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April 11, 2016

The Honorable Lawrence J. Hogan, Jr.  
Governor of Maryland  
State House  
100 State Circle  
Annapolis, Maryland 21401

***RE: House Bill 431 and Senate Bill 355, "Maryland Achieving a Better Life Experience (ABLE) Program – Establishment"***

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 431 and Senate Bill 355, "Maryland Achieving a Better Life Experience (ABLE) Program – Establishment." The bills, which are identical, contain an apparent drafting error in new § 18-19C-03(c)(4) of the Education Article ("ED"), page 12, lines 16 through 18 of the House bill and page 12, lines 14 through 16, of the Senate bill. While this provision can be construed consistent with the legislature's intent, it should be corrected during the next legislative session.

The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 ("ABLE Act") added § 529A to the Internal Revenue Code, which authorizes a new form of tax-advantaged savings accounts ("ABLE accounts") for disabled individuals. Pub. Law 113-295. Distributions from an ABLE account for qualified disability expenses, including the investment earnings portion of the distribution, are not included in the beneficiary's gross income for federal tax purposes. 26 U.S.C. § 529A(c). In addition to the special tax treatment, funds in an ABLE account generally are disregarded when determining an individual's eligibility for certain means-tested federal programs, such as Medicaid and Supplemental Security Income. Among other requirements, to be treated as a qualified ABLE program under federal law a program must provide that, except for certain exceptions, contributions to an ABLE account may not be accepted if the aggregate amount of contributions *for the taxable year* exceeds the amount in effect under § 2503(b) of the Internal Revenue Code (the federal gift tax exclusion). 26 U.S.C. § 529A(b)(2)(B).

House Bill 431 and Senate Bill 355 establish the Maryland ABLE Program to provide Marylanders with access to ABLE accounts as authorized by § 529A. The bills, in new ED § 18-19C-03(c)(4), state that “[m]oney and assets in the account of each ABLE account holder may not exceed the amount specified in § 2503(b) of the Internal Revenue Code for each calendar year in which the taxable year begins.” This language appears to impose a limit, of an amount equal to the federal gift tax exclusion, on the balance of the account rather than on the annual contributions to an account. However, another provision of the bills suggests that, consistent with § 529A of the Internal Revenue Code, the limitation was to apply to the amount of annual contributions to an account, not the account balance. Specifically, new ED § 18-19C-09(b) provides:

If the contribution of an ABLE account contributor under the Maryland ABLE Program would result in aggregate contributions from all contributors to the ABLE account for the taxable year exceeding the amount specified in § 2503(b) of the Internal Revenue Code for each calendar year in which the taxable year begins, the [Maryland 529] Board shall issue a refund to the ABLE account contributor.

Nothing in the legislative record suggests that the General Assembly intended to impose a limit on ABLE account balances of an amount equal to the federal gift tax exclusion. Instead, the General Assembly’s intent most likely was to conform Maryland’s ABLE Program to the parameters set forth in federal law. In describing the bills, the Fiscal and Policy Notes state as follows:

Federal law limits *total* contributions to a single ABLE account in a year to the amount allowed for tax-free gifts (currently \$14,000). The [Maryland 529] board<sup>1</sup> must refund to an ABLE account contributor any amount contributed to an ABLE account over this limit.

(Emphasis in original). Moreover, to construe ED § 18-19C-03(c)(4) as imposing such restrictive limits on ABLE account balances would negate much of the benefits of Maryland’s ABLE Program by severely limiting the amount of funds that may be held in an ABLE account for the benefit of a disabled individual.

In light of the above, we believe ED § 18-19C-03(c)(4) should be construed, consistent with federal law, as imposing a limit on annual contributions to an ABLE

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<sup>1</sup> The bills rename the College Savings Plans of Maryland Board as the Maryland 529 Board.

The Honorable Lawrence J. Hogan, Jr.  
April 11, 2016  
Page 3

account rather than a limit on the overall balance of an ABLE account. However, the General Assembly should correct the drafting error during next year's legislative session.

Sincerely,

A handwritten signature in cursive script, reading "Brian E. Frosh". The signature is written in black ink and is positioned above the typed name.

Brian E. Frosh  
Attorney General

BEF/DS/kk

cc: The Honorable John C. Wobensmith  
Joseph M. Getty  
Warren Deschenaux