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May 15, 2007

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

Re: Senate Bill 657 and House Bill 1239

Dear Governor O'Malley:

We have reviewed Senate Bill 657 and House Bill 1239, identical bills entitled "Prince George's County- Board of Education," for constitutionality and legal sufficiency. Because it is our view that the districts for election of the members of the Board of Education, as set up in the bill, violate the one person/one vote requirement of the Fourteenth Amendment, we cannot approve the bill.

Senate Bill 657 and House Bill 1239 alter the method of election of the Prince George's County Board of Education ("the Board") from a system under which members of the Board are nominated by the voters of residence districts but elected by the voters countywide to a system in which the members are elected by the voters of their district. The initial districts are set out in the bill and are based on the election districts and precincts in effect as of the last census. Moreover, the last census provides the only source of population figures on which to judge the relative size of the districts. However, just as districts drawn under that census are presumed to stay within constitutional population limits throughout the ten years, *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2611 (2006); *Georgia v. Ashcroft*, 539 U.S. 461, 488, n. 2 (2003), districts drawn as a later date are drawn according to and judged by those limits, *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2611-2612 (2006).

According to the last census, the total population of Prince George's County is 801,515, making the ideal population for the nine districts 89,057. The majority of the

districts created by the bill are within 3% of that ideal. Two, however, are significantly further off. Specifically, the 8th District has a population of 102,182, which is 14.74% over the ideal district, while the 9th District has a population of 75,892, which is 14.78% below the ideal district. Thus, the overall deviation, also known as the maximum deviation, is 29.52%.[1]

In *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), the Supreme Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." Specifically, the Court found "that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577. Subsequently, the Court held that State legislative districts are not subject to the strict population equality standards applicable to congressional districts, and that "so long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." *Mahan v. Howell*, 410 U.S. 315, 324 (1973).

Over time, the Supreme Court has developed a "10% rule," under which a showing of a overall deviation of less than 10% is not a prima facie evidence of a violation of population equality requirements, but a overall deviation of over 10% must be justified by the State. *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983); *White v. Regester*, 412 U.S. 755 (1973); *Marylanders for Fair Representation v. Schaefer*, 849 F.Supp. 1022, 1031 (D.Md. 1994); *In re Legislative Redistricting*, 331 Md. 574, 594-595 (1993). However, a overall deviation under 10% is not a guarantee that a plan will be upheld. Instead, a plaintiff may still prevail if the deviation results solely from the promotion of an unconstitutional or irrational state policy, *Marylanders for Fair Representation v. Schaefer*, 849 F.Supp. 1022, 1032 (D.Md. 1994), or that the drafters ignored all the legitimate reasons for population disparities and created the deviations solely to benefit certain regions at the expense of others, *In re Legislative Redistricting*, 331 Md. 574, 597 (1993). Such a showing is difficult to make, but in *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D.Ga.), *summarily affirmed Cox v. Larios*, 542 U.S. 947 (2004), the Court found a plan with a overall deviation of 9.98% invalid, holding that the drafters had ignored

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[1] Overall population deviation is the difference in population between the two districts with the greatest disparity. *Abrams v. Johnson*, 521 U.S. 74 (1997).

traditional redistricting criteria and instead concentrated on improving the electoral chances of Democrats over Republicans by creating districts with lower population in inner-city and rural districts and by selectively protecting Democratic incumbents while reaching out to place Republican incumbents in districts together.

The Supreme Court has never set a definite upper limit above which deviations could not be justified by any state policy. In *Mahon v. Howell*, 410 U.S. 315, 329 (1973), the Court upheld Virginia districts with an overall deviation of 16.4% based on a finding that the variance was justified by a policy of maintaining the integrity of political subdivision lines, but suggested that "this percentage may well approach tolerable limits." And in *Gaffney v. Cummings*, 412 U.S. 735, 744 (1973), the Court stated that "it has become apparent that the larger variations from substantial equality are too great to be justified by any state interest so far suggested." The cases cited by *Gaffney* as having "much smaller, but nevertheless unacceptable deviations," include *Swann v. Adams*, 385 U.S. 440 (1967) (20.65% overall deviation in the Senate and 33.55% overall deviation in the House); *Kilgarlin v. Hill*, 386 U.S. 120, 122-123 (1967) (26.48% overall deviation), and *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971) (28.20% overall deviation in the Senate and 24.78% overall deviation in the House).

The population standards applicable to state legislative districts have been extended to other local elected bodies, including school boards. *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 327 (2000); *Hadley v. Junior College District of Metropolitan Kansas*, 387 U.S. 50, 54 (1970); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996). Thus, the districts for election of the members of the Board must meet the population equality standards that have been set by the Courts.

The 29.52% deviation between the Board member districts as drawn by Senate Bill 657 and House Bill 1239 is in the range that the Court has suggested might be per se unconstitutional.[2] However, because there has been no definite decision on this ground, we cannot say that the plan is clearly unconstitutional on this ground.

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[2] It is true that the Supreme Court once upheld a plan giving a representative to a very small county, resulting in a overall deviation of 89%. *Brown v. Thomson*, 462 U.S. 835 (1983). However, in that case the challenge was made only to the single district, and not to the plan as a whole. *Id.* at 846. When the statewide redistricting was challenged after the next census, the new plan, which had a overall deviation of 83%, was found invalid. *Gorin v. Karpan*, 775 F.Supp. 1430 (D.Wyo. 1991).

The primary justification that has been recognized by the Supreme Court for overall deviations in excess of 10% is to keep political subdivisions from being split between districts. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Mahan v. Howell*, 410 U.S. 315, 325-326 (1973); *Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Reynolds v. Sims*, 377 U.S. 533, 578, 580 (1964). Other traditional redistricting criteria, such as compactness and contiguity, may provide a justification, *Reynolds v. Sims*, 377 U.S. 533, 578 (1964), as may preserving the cores of prior districts, and avoiding contests between incumbent Representatives, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Any of these justifications may be rejected, however, if they are not followed consistently, *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D.Ga.), *summarily affirmed Cox v. Larios*, 542 U.S. 947 (2004), or they could have been achieved with a smaller deviation, *Kilgarlin v. Hill*, 386 U.S. 120, 123 (1967).

While this office lacks the time and resources to do a full analysis of the plan in the time allotted for bill review, it does not appear that any of the above criteria would serve to justify a overall deviation of this size. It does not appear that the deviation arises from the need to keep a municipality together, and municipalities are split in other parts of the County, including Bowie, College Park, Glenarden and New Carrollton. The plan as it appears in the final bills is not significantly more compact or contiguous than the plan that appeared in the bills as introduced. Moreover, the districts are not based to any great extent on the districts under current law. Thus, we are forced to conclude that the plan for the districts included in the bill is unconstitutional.

Because the plan is the major substance of the bill, and because the remainder of the bill cannot be given effect unless the plan is changed, it is our view that the unconstitutional plan is not severable from the remainder of the bill. Therefore, we cannot recommend that this bill be signed.

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

DFG/KMR/kmr

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable C. Anthony Muse
The Honorable Barbara A. Frush