IN THE
CIRCUIT COURT FOR BALTIMORE CITY

KEITH A. BRADFORD, et al., Plaintiffs, v. MARYLAND STATE BOARD OF EDUCATION, et al., Defendants.	Case No. 94340058/CE 189672
BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY, et al., Plaintiffs, v. MARYLAND STATE BOARD OF EDUCATION, et al., Defendants.	Case No. 95258055/CL202151

THE BOARD OF SCHOOL COMMISSIONERS AND THE *BRADFORD* PLAINTIFFS' REPLY MEMORANDUM

The Board of School Commissioners for Baltimore City (the "Board") and the *Bradford* plaintiffs respectfully submit this reply memorandum in further support of their joint motion for extension of judicial supervision over remedy proceedings in this case.

PRELIMINARY STATEMENT

The State's opposition to plaintiffs' request for continued judicial supervision contains some remarkable concessions that support plaintiffs' request that this Court extend jurisdiction for "good cause" under paragraph 68 of the Consent Decree. The State's own data establishes

the factual predicates to a finding of educational inadequacy (St. Opp. at 21), and the State concedes that it has not yet complied with this Court's June 2000 order directing substantial additional funding to the BCPSS and that it will not comply, at the earliest, until FY 2008 (*id.* at 8). Plaintiffs have demonstrated a continuing constitutional violation and an admitted failure to comply with an outstanding Court order. It is difficult to imagine what more could possibly be necessary for the Court to find "good cause" to continue supervision of this matter.

The State contends, however, that plaintiffs have not established "good cause" because they have not demonstrated that the State has breached the Decree. The State is wrong on the facts – this Court found in June 2000 that the State breached paragraph 53 of the Decree, and the State concedes that it has not remedied that violation. (Pl. Ex. 6 at 2).[1] More important, the State is wrong on the meaning of "good cause." The parties negotiated for, and agreed to, a mechanism permitting the Court to make precisely the end-of-Decree assessment of the schools' progress that plaintiffs now request, in order to determine whether continued judicial involvement is necessary. The State's suggestion that continuing constitutional inadequacy is irrelevant to paragraph 68's "good cause" standard ignores the parties' intent, and also would make paragraph 69 of the Decree superfluous, in violation of established principles of contract interpretation.

The State also argues that there is no need for the Court to extend judicial supervision because the State is virtually certain that the General Assembly will fund all the planned increases established by S.B. 856, the bill that implemented the Thornton Commission's recommendations. Of course plaintiffs join the State in hoping that the Governor and General Assembly will fulfill the laudable commitment to education they made in S.B. 856 by finding the revenue to fund all of S.B. 856's planned increases. But the largest increases in S.B. 856, in the

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[1] References in this reply to "Pl. Ex. __" are to the exhibits that plaintiffs submitted with their motion and with this reply. For convenience, the exhibits attached to this reply are numbered sequentially with the exhibits attached to plaintiffs' motion.

later years, are specifically contingent on a joint resolution finding that the State's budget contains the money to fund them. The State's assurances now, in 2002, that funding will substantially increase through 2008 are an encouraging sign of the State's continued commitment to education, but they are not evidence.

Finally, the State also ignores – because it has no real answer to it – plaintiffs' alternative ground for continued judicial supervision, the State's conceded failure to date to comply with this Court's June 2000 order to date. That failure is itself "good cause" under paragraph 68, and constitutes a separate and independent basis for extension of judicial supervision as well.

I. CONTINUING CONSTITUTIONAL INADEQUACY IS "GOOD CAUSE" TO EXTEND JUDICIAL SUPERVISION

A. The Parties Agreed That "Good Cause" Includes A Continuing Constitutional Violation

The State contends that plaintiffs can demonstrate "good cause" only if they prove that the State failed to comply with the Decree. (St. Opp. at 23). Since the State believes that "good cause" does not include a continuing constitutional violation, the State also argues "[t]he Consent Decree provides no mechanism for making any finding as to constitutional adequacy at the end of the term of the Decree . . . ." and the Court has no jurisdiction to make such a finding. (*Id.* at 26).

The parties' agreement that "good cause" means something beyond "a breach of the Decree" is apparent from the structure and purpose of the Decree. The Decree is based in the Court's September 1996 finding of inadequacy, and recites that its purpose is to provide a "meaningful and timely remedy" for the children of Baltimore City. (Pl. Ex. 1 at 3). The Decree requires the State and Board to retain and pay, jointly, experts to assess the schools' progress in the middle and at the end of the Decree. (*Id.* ¶¶ 40-42). Both the interim and final evaluations must be provided to the Court. (*Id.* ¶¶ 40, 42). Just as the interim evaluation was meant to guide the Court's assessment under paragraphs 52 and 53 of the Decree whether additional funds for

the schools were necessary (Pl. Ex. 6 at 1), the final evaluation is meant to guide the Court's determination whether "good cause" exists to extend judicial supervision.

The fact that "good cause" encompasses a continuing constitutional violation is also apparent from the course of the parties' negotiations. When the parties negotiated the Decree, plaintiffs wanted an indefinite term, and the State wanted the Decree to terminate after five years. The parties compromised with paragraph 68, which provides for a term certain but permits the Court on petition of a party to extend judicial supervision for "good cause."[2]

The State's proposed interpretation of paragraph 68 – that "good cause" includes only a violation of the Decree – also would make paragraph 69 of the Decree superfluous, a result that is contrary to well-established principles of contract interpretation. Paragraph 68 provides for extension of judicial supervision on "good cause"; it permits the Court to assess the schools and the parties' circumstances, including any continuing constitutional inadequacy, at the end of the five-year term. Paragraph 69 provides that "[n]otwithstanding termination of this Decree, the Court shall retain jurisdiction to resolve any disputes that may have arisen during the term of this Decree"; it permits the Court to address breaches of the Decree after the Decree's term ends, whether or not there is "good cause" to extend jurisdiction. If "good cause" meant nothing beyond "the Court can addresses breaches of the Decree after the Decree term," there would be no need for paragraph 69. As between two suggested interpretations of a contract, the Court should choose the one that gives effect to all provisions of the contract, rather than the one that

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2 The State finds further support for its argument that "good cause" means only "a breach of the Decree" in an unsupported allegation that the *Bradford* plaintiffs "suggested a procedure to quantify constitutional inadequacy" that was "specifically not adopted" in the Decree. (St. Opp. at 31-32). In fact, the course of those negotiations demonstrates, to the contrary, that "good cause" was meant to and does include an assessment of the schools' performance. The *Bradford* plaintiffs argued that judicial supervision should be extended if the schools had not reached adequacy by June 30, 2002, and to that end suggested some specific and quantifiable benchmarks for whether the Decree should be terminated or extended, in the form of improvements in scores and other objective measures. The State objected to this suggestion, and the parties compromised with the "good cause" language. The "good cause" language includes no specific milestones, but plainly encompasses the concept that led the *Bradford* plaintiffs to suggest a provision for extension to begin with, the probability that five years would not be enough to permit the schools to reach adequacy.

renders some provisions meaningless. *State Highway Admin. v. David A. Bramble, Inc*., 351 Md. 226, 237 (1998) ("this Court will ordinarily avoid interpreting contracts in a way that renders its provisions superfluous"); *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 783 (1992) ("[i]t is a recognized rule of construction that a contract must be construed in its entirety and, if reasonably possible, effect must be given to each clause or phrase so that a court does not cast out or disregard a meaningful part of the writing").

The cases that the State cites to support its argument that the Court should refuse to extend judicial supervision because there has been no breach of the Decree actually establish the opposite – all of them support extension of the Decree until the schools reach constitutional adequacy. For one thing, none of the State's cases involves a Decree like this one, in which the parties agreed to a term certain but provided a contractual mechanism for the Court to determine whether the term should be extended. (St. Opp. at 23 (conceding that cases cited involve consent decrees that "had no term certain")).

More importantly, the cases do not stand for the proposition that a court may terminate a consent decree when the underlying constitutional violation continues. In fact, each of the State's cases instructs that as long as a constitutional violation continues, the Court should *retain* jurisdiction to supervise the remedy. As the court explained in one of the State's cases, *J.G. v. Board of Education of the Rochester City School District*, 193 F. Supp. 2d 693, 699 (W.D.N.Y. 2002), "[w]here a court determines that a party to a consent decree is operating in compliance with the commands of the Constitution, and that it is unlikely that the party would revert to non-compliance, the court may terminate a consent decree." When constitutional compliance has not yet occurred, the decree, and court supervision, should stay in place.

Freeman v. Pitts, 503 U.S. 467 (1992), for instance, involved a consent decree entered to remedy unconstitutional segregation in a public school system. The Supreme Court held that, in areas in which the defendant school board had shown that the vestiges of racial discrimination had been removed under the decree – i.e., the constitutional violation that prompted the suit had

been remedied – termination of judicial supervision over the school system was appropriate. *Id.* at 491. But in areas where unconstitutional vestiges of racial discrimination remained, the Court retained jurisdiction. *Id.*

In holding that the Court could terminate judicial supervision in areas where there was no longer a constitutional violation, the *Freeman* Court explained:

> The authority of the court is invoked at the outset to remedy particular constitutional violations. In construing the remedial authority of the district courts, we have been guided by the principles that "judicial powers may be exercised only on the basis of a constitutional violation," and that "the nature of the violation determines the scope of the remedy." A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation.

Id. at 489 (citation omitted). Thus, the *Freeman* Court said, a court considering whether to terminate a consent decree must look to "good faith commitment to the whole of the court's decree *and to those provisions of law and the Constitution that were the predicate for judicial intervention in the first place*." *Id.* at 491 (emphasis added). The State's reliance on the first half of this statement in *Freeman* (St. Opp. at 23-24) to argue that a continuing constitutional violation is irrelevant here ignores the fact that the crucial element in *Freeman*'s analysis was whether the constitutional violation that led to the suit had been remedied.

Similarly, in *Bobby M. v. Chiles*, the court terminated judicial supervision over a juvenile justice facility where the parties agreed and the court found that the facility was "in full and complete compliance with those standards which are prescribed by the Constitution of the United States and all relevant federal law." 907 F. Supp. 368, 369 (N.D. Fla. 1995). The court retained jurisdiction over another facility subject to the Consent Decree, however, because that facility had not yet remedied the violations of the Fourteenth Amendment's Equal Protection and Due Process clauses that prompted the suit. *Id.* at 369 n. 1.[3]

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[3] In *Lamphere v. Brown University*, likewise, the court refused to terminate a decree because it found a continued constitutional violation and found that the defendant had failed to substantially comply with the terms of the Decree. 712 F. Supp. 1053, 1060 (D. R.I. 1989). *Joseph A. v. New Mexico Department of Human Services* did not involve claims of a constitutional violation, but the court said that the decree should be terminated only if the defendants had

B. This Court Has Already Found A Constitutional Violation, And The State Admits It Has Not Been Remedied

The State also argues that there is no "good cause" to extend judicial supervision because "there has been no adjudication that any 'constitutional violation' *currently* exists." (St. Opp. at 26).

In fact, this Court has twice adjudicated a constitutional violation, and the State admits that it has not complied with the Court's directions to remedy the most recent determination. In October 1996 this Court found that undisputed objective evidence demonstrated that "public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards." (Pl. Ex. 3 ¶ 2). Again, in June 2000, looking at the same standards and updated objective evidence, the Court declared that "the State of Maryland is still not providing the children of the Baltimore City Public Schools with a constitutionally adequate education when measured by contemporary educational standards." (Pl. Ex. 6 at 1; *see* St. Opp. at 8 (conceding June 2000 finding)). The Court further declared that an additional $2,000 to $2,600 per pupil – approximately $200 to $260 million in annual operational funding – was needed to provide the children of the Baltimore City Public Schools with a constitutionally adequate education. (Pl. Ex. 6 at 1). The State dropped its appeal of the June 2000 order, so it is now final, binding, and the law of this case.

The State concedes that it has not yet complied with the June 2000 order, meaning that the constitutional violation identified in that order continues to be unremedied today. (St. Opp. at 8 ("the State did not fund that large amount per pupil [identified in the June 2000 Order] in fiscal years 2001 and 2002"); *see also id.* at 25-26). The State says, however, that its failure to address the June 2000 order to date does not support extension of judicial supervision, because S.B. 856 will eventually provide the BCPSS with $258 million in additional funding over that

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taken actions necessary to fulfill the purposes of the decree – there, to remedy sweeping inadequacies in New Mexico's foster care system. 69 F. 3d 1081, 1083 (10th Cir. 1995).

required by current law, which equates to the $2,000 to $2,600 per pupil that this Court estimated was necessary in 2000. (*Id.* at 25-26).

That argument does not establish that the constitutional violation has been remedied, nor does it support immediate termination of Court supervision. Even if the State is right that the General Assembly will find revenue sources sufficient to fund all the increases in S.B. 856 when they are planned, the BCPSS will not receive an additional $2,000 to $2,600 per pupil for another six full years, until FY 2008. (St. Opp. at 26). By that time, the Court's order will be almost a decade old; more than 12 years will have passed since the initial determination of inadequacy in 1996.

More importantly, the State's prediction that the General Assembly will fully fund S.B. 856 is not guaranteed. The Board and the *Bradford* plaintiffs hope that the State is right, and they are encouraged by the State's assurances that the Governor and General Assembly will find the revenue necessary to fund all the increases in the bill. But right now, the revenue sources are not there, and the later years of increases are explicitly made contingent on a joint resolution in both houses of the General Assembly confirming that Maryland has the money for the increases. (Pl. Ex. 2, S.B. 856, § 2).

Some legislative leaders, indeed, made clear during debate on the bill that future years' funding was uncertain and expressed doubt that the money would or could be found. As Delegate Howard P. ("Pete") Rawlings, House Appropriations Committee Chairman, described this requirement for a joint resolution in 2004, "'[Y]ou'll have a debate on whether you have this money for the plan. If you don't pass the resolution, then the spending stops.'" (Pl. Ex. 36, Howard Libit, *Overall of School Funding Accepted*, Baltimore Sun, Apr. 5, 2002). House Speaker Casper R. Taylor likewise stated, "'If, two years from now, the legislature determines that it can't go forward, then the Thornton funding will be frozen at that level until the legislature determines it can go forward.'" (Pl. Ex. 37, Howard Libit, *Finding Funds for Education is Next Hurdle*, Baltimore Sun, Apr. 8, 2002, at 1A). Del. Rawlings, just two days

before he voted to approve S.B. 856, described S.B. 856 as "a hoax on the citizens of this state because it is a funding proposal without a source of revenue." (Pl. Ex. 38, Barry Rascovar, *Fiscal Responsibility? Not This Year*, The Gazette, Apr. 12, 2002). Given the tenor of these comments and the uncertain future of Maryland's economy, it is not certain that the General Assembly will vote to continue the increases in funding for S.B. 856 beyond 2004.[4]

C. Substantial And Undisputed Evidence Demonstrates That The Constitutional Violation Continues Today

Plaintiffs have also provided this Court with ample evidence – which the State makes no attempt to dispute – that the objective data that supported the Court's 1996 and 2000 determinations of inadequacy also supports a determination that the violation continues into the present. The final evaluation required by the Decree concludes that education being provided in Baltimore City is inadequate, still, and that substantial additional funds are necessary. (Pl. Ex. 12, Westat Report, at vi, xiii, 334, 345, 347). Just like the interim evaluation the Court considered in June 2000, the Final Evaluation was performed by an expert jointly retained, instructed, and paid by the State and the City. The State's own Thornton Commission likewise found that BCPSS needs funds substantially in excess of those identified in the June 2000 order

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[4] One of the State's declarations contains an argument that the State will comply with the Court's June 2000 order by FY 2008 even if the General Assembly does not fully fund S.B. 856, because mandatory minimum increases under the bill will eventually result in $3,135 additional per pupil. (Declaration of Tina Bjarkell ¶ 11). The argument reflects the fact that S.B. 856 contains a mandatory 5% annual increase in funds if the General Assembly does not pass the joint resolution necessary to fully fund increases after FY 2004. (Pl. Ex. 2, § 20(d)(2); Pl. Ex. 10, Fiscal Note at 7, 14). This 5% increase is roughly equivalent to educational funding increases projected already under current law, (Pl. Ex. 7, Thornton Commission Report, at 65), and can fairly be said to reflect the anticipated effect of inflation over the next 6 years. This Court's June 2000 order did not contemplate compliance several years *after* June 2000 based on natural increases in funding that track inflation; if that were the case, the State could simply wait a decade or so and then claim it was in compliance, when the additional funds would represent no real gain.

Moreover, the State's calculations for the <u>total</u> increased funding to Baltimore throughout its opposition appear to include projected increases in federal funds – which by law can supplement but not supplant state funding, (*see* 20 U. S. C. S. § 2701 *et seq.*; *Bennett v. Kentucky Dep't of Education*, 470 U.S. 656, 659 (1985)) – as well as increases that the schools would get anyway under current law. (*E.g.*, Declaration of Tina Bjarkell ¶¶ 5-7).

to meet state standards. (Pl. Ex. 7 at 27, 28, 33). The State, not surprisingly, makes no attempt to dispute its own experts' conclusions of inadequacy.

Indeed, the State itself provides data that independently confirms a continuing violation. The State's Table 3 on page 21 of its Opposition, for instance, provides data on BCPSS' composite results on the MSPAP tests for third, fifth, and eighth graders, which demonstrates that although results are improving, not a single score for 1999-2000 is above 23% satisfactory performance. (St. Opp. at 21). State satisfactory performance is 70%, and the composite scores for the State as a whole are substantially higher than Baltimore City, even taking into account the fact that those statewide scores include Baltimore City scores. For instance, Baltimore's MSPAP composite score for grade 8 is 18.5; the statewide composite is 46.1. Baltimore's total composite for all three grades is 20.5, while the statewide total is more than double that score, 45.3. (Pl. Ex. 39, Maryland School Performance Report data from MSDE website). That data is completely consistent with the evidence plaintiffs submitted with their motion. (Pl. Figures 1 through 6).[5]

The State completely ignores, moreover, the undisputed evidence – confirmed by the final evaluation and the Thornton Commission – that substantial deficiencies exist in the BCPSS' facilities. Putting aside the deficiencies in operational funding, Baltimore City's capital funding also is woefully insufficient to provide students with a constitutionally adequate education. (*See* Pl. Joint Motion at 23).

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5 The State's reliance on *J.G. v. Board of Education of the Rochester City School District*, 193 F. Supp. 2d 693 (W.D.N.Y. 2002), for the argument that scores alone do not support a finding of a constitutional violation is misplaced. *J.G.* involved a situation in which a consent decree had expired on its own, and the plaintiffs were trying to revive it, so it is factually distinguishable. More importantly, *J.G.* cites another New York case, *Paynter v. New York*, 735 N.Y.S.2d 337 (Sup. Ct. 2001), for the proposition that scores alone do not establish a constitutional violation. But what *Paynter* held was that low scores *are* enough to establish constitutional inadequacy when there also is evidence that the State was not providing the resources and facilities necessary to provide an adequate education. *Id.* at 343. Here, the State's Thornton Commission and the parties' joint Westat report establish both those factual predicates, low scores and inadequate resources, and the Court relied on exactly that kind of evidence to find constitutional inadequacy in June 2000.

II. EVEN ASSUMING THAT ONLY A VIOLATION OF THE DECREE CAN CONSTITUTE "GOOD CAUSE," SUCH A VIOLATION EXISTS

Assuming for the sake of argument that plaintiffs must demonstrate a breach of the Decree to establish good cause, such a breach exists. Paragraph 53 of the Decree sets up a mechanism for the Court to assess whether the State has properly responded to requests for additional funding in FY 2001 and 2002. (Pl. Ex. 1 ¶¶ 52-53). In June 2000, this Court found a violation of paragraph 53, as well as a continuing constitutional violation, and declared the State must fund approximately $2,000 to $2,600 in additional operational funding. (Pl. Ex. 6 at 1).[6] The State concedes that it has not done so to date. (St. Opp. at 8, 25-26). If a breach is needed for good cause, this Court's June 2000 order, and the State's concessions, establish one.

III. THE STATE'S CONCEDED FAILURE TO COMPLY WITH THE COURT'S JUNE 2000 ORDER PROVIDES AN INDEPENDENT BASIS FOR EXTENSION OF JUDICIAL SUPERVISION

In addition to the arguments set forth above, plaintiffs' joint motion for extension of judicial supervision asserts an independent basis for this Court's continuing jurisdiction – this Court's inherent power and jurisdiction to enforce its own orders. (Pl. Joint Motion at 23). Specifically, this Court declared in June 2000 that the State was not providing the children of BCPSS with a constitutionally adequate education and that approximately an additional $2,000 to $2,600 dollars per pupil was needed. While Defendants appealed the June 30, 2000 Order, they later dismissed their appeal. Two years later, having failed to comply with the Court's mandate, the Defendants, in their opposition, acknowledge that this Court has the inherent power and jurisdiction to enforce its own Orders. (St. Opp. at 32). This Court's retention of jurisdiction and continued judicial supervision preserves that enforcement power in the event that the State's belated efforts to comply are not fulfilled.

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6 The Court also found that the State had failed to use its "best efforts" to fund the Board's request for additional funding for the Remedy Plan, and had thus breached its duties under paragraph 52 of the Decree as well. (Pl. Ex. 6 at 1).

CONCLUSION

For the foregoing reasons and the reasons set out in their motion, the Board of the Baltimore City Public Schools and the *Bradford* plaintiffs urge this Court to retain jurisdiction and continue judicial supervision of this matter until such time as the violation of Article VIII of the Maryland Constitution has been remedied and the State has complied with this Court's June 2000 Order.

Respectfully submitted,

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Dated: June 19, 2002

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of June, 2002, a copy of the foregoing was sent via hand delivery to:

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