

BILL ANALYSIS

Senate Research Center

S.B. 1664
By: Perry et al.
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Recently, the United States Congress passed the Achieving a Better Life Experience (ABLE) Act, which amends Section 529 of the Internal Revenue Service Code of 1986 to create the opportunity for people with disabilities to have tax-free savings accounts (ABLE account).

The federal ABLE Act passed with bipartisan support from Congress. In fact, 34 of the co-sponsors were Texas representatives.

This account allows individuals with disabilities to have a savings account, in their own name, to cover qualified expenses such as education, housing, transportation, employment training and support, health care, assistive technology and personal support services, funeral and burial and other expenses, which will be ultimately delineated by the United States Treasury.

The federal legislation also contains Medicaid fraud protection against abuse and a Medicaid pay-back provision when the beneficiary passes away.

Eligible individuals with disabilities (with an age of onset the age 26 or younger) will be able to save their earned income and plan for the future without the fear of losing their eligibility for Medicaid.

While ABLE allows individuals to save their own money, families and friends will also be able to financially support their loved ones with gift donations. However, the total aggregate amount deposited into an individual account must be less than \$14,000 for each calendar year with a maximum account limit of \$100,000 (including interest and dividend earnings). All contributions to the account made by any person would not be tax deductible.

Historically, people with disabilities have had limited options for saving money. ABLE accounts will allow people with disabilities to now live more independent, self-directed, and meaningful lives.

Although Congress passed the ABLE Act, states must pass legislation to enact ABLE Accounts.

S.B. 1664 instructs the comptroller of public accounts of the State of Texas (comptroller) to create ABLE accounts at the state level. Additionally, the bill provides for consumer protection, provides for the creation of a stakeholder board made up of the disability community, and gives flexibility to the comptroller to create rules around future federal regulations.

S.B. 1664 amends current law relating to the establishment of the Texas Achieving a Better Life Experience (ABLE) Program; authorizing the imposition of fees.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Prepaid Higher Education Tuition Board in SECTION 2 (Sections 54.904 and 54.915, Education Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 54.602(b), Education Code, as follows:

(b) Requires the Prepaid Higher Education Tuition Board (board) to administer following programs:

- (1) the prepaid higher education tuition program established under this subchapter;
- (2) the higher education savings plan established under Subchapter G (Higher Education Savings Plan);
- (3) the prepaid tuition unit undergraduate education program established under Subchapter H (Prepaid Tuition Unit Undergraduate Education Program: Texas Tomorrow Fund It);
- (4) the Texas Save and Match Program established under Subchapter I (Texas Save and Match Program); and
- (5) the Texas Achieving a Better Life Experience Program established under Subchapter J.

SECTION 2. Amends Chapter 54, Education Code, by adding Subchapter J, as follows:

**SUBCHAPTER J. TEXAS ACHIEVING A BETTER LIFE EXPERIENCE (ABLE)
PROGRAM**

Sec. 54.901. **PURPOSES OF PROGRAM.** Provides that the purposes of this subchapter are as follows:

- (1) to encourage and assist individuals and families in saving funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life; and
- (2) to provide secure funding for qualified disability expenses on behalf of designated beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, the Medicaid program under Title XIX of the Social Security Act, the supplemental security income program under Title XVI of the Social Security Act, the beneficiary's employment, and other sources.

Sec. 54.902. **DEFINITIONS.** Defines "ABLE account," "ABLE program" or "program," "board," "designated beneficiary," "eligible individual," "financial institution," "Internal Revenue Code," "participant," "participant agreement," "qualified disability expenses," and "Texas ABLE savings plan account."

Sec. 54.903. **CREATION OF PROGRAM AND ACCOUNT; ADMINISTRATION.** (a) Provides that the Texas Achieving a Better Life Experience (ABLE) Program is created under this subchapter. Provides that the Texas ABLE savings plan account is established as a trust fund outside of the state treasury.

(b) Requires the board to administer the ABLE program.

(c) Provides that the board, the office of the comptroller, and any manager or other contractor that contracts with the board to provide services under this subchapter are not covered entities for purposes of Chapter 181 (Medical Records Privacy), Health and Safety Code.

Sec. 54.904. **POWERS AND DUTIES OF BOARD.** (a) Requires the board, to establish and administer the ABLE program, to:

- (1) develop and implement the program;

(2) adopt rules and establish policies and procedures to implement this subchapter to:

(A) permit the program to qualify as a qualified ABLE program under Section 529A, Internal Revenue Code;

(B) make changes to the program as necessary for the participants in the program to obtain or maintain federal income tax benefits or treatment provided by Section 529A, Internal Revenue Code, and exemptions under federal securities laws; and

(C) make changes to the program as necessary to ensure the program's compliance with all other applicable laws and regulations;

(3) either directly or through a contractual arrangement for investment or plan manager services with a financial institution or plan manager or another qualified entity, develop and provide information for participants and their families necessary to establish and maintain an ABLE account;

(4) enter into agreements with any financial institution or any state or federal agency or contractor or other entity as required to administer the program under this subchapter;

(5) enter into participation agreements with participants;

(6) solicit and accept any gifts, grants, legislative appropriations, and other funds from the state, any unit of federal, state, or local government, or any other person, firm, partnership, or corporation;

(7) invest participant funds in appropriate investment instruments; and

(8) make provision for the payment of costs of administering the program.

(b) Provides that the board has all powers necessary or proper to carry out its duties under this subchapter and to effectuate the purposes of this subchapter, including the power to:

(1) sue and be sued;

(2) enter into contracts and other necessary instruments;

(3) enter into agreements or other transactions with the United States, state agencies, and other entities as necessary;

(4) appear on its own behalf before governmental agencies;

(5) contract for necessary goods and services, including specifying in the contract duties to be performed by the provider of a good or service that are a part of or are in addition to the person's primary duties under the contract;

(6) contract with another state that administers a qualified ABLE program as authorized by Section 529A, Internal Revenue Code, to provide residents of this state with access to a qualified ABLE program;

(7) engage the services of private consultants, trustees, records administrators, managers, legal counsel, auditors, and other appropriate parties or organizations for administrative or technical assistance;

- (8) participate in any government program;
- (9) impose fees and charges;
- (10) develop marketing plans or promotional materials or contract with a consultant to market the program;
- (11) make reports;
- (12) purchase liability insurance covering the board and employees and agents of the board;
- (13) make changes to the program as necessary for the participants in the program to obtain or maintain federal income tax benefits or treatment provided by Section 529A, Internal Revenue Code, and exemptions under federal securities laws; and
- (14) establish other policies, procedures, and eligibility criteria to implement this subchapter.

Sec. 54.9045. COLLECTION OF FEES. Requires the board to collect administrative fees and service charges in connection with any agreement, contract, or transaction relating to the program in amounts not exceeding the amount necessary to recover the cost of establishing and maintaining the program.

Sec. 54.905. INVESTMENT OF FUNDS. (a) Requires that all money paid by a participant in connection with a participation agreement be:

- (1) deposited into an individual ABLE account held on behalf of that participant in the Texas ABLE savings plan account; and
- (2) promptly invested by the board.

(b) Requires the board at least annually to establish and review the asset allocation and selection of the underlying investments of the ABLE program.

(c) Authorizes the board to delegate to duly appointed financial institutions authority to act on behalf of the board in the investment and reinvestment of all or part of the funds and to also delegate to those financial institutions the authority to act on behalf of the board in the holding, purchasing, selling, assigning, transferring, or disposing of any or all of the securities and investments in which the funds in the Texas ABLE savings plan account have been invested, as well as the proceeds from the investment of those funds.

(d) Authorizes the board, in delegating investment authority to financial institutions, to authorize the pooling of funds from the ABLE accounts with other funds administered by the board to maximize returns for participants. Requires the board, if funds from the ABLE accounts are pooled with other funds administered by the board, to track, monitor, report, and record separately all investment activity related to the ABLE accounts, including any earnings and fees associated with each individual ABLE account.

(e) Authorizes the board to select one or more financial institutions to serve as custodian of all or part of the program's assets.

(f) Authorizes the board, in the board's discretion, to contract with one or more financial institutions to serve as plan manager and to invest the money in ABLE accounts.

(g) Provides that a contract between the board and a financial institution to act as plan manager under this subchapter may be for a term of up to five years and may be renewable.

(h) Requires members of the board, in exercising or delegating investment powers and authority, to exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. Provides that a member of the board is not liable for any action taken or omitted with respect to the exercise of, or delegation of, those powers and authority if the member discharged the duties of the member's position in good faith and with the degree of diligence, care, and skill that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims.

(i) Provides that, in administering this subchapter, the board is subject to the board's ethics policy adopted under Section 54.6085 (Prepaid Higher Education Tuition Board Ethics Policy).

Sec. 54.906. TREATMENT OF ASSETS. (a) Requires that the assets of the ABLE program at all times be preserved, invested, and spent only for the purposes provided by this subchapter and in accordance with the participation agreements entered into under this subchapter.

(b) Provides that, except as provided by Section 529A, Internal Revenue Code, the state does not have a property right in the assets of the ABLE program.

Sec. 54.9065. EXCLUSION OF ABLE ACCOUNT ASSETS FROM CERTAIN BENEFIT ELIGIBILITY DETERMINATIONS. Prohibits the agency making the determination of eligibility for the assistance or benefit, notwithstanding any other provision of state law that requires consideration of the financial circumstances of an applicant for assistance or a benefit provided under that law, from considering the amount in the applicant's ABLE account, including earnings on that amount, and any distribution for qualified disability expenses in determining the applicant's eligibility to receive and the amount of the assistance or benefit with respect to the period during which the individual maintains the ABLE account.

Sec. 54.907. EXEMPTION FROM SECURITIES LAWS. Provides that an ABLE account is not a security within the meaning of the term as defined by Section 4 (Definitions), The Securities Act (Article 581-4, Vernon's Texas Civil Statutes), and is exempt from the provisions of The Securities Act (Article 581-1 et seq., Vernon's Texas Civil Statutes).

Sec. 54.908. PARTICIPATION AGREEMENTS. (a) Authorizes the board, under the ABLE program, to enter into participation agreements with participants on behalf of designated beneficiaries.

(b) Provides that a participation agreement may include the following terms:

(1) the requirements and applicable restrictions for:

(A) opening an ABLE account;

(B) making contributions to an ABLE account; and

(C) directly or indirectly, directing the investment of the contributions or balance of the ABLE account;

(2) the eligibility requirements for a participant to enter into a participation agreement and the rights of that participant;

- (3) the administrative fee and other fees and charges applicable to an ABLE account;
- (4) the terms and conditions under which an ABLE account or participation agreement may be modified, transferred, or terminated;
- (5) the method of disposition of abandoned ABLE accounts; and
- (6) any other terms and conditions the board considers necessary or appropriate, including those necessary to conform the ABLE account to the requirements of Section 529A, Internal Revenue Code, or other applicable federal law.

(c) Authorizes that the participation agreement be amended throughout the term of the agreement, including to allow a participant to increase or decrease the level of participation and to change the designated beneficiary or other matters authorized by this section and Section 529A, Internal Revenue Code.

(d) Authorizes the board, if the board finds a participant has made a material misrepresentation in the application for a participation agreement or in any communication regarding the ABLE program, to liquidate the participant's ABLE account. Entitles the participant, if the board liquidates an ABLE account under this subsection, to a refund, subject to any charges or fees provided by the participation agreement and the Internal Revenue Code.

Sec. 54.9085. ENCUMBRANCE OR TRANSFER OF ACCOUNT PROHIBITED. (a) Prohibits an ABLE account from being assigned for the benefit of creditors, used as security or collateral for any loan, or otherwise subject to alienation, sale, transfer, assignment, pledge, encumbrance, or charge.

(b) Provides that, notwithstanding Subsection (a), the state is a permissible creditor upon the death of a designated beneficiary for the purposes set forth in Section 529A, Internal Revenue Code.

Sec. 54.909. USE OF FUND ASSETS. Provides that the assets of the program may only be used to:

- (1) make distributions to designated beneficiaries;
- (2) pay the costs of program administration and operations;
- (3) make refunds for cancellations, excess contributions, liquidation under Section 54.908(d), and death, in accordance with a computation method determined by the board;
- (4) roll over funds to another ABLE account to the extent authorized by Section 529A, Internal Revenue Code; and
- (5) make distributions to the state as authorized by Section 529A, Internal Revenue Code.

Sec. 54.910. DESIGNATED BENEFICIARY. (a) Provides that the participant is the designated beneficiary and the owner of the ABLE account except as described by Subsection (b) and as otherwise permitted by Section 529A, Internal Revenue Code.

(b) Authorizes the parent or custodian or other fiduciary of the beneficiary, if the designated beneficiary of the account is a minor or has a custodian or other fiduciary appointed for the purpose of managing the minor's financial affairs, to serve as the participant if that form of ownership is permitted or not prohibited by Section 529A, Internal Revenue Code.

(c) Authorizes a designated beneficiary to own only one ABLÉ account, and each ABLÉ account to have only one owner, except as otherwise permitted by Section 529A, Internal Revenue Code.

Sec. 54.911. VERIFICATION UNDER OATH. Authorizes the board to require a participant to verify under oath:

- (1) the participant's certification as an eligible individual;
- (2) the participant's selection to change a designated beneficiary;
- (3) the participant's selection to cancel a participation agreement; and
- (4) any other information the board may require.

Sec. 54.912. CANCELLATION. (a) Authorizes a participant to cancel a participation agreement at will.

(b) Requires that each participation agreement provide that the agreement may be canceled on the terms and conditions and on payment of applicable fees and costs as provided by rule.

Sec. 54.913. REPORTS. (a) Requires the board to comply with the reporting requirements in Section 529A, Internal Revenue Code.

(b) Requires the board to report financial information related to the ABLÉ program in an annual financial report in accordance with the comptroller's requirements and guidelines for state agencies.

(c) Requires the board to include financial information for the ABLÉ program in the board's annual report posted on the board's website.

(d) Requires the board to prepare any other reports required by state or federal rules and regulations.

Sec. 54.914. CONFIDENTIALITY OF RECORDS. (a) Provides that, except as otherwise provided by this section, all information relating to the program is public and subject to disclosure under Chapter 552 (Public Information), Government Code.

(b) Provides that information relating to a prospective or current participant or designated beneficiary or to a participation agreement, including any personally identifiable information, is confidential except that the board may disclose that information to:

- (1) a participant regarding the participant's account; or
- (2) a state or federal agency as necessary to administer the program or as required by Section 529A, Internal Revenue Code, or other federal or state requirements.

Sec. 54.915. PROGRAM LIMITATIONS. (a) Provides that nothing in this subchapter or in any participation agreement entered into under this subchapter may be construed to guarantee that amounts saved under the program will be sufficient to cover the qualified disability expenses of a designated beneficiary.

(b) Provides that nothing in this subchapter or in any participation agreement entered into under this subchapter may be construed to create any obligation of the state, any agency or instrumentality of the state, or a plan manager to guarantee for the benefit of a participant:

- (1) the return of any amount contributed to an account;
- (2) the rate of interest or other return on an account; or
- (3) the payment of interest or other return on an account.

(c) Requires the board by rule to require that informational materials used in connection with a contribution to an ABLE account clearly indicate that the account is not insured by this state and that neither the principal deposited nor the investment return is guaranteed by the state.

Sec. 54.916. TERMINATION OR MODIFICATION OF PROGRAM. (a) Requires the comptroller, if the comptroller of public accounts of the State of Texas (comptroller) determines that the ABLE program is not financially feasible, to notify the governor and the legislature and recommend that the board not administer an ABLE program or that the program be modified or terminated. Provides that the program may be terminated only by the legislature.

(b) Authorizes the board, if the comptroller determines that the ABLE program is not financially feasible, to adjust the terms of participation agreements as necessary to ensure the financial feasibility of the program.

(c) Requires that the balance of each ABLE account, if the legislature terminates the ABLE program, be paid to the participant, to the extent possible.

Sec. 54.917. ABLE PROGRAM ADVISORY COMMITTEE. (a) Provides that the ABLE program advisory committee (advisory committee) is established to review rules and procedures related to the ABLE program, to provide guidance, suggest changes, and make recommendations for the administration of the program, and to provide assistance as needed to the board and comptroller during the creation of the program.

(b) Requires the comptroller to appoint at least five and not more than seven members to the advisory committee, including at least one member from each of the following groups:

- (1) persons with a disability who qualify for the program;
- (2) family members of a person with a disability who qualifies for the program;
- (3) representatives of disability advocacy organizations; and
- (4) representatives of the financial community.

(c) Requires the comptroller to appoint a presiding officer.

(d) Requires the advisory committee to meet quarterly or more frequently as the presiding officer determines is necessary to carry out the responsibilities of the committee.

(e) Provides that a member of the advisory committee is not entitled to compensation or reimbursement for travel expenses.

(f) Provides that Chapter 2110 (State Agency Advisory Committees), Government Code, does not apply to this section.

(g) Provides that this section expires and the advisory committee is abolished December 1, 2019.

SECTION 3. Requires a state agency, if necessary for implementation of a provision of this Act, to request a waiver or authorization from a federal agency, and authorizes a delay of implementation until such a waiver or authorization is granted.

SECTION 4. Authorizes the board to begin enrollment in the ABLE program as soon as reasonably practical to allow sufficient time for successful development and implementation of the ABLE program.

SECTION 5. Requires the comptroller, not later than December 1, 2015, to appoint the members of the ABLE program advisory committee as required by Section 54.917, Education Code, as added by this Act.

SECTION 6. Effective date: upon passage or September 1, 2015.