

CANDACE McLAREN LANHAM
Chief Deputy Attorney General

CAROLYN A. QUATTROCKI
Deputy Attorney General

LEONARD J. HOWIE III
Deputy Attorney General

CHRISTIAN E. BARRERA
Chief Operating Officer

ZENITA WICKHAM HURLEY
Chief, Equity, Policy, and Engagement

PETER V. BERNS
General Counsel



ANTHONY G. BROWN
Attorney General

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

SANDRA BENSON BRANTLEY
Counsel to the General Assembly

DAVID W. STAMPER
Deputy Counsel

JEREMY M. MCCOY
Assistant Attorney General

SHAUNEE L. HARRISON
Assistant Attorney General

NATALIE R. BILBROUGH
Assistant Attorney General

May 10, 2024

The Honorable Wes Moore
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401
Delivered via email

RE: Senate Bill 362, “Budget Reconciliation and Financing Act of 2024”

Dear Governor Moore:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 362, “Budget Reconciliation and Financing Act of 2024” (“BRFA”). There is one provision that, in our view, is questionable under the one subject requirement of the State Constitution because it increases mandated State spending. Although it is our view that the provision is not clearly unconstitutional,¹ we urge the General Assembly to enact future funding mandates through standalone legislation, not through the BRFA.

¹ We apply a “not clearly unconstitutional” standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

We also note that provisions in the BRFA relating to the funding of emergency services are nearly (but not quite) identical to House Bill 1439 and Senate Bill 1092. The differences between the bills are minor, and the bills can be signed in any order.²

Maryland's one subject requirement can be found in Article III, § 29 of the Maryland Constitution, which states, in relevant part, that "every Law enacted by the General Assembly shall embrace but one subject." This constitutional limitation on the General Assembly's legislative power serves the following purposes:

1. To avoid the necessity for a legislator to acquiesce in a bill he or she opposes in order to secure useful and necessary legislation; to prevent the engrafting of foreign matter on a bill, which foreign matter might not be supported if offered independently.
2. To protect, on similar ground, a governor's veto power.

Porten Sullivan Corp. v. State, 318 Md. 387, 408 (1990) (internal citations omitted).

An act satisfies the Constitution's one subject requirement if all of its provisions are "germane" to the same subject matter. *Migdal v. State*, 358 Md. 308, 317 (2000); *Porten Sullivan*, 318 Md. at 407. "Germane" means "in close relationship, appropriate, relative, pertinent." *Porten Sullivan*, 318 Md. at 402. For purposes of § 29, two matters can be regarded as a single subject either horizontally, because of a direct connection between them, or vertically, because they each have a direct connection to a broader common subject to which the bill relates. *MCEA v. State*, 346 Md. 1, 15-16 (1997).

As we have noted in past bill review letters, the Constitution's one subject requirement traditionally has been given a "liberal" reading so as not to interfere with or impede legislative action. *Id.* at 13. This deferential approach is meant to accommodate the nature of the legislative process, the political compromises that are part of this process, and the need to address increasingly complex issues through multifaceted legislation.

² All of the provisions of the cross-filed bills (HB 1439 and SB 1092) are included in the BRFA. In the cross-filed bills, "the" appears before "global budgets" in new Public Safety Article ("PS"), § 19-130(f)(7) but is not in the BRFA (*see* HB 1439, p. 11, line 21; SB 1092, p. 11, line 18; and SB 362, p. 57, line 10). Also, in new § 19-130(f)(8), the cross-filed bills refer to "[a]ny improvements," whereas the BRFA refers to "[a]ny other improvements" (*see* HB 1439, p. 12, line 3; SB 1092, p. 11, line 30; and SB 362, p. 57, line 20). In addition, there are three instances where SB 1092 differs slightly from both the BRFA and HB 1439. Both the BRFA and HB 1439, in three places, have an "a" before "trauma health care practitioner" that does not appear in SB 1092 (*see* HB 1439, p. 4 lines 20 and 23 and p. 9, line 17; SB 1092, p. 4, lines 20 and 23 and p. 9, line 12; SB 362, p. 50, lines 15 and 18 and p. 55, line 6). The differences between the bills are not substantive.

Delmarva Power v. PSC, 371 Md. 356, 368-69 (2002); *MCEA*, 346 Md. at 14. At the same time, the Supreme Court of Maryland has made it clear that its deferential approach to the one subject requirement was “never intended to render the Constitutional requirement meaningless” *Delmarva Power*, 371 Md. at 369.

When reviewing past BRFAs for compliance with the one subject requirement, this Office has considered “whether the various provisions of the bill deal with the single subject of balancing the budget and adjusting the finances of State and local government.” Bill Review Letter on House Bill 589 of 2021 (quoting Bill Review Letter on Senate Bill 187 of 2018); *see also* Bill Review Letter on Senate Bill 172 of 2014 (the purpose of the BRFA is “to balance the State operating budget and provide for the financing of State and local government”); Letter to William S. Ratchford, II from AAG Richard E. Israel, April 1, 1993 (“one-subject of adjusting the finances of State and local government”). Typical BRFA provisions are those that enhance State revenues or increase current or future year expenditures. Such provisions “often take the form of fund transfers, the elimination, reduction, or suspension of mandated spending, and revenue raising measures.” Bill Review Letter on Senate Bill 187 of 2018. Conversely, “[p]rovisions that reduce revenues or increase State expenditures arguably run counter to the primary purpose of the BRFA, and the inclusion of such provisions in the BRFA raises constitutional concerns.” *Id.*

In our Bill Review Letter on the 2005 BRFA, we noted “[a]n argument can be made that the genesis of the [BRFA] was to help bring the State’s budget into balance during a time of fiscal crisis, and funding mandates have no place in such legislation.” Bill Review Letter on House Bill 147 of 2005 at 5-6. Funding mandates in the BRFA, we suggested, are the hardest to defend. Accordingly, we have consistently advised that funding mandates typically are not an appropriate subject for the BRFA. *See, e.g.*, Letter to the Honorable Thomas V. Mike Miller, Jr. from AAG Bonnie A. Kirkland, dated April 1, 2009 (advising that a change to the disparity grant formula that would increase State expenditures “would be inconsistent with the primary purpose of the BRFA and should be addressed in separate legislation”); Bill Review Letter on Senate Bill 172 of 2014 at 4-5 (amendments to the BRFA mandating funding for Park Service operations and State Police “likely violate[] the one-subject rule”).

We have recognized, however, that funding mandates in the BRFA are at least “more defensible” when they are legislative reactions to a budget action taken by the Executive, either in the budget bill or a BRFA submitted to the General Assembly. Bill Review Letter on House Bill 152 of 2017 at 3. For example, during the 2005 legislative session, the Governor’s budget eliminated funding for prevailing wage enforcement, and the BRFA, as submitted by the Governor, would have repealed the Prevailing Wage Law. The General Assembly’s response was to reject the proposed repeal of the Prevailing Wage Law and to add a provision to the BRFA mandating funding for prevailing wage enforcement in future fiscal years. In considering whether inclusion of the funding

mandate in the BRFA satisfied the Constitution's one subject requirement, we stated that such a legislative response to the Governor's budget action arguably was "a legitimate exercise of policy making power granted to the legislature," and "[r]easonable arguments can be made to both support or challenge these types of actions." Bill Review Letter on House Bill 147 of 2005 at 6.

This year's BRFA, Senate Bill 362, contains many provisions that are typical of those found in a BRFA, including provisions that enhance revenues, reduce funding mandates, or provide for the transfer of funds. However, there is one provision included in the BRFA that raises a significant issue under the Constitution's one subject requirement because it mandates funding.

The BRFA amends Education Article ("ED"), § 5-229 to increase the "per pupil amount" that is used to calculate the mandated State and local shares of funding for public prekindergarten, beginning in fiscal year 2027. It also amends ED §§ 7-1A-01 and 7-1A-06 to delay and phase in the inclusion of "Tier II children" in the prekindergarten enrollment count that is used to calculate State and local mandated funding.³ It is our understanding that the net effect of these amendments on State finances, relative to current law, is to decrease expenditures in fiscal years 2025 (\$7.2 million in savings) and 2026 (\$6.3 million in savings) but to increase expenditures beginning in fiscal year 2027. Expenditures are projected to increase, relative to current law, by \$91.2 million for fiscal year 2027 (due to the increased per pupil amount), by \$80 million for fiscal year 2028, and by significantly smaller amounts in subsequent fiscal years.

While there are valid policy reasons for increasing the statutory per pupil amount (it has been stated that the additional funding is needed, at least in part, to address a shortage of qualified teachers), the legal issue is whether the statutory change is an appropriate subject for the BRFA, or whether it should be pursued through standalone legislation. Given that its effect is to increase mandated State funding, this is the type of BRFA provision that is the most difficult to defend under the Constitution's one subject requirement. It significantly increases spending in fiscal years 2027 and 2028. Moreover, the mandated spending does not appear to be a legislative reaction to a budget action taken by the Executive. In short, it has no relationship to balancing the State budget. Nonetheless, because it could be argued that the provision is related to the financing of

³ Under current law, a "Tier II child" means a child who is 4 years old, whose family income is greater than 300%, but no more than 600% of the federal poverty level, and whose family chooses to enroll the child in full-day prekindergarten. ED § 7-1A-01(j). The BRFA amends the definition of "Tier II child" so that it applies, in fiscal year 2026, to 4-year-olds whose family income is greater than 300%, but no more than 360% of the federal poverty level and, in fiscal year 2027 and subsequent years, to 4-year-olds whose family income is greater than 300%, but no more than 600%, of the federal poverty level.

State government, in our view this severable provision⁴ is not clearly unconstitutional. *See* Form Bill Review Letter, dated May 9, 2013 at n.2 (concluding that provisions in the 2013 BRFA that mandated State spending, and thus had no relationship to balancing the State budget, could be difficult to defend but were not clearly unconstitutional). We also recognize an argument can be made that the single subject concerns are reduced by the fact that the increased mandated spending for public prekindergarten is supported, at least in part, by other BRFA provisions that increase the sales and use tax on electronic smoking devices (Tax-General Article (“TG”), §§ 2-1302.34 and 11-104) and the tobacco tax (TG §§ 2-1603 and 12-105) and allocate a portion of those revenues to the Blueprint for Maryland’s Future Fund, which is used to fund public schools. Although it is our view that the amendments to ED § 5-229 are not clearly unconstitutional under the one subject requirement, we urge the General Assembly to enact any future funding mandates through standalone legislation, not as part of the BRFA.

We also write to offer comments on two other funding provisions in the BRFA, both of which raise a single subject issue but are more defensible than the amendments to ED § 5-229. The first requires that the Governor include in the annual budget bill a \$16.5 million appropriation to the Senator William H. Amoss Fire, Rescue, and Ambulance Fund (“Amoss Fund”), beginning in fiscal year 2026. Public Safety Article, § 8-102(g). That provision is part of a broader overhaul of how the State funds emergency services (see SB 362, Enrolled Version, at pages 48-58 and 80-82) and is supported by new State revenues. Specifically, the funding mandate is paid for through new revenues accruing to the Maryland Emergency Medical System Operations Fund (“MEMSOF”) from an increased annual motor vehicle registration surcharge. *See* Transportation Article, §§ 13-954(b)(1)(iii) (directing the Governor to allocate a portion of the vehicle surcharge revenues to MEMSOF). Because this funding mandate is part of a broader overhaul of how the State funds emergency services, and the mandate is directly supported by new revenues raised through other provisions in the BRFA, it does not, in our view, raise the same single subject concerns as the funding mandate for public prekindergarten. Moreover, the BRFA’s emergency services funding provisions, including the funding mandate, were also included in separate cross-filed bills (House Bill 1439 and Senate Bill 1092), both of which passed (*see* footnote 2, *supra*). If either, or both, of those standalone bills become law, that will cure any potential single subject issue raised by the BRFA’s mandate for the Amoss Fund.

Another provision of the BRFA at least has the potential to increase State funding requirements for public education, depending on the outcome of a report from the Accountability and Implementation Board (“AIB”). Section 16 of Ch. 36 of the Acts of

⁴ If a court were to find the provision increasing the prekindergarten per pupil amount unconstitutional, it is our view that it would be severable from the rest of the bill, such that a finding of unconstitutionality would not affect the bill’s other provisions.

2021 provides that annual increases in major education aid (and other funding increases required by Ch. 36) shall be limited to the rate of inflation, beginning in fiscal year 2026, if AIB “does not report that the Blueprint for Maryland’s Future is being implemented as intended and is achieving expected outcomes” AIB’s report is to be submitted to the Governor and General Assembly on or before December 1, 2024. The BRFA delays the AIB report by approximately two years (ED § 5-410(d)) and amends Section 16 of Ch. 36 to provide that the funding caps (limiting the annual increases to the rate of inflation) shall begin in fiscal year 2028 if AIB does not report that the Blueprint for Maryland’s future is being implemented as intended and is achieving expected outcomes.

To the extent this BRFA provision might have any impact on State expenditures, it would be to increase expenditures relative to current law. If AIB does not report that the Blueprint for Maryland’s Future is being implemented as intended and is achieving expected outcomes, then, under the BRFA provision, the funding caps would not be triggered until fiscal year 2028. If, however, the Blueprint is being implemented as intended and is achieving expected outcomes, then the funding caps are not triggered, and the two-year delay would have no effect on State spending. Although this provision has the potential to increase State funding for public education, the objective of the provision is to give AIB more time to complete its report, which will trigger (or not trigger) the funding caps. In our view, the inclusion of this provision in the BRFA, which modifies the State’s public education funding mechanism for the apparent purpose of giving AIB more time to conduct its work, is defensible under the Constitution’s one subject requirement and is not clearly unconstitutional.

Sincerely,

A handwritten signature in black ink, appearing to read "AGB", followed by the name "Brown" in a cursive script.

Anthony G. Brown

AGB/DWS/kd

cc: The Honorable Susan C. Lee
Eric G. Luedtke
Victoria L. Gruber