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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 15, 2009

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: HB 101

Dear Governor O'Malley:

We have reviewed and approve for constitutionality and legal sufficiency House Bill 101, "Budget Reconciliation and Financing Act of 2009," otherwise known as the BRFA. The BRFA is an omnibus bill that implements \$1.3 billion in actions that benefit the State general fund. The fiscal year 2009 and 2010 actions primarily include fund transfers, contingent reductions, relief from funding mandates, and formula changes, as well as several revenue measures. We write to address several issues raised by the bill, none of which leads us to doubt the bill's constitutionality or legal sufficiency.

HB 101 and HB 783 make identical changes to parts of Natural Resources Article, § 5-902(c). HB 783 was signed into law on May 7, 2009 as Chapter 419 of the Laws of 2009.

Section 7 of HB 101 provides that recovered federal Title IV-E funds for claims previously disallowed by the federal government will be deposited into the General Fund. To address the disallowance, the bill also repeals a provision that the federal government contends prohibits the Department of Juvenile Services (DJS) from administering any child welfare program of the Department of Human Resources (DHR). *See* Human Services Article, § 9-216(c). It also authorizes DJS, DHR, and the U.S. Department of Health and Human Services to share information and records as necessary to properly administer the Title IV-B and Title IV-E programs. *See* Section 42. House Bill 1382 amends Courts and Judicial Proceedings Article, § 3-8A-27(b) to authorize DJS to share information with a similar agency in the District of Columbia and Virginia, under certain

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conditions and authorizes access to and confidential use of a court record by DHR for the purpose of Title IV-E. If you wish Section 42 of HB 101 to prevail over the provisions of HB 1382, HB 1382 should be signed before HB 101.

Several federal tax provisions in the American Recovery and Reinvestment Act (ARRA) impact the calculation of Maryland income tax liability. The changes under the ARRA include a temporary expansion of the earned income credit, a deduction for unemployment compensation received, and a deduction for motor vehicle excise taxes paid. The Department of Legislative Services estimates that general fund revenue will decrease by \$39.5 million in FY 2010 and by \$10 million in FY 2011 as a result of these changes. Under current law, if the Comptroller determines that a federal tax change will impact State revenues by at least \$5 million in the fiscal year when the tax change was enacted, the federal tax change will not apply for Maryland tax purposes for that tax year. This is known as decoupling. Tax-General Article (TG), § 10-108. Section 24 of HB 101, however, provides that the decoupling provision of § 10-108 does not apply to the changes made under the ARRA, thus raising the issue of whether Section 24 relates to the BRFA's single subject of bringing the 2009 and 2010 budgets into balance and financing Government by eliminating, reducing or freezing funding mandates, authorizing transfers to the general fund, providing flexibility in the use of special funds, and taking similar actions. This office previously has cautioned against establishing or increasing funding mandates in the BRFA, *see* Bill Review letter on HB 147, dated May 19, 2005, and we reiterate our caution concerning BRFA provisions that obligate spending or substantially reduce revenue.

Although Section 27 (a) of HB 101 uses the phrase "the Governor shall appropriate," it is not a mandate and would be read as directory because the subsection relates to fiscal year 2009, and the General Assembly may not mandate an appropriation for the fiscal year that is the subject of the budget then under consideration. Md. Const. Art. III, Sec. 52.

Section 38 makes a finding that the Fair Campaign Financing Fund ("Fund") established under § 15-103 of the Election Law Article (EL) cannot operate as originally contemplated. Section 38 further: (1) authorizes \$2 million to be transferred to the Maryland Information Technology Development Project Fund ("IT Fund") for the purchase of a new optical scan voting system; (2) prohibits such a transfer from reducing the balance of the Fund below \$1 million; and (3) prohibits any such funds transferred and not used to purchase a new optical scan voting system from being retained by the IT Fund, but authorizes those funds to be transferred to the Maryland Election Modernization Fund established under EL § 15-103. Consistent with our advice to the

The Honorable Martin O'Malley

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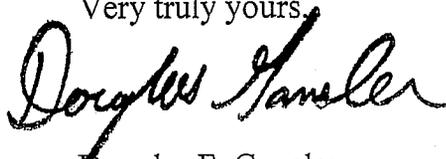
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Honorable Jon S. Cardin, dated March 25, 2009, attached, it is our view that the purposes to which the funds may be directed under Section 38 would enhance the electoral process and thus such disbursement would not violate the donors' intent.

Section 41 reduces, by \$36,000,000, the State Foundation Program funds to be disbursed to the Prince George's County Board of Education in fiscal year 2010, contingent on the Board proceeding with the purchase or lease of a new administration building under or in connection with a lease entered into in June of 2008. This contingent reduction is itself contingent on the failure of HB 960, the subject of our letter that is forthcoming.

In Section 47, the reference on page 70, line 38 should be "10-210.1(b)." This can be corrected in next year's corrective bill.

Very truly yours,

A handwritten signature in black ink, reading "Douglas F. Gansler". The signature is written in a cursive style with a large, prominent initial "D".

Douglas F. Gansler
Attorney General

DFG/BAK/kk

Attachment

cc: The Honorable John P. McDonough
Joseph C. Bryce
Karl Aro

DOUGLAS F. GANSLER
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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 25, 2009

The Honorable Jon S. Cardin
304 House Office Bldg.
Maryland General Assembly
Annapolis MD 21401

Dear Delegate Cardin:

You asked for advice concerning the ability of the General Assembly to transfer unspent funds in the Fair Campaign Financing Fund. As described more fully below, I believe that the legislature may authorize a transfer if the legislature finds that the Fund cannot operate as originally intended and the transfer is made for a purpose that would fulfill the general intent of the contributors to the Fund.

The legislature first created a system of public financing of campaigns in 1974. Then, as now, the system is limited to elections for the office of Governor and Lt. Governor. Election Law Art., Title 15. The funds contributed by the public under the current system are held in the Fair Campaign Financing Fund. In 2004, the Study Commission on Public Funding of Campaigns in Maryland, after holding 19 meetings over 18 months, released its final report. The Study Commission stated that "except for the 1994 gubernatorial campaign of one ticket, the fund has remained essentially unused to date." Study Comm'n Final Report at 9. The Study Commission also concluded that the fund has "rarely reached a functional level." *Id.*

The Attorney General has weighed in on this issue once before. In 1981, the Attorney General issued an opinion addressing whether the General Assembly could transfer the funds in the Fair Campaign Financing Fund to the general fund. 66 Op. Att'y Gen. 56 (1981)(the opinion is attached for your information and reference). In that opinion, the Attorney General concluded that the legislature could not do so. Nevertheless, the Attorney General outlined "constitutionally defensible alternative methods of disposing of the money in the Fund." *Id.* at 70 -71. Each alternative, however, "turns on the assumed inoperability of the Fund." *Id.* at 71. Accordingly, before the monies in the Fair Campaign Financing Fund may be put to a use different from that for which it was contributed (i.e., public campaign financing of gubernatorial elections), the General Assembly would have to find that the fund "cannot function as

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originally contemplated.” *Id.* In my view, the findings of the Study Commission on Public Funding of Campaigns in Maryland support this conclusion. Thus, the next question how the money in the Fair Campaign Financing Fund may be legally disbursed.

As described in the 1981 opinion, the Fair Campaign Financing Fund is essentially an express trust whereby taxpayers contribute money to be held in trust for candidates who qualify under the current system. 66 Op. Att’y Gen. at 58-60. If that trust fails, a proper distribution of those funds should occur. Money could be given back to the taxpayers who contributed to the fund—a task that is likely infeasible—or it can be used “in some other manner that would ‘as nearly as possible’ fulfill the general intent of the contributors.” *Id.* at 62 – 63. The latter approach is embodied in a charitable trust doctrine called the *cy pres* doctrine, which “is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees. So there is an indirect benefit to the settlor.” *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004). “Under *cy pres*, if the testator had a general charitable intent, the court will look for an alternate recipient that will best serve the gift’s original purpose.” *In re Airline Ticket Comm’n Antitrust Litigation Travel Network*, 307 F.3d 679, 682 (8th Cir. 2002). Applying the *cy pres* doctrine, the Attorney General concluded that using the Fair Campaign Financing Fund in a manner that would “as nearly as possible fulfill the general intent of the contributors to enhance the electoral process” would be constitutional. 66 Op. Att’y Gen. at 70.

You also asked whether the Fund could be disbursed to more than one other use, or whether the legislature had to choose one “best” use. *Cy pres* distributions are reviewed under an abuse of discretion standard and generally the only requirement is that some nexus exist between the purpose intended and the distribution. *In re Airline Ticket Comm’n Antitrust Litigation*, 307 F.3d at 682-683. Therefore, in my view, so long as each use to which the Fair Campaign Financing Fund is transferred has the required nexus to enhance the electoral process, the disbursement would be constitutional.

Sincerely,



Sandra Benson Brantley
Assistant Attorney General