Achieving a Better Life Experience (ABLE) Act
Division B of Public Law 113-295, December 19, 2014

The Arc
For people with intellectual and developmental disabilities

OVERVIEW

The Stephen Beck, Jr., Achieving a Better Life Experience Act[1] (ABLE) Act was signed into law on December 19, 2014 after many years of advocacy and bipartisan work in both the House and Senate. The law allows eligible individuals with disabilities the ability to establish "ABLE accounts" for qualified beneficiaries that resemble the qualified tuition programs, often called "529 accounts", that have been established under that section of the tax code since 1996. The new ABLE accounts will allow more individual choice and control over spending on qualified disability expenses and limited investment decisions, while protecting eligibility for Medicaid, Supplemental Security Income, and other important federal benefits for people with disabilities. Without these accounts, many people with disabilities have very limited avenues to save and allow for further independence.

A Form of 529 Account: The ABLE Act creates a new Section 529A establishing new tax-favored Qualified ABLE Programs in the Internal Revenue Code. The ABLE Program accounts are intended to be easy to open and available in any state, although each state will need to take action to make the accounts available to its residents. Assets in an ABLE account and distributions from the account for qualifying expenses would be disregarded or receive special treatment when determining the beneficiary's eligibility for most federal means-tested benefits.

Key Characteristics of ABLE Accounts:

- An eligible individual may have **one ABLE account**, which must be established in the state in which he resides (or in a state that provides ABLE account services for his home state).
- Any person, such as a family member, friend, or the person with a disability, may contribute to an ABLE account for an eligible beneficiary.
- An ABLE account may not receive **annual contributions** exceeding the annual gift-tax exemption ($14,000 in 2015). A state must also ensure that aggregate contributions to an ABLE account do not exceed the state-based limits for 529 accounts.
- **Eligibility** - An eligible individual is a person (1) who is entitled to benefits on the basis of disability or blindness under the Supplemental Security Income (SSI) program or under the Social Security disability, retirement, and survivors program OR (2) who submits certification that meets the criteria for a disability certification (to be further defined in regulations). An eligible individual's disability must have occurred before the age 26.
- **Designated Beneficiary** - The eligible individual who established the ABLE account and who is the owner of the account is the "designated beneficiary".
- **Qualified disability expenses** are any expenses made for the benefit of the designated beneficiary and related to his/her disability, including: education, housing,

[1] After Stephen Beck's death in December 2014, the law was named to honor him, a parent from northern Virginia who helped conceive and develop the ABLE Act and who worked tirelessly for its passage.

transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary of the Treasury under regulations.

- **Tax treatment** - Earnings on an ABLE account and distributions from the account for qualified disability expenses do not count as taxable income of the contributor or the eligible beneficiary. Contributions to an ABLE account must be made in cash from the contributor's after-tax income.
- **Roll-Overs** - Assets in an ABLE account may be rolled over without penalty into another ABLE account for either the designated beneficiary (for instance, when moving to another state) or any of the beneficiary's qualifying family members.

Federal Treatment of ABLE Account Under Means-Tested Programs, Including Supplemental Security Income & Medicaid:

- **Means-Tested Programs generally** - Assets in an ABLE account and distributions from the account for qualified disability expenses would be disregarded when determining the designated beneficiary's eligibility for most federal means-tested benefits.
- **Supplemental Security Income (SSI):** For SSI, only the first $100,000 in an ABLE account will be disregarded. Assets above $100,000 will count as resources under SSI. In addition, if the designated beneficiary's ABLE account balance exceeds $100,000, the individual's SSI benefits will not be terminated, but instead will be suspended until such time as the individual's resources fall below $100,000. Further, it is intended that distributions expended for housing purposes will receive the same treatment which all housing costs paid by outside sources receive.
- **Medicaid Eligibility:** A beneficiary will not lose eligibility for Medicaid based on the assets held in their ABLE account, even during the time that SSI benefits are suspended (as described above for an account with over $100,000).
- **Medicaid Payback Provision:** Subject to certain limits and upon the state's filing of a claim for payment, any assets remaining in an ABLE account upon the death of the qualified beneficiary must be used to reimburse the state for Medicaid payments it made on behalf of the beneficiary. The amount of any Medicaid payback is calculated based on amounts paid by Medicaid after the creation of the ABLE Account and shall exclude amounts paid by the beneficiary as premiums to a Medicaid buy-in program.

How Soon Will ABLE Accounts Be Available?

- **Federal Regulations:** The Secretary of the Treasury is required to issue regulations or other necessary guidance within six months of enactment of the law, which would require such regulations and/or guidance to be available by mid-June 2015.
- **State Decisions:** Each state will need to decide whether to offer a qualified ABLE program to its residents, and, if so, the state will need to decide whether the program will be state-run; whether to select another entity, such as a financial services firm, to run the program; or whether to contract with another state to allow its own residents to use the qualified ABLE program of another state.

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Major Provisions and Details of the ABLE Act

Readers should be aware that many significant changes were made in the ABLE Act legislation during the legislative process, from the House and Senate bills introduced in the 113th Congress, through changes made at mark-up in the House Ways and Means Committee, and final changes made prior to House and Senate passage and signature by the President. The details and descriptions in this section are taken in large part directly from the Committee report (ABLE Act, H. Rept. 113-614, 113th Congress (2013-2014), November 12, 2014, As Reported by the Ways and Means Committee), and updated based on statutory language (Division B - Achieving a Better Life Experience Act of 2014, Public Law 113-295).

Qualified ABLE Program

The law creates a new type of tax-advantaged savings program, known as a qualified ABLE program. A qualified ABLE program is established and maintained by a State, state agency, or state authorized entity. A qualified ABLE program must meet the following conditions:

> (1) Contributions may be made to an account (an "ABLE account") established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account;
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> (2) The program must limit a designated beneficiary to one ABLE account;
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> (3) The program must allow for the establishment of ABLE accounts only for designated beneficiaries who are either residents of the State maintaining the ABLE program (a "program State") or residents of a State that has not established an ABLE program (a "contracting State") which has entered into a contract with a program State to allow the contracting State's residents access to the program State's ABLE program; and
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> (4) The program must meet certain other requirements discussed below.

A qualified ABLE program is generally exempt from income tax, but is otherwise subject to the taxes imposed on the unrelated business income of tax-exempt organizations.

Designated Beneficiary: The designated beneficiary of an ABLE account must be an eligible individual (defined below) who is designated at the commencement of participation in the qualified ABLE program as the beneficiary of amounts paid (or to be paid) into the program. In situations such as rollovers, a designated beneficiary may be a brother, sister, stepbrother, or stepsister of the former designated beneficiary of the ABLE account, provided the new designated beneficiary is also an eligible individual.

Cash Contributions: Contributions to an ABLE account must be made in cash and are not deductible for federal income tax purposes. Except in the case of a rollover contribution from another account, an ABLE account must provide that it may not receive aggregate contributions during a taxable year in excess of the annual gift tax exclusion amount ($14,000

for 2015)[2]. In addition, a qualified ABLE program must provide adequate safeguards to ensure that ABLE account contributions do not exceed the limit imposed on accounts under the qualified tuition program of the State maintaining the qualified ABLE program, taking into account contributions under any prior qualified ABLE program. Amounts in the account accumulate on a tax-deferred basis (i.e., income on accounts in the plan is not subject to current income tax).

Limited Investment of Account Contributions and Earnings: A qualified ABLE program must permit the designated beneficiary to direct (directly or indirectly) the investment of any contributions (or earnings thereon), no more than two times per year. A qualified ABLE program must provide separate accounting for each designated beneficiary and may not allow any interest in the program (or any portion thereof) to be used as security for a loan.

Distributions and Non-Qualified Expenditures: Amounts distributed from a qualified ABLE account are includible in the gross income of the distributee as provided in Section 72 (relating to annuities) to the extent not otherwise excluded from gross income. If the distributions from a qualified ABLE account do not exceed the qualified distribution expenses of the designated beneficiary, no amount is includible in gross income. If the distributions exceed the qualified distribution expenses, the amount otherwise includible in gross income is reduced by an amount which bears the same ratio to the distributed amount as the qualified disability expenses bear to that amount. The portion of any distribution that is includible in gross income is subject to an additional 10-percent tax unless made after the death of the beneficiary.

Rollovers: Amounts in an ABLE account may be rolled over without income tax liability to another ABLE account for the same beneficiary[3] or to another ABLE account for the designated beneficiary's brother, sister, stepbrother, or stepsister who is also an eligible individual.

Limitation to One Account: If an ABLE account is established for a designated beneficiary, no account subsequently established for such beneficiary shall be treated as an ABLE account. In this case, the designated beneficiary of the non-qualifying account shall be treated as having received a distribution of the fair market value of all the non-qualifying account's assets on the first day of such taxable year. The Secretary of the Treasury[4] is required to prescribe regulations to enforce the one ABLE account limitation.

Gift Tax Rules: A contribution to an ABLE account is treated as a completed gift of a present interest to the beneficiary of the account and, therefore, the contribution qualifies for the per-donee annual gift tax exclusion ($14,000 for 2015) and, to the extent of the exclusion, is exempt from the generation skipping transfer ("GST") tax. A distribution from an ABLE account generally is not subject to gift tax or GST tax. These taxes may apply, however, to a change of designated beneficiary during any taxable year unless, as of the beginning of the

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[2] Sec. 2503(b). This amount is indexed for inflation. In the case that contributions to an ABLE account exceed the annual limit, an excise tax in the amount of six percent of the excess contribution to such account is imposed on the designated beneficiary. Such tax does not apply in the event that a corrective distribution of such excess amounts is made within the taxable year.

[3] Such circumstances could arise, for instance, if an eligible individual were to relocate to a different State.

[4] The ABLE Act is an amendment to the Internal Revenue Code of 1986. Therefore, references to the "Secretary" are references to the Secretary of the Treasury.

year, the new beneficiary is both an eligible individual for the taxable year and a brother, sister, stepbrother, or stepsister of the former beneficiary.

Additional Definitions and Special Rules

Eligible Individual: A qualified ABLE program must ensure that designated beneficiaries of ABLE accounts are eligible individuals. For these purposes, an eligible individual is an individual who became disabled prior to age 26 and either (1) has been determined, for purposes of Social Security disability benefits or Supplemental Security Income (SSI) benefits[5] to meet the requirements relating to disability or blindness, **OR** (2) has filed a qualifying disability certification with the Secretary for the taxable year.

A **disability certification** means a certification to the satisfaction of the Secretary, made by the eligible individual or the parent or guardian of the eligible individual, that:

1. The individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind (within the meaning of the Social Security Act), **AND** such blindness or disability occurred before the individual attained age 26, and
2. Includes a copy of the diagnosis relating to the individual's relevant impairment(s), signed by a qualified physician.

No inference may be drawn from a disability certification for purposes of eligibility for Social Security, SSI or Medicaid benefits.

List of Eligible Individuals: The Department of Treasury is responsible for maintaining the list of eligible individuals, including those who have a Social Security disability determination, so that States and the IRS need to contact only one entity to confirm an individual's eligibility status. The Social Security Administration (SSA) is responsible for providing confirmation of disability determination in the manner specified by Treasury. Congress believes this process does not violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA) because no diagnosis information should be exchanged, only binary information on the result of a disability determination or certification for a given tax year.

Conditions Deemed to Meet Requirements of Disability Certification: As discussed further below, not later than six months after the date of enactment, the Secretary must develop regulations or other guidance on certain aspects of the law. This includes regulations or guidance, to be developed in consultation with the Commissioner of Social Security, relating to disability certifications and determinations of disability including those conditions which are deemed to have occurred prior to age 26. It is intended that individuals with certain conditions should be required to present only limited (or no) evidence demonstrating that the condition occurred prior to age 26. This list of conditions should operate in a manner similar to the SSA's Compassionate Allowances, which targets the most obviously disabled individuals for allowances based on objective medical information that can be obtained quickly. Compassionate Allowances are selected using information received at public outreach hearings, comments received from the Social Security and Disability Determination Services

[5] These are benefits, respectively, under Title II or Title XVI of the Social Security Act.

communities, the counsel of medical and scientific experts, and research conducted by the National Institutes of Health.

Qualified Disability Expenses: Qualified disability expenses are any expenses related to the eligible individual's blindness or disability which are made for the benefit of an eligible individual who is the designated beneficiary. The ABLE Act specifies that qualified expenses include the following: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses, which are approved by the Secretary under regulations and consistent with the purposes of this section.

The earnings on distributions from an ABLE account are excluded from income only to the extent total distributions do not exceed the qualified disability expenses of the designated beneficiary. In other words, expenditures for non-qualified purposes will be penalized.

Reporting requirements: Each officer or employee having control of the qualified ABLE program (or their designee) is required to make reports to the Secretary and to the designated beneficiaries of ABLE accounts. Such reports must provide information with respect to contributions, distributions, the return of excess contributions, and other matters as required by the Secretary. In addition, for research purposes, the Secretary, with assistance from SSA, must make available to the public reports containing aggregate information, by diagnosis and other relevant characteristics, on contributions and distributions in the ABLE program. However, an item of information may not be made publically available if it can be associated with, or otherwise identify, directly or indirectly, a particular individual. Given SSA's research capabilities, it is expected that SSA will be an important partner in developing, creating, and publishing the required research tables. In addition, these tables will not violate HIPAA because data is de-identified and presented in the aggregate.

A qualified ABLE program must submit a notice to the Secretary upon the establishment of the ABLE account. The notice must contain the name and State of residence of the designated beneficiary, and other such information as the Secretary may require.

States having control of a qualified ABLE program must submit electronic monthly statements on distributions and account balances of all ABLE accounts to the Commissioner of Social Security. Congress is expecting that States will work with the Commissioner during implementation to identify data elements to include in their electronic statements that would allow SSA to electronically make accurate and timely SSI determinations on a monthly basis. This would include but not be limited to the name, date of birth, and Social Security number (SSN) of the beneficiary, balance information as of the first moment of the month (i.e., 12:00 a.m. on the first of the month); and, regarding distributions, the recipient of the distribution, whether it is a distribution for a qualified or non-qualified expense, and if for a qualified expense, the type of qualified expense (e.g., housing). To comply with the requirements for notice and appeal in the Computer Matching and Privacy Protection Act, Congress expects SSA to work with States to address issues so that information can be processed as efficiently as possible. In doing so, options such as providing immediate notice when an individual indicates a withdrawal is for a housing expense or when the account balance reaches $100,000 should be considered.

Reports and notices must be filed at such time and in such manner as required by the Secretary. A penalty may apply with respect to any failure to provide a required report or notice.

Transfer to State/ "Medicaid Payback": Upon the death of the designated beneficiary and subject to any outstanding payments due for qualified disability expenses incurred by the designated beneficiary, all amounts remaining in the deceased beneficiary's ABLE account not in excess of the amount equal to the total medical assistance paid for such individual after establishment of the account under any State Medicaid plan established under Title XIX of the Social Security Act shall be distributed to such State upon filing of a claim for payment by such State. Such repaid amounts shall be net of any premiums paid from the account or by or on behalf of the beneficiary to a Medicaid Buy-In program. For purposes of this provision, the state is considered a creditor of an ABLE account and not a beneficiary.

Regulations

The Secretary of the Treasury is directed to issue regulations or other guidance as the Secretary determines is necessary or appropriate to carry out the purposes of the qualified ABLE program rules, including regulations:

(1) To enforce the one ABLE account per eligible individual limit;

(2) Providing for the information required to be presented to open an ABLE account;

(3) To generally define disability expenses;

(4) Relating to disability certifications and determinations of disability, to be developed in consultation with the Commissioner of Social Security (as discussed above);

(5) To prevent fraud and abuse with respect to amounts claimed as qualified disability expenses;

(6) Under the estate tax, gift tax, and generation-skipping transfer tax provisions of the Internal Revenue Code; and

(7) To allow for transfers from one ABLE account to another ABLE account (such as when an eligible individual has a change in State of residence).

The Secretary is directed to issue such regulations or other guidance no later than six months after the date of enactment. Since the date of enactment was December 19, 2014, this provision calls for regulations or guidance by mid-June 2015.

Treatment of ABLE Accounts Under Federal Means-Tested Programs

Any amount in an ABLE account, and any distribution for qualified disability expenses, must be disregarded for purposes of determining eligibility to receive, or the amount of, any assistance or benefit authorized by any federal means-tested program. However, in the case of the SSI program, distributions for housing expenses are not disregarded, nor are amounts in an ABLE account in excess of $100,000. In the case that an individual's ABLE account balance

exceeds $100,000, the individual's SSI benefits shall not be terminated, but instead shall be suspended until such time as the individual's resources fall below $100,000. However, the suspension shall not apply for purposes of Medicaid eligibility. In addition, the expectation is that housing costs paid out of an ABLE account for an SSI beneficiary would be subject to the *in-kind support and maintenance presumed maximum value* treatment which is applied when housing costs are paid by outside sources for SSI beneficiaries.

Effective Date

The provision relating to the establishment of ABLE programs is effective for taxable years beginning after December 31, 2014. The requirement that the Secretary must issue regulations within six months and the disregard of ABLE accounts and distributions from such accounts in the case of certain means-tested Federal programs are both effective on the date of enactment.

Treatment of ABLE Accounts in Bankruptcy

Section 104 of P.L. 113-295 establishes certain rules regarding treatment of ABLE accounts in bankruptcy proceedings, including exclusion of certain property from the estate, timeframes, debtor's monthly expenses, and record of debtor's interest. These provisions are not the subject of this information sheet.

NOTE: The ABLE Act is new statutory language which many parties are eager to understand and implement. Regulations have not been written and implementation has not begun. It is possible that there will be differing opinions on the meaning of statutory language described above. Such differences may remain unresolved until guidance and/or regulations are issued from the Department of Treasury/Internal Revenue Service. However, if you disagree with the interpretation of ABLE Act language as described above, The Arc would be interested in being informed. Please contact Marty Ford (ford@thearc.org). Thank you.

1/29/15