

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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**PRIVATE PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY OF
DEFENDANT'S PROFFERED EXPERT WITNESSES**

The Private Plaintiffs, through their undersigned counsel, hereby move to exclude the testimony of Eric Hanushek, Nate Levenson, and Matthew Munter, witnesses proffered by Defendant Maryland State Board of Education as experts, from all proceedings in this matter, including summary judgment and trial.

The grounds and authorities in support of this Motion are set forth more fully in the accompanying Memorandum of Law, which is incorporated by reference.

Plaintiffs therefore respectfully request that the Court grant this Motion, exclude the testimony subject to this Motion, and grant such other relief as the Court deems appropriate.

Dated: August 12, 2022



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CERTIFICATE OF SERVICE

I, Jeffrey E. Liskov, certify that I have this day caused to be served a copy of this PRIVATE PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY OF DEFENDANT'S PROFFERED EXPERT WITNESSES, MEMORANDUM OF LAW, and PROPOSED ORDER on the following counsel and parties by electronic mail and by U.S. mail with postage prepaid on August 12, 2022:

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[PROPOSED] ORDER

Upon consideration of the Motion to Exclude the Testimony of Defendant's Proffered Expert Witnesses, Eric Hanushek, Nate Levenson, and Matthew Munter, submitted by the Private Plaintiffs, and any Opposition thereto and Reply thereupon;

It is ORDERED this ____ day of _____, 2022;

The Motion is GRANTED; and

The expert testimony of Eric Hanushek, Nate Levenson, and Matthew Munter is excluded and shall not be *admitted* in any proceedings in this matter.

Judge, Circuit Court for Baltimore County

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**PRIVATE PLAINTIFFS’ MEMORANUM OF LAW
IN SUPPORT OF THEIR MOTION TO EXCLUDE THE
TESTIMONY OF DEFENDANT’S PROFFERED EXPERT WITNESSES**

The Private Plaintiffs respectfully request that the Court exclude the opinions of Eric Hanushek, Nate Levenson, and Matthew Munter, witnesses proffered as experts by Defendant Maryland State Board of Education (“MSBE” or “State”), because their proposed testimony fails to meet this Court’s admissibility standards.

Expert testimony may be admitted only if the Court determines that it “will assist the trier of fact,” which requires that proposed testimony have sufficient factual basis and appreciably help the court. Md. Rule 5-702. In addition, expert testimony must be reliable, considering the “methodology” employed by the expert and whether the proposed testimony is “relevant and ‘fits’ the case at issue.” *Rochkind v. Stevenson*, 471 Md. 1, 31 (2020). The proposed testimony of each witness proffered by MSBE as an expert fails to satisfy these threshold requirements for admissibility.

This Court has already ruled that overall financial resources for Baltimore City Public Schools (“BCPSS”) are insufficient and that substantial additional funds are necessary. Ignoring these rulings, MSBE proposes that Hanushek testify that simply increasing funding does not consistently improve student outcomes. This is the same generic opinion he has offered for 40

years, and numerous courts have found it not credible and unhelpful. It should be excluded here too for the same reasons. The Court has no need for an expert to testify to the tautology that money spent effectively can help students, but money spent ineffectively may not help. His testimony also is not reliable because it is based upon an outdated “meta-analysis” of old studies and observations about historic, national test results, and because the witness did nothing to tailor his outdated analysis and general observations to fit the circumstances of BCPSS.

MSBE next wants to layer on Levenson’s views that the school policy recommendations compiled by Maryland’s Kirwan Commission (“Kirwan”) are “excellent;” the “Blueprint for Maryland’s Future” legislation (“Blueprint”), which partially adopted the Kirwan Commission’s recommendations in 2021, will provide adequate funding for BCPSS; and the poor condition of BCPSS facilities does not matter much for students. Levenson’s notions about facilities should be excluded because he admittedly is not an expert on facilities. His summation of Kirwan and the Blueprint should be excluded as an improper exercise for experts. Also, his opinions about the adequacy of funding for BCPSS should be excluded for lack of factual basis, reliability, and relevance; he seeks merely to sum and dress up what he read in Kirwan and Blueprint and a limited number of related documents, without performing any independent analysis or calculation of the amount of adequate funding for BCPSS.

MSBE’s proposed use of Munter is inappropriate. He is an employee of Bureau Veritas (“BV”), contracted by the State to assess and report on school facilities across Maryland, including in Baltimore City. MSBE wants him to testify concerning BV’s assessment project and its report that is not yet complete. MSBE should not be permitted to give the prestige of expert testimony to its contractor’s description of its unfinished report. Munter’s proposed opinions also should be precluded for lack of basis, as he did not conduct the assessment, nor prepare the unfinished report

that MSBE wants him to describe. He therefore would function merely as an improper “mouthpiece” for MSBE.

BACKGROUND

As relevant here, this Court determined in 2000 that “[o]verall financial resources available to BCPSS are not adequate.” 6/30/00 Mem. Opinion at 14, Dkt. 10. This Court accordingly declared that “additional funding is required to enable [BCPSS] to provide an adequate education measured by contemporary educational standards. *Id.* at 26.

Following the Court’s 2000 ruling, Maryland’s “Thornton Commission” studied and concluded that “students who live in poverty or face similar disadvantages cost more to educate,” and “Baltimore City’s ‘adequacy gap’ – the difference between current funding and funds needed to provide an adequate education – was the highest in the State.” 8/20/04 Mem. Opinion at 12, Dkt. 50.

This Court subsequently determined that additional substantial funding was required for BCPSS. Thus, in 2004, this Court ruled: “Funding sufficient for the BCPSS to achieve constitutional adequacy will not occur until the BCPSS receives *at least* \$225 million in additional state funding by, the latest, FY 2008.” *Id.* at 67 (emphasis added).

Despite this Court’s declarations of persistent underfunding for BCPSS, the State failed to provide additional funding necessary to close the “adequacy gap.” To illustrate, for FY2017, the State’s Department of Legislative Services (“DLS”) analyzed and calculated an annual adequacy gap for BCPSS of \$342.3 million, the largest annual deficit in funding adequacy of any school system in the State.¹

¹See Ex. H, excerpt of 7/24/19 DLS presentation showing \$342.2 million annual adequacy gap in 2017, an increase from \$270.4 million annually in 2002.

With this persistent and growing adequacy gap, in March, 2019, Plaintiffs petitioned this Court for relief that includes findings and declarations by the Court that, among other things: (1) MSBE is continuing to violate Article VIII of Maryland’s Constitution by failing to provide a “thorough and efficient” education for students attending BCPSS; (2) the State must comply with this Court’s prior rulings and provide constitutionally-required funding for BCPSS’s instructional activities consisting of, at the very least, “full Thornton funding” adjusted for subsequent inflation; and (3) the State has failed to provide the constitutionally-required funding necessary for maintenance, repairs, and capital improvements for BCPSS facilities. 3/7/19 Petition at ¶¶ 20-22, Dkt. 141. Plaintiffs’ requested relief is addressed in more detail in their August 12, 2022 motion.

On January 31, 2022, MSBE disclosed three proposed experts who would give testimony designed to align with MSBE’s defense arguments. These include: (1) Hanushek’s general view that there is no “systematic relationship” between school funding and student performance, presumably to help the State avoid responsibility for past and current underfunding for BCPSS students; (2) Levenson’s summary and endorsement of Kirwan’s recommendations and the Blueprint legislation and repetition of MSBE’s argument that this legislation satisfies the State’s funding obligations; and (3) Munter’s summary of BV’s unfinished statewide assessment of facilities in an effort to convert that incomplete work into the subject matter of expert testimony, disagree that BCPSS facilities need certain repairs identified by Plaintiffs, and generally dispute the amount of funding needed for BCPSS facilities.

Each of MSBE’s expert’s proposed opinions should be excluded as explained below.

ARGUMENT

Expert testimony may be admitted only if the court determines that it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Md. Rule 5-702. Maryland

courts also apply the United States Supreme Court’s *Daubert* factors to assess the admissibility of expert testimony. *See Rochkind*, 471 Md. at 26. *Daubert* requires that expert opinion be reliable to be admitted, considering factors such as whether an expert’s theory or methodology can be tested, and “the relationship between the methodology applied and conclusion reached.” *Rochkind*, 471 Md. at 31, 35-36. In Maryland, *Daubert* has been summarized as forcing courts to determine whether proposed expert opinion “is reliable, relevant and ‘fits’ the case at issue.” *Rochkind*, 471 Md. at 31 (citation omitted). These factors must be satisfied for expert opinion to be admitted, whether the factfinder is a judge or a jury. *See UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 832-37, n.4 (3d Cir. 2020). MSBE’s proposed expert witnesses fail to clear the Md. Rule 5-702 and *Daubert* hurdles and their testimony should not be admitted for trial or summary judgment purposes.

I. Hanushek’s Proposed Opinions Should be Excluded as Unhelpful, Unreliable, and Not “Fitted” to BCPSS

Hanushek is a veteran defense witness in education-funding cases who has repeatedly been hired to assert, as he does here, that “just putting in some more money” is not guaranteed to improve educational outcomes. (Ex. A, Hanushek Dep. 20:4-8, 72:9-20, 75:3-7.) He formed that view decades ago after reading some even older studies about school funding. (*Id.* 127:8-20, 129:13-18, 133:3-9.) He cites a few nationwide trends (*e.g.*, “NAEP”² student testing in 1970-2012) and dated analyses (*e.g.*, Tennessee’s “Project Star” in 1980s) (Ex. B, Hanushek Report 13, 18), but proffers no contemporary analysis specific to BCPSS – he has not considered BCPSS funding levels, BCPSS spending, BCPSS academic programs, BCPSS student test results, BCPSS

² NAEP, or National Assessment of Education Progress, is a nationwide assessment of student achievement. *See* <https://nces.ed.gov/nationsreportcard/>.

teachers or administrators, or BCPSS facilities. (Ex. A, Hanushek Dep. 23:16-18, 43:21-44:14, 46:1-11, 62:15-64:2, 65:20-68-11, 95:1-4, 97:9-16, 98:2-101:8, 141:19-142:19, 152:7-153:5.) Nevertheless, MSBE wants Hanushek to express a general view that there is no “systematic relationship” between school funding and student performance. (*Id.* 110:9-14.)

A. Hanushek’s Proposed Opinion is Unhelpful

Hanushek’s proposed opinion would not assist the court to determine a fact in issue, as required if it is to be admitted. *See* Md. Rule 5-702. This case does not present an issue of whether the State should provide additional funding for BCPSS – this Court already, repeatedly, has held that substantially more funding is required to enable BCPSS to provide an adequate education measured by contemporary educational standards. *See* 6/30/00 Mem. Opinion at 14, 26 Dkt. 10; 8/20/04 Mem. Opinion at 12, 67, Dkt. 50. There is, therefore, no need to take up judicial time listening to Hanushek’s views about educational spending.

This Court also would not be helped to understand the evidence by hearing Hanushek’s views. Hanushek’s core proposed opinion is that *just* providing more money for schools is not guaranteed to improve student outcomes, because *how* that money is spent also matters. Hanushek thus agreed in deposition that if BCPSS spent additional funding effectively, student outcomes could improve, but if additional funding were not spent effectively, student outcomes could not improve. (Ex. A, Hanushek Dep. 29:1-31:11, 39:13-41:7, 88:4-10). He repeatedly acknowledged that his opinion on the relationship between educational funding and outcome was “tautological.” (*E.g., id.* 41:5-7 (Hanushek: “the tautology holds for every – every subject you want to put into the question”).) This Court does not need expert testimony to understand the obvious proposition that additional funding spent effectively could improve student outcomes more than funding spent ineffectively.

Hanushek performed no analysis to make his proposed opinion more than a merely tautological statement. He did not evaluate whether BCPSS has spent funds effectively or ineffectively. (*Id.* 219:9-12.) He did not consider whether BCPSS’s plans for additional funding would be effective or ineffective. (*Id.* 95:1-4, 111:6-10.) He has analyzed spending effectiveness in forming opinions in other cases, *e.g.*, *Campaign for Fiscal Equity v. New York*, 187 Misc. 2d 1, 47 (N.Y. Sup. Ct. 2001) (reviewing Hanushek’s attempt to account for spending and student demographics in district at issue), but did not do so for this Court.

Other courts, after taking time to hear Hanushek’s proposed testimony, determined that it was not helpful. *See, e.g. Lobato v. Ortega*, No. 2005CV4794, 2011 WL 10960207, at *141 (Colo. Dist. Ct. Dec. 11, 2011) (Trial Order) (observing that Hanushek has testified about funding “in approximately nineteen school finance cases” and that “*in many of the cases, the courts disagreed*” with him) (emphasis added). Hanushek’s deposition makes clear this Court would reach the same conclusion, as there is no issue about whether additional funding is needed and he did no analysis to tailor his generic opinion, consisting of educational funding platitudes, to be applicable to BCPSS.

B. Hanushek’s Proposed Opinion is Not Based on a Reliable Methodology

Hanushek’s proffered testimony also should be excluded because it is not based on a reliable methodology. *See Matthews v. State*, 246 A.3d 644, 663 (Md. Ct. Spec. App. 2021) (explaining Rule 5-702(3) requires experts to have both “an adequate supply of data” and “employ a reliable methodology in analyzing that data”). Hanushek’s proposed opinion is predicated upon an array of methodological flaws, as several courts have already recognized.

Hanushek’s core opinion that simply increasing funding does not consistently improve educational outcomes is based on what he calls a “meta-analysis,” conducted in 1997, of articles published in 1994 and earlier. (Ex. A, Hanushek Dep. 111:22-112:7, 133:3-10.) He recognizes that

there is current research on the relationship between educational funding and outcomes, but testified that he chose to present his ancient “meta-analysis” without any consideration of current research. (*Id.* 177:1-10.) He took no steps to validate whether his old conclusion still holds for present-day demographic and socio-economic student profiles. (*Id.* 179:5-181:5.) His dated “meta-analysis” cannot be taken as reliably reflective of today’s overwhelmingly disadvantaged and minority BCPSS student population – especially when current research³ that he ignores shows that additional funding improves outcomes for students in districts like BCPSS. *See, e.g., Campaign for Fiscal Equity*, 187 Misc. 2d at 69 (noting “a significant body of research that purports to demonstrate that resources *do* matter”).

Hanushek’s opinion also is unreliable because it cannot be tested. *Rochkind* identifies “whether a theory or technique can be (and has been) tested” as the first factor for assessing expert opinion reliability. 471 Md. at 35. Despite the importance of testing, Hanushek admitted that the basis for his core opinion cannot be replicated and verified by Plaintiffs or their experts because, incredibly, he has no record of the data he selected from the articles he relied on long ago to form that opinion. (Ex. A, Hanushek Dep. 130:19-132:4, 175:22-176:20, 195:6-196:2.) Verification of proffered opinion is “key” under *Daubert*, 509 U.S. at 593, and the total inability to test and confirm the reliability of Hanushek’s opinion because he failed to record the data supposedly underlying it, renders his “black box” opinion inadmissible. *See, e.g., Colon v. Abbott Labs.*, 397 F. Supp. 2d 405, 415 (E.D.N.Y. 2005) (excluding opinion that could not be tested).

³ Current research includes a working paper that collects and analyzes over 30 recent studies examining the distributions of the causal effects of public K12 school spending on student outcomes in the United States. *See* C. Kirabo Jackson & Claire L. Mackevicius, *The Distribution of School Spending Impacts* (2021), available at https://edworkingpapers.org/sites/default/files/JacksonMackevicius2021_mom_0.pdf.

Hanushek attempts to support his unverifiable opinion by referring to historic trends. He claims that national NAEP test scores showed “virtually no change” during national funding increases during 1970-2012 (Ex. B, Hanushek Report 12-13), and that Tennessee’s investment in reduced class sizes in 1980s (“Project Star”) showed only inconsistent overall academic improvement (*id.* 17-19). His claims, however, are premised on flawed applications of this historic data and have been condemned by courts as such.

For example, in *Texas Taxpayer & Student Fairness Coalition v. Williams*, No. D-1-GN-11-003130, 2014 WL 4254969, at **131-32 (Tex. 200th Dist. May 16, 2014), the court identified multiple flaws in the same NAEP argument Hanushek makes here, including: He presents NAEP scores for 17-year-olds only, producing statistical bias because of changes in compulsory school attendance policies since the 1970s; he fails to account for obvious cost increases since the 1970s, while also failing to account for the fact that much of the increase he did consider was for special education for relatively few students; and he “made no effort to control for the changing ethnic and economic composition of the student population over the last four decades.” Other courts have similarly rejected Hanushek’s Project Star argument. *See, e.g., Lobato*, 2011 WL 10960207, at *56 (finding “strong research evidence that reducing class sizes, at least in the elementary grades, has powerful long-term benefits”).

These flaws in Hanushek’s methodology are fatal to his proposed opinion. Indeed, this Court already determined that Baltimore City’s students living in poverty and facing other disadvantages “cost more to educate.” 8/20/04 Mem. Opinion at 12, Dkt. 50. Hanushek’s failure to account for these distinctive facts results in a wide analytical gap between BCPSS and his opinion about educational funding, and this requires exclusion. *See Matthews*, 246 A.3d at 664 (excluding

testimony when expert did not consider relevant “input variables,” resulting in unreliable opinion that failed to “bridge” gap between available data and proffered opinion).

C. Hanushek’s Proposed Generic Opinions Do Not Sufficiently Fit BCPSS

A further basis for exclusion of Hanushek’s views is that they do not sufficiently fit the Baltimore City schools and students at issue in this litigation. *See Rochkind*, 471 Md. at 31 (*Daubert* forces a reckoning “with the factors that really do determine whether the evidence is reliable, relevant and ‘fits’ the case at issue”) (citation omitted).

BCPSS is a district with distinctive needs, as this Court has already determined. As further explained in Plaintiffs’ Petition: “BCPSS has the highest ‘at risk student index’ in the state – the percentage of students who receive free and reduced meals, have limited English proficiency, and have special education needs.” 3/7/19 Petition ¶ 13, Dkt. 141. These students are “mostly low-income students of color who already suffer the combined effects of the persisting legacy of structural racial discrimination in Baltimore.” 3/7/19 Memo. in Support of Petition 25, Dkt. 142. In addition, BCPSS’s facilities are not uniformly safe, functional, sufficient to support an adequate education program. 3/7/19 Petition ¶ 14, Dkt. 141.

The distinctive facts about BCPSS shape all the claims and relief in the case, but Hanushek did absolutely nothing to account for them when forming his opinions. He did not consider BCPSS funding or spending levels in developing his views of educational funding; he made no adjustments for the prevalence of at-risk or low-income students or students of color in BCPSS; he did not consider BCPSS academic programs or student test results in developing his opinion about educational outcomes; he gave no consideration to the teachers or administrators specific to BCPSS; and he ignored the condition of BCPSS’s facilities. (Ex. A, Hanushek Dep. 23:16-18, 43:21-44:14, 46:1-11, 62:15-64:2, 65:20-68-11, 95:1-4, 97:9-16, 98:2-101:8, 101:1-21, 141:14-142:19, 152:12-153:3, 180:20-182:6.)

Hanushek proffers no opinion that specifically concerns BCPSS. His views are entirely generic. His “meta-analysis” may not have included any studies about Baltimore City, but perhaps he might have looked at a 1960s study about Baltimore when he performed his meta-analysis in the 1990s. (Ex. A, Hanushek Dep. 92:14-93:11. Similarly, his observations about nationwide NAEP scores, Tennessee’s Star Program, or other historic trends presented in his report are not specific to BCPSS. Unlike Plaintiffs’ experts, Hanushek did not adjust his analytics to reflect current conditions in BCPSS, for example by accounting for the BSPSS student racial or socio-economic profiles. (E.g., *id.* 95:1-4, 97:6-99:5, 141:22-142:19, 180:8-182:6). He made no effort to “fit” his opinions to BCPSS.

Other courts have rejected Hanushek’s unfitted opinions. A Colorado court reviewed Hanushek’s history of “questionable” and “problematic” opinions that “lack credibility” and criticized him for reaching conclusions about educational funding and outcomes in Colorado without “any review or statistical analysis of Colorado data.” *Lobato*, 2011 WL 10960207, at *141. Another court found Hanushek’s opinion – the same one he is proffering here – to be biased and unpersuasive because he failed “to account adequately for the complex and multi-faceted variables that impact student performance” such as “economic disadvantage, proficiency in English, need for special education services, and racial or ethnic background.” *Texas Taxpayer*, 2014 WL 4254969, at *131.

Hanushek’s opinions cannot “‘fit[]’ the case at issue,” as required by *Rochkind*, because he did not consider or account for any facts specific to BCPSS. 471 Md. at 31. His generic opinions should be excluded here, consistent with the approach taken by other courts that have found his expressions of the same generic views to be unhelpful and not credible.

II. Levenson’s Testimony Should be Excluded Because He has No Qualifications to be an Expert on Facilities, His Views are Not Sufficiently Supported or Fitted to BCPSS, and His Testimony is Presented Merely to Echo MSBE’s Legal Arguments

Levenson claims – without any personal familiarity with BCPSS – that his experiences in a suburban school district and as a consultant qualify him to proffer expansive – and improper – opinions about BCPSS. (Ex. C. Levenson Dep. 60:20-64:2.) He asserts that more funding for BCPSS could “hurt” schoolchildren, even as he praises the effectiveness of BCPSS’s strategic plan for spending more funding. (Ex. D, Levenson Report 10) (Ex. C, Levenson Dep. 71:2-17.) He summarizes Kirwan, the Blueprint, and Maryland’s Built to Learn Act (“Built to Learn”) and 21 Century School Building Program (“21st Century”) that provide funding for school facilities, and enthusiastically endorses all of them. (Ex. D, Levenson Report 22-38.) He concludes that the Blueprint will provide “ample” funding for BCPSS (*id.* 28), in lockstep with MSBE’s position that the Blueprint satisfies the State’s financial obligations to BCPSS. Journeying farther afield, he posits “best practices,” drawn from two far-away school districts that won the controversial and now-defunct Broad Prize (*id.* 22-27; Ex. C, Levenson Dep. 105:22-110:15), and purports to apply those practices to BCPSS with no effort to adjust them for BCPSS’s demographics (*id.* 155:14-22, 189:9-190:1; Ex. D, Levenson Report 24-25.) He also proposes to opine about BCPSS’s facilities (*id.* 46-51), despite admitting he is not an expert on facilities (Ex. C, Levenson Dep. 60:5-6).

A. Levenson is Not Qualified to Offer Expert Opinions on BCPSS Facilities

Levenson devotes several pages of his report to the condition of BCPSS’s facilities, concluding that their condition does not matter much when assessing educational outcomes. (Ex. D, Levenson Report 46-51.) When asked in deposition if he is an expert in the identification of the impact of facilities on student performance, Levenson replied, “No. Facilities would not be one of my areas of expertise.” (Ex. C, Levenson Dep. 60:5-6.) He also testified that he has not studied the

impact of facilities on student outcomes in BCPSS. (*Id.* 66:2-5; *see also id.* 88:22-89:1 (“I did not opine on whether [BCPSS] would have sufficient funds for the facilities.”).)

Experts may only testify to matters that flow “naturally and directly” from their research and analysis. *Rochkind*, 471 Md. at 35-36. Levenson admittedly is not an expert on school facilities and, therefore, he may not provide opinions on facilities. This disqualification necessarily precludes his testimony on the sufficiency and effectiveness of any Built to Learn and 21st Century funding for BCPSS facilities, the purported high-performing schools in sub-par facilities in suburban Massachusetts, in New Orleans after Hurricane Katrina, and in unspecified “urban schools in Massachusetts” (Ex. D, Levenson Report 37-38, 47-48). It also precludes his views concerning the Jacobs Engineering report on BCPSS facilities conditions (*id.* 49-50), his ideas about the “cleanliness” of BCPSS facilities (*id.* 48-49), and his thoughts on the adequacy of any additional funding for BCPSS facilities (*id.* at 51).

B. Levenson’s Views on Funding Lack Support and are Not Sufficiently Tailored to BCPSS

Levenson’s ideas concerning the sufficiency of funding for BCPSS lack the factual basis required by Md. Rule 5-702. Levenson would testify that BCPSS has “sufficient funds to provide a great education” (Ex. C, Levenson Dep 119:2-4), but he did not himself calculate any funding amounts for BCPSS. (*Id.* 89:14-16.) Instead, he read the Kirwan Report and declared its funding plan “excellent” (*Id.* 87:7-12, 87:19-88:3), without any independent analysis to confirm its accuracy or adequacy for funding amounts for BCPSS:

- Q. Did you do any analysis of what it costs to educate high-needs students in Baltimore City?
- A. No. I relied on the Kirwan report.
- Q. And did you do any analysis of the impact of systemic racism on the cost of educating students?
- A. Again, relying on the Kirwan report....So yes, Kirwan considered all of that, and I thought all of that was the right thing to be considered.

(*Id.* 89:14-91:7.) Levenson accepted Kirwan’s funding plan without confirming whether it would, in fact, cover the State’s admitted accumulated massive underfunding for BCPSS:

- Q. Do you know whether the Kirwan legislation accounts for cumulative underfunding from prior years in Baltimore City schools?
- A. I don't know how they considered that. I know they created a plan to go forward and concluded that these -- calculated the dollars needed to implement the plan.
- Q. Are you aware that the State of Maryland’s own calculations measuring state spending in Baltimore City as of 2017 found a \$342 million a year adequacy gap?
- A. I can’t say I recall that study specifically. I – I’ll just leave it at that.

(*Id.* 94:15-95:5.) Critically, in deposition, Levenson had to acknowledge that he does not know whether Blueprint funds have been disbursed to BCPSS, whether these funds are “guaranteed” to be provided to BCPSS, or whether other appropriations for BCPSS would be decreased. (*Id.* 124:12-125:16, 201:14-202:2.)

The “sufficient factual basis” necessary for an expert opinion to be admitted requires “an adequate supply of data and a reliable methodology.” *Rochkind*, 471 Md. at 8-10. Levenson’s deposition confirmed that he lacks the data and the analysis necessary to support his proposed opinion. Without having assessed and calculated what would constitute adequate funding for BCPSS, nor whether that funding actually will be received by BCPSS, Levenson lacks the facts and basis necessary to opine that Kirwan’s potential funding amount is adequate for BCPSS. *See id.* at 8 (reviewing cases explaining that proposed opinions without factual basis amount to “mere speculation or conjecture”) (citation omitted).

As an additional flaw, Levenson’s views on funding are not tailored to fit the facts and circumstances of the current conditions in BCPSS as required to be admissible. *See Rochkind*, 471 Md. at 31 (courts must decide whether opinion “‘fits’ the case at issue”). In formulating his ideas about funding for BCPSS, Levenson failed to make any analysis of his own to account for

BCPSS’s distinctive disadvantaged and racial demographics. (Ex. C, Levenson Dep. 94:10-12 (“Q. Did you do any analysis of what it costs to educate high-needs students in Baltimore City? A. No. I relied on the Kirwan report.”).) This is not surprising, as he has not spent time in Baltimore, has not spoken to any BCPSS students, parents, or teachers, has not visited *any* BCPSS facility, and has no familiarity with BCPSS beyond having read a few deposition transcripts and some Kirwan and Blueprint-related documents. (*Id.* 19:22-20:11; 55:11-56:18.)

To the limited extent that Levenson purports to fit his opinion to BCPSS, his “methodology” fails. He derives some “principles” from two high-poverty school districts that won the Broad Prize years ago (Ex. D, Levenson Report 24), and then presumes, without any empirical data or analysis, that those principles are universal and would improve school performance wherever employed, *i.e.*, BCPSS. (Ex. C, Levenson Dep. 189:9-190:1 (“the best practices themselves don’t alter from district to district”).) Levenson does not control for racial composition, proportion of students receiving free or reduced-price lunch, English language learners, students in special education, students with disabilities, or students “at-risk.” (*Id.*)⁴ Without accounting for these and other important features distinctive to BCPSS, Levenson’s opinion is premised on apples-to-oranges comparisons. It lacks fit and should be excluded as unhelpful. *See Daubert*, 509 U.S. at 591 (expert testimony must be tied to facts of case so that it is of assistance to the trier of fact in resolving a disputed issue).

⁴ Levenson addressed race elsewhere in his report, comparing BCPSS to a Long Beach, California school district. (Ex. D, Levenson Report 25.) But Levenson failed to account for BCPSS’s comparatively higher proportion of Black students. (Ex. C, Levenson Dep. 154:5-156:15.)

C. The Proposed Use of Levenson’s Testimony Would Impermissibly Amplify MSBE’s Litigation Argument

MSBE has argued, repeatedly, that potential, future State funding for BCPSS provided by the Blueprint constitutes “full compliance” with the Court’s prior orders and Maryland’s Constitution, and moots Plaintiffs’ claims. *See, e.g.*, 11/10/21 Defs. Memo. of Law in Support of 2d Motion to Dismiss Petition at 1-2, 32-35, Dkt. 184/0. This Court having rejected these arguments, *see* 3/7/22 Order, Dkt. 189/5, MSBE now proposes to have its hired expert tell the Court about the Blueprint’s benefits, and to opine that they are adequate for BCPSS. Without having assessed BCPSS’s budget or funding needs, Levenson effusively praises the Blueprint throughout his report, going so far as to label it the “best education improvement plan I have reviewed.” (Ex. D, Levenson Report 2, 3, 5, 9, 15, 22-38, 42, 43, 45, 46, 47, 48.)

Levenson’s proposed testimony, if admitted, would allow him to function as a “mouthpiece” for MSBE’s legal argument. Expert opinion is improper if offered to echo or amplify the litigation theories of a party, especially where, as here, the witness relies on assumptions and speculation, and performed no independent analysis. *See Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 808 (N.D. Ill. 2005) (Rule 703 is not intended to enable an expert, “under the guise of giving expert testimony, to in effect become the mouthpiece” for a party). Levenson’s unqualified and unfitted testimony would not help the Court and would merely serve to summarize facts and underscore MSBE’s litigation position. It should be excluded.

III. Munter’s Proposed Opinion Testimony Should be Excluded Because He is a Fact Witness, His Views Lack Sufficient Basis, and He Would Serve as an Improper “Mouthpiece” of MSBE

Munter is hired by MSBE to describe BV’s Statewide Facilities Assessment (“SFA”) and still unfinished report on SFA results (“BV Report”) being prepared for the State. (Ex. F, Munter Disclosure 3, 5, 9, 16, 29.) BV was previously known as EMG and it subcontracted with BCPSS

to assess its facilities during 2016-2019. (*Id.* 28:3-12, 81:3-13.) Munter is a BV employee who supervised BV's SFA work to ensure the BV Report will meet the State's objectives. (Ex. E, Munter Dep. 20:13-2.) Munter is not a field inspector and he did not personally inspect any BCPSS facility for the SFA or in connection with his proposed opinion. (*Id.* 21:1-6, 22:21-22:3.) MSBE appears to hope to use Munter's testimony to introduce and explain facts about BV, the SFA, and the unfinished BV Report, to give testimony that would contradict the State's fact witnesses, and to rebut Plaintiffs' expert's opinions on the condition of BCPSS facilities. Such testimony by Munter would be improper.

A. Munter is a Fact Witness and it Would be Inappropriate for Him to Present Facts in the Guise of an Expert

By his own description, Munter would testify as a fact witness about BV's work on the SFA and the BV Report: His disclosure admits his intention to testify "about documents produced in this case relating to the ongoing SFA conducted by [BV]," how BV conducted the SFA ("Mr. Munter will testify that the Statewide FCA is a systematic evaluation of a building and its systems where each component is identified and its replacement cost and replacement timing are estimated by a field engineer"), and about the "preliminary data resulting from the SFA." (Ex. F, Munter Disclosure 3-5.)

Neither MSBE nor the Court needs Munter to testify on facts about BV's work for the State. Indeed, Munter identified fact witnesses who could testify as such, including the "lead person running this contract" who actually inspected schools, and the person who managed "how the data was coming together." (Ex. E, Munter Dep. 33:12-22, 34:1-7, 35:6-13.) If MSBE wants to introduce facts, it can call fact witnesses, subject to discovery and cross examination by Plaintiffs. It is not appropriate for MSBE to end-run fact discovery and admissibility safeguards and inject facts into trial through a purported expert. *See, e.g., Prosper v. Martin*, 989 F.3d 1242,

1250 (11th Cir. 2021) (affirming exclusion of expert testimony when it offered nothing more than what fact witnesses and lawyers could present to factfinder).

MSBE's use of Munter's proposed testimony would be especially improper here, as he would testify about the BV Report *before* it is completed. (Ex. F, Munter Disclosure 5 (confirming plan to opine based on "preliminary" data).) His eagerness to offer MSBE's preloaded opinion before the underlying analysis is complete (assuming, hypothetically, he were qualified to testify as an expert) demonstrates unreliability overall. It would be prejudicial to require Plaintiffs to respond to an incomplete, and likely evolving, opinion. *See In re TMI Litig. Cases Consol. II*, 911 F. Supp. 775, 787 (M.D. Pa. 1996) (explaining expert opinions may be excluded as unduly prejudicial under Rule 403).

Furthermore, it would be inappropriate – and unduly prejudicial – for Munter to purport to be an expert when he discusses BV's work on the SFA and the BV Report. Factfinders can "tend to assign expert testimony 'talismanic significance.'" *United States v. Frazier*, 387 F.3d 1244, 1260, 1263 (11th Cir. 2004). Courts accordingly do not permit experts to summarize facts, as MSBE would have Munter do, because doing so would unfairly bolster them with an expert's imprimatur. *See Hecht v. Waterville Dev. Corp.*, No. 05-cv-462, 2007 WL 542151, at *2 (D.N.H. Feb. 16, 2007) (explaining testimony is improper when expert merely placed "expert sheen on matters well within the jury's own ordinary experience and common sense").

B. Munter's Proffered Views Lack Sufficient Basis, Analysis, and Reliability

Even if Munter's work for BV and the State could qualify him as an expert, his proposed testimony should be excluded for lack of basis and analysis. An expert witness must have a "sufficient factual basis" to testify, *i.e.*, both "an adequate supply of data and a reliable methodology." *Rochkind*, 471 Md. at 8-10. This means an expert's opinion must draw conclusions from a "sound reasoning process," *Exxon Mobil Corp. v. Ford*, 422 Md. 426, 481 (2013), and those

conclusions must “reflect the use of reliable principles and methodology,” *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 182 (2003).

Munter’s deposition confirmed that he lacks the factual basis, and did not perform the analysis, necessary to support his testimony. Much of his proposed opinion is based on “preliminary” data and an incomplete BV Report, rather than his own analysis. Munter presumed BV’s methodology to be “sound” even though its report remains unfinished. (Ex. F, Munter Disclosure 5, 16). He did not collect BV’s preliminary data, nor did he prepare the BV Report, nor has he verified either of them. (Ex. E, Munter Dep. 21:1-6.) Munter, thus, would seek to confer an expert’s prestige upon a summary of BV’s work, without conducting any independent expert analysis of his own. Munter also claims that Roseman’s logic is “flawed” (Ex. F, Munter Disclosure 9), but failed to perform any analysis of his own to support his proposed critique of Roseman. (*Id.* 11, 12, 14, 23.)

Even assuming there were a factual basis for Munter’s proposed opinions, it is contradicted by the State’s own admissions. Munter’s proposed opinion includes his thought that as little as 2% or less of a building’s replacement value is sufficient funding for repairs and renewal. (*Id.* 19-20.) But the State’s fact witnesses admitted that 7% is an average recommended starting funding level for building repair and renewal. (*E.g.*, Ex. G, Donahue Dep. 45:15-46:16.) Munter’s proposed opinion should be excluded because it is contrary to the evidence, *see, e.g., United States v. Chaney*, 577 F.2d 433 (7th Cir. 1978), and because it would be prejudicial and improper for MSBE to put forth an expert to rewrite its own testimonial admissions in the case.

His proposed opinions are further contradicted by EMG’s analysis for BCPSS. Munter was involved in EMG’s facilities assessment for BCPSS, but omitted it from his CV for this assignment. (Ex. E, Munter Dep. 28:3-12.) The EMG assessment found a number of BCPSS

facilities and systems to be in “poor” condition, including Westport’s HVAC.⁵ Now that Munter has been hired by MSBE, however, he proposes to testify that these facilities and systems, including Westport’s HVAC, are not inadequate. (Ex. F, Munter Disclosure 34-35.) This changed conclusion confirms the lack of basis and resulting unreliability that could not be cured by cross-examination.

Munter’s views are no more than his own say-so, unsupported by an adequate collection of facts and independent analysis based on sound methodology. They are not reliable and should not be admitted as expert opinion. *See Rochkind*, 471 Md. at 36 (testimony need not be admitted when it is “the *ipse dixit* of the expert”); *Sugarman v. Liles*, 460 Md. 396, 415 (2018) (expert testimony must be based on facts sufficient to “indicate the use of reliable principles and methodology in support of the expert’s conclusions”).

C. Munter Would be an Improper “Mouthpiece” of MSBE

An expert witness may rely on others when forming opinions, but may not function as the “mouthpiece” of a party. *Loeffel Steel Prods*, 287 F. Supp. 2d at 808. Munter’s role as MSBE’s mouthpiece here is obvious. BV is working for the State on the SFA, a “big project” for BV. (Ex. E, Munter Dep. 35:4-14; *see also id.* 19:1-8 (long-term project) 40:8-14 (40 BV employees working on project).) In fact, Munter signed the contract for BV’s big project, and he is responsible for making sure BV is “getting done” what the State is “trying to do.” (*Id.* 20:9-22.)

Given this ongoing business relationship managed by Munter, he has every incentive to testify in a way that meets the State’s objectives. This is not an expert’s role. *See, e.g., Yancey v. Carson*, No. 3:04-CV-556, 2007 WL 3088232, at *4 (E.D. Tenn. Oct. 30, 2007) (disallowing

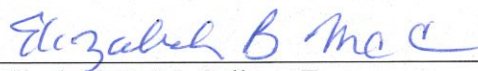
⁵ *See* BCPSS’s website explaining EMG’s work and providing its facilities assessment reports, available at <https://www.baltimorecityschools.org/facilitycondition>.

testimony of expert who “offered his interpretation of facts that are already in the record” and “essentially marshaled the facts in the record” which support his party’s position).

CONCLUSION

For the foregoing reasons, Private Plaintiffs respectfully request that the Court grant this Motion, exclude the testimony subject to this Motion, and grant such other relief as the Court deems appropriate.

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