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April 25, 2012

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

***Re: House Bill 1188, "State Department of Education - Lacrosse Opportunities Program"***

Dear Governor O'Malley:

We have reviewed HB 1188, which establishes the Lacrosse Opportunities Program in the Maryland State Department of Education ("MSDE"). The purpose of the Lacrosse Opportunities Program is "to increase opportunities for minority students to participate in lacrosse in their communities." A local education agency serving a "population of students at least 80% of which are minority students," may apply for a grant to establish a Lacrosse Opportunities Program. The statute makes \$40,000 available for these grants. The bill directs the State Superintendent to promulgate regulations to implement the grant program.

We have considered whether using race (*i.e.*, 80% of minority population) as the sole factor in the selection of schools eligible to participate in the Lacrosse Opportunities Program violates the Fourteenth Amendment of the United States Constitution. We have concluded that it does not.

The United States Supreme Court has been clear over the years that "individual racial classification," such as student or teacher assignments based on race, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007); racial quotas in procurement, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); or using race as a sole factor in college admission, *Gratz v. Bollinger*, 539 U.S. 244 (2003) will not pass constitutional muster unless such individual classifications are necessary to address a compelling public purpose and are narrowly tailored to accomplish that purpose. See generally *Wygant v. Jackson Board of Education*, 467 U.S. 267, 274-76 (1986).

The bill at issue here, however, does not mandate *individual* racial classifications of students for program participation. It merely selects high minority population schools in general for program eligibility. The statute does not limit participation in the Lacrosse Opportunities Program to particular students in the eligible school systems based on individualized racial classification.

As Justice Kennedy pointed out in his concurrence in *Parents Involved*, the use of mechanisms that are "race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race" would likely be found constitutional. 551 U.S. at 789 (concurring in part, concurring in judgment). Justice Kennedy also pointed out that:

Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.

*Id.*

While Justice Kennedy's concurrence in *Parents Involved* is not definitive law, the United States Departments of Education and of Justice have issued joint guidance to school systems on the use of generalized considerations of race. They have advised:

Although *Parents Involved* ultimately was decided on other grounds, a majority of the Justices expressed the view that schools must have flexibility in designing policies that endeavor to achieve diversity or avoid racial isolation, and, at

least where those polices do not classify individual students by race, can do so without triggering strict scrutiny. *Id.* at 789 (Kennedy, J., concurring in part, concurring in the judgment); *id.* at 837 (Breyer, J., dissenting). Thus, although there was no single majority opinion on this point, *Parents Involved* demonstrates that a majority of the Supreme Court would be “unlikely” to apply strict scrutiny to generalized considerations of race that do not take account of the race of individual students.

*Guidance on Voluntary Use of Race To Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* (December, 2011).

Based on the facts as we have gleaned them, there is evidence of a lack of diversity in lacrosse programs. In 2009-10, less than 10% of the student athletes playing NCAA lacrosse were minorities. *NCAA Student-Athlete Race/Ethnicity Report (2009-10)*. There is also anecdotal evidence that minority students do not have access to lacrosse programs. Mary Cate Slay, manager of youth development for *U.S. Lacrosse* states “There’s a huge perception out there that they [inner city kids] can’t or won’t [play lacrosse] . . . there are too many blocks or too may walls, or it’s too white or too rich or whatever.” *Diversifying Lacrosse. Still Work in Progress* (available at <http://sports.espn.go.com/espn/news/story?id=6165886>) (last visited Apr. 19, 2012). Indeed, lacrosse is a costly sport. It costs between \$350-\$1000, depending on the quality of the equipment, to outfit one lacrosse player. *Lacrosse Equipment* (available at <http://www.lacrosse-information.com/lacrosse-equipment.html>) (last visited Apr. 19, 2012). Depending on age, there are between 10 and 25 players on a lacrosse team.

In our view, this evidence provides a rationale to support using the generalized “high percentage of minorities” schools as the target audience for the Lacrosse Opportunities Program. Moreover, the statute directs the State Superintendent to craft regulations to implement the Program. In our view, the regulations can be crafted to conduct the Program in a race neutral way requiring eligible school systems to open the Program to all students without regard to race or ethnicity. Such an approach avoids the constitutional issue addressed by the Fourth Circuit in *Podbersky v. Kirwan*, 38 F.3d 147 (1994), when it found that the University of Maryland’s Banneker scholarship fund, for which only African-American students could apply, was unconstitutional.

The Honorable Martin O'Malley  
April 25, 2012  
Page 4

For all the reasons set forth here, we have concluded that the HB 1188 is constitutional and is hereby approved for your signature.

Very truly yours,

A handwritten signature in cursive script, reading "Douglas F. Gansler".

Douglas F. Gansler  
Attorney General

DFG/DF/kk

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