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April 6, 2016

The Honorable Michael E. Busch
Speaker of the House of Delegates
Maryland General Assembly
State House, Room H-101
Annapolis, Maryland 21401

Re: House Bill 172 – Anne Arundel County Board of Education and School Board Nominating Commission

Dear Speaker Busch:

You requested advice about House Bill 172. In particular, you asked whether the bill is unconstitutional because it terminates the terms of members of the Anne Arundel County School Board Nominating Commission who were appointed by the Governor. In my view, the bill is not clearly unconstitutional. I will explain my reasoning below.

The constitution states that the Governor "shall nominate, and, by and with the advice and consent of the Senate, appoint all civil and military officers of the State, whose appointment, or election, is not otherwise herein provided for, *unless a different mode of appointment be prescribed by the Law creating the office*." Article II, § 10 (emphasis added.) Under current law, Education Article ("ED"), § 3-110(b) creates a school board nominating commission in Anne Arundel County consisting of 11 members, five of whom are appointed by the Governor. The others are appointed by various organizations.[1] According to the legislative testimony in support of House Bill 172, public concerns were raised that the Nominating Commission was not selecting for nomination to the school board persons who reflect the diversity in the community. Thus, the Anne Arundel County delegation broadened the membership of the Nominating Commission to add persons appointed by additional organizations and the county executive.

[1] Nothing in law prevents the General Assembly from giving a private entity the power of appointment. *Commission on Medical Discipline v. Stillman*, 291 Md. 390, 411 (1981)(confirming that it was within the General Assembly's power to provide that the Medical and Chirurgical Faculty, a private entity, select members of the Board of Medical Examiners). *See also McCurdy v. Jessup*, 126 Md. 318 (1915) (upholding statute requiring that appointment of a local game warden be a person nominated by the Baltimore County Game and Fish Protective Association, a private entity).

The number of members on the Nominating Commission was increased from 11 to 13. The bill also provides that the Governor no longer appoints any Nominating Commission members and the terms of the members previously appointed by him are to end on June 1, 2016.

On April 5, 2016, the Governor vetoed House Bill 172 on the ground that by terminating the terms of his appointees, the bill violates the separation of powers doctrine. Article 8 of the Maryland Declaration of Rights provides:

> That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

"[T]he separation of powers provision means that one branch may not *usurp* the *essential* functions and powers of another branch, may not act to *destroy* the *essential* functions and powers of another branch, and may not *delegate* its *essential* functions and powers to another branch." 63 Op. Att'y Gen. 305, 310 (1978) (emphasis in original).

The Court of Appeals has recognized that few cases on separation of powers in Maryland involve conflicts between the legislative and executive branches. *Schisler v. State*, 394 Md. 519, 567 (2003). Conflicts arise only in circumstances where the General Assembly attempts to regulate in an area where the constitution grants exclusive powers to the Governor. The Court determined that the *Schisler* case was such a circumstance. At issue in that case was legislation that removed incumbent members of the Public Service Commission. A majority of the Court agreed that by removing the commissioners in the manner set out in the bill, the legislative branch usurped the power of the Executive in violation of Article 8. The Court noted that "[t]he Maryland Constitution grants the power to the Governor to remove for incompetency or misconduct those officers appointed by him for a term of years. This is the removal power *expressly conferred* by the Maryland Constitution." *Id.* at 595 (emphasis in the original) (citing Md. const., Art. II, § 15).[2]

Although it held that the legislative removal of officers violated the separation of powers doctrine, the Court in *Schisler* also repeatedly noted that when the legislature creates an office, it can designate "by whom and in what manner the person who is to fill the office shall be appointed." *Id.* at 582 (*citing Commission on Medical Discipline v. Stillman*, 291 Md. 390, 408 (1981) (citations omitted). "'It does not follow, as a necessary conclusion, that, in order to perform this duty, [the Governor] must have agents of his own nomination. Our form of government, in its various changes, has never recognized this power as an executive prerogative.'" *Id.* (*quoting Mayor of Baltimore v. State*, 15 Md. 376, 456 (1860)). "[I]t is clear that if it is done properly, i.e., abolishment or actual reconstruction of the Commission and the provisions of the statute originally authorizing it, the appointment process prospectively may be

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[2] Article II, § 15 states: "The Governor may suspend or arrest any military officer of the State for disobedience of orders, or other military offense; and may remove him in pursuance of the sentence of a Court-Martial; and may remove for incompetency, or misconduct, all civil officers who received appointment from the Executive for a term of years."

placed in the hands of persons other than the Governor." *Id.* at 583. *See also Buckholtz v. Hill*, 178 Md. 280 (1940) (appointment power is not an intrinsically executive function).

The problem that the Court in the *Schisler* case had with the 2006 bill impacting the PSC was that "[t]he Legislature has not abolished or reconstituted the Commission... It has left the Commission essentially intact and has instead ended the terms of the five incumbents and effectively precluded the incumbent Governor from reappointing them by requiring that his appointees be from a list submitted by the Legislature." *Id.* Moreover, the "new" method at issue in the *Schisler* case was short term – the method of appointment went back to the previous method when the next governor came into office. This "return" provision convinced the Court that "the primary, if not sole, reason for the passage of [the legislation] was to fire, i.e., 'remove,' the Commissioners because of the Legislature's disapproval of their actions while in office." *Id.* at 597, n.55.

In comparison, in House Bill 172 the legislature reconfigures the nominating commission and provides for additional methods of appointment. Although the terms of the Governor's appointees alone are cut short, there is no reason those individuals cannot be re-appointed to the commission, assuming they meet the qualifications of any of the vacancies. Accordingly, in my view, House Bill 172 is not clearly unconstitutional.

Sincerely,

Sandra Benson Brantley
Counsel to the General Assembly

cc: Adam D. Snyder, Chief Counsel,
Opinions & Advice, Office of the Attorney General