



**Governor's Advisory Council for Exceptional Citizens (GACEC)**  
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**MEMORANDUM**

**DATE:** May 24, 2017

**TO:** The Honorable Members of the Delaware General Assembly

**FROM:** Dafne A. Carnright, Chairperson  
GACEC

**RE:** House Bill No. 145 (ABLE Act Revision)

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed House Bill No. 145 which clarifies the treatment of funds in an ABLE account upon the death of a designated beneficiary. Specifically it prohibits State agencies or instrumentalities from clawing back from the ABLE account any funds it has expended on behalf of a designated beneficiary. Council **endorses** the proposed legislation.

The federal model allows states to recover the costs of Medicaid expenditures on the deceased's behalf made since the inception of the account upon the death of the ABLE account holder. See excerpt from proposed federal regulation. This "claw back" provision is characterized as a "significant drawback for many families" since it deters family contributions to an ABLE account. See Reuters.com article, "The limitations of ABLE accounts for the disabled" (May 18, 2015). Recognizing the "downsides" to the "claw back" model, some states have opted to include an exemption from "claw back" recovery in their enabling legislation. For example, Pennsylvania included the following exemption in its 2016 enabling law (S.B. No. 879):

*(d) Death of beneficiary. – Unless prohibited by Federal law, upon the death of a designated beneficiary, proceeds from an account may be transferred to the estate of a designated beneficiary, or to an account of another eligible individual specified by the designated beneficiary or the estate of the designated beneficiary. An agency or instrumentality of the Commonwealth may not seek payment under section 529A(f) of the Internal Revenue Code from the account or its proceeds for benefits provided to a designated beneficiary.*

House Bill No. 145 adopts the Pennsylvania exemption almost verbatim. Compare lines 6-10. Therefore, it removes a disincentive for contributions to an ABLE account. It is also consistent with Delaware public policy in related contexts. For example, Delaware law authorizes the operation of the Delaware CarePlan Trust, a non-profit group trust for individuals with disabilities. See 12 Del.C. Ch. 40. That law requires the disregard of the participant's interest in the trust "in assessing financial eligibility and liability under any program of government benefits or assistance." See 12 Del.C. §4009. Elimination of the "claw back" from ABLE accounts facilitates savings of earned income and accumulation of a "nest egg" in the safe harbor of an ABLE account.

Thank you for your time and consideration of our observations and endorsement. Please feel free to contact me or Wendy Strauss at the GACEC office should you have any questions.