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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

The undersigned organizations respectfully submit our comments concerning 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. Our organizations are all members of the Consortium for Citizens with Disabilities (CCD). CCD is a coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration, and inclusion of the approximately 57 million children and adults with disabilities in all aspects of society.

The ABLE Act allows qualified children and adults with disabilities the opportunity to save private funds for the future. These funds are dedicated to expenses related to their disability and aimed at maintaining their health, independence, and quality of life. The opportunity and promise of the ABLE Act, and its subsequent state programs, has the potential to have a profound effect on millions of individuals with disabilities and their families across the country. We are pleased to notice that the significance of this opportunity has been well recognized by the Department of Treasury and the Internal Revenue Service (IRS) and, as a result, is well reflected in several extremely positive areas of the NPRM. Additionally, we do acknowledge that this undertaking was not without its challenges and wish to thank the Department, along with the IRS, for meeting its statutory timeline with respect to the release of the NPRM.

That being said, we would continue to encourage the IRS to examine additional ways to lessen the administrative burden on state ABLE administrators, further streamline access to state programs for potential qualified beneficiaries in a simple and straightforward manner, and create more uniformity in certain areas.

Section 1.529A-1 Exempt Status of Qualified ABLE Program and Definitions

Sec. 1.529A-1(b)(2) Contracting State

We would like clarification on whether or not a state without an ABLE program can contract with multiple states (that have an ABLE program) or just a single state. Not unlike the operations of the 529 college savings plans, we believe potential ABLE beneficiaries and their families should have as wide an array of

program options as possible. Providing the availability to choose between multiple ABLE programs promotes competition among the programs and thus incentivizes states to ensure lower fees and minimal costs to the beneficiary. These costs will be further reduced if multiple states are allowed to contract together into ABLE program consortiums, an idea which has been proposed by multi-state financial entities in their ABLE program design discussions. A fundamental advantage of creating an ABLE account is that it should not be cost prohibitive to families and qualified beneficiaries with relatively low to modest means. In addition, as a result of the potential longevity of the accounts, combined with the availability of saving for short and long term expenses, a qualified beneficiary should have the choice to examine other ABLE programs outside of their state of residence in order to determine the investment option(s) which would best meet his/her needs.

We believe that allowing a state without an ABLE program to contract with multiple states with an ABLE program is a reasonable interpretation of the statute and is supported by the intent of the law. Furthermore, such an approach has the potential of allowing development of larger programs with the potential for broader investment choices, streamlined administration, and potentially significantly lower fees for individual account holders. Therefore, we believe it would be in the best interests' of the beneficiaries, financial planners, and ABLE program administrators to allow for multi-state contracts under a single ABLE program.

Sec. 1.529A-1(b)(4) Designated Beneficiary

We appreciate the confirmation on the beneficiary being the account owner, as well as an option for an individual other than the beneficiary to have signature authority in the event that the beneficiary chooses not to exercise that authority or has been determined to lack the capacity to enter into such an agreement. That being said, we would recommend that the IRS consider expanding the scope of the individuals eligible for signature authority to also include: a single designee of the parent or legal guardian (such as, but not limited to, a particular sibling or trusted friend of the beneficiary or family).

Section 1.529A-2 Qualified ABLE Program

Sec. 1.529A-2(b)(3) Community Development Financial Institutions (CDFIs)

We believe that the NPRM describes the administrative responsibilities of ABLE programs to be more extensive than that of their 529 college savings plans counterparts. We do appreciate IRS' efforts to suggest ways to relieve state administrative burden and cost. We believe that CDFIs could, with additional appropriations (government or otherwise) and the appropriate training, assist states in ABLE implementation and program maintenance. That being said, we would also recommend that IRS make it clear that other entities could play a similar role. Our concern is that states may assume that CDFIs are the only entities that have the authority to assist with the various responsibilities noted in the NPRM.

Sec. 1.529A-2(c)(1) Establishment of an ABLE Account

State residency requirement: As you may know, U.S. Sen. Richard Burr (R-NC) recently introduced an amendment to eliminate the state residency requirement, which would allow an ABLE account to be started in any state and not be limited to just the individual's state of residence. Although this amendment was withdrawn in committee, we believe that it had merit and that eliminating the state residency requirement would simplify plans for ABLE program development and implementation, lead to a more consistent and uniform ABLE program design, minimize administrative burdens on account beneficiaries and administrators, and would make the 529A program more consistent with the traditional 529 program.

We hope that the IRS will support this revision to the ABLE Act when the amendment is offered again in the future.

Who Can Establish an ABLE Account on Behalf of an Eligible Individual: see Comment under "Designated Beneficiary"

Sec. 1.529A-2(c)(2)(i) Only One ABLE Account

We acknowledge that the statute (and subsequent NPRM) allows for no more than one ABLE account per qualified beneficiary at any single point in time (with the exception of a rollover or program to program transfer). We believe that the method of verification by way of signature under penalty of perjury does offer a reliable safeguard coupled with a limited administrative burden to the State ABLE program.

Sec. 1.529A-2(c)(2)(ii) Treatment of Additional Accounts

In the case of possible multiple accounts, we appreciate that the NPRM allows for a short grace period in which the funds can be returned to the contributor without unfavorable tax implications. That being said, it is unclear if those funds held by additional ABLE accounts (not the existing original account), even if returned under the given time period, would count against the qualified beneficiary's eligibility or continued eligibility for federally funded means tested programs. We urge the IRS to clarify that this grace period will also effectively apply to eligibility status for federal means-tested benefits by treating the funds as incomplete contributions not received by the designated beneficiary.

Sec. 1.529A-2(c)(3) Beneficial Interest

We support the proposed rule that a person with signature authority over the account (other than the designated beneficiary) may neither have nor acquire any beneficial interest in the account during the lifetime of the beneficiary and must administer the account for the benefit of the designated beneficiary.

Sec. 1.529A-2(d)(1) Eligible Individual

The proposed rule gives states the authority to determine what documentation individuals must provide to satisfy eligibility criteria and continued eligibility. Furthermore, certification is considered filed once submitted to the state ABLE program administrator. While we appreciate the language related to the filing status, as we believe it may expedite the opening of an ABLE account for a qualified beneficiary, we do have concerns over the degree of flexibility a state is being given with respect to the specific documentation that will need to be filed. We urge the IRS to provide guidance to standardize the documentation necessary for eligibility. The information that the ABLE administrators collect and the IRS will ultimately have on file should include the following information:

a. Statement that blindness or disability occurred before age 26; AND
b. Basis of eligibility;
    i. Currently eligible for Supplemental Security Income (SSI – Title XVI of the Social Security Act); OR
    ii. Currently eligible for Social Security disability programs (Title II of the Social Security Act); ORF
    iii. Disability Certification:

1. (a) Blindness; or (b) Medically determinable physical or mental impairment, resulting in marked and severe functional limitations, expected to result in death or last at least 12 continuous months; AND
2. Written diagnosis signed by a physician.

Consistency in proof of eligibility would minimize confusion in the disability community and would increase the likelihood that a person who qualifies for an ABLE program in one state would also qualify for the ABLE program in another state in the event that she moves and desires to roll over the account. This would also ease the burden on health care providers (who often treat patients from different neighboring states) so that they would not need to change their criteria for eligibility certifications of their patients.

We urge IRS to develop a sample eligibility certification form that states could choose to adopt, which would be signed by the beneficiary under penalty of perjury. This form would contain elements such as:

I. How ABLE eligibility is established (with 3 options: (1) Entitlement to benefits under SSDI; or (2) Entitlement to benefits under SSI; or (3) a disability certification of eligibility that states that (a) the individual is blind or (b) has a medically determinable physical or mental impairment that has resulted in marked and severe functional limitations and is expected to result in death, or has lasted or is expected to last for a continuous period of not less than 12 months; and
II. A statement that the blindness or disability occurred prior to age 26; and
III. An indication of the categories in which the diagnosis falls (this could be a check box format and list categories from IRS Form 5498-QA).

Further certifications such as a recent entitlement letter for Social Security Act benefits or an authorized signature of the physician and date of diagnosis could be requested to prove eligibility, but due to privacy concerns, we recommend that the beneficiary maintains possession and control over this information but is ready to produce it if eligibility is in question.

Sec. 1.529A-2(d)(2)(i) and Sec. 1.529A-2(d)(2)(ii) Frequency of Recertification and Considerations

Due to the combination of characteristics that would allow an individual to be a qualified beneficiary (age of 26 requirement and severity of disability), many participants will have conditions/impairments that are not expected to improve to an extent that would disqualify them as a designated beneficiary. For that reason, we support the ability of an ABLE program to impose different periodic recertification requirements for different impairments to minimize the administrative burden on qualified beneficiaries and program administrators. That being said, we would recommend there be as much uniformity across ABLE programs with respect to the periodic recertifications as is possible. While the compassionate allowance list does offer a good example of conditions that are unlikely to improve, there is no list that would be all-inclusive of long-term conditions and impairments.

Therefore, we suggest that the original eligibility certification form include a check box and signature line for a physician to certify that the condition or impairment is not likely to improve, and that the *certification be considered effective for a period of 5 years* after which a new recertification could be filed for the next 5 years with the same stipulations. We also suggest that recertification be waived for those beneficiaries whose Social Security benefits qualify them for ABLE accounts so long as they remain on Social Security.

Sec. 1.529A-2(d)(3) Loss of Qualification as an Eligible Individual

We support the idea of an account maintaining its status as an ABLE account during a period of time in which the designated beneficiary may no longer be a qualified beneficiary. This allows a beneficiary who may experience a temporary period of time where they no longer meet the disability criteria (such as a cancer patient in remission), the ability to still maintain the funds in the account for future use if the disability should recur. If the individual again meets the ABLE qualifying criteria, s/he would not be disqualified from supports and services due to the funds in the ABLE account and those funds would again be available to meet qualified disability expenses.

Sec. 1.529A-2(e)(1) Disability Certification

While we agree that the qualifying criteria in the disability certification is sound, we have come to the conclusion that requiring the State ABLE program to receive and maintain sensitive materials, particularly materials of a medical nature, could have an extensively burdensome result on the program administrators and create privacy concerns for the beneficiaries. Again, our aim is to keep administrative burden to a minimum in hopes that it will keep the cost of the programs down, and thus make them more accessible to potential qualified beneficiaries.

While the qualified beneficiary should need to meet all the criteria stated in the NPRM, including having the diagnosis of his/her impairment, signed by a qualified physician, we would recommend a form, signed under penalty of perjury, that the qualified beneficiary meets the criteria and if ever audited will produce the diagnosis related to the impairment (along with the physician's signature) dated prior to the opening of the ABLE account. This form would serve as the disability certification. The qualified beneficiary would be responsible for holding the record of those sensitive materials while the program administrator would record but not verify how the individual is qualified.

Sec. 1.529A-29(e)(2) Marked and Severe Functional Limitations

We applaud the proposed provision and the preamble discussion regarding the language of the disability certification requirement which uses the "marked and severe functional limitations" from the SSA definition for childhood disability, *but without regard to age*. This is a critically important aspect of the disability certification definition and we believe it achieves the intended statutory result.

Sec. 1.529A-2(e)(3) Compassionate Allowance List and Additional Guidance

See comment related to "Frequency of Recertification and Considerations."

Sec. 1.529A-2(f) Change of Designated Beneficiary

We urge the IRS to allow the designated beneficiary, or parent, legal guardian, or agent with appropriate power of attorney, to establish (during the lifetime of the designated beneficiary) a "successor designated beneficiary" (SDB). The "SDB" would have to meet the federal definition of "family member" in the 529A statute. Upon the death of the designated beneficiary, the SDB would then become the designated beneficiary of the deceased beneficiary's ABLE account. Upon the circumstance in which the SDB already has an ABLE account, the funds of the deceased beneficiary's ABLE account would then be rolled over to the ABLE account of the SDB.

The IRS should establish a process for this designation. The IRS should also consider establishing, as a part of this process, that such designation is null and void if the named SDB is not an eligible individual at the time of the designated beneficiary's death.

Sec. 1.529A-2(h) Qualified Disability Expenses

We strongly support the proposed broad definition of qualified disability expenses, including allowing for basic living expenses. Individuals with disabilities often have a wide range of needs related to their disability and we appreciate a definition that reflects this wide array of needs. Specifically, the inclusion of basic living expenses will be important when people using SSI benefits reach the $100,000 limit and face an end to their monthly cash benefits; they will need to use the ABLE funds for basic living expenses that had formerly been covered by SSI cash benefits.

In addition, relating the expenses to maintaining or improving the beneficiary's health, independence, or quality of life further pairs the more tangible aspects of the program with the spirit and intent of the law. We also appreciate and strongly support the language stipulating that the qualified disability expense need not be of medical necessity and may have coincidental peripheral benefits to an individual in addition to the qualified beneficiary. These provisions will make it possible to more easily meet the needs of beneficiaries in daily life and to avoid unnecessarily twisted interpretations to determine whether anyone else is getting some incidental benefit out of an expenditure.

With respect to the language related to the responsibility of the ABLE program to establish a safeguard to distinguish between non-qualified and qualified distributions, there seems to be some uncertainty as to what may constitute an acceptable "safeguard." We would recommend the IRS offer an example of what would be allowable as a "safeguard." Additionally we would ask that the example articulate a reasonable safeguard that takes into consideration the limited administrative resources and capacities of state ABLE administrators. While we are confident that states will maintain their programs within the parameters of the law and regulations, we aim to keep administrative burden to a minimum, as we could foresee robust administrative responsibilities easily translated into overly cumbersome fees for the qualified beneficiary.

We would envision an appropriate safeguard to distinguish between non-qualified and qualified distributions to be something along the lines of a single form annually filed with the state ABLE program stating that all distributions made during such year were qualified distributions and signed under penalty of perjury. Under this proposed safeguard, the beneficiary would be solely responsible for keeping receipts and other evidence of allowable expenditures, and would only need to produce this documentation if expenditures were challenged or an audit of the ABLE account was requested. This aligns with a Health Savings Account model and keeps the recordkeeping burden on the individual instead of on the state administrator. Any requirement wherein a state ABLE program would need to certify distributions as qualified on a purchase-by-purchase basis would be extraordinarily prohibitive to the beneficiary and would presumably account for exhaustive administrative burden.

The question of housing versus non-housing expenditures is an issue for the Social Security Administration, not the IRS, and is relevant only for beneficiaries for the Supplemental Security Income (SSI) program. This information should be collected by SSA from SSI beneficiaries as it does so now, regardless of other sources of income. It is not information that is needed from all beneficiaries and therefore should not be required of them broadly.

Sec. 1.529A-2(j) Program to Program Transfers

We fully support the program-to-program option as described in Sec. 1.529A-1(b)(14) and believe it is an option that may alleviate concerns related to the 60-day permissible rollover period, specifically whether or not those funds (within those 60 days) could be counted against the qualified beneficiary's eligibility for

certain means tested benefits. While a program to program transfer may be the most efficient means to transfer funds, we still believe that the qualified beneficiary should have all the options under the law, including the 60-day rollover option, to transfer funds how they see fit. To avoid unnecessary trouble and uncertainty for beneficiaries, we urge the IRS to clarify that the funds are still within the statutory protection during a 60-day permissible rollover period.

Additionally, for those qualified beneficiaries who wish to utilize a program to program transfer, or the 60-day roll over provision, we urge the IRS to allow for assumed eligibility into the receiving program. Due to the fact that criteria for eligibility is consistent, being established in statute, we don't feel that the individual should have to file additional eligibility documentation prior or upon the transfer to the new program. That being said, we do acknowledge needing to file documentation at the time of re-certification.

Sec. 1.529A-2(o) Change of Residence

We strongly support this provision. It is foreseeable that a qualified beneficiary may over the lifetime of the account need to change residency to another state. It is important that the individual has the option to continue to maintain their ABLE account in the state in which it was established.

Sec. 1.529A-2(p) Post-Death Payments

See comment related to "Change of Designated Beneficiary."

Regarding the Medicaid payback provision, we support the IRS' interpretation that the state is a creditor and not a beneficiary. We urge the IRS to clarify that if there is more than one state that is eligible for Medicaid payback, the payback to all eligible states can be prorated.

Sec. 1.529A-6 Reporting of Distributions from and Termination of an ABLE Account

Sec. 1.529A-6(d) Request for TIN of Contributor(s)

Current safeguards already in existence and utilized by 529 administrators make the probability of excess contributions fairly rare. In light of this, we believe that it is unnecessary for an ABLE program to have to request the TIN for each contributor at the time a contribution is made. We find that this proposed requirement adds undue burden. We would ask that the ABLE administrators only have to obtain a contributor's TIN in the unlikely event that an excess contribution makes it past their system and has been determined to have accrued interest.

Conclusion

Again we appreciate the opportunity to submit comments concerning the ABLE Act NPRM and look forward to the public hearing on October 14th. We thank the Treasury and the IRS for its' prompt release of the NPRM and for the thoughtful evaluation of the statute. If you have any questions concerning our comments, or would like further clarification/explanation on any aspects included in this document, please contact Sarah Meek, co-chair of the CCD Financial Security Task Force, at smeek@lutheranservices.org.

Sincerely,

American Association on Health and Disability
American Network of Community Options and Resources (ANCOR)

Association of Assistive Technology Act Programs
Autistic Self Advocacy Network
Easter Seals
Goodwill Industries International
Lutheran Services in America Disability Network
National Academy of Elder Law Attorneys
National Alliance on Mental Illness
National Association of Councils on Developmental Disabilities
National Association of State Directors of Developmental Disabilities Services
National Disability Institute
National Down Syndrome Congress
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Special Needs Alliance
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