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May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 988

Dear Governor O'Malley:

We have reviewed and hereby approve House Bill 988, "State Board of Dental Examiners - Program Evaluation and Licensee Protection," for constitutionality and legal sufficiency. In doing so we have concluded that the bill as enrolled properly reflects what was passed by the General Assembly. We have also concluded that the shortening of the terms of the members of the State Board of Dental Examiners ("the Board") does not violate separation of powers. Finally, we have concluded that the title of the bill complies with the requirements of Maryland Constitution Article III, § 29.

House Bill 988, as introduced, made a variety of changes to the Health Occupations Article, including a whistleblower provision protecting licensees who disclose activities or policies of a health board from retaliatory action by those boards, and changes with respect to the State Board of Dental Examiners, including new provisions with respect to appointment of members of the Board, and provision for the Governor to appoint the President of the Board. In addition, the bill as introduced would have ended the terms of the current members of the Board on December 31, 2007, with the terms of members appointed under the new procedures starting January 1, 2008. The new board would have been required to promulgate new regulations with respect to disciplinary proceedings. Provisions of existing law allowing the Board to investigate licensees on its own motion were deleted. The bill further provided for an audit of the Board's complaint files by the Office of Inspector General at the Department of Health and Mental Hygiene each year until 2010, for a report by the Board itself on the

The Honorable Martin O'Malley

May 15, 2007

Page 2

implementation of the Act, and for rotation of assistant attorneys general representing the Board.

The bill passed the House with amendments that would have altered the provisions on appointment somewhat, to return the responsibility for submitting the list to the Maryland State Dental Association and the Maryland Dental Society, and to extend the time for giving notice about the meeting to determine the list. These amendments eliminated the provision in the first reader version of the bill for removal of the members of the Board, but instead shortened the terms to two years and provided that members who had already served more than four years would serve only until their successor was appointed and qualified. The amendments also eliminated the regulation requirement, the requirement that the Board report to the General Assembly, and the requirement for rotation of assistant attorneys general advising the Board. They also moved the sunset review provision up to 2009 from 2011, and set specific requirements of matters to be covered in the program review process. Finally, the House amendments made the bill an emergency bill.

On the Senate side, the bill was referred to the Education Health and Environmental Affairs Committee, which did not take the bill up for a vote until the last day of session. In the course of its consideration the Committee apparently considered at least two sets of amendments, one of which, #954738/1, would have made minor amendments to the bill as it passed the House, specifying that members who had not yet served four years could serve out their terms, but were not eligible for reappointment, and adding a provision to the matters to be covered in the course of program review. A second set of amendments, #754639/1, would have deleted most of the provisions of the bill as it passed the House, leaving only the provisions with respect to the sunset provision, program review, and the audit requirement. This second set of amendments made minor changes in these provisions, including moving the sunset date back to 2010.

It is our understanding that the Committee ultimately voted to go with the second set of amendments, #754639/1. However, the first set, #954738/1, was attached to the bill when it went to the floor of the Senate for second and then third readings, and also when the bill was returned to the House for concurrence. It is also our understanding that the amendments available on the members' laptops during the votes were the first set, #954738/1, and that is the set of amendments that appears in the Proceedings on the General Assembly's web site. The floor report in the Senate, and the concurrence report in the House, however, described the amendments voted on by the Committee, #754639/1. It is our view that the amendments attached to the original bill when it was

The Honorable Martin O'Malley

May 15, 2007

Page 3

voted on by the two houses are the amendments that were adopted and are properly reflected in the enrolled bill.

Under the rules of each House, the original bill is securely fastened to a durable backing that has space for the names of the sponsor, the number of the bill and for such forms of endorsement as may be deemed appropriate by the Chief Clerk or the Secretary of the Senate. Senate Rules 26 and 27, House Rules 26 and 27. *See also* Mason, *Manual on Legislative Procedure*, § 616(1) (2000) (“The sole power of the committee is to make recommendations to the body, and no recommendation becomes effective until adopted by the body.”). The “original bill” is read in the house of origin, and is sent to committee for its consideration. When the bill comes out of committee, it is signed by the chairman reporting the committee actions on the bill, and used as the basis of second reading. *Legislator’s Handbook I*. A printed version of the third reader is then used as the original bill and is considered by the second house. *Id.* The original bill (the first reading and then the third reading version) must be in the possession of the Senate or the House and present in the chamber before action on it can be taken. *Id.* In the house of origin, a bill can be amended only on second reading and the bill, with any amendments, is reprinted for third reading, with the third reader version becoming the new “original bill.” In the opposite house, amendments to the bill are simply attached to the original bill and the appropriate notations made. Like the bill itself, the amendments must be in the possession of the Senate or the House and present in the chamber before action on them can be taken. Statements by legislators on the floor, while useful in the interpretation of the language ultimately adopted, cannot alter the language that is adopted, which can come only from the amendment that is in the possession of the body. Singer, *Sutherland Statutory Construction* § 48.06 (2000 Revision); Mason *Manual on Legislative Procedure*, §§ 731(3) and 738(3); *Jessup v. Mayor and City Council of Baltimore*, 121 Md. 562, 564 (1913); *Legg v. Annapolis*, 42 Md. 203, 223 (1875). Moreover, a “legislative decision is not open to challenge on the speculative ground that the General Assembly acted on the basis of an incomplete or erroneous view.” 71 *Opinions of the Attorney General* 350, 360 (1986), *cf.*, *Fletcher v. Peck*, 10 U.S. 87, 123 (1810). As a result, the enrolled bill properly reflects what was in the amendment on the desk, which is the amendment reflected in the journals of the two houses, the proceedings, and the records of the Chief Clerk. *Cf. Berry v. The Baltimore and Drum Point Railroad Company*, 41 Md. 446 (1975).

House Bill 988 changes the terms of members of the Board from four years to two years. Existing law provides that a member may not serve more than two consecutive full terms. An uncodified section of the bill addresses the application of these provisions to

The Honorable Martin O'Malley

May 15, 2007

Page 4

existing Board members, providing that existing members who have already served the permitted total of four years are to serve until their successors are appointed and qualified, while those who have served less than four years may serve out their terms, and are ineligible for reappointment, but may serve past the end of their terms until a successor is appointed and qualifies. Section 2. It is our view that this adjustment of terms to give relatively prompt effect to the shortening of the terms of the members is not the type of legislative removal found invalid in the plurality opinion in *Schisler v. State*, 394 Md. 519 (2006). First, the bill does not work a wholesale removal of members as was the case in *Schisler*. In fact, two members of the Board are ineligible for reappointment under current law, and another 10 members of the Board either have already served their term and are holding over, or will be permitted to complete their current term. Only four members will have their terms cut short. In addition, by providing that members may hold over until their successors are appointed and qualified, the bill gives additional control over the timing of the replacements to the Governor. Most importantly, this bill does not in any way impair the appointment power of the Governor, which was the single feature of the PSC bill that was found invalid by all six of the judges who found problems with the law in question.

Finally, it is our view that the title adequately describes the provisions of the bill as required by Maryland Constitution Article III, § 29. The majority of the provisions of the bill apply only to the Board and the title appropriately reflects that. The short title, the generally relating clause, and those provisions in the title describing changes in the law relating to the Board all refer to the Board. With respect to the whistleblower provisions, which apply to all health boards, the title refers to "certain boards." It is our view that this reference is sufficient to give notice to the ordinary reader that boards other than the Dental Board will be affected by these provisions, *Mealey v. Hagerstown*, 92 Md. 741 (1901), for particulars those interested must look to the body of the law, *Whiteley v. Baltimore City*, 113 Md. 541 (1910). However, to ensure the constitutionality of the whistleblower provisions, it may be advisable to include them in the curative bill for next year.

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

The Honorable Martin O'Malley

May 15, 2007

Page 5

DFG/KMR/kmr

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Shirley A. Nathan-Pulliam