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Internal Revenue Service****Confidentiality Notice**

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**Date** *February 01, 2010***Number of pages including cover sheet** *5***TO:** *DAWN M WILLIAMSON***Phone** *(919) 610-0129***Fax Phone** *(815) 425-9155***FROM:** *Sunny Echem***Phone** *(615) 250-5085***Fax Phone** *(615) 250-5850***CC:****REMARKS:**  *Urgent*  *For your review*  *Reply ASAP*  *Please Comment*

Please replace the previous examination report dated November 02, 2009 with this updated copy; the only change here is the updated percentage of your Public Support Test calculation result.

Thanks.

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| Form <b>886A</b>  | Department of the Treasury - Internal Revenue Service<br><b>Explanation of Items</b> | Schedule No. or Exhibit                |
| <b>Name of Taxpayer :</b><br><b>Cherubs The Association of Congenital Diaphragmatic Hernia Research</b> |  | <b>Year/Period Ended</b><br><br>200612 |

(THIS REPORT SUPERCEDES THE REPORT DATE 11/02/2009)

January 29, 2010

**Issues:**

Is Cherubs The Association of Congenital Diaphragmatic Hernia Research, henceforth (CACDHR) properly classified as not being a public charity because it is described in Internal Revenue Code Section 509(a)(1), (2),(3) or (4)?

**Facts:**

The Organization was granted exemption from tax under Internal Revenue Code (IRC) Section 501(a) as an organization described in Internal Revenue Code Section 501(c)(3). Furthermore, CACDHR is not considered as Public Charity because it was changed to an organization described in IRC 509(a)(2) when it failed to respond to IRS Questionnaire at the end of its Advance Ruling Date.

Based on a computation of your yearly average public support for the four year period (01/01/2007-12/31/2004), it was determined that your public support percentage for IRC 509(A)(1) & 170(b)(1)(A)(vi) status is about 100%.

Calculation for IRC 509(A)(2) average public support test it was determined to be about 98% well over 1/3 support, the organization had no investment income and no UBI or net income from (UBI) for the four years period reviewed.

**Law:**

IRC 501(a) EXMPTION FROM TAXATION- An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

IRC 501(c)(3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder of individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection(h), and which it does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

In order to be exempt as an organization described in section 501(c)(3), an organization must be both organized and operated exclusively for one or more of the purposes specified in such section. If an

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organization fails to meet either the organizational test or the operational test, it is not exempt. [Treas. Regs. §1.501(c)(3)-1(a)(1)].

An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3) [Treas. Regs. §1.501(c)(3)-1(c)(1)].

IRC section 509(a); for purposes of this title, the term "private foundation" means a domestic or foreign organization described in section 501(c)(3) other than:

- 1) an organization described in section 170(b)(1)(A) (other than clauses (vii) and (viii));
- 2) an organization that normally receives more than one third of its support from contributions, membership fees, and gross receipts from activities related to its charitable, etc; functions – subject to certain exceptions and no more than one third of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975;
- 3) an organization that is not controlled by any disqualified persons (other than Foundation Managers) and support organizations described in sections 509(a)(1) or (2) or section 501(c)(4), (5), or (6), if they meet the tests of section (509(a)(2); and
- 4) an organization organized and operated to test for public safety.

IRC 170(b)(1)(A)(vi) and IRC 509(a)(1) describe an organization "...which normally receives a substantial part of its support from a governmental unit...or from direct or indirect contributions from the general public.

Treas. Regs. §1.170A-9(e)(2) of the Income Tax Regulations states that an organization is publicly supported if at least 33 1/3 percent of its support is received from governmental units and direct or indirect contributions from the general public.

Treas. Regs. §1.170A-9(e)(3)(i), The percentage of support "normally" received by an organization from governmental units, from contributions made directly or indirectly by the this subparagraph, an organization will not be treated as "normally" receiving a "substantial" amount of governmental or public support unless the total amount of governmental and public support "normally" received equals at least 10 percent of the total support "normally" received by such organization.

Section §1.170A-9(e)(6)(i) of the Regulations states, in part, that in order to meet the 33 1/3 support test, contributions from individuals, corporations or trusts are included in public support only to the extent that they do not exceed 2 percent of the organization's total support.

Section §1.512(b)-1(g)(1) states that in computing the unrelated business taxable income of an organization described in section 511(a)(2) the deduction from gross income allowed by section 170 (relating to charitable contributions and gifts) shall be allowed.

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Section §1.512(b)-1(g)(3) states that the contribution, whether made by a trust or other exempt organization, must be paid to another organization to be allowed.

IRC section 509(a)(2) of the Code describes an organization that normally receives no more than one-third of its support from gross investment income and more than one-third of its support in each tax year from any combination of the following:

- i) gifts, grants, contributions, or membership fees, and
- ii) gross receipts from admissions, sales of merchandise, performance of services or furnishing of facilities, in an activity which is not an unrelated trade or business (to the extent that gross receipts from any person, or from any bureau or similar agency of a governmental unit do not exceed the greater of \$5,000 or 1 percent of the organization's total support in that year)

FINAL-REG. §1.509(a)-3, Broadly, publicly supported organizations—

(c) “Normally”—(1) *in general-(i) Definition.* The support tests set forth in section 509(a)(2) are to be computed on the basis of the nature of the organization's “normal” support from any combination of gifts, grants, contributions, membership fees, and gross receipts from permitted sources and no more than one-third of its support from gross investment and unrelated business income for its current taxable year and the taxable year immediately succeeding its current year, if, for the four taxable years immediately preceding the current taxable year, if it meets those tests for such four year period.

FINAL-REG. TAX-REGS, §1.509(a)-6. Classification under section 509(a)  
§1.509(a)-6. Classification under section 509(a)

If an organization is described in section 509(a)(1) and also in another paragraph of section 509(a), it will be treated as described in section 509(a)(1). For purposes of this section, the parenthetical language “other than in clauses (vii) and (viii)” used in section 509(a)(1) shall be construed to mean “other than an organization which is described only in clause (vii) or (viii).” For example, X is an organization which is described in section 170(b)(1)(A)(vi), but could also meet the description of section 170(b)(1)(A)(viii) as an organization described in section 509(a)(2). For purposes of the one-third support test in section 509(a)(2)(A), contributions from X to other organizations will be treated as support from an organization described in section 170(b)(1)(A)(vi) rather than from an organization described in section 170(b)(1)(A)(viii). [Reg. §1.509(a)-6].

**Government's Position:** The taxpayer's private foundation status should be modified to one that is described in IRC section 509(a)(1) & 170(b)(1)(A)(vii) of the Code.

**Taxpayer's position:** The taxpayer agrees with the proposed change in private foundation classification from a 509(a)(2) to 509(a)(1) & 170(b)(1)(A)(vi) .

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**Conclusion:** Beginning with tax year ending December 31, 2009, CHERUBS – THE ASSOCIATION OF CONGENITAL DIAPHRAGMATIC HERNIA RESEARCH will qualify as non-private foundation under IRC 509(a)(1) & 170(b)(A)(vi) instead of IRC 509(a)(2) which is considered a more advantageous status. The organization indicated its agreement to the status change by signing the Form 6018.