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MEMORANDUM

DATE: May 25, 2016

TO: Ms. Kimberly Xavier, DMMA
Planning, Policy and Quality Unit

FROM: Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

RE: 19 DE Reg. 982 [DMMA Proposed ABLE Account Regulation (5/1/16)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA's) proposal to adopt regulations implementing the Achieving a Better Life Experience Act of 2014 ("ABLE" Act). The Act authorizes the establishment of a special account for the benefit of a qualifying individual with a disability. Funds in such an account which will not be a countable resource and distributions from such a fund for a qualified disability expense (QDE) are not countable income for public benefits programs. Implementing State legislation was adopted in 2015 and is codified at 16 Del.C. §§9601A-9608A. New State legislation (H.B. 358) was introduced on May 4, 2016. The proposed regulation was published as 19 DE Reg. 982 in the May 1, 2016 issue of the Register of Regulations. SCPD has the following observations on the proposed regulation.

First, in §20330.2.1.1, the definition of "person with signature authority" merits reconsideration. The first sentence reads as follows:

"Person with signature authority" means a person who can establish and control an ABLE account for a designated beneficiary who is a minor child or is otherwise incapable of managing an account.

The federal regulations do not require an adult to "be incapable of managing an account" to designate a "person with signature authority. See, e.g., the attached proposed regulation published at 80 Fed Reg. 35611 (June 22, 2015):

If the designated beneficiary is not able to exercise signature authority over his or her ABLÉ account or chooses to establish an ABLÉ account but not exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary.

[emphasis supplied] A "competent" adult can simply choose to not exercise signature authority.

Second, in §20330.2.1.1, the definition of "ABLE program" refers to a program established or maintained "by a State (or agency or instrumentality thereof)..." This is consistent with the proposed federal regulation. See 80 Fed Reg. at 35612(June 22, 2015). However, SCPD understands that many states are contemplating implementation through a consortium of states. Therefore, DMMA could consider expanding the reference as follows: "by a State or consortium of states (or agency or instrumentality thereof)..."

Third, for similar reasons, DMMA could consider amending the definition of "eligible individual" as follows: "a resident of this State, a contracting state, or a state participating in a consortium arrangement who is:..."

Fourth, for similar reasons, DMMA could consider amending §20330.2.1.2.2 as follows: "The State or consortium ABLÉ program that is administering the account."

Fifth, in §20330.2.1.1, the definition of "eligible individual" requires the person to be a resident of Delaware or "a contracting state". The proposed federal regulation would allow some persons (e.g. military) to keep an account even if the person is no longer a resident of the state. See attached 80 Fed Reg at 35608. Therefore, there is some "tension" between the "residency" requirement and the proposed federal regulation. Moreover, consistent with the attached January 11, 2016 article, Congress amended the law so an eligible person can open an account in any state, regardless of where the person resides.

Sixth, in §20330.2.1.3, second sentence, there is a plural pronoun ("their") with a singular antecedent ("person"). This can be easily corrected by substituting "the person's" for "their".

Seventh, in §20330.2.1.5, correct the grammar by substituting "the beneficiary's" for "their".

Eighth, §§20330.2.1.6.1 and 20330.2.1.6.2 treat distributions for housing less favorably than other distributions. If a housing distribution is made on May 31 and paid to a landlord on June 1, the entire housing distribution would be considered a countable resource for the month of June. This is an unreasonable approach.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations on the proposed regulation.

cc: Mr. Stephen Groff, DMMA
Ms. Sheila Grant, AARP
Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

19reg982dmma-ABLE account 5-25-16

(c) Effective/applicability date.

§ 1.529A-2 Qualified ABLÉ program.

(a) In general.
(b) Established and maintained by a State or agency or instrumentality of a State.

(1) Established.
(2) Maintained.
(3) Community Development Financial Institutions (CDFIs).

(c) Establishment of an ABLÉ account.

(1) In general.
(2) Only one ABLÉ account.
(3) Beneficial interest.
(d) Eligible individual.
(1) In general.
(2) Frequency of recertification.
(3) Loss of qualification as an eligible individual.

(e) Disability certification.
(1) In general.
(2) Marked and severe functional limitations.

(3) Compassionate allowance list.
(4) Additional guidance.
(5) Restriction on use of certification.
(f) Change of designated beneficiary.
(g) Contributions.
(1) Permissible property.
(2) Annual contributions limit.
(3) Cumulative limit.
(4) Return of excess contributions and

excess aggregate contributions.

(h) Qualified disability expenses.
(1) In general.
(2) Example.
(i) Separate accounting.
(j) Program-to-program transfers.
(k) Carryover of attributes.
(l) Investment direction.
(m) No pledging of interest as security.

(n) No sale or exchange.
(o) Change of residence.
(p) Post-death payments.
(q) Reporting requirements.
(r) Effective/applicability date.

§ 1.529A-3 Tax treatment.

(a) Taxation of distributions.
(b) Additional exclusions from gross income.

(1) Rollover.
(2) Program-to-program transfers.
(3) Change in designated beneficiary.
(4) Payments to creditors post-death.
(c) Computation of earnings.
(d) Additional tax on amounts includible in gross income.

(1) In general.
(2) Exceptions.
(e) Tax on excess contributions.
(f) Filing requirements.
(g) Effective/applicability date.

§ 1.529A-4 Gift, estate, and generation-skipping transfer taxes.

(a) Contributions.

(1) In general.
(2) Generation-skipping transfer (GST) tax.

(3) Designated beneficiary as contributor.

(b) Distributions.
(c) Change of designated beneficiary.
(d) Transfer tax on death of designated beneficiary.
(e) Effective/applicability date.

§ 1.529A-5 Reporting of the establishment of and contributions to an ABLÉ account.

(a) In general.
(b) Additional definitions.
(1) Filer.
(2) TIN.
(c) Requirement to file return.
(1) Form of return.
(2) Information included on return.
(3) Time and manner of filing return.
(d) Requirement to furnish statement.
(1) In general.
(2) Time and manner of furnishing statement.

(3) Copy of Form 5498-QA.
(e) Request for TIN of designated beneficiary.

(f) Penalties.
(1) Failure to file return.
(2) Failure to furnish TIN.
(g) Effective/applicability date.

§ 1.529A-6 Reporting of distributions from and termination of an ABLÉ account.

(a) In general.
(b) Requirement to file return.
(1) Form of return.
(2) Information included on return.
(3) Time and manner of filing return.
(c) Requirement to furnish statement.
(1) In general.
(2) Time and manner of furnishing statement.

(3) Copy of Form 1099-QA.
(d) Request for TIN of contributor(s).
(e) Penalties.
(1) Failure to file return.
(2) Failure to furnish TIN.
(f) Effective/applicability date.

§ 1.529A-7 Electronic furnishing of statements to designated beneficiaries and contributors.

(a) Electronic furnishing of statements.
(1) In general.
(2) Consent.
(3) Required disclosures.
(4) Format.
(5) Notice.
(6) Access period.
(b) Effective/applicability date.

§ 1.529A-1 Exempt status of qualified ABLÉ program and definitions.

(a) In general. A qualified ABLÉ program described in section 529A is exempt from income tax, except for the tax imposed under section 511 on the

unrelated business taxable income of that program.

(b) Definitions. For purposes of section 529A, this section and §§ 1.529A-2 through 1.529A-7—
(1) ABLÉ account means an account established under a qualified ABLÉ program and owned by the designated beneficiary of that account.

(2) Contracting State means a State without a qualified ABLÉ program of its own, which, in order to make ABLÉ accounts available to its residents who are eligible individuals, contracts with another State having such a program.

(3) Contribution means any payment directly allocated to an ABLÉ account for the benefit of a designated beneficiary.

(4) Designated beneficiary means the individual who is the owner of the ABLÉ account and who either established the account at a time when he or she was an eligible individual or who has succeeded the former designated beneficiary in that capacity (successor designated beneficiary). If the designated beneficiary is not able to exercise signature authority over his or her ABLÉ account or chooses to establish an ABLÉ account but not exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary.

(5) Disability certification means a certification deemed sufficient by the Secretary to establish a certain level of physical or mental impairment that meets the requirements described in § 1.529A-2(e).

(6) Distribution means any payment from an ABLÉ account. A program-to-program transfer is not a distribution.
(7) Earnings attributable to an account are the excess of the total account balance on a particular date over the investment in the account as of that date.

(8) Earnings ratio means the amount of earnings attributable to the account as of the last day of the calendar year in which the designated beneficiary's taxable year begins, divided by the total account balance on that same date, after taking into account all distributions made during that calendar year and all contributions received during that same year other than those (if any) returned in accordance with § 1.529A-2(g)(4).

(9) Eligible individual for a taxable year means an individual who either:
(i) Is entitled during that taxable year to benefits based on blindness or disability under title II or XVI of the Social Security Act, provided that such

designated beneficiary in maintaining or improving his or her health, independence, or quality of life. Such expenses include, but are not limited to, expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin. As previously stated, expenses incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of the proposed regulations are not qualified disability expenses.

In order to implement the legislative purpose of assisting eligible individuals in maintaining or improving their health, independence, or quality of life, the Treasury Department and the IRS conclude that the term "qualified disability expenses" should be broadly construed to permit the inclusion of basic living expenses and should not be limited to expenses for items for which there is a medical necessity or which provide no benefits to others in addition to the benefit to the eligible individual. For example, expenses for common items such as smart phones could be considered qualified disability expenses if they are an effective and safe communication or navigation aid for a child with autism. The Treasury Department and the IRS request comments regarding what types of expenses should be considered qualified disability expenses and under what circumstances. The proposed regulations authorize the identification of additional types of qualified disability expenses in guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2). A qualified ABLE program must establish safeguards to distinguish between distributions used for the payment of qualified disability expenses and other distributions, and to permit the identification of the amounts distributed for housing expenses as that term is defined for purposes of the Supplemental Security Income program of the Social Security Administration.

Limitation on Number of ABLE Accounts of a Designated Beneficiary

Section 529A(c)(4) generally provides that, except with respect to certain rollovers, once an ABLE account has been established for a designated beneficiary, no account subsequently established for that same designated

beneficiary may qualify as an ABLE account. The proposed regulations provide that, except with respect to rollovers and program-to-program transfers, no designated beneficiary may have more than one ABLE account in existence at the same time, but provides that a prior ABLE account that has been closed does not prohibit the subsequent creation of another ABLE account for the same designated beneficiary. A qualified ABLE program must obtain a verification from the eligible individual, signed under penalties of perjury, that he or she has no other ABLE account (except in the case of a rollover or program-to-program transfer). The proposed regulations provide that, in the event that any additional ABLE account is opened for a designated beneficiary with an ABLE account already in existence, only the first such account created for that designated beneficiary qualifies as an ABLE account, and each other account is treated for all purposes as being an account of the designated beneficiary that is not an ABLE account under a qualified ABLE program. The proposed regulations also provide, however, that a return, in accordance with the rules that apply to returns of excess contributions and excess aggregate contributions under § 1.529A-2(g)(4), of the entire balance of a second or other subsequent account received by the contributor(s) on or before the due date (including extensions) for filing the designated beneficiary's income tax return for the year in which the account was opened and contributions to the second or subsequent account were made will not be treated as a gift or distribution to the designated beneficiary for purposes of section 529A.

The prohibition of multiple ABLE accounts, however, does not apply to prevent a timely rollover or program-to-program transfer of the designated beneficiary's account to an ABLE account under a different qualified ABLE program.

Residency Requirements

Consistent with section 529A(b)(1)(C), the proposed regulations require that an ABLE account for a designated beneficiary may be established only under the qualified ABLE program of the State in which that designated beneficiary is a resident or with which the State of the designated beneficiary's residence has contracted for the provision of ABLE accounts. If a State does not establish and maintain a qualified ABLE program, it may contract with another State to provide an ABLE program for its residents. The statute is

silent as to whether a designated beneficiary must move his or her existing ABLE account when the designated beneficiary changes his or her residence. The Treasury Department and the IRS are concerned about imposing undue administrative burdens and costs on designated beneficiaries who frequently change State residency, such as members of military families. Therefore, the proposed regulations provide that a qualified ABLE program may permit a designated beneficiary to continue to maintain his or her ABLE account that was created in that State, even after the designated beneficiary is no longer a resident of that State. However, in order to enforce the one ABLE account limitation and in accordance with section 529A(g)(1), the proposed regulations provide that, other than in the case of a rollover or a program-to-program transfer of a designated beneficiary's ABLE account, a qualified ABLE program must require the designated beneficiary to verify, under penalties of perjury, when creating an ABLE account that the account being established is the designated beneficiary's only ABLE account. For example, the eligible individual could be required to check a box providing such verification on a form used to establish the account. The Treasury Department and the IRS are concerned that without such safeguards individuals could inadvertently establish two accounts with adverse tax consequences due to the loss of ABLE account status for the second account and expect qualified ABLE programs to establish safeguards to ensure that the required limit of one ABLE account per designated beneficiary is not violated.

Investment Direction

Section 529A(b)(4) states that a program shall not be treated as a qualified ABLE program unless it provides that the designated beneficiary may directly or indirectly direct the investment of any contributions to the program or any earnings thereon no more than two times in any calendar year. A program will not violate this requirement merely because it permits a designated beneficiary or a person with signature authority over a designated beneficiary's account to serve as one of the program's board members or employees, or as a board member or employee of a contractor that the program hires to perform administrative services.

Cap on Contributions

Section 529A(b)(6) provides that a qualified ABLE program must provide adequate safeguards to prevent aggregate

disabilityscoop

ABLE Accounts May Be Available Sooner Than Expected

by Michelle Diament | January 11, 2016

A tweak to federal law is poised to greatly expand choice and speed up availability of accounts allowing people with disabilities to save money without risking their government benefits.

Tucked inside a tax bill approved by lawmakers last month is a provision that will permit individuals with disabilities to open new accounts established under the Achieving a Better Life Experience, or ABLÉ, Act in any state, regardless of where they reside. *

The change means that people with disabilities across the country will be able to open ABLÉ accounts when the first state programs are up and running which could happen as soon as February or March, advocates say.

With the new accounts, people with disabilities will for the first time be able to accrue up to \$100,000 in savings without losing access to Social Security and other government benefits. Medicaid coverage will remain intact no matter how much money is saved in an individual's ABLÉ account.

Despite federal passage of the ABLÉ Act in 2014, states had to approve their own legislation and develop mechanisms to regulate and administer the new accounts before letting consumers take advantage. So far, 35 states have approved such legislation, advocates say, but some are farther along than others in implementing programs.

"Some of the smaller states don't have the capacity to create an ABLÉ program so this will allow more people with disabilities to access ABLÉ accounts and access ABLÉ accounts faster," said Sara Hart Weir, president of the National Down Syndrome Society.

Without the recent legislative change, individuals with disabilities would have been limited by the timetable and specific offerings in their state. Now, families will be able to shop around to find the state program that best suits their needs and the

availability of many options should promote competition among states to make their programs attractive, according to Chris Rodriguez of the National Disability Institute.

It's likely that each state ABLE program will only work with one or a handful of financial institutions and fees may vary, so enabling families to access programs across state lines will dramatically increase their options, Rodriguez said.

Some states are already working to encourage residents to utilize in-state accounts by offering tax incentives, he said.

"It's a pretty exciting development," Rodriguez said of the federal provision allowing consumers to access accounts originating in any state. "I know it's shaking things up. Some of the states are looking to quicken their development and others are sitting back and looking at whether they need to build a program."

Ohio, Florida, Virginia and Nebraska are widely expected to be among the first to make ABLE programs available. Accounts are likely to be created and administered through dedicated state websites, advocates say.

To be eligible for an ABLE account, an individual must have a disability that originated before the age of 26.

Funds in the accounts can be used to pay for education, health care, transportation, housing and other expenses. Interest earned on savings in the accounts will be tax-free.

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View this article online at <https://www.disabilityscoop.com/2016/01/11/able-accounts-sooner-expected/21752/>

- (c) Effective/applicability date.
- § 1.529A-2 Qualified ABLE program.
- (a) In general.
- (b) Established and maintained by a State or agency or instrumentality of a State.
- (1) Established.
- (2) Maintained.
- (3) Community Development Financial Institutions (CDFIs).
- (c) Establishment of an ABLE account.
- (1) In general.
- (2) Only one ABLE account.
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- (d) Eligible individual.
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- (r) Effective/applicability date.
- § 1.529A-3 Tax treatment.
- (a) Taxation of distributions.
- (b) Additional exclusions from gross income.
- (1) Rollover.
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- § 1.529A-4 Gift, estate, and generation-skipping transfer taxes.
- (a) Contributions.

- (1) In general.
- (2) Generation-skipping transfer (GST) tax.
- (3) Designated beneficiary as contributor.
- (b) Distributions.
- (c) Change of designated beneficiary.
- (d) Transfer tax on death of designated beneficiary.
- (e) Effective/applicability date.
- § 1.529A-5 Reporting of the establishment of and contributions to an ABLE account.
- (a) In general.
- (b) Additional definitions.
- (1) Filer.
- (2) TIN.
- (c) Requirement to file return.
- (1) Form of return.
- (2) Information included on return.
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- (d) Requirement to furnish statement.
- (1) In general.
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- (3) Copy of Form 5498-QA.
- (e) Request for TIN of designated beneficiary.
- (f) Penalties.
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- (g) Effective/applicability date.
- § 1.529A-6 Reporting of distributions from and termination of an ABLE account.
- (a) In general.
- (b) Requirement to file return.
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- (1) In general.
- (2) Time and manner of furnishing statement.
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- (e) Penalties.
- (1) Failure to file return.
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- § 1.529A-7 Electronic furnishing of statements to designated beneficiaries and contributors.
- (a) Electronic furnishing of statements.
- (1) In general.
- (2) Consent.
- (3) Required disclosures.
- (4) Format.
- (5) Notice.
- (6) Access period.
- (b) Effective/applicability date.
- § 1.529A-1 Exempt status of qualified ABLE program and definitions.
- (a) In general. A qualified ABLE program described in section 529A is exempt from income tax, except for the tax imposed under section 511 on the

unrelated business taxable income of that program.

(b) *Definitions.* For purposes of section 529A, this section and §§ 1.529A-2 through 1.529A-7—

(1) *ABLE account* means an account established under a qualified ABLE program and owned by the designated beneficiary of that account.

(2) *Contracting State* means a State without a qualified ABLE program of its own, which, in order to make ABLE accounts available to its residents who are eligible individuals, contracts with another State having such a program.

(3) *Contribution* means any payment directly allocated to an ABLE account for the benefit of a designated beneficiary.

(4) *Designated beneficiary* means the individual who is the owner of the ABLE account and who either established the account at a time when he or she was an eligible individual or who has succeeded the former designated beneficiary in that capacity (successor designated beneficiary). If the designated beneficiary is not able to exercise signature authority over his or her ABLE account or chooses to establish an ABLE account but not exercise signature authority, references to the designated beneficiary with respect to his or her actions include actions by the designated beneficiary's agent under a power of attorney or, if none, a parent or legal guardian of the designated beneficiary.

(5) *Disability certification* means a certification deemed sufficient by the Secretary to establish a certain level of physical or mental impairment that meets the requirements described in § 1.529A-2(e).

(6) *Distribution* means any payment from an ABLE account. A *program-to-program transfer* is not a distribution.

(7) *Earnings* attributable to an account are the excess of the total account balance on a particular date over the *investment in the account* as of that date.

(8) *Earnings ratio* means the amount of earnings attributable to the account as of the last day of the calendar year in which the designated beneficiary's taxable year begins, divided by the total account balance on that same date, after taking into account all distributions made during that calendar year and all contributions received during that same year other than those (if any) returned in accordance with § 1.529A-2(g)(4).

(9) *Eligible individual* for a taxable year means an individual who either:

(i) Is entitled during that taxable year to benefits based on blindness or disability under title II or XVI of the Social Security Act, provided that such