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Via Electronic and First Class Mail

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Re: PGPCS Summer School Tuition Policy/Denial of Full Tuition Waivers

Dear Mr. Eubanks and Mr. Pounds:

We write on behalf of the American Civil Liberties Union of Maryland ("ACLU") concerning Prince George's County Public School ("PGCPS") summer school tuition policy and its denial of full tuition waivers to students demonstrating financial need. In our view, PGCPS Board of Education Policy No. 5118.4 establishing summer school tuition fees and its denial of full tuition waivers to qualifying students violate Maryland constitutional and statutory mandates.

We understand that appeals by affected students challenging this policy are currently before the Board for decision, and we previously contacted you providing legal analysis in support of the students' appeals. Having learned that neither our analysis nor much of any substantive legal analysis seems to have been included in the General Counsel's cursory recommendation that the appeals be denied, we write again, to make clear that unless relief is granted to the affected students through the instant appeals process, we intend to work with local parents and students to pursue a court action challenging the County's overall summer school fee structure and its highly restrictive waiver provision.

We repeat our analysis, previously submitted to you in mid-September, below.

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Background

PGCPS Board of Education Policy 5118.4 (“PGCPS Policy”) promises, “[a] student shall not be denied entrance into summer school for lack of tuition.” In seeming contradiction, however, it also specifies that if a student cannot afford to pay the entire tuition, he or she only “may have a *portion* of the tuition fee waived” (emphasis added). The PGCPS Policy does not lay out a procedure for determining the appropriate amount of any tuition waiver. Instead, the tuition fee may be waived “upon recommendation of the principal of the home school.” But in any case, Section III(B) of the PGCPS Policy demands that even eligible students must “pay a minimum of 75% of the established tuition per course.” For further clarification, Section IV(B)(3) states that “[w]aivers may be granted **up to a maximum** of 25% of the tuition cost.” (Emphasis in original).

According to the fee scale for PGCPS Credit Recovery and Original Credit classes for high school, a single class can cost up to \$455.¹ One parent in the case at issue was required to pay \$796.25 to enroll her son in two courses, notwithstanding his receipt of Free or Reduced-Price Meals (FARMS).²

Well in advance of summer, affected students whose family incomes make them eligible for FARMS, submitted requests to former PGCPS Superintendent Kevin Maxwell, through counsel, seeking full credit recovery summer school tuition waivers in order to enable them to take necessary courses during the summer of 2018. PGCPS denied these requests. The students subsequently appealed these denials, and their appeals are now pending before the Board of Education for final decision.

Charging of fees for core courses violates constitutional and statutory law

1. Maryland constitutional and statutory laws mandate free public education to all residents

Article VIII, Section 1 of the Constitution of Maryland establishes the mandate for free public schools. The Maryland Court of Appeals has construed this provision as requiring schools to “be open to all without expense.” *Clark v. Maryland Institute*, 87 Md. 643 (1898). Md. Code Ann., Educ. § 1-201 likewise guarantees that “[t]here shall be throughout this State a general system of free public schools....”

¹ See PGCPS Credit Recovery and Original Credit High School website, available at <https://www1.pgcps.org/page.aspx?Pageid=234147&id=262731>. By comparison with other Maryland jurisdictions, most local public school systems have a free option for students who are eligible for Free or Reduced-Price Meals, bringing them into compliance with the law.

² See household income levels to be eligible for Free or Reduced-Priced Meals through PGCPS at <http://www1.pgcps.org/page.aspx?Pageid=234147&id=235880>.

The issue in this case is whether the charging of fees for necessary summer school courses violates the constitutional and statutory mandates for a system of free public schools. We believe it does.

The Office of the Maryland Attorney General (OAG) has weighed in repeatedly on the law concerning fees for various “school activities.” One OAG opinion has been widely used to determine the standards for determining what school activities must be offered free under the law. 72 Op. Att’y Gen. 262, 267 (1987). According to this Opinion, “whatever the outer limits of Maryland’s ‘free public schools’ guarantee, we are safe in saying that *anything directly related to a school’s curriculum* must be available to all without charge.” *Id.* at 267 (emphasis added.) This opinion relied on the North Dakota Supreme Court’s interpretation of what must be available to students free of charge, stating “whatever is an ‘integral part of the educational system’ must be free.” 72 Op. Att’y Gen. at 267 (citing *Cardiff. Bismarck Public School Dist.*, 263 N.W.2d 105, 113 (N.D. 1978)). Therefore, in answering whether the educational offering at issue must be available free of charge, we look to whether it is “directly related to a school’s curriculum” and whether it’s an “integral part of the educational system.”

Here, one student needed to take English over the summer “to maintain his progress in the regular school program” and one student needed to take math and English over the summer “to promote to the next grade.” To receive a diploma, students must complete math and English, of course. Md. Code Regs. 13A.03.02.03. Aside from the obvious conclusion that math and English directly relate to the school’s curriculum, they are also listed multiple times within the “Curriculum and Instruction” page of the PGCPs website.³

OAG Advice of Counsel letters regarding fees for various educational opportunities are instructive as well. An OAG letter dated July 22, 1992 reviewed the legality of offering the second-half of an all-day kindergarten program on a fee-paid basis. The OAG advised that because the fee-generating half-day would serve as a continuation of the half-day session that was mandated by law, children whose parents are unable to pay for the second half would be negatively affected by their absence from the paid section. As such, the OAG advised that such a fee would violate Article VIII, § 1 of the Maryland Constitution.

A decade later, a March 24, 2003 OAG Advice of Counsel Letter addressed a similar issue, on the question of a public charter school imposing a fee for full-day kindergarten. At that time, only half-day kindergarten was mandatory, but the school in question offered a full-day program. The OAG advised that because kindergarten was mandatory and part of Maryland’s system of free public schools, charging a fee for full-day kindergarten would not be legally acceptable. As with the July 22, 1992 letter, the OAG advised that the fee-generating portion of the program cannot constitutionally follow the established kindergarten curriculum as a continuation of the State mandated half-day session.

³ See <http://www.pgcps.org/curriculum/>.

These 1992 and 2003 OAG advice letters provide guidance here. First, while summer school isn't mandatory for all, the students at issue in the appeal were required by PGCPS to take summer courses in order to pass to the next grade. In effect, therefore, the summer classes were mandatory.⁴ We agree with the students' assessment, as discussed in their letter to PGCPS dated March 30, 2017, that "'Core' courses should be free of charge irrespective of whether the school district chooses to offer the classes in the evening or during the summer months." There is an obvious negative impact on students unable to pay for a summer class or families who undergo a financial hardship to pay for such classes that other students complete for free. In the case at hand, two students were not able to pay the fees, even with a partial waiver. Additionally, at least one parent in this case incurred financial hardship as a result of paying for her son's summer school course.

To distinguish education-related programs that must be available free from those considered extra for which charges may be levied, the OAG has distinguished certain extracurricular activities from courses offered as part of regular programming or those needed to graduate. For example, an OAG Letter dated March 7, 1995 advised that it would likely be unconstitutional for county school boards to charge students a fee for a driver education course offered during the regular school day. The OAG reasoned that "at the very least 'anything directly related to a school's curriculum must be free.'" OAG Advice of Counsel Letter (March 7, 1995) (*citing* 72 Op. Att'y Gen. 262, 267 (1987)). Conversely, in an April of 2010 Advice Letter, OAG ruled that a fee to attend a graduation ceremony at a public high school would not violate Article VIII, § 1 of the Maryland Constitution, citing *Bundick v. Bay City Indep. Sch. Dist.*, 140 F.Supp. 2d 735, 739 (S.D. Tex. 2001). ("the federal constitution's due process guarantees do not protect a student's interests in participating in extracurricular activities or graduation [ceremonies]." Because the plaintiff had completed his studies without delay, earned sufficient credits to graduate, and received his diploma, he could not "complain of being deprived of a basic education." *Id.* at 739. Here, however, math and English are core courses needed to graduate and the students in this case were explicitly told as much by PGCPS.

2. Other states have found fees for public summer school unconstitutional

Recently, the ACLU of Rhode Island successfully led litigation challenging public school fees for summer school education, in *Giannini v. Council on Elementary and Secondary Education, et al.*, No. PC 2014-5240, Providence Co. Super. Ct., (March 30, 2016). While the case was based on state law, the facts are essentially the same as those in the case before us. In *Giannini*, the student Plaintiff, G. Doe, fell short of his "yearly minimum credits" for Grade 9 after he failed several "core" courses and, as a result, the school "recommended that [he] attend a summer program to recover any missing credits to stay on track with graduation requirements." *Id.* at 2. It was undisputed that had G. Doe failed to

⁴ A larger discussion of the mandatory nature of summer core classes is below.

recover the missing credits during the summer, he would not have been allowed to pass to the 10th grade. *Id.* at 18.

The Defendants in *Giannini*, like the Prince George's County school system here, asserted that because the summer school programs fell "outside the 180-day mandated school year, and because they do not constitute a core element of education," fees could legally be imposed. *Id.* at 18. The Court disagreed. "It is clear," the Court held, "that the purpose of summer school is to provide additional instruction to students who are in need of recovering credits for core courses so that they either may graduate or advance to the next grade." *Id.* at 19 (citing *Vandevender v. Cassell*, 208 S.E.2d 436, 439 (W.V. 1974) ("Under a 'free' school system fees cannot be charged as a requirement for students to be admitted to school nor can fees be charged for any required course under the curriculum set up by the state board of education")). Further, the Court found that, "regardless of whether summer school is defined in the [local school system's] Manual as a core element of education, the facts of this case reveal that the *purpose* of the School District's summer school program is to provide instruction on 'core' courses that are required for graduation." *Giannini*, No. PC 2014-5240 at 18 (emphasis added).

The Court in *Giannini* went even further, holding that "even if the [the local school system's] Manual does not specifically address the issue of summer school, it is clear that the School District's curriculum requires students to achieve a certain number of "core course" credits for purposes of graduation. Thus, such credits constitute a core element of education in the School District's school curriculum." *Id.* at 20. G. Doe, the Court stated,

was given a choice: recover his required credits through additional instruction during the summer, or recover them by repeating the ninth grade. Assuming that instead of attending summer school, he had opted to repeat the ninth grade, it is beyond dispute that the school could not have charged him tuition for that additional year of schooling. Instead, however, G. Doe opted to recover his required credits by attending summer school and, in doing so, he was charged a fee for his attendance. The fact that one option would have been free and the other option incurred a fee necessarily leads to an absurd result.

Id. at 21.

Giannini is right on point here. Aside from the identical fact pattern to the case, when Maryland courts and the OAG have looked at fees for specific educational activities, they have looked to other states' courts to see how they have ruled, and would likely do so here. This is especially true, given *Giannini's* clear showing of the illogic in charging a fee for summer school core classes. Not only do fees for requirements under the curriculum run contrary to the local school system's stated purpose, but "[t]he fact that one option would have been free and the other option incurred a fee necessarily leads to an absurd result." *See Giannini*, No. PC 2014-5240 at 20.

Under Maryland law, we must “consider the words of these statutes in light of their purpose and objective” and make sure to “adopt a construction that comports with common sense and avoids illogical or absurd results.” *Kaczorowski v. Mayor & City Council of Baltimore*, 309 Md. 505, 517, 525 A.2d 628, 634 (1987) (citation omitted). It is wholly illogical to charge a fee for a summer class that would otherwise be free, especially where classes are credit recovery courses that are required to advance to the next grade or graduate. Common sense mandates that the school system not treat the same classes differently just because they are offered at different times. This logical conclusion is bolstered by the fact that PGCPs informed the parents in the case that their children would not be able to move on to the next grade without these classes. As was the case in *Giannini*, the students here were “given a choice: recover [their] required credits through additional instruction during the summer, or recover them by repeating” a grade. See *Giannini*, No. PC 2014-5240 at 21. The classes were mandatory to progress to the next grade. The fact that one option was free and the other option incurred a fee necessarily leads to an “absurd” result.⁵ See *Kaczorowski*, 309 Md. at 517.

3. *Local Education Agencies cannot charge fees for public summer school courses without explicit authorization by the Legislature*

Under Article 14 of the Maryland Declaration of Rights, “no aid, charge, tax, burden or fees ought to be rated or levied, under any pretense, without the consent of the Legislature.” The Maryland General Assembly has not explicitly enacted any legislation authorizing local school boards to collect tuition or fees for summer school.

PGCPS is the Local Education Agency (“LEA”) organized under the laws of Maryland responsible for providing educational services to the students in this case. LEAs do have some autonomy for when and how they charge fees. The students here had previously requested that PGCPS provide the legal authority under which PGCPS is entitled to charge fees for credit recovery courses during the school year and summer school. In a response dated April 28, 2016, PGCPS maintained their authority to charge fees, referencing Md. Code Ann., Educ. § 7-106, which states that each county must “adopt procedures for the selection and purchase of textbooks, supplementary readers, materials of instruction, visual and auditory aids, stationary and school supplies.... [and] “[i]tems which do not fall within these specific categories are not required to be provided free of charge.”

However, the charging of fees for school-related items beyond those specific categories raise significant legal concerns that have not yet been tested in court. On February 22, 1996, the OAG advised that a legislative proposal allowing schools to charge fees even for “non-academic type activities” could create a substantial constitutional question if those activities take place during the regular school day. Importantly, the OAG raised a separate legal issue, advising that even

⁵ The 1995 OAG Advice of Counsel letter, which differentiates between a driver education course taken during the “regular school day” and a driver education course taken outside of the regular school day, can be distinguished from the case at issue in that driver education is not a required, or “core,” course needed to graduate high school.

if the legislation was constitutional, “another question that surfaces is whether a local board of education has authority unilaterally to impose fees for certain activities that take place during the regular school day.” OAG Advice of Counsel (Feb. 22, 1996). In its letter, the OAG advised that in order to comply with the Maryland Constitution, legislation enacted by the General Assembly would be necessary to authorize local boards to collect fees for certain activities. OAG Advice of Counsel (Feb. 22, 1996) (referencing 76 Op. Att’y Gen. __ (1991) [Op. No. 91-033 (July 25, 1991)]).

In addition, in its *Hornbeck* decision, the Court of Appeals stated that “[t]he quantity and quality of educational opportunities to be made available to the State’s public school children is a determination committed to the legislature or to the people of Maryland through adoption of an appropriate amendment to the State Constitution,” suggesting that legislation may be necessary to determine the question of fees with regard to educational opportunities. *Hornbeck v. Somerset Cty. Bd. of Educ.*, 295 Md. 597, at 658-59 (1983).

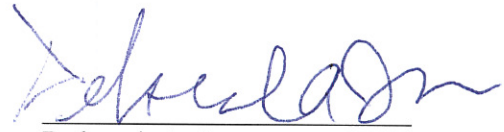
On this issue, we can look to California for guidance. The California ACLU affiliates filed suit in 2010 against the State of California challenging school fees as a condition of participating in certain educational activities. *See Doe v. State of California*, No. BC445151 (Cal. Sup. Ct) (complaint filed Sep. 10, 2010). While the lawsuit was ultimately resolved legislatively, before the legislation passed, the Court held, in part, that school officials cannot “require any pupil... to purchase any instructional materials for the pupils’ use in the school” and “[a] pupil enrolled in a school shall not be required to pay any fee, deposit, or other charge *not specifically authorized by law*.” *Doe v. California* (L.A. Sup. Ct. case No. BC445151) (emphasis added). As is the case with *Giannini* on the constitutional question, Maryland courts can look to *Doe* in California for guidance on the legality of charging public summer school fees without authorization from the General Assembly.

* * *

For all of these reasons, we urge PGCPSS to revisit and amend school system policies to lift fees for core summer school classes in order to comport with constitutional and statutory mandates. Given that the opportunity to take summer school courses has ended for this year, and that the students at issue have already been denied their constitutional and statutory rights, we hope you will work with affected students to accommodate their needs, and reimburse families for any fees wrongfully charged.

Absent such relief to the students through the current appeals process, please be advised that the ACLU will have no choice but to pursue litigation to address this serious constitutional violation undermining the rights of Prince George’s County students to a free public school education.

Sincerely,



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