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May 16, 2016

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

***RE: Senate Bill 910, "Maryland Education Development Collaborative – Established"***

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 910, "Maryland Education Development Collaborative – Established". We write to discuss potential constitutional issues with the bill and to provide advice for implementation to avoid those issues. Specifically, we are concerned, given the responsibilities of the Collaborative, that having members of the General Assembly serve on the Collaborative governing board could violate the separation of powers of Article 8 of the Maryland Declaration of Rights or cause a violation of the prohibition against plural office holding found in Article III, §11 of the State Constitution. It is our view, however, that by limiting the legislator members' role to purely advisory, the problems can be avoided.

Senate Bill 910 establishes a Maryland Education Development Collaborative as an instrumentality of the State. The bill sets out several express purposes of the Collaborative, including to advise the State Board of Education, the General Assembly, and local school systems "regarding statutory and regulatory policies necessary to promote 21st century learning" that enhances diversity in public schools and "[r]educes the achievement gap between socioeconomic and democratic groups across the State's public schools." In addition, the Collaborative is given several functions and duties, which primarily relate to providing information and advising on best practices to promote the goals of the effort.

The Collaborative has a governing board comprised of 18 members, including one member of the Senate and one member of the House of Delegates. The board members are

not paid, but are entitled to reimbursement of expenses. The members are appointed for a term of four years. Among the powers granted to the board are the authority to hire an executive director and to retain "any necessary accountants, financial advisors, or other consultants." In addition, the Collaborative may accept loans, grants, or assistance from public and private entities, and also enter into contracts and other legal instruments.

It is our concern that having legislative members of an entity that is empowered to enter into binding executive branch contracts could implicate the separation of powers of Article 8 of the Maryland Declaration of Rights or cause a violation of the prohibition against plural office holding found in Article III, §11 of the State Constitution. Article 8 of the Declaration of Rights provides: "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." Article III, Section 11 of the Constitution states: "No person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate."

In 1976, Attorney General Burch opined that these two constitutional provisions would be infringed by the service of members of the General Assembly on the Washington Suburban Transit Commission. 61 *Opinions of the Attorney General* 152, 159-62 (Jan. 22, 1976). In 2009, we advised the Governor about legislation reestablishing the Commission on the Establishment of a Maryland Women in Military Service Monument. Because the legislation empowered the Commission, the membership of which included members of the General Assembly, to enter contracts regarding "the funding, design, construction, or placement of an appropriate monument," and not merely to give advice regarding a monument, we advised that the exercise by the Commission of those executive powers could infringe these two provisions. Bill Review Letter on House Bill 944 and Senate Bill 367 (May 15, 2009).

Similarly, it is our concern that if the Collaborative enters into binding contracts on behalf of the State, it is performing a core executive branch function. For legislators to be members of a State board exercising such powers could risk a court finding a separation of powers violation because it is a core executive function that cannot be exercised by legislative branch officials either individually or as members of another State instrumentality.[1] Moreover, because we believe that the power to enter into such contracts is an exercise of the sovereign power of the State, we believe that membership on the

[1] Of course, legislative branch officials may enter into contracts on behalf of the legislative branch while judicial officials enter contracts on behalf of the judiciary. The problem here is that legislative officials might be part of a decision to enter contracts on behalf of the executive branch.

Collaborative could be found to be an "office of trust" that is incompatible with simultaneous service in the State legislature.

Nevertheless, concerns under both Article 8 of the Declaration of Rights and Article III, § 11 of the Constitution are substantially ameliorated by the likely limited occasion of the Collaborative to enter into contracts and by the fact that the vast number of responsibilities of the Collaborative are otherwise advisory in nature. In particular, it is our view that, because the Collaborative's contractual decision-making responsibilities are, at most, occasional, the courts likely would not conclude that participation in the selection of the contracts would transform service on the Collaborative into an "office of trust." At the same time, a colorable separation-of-powers concern would be raised by the selection of the State contracts through the votes of members of the legislature cast in those legislators' other capacity as members of an entity functioning, for purposes of the selection, as an Executive Branch entity.

It is also our view, however, that the foregoing constitutional concerns would be addressed if the legislators who are members of the governing board abstained from participating on contract matters. Thus, it is our view that if the legislators on the Collaborative's governing board limited their role to the advisory roles of the Collaborative, there are no constitutional problems with having two members of the General Assembly on the governing board. Accordingly, it is our view that Senate Bill 910 is constitutional and legally sufficient.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SBB/kk

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