BRIAN E. FROSH
Attorney General

ELIZABETH HARRIS
Chief Deputy Attorney General

THIRUVENDRAN VIGNARAJAH
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.
(410) 576-7036

WRITER'S DIRECT DIAL NO.
(410) 576-6327
asnyder@oag.state.md.us

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Via First Class Mail and Electronic Mail

The Honorable Paul G. Pinsky
James Senate Office Building, Room 220
11 Bladen St.
Annapolis, Maryland 21401-1991

The Honorable Anne R. Kaiser
House Office Building, Room 350
6 Bladen St.
Annapolis Maryland 21401

Dear Sen. Pinsky and Del. Kaiser:

You have asked two questions relating to the executive order recently issued by Governor Hogan requiring that the public school year begin after Labor Day. First, you ask whether the order is a permissible exercise of the Governor's executive order authority. Second, you ask whether the General Assembly could enact legislation overriding or negating the executive order.

The answer to the second question is clear: Yes, the General Assembly may enact legislation overriding the effect of the executive order. The answer to the first question is somewhat less clear. The Governor has broad constitutional and statutory authority to direct the actions of the Executive Branch of State government through the issuance of executive orders. The Labor Day executive order, however, purports to direct the State and local boards of education, which are independent bodies that are not directly answerable to the Governor, and it directs them on a topic, the school calendar, that likely falls within the State Board of Education's visitatorial power over educational policy and public school administration—a power that the Court of Appeals has described as "comprehensive" and "exclusive." *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129, 137 (2000). In the absence of controlling judicial precedent discussing the interplay between the Governor's executive order authority and the State Board's visitatorial powers, I cannot say unequivocally that the Labor Day executive order

exceeds the Governor's authority, but I believe it likely that a reviewing court, if presented with the issue, would conclude that it does.

Background

On August 31, 2016, Governor Hogan issued Executive Order ("E.O.) No. 01.01.2016.09 entitled "Starting the Public School Year After Labor Day." The order directs that all K-12 public schools, "through the local Boards of Education," shall open for students "no earlier than the Tuesday immediately following the nationally-observed Labor Day holiday" and shall adjourn "no later than June 15." E.O. ¶¶A, B. Within that beginning and end date, "each local Board of Education shall retain full responsibility for establishing its annual academic calendar and, therefore, shall have the necessary latitude to determine how best to comply with the provisions of this Executive Order along with State and local laws." *Id.* ¶C.

The executive order excludes certain things from its reach. It does not apply to summer school classes, *id.* ¶B, the timing of sports seasons as set forth in COMAR 13A.06.03.03, E.O. ¶E, or to school systems that operate year-round, as allowed under § 7-103(e) of the Education Article. E.O. ¶D. It also provides a mechanism by which local school boards may seek and obtain annual waivers of the requirements of the executive order. Such waivers are to be evaluated and granted by the State Board of Education at its "sole discretion," as set forth in rules and regulations to be adopted by the State Board. *Id.* ¶F. The Board's regulations must include procedures for filing waiver applications, "standards to receive a waiver based on compelling justification," and procedures and standards for "special waivers" for those school districts and individual schools proposing "non-traditional schedules." *Id.* ¶F(1), (2), and (3). The order is effective beginning with the 2017-18 school year.

In the introductory portions of the executive order, Governor Hogan described the potential benefits of starting the school year after Labor Day, stating that it would:

- Preserve the Labor Day holiday weekend, and the days that precede it, as an extended opportunity "to relax and enjoy time with family and friends";
- Result in "an additional $74.3 million in direct economic activity, including $3.7 million in new wages and $7.7 million in State and local tax revenue that could be reinvested in classrooms throughout the State of Maryland";
- Implement the recommendation of the Task Force to Study a Post-Labor Day Start Date for Maryland Public Schools; and

- Provide public health benefits by keeping students out of classrooms "in the second hottest month of the calendar year" when many schools lack air conditioning, and by "reducing the local ozone generation numbers due to fewer buses operating on the roadways during the heart of the ozone season."

E.O. at 1-2. The executive order was delivered to, and countersigned by, the Secretary of State. *See* Md. Code Ann., State Gov't § 3-404.

History of Executive Orders in Maryland

I. Early History Through the Formalization of the Executive Order Process

Executive orders have long been used in this State, though they have not always been called "executive orders." The term first appeared in Maryland case law in *Ahlgren v. Cromwell*, 179 Md. 243 (1941), which involved a 1920 executive order by Governor Albert C. Ritchie that purported to extend the State Merit System to State House watchmen. Under prior legislation, all direct gubernatorial appointees—including the State House watchmen—had been excluded from the System, but a 1920 law authorized the Governor, at his discretion, to add back into the System positions that been legislatively excluded. The Court of Appeals invalidated the 1920 law—and the executive order based on it—on the grounds that separation of powers prohibited the Legislature from delegating to the Governor the power to nullify earlier enactments of the General Assembly. *Id.* at 247.

This first use of the term "executive order" coincided with a nationwide trend that saw an increase in the number of State functions and a corresponding increase in the number of independent and semi-independent agencies over which Governors had little or no control. Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 Iowa L. Rev. 78, 79 (1964). The proliferation and fragmentation of governmental entities early in the twentieth century resulted in what one commentator characterized as "chaos," which triggered a movement toward consolidation and reform of governmental operations. *Id.* The response in many states was to reorganize government, often along with an increase in gubernatorial power. *Id.*

The result in Maryland was the enactment of Chapter 29 of 1922, which organized the functions of government into departments "in order to promote coordination and increased economy in the conduct of the Government." 1922 Md. Laws, ch. 29. Chapter 29 created and recognized a list of nineteen administrative departments, boards, and commissions, and provided that those not listed were to be included within those that were. The 1922 law further provided that:

> The head of the Executive Department shall be the Governor of the State, who in addition to the rights, powers, duties, obligations and functions now or hereafter conferred by law, shall also have supervision and direction over the officers and agencies hereby or hereafter assigned to the Executive Department.

Id. These provisions were updated in 1973, when the General Assembly enacted a series of measures establishing procedures for the issuance and maintenance of executive orders. *See* 1973 Md. Laws, ch. 68 (now codified at Title 3, Subtitles 3 and 4).[1] One provision—now codified at § 3-302 of the State Government Article—declared that "[t]he Governor is the head of the Executive Branch of the State government and, except as otherwise provided by law, shall supervise and direct the officers and units in that Branch." The 1973 enactment also defined the term "executive order." That definition—which now appears in § 3-401 of the State Government Article—states that the term means an order, or an amendment to or rescission of an order, over the signature of the Governor, that:

> (1) proclaims or ends a state of emergency or exercises the authority of the Governor during an emergency, under Title 14, Subtitle 3 of the Public Safety Article or any other provision of law;
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> (2) adopts guidelines, rules of conduct, or rules of procedure for:
>
> (i) State employees;
>
> (ii) units of the State government; or

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[1] Although not at issue here, the 1970s also saw the enactment of a new constitutional provision that authorized another kind of executive order, one focused on the reorganization of the Executive Branch. *See* Art. II, § 24. The new provision required that, when the organizational changes "are inconsistent with existing law, or create new governmental programs," they must be "set forth in executive orders in statutory form which shall be submitted to the General Assembly within the first ten days of a regular session." *Id.* Executive orders submitted to the Legislature "shall become effective and have the force of law on the date designated in the Order unless specifically disapproved, within fifty days after submission, by a resolution of disapproval concurred in by a majority vote of all members of either House of the General Assembly." *Id.* Because the Labor Day executive order does not effect a reorganization of the Executive Branch, we do not discuss Article II, § 24 in any detail below.

> (iii) persons who are under the jurisdiction of those employees or units or who deal with them;
>
> (3) establishes a unit, including an advisory unit, study unit, or task force; or
>
> (4) changes the organization of the Executive Branch of the State government.

State Gov't § 3-401.

II. Attorney General Opinions: 1963-1991

The 1973 legislation formalizing the process for issuing executive orders came after questions arose about the lack of guidelines about what a Governor could, and could not, reach through an executive order. In 1963, Governor Tawes asked Attorney General Finan for advice on the Governor's authority to issue an executive order that would eliminate discrimination on the basis of race, religion, color, creed, or national origin in any State-licensed business or profession. 48 *Opinions of the Attorney General* 72 (1963). The Attorney General concluded that the Governor could, under his Article II, § 1 power to "take care that the laws are faithfully executed," prohibit State licensing boards from discriminating in the issuance of licenses. That much was "within the power of the Executive to police and correct." *Id.* at 75. The Attorney General expressed "the gravest doubts," however, about the constitutionality of ordering the suspension or revocation of licenses on the grounds of the licensees' discrimination "*in their work or practice*." *Id.* (emphasis in original). The Attorney General stated that the Executive "has no plenipotentiary power, under the guise of executing the will of the Legislature, to brush aside any legislative act or to superimpose thereon his own view of what is necessary for the public good." *Id.* at 75; *see also* Robert A. Zarnoch, *Gubernatorial Executive Orders: Legislative or Executive Power?*, 44 Maryland Bar Journal 48, 50 (May/June, 2011).

Between issuance of the 1963 Opinion and the first decision of the appellate courts on the executive order power in 1991, our Office issued several opinions addressing particular executive orders. In 1967, Attorney General Burch determined that the Governor had the power to adopt, by executive order, a Code of Fair Practices that broadly prohibited discrimination by the agencies in the Executive Department of State government. 52 *Opinions of the Attorney General* 443 (1967). The Opinion found that the power to adopt a Code of Fair Practices was not derived from rulemaking power granted by the General Assembly, but was derived from the Governor's constitutional authority to see that the

laws, including anti-discrimination laws passed by the General Assembly, are faithfully executed. *Id.* at 446.

Other Opinions confirmed the authority of the Governor to issue executive orders with respect to the treatment of State employees. For example, in 61 *Opinions of the Attorney General* 219 (1976), Attorney General Burch concluded that the Governor had the power to provide hearing rights for unclassified employees who are discharged. The Opinion found that the ability of the Governor to issue executive orders for the "guidance and direction" of employees of the Executive Branch has both constitutional and statutory origin, being derived from the executive power granted by Article II, § 1 of the Maryland Constitution and what is now § 3-302 of the State Government Article. *Id.* at 224. So long as the order was not contrary to State law or did not make "any substantive change in the system of State employment or in the relationship between the State and its employees," it would not offend the separation of powers provision of Article 8 of the Declaration of Rights and thus would be constitutionally authorized. *Id.* at 227. The Opinion concluded that, "[u]nder the circumstances of its issuance, we view the Executive Order as the exercise of a management function which is implicit in the power of the Governor to supervise and direct the agencies of the Executive Department." Similarly, in 74 *Opinions of the Attorney General* 200 (1989), Attorney General Curran found that the Governor had the authority to issue an executive order establishing a State substance abuse policy. Noting that the order addressed only Executive Branch employees and did not apply to anyone outside of State government, the Opinion described the order as "the latest in a series of executive orders that, over the years, have 'supervised' or 'directed' some aspect of employee conduct or provided a benefit to employees." *Id.* at 206.

Some Opinions went further and upheld the validity of executive orders that, while targeted toward Executive Branch agencies, had ramifications *beyond* the government. For example, in 67 *Opinions of the Attorney General* 203 (1982), Attorney General Sachs considered a proposed executive order setting forth policies that would guide State agency decisions involving the physical and economic development of the State. Although the order would affect agency decisions about privately-proposed development projects, the Opinion concluded that the proposed order was authorized by statute, namely the provisions now found at §§ 3-302 and 3-401 of the State Government Article, describing them as granting the Governor "extremely broad authority to supervise and direct the officers and agencies assigned to the Executive Department." *Id.* at 207 (internal quotation marks and brackets omitted).

The only Opinion in this period concluding that an executive order was not authorized was 78 *Opinions of the Attorney General* 148 (1993), where the issue was whether the Governor could order private employers providing services on State-funded projects to test their employees for drugs. Attorney General Curran concluded that the requirement could be imposed by the Board of Public Works with respect to employers that had a contractual relationship with the State, but that it could not be imposed by the Governor through an executive order because:

> No statute, federal or State, presently authorizes the Governor to require a drug testing program by employers working on State-funded projects. In the absence of statutory authorization, an executive order may not regulate the conduct of private parties.

Id. at 152. The Opinion did not address the possibility that State contractors and their employees might be persons "under the jurisdiction of," or "who deal with," State agencies for purposes of § 3-401(2)(iii) of the State Government Article.

III. Appellate Court Decisions: 1991 to the Present

The first appellate case to address the Governor's power to issue executive orders was *Maryland Classified Employees Association v. Schaefer*, 325 Md. 19 (1991) ("*MCEA*"), which involved a challenge to an executive order increasing the normal workweek for State employees in the Executive Branch from 35½ to 40 hours a week.[2] The Court upheld the order, concluding that it was not inconsistent with existing law, which defined the work week as "at least 35½ hours up to a maximum of 40 hours." *Id.* at 27 (citing the personnel rules then set forth at COMAR 06.01.01.42A(1)). The Court concluded that "the Governor, as the head of the Executive Branch, has broad powers with respect to Executive Branch State employees and over the Secretary of Personnel, who exercises his power subject to the Governor and carries out the Governor's policies with respect to personnel matters." *Id.* at 34; *see also id.* at 28-30 (describing, and stating its "full agreement" with, the trial court's reasoning).

MCEA is significant for two principal reasons: First, it treated § 3-401(2) of the State Government Article as granting authority for the issuance of executive orders. The

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[2] The executive order at issue, No. 01.01.1991.19, was directed to the Secretary of Personnel, who served at the Governor's pleasure, Md. Ann. Code, art. 41, § 9-101(b) (1990 Repl. Vol.), and the "appointing authorities" for all State employees.

Court agreed with the trial court that the statutory provision was sufficiently broad "to allow the Governor to control and direct the officers over whom he is statutorily given control . . . [including] the essential aspects of state employment such as hours in a work week." *Id.* at 29 (quoting trial court; brackets in *MCEA*). Second, the decision established that the Governor could himself exercise powers that were granted to a cabinet Secretary. *Id.* at 34.[3]

Subsequent appellate cases continued to recognize the Governor's broad power to issue executive orders under both the Constitution and the State Government Article. In *McCulloch v. Glendening*, 347 Md. 272 (1997), the Court of Appeals upheld an executive order authorizing collective bargaining rights for Executive Branch employees,[4] holding that the Governor's power to do so was grounded in Article II, §§ 1 and 9 of the Maryland Constitution—which, respectively, vest the executive power of the State in the Governor, and direct the Governor to "take care that the laws are faithfully executed," *id.* at 282-83—as well as §§ 3-302 and 3-401 of the State Government Article. The Court stated that "a strong argument can be made . . . that the Executive Order can be upheld on the statutes alone," but when the constitutional and statutory provisions were considered together, "it becomes crystalline that the Governor has broad power and authority over Executive Branch employees and their working conditions." *Id.* at 286. The Court also reiterated the holding in *MCEA* that the Governor has broad power to exercise powers that could be exercised by the Secretary of Personnel. *Id.* at 286-87.

McCulloch also addressed what it means for an executive order to be inconsistent with State law. The parties challenging the validity of the order had argued that requiring

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[3] Attorney General Curran applied this proposition in 81 *Opinions of the Attorney General* 58 (1996), which concluded that the Governor had the authority to approve a memorandum of understanding between the World Health Organization and the Department of Health and Mental Hygiene. The Attorney General described the Governor's role as "head of the Executive Branch" and noted that each cabinet secretary "serves at the pleasure of the Governor" and is "responsible for carrying out the Governor's policies." *Id.* at 60 (quoting State Gov't § 3-302 and § 2-102(b) of the Health-General Article). "Because the Secretary had authority to execute the Memorandum, so did the Governor." *Id.*; *see also id.* (observing that *MCEA* confirmed the "Governor's authority to exercise personally authority granted by law to subordinates").

[4] The executive order applied to the principal departments within the Executive Branch—which are listed at § 8-201(b) of the State Government Article—as well as the Maryland Insurance Administration, the State Department of Assessments and Taxation, and the State Lottery Agency, but not the Mass Transit Administration. *McCulloch*, 347 Md. at 276-77.

State agencies to collectively bargain within an exclusive employee representative conflicted with the State Personnel Management Reform Act, which provided instead for "informal, participative employee-management relations" through "employee/ management teams." *Id.* at 287. The Court acknowledged that the different approaches to labor-management relations could constitute an "inconsistency" that "would or could have the effect of preventing the two systems from coexisting." *Id.* at 289. After engaging in a "comprehensive review" of existing law, however, the Court concluded that the two systems "could coexist," both in law and in practice. *Id.* at 289-90. First, from its review of the current statute, the Court saw no indication that the Legislature intended the existing, less formal arrangement to be the "exclusive means of employee/management relations." *Id.* at 289. Then, looking at how the two management approaches might work in practice, the Court concluded that they could operate "separately" or "harmoniously," or the agency head could avoid the conflict altogether by exercising his authority under existing law to "waive the establishment" of the less formal employee/management teams. *Id.* at 290.

The analysis in *McCulloch* was applied by the Court of Special Appeals in *Department of Pub. Safety & Correctional Services v. Beard*, 142 Md. App. 283 (2002), where the court held that an executive order establishing a substance abuse policy for State employees prevailed over contradictory provisions in a subsequently-enacted regulation that had the force of law. As the Court of Appeals did in *McCulloch*, the intermediate appellate court looked beyond the fact that the two authorities were "competing, if not conflicting," and explored ways in which to harmonize the two using principles of statutory interpretation. *Id.* at 302. Ultimately, the court concluded that the executive order controlled because it was the more specific of the two. *Id.* at 303. In reaching that conclusion, the court reiterated that the Governor's executive order authority was "broad" and was "rooted in Maryland's Constitution and statutory law." *Id.* at 296.

Most recently, in *State v. Maryland State Family Child Care Ass'n*, 184 Md. App. 424 (2009), the Court of Special Appeals upheld an executive order requiring the State to recognize a bargaining representative for private family child care providers who participated in the State's Purchase of Care Program. Under the program, the State reimbursed private child care providers—at a rate determined by the Maryland State Department of Education ("MSDE")—for a portion of the cost of providing child care services to families of limited economic means. *Id.* at 426-27. The executive order directed MSDE to recognize an organization designated by participating child care providers as their exclusive bargaining representative and to collectively bargain the reimbursement rate with that representative. *Id.* at 428-29.

As in *McCulloch* and other earlier cases, *Maryland State Family* recognized that the relevant constitutional and statutory provisions gave the Governor "broad authority" to issue executive orders. *Id.* at 449 (quoting *McCulloch*, 347 Md. at 287). But what is most significant about the case for our purposes is that it upheld the executive order despite the fact that the order affected private actors, namely, the child care providers who participated in the Program. The intermediate appellate court concluded that the executive order could reach the providers because they were "paid" and "regulated" by the State, and thus "deal with" the State for purposes of § 3-401 of the State Government Article. *Id.* at 446. In fact, the court stated that the order "fits squarely within" the terms of that provision. *Id.*

Taken together, these cases establish certain general propositions, but also leave some questions. First, the courts have taken a broad view of the Governor's power under § 3-401 of the State Government Article and under Article II, §§ 1 and 9 of the Constitution. Every court decision discussed above noted the breadth of the Governor's executive order authority over the Executive Branch. Second, the issues raised by the questions you ask will be evaluated against a body of judicial precedent that has uniformly upheld executive orders. Finally, the cases establish that the Governor may, by executive order, take action that could be taken by the secretary of a principal department of the Executive Branch. However, no Maryland appellate court has addressed the extent to which the Governor may, by executive order, direct the actions of the State and local boards of education—which are independent boards not directly answerable to the Governor—on matters that fall within the State Board's power to set the educational policy of the State.

Analysis

Maryland law provides for three types of executive orders: (1) those issued under the authority granted by Article II, § 24, of the Maryland Constitution, which authorizes the Governor to "make changes in the organization of the Executive Branch of the State Government"; (2) those issued pursuant to specific statutory authority, *see, e.g.*, State Gov't § 3-401(2) (authorizing the Governor to adopt "guidelines, rules of conduct, or rules of procedure" for State employees)[5]; and (3) those that are issued on the strength of the

[5] Other statutory provisions authorize the Governor to issue executive orders to implement specific policies. *See, e.g.*, Md. Code Ann., Public Safety §§ 14-106 and 14-107 (authorizing the Governor to issue an executive order declaring a state of emergency and taking responsive action); Md. Code Ann., Envir. § 2-105 (authorizing Governor to issue an executive order proclaiming an air pollution emergency and requiring "the immediate elimination of specifically identifiable sources of air pollution").

Governor's "general constitutional provisions relating to executive powers and duties." *See* 64 *Opinions of the Attorney General* 180, 181 (1979).

The Labor Day executive order does not "make changes in the organization of the Executive Branch" and thus is not authorized under Article II, § 24. Instead, it may only be upheld under either the Governor's general constitutional authority over the Executive Branch or his authority under § 3-401 of the State Government Article, which authorizes the Governor to adopt "guidelines, rules of conduct, or rules of procedure" for "State employees," "units of State government," and people who are "under the jurisdiction of," or who "deal with," those employees or units.

To a large extent, the rules governing executive orders issued under these two fonts of authority are the same. Although the different types of executive orders might have somewhat different reaches, they must direct how Executive Branch agencies exercise the discretion allowed to them under existing State law. 64 *Opinions of the Attorney General* at 184. Thus, to be permissible, these types of executive orders (a) must be consistent with existing law, (b) may only reach the actions of the State actors subject to the Governor's executive order authority, and (c) may not regulate private actors directly. Although these considerations often overlap, I will try to analyze them in turn.

I. Whether the Labor Day Executive Order is Authorized by Law

A. Is the Labor Day Executive Order Consistent with the Existing Law Governing the Public School Calendar?

Current law does not prescribe when the school year must begin or end. Instead, it requires that each public school "[s]hall be open for pupil attendance for at least 180 actual school days and a minimum of 1,080 school hours during a 10-month period in each school year." Md. Code Ann., Educ. § 7-103(a)(1); COMAR 13A.02.01.04.[6] The State Board has concluded that "the school calendar, which establishes duty days, professional days, holidays and student sessions[,] falls in the prerogative of the local boards," Opinion No. 70-1, 1 *Opinions of the Md. State Bd. of Educ.* 35, 36 (1970), but there is nothing in the

[6] If "normal school attendance" is prevented by severe weather or disaster, schools may obtain a waiver of the 180-day requirement so long as they have provided at least 1,080 hours of instruction during the 10-month period. Educ. § 7-103(a)(1)(ii); *see also* COMAR 13A.02.01.04C (setting forth the process of applying for waivers of the 180-day requirement).

statute that specifically gives local boards the exclusive authority to set those dates.[7] In this respect, then, the Labor Day executive order is not inconsistent with existing law.

Nor do I see anything inherently inconsistent between the Labor Day executive order and the statutory requirement that schools provide 180 school days of instruction. Even in years when Labor Day falls on September 7—*i.e.*, the latest possible date—there are 201 weekdays between Labor Day and June 15. Excluding the statutorily-required holidays, the total number of potential days of instruction come to 186.[8] The executive order and the statute are not inconsistent in this respect; the 180-day statutory requirement theoretically "could coexist" with school year that reaches from Labor Day to June 15. *See McCulloch*, 347 Md. at 290.

There are, of course, many other eventualities that might result in a local school system being unable to meet the 180-day/1,080-hour requirement within the limits of the executive order. But the statute and executive order both include provisions that would allow schools to seek adjustments to accommodate such eventualities. The statute gives the State Board the authority to grant adjustments to the 180-day requirement for inclement weather and disasters if the local board shows that it has made "a demonstrated effort" to comply with the requirement. Educ. § 7-103(b).[9]

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[7] The local boards have "control" over "educational matters" within the county schools, Educ. § 4-101(a), and the power to "determine . . . the educational policies of the county school system." *Id.* § 4-108(e). And the General Assembly has specified that the school calendar may not be a topic of negotiation in collective bargaining, a fact that suggests that the Legislature sees the school calendar as a prerogative of the local boards. *Id.* § 6-408(c)(3). But the local board's power in this respect remains subject to the "general control and supervision" of the State Board. *Zeitschel v. Bd. of Ed. of Carroll County*, 274 Md. 69, 81 (1975); *see also* Educ. § 4-108 (requiring that the local board exercise its powers subject to Article 4 of the Education Article and to "the applicable bylaws, rules, and regulations of the State Board").

[8] The worst-case 186-day figure accounts for those school years that have both a September 7 Labor Day and either a primary or general election day, because the statute includes the primary and general election days on the list of public school holidays. Educ. § 7-103(c)(1). In Calvert, Caroline, Dorchester, Kent, Talbot, and Worcester counties—which are statutorily authorized to remain open on primary and general election days, § 7-103(c)(4)—the worst-case scenario would be 187 days available for instruction.

[9] Unless otherwise indicated, all statutory citations will be to the current version of the Education Article.

The Labor Day executive order establishes a separate waiver process, to be "set forth in the rules and regulations adopted by the State Board," by which the State Board may grant a waiver of the Labor Day-to-June 15 calendar if a local board presents a "compelling justification." E.O. ¶F. I do not speculate here on what might constitute a "compelling justification," but local boards might seek to justify waivers to account for inclement weather or emergencies, school closures to allow for teacher development, Spring Break, or even an earlier start date. Although the executive order provides for waivers "annually," E.O. ¶F, F(2), there is nothing in it that would prevent a local board from seeking a waiver of the Labor Day requirement before the start of the school year. Such requests would be evaluated by the State Board to determine, in its "sole discretion," whether there is a "compelling justification" for a waiver. ¶F(2). Because the executive order provides for this type of flexibility, I cannot say that it could not "coexist" with existing statutory requirements. *See McCulloch*, 347 Md. at 290.

There is, however, an argument that requiring local boards to seek waivers from the State Board to begin the school year before Labor Day or end it after June 15 is itself inconsistent with two aspects of existing statutory law. First, under existing law, local school systems that wish to add additional school days onto the end of the school year to meet the 180-day requirement may do so without first seeking the State Board's approval, at least if the resulting school year can be concluded within the 10-month period allowed for under § 7-103(a)(1)(i). The Board's approval is only required when a local board—due to weather-related closures or a disaster—seeks to offer *fewer* than 180 days of instruction or extend the school year beyond ten months. § 7-103(b). Under the executive order, by contrast, local school boards would have to seek the Board's approval to remain open past June 15, even if to satisfy the 180-day requirement. The executive order thus imposes an approval requirement that is not required by existing law.

Second, the executive order arguably shortens the 10-month period allotted for local boards to provide the statutorily-required 180 school days or 1,080 school hours. *See* § 7-103(a)(1)(i). The executive order requires local school systems to remain open for approximately 9½ months—*i.e.*, Labor Day through June 15—and to seek a waiver from the State Board to remain open longer. *See* E.O. ¶F. Thus, the executive order would require local boards to seek State Board approval for remaining open between 9½ and 10 months when, under current law, they would not be required to do so.

Neither of these potential inconsistencies with existing State law seems especially problematic as a legal matter. As discussed above, the executive order gives the State Board the "sole discretion" to approve waiver requests, so the State Board and the local

boards may still craft a school calendar that meets their needs—even one that starts before Labor Day. If the State Board, in its "sole discretion," determines that an earlier start date is supported by a "compelling justification," the executive order allows for the adjustment. Thus, while a reviewing court might find these facial inconsistencies with State education law legally significant, I think the requirements of the executive order "could coexist" with the statutory provisions governing the school calendar. *See McCulloch*, 347 Md. at 290.

B. May the Governor, Through the Issuance of an Executive Order, Direct the Local School Boards on the Formulation of the School Calendar?

My conclusion that the Labor Day executive order is not inconsistent with existing law defining the school year does not end the inquiry. As discussed above, executive orders issued under the Governor's constitutional executive powers must be limited to the Executive Branch, and orders issued under his statutory authority must be limited to "guidelines, rules of conduct or rules of procedure" for "State employees", "units of State government," and people who are "under the jurisdiction of," or who "deal with," those employees or units. State Gov't § 3-401.

Whether local school boards fall within any of these particular categories is complicated by the fact that they are "hybrid" agencies, meaning that they are considered local entities for some purposes and State entities for others. *See Beka Indus., Inc. v. Worcester County Bd. of Educ.*, 419 Md. 194, 212 (2011); *see also* 71 *Opinions of the Attorney General* 128, 129-30 (1986) (observing that there is "no single test for determining whether a statutorily-established entity is an agency or instrumentality of the State for a particular purpose" and that "the status of an entity for some purpose is not determinative of its status for other purposes"). Ultimately, it is not necessary to establish whether the local boards are within the Executive Branch or qualify as a "unit of State government," whether board members are State employees, or whether the local boards are under the jurisdiction of, or deal with, the State Board. Suffice it to say, each question is uncertain, with arguments on both sides. These uncertain issues need not be resolved because, however they might be resolved, it is my view that the Labor Day executive order likely intrudes on the State Board's exclusive visitatorial power over educational policy and administration and thus would likely be found inconsistent with existing law on that basis.

1. The State Board Possesses Visitatorial Powers that the Court of Appeals Has Described as "Comprehensive" and "Exclusive."

Article VIII of the Maryland Constitution assigns to the General Assembly the duty to "establish throughout the State a thorough and efficient System of Free Public Schools" and to "provide by taxation, or otherwise, for their maintenance." Md. Const., Art. VIII, § 1. In compliance with that constitutional directive, "the General Assembly has created a structure for the operation and maintenance of public schools that weaves together State and local responsibilities." *Building Materials Corp. of America v. Board of Educ. of Baltimore County*, 428 Md. 572, 576 (2012).

The State Board issues regulations, which have the force of law, § 2-205(c), and guidelines for instruction, § 2-205(h), and it coordinates the overall "growth and development of elementary and secondary education in the State." § 2-205(g). The local boards, for their part, have "control" over the "educational matters" within the county schools, § 4-101(a), and "determine . . . the educational policies of the county school system." § 4-108(e). In all respects, however, the local boards operate "[s]ubject to this article and to the applicable bylaws, rules, and regulations of the State Board." *Id.* As the Court of Appeals has stated:

> The State Board of Education and the State Superintendent of Schools set the overall educational policy of the State and provide general direction and supervisory authority over the system, but, subject to that State direction and authority, it is predominantly the school boards and school superintendents in each of the 23 counties and Baltimore City that operate the public schools.

Maryland State Bd. of Educ. v. Bradford, 387 Md. 353, 359 (2005).

Within this dual system of public education, the State Board of Education possesses "'a visitatorial power of the most comprehensive character.'" *Zeitschel*, 274 Md. at 80 (quoting *Wilson v. Board of Education*, 234 Md. 561, 565 (1964)). The General Assembly, in the exercise of its authority under Article VIII of the Constitution, has "consistently vested" the State Board "with the ultimate administrative authority to interpret, explain, and apply the public education laws." *Baltimore City Bd. of School Com'rs v. City Neighbors Charter Sch.*, 400 Md. 324, 355 (2007). As a function of its oversight role, the State Board resolves appeals arising out of almost all types of decisions issued by the local boards in their quasi-judicial capacity, including decisions to terminate or discipline

employees, close or consolidate schools, transfer students, and discipline students. The State Board also reviews on appeal the decisions of the local boards involving charter school disputes, home instruction, transportation, and residency. Educ. § 4-205(c)(2) and (3); *see also* http://archives.marylandpublicschools.org/MSDE/stateboard/legalopinions/2010/s_i.htm (listing State Board opinions by topic).

In addition to its oversight over the local boards, the State Board also has the authority to "explain the true intent and meaning" of the Education Article. § 2-205(e). As the Court of Appeals has observed, "the paramount role of the State Board of Education in interpreting the public education law sets it apart from most administrative agencies," and its "broad powers necessarily circumscribe" the Judiciary's power to review State Board decisions. *Montgomery County Educ. Ass'n, Inc. v. Bd. of Educ. of Montgomery County*, 311 Md. 303, 309-10 (1987).

The State Board's power over educational policy and administration within Maryland is "in its nature, summary and exclusive." *Chesapeake Charter*, 358 Md. at 137 (quoting *Wiley v. Allegany County School Comm'rs*, 51 Md. 401, 405-06 (1879)). Through the exercise of its visitatorial power, the State Board has "the last word on any matter concerning educational policy or the administration of the system of public education." *Zeitschel*, 274 Md. at 80.

That the State Board exercises broad visitatorial power over the administration of the public school system does not by itself foreclose gubernatorial control. As discussed above, the Governor's role as "head of the Executive Branch" generally gives him the authority to "exercise personally authority granted by law to subordinates" within that branch of government. 81 *Opinions of the Attorney General* at 60. But the Governor does not have the same direct control over the State Board that he has over the "principal departments of the Executive Branch."

There are 19 principal departments that, by statute, are placed within the Executive Branch. State Gov't § 8-201. The secretaries of these principal departments serve at the Governor's pleasure, *id.* § 8-205(a), and are typically required by statute to implement the Governor's policies. *See, e.g.*, Md. Code Ann., State Fin. & Proc. § 4-202(c)(1) ("The Secretary shall advise the Governor on all matters assigned to the Department and is responsible for carrying out the Governor's policies on those matters."). There is no question that the Governor may direct the actions of the principal departments of the Executive Branch through an executive order.

The State Department of Education, however, is not statutorily designated as a "principal department of the Executive Branch." State Gov't § 8-201. It is instead "a principal department *of the State government*." Educ. § 2-101 (emphasis added). The different terminology reflects the fact that the State Board structurally occupies a different position *vis a vis* the Governor than do the principal departments of the Executive Branch. Unlike the Executive Branch agencies whose secretaries serve at the pleasure of the Governor and who are charged with carrying out the Governor's policies, the State Board is not directly answerable to the Governor. Although the Governor appoints the members of the State Board, subject to legislative approval, § 2-202, the members do not serve at the pleasure of the Governor. Instead, the Governor may remove a member from office only for cause, *i.e.*, immorality, misconduct in office, incompetency or willful neglect of duty, and only after providing the member notice and an opportunity to be heard publicly on the record. § 2-303. Furthermore, the functional equivalent of a departmental secretary within MSDE—the State Superintendent—is appointed and removed by the State Board, not the Governor. § 2-302. Given that the power to remove a recalcitrant official is ultimately the Governor's means of enforcing his executive orders, *see Gubernatorial Executive Orders*, 50 Iowa L. Rev. at 97, these features suggest that the MSDE and the State Board fall outside the Governor's authority to control via an executive order, at least with respect to their core powers. *See* Letter from Richard E. Israel, Assistant Attorney General, to Christopher N. Allan, Deputy State Archivist (May 19, 1997) (describing the manner in which members of the State Board are appointed and removed and concluding that the State Board "has a different status and relationship to the Governor than the principal departments headed by a secretary").[10]

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[10] There is some indication that the present configuration of the State Board, when it was adopted in 1916, was intended to "remove it as far as possible from politics" by, among other things, removing the Governor from membership on the Board. Abraham Flexner, Frank P. Bachman, "Public Education in Maryland, A Report to the Maryland Educational Survey Commission" at 155 (5th ed. 1921); *see Clauss v. Bd. of Ed. of Anne Arundel County*, 181 Md. 513, 518 (1943) (tracing origins of State Board's modern configuration to 1916 Md. Laws, ch. 506, which was passed as a result of the "most thorough and exhaustive" Flexner report authorized by 1914 Md. Laws, ch. 844). Flexner and Bachman recommended that, "[t]o remove the State Board as far as possible from politics, its members should be appointed without regard to parties for long terms—say seven years—confirmation by the Senate should be dispensed with, and the Governor should be deprived of membership." Flexner Report at 156. Of these proposed measures, the General Assembly ultimately adopted and retained the third.

Our Office has previously advised that the independence of the Board, combined with its broad visitatorial power, probably places it beyond the reach of the Governor's executive order authority. In 1996, when evaluating the scope of the collective bargaining executive order ultimately addressed by *McCulloch*, the Deputy Attorney General advised that, "[a]lthough the matter is not completely free from doubt, I believe that MSDE is not automatically covered by the Executive Order . . . ." Memorandum from Carmen M. Shepard, Deputy Attorney General, to Buddy Roogow (July 8, 1996). Ms. Shepard based her conclusion on the fact that the MSDE is not included in the list of "principal departments within the Executive Branch," but is instead statutorily described as "a principal department 'of the State Government.'" *Id.* (quoting § 2-101). She explained:

> The difference in statutory language is not accidental. MSDE is not subject to executive control to the same degree as other agencies. Unlike any cabinet agency whose Secretary is appointed and responsible to the Governor, MSDE is responsive to an independent board, which has control of any matter concerning educational policy or administration of the system of education.

Id. Thus, the State Board's substantial independence, combined with its visitatorial power, suggests that the Governor does not have the power to direct educational policy or public school administration through the mechanism of an executive order.

Although no Maryland case has addressed the interplay between the State Board's role and the Governor's executive order authority,[11] the Louisiana Court of Appeal—that state's intermediate appellate court—has addressed an analogous issue under that state's law. *See Hill v. Jindal*, 175 So. 3d 988, 992 (La. Ct. App.), *writ denied*, 179 So. 3d 600 (La. 2015). In *Hill*, the Louisiana court concluded that the Governor's executive order power did not reach the state educational agency's "exclusive authority" over educational policy and thus could not direct that agency to withdraw the state from the PARCC and the "common core" educational standards. *Id.*, 175 So.3d at 1007.[12]

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[11] As discussed above, *Maryland State Family Child Care Ass'n*, 184 Md. App. 424, involved an executive order that directed how MSDE interacted with private child care providers, but the case did not involve educational policy or the administration of the system of public education.

[12] PARCC stands for the Partnership For Assessment of Readiness For College and Careers Members. It is a consortium of states, the District of Columbia, and the Bureau of Indian

I think that a reviewing court would likely reach a similar conclusion with respect to Maryland's State Board of Education and the school calendar. As in Louisiana, the duty to provide for a public education system in Maryland is constitutionally assigned to the General Assembly, not the Governor. Under Article VIII, the Legislature is charged with "establish[ing] throughout the State a thorough and efficient System of Free Public Schools" and "provid[ing] by taxation, or otherwise, for their maintenance." Md. Const., Art. VIII, §1. Although the State Board is not similarly constitutionally-grounded—as its counterpart in Louisiana was, *see Hill*, 175 So.3d at 1006 (citing La. Const. Art. VIII, § 3(A))—the Legislature has delegated to the State Board its constitutional power to implement the public school system in Maryland:

> Public education is a highly important interest of the State government. In the promotion of that interest the State is acting through an agency which the Legislature created for that purpose and to which broad administrative powers have been delegated. In performing its functions the State Board of Education is representing and exerting the State's authority.

McCarthy v. Bd. of Educ. of Anne Arundel County, 280 Md. 634, 650 (1977) (quoting *Williams v. Fitzhugh*, 147 Md. 384 (1925)). As we have seen from more recent court decisions, the State Board's administrative powers are "summary and exclusive," *Chesapeake Charter*, 358 Md. at 137, and its exercise of those powers constitutes the "last word" on educational policy. *Zeitschel*, 274 Md. at 80. Based on all of this, I conclude that the Governor may neither formulate educational policy nor direct the administration of the public school system through the issuance of an executive order. The Governor's means of influencing those matters is through his appointments to the State Board.

2. The Determination of the School Calendar Likely Constitutes a Matter of Educational Policy Subject to the State Board's Visitatorial Power.

Having concluded that the Governor may neither formulate educational policy nor direct the administration of the public school system through the issuance of an executive order, the question then becomes whether the decision as to when to begin and end the

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Education, that works to create and deploy a standard set of K-12 assessments in mathematics and English, based on the Common Core State Standards.

school year is a matter of educational policy or school administration.[13] As the executive order describes, the determination of the school year potentially affects far more than the quality of the education students receive. According to the order, delaying the start of the school year allows students to spend more vacation time with their family and friends, promotes student health by keeping them out of hot classrooms, and promotes public health by keeping buses off the streets when ozone levels are at their highest. E.O. at 1-2. Further, the executive order states that Maryland Bureau of Revenue Estimates projected that delaying the start of the school year would result in "an additional $74.3 million in direct economic activity, including $3.7 million in new wages." E.O. at 2; *see also* Bureau of Revenue Estimates, "Economic Impact of a Post-Labor Day Start Date for Maryland Public Schools" (Aug. 14, 2013). Although the additional $7.7 million in State and local tax revenue that is projected "could be reinvested in classrooms throughout the State of Maryland," E.O. at 2, delaying the start of the school year arguably could be justified on grounds having little to do with educational policy.

At the same time, starting the school year after Labor Day potentially does have an impact on educational outcomes and would certainly seem to affect the administration of the public school system. It limits the number of days of instruction before standardized tests are administered, which occurs at fixed times in the Spring semester. It also makes it more difficult to complete the Fall semester before the Winter break, which increases the chance that students would have to take their semester exams after an extended time off from school—something that might lead to lower scores. And it might lead to longer summers, which, according to some studies, could contribute to "summer learning loss," particularly for disadvantaged children. *See generally* Martin R. West, Brookings Report, "Why delaying school start dates is a bad deal for students" (Sept. 8, 2016), www.brookings.edu/research/why-delaying-school-start-dates-is-a-bad-deal-for-students/ (citing studies). These considerations suggest that the school calendar is a matter of educational policy.

Maryland's appellate courts addressed, in a collective bargaining case, whether the school calendar constituted "educational policy" subject to the State Board's exclusive oversight role. *Board of Educ. of Montgomery County v. Montgomery County Educ. Ass'n*,

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[13] As discussed above, the State Board has left it to the local school boards to determine the school calendar, including when the school year begins. *See* Opinion No. 70-1, 1 *Opinions of the Md. State Bd. Of Educ.* 35 (1970). The decision whether to continue to apply the statute in that manner, however, remains subject to the State Board's authority to determine educational policy and adopt regulations for the administration of the public schools. *See* Educ. § 2-205(b)(1), (c)(1).

66 Md. App. 729 (1986), *aff'd*, 311 Md. 303 (1987). At issue in the case was the extent to which the school calendar was an appropriate topic for collective bargaining. The union argued that it was, because the school calendar related to "salaries, wages, hours, and other working conditions" and thus was negotiable under what is now § 6-408(c)(1) of the Education Article. The local board argued that the school calendar was not negotiable because it was a matter of educational policy, which was is a local prerogative, and thus not negotiable.[14] The State Board concluded that the topic was not negotiable and the union appealed.

The Court of Special Appeals held that, while the school calendar had a "tenuous" relationship to the working conditions of teachers, it had "a significant bearing on the administration of the public school system." *Id.* at 743. Because the topic was "affected by significant questions of educational policy," the topic was not appropriate for collective bargaining and instead was subject to the State Board's power to explain the "true intent and meaning" of § 6-408. *Id.* at 744. The State Board having determined that the matter was not appropriate for bargaining, the court's inquiry ended. *Id.*

The Court of Appeals affirmed and upheld the State Board's conclusion that the calendar was not negotiable. In doing so, the Court cited the hearing examiner's finding that the school employees' interest in the school calendar was "slight when weighed against the interests of parents, students, other employees, and the smooth operation of the school system." *Montgomery County Educ. Ass'n*, 311 Md. at 320. The Court recognized that the line between educational policy and public school work conditions was not "clear," but found that the balancing test the State Board used to draw that line was not "unreasonable." *Id.* at 316. Reviewing how the State Board applied that balancing test, the Court upheld the State Board's determination that the school calendar issue was "predominantly" a matter of educational policy and thus not subject to negotiation. *Id.* at 317, 320; *see also Mayor & City Council of Baltimore v. Baltimore Fire Fighters, Local 734, I.A.F.F.*, 93 Md. App. 604, 618-19 (1992) (describing decision in *Montgomery County Educ. Ass'n*).

The Court's decision to uphold the State Board's determination that the school calendar was predominantly a matter of educational policy and thus not a proper topic of collective bargaining does not necessarily mean that the topic is beyond the reach of the

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[14] The case was decided prior to the enactment of Chapter 287 of 2002, which added what is now § 6-408(c)(3): "A public school employer may not negotiate the school calendar, the maximum number of students assigned to a class, or any matter that is precluded by applicable statutory law."

Governor's executive order authority. In the labor context, it was enough that the school calendar's impact on union members was "slight" when weighed against the far greater impact on "parents, students, other employees, and the smooth operation of the school system." *Montgomery County Educ. Ass'n*, 311 Md. at 320. Arguably, in the executive order context, the balancing could come out the other way. The economic impacts, combined with the impact on parents and students, might be enough for a reviewing court to conclude that *those* impacts outweigh the impact that the school calendar might have on educational policy or public school administration.

Nevertheless, I conclude from all of this that the Governor may not set educational policy or direct the administration of public schools through the mechanism of an executive order and that a reviewing court would likely find that the establishment of the school calendar is a matter of educational policy or public school administration. If so, it would fall within the State Board's exclusive power to determine that policy. Although the Governor could influence that policy through his appointments to the State Board, he could not do so by executive order.

C. Does the Executive Order Impermissibly Regulate Private Conduct?

One final consideration. As discussed above, executive orders are designed to govern the conduct of Executive Branch employees; they may not directly regulate the public. For this reason, our Office has previously observed that "the Governor cannot legislate through an executive order." 95 *Opinions of the Attorney General* 3, 54 (2010); *see also McCulloch*, 347 Md. at 287 (evaluating whether executive order constitutes a "usurpation of legislative function").

In my view, there is some risk that a reviewing court would conclude that the Labor Day executive order does not control executive action so much as legislate on matters of public concern. Arguably, the order's primary effect is not on public school employees, but on the approximately 800,000 public school students and their parents, who will have to delay their return to (and departure from) school and thus revisit decisions about vacations and child care arrangements. Delaying the start of the school year until after Labor Day thus seems more like *making* law than *executing* it. An executive order that expressly purported to govern private conduct would be improper, at least in the absence of statutory authorization. 78 *Opinions of the Attorney General* 148, 152 (1993) ("In the absence of statutory authorization, an executive order may not regulate the conduct of private parties."). That is why Attorney General Finan opined more than 50 years ago that the Governor could properly ban discrimination by Executive Branch employees but could not reach discrimination by private businesses, even though they are regulated by the State.

See 48 *Opinions of the Attorney General* at 74-75. The Labor Day executive order, though it does not *expressly* address private conduct, surely has a significant impact on it.

There is a difference, however, between an executive order *directed* at private parties and one, like this order, that has an effect—even a significant one—on private parties. It is not uncommon for executive orders to have an effect on the public, whether it be altering the work week for State employees and thus altering the availability of State services, *see MCEA*, 325 Md. 19, or banning smoking in State office buildings, when the ban would apply to the members of the public who visit those buildings, *see* 72 *Opinions of the Attorney General* 230 (1987).[15] Although I think a reviewing court might consider the magnitude of this order's effect on the public in determining its validity, the mere fact that an executive order has an effect on the public does not necessarily render it invalid.

II. Whether the Legislature May Override the Effect of the Executive Order

Even if the Labor Day executive order were upheld as valid, it could be overridden by a subsequent legislative enactment. "[I]t is a well-established general principle of law that a statute prevails over an executive order to the extent of any inconsistency." Letter from Richard E. Israel, Assistant Attorney General, to Sen. Rosalie S. Adams (Feb. 10, 1983). Although the General Assembly may not block or void the *issuance* of an executive order, the Legislature remains free to "act independently to legislate in the same field" as that covered by an executive order. Letter from Clarence W. Sharp, Assistant Attorney General, to Sen. Elroy G. Boyer, at 3 (Feb. 19, 1973). And when the Legislature acts, the subsequent statute will "prevail" over the inconsistent parts of an executive order. 1983 Israel Letter at 1; *see also* Zarnoch, 44 Jun. Md. B.J. at 52 ("Most executive orders, and certainly all statutorily-authorized orders, are subject to legislative control, in that the General Assembly can enact a law effectively altering or superseding the executive order."). The General Assembly thus has the power to enact legislation governing the beginning and end of the school year.

Conclusion

The Governor has broad constitutional and statutory authority to direct the actions of the Executive Branch of State government through the issuance of executive orders. The

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[15] Note, however, that Attorney General Curran concluded that the smoking ban could not apply to "the property of an Executive Branch agency that (i) is leased to a private business and (ii) is used by the general public solely to conduct business with a private lessee and not with State employees." 72 *Opinions of the Attorney General* at 232.

Labor Day executive order, however, purports to direct the State and local boards of education, which are independent bodies that are not directly answerable to the Governor, and it directs them on a topic, the school calendar, that likely falls within the State Board's visitatorial power over educational policy and public school administration—a power that the Court of Appeals has described as "comprehensive" and "exclusive." In the absence of controlling judicial precedent discussing the interplay between the Governor's executive order authority and the State Board's visitatorial powers, I cannot say unequivocally that the Labor Day executive order exceeds the Governor's authority, but I believe it likely that a reviewing court, if presented with the issue, would conclude that it does. As to you your second question, yes, the General Assembly may enact legislation overriding the effect of an executive order.

Although this letter is not an Opinion of the Attorney General, I nevertheless hope that you find it helpful.

Sincerely,

Adam D. Snyder
Chief Counsel, Opinions & Advice