

KEITH BRADFORD, *et al.*,

Plaintiffs,

v.

MARYLAND STATE BOARD OF
EDUCATION,

Defendant.

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IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No.: 24C94340058

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**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION *IN LIMINE* TO PRECLUDE PLAINTIFFS' EXPERT
TESTIMONY**

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PRELIMINARY STATEMENT

The *Bradford* Private Plaintiffs (“Plaintiffs”), through their undersigned counsel, oppose Maryland State Board of Education’s (“MSBE” or “Defendant” or “State”) Motion *in Limine* to Preclude Plaintiffs’ Expert Testimony (“Motion”).

The testimony of Plaintiffs’ experts is admissible under Md. Rule 5-702, which considers whether they (1) are qualified, (2) will assist the trier of fact, and (3) have sufficient factual support. Plaintiffs’ experts satisfy the Rule, as even a summary of their impressive backgrounds and helpful and well-supported testimony confirms:

- ***Bruce Baker***, Ph.D., a professor at University of Florida with 20+ years of research on education policy and funding will assist the Court with testimony about school funding and funding levels necessary for BCPSS to provide students with an adequate education. His testimony is based on analyses of BCPSS funding since 1998, state and federal funding data, regression models evaluating BCPSS-specific funding and spending information, and outcome-based statistical models.
- ***Kirabo Jackson***, Ph.D., is an educational economist and professor at Northwestern University whose testimony will help the Court understand the relationship between school funding and student outcomes, a subject raised by MSBE’s claim that “simply spending more money doesn’t matter.” His testimony is based on studies of causal relationships between spending and student outcomes and statistical models that predict changes in BCPSS student outcomes in relation to BCPSS funding changes.
- ***Jerry Roseman***, MSc., has decades of experience researching and evaluating school facilities. His testimony will address the physical conditions of BCPSS facilities and funding needed to bring them into compliance with educational adequacy standards. His

testimony is based on professional literature, legislation, data and discovery about BCPSS facilities, interviews of 20+ BCPSS personnel, and inspections of BCPSS facilities.

- **Joshua Sharfstein**, MD., a doctor, professor with Johns Hopkins University, and former Acting Director for the U.S. Food and Drug Administration (“FDA”) and Commissioner of Health for Baltimore City, offers rebuttal testimony to help the Court evaluate MSBE’s proposed expert’s presentation of data about BCPSS facilities relative to other districts, and how BCPSS’s facilities conditions affect student learning and health. His testimony is based on professional experience, 25 years of analyzing public health related data, and research about health and school facilities.
- **Loraine Maxwell**, Ph.D., is an environmental psychologist and professor emerita with Cornell University whose testimony will inform the Court about the relationship between school facilities conditions and student outcomes, and about the ways that BCPSS’s facilities adversely affect the education of students. Her testimony is based on scholarly research, data concerning BCPSS’s facilities, Mr. Roseman’s reported facilities assessments, and data on student outcomes.
- **Michelle Fine et al.**,¹ Ph.D., a social psychologist and professor with CUNY since 1992, will give testimony that will assist the Court with evaluating how racial and social inequities and inadequate education funding in Baltimore City impacts needed funding levels for BCPSS. Her testimony is based on social science literature, empirical research, and her interviews of more than 90 BCPSS students, parents, and employees.

¹ As the Motion acknowledges (Motion 18), Dr. Fine’s report was prepared with the assistance of three psychology professionals, Tara M. Brown, Ph.D. and Varnica Arora, M.Psy. with the University of Maryland-College Park, and Justine H. Lee, Ph.D. with CUNY.

If there were any genuine question of whether Plaintiffs' expert testimony satisfies Md. Rule 5-702 and is admissible (and there is not), it could be addressed with cross examination before this Court, not with total pretrial exclusion based on MSBE's speculative arguments made without even first deposing any of the experts it seeks to exclude.

Perhaps recognizing it is not in position to exclude expert testimony, MSBE used the Motion to make arguments to supplement its summary judgment beyond the 50-page brief limit. The Motion thus asserts that Plaintiffs' expert testimony concerning the insufficiency of BCPSS's school facilities is unnecessary because Plaintiffs' facilities-related claims are not permitted pursuant to the Consent Decree—a dispositive argument not presented in MSBE's summary judgment, but which this Court has twice rejected in denying MSBE's motions to dismiss. (1/16/20 Memo. Order Dkt. 105/8; 3/7/22 Order, Dkt. 189/5.) The Motion also seeks to bolster MSBE's motion for summary judgment in circumvention of Md. Rule 2-501, by arguing, based on distorted and inadmissible "evidence," that Plaintiffs have no complaints about BCPSS and that BCPSS has surplus funding, and any experts who do not agree with these "facts" must be precluded from testifying for lack of factual support. These arguments also challenge the merits of Plaintiffs' claims and they are procedurally improper in an *in limine* motion, especially when they rely on "evidence" that would not be admissible to support MSBE's parallel summary judgment argument.

Nothing in the limited part of MSBE's argument that might be appropriately presented *in limine* supports the exclusion of Plaintiffs' experts. MSBE does not even object to the qualifications of any expert other than Dr. Sharfstein, and for Dr. Sharfstein Defendant claims he is not qualified to analyze something that he does not in fact do. Defendant claims Dr. Sharfstein is not qualified to testify about the assessment of school facility conditions. Dr. Sharfstein, however, is not proffered to testify about those assessments themselves; rather, he will testify about

MSBE's expert's erroneous methodology and misleading presentation of facilities related data, and about how facilities conditions affect BCPSS student learning and health. He is obviously qualified to present this testimony, with 25 years of experience analyzing and interpreting data with public health implications, research about BCPSS, and his past roles with the FDA and as Baltimore's Commissioner of Health. In fact, the State admitted that he is an expert with valuable information regarding the State's facilities assessment during recent meetings, contrary to the Motion's made-for-litigation argument.

MSBE also asserts that Plaintiffs' expert testimony is generally "unreliable" because the experts purportedly failed to consider how BCPSS funds were spent. Prof. Baker's report, however, discusses past BCPSS funding and spending across more than 50 pages; and Prof. Jackson also analyzes school spending through statistical models for BCPSS. By ignoring their actual analyses, MSBE articulated no reason to conclude that they are unreliable and must be excluded. And MSBE presented no reason why experts who are not testifying on funding amounts (e.g., Prof. Maxwell and Dr. Fine) must analyze BCPSS's past spending or be excluded.

Remarkably, MSBE requests exclusion of all of Plaintiffs' experts without first deposing any of them. The arguments presented in the Motion suggest that MSBE avoided taking discovery so it could have plausible deniability for making its strained arguments. This strategy, coupled with MSBE using a motion *in limine* to support dispositive arguments, repeating already-rejected arguments, failing to acknowledge entire subjects in Plaintiffs' experts' reports, and mischaracterizing Plaintiffs' testimony and other evidence, requires denial of the Motion.²

BACKGROUND

² Together with this response, Plaintiffs are filing a motion to strike unsupported and repetitive portions of MSBE's *in limine* and summary judgment briefs.

MSBE's 20-pages of so-called "Relevant Facts" appear to be copied-and-pasted from MSBE's prior filings, and these pages contain much irrelevant argument, mischaracterization of "facts," and omission of actual facts material to the Motion. (Motion 3-23.) Mindful of the Court's time, Plaintiffs will not correct and complete MSBE's "Relevant Facts" on a point-by-point basis. Instead, Plaintiffs will address them, to the extent relevant, in the course of argument below, and refer the Court to Plaintiffs' Memorandum in Opposition to MSBE's Motion for Summary Judgment for further explanation of disputed facts.

ARGUMENT

"[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court..." *Rochkind v. Stevenson*, 471 Md. 1, 10 (2019) (citation omitted). Expert testimony may be admitted under Rule 5-702 when (1) the expert is qualified, (2) the testimony is appropriate on the subject, and (3) there is sufficient factual basis to support the testimony. Plaintiffs' experts satisfy these requirements, and their testimony is therefore admissible. MSBE's arguments do not establish otherwise, and the Motion should be denied.

I. PLAINTIFFS' EXPERTS ARE QUALIFIED

Plaintiffs' experts clearly are qualified to offer their expert testimony. *See* Md. Rule 7-702(1). An expert is "qualified" in this context as long as the expert demonstrates "a 'minimal amount of competence or knowledge in the area in which [the expert] purports to be an expert.'" *Naughton v. Bankier*, 114 Md. App. 641, 655 (1997) (citation omitted). This competence or knowledge can come from "professional training, observation, actual experience, or any combination of these factors." *Levitas v. Christian*, 454 Md. 233, 235 (2017) (citation omitted).

A. MSBE Did Not – And Could Not – Challenge Five Experts Who Are Qualified

MSBE, wisely, did not attempt to contest the qualifications for five of Plaintiffs' experts. Their competence in the area of their testimony is established in their reports and extensive CVs (some of which MSBE omitted in the Motion):

- **Prof. Baker** is qualified to opine on whether funding provided to BCPSS is sufficient to provide students with an education that is adequate, based on 20+ years of research and analysis of this very subject, decades of experience teaching graduate and undergraduate courses on education finance, quantitative methods and data analysis, and education policy, and publication of three books and 260+ articles on school finance and education economics topics. (Motion, Ex. H (Report); Ex. 1 (current CV).)³
- **Prof. Jackson** is qualified to testify about the statistical effects of school funding levels on student outcomes given his Ph.D. in economics, background as an educational economist, professorship with Northwestern University, extensive research about the economics of education, and publication of more than 20 peer reviewed articles on these subjects. (Motion, Ex. J (Report and CV).)
- **Mr. Roseman** is qualified to testify as an expert on the conditions of BCPSS facilities and their relation to “adequacy” guidelines, standards, and measures, based on his MSc. in Occupational & Environmental Science and Hygiene, and his experience conducting hundreds of school facilities assessments. (Motion, Ex. A (Report and CV).)
- **Prof. Maxwell** is qualified to give expert opinion on the relationship between BCPSS facilities conditions and student learning outcomes because she is an environmental

³ The “letter” exhibits are attached to the Motion, and the “number” exhibits are attached to the declaration of Jeffrey Liskov submitted with this Opposition.

psychologist with a Ph.D., she has been a professor for nearly 30 years, teaching courses on design and environmental analysis, and she has decades of experience researching and writing about children and physical environments. (Motion, Ex. K (Report and CV).)

- *Dr. Fine* is qualified to opine on the consequences of inequity and inadequate educational funding in Baltimore City, because she holds a Ph.D. in social psychology, is a Distinguished Professor of Psychology and Urban Education at CUNY, has published books on research methods, racial justice, and urban education, has decades of experience researching and working with urban communities, conducted original focus group research in Baltimore City, and has received multiple lifetime achievement awards in her field. (Motion, Ex. I (Report and CV).)

B. Dr. Sharfstein Also Is Qualified And MSBE's Off-target Argument Does Not Support Exclusion Of The Testimony He Is Offering

Although MSBE did not—and could not—challenge the qualifications for five of Plaintiffs' experts, the Motion attempts to attack the qualifications of Dr. Sharfstein. But MSBE's argument distorts the subject matter of his testimony and ignores his qualifications for the testimony that he will, in fact, provide. MSBE's Motion also fails to mention the State's own admissions in public meetings that Dr. Sharfstein is an expert with valuable comments and reactions to the State's own facilities assessments.

MSBE argues that Dr. Sharfstein is not qualified to render opinions on inspections and assessments of the physical conditions of BCPSS facilities because he is not an engineer or experienced in building construction or maintenance. (Motion 38.) This argument is a straw man: Dr. Sharfstein is not proffered to testify on inspections or assessments. Rather, he will testify about

errors in the methodology employed by the State and by MSBE's proposed expert, Matt Munter,⁴ in analyzing Statewide Facilities Assessment ("SFA") data about BCPSS facility conditions, and about the State and Mr. Munter's misleading presentation of that data to suggest BCPSS facilities conditions are above average in Maryland. (*Id.*, Ex. L at 6-7.) Dr. Sharfstein is also proffered to testify about bias resulting from the methodology used for data reported for Maryland schools (*id.* at 11-12), and about his ongoing research and analysis of datasets and measurements of school conditions other than SFA that show BCPSS facilities to be disadvantaged compared to other Maryland schools. (*Id.* at 7-11; *see also* 9/19/22 School Conditions and Educational Equity in Baltimore City.⁵) He will opine that major equity gaps between BCPSS and other Maryland school systems, identified in his analyses, likely affect Baltimore City student learning and health. (Motion, Ex. L at 13.)

Dr. Sharfstein is qualified to give the testimony for which he is proffered. He is a medical doctor who studied epidemiology and biostatistics. (*Id.* at 2.) He is Professor of the Practice of Public Health Policy and Management at Johns Hopkins, and previously served, among other roles, as Acting Commissioner for the FDA and Commissioner of Health for Baltimore. (*Id.* at 2-3.) He has 25 years of experience analyzing and interpreting data and identifying public health implications. He has published dozens of peer-reviewed articles as a public health expert, and has experience analyzing empirical issues related to health and school conditions, including BSPSS

⁴ Mr. Munter is an employee of the contractor that conducted the SFA for the State, and MSBE proposes him as an expert to testify on how the SFA was conducted and to fill in facts about it that MSBE failed to produce in fact discovery. Plaintiffs moved to exclude Mr. Munter because, among other things, he is a fact witness improperly proffered as an expert. (8/12/22 Motion to Exclude at 17-21, Dkt. 251/0.)

⁵ Dr. Sharfstein's disclosure refers to ongoing research and analysis about BCPSS, facilities and student health. (Motion, Ex. L at 13.) Such analysis, as currently exists, is available at <https://gisanddata.maps.arcgis.com/apps/Cascade/index.html?appid=b9a4c509731d4d9baed7ee30de1ffec9>.

conditions. (*Id.* at 3-4 and CV.) This combination of experience and research makes him sufficiently competent to give his testimony. *See Levitas*, 454 Md. at 235 (explaining qualifications can come from combination of training, experience, or observation).

In fact, even the State recently acknowledged Dr. Sharfstein's expertise. In recent meetings of the State's Interagency Commission on School Construction ("IAC"), the IAC acknowledged that it has consulted with Dr. Sharfstein about school facilities (SFA) data.⁶ IAC's Acting Executive Director admitted that Dr. Sharfstein's analysis of this data provided "great input and feedback,"⁷ and that IAC appreciates having Dr. Sharfstein's "expert eyes" on the data.⁸ MSBE's present lawyer-driven argument, contrary to the State's real-life views of Dr. Sharfstein's expertise, provides no credible reason to conclude he is not qualified.

Even if, for argument's sake, Dr. Sharfstein's training, work, and experience in public health, statistical analysis, and Baltimore City schools did not demonstrate a "minimal amount of competence," *Naughton*, 114 Md. App. at 655, it still would be error to exclude his testimony. Generally "an expert's training, expertise or basis of knowledge go to the weight of the evidence and not its admissibility." *Levitas*, 454 Md. at 246-47 (citation omitted).

II. THE SUBJECTS ARE APPROPRIATE FOR EXPERT TESTIMONY AND MSBE HAS ARTICULATED NO ARGUMENT TO THE CONTRARY

The subjects addressed by Plaintiffs' experts are appropriate matters for expert testimony. *See* Md. Rule 5-702(2). This inquiry turns on "whether the trier of fact will receive appreciable help from the expert testimony in order to understand the evidence or to determine a fact in issue." *Sippio v. State*, 350 Md. 633, 649 (1998).

⁶ *See* 3/10/22 IAC Meeting Video at 1:14, <https://www.youtube.com/watch?v=W5OKfLmh8yc>.

⁷ *See* 4/14/22 IAC Meeting Video at 1:04, <https://www.youtube.com/watch?v=Vi7CBdOCMFo>.

⁸ *See id.* at 1:05.

A. The Testimony Subjects Are Appropriate For Experts Because They Will Help The Court

Each of Plaintiffs' experts offers testimony on aspects of this litigation which would help the Court understand evidence and resolve issues in this case. Although it is not possible, nor is it necessary, to itemize all the helpful testimony disclosed in Plaintiffs' experts' nearly 500 pages of reports and disclosures (not including rebuttals), it includes:

- **Prof. Baker's** analysis and testimony on school funding levels that will assist the Court with a core issue in the case—the levels of funding necessary for BCPSS to provide students with an education that is adequate when measured by contemporary educational standards. (Motion, Ex. H (Report).)
- **Prof. Jackson's** analysis and testimony concerning the statistical effects of school funding levels on student outcomes that will help the Court understand the potential benefits of additional funding for BCPSS, and the fallacy in MBSE's argument that simply providing more funds will not benefit Baltimore City students. (Motion, Ex. J (Report).)
- **Mr. Roseman's** testimony on the physical condition of BCPSS facilities that will assist the Court's determination of whether BCPSS is provided sufficient funding to achieve and maintain adequate facilities (Motion, Ex. A (Report)), and will help resolve Plaintiffs' request for "sufficient State funding and oversight to ensure that all BCPSS schools are brought into compliance with educational adequacy standards." (3/7/19 Petition at ¶ 22, Dkt. 98/0.)
- **Dr. Sharfstein's** rebuttal testimony concerning the methodologies for analyzing school facility conditions data that will help the Court understand the analytical flaws in MSBE's expert's analysis and presentation of data about BCPSS facilities, and will help the Court

understand the extent to which BCPSS facilities are disadvantaged and how this affects BCPSS student learning and health. (Motion, Ex. L (Report).)

- **Prof. Maxwell's** testimony on the relationship between facilities conditions and student learning and other outcomes that will help the Court understand the research showing poor quality and poorly maintained school facilities compromise BCPSS's ability to provide an adequate education for Baltimore City students. (Motion, Ex. K (Report).)
- **Dr. Fine's** testimony about how entrenched poverty, unstable housing, poor community and school infrastructure, racial isolation, and other socio-economic hardships make Baltimore City students vulnerable, and affects the resources needed for BCPSS to provide an adequate education. (Motion, Ex. I (Report).)

As these summaries demonstrate, each of Plaintiffs' experts offers testimony that goes to the heart of issues before the Court, such as funding resources necessary if BCPSS is to provide students a constitutionally adequate education. This testimony is squarely in the "realm" of expert opinion—confirmed by MSBE proposing expert testimony on many of the same subjects. *Sippio*, 350 Md. at 650 (1998) (explaining experts may opine on subjects that are not "beyond the proper realm of expert opinion testimony"). At the very least, Plaintiffs' experts will provide "appreciable help" in understanding the evidence and issues before the Court. *Id.* at 653 (ruling subjects are appropriate for experts if they can help the trier of fact). The second requirement of Md. Rule 5-702 is, therefore, satisfied.

B. MSBE's Argument That Plaintiffs Cannot Pursue Facilities Claims, Or Testify Concerning Facilities, Is Incorrect, Foreclosed By The Law Of This Case, And Is Summary Judgment Briefing Improperly Presented *In Limine*

Because MSBE cannot seriously claim the subjects of Plaintiffs' experts are "beyond the realm," MSBE resorts to the circular argument that Plaintiffs cannot pursue claims concerning

BCPSS facilities, so expert testimony about facilities should be excluded as unhelpful. (Motion at 38-40.)

The spurious argument that Plaintiffs cannot pursue facilities-related claims has been rejected by this Court multiple times. Plaintiffs' Petition seeks declarations and other relief for BCPSS facilities. (3/7/19 Petition at ¶ 22, Dkt. 98/0 (requesting declaratory orders addressing funding to ensure adequate facilities, capital and operational funding for facilities, and resources for ongoing maintenance for facilities).) MSBE's first motion to dismiss argued that Plaintiffs' claims are not allowed under the Consent Decree (6/16/19 Motion to Dismiss at 38-48, Dkt. 105/0), and MSBE repeated that argument in its improper second motion to dismiss (11/10/21 Motion to Dismiss at 27-38, Dkt. 184/0). This Court rejected MSBE's argument, twice. (1/16/20 Memo. Order Dkt. 105/8 (denying motion to dismiss and ruling that Plaintiffs may bring claims under consent decree); 3/7/22 Order, Dkt. 189/5 (denying second motion to dismiss).)

The law of the case doctrine now precludes MSBE's repetitious argument, and Defendant provides no reason to revisit this argument in any event. *See Ralkey v. Minn. Mining & Mfg. Co.*, 63 Md. App. 515, 520 (1985) (law of case doctrine generally provides that a 'legal rule of decision between the same parties in the same case' controls in subsequent proceedings between them"). MSBE's already twice-rejected argument cannot be used now to shutdown Plaintiffs' facilities claims and, in turn, make expert testimony on the subject become "unhelpful" and excluded.

MSBE's attempt to evade law-of-the-case preclusion by arguing that neither the Consent Decree nor this Court addressed facilities claims misses the point. (Motion at 38.) These claims were raised by Plaintiffs' complaint (Compl. ¶¶ 103-06 (Dkt. 1)⁹) and are raised by the Petition

⁹ In 1999, the docket in this case was converted to an electronic docket. This is the only pre-1999 docket cite in this Opposition, and this docket number corresponds, best as counsel can discern, to the original Complaint in this case dated December 6, 1994.

allowed by this Court. MSBE's argument also is inaccurate. The Consent Decree required the State to increase funding for facilities (Motion, Ex. C at ¶ 48 (Consent Decree)), and permitted requests for additional funding, including funding for classroom facilities (*id.* at ¶¶ 47, 50). Pursuant to the Consent Decree, this Court found in 2000 that BCPSS continued to lack "sufficient funding for school facilities improvements." 2004 Mem. Op. at ¶ 22, Dkt. 51/0. That 2000 finding and order is binding on the State, *see id.* at ¶¶ 31-32, and this Court in 2002, and again in 2004, extended its jurisdiction under the Consent Decree until such time as the State provides constitutionally-compliant funding, *see id.* at ¶¶ 61-65.

MSBE's assertion that facilities claims cannot be part of this case also is refuted by its own conduct. MSBE proffers two affirmative (not rebuttal) experts, Mr. Munter and Mr. Levenson, to testify about school facilities. The State thus concedes the relevance of facilities, and of expert testimony on the subject; otherwise, the State has wasted funds on unnecessary testimony.

MSBE's redundant attempt to avoid Plaintiffs' facilities claims on a motion *in limine* also is procedurally improper. A motion *in limine* is "not the proper vehicle for seeking a dispositive ruling on a claim..." *Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1162 n.4 (9th Cir. 2013). MSBE does not seek exclusion of facilities testimony for reasons contemplated in Md. Rule 5-702; rather, MSBE asks the Court to terminate that portion of Plaintiffs' claims based on MSBE's already-rejected argument that such claims are not allowed under the Consent Decree. Such a request should be denied as improperly presented *in limine*.

MSBE's argument should, therefore, be disregarded because it is really an improper summary judgment motion, which MSBE presents as a motion *in limine* to avoid its burden of adducing undisputed supporting facts (MSBE could not do so), and to circumvent page limitations (MSBE's summary judgment brief is at 50-page limit). *See, e.g.*, 75 Am. Jur. 2d Trial § 42 (2022)

(use of “motions *in limine* to summarily dismiss a portion of a claim has been condemned, and the trial courts are cautioned not to allow motions *in limine* to be used as unwritten and unnoticed motions for summary judgment or motions to dismiss”).

III. THERE IS SUFFICIENT FACTUAL BASIS FOR PLAINTIFFS’ EXPERTS’ TESTIMONY

Plaintiffs’ experts also have sufficient factual basis for their testimony. *See* Md. Rule 5-702(3). This basis, depending on the testimony, may be “(1) an adequate supply of data; and (2) a reliable methodology.” *Rochkind*, 471 Md. at 22 (citation omitted). An expert’s basis may “arise from a number of sources, such as facts obtained from the expert’s first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions.” *Sippio*, 350 Md. at 653. Accordingly, the trial court has “wide discretionary range” in finding the factual bases are sufficient. *Wantz v. Afzal*, 197 Md. App. 675, 684 (2011) (reversing trial court’s exclusion of testimony for lack of factual basis).

A. Plaintiffs’ Experts Cite Sufficient Information And Use Reliable Methodology For Their Testimony

The testimony offered by each of Plaintiffs’ experts has sufficient factual basis. The Motion, moreover, does not even attempt to dispute Plaintiffs’ experts’ methodologies. As MSBE does not seriously challenge the factual basis or the methodology of any of Plaintiffs’ experts, they are summarized briefly here, with references to their reports for more detailed explanations.

- **Prof. Baker’s** testimony on funding levels for BCPSS is based on years of researching, writing, and teaching on school funding, and his analysis of extensive factual information. In addition to Maryland’s legislative initiatives on school funding, Prof. Baker considered funding provided to BCPSS since the Consent Decree (1998). (Motion, Ex. H at 13-21.) He also analyzed state and federal data in regression models to estimate relative measures of educational spending with respect to school district characteristics such as child poverty

rates, and to identify the extent by which BCPSS student outcomes lag the outcomes of students in other districts by a variety of measures (*id.* at 21-72). Prof. Baker then used an outcome-based statistical model—a recognized methodology for deriving cost estimates from underlying relationships between existing spending and outcome variations (*e.g., id.* at 83-95)—to estimate the levels of funding the State would have to provide BCPSS to meet district-wide educational adequacy benchmarks. (*id.* at 95-124.) Notably, unlike MSBE’s experts’ generic opinions,¹⁰ Prof. Baker’s models use Maryland-specific data and his model outputs are adjusted to account for Baltimore City’s socio-economic characteristics.

- ***Prof. Jackson’s*** testimony on the effects of school funding levels on student outcomes is based on his research and systematic analysis of numerous credible (peer-reviewed, published, and non-published) studies considering causal relationships between school spending and outcomes. (Motion, Ex. J at 7-14.) This analysis identified the statistical relationship between school finance reform events (*i.e.*, an influx of funding by court order or otherwise) and student outcomes by various measures such as proficiency test scores and graduation rates. (*Id.* at 14-20.) He then used a mathematical formula to apply that statistical relationship to predict changes in BCPSS student outcomes if its funding were increased by \$2,000 and \$4,400 per pupil increments. This analysis predicts, with 90% confidence, appreciable improvements in BCPSS student proficiency test scores and graduation rates. (*Id.* at 2-6.)

¹⁰ Plaintiffs moved to exclude the proposed testimony of MBSE’s expert, Erik Hanushek, because, unlike Prof. Baker, he failed to consider Maryland- and BCPSS-specific cost information and, instead, proposes to offer outdated, generic observations about funding that are not relevant to BCPSS or the issues in this case. (8/12/22 Motion to Exclude at 5-12, Dkt. 251/0.)

- **Mr. Roseman's** testimony on the physical condition of BCPSS facilities is based on his methodical consideration of comprehensive information about the facilities and his decades of experience inspecting school facilities. As reflected in his report, Mr. Roseman's analysis was guided by literature and legislation relating to the adequacy of school facilities. (Motion, Ex. A at 6-7.) He reviewed voluminous case evidence and other information about BCPSS facilities, including comprehensive evaluations of facilities by third parties (Jacobs Engineering, EMG, and Bureau Veritas/IAC), and additional assessments, reports, records, and data on the conditions, maintenance, repairs, and budgets for facilities. (*Id.* at 6, 18-25, 174-84.) He also interviewed more than 20 BCPSS personnel regarding facilities and inspected a representative sample of 22 locations (*id.* at 7, 38-144, 185), which confirmed the reliability of the facility conditions as reported in the third-party evaluations (*id.* at 33-37). Relying on his experience and review of case evidence, Mr. Roseman prepared an analytical framework, reflecting key building systems and major components, to rate the adequacy of BCPSS facilities based on data derived from third party evaluations (*id.* at 15-32, 145-51), which supports his opinions about BCPSS receiving insufficient funding to build, maintain, repair, and operate its facilities in an adequate condition (*id.* at 152-72).
- **Dr. Sharfstein's** rebuttal testimony about school facility data and the impact of poor conditions on BCPSS student learning and health is based on his education (*i.e.*, medical doctor, epidemiology, biostatistics), work experience (*i.e.*, public health professor, former Acting Director of the FDA and Commissioner of Health for Baltimore City), and research and writing (*i.e.*, research on health and school conditions). His testimony also is based on

his analysis of SFA data and reports and records about BCPSS facilities (Motion, Ex. L at 5-12)—the same information used by MSBE’s proposed expert, Mr. Munter.

- **Prof. Maxwell’s** testimony on the relationship between facilities conditions and student learning outcomes is based on her 30 years of experience as an environmental psychologist and research and writing about children and physical environments. Her testimony also is based on scholarly research showing poor conditions and lack of maintenance of school facilities affect student learning and achievement. (Motion, Ex. K at 8-18.) She considers Mr. Roseman’s opinions about the conditions of BCPSS facilities, and data on BCPSS facilities derived from the evaluations conducted by third parties (Jacobs and EMG). (*Id.* at 18-21.) She also analyzed the relationship between BCPSS facilities conditions and BCPSS student outcomes, confirming, consistent with scholarly research, that students attending facilities assessed as poor/very poor conditions had low proficiency test scores, low graduation rates, and high dropout rates. (*Id.* at 21-24.)
- **Dr. Fine’s** testimony on the consequences of racial and social inequity and inadequate education funding in Baltimore City is based on her many years of experience as a psychologist and professor researching and writing on racial justice and urban education, analysis of social science literature, and empirical research on urban educational inequities and school finance and their implications for academic and emotional well-being. (Motion, Ex. I at 31-43, 49-76, 83-86, 91-92.) She also applied original focus group research—including interviews of more than 90 BCPSS students, parents, and employees—to assess the cumulative consequences of inequity and inadequate education funding on BCPSS. (*Id.* at 26-31, 43-49, 56-89, 92-98.) She also considered Baltimore City demographic data, BCPSS performance data, Prof. Baker’s findings on BCPSS student and staffing statistics,

Mr. Roseman’s report on BCPSS facilities, and data derived from evaluations conducted by Jacobs and EMG. (*Id.* at 26-31, 50-77) The research, statistics, and interviews together support her opinion that social and economic inequities in Baltimore City impact students educationally in ways that require relatively more funding to BCPSS to reach adequacy.

This brief summary of the bases of Plaintiffs’ experts’ testimony demonstrates that they rely on deep and varied reliable sources, including their experience, research, and publications, local, state and federal data on school funding, and data, assessments, and reports by third-parties and MSBE’s own contractor (Bureau Veritas). The scope of the information they draw upon far exceeds the information on which MSBE’s experts rely.¹¹ MSBE cannot show that Plaintiffs’ experts may not rely on the forms of information they have chosen, because experts have broad latitude to select the data on which they may base their opinions. *See Sippio*, 350 Md. at 653. Nor could MSBE show that Plaintiffs’ expert testimony must be excluded because it is “pure conjecture, rather than factually based opinion” (Motion at 25), when the nearly 500 pages of their reports cite hundreds of sources, and explain how and why those sources support the testimony. Plaintiffs’ experts have sufficient factual bases and Md. Rule 5-702(3) is satisfied. This is particularly so because Defendant did not even bother to depose Plaintiff’s experts regarding the factual bases for their testimony.

¹¹ MSBE’s experts, in contrast, want to testify about BCPSS funding and facilities even though they failed to consider or analyze information about BCPSS, such as its funding, spending, academic programs, student test results, teachers or administrators, and facilities. (8/12/22 Motion to Exclude at 5-16, Dkt. 251/0.)

B. MSBE's Argument That Plaintiffs' Experts Must Agree With Its Characterization Of Evidence Does Not Support Exclusion

MSBE argues that Plaintiffs' experts should be excluded, despite their detailed reports and wealth of factual support, because MSBE claims that these experts must "consider" and agree with MSBE's characterization of Plaintiffs' depositions and past funding and spending by BCPSS.

1. *Plaintiffs' experts should not be excluded because they did not "consider" and agree with MSBE's characterization of Plaintiff depositions*

MSBE summarily asserts that *all* the testimony of four of Plaintiffs' experts (Prof. Baker, Prof. Jackson, Prof. Maxwell, Dr. Fine) should be excluded prior to trial, for "lack of sufficient factual basis," merely because they allegedly did not consider, or report agreement with, MSBE's characterization of the depositions of the four Plaintiffs. (Motion at 29-32.) This flimsy argument provides no reason for exclusion of these experts.

To begin, MSBE's argument is premised on speculation, because it chose not to learn about Plaintiffs' expert testimony. The applicable Case Management Order gave MSBE four (4) months to depose Plaintiffs experts. (Dkt. 209 (setting November 1 disclosure and March 14 discovery deadlines).) MSBE chose not to take any such discovery. And MSBE rejected Plaintiffs' proposals to provide additional expert disclosures, including materials considered by experts.¹² MSBE, therefore, purposefully put itself in the position of not knowing why Plaintiffs' experts considered, or did not consider, any particular information, making MSBE's present argument pure conjecture.

¹² Maryland Rules require only a statement of the "substance" of expert opinions and a "summary" of their grounds. Md. Rule 2-402(g)(1)(A). The Federal Rules, by contrast, require complete disclosure of opinions and information considered. *See* Fed. R. Civ. P. 26(1)(2). MSBE repeatedly rejected Plaintiffs' proposal to exchange expert reports *and information considered* under the Federal Rules standard, instead of relatively sparse disclosures under the Maryland Rules. (Ex. 2, 3/29/22 Simanowith email (MSBE counsel: "The parties did not agree to follow the Federal Rules of Civil Procedure for expert disclosures").)

MSBE's Motion, moreover, misleadingly summarizes Plaintiffs' depositions to create the appearance that they never had any complaint whatsoever about their experiences with BCPSS. (Motion at 6-16.) Plaintiffs in fact testified about problems with BCPSS's educational operations, conditions in school facilities, and student outcomes that are tied directly to lack of funding. (10/4/22 Memo. in Oppo. to Motion for Summary Judgment at 4-11 (summarizing Plaintiffs' testimony.) The premise of MSBE's argument is not supported by Plaintiffs' actual testimony.

In any event, Plaintiffs' experts are not mandated to "consider" MSBE's characterization of Plaintiffs' depositions. Rule 5-702(3) only requires enough factual basis so that expert testimony "does not amount to conjecture, speculation, or incompetent evidence." *Wantz*, 197 Md. App. at 691 (citation omitted). MSBE's argument ignores the breadth and depth of factual support adduced by Plaintiffs' experts for their testimony, as summarized above. MSBE also overlooks that Plaintiffs' deposition testimony is not necessary to the expert opinions at issue. For example, Prof. Baker's analysis and testimony addresses funding for BCPSS systemwide, not for specific individuals; individual testimony also is not relevant to Prof. Jackson's analysis and testimony on the statistical relationship between funding levels and student outcomes; Mr. Roseman's assessment and testimony on facilities conditions would not change, even if some Plaintiffs testified that their children's schools are "not abysmal;" and Dr. Fine's testimony is informed by interviews of more than 90 BCPSS students, parents, and employees which, ironically, MSBE disregards while arguing that a few other depositions had to be considered. Plaintiffs' experts have sufficient bases for their testimony, and MSBE cannot establish that their testimony would be speculative or incompetent, whether or not they included the depositions.¹³

¹³ Additionally, Plaintiffs' experts would not be mandated to "consider" Plaintiffs' depositions, as argued by MSBE, because experts may assume liability when rendering opinions. *See, e.g., In re*

MSBE's focus on Plaintiff depositions also is inconsistent with this Court's Stipulated Order that the case proceed like a class action. The Stipulated Order expressly provides that any relief obtained by Plaintiffs "*will be applicable to the BCPS system as a whole....*" (Motion, Ex. B at ¶ 2 (emphases added).) Plaintiffs' experts, accordingly, proffer opinions about the BCPSS system, not individuals. The Motion utilizes creative citations to insinuate that Plaintiffs must prove "their specific, *individualized* right to relief" (Motion at 28 (emphasis by MSBE)); no such requirement is set forth in the Stipulated Order.¹⁴

Plaintiffs' experts' approach, as MSBE omits to note, is also consistent with well-established procedure in school funding cases. Claims of violations of education rights under state constitutions are routinely litigated and resolved on a district- or state-wide basis, not on an individual-by-individual basis. *See, e.g., Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004) 605 (trial on funding claims for all students in county district, with claims supported by district-wide data and information); *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475 (Sup Ct. 2001) (trial on claims of underfunding for New York City public school students in violation of constitution); *Lobato v. State*, 218 P.3d 358 (Colo. 2009) (resolving adequacy of funding claims with respect to students in 14 districts); *Committee for Educ. Equality v. State*, 294 S.W.3d 477 (Mo. 2009) (trial on funding claims, based on overall amounts of funding provided to public school districts); *Seattle School Dist. No. 1 of King Cnty. v. State*, 90 Wash.2d 476 (1978) (affirming trial resolution of funding claims for all students in district).

DVI, Inc. Sec. Litig., 2014 WL 4634301, at *6 (E.D. Pa. Sept. 16, 2014); *System Dev. Integration LLC v. Comput. Scis. Corp.*, 886 F. Supp. 2d 873, 882 (N.D. Ill. 2012).

¹⁴ Assuming, *arguendo*, that it was necessary for Plaintiffs to have shown an individual right to relief, they have done so. *See* 10/4/22 Memo. in Oppo. to Motion for Summary Judgment at 25-29 (explaining that Plaintiffs have standing for their claims).

None of the inapposite cases cited by MSBE supports exclusion of Plaintiffs' experts' testimony. (Motion 29-31.) Each of those cases involved experts who offered little or no factual support for their proposed testimony—the opposite of the extensive support cited across the nearly 500 pages of reports disclosed by Plaintiffs. *See Walter v. State*, 239 Md. App. 168 (2018) (no statistics, literature, or other support for expert's testimony); *Taylor v. Fishkind*, 207 Md. App. 121 (2012) (no evidence supporting expert's testimony that lead was present in home); *Roy v. Dackman*, 445 Md. 23 (2015) (same); *State Health Dep't v. Walker*, 238 Md. 512 (1965) (excluding testimony about characteristics of soil when expert had no information specific to the soil and visited the property many years prior). MSBE's cases, if anything, support exclusion of MSBE's experts because they failed to consider information specific to BCPSS,¹⁵ but not exclusion of Plaintiffs' experts.

Finally, even if MSBE's complaint about Plaintiffs' experts purportedly not considering Plaintiff depositions had merit and were relevant in this case—which Plaintiffs do not concede—it could be addressed on cross examination. *See Rochkind*, 471 Md. at 38 (explaining: “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” are appropriate means for challenging expert testimony that a party believes to be “shaky” but admissible) (citation omitted).

2. *There is no “analytical gap” with Plaintiffs’ depositions that requires exclusion of their experts’ testimony*

MSBE further claims that the testimony of Prof. Baker, Prof. Jackson, Prof. Maxwell, and Dr. Fine should be excluded because there is an “analytical gap” between the Plaintiffs' depositions and these experts' reports. (Motion at 31-33.) As explained at pages 18-20 above, this

¹⁵ *See* fn. 10, *supra*.

argument is premised on speculation: MSBE purposely avoided learning all the facts considered by Plaintiffs' experts. Moreover, it is premised on mischaracterization of Plaintiffs' depositions and ignores the procedure set by the Stipulated Order and the fact that cases such as this one are resolved on system-wide evidence, not evidence of individual educational situations.

Additionally, MSBE's argument is premised on a distortion of the concept of an "analytical gap." An analytical gap is not present whenever a party points to some piece of evidence that it alleges an opposing expert should have considered. An analytical gap exists only when "there is simply too great an analytical gap between the data and the opinion," such that the underlying data cannot support the opinion offered. *Rochkind*, 471 Md. at 18 (citation omitted). MSBE's argument fails to show that there is such a gap here.

Plaintiffs' experts offer testimony about the BCPSS system, addressing such issues as the funding levels needed to provide BCPSS students with an education in facilities that are adequate under Maryland's constitution. (Pages 9-11, *supra*.) Tellingly, the Motion avoids addressing the experts' system-wide scope of testimony, and tries to divert the Court with rhetorical questions about how much individual funding each one of Plaintiff's children receives, or about each child's individual "success" in school. (Motion at 32.) Answers to MSBE's individual-specific questions, as well as the deposition testimony of the four representative Plaintiffs, are not necessary to support the system-wide opinions proffered in this case. By definition, therefore, there cannot be an "analytical gap" between the opinions and MSBE's irrelevant rhetorical questions or Plaintiff depositions, let alone a "great" gap. MSBE's convoluted argument is not a reason to exclude.

3. Plaintiffs' experts should not be excluded because their reports allegedly did not consider past school funding

MSBE also summarily asserts that all of the testimony of the same four experts (Prof. Baker, Prof. Jackson, Prof. Maxwell, and Dr. Fine) should be excluded as "unreliable as a matter

of law,” because their reports allegedly do not recount how BCPSS spent funds years ago. (Motion at 33-38.) This argument, premised on sweeping and incorrect presumptions, should be rejected for multiple reasons.

MSBE, notably, cites no support for its position that all experts, as a matter of law, must consider “past spending,” during a period that MSBE arbitrarily sets as 2010-2019. (*Id.* at 35.) MSBE does not explain why Prof. Maxwell and Dr. Fine—who are psychologists whose testimony concerns the impact of school conditions on student outcomes and the consequences of social and economic inequities in Baltimore City on students (page 10, *supra*)—must consider “how BCPSS spends money” (Motion at 34). MSBE’s assumption that experts who express no opinion on spending levels must consider past funding, or be excluded, is nonsensical.

The Motion, moreover, disregards the proffered testimony of Prof. Jackson concerning the very subject that MSBE accuses Plaintiffs of ignoring. (*Id.* at 34.) Prof. Jackson analyzed the causal relationships between school spending and student outcomes, and will testify about statistical analyses predicting that BCPSS student outcomes will be appreciably improved with an increase in funding to BCPSS. (Page 10, *supra*.) Prof. Jackson thus considered the effects of spending; he employs, however, a different methodology from the one that MSBE would prefer. MSBE’s sweeping argument, which ignores Prof. Jackson’s analysis, cites nothing to establish that he and all other experts must rigidly adhere to MSBE’s approach, or be excluded.

MSBE also suggests, falsely, that Prof. Baker neither considered nor examined past BCPSS funding or spending. (Motion at 34-35.) In fact, Prof. Baker analyzed past State and BCPSS funding and spending in detail across many pages—including the State’s admitted annual “adequacy gap” that, by FY2017, had grown to \$342.2 million per year. (Motion, Ex. H at 4-8, 13-21, 27-64.) He also considered the scholarly literature and analyzed data showing how funding for

BCPSS matters for student outcomes (*id.* at 125-35), in anticipation that MSBE would, as it does here, resort to the long-discredited argument that it should not be accountable for its unconstitutional underfunding of BCPSS because “simply spending more money doesn’t matter.” Misrepresenting and ignoring the substance of Prof. Baker’s actual report and proposed testimony, MSBE fails to advance any credible reason for exclusion.

Another glaring defect in MSBE’s argument is that it is premised on imaginary BCPSS funding “surpluses.” MSBE asserts that the testimony of all of Plaintiffs’ experts should be excluded because they failed to “examine” purported “surpluses” during 2010-20. (*Id.* at 35.) But there were, and are, no funding surpluses; indeed, Plaintiffs have moved to strike MSBE’s purported showing of such surpluses because it is pure allegation and thus inadmissible, and because its incorrect and misleading.. MSBE confuses the “net changes in position” reported in BCPSS’s Comprehensive Annual Financial Reports with actual funds. As Alison Perkins-Cohen, Chief of Staff of BCPSS, explains in her Affidavit, “net changes in position” are reported pursuant to Government-Wide accounting principles, and include adjustments for capital outlays, depreciation, and debt repayment, plus government-restricted funds and an “unassigned fund balance” in connection with emergency and unexpected contingencies.¹⁶ MSBE should know that accounting adjustments for depreciation and debt paydown are not the equivalent of incoming revenue or funding, and certainly are not “surpluses” of funds. Plaintiffs’ experts cannot be faulted for not considering non-existent surpluses.

CONCLUSION

Plaintiffs respectfully request that the Motion be denied for the foregoing reasons.

¹⁶ See 10/4/22 Perkins-Cohen Affidavit at ¶¶ 52-57.

Dated: October 4, 2022



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KEITH BRADFORD, *et al.*,

Plaintiffs,

v.

MARYLAND STATE BOARD OF
EDUCATION,

Defendant.

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IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No.: 24C94340058

* * * * *

[PROPOSED] ORDER

Upon consideration of the Motion *in Limine* to Preclude Plaintiffs’ Expert Testimony (“Motion), submitted by Defendant Maryland State Board of Education, and any Opposition thereto, any Reply thereupon, and any oral argument by the Parties;

It is ORDERED this ___ day of _____, 2022;

The Motion is DENIED.

Judge, Circuit Court for Baltimore County

CERTIFICATE OF SERVICE

I, Jeffrey E. Liskov, certify that I have this day caused to be served a copy of this PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* TO PRECLUDE PLAINTIFFS' EXPERT TESTIMONY and PROPOSED ORDER on the following counsel and parties by electronic mail and by U.S. mail with postage prepaid on October 4, 2022:

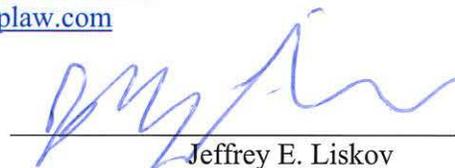
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Dated: October 4, 2022



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