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

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

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

April 2, 2024

The Honorable Johnny Ray Salling
Maryland Senate
321 James Senate Office Building
11 Bladen Street
Annapolis, Maryland 21401
Via email

RE: Senate Bill 1145 — Public and Nonpublic Schools – Child Sex Offenders – Prohibition on In-Person Attendance

Dear Senator Salling:

You have asked whether there is a reasonable argument that prohibiting in-person school attendance for students convicted of a serious sexual offense as proposed in Senate Bill 1145 is not a violation of students' Fourteenth Amendment due process rights considering Maryland's rigorous state standards for alternative education. In light of the lack of reported case law on this precise issue, it is my view that the bill is not clearly unconstitutional and there is a reasonable argument that it would not violate a student's rights under the Due Process Clause of the Fourteenth Amendment.

My March 14, 2024 letter to you analyzed **two issues**, which I have summarized and clarified below to address the information provided and particular question raised in your latest request.

1. ***Whether banning in-person school attendance as a disciplinary sanction amounts to a "total exclusion from the educational process for more than a trivial period," such that certain procedural protections are required under the Fourteenth Amendment.* Goss v. Lopez, *419 U.S. 565, 576 (1975).***

In my view, it would not be unreasonable to argue that an in-person attendance ban with provisions for adequate alternative education does not deprive a student of a constitutionally protected interest in an education. Such an argument would be consistent with the holdings of many cases where courts considered a student's disciplinary transfer to various forms of alternative education under the *Goss* requirements. *See, e.g.*, *Conklin v. Jefferson Cnty. Bd. of Educ.*, 205 F. Supp. 3d 797, 806 (N.D.W. Va. 2016) (plaintiff was not deprived of "his entire educational interest" when placed on "homebound instruction" which included instruction in the public and in-school library and student was able to graduate on time); *Clodfelter v. Alexander Cnty. Bd. of Educ.*, No. 516CV00021RLVDCK, 2016 WL 7365183, at *6 (W.D.N.C. Dec. 19, 2016) ("When a student, however, is placed in an alternative learning program for disciplinary reasons, he is not denied a public education and his reputation does not suffer the same harm that accompanies a suspension from school."); *CLM ex rel. McNeil v. Sherwood Sch. Dist. 88J*, No. 3:15-CV-1098 (SB), 2016 WL 8944450, at *12 (D. Or. Dec. 30, 2016) (finding plaintiff was not deprived of a property interest where "alternate forms of education would be made available to [the student]"), *report and recommendation adopted*, No. 3:15-CV-1098 (SB), 2017 WL 2129301 (D. Or. May 16, 2017); *Harris ex rel. Harris v. Pontotoc Cnty. Sch. Dist.*, 635 F.3d 685, 690 (5th Cir. 2011); *S.B. ex rel. Brown v. Ballard Cnty. Bd. of Educ.*, 780 F. Supp. 2d 560, 567 (W.D. Ky. 2011) (finding that the student's assignment to alternative school did not implicate procedural due process rights where she was "assigned normal work and receiving individualized attention from the teacher/supervisor of the Alternative School" and was "graded against her regular class").

However, many cases considering the issue of alternative education still involved some level of in-person classroom instruction, not remote or virtual-only learning, nor a permanent ban, as Senate Bill 1145 seems to require. A court may consider this a material difference, weighing in favor of finding a *more than de minimis* deprivation. *See Caldwell v. Univ. of New Mexico Bd. of Regents*, No. CIV 20-0003 JB/JFR, 2023 WL 4236016, at *49 (D.N.M. June 28, 2023) (concluding that campus ban where student was required to attend all but one class online only and prohibited from participating in campus activities was more than a *de minimis* deprivation). But, as you noted, Maryland law provides virtual and remote alternative education options and mandates those options satisfy certain educational standards. For example, Section 7-1401 *et seq.* of the Education Article authorizes counties to establish virtual schools and mandates certain standards for the curriculum, wraparound services, food and nutrition services, and health care services "equivalent to services available to students who receive in-person instruction in the public schools in the county." Md. Code Ann., Educ. § 7-1404. These standards, if applied, would support an argument that the alternative education options mandated for students who fall subject to the bill are constitutionally adequate.

As explained in my prior letter though, I think it is very likely that a court would consider the facts of a particular case before making this determination, including the length of the in-person attendance ban for a specific student, the adequacy of the alternative education provided, stigma involved, special needs of the student, etc. For example, a federal court in South Dakota considered the particular circumstances of a student's placement in alternative education and determined that because the student was enrolled in only one online class and received no certified teacher instruction, "her deprivation of an education was significant enough to be treated as a

suspension and warrants procedural due process." *E. S. by & through D.K v. Brookings Sch. Dist.*, No. 4:16-CV-04154-KES, 2018 WL 2338796, at *5 (D.S.D. May 23, 2018). In general, "[c]ourts addressing whether the due process requirements adopted by *Goss* apply within the context of challenges to disciplinary placements in alternative learning program have resolved the question in the negative so long as the alternative learning program provides the disciplined student with a meaningful public education opportunity." *Clodfelter*, 2016 WL 7365183, at *6; *see also Patrick v. Success Acad. Charter Sch., Inc.*, 354 F. Supp. 3d 185 (E.D.N.Y. 2018) (listing cases in Appendix D that have adopted this type of analysis). **Nevertheless, I do not think it would be unreasonable to argue that an alternative education requirement prohibiting in-person attendance does not implicate due process rights in light of binding case law to the contrary.**

2. ***If so, whether the procedures inherent in the criminal justice process for those convicted or adjudicated delinquent for a serious sexual offense would satisfy due process by "provid[ing] a meaningful hedge against erroneous action."* Goss, *419 U.S. at 583.***

Even if a court were to find an in-person attendance ban *does* deprive a student of a protected interest in education, it would be reasonable to argue that the procedural protections provided by the bill and current State law regarding school discipline satisfy procedural due process requirements. A student who has been convicted of a sexual offense will have received notice of the conduct at issue and afforded a hearing opportunity via the court system. The relevant inquiry here, then, is whether the U.S. Constitution requires a school to also provide notice and a hearing *in addition* to those provided in the criminal justice process before prohibiting a student from attending in-person school indefinitely. Some courts have recognized that notice requirements are satisfied when the student knows the basis of charges or the school discipline due to the student's arrest or conviction. *See, e.g.*, *Caldwell*, 2023 WL 4236016, at *51; *cf. Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 639 (6th Cir. 2005) (noting that in addition to written notice from school, student "was clearly on notice as to the reasons for the hearing. He had already been convicted of a drug felony, a fact not likely to have escaped his grasp"). Furthermore, a criminal conviction demonstrates that a deprivation is "not arbitrary" nor "baseless." *Rosa v. City Univ. of New York*, 306 F. App'x 655, 657 (2d Cir. 2009).

Ultimately, though, I do not need to answer this question because it appears that Maryland law already provides certain procedures that would apply in such a scenario. After a student is arrested for a "reportable offense," State regulations require the school principal and staff to "immediately develop a plan that addresses appropriate educational programming and related services for the student and that maintains a safe and secure school environment for all students and school personnel." COMAR § 13A.08.01.17. The regulations require the school principal to request the student's parent or guardian to participate in the plan's development and to hold a conference with the parent/guardian if the plan results in a change to the student's educational program. *Id*. "If a student is removed or excluded from the student's regular school program for a reportable offense, the principal or county superintendent shall invite the student's attorney, if the student has an attorney, to participate in the conference." Md. Code Ann., Educ. § 7-303(k). The plan must be implemented within five days of notification of the student's arrest and adjusted upon disposition of the offense. COMAR § 13A.08.01.17. The regulations also direct each local

school system to "provide a review process to resolve any disagreement that arises in the [regulation's] implementation." *Id*. This whole process, which is triggered by an arrest and would necessarily precede a student's conviction for rape or serious sexual offense, entails pre-deprivation notice to the student's parent/guardian, and provides an opportunity for a hearing via the conference and planning process.

Moreover, under current State law, when the reportable offense is a sexual offense, school officials *must* consider prohibiting the arrested student "from attending the same school or riding on the same school bus as the alleged victim of the reportable offense if such action is necessary or appropriate to protect the physical or psychological well-being of the alleged victim." Md. Code Ann., Educ. § 7-303(g); *see also* COMAR § 13A.08.01.17. And if the arrested student "is convicted of or adjudicated delinquent for the rape or sexual offense, the student may not attend the same school or ride on the same school bus as the victim." Md. Code Ann., Educ. § 7-303(g). Accordingly, the only difference in this process effected by Senate Bill 1145 would be that the convicted student must not only be prohibited from attending the victim's school, but any school *in person*. Again, a removal from the student's regular educational program upon conviction pursuant to Senate Bill 1145 would also require an invitation to the student's attorney and a conference with the parent/guardian. Other State and county school disciplinary procedures may also apply.

I do note, however, that the bill does not explicitly provide an opportunity for a hearing, appeal, or judicial review in the event that the student's conviction is overturned on direct appeal or post-conviction review, although other provisions of State law or county educational policy may apply in such a scenario. It is possible that a court could find that a lack of such a procedure violates due process, at least when applied in a particular student's scenario since it risks erroneous deprivation. I do not think this fact would make the bill facially unconstitutional, however.

Overall, since a convicted student will be afforded certain procedural protections by the criminal justice system, plus receive additional notice and hearing opportunities by the school system under State law, it would be reasonable to argue that nothing more is required by the Due Process Clause and Senate Bill 1145 is constitutional. Whether the application of the bill in a specific circumstance would be constitutional or otherwise illegal is beyond the scope of this letter because it would be fact specific.

I hope that this information is helpful. Please feel free to contact me if you have any additional questions.

Sincerely,

Natalie R. Bilbrough
Assistant Attorney General