BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL

SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

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

April 28, 2017

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

RE: Senate Bill 169 - Health – Cost of Emergency Room Visits to Treat Dental Conditions and Coverage of Dental Services Under Medicaid – Study

Dear Governor Hogan:

We have reviewed Senate Bill 169 ("Health – Cost of Emergency Room Visits to Treat Dental Conditions and Coverage of Dental Services Under Medicaid – Study"). We write to raise a constitutional issue with respect to Section 2 of the bill and the related contingency provision in Section 3. We believe there is a significant risk that a court would find that these provisions amount to an unconstitutional delegation of the General Assembly's legislative authority. Even if a court determines these provisions are unconstitutional, it is our view that the provisions are severable and will not impact the constitutionality of the provisions in Section 1. Thus, we approve Senate Bill 169 for constitutionality and legal sufficiency.

Section 2 of the bill allows the State to provide dental services under its Medicaid program, beginning January 1, 2019, for adults whose household income is at or below 133% of the poverty level, as permitted under federal law and subject to available funding in the budget. Section 3 provides that Section 2 is contingent on the Maryland Dental Action Coalition, a nonprofit private entity, determining after a study that it is "advisable to expand benefits" provided under Medicaid to include dental services for such adults. If the Coalition's study does not include a finding that the expansion of Medicaid is advisable, Section 2 of the bill shall be null and void. The study to be conducted by the Coalition is authorized by Section 1.

Describing the delegation doctrine, the Court of Appeals has explained that it "prohibits a legislative body from delegating its law-making function to any other branch of government or entity and is a corollary of the separation of powers doctrine implicit in the United States Constitution and expressly provided in the Maryland Constitution." *Maryland State Police v. Warwick Supply & Equip. Co.*, 330 Md. 474, 480 (1993).

> Of course, the General Assembly cannot constitutionally delegate to another body its "fundamental decision making authority" in the sense that it cannot delegate a function which the Constitution expressly and unqualifiedly vests in the General Assembly itself. Thus the General Assembly could not delegate to an administrative agency its power to impeach, to propose constitutional amendments, or to enact statutes.

Christ by Christ v. Maryland Dep't of Nat. Res., 335 Md. 427, 444–45 (1994) (citations omitted).

The Court of Appeals has "long sanctioned delegations of legislative power to administrative officials where sufficient safeguards are legislatively provided for the guidance of the agency in its administration of the statute." *State Police v. Warwick Supply & Equipment Co. Inc.*, 330 Md. 474, 480 (1993). Moreover, there are limited instances in which authority is lodged with private persons by a legislative body. *See e.g., Portsmouth Stove and Range Co. v. Mayor and City Council of Baltimore*, 158 Md. 244, 251 (1929) (City ordinance authorizing health commissioner to require tests by unofficial agencies before issuing licenses for gas installation not an unlawful delegation of legislative authority). However, the Court of Appeals has explained that "delegations of legislative authority to private entities are strictly scrutinized because, unlike governmental officials or agencies, private persons will often be wholly unaccountable to the general public." *Bd. of Trustees of Employees' Retirement Syst. of City of Baltimore v. Mayor and City Council of Baltimore,* 317 Md.72, 94 (1989).

In this case, Section 3 of the bill effectively delegates to a private entity the authority to determine whether the expansion of Medicaid under Section 2 is advisable and, based on its finding, whether Section 2 is to become law. We believe it is likely that a court would conclude that giving such authority to a private entity is unconstitutional under the delegation doctrine. *See, e.g., Maryland Co-op. Milk Producers v. Miller,* 170 Md. 81 (1936) ("The delegation with which we are concerned in this instance is not to the voters of a political subdivision or of a described locality, but to an indefinite portion of producer, consumer, and distributor classes in areas having no legislative description," and the "salient provisions [of the Act] are not intended to become operative until invoked by their affirmative request."). Moreover, because the contingency provision in Section 3 is integral to Section 2, we believe a court likely would find Section 2 invalid as well.

Even if a court were to conclude that Sections 2 and 3 are invalid, it is our view that the provisions in Section 1, which authorize the study, would most likely be found to be severable. Maryland law expressly provides for severability. General Provisions Article, § 1-210. Where a provision of a bill is found to be unconstitutional, it is generally presumed, "even in the absence of an express clause or declaration, that a legislative body generally intends its enactments to be severed if possible." *Davis v. State*, 294 Md. 370, 383 (1982). Thus, "when the dominant purpose

of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion." *Id.* at 384. It is clear that the purpose of Section 1 can be accomplished without Sections 2 and 3. As a result, we believe Senate Bill 169 is not clearly unconstitutional and that if the bill is enacted, the Coalition would be able to conduct the study pursuant to Section 1.[1] However, we believe any findings of the Coalition should be treated as recommendations only, and the General Assembly should pursue separate legislation if it chooses to expand the Medicaid program as contemplated in Section 2 of the bill.

Sincerely,

Brian E. Frosh
Attorney General

BEF/DWS/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Warren Deschenaux

[1] The Office of Attorney General ordinarily uses a "not clearly unconstitutional" standard when reviewing legislation. 71 *Opinions of the Attorney General* 266, 272 n.12 (1986).