

KEITH A. BRADFORD, *et al.*,

Plaintiff,

v.

MARYLAND STATE BOARD OF
EDUCATION,

Defendant.

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IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No.:24C94340058

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**PRIVATE PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY
JUDGMENT AND FOR FURTHER ORDERS PURSUANT TO THE DECLARATORY
JUDGMENTS ACT**

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PRELIMINARY STATEMENT

Private Plaintiffs (“Plaintiffs”)—parents of children who attend the Baltimore City Public Schools (“BCPSS”) and 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 education¹—respectfully submit this Reply to the Opposition (Dkt. 250/1) of Defendant Maryland State Board of Education (“MSBE,” “Defendant,” or the “State”) to Plaintiffs’ Motion for Summary Judgment.

On the basis of undisputed evidence and clear entitlement under the law, Plaintiffs seek an Order granting relief in two parts: *first*, directing the State to make payments in the current fiscal year (FY2023) and thereafter to Baltimore City Public Schools (“BCPSS”) in respect of the acknowledged “adequacy gaps” in the State’s funding of BCPSS, for instructional purposes and to improve facilities; and, *second*, requiring MSBE to present a comprehensive plan for compliance with the State’s constitutional obligation to achieve and maintain a “thorough and efficient system of public education” in Baltimore City, again with reference to instructional programs and to ensure modern, safe facilities fit for educational purposes.

The relief that Plaintiffs seek is predicated upon uncontroverted evidence, much of it generated or commissioned by MSBE itself, and upon well-established Maryland law, including this Court’s 2000 Mem. Op., which is “final, binding, and the law of this case because the State dismissed its appeal.” Ex. 4, 2004 Mem. Op. at 57.² MSBE sets forth no grounds for denial of Plaintiffs’ motion. It concedes that BCPSS’s performance is inadequate, but claims that it will

¹ See Ex. 3, this Court’s June 30, 2000 Memorandum Opinion (Dkt. 3-2) (the “2000 Mem. Op.”) at 1 and Ex. 4, its August 20, 2004 Memorandum Opinion (Dkt. 50) (the “2004 Mem. Op.”) at 2.

² To avoid duplicity of exhibits, Plaintiffs only attach exhibits to this Memorandum that have not been previously cited in Plaintiff’s Motion for Summary Judgment (Dkt. 250/0) or Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (Dkt. 260/0). Exhibits 1-78 are included as exhibits to Plaintiff’s Motion for Summary Judgment (Dkt. 250/0), Exhibits 79-89 are included as exhibits to Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment (Dkt. 260/0), and Exhibits 90-100 are submitted with this Memorandum.

address the issue with increased funding over the next several years. In the next breath, it argues that the problems of BCPSS are intractable and additional money will not help. It trumpets the high educational standards it has set, and its goal of providing sufficient resources for all Maryland students to have a reasonable opportunity to meet its standards. Then, it argues that BCPSS's students are entitled to no more than a "basic" education by the standards of 1983. Finally, it seeks to disavow the State's own calculations of the "adequacy gap" in its funding for BCPSS, without ever grappling with this Court's decisions or the undisputed facts. This Court should disregard MSBE's arguments and grant Plaintiffs' motion.

ARGUMENT

I. A "THOROUGH AND EFFICIENT" EDUCATION IS "ADEQUATE WHEN MEASURED BY CONTEMPORARY EDUCATIONAL STANDARDS."

This Court first held that students attending BCPSS were not receiving a constitutionally-adequate education in 1996. Order, Dkt. 1-66 at 2 (Oct. 18, 1996) ("1996 Order"). The Court made this finding again in 2000, 2000 Mem. Op. at 25, and yet again in 2004, when it detailed objective indicators that demonstrated BCPSS students were performing far below state standards and state averages because of underfunding. 2004 Mem. Op. at ¶¶ 98-125. Undisputed evidence demonstrates that children in BCPSS today continue to be deprived of the resources necessary for a constitutionally adequate education, and consequently continue to perform below state averages and state standards. Pl.'s Mem. Law. in support of Mot. Summ. J. (Dkt. 250/0) ("Pls.' MSJ Br.") at 16-22. MSBE concedes Plaintiffs' proof of poor performance, *see* Defendant's Memorandum of Law in Opposition (Dkt. 250/1) ("Def. MSJ Opp.") at 5 ("private plaintiffs also argue compellingly that outcomes for Baltimore's school children in 2022 remain sobering"), but presses the claim that Maryland's schoolchildren are not "guaranteed anything more than a minimum, basic education." *Id.* at 24. Without defining a "basic" education, MSBE suggests it is a lesser thing than the adequate

education that Plaintiffs seek for their children, and claims that Plaintiffs offer a garbled definition of “adequate.” In fact, Plaintiffs, and this Court, have throughout this litigation employed a clear formulation of adequacy that MSBE avoids quoting, even once, in any of its memoranda of law.

In its 1996 Order granting summary judgment for Plaintiffs, this Court held that “[t]he ‘thorough and efficient’ language of Art. VIII requires that all students in Maryland’s public schools be provided with an education that is adequate *when measured by contemporary educational standards.*” 1996 Order ¶1 (emphasis added). The Court has reiterated this definition of “thorough and efficient.” *See* Ex. 3, 2000 Mem. Op. at 24-25 (“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”); Ex. 4, 2004 Mem. Op. at 57-58 (“Under Article VIII, a ‘thorough and efficient’ education, meaning an education that is adequate when measured by contemporary educational standards...” (citing *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 639 (1983); *Montgomery Cnty. v. Bradford*, 345 Md. 175, 181 (1997) (“*Bradford I*”))).

This Court’s holding that every schoolchild in Maryland has the constitutional right to an education that is adequate when measured by contemporary educational standards, Ex. 3, 2000 Mem. Op. at 24-25, was based on *Hornbeck* and was accepted by the Court of Appeals in *Bradford I*. It is “final, binding and the law of this case.” Ex. 4, 2004 Mem. Op. at 57.³ “*Hornbeck*,” as the Court of Appeals explained in *Bradford I*, “teaches that the Maryland constitutional provision . . . does require that the General Assembly establish a Statewide system to provide an adequate public

³ Indeed, MSBE chose to dismiss its appeal from the Court’s 2000 Mem. Op., agreeing, as the then-Superintendent of Schools testified under oath, to be bound by this Court’s Orders. *See* Ex. 90, Trial Tr. Nancy Grasmick, at 1562-63 (Aug. 4, 2004). Having voluntarily withdrawn its appeal, MSBE has waived its appellate rights with regard to all matters decided in that ruling. *See, e.g., Osztreicher v. Juanteguy*, 338 Md. 528, 534-5 (1995). It is also the law of the case.

school education to the children in every school district.” 345 Md. at 181. This system must provide the school district “with the means essential to provide the basic education contemplated by Section 1 of Article VIII, *when measured by contemporary educational standards.*” *Id.* (emphasis added). As relevant here, the Court of Appeals recognized in *Hornbeck*, and subsequently in *Bradford I*, that a challenge to the constitutional adequacy of education may be predicated on evidence that the “comprehensive Statewide qualitative standards” are not being met in a school district; *or*, that “the State’s school financing scheme [does] not provide [a] district [...] with the means essential” to meet those standards. *Bradford I*, 345 Md. at 181 (citing *Hornbeck*, 295 Md. at 639) (internal quotations omitted).

The *Hornbeck* plaintiffs made no showing on these points: their case was limited to showing that “the educational resources available in the poorer school districts are inferior to those in the rich districts,” 295 Md. at 639. Plaintiffs, by contrast, do not seek statewide equality in per pupil funding; rather, they seek funding sufficient to enable BCPSS to provide an adequate education by contemporary educational standards. They present undisputed evidence that was not part of the plaintiffs’ case in *Hornbeck*, demonstrating that BCPSS is not meeting the comprehensive statewide qualitative standards set by State and federal statute and MSBE’s regulations, and that the State’s school financing scheme does not provide BCPSS with the means essential to meet those standards. *See* Pls.’ MSJ Br. at 16-22.

MSBE is the agency responsible for executing the contemporary educational standards imposed by the Maryland Constitution and state and federal legislation, and it promulgates additional contemporary educational standards by administrative rulemaking.⁴ It also collects statistics about every aspect of schooling in Maryland. Thus, MSBE is the source, the enforcer, and

⁴ Plaintiffs do not claim that the standards established by MSBE fail to meet constitutional standards.

the recordkeeper for the contemporary educational standards that Maryland schools must meet to provide an adequate education.

This Court has looked repeatedly to “the State’s own educational standards” as the basis for holding that “Baltimore City schoolchildren [are] not receiving a constitutionally adequate education.” Ex. 3, 2000 Mem. Op. at 24. The Court has recognized, moreover, that the State’s educational standards evolve over time. *See* Ex. 4, 2004 Mem. Op. at 15 ¶52 (“state standards now in effect are different, and higher, than the standards in effect when the Thornton Commission in 2001-02 estimated the amount necessary for students to meet state standards”).

It is inconsistent for MSBE to urge the Court to conclude that the relevant standard is whether “students are receiving a measurably worse education than any child received in Maryland in 1983,” Def. MSJ Op. at 25, when the Court has clearly defined adequacy by contemporary educational standards. Rather, the questions for the Court are whether students in BCPSS are receiving the full measure of current programming standards in facilities that meet current educational needs, and whether students’ performance satisfies those current educational standards. Current standards are at least those enacted in the Bridge and Blueprint Acts. This Court should not permit MSBE and the State to evade their duty to provide “an education that is adequate when measured by contemporary educational standards,” by lowering the standards to those of any era other than the present.

The assessments of adequacy of educational spending that MSBE points to are predicated on the standard of educational adequacy articulated in *Hornbeck*, *Bradford I*, and this Court’s decisions. Each of the assessments looks to the educational standards current at the time it was made and addresses whether the school system has sufficient funds to allow students to meet them. MSBE faults Plaintiffs for citing Thornton Commission findings of an adequacy gap because the

Thornton Commission “explicitly acknowledged that its own measure of adequacy was not derived from Maryland law on Constitutional adequacy.” Def. MSJ Opp. at 10. This argument ignores MSBE’s admission (*see infra* Section II) that full Thornton funding is required to meet constitutional standards. Moreover, the Court’s definition of constitutional adequacy is based on contemporary educational standards, and those standards are developed in part by panels such as the Thornton Commission. State legislation created that Commission and charged it “with reviewing current education financing formulas and accountability measures and making recommendations [] for ensuring *adequacy of funding* for students in public schools.” Ex. 5, Thornton Report at 1 (emphasis added). Accordingly, the Commission looked to then-existing state standards for performance in public schools to determine whether the funding was adequate to meet state educational standards as they existed in 2002. *See id.* The Commission decided to assess adequacy based on school performance under the Maryland School Performance Index (“MSPI”), the contemporary state assessment standard for school performance. *See id.* at 6.

MSPI is no longer in use, but it is undisputed that BCPSS students did not receive an adequate education as measured by MSPI and are not receiving an adequate education under current standards. MSPI was replaced by “Adequate Yearly Progress” in 2006, and then by the Report Card in 2014. The record is clear that these measures reveal inadequate performance by BCPSS, and that the State has provided inadequate funds to BCPSS. *See also* Pls. MSJ Br. at 16-22 (citing other indicators of inadequate performance, including National Assessment of Educational Progress results); *see infra* Section II (detailing funding adequacy gaps). Moreover, the work of the Kirwan Commission and the Blueprint Act again elevated contemporary educational standards. *See* Pls.’ MSJ Br. at 11; Md. HB1372; Ex. 11, Kirwan Report at 8-9 (“whole new approach” to establish “internationally benchmarked curriculum” that enables most students to achieve college and career

readiness by end of 10th grade). Thus, under *Hornbeck*, 295 Md. at 639, Plaintiffs have established a constitutional violation.

II. THE REQUIREMENTS FOR CONSTITUTIONALLY ADEQUATE FUNDING ARE CLEARLY DEFINED, AND THE STATE HAS NOT MET THOSE REQUIREMENTS.

MSBE should not be permitted to evade its own definition of funding that meets the constitutional standard. In the 2004 proceedings before this Court, State Superintendent Dr. Nancy Grasmick confirmed that: “full funding under S.B. 856 [the “Bridge Act”] is necessary to permit students to achieve the ‘thorough and efficient’ education required under Article VIII of Maryland’s Constitution.” Ex. 4, 2004 Mem. Op. at 15, ¶151 (*citing* a resolution from the State Board contained in Bradford Exhibit 70, at Ex. IV). Indeed, Dr. Grasmick testified that “adequate funding was an essential part of any remedy for the BCPSS.” *Id.* at 18, ¶167 (*citing* (Tr. 1574:21-1586:4)). These judicial admissions by MSBE’s Superintendent negate its claims that there is no basis on which to judge adequacy of funding.

MSBE devotes much of its opposition to the argument that Plaintiffs offer six different measures of adequate funding, Def. MSJ Opp. at 13 *et seq.*, but it never mentions its Superintendent’s definition of constitutionally adequate funding: “full funding under the Bridge Act.” The State never provided the full measure of Bridge Act funding to BCPSS in any year.

In 2004, this Court, adopting MSBE’s definition, held that full funding under the Bridge Act was the minimum needed to achieve adequacy. Ex. 4, 2004 Mem. Op. at 14-24, 57-58, 64-65. The Court noted that the Bridge Act itself recognized an “adequacy gap,” defined as the “difference between current funding and the funds necessary to provide an adequate education” of \$3,380 per pupil in the funding of BCPSS, *id.* at 12-13, 40, 43, and held that the State was not meeting its financial obligations to BCPSS and had not complied with the Court’s June 2000 Order.

Accordingly, the Court determined it would retain jurisdiction until the State reached compliance with its constitutional obligations and the orders of the Court. *See id.* at 68.

The Bridge Act provided for annual adjustments to its funding formula based on changes in “enrollment, local wealth, and other factors,” and for annual increases in payments for inflation. Ex. 7, DLS, *Education in Maryland*, Legislative Handbook Series, Vol. IX (2014) at 63, 72. DLS, which calculated the adequacy gap as the difference between current funding and the amount necessary to provide an adequate education under the Bridge Act’s then-current formula, found an adequacy gap for BCPSS in 2002 (before the commencement of Bridge Act funding) of \$270.4 million. Ex. 83, DLS, *Adequacy of Education Funding in Maryland*, Jul. 24, 2019, at 3. This gap was substantially identical to the approximately \$270 million per year in additional operational and programmatic funding that the Metis Report and this Court found was needed for adequacy before the Bridge Act was passed. Ex. 3, 2000 Mem. Op. at 14, 15.⁵

Full annual funding under the Bridge Act, however, was projected to be provided to BCPSS for the first time only in FY2008. Ex. 4, 2004 Mem. Op. at 13-16, ¶¶ 44, 57. In 2004, this Court held that, as of the end of FY2004, the State had still “not complied with its constitutional obligations to the children of Baltimore City,” and for FY2001, FY2002, FY2003 and FY2004, had “unlawfully underfunded BCPSS by \$439.35 million [based on the low-end estimate of \$2,000 per pupil] to \$834.68 million” [based on the estimate of \$2,600 per pupil] in contravention of a final order of this court. *Id.* at 64-65. Although this Court declared that it “would not tolerate any delays” in full funding for BCPSS under the Bridge Act beyond FY2008, *id.* at 68, BCPSS’s funding for FY2005, according to DLS’s 2009 calculations, was at 81.8% of adequacy; 85.3% adequacy in

⁵ Metis, was not, as MSBE would now have it, “a third-party consulting group,” but was, in fact, the independent consultant jointly retained by MSBE and BCPSS pursuant to the Court’s Consent Decree. Ex. 2, Consent Decree at 12-13, ¶¶ 40-42.

FY2006; 91.3%, in FY2007; and 97.2% for FY2008, meaning the State never hit the target. Ex. 84, DLS, *Bridge to Excellence Review, Presentation to the Budget and Taxation Committee*, (Jan. 28, 2009) at 20.

MSBE asserts, without citing any source, that from 2010 to 2020, there was “a steady increase in funding to BCPSS.” Def. MSJ Opp. at 6. In fact, DLS reported that State funding for BCPSS was nearly flat from FY2008 through FY2019, increasing an average of three-tenths of one percent (0.3%) per year. Ex. 86, DLS, *Overview of Education Funding in Maryland*, June 20, 2019, at 25. When inflation is factored in, funding declined year after year: the average annual rate of inflation from 2008 through 2019 was 1.57%,⁶ more than five times the percentage of the State’s average annual funding increase for BCPSS. By 2015, the “adequacy gap” for BCPSS was even larger than it had been before the Bridge to Excellence Act was enacted, and it continued to widen in thereafter. As calculated by DLS pursuant to the Bridge Act, the adequacy gap for BCPSS grew from \$631 per pupil in FY2009 to \$1,952 per pupil in FY2013 to \$3,611 per pupil in FY2015 to \$4,384 per pupil for FY2017.⁷

MSBE makes no serious effort to refute Plaintiffs’ factual showing that, by any measure, the State underfunded BCPSS in every year since 2000. It argues, instead, that the differing totals found by those who have calculated the shortfalls means the funding gap is a disputed issue of fact. This argument elides a major issue: not one of the organizations that studied the adequacy gap supports MSBE’s claim here that BCPSS had funding surpluses.

MSBE pretends the massive gap in funding for BCPSS determined by the State’s own DLS

⁶CPI Inflation Calculator, available at <https://www.in2013dollars.com/us/inflation/2008?endYear=2019&amount=100>.

⁷ For FY2009, *see* Ex. 85, Legislative Handbook Series (2010), Vol. IX-Education at 47. For FY2013, *see* Ex. 7, DLS, *Education in Maryland*, Legislative Handbook Series, Vol. IX (2014) at 64. For FY2015, *see* Ex. 9, DLS Presentation (2016) at 7. For FY2017, *see* Ex. 8, DLS Follow-up (2019) at 2.

has vanished by proffering two authorless tables that purport to show that BCPSS's total funding from all sources has exceeded the targets mandated by the Court's 2000 Order for every year since 2007. Def. MSJ Br. at 35 & Ex. N. These are the same two tables that the Court considered when it rejected MSBE's 2021 claim of compliance with the 2000 and 2004 Orders. Def. Mot. to Dismiss 2021 (Dkt. 183/0) at 34-35. MSBE presents them now, as it did then, without sworn testimony identifying any sources in the record for the numbers on which they are ostensibly based, nor concerning the calculations that produced the results shown. *See* Mot. Strike (Dkt. 259/0). The exhibit, moreover, purports to show "BCPSS's total per pupil funding per fiscal year," but the issue before the Court, as clearly established by the Consent Decree and subsequent Orders, is *additional* funding for BCPSS that the State must provide. *See* Pls' MSJ Opp. at 34-35. MSBE's Ex. N does nothing to contradict the 9-figure adequacy gaps calculated by the State's DLS for many of the years listed in the exhibit.

MSBE also attempts to bolster its claim that the adequacy gaps disappeared by misreading BCPSS's Comprehensive Annual Financial Reports to assert that BCPSS had "surplus budgets almost every year from 2010-2020, taking in an average of \$73 million more dollars per year than it planned to spend." Def. MSJ Opp. at 3. But the financial statements contained in BCPSS's reports explicitly identify the amounts that MSBE cites not as "surpluses," but as "net changes in position" that are principally accounted-for by capital outlays for building improvements that exceeded the costs of facility depreciation; or by repayments of BCPSS's bond principal and Master Leases bond principal and capital leases. Affidavit of Alison Perkins-Cohen dated October 3, 2022 (Dkt. 249/2) ("Perkins-Cohen 10/3 Aff.") ¶¶ 52-53. The other significant component of BCPSS's annual "net changes in position" is the total net change in the fund balance for government funds, *i.e.*, funds restricted by law or grant to specific uses, or that were specifically assigned to capital improvements

and other projects that were still in process at the end of the FY and therefore were carried over to the following or subsequent FYs. *Id.* ¶ 54. Neither of these components represent surplus monies that were available to be spent. Finally, consistent with Board of School Commissioners' policy set in accordance with governmental accounting standards, BCPSS strives to maintain a limited unassigned fund balance of 3-5% of its budgeted general fund expenditures for the upcoming FY. This unassigned fund balance was \$48.3 million on June 30, 2021, approximately 4% of BCPSS's FY2022 general fund adopted budget expenditures. These unassigned funds are not a surplus; holding them is a fiscally prudent approach to planning for emergencies. *Id.* ¶¶ 56-57.

III. DLS CONSISTENTLY FOUND ADEQUACY GAPS IN EDUCATION FUNDING.

MSBE challenges the definition of adequacy applied by the State's own agency, the Department of Legislative Services: funding "sufficient to acquire the total resources needed to reasonably expect that all students can meet academic performance standards." *See* Def. MSJ Opp. at 9-11. MSBE argues that DLS's adequacy findings are based on an "exacting standard" that cannot bind MSBE—an executive agency.⁸ *Id.* at 11. MSBE, however, admitted that full Thornton funding was required for a thorough and efficient education (*see supra* Section II), and DLS calculated the amounts by which Thornton funding fell short after the State eliminated or limited planned inflationary increases.

DLS is the state agency tasked with "conducting research and drafting legislation for

⁸ The Court should disregard MSBE's argument that DLS' definition of adequacy is an "exacting standard" that no Maryland jurisdiction can pass by citing test scores in wealthier counties. Def. MSJ Opp. at 11-12. In 2019, Howard County achieved "55.8% proficiency in Algebra I and 65.7% proficiency in ELA 10." *Id.* But BCPSS does not come anywhere close to Howard County. In the same year, BCPSS achieved only 9.1% proficiency in Algebra I and 16% proficiency in ELA 10—an underperformance of nearly 50% in both subjects. *See* <https://reportcard.msde.maryland.gov/Graphs/#!/Assessments/ElPerformance/1EL/3/6/3/1/30/XXXX/2019>. The MSBE Report Card defines "proficient" to mean that a student "has the expected knowledge, skills, and practices to demonstrate a command of grade-level academic standards." *See Guide to Understanding Your 2019 Maryland School Report Card*, at pp. 8, 14, 20, available at https://reportcard.msde.maryland.gov/HelpGuides/MSDE_ReportCard_UserGuide_2019_v5.pdf.

members of the General Assembly and its appointed commissions.” *Matter of 2022 Legislative Districting of the State*, --- Md. ---, 2022 WL 3914980, at *13 (Md. Aug. 31, 2022). The Kirwan Commission, created “as a bi-partisan effort by Gov. [. . .] Hogan and the General Assembly,” was charged with assessing the adequacy of educational funding and was “primarily staffed by the Department of Legislative Services.” See Accountability and Implementation Board, *Kirwan Commission*, available at <https://aib.maryland.gov/Pages/Kirwan-Commission.aspx>; see also DLS, *Overview of the Maryland Commission on Innovation and Excellence in Education Final Recommendations*, available at <http://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnInnovEduc/OverviewoftheRecommandations.pdf>. MSBE seeks to disclaim DLS’s calculations because DLS and MSBE are different agencies, but MSBE cannot evade DLS’ adequacy analysis when the chief of the Executive Branch and the General Assembly saw fit to charge DLS, as part of the Kirwan Commission, with the task of determining adequacy. Courts routinely hold that publications by a government agency charged with a specific role, result in binding government admissions. See, e.g., *United States v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989) (contents of a highway safety manual were party admissions because they were created by “the government department charged with the development of rules for highway safety”).

It is also inconsistent for MSBE to seek to disclaim DLS’ adequacy standard when MSBE has itself published materials and sponsored testimony from DLS adopting it. See, e.g., MSBE, *Minutes of the State Board of Education* (Jul. 28, 2015), available at <https://marylandpublicschools.org/stateboard/Board%20Meetings/July%202015%20Minutes.pdf> (adequacy study performed “to ensure that funding for K-12 education continues to be adequate for all students to meet State standards”); Ex. 91, Aff. John W. Rohrer ¶ 6. MSBE’s publication is

an adoptive admission. *See Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor, Ltd.*, 262 F. Supp. 2d 251, 259 (S.D.N.Y. 2003).

IV. IT IS BEYOND DISPUTE THAT MORE MONEY FOR SCHOOLS PRODUCES BETTER EDUCATIONAL OUTCOMES.

MSBE concedes that educational quality in BCPSS is not adequate, observing that Plaintiffs argue “compellingly” that BCPSS’s student performance results since 2009, after the State froze or limited the increases for inflation that had previously been required in the Bridge Act’s education funding formula, are “sobering.” Def. MSJ Opp. at 5. MSBE then falls back on the unsupported trope that nothing can be done to improve student achievement in a majority Black and Brown district, claiming, without evidence, that there is doubt about whether “more money will actually make things better.” Def. MSJ Opp. at 6. MSBE thus contradicts its position that the increased funding it contends will be made available to BCPSS through the Blueprint Act over the next decade moots Plaintiffs’ constitutional claims. The State’s legislative initiatives, first through the funding increases promised in the Bridge Act, and now through the promises in the newly-enacted Blueprint formula, are admissions that additional funding is expected to improve educational outcomes.

More fundamentally, the record reflects indisputable evidence that money matters. MSBE’s assertions to the contrary are belied in the first instance by its own agreement in the Consent Decree to provide increased funding, namely an immediate influx of \$230 million and to procedures for BCPSS and Plaintiffs to seek additional funding based on the findings of an independent expert retained by State and BCPSS. Ex. 2, Consent Decree ¶¶ 40-41, 52-54; Ex. 3, 2000 Mem. Op. at 3-5.

This Court, moreover, has already held that money matters. As with so much else that MSBE challenges here, that principle is the law of this case (and MSBE has waived appeal rights,

see supra note 7). In 2000, the Court adopted the Metis assessment to which the State had agreed in the Consent Decree and declared that additional funding was necessary for BCPSS to provide an adequate education to its students. Ex. 3, 2000 Mem. Op. at 14-16. In 2004, the Court reaffirmed its 2000 determination and declared that at least full funding under the Thornton formula was necessary to achieve constitutional adequacy. *See supra* Section II.

In addition, the State's own studies and analyses over the years confirm that additional resources improve educational performance. Through its Thornton and Kirwan Commissions, the State assessed educational needs, examined current funding, and determined the amounts of additional funding necessary to allow students to reach adequacy. Ex. 5 Thornton Report at 5-38, 42-85; Ex. 11 (Kirwan Report) at 6-12, 19-42. In the Thornton Report, in the APA study performed in preparation for the Kirwan Commission, and in the Kirwan Report, the State and its analysts found that substantial additional funds were necessary if students in BCPSS were to receive an adequate education. Ex. 5 Thornton Report at 23-32; Ex. 10 APA study at xxvii; Ex. 11 at 21. Indeed when it enacted the Bridge Act, the State provided a regression analysis showing that "funding and student performance are related." Ex. 92, DLS, Bridge to Excellence in Public Schools Act Fiscal Note SB 856 (2002) available at https://mgaleg.maryland.gov/2002rs/fnotes/bil_0006/sb0856.pdf.

Critically, state analysis confirms that performance improves when funding more closely approaches adequacy. In 2009, DLS reported the findings of an independent expert hired pursuant to the Bridge to Excellence act to assess its efficacy: each \$1,000 increase in per student spending was associated with proficiency gap closures of 4 percentage points in elementary reading and math and 8 percentage points in middle school reading and math, and the relationship between funding and proficiency gap closure was strongest for students eligible for free and reduced price meals and

minority students in elementary schools, and for minority students in middle schools. Ex. 84, DLS, Bridge to Excellence Review, Presentation to the Budget and Taxation Committee, (Jan. 28, 2009) at 6. As the funding of BCPSS's annual adequacy targets increased by 22.3% between 2003 and 2008, composite scores on proficiency tests rose by 27.9%, with only one district in the State showing a higher rate of increase. *Id.* at 20-21. *Accord* Ex. 93 (MGT summary of final report). Indeed, as MSDE conceded, "[t]he additional funding [from Bridge to Excellence], combined with the requirement that school systems assess their programs, has sparked continuous classroom improvement." Ex. 94, MSDE 2008 State of Education Report, at 15. A 2015 MSBE report shows that achievement went up as Bridge Act funding phased in, but plateaued when funding flattened out. Ex. 95, MSDE 2015 Master Plan Report at 9-10.

Analysis by Plaintiffs' experts further demonstrates that money matters. Plaintiffs' expert Bruce Baker opined that "a substantial and growing body of rigorous empirical research validates that substantive and sustained school finance reforms lead to improved short term and long term student outcomes," and assessed the additional funds necessary to improve BCPSS student outcomes to various goals. Ex. 13, Baker Report, at 12 & App. A. Dr. Kirabo Jackson applied statistical analysis to find a positive relationship between increased funding and improved outcomes in 28 of 31 studies he reviewed. *See* Ex. 96, Expert Report of Dr. Kirabo Jackson at 1-4. Focusing on Baltimore specifically, Dr. Jackson's analysis demonstrated that increases in funding could be expected to yield better test scores and higher graduation rates. *Id.* at 3-4 (finding, for instance, that a \$4,400 increase in per pupil spending would be expected to increase graduation rates by 8.46 percentage points).

Indeed, MSBE's own witnesses agree that additional funding for BCPSS can improve student outcomes. Eric Hanushek testified that "only a fool would say money doesn't matter"; "of

course money matters”; and “a good [funding] formula should provide more money in the prospect of trying to improve the performance of disadvantaged kids.” Ex. 97 (“Hanushek Dep.”) thereto, at 88, 89, 82; Def. MSJ Opp. Ex. Q (“Hanushek Rep.”) at 4. He acknowledged, moreover, that if BCPSS were to receive additional money and spend it well and efficiently, that would improve outcomes. Hanushek Dep. at 29; *cf. id.* at 106-108 (large urban districts with a “combination of achievement deficits and concentrations of minority students” need “very large” salary premiums to attract and retain teachers). A substantial portion of Hanushek’s report is devoted to lauding the increased funding provided by the Kirwan Commission. Hanushek Rep. at 8-10.

Hanushek’s general point is that it is important that additional resources be spent effectively and wisely to ensure gains in student performance. *Id.* at 10. He did not even attempt, however, to assess current spending and offerings in the BCPSS. Hanushek Dep. at 65-68, 99-103. He therefore does not suggest—nor could he—that BCPSS is failing to spend its current funds effectively, nor that it would not spend any additional funds effectively. MSBE’s claim that Hanushek “has testified specifically that more State money is unlikely to improve educational outcomes in BCPSS,” Def. Opp. at 30, is thus false, as he testified no such thing.

Nate Levenson, another witness proffered by MSBE, agrees that districts “with more students living in poverty, having a disability or learning English as a second language will require more money, much more money per pupil than districts with less needy students.” Ex. 24, Levenson Dep. at 95-96 (it costs more to educate students in concentrated poverty and those affected by systemic racism). He concludes that increased funding, well spent will “dramatically rais[e] achievement” for BCPSS students. Def. MSJ Opp., Ex. R (“Levenson Rep.”) at 29. He testified that BCPSS has an effective strategic plan to do this, “one of the best plans, in fact, I’ve ever seen for a school district.” Ex. 98, Levenson Dep. at 75-76.

V. IT IS UNDISPUTED THAT MSBE HAS VIOLATED THE COURT’S ORDERS.

MSBE primarily cites its Ex. N in support of its claim to have complied with the Court’s prior orders “[s]ince at least the year 2007.” Def. MSJ Opp. at 3. As set forth in Plaintiffs’ October 4, 2022 Motion to Strike, (Dkt. 259/0) Exhibit N cannot properly be admitted into evidence; as shown in Section II above, even if it were admitted, it would not demonstrate compliance with the Consent Decree and the Court’s subsequent Orders. MSBE’s argument, moreover, that Plaintiffs’ interrogatory response “creates a dispute of material fact” that the State has been violating the Court’s Orders is nonsensical, has already been rejected by this Court, and is addressed in Plaintiffs’ prior briefing. *See* Pls. MSJ Opp. at 24-29. Plaintiffs (and BCPSS) have consistently pointed to the Consent Decree and the Court’s subsequent Orders as the basis for this Court’s jurisdiction, and recited at length the facts showing violations. *Id.*

VI. IT IS UNDISPUTED BCPSS FACILITIES ARE INADEQUATE.

MSBE is incorrect that the constitutional inadequacy of BCPSS facilities is a “new” argument, and that “none of the Court’s prior Orders concerns the adequacy of BCPSS facilities.” Def. MSJ Opp. at 14. The Court’s 2000 Memorandum Opinion formally adopted the findings of the Metis Report in its findings of fact, noting that the Metis Report “confirms the need for substantial additional funding,” including for “school facilities improvement.” Ex. 3, 2000 Mem. Op. at 4, 14, 16 (quoting Metis Report). Indeed, Metis reported that funding for BCPSS facilities funding was “inadequate,” that “[f]acilities need to be renovated” and that current State funding “represent[ed] *only a fraction of the overall need.*” Ex. 99, Metis Report, Executive Summary at 8-9 (emphasis added); II-9; IV-29.

The deficiencies identified by Metis in 2000 continue to plague BCPSS today. Metis cited lack of air conditioning; *see* Ex. 99, Metis Report Summary-16, II-33, IV-27; two decades later the

IAC reports that 75% of the classrooms in Maryland that lack air conditioning are in BCPSS, and students are losing millions of hours of classroom time to heating and cooling failures. *See* Pls. MSJ Br. at 32-34. The Metis Report recommended “more funding for...facilities staff;” *see* Ex. 99, Metis Report Executive Summary at 21, but BCPSS still unable to provide enough custodians to necessary to maintain facilities. *See* Neal Dep. at 26 (discussing lack of custodians available to maintain bathrooms); Pls. MSJ Opp. 5-7. The Metis Report also included school staff descriptions of “buildings in disrepair;” and how teachers had to “repair or repaint[] their own classrooms” at “their own expense[],” and had to seek “external funding for items such as walls for open classrooms and air conditioning systems.” Ex. 99, Metis Report at II-31. This burden is still borne by teachers and parents. *See* Fine-Brown Report at 16, 89, 93, 96 (teachers paying for supplies and equipment); Pls. MSJ Opp. at 7-10 (parents compensating for lack of facility resources).

In 2000, Metis reported that BCPSS “[f]acilities need to be renovated,” Ex. 99, Metis Report at II-9; and yet today, BCPSS schools “cumulatively are more than 1000 years older than average.” Sharfstein, *Johns Hopkins University, School conditions and educational equity in Baltimore City*, Sept. 19, 2022, available at <https://gisanddata.maps.arcgis.com/apps/Cascade/index.html?appid=3ddf7ded140d4dc38bedc27d6c0e44f7>; *See also* Ex. 44, Gorrell Dep. at 86; Ex. 45, Donahue Dep. at 63 (agreeing that BCPSS have on average the oldest facilities in the State).

In the face of this undisputed evidence of inadequate facilities, the State splits hairs about differing definitions of facility adequacy. Def. MSJ. Opp. at 15. Plaintiffs have already explained that although there are slightly varying FCI ranges in the Kopp Commission, Roseman, Jacobs, and EMG studies, there is agreement that “FCIs from 50 to 60 correspond to ‘poor’ condition, and that FCIs greater than 60 corresponds to ‘very poor’ condition.” *See* Pls. MSJ Br. at 23-28. It is undisputed based on BCPSS’s data and the objective data of experts that many BCPSS facilities or

facility components are poor: the most recent SFA by Bureau Veritas found that 33% of BCPSS schools had an FCI of 60 or higher (“very poor”), while another 29% receive an FCI between 50 and 60 (“poor”). *See* Ex. 57, Roseman Report at 25, 37; (the fact that more than 60% of all schools in Baltimore City exceeded an FCI of 50 “is very alarming”). Indeed, Mr. Gorrell confirmed what the rest of the data shows: BCPSS facilities are, on average, the oldest in the state, Ex. 44, Gorrell Dep. at 86, and schools with FCI scores of 60% or more should be renewed or replaced, *id.* at 200.

The Court also should reject the State’s misinformed argument that BCPSS has misused facilities funding. Def. MSJ Opp. at 16. The State describes testimony by Robert Gorrell, former director of the Interagency Commission on School Construction as supporting its argument that BCPSS is not “spending their dollars effectively” because they are reluctant to close schools and instead have wasted funds on “some pretty fancy schools.” *Id.* In fact, MSBE mischaracterizes Mr. Gorrell’s on this point, as Mr. Gorrell testified that BCPSS “made progress in increasing their utilization by closing some facilities,” “did a pretty good job [] by being relatively modest in how they built [a recent renovation project],” and demonstrated “effective spending.” *See* Exs. 44, 100, Gorrell Dep. at 76, 209. As City Schools also explains in its affidavit that, the notion that BCPSS is building “fancy schools” is belied by other newer facilities in Maryland, which exceed IAC’s educational sufficiency standards and are equipped with better athletic facilities, auditoriums, and pools, for example. *See* Supplemental Affidavit of Alison Perkins-Cohen dated Oct. 28, 2022, (“Perkins-Cohen Supp. Aff.”) 34. As far as school closures, BCPSS has overdelivered on its commitments under the statute by “surplus[sing] even more buildings than initially conceptualized under the 21st Century School Buildings Plan” over the past decade. *Id.* ¶ 43. Since 2013, City Schools has approved the closure of 47 schools and the surplus of 29 buildings, and increased its utilization rate (*I.e.*, the percentage of classroom space occupied by enrolled students) from 65%

of available space to 87%. *Id.* ¶ 43, 44.

Finally, the State’s insistence “that the facilities have not gotten in the way of instruction” should be outright rejected. Def. MSJ Opp. at 5. Plaintiffs incorporate by reference their extensive briefing on the harm the decaying BCPSS facilities have on students, faculty, and staff. *See* Pl. MSJ Br. at 1-10, 31-35.⁹

VII. COMAR CERTIFICATIONS DO NOT CHANGE THE UNDISPUTED FACT THAT BCPSS’S STUDENTS ARE RECEIVING A CONSTITUTIONALLY INADEQUATE EDUCATION.

The Code of Maryland Regulations (“COMAR”) requires each school system to submit certifications by its superintendent that it offers instruction in specific subjects that “enables students to meet graduation requirements” and “provide[s] for the diversity of student needs, abilities, and interests.” *See* Def. MSJ Opp. at 16-17. In 2020, BCPSS’s CEO certified that BCPSS met COMAR requirements for eight of nine core subject areas, with the exception of fine arts. *See id.* at 17. MSBE argues that these certifications “contradict[] the Plaintiffs’ argument that Baltimore City public school students are not receiving an adequate education.” *Id.* at 5. The record provides no support for this argument. The certifications required by COMAR are not intended to be, and cannot be construed as, certification of the overall adequacy of the education provided by BCPSS, the adequacy of specific programs or facilities, or the adequacy of State funding. *See* Perkins-Cohen Supp. Aff. ¶ 6.

The COMAR certifications are meant solely to ensure that the curricula and instructional programs offered by Maryland schools are aligned with the State’s content standards for the

⁹ This Court should also dismiss the State’s unconvincing attempt to discredit Jerry Roseman’s report concerning BCPSS facilities because of his visit to Dorothy I. Height Elementary because Dorothy I. Height Elementary is a 21st Century School and has therefore undergone renovations woefully lacking in other BCPSS facilities. *See* Pls. MSJ Br. at 24. Nothing about Mr. Roseman’s assessment of Dorothy I. Height Elementary creates a genuine issue of material fact regarding the widespread inadequacies of the BCPSS facility portfolio as a whole. *See id.* at 22-35.

relevant subjects. *Id.* The certifications, by their own terms, do not address any other components of educational programming or the non-curricular and non-instructional operations that are necessary to ensure an adequate education for public school students. *Id.* Nor do they address programs necessary to meet the needs of students with disabilities, English Learners, homeless students, students living in neighborhoods with high concentrations of poverty, or other students who need the additional supports and interventions that the Kirwan Commission and the Blueprint Act recognized as necessary. *Id.*

In the Blueprint Act, the General Assembly recognized many contributors to educational adequacy beyond the curricula required by COMAR. Curriculum and instructional programs are just one aspect of one pillar of the Blueprint Act, college and career readiness; other critical pillars include early childhood education, high quality and diverse teachers and learners, more resources to ensure that all students are successful, and governance and accountability. *Id.* at ¶ 20. The COMAR certifications cited by MSBE thus reflect only a subset of the services that school systems must provide their students, and many other services are essential if children are to have access to an adequate education. To the extent these services are not fully funded by the categorical funding provided in the Blueprint Act, BCPSS must use other funding streams for these purposes. *Id.* at ¶ 21-22.

MSBE acknowledges, moreover, that BCPSS expressly advised that it could not certify compliance with COMAR requirements for educational programming in fine arts. Decades of under-investment have caused BCPSS to operate from a significant deficit in fine arts program areas, as compared to other school systems in Maryland. BCPSS is currently utilizing the statutory authority provided in the Blueprint Act to deploy Concentrations of Poverty Grant funding to meet basic State requirements for arts programming before applying these funds for much needed

supplemental wrap-around support services contemplated by the Kirwan Commission. Perkins-Cohen Supp. Aff. ¶ 23-24 citing Md Ann. Code § 5-223(c)(9). BCPSS is also using federal recovery funding, but is still unable to meet the basic COMAR fine arts requirements, and will need additional support after the federal funds have been fully utilized in FY2024. *Id.* at ¶ 23-24.

Finally, the COMAR certifications do not address any of the deficiencies in funding for capital improvements and maintenance of BCPSS's aging facilities. Such funding is a prerequisite for educational adequacy. Perkins-Cohen Supp. Aff. ¶ 26. A complete statement of BCPSS's needs and the insufficiency of the funding provided by the State for capital improvements and maintenance of BCPSS's aging facilities is set forth in the Affirmation of Alison Perkins-Cohen in support of the Private Plaintiffs' Motion for Summary Judgment, dated August 12, 2022 (Dkt. 250/0).

VIII. DEFENDANT'S REMAINING ARGUMENTS SHOULD BE REJECTED.

In the interest of judicial economy, Plaintiffs incorporate by reference here their filed memorandum of law in opposition to Defendant's motion for summary judgment, which addresses many of the same arguments Defendant raise here. Pls. MSJ Opp., Dkt. 249/2

First, this Court has already considered and rejected MSBE's position on standing when it denied Defendant's motion to strike the Notice of Substitution that added the current representative Plaintiffs. Pls. MSJ. Opp. at 22-29, Dkt. 162/2. This Court has already decided the issues presented and has no need to address them again, and its prior holdings are the law of the case. *Id.* at 23.

Plaintiffs, of course, have standing. MSBE seeks to manufacture a factual dispute by claiming, based on a partial and materially misleading read of their testimony, that Plaintiffs' children are receiving adequate educations. Def. MSJ Opp. at 17-18, 28-29. Not one Plaintiff testified that she believed her child or children are not, facing the risk of educational failure. *See*

Pls. MSJ Opp. at 3-9. As detailed in Plaintiffs' opening brief, Plaintiffs' children's school district is inadequately funded by the State, and there is undisputed evidence of the adverse consequences of the State's failure to provide constitutionally adequate funding. *Id.* at 25-29.

Second, Contrary to Defendant's repeated assertions otherwise, relief is available under the Maryland Uniform Declaratory Judgment Act because Defendant has not complied with the Consent Decree and the Court's subsequent orders thereunder. *Id.* at 29-35.

Third, once again Defendant raises its "political question" argument—an argument it has repeatedly raised before without success since the inception of this case. *Id.* at 41-49. The determination that this case presents justiciable issues not barred by the political question doctrine is plainly law of the case. *Id.* at 43-44. It is also plainly correct: this Court has the judicial authority to order state agencies like Defendant violating constitutional rights to provide funding needed to comply with the state Constitution. *Id.* at 44-49.

Fourth, just as Defendant argued in its motion for summary judgment, it again argues that funding under (1) the Blueprint Act, (2) the Built to Learn Act, as well as (3) funding received from the federal government satisfies the constitutional requirements for an adequate education. Def. MSJ Opp. at 1, 7, 30. However, as Plaintiffs previously explained, none of these sources of funding are adequate. Pls. MSJ Opp. at 10-15. The Blueprint Act does not guarantee future funding for Maryland schools; even if it did, it does not begin to address the State's decades long failure to fund the BCPSS under the Bridge Act formula; and is not scheduled to be fully funded until FY2034. *Id.* at 10. Additionally, the Built to Learn Act, even in conjunction with the 21st Century School Buildings Program, does not address the constitutionally inadequate state of BCPSS's facilities, as 89 additional buildings require a complete overhaul to meet minimally acceptable standards. *Id.* at 14-15. Finally, under the Consent Decree and this Court's subsequent orders,

federal funding does not address the State's obligation to BCPSS. BCPSS's federal grant funds, which are a one-time payments, have already been allocated, including to use for COVID-19 health and safety protocols and remote learning technology including wireless connectivity (because many BCPSS students lack reliable home access to the Internet). *Id.* at 15-16.

Finally, the State argues that Plaintiffs have not met their summary judgment burden in part because they request a range for the funds needed immediately. The Court should reject this argument in light of its recognition that “additional funding is required to enable [BCPSS] to provide an adequate education measured by contemporary educational standards,” even if “[t]he amount of additional funding required cannot be determined with absolute precision.” Ex. 3, 2000 Mem. Op. at 26. The school children of Baltimore City children should not have to do without any of the additional funding that the constitution requires until the State has implemented the comprehensive compliance plan under judicial supervision that Plaintiffs seek. Accordingly, Plaintiffs ask this Court to direct the State to make a down payment on its constitutional obligations by paying certain undisputed amounts in the current fiscal year, and in each FY thereafter until the compliance plan is in place, for instructional programs and to maintain and improve facilities.

For facilities, it is undisputed that the IAC advises school districts to spend 4% of the current replacement value of their facilities each year on maintenance and operations and on capital improvements. Based on the most recent assessment, the replacement value of BCPSS's facilities is \$7.2 billion: 4% of that amount is \$288 million. For programs and operations, Plaintiffs ask the Court to choose among uncontested calculations of the minimum shortfall. The Court could order the State to pay an amount within the range of \$2,000 to \$2,600 per pupil per year that it ordered in 2000, it could adjust that amount for inflation, or it could update the amount based on the 2017 adequacy gap analysis by DLS. Ultimately, this immediate influx is intended to be interim relief

while the State develops the requested relief of a comprehensive plan to comply with its constitutional obligations.

CONCLUSION

For the foregoing reasons, the Private Plaintiffs respectfully request this Court grant Plaintiffs Motion for Summary Judgment and for Further Orders Pursuant to the Declaratory Judgments Act in the terms set forth in their Proposed Order attached to their opening brief.

Dated: October 28, 2022



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CERTIFICATE OF SERVICE

I, Jeffrey E. Liskov, certify that I have this day caused to be served a copy of this PRIVATE PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND FOR FURTHER ORDERS PURSUANT TO THE DECLARATORY JUDGMENTS ACT on the following counsel and parties by electronic mail and by U.S. mail with postage prepaid on October 28, 2022:

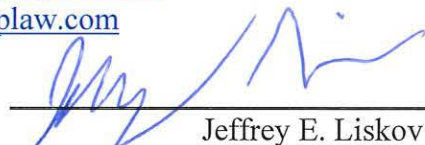
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