

IN THE
CIRCUIT COURT FOR BALTIMORE CITY

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

**THE *BRADFORD* PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR
DECLARATION ENSURING CONTINUED PROGRESS TOWARDS COMPLIANCE
WITH COURT ORDERS AND CONSTITUTIONAL REQUIREMENTS**

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The *Bradford* plaintiffs respectfully submit this memorandum in support of their request for a declaration that, until the Court's June 2000 order is fully satisfied and the Baltimore City Public School System ("BCPSS") is providing a "thorough and efficient" education to its students as required by Article VIII of Maryland's Constitution, the BCPSS must continue its progress towards adequacy, and may not offer reduced educational opportunities to children, and the other defendants must continue progress toward full funding for public education. The *Bradford* plaintiffs seek a further declaration that the budget adopted by BCPSS for next school year engages in precisely such an improper reduction of educational opportunities and must be corrected.

I. INTRODUCTION

The *Bradford* plaintiffs bring this motion in order to ensure that steps taken to address the fiscal issues now facing the BCPSS do not penalize the children attending the schools, and do not interfere with the slow, but steady, progress that the parties are making towards compliance with this Court's June 2000 declaration and the Constitution's requirement that students attending public schools receive an education that is adequate when measured by contemporary educational standards. Since September 1996, when it first found that the education that students in Baltimore City were receiving was inadequate as a matter of law, this Court has supervised a gradual, phased-in remedy for the constitutional violation the *Bradford* plaintiffs proved. In June 2000, the Court found that the constitutional violation was continuing and declared that an increase in State funding of between \$2,000 to \$2,600 per student was then required. In 2002, responding to that order, the State enacted the historic Bridge to Excellence in Public Schools Act, or "Thornton," bill, promising an additional \$258.6 million in funding (approximately \$2,600 per pupil) to BCPSS by 2008, on top of the normal anticipated increases in the preexisting APEX formula, to account for the increasing cost of education. In June 2002, the Court found that continued Court supervision was appropriate, because the State had "yet to comply with the Court's [June 2000] order," and because although full Thornton funding would

“arguably” result in compliance with the order by 2008, such full Thornton funding was “uncertain.” (Memorandum Opinion, June 25, 2002, at 5.)

That gradual remedy, and the system’s slow but steady progress towards additional funding and increased academic achievement, is now at risk. Through a combination of inadequate fiscal controls and decisions to spend money on research-based and academically valuable, but expensive initiatives, the BCPSS had a serious short-term cash-flow crisis earlier this year, and it has accumulated a \$58 million deficit. The City provided a short-term loan of \$42 million, and the City, Board, and State have all submitted documents to the Court describing the steps to be taken to address the fiscal issues now facing the system. The system has determined to pay off its accumulated \$58 million deficit in two years, \$35 million this year and \$23 million next year, and it has determined to establish a “rainy-day” or reserve fund of an additional \$10 million a year. It has also committed to repay \$34 million of the short-term loan it received from the City in August 2004, with the remaining \$8 million to be repaid in FY 2006.

All the parties agree that steps taken to address that deficit should not slow progress towards an adequate education. All the parties agree that the children should not be penalized for the adults’ mistakes. Yet the information submitted to the Court thus far demonstrates that in fact, in order to address the fiscal issues, repay the City, retire the accumulated deficit and accumulate a substantial rainy-day fund over two years, educational opportunities offered to Baltimore City’s students will be reduced. That diminution of educational opportunity, moreover, comes on top of significant layoffs and budget cuts imposed *last* year to achieve a balanced budget, which also adversely affected educational opportunities to the children. Rather than continuing to progress towards adequacy, under the proposals currently in place, the system will be moving backwards. A substantial proportion of the financial resources being put towards deficit reduction and creation of the rainy day fund this year is coming at the expense of reduced educational opportunities for children. Decisions to eliminate systemic summer school for at-risk children in elementary and middle school, to increase class sizes, to eliminate guidance counselors and other specialists, to eliminate the program of mentor teachers, to encourage the

retirement/attrition of experienced teachers and principals, and others -- all without any adequate assurance that funds or focus shifted to other programs will compensate for such reductions in services to children -- will immediately and adversely affect the quality of education being provided to children in Baltimore City, as the declaration of educational expert Steven M. Ross attached hereto demonstrates, and as the *Bradford* plaintiffs will prove at the hearing on July 22 and 23.

Accordingly, to assure that the system moves forward rather than backward, the *Bradford* plaintiffs seek a declaration from the Court protecting the gradual remedy currently in progress, and directing the State, the City and the Board to go back to the drawing board to ensure that operational revenue available to educate students in 2004-05 is sufficient to ensure continued progress towards that remedy. Such continued progress is essential, given the glacial pace at which the remedy has moved so far. Almost *eight years* have passed since the Court first found a constitutional violation in September 1996. There are students now about to enter high school who were first graders in 1996, and who thus have at least spent eight years in an unconstitutional and inadequate system. Even though the Thornton remedy itself has been reduced, this was to have been the first year in which the phase-in of Thornton monies would result in a *substantial* increase to the BCPSS, of approximately \$50 million.¹ Now, instead of being used to provide increased opportunities to Baltimore's student population, much of that new Thornton money is being used simply to ameliorate the effect of the proposed budget cuts -- principally to ensure that the proposed increase in class sizes is not quite as large as it otherwise would have been. Thornton funding increases should be used to increase educational

¹ Originally, both the Thornton Commission itself and the Thornton bill required funding for a "Geographic Cost to Education Index" that would adjust for the fact that providing an education is more expensive in some of Maryland's districts than in others. See Final Report, Commission on Education, Finance, Equity and Excellence, Jan. 2002, at 20; Department of Legislative Services, S.B. 856 Fiscal Note, Revised May 10, 2002, at 3, 10. That requirement now has been made discretionary, see Md. Code Ann. § 5-202(f)(2), a decision that will cost Baltimore City between \$9.3 and \$21 million dollars. See Fiscal Note to H.B. 901 (estimating Baltimore City's share of geographic cost adjustment). Other cuts to underlying programs have reduced anticipated Thornton funding to Baltimore City as well. See Letter from Elizabeth B. McCallum to Hon. Robert L. Ehrlich, Jr. *et al.*, March 17, 2004, a copy of which has already been provided to the Court.

opportunities for Baltimore City's school children, not to slow the pace by which the system slips backwards.

There are a number of ways that the parties could alter current plans to ensure sufficient funds available for educational objectives this year to accomplish continued progress towards adequacy. First, the State defendants could ensure sufficient immediate additional revenue to the schools to forestall the proposed sacrifices to educational quality, through a deficiency appropriation, through accelerating the pace at which State aid is paid to the district, or otherwise. Of course, if the State had fully complied with the Court's June 2000 order to provide \$2,000 to \$2,600 per pupil, the system now would have about \$190 million in additional annual funding, and there would be no fiscal crisis. Second, the City could ensure that the \$31.6 million it owes the Board for accrued but unpaid employee leave is paid immediately, rather than in \$2.8 million installments over the next twelve years, an option that the City has suggested before and that is described in the Financial Recovery Plan (at 17). Third, the City could relax its requirement that the Board repay it \$34 million of the outstanding \$42 million loan in August 2004, and permit a longer payout of that loan so that more operational revenue is available to educate students for this fiscal year.² Fourth, the parties could alter the Board's plans to pay down the accumulated \$58 million deficit in 2 years – stretching that repayment out further over several years – and also could reduce or eliminate plans to achieve a \$20 million reserve fund, in order to ensure sufficient operational funds are available for student education.³

² When the Oakland, California schools suffered a similar but more severe financial crisis, the funds provided by the state were to be paid out over a substantially longer time, measured in decades, not months. *See* 2003 Cal. Adv. Legis. Serv. 14 (Deering).

³ This fourth option, if the parties choose to implement it, would require an additional action by the Court. Both S.B. 894, the "Educational Fiscal Accountability and Oversight Act of 2004" and the March 17, 2004 City Funding Agreement between the Mayor, the City Council of Baltimore and the Board ("MOU") (attached as Exhibits 1 and 2) purport to require the Board to retire the entire deficit by the end of FY 2006. In order to provide the parties with the flexibility to institute this option if they desire to do so, the Court may and should declare both the statute and the MOU ineffective and unconstitutional to the extent that they operate to require the Board to use operational funds necessary for continued progress towards educational adequacy to instead retire the accumulated deficit. Once the system is running a currently-balanced budget – which it now appears to be doing – there is no reason why it must retire the accumulated deficit in two years.

The *Bradford* plaintiffs do not suggest that any one of these solutions is the optimal or correct solution. Rather, they suggest that the Court should declare that the defendants may *not* stop making forward progress toward educational adequacy and full funding, should find that the proposed BCPSS budget would be a step backward in violation of that principle, and should give the parties a specified, limited period of time to formulate a plan to ensure continued progress towards compliance with the June 2000 order and towards adequacy, including a specific direction to ensure that funds taken from educational programs and currently being used to retire the deficit are used instead for programmatic initiatives that will benefit Baltimore's at-risk student population and provide educational opportunities sufficient to replace those that the Board has decided to cut.⁴

The defendants undoubtedly will contend that any change to the current budget (other than a new source of funding from the State) will result in BCPSS facing continued cash-flow issues. There will be some cash-flow issues even as the budget is currently configured, however (*see* Financial Recovery Plan Appendix C), and the City has committed to work with the BCPSS to address those issues. More important, it is the parties' constitutional responsibility to provide an adequate education to the children of Baltimore, and to ensure continued progress towards the phased-in remedy for the current constitutional violation. The declaration the *Bradford* plaintiffs seek would direct the parties to live up to their constitutional obligation; finding a way to address short-term cash-flow issues without reducing educational opportunities is part of that obligation.

⁴ The *Bradford* Plaintiffs are not asking the Court to order BCPSS simply to restore summer school, reduce class size, and other educational initiatives that the Board has cut. While such steps might be desirable, plaintiffs fear that hasty attempts to reinstate these initiatives at this late date might prove ineffective, or even counterproductive.

II. FACTUAL BACKGROUND⁵

A. The Gradual, Phased-In Remedy For Demonstrated Constitutional Inadequacy

The parties to this litigation are moving towards a gradual, phased-in remedy for the continuing constitutional violation this Court has found, and this Court has retained jurisdiction to supervise the implementation of that remedy and to ensure that it is achieved. This litigation began in December 1994, when the *Bradford* plaintiffs⁶ sued the Maryland State Board of Education and the State Superintendent of Schools, alleging that the State was failing to provide the students of Baltimore City with the “thorough and efficient” education required by Article VIII of Maryland’s Constitution. On October 18, 1996, this Court made its *first* determination of constitutional inadequacy, when it entered partial summary judgment for the City and for the *Bradford* plaintiffs. First, the Court affirmed the relevant legal standard that the Court of Appeals had enunciated in *Hornbeck v. Somerset County Board of Education*, 295 Md. 597, 458 A.2d 758 (1983), that the “thorough and efficient” language of Article VIII requires that “all students in Maryland’s public schools be provided with an education that is adequate when measured by contemporary educational standards.” (Order on *Bradford* Plaintiffs’ Motion for Summary Judgment, Oct. 18, 1996 ¶ 1.) Next, the Court found that undisputed evidence – such as woefully low scores on the State’s Maryland School Performance Program standards, Baltimore City’s high drop-out rate, and other objective gauges of academic performance – demonstrated that “public school children in Baltimore City are not being provided with an education that is adequate when measured by contemporary educational standards.” (*Id.* ¶ 2.)

⁵ Because most of the voluminous documents cited herein have already been lodged with the Court, and because the Court has scheduled an evidentiary hearing on this motion and other matters for July 22 and 23 at which evidence will be submitted, the *Bradford* plaintiffs have not provided the Court and parties with an extensive appendix of exhibits. They will be happy to provide the Court or parties with full copies of any cited items upon request, and of course will submit all relevant items into evidence at the July 22-23 hearing.

⁶ The *Bradford* plaintiffs are parents of children attending Baltimore City public schools who are “at risk” of educational failure, meaning that they live in poverty or otherwise are subject to economic, social, or educational circumstances increasing the odds that they will not receive an adequate education. The Mayor, the City Council of Baltimore, and the Board of School Commissioners of Baltimore City and its President sued the same State defendants alleging the same constitutional violation in 1995. The two suits were consolidated.

Days before trial on the remaining issues of causation and the appropriate remedy for the constitutional violation was set to begin, the parties entered into the Consent Decree, by which they undertook “to provide a meaningful and timely remedy . . . to meet the best interests of the schoolchildren of Baltimore City.” (Consent Decree at 3.) The Decree addressed concerns that the State had over management deficiencies in the BCPSS by reorganizing the Baltimore City school board, creating a “new Board” jointly appointed by the Governor and the Mayor, from a panel proposed by the State Superintendent pursuant to specified guidelines designed to ensure that the Board had members with educational and operational expertise. (*Id.* ¶¶ 8-20.) The Decree also required additional management changes, including the development of a “Master Plan” approved by the State to improve management and education in the schools. (*Id.* ¶¶ 21-23, 29-34.) Finally, the Decree provided for modest annual increased operational funding, \$30 million in FY 1998 and \$50 million annually from FY 1999 through FY 2002 for operating funds. (*Id.* ¶¶ 47-48.) In April 1997, the General Assembly of Maryland codified the principal terms of the Decree at S.B. 795. (*See* S.B. 795, 1997 Reg. Sess.)

The Consent Decree largely followed the State’s preferred remedy of management reform with some limited additional funding. In exchange, however, the parties agreed to include provisions in the Decree authorizing the Board to seek additional funds from the State during the term of the Decree, once the management changes and limited additional funds had begun to operate to improve the system and, if the State did not cooperate to provide additional necessary funds to the BCPSS voluntarily to seek an order for such funding from the Court. (*Id.* ¶¶ 52-53.) The key evidence in such a proceeding, the parties agreed, would be an independent expert’s report required by the Decree halfway through the Decree’s initial five-year term. (*Id.*)

In June 2000, the Board and the *Bradford* plaintiffs returned to Court, seeking additional funds as permitted by the Decree after the State did not agree to provide such funds voluntarily. Based on substantial evidence, including the independent expert’s evaluation and funding needs

assessment,⁷ the Board's own "Remedy Plan" seeking additional funding, the declaration of educational expert Stephen M. Ross, and over 100 additional exhibits and affidavits, the Court reaffirmed its 1996 order declaring that schoolchildren in BCPSS have a constitutional right to an education that is adequate when measured by contemporary educational standards.

(Memorandum Opinion and Order on Petition of New Board of School Commissioners For Baltimore City For Further Relief Pursuant to the Consent Decree, June 30, 2000, at 1.) 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." (*Id.*) The Court further declared that an additional \$2,000 to \$2,600 per pupil – approximately \$200 to \$260 million in annual operational funding based on a student enrollment of nearly 100,000 – was needed to provide the children of the Baltimore City Public Schools with a constitutionally adequate education. (*Id.*) Having declared a constitutional violation and estimated the amount of additional funding necessary for adequacy, the Court stated, as other courts regularly do in educational funding and adequacy cases, that it trusted that the executive and legislative branches would act to remedy the violation without the necessity for further action by plaintiffs. (*Id.* at 2.)⁸

In January 2002, the "Thornton Commission" – which had been appointed by the General Assembly to assess the equity and adequacy of education funding in Maryland on a statewide basis – issued a report finding a substantial gap between the resources currently available to school systems in Maryland and the resources necessary for educational adequacy. (*Commission on Education Finance, Equity, and Excellence*, Final Report, Jan. 2002 ("Thornton Commission Report"), at x-xi.) Not surprisingly, and consistent with the Court's June 2000 ruling and its own determination that students who live in poverty or face similar disadvantages cost more to

⁷ Metis Associates, Inc., *Interim Evaluation of the Baltimore City Public School System*, Feb. 1, 2000.

⁸ The State initially appealed the Court's June 2000 Order, an appeal specifically contemplated and authorized by the Consent Decree, but later withdrew its appeal. Thus, the June 2000 order is now final, binding, and not subject to appeal.

educate, the Commission found that Baltimore City's "adequacy gap" – the difference between current funding and the funds necessary to provide an adequate education – was the highest in the State. The Commission cited evidence demonstrating that Baltimore City needs an additional \$2,938 to \$4,250 per pupil to achieve educational adequacy. (*Id.* at 27, 28, 33.) That translates to annual operational funding increases of approximately \$290 to \$420 million – an amount significantly higher even than the amount the Court deemed necessary in its June 2000 order.⁹

In May 2002, the State enacted a bill that substantially incorporated the Thornton Commission's recommendations, the "Bridge to Excellence in Public Schools Act," S.B. 856. S.B. 856 phases in a new statewide funding system that will result in \$1.3 billion in additional State funding for all counties over a six-year period from FY 2003 through FY 2008. Had all the bill's projected increases been fully funded – and they have *not* been, so far – Baltimore City was predicted to receive increases (over previously anticipated APEX and other funding) of approximately \$18.7 million in FY 2003, \$28.1 in FY 2004, \$68.9 million in FY 2005, \$125.5 million in FY 2006, \$187.6 million in FY 2007, and \$258.6 million in FY 2008. (Department of Legislative Services, S.B. 856 Fiscal Note, Revised May 10, 2002, at Ex. 8.) As part of the phase-in of this new formula, S.B. 856 also phased out the funding provided by the Consent Decree and other funding for the Baltimore City-State partnership starting in FY 2004.

All Maryland's districts will eventually receive substantial increases under S.B. 856, even those that the Thornton Commission found *already* have the funds necessary for adequacy.

⁹ Moreover, there is substantial evidence now that even the Thornton Commission's recommendations are likely too low. The Commission based its adequacy gap and funding analysis on the amounts necessary to enable students to meet then-current State standards – the MSPAP tests in elementary and middle school and the "functional tests" for high school students. Since the Commission's analysis, both State and federal standards have grown more stringent. The State has now replaced the undemanding "functional tests" (which most students were expected to, and did, pass in middle school) with high-stakes "High School Assessment" tests, which are required for graduation. The federal government, in the No Child Left Behind legislation, has imposed a required that all students achieve acceptable performance levels on State-mandated testing by 2014. No Child Left Behind Act, 20 U.S.C. §§ 6301 et seq. (2002). In response, the State has instituted new "Maryland School Assessment" tests, under which all schools are required to demonstrate increasing "Adequate Yearly Progress" toward meeting the 100% performance goals each year.

Districts with the greatest demonstrated need, however, do *not* receive a faster phase-in of the increased funding.

In June 2002, the Court entered an order extending the Consent Decree's initial five-year term and its own jurisdiction over the case. The Decree provided for such an extension for "good cause." (Consent Decree ¶ 68.) Based on the determinations that even "arguable" compliance with the Court's June 2000 order would not occur until Thornton was fully funded in 2008, and because such full funding was "uncertain," the Court found good cause and extended judicial supervision. (Memorandum Opinion, June 25, 2002, at 5.) By that order, the Court extended its jurisdiction to supervise the remedy "phase-in" provided by the Thornton bill, to ensure continued progress towards that remedy.

B. The BCPSS Fiscal Crisis

The instant dispute arose because, starting in FY 2002, the BCPSS began to engage in deficit spending. By the end of FY 2002, the cumulative deficit reached \$21 million. It grew to \$52 million at the end of FY 2003, and reached \$58 million by FY 2004. (Financial Recovery Plan, May 30, 2004, at 9.) The mounting shortfall created significant cash flow problems for BCPSS earlier this year.

Although the origins of the deficit are somewhat murky, it seems to have arisen from a combination of several factors, including: (1) lack of appropriate fiscal controls, (2) over-hiring based on enrollment projections that proved to be inflated, and (3) Board decisions to embark on a number of research-based, academically valuable and "successful," but expensive, initiatives, including reducing class sizes, expanding summer school options, enhancing classroom assistance, hiring a number of "academic coaches" to help teachers teach, and creating a "CEO's district" to closely monitor and supervise under-performing schools. (BCPSS FY 2005 Budget at 2; Financial Recovery Plan at 9 (noting that, "despite the academic value of many of these initiatives" BCPSS did not have the financial resources to sustain "reduced class sizes, expanded summer school," and "enhanced classroom assistance.").)

A number of layoffs and other budget cuts were instituted in the 2003-04 school year to stop the growth of the deficit and to ensure a currently-balanced budget. As a result of these actions, it appears that the system currently is operating within its means. (Financial Recovery Plan at 11-12.) However, these layoffs and budget cuts created significant morale issues both within the system and among the parents and students it served, and had an adverse effect on educational opportunity, as described below in section C.

In April 2004, the accumulated deficit led to a serious cash flow crisis, raising the possibility that the BCPSS would be unable to meet its short-term financial obligations. Initially, the Governor proposed a plan, to be effectuated by act of the General Assembly, which would have advanced additional State monies to the BCPSS and, in return, established substantial additional State control over the system.

As it happened, the Mayor and City Council intervened to avoid this increase in state control by advancing a short-term loan from the City to permit the BCPSS to surmount the cash-flow crisis and meet its immediate financial obligations. The City advanced the BCPSS \$42 million. Under a Memorandum of Understanding signed by Board and City, the Board is required to repay \$34 million of this loan in August 2004, and to repay the remaining \$8 million in FY 2006. (Ex. 2, MOU at ¶ 3; Financial Recovery Plan at 14.) The MOU also requires the BCPSS to retire the accumulated \$58 million deficit by June 30, 2006, with 60% (\$35 million) to be retired in FY 2005 and 40% (\$23 million) to be retired in FY 2006.¹⁰ (Financial Recovery Plan at 14.) The Board has also agreed to create \$10 million surplus in FY 2005 and a \$10 million surplus in FY 2006. (Financial Recovery Plan at 14.)

This motion does not attempt to assign blame for the budget crisis – the important thing is not who created the crisis, but whether the crisis is addressed quickly and the system returned to

¹⁰ A statute enacted in 2004 also requires the BCPSS to eliminate the accumulated deficit by the end of FY 2006. (Ex.1, S.B. 894 (2004 Reg. Sess.)). To the extent that either the MOU or the statute impose artificial constraints on the Board's use of operational funds to benefit students, this Court, as explained below, should hold them unconstitutional and ineffective as applied.

financial stability without penalizing students or slowing progress towards constitutional adequacy. It is worth noting, however, that the City and State, as well as the Board, should bear some responsibility here. Under S.B. 795 and the Consent Decree, the City Council reviews and approves the BCPSS' budget on an annual basis and, one assumes, could and should have been aware of the mounting deficit and the system's fiscal woes. Indeed, audits and assessments of the budget issues were performed in 2003.

The State similarly has substantial oversight responsibility under the City-State Partnership, the Consent Decree, and S.B. 795. Indeed, the State Superintendent is required by the Decree and S.B. 795 to submit an annual report to the legislature each year on the progress of the BCPSS. The Superintendent's February 2003 report specifically informed the General Assembly of the deficit problem as it then existed, describing a lack of fiscal controls and a FY 2002 deficit, and projecting an additional \$31.2 million deficit in FY 2003. (Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, March 31, 2004, at 10.)

Moreover, the State has engaged in a pattern of cutting Thornton and underlying State funding. This past year, for instance, the Governor failed to include funds meant to compensate Maryland districts for the differing geographic costs of providing an education, even though the Thornton Commission, the Thornton bill, and the States' own experts concluded that such an adjustment was necessary. (Final Report, Commission on Education Finance, Equity, and Excellence, January 2002, at 20; S.B. 856 (2002 Reg. Sess.); Letter from Elizabeth B. McCallum to Hon. Robert L. Ehrlich, Jr. *et al.*, March 17, 2004, at 3-4, a copy of which has already been provided to the Court.) The State also imposed substantial cuts on programs underlying Thornton, the base on which the Thornton increases was imposed. *Id.* at 4. These cuts, which came on top of similar cuts in last years' legislative session, resulted in at least \$11 million in loss to the BCPSS alone this year.

At the same time, the State Board and the Superintendent have repeatedly required the BCPSS to engage in programmatic changes and adjustments that cost money, without a word about where the money might come from. For instance, in July 2003 the State Board placed the

BCPSS in “corrective action” and demanded that it implement a number of initiatives in various areas, including curriculum alignment, professional development, the recruitment and retention of “highly qualified” teachers, and the establishment of special “CEO districts” to focus on low-performing middle and high schools. (See Letter from Nancy S. Grasmick to Bonnie Copeland, June 4, 2004, at 1.) Likewise, the State has demanded additions and changes to the BCPSS’ draft Master Plan. (Letter from Valerie V. Cloutier to Hon. Joseph H. H. Kaplan, *et al.*, June 14, 2004, noting that State had rejected draft Master Plan for not “addressing critical needs.”) The State has continued to criticize the Board for not spending *enough* on objectives important to the State, stating in its June 14 letter to the Court that the Financial Plan “does not address the resources necessary to implement the requirements of the revised Master Plan,” the “systemic corrective actions imposed on the school system by the State Board,” the “resources for the 70 schools identified for restructuring” under No Child Left Behind initiatives, or “the resources necessary to continue improved delivery of special education.” (*Id.* at 2-3.)¹¹ In her March 31, 2004 report to the General Assembly, Dr. Grasmick again listed a number of substantive areas in which the State believes that increased BCPSS focus is critical, including curriculum alignment and professional development, recruitment and retention of qualified teachers, certification of teachers,¹² establishment of CEO districts for middle and high schools, assistance to the many schools in restructuring status, and gifted and talented education. (Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, March 31, 2004, at 10-11.)

Most importantly, of course, because of the extremely slow phase-in of Thornton money to BCPSS, the State continues to underfund public education in Baltimore City by approximately \$190 million per year, more than triple the total accumulated deficit. That report likewise was

¹¹ The State also indicates that the BCPSS fails to ensure sufficient spending on facilities (*id.* at 3). Several years ago, an independent study found that, in 1997 dollars, the BCPSS faces over \$600 million in facilities needs.

¹² 37.2% of Baltimore teachers are on conditional certification, but the central office department for teacher certification has been eliminated by the budget cuts. (Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, March 31, 2004, at 11.)

conspicuously silent on the question of the sources of funding for implementing these educational initiatives.

C. The Reduction in Educational Opportunities in FY 2004 and FY 2005

The *Bradford* plaintiffs are appreciative of Dr. Copeland and the Board's quick action, with the help of the City and the offer of State assistance, to address the fiscal crisis and move towards fiscal stability. We agree that the school system must live within its means, and that adequate and effective fiscal controls are required. But we are concerned that the actions taken to address the fiscal crisis – and, more specifically, to retire the accumulated \$58 million deficit in two years while creating a \$20 million reserve fund – will reduce educational opportunities available to children and slow progress towards constitutional adequacy. There are a number of areas in which the cuts implemented to reduce the deficit by \$35 million this year and put \$10 million in the reserve fund will directly and adversely affect educational opportunities, as well as a number of other areas in which the Board has decided not to expand existing programs in ways that would benefit children. Expert testimony (in the declaration of Steven M. Ross, an expert in the areas of the kinds of programs and services necessary to educate at-risk students) demonstrates this adverse impact and, indeed, it has been acknowledged by Board, State, and City alike. In fact, the Board Remedy Plan submitted to this Court in 2000, which formed part of the record on which the Court issued its June 2000 order, made the point that additional money was *crucial* to provide exactly the same kinds of services and changes – offer summer school, reduce class sizes, provide guidance counselors and additional support staff – that the BCPSS is now reducing or eliminating. We provide examples of the most important areas in which educational opportunities have been reduced below.

1. Elimination of Systemic Summer School for Struggling Elementary and Middle School Students

The BCPSS purports to save approximately \$10 million by eliminating systemic summer school offerings for elementary and middle school students who are struggling academically.

Previously, the system offered summer school to all elementary school children who performed poorly on the Comprehensive Test of Basic Skills. In 2002, 43,257 students were eligible for this summer school program, and approximately 30,600 attended. In 2003, similarly, 39,541 students were eligible, and 18,965 attended. (See BCPSS, An Evaluation of Summer School 2003: Phase I, Nov. 21, 2003, Executive Summary; BCPSS, An Evaluation of Summer School 2002: Phase I, August 2002 at p. 22; BCPSS, An Evaluation of Summer School 2002: Phase I, Executive Summary, available at http://www.bcps.k12.md.us/Student_Performance/Program_Evaluation/summer_school.asp). In place of this systemic summer program, this summer BCPSS is offering a patchwork of non-academic programs to significantly fewer students;¹³ the Mayor has developed a “summer learning challenge” in which students are expected to solve a daily math problem and read 30 minutes a day¹⁴; and the Board has made vague promises of targeted interventions to take place in 2005. (See, e.g., Robinson Letter at 3-4.)

These piecemeal programs – many of which are essentially the same programs that were offered last year – do not provide an acceptable substitute for a systemic summer school program designed to provide academic help to struggling students and to prevent the inevitable summer learning loss that occurs when students are not in school. As the BCPSS noted in its June 1 submission to the Court, students “lose approximately 2.6 months” of grade level equivalency over the summer, and “[s]ummer learning loss contributes to the achievement gap in reading performance between lower income and higher income children and youth.” (Robinson Letter, Attachment 1, Slide 1, quoting the Johns Hopkins University’s Center for Summer Learning.) Increased summer school offerings over the past few years have been credited with helping city

¹³ Title I elementary schools will offer summer programs for approximately 1,800 third and fourth graders, according to the June 1, 2004 letter from Sally A. Robinson to Judges Garbis and Kaplan, Ex. 3, which is not a substitute for the external programs eliminated under the FRP. A review of that letter indicates that the patchwork of other programs offered will serve, at most, 9,779 students. See Attachment 3 to Robinson Letter.

¹⁴ A copy of the first question from the Mayor’s Summer Learning Challenge is attached as Exhibit 4.

schools improve their performance by a number of authorities, including the independent evaluators required by the Consent Decree and S.B. 795. *See, e.g.*, Metis Report, Executive Summary, at 3, 29-30 (noting that summer school “helped to increase achievement for a majority of students who participated”). In her March 2003 report to the General Assembly, similarly, the State Superintendent noted that summer school was “critical to BCPSS students.” (Letter from Nancy S. Grasmick, *et al.* to Hon. Thomas V. Miller, Jr., *et al.*, March 2003, at 10.)

Educational expert Steven Ross¹⁵ confirms that elimination of a systemic summer school program for struggling elementary and middle school programs will adversely affect educational opportunities. (Ross Dec. at 3-10.) He opines that the patchwork of programs that the system offers instead, although they appear well-intentioned and may be individually valuable to a limited population of students, are not a sufficient substitute for a systemic program designed to stem the inevitable summer learning loss. (*Id.* at 6 (substitute program falls far short of providing the “remedial and enrichment goals normally expected of summer programs”). In fact, a formal summer program is necessary, in Dr. Ross’ opinion, based solely on the number of BCPSS students with low MSA test scores. The “City-Wide Awareness” campaign is not capable of achieving anywhere near the results of a “research-based systemic” summer program, and there is no “accountability component” in BCPSS for the vaguely-promised future targeted interventions. *Id.* at 6.

2. Fee-Based Summer School for High School Students

The 2004 summer program for high school children who need credits to graduate has been scaled back significantly. It will no longer be provided free of cost, but will be replaced by a program that costs \$150 per course. The “waiver” program for children who cannot afford those payments is vague and undefined, and students were only notified of the program very shortly before the waiver applications were due. (*See* Ex. 6, Draft Request for Special

¹⁵ Dr. Ross is a professor in the Educational Psychology and Research Department at the University of Memphis, serves as the Executive Director of the Center for Research in Educational Policy, and holds the Moss Chair of Excellence in Urban Education. A copy of Dr. Ross’ Declaration is attached as Exhibit 5.

Consideration Fee Waiver/Reduction (noting that “BCPSS will make professional judgment decisions in regard to students who have unusual and special circumstances that could affect ability to pay tuition for a maximum of two summer school courses” and that “eligibility for reduce/free lunch is [a] contributing factor and is not the single determinant for fee waiver/reduction”). This differs from the 2003 summer high school program, which charged a flat fee of \$75.00, and from 2002 when the summer program was mandatory and *free* for high school students failing courses and without credits to graduate. As Dr. Ross noted, “[t]he high school students having the strongest need for summer school experiences are also those least likely to have financial resources” so the fee “will serve as a barrier or deterrent for many students in need,” particularly given the late notice of the possibility of a fee waiver. *Id.* at 7.

3. Increased Class Sizes

The BCPSS also purports to save approximately \$12.5 million¹⁶ by increasing class sizes and, as result, cutting teacher salary expenses. This cut back is particularly worrisome because one of Board’s key initiatives to improve and ultimately attain adequacy – one of the centerpieces of the Remedy Plan submitted to this Court in 2000, for instance – was smaller class size. Moreover, the increase in class size proposed under the FRP builds on earlier increases to class size that were implemented in the 2003-04 school year. (See Ex. 7, June 13, 2002 Memo to School Principals re: Allocations for School-Year 2002-2003; Ex. 8, 4/17/02 Memo to Area I Principals re: Projections/Budget FY 2003). The following table illustrates the changes in class size from FY 2003 to FY 2005:

	FY 2003	FY 2004	FY 2005
Pre-K	1:20 w/asst.	No change	No change
K	1:25 w/asst.	No change	No change

¹⁶ The actual extent of the staff reductions needed, and the savings achieved, by the decision to increase class sizes is unclear. The various documents provided by the parties are inconsistent and ambiguous on this issue.

Gr 1-3	1:18	1:20	1:22
Gr. 4-5	1:27	1:27	1:29
Gr. 6-8	1:27	1:28	1:30
Gr 9-12	1:28	1:30	1:32

These planned class size increases mean that Baltimore City, despite having the highest percentage of at-risk students who could benefit from small classes, will once again have the largest average class sizes in Maryland. See Ex. 9, Chart of Selected Class Sizes, Maryland FY 2005.¹⁷ Moreover, it is important to note that these class sizes are not caps, they are averages (Robinson Letter at 3) – meaning that many classes may have more, and in some cases significantly more, students.

Dr. Ross has considered the impact that the proposed class size increases would have on BCPSS. He ultimately concludes that larger class sizes “can only work in the direction of increasing teaching demands and reducing the potential to raise student achievement,” and he notes that research demonstrates that smaller class sizes are particularly important in high-need districts like Baltimore City. (Ross Dec. at 16.) Dr. Ross also disputes that the argument raised by BCPSS in some court submissions that modest class size increases will not cause “significant liabilities;” he concludes that “there are logical and scientific reasons to believe that ‘liabilities’ occur with *any* increase in enrollment.” (*Id.* at 12.)¹⁸

¹⁷ In contrast, Montgomery County has instituted a program focusing resources on high-need, low performing schools that, among other things, has sharply reduced class size in kindergarten to 15 and in grades 1-3 to 17. There has been an encouraging increase in scores. (Ross Dec. at 13.)

¹⁸ The Board has proposed to use a significant portion of its Thornton increase for this year simply to reduce the level of the class size increase – because of Thornton money, it will increase class size by only 2, rather than 3, students. Thornton money is thus being used to help the system minimize the decrease in services to at-risk students, not to increase them.

4. **Teacher Reduction and Attrition, and Reduction in Teacher-Mentor Program**

The proposed reduction in the actual number and quality of teachers through layoffs and attrition, as well as the elimination of mentors that help less experienced teachers learn to teach, likely will, as Dr. Ross opines, also have an adverse impact on educational quality. (Ross Dec. at 15-16.) As Dr. Ross notes, “teacher effectiveness is by far the most important extrinsic determinant of student success” (*id.* at 11), and a policy that leads to experienced teachers leaving and provides fewer resources to assist new teachers is unwise. More than a third of the teachers in BCPSS are already less-than-fully certified. Moreover, as the State acknowledged in its June 14, 2004 letter from Valerie Cloutier to Judges Garbis and Kaplan, the current FRP’s plan to remove 250 teachers through natural attrition will be problematic if “all 250 resignations/retirements are certified teachers in English and/or special education.” (Letter from Valerie V. Cloutier to Hon. Joseph H.H. Kaplan, *et al.*, June 14, 2004, at 2.) The State has repeatedly pointed out the importance of continuing to attract and retain qualified teachers and providing sound mentoring programs for them to continued progress for the BCPSS. *See* Letter from Nancy S. Grasmick, *et al.*, to Hon. Thomas V. Miller, Jr. *et al.*, March 2003, at 6 (noting that “the System instituted another major instructional reform by assigning at least two academic coaches one for reading and one for math – to every elementary and middle school. The initiative was designed to enhance the quality of instruction – a critical need throughout the system”); Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, March 31, 2004, at 9 (“The lay-offs of temporary employees who have played a role in supporting classroom teachers and counseling students can be disorienting to a school, particularly in the short run”); *id.* at 10 (noting that the Master Plan II review panel expressed concern about BCPSS’ “lack of capacity for recruitment, retention and certification of highly qualified staff”); *id.* at 11 (“BCPSS must ensure that its recruitment activities attract candidates that will meet the No Child Left Behind requirement that all teachers be highly qualified by school year 2005-2006”); *id.* at 13 (noting that “interventions only make sense in the context of a foundational program that is sound and

focused – where quality of instruction is at the core of all classroom activity”). Moreover, the loss of experienced teachers already has, and will continue to, contribute to the substantial decline in morale throughout the system.”

5. Elimination of Elementary-School Guidance Counselors and Other Support Personnel

Finally, the BCPSS purport to save approximately \$8 million by eliminating guidance counselors and other essential support staff. *See* Ex. 10, BCPSS Fiscal Year 2005 Proposed Operating Budget at 77 (indicating cuts of 147.50 guidance counselor positions at a savings of \$8,829,907 and noting that “support services continue to be impacted as the elementary guidance counselor positions were eliminated”); Attachment 7 to June 1, 2004 letter from Sally Robinson to Judges Garbis and Kaplan (indicating cuts of 23 guidance counselors from Oct. 31, 2003 to June 1, 2004). Dr. Ross has opined that such cuts will have an adverse educational impact. (Ross Dec. at 14-15.)

6. Failure to Expand Existing Programs

Moreover, in addition to these cuts and others, there are a number of areas in which the BCPSS has decided not to implement planned expansions in services designed to help educate at-risk students. A chart comparing the BCPSS original Master Plan for the next school year, drafted in October 2003, with a revised plan drafted in February 2004, indicate that the BCPSS intends not to implement previously planned expansions in music and arts and physical education programs, in gifted and talented programs, in pre-Kindergarten programs, in technology models to early learning environments, in providing bilingual translators for parents with difficulty speaking English, and the like. (Exhibit 11.)

Both the City and State recognize the adverse impact that all of the foregoing cuts will have on student education. The Financial Recovery Plan acknowledges that it “does not directly address the classroom impacts that may be associated with curing BCPSS’s cash flow deficiencies and eliminating its cumulative deficit by the end of FY2006.” (Financial Recovery

Plan at 9.) The State has said that to assume no educational impact from the cuts would be “naïve.” (Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, March 31, 2004, at 9).

III. ARGUMENT

A. The Constitutional Violation Established By the Court’s September 1996 and June 2000 Orders Continues Today

The constitutional violation that this Court found in 1996 and 2000 is continuing. Student scores and other objective evidence establishes that Baltimore students still are not receiving the “thorough and efficient” education (i.e., an education that is adequate when measured by contemporary educational standards) guaranteed by Article VIII of the Maryland Constitution, and, as of FY 2005, state aid has *not* increased by the amount deemed necessary by this Court’s June 2000 order.

1. Overwhelming Objective Evidence Establishes That The BCPSS Still Are Not Close To Achieving Constitutional Adequacy

Although the BCPSS has made progress in improving test scores in the past few years, it still trails behind the rest of the state, with scores remaining far below the state standards for proficient performance and far below the state average. In 2003, Maryland replaced the Maryland School Performance Assessment Program (“MSPAP”) tests with the Maryland School Assessment (“MSA”) tests, pursuant to the federal No Child Left Behind law. That law requires each state to require schools to make “Adequate Yearly Progress” towards a specified level of performance on a statewide test. In Maryland, all students must be “proficient” in the subject matters tested by the MSA by 2014.¹⁹ In Baltimore City, 2004 scores on the MSA showed that a majority of students (from 45% to 65%, depending on grade level) were functioning only at a

¹⁹ Further information regarding the MSA test is available at <http://www.mdreportcard.org/introduction/index.aspx?WDATA=intro>. The state website that reports score data is <http://www.mdreportcard.org/>

“basic” – i.e., unsatisfactory – level in reading and from 58% to 89% (again, depending on grade level) of students were functioning only at a “basic” level in mathematics. Students who show a “basic” performance for reading are “unable to adequately read or comprehend grade appropriate literature and informational passages.” Those with “basic” performance in mathematics “demonstrate only partial mastery of the skills and concepts defined in the Maryland Mathematics Content Standards.” In Baltimore City, therefore, nearly two-thirds of the City’s tenth-grade students (65%) *do not “adequately read or comprehend” grade level reading material* – they are, in the words of the Baltimore Sun, “functional illiterates.” (Ex. 12, “North Avenue can hold off on the high-fives.”) Figures 1 through 22, attached as Exhibit 13, show that that Baltimore City has the largest percentage of students scoring at the “basic” (i.e., unsatisfactory) level for each MSA when compared to the State and Baltimore County and trails behind the State and the County in the percentage of students meeting the “proficient” (i.e., satisfactory) standard. These charts also demonstrate that the gap between the City and the State average increases as the children get older.

Based on the BCPSS’ performance on the MSA tests last year, the State Board of Education placed this *entire school system* in “corrective action” and directed it to perform a number of specified actions designed to enhance performance. (Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, March 31, 2004. at 9-10). Even though MSA results demonstrated some encouraging improvement in 2004, some 96 of the approximately 180 schools in Baltimore City remain on various levels of the state’s “watch list” for required improvement. As expert Steven Ross noted: “By any measure, a system demonstrating those outcomes has not achieved acceptable educational goals either locally or nationally.”

The BCPSS’ performance on the High School Assessment tests confirms this conclusion. On these new “high-stakes” tests that will be required for high-school graduation, Baltimore City students performed well below the rest of the state in 2002 and 2003. For instance, only 20.7% of Baltimore City students passed the Algebra exam compared to the more than 50% who passed throughout the State. Likewise, in 2003, only 26% of Baltimore City students passed the Biology

exam compared to the State passing average of over 54%. A set of figures (19-22) attached as Exhibit 13 illustrates Baltimore City's performance on the High School Assessments; full information is available at <http://mdk12.org>.

To pick just one more objective indicator of continuing inadequacy, among many others, Baltimore City's dropout rate still substantially exceeds the state satisfactory standard (3%), and are still close to 11% (down from almost 14% in 1997). See Figure 23, Ex. 13.

The State has repeatedly acknowledged the continuing gap between Baltimore City and the rest of the state on these objective indicators of educational quality. (See, e.g., Letter from Nancy Grasmick to the Hon. Thomas V. Miller, *et al.*, March 31, 2004, at 9 ("when the 2003 MSA scores for Baltimore City were released – showing that, despite earlier gains, too many of the City's schools continue to languish . . ."); *id.* ("The new High School Assessment offers more evidence of the huge challenges that face BCPSS students. In 2003, BCPSS' passing rate was last among all jurisdictions in English, Biology and Algebra and third from last in Government"); (Letter from Nancy S. Grasmick, *et al.* to Hon. Thomas V. Miller, Jr., *et al.*, March 2003, at 4 ("Despite gains, there remains a huge gap between the performance of Baltimore City students and that of students in most other Maryland counties. The gap is less pronounced in lower grades where the system has invested much of its attention and resources during the first five years of the Partnership").)

2. The State Has Not Complied With The Court's June 2000 Order

As of FY 2005, the State has not yet come close to complying with the Court's June 2000 direction that an additional \$2,000 to \$2,600 per pupil be provided to Baltimore City. The Court held in June 2002, in a holding that remains correct and binding today, that even "arguable" compliance with the June 2000 order would not occur before full Thornton funding was achieved in 2008. (June 2002 Order at 5.) Indeed, the Thornton bill's "Fiscal Note" – which contains the original estimates of funding that the Thornton bill would provide over normally-occurring increases in APEX and other foundational funding – confirms the Court's June 2000 ruling. The

Fiscal Note demonstrates that an additional \$260 million (or approximately \$2,600 per pupil) over pre-existing funding will *not* be achieved until at least FY 2008. (Department of Legislative Services, S.B. 856 Fiscal Note, Revised May 10, 2002, at Ex. 8.)²⁰

It is undeniably relevant, moreover, that since the Court estimated that \$2,000 to \$2,600 per pupil was necessary, the Thornton Commission has estimated substantial additional needs the cost of educational services has increased,²¹ and the State standards on which both this Court and the Thornton Commission's estimates of need were based have been raised substantially, with the institution of new high-stakes tests required for high-school graduation, the MSA tests, and the new federal standards required by the No Child Left Behind.

B. This Court Should Issue A Declaration Necessary To Ensure That BCPSS Continues Progress Towards A Complete Remedy For The Established And Continuing Constitutional Violation In This Case

Under its inherent power and jurisdiction to enforce its own orders (which the Court recognized in its June 2002 opinion)²² and its continuing jurisdiction to remedy the constitutional violation it has found, this Court should, after hearing evidence at the July 22-23 hearing set in this matter, issue an appropriate declaration ensuring that the steps taken to address BCPSS's fiscal issues do not hinder progress towards the gradual, phased-in remedy established by

²⁰ The State apparently intends to argue that it is now in compliance with this Court's June 2000 order because, in nominal dollars, BCPSS is now spending more than \$2000 per pupil more than it did in FY 2001. Of course, as the Fiscal Note to the Thornton legislation makes clear, most of this nominal increase is simply the normal adjustment in state funding built into the preexisting APEX formula. These are funds needed simply to purchase the same level of educational services offered at the time of the Court's order, not real new funds available to BCPSS to purchase additional educational services. As the fiscal note makes clear, those new funds would have totaled only \$68.9 million for the 2004-05 school year, or about \$ 755.56 per pupil, even if the original legislation had been fully funded (which it has not). In fact, this year the City gets only about \$50 million in Thornton increases, or about \$555.56 per pupil.

²¹ Indeed, the Court's ordered increase of \$2,000 to \$2,600 itself should be increased to take account of the rising cost of educational services.

²² See e.g., *Reich v. Walker W. King Plumbing & Heating Contractor*, 98 F.3d 147, 154 (4th Cir. 1996); *Virginia Panel Corp. v. MAC Panel Co.*, 139 F. Supp. 2d 753, 756. (W.D. Va. 2001); *Link v. Link*, 35 Md. App. 684, 688, 371 A.2d 1146, 1149 (1977); Memorandum Opinion, June 25, 2002.

legislature and the Court here. The *Bradford* plaintiffs suggest that an appropriate declaration would (1) declare that the constitutional violation the Court found in 1996 and 2000 continues; (2) re-affirm, as the Court did in its June 2002 order, that substantial compliance with the June 2000 order will not occur until at least 2008; (3) declare that, in the interim, the parties are required to ensure continued progress towards adequacy and towards increased educational opportunities for the students; (4) declare that the FY 2005 budget is not consistent with those requirements, because educational opportunities for students are being reduced; and (5) instruct the parties, consistent with the Court's declaration, take appropriate actions within a limited time-certain to ensure that funds in the FY 2005 budget that currently are being directed away from educational opportunities toward deficit reduction are redirected into programs and services that provide such opportunities and benefit for Baltimore City's at-risk student population.

Such interim orders to ensure continued progress towards remedying constitutional violations are common in the school-funding context. *See, e.g., Abbott v. Burke*, 693 A.2d 417 (N.J. 1997) (ordering interim remedial relief).

The *Bradford* plaintiffs do not suggest that the Court directly involve itself in finding solutions to the fiscal problems, rewriting the budget, or directing specific programs to which funds should be channeled. Instead, they anticipate that the BCPSS, City, and State will act in accordance with the Court's declarations to do so. In fact, there are a number of ways that the parties could alter current plans to ensure sufficient funds available for educational objectives this year to accomplish continued progress towards adequacy. The State defendants could ensure sufficient immediate additional revenue to the schools to forestall the proposed sacrifices to educational quality, through a deficiency appropriation, through accelerating the pace at which State aid is paid to the district, or otherwise. The City could ensure that the \$31.6 million it owes the Board for accrued but unpaid employee leave is paid immediately, rather than in \$2.8 million installments over the next twelve years, an option that the City has suggested before and that is described in the Financial Recovery Plan (at 17). The City could relax its requirement that the

Board repay \$34 million of the outstanding \$42 million loan in August 2004, and permit a longer payout of that loan so that more operational revenue would be available to educate students for this fiscal year. Or, the parties could alter the BCPSS' plans to pay down the accumulated \$58 million deficit in 2 years – stretching that repayment out further over several years – and also could reduce or eliminate plans to achieve a \$20 million reserve fund, in order to ensure that sufficient operational funds are available for student education.

All of these solutions, separately or in combination, combined with appropriate and effective use of the free-up funds to enhance educational opportunity, could ensure continued progress towards adequacy. To the extent that the parties choose the final option, stretching out the deficit payback, a further action will be required of this Court. Currently, a state statute (S.B. 894) and the MOU both purport to require the accumulated deficit to be eliminated by FY 2006. The Court has the power and authority to strike the statute, as applied to Baltimore City, to the extent that it violates the children's constitutional right to an adequate education by requiring funds to pay down the deficit at the expense of reduced educational opportunities. *See, e.g., Sugarloaf Citizens Ass'n, Inc. v. Gudis*, 319 Md. 558, 573 A.2d 1325 (1990) (declaring section 19A-22(b) of Montgomery County Code unconstitutional and explaining that “[c]ourts can invalidate legislation on grounds of unconstitutionality.”); *Board of Public Works v. Baltimore County*, 288 Md. 678, 421 A.2d 588 (1980) (invalidating provisions of Chapter 889 of the Acts of 1980 that authorized the expenditure of state funds); *Beauchamp v. Somerset County Sanitary Comm'n*, 256 Md. 541, 261 A.2d 461 (1970) (affirming the unconstitutionality of Chapter 674 of the Laws of 1996 that provided a property exemption from the levy of taxes); *Brigham v. State*, 692 A.2d 384 (Vt. 1997) (system for funding public education held in violation of state constitution); *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (statutory funding scheme found unconstitutional). Similarly, the Court may invalidate the MOU to the extent that it stands in direct conflict with the Board's constitutional duty and is contrary to public policy. *See* 15 Grace McLane Geisel, (revised ed. 2003) *Corbin on Contracts* § 79.1 -3 (courts have the right to refuse contract enforcement when necessary to protect a public interest) (constitutions are

declarations of public policy); *Medex v. McCabe*, 372 Md. 28, 811 A.2d 297 (2002) (contracts conflicting with public policy are invalid); *Jennings v. Government Employees Ins. Co.*, 302 Md. 352, 488 A.2d 166 (1995) (holding insurance policy clause contrary to public policy invalid and unenforceable).

The governmental parties almost certainly will argue that some sacrifice in educational quality is necessary in order to achieve fiscal responsibility, and will contend that continuing cash flow issues necessitate that the deficit payoff be structured as it is. The crucial consideration, however, is ensuring continued progress towards a “thorough and efficient” education, and ensuring that the students in Baltimore City are not penalized as a result of the budget issues. In light of this constitutional mandate, it is the obligation of the city and state to provide sufficient funds—through repeated short-term loans if necessary—to deal with the cash flow problems without adversely affecting educational opportunity.

CONCLUSION

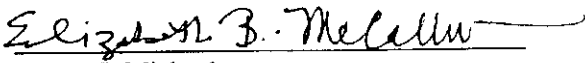
For the reasons stated, the *Bradford* plaintiffs respectfully request that the Court, after hearing evidence at the July 22-23 hearing, enter the relief herein requested.

Dated: July 8, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE


I hereby certify that copies of The *Bradford* Plaintiffs' Motion for Declaration Ensuring Continued Progress Towards Compliance With Court Orders and Constitutional Requirements, Memorandum in Support Thereof, and Exhibits Thereto were served by regular United States mail, postage prepaid, this 8th day of July, 2004 upon each of the parties listed below:

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