

Keith Bradford, et al.,

Plaintiffs,

v.

Maryland State Board of Education,

Defendant.

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IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No.: 24C94340058

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**MEMORANDUM OF GROUNDS, POINTS, AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' PETITION FOR FURTHER RELIEF**

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Plaintiffs Keith Bradford, *et al.*, along with additional class representatives Stefanie Croslin and Angela Gant,¹ by their undersigned attorneys, submit this Memorandum of grounds, points, and authorities in support of their Petition for Further Relief.

PREFATORY STATEMENT

This Petition for Further Relief seeks to redress the unconstitutionally inadequate, underfunded, and decrepit, public schools attended by tens of thousands of Baltimore City school children. Through this Petition, Plaintiffs, who are the parents of Baltimore City children at risk of not receiving the education they need to succeed in life, seek to enforce prior rulings by this Court establishing their right to a constitutionally adequate education by contemporary standards. This case is a longstanding action that was brought by Plaintiffs in 1994 to require the State to comply with its constitutional duty to provide an adequate education to Baltimore City school children, including adequate funding for Baltimore City public schools.

Under Article VIII of the Maryland Constitution, the State of Maryland must establish a “thorough and efficient” system of public education throughout the State, and must further provide sufficient funding to maintain that system.² Despite this constitutional duty, and notwithstanding prior rulings by this Court in this case that the State was not meeting its obligations under Article VIII, for decades the State has abdicated its responsibilities to provide adequate funding for instructional activities and to address the chronically abysmal physical condition of school

¹ Along with this motion, Plaintiffs have filed a notice of substitution, as permitted by this Court’s order of December 11, 1995 (Dkt. 41), designating Ms. Croslin and Ms. Gant to replace the prior class representatives. Their particular circumstances are discussed *infra* and in that notice.

² Article VIII is implemented by Article III, Section 52, which requires that the State budget include an estimate of appropriations for establishing and maintaining a thorough and efficient system of public schools throughout the State. Thus, both the executive and legislative branches are constitutionally obligated to determine the funding level needed to comply with Article VIII and then budget for that amount. As discussed below, Article III § 52’s constitutionally mandated budget process has broken down and effectively been abandoned for the last decade.

facilities in Baltimore City. According to the Maryland Department of Legislative Services (“DLS”), the level of state underfunding of Baltimore City schools, *i.e.*, the gap between what was constitutionally required and what was actually funded, or the “adequacy gap,” was \$290 million in FY 2015. According to an independent analysis mandated by the General Assembly, the State underfunded Baltimore City public schools by \$358 million that year. Over the decades of underfunding, the generations of children attending the Baltimore City schools have been deprived of over \$2 billion in educational funding to which they were constitutionally entitled. In 2000, this Court adopted the findings of a court-ordered independent study determining that many Baltimore City public school buildings were in poor condition and getting worse, and estimating that it would cost \$600 million to fix. The State ignored those and subsequent findings of decrepit school conditions, which now require \$3 billion to fix and \$5 billion to replace.

These numbers affect tens of thousands of Baltimore City school children, most of whom live in poverty and are children of color, who are denied the adequate education mandated by Article VIII. Among them are Stefanie Croslin’s two sons, ages 11 and 13, who are Baltimore City Public School Systems (“BCPSS”) students. The older of the two, Cohen, loves science, but his school does not have Bunsen burners or an eye wash station, much less the advanced computer technology available for students in comparable grades in neighboring Baltimore County. Teachers collect materials donated by parents to design experiments. Ms. Croslin’s younger son, Cyrus, was devastated when his school had to cancel music class, permanently, due to a lack of funding. It was his favorite subject. Most parents in BCPSS have stories like these. Dashawna Bryant has sickle cell anemia and had to spend a week in the hospital last winter after a day in an unheated classroom. Angela Gant’s daughter Naya, who used to excel in math, recently has begun

to struggle, but her school no longer offers tutoring services that were available when Ms. Gant's older daughter attended Baltimore schools.

On the whole, BCPSS has the lowest teacher to student, teacher and therapist to student, and non-instructional staff to student ratios in the State. The teachers that are employed often have less education and less experience than similarly-sized districts statewide. According to the State's own report card, BCPSS had the lowest number of five-star schools (the highest rating) and the highest number of one-star schools (the lowest rating) in the State. BCPSS students score lower than their counterparts nationally and across the State on almost every assessment and college entrance test. BCPSS's graduation rate is 17 points lower than the state average, and its dropout rate is nearly double the state average. In 2004, this Court pointed to similarly dismal statistics in concluding that the State's underfunding of BCPSS violated the State Constitution.

This Court has entered multiple orders declaring Plaintiffs' constitutional right to sufficient State funding for "adequate" public schools and specifying the then-minimum amounts of funding required, the last of which was entered in 2004. After a decade of working through the General Assembly and otherwise to attempt to convince Defendants (the State officials and agencies responsible for school funding) to honor their continuing promises to provide sufficient education funding, Plaintiffs now return to this Court to compel compliance with the mandate of Article VIII.

Article VIII guarantees:

The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools, and shall provide by taxation, or otherwise, for their maintenance.

Md. Const., Art. VIII, § 1. This Article requires that all students in Maryland's public schools be provided with an education that is "adequate when measured by contemporary educational standards." *Montgomery Cty. v. Bradford*, 345 Md. 175, 189 (1997) ("*Bradford I*"); *Hornbeck v.*

Somerset Cty. Bd. of Educ., 295 Md. 597, 615 (1983); Dkt. 1-66 Order (Oct. 18, 1996);³ Dkt. 10, Mem. Op. 24 (dated June 30, 2000, entered July 6, 2000). Article VIII is implicated when the State “‘fails to make provision for an adequate education,’ or the State’s school financing system ‘[does] not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Article VIII, when measured by contemporary educational standards.’” *Bradford*, 345 Md. at 181 (quoting *Hornbeck*, 295 Md. at 639). Article VIII also requires the State make efforts to address student populations that require additional or different resources or programming, such as high concentrations of students who live in poverty. *See Hornbeck*, 295 Md. at 639 (affirming that Article VIII requires that “efforts are made . . . to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child”).

This Petition presents two closely related sets of violations. *First*, Defendants have failed to provide sufficient funding for constitutionally adequate school operations and instructional functions despite the Court’s numerous prior orders specifying the funding formulas that they must follow to reach minimal compliance. *Second*, Defendants have failed to fix the crumbling school facilities in Baltimore City that leave children cold from broken heat systems in the winter, overheated from schools lacking air conditioning in the summer, and wet from pipe leaks throughout the year. These failures directly limit the ability of students to learn.

To comply with Article VIII, Defendants must address both issues. Two full generations (12 grades per generation) have entered and graduated from Baltimore City Public Schools since this litigation was brought in 1994. Through the events of last winter and summer, the State’s constitutional violations have reached the point of national notoriety. Only action by this Court

³ The docket entries in this case are divided due to the conversion to an electronic docket in 2000, after which the numbering returned to start at number 1. For convenience, entries before the conversion are prefaced with “1-”.

will halt the violations from continuing so that the current generation of school children receives the adequate education guaranteed by the Maryland Constitution. Because Defendants have made clear that they will not do so voluntarily,⁴ Plaintiffs ask this Court to compel them to comply with the State Constitution.

LEGAL AND FACTUAL HISTORY

I. Defendants Have Not Complied with this Court's Declarations to Provide Full Funding to BCPSS, Thereby Preventing BCPSS from Providing an Education That is Adequate by Contemporary Standards.

A. Overview.

In a series of declaratory rulings in this case commencing in 1996, this Court (the Hon. Joseph H. H. Kaplan, Jr.) repeatedly ruled that the State of Maryland was in continuing violation of its constitutional obligation to provide children attending Baltimore City public schools with a “thorough and efficient” education, which this Court defined as an “an education that is adequate when measured by contemporary educational standards” mandated by Article VIII of the Maryland Constitution. Dkt. 1-66 Order (Oct. 18, 1996); Dkt. 10, Mem. Op. 24 (June 30, 2000) (relying on the Court of Appeal’s decision in *Hornbeck*). Those rulings apply even more vigorously today, as the State’s support for public schools in Baltimore City continues to fall far below minimum constitutional requirements. Each year, the gap has broadened between what the Maryland Constitution requires for on-going school operations and what the State of Maryland actually funds, depriving the students who have attended the BCPSS over the last decade of an accumulated \$2 billion to which they were entitled for instruction alone. Rapidly decaying school buildings dramatically amplify the gap, adding another \$3 billion to fix schools or \$5 billion to replace them

⁴ For instance, there has been no response to a Jan. 22, 2019 letter by Plaintiffs asking for action on the issues that was sent to the Governor and copied to legislative leaders. *Available at* https://www.aclu-md.org/sites/default/files/bradford_letter_1.22.2019_final.pdf.

to the amount needed to provide a constitutionally sufficient education. Together, these profound deficits mean that Baltimore City's children—many of whom live in extreme poverty and face daunting environmental and societal challenges—are extraordinarily short-changed in their educational opportunities.

This Petition for Further Relief is compelled by the State of Maryland's failure to meet this Court's expectations that the State would accept its constitutional obligations as established by the Court. This Court expected that the State would reach constitutional compliance by 2008, or, at the very least, that it would reach the funding levels for Baltimore City recommended by the Commission on Education Finance, Equity, and Excellence (the "Thornton" Commission), a legislatively created state body tasked with recommending adjustments to the state funding formula, and enacted by the legislature in the Bridge to Excellence Act. But, over the past decade, the State abandoned its promises to the Court that it would abide by the Thornton formula and instead each year has funded far less than the amount required by this Court's rulings. Moreover, the State has ignored the Court's direction that it attempt to remedy prior accumulated gaps in funding that had been identified by the Court as critical to bringing the State into constitutional compliance. This failure to abide by the Court's instructions as to what was constitutionally required has created an ever-deepening financing deficit that now totals billions of dollars and results in a constitutionally inadequate education for tens of thousands of Baltimore City children each year. That yawning "adequacy gap" constitutes the difference between an education that is adequate by contemporary standards (now commonly referred to as an education that prepares students for the 21st century economy) and the current struggling system.

This Court's rulings were intended to prevent this tragic record of educational deprivation. As this Court stated, it fully anticipated that, once the State's constitutional obligations were

spelled out in clear terms, Defendants would comply and honor those obligations. However, after several years of funding increases to approach the Thornton formula levels, the State elected to ignore the Court's rulings and abandon its prior commitments to adhere, at a minimum, to Thornton. Plaintiffs, therefore, return to this Court for further relief, namely an order compelling Defendants to comply with the State Constitution.

The need could not be greater. Since this litigation was brought in 1994, two generations of children have entered and graduated from BCPSS schools without receiving the education guaranteed them by the State Constitution. This is a wholesale abdication of the State's duty to provide sufficient funding to educate children in Baltimore City. Absent judicial enforcement of the children's constitutional rights and this Court's own prior declarations and orders, compliance with the Constitution will never occur. The question raised by this Petition is whether the constitutional guarantee of Article VIII will prove illusory for yet another generation of Baltimore City school children.

B. This Court's Prior Declaratory Rulings Determined that the State's Funding Levels Violate Article VIII of the Maryland Constitution.

This Court first found the educational system for Baltimore City children to be unconstitutional in 1996. The case was brought as a class action by parents of Baltimore City public school children "at risk of educational failure" because they lived in poverty; attended schools where a large number of students lived in poverty; needed special educational services; spoke English as a second language; had parents who did not graduate high school or were unemployed; were homeless; lived under a threat of violence; had been retained in grade at least once or had scored below grade level on standardized tests; or had experienced economic, social,

or educational disadvantage that increased the likelihood of an inadequate education.⁵ *See* Dkt. 1-4, Compl. at 3 ¶¶ 8-9. Plaintiffs claimed that the State failed to fund BCPSS at constitutionally required levels, even though enhanced funding was plainly necessary given that Baltimore City had the lowest test scores, the lowest graduation rates, and the highest number of students facing risk factors in the State. *Id.* at 12-24 ¶¶ 41-74. The Defendants included the State Superintendent and State Board of Education, among others. The City of Baltimore filed its own education funding suit nine months later, the two cases were consolidated, and the State counterclaimed against the City, alleging that deficiencies in education were the fault of BCPSS rather than any lack of funding or support from the State.

1. The Court First Ruled in 1996 that Baltimore City Children Were Being Denied a Constitutionally Sufficient Education.

On October 18, 1996, this Court granted partial summary judgment to Plaintiffs, ruling that the “thorough and efficient” clause of Article VIII of the Maryland Constitution “requires that all students in Maryland’s public schools be provided with an education that is adequate when measured by contemporary educational standards” and that that requirement was judicially enforceable. The decision declared:

There is no genuine material factual dispute in these cases as to whether the public school children in Baltimore City are being provided with an education that is adequate when measured by contemporary educational standards. Based on the evidence submitted by the parties on the partial summary judgment and summary judgment motions in these cases, . . . the public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards.

Dkt. 1-66, Order at 2 (Oct. 18, 1996).

On the eve of trial on issues of causation and remedy, the parties agreed to a Consent

⁵ The Court never formally certified a class and instead accepted an agreement of the parties that the Plaintiffs would be treated as a class and that the individual plaintiffs would be deemed “representative plaintiffs.” Dkt. 1-41, Order (Dec. 11, 1995).

Decree approved and entered by the Court which provided for a small but immediate influx of cash for operations and facilities over five years.⁶ BCPSS and the State were to retain an independent consultant to prepare interim and final assessments of, *inter alia*, the sufficiency of the additional funding, the need for further funding to reach constitutional adequacy, and the progress made toward reaching that standard. Dkt. 1-77, Consent Decree ¶¶ 41-42 (Nov. 26, 1996). Based on the results of the interim independent assessment, the BCPSS Board could return to court “to seek relief . . . for funding amounts greater than those described in Paragraph 47” of the Consent Decree. *Id.* ¶ 53.⁷ The final report was due by the end of 2001 and the decree was set to expire after five years, on June 30, 2002, unless expanded “upon a showing of good cause to extend the Decree.” *Id.* ¶ 68.

2. The Court’s June 2000 Order Found Continued Constitutional Violations.

The interim independent evaluation ordered by the Consent Decree (the “Metis Report”) found that, although progress was being made, an additional \$2,698 per child (for a total per pupil expenditure of \$10,274), or \$270 million a year, in operational/educational funding was then

⁶ In January 1995, Montgomery County tried, unsuccessfully, to intervene in the case. It appealed this Court’s denial of its motion to intervene, and the Court of Appeals affirmed the Court’s ruling denying intervention. *See Bradford I*, 345 Md. at 177, 200. Notably, as discussed above, the decision by Chief Judge Murphy affirmed *Hornbeck*’s holdings that Article VIII “does require that the General Assembly establish a Statewide system to provide an adequate public school education to the children in every school district” and that, if the State’s school financing system “did not provide all school districts with the means essential to provide the basic education contemplated by § 1 of Article VIII, when measured by contemporary educational standards, a constitutional violation may be evident.” *Id.* at 181 (discussing *Hornbeck*, 295 Md. at 639).

⁷ As this Court subsequently explained, “the parties were aware [at the time] that \$230 million over five years was not enough to provide an adequate education to Baltimore City’s unique population of disadvantaged children” and, therefore, provided in the Consent Decree “a mechanism for the New [BCPSS] Board to request additional funds from the State throughout the term of the Decree” and that, if, after June 1, 2000, “the State fails to satisfy the New Board’s request for additional funds, the New Board may go back to Court for a determination of whether additional funding is needed in order for the BCPSS to provide a Constitutionally Adequate Education.” Dkt. 10, Mem. Op. 3 (June 30, 2000).

needed for adequacy. Dkt. 10, Mem. Op. 14, 15 (June 30, 2000). When a lengthy process of negotiation with the State failed to secure additional funding for a BCPSS remedy plan implementing the Metis Report recommendations, BCPSS returned to the Court in 2000 to compel the State to provide constitutionally required funding. *See, e.g., id.* at 4.

On June 30, 2000, after considering substantial evidence submitted by the parties, this Court found that the State was not making “best efforts” to provide available funding for the BCPSS remedy plan as required by the Consent Decree; it formally adopted the Metis Report as its findings of fact. *Id.* at 14, 23-25. The Court specifically found that, despite progress, Baltimore City children continued to be deprived of “an education that is adequate when measured by contemporary standards” and “still are being denied their right to a ‘thorough and efficient’ education” as constitutionally required. *Id.* at 25. It further found that, despite a “significant budget surplus and new sources of revenue available in [FY 2001],” the State had failed to make sufficient efforts “to make a reasonable down payment on the additional funding of approximately \$2,000 to \$2,600 per pupil that is need[ed] to receive Constitutionally Mandated Adequate Education when measured by Contemporary Educational Standards.” *Id.* The Court therefore declared that “additional funding is required to enable [BCPSS] to provide an adequate education measured by contemporary educational standards,” that “the State is not meeting its obligations under Article VIII of the Maryland Constitution,” and that “additional funding of approximately \$2,000 to \$2,600 per pupil per year” was needed for FY 2001 and 2002 educational and operational funding (which translated to an annual shortfall of \$200 to 260 million). *Id.* at 26. As discussed below, as determined by DLS, the shortfall caused by State’s current funding for BCPSS now substantially exceeds this level.

For relief, the Court determined that this declaration of rights should suffice to spur the State to comply with the Constitution, making a direct order unnecessary. It explained:

Having determined and declared that the State is not fulfilling its obligations under Article VIII of the Maryland Constitution, as well as under the Consent Decree, the Court trusts that the state will act to bring itself into compliance with its constitutional obligations under the Consent Decree for the Fiscal Years 2001 and 2002 without the need for Plaintiffs to take further action.

Id. Thus, the Court trusted that its declaration of the State's constitutional violation would suffice to induce future compliance with Article VIII.

Some minimal progress was made after the Court's June 2000 order. However, the final evaluation required by the Consent Decree (the "Westat Report") confirmed the need for substantial additional funds, as did the Thornton Commission, the state body tasked by the Maryland legislature to revise the state formula for funding education. In 2001, the Thornton Commission issued its final report, which concluded that the BCPSS "adequacy gap" for educational funding needs (not including facilities) was the highest in the State at \$2,938-\$4,250 per pupil. *See* Thornton Comm. Rep. at 27-28 (Jan. 2002), *available at* http://dlslibrary.state.md.us/publications/OPA/I/CEFEE_2002_fin.pdf. The Thornton Commission report also provided a formula that would allow for determination of future levels of constitutional adequacy. *Id.* at iii, xiii.

In response, in 2002 the State enacted SB 856 (2002), the "Bridge to Excellence in Public Schools Act," to implement the Thornton Commission recommendations. 2002 Laws of Md., ch. 288. It recognized a substantial "adequacy gap" of \$3,383 per pupil for BCPSS and committed to provide BCPSS with an additional \$258.6 million annually in educational/operational funding, to be phased in over six years, *i.e.*, by FY 2008. Ex. 1, DLS, S.B. 856 Fiscal Note, Revised, at Exs.

1, 8 (July 3, 2002).⁸ That amount translated to approximately \$2,600 per pupil—the same amount this Court called for in its 2000 decision. *See* Dkt. 50, Mem. Op. at 3 (Aug. 20, 2004). The General Assembly, recognizing that costs of education increase and standards change, also directed an independent assessment of the schools, including the adequacy of educational funding, ten years after its Bridge to Excellence in Public Schools legislation. 2002 Laws of Md., ch. 288.

3. The Court’s June 2002 Order Found Continued Non-Compliance and Extended Jurisdiction Indefinitely until the State Complies with the June 2000 Order.

In May 2002, BCPSS and Plaintiffs jointly moved to extend the term of the Consent Decree and to continue the Court’s jurisdiction until such time that the State’s constitutional violations had been remedied. *See* Dkt. 25, Mem. Op. at 3 (June 25, 2002). After receiving substantial evidence from the parties, the Court issued a Memorandum Opinion on June 25, 2002 granting the motion over the State’s opposition. Judge Kaplan specifically found that continued jurisdiction was necessary because the Thornton funding was uncertain, as the State had not identified a revenue stream. *Id.* at 3-4. Moreover, the Court declared, “two years have passed and the State has yet to comply with this Court’s order[.]” It further found that, although recent legislation would “arguably result in substantial compliance with the June 2000 order by 2008, it is uncertain that all the recommended increases will be funded.” Accordingly, given the uncertainty and “the lack of compliance to date with the June 2000 order,” the Court ruled that it would “retain jurisdiction and continue jurisdiction until such time as the State has complied with this Court’s June 2000 Order.” *Id.* at 5.

⁸ The Bridge to Excellence in Public Schools Act provided additional funding for all Maryland schools, even those without an “adequacy gap.” The phase-in schedule treated all districts equally, without any recognition of the greater needs of Baltimore City and other districts with adequacy gaps.

4. The Court's August 2004 Opinion Found Ongoing Lack of Compliance, Accumulated Underfunding of \$439 to \$835 Million, and Substantial Educational Deficits for Baltimore City Children.

In 2004, well before full phase-in of the constitutionally-required Thornton funding, a \$58 million BCPSS deficit emerged that forced increases in class sizes, the elimination of summer school, and a reduction in supportive services such as guidance counselors. Dkt. 50, Mem. Op. at 30-51 (Aug. 20, 2004). As a result, Plaintiffs moved for further declaratory relief. After a week-long evidentiary hearing, the Court ruled in August 2004 that the State *still* had not provided the \$2,000 to \$2,600 per pupil the Court had found necessary in 2000 and that the State had “unlawfully underfunded [BCPSS] by an amount ranging from \$439.35 million to \$834.68 million” in the aggregate for FY 2001, 2002, 2003, and 2004. *Id.* at 64-65. It held that BCPSS would not be sufficiently funded, unless the State provided BCPSS at least \$225 million in additional annual funding by FY 2008, at the latest. Dkt. 51, Order at 2 ¶¶ 2-3 (Aug. 20, 2004).

Significantly, the Court further found that, due to increased costs, the funding increases previously determined to be necessary “should be adjusted to reflect that increased cost” of education. Dkt. 50, Mem. Op. at 24 ¶ 92 (Aug. 20, 2004). In other words, the Court found that by 2004 the constitutional floor already exceeded the Thornton Commission levels. *Id.* at 24 ¶ 94. Moreover, the Court found that compliance with its 2000 order would not occur until full funding of the Thornton Commission formula was achieved and further, that, because it “has unlawfully underfunded BCPSS . . . in contravention of a final order of this court,” it “should endeavor to repay over the next several years the amounts it failed to fund pursuant to this Court’s 2000 order.” *Id.* at 65; *see also id.* at 67-68.

The Court also made extensive findings of fact regarding the effect of the State’s continuing constitutional violation. Overall, the Court found that the “objective evidence continue[s] to demonstrate, as [it] did in 1996 and 2000, that the BCPSS students are performing

at levels far below state standards, and far below state averages, although there have been some improvements[.]” *Id.* at 25 ¶ 98. Among the deficits: school assessment scores were far below state standards and averages; a low percentage of Baltimore City children had passed the state high school assessment tests; BCPSS had high dropout and correspondingly low graduation rates; student attendance rates were “unacceptable”; and Baltimore City had the highest suspensions and expulsions in the State. *Id.* at 14-29 ¶¶ 95-121. All of these factors were attributable to an inadequate level of educational services. *Id.* These dismal outcomes were compounded by the profound poverty and other demographic and socioeconomic characteristics of BCPSS students that established a “significant number of children at risk of educational failure.” *Id.* at 29 ¶ 124. The Court found that these disadvantaged students “require increased educational focus and resources.” *Id.* at 29.

Overall, this Court concluded that, as a result of these funding deficiencies, “academic achievement among City students remained grossly unsatisfactory,” as the Court of Appeals later summarized the data. *See Md. State Bd. of Educ. v. Bradford*, 387 Md. 353, 379 & n.8 (2005) (“*Bradford II*”) (discussing 2004 Mem. & Op. 24-30 ¶¶ 94-125).⁹ The Court ruled that the constitutional violation it had previously found in 1996 and again in 2000 “is continuing,” that Baltimore City children “still are not receiving an education that is adequate when measured by contemporary educational standards,” and that they therefore were “still being denied their right to a ‘thorough and efficient’ education under Article VIII of the Maryland Constitution.” Dkt. 51, Order at 1-2 ¶ 1 (Aug. 20, 2004).

⁹ The State appealed the Court’s 2004 order and its many findings and declarations. The Court of Appeals declined to hear most of the State’s appeal on the basis that the Circuit Court’s order was not final. *See Bradford II*, 387 Md. at 385-86. The remainder of the appeal concerned the BCPSS budget deficit, and the Court of Appeals reversed a specific injunction regarding the budget deficit. *See id.* at 387-88. That limited ruling is not relevant here.

Moreover, the Court also ruled that changed circumstances since 2001 made it “likely” that the Thornton levels even then “were too low.” Dkt. 50, Mem. & Op. at 15 ¶¶ 52-55 (Aug. 20, 2004). It cited new, higher state standards for high school graduation; federal requirements under the No Child Left Behind legislation requiring all students to achieve satisfactory scores on statewide tests; and the increased needs of children in poverty (as acknowledged by the State Superintendent of Education); and higher education costs. *Id.* at 15-16 ¶¶ 52-56, 23-24 ¶¶ 92-94. In other words, “the cost of an adequate education” could not be measured by the Thornton numbers alone. *Id.* at 24 ¶ 94.

The Court declared that it would continue to retain jurisdiction to ensure compliance with its orders and to monitor funding and management issues and that it would revisit its continuing jurisdiction once full funding was achieved. Dkt. 51, Order at 2 ¶ 6 (Aug. 20, 2004). And, once again, it declared that “the Court trusts that the parties shall act in good faith and with all deliberate speed to ensure compliance without the necessity of further action by plaintiffs.” *Id.* at 4 ¶ 16.

The Court’s 2004 ruling was clear that: (1) at a bare minimum, the State must provide “full Thornton funding” for BCPSS “beyond FY 2008” to support any possible argument that it had achieved constitutional adequacy; and (2) that the Court would not, “in any event, tolerate any delays” in that “full Thornton funding.” *Id.* at 2 ¶ 4. Unfortunately, as shown below, the State has betrayed this Court’s trust and confidence that the State would abide by its constitutional obligations to provide an “adequate” education to Baltimore City children. Funding has not kept pace as constitutionally required, with disastrous consequences for Baltimore City children.

C. The State’s Current Funding of BCPSS Does Not Provide Sufficient Funding for a Constitutionally Adequate Education.

Notwithstanding this Court’s unequivocal rulings, the State has continued to violate Article VIII by serially underfunding BCPSS schools and shortchanging a generation of Baltimore City

school children. As DLS has concluded, the shortfall that existed three years ago was greater than the shortfall that existed when this Court first declared an additional \$2,000 to \$2,600 per pupil was necessary in 2000. An independent study completed in 2016, which was mandated by the General Assembly as part of the Bridge to Excellence in Public Schools Act, also confirmed a massive annual adequacy gap in Baltimore City. Most troubling of all, the State has recently delayed finalizing and acting on the recommendations of its own Kirwan Commission (identified below), which it had established to overhaul the Thornton formula.

1. The State's Studies Have Demonstrated an Annual Adequacy Gap of \$290 to \$353 Million Annually for Baltimore Schools.

This Court held that constitutional adequacy would not even begin to be met until the Thornton funding formula, enacted to fulfill this Court's 2000 decision, was fully phased in. This Court also found that adjustments to the formula were constitutionally necessary to address the rising cost of education and more stringent educational standards. Accordingly, even in 2004, before Thornton was fully phased in, the amounts in the Thornton formula were "likely" insufficient. Dkt. 50, Mem. & Op. at 15 ¶¶ 52-55 (Aug. 20, 2004). But the State has not even met that minimal floor, failing to fully fund Baltimore schools under the Thornton formula and failing to adjust it over time to address greater costs and needs.

The Thornton formula has built-in mechanisms for annual adjustments based on changes in "enrollment, local wealth, and other factors, including inflation in some cases." *See* DLS, Education in Maryland, IX Legislative Handbook Series (2014) ("Handbook") at 63, 72, *available at* <https://www.dllr.state.md.us/p20/p20legishandbook.pdf>. Initially, the Thornton formula amounts were to be increased for inflation each year, using a measure called the implicit price deflator for State and local government expenditures. *Id.* at 72. Starting with the 2007 legislative summer session, however, in response to a deficit, the State chose not to fund the increases

mandated by the Thornton Commission formula, even for BCPSS, notwithstanding this Court's rulings. Rather, it first eliminated and then capped inflation increases to the Thornton funding, among other reductions to the formula, which have continued since in every year thereafter, starting with FY 2009. *Id.* at 76-77. *Accord* APA Consultants, Final Report of the Study of Adequacy of Educational Funding in Maryland (2016) ("APA Final Report"), at 3, *available at* <http://marylandpublicschools.org/Pages/adequacystudy/index.aspx>. These decisions resulted in a steadily increasing "adequacy gap" by the State's own chosen method of calculation.

As a result, BCPSS received only minimal increases in State funding, contrary to the original Thornton formula and contrary to this Court's directions. In FY 2009, funding increased by only \$20 million and in FY 2010, BCPSS received only a \$9 million increase. By FY 2013, DLS calculated that the State's funding level for that year resulted in a shortfall for BCPSS of \$1,952 per pupil (one dollar less than the gap for Prince George's County, which had the largest gap). *Id.* at 64 (Ex. 3.4). ¹⁰ This translated to an FY 2013 adequacy gap of \$156 million.

For the State's FY 2015 budget, DLS again looked at the State's school financing levels and determined that the adequacy gap for BCPSS had risen to \$290 million, based on a per-pupil funding shortfall of \$3,611. *See* DLS, Education in Maryland, Presentation to the Commission on Innovation and Excellence in Education (2016) at 7, *available at* [http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2016-12-](http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2016-12-08_DLS_Adequacy_Presentation.pdf)

08_DLS_Adequacy_Presentation.pdf. Indeed, State funding for BCPSS has largely stayed flat since FY 2009. *See* Ex. 2, Funding Chart. This decade of flat funding has negated the Thornton

¹⁰ It appears that DLS did not use the original Thornton formula to calculate the adequacy gap for FY 2013 and instead applied an inflation factor that had been added to the statute in 2007. *See id.* at n.1. Thus, the actual shortfall for that year probably is higher than what DLS reported. Moreover, FY 2015 was the last year for which DLS appears to have performed this analysis.

increases of the prior decade. Based on the original Thornton formula, the State funding falls well below constitutional requirements for adequacy as previously determined by the Court, and therefore the funding level necessarily violates Article VIII.

These shortfalls have had a cumulative effect as well. The near-decade long period of constitutional violation of Article VIII has created an even greater educational programming deficit in Baltimore City. The aggregate underfunding since FY 2008 now totals (at least) over \$2 billion. This is in addition to the prior aggregate funding gap ranging from \$439.35 million to \$834.68 million that the Court identified in 2004 and directed the State to remediate. Contrary to the Court's finding and expectation that the State would redress this past deficit, the State never tried to ameliorate it. These accumulated annual deficits represent generations of BCPSS students deprived of their constitutional right to an adequate education.

Moreover, a subsequent State-mandated independent study confirmed DLS's findings of a massive annual shortfall that BCPSS requires to provide an adequate education. In 2002, the Bridge to Excellence in Public Schools Act implementing the Thornton Commission's recommendations had required a new independent analysis of schools and funding adequacy after ten years. See APA Final Report, *available at* <http://marylandpublicschools.org/Pages/adequacystudy/index.aspx>. The State Department of Education hired Augenblick, Palaich, and Associates Consulting ("APA") in 2014 to meet this requirement, and APA issued its final report in November 2016. That report concluded that a "significant increase" in funding was required for BCPSS, as well as a new formula for determining adequacy. *Id.* at 86-87.

In reviewing the FY 2015 data, APA determined that Baltimore City needed another \$358 million annually, or a per pupil amount of \$3,416. *Id.* at xxv-xxvi (Tables 9, 10), 111 (Tables

6.7b, 6.7c). To put this sum in perspective, the \$358 million shortfall constituted one-third of the State's entire funding level of BCPSS for FY 2015. *See id.* But even though this study was required by State law, funded by and prepared for the State Department of Education, it too failed to spur the State to reach compliance or materially change its funding pattern.

2. The State's Decision to Delay the Kirwan Commission Report Compounds the State's Continuing Constitutional Violation.

Instead of developing legislation to bring the State back into compliance after its actions reducing required funding under the Thornton formula, the State enacted legislation in 2016 to establish the "Commission on Innovation and Excellence in Education" (the "Kirwan Commission"). The Kirwan Commission was tasked with creating a new set of standards and funding proposals to establish "world-class" schools throughout Maryland, ensuring a 21st-century education for all Maryland children attending public schools and preparing them to meet the challenges of participating in the global economy. The Kirwan Commission was supposed to complete its work with a final report by December 31, 2017. That deadline has been postponed repeatedly, most recently from December 31, 2018 to December 31, 2019. Kirwan Commission, Interim Rep. of the Commission, at iv, 7-8, 11, *available at* <http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2019-Interim-Report-of-the-Commission.pdf> ("Kirwan Comm'n"). In the interim, the General Assembly has not addressed its ongoing failure to fund even the Thornton-required levels.¹¹

But the Kirwan Commission's work to date resoundingly confirms the desperate need—right now—for additional resources to achieve adequacy. It found that, on national and

¹¹ The legislation creating the Kirwan Commission (like the legislation that created the Thornton Commission) does not require the General Assembly to fund its recommendations. Thus, there is no guarantee that the Kirwan Commission's final recommendations, if and when they ever are issued, will result in constitutional compliance (just as the Thornton Commission recommendations have failed to achieve compliance).

international standards, “Maryland schools perform at a mediocre level in a country that performs at a mediocre level internationally.” *Id.* at 2. It found “glaring gaps in student achievement based on income, race, and other student subgroups.” *Id.* It found “big teacher shortages,” and noted that the current system is “unfair to poor communities and the children who live in them.” *Id.* at 3. Its preliminary recommendations are particularly clear about the ways in which the current educational system is failing students who live in poverty, especially those who attend schools with high concentrations of poverty, and students of color. *Id.* at 14-15. Based on these needs, the Commission reached the “inescapable conclusion” that “substantial and sustained improvement in Maryland’s educational performance requires targeted attention to its lowest performing schools and an integrated set of reforms that will enable its most challenged students to achieve their full potential.” *Id.* at 15. Such needs, moreover, include “critical social services, health care, nutritional, and other needs that students from more affluent families receive as a matter of course.” *Id.* (noting as well that such students “often live in neighborhoods where they experience traumas that are going untreated”). These needs, the Commission concluded, must be given priority, as must actions to address persistent racial inequities and the explicit and implicit biases that contribute to such inequities. *Id.* at 16-17.

Thus, the Kirwan Commission’s work to date confirms that the status quo is unacceptable and that what is “adequate when measured by contemporary educational standards,” *id.* at 117, has evolved since 2000, raising the constitutional floor. It demonstrates that modern educational needs have increased substantially, much as this Court recognized in 2004, just four years after the Thornton levels were established. And the State’s decision to delay the Kirwan work for at least another year, with no promise of adequate funding at the end, means that the children who need additional funding the most (per Kirwan’s recommendations) will not receive it.

3. BCPSS Has Submitted a Plan to the Kirwan Commission Confirming the Constitutional Inadequacy of Current Funding to the District.

Building on the Kirwan Commission’s initial recommendations and areas of focus, BCPSS submitted its own analysis of needs in Baltimore City schools to the Kirwan Commission in January 2019. To develop the plan, called Investing in our Future: A World-Class Education System for Baltimore City Students (Jan. 2019) (“BCPSS World-Class Plan”), *available at* <https://www.baltimorecityschools.org/sites/default/files/2019-01/investinginourfuture.pdf>, BCPSS met with teachers, administrators, other stakeholders, and experts, and reviewed research on student outcomes, to attempt to answer the question: “What could it look like for a child born in Baltimore in the *second* 18 years of the 21st century— if all schools in Maryland were funded equitably and at a level that truly supports the world-class education that our children deserve?” BCPSS World-Class Plan at 3. The answer is a variety of programs and services focusing on the same areas that the Kirwan Commission identified: (1) early learning focus, including proposals both for three and four-year old public preschool programs and free childcare in public high schools for students who also are parents; (2) high-quality instruction including extended and special education options for students in need and tutors, assistant principals, assistants, and other necessary staff, for arts and elective funding, and for funds spent on technology purchases and upgrades; (3) college and career readiness, including ensuring BCPSS high schools are staffed with college and career counselors, along with internship programs and career education; (4) student wholeness—also one of the Kirwan Commission’s most important areas—including providing mental health services, such as counselors and social workers, to students; (5) talent recruitment, development, and retention, with a focus on hiring and training; and (6) systems, structures, and facilities, including student transportation, administrative staffing, technological

upgrades, renovating current buildings, providing for preventative maintenance, and ensuring custodial and grounds support.

The plan's rich menu of programs and services further demonstrates that the students in the BCPSS are not receiving a constitutionally-adequate education. The plan does not specifically cost out its proposals for an adequate education or measure the additional funding necessary for implementation, but it seems likely that such costs would be substantially in excess of current funding.

4. The State Compounded Its Continuing Constitutional Violation by Diverting Funds from the Education Trust Fund.

Finally, adding yet another insult to the sorry story of constitutional injury set out above, for years the State raided an "Education Trust Fund" established in 2008, to receive a portion of new casino license revenues. In 2012, Governor O'Malley boasted that a plan to expand casino gambling would mean "hundreds of millions of dollars for our schools." See John Wagner, *Maryland's casino-gambling ballot measure: The big questions about Question 7*, Wash. Post (Oct. 22, 2012), available at https://www.washingtonpost.com/local/md-politics/marylands-casino-gambling-ballot-measure-the-big-questions-about-question-7/2012/10/22/347d10bc-1c54-11e2-9cd5-b55c38388962_story.html?utm_term=.eeca13d3cb12. That never happened. The funds Maryland voters were told would *supplement* education funding instead were used to *supplant* existing funding, meaning that available funds for compliance were not utilized and other priorities were funded instead. See Ian Duncan, *Casino "lockbox" for Maryland school funding and Election Day voter registration win approval*, Baltimore Sun, Nov. 6, 2018, available at <http://www.baltimoresun.com/news/maryland/politics/bs-md-state-ballot-20181102-story.html>. Even though a constitutional amendment was adopted this past year to establish a "lockbox" to halt reassignment of current funding, the current Governor has proposed legislation that would

utilize this funding to pay for statewide school construction requests, instead of using it to remedy existing constitutional violations in BCPSS and the State's ongoing violations of the Court's findings and orders. See HB 153, available at <http://mgaleg.maryland.gov/2019RS/bills/hb/hb0153f.pdf>.

5. National Studies Confirm the Huge "Adequacy Gap," Including its Impact on African-American Students.

National studies further confirm that the State's failure to fund BPCSS at constitutional levels over time has contributed to a widening gap between the education to which Baltimore students are constitutionally entitled and the education they receive, particularly in light of their increased level of need. For example, in its 2018 National Report Card of state support of public schools, the Education Law Center concluded that Maryland's system is among the most regressive in the entire country, receiving a "D" for its insufficient recognition of poverty and ranking 11th from the bottom nationwide. Education Law Center, *Is School Funding Fair: A National Report Card* (7th Ed. 2018), at 11, available at http://www.edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Editi.pdf. See also *id.* at 14 (demonstrating that Maryland is regressive as compared to its geographic region). Accord Kirwan Comm'n, *supra*, at 18 (finding that Maryland's formula is regressive). Additionally, Maryland's formula disproportionately harms its African-American population. The Education Trust looked at the State's funding distribution for FY 2015 and concluded that the system is inequitable for children of color, as the three districts with the highest numbers of children of color (Baltimore City, Prince George's County, and Caroline County) also are the three most underfunded districts in the State. See Baltimore Community Foundation, The Education Trust Report: Innovation, Excellence and Funding for Maryland Public Schools, "Inequities in Access to Funding of Students of Color" (2018), available at

<http://education.baltimorecommunityfoundation.org/2018/11/02/ed-trust-report/>. *Accord* discussion *supra* at 19-20 (discussing Kirwan Commission’s interim report recognizing the pressing needs of children of color and children who live in poverty).

* * *

Whatever the measure, the State’s current funding levels for BCPSS do not come close to meeting the requirements of Article VIII. During the years in which the State has been ignoring this Court’s declaration of rights of the Plaintiffs to adequate schools, two generations of children have entered and graduated BCPSS schools since this litigation began without receiving the education the State Constitution guarantees them. This Court needs to act now to halt the State’s chronic abdication of its fundamental duty to provide sufficient funding to educate the at-risk children in Baltimore City.

D. The State’s Failure to Fund BCPSS Sufficiently Continues to Result in the Denial of an Adequate Education in Violation of Article VIII.

What this Court first found in 1996 remains distressingly true today: “There is no genuine material factual dispute . . . as to whether the public school children in Baltimore City are being provided with an education that is adequate[.]” Dkt. 1-66, Order (Oct. 18, 1996). In 2004, the Court agreed with the Thornton Commission’s finding that Baltimore City’s “‘adequacy gap’ . . . was the highest in the State.” Dkt. 50, Mem. Op. at 12 ¶ 40 (Aug. 20, 2004). The sad reality is that, no matter the measure used, current data demonstrate that children in BCPSS continue to receive an education that is constitutionally deficient. These disparities echo the same deficits that Judge Kaplan found in 2004, and, as was the case then, are the result of the State’s failure to fund education in Baltimore sufficiently. These disparities are exacerbated by the lack of sufficient local revenue that Baltimore City, the poorest large jurisdiction in the State, can tap to fill the huge hole in State aid. They are particularly tragic given the needs of Baltimore City’s student

population, which is comprised by mostly low-income students of color who already suffer the combined effects of the persisting legacy of structural racial discrimination in Baltimore and the City's current economic woes.

The continuing constitutional violation is demonstrated both by the school system's "inputs" (the educational services, programs, and facilities available to students attending BCPSS) and its "outputs" (student performance on standardized tests and other measures used to determine whether and how well they are learning and being prepared to be 21st century citizens).

1. Baltimore City Public Schools Have Less Staff and Less Experienced Staff Than Other Districts Statewide.

The lack of financial resources translates to a lack of educational services. These disparities are reflected in, among other things, the lack of adequate numbers of teachers and staff in Baltimore City schools. Baltimore City averages the highest ratios of students to staff of any school district in the state: 16.4 students per teacher; 14.7 students per teacher and therapist; and 29.5 students per non-instructional staff member. *See* Maryland Public Schools ("MPS"), Staff Employed at School and Central Office Levels, at 5 (Oct. 2017) ("Staff Levels"), *available at* http://marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Staff/2018_Staff_Emply.pdf.

The problem is exacerbated by the fact that BCPSS has had to reduce significantly the number of its teachers. Baltimore has nearly 500 fewer teachers than it had just three years ago. Ex. 3, BCPSS, Investing in Student Success at 9. Budget shortfalls have affected other staffing decisions as well. Recently, BCPSS had to slash spending on leadership and management. *Id.* at 8. Current spending levels on school leadership and management lag behind similar sized districts nationwide, including Boston, Cleveland, Oakland, and the District of Columbia. *Id.*

A disproportionate number of the BCPSS teachers lack sufficient formal training. Over 20 percent of BCPSS teachers lack standard professional certification, compared to 2.2 percent in Baltimore County Public Schools, 1.1 percent in Carroll County Public Schools, 1.2 percent in Harford County Public Schools, 1.2 percent in Howard County Public Schools, and none in Anne Arundel County Public Schools. *See* Cara McClellan, *OUR GIRLS, OUR FUTURE: Investing in Opportunity & Reducing Reliance on the Criminal Justice System in Baltimore*, at 11, available at https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf. BCPSS teachers are also less experienced and more likely to be absent from school: nearly 25 percent are in their first two years of teaching. *See* U.S. Dep't of Educ., Civil Rights Data Collection (2018), available at <https://ocrdata.ed.gov/districtschoolsearch#schoolsearch> ("Civil Rights Data Collection"). Over 69 percent of BCPSS teachers are absent more than ten days of the school year. *Id.*

BCPSS teachers also have fewer advanced degrees than their counterparts around the State. Over 73 percent of teachers in Baltimore County Public Schools have a Master's degree or higher. *See* MPS, Professional Staff by Type of Degree and Years of Experience, 2017, at 8, available at http://marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Staff/2018_Prof_Staff_by_Degree.pdf. By comparison, only 50 percent of BCPSS teachers have a Master's degree or higher. *Id.* In Montgomery County Public Schools, 22 percent of teachers have only a Bachelor's degree or less. *Id.* By contrast, 41 percent of BCPSS teachers fall into this category. *Id.*

Although Baltimore City is the fourth largest district in the state, it has fewer support staff than similarly sized districts, such as Anne Arundel County. *See* MPS, Staff Levels, *supra*, at 1. Likewise, although Montgomery County Public Schools is less than twice the size of BCPSS, it has almost four times the number of support staff. *Id.* Similarly, although Baltimore County

Public Schools is approximately 1.3 times the size of BCPSS, it has more than double the number of support staff. *Id.* The disparities and shortages are not limited to support staff. Many schools lack their own school nurse and mental health professionals. *Id.* at 3. In 2017, BCPSS had no library aides. *Id.* Again, given the needs of the Baltimore City student population, these staffing shortages are especially harmful.

Likewise, BCPSS employed merely 81 school counselors. *Id.* at 2. By comparison, Anne Arundel County Schools, a system of similar size, employed 219. *Id.* In some areas, the disparities are starkest at the elementary school level. BCPSS employs merely ten guidance counselors in its 127 elementary schools. *Id.* at 7. Baltimore County Public Schools employs 125. *Id.* The disparities continue as children progress through school. BCPSS employs merely 62 librarians; Anne Arundel County Public Schools, by comparison, employs double that amount. *Id.* at 6.

BCPSS also is challenged to respond fully to the needs of students with disabilities. Although Baltimore City's student population is roughly equivalent in size to that of Anne Arundel County, BCPSS has only 75 percent of the special education therapists that Anne Arundel County Public Schools does. *Id.* at 11.

Currently only 55 percent of Baltimore City elementary school students have music courses and only 81 percent have visual art; very few have dance and theatre. *See Arts Every Day, Baltimore Arts Education Initiative at 5, available at* <https://www.artseveryday.org/wp-content/uploads/2019/02/City-Council-Hearing-2.pdf>. In neighboring Anne Arundel County, 100 percent of elementary students are enrolled in both music and visual arts classes each year. *Id.*

2. Students in Baltimore City Public Schools Are Not Proficient in Reading and Math.

The lack of sufficient staff, along with other similar funding related deficiencies, has a direct impact on student performance. Despite some improvements, BCPSS students continue to

perform at levels well below contemporary standards. By national standards, only 13 percent of BCPSS students in 4th and 8th grade are proficient readers. *See* National Assessment of Educational Progress (“NAEP”), National Assessment of Educational Progress Results: Presentation to the Baltimore City Board of School Commissioners (Apr. 2017) at 7, *available at* [https://www.boarddocs.com/mabe/bcpss/Board.nsf/files/AXPN9H5EB399/\\$file/18.04%202017%20National%20Assessment%20of%20Educational%20Progress%20\(NAEP\)%20Results.pdf](https://www.boarddocs.com/mabe/bcpss/Board.nsf/files/AXPN9H5EB399/$file/18.04%202017%20National%20Assessment%20of%20Educational%20Progress%20(NAEP)%20Results.pdf). The results are similarly alarming when students are tested as to proficiency in math. In 2017, only 14 percent of 4th graders and only 11 percent of 8th graders were proficient. *Id.* at 8.

The percentage of students who meet these basic proficiency standards is far lower than those of students in Maryland and across the country. The disparities exist at every level of the system, including among the City’s youngest students. Fourth grade students in Baltimore City, when tested as to their reading abilities, score 16 points lower than students in other large cities, 24 points lower than students nationwide, and 28 points lower than students on average throughout Maryland. NAEP, *supra*, at 5. Eighth grade students in BCPSS score 15 points lower in reading than students do in other large cities nationwide, 22 points lower than students across the country, and 24 points lower than students across Maryland. *Id.* Likewise, fourth grade students in BCPSS, when tested on math, score 17 points lower than students in other large cities, 24 points lower than students nationwide, and 26 points lower than students on average throughout Maryland. *Id.* at 6. Similarly, eighth grade students in BCPSS score 19 points lower than students in other large cities nationwide, 27 points lower than students across the country, and 26 points lower than students across Maryland. *Id.*

Even when compared with 28 other large school districts nationwide, Baltimore City students scored lower than all but three districts in reading and math. *Id.* at 19. Among the districts

that scored higher than Baltimore City were Atlanta, Philadelphia, and the District of Columbia, each of which have socio-economic demographic makeups similar to Baltimore. *Id.* BCPSS students in eighth grade scored lower than all but two districts, including Atlanta, the District of Columbia, Philadelphia, and Milwaukee. *Id.* at 20.

3. Baltimore City Students Score Lower on Advanced Placement and College Entrance Exams.

State funding also directly affects the availability of advanced placement and college preparatory courses and student performance on them. Of the 39 high schools that were open in 2017, only 23 offered Advanced Placement (“AP”) or an International Baccalaureate Diploma Program. Civil Rights Data Collection, *supra*.

The students who are fortunate enough to enroll in AP courses often score lower than other students statewide. Of the nearly 2,300 students who took Advanced Placement courses in 2017, only 31 percent passed. *See* BCPSS, College and Career Readiness Update: Presentation to the Baltimore City Board of School Commissioners, Teaching and Learning Committee (Nov. 5, 2018) at 46, *available* at [https://www.boarddocs.com/mabe/bcpss/Board.nsf/files/B5ZLUD4D571C/\\$file/College%20and%20Career%20Readiness%20Update.pdf](https://www.boarddocs.com/mabe/bcpss/Board.nsf/files/B5ZLUD4D571C/$file/College%20and%20Career%20Readiness%20Update.pdf). The average Maryland pass rate, 63.1 percent, was more than double that in BCPSS. *Id.* at 47. Again, the percentage of African-American students passing lagged far behind that of other students, with only 12.8 percent passing their exams. *Id.* at 48. The results are particularly alarming given that students in Maryland, on the whole, score more than 7 points higher than the national average. *Id.* at 47.

The disparities are likewise reflected in the lower test scores of BCPSS students taking college entrance exams. In 2017, the average SAT score for BCPSS students was 884, more than 150 points lower than the state average. *Id.* at 11. Similarly, 11th grade BCPSS students taking

the PSAT scored more than 183 points lower and students taking the SAT scored 162 points lower. *Id.* at 36, 51.

4. Graduation Rates Are Lower and Dropout Rates Are Higher among BCPSS Students.

These lower performance rates are reflected in the relatively low number of students who make it to graduation. Graduation rates for BCPSS students continue to lag behind students in other districts across the state. “Four-year graduation rates have flattened, with the class of 2017 showing a four-year rate of 70.7 [percent],” significantly lower than the statewide average of 87.7 percent and the average graduation rates in Anne Arundel, Howard, Montgomery, Prince George’s, and Baltimore County Public Schools. Ex. 4, BCPSS, Summary Report: 4 Year Graduation and Dropout Update Class of 2017, at 1.

“While graduation rates have flattened, four-year dropout rates in City Schools increased from the previous year. The four-year dropout rate for the Class of 2017 stood at 15.9 percent, up from 13.9 percent for the Class of 2016” *Id.* at 2. By contrast, only 8.2 percent of students statewide dropped out. *Id.* at 4. Rates from other large counties, including Anne Arundel, Howard, and Montgomery County Public Schools, were even lower. *Id.* Dropout rates increased among most student groups, but were most pronounced among the Hispanic/Latino and English Learner populations, which also saw the largest increases in population. Both groups’ dropout rates increased by more than 12 percentage points. *Id.* at 3.

The disparities are also reflected in where students find themselves once they graduate. The percentage of BCPSS students enrolled in a two or four-year college in their first fall after graduation has continued to fall, with only 41.7 percent of students enrolled, compared to 46 percent in 2012. *See* BCPSS, College and Career Readiness Update, *supra*, at 54. Two years after graduation, only 53 percent of former BCPSS students are enrolled in college, compared to 71.1

percent statewide. *Id.*; Md. State Dep't of Educ., Maryland Report Card: Demographics (2017), <http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20162017Student/2017EnrollbyRace.pdf>.

5. The Official State Report Card for Public Schools Confirms these Disparities.

The State's own official measure of school performance confirms that BCPSS schools fail to meet state standards in numerous categories. In 2017, the General Assembly passed legislation, the Protect our Schools Act of 2017 (HB 978) refining the factors and calculations the Maryland State Board of Education uses to assess schools statewide, assigning them star ratings—from 1 to 5 stars—and percentile rankings based on performance. *See* Md. Laws 2017, ch. 29; Danielle E. Gaines, *With New Report Card, State Schools Receive A Star Rating*, Maryland Matters (Dec. 5, 2018), *available at* <https://www.marylandmatters.org/2018/12/05/with-new-report-card-every-state-school-receives-a-star-rating/>.¹² All schools in the state were assigned a star rating based on the possible percentage of points achieved after an assessment of, among other things, standardized test scores, graduation rates, and the chronic absenteeism rate. *Id.* Five-star schools received at least 75 percent of the possible points; one-star schools received less than 30 percent of the possible points. *Id.* The report card improved on the previous system by, among other things, considering different factors for elementary, middle and high school students and improvement over time among elementary and middle school students. *Id.* The previous system was criticized for

¹² As explained by MSDE, the new Report Card assessment of schools constitutes the formal measurement tool for Maryland to comply with the federal Every Student Succeeds Act, which requires states to develop plans to improve schools through accountability and innovation. It was approved by the US Department of Education early in 2018. In addition to collecting information on how schools and districts fare on State assessments, it also measures “other factors such as growth in achievement, high school graduation, student access to a well-rounded curriculum, the progress of English language learners, and postsecondary readiness.” MSDE, Maryland Report Card, Introduction. *available at* <http://reportcard.msde.maryland.gov/>.

“paint[ing] too simplistic a picture of the complicated factors that go into” assessing whether a school is providing students an adequate education. *Id.*

The new system of measurement, like its predecessor, reveals the gross disparities between BCPSS and its counterparts. Baltimore had 23 schools that received only one star, almost twice the number of one-star schools in every other Maryland school district combined. *Id.* Only 3 percent of schools statewide received the lowest rating, and 66 percent of these schools (23 of 35) were in BCPSS. *Id.* Although three and four-star ratings were by far the most common statewide, only 39 percent of BCPSS schools were so rated compared to 74 percent of schools in the rest of the state. *Id.* BCPSS was the only school district in which the largest number of schools received two stars. *Id.* Altogether, almost 60 percent of BCPSS schools received only one or two stars (99 of 166 schools)—not only the largest percentage in the State, but more than *eight times* the percentage for the rest of the State, where less than 7 percent of all schools received only one or two stars (80 out of 1150 total schools outside of Baltimore City). *Id.*

Conversely, only three BCPSS schools received five stars. *Id.* Baltimore County had 36 such schools; Howard County had 31 such schools; and, in Montgomery County, 50 schools were awarded five stars. *Id.* Only 13 percent of BCPSS schools were awarded four or five stars—the lowest percentage in the State, and almost half that of the school district with the next lowest percentage. *Id.* Combined, 219 schools statewide received five stars. BCPSS accounted for barely 1.5 percent of these schools. *Id.* On average, 17 percent of schools statewide received five stars; in Baltimore, only two percent of schools did. *Id.*

6. Baltimore City’s Student Population Has Higher Needs Resulting from Higher Poverty Rates and Other “At-Risk” Factors.

Students who attend BCPSS face additional challenges that the State must account for. This Court previously found that the “students who live in poverty or face similar disadvantages

cost more to educate.” Dkt. 50, Mem. Op. at 12 ¶ 40 (Aug. 20, 2004); *accord id.* at 29 § 8 (finding that the substantial number of students who live in poverty and have other needs “require increased educational focus and resources”) (capitalization omitted). It accepted the Thornton Commission’s finding that “substantial additional resources in addition to then-current funding were necessary to educate students who live in poverty[] to enable those students to meet state standards and receive an adequate education.” *Id.* at 11 ¶ 38. Citing testimony by the State Superintendent, this Court also found that “the needs of children in poverty have increased since the Thornton recommendations were issued.” *Id.* at 16 ¶ 56. All of these findings apply with equal force today, as the January 2019 interim report from the Kirwan Commission confirms. *See* Kirwan Comm’n, *supra*, at 4 (recommending “broad and sustained new support” for students who liv in poverty); *id.* at 106-07 (explaining that “extra resources and a determined, persistent, and comprehensive effort” are needed for schools with high concentrations of poverty).

As calculated by the State, BCPSS has the highest “at risk student index” in the State—the combined percentage of students that receive free and reduced meals, have limited English proficiency, and have special education needs. *See* DLS, Overview of State Aid to Local Governments, Fiscal 2020 Allowance, at 40-42, *available at* <http://dls.maryland.gov/pubs/prod/InterGovMatters/SteAidLocGov/Overview-of-State-Aid-to-Local-Governments-Fiscal-2020-Allowance.pdf>. Over 86 percent of students in BCPSS are eligible for free and reduced meals—the highest percentage in the state. *Id.* at 40. By comparison, on average, only 42 percent of students are eligible statewide. *Id.* Of these, 19.3 percent of BCPSS students suffer from extreme poverty, nearly three times the statewide average. Ex. 3, BCPSS, Investing in Student Success at 4. BCPSS identified 2,716 homeless youth who attended the

district's schools in the 2012-13 school year. *See* BCPSS, Homeless Services, *available at* <http://www.baltimorecityschools.org/homeless>.

These differences are not without consequence. Students who are economically disadvantaged score significantly lower than other students. The National Assessment of Educational Progress found that, in 2017, BCPSS students, tested separately in grades 4 and 8, who received SNAP (Food Stamp) or TANF (welfare) benefits, were homeless, or were in foster care, received lower scores in both math and reading. NAEP, *supra*, at 15-16.

Unfortunately, the barriers extend beyond wealth. More than 7 percent of Baltimore City students have limited English proficiency—the sixth highest percentage in the state. *See* DLS, Overview, *supra*, at 41. Seventeen percent of the City's student population has special education needs—the second highest percentage in the state and four points higher than the state average. *Id.* at 42.

Because of the social and economic challenges that Baltimore neighborhoods face, BCPSS schools have a high proportion of students who need social and emotional supports. Nearly 30 percent of children in Baltimore, compared to 19 percent statewide, have ACE (“Adverse Childhood Experiences”) scores of two or more, meaning that they have experienced more than two incidences of traumatic events such as domestic violence, living with someone with an alcohol/drug problem, the death of a parent, or being a victim/witness of neighborhood violence. *See* Balt. City Health Dep’t, Healthy Baltimore 2020: A Blueprint for Health (Mar. 2017) at 10, *available at* <https://health.baltimorecity.gov/sites/default/files/HB2020%20-%20April%202017.pdf>. As research has established, these barriers drastically affect a student's ability to learn because toxic stress affects a child's developing brain. *See* Centers for Disease Control and Prevention, *Violence Prevention: Adverse Childhood Experiences*, *available at*

https://www.cdc.gov/violenceprevention/childabuseandneglect/cestudy/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Facestudy%2Findex.html.

Approximately 37 percent of BCPSS students are chronically absent due to these and other challenges. See Liz Bowie, *Does Maryland really have the highest rate of chronically absent students in the U.S.?*, Baltimore Sun (Sept. 17, 2018), available at <https://www.baltimoresun.com/news/maryland/education/k-12/bs-md-report-school-absence-20180917-story.html>. Students who attend high poverty schools are significantly more likely to experience conditions that make it difficult to attend school every day. See Hedy N. Chang & Mariajosé Romero, *Present, Engaged, and Accounted For: The Critical Importance of Addressing Chronic Absence in the Early Grades* (Sept. 2008), available at http://www.nccp.org/publications/pdf/text_837.pdf. These conditions include: physical and behavioral health conditions; substandard, unstable housing; dangerous routes to and from school; and unreliable public transportation. Many students have one or more health conditions that put them at risk for frequent absence from school, such as asthma, dental health, and vision impairments, among others. Chronic absence rates highlight educational inequity and lack of access to opportunities. See Krenitsky-Korn S., *High school students with asthma: attitudes about school health, absenteeism, and its impact on academic achievement*, 37 J. Ped. Nursing 61, 68 (2011); Julia Burdick Will, *et al.*, *Danger on the Way to School: Exposure to Violent Crime, Public Transportation, and Absenteeism*, 6 Sociological Sci. 118, 119-20 (2019); Stephanie L. Jackson, *et al.*, *Impact of Poor Oral Health on Children's School Attendance and Performance*, 101 Am. J. Pub. Health 1900, 1906 (2010).

These factors work together to decrease the quality of education and opportunities that students receive. Classes with significant student populations with high and diverse needs make

it more difficult for teachers to meet all students' needs. Ex. 3, BCPSS, Investing in Student Success at 21. As a result, schools must provide additional special education resources and other support services which otherwise would not be needed. *Id.* This leaves fewer resources for general education and the provision of a more rigorous curriculum for all students. *Id.* Examples of additional resources required might include, among other things, physical health supports, such as school nurses; mental and behavioral health supports, such as school psychologists; and academic support and tiered interventions, such as small group instruction and tutoring. *Id.*

BCPSS spends 24 percent of its total operating budget on services for students with disabilities, the highest among comparison districts in the State. *Id.* at 20. This is due, in part, to having to expend 41 percent more on physical health services and 60 percent more on social emotional services for students than other districts spend on average statewide. *Id.* City schools' transportation costs are also higher for students with disabilities. *Id.* According to BCPSS estimates, the district needs an additional \$600 per elementary school student and \$1,375 per middle and high school student to address *just the additional costs* that arise from having an overwhelmingly high need, student population. Ex. 5, Proposed Changes to the Fair Student Funding Model at 35 (Jan. 9, 2018).

Nonetheless, the State has ignored and continues to ignore Baltimore's student population. As of 2013, DLS determined that Baltimore City had the second largest funding gap per student in the state—the gap between current funding and funding determined by the State in 2002 to be necessary to provide students an adequate education—\$1,952 per student. *See Handbook, supra*, at 64. Although, in a majority of states, students in the poorest school districts tend to receive more funding than rich districts, Maryland is one of six states where the wealthiest 25 percent of school districts receive more money than the poorest. *See* Jill Barshay, *In six states, the school*

districts with the neediest students get less money than the wealthiest, The Hechinger Report (July 9, 2018) (discussing 2014-15 data from, and recent report by, the National Center on Educational Statistics), *available at* <https://hechingerreport.org/in-6-states-school-districts-with-the-neediest-students-get-less-money-than-the-wealthiest/>. As discussed above, a study by the Education Law Center found that Maryland's funding system is among the most regressive nationwide for its failure to provide additional funding to school districts with high concentrations of low-income students. *See* Education Law Center, *Is School Funding Fair: A National Report Card*, *supra*, at 15 & n.15.

7. BCPSS Is Racially Isolated from Surrounding School Districts.

Compounding matters, the Baltimore region is highly segregated, which is reflected in the racial composition of BCPSS's student population. *See* Jennifer B. Ayscue, *et al.*, *Settle for Segregation or Strive for Diversity? A Defining Moment for Maryland's Public Schools*, at 6 (April 2013), *available at* <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/settle-for-segregation-or-strive-for-diversity-a-defining-moment-for-maryland2019s-public-schools>; Gary Orfield, *et al.*, *Brown at 62: School Segregation by Race, Poverty and State*, at 4 (May 16, 2016), *available at* <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-62-school-segregation-by-race-poverty-and-state>. Accordingly, the State's failure to fund BCPSS adequately has caused the denial of an adequate education to a significant proportion of Maryland's African-American student population. Approximately 79 percent of BCPSS students are African-American—the highest percentage in the state. *See* MPS, *Public School Enrollment by Race/Ethnicity and Gender and Number of Schools*, at 1, *available at* <http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20172018Student/2018EnrollbyRace.pdf>. As of 2015, 53 percent of African-American students in Maryland attended

chronically underfunded schools, compared to just 8 percent of white students across the state. *See* Letter from Sonja Brookins Santelises to Kirwan Comm’n (Jan. 16, 2019), *available at* http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/2019_01_18_BaltCityPublicSchoolsLetter.pdf. Moreover, as the Kirwan Commission has found, Maryland has “glaring gaps in student achievement based on income, race, and other student subgroups.” Kirwan Comm’n, *supra*, at 2; *id.* at 14 (citing data); *id.* at 16-17 (finding that “race and poverty are not interchangeable” and that students of color face unique barriers from racial inequities and explicit and implicit bias).

Additionally, racially isolated schools hamper the educational opportunities of all students by impeding the development of critical thinking skills, stifling educational and career goals, and failing to prepare students for careers in a diverse workforce. *See* U.S. Comm’n on Civil Rights, Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation at 5 (Jan. 2018), *available at* <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>). The impact of racial isolation on educational opportunity can be addressed only through state-wide policies and initiatives to foster diversity and address the segregation that exists between schools and school districts. Thus, in addition to increasing funding on other areas that are proven to increase educational outcomes for students through recruiting and supporting strong and experienced faculty, expanding social and health services in schools, and offering high quality early education, among other things, additional funding to support a constitutionally-adequate education is needed to remediate the effects of racial segregation and isolation. *See* Jennifer Ayscue, *et al.*, *The Complementary Benefits of Racial and Socioeconomic Diversity in Schools* (Mar. 2017), *available at* <http://school-diversity.org/pdf/DiversityResearchBriefNo10.pdf>.

8. Baltimore City Public Schools Require State Funding Because Baltimore City Lacks Sufficient Revenue Resources Available to Wealthier Counties.

State funding is particularly important to BCPSS because of the low level of local funding available for education in Baltimore City. Only 24 percent (approximately \$278 million) of BCPSS funding comes from local sources, even though the City's property tax rate is the highest in the state. Ex. 6, Funding 101 Slides at 2. By comparison, Howard County receives over 70 percent (approximately \$572 million) of its funding from local sources. *Id.* The disparity is not borne from disinterest or inadequate support by the City government. Rather, it reflects the economic reality of Baltimore City's population: Baltimore City residents are lower-income than residents in surrounding districts. *See* <https://factfinder.census.gov>. Indeed, Baltimore City residents are, on average, much poorer than the residents in any other large jurisdiction in the State. *Id.* As a result, the tax base is much lower, and the City cannot fill budget holes with its own revenues like other large jurisdictions are able to do. The Kirwan Commission has recognized this problem, noting that "several national studies show Maryland to be 'regressive' in its school funding, which means, in effect, that our school finance system is unfair to poor communities and the children who live in them." Kirwan Comm'n, *supra*, at 3.

To cite one glaring consequence of this stark inequity, BCPSS expends over \$50 million annually from its general operating budget to pay its share of the cost of the bonds that are funding the new "21st Century School Plan"¹³ buildings in Baltimore City. *See* BCPSS Operating Budget for 2018-19 at 23 (listing \$53,496,255 for "debt service"), *available at* <https://www.baltimorecityschools.org/sites/default/files/2019-01/Budget-FY19OperatingBudget->

¹³ The Plan is a joint agreement between the City and the State to fund the construction of a limited number of new school buildings in Baltimore. *See* <https://baltimore21stcenturyschools.org/about/history>. However, as explained below, the Plan is insufficient to address the overwhelming facility needs of the system's buildings.

English.pdf. Other jurisdictions are able to pay their share of school construction costs out of separate capital budgets and thus do not have to raid academic operations in order to pay for new school construction.

This Court has already noted the significance of Baltimore City's comparative lack of resources. In 2004, Judge Kaplan made an express finding that Baltimore City ranked last among Maryland jurisdictions in wealth per pupil. Dkt. 50, Mem. Op. at 30 ¶ 125 (Aug. 20, 2004). Today, the situation is not much better.

Moreover, Baltimore City is already contributing more, proportionately, than many richer jurisdictions. APA's state-mandated study for the State Department of Education in 2016, for instance, concluded that not only should the State share of funding for Baltimore City be increased by \$387 million (in FY 2015 numbers), or 45 percent, but the City's share should actually be *decreased* by \$29 million, or 13 percent. *See* APA, *supra*, at 109 Table 6.7a, 6.7b (net annual "adequacy gap" of \$358 million).

9. The Aggregate Evidence Demonstrates that Defendants' Violations of Article VIII Persist, Nearly 15 Years after this Court's 2004 Decision.

For all of these reasons, what the Court concluded in 2004 about the State's chronic underfunding of BCPSS remains true today: "Student scores and other objective evidence continue to demonstrate, as they did in 1996 and 2000, that the BCPS students are performing at levels far below state standards, and far below state averages[.]" Dkt. 50, Mem. & Op. at 25 ¶ 98 (Aug. 20, 2004). Among the pertinent evidence were disproportionately low scores on state achievement tests and high school assessment tests; unacceptable dropout, graduation, and attendance rates; and high concentration of poverty and other high-risk factors. *Id.* at 25-30 ¶¶ 99-125. These poor outcomes and high-risk factors "indicate an inadequate level of educational services." *Id.* at 28 § 7 (capitalization omitted). The objective evidence of poor outcomes has not changed materially

since 2004, and, accordingly, neither should the Court's conclusions. BCPSS schools receive insufficient funds to provide "an [i]adequate level of educational services." *Id.* (capitalization omitted).

II. The State Is Violating Its Constitutional Obligation to Provide Baltimore City Students with Adequate School Facilities.

In addition to depriving Baltimore City children of funds sufficient for adequate educational and instructional programs, the State also has abdicated its duty under Article VIII to provide funding sufficient to ensure that students in the City attend school in buildings that are safe, functional, have reliable heat and air conditioning, and have sufficient facilities to support an adequate education program. The physical condition of most school facilities in Baltimore City is abysmal. The system has reached a breaking point, and the condition is getting steadily worse. Accordingly, these problems continue to directly affect the ability of Baltimore City students to learn.

Article VIII clearly requires adequate facilities, both because an adequate education under contemporary standards should be understood to include the facilities where students learn, and because adequate facilities are necessary for adequate learning. Accordingly, this Court has already recognized that facilities are relevant to assessing whether a system of education meets contemporary standards, because it approved the Consent Decree which included funds for improving schools and because it adopted as its own the findings of the Metis Report, which focused extensively on the inadequacy of the BCPSS facilities. As discussed below, moreover, that recognition is consistent with several decisions from other courts across the country applying identical or similar constitutional provisions.

Nonetheless, BCPSS has been starved of the funds necessary even to maintain its facilities, let alone to bring them to modern standards. Children attending BCPSS are expected to learn in

physical facilities that oftentimes lack functional and reliable heat, lack air conditioning, lack drinkable water, lack security measures such as classroom doors that lock or appropriate coverage by security cameras, have dilapidated elevators that routinely break down because they are decades beyond the date when they should have been replaced, and often have roofs and structures that are leaking, crumbling, and well beyond their useful lives. *See, e.g.,* Talia Richman, *Leaky roofs, lead in the water, fire risk: Baltimore schools face nearly \$3 billion maintenance backlog*, Baltimore Sun, available at <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-facilities-costs-20180914-story.html>; Ex. 7, Jacobs, State of School Facilities, Baltimore City Public Schools, June 2012, at 23 (“Jacobs Report” or “Jacobs Rep.”); Ex. 8, BCPSS, Comprehensive Educational Facilities Master Plan (Oct. 12, 2018), at 620-26 (listing schools with a variety of problems, including structural issues, fire safety issues, and the need to replace HVAC systems, roofs, and electrical systems). Last winter, the system closed for a week because numerous ancient heating systems failed and classrooms were without heat; last summer, schools closed for lack of air conditioning; this winter, problems have recurred.

Six years ago, at least 85 percent of the school buildings were rated “very poor” or “poor” by the engineering firm, Jacobs, which relied on accepted industry standards to assess every facility in BCPSS. Ex. 7, Jacobs Rep., *supra*, at 26. The Jacobs report, the standard it used, and its findings have served as the accepted basis by BCPSS and the State to assess facilities deficiencies in BCPSS. *See* <https://baltimore21stcenturyschools.org/about/history> (noting the importance of the Jacobs report and its findings to the work of the 21st Century Schools fund, under which the State and BCPSS have partnered to renovate a small number of Baltimore schools). Using estimates projected by BCPSS from the 2012 Jacobs Report, it would cost \$3 billion to bring BCPSS buildings up to a minimally acceptable standard through repairs and building replacements

and \$5 billion to complete a full portfolio replacement to meet modern educational standards. Nor does the BCPSS have the funds to adequately maintain the schools, particularly in light of their already dilapidated condition—the \$23 million annually it spends from its operating funds (taking funds from the classroom) is not even close to the \$150 million that industry standards require for similar systems. Ex. 9, BCPSS SY 18-19 Comprehensive Maintenance Plan at 3.

Students feel the effects of this systemic constitutional violation at the individual school level. One compelling measure of how students experience day-to-day education in Baltimore City’s aging facilities is the significant number of emergency/unscheduled work orders. Emergency work orders are “for immediate repair to equipment or the physical plant that is a threat to life and safety or the mitigation of the threat to life and safety.” *Id.* at 46. In 2017 there were almost 42,000 such work orders for BCPSS’s 159 school buildings, requiring 96,000 hours to address. There were 32,000 such work orders for 2018 requiring 53,000 hours. *Id.* at 46, 47. These emergency repairs “typically include full or temporary repairs to critical safety, mechanical, plumbing, electrical, and security systems” – and they can and do lead to school closures such as the events of last winter. *Id.* at 12.

A. BCPSS Facilities Are in Abysmal and Unconstitutional Condition.

1. Building Conditions Are So Poor that Emergency Issues, Including School Closures, Often Affect Students’ Opportunities to Learn.

Last winter, students in 87 Baltimore City public schools—over half of all public schools in the City—attended class in rooms that were without heat or with limited heat because boilers and other major elements of the schools’ aging heating systems failed. Ex. 10, BCPSS Mem. to Del. Maggie MacIntosh (Jan. 22, 2018) (“Mem. to Del. McIntosh”); *see also* Sarah Larimer, *Kids are freezing: Amid bitter cold, Baltimore schools, students struggle*, Wash. Post (Jan. 5, 2018), available at <https://www.washingtonpost.com/local/education/kids-are-freezing-amid-bitter-cold->

baltimore-schools-students-struggle/2018/01/05/8c213eec-f183-11e7-b390-a36dc3fa2842_story.html?utm_term=.9a7b8903265f. As a result, over the course of a two-week period, over 60 schools were forced to close, with thousands of students forced to miss multiple days of instructional time. Teachers and families tried to raise funds to buy winter coats and space heaters for their shivering students, including through well-publicized GoFundMe campaigns. See Tim Tooten, *GoFundMe created in hopes of solving cold-school crisis in Baltimore City*, available at <https://www.wbalv.com/article/gofundme-created-in-hopes-of-solving-cold-school-crisis-in-baltimore-city/14751935>. The problems with heat are chronic. Fifty-one of the 87 buildings that closed had *repeated* building-wide heating incidents during the 2017-18 school year. Ex. 11, 2018 Advisory Group Rep. 1. Fixing the problems is expensive: long-term capital needs related only to HVAC for these buildings were estimated at \$154 million; overall long-term capital needs were estimated at \$1 billion. Ex. 10, Mem. to Del. McIntosh, *supra*.¹⁴

This past summer, over 70 schools again were forced to close; this time, because classrooms had no air conditioning. See Abby Isaacs, *Lack of air conditioning closes 70+ Baltimore City schools early on first day*, WMAR Baltimore (Sept. 4, 2018), available at https://www.wmar2news.com/news/region/baltimore-city/lack-of-air-conditioning-closes-70_-baltimore-city-schools-early-on-first-day-of-school. Nearly 40 percent of all BCPSS schools lack air conditioning. See Richard Martin, *Baltimore Schools Without Air Conditioning Will Dismiss Early*, The Baltimore Sun (Sept. 6, 2018), available at <https://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-schools-dismiss-early-20180906-story.html>; Ex. 11, 2018 Advisory Group Rep. 1.

¹⁴ The State provided \$12 million in short-term emergency funding at the peak of the crisis in late January 2018 but nothing for long-term capital needs. Only 21 of the 87 buildings are slated to be renovated, replaced, or surplus as part of the 21st Century Plan, discussed below. Ex. 10, Mem. to M. MacIntosh; Ex. 12, BCPSS Impact Mem.

This winter, issues with school closures because heat is lacking have continued. See Sara Meehan, *5 Baltimore schools closed because of water, heat problems Tuesday* (Jan. 22, 2019), available at <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-school-closures-20190122-story.html>. Although the system reports working to improve monitoring and response times to avoid closures like last winter's, the capital needs that led to the problems remain. See, Talia Richman, *How are Baltimore Schools Preparing for Winter After Last Year's Heating Disaster* (Nov. 26, 2018), available at <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-ci-schools-winter-preparedness-20181119-story.html>.

Heating and air conditioning are not the only urgent problems—aging plumbing and other structural systems cause disruptive situations as well. For instance, a teacher at one school recently tweeted a video of water coming from leaking pipes in the ceilings and reported that trash cans had been placed to catch it in the hallways. The system attributed the leak to “aging plumbing infrastructure.” See *Video Shows Water Pipe Leaking at Baltimore School*, WBALTV, available at <https://www.wbal.tv.com/article/matthew-henson-elementary-leaking-water-pipes/26236298>; Aaron Maybin, photos, available at <https://www.dropbox.com/sh/q7twu6gfwsgwv6f/AADw3OwxLNTnnVcvaopnkqB0a?dl=0> (collection of pictures). Several schools have been closed for issues with their water systems. See Sarah Meehan, *5 Baltimore schools closed because of water, heat problems Tuesday*, (Jan. 22, 2019), available at <http://www.baltimoresun.com/news/maryland/education/k-12/bs-md-school-closures-20190122-story.html>.

Student, parent, and teacher comments further illustrate the abysmal conditions in which Baltimore City children are expected to learn and the effect that these continuing emergency conditions have on learning and student achievement. Student Dashawna Bryant has sickle cell

anemia and spent a week in the hospital after a day in an unheated classroom last winter. She says:

I would like our leaders to know that students in Baltimore also have a dream, and just because some of us aren't rich enough to have those dreams come true doesn't mean they should be taken away from us. I want to study to be a child psychologist when I go to college. I know some of my friends are trying to be doctors or lawyers or judges, but the fact that we go to a Baltimore City school, and the fact that we don't have heating or air conditioning or all this funding, takes away from those dreams. It makes it harder for people to want to go to college because they know how hard it is for them. I just want the elected leaders to know that just because we don't go to a private school, or just because we don't live out in the county, we do still have dreams that we want to accomplish.

Similarly, a teacher, former NFL football player Aaron Maybin, described school closings due to lack of heat as “mass institutional negligence,” stating that it was “heartbreaking” to watch his students suffer:

When I'm sitting there in a classroom with my students, who I know, who I love, who I understand, who I expect the most out of, who I definitely drive to be better — when I'm a room with them, and they can see their breath in the room, and some of them don't have winter coats, so they're shivering, their lips are chapped, they're ashy, you know what I mean? . . . It's infuriating. It makes you angry. It makes you sad. It makes you heartbroken. But more than anything, you want to do something.

Larimer, *supra*.

2. The Vast Majority of BCPSS Buildings Are in “Very Poor” Or “Poor” Condition Under Accepted Industry Standards.

These urgent issues are a symptom of a much larger problem—the pervasive age and deterioration of the buildings, the continued lack of capital outlay and sufficient maintenance, and insufficient funding for ongoing maintenance. Many BCPSS schools are the oldest in Maryland. Currently, the system operates 159 buildings, decreasing to 156 in the 2019-20 school year. Twenty-three percent of the buildings were built before 1946 and 74 percent were built between 1946 and 1985. Only three percent, not counting the new schools just opened under the 21st Century Program, have been built since 1985. Ex. 13, BCPSS, State of City Schools Buildings: Summary of the Preliminary Jacobs Report at 4 (June-July 2012).

The most recent comprehensive survey available, by the engineering firm Jacobs in 2012, demonstrates the decrepit and abysmal condition of Baltimore City school facilities. Jacobs assessed all 185 school buildings then operating and rated them on the established industry standard, the Facilities Condition Index (“FCI”), for physical conditions and educational adequacy, including security, technology, classroom size, special use areas like libraries, lighting, as well as specific equipment and space for programs like science, technology, and music/arts. Ex. 7, Jacobs Rep., *supra*, at 8-11. Its findings were damning. The overall FCI for BCPSS was 60 (on a 0-100 scale, with 100 the worst score), reflecting “facilities in very poor condition.” *Id.* at 25. Sixty-nine percent of all school buildings were in “very poor” condition and an additional 16 percent were in “poor” condition. Of these, 50 buildings had such high FCIs that they “should be considered as candidates for replacement or [treated as] surplus.” *Id.* at 33. BCPSS schools scored nearly as poorly for “educational adequacy,” with an average score of 55, a “failing grade.” *Id.* at 9.

Simply put, “City Schools buildings do not provide the physical structures, technology and instructional space to support 21st-century teaching and learning.” Ex. 13, BCPSS, State of City Schools Buildings, *supra*, at 9. Jacobs estimated that it would cost \$2.5 billion (about \$3 billion today by BCPSS’s estimate) to bring BCPSS buildings up to a minimally acceptable standard through repairs and building replacements and \$4 billion (\$5 billion today) to complete a full portfolio replacement to meet modern educational standards. *Id.* at 25. Notably, in a report to the General Assembly, the State’s own Interagency Committee on School Funding (comprised principally of State cabinet officials, *i.e.*, the State Superintendent of Schools and the Secretaries for the Departments of General Services and of Planning), accepted the Jacobs Report’s conclusions that “that City Schools facilities are severely deficient when measured by a number of

commonly accepted standards: age of facility, educational adequacy, facility condition index (FCI), and level of utilization.” *See* Interagency Comm. on School Construction, Baltimore City: Public School Construction Program Block Grant Funding, at 4 (Jan. 8, 2013), *available at* http://www.pscp.state.md.us/reports/2012_p196_PSCP_Report%20on%20Baltimore%20City%20Block%20Grant.pdf.

The 2018 BCPSS Facilities Master Plan confirms that the problems identified in the Jacobs report persist in 2018 and continue to require substantial State funding to fix. Ex. 8, BCPSS, Comprehensive Educational Facilities Master Plan at 73 (Oct. 12, 2018). It further finds that “without considerable district-wide investment in capital improvement and facility sustainment, conditions will continue to deteriorate as older school buildings age and as deferred maintenance continues to degrade facility conditions.” *Id.* And it confirms that BCPSS’s facilities, the largest and oldest in the State, continue to need substantial emergency repairs to “critical building systems and equipment,” including HVAC. *Id.*

3. The System Lacks Funds for Ongoing Maintenance (Including Dealing with Emergencies), Further Contributing to Deficiencies.

The deplorable, deteriorating condition of the schools is steadily worsening because BCPSS lacks sufficient funds for current preventive and corrective maintenance and operation of its schools (*e.g.*, pest control, snow removal, landscaping, trash removal, and utility charges). Each day that maintenance needs go unaddressed, the conditions worsen and the cost for repairs increases. The industry standard for public schools is that systems should budget three percent of the current replacement value of the buildings annually for ongoing building maintenance. Ex. 9, BCPSS SY 18-19 Comprehensive Maintenance Plan at 3. For BCPSS, the current replacement value is approximately \$5 billion, and three percent of that is \$150 million. *Id.* But BCPSS’s annual

maintenance budget is only \$23 million, *just 15 percent of the established industry standard*. *Id.* That does not address the significant deferred maintenance costs. Ex. 7, Jacobs Rep., *supra*, at 23.

B. For Years, the State Has Failed to Fund Facilities While Buildings Crumbled.

The State has ignored these problems for decades, despite clear notice that BCPSS facilities are rapidly deteriorating, thus allowing a \$600 million problem to mushroom to a \$5 billion one. The Jacobs Report was not the State's first warning. Over two decades ago, Plaintiffs first alleged that the BCPSS facilities were not constitutionally sufficient. *See* Dkt. 1-4, Compl. ¶ 105. They relied on a 1992 assessment demonstrating that over 20 percent of BCPSS schools were then in "poor" condition, "with seriously leaking roofs and other structural defects," and only 16 percent were in "good" condition. *Id.* (citing 1992 Facilities Master Plan, State Amended Admission 86).

By 1996, when this Court entered its summary judgment ruling determining that the education being provided to Baltimore students was constitutionally inadequate, the percentage of schools rated as poor had risen to 35 percent, with only 10 percent of the buildings rated in "good" condition. This Court relied on that evidence, among much else, in finding a constitutional violation and setting a trial on remedy. Dkt. 1-66, Order at 2, ¶ 2 (Oct. 18, 1996).

Likewise, the Consent Decree to which the parties agreed, and which the Court approved, included corrections to the facilities problems Plaintiffs identified. Specifically, the Decree provided additional funding for facilities conditions. Dkt. 1-77, Consent Decree at ¶ 48. It also required BCPSS to develop a "Master Plan," which had to address (among other things) "[t]he planning and provision of construction, repair, and maintenance services within BCPS." *Id.* at ¶ 33(C). Additionally, it required interim and final independent evaluations of the schools, including adequacy of funding, and permitted the BCPSS board to return to court to seek more funding based on the results of the interim evaluation. *Id.* at ¶¶ 40-42, 47, 53.

By 1999, the interim independent evaluation, the Metis Report, was complete, and it found

that the condition of the BCPSS facilities was getting worse. *See* Ex. 14, Interim Evaluation of the Baltimore City Public School System (Feb. 1, 2000) (“Metis Report”). The Report relied on a 1998 facilities survey that had “identified over \$600 million in construction and improvement needs.” *Id.* at 8-9. Based on that 1998 study and its own investigations, including teacher complaints about using their own funds to repair and maintain their classrooms, the Metis Report recommended substantial additional funding for facilities. *Id.* at II-31, 3. Funding to implement capital improvements, the Report found, was “essential” to educational strategies such as smaller class sizes, technology updates, and the like. *Id.* at 8.

The survey upon which Metis relied, performed by engineering firm 3D-I, had found that BCPSS physical facilities were rapidly deteriorating, with one-third of schools in “very poor [condition] and in need of immediate renovation.” Major areas of concern included obsolete and deteriorating HVAC and electrical systems, worn roofs and windows, structural issues, battered doors and walls, deteriorated pavement and playgrounds, and leaks. *See* Baltimore City: Public School Construction Program Block Grant Funding, A Report to the Legislative Committees, at 15 (Jan. 8, 2013), available at http://www.pscp.state.md.us/reports/2012_p196_PSCP_Report%20on%20Baltimore%20City%20Block%20Grant.pdf.

In June 2000, this Court expressly adopted the Metis Report’s “specific findings and recommendations”, including the conclusions that BCPSS’s physical facilities were in very poor shape and substantial additional funding should be requested and provided. Dkt. 10, Mem. Op. at 15 (June 30, 2000).

By the time the final independent evaluation under the Consent Decree was completed in 2001, conditions were even worse. That report found that BCPSS facility deficiency costs had

“grown to approximately \$680 million” and that “[m]any school buildings have serious problems that interfere with the instructional mission.”

By 2004, the amount necessary to fix BCPSS facilities had grown to \$1 billion, an amount that the then-State Superintendent confirmed under oath to this Court. *See* May 2004 Hr’g Tr. at 1284:5-10, 1413:11-19, 1586:5-10. A state commission to study school facilities established by the General Assembly on the recommendation of the Thornton Commission, led by Treasurer Nancy Kopp and known as the “Kopp Commission,” confirmed this. It examined the “minimal adequacy” of buildings and concluded that almost 70 percent of BCPSS facilities did not meet air quality standards; 95 percent did not have sufficient heating and cooling systems (compared to 16 percent of schools statewide); none had drinkable water; almost 60 percent did not meet standards for “human comfort”; 36 percent did not meet fire safety standards; almost 30 percent lacked adequate bathrooms; and many did not have sufficient space for library use, science labs, technology education, arts education, and health services. *See* Task Force to Study Public School Facilities Final Report, at 90, 125 (Feb. 2004) (the “Kopp Commission Report” or “Rep.”), *available at* http://dlslibrary.state.md.us/publications/OPA/I/TFSPSF_2004.pdf.

The Court’s 2004 Memorandum Opinion again recognized facility needs, noting that BCPS had “sought an additional \$133 million annually for capital improvements,” and that school officials’ list of things for which they needed more money included immediate capital improvements. Dkt. 50, Mem. Op. at ¶¶ 24, 71 (Aug. 20, 2004). For the next two decades, the State ignored the Kopp Commission’s recommendation that it update its facilities assessment every four years. *See* 21st Century Facilities Commission Final Report at 9 (Jan. 2018) (the “Knott Commission Report” or “Rep.”), *available at* <http://dls.maryland.gov/pubs/prod/NoPblTabMtg/SchFac21stCent/2017-Final-Report-Knott.pdf>.

C. Substantial Additional State Funds Are Required to Ensure Adequate Facilities.

1. Capital Funding Has Been Insufficient to Meet Ever-Increasing Needs.

As discussed above, the most recent comprehensive assessment of the BCPSS buildings, the Jacobs report, found that \$3.1 billion (in today's dollars) is needed for adequate repair and renovation of the existing buildings and \$5 billion (again in today's dollars) is necessary for replacement. Over the years, State funding has been wholly insufficient to address these needs, with the result that the problem has grown from a \$600 million problem in 2000 to a \$5 billion problem today.

Baltimore City has the lowest per capita wealth and lowest tax base of any large district in the State and lacks the resources that other jurisdictions of comparable size use to support school construction. *See* DLS, Overview of State Aid to Local Governments, Fiscal 2019 Allowance, at 31, 49 (Jan. 2019), *available at* <http://dls.maryland.gov/pubs/prod/InterGovMatters/SteAidLocGov/Overview-of-State-Aid-to-Local-Governments-Fiscal-2019-Allowance.pdf>. The State has recognized its responsibility to address facilities issues in districts with outsized needs: the recent state report by the Knott Commission declares that “the State must focus its limited resources on critical areas of need, especially in low-wealth jurisdictions including those with a higher proportion of students living in poverty” *See* Knott Comm. Rep., *supra*, at 7.

The State's actual formula does not recognize this greater need. Rather, State support for capital spending on schools is based upon a formula that treats counties equivalently, without regard to county wealth, the age of schools, or other factors demonstrating acute need, based principally upon the size of the student population.

As a result, Baltimore City receives far less than required to replace or even repair its aging stock of schools. For instance, state funding for the larger county school systems shows roughly similar amounts given, but the much higher local amount contributed by, for example, Montgomery County (\$215.5 mil.), Prince George's (\$92.5 mil.), and Anne Arundel (\$96.9 mil.) dwarfs the amount Baltimore City contributes (\$16.9 mil.).¹⁵ See School Construction Funding Trends in Maryland, Presentation to the 21st Century School Facilities Commission at 7, *available at* <http://mgaleg.maryland.gov/Pubs/CommTFWorkgrp/2017-21st-Century-School-Facilities-Commission-Funding-Subcommittee-2017-9-27.pdf>; Local School Construction Funding Presentation to the 21st Century School Facilities Commission at 3, *available at* <http://mgaleg.maryland.gov/Pubs/CommTFWorkgrp/2017-21st-Century-School-Facilities-Commission-Funding-Subcommittee-2017-11-2.pdf>. The combined state-local school construction funding available is widely disparate, even before taking into consideration the difference in school building conditions the funding must address.

Finally, emergency stopgap measures are insufficient. Short-term fixes on boiler and related HVAC system components are difficult in aged schools that have been in use long past their maximum expiration date and have suffered from years of deferred maintenance. For example, replacing a boiler—not an easy task in itself—may not be sufficient because the pipes leading to that boiler and the necessary electrical systems are outdated as well. Typically, it is easier and more cost-efficient to replace an antiquated building entirely rather than to patch it up.

2. The 21st Century Building Program Will Address Problems in Only 18 Percent of BCPSS Buildings.

The one bright spot occurred in 2013, when the General Assembly passed HB 860, the

¹⁵ The Baltimore City share includes \$20 million that Baltimore City is able to contribute annually to the 21st Century Schools Program.

Baltimore City Public Schools Construction and Revitalization Act of 2013, as a starting point to replace a small number of aging BCPSS schools with 21st century replacements, based on the Jacobs Report. This “21st Century Schools Program” has allowed the renovation or replacement of nine Baltimore City school buildings, with outstanding results, and will eventually lead to 23-28 new or fully renovated schools. *See* 21st Century Schools Baltimore, Current Status, *available at* <https://baltimore21stcenturyschools.org/roadmap> (listing school projects and status).

The 21st Century program is an important and good first step. It also confirms the obvious point that fixing facilities problems by replacing individual building components is not an efficient option. Rather, replacement of the school buildings with failing grades is the only cost-efficient long-term option. At present levels, the 21st Century program, however, does not come close to resolving the systemic problems. It will replace at most only about 18 percent of BCPSS buildings. *See id.* By contrast, the Jacobs Report found that at least 85 percent of those buildings are in very poor or poor condition. Ex. 7, Jacobs Rep., *supra*, at 26.

Moreover, the funding structure for the 21st Century buildings adversely affects BCPSS. The system was required to commit at least \$20 million/year of its operating dollars for 30 years to leverage the bonds that finance the program, taking already limited dollars out of classrooms. *See* Financing the Plan, *available at* <https://baltimore21stcenturyschools.org/about/financing-plan>.

Although the Governor recently introduced legislation that would provide approximately \$3.5 billion towards school facilities construction over the next ten years, it is unclear whether that funding will be allocated any differently than the current inequitable distribution and how much of that money will address the unconstitutional deficiencies in BCPSS buildings. *See* <https://governor.maryland.gov/2018/12/11/governor-larry-hogan-announces-over-3-5-billion-building-opportunity-fund-school-construction-initiative>.

3. State-Imposed Procedural Hurdles Hamper BCPSS's Ability to Use the Capital Funds It Has Received.

BCPSS has also reported significant issues (in addition to the financial deficits) with State-imposed procedural requirements that have impaired BCPSS efforts to address facilities issues. The State's Knott Commission has confirmed that the State's required review process imposes unnecessary complexity and cost and proposed numerous reforms, precluding greater local control. *See* Knott Comm. Rep., *supra*, at 12-15 (citing local jurisdiction testimony that "the State's current review process is overly bureaucratic and time consuming, which can delay projects and increase costs" and finding that many State requirements were outdated, "unnecessarily burdensome or obsolete"). For instance, BCPSS has indicated that stringent after-the-fact bidding and award requirements effectively preclude bulk purchases and single source procurement, which has significantly slowed the process underway to install portable HVAC units in classrooms. *See* Ex. 11, 2018 Advisory Group Rep. at 2. Similarly, BCPSS has reported that a long-term problem with multi-year capital funding only fixed legislatively last year required it to return approximately \$66 million to the State, which then "recycled" those funds to support other projects rather than the ongoing multi-year project for which they were originally granted. *See* Ex. 15, BCPSS letter to Knott Commission (Oct. 17, 2017); HB 1783 (ch. 14, Laws of 2018).

D. Inadequate Facilities Harm Student Learning.

Just as insufficient operational/educational funding has a direct effect on the quality of education students receive, dilapidated school buildings also directly affect teaching and learning. Obviously, students whose schools are closed because they have no heat or air conditioning cannot learn. Even when schools are open, academic achievement suffers when students are forced to learn in poor conditions, without adequate light, ventilation, and essential facilities.

The Kopp Task Force, the State's prior task force on facilities, confirmed in 2004, adopting

a report by Plaintiffs' educational facilities expert Dr. Glen Earthman, that research "demonstrates a strong correlation between certain facility factors and student achievement." *See* Kopp Comm. Rep., *supra*, at 4. Dr. Earthman's report found that students in buildings rated "poor" (such as students in 85 percent of BCPSS schools) perform more poorly than students in functional school buildings, with scores five to 17 percent lower. *See* Ex. 16, Earthman Rep. at 8-9 (Jan. 5, 2004).¹⁶ The research demonstrated that student achievement was affected by a variety of human-comfort factors: temperatures within the human comfort range regulated by appropriate HVAC systems; indoor air quality, including appropriate ventilation and filtering systems; lighting; acoustical control; laboratory and other specialized facilities; and student capacity. *Id.* at 10-11. Additional critical factors directly affecting student health include potable water, fire safety, adequate lavatories, security systems, and communications systems. *Id.* at 10.

More recent research amply confirms what the Kopp Commission found in 2004, with numerous studies showing "significant correlations between poor structural, conditional, and aesthetic attributes of school buildings and low student learning and achievement. These attributes include lighting, temperature and thermal comfort, acoustics, indoor air quality, and other environmental factors." *See* Build Us Schools, *Education Equity Requires Modern School Facilities* at 2 (Sept. 2018) (citing research), available at <https://static1.squarespace.com/static/5a6ca11af9a61e2c7be7423e/t/5ba23b3688251b659c2f9eff/1537358671343/Education+Equity+Requires+Modern+School+Facilities.pdf>.

For instance, a 2017 study found that moving students from aging and degraded buildings into new facilities increased test scores by ten percent of a standard deviation in math and five percent in English-language arts. *See* Julian Lafortune and David Schönholzer, *Does new School*

¹⁶ "Poor" buildings are "those that lack appropriate HVAC systems, have poor lighting, are old, are noisy, lack functional furniture, or have some variation or combination of these qualities." *Id.* at 8.

Construction Impact Student Test Scores and Attendance?, Univ. of Calif. Policy Lab Policy Brief (Oct. 2017), available at <https://www.capolicylab.org/wp-content/uploads/2017/10/Policy-Brief-Lafortune-Schoenholzer.pdf>. Other studies show strong correlations between improved facilities and students' academic performance, standardized test scores, attendance, and overall school climate. See, e.g., Jack Buckley, et al., *Los Angeles Unified School District School Facilities and Academic Performance*, National Clearinghouse for Educational Facilities (2004), available at www.ncef.org/pubs/teacherretention.pdf (fixing a school facility so it went from “worst” to “best” on the overall environmental compliance rating correlated to a 36-point average increase in a school’s Academic Performance Index); David Branham, *The Wise Man Builds His House Upon the Rock: The Effects of Inadequate School Building Infrastructure on Student Attendance*, 85 Soc. Sci. Q. 1112, 1113 (finding that poor facility quality significantly reduced daily attendance and increased drop-out rates); Christopher Neilson & Seth Zimmerman, *The effect of school construction on test scores, school enrollment, and home prices*, 120 J. Pub. Econ. *Journal of Public Economics* 1 (2014) (finding that moving students into a rebuilt or renovated school results in strong gains (0.15 standard deviations) in reading scores); Lorraine E. Maxwell, *School building condition, social climate, student attendance and academic achievement: A mediation model*, 46 J. Env. Psych. 206 (higher ratings of school social climate—which were correlated to better building conditions, as assessed by building professionals—predicted lower student absenteeism, which in turn predicted higher standardized test scores).

Peer-reviewed studies also show that the quality of physical school facilities affects not only students, but also teachers, with high quality buildings contributing to teacher retention and satisfaction. A 2002 survey found that when teachers consider their school to be in poor physical condition, they are far more likely to report that they plan to leave their school or to leave teaching

altogether, compared to teachers working in facilities that they consider to be in good or excellent condition. *See* Buckley, *supra*. A 2017 study found that improved ventilation and indoor air quality at schools improved teachers' self-reported job satisfaction. Stuart Batterman, *et al.*, Ventilation rates in recently constructed U.S. school classrooms, 27 Indoor Air 880, 880 (2017).

Additionally, as discussed above, there are disproportionate numbers of students who are poor and students of color attending Baltimore City schools. The poor condition of BCPSS schools exacerbates the effects of historic discrimination and other barriers to achievement, telling those children that they are less worthy than their peers. *Stout v. Jefferson Cty. Bd. of Educ.*, 250 F. Supp. 3d 1092, 1096 (S.D. Ala. 2017) ("when black public school students are treated as if they are inferior to white students, and that treatment is institutionalized by state or municipal action, the resulting stigma unconstitutionally assails the integrity of black students."). Social science research makes clear that "[w]hen schools offer fewer material resources . . . to low-income students and students of color than to their wealthier and white peers, schools send the message that those kids are less valuable." *See* U.S. Comm'n on Civil Rights, Public Education Funding Inequity in the Era of Increasing Concentration of Poverty and Resegregation at 110 (2018, available at <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>). Students who attend the decrepit, crumbling, weather-challenged schools in Baltimore City are taught the cruel lesson that they do not deserve the modern facilities that exist in neighboring jurisdictions that are wealthier and more diverse. *See, e.g.,* Michelle Fine, *The Psychological and Academic Effects on Children and Adolescents of Structural Facilities' Problems, Exposure to High Levels of Under-Credentialed Teachers, Substantial Teacher Turnover, and Inadequate Books and Materials*, available at http://decentsschools.org/expert_reports/fine_report.pdf.

In sum, as the federal Department of Education has stated:

Structurally sound and well-maintained schools can help students feel supported and valued. Students are generally better able to learn and remain engaged in instruction, and teachers are better able to do their jobs, in well-maintained classrooms that are well-lit, clean, spacious, and heated and air-conditioned as needed. In contrast, when classrooms are too hot, too cold, overcrowded, dust-filled, or poorly ventilated, students and teachers suffer.

U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Resource Comparability, at 17 (Oct. 1, 2014), *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

ARGUMENT

I. This Court Should Enter an Order Compelling the State to Comply with its Constitutional Obligations Pursuant to the Prior Rulings by this Court and the Additional Evidence Presented.

A. The State is Liable for Its Failure to Provide BCPSS Students a Constitutionally Adequate Education.

The principal issue regarding the funding of BCPSS school operation and instruction costs is not the legal question of Defendants' liability. This Court has established that Defendants are liable under Article VIII for their failure to fund local school districts adequately. The Court of Appeals affirmed that right, first in *Hornbeck* and again in *Bradford I*.

Nor can there be a legitimate question as to whether, as a factual matter, Defendants are now violating Article VIII with respect to funding for educational operations. This Court has already determined in three separate orders that the State's funding of BCPSS below the Thornton formula violates constitutional norms. DLS, the agency responsible for budgetary analysis for the General Assembly, already has determined that State's funding falls far short of Thornton and has fallen short continuously since FY 2009. Indeed, the gap between what Thornton requires and what the State actually funds for BCPSS is greater now than it was when the Court previously found them to be unconstitutional.

There is little question that constitutional adequacy requires, at a minimum, compliance with Thornton—indeed it likely requires more. However, Defendants have not even come close to complying with that minimum standard. Whatever the constitutional requirement may be, the State’s funding of BCPSS is at least \$300 million below Thornton and therefore at least \$300 million below even the minimum floor that existed 20 years ago.

B. The Court Has the Authority to Order the State to Correct Its Failure.

It is equally clear that this Court is not limited to declaring that the State has violated the Constitution, but has the power to compel the State to comply with Article VIII. As previously held by this Court, and as affirmed by the Court of Appeals in *Bradford I*, Article VIII establishes a specific right to an adequate education by contemporary educational standards for all Maryland children attending public schools, and it obligates the General Assembly to raise sufficient revenue through taxation or other means and to appropriate sufficient funds to ensure that all Maryland children receive a thorough and efficient education. Article III, Section 52 requires the State to budget for this amount. This right is judicially enforceable: Article VIII is not a meaningless, toothless provision that is valid on paper only. Constitutional rights that require State funding for compliance are fully enforceable by Maryland courts, and the courts have a *duty* to enforce those rights. The Court of Appeals has made that fundamental principle abundantly clear.

In *Ehrlich v. Perez*, 394 Md. 691 (2006), a group of Maryland residents who had immigrated to the United States after August 22, 1996, alleged that the State’s failure to appropriate funds to pay for state funded medical benefits for, among others, children and pregnant women, while appropriating funds for similar individuals who immigrated prior to that date, violated Article 24 of the Declaration of Rights’ guarantee of equal protection. The circuit court granted a preliminary injunction requiring payment of prospective and retrospective benefits, and the Court of Appeals affirmed in pertinent part, rejecting the defendants’ argument that courts

lacked constitutional power to order the State to expend unappropriated funds. The Court of Appeals emphasized that because the circuit court was tasked with remedying a constitutional violation, it was acting within its authority even if it resulted in state expenditures. It explained that “the order prospectively reinstating medical benefits to the plaintiffs does not operate as an order directing the appropriation of specific funds” and instead “serves as a judicial determination that [defendants’] action warranted the issuance of a preliminary injunction because there is a likelihood that [their] action was unconstitutional.” *Id.* at 735-36. Finally, the Court of Appeals confirmed that courts necessarily have power to issue an “order to remedy a constitutional violation.” *Id.* at 737 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

The alternative is not tenable. As the Court of Appeals explained in *Ehrlich*, “to hold otherwise would create a ‘legal’ means for State government to employ invidious classifications that violate the equal protection guarantees of the Maryland Declaration of Rights (as well as other constitutional guarantees) by adopting budgets rather than by enacting laws, which we have long recognized is subject to constitutional constraints.” *Id.* at 736; *see also id.* at 735 n.25 (quoting *Md. Action for Foster Children v. State*, 279 Md. 133, 139 (1977)), in which the Court of Appeals similarly “concluded that a statute requiring equal funding levels to parents of foster children was not an appropriation because it did ‘not purport to appropriate money out of the State Treasury or direct the Comptroller, Treasurer, or anyone else to make payments of money’”). Thus, the Court has plenary authority to order the State to comply with Article VIII by providing sufficient support to meet the threshold for a constitutionally required education. An order compelling State officials to comply with the State Constitution by providing constitutionally required services or benefits does not offend the separation of powers.

Moreover, Article VIII expressly *requires* the State to raise sufficient revenue through taxation or other means to fund the constitutional right to a thorough and efficient education. Article III, Section 52 specifically *requires* that the State budget determine the amount of funding necessary to comply with Article VIII's mandate of sufficient funding to ensure educational adequacy for all Maryland children and to budget for that amount. Adequate funding is an intrinsic, non-severable aspect of the constitutional right to an adequate education. If the latter is enforceable, so is the former. Having expressly required the State to budget for and raise sufficient revenue to fund public schools sufficiently to comply with the Constitution, the framers of Article VIII hardly could have intended that this express clause would be toothless surplusage. *Cf. In re Adoption/Guardianship of Dustin R.*, 445 Md. 536, 578-80 (2017) (rejecting separation-of-powers challenge to order directing state agency to provide services pursuant to express statutes).

Courts in other jurisdictions have issued orders compelling compliance with similar constitutional provisions, especially when the state is provided ample opportunity to come into compliance, but fails to do so. *See, e.g., Gannon v. State*, 368 P.3d 1024, 1058 (Kan. 2016) (holding that “the judiciary clearly has the power to review a [school funding] law and potentially declare it unconstitutional. But this power is not limited solely to review. It also includes the inherent power to enforce our holdings [that a funding formula is unconstitutional.]”); *McCleary v. State*, 269 P.3d 227, 259 (Wash. 2012) (“What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education. Article IX, section 1 is a mandate, not to a single branch of government, but to the entire state. We will not abdicate our judicial role.”) (internal citation omitted); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995) (“When the legislature’s transgression is a failure to act, our duty to protect individual rights includes compelling legislative action required

by the constitution.”), *as clarified on denial of reh’g* (Dec. 6, 1995); *Robinson v. Cahill*, 351 A.2d 713, 720 (N.J. 1975) (“If . . . a thorough and efficient system of education is a fundamental right guaranteed by the Constitution . . . it follows that the court must afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.”) (citation omitted).

Thus, the Court has clear authority to order the State to comply with Article VIII and provide BCPSS with the constitutionally required funding. Under the circumstances of this case, where the State’s failure to fund BCPSS pursuant to the Thornton formula is not reasonably debatable, and where overwhelming evidence demonstrates that the “adequacy gap” in fact has increased far beyond what had been necessary at the turn of the century, the need for judicial action is clear. Through a letter to the Governor, Plaintiffs have given Defendants notice of their continued constitutional violations, demanded prompt compliance, and warned of this action, all to no avail. *See* Letter from Bradford Plaintiffs (Jan. 22, 2019), *available at* https://www.aclu-md.org/sites/default/files/bradford_letter_1.22.2019_final.pdf. To date, Defendants have not responded. No plan currently exists for the State to come into compliance with Article VIII.

This Court trusted the State to honor its constitutional obligations to hundreds of thousands of Baltimore City children facing the risk of educational failure. The State has abjectly refused to honor that trust, causing lasting deprivations to at-risk children throughout Baltimore City. The State’s most recent extension of the deadline for completion of the Kirwan Commission’s work, making another year of constitutional deprivations inevitable, demonstrates the political resistance against Article VIII’s mandate to fund decent schools for all children regardless of whether they live in the wealthiest or poorest of jurisdictions. Given rising political concerns about Kirwan’s potential cost, there is no reason to believe that the latest deadline for a final report by December

31, 2019, will be enforced, or that the State will honor its findings. Without judicial action, the constitutional violations will continue, and another generation of children will go without the educational opportunities that Article VIII's framers required 151 years ago. Ten years of legislative inaction is enough time to establish a record that judicial authority is needed to compel the State to abide by its constitutional obligations.

The need for judicial intervention could not be graver. Lacking constitutionally adequate resources, BCPSS is unable to provide Plaintiffs with the educational programs and services required by the Maryland Constitution. Just a few of the statistics cited above reflect the urgency of the situation:

- **Lack of proficiency.** The lack of proficiency of BCPSS students in reading and math, with only 13 percent of 4th and 8th graders being proficient in reading per the national NAEP assessment, is a widely accepted evidence of substantial educational inadequacy. *See, e.g., Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109, 129 (Del. Ch. 2018) (finding that low state assessment results “support a reasonable inference that Delaware is not providing a system of public schools that is fulfilling its educational purpose for low-income students”); *Gannon*, 390 P.3d at 500 (“We complete our outputs examination by concluding that, at a minimum, the results on various standardized tests reveal that an achievement gap, or proficiency gap, found by the [lower court] panel to exist between “all students” and certain subgroups persists as of school year 2015-2016. And the numbers of all students failing to reach proficiency in core subjects each year continue to be significant.”).

- **Lack of staff.** BCPSS has the highest teacher-student ratios in the state, and the same is true for guidance counselors, therapists, maintenance staff, and others. These are crucial indicators of educational adequacy, or the lack thereof. *See Delawareans*, 199 A.3d at 116 (“Key

indicators of educational quality include levels of spending, teacher effectiveness, class size, and the availability of support services.”); *McCleary*, 269 P.3d at 255 (holding that Washington State’s school funding system was unconstitutional based on “compelling” evidence of severe shortfalls in “three major areas of underfunding: basic operational costs []; student to/from transportation; and staff salaries and benefits”).

- **Lack of student success under state standards.** The new state Report Card makes it abundantly clear that BCPSS schools fall far short of the State’s own standards for adequate schools. Where almost 60 percent of BCPSS schools received only one or two stars (99 of 166 schools), more than *eight times* the percentage for the rest of the State (7 percent), under an assessment formula mandated by state law (and approved by the federal government), Defendants should not be heard to contest the failure of BCPSS schools to meet constitutional standards. As the Court of Appeals, as well as numerous other jurisdictions have concluded, a state’s failure to meet its own standards is evidence of its failure to provide its students a constitutionally adequate education. *See Hornbeck*, 295 Md. at 639 (noting that the plaintiffs did not allege or present any evidence that the State had failed to comply with the educational standards laid out in COMAR); *Delawareans*, 199 A.3d at 166 (“the proper course . . . [is] to look first to the standards that the General Assembly and the Delaware Department of Education have chosen”); *id.* at 165, n.313 (citing, *e.g.*, *McCleary* 269 P.3d at 246-47 (measuring adequacy by the state’s own statutory and regulatory standards established in nine content areas)); *Idaho Schs. for Equal Educ. Opp. v. State*, 976 P.2d 913, 919 (Idaho 1998) (affirming that ““educational standards [promulgated] pursuant to the legislature’s directive”” can establish test for determining compliance for constitution’s requirement for thorough education) (alteration in original); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) (using “the standards enunciated by the legislature and the state

department of education”); William F. Dietz, Note, *Manageable Adequacy Standards in Education Reform Litigation*, 74 Wash. U. L. Q. 1193, 1194 (1996) (“[T]he proper approach to a judicial definition of educational adequacy is to adopt as mandatory the standards that the legislature and the educational bureaucracy have adopted for themselves in the form of accreditation standards or statutory statements of educational goals.”).

- **Resegregated, underfunded schools.** In sharp contrast with surrounding districts, BCPSS serves mostly students of color, almost 4/5 of whom are African-American. They also are predominantly from low income families, with 86 percent eligible for free and reduced lunch meals, the standard measure of poverty for students in public schools. Yet Maryland is one of six states where the wealthiest 25 percent of school districts receive more money than the poorest. As a court recently ruled on similar facts in Delaware:

The complaint’s allegations regarding how the State allocates financial and educational resources, coupled with its allegations regarding how Disadvantaged Students have become re-segregated by race and class, support an inference that the current system has deep structural flaws. These flaws are so profound as to support a claim that the State is failing to maintain “a general and efficient system of free public schools” that serves Disadvantaged Students.

Delawareans, 199 A.3d at 117. Ameliorating the effects of such disparities is a necessary and inherent element of Article VIII’s mandate. See *Hornbeck*, 295 Md. at 780 (affirming that Article VIII requires that “efforts are made . . . to minimize the impact of undeniable and inevitable demographic and environmental disadvantages on any given child”).

- **Lack of local resources.** As a relatively poor jurisdiction, Baltimore City’s local financial contribution to its school system is much lower, proportionately, than any other large jurisdiction in Maryland. This exacerbates inadequate State funding, as amply demonstrated by the fact that BCPSS has to divert over \$50 million annually of scarce operating funds to cover debt service costs for the 21st Century Schools new school construction program and other capital

bonds, compounding the inequitable funding levels that already exist. *See, e.g., Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 262 (N.D. 1994) (“The higher revenues in wealthy districts translate into more staff, better teacher-pupil ratios and programs, and adequate supplies The existing school finance system in North Dakota has systematically created and continues significantly unequal educational access and opportunities, stemming from lower per pupil expenditures due to property wealth variations. These serious educational disadvantages for some children are only explained by the lack of uniformity in resources.”); *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71, 97-98 (Wash. 1978) (holding that school financing system was unconstitutional where complaining district was required to raise approximately one-third of its funding for maintenance and operations from a local levy).

This is an ongoing and escalating crisis. Every year, thousands of additional at-risk students have their constitutional rights violated. Every year, thousands graduate without receiving the education required by the Constitution. Every year, the State points to a future study or task force upon which no action should occur until the final findings are available for legislative contemplation, which then provides further excuse for the State to delay action, even though every year of additional delay means another year that children do not receive the education mandated by the State Constitution. It also means further inflation of the adequacy gap in Baltimore City, making subsequent compliance that much more difficult.

The Kirwan Commission is just the latest episode of this long saga. As the Kirwan Commission will not be proposing any solutions imminently, it is incumbent upon Defendants to comply with this Court’s directions and meet its constitutional obligations to provide Baltimore City children with a thorough and efficient education. Only concerted and persistent action by this Court induced Defendants to move toward compliance with Article VIII at least six years after

completion of the Thornton Commission's work and enactment of the Bridge to Excellence in Public Schools Act. But the effect of the Court's prior rulings has worn off, and, for the past decade, the State has ignored them with seeming impunity.

C. This Petition Is the Appropriate Vehicle for Plaintiffs to Seek the Necessary Relief from this Court.

A petition for further relief pursuant to Maryland Courts and Judicial Procedure Code Section 3-412(a) is the appropriate vehicle for this Court to address the State's decade-long failure to comply with the Court's prior declaratory orders, as it expressly provides that "[f]urther relief based on a declaratory judgment or decree may be granted if necessary or proper." Thus, the Declaratory Judgments Act permits parties to return to court to seek enforcement of rights previously determined by declaratory judgment when those declared rights are violated. *See DeWolfe v. Richmond*, 434 Md. 403, 419-20 (2012) (applying statute and quoting position by State defendants that § 3-412(a) provides plaintiffs with "'the option to seek further relief, if necessary, under [C.J.] § 3-412 at a later time if Defendants were to fail to comply with the declarations'") (alteration in original), *on reconsideration*, 434 Md. 444, 472 (2013) (affirming parties' right to raise additional issues in a petition for further relief); *Nova Research, Inc. v. Penske Truck Leasing Co.*, 952 A.2d 275, 289 (Md. 2008) ("The statutory scheme expressly permits further relief based on a declaratory judgment if necessary or proper, either in a separate action or by application [to] a court who retains jurisdiction.").

The Declaratory Judgment Act's lone procedural requirement is that the applicant file a petition for further relief in a court with proper jurisdiction. Md. Code Ann. Cts. & Jud. Proc. § 3-412(b). If the petition is facially valid, the Court must order Defendants to show cause why the requested relief should not be granted. *See id.* at § 3-412(c) ("If the application is sufficient, the court, on reasonable notice, shall require any adverse party whose rights have been adjudicated

by the declaratory judgment or decree, to show cause why further relief should not be granted.”). As this Petition obviously states a facially colorable claim, the Court should order Defendants to show cause why the requested injunctive and additional declaratory relief should not be granted. A proposed order to show cause accompanies the Petition.

II. This Court Should Enter an Order Directing the State to Ensure that Baltimore City Students Learn in Constitutionally Adequate Buildings.

More than an entire generation of students has come and gone since this litigation was first brought, and the conditions in BCPSS schools have steadily deteriorated. The State Constitution *requires* that Plaintiffs’ children attend schools that are not crumbling and are not at constant risk of closure due to seasonal weather patterns. Despite having had years to address the issue, the State instead has allowed a \$600 million repair cost to balloon to \$3 billion for repair and \$5 billion for replacement. Ex. 9, BCPSS SY 18-19 Comprehensive Maintenance Plan at 3. The 21st Century Schools Project will replace only 18 percent of the systems’ decrepit buildings, and operationally, BCPSS has funds for only a fraction of the ongoing current maintenance budget recommended for public school systems.

Baltimore City school children cannot wait any longer. When schools cannot stay open during cold winter weather and late-spring or late-summer heat waves; when teachers must raise funds to buy winter coats for their students; when a school system reaches a \$1.2 billion backlog in deferred maintenance and has funding available to pay only a small fraction of what is required for basic ongoing maintenance, the State Constitution compels action. This Court should compel Defendants to remedy these deplorable conditions and require the State to fulfill its duty to ensure that the physical facilities of Baltimore City schools provide students the “thorough and efficient” education the State Constitution requires.

A. “Thorough and Efficient” Education Requires Adequate Physical Facilities.

The State’s Article VIII obligation to “establish” and “provide for” for an adequate education, discussed in detail above, includes the duty to provide adequate physical facilities. Students cannot learn if they cannot attend school because there is no heat or air conditioning, or when they are unable to concentrate because of such conditions. Educational quality and teacher retention improves when school buildings are safe, inviting, functional, and adequately equipped.

Article VIII plainly applies to school environments for children’s educational instruction just as much as it applies to the quality of that instruction. This Court has recognized and incorporated evidence regarding inadequate facilities into its findings of continuing constitutional violation, and the original Consent Decree in this case included additional funding for facilities improvement. *See* Dkt. 1-66, Order at 2, ¶ 2 (Oct. 18, 1996); Dkt. 1-77, Consent Decree at ¶¶ 43-54 (additional funding); *Id.* at ¶¶ 29-34 (Master Plan requirement); *id.* at 40-42 (further interim and final evaluations); Dkt. 10, Mem. Op. at 15 (June 30, 2000) (adopting Metis Report); Dkt. 50, Mem. Op. at ¶¶ 24, 71 (Aug. 20, 2004) (discussing evidence from hearing).

Moreover, courts in numerous states have held that the same or very similar language to Article VIII in their state constitutions requires safe facilities suitable to provide educational services and that such facilities are a critical part of a constitutionally adequate education. For example, the New Jersey Supreme Court has construed an identical “thorough and efficient” constitutional provision to find that “[d]eteriorating physical facilities relate to the State’s educational obligation” and explained that it “continually ha[s] noted that adequate physical facilities are an essential component of that constitutional mandate.” *Abbott by Abbott v. Burke*, 693 A.2d 417, 437 (N.J. 1997). The Supreme Court of Ohio has reached the same conclusion, namely that its constitutional provision requiring a “thorough and efficient” education requires adequate physical facilities and equipment:

A thorough system means that each and every school district has enough funds to operate. *An efficient system means one in which each and every school district in the state has an ample number of teachers, sound buildings that are in compliance with state building and fire codes, and equipment sufficient for all students to be afforded an educational opportunity.*

DeRolph v. State, 728 N.E.2d 993, 1001 (Ohio 2000) (emphasis added). To “pass constitutional muster,” the Supreme Court of Ohio held, “the state must have in place legislation that will be likely to bring school facilities into compliance within a reasonable time.” *DeRolph v. State*, 754 N.E.2d 1184, 1195 (Ohio 2002).

In Wyoming, the state Supreme Court held that this constitutional right (based upon very similar constitutional language) guaranteed students safe and efficient school facilities and that a public educational system that did not provide safe and adequate physical facilities was unconstitutional. “*Safe and efficient physical facilities*,” the Court held, “*are a necessary element of the total educational process. State funds must be readily available for those needs.*” *Campbell Cty. Sch. Dist.*, 907 P.2d at 1275 (emphasis added). Idaho has reached the same conclusion. *See Idaho Schs. for Equal Educ. Opp.*, 976 P.2d at 919-20 (citing Idaho regulations that “facilities are ‘a critical factor in carrying out educational programs’ and that ‘[t]he focus of concern in each school facility is the provision of a variety of instructional activities and programs, with the health and safety of all persons essential,’” but concluding, as a matter of constitutional law, that “a safe environment conducive to learning is inherently a part of a thorough system of public, free common schools that Article IX, § 1 of our state constitution requires the Legislature to establish and maintain.”).

Moreover, a local jurisdiction cannot be saddled with a choice of diverting necessary funds for instructional operations toward maintenance to try to compensate for the lack of adequate capital spending by the State for adequate school facilities. This practice, all too true for Baltimore City, was rejected by Wyoming’s Supreme Court:

Without adequate funding for costly repairs, renovations, and building construction, school districts faced with non-routine major expenditure items must choose from the lesser of two evils: either ignoring the problem or, if that is no longer an option, diverting operational funding intended for teachers' and staff salaries and essential school programs. If the schools' operational funding budgets have no surplus money to divert, a deficiency results and educational staff and programs are eliminated to reduce expenditures. At the same time, it is rare that these extraordinary efforts are sufficient to properly maintain buildings.

State v. Campbell Cty. Sch. Dist., 32 P.3d 325, 327 (Wyo. 2001). A "fundamental precept," it concluded, was that "*the State is responsible for funding capital construction of facilities to the level deemed adequate by state standards.*" *Id.* at 337 (emphasis added).

Courts in other jurisdictions have similarly required substantial increases in state funding to address deplorable facilities. Arizona's Supreme Court has held that its state constitutional obligation includes establishing standards for school facilities and providing funding sufficient to ensure that districts do not fall below the standards. *See Hull v. Albrecht*, 960 P.2d 634, 637 (Ariz. 1998). Likewise, consent decrees and injunctions compelling increases in state funding for school facilities have been entered or ordered in many jurisdictions, including New Mexico, Arizona, New Jersey, and Los Angeles. *See, e.g., Martinez v. New Mexico*, Case No. D-101-CV-2014-00793 (N.M. Dec. 20, 2018); *Hull v. Albrecht*, 950 P.2d 1141, 1146 (Ariz. 1997); *Abbott v. Burke*, 693 A.2d 417, 456-57 (N.J. 1997); *Rodriguez v. Los Angeles Unified Sch. Dist.*, No. C 6 11-3 5 8 (July 22, 1992).

In a series of admissions, moreover, state representatives have also repeatedly recognized that the State's constitutional obligation extends to adequate school buildings suitable for learning. When he announced additional funds for facilities, Governor Hogan said:

I believe very strongly that every single child in Maryland deserves access to a world-class education regardless of what neighborhood they happen to grow up in, and an important part of that is making sure that all of our students are educated in facilities that are modern, safe, and efficient which provide them with an environment that encourages growth and learning.

Office of Governor Larry Hogan, available at:
<https://governor.maryland.gov/2018/12/11/governor-larry-hogan-announces-over-3-5-billion-building-opportunity-fund-school-construction-initiative/>.

Similarly, Robert Gorrell, Executive Director of the Maryland Public School Construction Program, affirmed in 2017 that facilities were covered by “the mandate” of Article VIII and that a “thorough and efficient system” of public schools included both programs and facilities. Ex. 17, Gorrell Presentation to Knott Comm. at 2 (Sept. 27, 2017) (“‘[The State] . . . shall by Law establish throughout the State a thorough and efficient *System* of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.’ Education *System* = Programs + Facilities”). “Educationally adequate facilities,” he explained, are those that “provide healthy and safe physical environments that support the effective delivery of education programs that meet Maryland’s education standards.” *Id.* at 7. Similarly, the Kopp Task Force in 2004 described its task as “to review, evaluate, and make findings and recommendations regarding whether public school facilities in Maryland are adequate to support educational programs funded through an adequate operating budget as proposed by the Thornton Commission.” *See* Kopp Comm. Rep., *supra*, at Apx. 4 p. 149.

B. Court Intervention Is Required to Compel the State to Remedy Its Constitutional Violations and Ensure that BCPSS School Facilities Can Provide an Adequate Education by Contemporary Educational Standards.

The State has watched Baltimore City schools steadily deteriorate throughout the course of this litigation, a period now spanning 24 years, without taking necessary, comprehensive action to fix the problems. It has yet to change a school construction program that allocates state funds to Baltimore City schools on a par with state funds to Montgomery County schools, despite the huge difference in availability of local funds. When the State has taken steps, the measures have been relatively limited (*i.e.*, the 21st Century School Buildings Program, which will renovate/build 18

percent of the building stock and requires only a State outlay of \$20 million/year), belated (the legislation last year to change the State's procurement cycle took years of advocacy before the General Assembly finally forced the State to change its policy), and insufficient (*e.g.*, the \$12 million in emergency funding last winter). The State has never tackled the overall problem, and, as a result, tens of thousands of children attend constitutionally inadequate schools each day, every year. A class of students graduates each year never having had the experience of attending class in modern, safe, and healthy schools.

The State's decades of neglect speak volumes. Its own Kopp Task Force made the gravity of the constitutional violations perfectly clear some fourteen years ago. No action was taken, and the State's funding of school construction failed to prioritize the conditions in Baltimore City. This longstanding record of neglect and inaction begs the question: Will the State comply with the Maryland Constitution without action by this Court? The past 24 years teach the clear lesson that Court intervention is necessary.

This Court first declared that Baltimore City school children were receiving an unconstitutionally deficient education in 1996. It made the same or similar declarations in 2000, 2002, and again in 2004. Those declarations, and the relief entered by the Court, have failed to achieve compliance. Today, the physical facilities are in much worse condition than they were in 1996 or 2004. Plainly, the relief previously ordered has failed to secure compliance with the Constitution, and further relief from the Court is required.

III. The Court Should Make the Following Declarations and Provide the Following Further Relief.

For these reasons, this Court should order Defendants to show cause why Plaintiffs are not entitled to the following relief.

First, this Court should find and declare that:

- a. The State is violating Article VIII by failing to provide a “thorough and efficient” education, *i.e.*, an education that is “adequate when measured by contemporary educational standards,” to students at risk of educational failure attending BCPSS;
- b. The State has been in continuous violation of Article VIII since this litigation commenced and has never complied with the Court’s prior declarations as to its constitutional obligations under Article VIII, including the Court’s declaration that, at a minimum, “full Thornton funding” is constitutionally required;
- c. The State’s current funding level for educational services in BCPSS is below constitutionally required levels;
- d. The State’s continuing failure to provide funding to BCPSS at levels required by Article VIII has deprived BCPSS students of least \$2 billion that this Court has ordered over the past decades;
- e. These constitutional violations will persist until the State of Maryland, including its legislative and executive branches, acts to provide constitutionally adequate funding for educational services in BCPSS and to remedy the effects of its prior constitutional violations;
- f. The State also is violating Article VIII by failing to provide sufficient resources to ensure that BCPSS facilities are adequate for a “thorough and efficient” education, *i.e.*, one that is “adequate when measured by contemporary educational standards”; and
- g. These constitutional violations will persist until the State of Maryland, including its legislative and executive branches, acts to remedy the physical condition of the facilities to make them “adequate when measured by contemporary educational standards.”

Second, this Court should order Defendants to comply immediately with the Court’s prior rulings that “full Thornton funding,” at the very least, is constitutionally required, using, at a minimum, the \$290 million shortfall in annual funding that DLS found was needed for “full Thornton funding” for FY 2015, as adjusted for subsequent inflation;

Third, this Court should order Defendants to develop and submit a comprehensive plan for full compliance with Article VIII and the Court’s prior orders and declarations, subject to review and approval by the Court. This must include, but not be limited to, provisions:

- a. Remedying the effect of the aggregate shortfall of past violations of Article VIII;
- b. Remedying the effects of the historic and continued racial isolation of BCPSS's primarily African-American student population;
- c. Directing sufficient State funding and oversight to ensure that all BCPSS schools are brought into compliance with educational adequacy standards, including but not limited to, funding necessary for the Baltimore City Public School System's 2019 "Investing in our Future: A World-Class Education System for Baltimore City Students";
- d. Ensuring that the State provides sufficient funding such that all BCPSS schools will have, among other things, adequate and reliable HVAC systems; adequate and reliable plumbing and piping systems; drinkable water; clean, well-lighted, and well-maintained facilities; adequate roofing; adequate and functioning bathrooms; adequate fire safety provisions; adequate ventilation; sufficient specialized facilities for a modern constitutionally adequate education, including computer, science, art, and music;
- e. Directing on-going capital and operational funding sufficient to maintain, update, and replace BCPSS buildings as necessary, including funding necessary to bring all schools to the standards of the 21st Century Schools program;
- f. Ensuring adequate resources for, and organizational structure supporting, ongoing maintenance of facilities, including but not limited to sufficient staff for maintenance, consistent with industry standards and consistent with the current aged condition of BCPSS facilities and consistent with the staffing levels of other systems in Maryland; and
- g. Removing unnecessary procedural barriers to accomplishing the above as quickly as reasonably possible, including bidding and contracting requirements;

Fourth, this Court should order the final approved plan to be entered as an enforceable judicial decree of the Court along with any additional relief that the Court finds necessary and appropriate; and

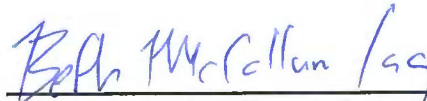
Finally, this Court should order that, should Defendants not comply with these orders and decrees, Defendants may be required to pay compensatory damages, including attorney's fees incurred in enforcing the Court's orders and decrees, as well as penalties to compel compliance.

Dated: March 7, 2019

Respectfully submitted,

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