - 400), giving Jason a monthly SSI check of \$203. If Jason lived in a state with a \$50 SSI supplement, his SSI check would be \$253. You also explain that when he becomes an SSI recipient, he will also qualify for automatic Medicaid because he lives in one of the 39 states that provides automatic Medicaid to SSI beneficiaries. With this expected eligibility for Medicaid in three months, you urge the family to start taking steps to seek Medicaid funding for the power wheelchair.

Another consequence of establishing SSI eligibility is that Jason will now be eligible for any services from your state VR agency that are based on financial need. This is because SSI and Social Security Disability Insurance (SSDI) beneficiaries are, pursuant to federal regulations, considered to meet any financial needs test established by a state VR agency. See our Fall 2001 issue of *AT Advocate* and its lead article on state VR agencies, available at: www.nls.org/av/fall01.htm. This should mean that Jason will qualify for VR agency funding to pay for tuition, books and, potentially, a range of other goods and services that are connected to meeting his employment goal.

Finally, you explain to Jason and his parents that eligibility for Social Security survivor's benefits, which are not based on disability, will end when Jason graduates from high school or turns age 19, whichever occurs first. Since Jason will be 19 in July 2007, survivor's

benefits will end in June 2007 upon his graduation. However, since Jason is disabled those benefits will be converted to SSDI benefits under the Disabled Adult Child category (often referred to as Childhood Disability Benefits).

What Is a PASS? How Does it Work?

The PASS acts as a rule for excluding, or not counting, income or resources that a person will use to purchase items to reach a work goal. Since the excluded income or resources will not count when used for a PASS expense, the approved PASS can allow a person with a disability to obtain SSI, obtain a higher monthly check, or retain SSI when income or resources have increased.

How might this work for Jason? Looking only at his need for a computer (assume a cost of \$2,000, with a monitor, printer, software, and any disability-related adaptations), Jason proposes a PASS with a vocational goal of Spanish teacher. He agrees to set aside \$400 of his monthly Social Security check toward this purchase. If the Social Security Administration (SSA) approves the PASS (they should under these facts), Jason's SSI check will be calculated as follows:

\$ 420	SSDI check
- 20	Unearned income exclusion
- 400	Exclusion for PASS expenses
\$ 0	Countable income

\$ 603	SSI base rate
- 0	Countable income
\$ 603	New SSI check amount

If we assume Jason became eligible for SSI in August 2006 (i.e., an SSI approval is effective the month following the month of application) and submitted the PASS proposal in October, it

SSA'S PASS CADRES

SSA has established PASS Cadres, or PASS specialist units in several regions of the country. For example, the PASS Cadre for the San Francisco Region is responsible for ruling on PASS proposals for California, Nevada, Arizona, and Hawaii. For a national PASS Cadre map and contact information for each of the regional specialty units, go to the SSA website at: www.socialsecurity.gov/disabilityresearch/wi/passcadre.htm.

could be retroactive to August (his first month of SSI eligibility). This would allow him to save the \$2,000 by December 2006. He can then purchase the computer by Christmas and become proficient with the computer before he graduates from high school.

In this example, Jason retains the same amount of monthly income, \$623, for ordinary expenses (\$603 SSI check, plus the \$20 of Social Security that was disregarded, compared to \$420 in Social Security and \$203 in SSI before the PASS was approved). He is able to quickly save up \$2,000 for the computer, in five months, and continues to be eligible for automatic Medicaid in 39 states, the District of Columbia, and the Northern Mariana Islands.

Any kind of income can go into a PASS, including wages, Social Security benefits, disability payments from sources other than Social Security, or income of a parent or spouse that is considered available to the SSI applicant or beneficiary (i.e., “deemed income”)(see box below

regarding the use of deemed income in a PASS). Any liquid resource can also go into a PASS, including savings, an inheritance, a personal injury award, or retroactive disability payments.

Criteria for PASS Approval

A PASS proposal must be in writing and submitted to SSA. Anyone can write the PASS, including the person with a disability. We recommend that a trained advocate or other professional assist in drafting a PASS. SSA is required to assist in writing a PASS if requested to do so. We hope many of our readers will become involved in either writing PASSes or identifying when a PASS might be available. In most regions of the country, you should be able to refer a person to a Benefits Planning, Assistance and Outreach (BPAO) project (soon to be renamed the Work Incentives Planning and Assistance or WIPA project) to assist with writing the PASS. Attorneys and advocates working for either the P&A for Assistive Technology (PAAT) or the P&A for

THE PASS AND CHILDREN UNDER 18

The PASS Can Use a Parent's Income to Pay for Items Related to a Work Goal

A child who has countable income “deemed” available from a working parent could be eligible for SSI with a PASS by excluding deemed income.

Example. Ann has cerebral palsy and is finishing her second year in high school. She walks with special crutches and can ambulate short distances, generally no more than about 200 to 250 feet. In order to pursue her long-term vocational goal of becoming an engineer, Ann will need: a passenger vehicle, modified with hand controls (\$12,000 for a dependable used vehicle; hand controls should be funded by her state VR agency); a lightweight laptop computer, adapted with an external modified keyboard and software offering the ability to use some voice commands, with a printer for home use (\$1,500); a docking station at home, allowing her to use her laptop as a personal computer with full Internet access from her bedroom (\$400); and a specially designed computer work station for use in her bedroom, allowing her to use the computer, printer, and work area from an office chair designed to accommodate her disability (\$900 including the office chair). Total cost for items: approximately \$14,800.

Ann just turned 16 years old and lives with her mother and 12 year old brother who does not have a disability. She was getting a \$603 SSI check until her mother went to work and started making \$35,256 per year (about \$2,938 per month). Her countable deemed income is now \$653 or \$50 more than the 2006 federal benefit rate of \$603. A PASS is proposed to put \$653 of the mother’s monthly wage into an account to save for the various items listed above, to allow Ann to attend college to become an engineer.

The PASS is approved, meaning that the SSI program will no longer count the \$653 in deemed income, thereby reducing Ann’s countable income to \$0 per month. She will once again qualify for a \$603 SSI check and automatic Medicaid in most states. If Ann saves this amount (\$653) each month for two full years, or until deeming stops on her 18th birthday, she will be able to save nearly \$16,000 in her PASS fund. Keep in mind, if the individual was not eligible for SSI before the PASS was submitted, an SSI application would need to be submitted along with the PASS proposal. Under this scenario, we can probably anticipate adding the cost of vehicle insurance into the PASS.

IS WORK ON PASS PROPOSALS AN APPROPRIATE USE OF PAAT RESOURCES?

The Protection and Advocacy for Assistive Technology (PAAT) projects are funded to work on any legal or advocacy issues that will help an individual with a disability obtain appropriate AT devices or services. Although the PASS can be used to fund a wide range of items that do not involve AT, to the extent that AT is part of the PASS or to the extent that advocacy for the PASS is part of an overall plan to fund a range of items, including AT, the use of PAAT resources to assist with a PASS proposal is appropriate. For example, the PASS may provide the funding for a vehicle (car or van) with modifications then to be funded by the state VR agency.

It is our experience that many P&As have prioritized work under their PAAT project to assist individuals in their ability to maximize independence, independent living, and self sufficiency. Since the PASS can clearly be used to meet all of these goals, so long as connected to a vocational goal, work on PASSes would be in keeping with these goals. In fact, a logical collaboration within the P&A agency would be to have the PAAT advocates and PABSS advocates working together on PASS proposals.

Other key resources for help with PASS proposals include the BPAO (soon to be WIPA) projects. If your PAAT program will not be able to assist with PASS proposals, or if the PASS proposal in question does not involve AT, you should find out if the Benefits Planning, Assistance and Outreach (BPAO) project for your state or region of the state is willing to assume this role. BPAOs are funded by the Social Security Administration to assist SSI and SSDI beneficiaries, who are working or planning to work, to fully understand the impact of work on benefits and how to access the range of SSI and SSDI work incentives. For contact information on the BPAO for your area, go to www.ssa.gov/work/ServiceProviders/BPAODirectory.html.

Beneficiaries of Social Security (PABSS) programs should consider doing PASSes as part of their work, especially in those regions of your state where the BPAO program is not able to assist with all PASS proposals.

SSA has a 14-page form (SSA-545) for preparing PASS proposals. Although a PASS can be submitted without this form, it is always best to use it as the form ensures that all critical information is submitted to make approval more likely. You can obtain a copy of the form from your local SSA office and it is also available on SSA's website in a PDF format at www.ssa.gov/online/ssa-545.pdf.

The written PASS must contain:

- a specific occupational objective;
- a list of items to be funded and their cost;
- the income/resources to go into the PASS;
- specific savings and disbursement goals; and
- a timetable for achieving the goal.

The proposal must specify an expected level of earnings when the PASS is completed. For SSI beneficiaries, that earning level should be enough to reduce or eliminate dependence on SSI. For SSDI beneficiaries, it should be enough to eliminate dependence on SSDI (i.e., above the 2006 monthly substantial gainful

activity level of \$860 or \$1,450 for individuals who are legally blind). The SSI beneficiary must comply with the terms of the approved PASS.

What Items Can Be Funded with a PASS?

A PASS can fund any item that is connected to achieving a work goal. SSI's policy manual contains an extensive list of items that can be funded using a PASS. The following examples of approvable expenses are specifically listed in POMS SI 00870.025 B.5.g.:

- Attendant care;
- Basic living skills training that is necessary to achieve a work goal;
- Child care;
- Dues and subscriptions for publications for academic or professional purposes;
- Equipment, supplies, operating capital and inventory required to establish and carry on a trade or business;
- Equipment and tools, including safety equipment, whether specific to the person's condition or designed for use by a person without a disability;
- Finance and service charges connected with obtaining any of the above, including finance and service charges related to a bank

account that is set up solely for the purpose of keeping PASS funds separate and identifiable;

- Food and shelter while temporarily absent from one's permanent residence to attend educational, training, employment, trade, or business activities, if there is also a cost associated with maintaining the permanent residence;
- Job coaching/counseling services;
- Job search or relocation expenses;
- Meals consumed during work hours (including job-training and school);
- Modifications to buildings, vehicles, etc., for operational or access purposes for persons with disabilities;
- PASS preparation fees;

- Taxes and government-imposed user fees (e.g., permits, licenses) connected with obtaining any item on this list, except that income taxes or government-imposed penalties or fines are not allowable;
- Transportation, including hire of private or commercial carriers, or hire of person to drive the individual's vehicle;
- Transportation, including lease, rental or purchase of private vehicle, plus associated costs for fuel, insurance, maintenance, registration, taxes, etc.;
- Transportation, including public transportation and common carriers;
- Tuition, books, supplies, and all fees and costs imposed by or in connection with an educational or occupational training facility,

AN ALTERNATIVE FINANCING PROGRAM IN YOUR STATE MAY BE AVAILABLE TO OBTAIN A LOW INTEREST LOAN TO PAY FOR AT

Many states operate some kind of alternative financing program (AFP), i.e., an AT or equipment loan program, offering low-cost loans to persons with disabilities who meet the criteria of the program. Currently, more than 40 states offer some type of "alternative financing" program, funded either pursuant to Title III of the AT Act (see www.resna.org/AFTAP/state/index.html), or through another source of funding (see www.resna.org/AFTAP/state/otherloans.html).

The loan program will generally offer one of three methods to deliver low-interest financing for AT: a revolving loan, a loan guarantee, or an interest buy down. Dollar limits for loans will vary, typically between \$10,000 and \$30,000, with some programs having no set dollar limit. Interest rates will vary from a 0 percent rate to an 8 percent rate. Some offer interest rates below the federal prime lending rate. Some of the most common items purchased with loan funds include: transportation-related purchases, including vehicle modifications; computers and costs associated with computer access; mobility equipment, including wheelchairs and scooters; equipment for daily living, such as environmental control units; hearing aids, vision aids.

Using a Low-Interest Loan in Combination with a PASS. Many individuals can benefit from a PASS, but do not have the luxury of waiting to make that big purchase while they save up money over a period of months or even years. An AFP-sponsored loan may be available in a case like this to allow the individual to immediately obtain the needed item. The PASS can be used to pay off the loan over a period of years.

Consider Jason again (see examples throughout the main article). The university which Jason will attend is a 30-minute round-trip commute from his home. There is no public transportation available to him, so he will need the van when his first semester of college begins in September 2007.

In this scenario, Jason will begin his PASS in August 2006, saving for five months to purchase the computer. Starting in January 2007, he begins saving toward a downpayment and insurance for the van. Between January and July, seven months, he saves \$2,800, using \$1,000 to pay for his first six months of van insurance and \$1,800 on a van downpayment. He borrows \$20,000 through the AFP program to purchase the van, agreeing to pay the loan off over a five-year period. Jason's state VR agency agrees to funding more than \$18,000 in van modifications to allow Jason to drive it from his wheelchair.

including fees for tutoring, testing, counseling, etc.; and

- Uniforms, specialized clothing, safety equipment, and appropriate attire (e.g., suits and dresses) needed for job interviews or to begin working in an office or professional setting.

Keep in mind that this is only a representative list. Presumably, any other reasonable and necessary expense that is specifically tied to achieving the occupational objective can be approved under a PASS. For example, although personal computers, including laptop computers do not appear on the list, many PASSES have been approved to pay for computer equipment.

Consider Jason again. In addition to the computer, he wants to save money toward a van (\$20,000) and his first year's insurance premium (\$2,000). He would like to have the van by the beginning of his senior year in college so that he can commute to student teaching assignments and travel to job interviews.

Jason's original PASS proposal could have identified this need or he can later amend the PASS. Under the facts presented, Jason finishes saving for the computer in December 2006 and can begin saving for the van in January 2007. Between January 2007 and July 2010 when he wants to purchase the van (43 months), Jason could save \$17,200 - - almost enough to purchase the van. He could use this money for a large down payment and the first year's insurance premium, and then continue the PASS to pay off a small loan for the van (as noted below, the time limit for the PASS is what is reasonable under the circumstances). Despite earlier policy questions about whether PASS expenses would be limited to a down payment in cases like this, SSA's current policy would clearly allow the PASS to be used for installment payments if Jason could not meet both his living expenses and the installment payments without providing for them in the PASS. *See POMS SI 00870.025 B.5.b.*

We recommend pursuit of other funding sources first, turning to the PASS for items that cannot otherwise be funded. For instance, in New York our state VR agency would pay for Jason's tuition, in most cases, up to the rates charged at our state university system. Our VR agency is also authorized to pay for computer equipment and vehicle modifications, but will not pay for a vehicle. In New York we would propose a PASS to pay for excess tuition if

Jason will attend a private university and to pay for the van purchase price. Advocates need to determine what the other sources will pay for and turn to the PASS for items that cannot otherwise be funded.

A second example. *Maria, age 38, was injured in a car accident at age 33. She uses a power wheelchair for all mobility and personal care aides help her at home. Two years ago she received a \$275,000 settlement from her accident. \$220,000 was used to buy a home and equip it for her disability, and \$35,000 to buy a modified van that she can drive from her wheelchair. She has lived off the remaining \$20,000 and currently has \$13,000 left. Before the accident, Maria worked part-time as a nurse. She currently receives \$488 in monthly SSDI benefits. The only other household income is child support payments of \$300 per month for her two children, ages six and eight.*

Maria wants to attend a four-year college program to become a paralegal. With her medical background, she hopes to do medically-related legal work. Based on the limitations imposed by her disability, she plans to finish college in five years. She will need money for tuition, books, a computer, and to replace her van when she graduates (it will be nearly eight years old then). She is concerned that: \$738 in monthly household income will not meet expenses when her savings are gone; she will be unable to pay for personal care aides; she will be unable to pay for a power wheelchair to replace her current five-year old wheelchair; and she will be unable to pay a baby sitter when she attends afternoon classes.

It appears that Maria's needs can be met through a combination of funding from her state VR agency, Medicaid, and an approved PASS. She would be eligible for the VR agency based on her disability and her work goal to become a paralegal. The VR agency should be able to pay for tuition, books, and possibly the computer. Also, if Maria can come up with the money to purchase a replacement van, the VR agency should be able to pay for modifications to allow Maria to drive the van from her wheelchair. Although the VR agency will only fund these items for persons who meet a financial needs test, as noted above, SSI and SSDI beneficiaries automatically meet the financial needs test.

Currently, Maria is not eligible for SSI because of the \$13,000 bank account. Without that money, she would be eligible for SSI at the 2006 rate of \$603 per month. The SSI program

Eighth Circuit Finds Missouri's Exclusion of Medicaid Coverage for Durable Medical Equipment and Supplies Illegal

On June 22, 2006, the U.S. Court of Appeals for the Eighth Circuit ruled, in the case of *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006), that the State of Missouri could not legally eliminate large classes of durable medical equipment (DME) for most Medicaid recipients. This case involves an appeal of the denial of a preliminary injunction motion with regard to Missouri regulations which dramatically limited DME, providing full DME benefits only to the blind, children and pregnant women. Other Medicaid recipients could receive only a small list of equipment unless they were also receiving home health services or could show they met extreme exception criteria to get non-listed equipment (like being terminally ill or establishing that their needs arose from an "act of God"). The district judge rejected all claims, but mostly focused on, and rejected, the comparability challenge (between blind and non-blind recipients).

The named plaintiffs, represented by the National Health Law Program, the Missouri P&A, and several other state and national organizations, brought their case claiming violations of two federal Medicaid Act provisions: the comparability provisions, 42 U.S.C. § 1396a(a)(10)(B); and the reasonable standards provisions, 42 U.S.C. § 1396a(a)(17). Both claims were brought pursuant to 42 U.S.C. § 1983. Simultaneously, both claims were brought under the U.S. Constitution's Supremacy Clause, claiming that the federal Medicaid Act "preempts" any inconsistent state law or regulation.

The Eighth Circuit found that the state regulation did not violate the comparability clause because in fact the extra DME coverage for blind recipients was fully state-funded at that point (precisely to get around the comparability challenge). 451 F.3d at 506. The court then went on to address the reasonable standards claim under

section 1396a(a)(17), finding, unfortunately, that it is not enforceable under 42 U.S.C. § 1983. 451 F.3d at 508-509. However, the court then held that both the statute and the regulations (see 42 C.F.R. § 430.230(b) and (c)), as they relate to reasonable standards, are separately enforceable under the Supremacy Clause's preemption analysis. 451 F.3d at 510-513. Overall, this decision is very good and we encourage you to read it, as it makes several key holdings which we briefly summarize.

A key to the court's holding was its adoption of what many AT advocates have been professing for more than a decade:

While a state has discretion to determine the optional services in its Medicaid plan, a state's failure to provide Medicaid coverage for non-experimental, medically necessary services within a covered Medicaid category is both per se unreasonable and inconsistent with the stated goals of Medicaid. [citations omitted] Because Missouri has elected to cover DME as an optional Medicaid service, it cannot arbitrarily choose which DME to reimburse under its Medicaid policy. 451 F.3d at 511.

The court found that the homebound requirement to get home care services is in conflict with Centers for Medicare and Medicaid Services (CMS) directives, under a July 25, 2000 CMS letter, so even the non-DME part of Missouri's home care program apparently is illegal. It also found that the exception process for people needing non-listed DME, who are not also receiving home care services, does not afford a meaningful opportunity to obtain non-listed DME, which must be available under Medicaid, per the separate September 1998 CMS letter issued in the *DeSario* case (called *Slekis* in the Supreme Court). 451 F.3d at 512-513. In concluding, the court finds a

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AT Court Watch (continued)

reasonable basis for finding a likelihood of success on the merits of plaintiffs' preemption claim to support their request for a preliminary injunction, justifying a remand to determine whether the remaining factors for granting of a preliminary injunction were satisfied.

Most advocates believe that the court wrongly declared that DME is an "optional" benefit even though it is part of the home care benefit which CMS regulations say is a mandatory benefit for the categorically needy, and CMS's September 1998 *DeSario* letter clearly declares that DME is "mandatory benefit." Despite erroneously calling DME an optional benefit, it provides a helpful twist as a result: it effectively endorses the 1998 *DeSario* letter as a statement that even optional categories of benefits are subject to the prohibition on exclusive lists invalidated in that letter (even though the analysis was based on DME being mandatory).

An important lesson from *Lankford* is that good lawyering now requires that Medicaid Act violations be brought under both 42 U.S.C. § 1983 and the U.S. Constitution's Supremacy Clause. With so many courts now questioning the viability of 1983 as a vehicle to enforce Medicaid Act violations in the federal courts, this separate theory for enforcement is critical.

Our National AT Advocacy Project has a number of key documents from both the District Court and the Court of Appeals, including: the complaint, plaintiffs' preliminary injunction briefs (primary brief, reply brief), court decision denying preliminary injunction, plaintiffs' brief opposing motion to dismiss, court decision denying motion to dismiss, plaintiffs' brief and amicus briefs at 8th Circuit, and most of the state's briefs. Contact Jim Sheldon (jsheldon@nls.org) or Diana Straube (dstraube@nls.org) for copies of any of these documents. All are available in electronic formats.

would count \$468 of her \$488 SSDI check, allowing her to get an SSI check of \$135 per month. (The SSI program would not count the \$300 of monthly child support received for Maria's children.) When Maria becomes eligible for SSI, she will automatically be eligible for Medicaid which should then become a payment source for the replacement wheelchair, the personal care aides, and any other medically related expenses. (NOTE: Readers must keep in mind that personal care services is an optional Medicaid service that might not be available in every state.)

Maria proposes a PASS to set aside \$11,500 of her savings in a special account toward the future purchase of a replacement van. She also proposes to set aside \$468 of her SSDI check for: child care expenses during college; for additional savings for a van projected to cost \$22,000; and to establish an accessible home work station/study area in her spare bedroom (i.e., to purchase a computer package with a specially designed keyboard and a specially designed desk for a wheelchair user). She agrees in her PASS proposal that she will exhaust any resources available through the state VR agency, grants, and other non-loan assistance.

If the PASS is approved, the \$11,500 will be exempt and not counted against SSI's \$2,000 resource limit (the \$1,500 retained in her regular bank account also keeps her under SSI's resource limit). The \$468 of SSDI that she puts into the PASS will reduce her countable income to \$0 per month ($\$488 - 20 = 468 - 468 = \0). Thus, she will now be eligible for a \$603 monthly SSI check and automatic Medicaid.

Consider what Maria will accomplish through proactive planning. First, the state VR agency is identified as a funding source for tuition, books, potential computer equipment, and future van modifications. Second, SSI's PASS will be used to exclude savings for the future van purchase, with income also excluded to pay for child care, computer equipment, and computer accessories to the extent not covered by the VR agency. Third, Medicaid eligibility is established through creating SSI eligibility, creating funding for personal care services and a replacement power wheelchair. Finally, by ensuring SSI eligibility, the family's monthly income increases by \$135, making it more realistic that Maria can attend college and meet household expenses. Maria will apply for loans, including student loans and/or loans for AT

through a state alternative financing program (see box, p.343), only if she cannot meet her expenses after getting support from the state VR agency, the PASS, Medicaid, and the SSI check.

Time Limits for the PASS

There is no firm time limit for a PASS. A PASS proposal must contain a beginning date and a “reasonable ending date.” See 20 C.F.R. § 416.1181(a)(8). So, for example, a reasonable ending date for an individual attending a 12-month auto mechanics training program might be 14 to 15 months after the program begins (i.e., 12 months for the program and a two to three-month period to obtain suitable employment). That period might be expanded if the individual would not be self supporting right away because of the need to use money set aside in the PASS to pay for mechanic’s tools.

Example. *Let us return to Jason. His PASS is approved to attend college and become a Spanish teacher. He will need five years to complete this four-year undergraduate program, as the reduced course load will allow him to work within the limitations of his disability. For Jason, a “reasonable ending date” would be three months after the expected graduation date, allowing him the three months to find suitable employment.*

An Approved PASS Can Be Amended

Jason enters college seeking to become a Spanish teacher, but fails to plan for several expenses. He must purchase computer software and Internet services to do assignments involving use of websites. He also needs to pay for an increase in room and board costs. His state VR agency has assisted Jason up to its dollar limits. He needs an extra \$500 for the software; \$20 per month for Internet services; and an extra \$250 annually for room and board.

Jason submits a written proposal to amend his PASS to include these items. The amendment is approved and he continues to put his full SSDI check (minus the \$20 exclusion) into the PASS and continues to get SSI at the full federal benefit rate of \$603 per month (again, this might be higher in a state that supplements the FBR). While the amendment to the PASS was absolutely necessary, the advocate or benefits counselor must inform Jason that this will lessen the amount he can save over the next five years for the purchase of the van.

Using the PASS to Gain Access to 1619(b) Medicaid

Our Spring 2005 issue of AT Advocate (available at: www.nls.org/av/spring05.htm) briefly discussed section 1619(b) Medicaid as one way that former SSI recipients can retain eligibility for Medicaid. That special rule allows individuals who lose SSI due to wages to continue Medicaid in most instances if their disability continues, annual income from wages is less than a figure established for your state - - in 2006, this ranges from a low of \$22,052 in Alabama to a high of \$49,517 in Alaska (see SSA’s POMS SI 02302.200 A.) - - and absent the wages, the individual would still be eligible for SSI.

Since 1619(b) is only available to former SSI recipients, an individual who never received SSI cannot take advantage of 1619(b). However, if the individual establishes SSI eligibility through a PASS, then later loses SSI due to wages, 1619(b) eligibility can potentially be established. This can be an added benefit of the PASS.

Example. *Olivia is deaf and receives SSDI benefits of \$720, but no SSI. Immediately following graduation from college, Olivia proposes and SSA approves a PASS, allowing her to put \$700 monthly into a designated bank account to pay for a range of equipment and services, including equipment to accommodate for her hearing impairment, to establish a home office as a computer programmer. The PASS is projected to run for 18 months, allowing Olivia to initially save for some items and take out loans to pay for additional items. Shortly after getting her home office established, ABC corporation hires her part-time as an employee to do programming, with 90 percent of the work to occur from her home office. Since Olivia earns \$1,800 gross per month in this position (i.e., more than the \$860 substantial gainful activity amount), she loses her SSDI benefits 12 months after her PASS begins (following a nine-month trial work period and three-month grace period). However, she continues her PASS, now using \$700 of her wages to pay off the loans incurred as part of the PASS.*

As projected, after 18 months her loans are paid off and the PASS ends. Now, with \$1,800 in gross monthly earnings and no continuing income exclusion under the PASS, she loses her SSI due to countable wages. [After applying the SSI earned income disregards, her countable

monthly wages will be \$857.50 ($\$1,800 - 20 - 65 = \$1,715 \div 2 = \857.50), or considerably more than the \$603 SSI rate.] Since Olivia became an SSI recipient through the PASS and has now lost her SSI due to earned income, she meets the criteria for 1619(b) (i.e., she lost SSI due to wages and her annual earned income, \$21,600, is less than the 1619(b) threshold in all states).

Conclusion

The PASS is an important work incentive as

it creates a source of funding for items needed to achieve a work goal. It should be viewed as a supplement to assistance that can be offered by your state VR agency. It should also be viewed as just one part of an overall plan to use a range of other benefits to help individuals achieve both self sufficiency and maximum independence. As always, readers who have more questions about the PASS are encouraged to call the National AT Advocacy Project at 716-847-0650.

THE PASS AND MEDICAID

The PASS Can be Used to Reduce the Medicaid Spend Down Amount

For individuals with disabilities who do not receive SSI, Medicaid is available through the medically needy program in about two thirds of the state. See POMS SI 01715.020 for a chart listing which states have medically needy programs. These are often called “spend down” or “share of cost” programs because they allow individuals with income above the state Medicaid eligibility threshold to spend down to the eligibility level by incurring costs for medical services.

For states in which Medicaid is automatic for SSI recipients, known as 1634 states or SSI states (see POMS SI 01715.010 for an explanation and 01715.020 for a chart noting which states are 1634 or SSI states), the Medicaid agency must follow SSI’s rules for counting income and resources. See 42 C.F.R. §§ 435.831 (income), 435.601 and 435.845 (resources). Importantly, this means for example that in a 1634 state with a medically needy program the Medicaid agency must allow the individual to reduce monthly countable income by setting aside all or a part of that income into an approved PASS. See, e.g., New York’s Medicaid regulation, 18 N.Y.C.R.R. § 360-4.6(a)(2)(xxiv).

Example of Medicaid PASS. Robert, age 38, lives in New York and has a mental illness and severe rheumatoid arthritis, and receives \$1,062 per month in SSDI benefits. After excluding the first \$20 of SSDI, the New York Medicaid program will

count \$1,042 as income and Robert will have a \$350 spend down (i.e., his countable income is \$350 more than the one-person Medicaid eligibility threshold of \$692). He has been accepted in a community college program with a goal of becoming a mental health therapy aide. The state VR agency (VESID) will pay for his two years of college. Robert’s 1992 Chevy Cavalier needs a new transmission and he can no longer drive it, without the installation of hand controls, because of the progressive nature of his arthritis. He would like to use a PASS to purchase a newer used car to make the 48-mile round trip commute to school, which is not on a bus route. VESID would then pay for the hand controls.

Let us assume that Robert can either obtain credit or a co-signer for a car loan, that loan payments on a 48-month loan will be \$190 per month, and that insurance payments on the car will be \$60 per month. Robert could propose a Medicaid PASS to his local Medicaid agency to put \$250 of his SSDI into a special account to pay for his car payments and insurance payments. If approved, his countable income would be reduced from \$1,042 to \$792 and his spend down reduced from \$350 to \$100 per month. If Robert could justify another \$100 per month toward computer equipment and set aside \$350 per month for the PASS, his countable income would be reduced to \$692 and his spend down eliminated.

The **AT Advocacy Project** will provide nationwide services to PAAT projects including technical assistance to advocates wanting to access funding for assistive technology for individuals with disabilities.



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