



# Advocate

Newsletter of the National Assistive Technology Advocacy Project  
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## **NON-TRADITIONAL FUNDING SOURCES & FUNDING STRATEGIES FOR ASSISTIVE TECHNOLOGY**

*Creative Ways to Access Traditional AT Funding Sources, as Well as Some Little Known AT Funding Sources & Funding Strategies*

Assistive technology (AT) advocacy has traditionally focused on several key funding sources. Generally, the following five funding sources receive the greatest attention: Medicaid, Medicare, special education programs, state vocational rehabilitation agencies, and private insurance plans.

These “big five” funding sources may not meet an individual’s specific AT funding needs for one or more reasons:

- The individual with a disability is either not eligible for the program or not eligible for a special benefit available through the program.
- The individual is eligible for the program and any special benefit categories within the program, but the AT device sought is not covered by the program.
- The individual is eligible for the program (and any special program category) and the item in question is covered by the program. However, the individual has not demonstrated the “need” for the item under program criteria (i.e., medical necessity, educational necessity, vocational necessity, least costly alternative, etc.).

Where one of the big-five funding sources is not available or appears not to be available, this article will help the AT advocate identify one or

more strategies to fund the AT device in question, including:

- identifying a way to make the individual eligible for the program; or
- identifying another program that may fund the AT device; or

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- identifying a generally available funding strategy to pay for all or part of the AT device.

**Using this newsletter.** Since this article surveys many sources of funding and funding strategies, no program or strategy is covered in great detail. Wherever possible, we provide citations to law, regulation, policy, web sites, or other documents that discuss the topic in greater detail. Using this article as a starting point, AT advocates or persons seeking an AT device may need to do further research and investigation to determine whether any of the ideas presented will work in individual cases. In many cases, the federal law and policy will provide only a starting point for analysis with state-specific provisions determining eligibility for the program and coverage criteria for the device.

### **Ensuring Eligibility for the Traditional, Big-Five Funding Sources**

We start with this strategy because your best bet is always to find a way to qualify for one of the big-five funding sources and then satisfy that funding source's criteria for funding of the AT device in question. If the individual is eligible for one of the big-five funding sources, but the AT device is denied, an administrative appeal or even litigation may be in order. Strategies for pursuing those appeals will not be discussed in this article.

#### **Medicaid: a Focus on Eligibility**

Based on our experience, Medicaid continues to be the the most important AT funding source among the big five. It is also the one funding source that offers the most opportunity in terms of creative eligibility approaches.

Persons with disabilities have several paths to potential eligibility: through receipt of SSI in 39 states, the District of Columbia, and the Northern Mariana Islands; in two thirds of the states, through the optional "medically needy" category, allowing an individual to "spend down" to the state's monthly income eligibility threshold if countable income is above that threshold; through an optional home and community-based services (HCBS) waiver; as a child adopted pursuant to the federal Adoption Assistance Program; or through a state's optional Medicaid Buy-In program for individuals who are working. The Kaiser Family Foundation has a great link to the Medicaid websites and other state-specific information for all states. See [www.statehealthfacts.org](http://www.statehealthfacts.org).

## **National AT Advocacy Project Continues Under New Partnership With RESNA**

Our National AT Advocacy Project was originally started in May 1996 through a subcontract through the national United Cerebral Palsy Association. More recently, in 1999 and 2002, Neighborhood Legal Services, Inc. of Buffalo, New York was awarded direct three-year grants to continue as the technical assistance and training project serving Protection and Advocacy for Assistive Technology (PAAT) projects nationwide.

In late September 2005, the Department of Education announced that it was awarding a new five-year grant to the Rehabilitation Engineering Society of North America (RESNA) for a new, National Assistive Technology Training and Technical Assistance Partnership (NATTAP). The new NATTAP will combine the functions of three longstanding technical assistance projects: those historically operated by RESNA serving State AT Act Projects and Alternative Financing Projects; and the project serving the PAATs which we have operated for nearly 10 years.

All of the services we have historically offered – technical assistance, training, this newsletter, larger publications, our resource libraries (brief bank, hearing decisions bank), website, list serve, and national work group meetings – will continue under this new collaborative project. Additionally, RESNA and NLS will be working more collaboratively in a number of areas. Stay tuned for more details.

**Establishing or maintaining SSI eligibility for the child of a working parent.** A parent may want to consider creative structuring or restructuring of a wage and benefit package to minimize deemed income (for SSI purposes) to a child under 18.

**Example.** Darlene Green is a widow with three minor children, Chris, age 11, Carey, age 13, and Jason, age 16. Jason has cerebral palsy and receives a monthly SSI check of \$320 with automatic Medicaid. Medicaid has paid for pre-

scription medications, therapy not covered by private insurance, an \$8,000 power wheelchair that must be replaced soon, a \$6,000 augmentative communication device, and the co-payment amounts required under the family's private insurance policy. Keeping Medicaid is critical! (We assume that Jason lives in a state that pays the 2006 SSI Federal Benefit Rate of \$603 with no state supplement and that provides automatic Medicaid eligibility to SSI recipients.)

Jason's SSI amount is based on his mother's gross wages of \$30,000 (\$2,500 per month), working 60 percent time. Darlene's employer would like her to work more hours, either 80 percent time (\$40,000 per year/\$3,333 per month), 90 percent time (\$45,000 per year/\$3,750 per month) or full-time (\$50,000 per year/\$4,167 per month). Darlene is willing to accept a reduction in Jason's SSI check, but cannot let go of the Medicaid. What should she do?

NOTE: Darlene will continue to pay \$250 per month toward a family health insurance policy with her employer paying the remaining \$600 toward the \$850 per month policy.

The monthly "break-even amount" (i.e., the amount of parental income at which Jason's SSI check is reduced to \$0) is \$3,140 per month in 2006. At that amount of gross monthly wages, Jason will lose his SSI check and lose his automatic entitlement to Medicaid.

Darlene can pursue one of four strategies:

- Continue at 60 percent time. By taking this "safe" course of action, Jason will continue to get the same SSI check of \$320 and automatic Medicaid.
- Accept the 80 percent time job if the employer will restructure her salary and benefit package: paying her \$3,083 per month/\$37,000 per year in wages (just below the monthly break-even amount for SSI) and reducing Darlene's family health contribution by \$250 to \$0 per month. Since the SSI program will only count wages and not employer-funded health insurance, this allows Jason to retain a reduced SSI check of \$28 per month and automatic Medicaid.
- If the employer offers a flexible spending account pursuant to section 125 of the Internal Revenue Code (see below), she could accept the 80 percent time job and have \$250 deducted each month and put into the flex account to pay toward health insurance premiums. This pre-tax deduction reduces the taxable income

from \$3,333 to \$3,083 per month, reducing the monthly income "deemed" by the SSI program to Jason as well. Jason will now be eligible for a \$28 monthly SSI check and automatic Medicaid. See Social Security Program Operations Manual (POMS) SI 00820.102 (providing that pre-tax wages set aside in a flexible spending account, or what the SSI program refers to as a "cafeteria plan," will not be counted as income by the SSI program).

Note that the result of the flex account contribution is the same as the previous example of the employer reducing the gross wage by the amount of the increased health insurance payment. With enough expenses to pass through the flex account and reduce gross wages, for IRS purposes, Darlene may be able to accept the 90 percent or even full-time position. (See more detailed discussion on p.322, below.)

- Wait until Jason's 18<sup>th</sup> birthday to accept additional hours and pay. At age 18, the SSI program will no longer consider any part of Darlene's income and resources as available to Jason. At that point, he will be eligible for a full SSI check and automatic Medicaid no matter how high his mother's salary is.

**Accessing an HCBS waiver.** Darlene, in the preceding example, may want to investigate Jason's potential eligibility under an HCBS waiver. In many states, these optional programs will "waive" parental deeming of income rules. If such a waiver exists in Jason's state, his mother's income would not count against him and he could establish Medicaid eligibility even if his mother accepted the increase to full-time employment.

**Accessing the optional Medicaid Buy-In program.** The buy-in program is part of the Balanced Budget Act of 1997, as expanded by section 202 of the Ticket to Work and Work Incentives Improvement Act of 1999, 42 U.S.C. §§ 1396a(a)(10)(A)(ii) and 1396o. It allows a person who meets SSI's medical definition of disability to qualify for Medicaid even if the person has never received SSI and is currently earning a considerable annual wage. States can establish income limits between 250 and 450 percent of federal poverty guidelines, after deducting all applicable SSI exclusions from earned income (including the special 50 percent

## **AT Advocate Newsletter To Be Published At Least Three Times Per Year**

We have published the AT Advocate newsletter, periodically, since July 1996. After originally publishing the newsletter monthly, then every other month, we settled into a quarterly publication schedule. In recent years, however, we have not always kept to that schedule.

Under our National AT Advocacy Project's role as part of the new National AT Technical Assistance Partnership (see box, p.315), we are committed to publish a least three newsletters per year. Thus, the current Summer-Fall 2005 newsletter will be followed by Winter and Spring 2006 issues. As always, we will strive to make our newsletters part of an ongoing curriculum on the many legal issues that attorneys and advocates must work with to get AT funded for their eligible clients.

Depending on the subject matter, the newsletter will be published with either 7 pages or 11 pages of content. All will be sent out in hard copy to a national mailing list that includes one or more individuals from each PAAT, each state P&A director, each state AT Act Project, and the primary office for each federally-funded legal services/legal aid program. All back issues of the newsletter will also be on our National AT Project's website, [www.natmain.htm](http://www.natmain.htm).

exclusion from earned income). This will allow persons with disabilities to receive Medicaid with wages exceeding \$40,000 per year or, in states opting for the highest income thresholds, with wages in excess of \$70,000.

As of late 2005, the buy-in program existed in 30 states: Alaska, Arizona, Arkansas, California, Connecticut, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, South Carolina, Utah, Vermont, Washington, Wisconsin, and Wyoming. A similar program,

approved as a section 1115 waiver, is being implemented in Massachusetts.

### **Medicare Savings Plans: Payment of Part B Premiums, Deductibles, Co-Insurance**

Medicare is not usually viewed as comparable to Medicaid as an AT funding source. However, a wide range of AT devices can be funded through Medicare Part B's durable medical equipment (DME) provisions, including augmentative communication devices (classified by Medicare as "speech generating devices"). Also, starting in 2006, Medicare can pay for prescription drugs through the new Part D benefit.

Medicare Part B is optional and is subject to a \$78.20 premium in 2005 (\$88.50 in 2006). A person with a disability becomes eligible for Medicare, including the optional Parts B and D, after 24 months of entitlement to Social Security Disability Insurance (SSDI) benefits. An SSDI beneficiary with a diagnosis of ALS (i.e., Lou Gehrig's Disease), will be immediately eligible for Medicare, without a 24-month waiting period.

**QMB, SLMB, QI-1.** Three little-known programs allow your state's Medicaid program to pay the Part B premium if certain low-income criteria are met. These are commonly known as "Medicare Savings Programs":

- *Qualified Medicare Beneficiaries program (QMB).* Requires every state to pay Medicare premiums, deductibles and coinsurance for disabled individuals who meet certain income and asset restrictions. In order to be eligible for QMB, a person has to: be currently enrolled in the Medicare program; have gross monthly income at or below 100 percent of the federal poverty level; have assets at or below \$4,000 for an individual and \$6,000 for a couple.
- *Specified Low-Income Medicare Beneficiary program (SLMB).* Requires states to pay the Medicare Part B premium only. In order to be eligible for SLMB a person has to: be currently enrolled in the Medicare program; have gross monthly income between 100 and 120 percent of the federal poverty level; have assets at or below \$4,000 for an individual and \$6,000 for a couple.
- *Qualified Individual Program (QI-1).* Requires states to pay the Medicare Part B premium only, within the limits of available funds. In order to be eligible for QI-1 a person has to: be currently enrolled in the Medicare program; have

gross monthly income between 120 and 135 percent of the federal poverty level; have assets at or below \$4,000 for an individual and \$6,000 for a couple.

Since state Medicaid agencies are given leeway on how to count income and resources, the eligibility criteria will vary somewhat from state to state. Your best source of information on QMB, SLMB and QI-1 eligibility should be your state Medicaid agency's website, often by following a link for "Medicare Savings Plans." The Center for Medicare Advocacy's website, [www.medicareadvocacy.org](http://www.medicareadvocacy.org), contains a number of good resources on these Medicare Savings Plans.

An obvious benefit of each of these three programs is the payment of monthly Part B premiums. Since QMB also pays for deductibles and co-insurance, the benefits for an AT user can be substantial. For example, if Medicare funds a speech generating device based on a Medicare approved rate of \$6,000, Medicare will pay for 80 percent of that amount (\$4,800) and the individual will be responsible to the remaining 20 percent (\$1,200). Typically, Medicaid would pay this 20 percent copayment. If the person is not eligible for Medicaid (or chooses not to pay a spend down to receive it), the QMB program could pay this \$1,200 copay.

A side benefit to establishing eligibility for QMB, SLMB, or QI-1, if the individual is not a Medicaid recipient, is that the person will then be classified as "dually eligible" (for Medicare and Medicaid) for Medicare Part D purposes, making the person eligible for the full low-income Part D subsidy benefit. This will dramatically limit the individual's out-of-pocket costs associated with the new Part D prescription drug program.

### **State Vocational Rehabilitation (VR) Agencies and Financial Eligibility**

Title I of the Federal Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*, and its implementing regulations, 34 C.F.R. Part 361, allow state VR agencies to establish a financial needs test for most services, including the more expensive services like college tuition, rehabilitation technology, and AT. *See* 34 C.F.R. § 361.54(b).

Beneficiaries of SSI or SSDI benefits automatically meet any needs-based criteria established by the state VR agency. Stated another way, they are totally exempt from any financial needs test. 42 U.S.C. § 361.54(b)(3)(ii). So long as the individual receives any amount of either SSI or SSDI benefits, eligibility for VR ser-

vices should be at no cost to the individual. (See other parts of this newsletter for strategies for obtaining or retaining SSI.)

### **Private Insurance**

#### **Continuation Coverage under COBRA.**

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 29 U.S.C. §§ 1161 *et seq.*, applies to employers who customarily employed 20 or more employees on a typical business day in the preceding calendar year. COBRA provides an option for continuing insurance coverage for employees and their dependents after a lay off or job termination.

Under COBRA, the employee or dependent has a minimum of 60 days to elect continued coverage. 29 U.S.C. § 1165. The employee or dependent is generally entitled to continued coverage, at their expense, for a period of 18 months following the termination. The 18 months of continued coverage is extended to 29 months for individuals who are determined to be disabled under the SSDI or SSI programs at the time when employment is terminated or when continuation coverage begins. To extend coverage to 29 months, the employee or dependent must provide notice of the disability before the 18 month continuation period expires. 29 U.S.C. § 1162(2)(A).

COBRA limits the premium to 102 percent of the group rate paid by the former employer and permits payment in monthly installments. 29 U.S.C. §§ 1162(3)(A) and (B). COBRA does not, however, apply to employees who are terminated as a result of gross misconduct. 29 U.S.C. § 1163(2).

COBRA protects individuals during the period they are between jobs or awaiting Medicare eligibility. It protects an employee's spouse and dependent children when they lose eligibility under the group health plan as a result of the employee's death, entitlement to Medicare, termination of employment, or reduction of work hours. 29 U.S.C. §§ 1163, 1167(3). COBRA also protects a spouse in the event of divorce or legal separation and protects dependent children who lose their right to coverage as dependants because they get older or marry. 29 U.S.C. §§ 1163(3) & (5).

**Continued coverage for young adult dependents with disabilities.** A typical insurance policy will cover dependent children only through a certain age or until they complete college. For example, most New York private insurance plans cover dependent children until age 19 if they are no longer in school and will cover

college students through age 23.

Many insurance policies may have special provisions to cover adult disabled children indefinitely. Check the policy to see if this kind of provision exists and to see what it uses as a definition of disability. The SSI/SSDI definition of disability will commonly appear as the standard. If one of these provisions exists, there will be no need to pay extra money to continue coverage under the COBRA provisions.

### **Alternative and Little Known Programs for Funding AT Equipment Loan Funds**

Many states operate some kind of AT or equipment loan program, offering low-cost loans to persons with disabilities who meet the criteria of the program. These programs have typically originated in one of two ways:

- Many of the newest programs have been funded as “alternative financing” programs under Title III of the AT Act. Currently, 30 states and three territories receive funding in this manner. See website of the Rehabilitation Society of North American (RESNA) at: [www.resna.org/AFTAP/state/index.html](http://www.resna.org/AFTAP/state/index.html).
- Many older programs were established with funds other than Title III funds. Currently, 13 states have such programs. See RESNA website at: [www.resna.org/AFTAP/state/otherloans.html](http://www.resna.org/AFTAP/state/otherloans.html).

The loan program will typically offer one of three methods to deliver low-interest financing for AT: a revolving loan, a loan guarantee, or an interest buy down. Some programs will offer two of these methods, some all three.

**Dollar limits, interest rates, term of the loan.** Loan limits will vary, typically between \$10,000 and \$30,000, with some programs having no set dollar limit. Interest rates will usually vary from a 0 percent rate to an 8 percent rate. Some offer rates below the federal prime lending rate. Repayment terms may range from five to seven years, but some programs offer longer repayment periods for home equity loans.

**Common items purchased with loan funds.** These include: transportation-related, 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; and hearing and vision aids.

## **THE 10<sup>TH</sup> ANNUAL “BRIDGES TO BETTER ADVOCACY” CONFERENCE: APRIL 5-7, 2006**

Our 10<sup>th</sup> annual “Bridges” conference will take place again at the Crowne Plaza (soon to be renamed, the Hilton Garden Inn) in Austin, Texas. Our traditional two-day event will take place on April 6<sup>th</sup> and 7<sup>th</sup> (Thursday-Friday). An optional pre-conference is scheduled for Wednesday, April 5<sup>th</sup> and will focus on Medicaid hearing skills.

A flyer and registration form is available as an insert to this newsletter or is available on the National AT Advocacy Project’s website, [www.nls.org/natmain.htm](http://www.nls.org/natmain.htm).

For more detail and links/contact information for programs in more than 40 states, see RESNA’s website for its Alternative Financing Technical Assistance Project: [www.resna.org/AFTAP/index.html](http://www.resna.org/AFTAP/index.html). Many state websites include success stories, detailing how equipment obtained through a loan program has enhanced the ability to live in the community, maintain a home, access public transportation, drive, attend school, or work.

### **The Federal Adoption Assistance Program**

Federally funded adoptions are governed by the federal Adoption Assistance and Child Welfare Act of 1980. 42 U.S.C. §§ 620-28, 670-676. States are authorized to enter into adoption assistance agreements with parents “who adopt a child with special needs.” 42 U.S.C. §§ 673(a)(1)(B), 675(3).

For children with disabilities, the child is held to meet the criteria as a child with special needs if the child meets all the eligibility requirements for SSI. 42 U.S.C. § 673(a)(2)(A)(ii). For such children, the state “may make adoption assistance payments to such [adoptive] parents directly through the State agency or through another public or nonprofit agency, in amounts to be determined.” 42 U.S.C. § 673(a)(1)(B)(ii). These payments are commonly referred to as “adoption subsidy payments.”

States have leeway to make adoption assistance payments based on individual circumstances, but they cannot be higher than foster

care payments would have been if the child had remained in or entered a foster home. 42 U.S.C. § 673(a)(3). In the case of adopted children with disabilities, states may continue the adoption assistance payments until the child is 21. 42 U.S.C. § 673(a)(4).

NOTE: A child with a disability will not be considered a child with special needs unless: (a) the state has determined that the child cannot or should not return to the home of his or her natural parents; (b) the state has determined that because of the child's disability (or other special factors, such as ethnic background) it is reasonable to conclude that the child cannot be adopted without providing adoption assistance; and (c) a reasonable but unsuccessful effort has been made to place the child without providing adoption assistance or Medicaid. 42 U.S.C. § 673(c).

**Automatic Medicaid eligibility.** If the following criteria is met, the adopted child with a disability is automatically eligible for Medicaid [42 U.S.C. § 673(b)(1)]:

- The child meets the criteria of “child with special needs” by meeting the eligibility requirements for SSI.
- There is an adoption assistance agreement in effect, even if adoption assistance payments are not being made pursuant to that agreement.

**Automatic Medicaid eligibility, at state option.** States may provide Medicaid coverage for children who are receiving benefits from state or local (non-federal) adoption assistance programs. 42 U.S.C. §§ 1396a(a)(10)(A)(ii), 1396d(a)(I).

## ***AT Court Watch***

### ***Lankford Case Challenges Missouri's Dramatic Cuts To Its Medicaid DME Benefit***

In late August 2005, the *Lankford v. Sherman* case was filed in the U.S. District Court for the Western District of Missouri. The lawsuit challenges Missouri legislation, implemented through an emergency regulation that eliminates most durable medical equipment (DME) for adult Medicaid recipients who are neither blind nor pregnant. Under Missouri's cuts, adults in the limited benefit group no longer qualify for Medicaid funding of items such as hospital beds, decubitus care equipment, augmentative communication devices, wheelchair batteries, and wheelchair accessories.

The seven named plaintiffs are represented by the National Health Law Program (Jane Perkins, Sarah Somers), the Missouri P&A, the AT Law Center (Lew Golinker), and several other public interest law organizations. The complaint claims that Missouri's new policy violates two provisions of the federal Medicaid Act: the reasonable standards provisions, 42 U.S.C. § 1396a(a)(17); and the comparability provisions, 42 U.S.C. § 1396a(a)(10)(B). The complaint also states claims under the U.S. Constitution's Supremacy Clause, claiming that the Medicaid Act provisions preempt the inconsistent Missouri regulations that limit DME coverage.

In early September 2005, the District Court denied plaintiffs' motion for a preliminary injunction finding, in part, that plaintiffs failed to show a likelihood of success on the merits. That order is now being appealed in the 8<sup>th</sup> Circuit Court of Appeals. The case has been fully briefed and arguments should take place in the late Winter or early Spring. For copies of the Complaint or any of the briefs, including the plaintiffs', defendant's, and *amicus curiae's* briefs filed in the 8<sup>th</sup> Circuit, contact Jim Sheldon or Diana Straube at the National AT Project ([jsheldon@nls.org](mailto:jsheldon@nls.org) or [dstraube@nls.org](mailto:dstraube@nls.org)). Jim and Diana joined Sheldon Toubman of New Haven Legal Assistance, Jennifer Giesen of the Minnesota Disability Law Center, and Steve Elliot of Advocacy, Inc. (Texas) on the *amicus* brief, filed on behalf of the National Disability Rights Network and several other national organizations.

While the 8<sup>th</sup> Circuit appeal was pending, the District Court denied the defendant's motion to dismiss finding: that plaintiffs' Medicaid Act claims are properly asserted under 42 U.S.C. § 1983 and that plaintiffs claims under the Supremacy Clause are properly asserted as well. That decision is also available through the National AT Advocacy Project.

**Additional services to adoptive parents** will vary from state to state. These may be available through one of two sources: the state Title 20 plan, a comprehensive social services plan describing services which are available to all adopted children; or through optional state adoption assistance benefits. This section will discuss the latter.

The adoption assistance agreement is to include any additional services that are to be provided to the family or child. 42 U.S.C. § 675(3)(A). The federal law does not provide any federal funds for these additional services, but states may make additional benefits available with state or local funds.

Advocates will need to become familiar with what special services are available under state law and policy. In Minnesota, for example, adopted children are entitled to a range of items that would be categorized as AT, including [see Minnesota's adoption subsidy rule 9560.0083, subpart 7]:

- Specialized communications equipment
- Ramps
- An accessible shower
- Elevated bathtubs and toilets
- Blinking lights and tactile alarms as alternate warning systems
- Lowered kitchen work surfaces
- Disability-related modifications to a vehicle

To determine how the adoption subsidy program operates in your state and the special services available to adopted children, you can use the links available on the North American Council on Adoptable Children website, [www.nacac.org/subsidy\\_stateprofiles.html](http://www.nacac.org/subsidy_stateprofiles.html).

### **The Crime Victims Compensation Fund**

This program, operated through each state by a federal grant, is authorized by the Victims of Crime Act of 1984 (VOCA), as amended, 42 U.S.C. §§ 10601 *et seq.* Final guidelines were published at 66 Fed. Reg. 27158 - 27166 (5/16/01).

The VOCA authorizes federal assistance to states (up to 40 percent reimbursement for approved expenditures) to compensate and assist crime victims, fund training and technical assistance, and serve victims of federal crimes. For updated information on this program, see the website of the federal Office for Victims of Crime (OVC), [www.ojp.usdoj.gov/ovc/help/links.htm](http://www.ojp.usdoj.gov/ovc/help/links.htm), and the website of the National Asso-

ciation of Crime Victims Compensation Boards (NACVCB), [www.nacvcb.org](http://www.nacvcb.org). For links to the websites of state Crime Victims Boards, see the national map on the OVC website or use the links on the NACVCB website, [www.nacvcb.org/statelinks.html](http://www.nacvcb.org/statelinks.html).

**Compensable crimes.** States must include crimes whose victims suffer death or physical injury as a result of:

- Terrorism
- Driving while intoxicated
- Domestic violence
- Intentional or attempted defacement of any religious real property because of: its religious character; or the race, color or ethnic characteristics of any individual associated with the religious property.

**Compensable expenses.** At a minimum, states must award compensation for a list of expenses when they are attributable to a physical injury resulting from a compensable crime.

These include:

- Medical expenses, including eyeglasses and other corrective lenses, dental services, prosthetic or other devices (see 42 U.S.C. § 10602(d)(2))(no definition of “prosthetic and other devices” appears in the federal law or guidelines)
- Mental health counseling and care
- Lost wages
- Funeral expense

**Optional allowable expenses.** States may offer compensation for other types of expenses as authorized by state law, regulation, or established policy. These include “[n]ecessary building modification and equipment to accommodate physical disabilities resulting from a compensable crime.” VOCA Guidelines, part IV.A.2.b. No definition for these terms appears in the federal law or guidelines. The Texas program, for example, allows up to \$50,000 in the case of “catastrophic injuries resulting in a total and permanent disability” for such things as making a home accessible, job training, and vocational rehabilitation.

**Payor of last resort.** The federal guidelines provide that this program is the payor of last resort “with regard to federal or federally financed programs.” VOCA Guidelines, part IV.A.3.

AT advocates may need to forcefully advocate for AT, on behalf of crime victims, under either the mandated “prosthetic or other devices”

clause or the optional “necessary building modification and equipment” clause. A quick review of state websites suggests that many states do not even mention these two categories of compensation in policies, application forms, or other literature describing the program. Many state programs offer some appeals process if requested compensation benefits are denied, but appeals are not mentioned in the federal law or VOCA Guidelines.

According to the National Association of Crime Victims Compensation Boards website, the average maximum compensation per case, allowed by states, is about \$25,000.

## **Funding Strategies That Do Not Involve a Program That Funds AT In a Conventional Sense**

### **The Flexible Spending Account Under Federal Tax Law**

These accounts, known as “flex plans,” “cafeteria plans,” or “125 plans,” are authorized by section 125 of the Internal Revenue Code. If an employer offers this alternative, the employee may designate a certain amount of pay that is set aside, pre-tax, to cover items or expenses not otherwise covered by health insurance.

These plans can be used to cover traditional medical costs such as health insurance premiums, co-payments on doctor visits/prescription drugs, AT-related purchases, and uncovered services such as chiropractic visits. They can also be used to cover expenses that have nothing to do with medical needs, such as dependent child care, adoption expenses, and parking fees.

The following is a representative list of disability-related expenses, including AT-related expenses that can be deducted if paid by the employee:

- Braille-books and magazines
- Chiropractors
- Co-insurance amount
- Co-pay amount
- Contact lenses and eyeglasses plus eye examination
- Cost of operations and related treatments
- Crutches
- Deductible medical coverage amounts
- Dental fees
- Prescription drugs
- Medical supplies
- Hearing devices and batteries

- Home improvements motivated by medical considerations
- Physician recommended swimming pool or spa equipment costs (is restricted by IRS regulations)
- Telephone, adapted for the deaf
- Television audio display equipment for deaf
- Wheelchair

The source of this list is a publication available on the website of P&A Administrative Services (no connection to Protection and Advocacy agencies), administrator of the flex plan for Neighborhood Legal Services, parent organization for the National AT Advocacy Project. See [www.padmin.com/forms/Valuable\\_Benefit.html](http://www.padmin.com/forms/Valuable_Benefit.html).

**Benefits to individuals who use the flexible spending plan.** The benefits are primarily through tax savings, an indirect subsidy toward the cost of necessary medical expenses, including expenses for AT devices. The actual tax savings will depend on the taxpayer’s tax bracket or what is known as the marginal tax rate, i.e., the rate on the last dollar earned. By reducing countable income for IRS purposes, this will also work to the taxpayer’s advantage with many needs-based programs that use taxable income as their yardstick for eligibility.

**Example 1.** Let us return to Darlene Green and her son, Jason, who were first described on page 315. As described above, Ms. Green was able to pay her \$250 per month share of family health insurance premiums through her flex plan. By doing so, she and her son were able to benefit in three ways:

- Her income taxes were reduced as her annual income was reduced by \$3,000.
- Because the SSI program will not count this income when determining Jason’s SSI eligibility, he remains eligible for SSI.
- With the retention of SSI, Jason keeps Medicaid, providing a payment source for a range of items described earlier.

**Example 2.** Candida Perez is married to Juan who recently became disabled in a car accident. Juan uses a manual wheelchair for all mobility but could benefit from a power wheelchair. Juan is not eligible for SSDI benefits because he did not have a sufficient work history. He applied for SSI (his state would pay the 2006 federal benefit rate of \$603 with no state supplement). He was denied SSI because of his wife’s income.

## Help Us to Enhance Our Hearing Decisions Resource Library

In a field as narrow as assistive technology (AT) advocacy, there are a limited number of AT-related court decisions. In your search for decisions dealing with similar equipment or similar issues, your only relevant documents may be other hearing decisions – including decisions from other states. In the Medicaid program, where AT advocates tend to work most, those out-of-state decisions will not be considered binding precedent, but they may provide a very persuasive rationale for why funding was awarded. After all, state X must follow the same federal Medicaid law and regulations that apply in your state.

We maintain a resource library of hearing decisions sent to us by advocates throughout the country. Currently, we have more than 500 decisions (mostly Medicaid, but also involving Medicare and special education). In some cases, we also have the written arguments that were submitted to support the case.

Please send us your hearing decisions so that we can expand this resource library and make it more valuable for all. If you have the capacity to make a PDF from the decision please send it to us in that format as we have converted nearly all of our hearing decisions to the PDF format. You can mail, fax, or email your decisions to Diana Straube ([dstraube@nls.org](mailto:dstraube@nls.org)) at the National AT Advocacy Project.

In Juan's situation, the SSI break-even amount for Candida's monthly gross earnings (the amount at which the deemed income would reduce his potential SSI check to \$0) would be \$1,893 per month in 2006. Candida earns just more than that amount, \$1,923 gross per month and is being considered for a promotion next year.

What can Candida do? After consulting her flex plan administrator, she starts a flexible spending account. In it, she has \$300 per month deducted from her monthly paycheck: \$150 for her share of health insurance; \$100 for parking; and \$50 to cover a range of co-payments and uninsured medical expenses.

How has the flex plan helped Candida and

Juan? By reducing the family's taxable income by \$300 per month (\$3,600 per year), there will be a tax savings. By reducing Candida's monthly gross income from \$1,923 to \$1,623, Juan goes from not being eligible for SSI to eligibility for a \$135 monthly SSI check. Juan is also now eligible for automatic Medicaid in his state. Medicaid will pay for prescription co-pays (his state covers that optional service), a power wheelchair he desperately needs, and any other services not covered by the private insurance plan.

Because he is now an SSI recipient, Juan will also be eligible for any needs-based assistance from his state VR agency without regard to the income of his spouse. The VR agency will pay for a number of expenses to allow Juan to pursue a vocational goal: tuition and other college expenses; a ramp to allow Juan to get into and out of his home; and vehicle modifications if he can come up with the money to purchase a van.

### Creative Structuring or Restructuring of a Child Support or Alimony Agreement to Obtain or Retain SSI and Medicaid

The purpose of this strategy is to have disability-related and other needs met through the child support or alimony obligation without decreasing the SSI amount that would otherwise be due. This strategy allows the individual (adult or child) to obtain or retain eligibility for SSI, thereby ensuring eligibility for Medicaid (in most states) and providing a funding source for various medical expenses, including AT. For a very extensive discussion of these issues see *SSI and the Family Law Attorney* (Aug. 1999), a part of our original Funding of AT booklet series. Hard copies are available from the National AT Advocacy Project or can be obtained on our website: [www.nls.org/ssifmaty.htm](http://www.nls.org/ssifmaty.htm).

The underlying strategy is to avoid the direct payment of cash to or for the benefit of the SSI beneficiary. Any cash or in-kind contribution covering food or shelter will have the affect of reducing, or even eliminating SSI payments. By directing that payments from a parent or spouse be paid directly for items other than food or shelter, we ensure that those payments will not be counted as income to the SSI applicant or recipient. (Note: When our *SSI and the Family Law Attorney* article was published in 1999, the SSI program's definition of income included cash or the in-kind equivalent of cash received in the form of "food, clothing or shelter." During 2005 the SSI program amended its regula-

tions to delete “clothing” from the definition of income. See final regulations published on February 7, 2005 (effective March 5, 2005), 70 Federal Register 6340-6345, amending 20 C.F.R. § 416.1102).

**Example.** Let us return to the case involving Darlene Green and her son, Jason Green, who has cerebral palsy. Let us also assume that Ms. Green is working 80 percent time and earning \$40,000 per year or \$3,333 per month. Because \$250 per month is set aside in a flexible spending account to pay for her share of health insurance premiums, her taxable income is \$37,000 per year or \$3,083 per month. As we noted above, at this rate of income (and with two other minor children) Jason’s SSI check will be \$28 (assuming his state pays the 2006 federal benefit rate of \$603 per month). Without going through all the budgeting, the SSI program will consider (or “deem”) \$595 of Ms. Green’s monthly wages as available to Jason. After \$20 of that amount is disregarded, Jason’s countable income is \$575 and his SSI check will be \$28 (\$603 - 575).

Assume that Jason’s parents are about to get divorced and that Jason’s father is prepared to pay \$450 per month as child support for Jason. The SSI program will count two thirds of that amount (\$300) which, combined with the income deemed to Jason from Ms. Green (\$575), will give Jason countable monthly income of \$875 per month, i.e., more than the SSI base rate of \$603. The effect of this will be to make Jason ineligible for an SSI check and automatic Medicaid. Is there an alternative approach that would keep Jason eligible for SSI and Medicaid?

The attorney representing Ms. Green learns that she has car payments of \$200 per month and car insurance payments of \$100 per month for a compact car. Jason is only able to travel in that car when two adults lift him into the front seat and put his folded manual wheelchair into the trunk. There is no way for Jason to travel in the car if he is using his power wheelchair. The attorney proposes and Mr. Green accepts an alternative to the \$450 per month cash payment for child support. The father will, instead, send checks directly to vendors/creditors as follows:

- \$400 per month to a bank to pay directly on a vehicle loan, allowing Ms. Green to purchase a van that is specially modified for Jason to use in his wheelchair;
- \$50 to the car insurance company toward the cost of insurance that will now be \$150 per month for the more expensive van.

Upon the implementation of this alternative child support settlement, a number of things will happen:

- Jason will retain SSI at the same amount per month. This is because the payments from his father will not be counted as income by the SSI program because the money goes directly to the bank and insurance company and cannot be used to pay for his food or shelter.
- Jason will retain Medicaid, a source of payment for many items, including a power wheelchair and augmentative communication device.
- The family will be able to purchase a modified van that can now be used to transport Jason in his power wheelchair without the need for assistance from another adult.
- Ms. Green will actually come out \$200 ahead in the family budget as she will no longer be responsible for any vehicle loan payment and Jason’s father will pay for the increase in insurance.

## Conclusion

Many individuals and families come to us with clearly identified needs for AT, but no clear method of obtaining funding for the needed equipment. Traditionally, most of us who work with Protection and Advocacy for Assistive Technology (PAAT) programs view our role as stepping in at the appeals stage when Medicaid or another funding source denies coverage for the item. In some cases, however, our clients would be better served if we used a more proactive “benefits counseling” or “benefits planning” model to help them obtain funding. Combining the benefits counseling/benefits planning approach with the more traditional model of negotiation, administrative hearing representation, and litigation will allow your PAAT program to get more AT devices into the hands of individuals with disabilities.

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**Visit our Website:**  
***[www.nls.org/natmain.htm](http://www.nls.org/natmain.htm)***

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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.



If you would like the  
**AT Advocate Newsletter**  
sent to you in a large-print  
or other alternative format,  
please let us know.

### **Update on The National Assistive Technology Resource Library**

We have designed a word-searchable digest, using computer technology, to store and retrieve hearing decisions and other administrative documents. We also have indexed nearly 700 documents from more than 125 pending and decided court cases. All documents are available through our AT Resource Library. Please send us your hearing decisions, briefs and other documents involving AT.

**Please send information to:**

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