September 21, 2015

CC:PA:LPD:PR (REG-102837-15)
Room 5203
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

http://www.regulations.gov (IRS REG-102837-15)

RE: Comments on Proposed Rule, Qualified ABLE Programs
RIN 1545-BM68, IRS REG-102837-15

As the President of the Special Needs Alliance (SNA), I am writing in response to the Notice of Proposed Ruling Making (NPRM) with respect to the Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act, codified in part at 26 U.S.C. § 529A.

The SNA is a national, non-profit organization committed to helping individuals with disabilities, their families, and the professionals who serve them. Many of our member attorneys have family members with special needs; all of them work regularly with public benefits, guardianship/conservatorships, planning for disabilities and special education issues. We volunteer significant time to the special needs community and advocate for legislative and regulatory change to improve the quality of life for individuals with disabilities.

Based on these experiences, the following comments on the proposed rules are intended to make the process of creating and using ABLE accounts as easy as possible for the individuals and families who the SNA members serve. All efforts should be made to make compliance with the rules for accounts simple to understand and simple to follow. Overall, there are many important clarifications provided in the proposed rules. Our comments highlight questions that the proposed rules do not contemplate, or do not sufficiently address. We are concerned that many of the proposed regulations may impact the public benefits that our clients receive. We believe that input must be provided and coordinated with the Social Security Administration and the State Medicaid programs. We ask that you revise the proposed regulations to address these issues so that the process of establishing an ABLE account is straightforward and those individuals and their families who would benefit from ABLE accounts will be able to do so without trepidation.

COMMENTS:

1. **REGULATION**: 529(A)-2(b)(3): "Community Development Financial Institutions (CDFIs). Some or all of the services described in paragraphs (b)(2)(i) and (ii) of this section may be performed by one or more Community Development Financial Institutions

(CDFIs) with whom the State (or its agency or instrumentality) contracts for that purpose."

QUESTION: What is a Community Development Financial Institution (CDFI)?

The proposed regulations allow qualified ABLE programs to establish contracts with Community Development Financial Institutions (CDFI). The proposed regulations do not provide a definition of CDFI, nor do they cite to an existing definition of CDFI. A CDFI is a specialized financial institution that aims to serve constituents who are underserved by traditional financial institutions. CDFI certification is conferred by the CDFI Fund, a program of the U.S. Department of the Treasury.

CDFIs have not been established in every state. Some states that establish ABLE programs may not have a preexisting CDFI. Those who are unfamiliar with CDFIs, may struggle to appreciate how a CDFI differs from a traditional banking institution. The specialized nature and certification of CDFIs makes them uniquely suited to provide services to ABLE account holders and agencies that work with qualified ABLE programs. The regulations will be more useful to legislators, providers, account holders and their advocates if a definition of CDFI or citation to an existing definition of CDFI is provided and accompanied by information about how to locate a CDFI in the appropriate State.

Proposed Solution: Define CDFI and any other entities with which ABLE programs may contract, provide a citation to 12 CFR 1805.104 or 12 CFR 1805.200; and provide listing or other means by which families and their advocates can locate a CDFI in the appropriate State.

2. **REGULATION:** See 529A-1(16): Qualified disability expense means any expenses incurred at a time when the designated beneficiary is an eligible individual that relate to the blindness or disability of the designated beneficiary of an ABLE account, including expenses that are for the benefit of the designated beneficiary in maintaining or improving his or her health, independence, or quality of life. See §1.529A-2(h). Any expenses incurred at a time when a designated beneficiary is neither disabled nor blind within the meaning of 1.529-1(b)(9)(A) or 1.529-2€(1)(i) are not qualified disability expenses.

QUESTION: What are qualified disability expenses?

The parents, representative payees, guardians, conservators or others who assist the special needs person have many reporting requirements. For example, each year a financial report is made to the Social Security Administration regarding the receipt and use of SSA funds. If the special needs beneficiary is the beneficiary of a trust, the trust and its financial status must be reported to SSA and Medicaid. Additionally, if the special needs beneficiary has funds in an account overseen by the Court, accountings must be filed with the Court, pursuant to the State law requirements. It is not clear from the proposed regulations how the beneficiary, or his/her representative, will determine what a qualified disability expense might be. Will the parent or other authorized person have to meet with the CDFI monthly or each time a distribution is made to ensure it is an acceptable qualified disability expense? Who makes that determination? Does a budget need to be submitted to the CDFI? Do proposed monthly expenses need to be discussed with the CDFI prior to making the distributions? Does the ABLE account always have to be a checking account? Does the person with access to the funds need to use only a check or debit

card to pay expenses so they can be tracked? Can cash be distributed from and ABLE account and then will receipts need to be provided monthly or in some other way to the "filer" or CDFI?

Instead of adding complexity to ensure that the beneficiary will not be penalized if an expense is later determined not to be a qualified disability expense, the definition should be changed to include any expense of the qualified individual. The qualified individual should be able to use the funds to go on vacation, buy a new computer, have new sheets for his/her bed, obtain clothing or anything that in any way benefits that special needs beneficiary. One reason parents and others advocated for the passage of the ABLE Act was to assist special needs beneficiaries to learn how to manage money and avoid having to limit their monthly resources to less than $2000. Simply because one has a disability should not mean that individual has to justify each and every distribution.

Proposed Solution: Expand the definition to mean any expense for the benefit of eligible beneficiary.

3. **REGULATION: 529(A)-2(c)(1);** "If an eligible individual is unable to establish an ABLE account on his or her own behalf, the ABLE account may be established on behalf of the eligible individual by the eligible individual's agent under a power of attorney or, if none, by a parent or legal guardian of the eligible individual."

   QUESTION: Why are the people who can create the ABLE account limited to the eligible individual, eligible individual's agent under a power of attorney or, if none, by a parent or legal guardian of the eligible individual?

Some eligible individuals who require assistance to establish an ABLE account will not have an agent under a power of attorney, parent or legal guardian to establish an ABLE account. Some eligible individuals may have a representative payee who oversees the SSA benefits, a grandparent, or other individual who helps the individual and who is a trusted advocate. Additionally, in some states, a guardian does not have authority over money, only health care decisions, while a Conservator, in such states, is the person or entity appointed by the Court to manage financial issues. The proposed legislation does not include Conservators. Additionally, a person may have created a Trust to benefit the eligible individual. Those individuals should also be included in the list of people who can create the ABLE account. Limiting the class of people to those in the current legislation may cause many eligible individuals to have no way to create the account. This example demonstrates how the proposed regulations are unduly restrictive to the potential detriment of eligible individuals who need assistance establishing accounts.

The proposed regulations are clear that an eligible individual may not have multiple ABLE accounts. In circumstances where multiple individuals have authority to establish an ABLE account on the eligible individual's behalf, should the proposed regulations list these individuals by priority so there is clarity about who has priority to establish an ABLE account?

Proposed Solution: Broaden the list of individuals who may establish ABLE accounts on the eligible individual's behalf to include spouses, children, Guardian of the Property, Conservators, a trustee of a trust of which the eligible individual is a beneficiary, and the representative payee for benefits received by an eligible individual based on blindness or a disability under Title II of the Social Security Act.

4. **REGULATION:** 529(A)-2(d)(3); "If the designated beneficiary of an ABLE account ceases to be an eligible individual, then for each taxable year in which the designated beneficiary is not an eligible individual, the account will continue to be an ABLE account, the designated beneficiary will continue to be the designated beneficiary of the ABLE account (and will be referred to as such), and the ABLE account will not be deemed to have been distributed….Additionally , no amounts incurred during that year and each subsequent year in which the designated beneficiary does not satisfy the definition of an eligible individual will be qualified disability expenses."

   QUESTION: What happens if the beneficiary (i.e. account holder) no longer meets the definition of Disabled? What are the financial consequences of distributions from the ABLE account?

It is unclear from the proposed regulations what the financial consequences are to the beneficiary if the beneficiary no longer meets the definition of "disabled." If the funds were used for medical expenses after the individual was no longer deemed to be "disabled," regardless of whether the individual meets the definition of "disabled," are those funds tax deductible from income and thus not subject to any financial consequences? For example, a person who was previously deemed "disabled" now needs to have a surgical procedure that is not completely covered by insurance. Can that individual use funds in the ABLE account to pay for that medically necessary surgical procedure without incurring a financial penalty or tax when the distribution is made?

Proposed Solution: Explain whether any distributions can be made from the ABLE account during a period when the individual is not an "eligible individual" without incurring any tax consequences. Additionally, it would be helpful to explain the exact tax consequences for making distributions from the ABLE account when the ABLE beneficiary is not an "eligible individual."

5. **REGULATION:** see 529(A)-2(g)(1); "Except in the case of program-to-program transfers, contributions to an ABLE account may only be made in cash. A qualified ABLE program may allow cash contributions to be made in the form of a check, money order, credit card, electronic transfer, or similar method."

   QUESTION: If an SSI recipient has excess SSI in any month can that be transferred to an ABLE account without any penalty from SSA or ABLE?

Sometimes an SSI recipient does not have expenses that use up all of the SSI payments in a month. In order to remain eligible for SSI benefits, the total assets of that SSI recipient cannot exceed $2,000 at the end of the month. Some clients, particularly disabled individuals who live at home or are receiving Medicaid benefits that pay for their medical, housing and food needs, may not have other expenses on which to spend his/her SSI benefit. While there appears to be no prohibition against transferring SSI funds to the ABLE account, there is no outright approval of this process. Because of the requirement that the State Medicaid agency receive any funds remaining in the ABLE account at the death of the beneficiary, it does not appear that allowing the transfer of SSI funds to an ABLE account would have any negative consequences for the benefit programs and it would allow the SSI beneficiary to remain eligible for SSI and 'save' funds for more necessary expenses later. At the current time, SSI beneficiaries might buy items that are not needed immediately and are purchased to ensure continued eligibility.

Proposed Solution: Allow SSI payments to be direct deposited to an ABLE account or if funds remain in a segregated SSI account, allow those to be contributed to an ABLE account without a tax impact and without loss of SSI benefits.

6. **REGULATION:** see 529(A)-2(h)(1); "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."

   QUESTION: Will paying for housing reduce SSI and be treated as In Kind Support and Maintenance ("ISM)?

Under the current SSI rules, if a third party pays for food or housing expenses of an SSI beneficiary, the SSI benefit is reduced by the lesser of 1/3 of the maximum SSI amount for that year or the actual costs of the food and housing paid for by the third party. The ABLE rules allow housing costs to be paid from an ABLE account. Since the funds are owned by the eligible individual, there should be no impact on SSI, but we would like confirmation that the payment from the ABLE account will not be deemed as ISM by the Social Security Administration and thus reduce the SSI benefit to the eligible individual. This is a very important issue for all SSI beneficiaries. In particular, the ABLE Act was created to allow a disabled individual to save some funds to be used to enhance his/her life. If the use of the money for housing costs will reduce SSI benefits, the public and those professionals who assist those with special needs, need to understand the consequences of making such expenditures and budgeting for that special needs beneficiary. For example, if a special needs beneficiary would like to be in a private room and is willing to pay $500 a month for that luxury, if the beneficiary pays with the SSI funds, the beneficiary will receive $733 a month, pay $500 a month and be left with $233 for other food and housing expenses. If the same beneficiary has an ABLE account and the ABLE account can pay the $500 and it is not deemed to be ISM, that same beneficiary will have $733 a month for other food and housing costs. If housing is deemed to be ISM, the beneficiary will use $500 from the ABLE account and will have SSI reduced by approximately $200 a month. In that case, the beneficiary will have "spent" approximately $700 for the $500 a month expense since he/she lost $200 of SSI funds.

Proposed Solution: Confirm that the payment of housing from an ABLE account is NOT ISM for SSI purposes.

7. **REGULATION:** see 529(A)-2(p); "A qualified ABLE program must provide that a portion or all of the balance remaining in the ABLE account of a deceased designated beneficiary must be distributed to a State that files a claim against the designated beneficiary or the ABLE account itself with respect to benefits provided to the designated beneficiary under that State's Medicaid plan established under title XIX of the Social Security Act. The payment of such claim (if any) will be made only after providing for the payment from the designated beneficiary's ABLE account of all outstanding payments due for his or her qualified disability expenses, and will be limited to the amount of the total medical assistance paid for the designated beneficiary after the establishment of the ABLE account (the date on which the ABLE account, or any ABLE account from which amounts were rolled or transferred to the ABLE account of the same designated beneficiary, was opened) over the amount of any premiums paid, whether from the ABLE

account or otherwise by or on behalf of the designated beneficiary, to a Medicaid Buy-In program under any such State Medicaid plan."

QUESTION: Before payback is made to satisfy any lien by a State Medicaid program, can funds in a deceased holder's account be applied towards funeral expenses if there was an existing contract, or balance on a contact, that was not paid in full by the time of the account holder's death?

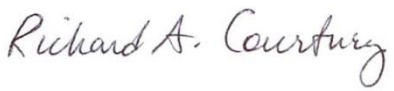
The proposed regulations require a qualified ABLE program to provide that a portion (or all) of the balance remaining in the ABLE account of a deceased designated beneficiary be paid to a state that files a claim against the designated beneficiary or the ABLE account itself, *however* they do permit outstanding expenses due for the Account Holder's qualified disability expenses to be paid *before* payment of any claim made by a state.

If the proposed regulations allow outstanding payments due for the deceased account holder's qualified disability expenses to be satisfied before any lien on the account is satisfied by the State's Medicaid plan, the regulations should also allow post-death payments to be made on an preexisting contract for funeral arrangements. This change to the proposed regulations would be consistent with the practice of many State Medicaid programs that do not count funds expended for funeral arrangements as an existing resource for Medicaid recipients.

Proposed Solution: Specifically allow remaining funds in a deceased holder's account to be used toward funeral expenses if there is an existing contract/remaining balance at the time of the Account Holder's death before funds are used to satisfy any lien entered by a State Medicaid program.

Thank you for the opportunity to submit comments on the proposed rule for Qualified ABLE Programs.

Sincerely,



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