

# Maryland Association of Boards of Education



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Subject: MABE's Objection to the Legality of Governor Hogan's  
Executive Order (01.01.2016.09) to Mandate Starting the  
School Year After Labor Day and Ending No Later Than  
June 15.

Dear Mr. Snyder:

On August 31, 2016, Governor Hogan signed an Executive Order mandating a post-Labor Day start for all Kindergarten through 12th grade public schools in the state of Maryland beginning with the 2017-2018 school year. The Executive Order further mandates that the school year end by June 15th. MABE strongly opposes this initiative as outside the scope of the Governor's executive authority and contrary to the principle of state and local board of education governance of education policy as provided in numerous provisions of state law.

## The Executive Order is Outside the Scope of the Governor's Constitutional Executive Authority

The Executive Order references being issued under the authority vested in the Governor by the Constitution and laws of Maryland; authority which neither the Constitution nor laws of Maryland provide.

First, the Constitution provides the Governor with the authority to issue an Executive Order as follows: "The Governor may make changes in the organization of the Executive Branch of the State Government, including the establishment or abolition of departments, offices, agencies, and instrumentalities, and the reallocation or reassignment of functions, powers, and duties among the departments, offices, agencies, and instrumentalities of the Executive Branch" (Article II, Section 24, Maryland Constitution). The Executive Order lies outside this

scope of authority because the Maryland State Department Education (MSDE) is not a state agency within the Executive Branch of the State Government. Section 8-201 of the State Government Article defines the Executive Branch of the State Government to mean “not more than 21 principal departments” and enumerates 19 principal departments, including: (1) Aging; (2) Agriculture; (3) Budget and Management; (4) Commerce; (5) Disabilities; (6) the Environment; (7) General Services; (8) Health and Mental Hygiene; (9) Housing and Community Development; (10) Human Resources; (11) Information Technology; (12) Juvenile Services; (13) Labor, Licensing, and Regulation; (14) Natural Resources; (15) Planning; (16) Public Safety and Correctional Services; (17) State Police; (18) Transportation; and (19) Veterans Affairs.

Under Section 8-201 of the State Government Article, the Maryland State Department of Education (MSDE) is not a department within the Executive branch. Therefore, the Executive Order exceeds the scope of executive authority granted a Governor under Section 24 of Article II of the Maryland Constitution.

To further support this position, and to distinguish MSDE from state agencies within the Executive Branch, Section 8-203 of the State Government Article provides that “The head of each principal department is a secretary, who shall be appointed by the Governor with the advice and consent of the Senate.” This law does not apply to MSDE or the office of the State Superintendent of Schools. By contrast, the State Superintendent is appointed by the State Board of Education, not the Governor, and has the general powers and duties provided in Subtitle 3 of the Education Article. In this context, the Executive Order exceeds the Governor’s scope of authority.

#### The Executive Order Conflicts with the Authority of the State Board of Education under State Law

The Executive Order conflicts with the scope of authority granted the State Superintendent and State Board of Education under Section 2-205 of the Education Article. Section 2-205(b) provides: “The State Board shall: (1) Determine the elementary and secondary educational policies of this State; and (2) Cause to be carried out those provisions of this article that are within its jurisdiction” Under Maryland law, it is the State Board of Education which “shall adopt bylaws, rules, and regulations for the administration of the public schools.”

Maryland’s highest court has consistently found that Section 2-205 of the Education Article confers comprehensive “visitatorial power” upon the State Board. This “visitatorial power” has been recognized for more than a century, and is typically described in the same manner prescribed by Maryland’s highest court in *Board of Education v. Heister*, 392 Md. 140 (2006):

The totality of [the Education Article] provisions has been described as a visitatorial power of such comprehensive character as to invest the State Board “with the last word

on any matter concerning educational policy or the administration of the system of public education." The broad sweep of the State Board's visitatorial power has been consistently recognized and applied since the principle was first enunciated in 1879 in *Wiley v. School Comm'rs*, 51 Md. 401.

The court, in *Heister*, went on to explain the scope and purpose of the State Board's visitatorial power:

We think it beyond question that the power of visitation vested in the State Board is one of general control and supervision; it authorizes the State Board to superintend the activities of the local boards of education to keep them within the legitimate sphere of their operations, and whenever a controversy or dispute arises involving the educational policy or proper administration of the public school system of the State, the State Board's visitatorial power authorizes it to correct all abuses of authority and to nullify all irregular proceedings.

#### The Executive Order Conflicts with the Authority of the State Superintendent of Schools under State Law

The State Board of Education's authority is to be exercised through the State Superintendent. Section 2-205(g) of the Education Article provides that: "(2) Through the State Superintendent, the State Board shall exercise general control and supervision over the public schools and educational interests of this State"; and further that "With the advice of the State Superintendent, the State Board shall establish basic policy and guidelines for the program of instruction for the public schools." In these ways, the Executive Order conflicts with the legal authority established for the State Superintendent and State Board of Education under the Education Article of the Annotated Code of Maryland.

#### The Executive Order Conflicts with the Authority of Local Boards of Education under State Law

Under Section 4-108 of the Education Article, "Each county board shall: (1) To the best of its ability carry out the applicable provisions of this article and the bylaws, rules, regulations, and policies of the State Board; (2) Maintain throughout its county a reasonably uniform system of public schools that is designed to provide quality education and equal educational opportunity for all children; (3) Subject to this article and to the applicable bylaws, rules, and regulations of the State Board, determine, with the advice of the county superintendent, the educational policies of the county school system; and (4) Adopt, codify, and make available to the public bylaws, rules, and regulations not inconsistent with State law, for the conduct and management of the county public schools."

This statute delegates broad policy-making authority to each local board of education, subject to the Education Article and the regulations adopted by the State Board of Education. The Executive Order purports to violate the scope of authority established under enacted statutory law for each local board of education.

#### School Calendar is an Illegal Subject of Bargaining within the Sole Purview of Local Boards

The authority of each local board to determine the annual school calendar is clearly indicated by the law's definition of the scope of collective bargaining. Section 6-408 (c)(3) and 6-510 (c)(3) limit the scope of bargaining to exclude school calendar and class size. The statute provides: "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." By logical implication, the only rationale for stipulating the illegality of subjecting the school calendar to the bilateral bargaining process is to preserve this topic for the local board's unilateral decision-making authority. The Executive Order shifts the status of the school calendar from a subject matter within the sole purview of each local board, not even subject to negotiation with employee organizations, to one governed by parameters established solely by the Governor.

#### Local Boards Are Not Units of State Government

Maryland's local boards of education are not units of state government. Maryland's highest court has held that local boards of education are not defined as units of state government (*Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129 (2000)).

#### The Waiver Process Impedes the Local Board Duty to All Students

In addition, the Executive Order imposes a new legal impediment to the ability of each local board to exercise authority under Section 4-108 to "Maintain throughout its county a reasonably uniform system of public schools that is designed to provide quality education and equal educational opportunity for all children." By imposing rigid parameters for the beginning and ending of the school year, and providing an annual waiver process based on "compelling justification", the Executive Order would force a local board to seek a waiver in order to fulfill its statutory duty to make decisions, including the adoption of a school calendar, in a manner "designed to provide quality education and equal educational opportunity for all children." This impediment would foreseeably have a disproportionate impact on students defined under Maryland education law as deserving additional educational resources: students receiving special education, students eligible for free and reduced price meals, and students with limited English proficiency.

## Local Board Authority to Set Calendar During 10-Month Period

The Executive Order directly conflicts with the authority vested in each local board of education, under Section 7-103 of the Education Article, to ensure that each public school "Shall 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." The statutory authority assigned to each local board to set the school calendar during a 10-month cannot be exercised within the less than 10-month period mandated by a post-Labor Day through June 15 school year. For example, in 2020 when Labor Day falls on September 7, and school could not commence until September 8, the June 15 deadline for the end of the school year would require a school year much shorter than 10 months. Again, unless the statute is amended, the Executive Order stands in direct conflict with the 10-month school calendar parameter delegated to each local board.

### Conclusion

For the above stated reasons, MABE requests the Office of the Maryland Attorney General to issue an opinion finding the Executive Order (01.01.2016.09) to mandate starting the school year after Labor Day and ending no later than June 15 to be illegal as outside the scope of the Governor's Constitutional executive authority.

For more information on this matter please contact MABE's Director of Legal and Policy Services, Stephen C. Bounds, at [sbounds@mabe.org](mailto:sbounds@mabe.org); or MABE's Director of Governmental Relations, John R. Woolums, Esq., at [jwoolums@mabe.org](mailto:jwoolums@mabe.org).

Sincerely,



Brig.Gen. Warner I. Sumpter (Ret.) USA  
President

WIS:kwb